No. 326PA19 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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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BRIEF BY AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF NEITHER PARTY

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BRIEF BY AMICUS CURIAE
THE STATE OF NORTH CAROLINA
IN SUPPORT OF NEITHER PARTY[1]

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[1] No person or entity, other than the amicus curiae, wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

INTRODUCTION

The *Noerr-Pennington* doctrine immunizes from civil liability certain statements by private parties seeking government action. This Court has never decided a case about the scope of *Noerr-Pennington* immunity. The State submits this brief to assist the Court with that novel issue.

This appeal first asks whether *Noerr-Pennington*—a doctrine originally developed to interpret the reach of federal antitrust law—applies to state-law tort claims. The parties below agreed that it does. The Court of Appeals, however, disagreed. The Court held that the *Noerr-Pennington* doctrine is limited to antitrust and unfair-competition claims. Thus, the Court held that the defendants in this case could not assert *Noerr-Pennington* immunity as a ground for moving to dismiss the plaintiff's tortious-interference claim.

The State respectfully submits that the decision below was based on an incorrect understanding of the law. Although *Noerr-Pennington* began as an antitrust-specific doctrine, the U.S. Supreme Court has since applied it in other areas of law as well. And courts across the country have held that *Noerr-Pennington* applies to all manner of state-law tort claims.

Because *Noerr-Pennington* applies to tort claims, the next question is how. To answer this question, the State submits that *Noerr-Pennington*

seeks to balance two sometimes-competing values. All persons have a First Amendment right to petition their government in bona fide ways without fear of civil liability. But that right does not give private parties license to make false, misleading, or sham representations to the government. A court must therefore conduct a case-specific inquiry into the "source, context, and nature" of the petitioning activity to decide whether a defendant is entitled to *Noerr-Pennington* immunity. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1986). Under this analysis, both parties here are wrong to the extent they suggest that *Noerr-Pennington* immunity is a mechanical rule rather than a flexible standard.

Because the Court of Appeals held that *Noerr-Pennington* immunity was categorically unavailable except for antitrust and unfair-competition claims, it did not have occasion to analyze the source, context, and nature of the defendants' petitioning activity. The State respectfully suggests that the Court of Appeals should have the first opportunity, on remand, to apply the proper legal framework. The State otherwise takes no position on how *Noerr-Pennington* might apply to the facts in this case.

ARGUMENT

I. The *Noerr-Pennington* Doctrine Generally Applies To State-Law Tort Claims.

The *Noerr-Pennington* doctrine generally applies to state-law tort claims. The Court of Appeals below, however, held that *Noerr-Pennington* is limited to antitrust and unfair-competition claims. *See Cheryl Lloyd Humphrey Land Invest. Co., LLC v. Resco Prods., Inc.*, 831 S.E.2d 395, 401 (N.C. Ct. App. 2019). The State respectfully submits that this decision was incorrect. As the U.S. Supreme Court has made clear, *Noerr-Pennington* is not an antitrust-specific doctrine. And courts across the country have applied *Noerr-Pennington* to state-law tort claims like the one at issue here.

The *Noerr-Pennington* doctrine can, in some circumstances, provide immunity from civil liability when a private party petitions the government for redress. The doctrine traces its roots to two cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In *Noerr*, a group of trucking companies sued a group of railroad operators. *See* 365 U.S. at 128-29. The truckers alleged that the railroads conspired to restrain trade in and monopolize the market for long-distance

freight services. *Id.* at 129. Specifically, the truckers alleged that the railroads worked together on a "vicious, corrupt, and fraudulent" publicity campaign against the truckers. *Id.* One element of the campaign was a lobbying effort to persuade a governor to veto legislation that would have helped the truckers compete more effectively against the railroads for long-distance freight services. *See id.* at 129-30.

The Court held that the truckers did not have a viable antitrust claim. It explained that the railroads were immune from antitrust liability for their "mere attempts to influence the passage or enforcement of laws." *Id.* at 135.

The Court gave two reasons for this conclusion. First, the Court explained that Congress intended antitrust law to regulate business, not politics. *See id.* at 137. Subjecting a publicity campaign to antitrust liability would "substantially impair the power of" our democratic government, which "depends upon the ability of the people to make their wishes known to their representatives." *Id.*

Second, applying antitrust law to a publicity campaign "would raise important constitutional questions" under the First Amendment, which guarantees the right to petition the government. *Id.* at 138. To avoid this constitutional question, the Court construed the antitrust statutes to provide

immunity for certain types of petitioning conduct. *See id.* at 132 n.6; *id.* at 138.

The U.S. Supreme Court reaffirmed the core holding of *Noerr* just four years later in *Pennington*. There, the Court made clear that "*Noerr* shields from the [antitrust laws] a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670.

Both *Noerr* and *Pennington* happened to arise in the antitrust context, but nothing in those decisions suggests that the doctrine is limited to antitrust or unfair-competition claims. Indeed, although the two cases involved claims under federal antitrust law, the U.S. Supreme Court has since applied *Noerr-Pennington* to interpret the reach of other statutes. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525-26, 535-36 (2002) (National Labor Relations Act); *cf. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.* ("*PRE*"), 508 U.S. 49, 59 (1993) (referencing the possibility of "applying *Noerr* as an antitrust doctrine *or invoking it in other contexts*" (emphasis added)).

Similarly, courts across the country have concluded that the doctrine should also generally apply to claims under state law. *See Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 895 n.18 (10th Cir. 2011) (collecting numerous

cases); *see also, e.g.*, *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 312 (4th Cir. 2003) (state business tort claims); *Ex parte Simpson*, 36 So. 3d 15, 26-27 (Ala. 2009) (state tort claims); *Blank v. Kirwan*, 703 P.2d 58, 63–65 (Cal. 1985) (state antitrust claim); *Astoria Ent., Inc. v. DeBartolo*, 12 So. 3d 956, 960, 964 (La. 2009) (state unfair-competition, unjust-enrichment, civil-conspiracy, and tortious-interference claims); *Green Mountain Realty Corp. v. Fifth Estate Tower, LLC*, 13 A.3d 123, 130 (N.H. 2010) (state statutory consumer-protection claim); *Cove Rd. Dev. v. W. Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1237 (R.I. 1996) (state tort claims).[2]

Here, the plaintiff asserts a claim for tortious interference with prospective economic advantage under North Carolina law. U.S. Supreme Court precedent shows that *Noerr-Pennington* immunity may be available for a claim of that kind.

As discussed above, the U.S. Supreme Court based its decision in *Noerr* on two grounds: (1) Congress did not intend antitrust law to regulate politics, and (2) constitutional avoidance counseled in favor of providing

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[2] The State is aware of limited contrary authority. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889-90 (10th Cir. 2000) (en banc) (appearing to limit *Noerr-Pennington* immunity to federal antitrust claims).

immunity for certain types of petitioning activity. 365 U.S. at 137-38. Both of those reasons apply with equal force to tortious-interference claims.

First, the state law of tortious interference generally does not regulate political activity any more than federal antitrust law does. As the Court explained in *Noerr*, antitrust law focuses on business, not politics. *See* 365 U.S. at 137. The same is true here. Tortious-interference claims concern private wrongs that usually arise in the commercial context. *See, e.g.*, *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016) (a tortious-interference claim "arises when a party interferes with a business relationship").

Second, courts follow the principle of constitutional avoidance to interpret the reach of state common law, just as they do to interpret the reach of federal statutes like the antitrust laws. Indeed, constitutional issues can often arise from imposing common-law tort liability for petitioning activities. *See Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("[I]t is hard to see any reason why, as an abstract matter, . . . common law torts . . . might not in some of their applications be found to violate the First Amendment."). And the First Amendment generally bars common-law claims in some circumstances. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458-59 (2011)

(intentional infliction of emotional distress). The decision below, however, raises serious constitutional issues by depriving private parties of any defense to tortious-interference claims that seek to impose liability for certain forms of political advocacy.[3]

Many courts have therefore concluded that *Noerr-Pennington* applies to tortious-interference claims. *See, e.g.*, *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3d Cir. 1999); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649-50 (7th Cir. 1983); *Suburban Restoration Co., Inc. v. ACMAT Corp.*, 700 F.2d 98, 101-02 (2d Cir. 1983); *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163, 171 (Miss. 2001); *Titan Am., LLC v. Riverton Inv. Corp.*, 569 S.E.2d 57, 62 (Va. 2002); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891 & n.7, 894, 913-14 (1982) (discussing *Noerr* in holding that a "nonviolent, politically motivated boycott designed to force governmental

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[3] Courts are divided on whether *Noerr-Pennington* is a rule of constitutional avoidance or a direct interpretation of the First Amendment's Petition Clause. *Compare, e.g.*, *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (rule of avoidance), *with, e.g.*, *Pound Hill Corp., Inc. v. Perl*, 668 A.2d 1260, 1264 (R.I. 1996) (constitutional interpretation). This Court need not decide that question here, however. Either way, nothing in *Noerr-Pennington* suggests that it is an antitrust-specific doctrine.

and economic change" was immune from claim for malicious business interference).

Here, the Court of Appeals read *Noerr-Pennington* too narrowly. It held that *Noerr-Pennington* immunity is categorically unavailable outside the antitrust and unfair-competition context. *See Resco*, 831 S.E.2d at 401.

Because the allegations in this case did not involve a "dispute between competitors" or "the consolidation of market power," the Court of Appeals reasoned, *Noerr-Pennington* categorically did not apply. *Id.* It ruled in this way even though the parties had both agreed that *Noerr-Pennington* generally *does* apply to state-law tort claims. *See* No. COA19-76, Pl.'s Br. 10; Defs.' Br. 10.

In sum, this Court should follow the weight of authority and hold that *Noerr-Pennington* generally applies to tort claims in this State. For that reason alone, this Court should reverse the judgment of the Court of Appeals and remand for further proceedings.

II. *Noerr-Pennington* Immunity Is Not Absolute.

If this Court holds that *Noerr-Pennington* immunity generally applies to state-law tort claims, the Court should decline the defendants' invitation to go further and hold that the defendants have "absolute" immunity. No.

326PA19, Op. Br. 2, 21-22. The U.S. Supreme Court has rejected these kinds of "absolutist" claims to *Noerr-Pennington* immunity. *See Allied Tube*, 486 U.S. at 503. Far from stating a categorical rule, the *Noerr-Pennington* doctrine seeks to balance competing values. As a result, it does not automatically confer immunity in any given case.

The *Noerr-Pennington* doctrine harmonizes two important legal principles. On the one hand, the Constitution protects the right to petition the government. On the other hand, all individuals "must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.). Private parties should not receive immunity when they make sham requests or misrepresentations to the government. Conduct of that kind harms both our economy and our politics.

To begin, all persons have a constitutional right to petition their government. The U.S. Constitution provides for the "right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. This right is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The "historical roots" of petitioning "long antedate the Constitution." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). The English Bill of Rights of 1689, for example, allowed the "right of the subjects to petition the king." 1 Wm. & Mary, Sess. 2, ch. 2, § 5 (1689).

The English brought this right with them across the Atlantic to our shores. Petitions to colonial governments "originated more bills in pre-constitutional America than any other source of legislation." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 144 (1986). These petitions ran the gamut, from private disputes about debt and divorce to public concerns about wages and safety regulations. *See id.* at 144–46.

Since the founding, the petition right has "allow[ed] citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). "A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Id.* at 388-89. The petition right covers a wide range of interactions with all types of government bodies—executive, legislative, and judicial. *California Motor Transp. Co v. Trucking Unlimited*, 404 U.S. 508, 510

(1972). Indeed, petitioning inheres in "[t]he very idea of government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

But the right to petition is not absolute. Even though "the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity" from civil liability. *McDonald*, 472 U.S. at 483. Indeed, in *Noerr* itself, the U.S. Supreme Court recognized that the right to petition must sometimes give way to the government's regulatory authority. Thus, the antitrust laws, *Noerr* allowed, might apply to conduct "ostensibly directed toward influencing government action [but that was] a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144.

For good reason: private parties should not receive immunity for sham requests or misrepresentations that they make to the government.

Private parties who seek to exploit government processes for their own gain and at the expense of others can cause harm to competition and consumers. For example, governments impose all kinds of procedural barriers to entering certain markets: they enact permitting regimes and set

industry-wide standards and rules, to name a few. *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 991 (2005). These requirements serve important health, safety, and welfare goals. *See id.* But they can also be subject to abuse.

Indeed, "[o]ne of the most effective ways for parties to acquire or maintain market power is through the abuse of government processes." Maureen K. Ohlhausen et al., Fed. Trade Comm'n, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine* 3 (2006), https://bit.ly/3d5yfQI. Consider a firm that tries to prevent a potential competitor from entering a market by filing a baseless objection with the government during a licensing hearing. *See* Creighton, *supra*, at 991. Or take a firm that makes a false representation to a government agency, which in turn causes the agency to adopt a regulation that helps the firm acquire monopoly power. *See id.* at 985. Or imagine a firm that challenges the sufficiency of information provided by a permit applicant to a state agency, forcing the applicant to divulge confidential business information that the firm can then misuse. *See id.* at 991.

This type of conduct distorts the free market. Deceiving the government is hardly "competition on the merits"—making a better product

or operating more efficiently. *See Aspen Skiing Co v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985); Creighton et al., *supra*, at 981, 989. A firm that uses the government to injure other firms or consumers produces no benefit for society. And the cost of engaging in that behavior is low, making it all-too-easy to do: lying to the government, for instance, often requires only a modest investment in resources. *See* Creighton et al., *supra*, at 981.

By contrast, this conduct can cause severe harm. A firm that leverages its petitioning activity to exclude or harm a competitor can in turn injure the economy and consumers by raising prices, lowering output, and lowering quality. *See* Creighton et al., *supra*, at 986-87. Similarly, a firm that abuses a government process to interfere with the economic relationships of another firm, or to extract confidential information from it, can harm not only that business but also its customers. *See id.* at 991.

These injuries extend beyond the economic realm. Ensuring that the marketplace is free of anticompetitive or otherwise abusive behavior is critical "to the preservation of our democratic political and social institutions." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *cf.* N.C. Const. art. I, § 34 ("Perpetuities and monopolies are contrary to the genius of

a free state and shall not be allowed."). Indeed, fraudulent petitioning activity can also undermine the integrity of government decisionmaking.

A notable Business Court decision provides a stark illustration of this danger. A group of environmental cleanup firms and their directors allegedly rigged bids for state-agency contracts to remediate environmental damage from leaking underground storage tanks. *See State ex rel. Cooper v. McClure*, No. 03-CVS-5617, 2004 WL 2965983, at *1 (N.C. Super. Ct. Dec. 14, 2004), *amended on reconsideration on other grounds*, 2005 WL 3018635 (N.C. Super. Ct. Oct. 28, 2005). Specifically, the firms allegedly colluded to inflate the pricing of environmental-remediation contracts by submitting false billing information in surveys about the firms' rates. *See id.* at *2. This conduct in effect deprived a state agency of its ability to make an informed decision about how to best allocate taxpayer dollars and protect North Carolina citizens from environmental damage. Taking these allegations as true on a motion to dismiss, and weighing any right to petition against the anticompetitive conduct at issue, the Business Court correctly recognized that *Noerr-Pennington* immunity provided no refuge for such fraudulent conduct. *See id.* at *4-6.

In sum, the *Noerr-Pennington* doctrine seeks to balance two values—the importance of free competition and good government, on the one hand; and the right to petition, on the other. As a result, this Court should reject any claim that *Noerr-Pennington* establishes absolute immunity. The doctrine immunizes some, but not all, conduct aimed at influencing government decisionmaking.

III. The Scope Of *Noerr-Pennington* Immunity Depends On The Specific Conduct At Issue.

Because *Noerr-Pennington* immunity is not absolute, courts examine "the source, context, and nature" of the alleged petitioning activity to decide whether it falls within the doctrine. *Allied Tube*, 486 U.S. at 499; *accord McClure*, 2004 WL 2965983, at *4.

As discussed above, the Court of Appeals did not perform that analysis, because it held that *Noerr-Pennington* immunity was unavailable for a tortious-interference claim. Nonetheless, as a fallback to their assertion of "absolute" immunity, defendants argue that their petitioning conduct is protected so long as it was not a "sham." No. 326PA19, Op. Br. 22-28. By contrast, the plaintiff argues that the defendants cannot invoke *Noerr-*

Pennington immunity because they submitted "false" information to the government. Br. in Opp. to Pet. for Discretionary Review 7-8.

The State respectfully submits that both of these positions are too categorical. Here, the plaintiff alleges that the defendants made misrepresentations during "a series of meetings" before the town of Hillsborough and its planning board about a request to annex and rezone an area of land for residential development. (R pp 13-14, ¶¶ 21-25) These allegations raise at least two questions that are relevant to whether immunity applies here. First, was the town meeting a political context? And second, did the defendants engage in sham petitioning or make misrepresentations?

The Court of Appeals did not address these questions. The State respectfully suggests that this Court need not do so here. Instead, this Court may set out the proper legal framework for applying *Noerr-Pennington* immunity and then remand for the Court of Appeals to apply the correct framework in the first instance.

A. A court should consider whether the petitioning activity took place in a political or nonpolitical context.

First, the scope of *Noerr-Pennington* immunity depends in part on whether the petitioning activity took place in a political or nonpolitical context—a distinction some courts also refer to as the difference between a "legislative" and "adjudicative" context. *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 844 (7th Cir. 2011).

Noerr-Pennington immunity is robust in political contexts, where courts are reticent to decide what speech is true and what speech is false. For example, *Noerr* itself held that a publicity campaign "in the political arena" enjoyed immunity from civil liability, even though the campaign allegedly employed deception. 365 U.S. at 140-41. The Court noted that "Congress has traditionally exercised extreme caution in legislating with respect to . . . the conduct of political activities," *id.* at 141, and that deception is par for the course in the "no-holds-barred" realm of politics, *id.* at 144.

By contrast, *Noerr-Pennington* immunity has a limited scope in nonpolitical contexts, where parties must make accurate representations to the government. "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor*,

404 U.S. at 513. The "unethical and deceptive" publicity campaign in *Noerr*, for example, would not be immunized "in less political arenas, [where such] practices can constitute abuses of administrative or judicial processes that may result in [legal] violations." *Allied Tube*, 486 U.S. at 500. Misrepresentations under oath before a legislative committee may similarly be beyond the pale. *See id.* at 504.

This distinction between political and nonpolitical contexts is consistent with the balance that *Noerr-Pennington* seeks to maintain. The First Amendment often protects speech on matters of public concern, including some speech that is false. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-42 (1976). But allowing private parties to assert *Noerr-Pennington* immunity for petitioning activity regardless of the context would wreak havoc on all kinds of legislative, executive, and judicial proceedings. "Administrative bodies and courts . . . rely on the information presented by the parties," as "[t]hey seldom, if ever, have the time or resources to conduct independent investigations." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982) (footnote omitted). "The supplying of fraudulent information thus threatens the fair and impartial functioning of these" bodies. *Id.* at 1261.

Indeed, the U.S. Supreme Court has emphasized that, under some circumstances, the law may punish false statements to the government without raising First Amendment concerns. For example, the Court has confirmed the "unquestioned constitutionality of perjury statutes." *United States v. Grayson*, 438 U.S. 41, 54 (1978).

Not surprisingly, North Carolina law regulates conduct for its truthfulness across a number of contexts where the integrity of government decisionmaking is at stake. *See, e.g.*, N.C. Gen. Stat. § 14-209 (perjury); *id.* § 74-64(b) (misrepresentations to state agency); *id.* § 96-18(a)(1) (misrepresentations in applications for employment benefits); N.C. R. Prof'l Conduct 3.3 (candor to the court); *id.* R. 4.1 (truthfulness to third parties); N.C. R. Civ. P. 11(a) (pleadings must be "well grounded in fact"); *id.* R. 60(b)(3) (court may alter or amend final judgment based on fraud or misrepresentation). No one seriously argues that these laws violate the First Amendment.

Thus, whether petitioning activity is within the scope of *Noerr-Pennington* immunity depends, in part, on whether the petitioning takes place in a political or nonpolitical context. Making that distinction can pose difficulties. The Seventh Circuit's approach is instructive, however. That

court considers the totality of the circumstances to decide if the challenged petitioning activity took place in a context where there is an expectation of truthfulness. *See Mercatus*, 641 F.3d at 843-47.[4]

Here, the Court of Appeals did not address whether a town meeting about a rezoning request is a political or a nonpolitical context.[5] The State respectfully suggests that the appropriate course may be to remand to that Court to address this question in the first instance.

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[4] Specifically, the Seventh Circuit has suggested five nondispositive factors to help courts make the distinction between political and nonpolitical (or, alternatively, legislative and adjudicative) contexts for the purposes of *Noerr-Pennington* immunity. Those factors are: (1) the "general nature of the authority exercised by the" government body—legislative, executive, judicial, and so on; (2) the "formality of the [government body's] fact-finding processes"; (3) the "extent to which the fact-finding process was subject to political influences," like "lobbying and other forms of ex parte influence"; (4) whether "any testimony at the proceeding in question was given under oath or affirmation, under penalty of perjury"; and (5) whether "the governmental actions at issue were matters of discretionary authority or were instead guided by more definite standards susceptible to judicial review." *Mercatus*, 641 F.3d at 845-46 (citations omitted).

[5] The distinctions that this Court has drawn among the "four different categories" of local zoning decisions—"legislative, advisory, quasi-judicial, and administrative"—could help inform this analysis. *See County of Lancaster v. Mecklenburg*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993). So too could the many cases on *Noerr-Pennington* immunity in the specific context of zoning disputes. *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380-81 (1991); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (10th Cir. 1982); *Mercatus*, 641 F.3d at 847-49; *Simpson*, 36 So. 3d at 26-28; *Pound Hill*, 668 A.2d at 1264.

B. A court should consider whether the petitioning activity is allegedly a sham or a misrepresentation.

In addition to context, the nature of the petitioning activity is also relevant to defining the scope of *Noerr-Pennington* immunity.

Courts hold that so-called "sham" petitions generally fall outside the scope of *Noerr-Pennington* immunity. *PRE*, 508 U.S. at 56. A party engages in sham petitioning activity when it takes "private action that is not genuinely aimed at procuring favorable government action." *Id.* at 58 (quoting *Allied Tube*, 486 U.S. at 500 n.4). "A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

When, as here, a party engages in a single act of petitioning, the U.S. Supreme Court has set out a two-part test to decide whether the petition is a sham.[6] First, the petition must be "objectively baseless in the sense that no

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[6] A different test may apply when a defendant allegedly engages in a pattern of sham petitioning. *See U.S. Futures Exchange, LLC v. Bd. of Trade of Chicago*, 953 F.3d 955, 964 & n.10 (7th Cir. 2020) (describing circuit split on this issue); *accord* Ohlhausen et al., *supra*, at 28-36 (same).

reasonable [party] could realistically expect success on the merits." *See PRE*, 508 U.S. at 60. Second, the petition must also be subjectively baseless in the sense that it attempts to use a government process, "as opposed to the outcome of that process," as a "weapon" against another party. *See id.* at 61.[7]

Many courts have also held that petitions based on misrepresentations generally fall outside the scope of *Noerr-Pennington* immunity.[8] A party engages in petitioning activity that is based on a misrepresentation when it seeks a specific government outcome, distorted by a false or misleading statement. To fall within this exception, courts generally require two showings. First, the misrepresentation must be "intentionally made, with knowledge of its falsity." *Mercatus*, 641 F.3d at 843. Second, the

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[7] The U.S. Supreme Court first developed this framework to decide whether a party had *Noerr-Pennington* immunity for filing an allegedly sham lawsuit. *PRE*, 508 U.S. at 60-61. That said, this general framework can apply to all types of sham petitions, not just lawsuits. *See Omni*, 499 U.S. at 381-82; 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶¶ 204a, 204b, 204c (4th ed. Supp. 2020). Sham lawsuits, however, may raise additional, unique issues under the *Noerr-Pennington* doctrine that are not implicated here. Areeda & Hovenkamp, *supra*, ¶ 205.

[8] The U.S. Supreme Court has not explicitly held that misrepresentations are beyond the scope of *Noerr-Pennington* immunity. *See PRE*, 508 U.S. at 61 n.6. But many lower federal courts have. *See, e.g.*, Ohlhausen et al., *supra*, at 25 n.104 (collecting cases from nine federal appellate courts).

misrepresentation must be "material, in the sense that it actually altered the outcome of the proceeding." *Id.*[9]

Here, the Court of Appeals did not consider whether the plaintiff has plausibly alleged that the defendants engaged in petitioning activity that was a sham or based on misrepresentations. Again, the State respectfully suggests that the proper course may be to remand for the Court of Appeals to decide this question in the first instance.

CONCLUSION

In this case, the Court of Appeals held that *Noerr-Pennington* immunity was not available for most state-law tort claims. The Court of Appeals based its decision on that threshold issue, so it did not reach any additional questions about the scope of the immunity.

Because a Supreme Court is a court of "review, not first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the State respectfully suggests that

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[9] In some cases, the concepts of a "sham" petition and a petition based on a misrepresentation may overlap, but commentators treat these two kinds of petitioning activity separately. As discussed above, a sham petition "is not intended to obtain the requested relief," but instead to harm another party by abusing a government process. By contrast, a misrepresentation is ordinarily designed to secure "actual relief from the government entity in question," distorted by false or misleading information. *See* Areeda & Hovenkamp, *supra*, ¶¶ 204a, 205a1; *accord* Ohlhausen et al., *supra*, at 22-23.

this Court reverse the judgment below and remand for the Court of Appeals to apply the proper legal framework. The State takes no position on the ultimate question of whether *Noerr-Pennington* bars plaintiff's claim on the facts in this case.

Respectfully submitted, this 22nd day of July, 2020.

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N.C. R. App. P. 33(b) Certification:
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