No. 326PA19 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, Plaintiff-Appellee, v. RESCO PRODUCTS, INC. and PIEDMONT MINERALS COMPANY, INC., Defendants-Appellants.	)	From Orange County

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DEFENDANTS-APPELLANTS' NEW BRIEF

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ISSUES PRESENTED

I. WHETHER THE FIRST AMENDMENT'S PETITION CLAUSE SHIELDS A SPEAKER FROM LIABILITY FOR STATEMENTS MADE TO A LOCAL GOVERNMENT BODY AT A PUBLIC REZONING HEARING ABOUT THE SAFETY AND ENVIRONMENTAL RISKS OF CONDUCTING EXPLOSIVE BLASTING 300 FEET FROM A POTENTIAL RESIDENTIAL DEVELOPMENT.

II. WHETHER AN ALLEGATION THAT A SPEAKER "OVERSTATED" ITS VIEWPOINT TO A LOCAL GOVERNMENT BODY AT A PUBLIC HEARING ABOUT A PENDING DECISION IS ACTIONABLE AS A MISREPRESENTATION DESPITE THE PETITION CLAUSE.

INTRODUCTION

"The American Revolution was fought for the freedom to criticize the Crown. We have resisted censorship, Nazism, McCarthyism, and suppression of thought and belief in all forms. From city hall to Congress, neighborhoods to nation, soapbox to sit-in, picket lines to prime time, Americans feel they have a "right" to speak out on important issues, to each other and to their government officials. We accept the risk of equally public and hard-hitting rebuttal from the other side, but we assume that the system, which encourages us to speak out, will protect us when we do."

This is a case of first impression for this Court. It directly implicates the First Amendment's Petition Clause and affords the Court its first opportunity to define the scope of Petition Clause protection in North Carolina. The Court of Appeals held that liability may be imposed on a speaker for statements made to a public body, during a public meeting, to influence a rezoning decision, if they are alleged to be an "overstatement." The First Amendment and Petition Clause forbid such liability and provide absolute protection for such statements at public meetings. This Court must correct the Court of Appeals' error and protect North Carolinians' right to speak and petition local governments about their grievances without fear of retaliatory litigation.[1]

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[1] George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, 2 (Temple Univ. Press) (1996). This type of civil action has been described as a "SLAPP" lawsuit. The acronym "SLAPP" stands for Strategic Lawsuits Against Public Participation and was coined by Pring and Canan. Pring and Canan cite New York trial judge J. Nicholas Colabella, who describes SLAPPs as

> [S]uits without substantial merit that are brought . . . to "stop citizens from exercising their political rights or to punish them for having done so" . . . SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer

This case arises from statements made at a public hearing before the Hillsborough Town Board and Planning Board (together, the "Town Board") as they sat jointly to consider a rezoning petition. The Town Board was considering whether to grant a petition by Plaintiff-Appellee Cheryl Lloyd Humphrey Land Investments, LLC ("Humphrey Land") to annex and rezone a property for residential development. Defendant-Appellants Resco Products, Inc. and Piedmont Minerals, Inc. (together, "Resco") appeared through a representative who spoke to the Town Board to oppose the rezoning, exercising time-honored First Amendment and Petition Clause rights.

Resco told the Town Board that (1) it operated an active mine adjacent to the land at issue in Humphrey Land's Petition, (2) it engaged in explosive blasting at the mine, (3) its explosive blasting operations were conducted roughly 300 feet from Humphrey Land's proposed residential development, potentially impacting and endangering future residents, and (4) it would need to undertake costly additional safety precautions if the Town Board allowed the portion of the planned development closest to the mine to proceed.

> moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a Pyrrhic victory. . . The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 656 (1992).

Humphrey Land now seeks to hold Resco liable for its petitioning activity before the Town Board. It asks this Court to strip Resco's statements of Petition Clause protection in retaliation for opposing Humphrey Land's rezoning petition before the Town Board.

The Superior Court, Orange County (the Hon. Michael O'Foghludha presiding) correctly dismissed Humphrey Land's retaliatory complaint, recognizing the First Amendment and Petition Clause protections it implicated. But the Court of Appeals reversed, holding that Resco's petitioning activity was not protected because (1) this action did not arise "between competitors in the marketplace" or assert antitrust claims and (2) because Resco "overstated" or "mis-described" the prospective risks of explosive blasting conducted 300 feet from a residential development—despite the ultrahazardous classification North Carolina's courts assign to blasting. 2019 N.C. App. LEXIS 595, 831 S.E.2d at 401, 402.

This Court should reverse the Court of Appeals decision and affirm the Superior Court's dismissal of Humphrey Land's Complaint. That Complaint, which asserts a single claim for tortious interference with prospective economic advantage, infringes Resco's absolute right to petition the government for redress of grievances. Resco's statements sought to procure government action—the denial of a rezoning petition—by asking the Town Board to consider the prospective risks and impacts that blasting would have on residents of an adjacent proposed development as the Town Board considered whether to allow the development to proceed. Resco should not be subjected to the threat and expense of litigation with Humphrey Land for

"overstating" the risks and impacts of blasting in statements to a Town Board at a public hearing – the essence of the First Amendment right to petition.

The Court of Appeals decision jeopardizes North Carolinians' protections for petitioning activity. If it stands, the decision will allow tortious interference liability to be imposed against any citizen who speaks out against a proposed development to a zoning board or other government body at a rezoning hearing or similar public meeting. Any citizen who seeks to speak out on a zoning or land use decision being considered by a local government body—even based on public health and environmental risks—will risk liability for "overstating" or "mis-describing" their concerns. Meanwhile, a developer seeking rezoning can leverage the threat of litigation to silence critics. Such a threat could easily chill public debate at public meetings because the Court of Appeals ruling means that alleged "overstatement" is now the basis for prolonged litigation and potential liability.

Accordingly, this Court should reverse the decision of the Court of Appeals. It should uphold the trial court's Order dismissing Humphrey Land's Complaint, because Resco's petitioning activity is absolutely protected by the First Amendment.

STATEMENT OF THE CASE

Humphrey Land filed this tortious interference with prospective advantage lawsuit against Resco on 27 October 2017. (R p 9). Resco moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Motion"). (R p 19). The parties presented briefs in support of and opposition to the Motion, and the Orange County Superior Court heard the Motion on 1 October 2018. (R pp 23, 30, 112). The trial court granted Resco's Motion

and dismissed the complaint. (R p 112). Humphrey Land filed its Notice of Appeal on 29 October 2018. (R p 113).

Without oral argument, the Court of Appeals issued its opinion on 16 July 2019, reversing the trial court's Order. 2019 N.C. App. LEXIS 595, 831 S.E.2d 395. Resco timely filed a Notice of Appeal Based Upon a Substantial Constitutional Question and Alternative Petition for Discretionary Review on 20 August 2019, which this Court granted on 28 February 2020.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's Order was a final judgment on all claims alleged in the operative Complaint, which was appealable to the Court of Appeals as of right. N.C. Gen. Stat. § 7A-27(b)(1). Following the Court of Appeals' decision, this Court granted Resco's Petition for Discretionary Review. This Court has jurisdiction. *See* N.C. Gen. Stat. § 7A-31.

STATEMENT OF FACTS

In the fall of 2013 and early 2014, the Hillsborough, North Carolina Town Board and Planning Board, sitting together, held a series of public hearings (together, the "Town Board"). (R p 13, ¶ 21, p 73:10-11). At those hearings, the public was given the opportunity to speak in opposition to or in support of Humphrey Land's rezoning petition. The petition asked the Town Board to annex 45 acres of Humphrey Land's property into the Town of Hillsborough and to rezone it for residential use. *Id.* Humphrey Land filed the petition because it sought to develop its property and was in negotiations with a developer, Braddock Park Homes, Inc. ("Braddock"), for the sale of the 45-acre parcel for construction of a 118-unit townhome subdivision. (R p

13, ¶¶ 17-19). Before the development could proceed, Humphrey Land needed the Town Board to approve its petition. (R p 13, ¶ 19).

At one public hearing on 16 January 2014, Resco exercised its constitutional right to speak in opposition to Humphrey Land's Petition. (R p 13, ¶ 22, p 73:10-11). Through a representative, Resco told the Town Board that (1) it operated an active mine right next to Humphrey Land's 45-acre parcel, (2) it regularly engaged in explosive blasting at the mine, (3) the explosive blasting operations were conducted roughly 300 feet from a 5.5 acre portion of the planned townhome development, potentially impacting and endangering future residents, and (4) it would have to take costly additional safety precautions if the 5.5 acre portion of the planned development closest to the mine was rezoned and developed.[2] (R pp 13-15, ¶¶ 21-27).

After the 16 January 2014 hearing, but before the Town Board issued its final decision on the rezoning petition, Humphrey Land and Braddock allegedly entered into a Purchase and Sale Agreement on 28 February 2014 (the "Agreement"). (R pp 15 ¶ 30). Braddock bought 41 acres of Humphrey Land's property for $85,000 per acre. *Id.* Under the Agreement, Braddock also obtained a "free look" at the remaining 5.5 acres closest to Resco's mine and, subject to Humphrey Land's acceptance, the right to modify the Agreement to exclude the 5.5 acres from its purchase. (R p 15 ¶¶ 31-32).

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[2] Resco's alleged "overstatements" at the public hearing consisted of expert testimony on explosive blasting, two studies performed by the National Institute for Occupational Safety and Health on the dangers of toxic fumes and fly rock associated with explosive blasting, and a 20 November 2013 decision from the Federal Mine Safety and Health Review Commission. (R p 74:17-25).

After the Agreement was final, the Town Board approved the annexation and rezoning of all 45 acres despite the health and safety concerns Resco had raised at the 16 January public hearing. (R p 15 ¶ 28). Despite this approval, Braddock decided to exercise its right to modify the contract and so excluded the 5.5 acres, citing the statements that Resco made at the public hearing. (R pp 15-16 ¶¶ 28, 33). The remaining 41 acres of the subdivision were developed as planned. (R pp 79-80).

Humphrey Land then sued Resco for tortious interference with prospective economic advantage, seeking damages of nearly $500,000 and alleging that Resco's petitioning activity amounted to intentional interference with Humphrey Land's contract to sell the 5.5 acres of land to Braddock. (R pp 9-17). Resco moved to dismiss under Rule 12(b)(6), arguing: (1) the *Noerr-Pennington* Doctrine and the First Amendment's Petition Clause absolutely protected Resco's right to petition the Town Board for redress at the rezoning hearing; (2) a tortious interference with prospective economic advantage claim could not be based on a party's exercise of a contract term; and (3) even if interference occurred, the interference was legally justified by the safety and environmental concerns inherent in explosive blasting. (R pp 19-21, 23-27).

After reviewing the parties' briefs and considering arguments at the 1 October 2018 motion hearing, the trial court granted Resco's motion and dismissed the Complaint with prejudice. (R p 112). Humphrey Land appealed (R p 113). Without oral argument, the Court of Appeals reversed, holding that (1) First Amendment and Petition Clause protections for Resco's petitioning activity did not apply outside the

antitrust context of the *Noerr-Pennington* doctrine; (2) Resco could not claim Petition Clause protection because it "overstated" its concerns to the Town Board during the public hearing; (3) Resco could not use the fact that it engaged in ultrahazardous explosive blasting as a defense to claims that its "overstatement" was an actionable misrepresentation; and (4) a third party's exercise of a contract right to modify an existing agreement satisfied the prospective economic advantage element of a tortious interference claim. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc. and Piedmont Minerals Co.*, 2019 N.C. App. LEXIS 595, 831 S.E. 2d 395, 401-405 (2019).

ARGUMENT

I. STANDARD OF REVIEW

"This Court reviews *de novo* the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 97, 834 S.E.2d 404, 411 (2019) (citations omitted). "[T]he Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* at 97-98 (*citing CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 659-60 (2016).

If the facts alleged in the complaint fail to give rise to any claim which entitles the pleader to relief dismissal is warranted. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). Dismissal is also warranted "when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Id.* For purposes of reviewing a complaint for legal sufficiency, unwarranted deductions of fact are not

entitled to a presumption of truth and should be disregarded. *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 163 (1970) (in reviewing a 12(b)(6) motion, "unwarranted deductions of facts are not admitted.").

Whether an activity is protected by the First Amendment is a question of law. *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3d Cir. 1995). The *Noerr-Pennington* doctrine grants First Amendment immunity to those who engage in constitutionally protected petitioning activity, and its application is also a question of law. *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003).

II. THE COURT OF APPEALS DECISION VIOLATES RESCO'S FIRST AMENDMENT RIGHTS.

The Court of Appeals failed to recognize that the First Amendment's Petition Clause protected Resco's statements at the public hearing. It incorrectly held that the *Noerr-Pennington* doctrine's antitrust origins restrain and limit Resco's First Amendment and Petition Clause protection. The holding strips Resco of its constitutional protections against a retaliatory tortious interference lawsuit based entirely on the content of its petitioning speech. After acknowledging the *Noerr-Pennington* doctrine, the Court of Appeals looked only to a few, scattered North Carolina precedents rather than the substantial federal precedents that expansively define Petition Clause protection. Accordingly, this Court should reverse and hold that the First Amendment shields Resco's petitioning speech.

A. The Court Of Appeals Incorrectly Limited First Amendment Protection For Petitioning Activity to the Antitrust Context.

A party may invoke Petition Clause protection through the *Noerr-Pennington* doctrine when its First Amendment right to petition is attacked. The United States

Supreme Court created the *Noerr-Pennington* doctrine to protect "citizens' participation in government," *City of Columbia v. Omni Outdoor Adver.,* 499 U.S. 365, 383 (1991), because "[i]n a representative democracy such as this, [the] government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961). The doctrine is a constitutional one that bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally protected petitioning activity. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 516-17 (2002) (reversing circuit court's holding that *Noerr-Pennington* only applied in antitrust context); *N.A.A.C.P. et al. v. Claiborne Hardware Co. et al.*, 458 U.S. 886, 913-914 (1982) (applying the *Noerr-Pennington* doctrine outside antitrust context and recognizing First Amendment immunity for a business boycott); *Good Hope Hosp., Inc. et al. v. N.C. Dept. of Health and Human Servs.*, 174 N.C. App. 266, 275-76, 620 S.E.2d 873, 881 (2005) ("We hold that *Noerr* applies in the state courts of North Carolina.") (*quoting Gen-Probe, Inc. v. Amoco Corp.*, 926 F.Supp. 948, 956 (D.Cal. 1996) (internal quotation marks omitted).

While the doctrine may have originated in antitrust litigation, neither the doctrine nor the First Amendment principles that are its foundation are confined to that context. *Content Ext. and Trans. LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014) (applying *Noerr-Pennington* to claim for tortious interference and RICO violations); *IGEN Intern., Inc.*, 335 F.3d at 310-13 (applying *Noerr-Pennington*

to claims for tortious unfair competition and breach of contract); *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (reasoning that *Noerr-Pennington* may apply state tort claims because "it is hard to see why, as an abstract matter, . . . common law torts . . . might not in some of their applications be found to violate the First Amendment."); *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987) (applying *Noerr-Pennington* to a claim for tortious interference with contract); *Havoco of Am. Ltd. v. Hollobow*, 702 F.2d 643, 649-50 (7th Cir. 1983) (*Noerr-Pennington* "has been applied to protect the First Amendment right to petition against claims of tortious interference with business relationships.").

But the Court of Appeals' opinion ignores these precedents, including the Supreme Court's express application of the doctrine outside the antitrust context in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993) ("Whether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts* . . .") (emphasis added). To support the doctrine's application outside of anti-trust, the Supreme Court cited *N.A.A.C.P. v. Claiborne Hardware Company*, a non-antitrust case involving the right to petition and freedom of association. 458 U.S. 886 (1982). Applying an analysis identical to that used in antitrust cases, the *NAACP* Court held that the doctrine immunized black citizens engaged in a boycott of white merchants from three state law claims including malicious interference with plaintiffs' businesses. *Id.*

The Court of Appeals opinion turns on its incorrect view that *Noerr-Pennington* is limited to claims "between competitors in a marketplace" or otherwise

alleging "anti-competitive-related harms." 2019 N.C. App. LEXIS at 595, 831 S.E.2d at 401. This misreads *Noerr-Pennington*'s specific Petition Clause protection of claims that do implicate antitrust concerns into a limitation on the Petition Clause itself, which protects petitioning activity and speech much more generally. Petition Clause protection is not limited to "anti-competitive-related" petitioning activity, and the *Noerr-Pennington* doctrine is grounded in the First Amendment's express protections for petitioning speech and activity—not the statutory construction of the Sherman Act. *See* U.S. Const. amend. I; *BE & K Constr. Co.,* 536 U.S. at 524-26 (reasoning that the right to petition is the most precious of liberties safeguarded by the Bill of Rights and implied by the very idea of a republican form of government, and therefore the Court would not "impute to Congress an intent to invade [those] freedoms," through the Sherman Act or any other law) (internal citations omitted).

The Court of Appeals refused to recognize that Resco's statements to the Town Board sought to influence its decision on the pending rezoning petition, and were paradigmatic petitioning speech protected by the Petition Clause. It ignored not only the text of the First Amendment, but also settled Petition Clause jurisprudence. It then endorsed a landowner's tortious interference complaint based solely on petitioning speech *at a public hearing* that sought to influence *a public body* deciding a *rezoning petition* because the speaker was a neighbor, not a business competitor.

For these reasons, this Court should reverse the Court of Appeals and hold that the First Amendment shields Resco's exercise of petitioning activity from Humphrey Land's retaliatory tortious interference claim.

B. Humphrey Land's Claims Directly Attack Resco's Exercise of Its Constitutionally Protected Petitioning Rights and Speech.

The text of the First Amendment guarantees Resco the right to petition the government, through its representatives, for redress of grievances. The Court of Appeals holding denies these First Amendment rights because it holds that Resco's "overstatement" of its position at a public hearing to a public body is now the basis for prolonged litigation and potential liability. It allows Humphrey Land to pursue damages claims that seek to punish Resco for speaking in opposition to Humphrey Land's rezoning petition at a Town Board public meeting, as the Town Board was considering whether to approve or deny that petition. Left uncorrected, the Court of Appeals' holding will encourage tortious interference claims against citizens who speak up at a public hearing before a local government body, inevitably chilling public debate. Any citizen or entity who seeks to redress grievances with a local government body at a public hearing will think twice for fear of being held liable in tort.

"Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. I.[3] The Petition Clause, applicable to the states through the Fourteenth Amendment, is the foundation of all liberties. *NAACP,* 458 U.S. at 886 (in a civil lawsuit between private parties the application of state rules of law by state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (expression on public issues

[3] Nothing in the First Amendment's text limits Petition Clause protection to claims between "business competitors in the marketplace" or "anti-competitive-related harms." *Cf.* Ct. of App. Op., 2019 N.C. App. LEXIS at 595, 831 S.E.2d at 401.

"has always rested on the highest rung of the hierarchy of First Amendment values"); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.") Historically, it was the first popular right to be recognized. From the Magna Carta to The Colonial Laws of Massachusetts, the Right to Petition the government for redress was consistently recognized.[4] In fact, North Carolina was one of four states that specified during ratifying conventions for the proposed federal constitution that the right to petition should be guaranteed without exception.[5] And today, the right to petition is guaranteed by the First Amendment. U.S. Const. amend. I; *cf.* N.C. Const. art. I, § 12 ("The people have a right . . . to apply to the General Assembly for redress of grievances.").

Constitutionally protected petitioning activity encompasses the pursuit by individuals and businesses of personal, political, and economic goals, and their

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[4] Petitioning as a right was specifically recognized in Magna Carta of 1215: "[I]f we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any of the articles of the peace or of this security, and the offences be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, *petition to have the transgressions redressed without delay*." W. McKechine, *Magna Carta, A Commentary on the Great Charter of King John* 467 (2d ed.) (1914) (emphasis added); "[E]very man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any public Court, Council or Town Meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information, whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner." THE COLONIAL LAWS OF MASSACHUSETTS, 90 (Reprinted From the Edition of 1672) (1887).

[5] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE CONSTITUTION 21-663 (J. Elliot ed.) (1866).

petitioning activity comes in many forms. *See Citizens United v. FEC*, 558 U.S. 310 (2010) (corporations are entitled to First Amendment protection in the same manner as individuals). It includes any peaceful attempt to promote or discourage government action at any level and in any branch. *See* LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 96-16, 99th Congress, 1st Sess. 1141-45 (1982). For example, reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, lobbying for legislation, and engaging in peaceful boycotts and demonstrations are all forms of constitutionally protected petitioning activity. *McDonald v. Smith*, 472 U.S. 479 (1985); *NAACP*, 458 U.S. at 886; *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bridges v. Cal.*, 314 U.S. 252 (1941); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Havoco of Am., Ltd.*, 702 F.2d at 643.

To ensure the right to petition is protected, the First Amendment mandates prompt dismissal of private claims that chill or seek to punish petitioning activity. Early dismissal is essential to protect a party's petitioning rights because the threat of having to defend a lawsuit is as chilling to the exercise of petitioning activity as fearing the outcome of the lawsuit itself. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740-41 (1983); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) *cert. denied,* 385 U.S. 1011 (1966) (holding summary procedures are especially essential when First Amendment rights are at issue because free debate is at stake).

The Supreme Court explained the dangers of allowing lawsuits that attack First Amendment rights in *Bill Johnson's Restaurants v. NLRB*:

> A lawsuit no doubt may be used . . . as a powerful instrument of coercion or retaliation . . . Regardless of how unmeritorious the . . . suit is, the defendant will most likely have to retain counsel and incur substantial legal expenses to defend against it . . . Furthermore . . . the chilling effect . . . upon a defendant's willingness to engage in constitutionally protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.

461 U.S. at 740-41.

The purpose of the First Amendment's Petition Clause protections is not only to avoid the imposition of damages for engaging in petitioning activity, but also to promote full and free exercise of petitioning rights. Unless First Amendment freedoms are shielded from the harassment of civil lawsuits, citizens will self-censor resulting in a less uninhibited, less robust, and less wide-open public debate. *Washington Post*, 365 F.2d at 968 (*citing Smith v. Cal.*, 361 U.S. 147, 154 (1959)).

The Court of Appeals' new standard for Petition Clause protection encourages prolonged litigation rather than early dismissal. It urges a judge or jury to scrutinize a party's petitioning statements ex post facto to determine whether the statements could have been "overstated" or "mis-described," and if so, to impose civil liability for petitioning speech. The Petition Clause does not permit a jury or judge to second-guess petitioning speech outside the public meeting context because to do so would amount to slow motion censorship. *See Miner v. Novotny*, 60 Md. App. 124, 481 A.2d 508 (1983) (challenges to petitioning activity must be resolved according to objective criteria because any subjective determination from a court or jury would fail to supply

protection). The proper place to combat petitioning speech directed to a public body is before that public body, and it is up to that body to weigh the merits of the speech and act accordingly—which the Town Board did when it approved Humphrey Land's petition.[6]

It is indisputable that Resco's statements to a Town Board, at a public hearing conducted by the Town Board, intended to influence the vote on a petition the Board was considering, are constitutionally protected petitioning speech. *See Cal. Motor Transp. Co.*, 404 U.S. at 510 ("Certainly the right to petition extends to all departments of the Government."); *Patrick Henry Estates Homeowners Ass'n v. Miller*, 758 F. Supp. 2d 331, 344 (N.D. Va. 2010) (holding "there can be no question that petitioning a planning commission and appearing for a public hearing conducted by a planning commission are petitioning activities" and that defendant's petitioning activities were immune from plaintiff's tortious interference with business relationship claim by the *Noerr-Pennington* doctrine).

In fact, Humphrey Land's Complaint makes it clear that it seeks to hold Resco liable for exercising its right to petition the Hillsborough Town Board for redress:

> In the fall of 2013, the Town of Hillsborough and or its planning board ("Town of Hillsborough") conducted a series of meetings to consider whether the property to be purchased by Braddock Park Homes, Inc. could be rezoned and annexed into the Town.

(R. p 13 ¶ 21).

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[6] "Despite [Resco's] objection, the Town of Hillsborough approved [Humphrey Land's] request . . .". (R p 15 ¶ 28).

> *During the approval process required by the Town of Hillsborough* to approve the Braddock Park project, the [Resco] Defendants requested that the Town [of Hillsborough] deny the approval [of HLC's Petition] which was proposed on the parcel of land adjacent to their Hillsborough Mine, due to the potential threat of damage to the health safety and welfare of future residents [of the proposed development] due to fly rock and structural damage from the operation of [Resco] Defendants' Mine.

(R p 13 ¶ 22) (emphasis added).

> *During the course of the meetings before the Town of Hillsborough*, the Defendants . . . *misrepresented* that the [prospective developments] residents would be endangered from fly rock . . . . excessive air blasts . . . [and] excessive ground vibrations from the blasting operations at the Defendants' Hillsborough Mine.

(R p 14 ¶¶ 23-25) (emphasis added).

> The Defendants intentionally induced Braddock Park, Inc. not to enter into a contract for the purpose of Phase II of the Town Home Project *by making these intentional misrepresentations to the Town.*

(R p 16 ¶ 35) (emphasis added).

Resco's petitioning speech directed to the Town Board is absolutely protected from Humphrey Land's retaliatory tort claim. Resco should not be subject to prolonged civil litigation for engaging in petitioning speech to a government body that sought to affect a decision that body was considering. The Court of Appeals failed to apply First Amendment protection to Resco's petitioning speech. Instead, that court ignored applicable First Amendment precedents to adopt an improperly restrictive view of the Petition Clause that encourages a judge or jury to critique petitioning statements made to a public body. Its ruling will chill petitioning speech, prolong litigation, and invite liability if a jury later decided some petitioning speech is

"overstated" or "mis-described." Its decision allows a tortious interference claim based wholly on Resco's constitutionally protected petitioning speech to survive. Therefore the Court of Appeals' decision must be reversed.

III. THE COURT OF APPEALS HOLDING FAILS TO PROTECT RESCO'S PETITIONING STATEMENTS TO A PUBLIC BODY ABOUT A PENDING DECISION.

The Court of Appeals holding strips First Amendment Protections from statements made to a Town Board during a public hearing because the statements are alleged to "overstate" or "mis-describe" the prospective risks of explosive blasting. This contradicts First Amendment precedent, which holds that petitioning activity that is directed toward obtaining governmental action is protected activity. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . ."); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").

And, even if this Court chooses to forego absolute protection for petitioning speech made to a public body, during a public meeting, in an effort to influence that body's rezoning decision, and instead scrutinizes whether Resco's statements are subject to the "sham" exception to *Noerr-Pennington* immunity, the allegations on the face of Humphrey Land's Complaint demonstrate that Resco's statements were objectively reasonable and justified. Accordingly, this Court should reverse the Court of Appeals decision that "overstatement" is the standard for Petition Clause protection and hold that Resco's petitioning activity is absolutely protected.

A. Resco's Statements Are Protected By The Petition Clause Because They Were Made In An Effort To Elicit Government Action.

There can be little doubt that Resco's petitioning speech was made in an effort to influence the Town Board's rezoning decision and therefore, is protected under the First Amendment. *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) ("Expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("debate on public issues should be uninhibited, robust, and wide-open."). Whether or not a private party "overstates" or "mis-describes" its concerns while engaging in petitioning speech made to elicit government action, that speech is protected.

Even this Court has held that such misrepresentations made in the course of petitioning activity are not actionable. *See R.H. Bouligny, Inc. v. United Steelworkers of America*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967) (applying First Amendment absolute protection in response to defamation claims attacking petitioning activity). In *R.H. Bouligny*, this Court stated that absolute immunity from civil liability for privileged petitioning activity is not based on the content of the speech or the speaker, but applies to cases

> "where it is in the public interest that the party speak out his mind fully and freely, that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only where the public service or the due administration of justice requires it, e.g., words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty,

> everything said by a judge on the bench, by a witness in the box, and the like."

Id.

Humphrey Land's Complaint demonstrates that Resco's petitioning speech was made in an effort to influence the Town Board's rezoning decision.

> During the approval process required by the Town of Hillsborough to approve the Braddock Park project, *[Resco] requested that the Town [of Hillsborough] deny the approval [of Humphrey Land's Petition]* . . .

(R p 13 ¶ 22) (emphasis added).

Resco exercised its First Amendment right to speak fully and freely to the Town Board to explain the prospective dangers associated with conducting explosive blasting 300 feet from a proposed residential development, and as the Town was considering whether or not to approve a rezoning petition allowing the proposed development. Resco made the statements at a public meeting in an effort to influence the Town Board to deny the rezoning petition. Whether or not Resco "mis-described" the prospective risks of an ultrahazardous activity or "overstated" its position while addressing the Town Board is irrelevant. This Court should reverse the Court of Appeals' holding that "overstatement" is the standard for Petition Clause protection and hold that Resco's petitioning activity is absolutely protected.

B. Even If This Court Must Assess Whether Resco's Statements Are Subject To The "Sham" Exception, Resco's Petitioning Statements Were Objectively Reasonable.

Resco's petitioning activity is absolutely protected by the First Amendment, and it is not subject to the "sham" exception of the *Noerr Pennington* doctrine. In limited circumstances, petitioning activity can lose the *Noerr Pennington* doctrine's

protection if the activity is a "sham." The "sham" exception to the *Noerr Pennington* doctrine applies when the petitioning activity is objectively baseless. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 59-60 (1993). This objective standard makes petitioning cases ripe for dismissal on the pleadings.

Cases fall into the "sham" exception and lose the doctrine's protections where (1) the petitioning activity is comprised of numerous, frivolous objections to a license or permit application, where the petitioning party only seeks to impose expense and delay; (2) no reasonable litigant could reasonably expect to succeed on the merits of the petitioning activity; or (3) where a party, through its petitioning activity, effectively deprives the government process of all legitimacy. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 59-60 (1993); *Cal. Motor Transport Co.*, 404 U.S. at 508 (1972); *Good Hope Hosp., Inc.,* 174 N.C. App. at 275-76, 620 S.E.2d at 881. None of these "sham" petitioning activities apply to Resco's speech. Resco's statements were objectively reasonable and justified, and the Court of Appeals decision should be reversed because the "sham" exception to the *Noerr Pennington* doctrine does not apply.

1. Resco's Petitioning Statements Were Objectively Reasonable.

Resco's statements made to the Town Board were objectively reasonable, so they are not subject to the "sham" exception. Resco's statements to the Board concerned the prospective safety and health risks associated with conducting explosive blasting at an active mine located 300 feet from a residential development. As a matter of law, explosive blasting *is* a safety and health risk because "it is impossible to predict with certainty the extent or severity of its consequences."

Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 74, 131 S.E.2d 900, 904; *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000) ("Ultrahazardous activities are those that are so dangerous that even the exercise of reasonable care cannot eliminate the risk of serious harm. In North Carolina, only blasting operations are considered ultrahazardous."). Resco's statements are objectively reasonable because they were rooted in well-settled North Carolina law classifying explosive blasting as ultrahazardous.

The Court of Appeals decision does not look to whether or not Resco's petitioning activity was objectively baseless. Instead, it flipped the script and held that First Amendment protections are lost when a party "overstates" or "mis-describes" their position to a public body—even when that petitioning activity took place at a public meeting, was directed at a public body, was made in an effort to influence that body's decision, and was a matter of public health and safety.

The Court of Appeals decision sweeps aside the ultrahazardous classification of explosive blasting and the "objectively baseless" sham litigation standard with it, replacing it with "overstatement." The Court of Appeals even implies that, because the Town approved the rezoning petition, Resco's concerns were unpersuasive and therefore subject to liability. But it is well settled that Petition Clause protection adheres regardless of whether or not the petitioning activity succeeds. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 59-60 (1993) (holding that First Amendment protected defendant's petitioning activity from suit even though petitioning activity was unsuccessful).

Left uncorrected, the Court of Appeals holding subjects all individuals and businesses to the threat of litigation for "overstating" concerns to a public body regardless of whether those concerns are objectively reasonable—or even grounded in law or fact. Instead, it would make Petition Clause protection depend on whether another individual or entity with a different viewpoint alleges that your petitioning speech "overstates" or "mis-describes" your concerns. When virtually any proposed government action is viewed differently by different citizens, each of whom may predict different consequences, the Court of Appeals decision is "tantamount to outlawing" petitioning activity. *See Noerr,* 365 U.S. at 143-45 (reasoning that injury to another resulting from petitioning activity is "inevitable" but is non-actionable because to conclude otherwise would "be tantamount to outlawing" petitioning activity). The Court of Appeals decision should be reversed because Resco's statements were grounded in well-settled North Carolina law, and therefore not objectively baseless.

2. Resco's Petitioning Statements Were Justified.

The fact that Resco's financial interests were one reason for its opposition to Humphrey Land's rezoning petition does not disqualify its statements from *Noerr Pennington's* protection—it qualifies them. *Noerr*, 365 U.S. at 139-140 ("[D]isqualify[ing] 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 reject such a construction . . .").

Humphrey Land seeks to hold Resco liable because it had a financial motive to exercising its right to petition the Town Board to deny the rezoning petition. (R pp 13-15, 73 ¶¶ 21-27, 39) ("they would have to take additional safety precautions at a higher cost if the 5.5 acre portion of the planned development closest to the mine was rezoned and developed . . . and, [Resco] could purchase the 5.5 acre tract . . . at a substantially discounted price.") *Noerr* and other precedents do not support this conclusion. Petitioning activity that is directed toward obtaining governmental action is protected activity, regardless of motive or intent. *Prof'l Real Estate Investors, Inc.*, 508 U.S. 49, 59-60 (1993) ("Our decisions therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining government action" is "not at all affected by any anticompetitive purpose [the actor] may have had.")

The Supreme Court's opinion in *City of Columbia v. Omni Outdoor Advertising* is instructive. 499 U.S. 365 (1991). Omni Outdoor Advertising ("Omni"), a newcomer, was trying to gain a foothold in the Columbia, Georgia billboard market. *Id.* To keep it out, Columbia Outdoor Advertising ("COA") successfully lobbied the city council to adopt ordinances restricting billboards which, if passed, would restrict Omni from putting up its billboards. *Id.* Omni sued the city and COA for lobbying the city council to pass the restrictive ordinances and claimed that COA could not avail itself of Petition Clause protection for its lobbying activity. *Id.* The district court dismissed the action, holding that First Amendment protections immunized the lobbying activity, and the Fourth Circuit Court of Appeals reversed. *Id.* The Supreme Court

reversed the Fourth Circuit and affirmed the district court's dismissal holding that "whether or not a private party's political motives are selfish are irrelevant . . . [the Petition Clause] shields . . . a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 380. So long as the actor is seeking to influence a decision by government officials, no claim can arise.

The *Omni* Court explained that for petitioning activity to be considered objectively baseless, the petitioning activity must be "nothing more than an attempt to interfere directly with the business relations of a competitor." *Id.* at 381. The *Omni* Court further explained this "attempt to interfere" standard and why COA's conduct did not rise to a "sham" even though its selfish motive for petitioning the city council was to oust Omni from the market:

> "Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. . . [T]he purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham" unless the delay is sought to be achieved only by the lobbying process itself, and not by the government action the lobbying seeks. . . As for denying . . . meaningful access to the appropriate city administrative and legislative fora, that may render the manner of lobbying improper or even unlawful but does not necessarily render it a sham."

Id. at 398-399.

Resco sought government action as the "ultimate product" of its statements—the Town Board's denial of Humphrey Land's rezoning petition. Humphrey Land's Complaint demonstrates that Resco spoke up in opposition to the rezoning petition

based on its own financial interest. Resco's operational costs would increase if a residential development was built 300 feet from its blasting site. As in *Omni*, Resco's petitioning activity is not a "sham" because it had a self-interested motive for seeking the denial of Humphrey Land's rezoning petition. Because the Court of Appeals misapplied *Noerr-Pennington* and its "sham exception" and ignored these precedents, its decisions *must* be reversed.

CONCLUSION

The Right to Petition the government for redress is virtually absolute—its protection is not limited to petitioning activity that other citizens (like Humphrey Land) do not find objectionable. If anything, it is imperative that the Petition Clause protection be afforded to petitioning speech on matters that are controversial and questions of government policy that are close and contested. The Court of Appeals decision fails to recognize the extensive reach of the Petition Clause and would improperly foreshorten and constrain it. This infringement on citizens' First Amendment and Petition Clause rights cannot stand, and the Court of Appeals decision must be reversed.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned counsel has this day served the foregoing electronically filed **DEFENDANTS-APPELLANTS' NEW BRIEF** in the above-captioned action on all parties to this cause by depositing the original and/or copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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