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After BE & K: The Difficult Constitutional Question of Defining the First Amendment Right to Petition Courts

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ARTICLE

AFTER *BE & K*: THE "DIFFICULT CONSTITUTIONAL QUESTION" OF DEFINING THE FIRST AMENDMENT RIGHT TO PETITION COURTS

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The First Amendment to the federal Constitution guarantees persons the right to petition the government for redress of grievances.[1] Although the Petition Clause was virtually ignored for decades, it has garnered considerably more attention in the past several years. Most legal observers now agree that the First Amendment guarantees some form of access to court and that the right does not extend to baseless suits. An emerging issue is the standard for defining the civil suits that are within First Amendment protection: Does the Petition Clause protect only winning claims, or does it also protect losing but objectively reasonable suits? The U.S. Supreme Court has fueled debate on this issue by seemingly endorsing both standards of merit. In June 2002, in *BE & K Construction Co. v. NLRB*,[2] the Court again considered the question of the proper merit standard under the First Amendment, but, ultimately, it avoided what it called a "difficult constitutional question" by deciding the case on statutory grounds.[3] In this Article, I examine the debate concerning meritorious suits and the impact of *BE & K*, and, more importantly, I propose a solution to this difficult constitutional question.

In Part I of this Article, I give the background of the issue. I start with an overview of the modern recognition of the right of court access under the Petition Clause. I then review the debate concerning the proper test for determining whether a civil suit falls within the protection of the First Amendment. I examine in detail the Court's two prior decisions—*Bill Johnson's Restaurants, Inc. v. NLRB*[4] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[5]—in which it set seemingly conflicting standards. *Bill Johnson's* suggested a win-lose test, while *Professional Real Estate Investors* set an objective merit standard.[6] I conclude this review by reporting how lower courts have responded. For the most part, courts have followed the more protective *Professional Real Estate Investors*

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1. The Petition Clause is the last protection of the First Amendment:
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances.*

U.S. CONST. amend. I (emphasis added).

2. 122 S. Ct. 2390 (2002).
3. *Id.* at 2399, 2401–02.
4. 461 U.S. 731 (1983).
5. 508 U.S. 49 (1993).
6. Refer to Part I.B *infra*.

objective standard, but some have chosen to apply the narrower *Bill Johnson's* win-lose test.

In Part II, I examine the *BE & K* case and its implications for solving this conflict. I give the background of the case and then explore in detail the Court's opinions in *BE & K*—the majority opinion of Justice O'Connor and the two concurring opinions of Justice Scalia and Justice Breyer. The exact impact of the case is somewhat difficult to decipher. Although the Court explored the question of what suits are within the protection of the First Amendment, the Court reserved decision on this issue and instead decided the case by narrowly construing the National Labor Relations Act. The constitutional standard is thus open to debate, although the Court did give some suggestions as to how in the future it might approach the question of merit under the Petition Clause.

In Part III, I offer my solution. I argue that the Court should adopt a narrow standard for defining the suits that fall within the core right of the Petition Clause—whether a case wins or loses in court—but that the Court should protect this narrow right by applying "breathing room" analysis and extending constitutional protection to many losing but meritorious suits. I have advocated this breathing room framework before, in a prior series of articles examining the right to petition courts.[7] The Court in *BE & K* cited the first of these articles in discussing whether the First Amendment protected losing but meritorious lawsuits.[8] Here, I refine my

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7. In my first article, I generally examined the right to petition courts, including whether such a right could properly be founded on the First Amendment. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) [hereinafter Andrews, *Access to Court*]. I concluded that the First Amendment includes a right of court access but that the core right is limited in many respects. Among other things, I argued that the core right to petition courts applies only to winning claims, but that the ability to file lawsuits is further protected by breathing room analysis, similar to that which the Court applies to defamatory speech in the *New York Times* line of cases. In two additional articles, I applied my proposed analytical framework to a variety of statutes and court rules that purport to limit access to court based on the motive of the plaintiff. *See* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000) [hereinafter Andrews, *Motive Restrictions*] (assessing a wide array of laws ranging from court rules to civil rights statutes); Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13 (2000) [hereinafter Andrews, *Rules of Professional Conduct*] (focusing on motive restrictions in the rules of professional conduct for lawyers). In the fourth article, I focused my analysis on Federal Rule of Civil Procedure 11(b)(1) and its potential interaction with the Petition Clause in Paula Jones's case against former President Clinton. *See* Carol Rice Andrews, Jones v. Clinton*: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1 [hereinafter Andrews, *Politically Motivated Suits*].

8. BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2400 (2002) (quoting Andrews,

proposal and examine it in light of the *BE & K* decision. I conclude that my proposed framework is consistent with the Court's discussion in *BE & K*, including the separate concurring opinions. More importantly, a narrow definition of the right of court access, accompanied by breathing room analysis, is the best way to achieve a proper balance between protecting a plaintiff's First Amendment freedom of court access and preventing substantive abuses of our court system.

I. THE "MERIT" DEBATE UNDER THE FIRST AMENDMENT RIGHT TO PETITION COURTS

Most people are unfamiliar with the last clause of the First Amendment, which protects a citizen's right to petition the government for redress of grievances. Yet the right is essential to "[t]he very idea of a government, republican in form."[9] Like most other First Amendment freedoms, the right to petition is not absolute. In the context of petitions to the legislative or executive branches of government, the Supreme Court has held that the right does not include a duty of response by those branches[10] and does not include the right to file sham[11] or maliciously false petitions.[12] The right to petition the judicial branch also is limited, but the contours of that limitation are ill-defined. As courts and commentators increasingly recognize a right to petition courts, they also must struggle to define the extent of that right. One issue is whether the Petition Clause protects a person's right to file something other than a winning suit. Although many courts, following the Supreme Court's decision in *Professional Real Estate Investors*, hold that the Petition Clause right of court access includes losing but colorable claims, others follow the Court's earlier decision in *Bill Johnson's* and hold that the core right extends only to civil actions that ultimately prevail.

Access to Court, *supra* note 7, at 656).

9. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

10. Minn. State Bd. of Cmty. Colls. v. Knight, 465 U.S. 271, 282, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggest that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues.").

11. *E.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). Refer to notes 38–44, 61–62 *infra* and accompanying text (discussing the *Noerr* sham doctrine).

12. *See* McDonald v. Smith, 472 U.S. 479, 484 (1985). Refer to notes 54–56, 60 *infra* and accompanying text (discussing *McDonald*).

A. Recognition of the First Amendment Right to Petition Courts

Despite the general lack of familiarity with the right to petition, petitions to the government are a fixture in Anglo-American law.[13] In 1215, the right to petition was one of the concessions that King John extended to the English barons in the Magna Carta.[14] Petitioning became a common means by which English subjects communicated with the King and early Parliament.[15] The English Bill of Rights, in 1689, included the "right of . . . subjects to petition the king" and mandated "that, for redress of all grievances . . . parliaments ought to be held frequently."[16] Colonists continued the practice in America. Americans preserved the right to petition both in their colonial charters[17] and in their early state constitutions.[18]

The common conception of a petition today is one to the executive or legislative branch, and many historical statements of the petition right spoke only of such petitions.[19] Nevertheless, citizen petitions historically included requests for private relief,

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13. For a more detailed discussion of the history of the right to petition and its application to private judicial petitions, see Andrews, *Access to Court*, *supra* note 7, at 595–625.

14. MAGNA CARTA, ch. 61 (1215), *translated and reprinted in* J.C. HOLT, MAGNA CARTA 333–35 (1965) ("[I]f we or . . . any of our servants offend against anyone in any way . . . four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we will have it redressed without delay.").

15. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 23–24 (1993) (reporting that the process of petitioning "ultimately led to the development of Parliament," that the practice "also included quasi-judicial functions," and that "[d]ue to the intermingling of the executive, legislative, and judicial functions of government, petitioning possessed a very broad meaning for the British citizenry").

16. BILL OF RIGHTS (1689), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971).

17. *See, e.g.*, MASSACHUSETTS BODY OF LIBERTIES, ch. 12 (1641), *reprinted in* 1 SCHWARTZ, *supra* note 16, at 73 ("Every man . . . shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing . . . to present any necessary motion, complaint, petition, Bill or information . . . ."). In addition to petitions to the colonial governments, English colonists petitioned the government in England. *See* Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 10–45 (1971) (unpublished Ph.D. dissertation in Government, Texas Tech University) (on file with the Ohio State Law Journal) (describing charters and their relationship to the right to petition).

18. *See, e.g.*, MARYLAND DECLARATION OF RIGHTS art. XI (1776) [hereinafter MARYLAND DECLARATION], *reprinted in* 1 SCHWARTZ, *supra* note 16, at 281 (proclaiming that "every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner"). For a complete listing and reproduction of the early state constitutional statements of the right to petition, see Andrews, *Access to Court*, *supra* note 7, at 604 n.159.

19. *See* MARYLAND DECLARATION, *supra* note 18, art. XI, *reprinted in* 1 SCHWARTZ, *supra* note 16, at 281.

regardless of the body to which the petition was directed.[20] In colonial America especially, where colonists distrusted the courts under the control of the royal governors, complainants often chose to direct their private petitions to the colonial legislatures.[21] Today, such private petitions to the legislature may seem odd, because the separation of powers between the branches of government is more clearly defined. Indeed, the federal Constitution gives the judiciary the exclusive power to decide private disputes.[22] Yet the First Amendment, unlike some state constitutions, does not limit the petition right to a single branch of government. It gives the people the right to petition "*the Government*."[23] Thus, the historical concept of petitioning for private relief is retained in the First Amendment, which protects the right to petition all three branches of government.

The policies underlying the Petition Clause extend to the courts. Petitions are a form of speech, but speech is elsewhere protected in the First Amendment.[24] The petition right is a separate right.[25] By protecting the right to petition, the First

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20. The English Parliament regularly acted as a court in deciding private disputes. *See* JAMES S. HART, JUSTICE UPON PETITION: THE HOUSE OF LORDS AND THE REFORMATION OF JUSTICE 1621–1675, at 2–3 (1991) (describing the judicial practices of the House of Lords in the seventeenth century); *see also* Spanbauer, *supra* note 15, at 16–22 (discussing the nature of petitions).

21. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 154–55 (1969) (describing colonial legislative practice and noting that "[t]hey continually tried cases"). In *The Federalist* papers, James Madison stated that the Virginia legislature "*in many* instances, *decided rights* which should have been left to *judiciary controversy*" and that the intrusion was "*becoming habitual and familiar*." THE FEDERALIST NO. 48, at 279 (James Madison) (Clinton Rossiter ed., 1961) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (1787)).

22. Article III states: "The *judicial Power* of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added). Congress, on the other hand, received under Article I only "*legislative Powers*." *Id.* art. I, § 1 (emphasis added).

23. U.S. CONST. amend. 1 (emphasis added). James Madison's first draft of the Petition Clause mentioned only petitions to the federal legislature. *See* 2 SCHWARTZ, *supra* note 16, at 1026 (reprinting Madison's proposal). The House Select Committee, of which Madison was a member, soon revised Madison's proposal and stated a right to petition the entire "government." House of Representatives Journal (Aug. 1789), *reprinted in* 2 SCHWARTZ, *supra* note 16, at 1122.

24. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

25. Few authorities fully develop the distinction between the rights of speech and petition. *See* 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 16.3, at 16-4 to 16-6 (2002) [hereinafter SMOLLA, FREEDOM OF SPEECH] (discussing the role of the corollary rights of assembly, press, and petition as they relate to speech cases). In recent years, however, courts and scholars have examined the petition right in more detail. *See* San Filippo v. Bongiovanni, 30 F.3d 424, 434–43 (3d Cir. 1994) (exploring in depth the distinction between the petition and speech rights); *see also* Andrews, *Access to Court*, *supra* note 7, at 558–61, 560 nn.9–12, 581 (recounting commentary and cases that discuss the Petition Clause).

Amendment guarantees that citizens will have an opportunity to inform government officials of their views and to peaceably seek change, both public and personal. Petitions to the courts serve these purposes as well as petitions to the other branches of the government. However, petitions to courts usually are the best way to seek private redress, and they sometimes are the best means by which to seek more general change in government. Indeed, in the landmark civil rights decision of *NAACP v. Button*,[26] the Supreme Court recognized that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[27]

Even though this seems to be a sensible view of the Petition Clause, courts only recently have begun to recognize that the petition right extends to the judicial branch. The early battles to gain formal recognition of a right of court access initially centered on due process, not on the First Amendment. This is not surprising given that the guarantee of due process has long been the primary and nearly exclusive constitutional provision against which civil litigation standards have been tested.[28] But the efforts to gain a due process right of court access largely failed. In a series of cases in the early 1970s, indigent civil litigants asked the Supreme Court to rule that they had a due process right of court access and to hold that filing fees violated that right.[29] The Court refused to recognize such a right in all but the most extraordinary of cases. The Court allowed a due process right

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26. 371 U.S. 415 (1963).

27. *Id.* at 430–31. In *Button*, the NAACP encouraged and assisted black citizens in lawsuits seeking to integrate Virginia schools. *Id.* at 419–22. Virginia argued that the NAACP activity constituted illegal solicitation of legal business. *Id.* at 423–26. The Court held that the First Amendment protected the NAACP litigation efforts. *Id.* at 444–45. The Court also noted the potential implication of the Petition Clause, as noted above, but it relied primarily on the First Amendment right of association:

> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of the members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id. at 431.

28. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–15, 319–20 (1950) (noting that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause" and holding that due process requires reasonable notice in judicial proceedings); Pennoyer v. Neff, 95 U.S. 714, 733–34 (1877) (noting that due process reflects general principles of fairness and that in the context of judicial proceedings it means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

29. *See generally* Andrews, *Access to Court*, *supra* note 7, at 567–71 (discussing the Court's treatment of court access under due process).

only when the underlying litigation concerned a fundamental right, such as marriage, and only when the remedy, such as a divorce decree, could not be obtained outside of court.[30] The Court also held that prisoners have a due process right to gain access to court on issues concerning their confinement or conviction,[31] but it refused to extend a broad due process right of court access to ordinary citizens.

Given the Court's reluctance to grant a due process right of court access in these early 1970s cases, it is somewhat ironic that the Court already had hinted at a First Amendment right of court access. The Court developed this petition right in two entirely different contexts—association and antitrust cases. First, in *Button*, the Court recognized that the NAACP's litigation efforts were a form of group petitioning.[32] In 1964, one year after *Button*, the Court in *Brotherhood of Railroad Trainmen v. Virginia*[33] extended this recognition to private, non-political litigation when it ruled that Virginia could not enjoin a union from assisting its members in settlements and litigation with their employers:[34]

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30. *See* Boddie v. Connecticut, 401 U.S. 371, 375–76, 382–83 (1971) (holding that due process gives indigent divorce claimants free access to court only because courts are the sole means to dissolve a marriage and marriage is of fundamental importance); *see also* Ortwein v. Schwartz, 410 U.S. 656, 658–60 (1973) (per curiam) (denying the due process right of access to an indigent welfare claimant because the interest in welfare payments "has far less constitutional significance" than divorce and because the claimant had access to the administrative hearing process); United States v. Kras, 409 U.S. 434, 443–46 (1973) (denying the due process right of access to an indigent bankruptcy petitioner because an alleged bankrupt's interest "does not rise to the same constitutional level" as the "associational" interest in dissolving a marriage and because "a debtor, . . . in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors").

31. The Court now bases the prisoner's right of court access on due process. *See* Wolff v. McDonnell, 418 U.S. 539, 579–80 (1974) ("The [prisoner's] right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). But the right has an unsettled history, and some members of the Court continue to question its constitutional foundation. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 838–40 (1977) (Rehnquist, J., dissenting) (arguing that the Court's declaration of a "fundamental constitutional right of access to the courts [for prisoners] . . . is found nowhere in the Constitution"). The Court in 1996 limited the prisoner's right of access by clarifying that the right did not require the state to affirmatively assist prisoners in preparing and conducting litigation. Lewis v. Casey, 518 U.S. 343, 354 (1996) (acknowledging and "disclaiming" statements in *Bounds* that suggested "the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court"). *See generally* Andrews, *Access to Court*, *supra* note 7, at 571–76 (discussing a prisoner's right of court access).

32. NAACP v. Button, 371 U.S. 415, 429–31 (1963). Refer to notes 26–27 *supra* and accompanying text.

33. 377 U.S. 1 (1964).

34. *Id.* at 1–5.

> The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped.*[35]

In this and subsequent union litigation cases, the Court relied principally on the right of association,[36] but it nevertheless continued to state that the petition right encompasses all forms of litigation, not just those involving "political" concerns.[37]

At the same time, the Court was independently developing the petition right in a series of antitrust cases. In 1961, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[38] the Court applied the Petition Clause to limit the Sherman Act. In *Noerr*, railroad companies engaged in a lobbying and publicity campaign in which they lobbied the governor, among other things, to veto legislation beneficial to the trucking industry.[39] The truckers responded with an antitrust suit, charging that the railroads' lobbying efforts constituted illegal, anticompetitive activity.[40] The literal language of the Sherman Act, which prohibits combinations made in restraint of trade,[41] would have reached the railroads' lobbying, but the Court refused to read the Sherman Act so broadly.[42] It held that Congress did not intend the Sherman Act to extend to petitioning activity:[43] the

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35. *Id.* at 7 (emphasis added).

36. *See* United Transp. Union v. State Bar, 401 U.S. 576, 585–86 (1971) (holding that the "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 221–22 (1967) (holding that "the freedom of speech, association and petition guaranteed by the First and Fourteenth Amendments gives [the union] . . . the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights").

37. *See United Mine Workers*, 389 U.S. at 223 (noting that "in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, that the principles announced in *Button* were applicable only to litigation for political purposes" (citation omitted)).

38. 365 U.S. 127 (1961).

39. *Id.* at 129–31.

40. *Id.* at 129.

41. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (2000). Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." *Id.* § 2.

42. *Noerr*, 365 U.S. at 136–37 ("[T]he Sherman Act does not prohibit . . . persons from associating . . . 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.").

43. The Court also recognized that the legislative history did not suggest an intent by Congress to regulate political activity. *Id.* Refer to note 91 *infra* (discussing this "essential dissimilarity" rationale for *Noerr* petitioning immunity).

"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."[44] The Court thus created a form of immunity from antitrust liability for petitioning activity. In 1972, the Court in *California Motor Transport v. Trucking Unlimited*[45] extended this immunity to petitions directed at courts and administrative agencies:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly, the right to petition extends to all departments of the Government. *The right of access to the courts is indeed but one aspect of the right of petition.*[46]

The petition right of court access took on more importance in 1983, when the Court applied the right in a labor case. In *Bill Johnson's Restaurants, Inc. v. NLRB*,[47] the National Labor Relations Board (NLRB) enjoined an employer from suing picketing employees for defamation on the ground that the employer's suit constituted a retaliatory and unfair labor practice in violation of the National Labor Relations Act (NLRA).[48] The Supreme Court held that the NLRB had read the NLRA too broadly and that the injunction was improper.[49] The Court relied in part on federalism concerns,[50] but it also noted that the NLRB's action had intruded on the employer's right to petition the state courts for redress of the alleged defamation:

> In *California Motor Transport*, we recognized that the right of access to the courts is an aspect of the First Amendment

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

45. 404 U.S. 508 (1972).

46. *Id.* at 510 (emphasis added).

47. 461 U.S. 731 (1983).

48. *Id.* at 733–35. The NLRA provides that it is an "unfair labor practice for an employer":

> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [§] 157 [of the NLRA, which guarantees employees the right to self-organize, form unions, and engage in other concerted actions of their mutual aid or protection];
>
> . . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . .

29 U.S.C. § 158(a) (2000).

49. *Bill Johnson's*, 461 U.S. at 741–43.

50. The Court noted that the NLRB must respect the state interest in providing a civil remedy to its citizens and also argued against an expansive reading of the NLRA. *Id.* at 742–43. These state interests were "maintenance of domestic peace," the need to provide "a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility,'" and "protecting the health and well-being of its citizens." *Id.* at 741–42.

> right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. We should be sensitive to these First Amendment values in construing the NLRA in the present context. . . . The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.[51]

Bill Johnson's is important in the development of the right to petition courts for several reasons. First, it applied the right outside of the antitrust context, in a labor case. Second, it applied the right in a case brought by an individual, not an association as in the union cases. It also used the right to protect a plaintiff's ability to file private suits asserting common law torts, not merely political litigation. As discussed below, *Bill Johnson's* did not create a groundswell of recognition of the new petition right by lower courts and commentators—it took another ten years and an antitrust case, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[52] to do that—but *Bill Johnson's* is significant in the Court's own development of the right.[53] Moreover, *Bill Johnson's* became center stage in the debate as to whether the petition right extends to any actions other than winning suits. I next summarize that debate as it existed before the Supreme Court issued its decision in *BE & K*.

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51. *Id.* at 741 (quotation marks omitted) (citations omitted); *see also id.* at 742–43 ("Considering the First Amendment right of access to the courts and the State interests . . . we conclude 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 plaintiffs desire to retaliate . . . ."); *id.* at 751–52 (Brennan, J., concurring) (acknowledging that the Petition Clause extends to the courts and that the narrow interpretation of the NLRA has "constitutional resonances").

52. 508 U.S. 49 (1993).

53. Although the case was technically one of statutory interpretation, the Court cites *Bill Johnson's* as authority for application of the petition right to the courts. *See* Christopher v. Harbury, 122 S. Ct. 2179, 2186–87 (2002) (noting that the Court has based the right of court access on different constitutional provisions and citing *Bill Johnson's* and *California Motor Transport* as support for court access under the Petition Clause); McDonald v. Smith, 472 U.S. 479, 484 (1985) (citing *Bill Johnson's* and stating in dicta that the "[f]iling of a complaint is a form of petitioning activity"); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896–98 (1984) (stating in dicta that "[t]he First Amendment right protected in *Bill Johnson's* . . . is plainly a right of access to the courts . . . for redress of alleged wrongs" (quotation marks omitted)).

B. *The Different Standards for Defining Meritorious Lawsuits Within the Petition Right*

The Court has stated repeatedly that the petition right, no matter the branch of government at issue, is not absolute. The leading case is *McDonald v. Smith*.[54] There, the defendant sent a letter to President Reagan allegedly defaming the plaintiff, and the defendant argued that his statements were absolutely immune from liability by virtue of their being stated in a petition.[55] The Court did not agree. It held that the statements in a petition to the executive are subject to defamation damages as with any other form of speech.[56] The limited nature of the petition right also underlies many of the Court's other petition cases. In *Noerr*, for example, the Court held that antitrust petitioning immunity was limited and does not protect lobbying efforts that are merely "sham" petitions.[57]

That the petition right is limited is not the source of much debate.[58] Instead, the debate centers on how to define the limits of the right.[59] In *McDonald*, the standards for testing defamatory petitions were easily at hand. Since the case alleged defamation of a public figure, the Court simply borrowed the *New York Times Co. v. Sullivan* standards applicable to defamatory speech.[60] In

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54. 472 U.S. 479 (1985).

55. *Id.* at 480–81.

56. *Id.* at 485 ("There is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.").

57. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144–45 (1961).

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a *mere sham* to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Id. at 144 (emphasis added).

58. Nevertheless, a few scholars argue that the Court is wrong and that the petition right should be nearly absolute. *See generally* Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154, 1187–88 (1986); Spanbauer, *supra* note 15.

59. In addition to the merit debate discussed in this Article, another area of contention is the Court's holding in *Minnesota State Board of Community Colleges v. Knight* that the government has no duty to respond to citizen petitions. 465 U.S. 271, 283–84 (1984). *See generally* Andrews, *Access to Court*, *supra* note 7, at 634–44 (discussing the academic criticism of *Knight* and the historical bases for interpreting whether the government has a duty to respond). Refer to note 13 *supra*.

60. *McDonald*, 472 U.S. at 485 (holding that the *New York Times* standard for defamation liability properly protected the defendant's speech and petition). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–81 (1964), and its progeny, the Court developed the "breathing room" doctrine to protect speech in the defamation setting. Refer to Part III *infra* (discussing the "breathing room" doctrine).

Noerr, the Court had to create a new test for antitrust. It defined sham lobbying to be that which is not genuinely aimed at obtaining governmental action.[61] This is a subjective test in a sense, but as the Court cautioned, anticompetitive intent itself is irrelevant in determining whether a petition is sham.[62] It is the intent to get a governmental response that is the test for sham lobbying efforts. So long as the lobbyist intends to get a governmental response, his lobbying is protected petitioning, no matter his purpose in seeking the response.

Translating this antitrust sham exception to judicial petitioning proved problematic. The Court's decision in *California Motor Transport*[63] particularly confused the question. At some points, the Court seemed to use a subjective test similar to that in *Noerr* when it discussed whether the petitioner had the intent to use the adjudicatory process to harm its competitor.[64] On the other hand, the Court suggested that a sham petition may be broader in the judicial context because courts tolerate less abusive behavior than the other two branches of government.[65] Finally, the Court suggested an objective test for judicial

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61. *Noerr*, 365 U.S. at 144 (holding that the railroad lobbying at issue was protected from antitrust liability because "the railroads were making a genuine effort to influence legislation and law enforcement practices").

62. Indeed, the *Noerr* Court explained that ill motives regularly accompany a citizen's petitioning efforts:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We . . . hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

Id. at 139–40; *see also* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) ("Joint efforts to influence officials do not violate the antitrust laws even though intended to eliminate competition.").

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

64. *Id.* at 511 (quoting *Noerr* and commenting that "the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings").

65. *Id.* at 512–13 (noting that the railroads' political campaign in *Noerr* "employed deception and misrepresentations" and that "[m]isrepresentation[s], condoned in the political arena, are not immunized when used in the adjudicatory process").

petitions by noting that the underlying litigation at issue in *California Motor Transport* was baseless.[66]

California Motor Transport spawned a debate among courts and legal scholars as to what constituted sham litigation for purposes of applying the antitrust immunity.[67] Among other things, the debate concerned the role of subjective intent relative to the objective merits of the suit. Did bad intent alone—even intent to abuse the process of the courts[68]—expose a plaintiff to antitrust liability, or must his suit also lack substantive merit? In 1993, the Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[69] took up the question "left unresolved" in *California Motor Transport*: "whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant."[70] The Court answered no.

The *Professional Real Estate Investors* Court explained that although it sometimes had used both subjective and objective terminology to describe sham petitions,[71] it always had held that improper purpose alone could not transform otherwise legitimate activity into a sham.[72] The Court then set out a two-part test for sham litigation:

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

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66. *Id.* ("[P]etitioners instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." (second alteration in original) (quotation marks omitted)); *id.* at 513 (suggesting that defendants' actions constituted "a pattern of baseless, repetitive claims").

67. *See* Thomas A. Balmer, *Sham Litigation and the Antitrust Law*, 29 BUFF. L. REV. 39, 47–49 (1980) (discussing the "perplexity" of *California Motor Transport*); William R. Jacobs, *The Quagmire Thickens: A Post-*California Motor *View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281, 301–07 (1973) (noting problems created by *California Motor Transport*).

68. The Court previously suggested that abuse of process was a form of sham petitioning. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379–80 (1991) (stating that sham lobbying "encompasses situations in which persons use the governmental process—as opposed to the *outcome* of that process—as an anticompetitive weapon"); *California Motor Transport*, 404 U.S. at 513 (observing that the line between legitimate resort to litigation and abuse of process is difficult to draw, but that "once it is drawn, the case is established that abuse of those processes produced an illegal result . . . effectively barring respondents from access to the agencies and courts").

69. 508 U.S. 49 (1993).

70. *Id.* at 55, 57 (noting that "[t]he courts of appeals have defined 'sham' in inconsistent and contradictory ways").

71. *Id.* at 57–58.

72. *Id.* at 59.

> 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 anti-competitive weapon."[73]

Even though the claim at issue in *Professional Real Estate Investors* did not survive summary judgment, the Court held that the claim was immune from antitrust liability.[74] Moreover, because the claim had objective merit when filed, the subjective motive of the plaintiff was irrelevant.

The *Professional Real Estate Investors* formulation thus emphasizes the objective content of the underlying suit. Although the Court used "expectation" to define the first prong of the test, it nevertheless sets an objective standard. The relevant expectation is not that of the actual litigant but instead that of a reasonable person. If a suit has this objective merit, the plaintiff cannot be held liable under the antitrust laws, no matter his personal subjective intent.[75] Moreover, the Court's description of the second prong—motives that are irrelevant if the claim has objective merit—includes not only an intent to harm a competitor through the ultimate judgment but also an intent to abuse the process of litigation. Thus, under *Professional Real Estate Investors*, if the suit is objectively reasonable, it is irrelevant that the plaintiff filed suit solely to hurt the competitor through the burden of litigation.

The Court in *Professional Real Estate Investors* cautioned against 20/20 hindsight in testing the objective merit of the claim. The Court explained that the test is objective merit at the outset, not whether the claim ultimately prevailed:

> A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." The court must remember that "[e]ven when the law or the facts

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73. *Id.* at 60–61 (alteration in original) (emphases added) (citations and footnote omitted).

74. *Id.* at 65–66.

75. *Id.* at 57 ("[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent.").

> appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."[76]

The *Christiansburg* case, on which the Court relied, emphasized the distinction between losing but meritorious suits, on the one hand, and winning suits, on the other. *Christiansburg* held that prevailing defendants in Title VII cases are not entitled to attorneys' fees by virtue of their success alone; they may recover attorneys' fees only when the plaintiff's suit was "frivolous, unreasonable, or without foundation."[77] In this context, the Court explained, "meritless" means "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case."[78]

This definition of "meritless"—as something less than a winning case for after-the-fact assessment of attorneys' fees or other damages—is directly contrary to the definition used by the Court in *Bill Johnson's*. The Court in *Bill Johnson's* developed two tests for merit, depending on the stage of litigation at which the merit of the case is assessed. First, as to whether the NLRB could enjoin an ongoing suit filed by an employer against its employees in state court, the Court adopted the test for summary judgment—whether employer's lawsuit presents "a genuine issue of material fact."[79] If the suit presents such issues, the Board may not enjoin the suit:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.[80]

This was the actual holding of the case. In the case before the Court in *Bill Johnson's*, the NLRB had enjoined the employer's suit without testing whether the claim presented genuine issues of fact.[81]

The *Bill Johnson's* Court, however, did not end its discussion with the test for ongoing suits. The Court also instructed the

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76. *Id.* at 60 & n.5 (alteration in original) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421–22 (1978)).

77. *Christiansburg*, 434 U.S. at 421.

78. *Id.*

79. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 744, 745 & n.11 (1983).

80. *Id.* at 745.

81. *Id.* at 733–35.

NLRB as to what it could do once the underlying litigation was completed. The second test, which governed the NLRB's ability to assess damages, after-the-fact, to completed litigation, was quite different:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves *meritorious and he has judgment against the employees*, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice. *If judgment goes against the employer* in the state court, however, or if his suit is withdrawn *or is otherwise shown to be without merit*, 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 . . . unfair labor practice case. The *employer's suit having proved unmeritorious*, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation of the exercise of the employees' . . . rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses.[82]

Thus, unlike in *Professional Real Estate Investors* and *Christiansburg*, the Court in *Bill Johnson's* expressly defined "unmeritorious" as a suit that did not prevail.[83] Under this test, only winning claims are absolutely immune from liability; losing claims, even losing claims that had sufficient merit to withstand summary judgment, are not protected.

The two tests of *Bill Johnson's* do not necessarily contradict each other. As the Court explained, a case that has been prosecuted to its completion is in a different position than an ongoing suit, because once a suit is completed, "the employer has had its day in court" and "the interest of the state in providing a forum for its citizens has been vindicated."[84] Moreover, the different levels of protection are consistent with the Court's other First Amendment jurisprudence. The Court is more protective of speech when it is considering a prior restraint against uttering the speech than when it is considering damages for speech already uttered.[85]

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82. *Id.* at 747 (emphases added).

83. *Id.*

84. *Id.*

85. *See* Alexander v. United States, 509 U.S. 544, 553–54 (1993) (discussing the prior restraint doctrine); 1 SMOLLA, FREEDOM OF SPEECH, *supra* note 25, § 15.9, at 15-10

Of the two *Bill Johnson's* tests, it is the latter test, the one applicable to completed litigation, that is parallel to the *Professional Real Estate Investors* test. In *Professional Real Estate Investors*, the Court was looking at completed litigation and determining whether to assess antitrust damages against the competitor for having filed and lost the underlying suit.[86] Although the two tests both look at completed litigation, they set a different standard. Under *Bill Johnson's*, the NLRB must ask simply whether the employer won or lost its suit, but under *Professional Real Estate Investors*, the court must look deeper and determine whether the claim had objective merit when filed, regardless of whether the plaintiff ultimately prevailed. Indeed, because the claim at issue in *Professional Real Estate Investors* did not survive summary judgment, it would have failed the *Bill Johnson's* win-lose test. Yet the Court protected the claim from antitrust liability, because it was objectively colorable.[87] Thus *Professional Real Estate Investors* provides more protection to litigation than *Bill Johnson's*, and it is this difference that is at the center of the controversy concerning the extent to which the Petition Clause protects civil claims.

One could argue that *Professional Real Estate Investors* superseded or overruled the win-lose test. After all, *Bill Johnson's* itself presented only the question of the NLRB's power to enjoin ongoing litigation, so the test as to completed litigation was dicta. Indeed, in *Professional Real Estate Investors*, the Court cited *Bill Johnson's* but referred only to its test for ongoing suits:

> 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. Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be *enjoined* under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless."[88]

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to 15-11 ("Distinguishing between prior restraints and subsequent punishment."). This is not a perfect analogy, for in the case of an ongoing suit, the plaintiff has filed his suit, and he has not been enjoined from initial access. Nevertheless, the Court's two-tiered test reflects some of the deference afforded by the prior restraint doctrine. I argue elsewhere that this is a form of breathing room protection. Refer to notes 274–78 *infra* and accompanying text.

86. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 54–56 (1993).

87. *Id.* at 65 ("A court could reasonably conclude that [the plaintiff's] infringement action was an objectively plausible effort to enforce rights.").

88. *Id.* at 59 (emphasis added) (citations omitted).

On the other hand, the Court in *Professional Real Estate Investors* could have intended to leave the *Bill Johnson's* win-lose test undisturbed. It never addressed that test with approval or disapproval. The fact that the Court in *Professional Real Estate Investors* set a different and more protective test for completed litigation does not mean that the Court meant to change anything about *Bill Johnson's*. Although both cases discussed the First Amendment right to petition courts, both were in fact exercises in statutory construction. *Bill Johnson's* interpreted the NLRA, and *Professional Real Estate Investors* interpreted the antitrust laws. Statutory differences alone could explain the two tests, for the Petition Clause played only a part in each case.

In *Bill Johnson's*, the Court held that both the Petition Clause and federalism concerns—deferring to the states' interests in providing civil remedies for its citizens[89]—mandated some protection of the employer's access to court. Yet, the Court emphasized that it was reluctant to protect employers from liability under the NLRA for two reasons. First, suits by a powerful employer against individual employees raise a particularly high risk of abuse, and second, Congress intended the NLRA to be a broad remedial statute.[90] The Petition Clause and federalism concerns prompted the Court to give some protection to the employer's suit, but the two countervailing concerns argued for only minimal protection.

In *Professional Real Estate Investors*, the Court had a different set of factors before it. First, unlike the NLRA, the Court had not found a congressional intent to broadly read the antitrust laws. To the contrary, the Court in *Noerr* found "no basis whatever" in the legislative history of the Sherman Act for suggesting an intent to regulate political activity, as opposed to

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89. *Bill Johnson's*, 461 U.S. at 741–42.

90. *Id.* at 740–41. The Court stated:

> Sections 8(a)(1) and (4) of the Act are broad, remedial provisions that guarantee that employees will be able to enjoy their rights . . . by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Id. (citations omitted). Section 8(a)(1) and (4) of the NLRA, contained in 29 U.S.C. § 158(a) (2000), is reproduced at note 48 *supra*.

business activity.[91] Furthermore, the risk of litigation abuse is not as high in the antitrust setting as it is in the labor context, because the typical dispute is between commercial competitors. There may be disparity between competitors, but not as much as between an employer and an hourly worker. Thus, both the need to curb litigation abuse and the congressional intent to do so are more evident under the NLRA than under the antitrust laws.

In addition, the chilling effect of the statute arguably is less under the NLRA than under the antitrust laws. When the NLRB charges that a lawsuit is in violation of the NLRA, it brings an administrative proceeding with limited discovery and remedies.[92] In contrast, a charge that a suit violated the antitrust laws usually is brought in a civil action, with full discovery rights and burdens, and possible treble damages.[93] These differences in the statutory policies and applications, and not the Petition Clause, could explain the different levels of protection in the *Professional Real Estate Investors* and *Bill Johnson's* tests.

Moreover, to hold that *Professional Real Estate Investors* sets the constitutional test would mean that the Court was declaring the *Bill Johnson's* win-lose test to be unconstitutional and no longer applicable in the labor setting. If losing but otherwise objectively meritorious suits are protected by the First Amendment, then, as a matter of constitutional law, the NLRB cannot assess damages against losing suits as the Court suggested in *Bill Johnson's*. Such a broad reading of *Professional Real Estate Investors* would run counter to the Court's doctrine that it does not lightly pass on constitutional questions.[94]

Despite these uncertainties, most courts and legal observers have applied *Professional Real Estate Investors* outside of antitrust, to limit other laws, such as the tort of abuse of process, as if *Professional Real Estate Investors* set the First Amendment

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91. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136–37 (1961). This is called the "essential dissimilarity" rationale of *Noerr* petitioning immunity in that the activity the Sherman Act was meant to regulate is essentially different from political activity. *Id.* (marking the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by [the Sherman Act]"); *see also* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 306–07 (1994) (discussing this basis for *Noerr* immunity).

92. *See* 29 U.S.C. §§ 160–161 (2000) (setting forth the powers and procedures for NLRB proceedings).

93. *See, e.g.*, 2 PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 303, at 27–28 (2d ed. 2000) (discussing antitrust remedies, including criminal penalties and treble damages).

94. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting "the prudential concern that constitutional issues not be needlessly confronted").

standard.[95] *Professional Real Estate Investors* triggered a virtual explosion in cases and academic commentary. An ever growing number of courts and scholars are recognizing a universal right, under the Petition Clause, to gain access to court.[96] In doing so, most of these authorities cite *Professional Real Estate Investors* and apply its objective merit test with no consideration of the possible conflict with *Bill Johnson's*.

Proportion-Air, Inc. v. Buzmatics, Inc.[97] is an example. There, a competitor sued another for patent infringement, and the defendant raised several counterclaims, including charges that the plaintiff's filing of the suit was itself a violation of both federal antitrust laws and various state torts, such as tortious interference with business relationships.[98] After a bench trial, the court ruled against the original plaintiff on all claims, including the defendant's counterclaims.[99] On appeal, the Federal Circuit reversed and remanded on the counterclaims, holding that the trial court must conduct a review of the objective merit of the original patent claim under *Professional Real Estate Investors*.[100]

The *Professional Real Estate Investors* objective test was of course the proper test for determination of federal antitrust immunity, but it was not necessarily the proper test for the state tort law counterclaims in *Proportion-Air*. In the absence of some form of state law immunity, the only immunity that the federal court could apply to the state tort claims would be that required under the First Amendment. The fact that the plaintiff did not prevail on its patent claim would have been enough to satisfy *Bill Johnson's*, but the Federal Circuit never addressed whether *Bill Johnson's* might set the First Amendment standard.

A very few courts have recognized that *Professional Real Estate Investors* might not set the constitutional standard for protection under the Petition Clause, but they rarely analyze the

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95. *See, e.g.*, Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1235, 1238–39 (R.I. 1996) (applying the *Professional Real Estate Investors* objective test to determine whether the defendant's losing zoning suit was protected against liability under state torts of malicious prosecution and abuse of process).

96. Many of the cases and commentary are collected in my prior articles. *See* Andrews, *Access to Court*, *supra* note 7, at 590 nn.118–19; Andrews, *Motive Restrictions*, *supra* note 7, at 679 nn.60–62, 680 n.63.

97. No. 94-1426, 1995 WL 360549 (Fed. Cir. June 14, 1995) (vacating the district court's findings of fact and conclusions of law that focused on subjective intent and remanding with instructions to apply *Professional Real Estate Investors*' objective test).

98. *Id.* at *1.

99. *Id.*

100. *Id.* at *2–*3.

merit standard itself.[101] In *United States v. Robinson*,[102] for example, the court considered whether to apply a form of petitioning immunity to limit the Fair Housing Act.[103] There, the government charged that the defendants had filed a state lawsuit to enforce a zoning ordinance for a discriminatory purpose—to stop a family with disabled foster children from moving into the neighborhood.[104] The defendants claimed that their suit was protected petitioning activity.[105] In response, the court noted the First Amendment and policy elements in both *Professional Real Estate Investors* and *Bill Johnson's* and concluded that petitioning protection should be determined on a statute-by-statute basis.[106] The court examined the legislative history and policies of the Fair Housing Act and found that it too required a form of petitioning immunity.[107] The court stopped its analysis short, however, and did not consider the proper standard for determining the immunity.[108] The court held that the defendants before it were entitled to protection because their zoning suit had objective merit.[109] The court did not consider whether the win-lose standard of *Bill Johnson's* might be the proper standard, even though the defendants voluntarily dismissed their zoning suit[110] and did not prevail within the meaning of *Bill Johnson's*.[111]

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101. At the other extreme, a few observers continue to argue that *Noerr* and its progeny, including *Professional Real Estate Investors*, are purely applications of the antitrust laws and have no First Amendment implications. *See* Andrews, *Access to Court*, *supra* note 7, at 589–90, 591 n.119 (collecting academic commentary).

102. No. 3:92CV00345, 1995 U.S. Dist. LEXIS 22327 (D. Conn. Jan. 26, 1995).

103. *Id.* at *15–*16 (discussing the conflict between the "First Amendment right of petition" and the "statutory right to equality in housing"). The federal Fair Housing Act makes it unlawful to discriminate in housing based on race, religion, family status, or handicap or "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by [the Act]." 42 U.S.C. §§ 3604, 3617 (2000).

104. *Robinson*, 1995 U.S. Dist. LEXIS 22327, at *1–*3.

105. *Id.* at *10–*12.

106. *See id.* at *15–*18 (examining the conflict between rights arising under federal equal housing provisions and the constitutional right of petition).

107. *Id.* at *29–*33.

108. *See id.*

109. *Id.* at *35–*36.

110. *Id.* at *6.

111. In the few other cases in which the court has identified the issue, the distinction often is irrelevant and discussion of the difference is dicta, as in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889–90, 889 n.4 (10th Cir. 2000) (en banc). In that case, the court considered whether a pre-litigation "cease-and-desist" letter was protected petitioning activity, immune from state tort liability for tortious interference with contract. *Id.* at 886–87. The author of the letter claimed the letter was protected under *Professional Real Estate Investors*, and the original panel of the Tenth Circuit agreed. *Id.* at 887. On rehearing en banc, the Tenth Circuit reversed the panel. *Id.* at 893. The court first noted that "*Noerr* immunity" is a misnomer when applied outside of

There was one prominent exception to this almost rote application of *Professional Real Estate Investors*. In labor cases (before *BE & K*), the NLRB regularly followed *Bill Johnson's*.[112] When an employee charged that an employer had filed suit against him for a retaliatory purpose, the NLRB allowed the employer's suit to continue to its completion, but once the case was completed, the NLRB merely looked to whether the employer had prevailed to determine whether the suit was protected petitioning. If the employer had won its suit, then the NLRB did not declare it to be an unfair labor practice. On the other hand, if the employer's suit ended with anything other than a judgment in the employer's favor,[113] the NLRB presumed that the suit lacked merit and was no longer protected under *Bill Johnson's*. The NLRB then looked to whether the employer had a retaliatory motive, and the NLRB often presumed such motive when the employer bore anti-union animus and when the employer's suit challenged activity protected under the NLRA.[114] Thus, whether

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antitrust, because *Noerr*, as developed by *Professional Real Estate Investors*, has elements of both statutory construction and First Amendment jurisprudence. *Id.* at 889–91. The court then observed that the statutory element may mandate protection not required under the Petition Clause, and it cited the conflict between the merit standards of *Professional Real Estate Investors* and *Bill Johnson's* as an illustration of this difference. *Id.* at 889 & n.4. Ultimately, however, the court denied petitioning immunity because it held that a pre-litigation letter is not a petition to the government. *Id.* at 892–93. Thus, the distinction was not decisive in the case, and the court had no need to decide the proper merit standard.

112. This summary of NLRB practice largely comes from that reported in the *BE & K* case. *See* Brief for the NLRB, at *14–*17, BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390 (2002) (No. 01-518) [hereinafter NLRB Brief] (discussing NLRB practice), *available at* 2002 WL 449275; Brief for Petitioner, at *21–*28, BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390 (2002) (No. 01-518) [hereinafter Petitioner's Brief] (same), *available at* 2001 WL 177612; United States Supreme Court Official Transcript, BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, at *14–*26, *29–*42, *46–*49 (2002) (No. 01-518) [hereinafter Official Transcript] (same), *available at* 2002 WL 753390; *see also* Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1087–88 (9th Cir. 1995) (same).

113. An issue in applying the *Bill Johnson's* win-lose test was what to do with cases that ended at the plaintiff's own volition. The *Bill Johnson's* Court had suggested that a loss included more than just adverse judgments after trial on the merits: "If judgment goes against the employer in the state court, however, *or if his suit is withdrawn or is otherwise shown to be without merit*, 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 . . . unfair labor practice case." Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 747 (1983) (emphasis added). In *NLRB v. Vanguard Toys, Inc.*, the Second Circuit addressed this question and rejected the NLRB's position that "any termination favorable to the defendants [in the original employer suit] gives rise to a presumption that a suit lacked a reasonable basis in fact or law." 981 F.2d 62, 65 (2d Cir. 1992). Even though the court noted that "[t]here are many reasons a party may choose to withdraw a suit," it adopted an objective merit test for suits the employer voluntarily withdrew. *Id.* at 66.

114. In the *BE & K* case, the NLRB claimed there were several factors that the NLRB could consider in finding retaliatory motive, but the Court found that these two

the employer won or lost its suit often was the dispositive question in determining whether an employer's suit violated the NLRA.

For the most part, the lower courts upheld this approach. In *Diamond Walnut Growers, Inc. v. NLRB*,[115] for example, several unions called a strike against Diamond, and Diamond sued the unions for allegedly defamatory statements in letters that the unions sent to Diamond's customers.[116] Diamond did not prevail in this suit.[117] The primary union then filed a charge with the NLRB, claiming that Diamond's defamation suit was an unfair labor practice, and the NLRB agreed.[118] On appeal, the NLRB, citing *Bill Johnson's*, claimed that the lawsuit lacked merit because Diamond did not prevail, but Diamond, relying on *Professional Real Estate Investors*, insisted that the NLRB should have looked to whether its suit had objective merit at the outset.[119] The Ninth Circuit rejected Diamond's argument:

> Diamond is mistaken. Whether a lawsuit lacks a reasonable basis in fact or law is relevant only to whether the Board may *enjoin* a lawsuit. After a lawsuit is over, however, the standard changes. If the suit results "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." Thus, bringing an action that proves unmeritorious may constitute an unfair labor practice, even though the suit did not lack a reasonable basis in law or fact at the time it was filed.[120]

Despite such failure in the courts, employers in labor disputes continued to press for application of the more protective *Professional Real Estate Investors* standard. In recent years, the courts in labor cases have persisted in applying *Bill Johnson's* win-lose test, but at least some courts have lent a sympathetic ear to the employers' arguments. In *White v. Lee*,[121] for example,

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factors were the principal bases for finding such motive in that case. *See* BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2400–01 (2002); NLRB Brief, *supra* note 112, at 46–47 (discussing factors in determining motive).

115. 53 F.3d 1085 (9th Cir. 1995).

116. *Id.* at 1087.

117. The state court dismissed on the ground that the letters were opinion and therefore not subject to defamation damages. *Id.*

118. *Id.*

119. *Id.* at 1087–88.

120. *Id.* at 1088 (citations omitted) (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 749 (1983)). The court distinguished *Professional Real Estate Investors* as setting the standard only under the antitrust laws. *Id.*

121. 227 F.3d 1214 (9th Cir. 2000).

the Ninth Circuit reexamined the *Bill Johnson's* win-lose test and characterized it as dictum.[122] The court stated that it was bound by *Diamond Walnut* to apply the test in the labor context, but it held that it would apply the more generous *Professional Real Estate Investors* objective merit test in all other contexts.[123] Likewise, in *Petrochem Insulation, Inc. v. NLRB*,[124] the District of Columbia Circuit ultimately rejected the employer's argument that *Professional Real Estate Investors* should control in the labor case before it, but the court urged the Supreme Court to "one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than in others)."[125]

In sum, this was the setting when the Supreme Court granted certiorari in *BE & K*. Most legal authorities recognized a right of court access under the Petition Clause, but they did not give much consideration to the proper definition of that right. Most assumed that *Professional Real Estate Investors* set the standard. The few courts that considered the issue tended to limit application of the *Bill Johnson's* win-lose test to labor cases, but at least in that context, the NLRB and courts held fast and applied the more stringent win-lose test.

II. THE *BE & K* DECISION

In *BE & K Construction Co. v. NLRB*,[126] the Court had an opportunity to resolve the uncertainty. The Court granted certiorari to consider whether the NLRB could continue to penalize employers who, for a retaliatory purpose, filed but lost objectively reasonable suits against employees or unions.[127] This suggested that the Court was ready to settle the constitutional debate. Yet, the Court did not decide the question. Instead, the Court decided the case on narrow statutory grounds and

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122. *See id.* at 1235–36.

123. *Id.* at 1236 (noting that "this court has applied 'the First Amendment rationale of the *Noerr-Pennington* doctrine' broadly to claims not involving antitrust law" and that "it is the NLRA cases that we treat differently from all others with respect to the *Noerr-Pennington* 'sham' exception"). The claims in *White v. Lee* were brought under the Fair Housing Act, and the court found that the government's activity in response to the litigation was excessive and would have violated plaintiffs' First Amendment rights, regardless of whether the *Professional Real Estate Investors* test or *Bill Johnson's* test applied. *Id.* at 1237.

124. 240 F.3d 26 (D.C. Cir. 2001).

125. *Id.* at 32.

126. 122 S. Ct. 2390 (2002).

127. *Id.* at 2392.

corrected only the NLRB's standard for finding retaliatory motive. Although the Court has not settled the debate, its three opinions offer some insights into the approach that the Court may take in the future to resolve the difficult constitutional question.

A. *The Background of the Litigation*

The *BE & K* case grew out of a labor dispute in California.[128] BE & K, a non-union construction company based in Birmingham, Alabama, entered into a contract to modernize a California steel plant.[129] Several local unions resisted the hire of BE & K and, according to BE & K, began a campaign to force the steel plant owner to stop doing business with BE & K.[130] The unions' efforts included picketing, advocating for application of toxic waste ordinances to the project, and alleging that the job site violated health and safety standards.[131] BE & K responded with a lawsuit, filed in federal court in California, alleging that the unions' activities violated the labor laws and (later in an amended complaint) the antitrust laws.[132]

This was not the first tangle between BE & K and unions. They are notoriously hostile to each other. Unions have engaged in campaigns against BE & K,[133] the most famous of which was a

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128. For a more detailed discussion of the background of the case, see *BE & K Construction Co. v. NLRB*, 246 F.3d 619, 621–24 (6th Cir. 2001). In addition, the labor dispute is summarized in the two reported decisions of the trial court in BE & K's original California federal suit against the unions. *See* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 721 F. Supp. 239, 241 (N.D. Cal. 1989); USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 692 F. Supp. 1166, 1167–68 (N.D. Cal. 1988).

129. *BE & K*, 246 F.3d at 621.

130. *Id.*

131. *Id.* at 621–22. That effort included state court litigation filed by the unions in which they sought to enjoin alleged violations of the California Health and Safety Code in the removal of hazardous material from the job site. *See USS-POSCO*, 721 F. Supp. at 241. As noted later by the court in BE & K's federal suit against the unions, the unions' original "state court action was not successful on its merits" in that the unions' requests for relief were denied, but the union suit likely had a reasonable factual and legal foundation. *Id.* at 241–42. Thus, the legitimacy of the unions' suit itself turned on the distinction between the *Bill Johnson's* win-lose test and the *Professional Real Estate Investors* objective test. The federal court applied the more protective *Professional Real Estate Investors* test and dismissed BE & K's claim. *Id.* This issue was not raised for review by the Supreme Court.

132. The plant operator, USS-POSCO, joined BE & K as plaintiffs in the suit. *See USS-POSCO*, 692 F. Supp. at 1167–68.

133. For example, union officials in 1989 explained that the carpenters' union "singled out" BE & K for an "aggressive corporate campaign" by the union because BE & K was "the only big nonunion contractor that market[ed] itself to owners as a strikebreaker." William G. Krizan, *Unions, BE & K Square Off*, ENG'G NEWS-RECORD, Apr. 13, 1989, at 11 (interviewing Dean Sooter, the carpenters' union second general vice-

strike at a paper mill in International Falls, Minnesota, which provoked violence.[134] Likewise, BE & K has been anti-union in its corporate policies and actions, including litigation against the unions.[135] BE & K has filed a number of suits against unions and has been moderately successful in this litigation. For example, a federal jury in Illinois awarded BE & K $544,000 in damages after finding that the unions had illegally threatened a secondary boycott and caused BE & K to lose construction work.[136]

BE & K's federal suit against the unions concerning the California job did not fare as well. In a series of motions, the federal district court dismissed, or entered summary judgment, against BE & K on almost all of its claims and, after losing these motions, BE & K voluntarily dismissed the remaining claim.[137] On appeal, the Ninth Circuit gave BE & K partial vindication by reversing a few of the trial court's rulings, but the Ninth Circuit did not disturb the dismissal of BE & K's claims.[138]

Soon after BE & K originally filed its federal suit, the unions filed charges with the NLRB, claiming that BE & K's suit constituted an unfair labor practice.[139] The NLRB stayed its proceedings until BE & K's claims were resolved in federal court.[140] After the conclusion of BE & K's federal suit, in September 1999, the NLRB found that BE & K had violated the NLRA by filing the suit.[141] It ordered BE & K to refrain from filing any similar suit, to reimburse the unions for their costs in

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president).

134. For a discussion of the Minnesota incident and the continuing hostility between BE & K and unions, see *Ex parte United Brotherhood of Carpenters*, 688 So. 2d 246, 247–49 (Ala. 1997).

135. *See* Krizan, *supra* note 133 (describing BE & K as a strikebreaking and union-busting company).

136. *See* BE & K Constr. Co. v. Will & Grundy Counties Bldg. Trades Council, 156 F.3d 756 (7th Cir. 1998) (affirming BE & K's verdict on appeal). BE & K won a substantial jury verdict in a similar Arkansas case—$125,000 in compensatory damages and $20 million in punitive damages—but the Eighth Circuit reversed much of the judgment and ordered a new trial. BE & K Constr. Co. v. United Bhd. of Carpenters, 90 F.3d 1318, 1321 (8th Cir. 1996).

137. *See* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 721 F. Supp. 239 (N.D. Cal. 1989) (granting defendant's motion for partial summary judgment as to BE & K's claims concerning the unions' state court suit); *USS-POSCO*, 692 F. Supp. at 1167 (granting summary judgment as to BE & K's claims concerning the unions' lobbying efforts but denying summary judgment as to BE & K's claims concerning the unions' state court suit).

138. USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 810–12 (9th Cir. 1994).

139. BE & K Constr. Co., 329 NLRB Dec. (CCH) 68 (1999) (NLRB decision and order), *available at* 1999 WL 883851, at *1.

140. BE & K Constr. Co. v. NLRB, 246 F.3d 619, 624 (6th Cir. 2001).

141. *BE & K*, 329 NLRB Dec. (CCH) 68, at *2.

defending the federal suit (including their attorneys' fees plus interest), and to post notices informing employees in Alabama and California that the company had violated the NLRA.[142]

BE & K appealed to the Sixth Circuit.[143] BE & K made two attacks against the NLRB's finding of an unfair labor practice.[144] First, BE & K argued that the NLRB had inappropriately applied the *Bill Johnson's* win-lose test instead of the *Professional Real Estate Investors* objective merit test.[145] The Sixth Circuit rejected this argument. It held that *Professional Real Estate Investors*, as an antitrust case, was "totally inapplicable" to test the merits of BE & K's suit under the NLRA.[146] Instead, the *Bill Johnson's* "bifurcated system of analysis" controlled:

> Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.[147]

The Sixth Circuit then noted that the California federal court had dismissed BE & K's claims "on the merits," as opposed to some other form of dismissal, and held that the NLRB was therefore free to investigate the motives of BE & K in filing suit.[148]

BE & K's second argument went to the NLRB's finding of retaliatory motive. BE & K argued that the NLRB had inferred this motive merely from the fact that BE & K had failed in its lawsuit.[149] The Sixth Circuit noted that if the NLRB in fact had

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142. *Id.* at *17–*18.

143. In oral argument before the U.S. Supreme Court, counsel for BE & K explained that its appeal from the NLRB ruling went to the Sixth Circuit because BE & K was no longer doing business in California and most of its work was in the Sixth Circuit. Official Transcript, *supra* note 112, at *15.

144. BE & K raised three basic arguments on appeal. It argued that (1) the unions could not seek relief under the NLRA because they were not BE & K's employees, (2) the NLRB erred in finding that its federal suit was an unfair labor practice, and (3) attorneys' fees were an improper remedy even if BE & K were in violation of the NLRA. *BE & K*, 246 F.3d at 621. The Sixth Circuit rejected all three arguments, but this Article addresses only the second argument.

145. *Id.* at 628–29.

146. *Id.* at 629.

147. *Id.*

148. *Id.* (emphasis omitted).

149. *Id.* at 629–30.

done this, it "would run the serious risk of conflating the two elements of the *Bill Johnson's* unfair labor practice analysis and thus infringe upon the protections afforded by the [P]etition [C]lause of the First Amendment."[150] Nevertheless, the NLRB could consider the loss as one factor in determining motive so long as there was other evidence.[151] The court then found the following circumstantial evidence of BE & K's retaliatory motive: that BE & K had realleged claims after they were dismissed by the federal court, that BE & K sought treble damages under the antitrust laws, and that BE & K named two unions as defendants in the federal suit even though the two unions had not been formal parties to the suits that BE & K challenged.[152] This, according to the Sixth Circuit, constituted "substantial evidence" on which the NLRB could find an illegal retaliatory motive.[153] The court thus affirmed the NLRB's findings and penalties.[154]

BE & K petitioned for an en banc rehearing by the Sixth Circuit and was denied.[155] BE & K then petitioned for certiorari with the U.S. Supreme Court.[156] On January 4, 2002, the Court granted certiorari but limited the issue for review.[157] The Court stated the sole question as follows: "Did the Court of Appeals err in holding that under *Bill Johnson's* 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*?"[158] Thus, the Court seemed poised to resolve the merit debate under the Petition Clause.

In the briefs before the Court, the parties focused squarely on the two merit tests.[159] BE & K argued that the NLRB's

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150. *Id.* at 630.

151. *Id.* The court cited *Bill Johnson's* for this proposition: "[T]he United States Supreme Court itself, in *Bill Johnson's*, admitted that the mere finding that an employer's suit against employees or unions is unmeritorious warrants the [NLRB] 'taking that fact into account in determining whether the suit had been filed in retaliation' . . . ." *Id.* (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 747 (1983)).

152. *Id.*

153. *Id.* at 630–31.

154. *Id.*

155. NLRB Brief, *supra* note 112, at *1.

156. *Id.*

157. BE & K Constr. Co. v. NLRB, 534 U.S. 1074 (2002) (mem.).

158. *Id.* (citations omitted). BE & K had sought certiorari on other issues, such as whether the NLRB had authority to award attorneys' fees, but the Court limited its grant to the single issue. BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2398 (2002).

159. Petitioner's Brief, *supra* note 112, at *12–*13; NLRB Brief, *supra* note 112, at *14–*15; Reply Brief for Petitioner at *1, BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390

application of the *Bill Johnson's* win-lose test was a "dangerous anomaly in the law threatening the entire business community's right of access to the courts on labor issues."[160] It argued that the *Bill Johnson's* win-lose test was ambiguous dicta and that the only test set by *Bill Johnson's* was the test for ongoing litigation, which was an objectively reasonable standard—similar to that in *Professional Real Estate Investors*.[161] BE & K further argued that *Professional Real Estate Investors* set the proper constitutional test and that it had been "broadly and uniformly applied in every imaginable context."[162] According to BE & K, the *Bill Johnson's* win-lose test would chill an employer's First Amendment rights because "it is impossible for employers to know in advance how litigation will be resolved" and that, faced with this dilemma, many employers will "undoubtedly forego exercise of their rights to avoid incurring statutory liability for having predicted wrongly."[163]

In response, the NLRB[164] argued that the win-lose standard of *Bill Johnson's* was not dicta,[165] that it had been part of the labor law since 1983, and that *Bill Johnson's* appropriately set two tests to reflect the different levels of protection applicable to prior restraints and to post-action damages.[166] The NLRB distinguished *Professional Real Estate Investors* as an antitrust doctrine, and it warned against "the breath-taking implications" of applying the objective test outside of the context of antitrust immunity.[167] In this regard, the NLRB contended that the broad test would "invalidate numerous federal and state statutory provisions and rules"[168] such as other federal labor laws,[169]

(2002) (No. 01-518), *available at* 2002 WL 523018.

160. Petitioner's Brief, *supra* note 112, at *14.

161. *Id.* at *25.

162. *Id.* at *17–*18.

163. *Id.* at *26.

164. Both the NLRB and the complaining unions were respondents in the case, and both filed briefs. Their arguments are largely duplicative of each other. This Article cites only to the NLRB brief because it, and not the union brief, is available on Westlaw (2002 WL 449275) and because only counsel for the NLRB participated in oral argument on behalf of all respondents.

165. NLRB Brief, *supra* note 112, at *22–*24. The NLRB argued that because some of the claims in the underlying suit in *Bill Johnson's* already had been dismissed prior to the NLRB injunction, the win-lose test was applicable to the resolution of those claims. *Id.*

166. *Id.* at *22–*25, *35–*38.

167. *Id.* at *30.

168. *Id.*

169. The NLRB argued that Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (2000), allowed fees to be shifted to a plaintiff who seeks injunctive relief, even if the request is not frivolous. NLRB Brief, *supra* note 112, at *31.

Federal Rule of Civil Procedure 11(b)(1),[170] the common law tort of abuse of process,[171] and the court's inherent power to sanction litigants,[172] all of which, it argued, "authorize the imposition of fees on a losing plaintiff without a finding that the plaintiff's suit lacked a reasonable basis."[173] The NLRB finished this litany by arguing that extension of *Professional Real Estate Investors* would constitutionalize the "American rule"; in other words, Congress could no longer enact laws that required losing plaintiffs to pay the defendant's attorneys' fees.[174] Finally, the NLRB argued that the differences between labor suits and antitrust suits, such as the availability of treble damages in civil antitrust suits, give potential antitrust liability a much greater chilling effect than the possibility of an NLRB labor charge.[175] This greater threat, argued the NLRB, warranted more protection for First Amendment rights in the antitrust context than in the labor area.[176]

The Court heard oral arguments on April 16, 2002.[177] Because the questions of the Court were scattered and addressed a number of issues,[178] it is difficult to characterize the arguments. Some questions addressed whether *Bill Johnson's* was dicta[179] and whether *Professional Real Estate Investors* was a constitutional doctrine.[180] Several questions asked whether *Professional Real Estate Investors* would invalidate fee-shifting statutes[181] and whether the NLRA was more punitive or

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170. Federal Rule of Civil Procedure 11(b)(1) requires a plaintiff to certify, among other things, that he is not filing his complaint "for any improper purpose." FED. R. CIV. P. 11(b)(1). The NLRB argued that proper purpose is an independent requirement under Rule 11. NLRB Brief, *supra* note 112, at *32 (citing Andrews, *Motive Restrictions*, *supra* note 7, for support).

171. The NLRB argued that under some applications of the tort of abuse of process, it is not necessary to show that the underlying claim lacked merit. *Id.* at *32–*33.

172. The NLRB argued that courts have the inherent power, absent First Amendment considerations, to sanction litigants who act in bad faith without inquiring as to the objective basis of their actions. *Id.* at *33–*34.

173. *Id.* at *30.

174. *Id.* at *34.

175. *Id.* at *40–*45.

176. *Id.* at *44–*45.

177. Official Transcript, *supra* note 112, at *1.

178. According to Supreme Court practice, the transcript does not reveal the identity of the member of the Court who is asking a question in oral argument. On occasion, however, another member of the Court or the lawyer identifies the Justice when referring back to his or her question.

179. *Id.* at *6–*8, *27–*28.

180. *Id.* at *42–*43 (asking whether Congress could overrule *Professional Real Estate Investors*).

181. *Id.* at *11–*12 (questioning whether BE & K's argument would mean that "if Congress passed a law adopting the English rule on . . . attorney's fees, [it] would be

otherwise distinguishable from fee-shifting statutes.[182] Others asked for ways in which to distinguish the NLRA setting from antitrust.[183] The arguments concluded with a number of questions that focused on the NLRB's actual practice in implementing the *Bill Johnson's* holding over the past twenty years,[184] especially in determining whether an employer had a retaliatory motive.[185]

B. The BE & K *Opinions*

On June 24, 2002, the Court issued its decision.[186] BE & K won. The Court was unanimous in its judgment that the NLRB applied the wrong standard in finding BE & K in violation of the NLRA.[187] All nine Justices agreed that the NLRB improperly found retaliatory motive.[188] The Court thus avoided defining the proper merit standard under the Petition Clause. Although the issue is still open for debate and decision, the majority opinion, by Justice O'Connor, and the two concurring opinions of Justice Breyer and Justice Scalia, offer some intriguing discussion that may impact future analysis of this difficult constitutional question.

Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined.[189] Her majority opinion is difficult to follow. The difficulty comes in large part from her pattern of starting a discussion and setting up an issue, only to dismiss the discussion and issue as not relevant to the question at hand. Yet, it is through these distinguished questions that we can garner the most insights into the majority's likely future approach to the First Amendment merit standard.

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unconstitutional").

182. *Id.* at *12–*13, *39–*40 (noting that, for example, exposure to triple damages constitutes a punishment that is different from fee-shifting).

183. *See id.* at *12–*13, *16. This came from both directions. Some asked about the burdens imposed by the NLRA, as opposed to those under antitrust. *Id.* at *12–*13, *20–*21, *32–*35, *43–*44. Other questions asked about the special potential for abuse when an employer sues employees for retaliatory purposes. *Id.* at *17; *see also id.* at *19 (stating that the Court is "not concerned solely with chilling [the employer's petition right]; we're also concerned with retaliation").

184. *Id.* at *14, *20–*23. The Court expressed its concern about the doctrine of stare decisis, under which the Court holds that Congress has implicitly endorsed the Court's interpretation of a federal statute when Congress does not act to reverse it. *Id.* at *22–*23.

185. *Id.* at *36–*39 and *44–*50.

186. BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390 (2002).

187. *See id.* at 2393, 2402.

188. *Id.*

189. *Id.* at 2393.

Justice O'Connor started her opinion by tracing the history of the petition right, creation of *Noerr* petitioning immunity, and extension of *Noerr* immunity to judicial petitions.[190] In doing so, she set out the different merit standards in *Professional Real Estate Investors* and *Bill Johnson's*.[191] Importantly, Justice O'Connor explained that the *Bill Johnson's* win-lose test for completed litigation was dicta[192] and that the Court "customar[ily] refus[ed] to be bound by dicta."[193] She thus turned to "the question presented," which she characterized as "whether the [NLRB] may impose liability for a retaliatory lawsuit that was unsuccessful even if it was not objectively baseless."[194]

In analyzing this question, Justice O'Connor first addressed whether the difference between a finding of antitrust liability, on the one hand, and NLRA illegality, on the other, justified the greater protection of *Professional Real Estate Investors*.[195] She acknowledged the NLRB's arguments that antitrust suits impose greater burdens than an NLRB proceeding, but she concluded that these differences demonstrate at most that "an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication" and that "[t]his does not mean the burdens posed by the NLRA raise no First Amendment concerns."[196] She explained that the NLRA imposes burdens, even aside from an award of attorneys' fees.[197] She expressly set aside the question of an order that awarded attorneys' fees only.[198] Instead, a finding of illegality under the NLRA itself imposes burdens, such as reputational harm, that are sufficient to test the validity of the NLRA.[199]

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190. *Id.* at 2395–96.

191. *Id.* at 2396–97.

192. *Id.* at 2397 (noting that the issue in *Bill Johnson's* was whether the NLRB could enjoin an ongoing suit and that "although [the Court's] statements [in *Bill Johnson's*] regarding completed litigation were intended to guide further proceedings, [the Court] did not expressly order the [NLRB] to adhere to its prior finding of unlawfulness under the standard we stated").

193. *Id.* at 2397–98 (citing U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994)).

194. *Id.* at 2398.

195. *Id.*

196. *Id.* (finding that, in addition to attorneys' fees, the "finding of illegality is a burden by itself" that will result in additional legal consequences and danger of reputational harm).

197. *Id.*

198. *Id.* ("Because we can resolve this case by looking only at the finding of illegality, we need not decide whether the [NLRB] . . . has authority to award attorney's fees when a suit is found to violate the NLRA."). Justice O'Connor noted that BE & K had sought certiorari on the issue of whether the NLRB was authorized to assess attorneys' fees, but that the Court did not grant review of this issue. *Id.* Accordingly, the Court looked to the burden of NLRA liability, assuming no award of attorneys' fees. *Id.*

199. *Id.* BE & K had argued in oral argument that these burdens included loss of

This set up the First Amendment issue. Having identified the burdens, Justice O'Connor moved on to discuss whether the burdens impacted activity protected by the Petition Clause.[200] She returned to examining *Bill Johnson's*. There, she said the Court recognized a First Amendment interest when it stopped the NLRB from enjoining an ongoing suit.[201] Justice O'Connor analogized this concern to the prior restraint doctrine.[202] The analogy, however, did not answer the question at hand:

> [T]his analogy at most suggests that injunctions may raise greater First Amendment concerns, not that after-the-fact penalties raise no concerns. Likewise, the fact that *Bill Johnson's* allowed certain *baseless* suits to be enjoined tells little about the propriety of imposing penalties on various classes of *nonbaseless* suits.[203]

Justice O'Connor also analogized the issue to another First Amendment doctrine—breathing room analysis.[204] As she noted, *Bill Johnson's* cited *Gertz v. Robert Welch, Inc.*[205] and compared baseless suits to false statements under the Speech Clause.[206] Justice O'Connor explained that under *Gertz*, the First Amendment requires protection for some categories of false speech so that true speech—"*speech that matters*"—has breathing room and is better protected.[207] Justice O'Connor explained that both the *Bill Johnson's* test for ongoing litigation and the *Professional Real Estate Investors* test were "consistent" with this breathing room doctrine, in that they did not punish all baseless litigation.[208] Instead, both cases imposed a subjective intent

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work because entities, especially the government, would not hire contractors who were found to be violators of the NLRA. *See* Official Transcript, *supra* note 112, at *12–*13.

200. *BE & K*, 122 S. Ct. at 2398 ("Having identified this burden, we must examine the petitioning activity it affects.").

201. *Id.*

202. *Id.* at 2399.

> By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the First Amendment historically provides greater protection from prior restraints than after-the-fact penalties . . . .

Id.

203. *Id.*

204. *Id.*

205. *See* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." (citations omitted) (citing Gertz v. Robert Welch, Inc., 418 U.S. 322, 341 (1974)). *Gertz* and potential application of its breathing room analysis are discussed in Part III.A *infra*.

206. *BE & K*, 122 S. Ct. at 2399.

207. *Id.* (quoting *Gertz*, 418 U.S. at 341).

208. *See id.* Justice O'Connor explained:

limitation before liability could be imposed, even on a suit that lacked objective merit.[209] In other words, some baseless suits—those filed for a proper purpose—are protected under both tests.

Yet, again, this discussion did not answer the issue before the Court. Justice O'Connor explained:

> But we need not resolve whether objectively baseless litigation requires any "breathing room" protection, for what is at issue here are suits that are not baseless in the first place. Instead, as an initial matter, we are dealing with the class of reasonably based but unsuccessful lawsuits. But whether this class of suits falls outside the scope of the First Amendment's Petition Clause at the least presents a difficult constitutional question, given the following considerations.[210]

Before discussing Justice O'Connor's three "considerations," it is important to understand the "difficult constitutional question" that she was addressing. Although she did not say so explicitly, I contend that Justice O'Connor was trying to determine which side of the line losing but reasonable suits fall. Are they like "baseless" suits and false statements, which warrant only protection indirectly through breathing room analysis? Or, are they closer to winning claims and true speech, which are within the core right of the First Amendment and which warrant nearly absolute protection under strict scrutiny review? This is the crux of the First Amendment issue. Justice O'Connor was in essence trying to set the standard for determining the lawsuits that fall within the core right of the First Amendment, while acknowledging that the breathing room doctrine still might protect some suits that fall outside of this core right.

To answer this difficult constitutional question, Justice O'Connor listed three considerations. First, she noted that some losing suits present genuine grievances and that the text of the Petition Clause is not limited to successful petitions.[211] Second, Justice O'Connor recognized that unsuccessful, but reasonable,

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> It is at least consistent with these "breathing space" principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose.

Id.

209. *See id.*

210. *Id.*

211. *Id.* at 2399–2400 ("[T]he text of the First Amendment . . . speaks simply of the right of the people . . . to petition the Government for a redress of grievances." (quotation marks omitted)).

suits advance some First Amendment issues, such as public airing of disputes and raising matters of public concern,[212] developing the law,[213] and providing an alternative to violence.[214] As her final consideration, Justice O'Connor noted that the analogy to false statements of fact is not perfect because "the fact [that a suit] loses does not mean that it is false" but rather means "[a]t most . . . [that] the plaintiff did not meet its burden of pro[of]."[215] In listing the three factors, Justice O'Connor seemingly suggested that losing but reasonable suits should fall on the side of winning lawsuits, within the core right of the First Amendment. All three arguments go to such protection. However, she never decided this point. Instead, she shifted focus and addressed the NLRB's finding of retaliatory motive.

Justice O'Connor made the transition by noting that the NLRB does not penalize any suits unless they are filed for a retaliatory purpose.[216] Therefore, she explained, the Court must consider the "significance of that particular limitation."[217] This is where the majority opinion gets particularly difficult to follow. Justice O'Connor started the discussion of motive by noting that *Bill Johnson's* did not define "retaliatory" motive, but that the NLRB had since interpreted retaliation to mean interference with an employee's protected rights.[218] Justice O'Connor said that this definition was too broad.[219] Her problem likely was not in use

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212. *Id.* at 2400 ("Like successful suits, unsuccessful suits allow the 'public airing of disputed facts,' and raise matters of public concern." (citing Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 743 (1983) (citation omitted))).

213. *Id.* (observing that unsuccessful suits "also promote evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around").

214. *Id.* ("Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force." (citing Andrews, *Access to Court*, *supra* note 7, at 656)).

215. *Id.*

216. *Id.* (noting that "the [NLRB] confines its penalties to unsuccessful suits brought with a retaliatory motive").

217. *Id.* Likely because this issue seems to be off track, Justice O'Connor noted that motive was "fairly included" in the question presented in the Court's grant of certiorari, which was "whether 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.'" *Id.* (quoting BE & K Constr. Co. v. NLRB, 534 U.S. 1074 (2002) (mem.) (granting certiorari)). This may seem a bit of a stretch, but it is the means by which the Court ultimately avoided deciding the difficult constitutional question of whether reasonable but losing suits are within the core right of the First Amendment. In actuality, this question of motive could be a constitutional question—whether the motive limitation is alone an adequate protection of the right to file suits or whether motive itself defines the right to petition. Refer to notes 284–85 *infra* and accompanying text (discussing the role of motive in defining First Amendment rights).

218. *BE & K*, 122 S. Ct. at 2400.

219. *Id.* ("As we read it . . . the [NLRB's] definition broadly covers a substantial

of the term "interfere," because this is the statutory language of the NLRA, which makes it illegal to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [the NLRA]."[220] Instead, Justice O'Connor's problem seemed to be the way in which the NLRB found this interference.

The NLRB found motive in the *BE & K* case based in large part on the fact that BE & K had lost its suit that challenged protected activity. According to Justice O'Connor, a suit could interfere with the unions' exercise of their statutory labor right and yet be genuine:

> As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the [NLRB's] first basis for finding retaliatory motive was the fact that [BE & K's] suit related to protected conduct that [BE & K] believed was unprotected. If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.[221]

The second basis on which the NLRB found unlawful motive was BE & K's anti-union animus.[222] Justice O'Connor had two problems with this basis. First, she explained that ill will is to be expected in litigation and that it does not mean that the plaintiff does not honestly seek relief.[223] Second, she noted that in the context of First Amendment freedoms, the Court has been reluctant to impose liability based on ill will alone, even when the activity at issue, such as false speech, is outside the core right of the First Amendment.[224]

Justice O'Connor concluded that "[f]or these reasons," the motive limitation as imposed by the NLRB does not make the

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amount of genuine petitioning.").

220. 29 U.S.C. § 158(a)(1) (2000). Refer to note 48 *supra* (quoting § 158(a)(1)).

221. *BE & K*, 122 S. Ct. at 2400 (citation omitted).

222. *Id.* (observing that the NLRB "claims to rely on evidence of antiunion animus to infer retaliatory motive").

223. *Id.* at 2400–01 ("[I]ll will is not uncommon in litigation. . . . But that does not mean that such disputes are not genuine.").

224. *Id.* at 2401. Refer to notes 322–25 *infra* (discussing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)). Justice O'Connor explained this First Amendment practice:

> Even in other First Amendment contexts, we have found it problematic to regulate some *demonstrably false* expression based on the presence of ill will. For example, we invalidated a criminal statute prohibiting false statements about public officials made with ill will. Indeed, the requirement that private defamation plaintiffs prove the falsity of speech on matters of public concern may indirectly shield much speech concealing ill motives.

BE & K, 122 S. Ct. at 2401 (citation omitted).

difficult constitutional issue any easier, because the "limitation fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine."[225] Yet, in actuality, the breadth with which the NLRB applied the motive standard did make the constitutional question easier because it had the effect of restating the question. In other words, Justice O'Connor acknowledged that the question was no longer whether the NLRB could punish reasonable suits that were truly retaliatory in nature, as suggested in the Court's grant of certiorari, but instead "whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine."[226] The latter question seemingly would be easier to answer than the former both on a constitutional level—because the intrusion into exercise of First Amendment freedoms is greater—and on a statutory level—because the NLRB is punishing activity not necessarily within the congressional prohibition. Thus, Justice O'Connor restated the question and moved away from the original "difficult" question of defining the merit standard.

Yet Justice O'Connor avoided answering even the new question on a constitutional level. This she did expressly. She noted that in a prior labor case the Court avoided a potential conflict with the First Amendment by narrowly construing the NLRA.[227] Justice O'Connor then proceeded to similarly narrow the NLRA so that it did not apply to BE & K's suit, at least not to the factual findings relied upon by the NLRB:

> Because there is nothing in the statutory text indicating that [29 U.S.C.] § 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 [NLRB's] standard for imposing liability under the NLRA

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225. *Id.*

226. *Id.*

227. *Id.* Justice O'Connor stated:

> In a prior labor law case, we avoided a similarly difficult First Amendment issue by adopting a limiting construction of the relevant NLRA provision. . . . [*Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)], we found that the statutory provisions and their legislative history indicated no clear intent to reach the handbilling in question, and so we simply read the statute not to cover it, thereby avoiding the First Amendment question altogether.

Id. (citation omitted). In *DeBartolo*, unions peacefully distributed handbills outside a mall, urging consumers to not shop at the stores until the mall owner agreed to use only contractors paying fair wages. 485 U.S. 568, 570 (1988). The Court decided that the NLRA did not reach such handbilling and thus avoided "deciding whether a congressional prohibition of handbilling on the facts of [*Debartolo*] would violate the First Amendment." *Id.* at 578.

> allows it to penalize such suits, its standard is thus invalid.[228]

Her choice of words here is somewhat confusing. In the first sentence she referred to "suits filed for a retaliatory purpose," but as she explained just a few paragraphs earlier, her real problem with the NLRB was that it punished suits, such as BE & K's suit, that were not necessarily filed for an improper purpose.[229] She did not necessarily have a problem with the NLRB punishing suits filed for a truly improper purpose, as she made clear in her next sentence:

> We do not decide whether the [NLRB] may declare unlawful any unsuccessful but reasonably based suits that would not have been filed *but for a motive to impose the costs of the litigation process, regardless of outcome, in retaliation for NLRA protected activity*, since the [NLRB's] standard does not confine itself to such suits.[230]

Thus, the narrow holding of the case is that the NLRB improperly interpreted the NLRA in order to punish suits that might have been filed for the legitimate purpose of challenging behavior that the employer genuinely believed to be illegal. This leaves many questions open. One, as stated above, is whether the NLRA can punish reasonable but losing suits that were filed for purposes other than seeking relief.[231] Justice O'Connor also explained that the Court's holding did not impact other litigation penalties:

> [N]othing in our holding today should be read to question the validity of common litigation sanctions imposed by 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.[232]

Thus, by sidestepping the "difficult constitutional question," the Court preserved, at least for a time, most other litigation penalties.

All nine Justices agreed with the narrow ground of decision: the NLRB had improperly found retaliatory motive under the

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228. *BE & K*, 122 S. Ct. at 2402.

229. *Id.* at 2401–02 (finding that "the [NLRB's] standard for imposing liability under the NLRA allows it to penalize" reasonably based suits).

230. *Id.* at 2402 (emphasis added).

231. As to motive, the Court also reserved decision on any further meaning of the term "retaliation." *Id.* ("[W]e need not decide what our dicta in *Bill Johnson's* may have meant by 'retaliation.'").

232. *Id.*

statute in this case.[233] However, Justice Breyer, in a concurring opinion, in which Justices Stevens, Souter, and Ginsburg joined, took issue with the majority opinion. Justice Breyer agreed that the NLRB's finding of motive inappropriately suggested "that losing a lawsuit against a union, in and of itself, virtually alone, shows retaliation."[234] Justice Breyer would have limited the discussion to that narrow ground.[235] He objected to the majority's characterization of the *Bill Johnson's* win-lose test as dicta.[236] Justice Breyer observed that any such discussion by the majority was itself dicta,[237] but he nonetheless expressed concern that "the Court's opinion might suggest a more far-reaching rule."[238]

The more far-reaching rule about which Justice Breyer was concerned was application of the *Professional Real Estate Investors* objective merit standard to test the legality of completed suits under the NLRA. Justice Breyer did not expressly address the constitutional question of the standard required by the First Amendment. He instead discussed differences in statutory policy and history that distinguish the NLRA setting from antitrust.[239] Nevertheless, by making these policy arguments, he implicitly argued that *Bill Johnson's* set the constitutional standard. If *Professional Real Estate Investors* set the First Amendment standard, the NLRA could not punish losing but meritorious suits, no matter any differences in statutory history and policy.

In discussing the differences between labor and antitrust, Justice Breyer first repeated the arguments, raised by the NLRB and noted by the majority, that the threat of potential antitrust liability has a far more chilling effect on filing suit than the potential threat of NLRA liability.[240] But Justice Breyer added

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233. *See id.* at 2402–04.

234. *Id.* at 2404 (Breyer, J., concurring in part and concurring in the judgment).

235. *See id.* (Breyer, J., concurring in part and concurring in the judgment) ("Insofar as language in the Court's opinion might suggest a more far-reaching rule, I do not agree." (citation omitted)).

236. *Id.* (Breyer, J., concurring in part and concurring in the judgment) ("The courts, the [NLRB], the bar, employers, and unions alike have treated the Court's discussion of completed lawsuits in *Bill Johnson's* as a holding and have followed it for 20 years.").

237. *Id.* (Breyer, J., concurring in part and concurring in the judgment) ("I can find no good reason to characterize the statements in *Bill Johnson's* as dicta—though I recognize that the Court's language so characterizing *Bill Johnson's* is itself dicta.").

238. *Id.* (Breyer, J., concurring in part and concurring in the judgment).

239. *See id.* at 2404–06 (Breyer, J., concurring in part and concurring in the judgment) (explaining why he "do[es] not believe that this Court's antitrust precedent determines the outcome here").

240. *Id.* at 2404–05 (Breyer, J., concurring in part and concurring in the judgment) (noting that applying antitrust law threatens the defendant with treble damages and high court-defense costs).

that there were "[o]ther differences, those related to scope, purpose, and history, [that] are major and determinative."[241] These other differences boil down to the relative role of abusive lawsuits in the two statutory schemes. Justice Breyer argued that abusive lawsuits "occupy but one tiny corner of the anticompetitive-activity universe," but that abusive lawsuits against employees and unions constituted "much of [the NLRA's] historical reason for being."[242] He recounted the history of the federal labor laws[243] and concluded by saying: "[t]he upshot is that an employer's antiunion lawsuit occupies a position far closer to the heart of the labor law than does a defendant's anticompetitive lawsuit in respect to antitrust law. And that fact makes all the difference."[244] Given this history, he concluded that the antitrust doctrine of *Professional Real Estate Investors* has no application to the NLRA; *Bill Johnson's* correctly set the standard for NLRA liability; and the majority should not have suggested, albeit in dicta, that the issue was open.[245]

Justice Scalia filed a concurring opinion in which Justice Thomas joined.[246] Justice Scalia had no objection to Justice O'Connor's discussion or holding. Instead, he took issue with Justice Breyer's concurrence. Justice Scalia agreed with Justice Breyer that the implication of the majority opinion is that the Court in the future will construe the NLRA to require application of the *Professional Real Estate Investors* objective standard.[247]

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241. *Id.* at 2405 (Breyer, J., concurring in part and concurring in the judgment).

242. *Id.* (Breyer, J., concurring in part and concurring in the judgment).

243. *Id.* at 2405–06 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer reported that courts in the nineteenth century were particularly hostile to unions and held unions to be criminal conspiracies, granted injunctions against unions, and broadly interpreted statutes to regulate union activity. *Id.* at 2405 (Breyer, J., concurring in part and concurring in the judgment). He claimed that the labor laws were designed in large part to counter this judicial hostility toward unions. *Id.* at 2405–06 (Breyer, J., concurring in part and concurring in the judgment).

244. *Id.* at 2406 (Breyer, J., concurring in part and concurring in the judgment).

245. *Id.* (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer concluded:

> I do not know why the Court reopens these matters in its opinion today. But I note that it has done so only to leave them open. It does not, in the end, decide them. On that understanding, but only to the extent that I describe at the outset, I join in the Court's opinion.

Id. (Breyer, J., concurring in part and concurring in the judgment) (citations omitted).

246. *Id.* at 2403 (Scalia, J., concurring) ("I am able . . . to join the Court's opinion in full . . . .").

247. *Id.* (Scalia, J., concurring).

> I agree with Justice Breyer that the implication of our decision today is that, in a future appropriate case, we will construe the [NLRA] in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.

Unlike Justice Breyer, Justice Scalia presumably endorsed this result. Justice Scalia, however, did not necessarily agree that the *Professional Real Estate Investors* test was required in all contexts.[248] Instead, he isolated one factor in labor cases that mandated the extra protection of *Professional Real Estate Investors*—the fact that a federal agency, rather than a court, made the factual findings necessary for imposing liability under the NLRA.[249]

Justice Scalia claimed that Justice Breyer overlooked one difference between labor and antitrust that "suggests—indeed, demands—precisely the opposite conclusion" of that argued by Justice Breyer.[250] According to Justice Scalia, the fact that in the labor context the NLRB, rather than an Article III federal court, determines whether a reasonably based lawsuit will be punished "undermines" Justice Breyer's analysis.[251] "At the very least," Justice Scalia argued, this difference poses

> a difficult question under the First Amendment: 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* judicial review by the substantial evidence standard [of the NLRA][252]—that the complainant had one motive rather than another.[253]

He continued 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."[254] Accordingly, Justice Scalia agreed that the majority correctly limited its holding so as not to invalidate litigation sanctions "imposed by courts themselves."[255] Justice Scalia thus recognized a constitutional dimension to the problem, but centered the First Amendment concern on the

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Id. at 2402 (Scalia, J., concurring).

248. *See id.* at 2402–03 (Scalia, J., concurring) (finding that the complainant may have more First Amendment rights to file a lawsuit under the NLRA).

249. *Id.* (Scalia, J., concurring) (noting that under the NLRA an executive based agency, the NLRB, "determines whether a litigant will be punished for filing an objectively reasonable lawsuit").

250. *Id.* at 2402 (Scalia, J., concurring).

251. *Id.* at 2402–03 (Scalia, J., concurring). This issue was not raised by the parties, but instead by one of the Justices in oral argument; most probably Justice Scalia raised this concern. *See* Official Transcript, *supra* note 112, at *29–*32.

252. The NLRA requires that courts review findings of fact made by the NLRB under the "substantial evidence" standard. *See* 29 U.S.C. § 160(f) (2000).

253. *BE & K*, 122 S. Ct. at 2403 (Scalia, J., concurring).

254. *Id.* (Scalia, J., concurring).

255. *Id.* (Scalia, J., concurring) (emphasis omitted).

"new" issue of the entity that makes the finding of fact, not on the merit standard.

In sum, despite suggesting otherwise in its grant of certiorari, the Court did not determine the proper standard for determining merit under the Petition Clause right of court access. The Court's three opinions skirt around the issue, but they never resolve it. Thus, we must wait for what Justice Scalia called the "future appropriate case"[256] to learn the Court's resolution to the "difficult constitutional question." In the meantime, however, this Article proposes a framework by which the Court should approach and answer the question.

III. A PROPOSAL FOR DEFINING AND PROTECTING MERITORIOUS LAWSUITS UNDER THE PETITION CLAUSE

My proposed framework for protecting civil suits under the First Amendment has two basic levels. The first is definition of the narrow right of court access that is at the core of the Petition Clause. I contend that this narrow right includes only winning claims. The second level is protection of the core right. I propose that the protection should consist of strict scrutiny for lawsuits within the core right and breathing room analysis for suits at the periphery of the core right, such as losing but reasonable suits. This is the proposal that I have put forth in previous articles. Here, I briefly repeat the proposal, but in a slightly different order. I start by stating the basic elements of my suggested analysis, as I have done in my previous articles, without factoring in the *BE & K* decision. In Part A, I give a broad overview of my proposed breathing room analysis framework. In Part B, I focus on the fundamental issue of setting the proper merit standard for determining the suits that are within the core right to petition courts. The proper definition of the core right is pivotal because the level of protection—strict scrutiny or breathing room analysis—turns on whether a suit is within or outside the core First Amendment right.

In Part C, I conclude by analyzing my proposal in light of the *BE & K* decision. The *BE & K* Court did not adopt any particular framework for analysis. Indeed, its discussion of the constitutional question was dicta, and the Justices had differences of opinion. Yet, I contend that my proposed form of analysis is at least consistent with much of the discussion in the three *BE & K* opinions and, more importantly, it is the best, if not only, means to address the concerns of the Court. Narrow

256. Refer to note 247 *supra* (quoting Justice Scalia's concurrence in *BE & K*).

definition of the core right to petition courts to include only winning claims, combined with breathing room protection for other meritorious suits, is the most likely means by which the Court can retain some flexibility to both protect litigants' rights and curb extreme cases of abuse.

A. *The General Approach*

I borrow and adapt my suggested analysis from the Court's speech jurisprudence. Although the Court has not yet formally adopted a particular scheme of analysis under the Petition Clause, it has suggested use of its Speech Clause methodology. In 1945, the Court declared that the rights of petition, speech, and press, "though not identical, are inseparable"[257] and demand more protection than other rights.[258] In *NAACP v. Button*,[259] the Court explained that this greater protection would require "strict scrutiny" review.[260] Under strict scrutiny, the government must have a compelling interest to regulate the right at issue, and it must narrowly tailor its regulation to meet that purpose.[261] That

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257. Thomas v. Collins, 323 U.S. 516, 530 (1945). The Court explained the relationship between petition and speech:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore united in the First Article's assurance.

Id. (citation omitted).

258. *Id.* The *Thomas* Court further explained the special place of First Amendment freedoms:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice.
>
> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

Id. (citations and footnote omitted).

259. 371 U.S. 415 (1963).

260. *Id.* at 438. In *Button*, the Court noted that its "decisions . . . have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.*

261. This special protection, as the *Thomas* Court noted, is more protective than that applicable to other constitutional rights, such as due process. Refer to note 258 *supra*. Due process requires only that the state reasonably aim its regulation to achieve a legitimate

the petition right is analogous to speech and protected by strict scrutiny, however, does not end the problem of determining the proper way to protect the right to petition courts. There are innumerable specialized doctrines, tests, and categories applicable in speech cases, and these standards seem to be in constant flux.[262] In proposing my framework for the petition right of court access, I keep the analysis relatively simple by adapting one of the Court's better known speech doctrines, the *New York Times* analysis.

Under *New York Times Co. v. Sullivan*,[263] courts take a two-step approach to protect speech in the defamation context. First, they characterize the speech at issue as being outside or within the core right of free expression. False speech is not part of the core right, while true statements of fact and opinion are within the core right.[264] In the second step, the courts determine what type of protection is due the different categories of speech. Speech within the core right gets nearly absolute protection under strict scrutiny review.[265]

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state object. *See* Jones v. Union Guano Co., 264 U.S. 171, 181 (1924) (holding that a court will not invalidate a precondition to filing suit under due process if "the condition imposed has a *reasonable* relation to a *legitimate* object" (emphases added)).

262. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Members of the Court disagreed as to whether strict scrutiny applied to a hate speech ordinance that regulated "fighting words," a category of speech not traditionally considered to be within the core right of protected speech. Justice Scalia, writing for the Court, characterized the ordinance as one invoking viewpoint and mandating strict scrutiny. *Id.* at 395–96. Justice White argued that fighting words warranted no protection. *Id.* at 399–400 (White, J., concurring in the judgment) ("This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."). Likewise, in recent cable access cases, members of the Court have disagreed as to the proper standard of review. *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 786 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (criticizing the plurality opinion for not applying strict scrutiny despite its use of "synonyms" for strict scrutiny); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring in the judgment) (arguing that the strict scrutiny standard found its way into First Amendment jurisprudence "by accident").

263. 376 U.S. 254 (1964).

264. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (stating that "there is no constitutional value in false statements of fact"). *See generally* 2 SMOLLA, FREEDOM OF SPEECH, *supra* note 25, §§ 23.6–.10, at 23-38 to 23-40.5 (discussing the different categories of speech in the defamation context, including false statements of fact, true statements, and opinions).

265. The Court has suggested, but has not unequivocally held, that all true speech is absolutely immune from civil liability, regardless of the motive of the speaker. This has been particularly evident in the defamation context. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (extending the doctrine to public figures and to civil liability other than defamation); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 778, 779 & n.4 (1986) (holding that the First Amendment required a private figure plaintiff to prove the falsity of the statement—as opposed to placing the burden of proof and risk of doubt on

The primary focus of the *New York Times* line of cases, however, is the protection due false speech, which falls outside of the core right. It is protected only to the extent necessary to protect the speech within the core right, through a form of breathing room. In *New York Times*, the Court gave true speech breathing space through the actual malice standard: a court may not award civil damages for false and defamatory speech about public officials or public figures unless the plaintiff can prove, by clear and convincing evidence, that the defendant spoke with actual knowledge or reckless disregard for the falsity of the statement.[266] In other words, to protect true speech about important issues, the Court protected some forms of false speech—negligent false speech about public officials—from liability.[267]

Breathing room analysis provides less protection than strict scrutiny. It is a form of reasonable analysis. The particular type of protection due each utterance depends upon the relative interests at stake and requires a balancing of interests. For example, in *Gertz v. Robert Welch, Inc.*, the Court did not give the protection of the *New York Times* actual malice standard to speakers who defamed private persons, as opposed to public figures, even as to speech that addressed matters of public concern.[268] Although the possibility of damages still would chill speech in this context, the *Gertz* Court allowed the chilling effect because speech about private persons is not as central to the First Amendment as speech about public figures, and because the state interest in protecting a private person is greater than that

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the speaker—at least where the defendant is a member of the media and the speech is of public concern); Garrison v. Louisiana, 418 U.S. 323 (1974) (holding that the First Amendment barred criminal sanctions against a speaker whose statements about a public official were true but spoken with ill will). In other contexts, the Court has allowed some regulation of true speech. The Court, for example, allows reasonable regulation of the time, place, and manner of commercial speech and speech in private fora. These doctrines reflect at least the spirit of strict scrutiny in that they tolerate very little regulation of true speech, the core right under the Speech Clause. *See generally* 1 SMOLLA, FREEDOM OF SPEECH, *supra* note 25, §§ 2.01–.08, at 2-2 to 2-72 (providing an overview of free speech methodology and noting that the term "heightened scrutiny" describes the Court's approach in most speech cases).

266. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). The Court thus gave the speech at issue two forms of breathing room: the actual malice standard and the higher clear and convincing evidence burden of proof. *Id.* at 279–80, 285–86 (finding that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands").

267. *See Gertz*, 418 U.S. at 342 ("[W]e have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood." (citation omitted)).

268. *Id.* at 342–43.

in protecting public officials who can protect themselves.[269] This, however, did not mean that this type of speech was totally unprotected. The *Gertz* Court extended a more limited form of breathing room to the speech at issue by forbidding presumed or punitive damages, which have a particularly chilling effect.[270]

Under this breathing room approach, the Court first looks at each form of governmental penalty or restriction and determines the chilling effect, if any, on utterance of true speech. To determine whether the chilling effect is undue, the Court balances the governmental interests behind the restriction against the First Amendment interests implicated by the particular type of speech. Thus, in the defamation context, the Court distinguishes between different types of plaintiffs, different standards for liability, different forms of damages, and different types of speech. This individualized review, however, is a restriction-by-restriction, rather than case-by-case, approach.

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269. *Id.* at 322–47. The *Gertz* Court explained the different interests presented by a private plaintiff:

> [W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> . . . .
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> [Public officials and public figures also assume some of the risk of defamation]. No such assumption is justified with respect to a [pr]ivate individual. He has not accepted public office or assumed an influential role in ordering society. . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.
>
> For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

Id. at 344–46 (quotation marks omitted) (footnote omitted).

270. *Id.* at 348–50. The *Gertz* Court explained the problem with punitive damages:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . . More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349. The Court later refined this aspect of breathing room by distinguishing *Gertz* as involving speech of public concern and holding that presumed and punitive damages could be awarded if the speech concerned purely private matters and persons. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–71 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of actual malice.").

As the Court in *Gertz* warned, a case-by-case approach might itself unduly chill speech.[271]

Other speech doctrines, outside of the defamation context, also address possible chilling effects. The prior restraint rule, for example, requires courts to critically examine injunctions,[272] even those issued against utterance of false speech, because injunctions stop speech rather than merely deter it.[273] The vagueness doctrine has a similar aim. Under this doctrine, a statute is invalid if it chills exercise of lawful speech by not clearly distinguishing between lawful and unlawful speech.[274] Finally, the overbreadth doctrine invalidates laws that chill speech by reaching too broadly and restricting both protected and unprotected speech.[275]

I propose, as I have in my previous work, that the Court use these basic doctrines to protect the right to petition courts. First, the Court should set a standard for determining the civil suits that address the core right of the First Amendment Petition Clause. Second, the Court should protect the core right by extending it some breathing room through protection of other lawsuits on the periphery of the core right.[276] The Court already

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271. *Gertz*, 418 U.S. at 343–44 (noting that "[t]heoretically . . . the balance between the needs of the press and the individual's claim . . . might be struck on a case-by-case basis" but that "this approach would lead to unpredictable results and uncertain expectations").

272. Prior restraints usually take the form of an injunction, but other regulations can have the same effect. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (noting that an "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum' is a prior restraint on speech" (citation omitted)).

273. Refer to notes 200–03 *supra* (discussing Justice O'Connor's analogy to prior restraint doctrine in *BE & K*).

274. Vagueness is a due process concern as to all statutes. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). When applied to First Amendment freedoms, however, the doctrine is even more exacting. *See* NAACP v. Button, 371 U.S. 415, 432–33 (1963) (discussing the "narrow specificity" with which statutes regulating First Amendment freedoms must be drawn).

275. Not just any potential improper application will invalidate a statute that otherwise properly reaches activity within the police power of government. The test is whether the statute substantially burdens protected activity. *See* Gentile v. State Bar, 501 U.S. 1030, 1077 (1991) ("The 'overbreadth' doctrine applies if an enactment 'prohibits constitutionally protected conduct.' To be unconstitutional, overbreadth must be 'substantial.'" (citations omitted)); *see also Button*, 371 U.S. at 432 ("[I]n appraising a statute's inhibiting effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.").

276. I also propose other limitations on the core right other than the winning claim definition. For example, I have argued that the core right to petition courts extends only to the initial filing of the suit and not to either preparation of the claim before filing or

has hinted at this general approach for Petition Clause cases. In *McDonald v. Smith*, the Court applied the *New York Times* breathing room doctrine to allegedly defamatory executive petitions.[277] In *Button*, the Court recognized that the NAACP litigation activity needed "breathing space."[278] In *Bill Johnson's*, the Court cited *Gertz* and held that baseless suits were not part of the core right to petition courts.[279] Although the Court there did not use the terms "breathing room" or "prior restraint," it implied such when it stated the two tests of merit—one applicable to ongoing suits and the other to completed litigation.[280]

B. The Core Petition Right to File Only Winning Claims

This leaves the important question of how to define the core right. I argue that the core right to petition courts extends only to winning claims. I fully acknowledge that this definition seems counter-intuitive. But, as I hope to demonstrate, it is not an unreasonable definition of the core right. There are some textual and historical bases for the narrow definition. More importantly, the narrow definition achieves the best balance of policy. It gives courts flexibility so that they can preserve a citizen's right to go to

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processing of the claim once it is filed. *See* Andrews, *Access to Court*, *supra* note 7, at 633–48. Yet, I have argued that the breathing room doctrine would protect some of this other activity so as not to chill the core right to file the claim. *See* Andrews, *Politically Motivated Suits*, *supra* note 7, at 70–74, 90–93; *see also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 896–99 (10th Cir. 2000) (Lucero, J., dissenting) (arguing that the breathing room doctrine required some protection of pre-litigation threat letters between private parties).

277. McDonald v. Smith, 472 U.S. 479, 486–87 (1985) (Brennan, J., concurring). Refer to notes 54–56, 60 *supra* and accompanying text (discussing the Court's view of statements in a petition to the executive as being in the same light as those made to any other public figure).

278. *Button*, 371 U.S. at 432–33. *Button* warned that statutes touching on First Amendment rights, including the right to petition, must be drawn with "narrow specificity":

> [S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . [T]he danger [is] tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Id. (citations and footnote omitted).

279. Refer to notes 203–09 *supra* (discussing the Court's treatment of baseless litigation under the First Amendment).

280. Refer to notes 80–85 *supra* and accompanying text (comparing the test applicable to ongoing suits with the test applicable to completed litigation).

court, on the one hand, and curb extreme cases of abuse, on the other.

Before I discuss the win-lose and objective tests of merit, I must address two preliminary questions. The first is whether any form of merit standard is warranted under the Petition Clause. After all, one could argue that the First Amendment protects all petitions, including frivolous complaints, regardless of their merit. I do not agree. Some form of merit standard is inherent in the petition right, at least as it applies to courts, for several reasons. First, the Petition Clause speaks of petitions "for redress of grievances."[281] A frivolous complaint arguably is not one "for redress." The Court has similarly limited other First Amendment rights even where the text is not as amenable to a narrow reading as is the Petition Clause. The Court, for example, excludes false speech from the core First Amendment right, even though the text broadly guarantees "freedom of speech."[282]

The Court also looks to history and policy to define constitutional rights. Courts historically have limited access based on the merit of the claim. Long before the Framers drafted the First Amendment, courts sought to bar or punish false pleadings and groundless suits.[283] The judicial hostility toward frivolous complaints has several sound policy bases. The defendant suffers needless reputation injury and financial loss when forced to defend meritless suits. This harm is particularly troublesome because the government participates in inflicting the harm by requiring the defendant to come to court. Moreover, baseless filings harm the very court system that is at the heart of the Petition Clause freedom. Taxpayer dollars are wasted on the judicial processing of frivolous claims. More significantly, frivolous suits could overwhelm the courts so that other citizens, with reasonable claims, could be denied access to justice. Thus, the Petition Clause's right of court access itself is threatened when courts tolerate frivolous claims.

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281. Refer to note 1 *supra* (quoting the First Amendment).

282. Refer to notes 264 *supra*, 296–97 *infra*, and accompanying text (discussing the Court's exclusion of false speech from the core right).

283. *See generally* Andrews, *Motive Restrictions*, *supra* note 7, at 692–704 (discussing the history of restrictions on court access). As discussed below, however, most early governmental restrictions were tied to whether the suit was won or lost, not merely whether the suit was groundless. Refer to notes 287–94 *infra* and accompanying text (describing various historical punishments for false pleadings and groundless suits); *see also* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 17–19 (1977) (noting that the "fines and amercements system reflects the common law's failure to distinguish falsity and dishonesty in a very sophisticated manner" and that as a result, the "losing party to a lawsuit had to pay a sum of money to the king for having been in the wrong before the king's court").

A second preliminary question is whether the plaintiff's motive itself might define and limit the scope of the right to petition. In other words, if the plaintiff has an improper motive, is he nevertheless filing a petition "for redress of grievances" within the meaning of the Petition Clause? In my previous articles, I answer yes to this question and address the textual, policy, and historical arguments at length.[284] Here, I note only the compelling policy reasons for not using motive to define the First Amendment right. As frequently noted by the Supreme Court, most petitions are accompanied by some selfish or other "less than ideal" motive.[285] This is particularly true with civil complaints. Most plaintiffs bear ill feelings toward the defendant. Indeed, one of the policy bases for extending the right to petition to the courts—providing an alternative to force—*assumes* such hostility.

More importantly, use of motive to limit the right to petition courts threatens the freedom of thought inherent in the First Amendment. The propriety of a particular motive tends to change with community views. For example, society today might think well of a plaintiff who wants to destroy the Ku Klux Klan or the big tobacco companies through litigation, but it is not difficult to imagine a different societal view only a few decades ago. The availability of courts should not turn on political mood swings. A plaintiff's bad motive in filing a civil action, by itself, should not take the claim outside the First Amendment. Instead, the definition should turn on the merit of plaintiff's claims.

This leaves the question at hand, which is setting the proper merit standard. As I have stated, I suggest that the Court adopt a winning claim standard for defining the core right to petition courts. I have previously argued that this is the constitutional standard set by the Court in *Bill Johnson's*,[286] but that point may

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284. *See* Andrews, *Motive Restrictions*, *supra* note 7, at 668–69; Andrews, *Professional Rules of Conduct*, *supra* note 7, at 13–26.

285. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961). For example, the Court in *Noerr* stated:

> The right of the people to inform their . . . government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id.

286. *See* Andrews, *Access to Court*, *supra* note 7, at 648–52; Andrews, *Motive*

be irrelevant now in light of the Court's seeming willingness to reopen the issue in *BE & K*. However, there are several independent arguments why only winning claims should be within the core right to petition courts.

The textual argument is the weakest. The Petition Clause's reference to "grievances" would seem to include both successful and unsuccessful petitions, so long as they are not frivolous. Yet, one also might argue that because the text speaks of "redress," it is limited to winning claims. Winning suits are the only petitions that get redress. I do not think that this textual argument alone is sufficiently persuasive to define the core right, but it at least suggests some ambiguity in the Petition Clause, thereby making the historical and policy arguments more determinative.

The historical arguments are stronger. This may come as a surprise to modern observers, but plaintiffs in the Anglo-American judicial system have long paid penalties, sometimes severe, when they have lost civil suits. In early English history, a loss was deemed the equivalent of a false swearing, and a losing plaintiff paid with his tongue.[287] Although English courts lightened the punishment to a form of fine paid to the King, they continued to burden plaintiffs with financial penalties for losing their suits.[288] Eventually the payment was made to the winning

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Restrictions, *supra* note 7, at 684–87; Andrews, *Politically Motivated Suits*, *supra* note 7, at 60–65.

287. Pollack and Maitland explain that a losing suit was considered "an aggravated form of defamation," a wrong about "which ancient law speaks fiercely" and for which a man, before the Conquest, "might lose his tongue." 2 FREDERICK POLLACK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 539 (2d ed. 1952).

288. *See* William C. Campbell, Comment, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1221–22 (1979). The early English practice evolved from payment with the plaintiff's tongue to payment of "amercement":

> Anglo-Saxon courts employed a simple system for guarding against false suits: the complainant unfortunate enough to lose his cause also lost his tongue, or, if that option proved distasteful, was compelled to pay his opponent compensation, called *wer*, which was fixed according to the complainant's status. Each complainant was required to provide sureties . . . .
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> The system of taxing fixed wer in response to false suits did not long survive the Norman conquest. It gave way to a new and more flexible system that evolved from Norman traditions—amercement.
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> The amercement system did not exact a previously fixed penalty from the losing plaintiff and in strict theory was not automatically applied to every case. In practice, however, immediately following the determination of the underlying suit, judges found virtually all losing plaintiffs to be in the King's mercy for a false claim. Liability then attached for some monetary penalty, which was assessed or "affeered" by honest men of the neighborhood. Once the penalty had been ascertained, the losing plaintiff or his pledges would pay it to the court.

party, as opposed to the crown, to reimburse the winner for his costs of suit.[289] This cost-shifting, today called the "English rule," applies to both losing defendants and losing plaintiffs and includes attorneys' fees.[290]

American courts today do not usually make the loser pay the winner's attorneys' fees, but this "American rule" is a relatively modern trend.[291] The concept of distinguishing between winning and losing claims, for purposes of assessing penalties, was a common practice at the time the Framers protected the petition right. The American colonies imposed costs, including attorneys' fees, on losing plaintiffs.[292] Historical evidence also suggests that

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Id. (footnotes omitted).

289. *See* 4 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 536–37 (1924). Professor Holdsworth describes how England moved to cost statutes under which the losing party reimbursed the winning party for its litigation expenses, as opposed to paying a fine to the King:

> [T]hough from an early date the Chancellor in the exercise of his equitable jurisdiction, had assumed the fullest power to order the defeated party to pay costs, it was only by degrees that the principle made its way into the common law. The amercement of the vanquished party was perhaps considered a sufficient punishment. But a payment to the king or lord was not much satisfaction to the successful party; and so, side by side with the amercement, we get the gradual growth of the rule that the vanquished party must pay costs. The amercement gradually became merely formal, and finally disappeared; but the law about costs has increased in bulk and complexity from the thirteenth century onwards.

Id. (footnotes omitted).

290. *See* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 853 (1929).

> The law giving costs to the successful defendant developed more slowly than that which gave costs to the plaintiff. . . . In 1607 the final step was taken when it was provided that a defendant might recover costs in all cases in which the plaintiff would have had them if he had recovered.

Id. (footnote omitted); *see also id.* at 861 (noting that an award of costs after 1875 often included consideration of motive but that in previous statutes "costs must follow the event" of the loss).

291. In 1796, the Supreme Court announced what would become the "American rule." *See* Arcambel v. Wiseman, 3 U.S. 306, 306 (1796) ("The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.").

292. The origin of the American rule is attributed to colonial hostility toward lawyers. John Leubsdorf, *Toward a History of the American Rules on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 1, 11 (1984). Lawyers originally collected most of their fees from the vanquished party, and colonial legislatures set fee schedules to limit how much attorneys could recover from the losing party. *Id.* at 10–11. Professor Leubsdorf explains this history:

> During much of the eighteenth century, virtually all the colonies tried to regulate fees by statute. To be effective, such legislation had to prescribe both the fees a lawyer could charge his client and those that could be recovered from a defeated adversary. The laws governing attorney fee awards, in other words, served less as a way to shift or not shift fees from one party to another than as a way to limit the amount of those fees. *Once the fee was set, it was taken for*

colonial legislatures likewise imposed costs on losing petitions that asked for private relief, but the record is thin as to actual cost procedures.[293] Moreover, even today, the American rule has many exceptions that allow courts to penalize losing parties, including plaintiffs, with fee awards.[294]

The policy arguments are mixed as to whether the core right should be limited to winning claims, but I contend that the balance of the arguments supports the narrow definition. Without question, losing but meritorious suits serve at least some of the policies underlying the right to petition. Meritorious suits, even if they are not ultimately successful, have social value. By providing a neutral body, the courts give a peaceful alternative for resolving disputes. Lawsuits that present reasonable legal arguments advance development of the law, even if they do not succeed. That reasonable but losing suits have social value, however, does not answer whether such suits should be within the core right to petition courts. To illustrate this point, I turn to the Court's treatment of false speech.

In the *New York Times* line of cases, the Court did not hold that false speech has no value at all. The ability to speak freely, even to utter false statements, has some social value. If the speaker is unencumbered, he can more fully participate in debate, and such debate is a peaceful alternative to more forceful methods by which the speaker might express himself, even if his intent is to utter falsehoods.[295] Instead, the Court in *Gertz* held that false speech has no "constitutional value"[296] because its harm outweighs its benefits:

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granted that it could be recovered from a losing party.

Id. (emphasis added) (footnotes omitted).

293. *See* A Speciall Court Held at Hartford, August 29, 1689, *reprinted in* 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 246 (1968) (setting out procedures for petitioners against other individuals, including service and, "if upon the tryall of the cause it doth appear that either the petitioners or the person or persons cited doe or have given the other any unjust trouble, the party wronged shall be allowed his just cost and damages as in other cases"), *available at* http://www.colonialct.uconn.edu/ViewPageByPageNew.cfm?v=3&p=246&c=4 (last visited Jan. 17, 2003).

294. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247–62 (1975) (surveying the history of federal cost and fee statutes). Today, a number of doctrines and statutes allow the assessment of attorneys' fees against the losing party. *See id.* at 257–69. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570–90 (1993) (summarizing the common law exceptions and the more than two thousand state and two hundred federal statutes shifting attorneys' fees). American courts also regularly make a losing plaintiff pay at least some of the defendant's other expenses. *See, e.g.*, 28 U.S.C. § 1920 (2000) (providing that "[a] judge or clerk or any court of the United States may tax as costs" certain listed items, such as marshal and clerk fees, court reporter fees, printing costs, and witness fees).

295. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

296. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating that "there is

> Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are 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."[297]

Thus, whether a particular activity falls within the core First Amendment right turns on a balancing of the activity's benefits against its detriments.

The social value arguments regarding reasonable but losing suits mirror those regarding false speech, but, admittedly, the analogy between losing suits and false speech is not perfect. Losing but meritorious suits have more value than false speech. The filing of a meritorious suit is more likely to advance law and promote positive change than the utterance of false speech. Moreover, a speaker is in greater control of the falsity of his speech than a plaintiff is with regard to the outcome of his suit. Assuming that a lawsuit is not grossly or intentionally frivolous, a plaintiff does not necessarily know whether his claim is deserving of redress. The outcome depends not only on the truth of the facts, but also on a number of other factors such as the passage of time, the relative ability of the lawyers, the status of the law, the competence of the judge, and the make-up of the jury.

Yet, on the other side of the scale, lawsuits impose greater burdens than speech. The filing of any civil suit imposes burdens on both the government and the defendant. One might be able to ignore false speech, but neither the government nor the defendant can ignore a lawsuit. Both must devote substantial resources in response to a civil suit. Furthermore, unlike the marketplace of ideas, judicial access is a limited resource. For every lawsuit that is filed and lost, governmental resources are diverted from processing winning claims. Thus, one could argue that although the factors are different in considering false speech and losing suits, the balance comes out the same way: there is

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no constitutional value in false statements of fact").

297. *Id.* (quotation marks omitted) (citation omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). In *Chaplinsky*, the Court held that a New Hampshire statute may properly outlaw epithets that are likely to provoke the average person to retaliation and that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Chaplinsky*, 315 U.S. at 572–74.

not sufficient constitutional value in losing but reasonable suits to include them in the core First Amendment right.

This result is more compelling when considered in light of the practical and policy implications of narrowly defining the core right to include only winning claims, as opposed to a broader definition. The principal implication of the definition is the level of protection given to the suits at issue. To illustrate this implication, I again use the example of false speech. Under *New York Times*, false speech gets less protection than true speech—regulation of false speech is tested under breathing room analysis rather than the strict scrutiny applicable to true speech (the core right).[298]

Breathing room analysis is a form of balancing, as was the initial determination of whether false speech had constitutional value, but the focus of the two balancing tests is different. Under the breathing room balancing test, the question is not whether the harms of false speech outweigh the benefits of false speech, but instead whether the regulation of false speech unduly chills the expression of true speech.[299] The analysis focuses the protection on the speech that really matters—true speech.

Likewise, narrow definition of the core right to petition courts would focus First Amendment protection on the suits that matter most, winning claims. Winning claims serve all of the social value of reasonable but unsuccessful suits, and more. Winning claims do not state merely plausible theories, they state legal and factual arguments that actually deserve relief. As recognized by the Court in *Bill Johnson's*, the First Amendment's interests in civil suits include "compensation for violated rights[,] . . . psychological benefits of vindication, [and] public airing of disputed facts."[300] Losing suits might air disputed facts or advance the law, but winning suits alone serve the additional aims of compensation and vindication. In other words, by serving all of the policy aims of the Petition Clause, winning suits are the core of the First Amendment right and should be protected by strict scrutiny, as is true speech.

Similarly, as under *New York Times*, narrow definition of the right of court access would not leave losing suits completely unprotected. Instead, the courts would apply breathing room analysis to determine whether a particular restriction on filing a

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298. Refer to notes 266–71 *supra* and accompanying text.

299. Refer to notes 270–71 *supra* and accompanying text (describing the balancing involved with breathing space analysis).

300. Bill Johnson's Rests., Inc. v. NLRB, 418 U.S. 731, 743 (1983) (quoting Balmer, *supra* note 67, at 60).

losing suit would unduly chill a plaintiff's ability to file a winning claim. As I have argued before, many government restrictions would fail breathing room analysis, for some of the same policy reasons that distinguish losing but reasonable claims from false speech.[301] The fact that a plaintiff cannot easily determine whether his claim will win or lose in court is a significant factor in the evaluation of chilling effect. For example, a court rule that purported to allow a plaintiff to file only winning claims would create an undue chilling effect on the ability to file winning claims, precisely because the plaintiff cannot make this determination before he files suit. Such a restriction, in most cases, would fail First Amendment breathing room analysis.[302]

Most motive restrictions on filing reasonable but losing claims would fail breathing room analysis for the same reason. Assume for illustration purposes a court rule that bars a person from filing suit for "any improper purpose." Federal Rule of Civil Procedure 11(b)(1) is an example of such a rule.[303] Even if such a rule were read to apply to only completed and unsuccessful claims, the rule still would chill the filing of winning claims. Because the plaintiff cannot determine in advance whether his claim will prevail, his only decision criteria is whether his purpose is proper. The vague prohibition on "improper" purpose further compounds his difficulty in deciding whether he may bring his claim. If the potential plaintiff concludes that he has an improper purpose within the meaning of the law and he wants to comply with the law, his only choice is to not file suit even though his claim might prevail. Thus, the motive restriction, even if limited to punish only losing claims, has a chilling effect on the filing of winning claims.

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301. *See generally* Andrews, *Rules of Professional Conduct*, *supra* note 7, at 13–29, 56–65 (assessing the rules of professional conduct for lawyers that might run afoul of the First Amendment right to petition courts); Andrews, *Motive Restrictions*, *supra* note 7, at 695–738 (addressing a range of laws that purport to limit court access based on the motive of the plaintiff).

302. By contrast, a rule that required a plaintiff to pre-certify that her complaint states objectively reasonable claims likely would pass breathing room analysis because the plaintiff can employ some standards to determine whether the claim is reasonable. Such a requirement might deter an overly cautious plaintiff from filing even a winning claim, but the chilling effect is far less. *See* Andrews, *Motive Restrictions*, *supra* note 7, at 787 (arguing that a prefiling standard of merit might deter some plaintiffs from filing a winning suit, but not nearly to the degree of a winning claim certification, and winning claim certification would not be allowed by the First Amendment).

303. *See* FED. R. CIV. P. 11(b). This rule requires plaintiffs to certify, among other things, that they have not filed the complaint for "any improper purpose." *Id.* I have argued that Rule 11(b)(1) violates the Petition Clause in many of its applications. *See* Andrews, *Politically Motivated Suits*, *supra* note 7, at 48 (concluding that "any use of Rule 11(b)(1) to sanction or deter [Paula] Jones from filing her claims, based solely on her motive, would have violated her rights under the First Amendment").

Whether this effect is undue depends on a balancing of the governmental interests behind the rule and the First Amendment interests at stake. The governmental purpose behind the "improper purpose" court rule is ambiguous, and that ambiguity itself undermines the strength of the government's interest.[304] One aim likely is to deter frivolous suits, because many frivolous suits are filed for improper purposes. But a ban on frivolous claims by itself would achieve this purpose, so the question is what additional interest a ban on improper motive might serve. The government may have some interest in keeping the motives of its litigants "proper"—so that its court system will not be used as a weapon in personal battles or vendettas—but such a purpose would intrude significantly into First Amendment freedoms. Because most litigants, even those with winning claims, have some ill motives, a ban on improper purpose would chill the filing of even the most meritorious claims. Thus, on balance, the chilling effect of such a court rule would be undue and would not survive breathing room analysis.

However, as the Court recognized in *Gertz*, the need for breathing room may decrease as the governmental interest changes. In the above example of the court rule, the governmental interest was a general one regarding administration of the courts. Laws such as the civil rights statutes have a more specific and compelling purpose—to prevent the personal and societal harms of discrimination. The civil rights laws, as currently worded, are broad enough to potentially apply to and penalize a plaintiff who files suit for a discriminatory purpose.[305] In such a case, the plaintiff would be using the courts not only to advance a personal vendetta but also to inflict harm, based solely on the defendant's race, disability, or other special status. This abuses the court system in a unique way. Although the formation of courts may be premised in part on hostility between the parties—to provide a peaceful alternative for resolution of dispute—courts were not created to assist persons in promoting racial or other wrongful discrimination.

Thus, as I have argued before, a court might be able to assess compensatory damages under the Fair Housing Act against a neighbor who, for a discriminatory purpose, filed and

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304. I explore this ambiguity and the potential governmental purposes behind the federal "improper purpose" rule, Federal Rule 11(b)(1), in Andrews, *Politically Motivated Suits*, *supra* note 7, at 85–90.

305. Refer to note 103 *supra* and accompanying text (quoting pertinent excerpts of the federal Fair Housing Act). *See also* Andrews, *Motive Restrictions*, *supra* note 7, at 739–40 (discussing the potential application of civil rights laws to punish civil suits).

lost an objectively reasonable suit against his neighbor.[306] To be sure, the mere possibility of these damages would chill the filing of winning claims for the same reasons that the court rule would do so. The chilling effect would be somewhat less because the civil rights laws prohibit a narrow category of motives that a plaintiff can more easily identify than the broad "improper purpose" of the court rule. Nevertheless, because the plaintiff cannot know in advance if he will prevail, the civil rights laws would chill some winning claims.[307] In this rare case, however, the chilling effect may be justified. Society may want this plaintiff in particular to stop, think, and refrain, and the First Amendment may allow this limited effect. In other words, the chilling effect may not be undue in light of the important governmental interests in both eliminating the harms resulting from insidious discrimination and preventing the courts from becoming a tool in inflicting those harms.

Change the burden, however, and the result of the balancing test necessarily varies. Even civil rights laws with important interests cannot unduly chill the core right. Breathing room analysis probably would not allow a court in a Fair Housing Act challenge to enjoin a reasonable suit before its completion or to impose punitive damages, because such measures would produce too great a chilling effect on the filing of winning suits. Similarly, under the vagueness and overbreadth doctrines, Congress may need to revise the civil rights laws so that they are explicit in their regulation of civil suits.

The foregoing discussion assumes that laws, even the civil rights statutes, could not punish suits within the core right because this application could not pass strict scrutiny. The Supreme Court for the most part has not permitted the civil rights laws, no matter how high their aims, to penalize the exercise of core First Amendment freedoms. This is not an easy area of the law to decipher, for the Court only loosely applies strict scrutiny criteria.[308] Instead, the Court seems to have

306. Andrews, *Motive Restrictions*, *supra* note 7, at 790–91.

307. *Id.* at 786–87.

308. For example, where the Court has invalidated civil rights laws in a First Amendment challenge, it is difficult to discern whether the Court is holding that the purpose behind the law is not sufficiently compelling or whether the law is not narrowly tailored to meet that aim. The Court, however, continues to cite strict scrutiny standards. Refer to note 317 *infra* (discussing the *Boy Scouts* case and the Court's reference to strict scrutiny); *see also* Andrews, *Motive Restrictions*, *supra* note 7, at 778–82 (discussing the Court's application of strict scrutiny to civil rights laws). The Court's cases under *New York Times* likewise provide little guidance because the Court's focus in those cases is on breathing room analysis of restrictions on periphery activity, not strict scrutiny of laws concerning core First Amendment activity. Refer to note 265 *supra* (discussing the Court's

adopted a substantial intrusion test, under which the Court examines the degree to which the civil rights law intrudes on core First Amendment freedoms. If the intrusion into the core activity is substantial, then the civil rights laws, no matter their compelling purpose, violate the First Amendment.

The Court's substantial intrusion analysis is illustrated by *Roberts v. United States Jaycees*.[309] In *Roberts*, the Court considered whether application of Minnesota's civil rights statute to compel the Jaycees to accept women violated the Jaycees's First Amendment right of association.[310] The Court answered no, because this application of the civil rights law did not substantially intrude on core First Amendment freedoms.[311] The Court explained that Minnesota's interest in eradicating sexual discrimination "plainly serves compelling state interests of the highest order"[312] and that the law, as applied to the Jaycees, did not impose "any serious burdens on the male members' freedom of expressive association."[313] Yet the Court also noted that the civil rights laws could not be applied to limit other, more fundamental and intimate associational choices, such as one's spouse.[314] In other words, the core associational right extends to intimate associations and expressive associations.[315] Any substantial intrusion by the government into these core associations violates the First Amendment, even if the government's purpose is to eradicate discrimination. Accordingly,

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use of breathing room analysis in the cases following the decision in *New York Times*).

309. 468 U.S. 609 (1984).

310. *See id.*

311. *Id.* at 623–24.

312. *Id.*

313. *Id.* at 626.

314. *Id.* at 620 (noting that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees").

315. *Id.* at 617–18. The Court explained the importance of these core associational rights:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Id.

the Court subsequently has held that the First Amendment does not permit states to compel parade organizers to include a gay and lesbian group,[316] and it does not allow states to force the Boy Scouts to admit gay scout masters.[317]

The Court has applied similar limits on the civil rights laws in other First Amendment contexts. For example, the Court has allowed a civil rights law to ban a discriminatory job advertisement because the advertisement was commercial speech that concerned wrongful activity and was not an expressive advertisement such as that at issue in *New York Times*.[318] In other words, the advertisement did not contain speech at the heart of the First Amendment speech right. The Court also has permitted civil rights laws to enhance the penalty for crimes, such as battery, that are motivated by racial hatred because the underlying conduct—battery—is not speech.[319] But the Court has not allowed civil rights laws to punish "hate speech" for its racial

316. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572–73 (1995) (holding that a Massachusetts civil rights law, which protected citizens from discrimination based on sexual orientation, could not be applied to force inclusion of a gay group in a parade because such application would violate the parade organizer's First Amendment rights of association and expression).

317. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000). After finding that the Boy Scouts was an expressive association, the Court examined whether the state law could regulate that association. *Id.* at 656. The Court noted some confusion in its cases assessing civil rights laws under the First Amendment right to association, but it reaffirmed a form of strict scrutiny. *Id.* at 648 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). This form of strict scrutiny was applied as a question of whether the state law placed a "severe intrusion" on the organization's expressive activity. *Id.* at 659 (citing *Hurley*, 515 U.S. at 580–81). The Court concluded that the New Jersey law constituted an impermissible intrusion on this core right. *Id.* "The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.*

318. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). In *Pittsburgh Press*, a city ordinance outlawed sex-designated employment advertisements. *Id.* The Court noted that unlike the political advertisement in *New York Times*, the job advertisements at issue did not take a "position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex" and did not criticize the ordinance or the city's practice of enforcing the law. *Id.* at 385. Instead, the newspaper classified its help-wanted listings by sexual preference, such as "Male Help Wanted." *Id.* at 379–80. According to the Court, the advertisements were commercial activity, which gets less protection under the First Amendment than other forms of speech. *Id.* at 387–88. Moreover, the speech at issue merited even less protection because it stated in essence that the employer would engage in unlawful hiring practices, just as if the advertisement proposed a sale of illegal drugs or prostitution. *Id.* at 388–89. Thus, any First Amendment interest in protecting the commercial speech was "altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

319. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489–90 (1993) (holding that Wisconsin could enhance a penalty based on racial motive and could prove that motive through evidence of protected First Amendment activity, if the underlying conduct itself, such as battery, was not protected by the First Amendment).

content.[320] The civil rights laws, no matter how compelling their purpose, cannot intrude on core First Amendment rights.

Thus, the definition of the core right to petition courts is crucial, for it determines the point at which a law's intrusion into a First Amendment freedom becomes "substantial." By analogy to the association cases, it is the equivalent of holding that expressive and intimate associations are at the heart of the First Amendment right of association. Thus, with respect to the right to petition, if the core right were to include reasonable but losing suits, the civil rights laws could not punish plaintiffs who brought such suits, even for a racially discriminatory purpose. If the core right were narrow and included only winning claims, the courts could not punish plaintiffs who won their suits, no matter their discriminatory purpose, but the courts might exact limited penalties, under appropriately drafted civil rights laws, against all other claims filed for discriminatory purposes.

Finally, by advocating a narrow definition of the core right, I am not arguing for the reversal of *Professional Real Estate Investors* or the cases that applied its objective standard in other contexts. It may be good public policy to grant greater protection to civil suits than that required by the First Amendment. Moreover, in many contexts, the added protection of the objective merit standard may be mandated by First Amendment breathing room analysis.[321] The question would be whether the governmental interest behind the other laws, whether antitrust statutes or state tort laws, is sufficient to justify their potential chilling effect. As I argue above, motive restrictions rarely would survive this test, but the validity of each law imposing motive restrictions on filing suit remains an open question until a court properly balances the competing interests and policies.

In sum, the definition of the core right to petition courts is indeed a "difficult constitutional question." It is a question that I believe must be answered narrowly. I recognize that my arguments as to practical results hint at an "ends justify the means" argument, but the practical implications of any ruling, especially constitutional rulings, should not be ignored.

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320. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392–94 (1992) (finding that a St. Paul ordinance prohibiting messages based on "bias motivated hatred" and "virulent notions of racial supremacy" constituted an improper content and viewpoint regulation of speech in violation of the First Amendment).

321. As Justice O'Connor noted in *BE & K*, the *Professional Real Estate Investors* standard gives litigation some breathing room by penalizing only those suits that were filed for an anticompetitive purpose. Refer to notes 205–09 *supra* and accompanying text. In other words, the standard protects some baseless suits from liability—baseless suits filed for purposes other than anticompetitive intent.

Moreover, I do not offer these arguments in isolation. I consider the textual, historical and other policy arguments, and they do not unequivocally point in one direction. Thus, the practical implications tip the scale and argue for a narrow definition of the core right to include only winning claims. For only through this definition can the courts retain some flexibility, albeit a very limited flexibility, to address and curb extreme cases of abuse.

C. *The Implications of* BE & K

Finally, I address how, if at all, the *BE & K* decision impacts my proposal. I believe not only that the Court's opinions in *BE & K* are consistent with my proposed framework but also that adoption of my proposal is the best way in which the Court can address most of its stated concerns. My analysis likely will not please all nine Justices (or the legal academic community), but no single system likely could achieve such unanimity. I fully recognize that my argument that the right includes only winning claims is neither initially appealing nor endorsed by the Court in *BE & K*. Yet, upon closer examination of the Court's opinions, my proposal fits remarkably well.

First, the majority suggested that motive alone does not define the petition right. In other words, the fact that a plaintiff has a bad motive by itself does not mean that he is not petitioning for redress within the meaning of the Petition Clause. This is an important issue, for if motive alone could serve as the basis for liability, the definition of the proper merit standard would be less important when evaluating laws that impose a motive limitation, such as the NLRA and antitrust statutes. The role of motive is a continuing concern of the Court with regard to First Amendment rights. It was a central issue in *Hustler Magazine, Inc. v. Falwell*.[322] In *Hustler*, the Court considered whether Larry Flynt's intent to use his speech to inflict emotional harm on Jerry Falwell could alone serve as a basis for liability.[323] The Court held that the First Amendment prohibited

322. 485 U.S. 46 (1988).

323. *Id.* at 50–51. *Hustler* magazine had published a cartoon parody suggesting that Jerry Falwell had a drunken, incestuous relationship with his mother. *Id.* at 47–48. Falwell did not prevail on his defamation claim because the jury found that the cartoon could not be mistaken for fact. *Id.* at 48–49. The jury found, however, that the cartoon caused Falwell emotional distress and awarded him more than $100,000 in damages. *Id.* at 49. Intent was the essential prerequisite to liability under this tort, and Larry Flynt admitted that he meant to harm Falwell. *See* RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 59–60 (1988) (quoting deposition testimony in which Flynt said that he wanted to "assassinate" Falwell through his parody). In oral argument, the Court pondered whether intent alone could ever trigger liability for speech. *Id.* at 268 (presenting excerpts of oral argument).

this liability, but it limited its holding to the case before the Court, which involved speech concerning a public figure.[324] Thus, *Hustler* left open whether bad motive in other cases could serve as the sole basis for punishing exercise of First Amendment freedoms.

The majority opinion in *BE & K* did not answer the question either, but Justice O'Connor suggested that motive alone could not serve as a basis for punishing civil suits. She cited *Hustler* as "prohibiting use of ill motive to create liability for speech in the realm of public debate about public figures."[325] Importantly, Justice O'Connor added:

> [I]ll will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U.S., at 69 (Stevens, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation.[326]

These two factors—the Court's reluctance to limit First Amendment rights based on bad motive and the frequency of ill motives in litigation—were the factors that Justice O'Connor claimed did not "ease" the constitutional question before the Court.[327] Yet, had motive been a proper basis on which to attach liability for civil suits, the question would have been easier. In other words, if the Court wanted an easier constitutional question, it simply could have held that motive alone is a proper basis for punishing civil suits. To be sure, the Court's decision relied primarily on the fact that the NLRB punished some litigation filed for a genuine purpose, but the Court's struggle to define and redefine the constitutional question and its general discussion of motive strongly suggest that the Court will not allow lawsuits to be punished based solely on motive, regardless of their merit.

By suggesting that motive does not define the right to petition courts, the Court placed greater importance on the merit standard. Although the Court did not decide the question of merit under the First Amendment, I contend that my proposed approach to defining the core right is reflected by the majority

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324. *Hustler*, 485 U.S. at 53 ("[W]hile such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.").

325. BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2401 (2002) (citing *Hustler*, 485 U.S. at 53).

326. *Id.* at 2400–01 (parallel citation omitted).

327. *Id.* Refer to notes 215–26 *supra* and accompanying text.

opinion. The Court cited its breathing room jurisprudence and struggled with defining the right under the Petition Clause, just as my approach proposes. Admittedly, by listing the three considerations, Justice O'Connor strongly suggested that the Petition Clause should protect losing but reasonable suits.[328] I do not disagree with this suggestion. In many instances, the First Amendment should protect the right to file such suits. That protection, however, should come from breathing room analysis. Nothing in the majority opinion forecloses this result.

Importantly, the majority opinion expressly referred to the breathing room doctrine and thereby suggested its approval of this general approach to test and protect civil lawsuits under the First Amendment. This is a significant suggestion, for this form of analysis was by no means clear before *BE & K*. I previously had argued for such an approach, but the Court never expressly applied it to judicial petitions. As I note above, the Court had suggested breathing room analysis in *Bill Johnson's*, but it did not formally adopt it as an analytical framework.[329] The Court did not do so in *BE & K* either, but its citation to breathing room cases, and not to other modern approaches to speech cases,[330] suggests that the Court finds breathing room analysis appropriate.

The question instead seems to be where the majority might draw the line for application of breathing room doctrine. That is the issue to which Justice O'Connor addressed her "three considerations."[331] To be sure, all three considerations argue for protection of losing but reasonable suits, but they do not necessarily argue for absolute protection as a core First Amendment right. One could interpret Justice O'Connor's litany of considerations as listing the arguments or factors that should be considered in making the decision as to breadth of the core right. Indeed, in my first article, I listed many of these concerns

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328. Refer to notes 208–15 *supra* and accompanying text.

329. Refer to text accompanying notes 279–80 *supra*.

330. For example, in an earlier article I considered whether the Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Court applied strict scrutiny to a hate speech ordinance, changed the form of analysis and outcome. *See* Andrews, *Motive Restrictions*, *supra* note 7, at 747–51, 758–60. I concluded that the *R.A.V.* analysis likely would reach the same result as under the breathing room doctrine. *Id.* Justice Breyer has suggested another form of balancing interests in recent speech cases. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225–29 (1997) (Breyer, J., concurring in part) (requiring "a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' . . . programming objectives, and also to decide whether the statute . . . strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences"); *see also* Andrews, *Motive Restriction*, *supra* note 7, at 749–50 (discussing Justice Breyer's approach). Neither new approach was suggested in *BE & K*.

331. Refer to notes 208–15 *supra* and accompanying text.

in weighing the same issue—whether losing and reasonable suits are within the core right and absolutely protected or on the periphery and protected by breathing room doctrine. And, it was to this weighing of arguments that Justice O'Connor cited my article.[332] Finally, the majority never decided the issue.[333] It merely stated the issue and arguments, as I had done in my article. The Court is free in the future to draw the line on either side.

The Court's reservation of open questions is particularly telling as to the approach it will take in future cases. The majority stated that it was not deciding whether the NLRB could sanction losing but reasonable suits (if filed for a truly retaliatory purpose) and not invalidating other litigation sanctions, such as Federal Rule of Civil Procedure 11 and fee-shifting statutes. This of course follows from the Court's narrow ground of decision. The Court in the future could reach any number of conclusions on these issues. Yet the fact that the Court expressly limited its holding to not reach these other restrictions suggests, at a minimum, that the Court wants to be cautious with regard to these laws. Breathing room analysis is a far more cautious approach than a broad reading of the core right. Thus, not only is the majority opinion sufficiently open to allow future application of my proposed definition and analysis, but my proposed framework also would better serve the Court's desire to cautiously apply the petition right to other litigation sanctions.

In contrast to the majority opinion, which strived to leave open as many issues as possible, the concurring opinions of Justice Breyer and Justice Scalia took a position. I contend that although the two opinions advocated for different end results, both reflect concerns that require a breathing room approach. Justice Breyer clearly stated his view that the NLRB should be able to continue its practice of punishing losing suits, if filed for a truly retaliatory purpose. He can achieve this result, if at all, only if the Court adopts the narrow definition of the right to petition courts. For if the Court adopted the broader definition and included losing but reasonable claims within the core right, the NLRB penalty would be subject to strict scrutiny. This application of the NLRA likely would fail strict scrutiny for the

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332. Refer to note 214 *supra* and accompanying text.

333. *See* BE & K Constr. Co. v. NLRB, 122 S. Ct. 2390, 2402 (2002) ("[W]e do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits . . . .").

same reasons the civil rights laws, which have an equal or more compelling purpose than the NLRA, would fail.[334]

If the Court adopted the more narrow definition of the core right, Justice Breyer would have at least an opening, under breathing room analysis, to make his policy arguments. This is not to say that he would prevail. In my previous articles, I have suggested that some laws, such as the civil rights statutes, would survive breathing room analysis. Following the lead of the *Bill Johnson's* win-lose test, I even suggested that the NLRA could be read to allow damages as to completed suits that were reasonable but unsuccessful.[335] However, as I next discuss, Justice Scalia raised a breathing room concern that I had not previously considered, which may tip the balance in a breathing room analysis and argue against allowing the NLRB to impose damages for such retaliatory suits. At a minimum, the NLRA likely would need revision so that it expressly addresses lawful and unlawful suits, in order for the NLRA to satisfy the vagueness and overbreadth doctrines.[336] In any event, Justice Breyer would need to embrace my proposed approach, as opposed to the broader definition of the core right, in order to have the best opportunity to make his policy arguments for permitting NLRA penalties.

By contrast, Justice Scalia suggested the opposite result. He seemingly would endorse a future holding under which the Court would limit the NLRB's ability to punish employer suits. He would hold that the NLRB could punish only those suits that are both objectively unreasonable and filed for a true improper purpose. This future holding could be a matter of restrictive statutory policy, as was *Professional Real Estate Investors*, but Justice Scalia suggested a First Amendment dimension to the problem.[337] This suggestion might reflect his view that the core right includes losing but meritorious suits, but I believe that the better interpretation is that Justice Scalia's First Amendment concerns arise out of breathing room doctrine.

Justice Scalia's chief concern with NLRB punishment of losing but reasonable suits was that a federal agency, rather than an Article III court, makes the factual finding as to motive.[338] Justice Scalia's concern mirrors that in *Bose Corp. v.*

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334. Refer to notes 308–20 *supra* (discussing strict scrutiny of civil rights laws).

335. *See* Andrews, *Politically Motivated Suits*, *supra* note 7, at 95–96 (contrasting potential breathing room analysis of the NLRA to that of Federal Rule of Civil Procedure 11(b)(1)).

336. Refer to notes 274–75 *supra* (defining the vagueness and overbreadth doctrines).

337. Refer to notes 250–55 *supra*, 339–41 *infra* and accompanying text.

338. *See BE & K*, 122 S. Ct. at 2403 (Scalia, J., concurring).

Consumers Union of United States, Inc.[339] In *Bose*, the Court reaffirmed that appellate courts must conduct a *de novo* review of the "constitutional facts" necessary for finding liability under the *New York Times* actual malice standard.[340] This is a form of breathing room. In order to ensure the protection of the actual malice standard, the appellate courts under *Bose* must independently review the factual basis for any finding of actual malice, which adds another layer of breathing room. The analogy is not perfect. *Bose* imposed *de novo* appellate court review of a jury's finding of fact. Justice Scalia instead was concerned about findings made by a federal agency. Yet, he echoed the concerns of *Bose* when he said that a "difficult question under the First Amendment" was presented by an executive agency punishing a reasonably based suit filed in federal court whenever the agency "concludes—insulated from *de novo* judicial review" that the plaintiff had a particular motive.[341]

That Justice Scalia was raising a breathing room issue is further reflected by the fact that his concerns did not extend to other findings made by the NLRB. Justice Scalia seemingly would allow the NLRB to make findings as to motive when the underlying suit was objectively baseless. This reflects the flexibility of breathing room analysis where the level of protection depends on the burdens and the relative governmental and First Amendment interests. Independent judicial review might be necessary under the breathing room doctrine when punishing losing but reasonable suits, but not necessary when punishing frivolous suits. The former involves greater First Amendment interests and is much more likely to create a chilling effect on winning suits than the latter.

Justice Scalia also suggested that a trial court could invoke common litigation sanctions against litigants that appear before

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339. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

340. *Id.* at 510–11. The *Bose* Court explained:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that not supported by clear and convincing proof of "actual malice."

Id.

341. *BE & K*, 122 S. Ct. at 2403 (Scalia, J., concurring).

the court.[342] The ability to impose such litigation sanctions depends first on what action the court is punishing. If the court is addressing affirmative misconduct of a litigant or his attorney, such as a misrepresentation or disobedience of a court order, the court has the power to punish the behavior, without Petition Clause problems, regardless of how the core right is defined.[343] Justice Scalia more likely was referring to the question reserved by the majority—the validity of fee-shifting statutes that impose a fee award solely because the plaintiff lost his case. For this type of statute, the definition of the core right is crucial. Courts, even Article III federal courts, are not free to infringe First Amendment freedoms. If the core right included losing but reasonable claims, many fee-shifting statutes would be in jeopardy under strict scrutiny analysis.

Take the example of an attorneys' fee award under a statute that shifts fees based solely on whether the plaintiff prevailed (as opposed to a statute such as the NLRA, which imposes additional burdens and which bases the award on additional criteria such as motive). At least one Justice in oral argument sought to distinguish such an award as a common form of cost, as opposed to punishment.[344] Yet, a fee award is a form of compensatory damages. Indeed, attorneys' fees are the primary damage suffered when a defendant is harmed by a civil suit. *New York Times* made clear that a compensatory damage award is a government restriction that can run afoul of the First Amendment just as a criminal penalty can.[345] The Court has not

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342. *Id.* (Scalia, J., concurring) (concluding that the majority was correct in not questioning the "validity of common litigation sanctions imposed by courts themselves").

343. This is in part because the core petition right protects only the right to file the initial claim and not its later processing. Refer to note 276 *supra*. Later procedures before a court are protected by breathing room analysis, and such analysis would permit punishment of affirmative misdeeds. Moreover, the Petition Clause likely would not prohibit a court from punishing a plaintiff for making a misrepresentation in the initial complaint itself because such misrepresentation seemingly would not be part of the core right to present *winning* claims. *See generally* Andrews, *Politically Motivated Suits*, *supra* note 7, at 90–93 (concluding that "the balance of interests might allow a motive ban on particular stages of the process because such a prohibition would have only a minor chilling effect and serve both governmental and First Amendment interests").

344. *See* Official Transcript, *supra* note 112, at *12 (noting that "one could easily say, when you're exposed to treble damages, punitive damages, yes, that's a punishment. . . . fee-shifting is the rule in most countries in the world").

345. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action [for defamation] and that is common law only . . . .

Id.

yet allowed compensatory damage awards as to true speech.[346] Indeed, it only grudgingly allows compensatory damages as to false speech.

To be sure, the government can impose some costs when the exercise of First Amendment freedoms burdens the government.[347] For this reason, courts in most cases can continue to require the plaintiff to pay a filing fee.[348] Fee awards, however, are a far more significant burden. Indeed, this potential burden is precisely why Congress chooses to shift fees, so that it can create either an incentive or disincentive to bring suit.[349] Thus, absent any other litigation misconduct, fees should be awarded, if at all, only against suits outside of the core right. If the core right were defined to include losing but reasonable suits, losing plaintiffs could not be burdened with fee awards unless they presented frivolous claims. Any simple fee-shifting statute that broadly applied to all losing plaintiffs would be unconstitutional.

By contrast, under my proposed framework, the constitutional free zone would include only winning plaintiffs. In other words, the Petition Clause would protect a winning plaintiff from the burden of a fee award,[350] but courts might be able to impose fee awards against losing plaintiffs with reasonable claims. The latter question would depend on application of the breathing room doctrine. This is where the difference between fee-shifting and other forms of punishment, such as treble damages, comes into play. Because fee awards are

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346. Refer to note 265 *supra* (discussing the Court's treatment of true speech in the defamation context).

347. Even in the case of protected speech, the Court allows the government to recoup some of its costs through permit or license fees, so long as those fees are not dependent on content. *See* Northeast Ohio Coalition for the Homeless v. City of Cleveland, 885 F. Supp. 1029, 1033–34 (N.D. Ohio 1995) (rejecting the argument that only nominal fees are constitutional and allowing a $50 fee because it was "reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order"). *See generally* David Goldberger, *A Reconsideration of* Cox v. New Hampshire*: Can Demonstrators Be Required to Pay the Costs of Using American's Public Forums?*, 62 TEX. L. REV. 403, 404–07 (1983).

348. *See* Andrews, *Access to Court*, *supra* note 7, at 679 n.418 (discussing filing fees). There may be some question as to the constitutionality of a filing fee under First Amendment scrutiny when the plaintiff is indigent. *See* Note, *A First Amendment Right of Access to Court for Indigents*, 82 YALE L.J. 1055, 1064–66 (1973) (arguing that filing fees as assessed against indigent plaintiffs would not pass strict scrutiny).

349. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415–19 (1978) (summarizing the various congressional policies behind fee-shifting provisions in the civil rights laws, including the "intent of Congress to cast a . . . plaintiff in the role of a 'private attorney general'").

350. *See In re* Workers' Comp. Refund, 46 F.3d 813, 821–22 (8th Cir. 1995) (holding that a statute that required plaintiff to bear the defendant state's costs, win or lose, in any suit challenging the refund statute violated the plaintiff's Petition Clause right of court access).

common and present somewhat lower burdens than other punishments, some fee-shifting laws might pass breathing room analysis, depending on the statute's purpose and its actual effect. Not all fee awards would survive breathing room analysis, but this approach at least allows a balancing of the relative interests.

Thus, Justice Scalia, like Justice Breyer, needs the freedom afforded by my proposed framework. Both Justices want to preserve the ability to punish some losing but reasonable suits. They just disagree as to the appropriate cases for such penalty. This is in essence a debate as to application of the various breathing room doctrines, and this debate is possible only when the core right is narrowly defined by whether the claim wins or loses.

IV. CONCLUSION

In *BE & K*, the Court had an opportunity to resolve the question of the proper merit standard under the Petition Clause. It chose not to do so. However, this does not mean that the Court left us without any clues as to the future case in which it will decide the "difficult constitutional question." Although no particular form of analysis is readily apparent from the three opinions in *BE & K*, closer examination of the opinions suggests that the Court may adopt my proposed framework, or one like it, in which the Court will narrowly define the core right to include only winning claims and broadly protect that right under breathing room analysis. The majority opinion is deliberately cautious and leaves this possibility open. Moreover, breathing room analysis, as opposed to strict scrutiny, gives Justice Breyer at least an opening to argue that labor law history and policy support punishment of losing but reasonable suits. Likewise, it also gives Justice Scalia a better opportunity to argue for continued application of fee-shifting statutes against losing plaintiffs.

More importantly, even without considering the Justices' views in *BE & K*, narrow definition of the core right is the better approach. The proposed framework would focus First Amendment protection on the suits that matter most—winning claims. This would not expose every losing plaintiff to punishment and would not close courthouse doors to aggrieved parties. Due to the unique nature of civil suits—principally the fact that a plaintiff can never know whether his reasonable claim will prevail—most restrictions on reasonable claims would fail breathing room analysis. The First Amendment would permit only rare punishment of losing but reasonable suits. The courts

might be able to apply a civil rights law to assess damages against a plaintiff who filed suit against his neighbor solely because of racial hatred, but even this punishment probably would be limited to clearly worded statutes that applied only compensatory damages to completed and unsuccessful suits. The virtue of the breathing room framework is that it is flexible enough to allow such damages in extreme cases. It protects the rights of most litigants to go to court with reasonable claims, and at the same time, it also protects the courts against flagrant cases of abuse.