

4-15-2000

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Recommended Citation

David K. Godschalk *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits Under the Fair Housing Act*, 27 Pepp. L. Rev. Iss. 3 (2000)

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Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits Under the Fair Housing Act

David K. Godschalk*

I. INTRODUCTION

Free speech and equal protection are at the core of American notions about rights and justice. In the context of fair housing, however, the two ideals have come into conflict as courts and federal agencies have addressed attempts to use lawsuits, ordinarily protected by the First Amendment right to petition the government for redress of grievances, to deny equal housing opportunities to protected groups.¹

The Fair Housing Act (the "Act") prohibits discrimination in the sale or rental of housing on the basis of race, color, religion, sex, familial status, national origin,

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1. See *White v. Julian*, No. C 95-1757 MHP, 1996 U.S. Dist. LEXIS 21899 (N.D. Cal. Jan. 5, 1996) (lawsuit alleging HUD investigation of opposition to group home violated First Amendment); *United States v. Wagner*, 940 F. Supp. 972, 978-80 (N.D. Tex. 1996) (state court lawsuit to block sale of house for use as a group home violated 42 U.S.C. § 3617); *United States v. Scott*, 788 F. Supp. 1555, 1561-62 (D. Kan. 1992) (state court lawsuit to enforce restrictive covenant prohibiting group homes violated 42 U.S.C. § 3617). This conflict has been most apparent in the fair housing context in lawsuits involving the siting of group homes in residential neighborhoods. *But cf.* *HUD v. Grappone*, P-H: Fair Housing-Fair Lending Rptr. para. 25,059, at p. 25,573-79 (HUD ALJ 1993); *HUD v. Tucker*, P-H: Fair Housing-Fair Lending Rptr. para. 25,033, at p.25,348-49 (HUD ALJ 1992). See Part IV, *infra*.

or handicap.² Under the Act, discrimination can take various forms, such as the failure to sell or rent property, steering persons to particular neighborhoods, the use of different terms of sale or rental, or harassment and intimidation of individuals in the exercise of their fair housing rights.³

The classic means of intimidation are familiar: arson, firebombing, assault, crossburnings, and vandalism.⁴ The Act's prohibitions on intimidation and interference are not limited to violent acts, however it also bans nonviolent retaliation, including some commercial and legal actions.⁵ Cases upholding the ban on discriminatory legal actions have frequently involved attempts to use zoning or restrictive covenants to prevent the operation of group homes.⁶ Victims of such tactics have used the Act to challenge those who have attempted to use lawsuits against them.

2. 42 U.S.C. §§ 3601-19 (1998), originally enacted as Title VIII of the Civil Rights Act of 1968, amended by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974) (adding discrimination based on sex), and the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). The Fair Housing Amendments Act prohibits discrimination based on "handicap." See §§ 3602(h), 3604, 3605, 3606. In accordance with current usage, the text of this paper refers to discrimination based on "disability," although the statute's language, where directly quoted, is left in its original form.

3. See 42 U.S.C. §§ 3604-06, 3617.

4. See, e.g., *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994) (crossburning); *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986) (physical assault motivated by association of victims with persons of other races); *United States v. White*, 788 F.2d 390 (6th Cir. 1986) (arson of home being constructed by black family in white neighborhood); *Stackhouse v. DeSitter*, 620 F.2d 208 (N.D. Ill. 1985) (black complainant's car vandalized and burned after he moved to white suburb); *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989) (racially-motivated firebombing). For an extensive collection of cases in which such violent harassment has been found to violate the criminal provisions of 42 U.S.C. § 3631 of the Fair Housing Act, see ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* 20.4 n.15 (1997).

5. See, e.g., *Michigan Protection & Advocacy Serv. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) (noting that physical force or violence are not necessary elements in establishing a violation of § 3617).

6. See, e.g. *Skipper v. Hambleton Meadows Architectural Review Committee*, 996 F. Supp. 478 (D. Md. 1998); *Hill v. Community of Damien of Molokai*, 911 P.2d 861, 871-76 (N.M. 1996) (holding that a group home's actions did not violate restrictive covenant under state law, and enforcing covenant would violate the Act); *United States v. Wagner*, 940 F. Supp. 972, 979 (N.D. Tex. 1996) (holding that a lawsuit to enforce single family deed restrictions against group home violated § 3617 of the Act); *Martin v. Constance*, 843 F. Supp. 1321, 1325 (E.D. Mo. 1994) (holding that enforcement of restrictive covenant to oppose group home violated the Act); *Oxford House, Inc. v. Township of Cherry Hill, N.J.*, 799 F. Supp. 450, 461 (D. N.J. 1992) (finding a prima facie case of disparate impact where Township's interpretation of zoning ordinance served to exclude group homes); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (holding that defendants violated the Act by "attempting to enforce a restrictive covenant to prevent handicapped individuals from residing in their neighborhood," where state court had previously held that plaintiffs had not violated the restrictive covenants); *United States v. Borough of Audubon, N.J.*, 797 F. Supp. 353, 357 (D.N.J. 1991), *aff'd mem.*, 968 F.2d 14 (3d Cir. 1992). Similar cases have involved attempts to use zoning rules to discriminate on the basis of race. See *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1099 (N.D. Ohio 1980) (finding FHA violation based upon race, explaining that "[a]ctions which are typically lawful, such as a mandatory referendum on housing and zoning matters, . . . lose that character when they are undertaken for a discriminatory purpose.").

On the other hand, the Supreme Court has held that lawsuits can fall within the protection of the First Amendment's "right to petition" clause,⁷ but the limits of the immunity which attends such petitioning are unclear and vary dramatically in different circumstances. In some fields, such as antitrust law, the limits are clearer having developed over decades of litigation. In others, like fair housing, they are still evolving.

Consider a recent case. The owner of a house in a small subdivision wishes to sell and locates a buyer. The two parties arrange the sale of the house. Before the sale closes, word reaches the neighbors that the buyer intends to convert the house into a group home for autistic children. They hastily circulate a petition opposing the group home and file suit against the seller claiming that the proposed use violates the restrictive covenants that preserve the single family character of their subdivision. The seller responds by filing a complaint under sections 804 and 817 of the Act charging that the neighbors' lawsuit is an attempt to deny housing to people with disabilities. The neighbors defend their suit as an exercise of their First Amendment right to petition the courts for a redress of grievances. How is the court to rule?⁸

This pattern has arisen in jurisdictions across the country, making efforts to enforce local zoning rules or private covenants against group homes an important forum for emerging case law regarding the role of lawsuits under the Act. In deciding such cases, courts have been charting new territory searching for guidance on the right to petition in antitrust and labor law, and attempting to balance the relevant state and federal interests.

This interplay between the right to petition and the Act was a matter of interest mostly to practitioners, until a much publicized 1994 investigation by the U.S. Department of Housing and Urban Development ("HUD") in Berkeley, California brought it to the attention of the larger public. That incident is important because it set the stage for current attempts by Congress and the executive branch to resolve this seeming conflict between the Act and the First Amendment.

In the summer of 1994, HUD began an investigation of a complaint under the Act alleging discriminatory community opposition to a shelter for people with disabilities. One issue in the investigation involved a neighborhood group that had filed suit in state court against the proposed shelter seeking to overturn the shelter's

7. U.S. CONST. amend. I: "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."

8. This hypothetical is loosely based upon the facts in *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996), discussed in Part IV, *infra*. Similar scenarios can be found in cases such as *Skipper v. Hamilton Meadow*, 996 F. Supp. 478 (D. Md. 1988), and *United States v. Robinson*, Civ. No. 3:92CV0345 (D. Conn. 1995).

zoning variance.⁹ In response, the agency planning to operate the shelter filed a complaint with HUD alleging that the plaintiffs had violated the Act by pursuing the state court action and impeding construction of the shelter, thereby impairing the agency's ability to provide housing for people with disabilities.¹⁰ The complaint alleged that the plaintiffs opposed the shelter because the shelter's residents would include people with mental and physical disabilities, including recovering alcoholics and drug addicts.¹¹

In response to HUD's investigation, the plaintiffs filed suit against HUD claiming that the agency had violated their First Amendment rights by, among other things, demanding membership lists and offering to drop federal charges if the group would drop its lawsuit against the shelter. HUD was denounced for trampling on the First Amendment.¹²

The outcry resulting from the Berkeley incident spawned a number of governmental attempts to reconcile federal fair housing law and the right to petition. HUD moved rapidly to issue new guidance regarding its policy on cases involving the First Amendment.¹³ Public concern over the Berkeley case also generated congressional attempts to provide standards limiting the government's authority to initiate enforcement action or investigations in cases involving political speech or judicial petitioning.¹⁴

The solution ultimately adopted by the courts or Congress will have a powerful impact on the future of both fair housing, land use, and zoning law. Overprotection

9. See *White v. Julian*, 1996 U.S. Dist. LEXIS 21899, at *2-3 (N.D. Cal. Jan. 5, 1996).

10. See *id.* (quoting the language of the complaint).

11. Alcoholism and substance addiction are considered disabilities within the meaning of the Fair Housing Act. See *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993).

12. See, e.g., Sigfredo A. Cabrera, *HUD Continues Its Assault on Free Speech*, WALL ST. J., June 7, 1995, at A15; *HUD's Thought Police*, WALL ST. J., Aug. 23, 1994, at A12; *Henry Cisneros' War on the Constitution*, WASH. TIMES, Aug. 16, 1994, at A16; Joyce Price, *Progress 'Aggressive' at HUD: New policies, programs Hit for 'Big Brother' Pushiness*, WASH. TIMES, Sep. 27, 1994, at A8.

13. As a result of the Berkeley incident, Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity at the time of the investigation, issued new guidelines setting forth the circumstances under which investigations may be limited by First Amendment concerns. Those guidelines provide that the filing or prosecution of "frivolous" lawsuits may violate the Fair Housing Act. See Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, Notice to FHEO Office Directors, *Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints That May Implicate the First Amendment*, at 5 (hereinafter *FHEO Notice*) (on file with author); see also Robert S. Swierczek, *Achtenberg Issues Enforcement Guidelines for Fair Housing Cases Involving First Amendment*, 22 Hous. & Dev. Rep. (BNA) 257 (Sep. 12, 1994). Achtenberg's memorandum expressly stated that the new guidelines were intended to provide "maximum deference" for First Amendment speech protections in situations where there is interplay between those protections and the Fair Housing Act. See *FHEO Notice*, at 1.

As the agency with primary responsibility for implementing and administering the Fair Housing Act, HUD's interpretations of the statute are "entitled to great weight," *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972), so long as they do not violate the statute's plain meaning and are reasonable constructions of the law. See generally *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

14. See Part IV, *infra*.

of lawsuits could create new barriers to housing opportunity; underprotection of those lawsuits could chill lawful petitioning activity and feed a perception that the government is out of touch with the legitimate concerns of its citizens. The solution adopted is also likely to have implications the interpretation of the First Amendment in other circumstances under the Act, such as in cases involving attempts to persuade political decisionmakers to take discriminatory action.

The goal of this article is to explore the sources and interpretations of petitioning immunity for lawsuits, and to suggest how the right to petition may be construed in the fair housing context to provide the proper deference to the First Amendment and to preserve the goals of the Act. This article addresses the two main competing standards that have been proposed for determining when a lawsuit violates the Act. The first, adopted by HUD, the Department of Justice, and a number of federal district courts, is the Supreme Court's ruling in *Bill Johnson's Restaurants, Inc. v. NLRB* ("Bill Johnson's").¹⁵ The second, proposed in Congress in a series of bills, is drawn from Rule 11 of the Federal Rules of Civil Procedure. This article attempts to provide some comparison of the merits of these two standards within the context of existing First Amendment jurisprudence.¹⁶

Part I begins with a brief discussion of the relevant prohibitions on discrimination in the Act, its implementing regulations, and their interpretation by the courts. Special attention is given to the accumulating body of law dealing with the legality of local zoning rules and decisions which interfere with the siting and operation of group homes for individuals with disabilities, because those cases have provided a growing source of law regarding the status of lawsuits under the First Amendment. Part II traces the history of the right to petition and examines the interplay between the right to petition, the common law, and statutory limits on lawsuits. Part III examines the Supreme Court's decision in *Bill Johnson's* and the two-part test it sets forth, as well as the meaning and importance of the "illegal objective" exception. Part IV addresses the current attempts to chart a First Amendment policy for the Act by HUD, the courts, and Congress. Part V argues, in conclusion, that the *Bill Johnson's* standard is more suitable for application to the Act than a Rule 11 based approach. It further argues that the illegal objective rule is viable for fair housing cases, and it discusses the possible application of *Bill Johnson's* standard to cases involving suits enforcing discriminatory zoning rules or restrictive covenants.

15. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

16. For an excellent article addressing this same question, see generally David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits under the Fair Housing Act*, 63 U. CHI. L. REV. 1607 (1996). This article shares much of Mr. Franklin's analysis, but differs significantly in several conclusions.

II. HISTORY AND GOALS OF THE FAIR HOUSING ACT

Congress originally enacted the Act in the wake of the Martin Luther King assassination as Title VIII of the landmark 1968 Civil Rights Act.¹⁷ The Fair Housing Amendments Act of 1988 extended the original prohibitions on discrimination to include gender and disability and to strengthen the enforcement authority allocated to HUD and the Department of Justice.¹⁸

In adopting the Act, Congress intended to preempt state and local laws that conflict with its prohibitions. Section 815 of the Act states that “[a]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter *shall to that extent be invalid.*”¹⁹

Currently, the Act prohibits discrimination in the sale or rental of housing on

17. 42 U.S.C. §§ 3601-3619 (1994); See SCHWEMM, *supra* note 4, at 5-4. Professor Schwemm provides a comprehensive study of the Act’s legislative history, constitutionality, and interpretations of Congressional intent. See *id.* ch. 5 - 7, 5-1 – 7-12.

18. The Fair Housing Amendments Act of 1988 created the current administrative enforcement system, added two new protected classes (families with children and persons with disabilities), expanded the ban on discrimination in residential financing, and amended the definition of discriminatory housing practices to include interference and intimidation under § 3617. See SCHWEMM, *supra* note 4, at 5-6.

19. 42 U.S.C. § 3615 (1994) (emphasis added). The House Judiciary Committee stated expressly that the Act was intended to apply to “state and local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps,” as well as to zoning decisions and practices with the same effect. Report of the House Judiciary Committee, H.R. Rep. No. 100-711, at 24 (1988), *reprinted in* 1988 U.S.S.C.A.N. 2173, 2185 [hereinafter House Report]. As the House Judiciary Report accompanying the Fair Housing Amendments Act makes clear, the amendments were specifically intended “to prohibit special restrictive covenants . . . which have the effect of excluding . . . congregate living arrangements for persons with handicaps.” *Id.* at 2173, 2184. The House Report further stated that the Act “prohibit[s] the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [disabled persons] to live in the residence of their choice in the community.” *Id.*

This preemption of local zoning authority has been tested numerous times, and courts have repeatedly held that local zoning rules and restrictive covenants that have the effect of prohibiting group homes in single-family neighborhoods violate the Act. See *United States v. Wagner*, 940 F. Supp. 972, 979 (N.D. Tex. 1996). Cf. *Casa Marie, Inc. v. Superior Court*, 988 F.2d 252 (1st Cir. 1993). See also *City of Edmonds v. Oxford House*, 514 U.S. 725, 734-35 (1995) (holding that local zoning rule providing occupancy limits for unrelated persons in single-family homes was not an exempt occupancy restriction under § 3607(b)(1) of the Fair Housing Act). For an exhaustive summary of the extensive case law involving zoning and group homes under the Fair Housing Act, see SCHWEMM, *supra* note 4, at 11-48 - 11-79; see also Douglas E. Miller, Note, *The Fair Housing Act, Oxford House, and the Limits of Local Control over the Regulation of Group Homes for Recovering Addicts*, 36 WM. & MARY L. REV. 1467 (1995) (discussing law and policy regarding location of group homes for substance abusers in single-family neighborhoods).

the basis of race, color, religion, sex, familial status, national origin, or disability.²⁰ The main substantive provisions of the Act's prohibitions on discrimination in the sale or rental of housing, the provision of loans or financing, or the provision of appraisal or brokerage services—are found in sections 3604 through 3606.²¹

Section 818 provides further protection for persons exercising the rights guaranteed by sections 803 through 806 of the Act.²² Specifically, section 818 makes it unlawful to “coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604 of this title.”²³

20. 42 U.S.C. § 3604. While the language of the Fair Housing Act speaks of discrimination “based on” or “because of” a person’s protected status, a showing of intent to discriminate based on protected status is not always required to establish liability. See generally SCHWEMM, *supra* note 4, 10.1- 10.4(5) (discussing methods of proof involving intentional or direct discrimination, mixed motive, and disparate impact). The following cases also illuminate this point: *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995) (analyzing disparate impact claim in familial status discrimination case against private defendant); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (holding a challenge to a city’s conditional use permit by residents of group home for mentally retarded was a disparate treatment, not a disparate impact claim); *Jackson v. Okaloosa County*, 21 F.3d 1531 (11th Cir. 1994) (following the Fifth Circuit’s recognition of the disparate impact analysis); *Casa Marie, Inc. v. Superior Ct. of Puerto Rico*, 988 F.2d 252, 269 (1st Cir. 1993) (recognizing elements of disparate impact claim under Title VIII); *Edwards v. Johnson County Health Dept.*, 885 F.2d 1215, 1223 (4th Cir. 1989) (recognizing that practices with disparate impact violate the Fair Housing Act); *Keith v. Volpe*, 858 F.2d 467, 482-83 (9th Cir. 1988) (applying disparate impact analysis in racial discrimination case against municipality); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-39 (2d Cir. 1988), *aff’d per curiam*, 418 U.S. 15 (1988) (applying disparate impact analysis in racial discrimination case against municipality); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 576-77 (6th Cir. 1986) (applying disparate impact analysis in racial discrimination case against city housing authority); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 986-89 (4th Cir. 1984) (applying disparate impact analysis in racial discrimination case against private defendant); *Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1036 (2d Cir. 1979) (applying disparate impact analysis in racial discrimination case against private defendant); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (recognizing that practices with disparate impact violate the Fair Housing Act); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148 (3rd Cir. 1977) (applying disparate impact analysis in racial discrimination case against city government); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (applying disparate impact analysis in racial discrimination case against municipality); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (applying disparate impact analysis in racial discrimination case against city government); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974) (applying disparate impact analysis in racial discrimination case against private defendant).

21. 42 U.S.C. §§ 3604-3606.

22. See 42 U.S.C. § 3617. Section 803 of the Fair Housing Act provides for the scope of the Act’s coverage and certain exemptions. See 42 U.S.C. § 3603.

23. 42 U.S.C. § 3617. HUD’s implementing regulations define the scope of this prohibition to include:

Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with

In the Preamble to its regulations implementing the Act, HUD observed that "a broad range of activities" can constitute illegal intimidation or interference under section 3617.²⁴ It is not necessary to find a corresponding violation of one of the other substantive provisions of the Act in order for a violation of section 3617 to exist.²⁵ Although physical violence or duress are frequent elements of claims invoking section 3617, they are not necessary to establish a violation.²⁶ Courts have applied section 3617 broadly to cover "all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws."²⁷ Such practices range from racially motivated firebombings, crossburnings, vandalism, and sexual harassment to exclusionary zoning and insurance redlining.²⁸ Most importantly, for the purpose of this paper, a number of courts have held that filing a lawsuit can constitute prohibited interference under section 3617.²⁹

In *United States v. Scott*,³⁰ a group of neighbors filed suit in state court to enforce a restrictive covenant to prevent the conversion of a residence into a group

a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.400(c)(1). Section 100.400(c)(5) further prohibits "[r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act."

24. Preamble, 24 C.F.R. ch. 1, subch. A, app. I (1996). The Preamble has been eliminated from subsequent editions of the C.F.R. as a result of the Executive Branch's Regulatory Reinvention project.

25. See, e.g., *United States v. City of Hayward*, 36 F.3d 832, 836 (9th Cir. 1994); see also SCHWEMM, *supra* note 4, at §§ 20.8 - 20.9.

26. See *Michigan Protection & Advocacy Service v. Babin*, 18 F.3d 337, 346-48 (6th Cir. 1994). *But see Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982).

Section 3617 is not limited to those who used some sort of 'potent force or duress,' but extends to other actors who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus. Under this standard, the language 'interferes with' encompasses such overt acts as racially-motivated firebombings, sending threatening notes, and less obvious, but equally illegal, practices such as exclusionary zoning.

Babin, 18 F.23d at 347 (citations omitted). See also SCHWEMM, *supra* note 4, at 20.2.

27. *Michigan Protection & Advocacy Services v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994).

28. See *City of Hayward*, 36 F.3d at 835; see also *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974) (discriminatory zoning); *Johnson v. Smith*, 810 F. Supp. 235 (N.D. Ill. 1992) (crossburning); *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989) (firebombing); *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988) (sexual harassment); *Stackhouse v. DeSitter*, 620 F. Supp. 208 (N.D. Ill. 1985) (vandalism); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976). Compare *Babin*, 18 F.3d at 348. Mere "economic competition" may be beyond the reach of section 3617. See *Michigan Protection & Advocacy Services*, 18 F.3d at 348 (holding neighbors who outbid group home for property did not violate § 3617). *But see United States v. Hughes*, 849 F. Supp. 685, 686 (D. Neb. 1994) (calling the 6th Circuit's decision "plainly wrong" in suggesting there is some sort of economic competition exception to the Act). See also SCHWEMM, *supra* note 4, at 20.2(2).

29. See *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996); *Schroeder v. De Bertolo*, 879 F. Supp. 173 (D. P.R. 1995); *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992); *HUD v. Grappone, P-H: Fair Housing-Fair Lending Rptr.* para. 25.059 (HUD ALJ 1993), available in 1995 WL 77544, at *3.

30. 788 F. Supp. 1555 (D. Kan. 1992).

home for persons with disabilities.³¹ The state court found that the group home did not violate the restrictive covenant, although it declined to award attorney's fees to the group home defendants because it found the plaintiffs' action was not frivolous.³² The sellers then filed a complaint with HUD which charged the neighbors with violating sections 804 and 818 of the Act.³³ In the resulting federal district court case, the court held that the language of sections 804 and 807 encompassed enforcing restrictive covenants through the judicial process in order to deny housing opportunities to persons with disabilities.³⁴ The court granted the government's motion for summary judgment, holding that the neighbors' attempt to enforce a facially neutral restrictive covenant to prevent the group home from residing in their neighborhood violated the Act.³⁵

In other cases, courts have held that filing a lawsuit could constitute unlawful interference under the Act. In *Northside Realty Associates v. Chapman*,³⁶ a real estate agent brought a state class action suit on behalf of all state real estate agents and brokers against a fair housing testers group alleging interference with economic relations, nuisance, trespass, unjust enrichment, and libel.³⁷ Counterclaiming that the broker's suit violated section 3617 of the Fair Housing Act, the fair housing group petitioned for removal to federal district court.³⁸ In deciding against the broker's petition for remand, the district court held that under the language of section 3617 the defendant fair housing group should be allowed the opportunity to show that the state court lawsuit had the effect of interfering with their rights under the Act.³⁹ Similarly, in *Casa Marie Inc. v. Superior Court of Puerto Rico*,⁴⁰ and *Sofarelli v. Pinellas County*,⁴¹ the courts held the lawsuits constituted prohibited interference.⁴²

31. *See id.* at 1556.

32. *See id.* The fact that the court found the suit was not frivolous has important implications for the status of that suit under the First Amendment.

33. *See id.* at 1556-57.

34. *See id.* at 1562-63.

35. *See id.* at 1562-63.

36. 411 F. Supp. 1195 (N.D. Ga. 1976).

37. *See id.* at 1197.

38. *See id.*

39. *See id.* at 1199-1200.

40. 752 F. Supp. 1152 (D. P.R. 1990), *rev'd on other grounds*, 988 F.2d 252 (1st Cir. 1993).

41. 931 F.2d 718 (11th Cir. 1991).

42. *See id.* at 724-25; *Casa Marie*, 752 F. Supp. at 1167-69.

III. THE RIGHT TO PETITION

Treating a lawsuit as the basis for substantive civil liability can be problematic, however, because lawsuits have traditionally been treated as a form of protected speech under the First Amendment's right to petition. As discussed above, this protected status has recently become a lively issue in fair housing enforcement, but one that is often not well understood.⁴³ A closer examination of the history of the right to petition reveals both its inherent limits and the way in which its scope can be affected by the substantive statute at issue.

A. *The History and Scope of the Right to Petition*

The right to petition, as modern courts understand it, protects the free expression of opinions regarding the government and requests for governmental action.⁴⁴ The First Amendment states that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances."⁴⁵ The right to petition extends to all parts of the government, and the right of access to the courts is one aspect of it.⁴⁶

The historical roots of the right to petition predate the Constitution. Its development in English law can be traced to the Magna Carta and the Bill of Rights imposed by William and Mary in 1689, and it may date back as early as the tenth century.⁴⁷ In its original usage, the right to petition protected the right of individuals to petition the government for a redress of public or private wrongs, and it included an affirmative duty for the government to consider the grievance presented.⁴⁸ In the colonial period, the process for considering such petitions blended legislative and quasi-judicial action and was an important means of

43. See, e.g., *White v. Julian*, No. C95-1757 MHP, 1996 U.S. Dist. LEXIS 21899, at *15, *22-23 (glossing over the intricacies of petitioning law and stating broadly that "at all relevant times long-established Supreme Court precedent upheld the right to participate in public debate and petition the government for redress of grievances").

44. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56-57 (1993); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379-82 (1991); *McDonald v. Smith*, 472 U.S. 479, 482 (1985); see also Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199, 1234-41 (1994).

45. U.S. CONST. amend. I.

46. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509 (1972).

47. See, e.g., *McDonald*, 472 U.S. at 482; *Adderley v. Florida*, 385 U.S. 39, 49-50 n.2 (1966) (Douglas, J., dissenting) (tracing the historical development of the right to petition, and noting the protection of petitioning by the Magna Carta and the Stamp Act Congress of 1765); see also RONALD D. ROTUNDA AND JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 384 (1992) (hereinafter ROTUNDA AND NOWAK).

48. See Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for Redress of Grievances*, 96 YALE L. J. 142, 142-44 (1986).

addressing public matters of concern and private disputes.⁴⁹ Britain's failure to respect colonial petitioning was protested in the Declaration of Independence.⁵⁰

The right to petition was included in the Bill of Rights, although Madison initially proposed it as part of a clause guaranteeing the rights to assembly, consultation, and petition, with a separate clause guaranteeing the freedoms of speech and the press.⁵¹ Congressional attention to the petitioning process floundered under a growing burden of petitions, and ultimately sank during a crisis over abolitionist petitioning in the 1830's and 1840's.⁵² The right to petition was ultimately subsumed into an aspect of the right to free expression.⁵³

Modern interpretations of the right to petition focus on its importance in furthering the democratic process.⁵⁴ The right to petition protects the right to criticize government officials, to lobby the government to achieve one's goals, and to go to court to protect one's interests or seek political objectives.⁵⁵ Like the other rights protected by the First Amendment, the right to petition does not confer absolute immunity.⁵⁶ It provides no greater constitutional protection than other elements of the First Amendment and has been treated similarly to the other

49. *See id.* at 144-58. Colonial legislatures frequently performed both legislative and judicial functions. *See id.* at 145. Higginson notes that the petitioning process served to provide access to otherwise unrepresented groups in colonial society, such as women and Indians, and even served as means for slaves to gain their freedom. *See id.* at 153 (citing the approval in 1779 by the Connecticut Assembly of an emancipation petition from a slave whose owner was a Connecticut resident who joined the side of the British during the Revolutionary War).

50. *See id.* at 155 n.92 (citing the Declaration of Independence para. 30 (U.S. 1776): "[i]n every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury").

51. *See id.* at 155-56.

52. *See id.* at 156-65. The House of Representatives adopted a gag rule in 1836 to stem the flow of abolitionist petitions. This rule tabled without discussions petitions concerned with the abolition of slavery. *See id.* John Quincy Adams succeeded in having the rule repealed in 1844. *See ROTUNDA AND NOWAK, supra* note 47, at 384.

53. *See Higginson, supra* note 48, at 165; *see also NAACP v. Button*, 371 U.S. 415, 452-53 (1963) (Harlan, J., dissenting) ("[J]ust as [freedom of expression] includes the right jointly to petition the legislature for redress of grievances, so it must include the right to join together for purposes of obtaining judicial redress.") (citations omitted).

54. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring) ("The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority.")

55. *See id.* at 485; *Button*, 371 U.S. at 430-31. It is well accepted that the act of filing a lawsuit falls within the right to petition. *See, e.g., Button*, 371 U.S. at 430-31; *McDonald*, 472 U.S. at 484; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

56. *See McDonald*, 472 U.S. at 482, 484-85.

guarantees of free expression.⁵⁷

It is a fundamental tenet of First Amendment jurisprudence that it protects speech without regard to the truth or popularity of the ideas that are offered, and this protection necessarily extends to the right to petition.⁵⁸ This protection is not limited to political matters, but also covers business and other economic activity.⁵⁹ Courts have suggested, however, that litigation involving equal opportunity, as a form of political speech, may deserve more protection than commercial litigation. The Supreme Court in *NAACP v. Button* noted that litigation could not only be a means of resolving private differences, but also a means for achieving lawful political objectives like equality of treatment, and as such was a form of political expression.⁶⁰ In *Creek v. Village of Westhaven*,⁶¹ Judge Posner observed that “a racial motivation, to the extent that it lent an ideological hue to the lawsuit, could actually strengthen the case for regarding it as a form of petition for redress of grievances or as an exercise of freedom of speech.”⁶² However, in other contexts, the Court has stated that litigation need not be “bound up with political matters of acute social moment” to be protected.⁶³

Although the right to petition extends to all branches of government, its limits vary with the form of the petitioning activity at issue.⁶⁴ It has been argued that

57. See *id.* at 484-85, 488-90 (Brennan, J., concurring) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-912, 915 (1982)); *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 221-22 (1967); *Adderley v. Florida*, 385 U.S. 39, 40-42 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 234-35 (1963); *Button*, 371 U.S. at 429-33; see also Jean F. Rydstrom, *The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances*, 30 L. ED. 2d 914 (1973) (discussing the development of right to petition jurisprudence since the nineteenth century).

58. See *Button*, 371 U.S. at 444-45.

59. See *Thomas v. Collins*, 323 U.S. 516 (1945); *ROTUNDA AND NOWAK*, *supra* note 47, at 388.

60. See *Button*, 371 U.S. at 440-45.

61. 80 F.3d 186 (7th Cir. 1996)

62. See *id.* at 192 (citing *Button*, 371 U.S. 415; *National Socialist White People’s Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1973) (en banc)). Judge Posner made the same point in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982):

Some decisions state that the right to bring lawsuits, even of a purely commercial character, is protected by the First Amendment, as a form either of petition for redress of grievances or of speech. But we do not believe that the extent of protection is invariant to the nature of the lawsuit - that the efforts of the National Association for the Advancement of Colored People to use constitutional litigation to break down official segregation are entitled to no more protection than the efforts of Illinois Tool Works to collect damages for an alleged theft of trade secrets - or, if Grip-Pak is right, to drive a competitor out of business.

Id. at 470-71 (internal citations omitted).

63. See *United Mine Workers of America*, 389 U.S. at 223 (rejecting the contention that the principles announced in *NAACP v. Button* apply only to litigation for political purposes); see also *Thomas v. Collins*, 323 U.S. at 531 (“The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones.”). This interpretation seems most consistent with the early history of the right to petition. See Part II, *supra*.

64. See *Perry Educational Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”). See also

various explicitly political forms of protected speech, such as speaking in town meetings and contacting government officials and the media, should enjoy greater immunity under the First Amendment than petitioning before the courts. In practice, that appears to be the case.⁶⁵ Scholars have noted that the Supreme Court has long distinguished between the legislative and adjudicatory limits on petitioning.⁶⁶ “From the outset, the Supreme Court suggested a sharp distinction between the political arena of the legislature and the adjudicatory setting of judicial and administrative proceedings, with the latter category benefitting from a more expansive sham exception and a correspondingly lesser degree of petitioning immunity.”⁶⁷ Courts have “almost plenary power” to control the conduct of courtroom proceedings, and may impose prior restraints on speech in ways that would be inconceivable elsewhere.⁶⁸

B. The Protection for Lawsuits Guaranteed by the Right to Petition is Limited

The existence of substantive and procedural limitations on petitioning protection for litigation is apparent in examples drawn from the common law (the torts of abuse of process and malicious prosecution are frequently cited as

ROTUNDA AND NOWAK, *supra* note 47, at 308-09, 395.

65. See Franklin, *supra* note 16, at 1636 n.139 (citing *White v. Julian*, 1996 U.S. Dist. LEXIS 2116, *2-3, 12-14 (N.D. Cal. 1996)).

66. See Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1, 32 (1995).

67. See *id.*

68. See David McGowan and Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 384 (1994):

Courts may forbid the publication of material obtained in discovery to preserve the integrity of the litigation process, control (within limits) media coverage of a trial, pass rules limiting the right of attorneys to speak about a case, place gag orders on attorneys during a trial, and sanction the filing of ‘petitions’ interposed for an improper purpose or filed without adequate investigation.

(citations omitted); see also Part II, *infra*, on Rule 11. Courts can also limit the content and manner of such petitions by applying the doctrines of collateral estoppel and *res judicata*. See Part II, *infra*.

Similarly, McGowan and Lemley note that contact with administrative officials is also limited to prohibit certain *ex parte* communications with potential petitioners. See McGowan and Lemley *supra*, at 384. Limits on petitioning activity may be considered a function of the intrinsic nature of this right; unlike the right to freedom of speech, which involves the freedom to publish information and opinions, the right to petition preserves the right to be involved in the process of government and to have that government hear one’s grievances. Limits on the right to petition are essentially limits (established by legislation or common law) on the kind of action that the government can take and, correspondingly, the kinds of requests to act that it will hear.

examples of common law limits on judicial petitioning, as is the *Noerr-Pennington* doctrine in antitrust law) and the Federal Rules of Civil Procedure.⁶⁹ These examples, along with a line of labor cases addressing retaliatory lawsuits, have provided guidance for judicial, executive, and congressional attempts to reconcile fair housing enforcement with petitioning immunity.

1. Abuse of Process and Malicious Prosecution

Abuse of process is the misuse of a legal process, either criminal or civil, to accomplish a purpose for which the “process” is not intended.⁷⁰ Process is defined as a direction or demand emanating from court authority.⁷¹ The mere institution of an action or filing of a complaint is not sufficient to give rise to liability under this tort.⁷² A legal or legitimate use of process cannot constitute abuse, regardless of any improper motive of the user.⁷³

Malicious prosecution is the malicious institution or continuation of a criminal prosecution or civil suit, without probable cause, for purposes of harassment where the suit ultimately fails, and results in damage to a person or their property.⁷⁴ There

69. See, e.g. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 470-71 (7th Cir. 1982). For a discussion of abuse of process, malicious prosecution, and the *Noerr-Pennington* doctrine as common law remedies for frivolous legal action, see Timothy P. Getzoff, *Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the Noerr-Pennington Doctrine*, 67 U. COLO. L. REV. 675 (1996). In addition, judicial doctrines like res judicata and collateral estoppel also illustrate the judiciary’s power to control the petitioning process. Res judicata bars relitigation of claims that could have been raised in an earlier proceeding. See *Grip-Pak, Inc.*, 694 F.2d at 469. Collateral estoppel prevents relitigation of issues already litigated and decided in a prior suit between the parties. See *id.* Both of the doctrines create constraints on the right to petition and illustrate the broad authority to limit the form and conduct of petitioning that is accorded to the courts. However, it is not clear whether these doctrines should be considered as restraints on the content of judicial petitioning; more likely, they should be treated as restraints on the time, place, and manner of petitioning, because they both address the repetition of prior proceedings.

70. See 1 AM. JUR. 2D *Abuse of Process* § 1 (1994); 72 C.J.S. *Process* § 106 (1987).

71. See 1 AM. JUR. 2D *Abuse of Process* § 2.

72. See *id.* However, filing a counterclaim can constitute “process” within the meaning of the tort. See *id.* at n. 9.

73. See 72 C.J.S. *Process* § 108(b).

74. See 52 AM. JUR. 2D *Malicious Prosecution* § 1 (1970); 54 C.J.S. *Malicious Prosecution* § 2 (1987). Cf. *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49, 62 n.7 (1993) (stating that malicious prosecution “strictly speaking” covers criminal proceedings only). In addition to injuries to person or property, reputational injury is sometimes protected. See *id.*

Malicious prosecution is an ancient tort. The Statute of Marlbridge amended it in 1269 by including the first provision in English law permitting the recovery of costs by a defendant in a civil action as a remedy for malicious prosecution. The law enabled a defendant in a maliciously prosecuted action to recover his costs and damages. See 54 C.J.S. *Malicious Prosecution* § 9.

The relevant provision of the Statute of Marlbridge is quoted in a 1943 malicious prosecution case, *Myhre v. Hessey*:

And if any chief Lords do maliciously implead such feoffees, faining this case, namely, where the feoffments were made lawful and in good faith, then the feoffees shall have their damages awarded, and their costs which they have sustained by occasion of the foresaid plea, and the

is no federal tort of malicious prosecution.⁷⁵

Abuse of process is similar to malicious prosecution in that both torts involve the improper use of the courts.⁷⁶ The difference between the two is that malicious prosecution involves maliciously causing process to issue, whereas abuse of process involves the improper use of process after it has issued.⁷⁷ There is no liability for abuse of process if the defendant has merely carried the process to its authorized conclusion, even if with bad intentions; instead, some perversion of the process, such as using a judgment as a club for coercion or extortion, is necessary.⁷⁸ In construing the *Noerr-Pennington* doctrine of immunity for petitioning under antitrust law, courts have analogized the doctrine to both torts, and have drawn from them the conclusion that baseless or improperly motivated lawsuits may lose their immunity.⁷⁹

2. The *Noerr-Pennington* Doctrine

The most widely referenced example for balancing First Amendment protections with substantive prohibitions on improper litigation is the *Noerr-Pennington* doctrine, named for *Eastern Rail Road Presidents Conference v. Noerr Motor Freight, Inc.* and *United Mine Workers of America v. Pennington*, and

plaintiffs shall be grievously punished by americiament.
Myhre v. Hessey, 9 N.W. 2d 106, 110 (Wis. 1943) (quoting pt. III of Cap. VI of the Statute of Marlbridge, 52 Hen. III).

75. See 54 C.J.S. Malicious Prosecution § 2. The Supreme Court noted in *Bill Johnson's* that the National Labor Relations Board's power to enjoin baseless state court suits was not limited by the existence of state court remedies through malicious prosecution. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 n.14 (1983).

Dual remedies are appropriate because a State has a substantial interest in deterring the filing of baseless litigation in its courts, and the Federal Government has an equally strong interest in enforcing the federal labor laws. The Federal Government need not rely on state remedies to ensure that its interests are served.

Id.

76. See 1 AM. JUR. 2D *Abuse of Power* § 3 (1994).

77. See *id.*

78. See STUART M. SPEISER, ET AL., 8 THE AMERICAN LAW OF TORTS § 28.34, 205-207 (1991).

79. See *Professional Real Estate Investors*, 508 U.S. at 62-63, 73-75 (Stevens, J., concurring) (quoting with approval *Grip-Pak*, 694 F.2d at 472: "The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation . . ."); see also *Grip-Pak*, 694 F.2d at 471 ("If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional--something that, so far as we know, no one believes."); Joseph B. Maher, Comment, *Survival of the Common Law Abuse of Process Tort in the Face of a Noerr-Pennington Defense*, 65 U. CHI. L. REV. 627 (1998) (arguing that the *Noerr-Pennington* doctrine does not define the scope of the First Amendment right to petition). The scope and basis of the *Noerr-Pennington* doctrine are summarized in Part II, *infra*.

extended by *California Motor Transport Co. v. Trucking Unlimited*.⁸⁰ Analyses of the *Noerr-Pennington* doctrine have been provided by a number of scholars and practitioners; therefore, this paper will provide only a brief summary of that doctrine and the points most related to the matter at issue here.⁸¹

The *Noerr-Pennington* doctrine states that conduct seeking to influence legislative, executive, or judicial action to eliminate competition is immune from federal antitrust liability unless the conduct falls within the "sham exception."⁸² The sham exception states that petitioning conduct which is ostensibly directed toward influencing governmental action, but is in actuality merely a sham to cover an attempt to interfere directly with the business relationships of a competitor, is not exempt from antitrust liability.⁸³

Originally, *Noerr-Pennington* immunity was recognized only for attempts to persuade the legislature or the executive to take action.⁸⁴ In *Noerr*, a coalition of trucking companies and their trade association invoked the Sherman Act against several railroads. The trucking companies claimed that the railroads, attempting to monopolize the long-distance freight business, had conducted a publicity campaign intended to foster the adoption of anti-trucking laws and to create distaste among the general public for the trucking industry, and had successfully lobbied the governor of Pennsylvania to veto pro-trucking legislation.⁸⁵ In ruling that the Sherman Act does not prohibit attempts to persuade a legislature or an executive to restrain trade or create a monopoly, the Court based its decision on two complementary justifications: the power of government to lawfully restrain trade, and the right of private citizens to petition the government to do so.⁸⁶ These two

80. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

81. See, e.g., Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); McGowan and Lemley, *supra* note 68; Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 (1984). For a discussion of the history of the doctrine and its application, see *Professional Real Estate Investors*, 508 U.S. at 56-61 and 70-76 (Stevens, J., concurring). The ten volume treatise by Professors Areeda and Hovenkamp is an indispensable resource. See generally PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 148-259 (1997) (discussing *Noerr-Pennington* doctrine and cases).

82. See *Noerr*, 365 U.S. at 136-144; see also *Professional Real Estate Investors*, 508 U.S. at 56-57 (summarizing historical formulations of the *Noerr-Pennington* doctrine).

83. See *Noerr*, 365 U.S. at 144; see also *Suburban Restoration Co. v. Acmat Corp.*, 700 F.2d 98, 99 (2d Cir. 1983); *United States v. Robinson*, Civ. No. 3:92CV0345, at 15 (slip op.) (D. Conn. 1995).

84. See *Noerr*, 365 U.S. at 136; *Professional Real Estate Investors*, 508 U.S. at 56.

85. See *Noerr*, 365 U.S. at 129.

86. See *id.* at 136-138. The Court noted that to impose liability would:

[S]ubstantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act 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 The right of petition is one of the freedoms protected by the Bill

justifications--the state action doctrine and the right to petition--underlie all subsequent interpretations of the *Noerr-Pennington* doctrine.⁸⁷

The judiciary expanded legislative petitioning immunity to encompass petitioning before administrative agencies in *United Mine Workers v. Pennington*⁸⁸ and courts in *California Motor Transport*.⁸⁹ The *California Motor Transport* decision left open the question of whether a litigant must have a subjective expectation of success in order for the lawsuit not to be considered a sham.⁹⁰ The Court answered that question in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*⁹¹

The Court held that in the antitrust context, an "objectively reasonable effort to litigate" could not constitute a sham, despite any improper intent by the litigant.⁹² The Court stated that *Noerr-Pennington* immunity covers lawsuits in which an objective litigant could conclude that the suit is "reasonably calculated to elicit a

of Rights, and we cannot, of course, lightly impute to Congress an intent to invade those freedoms

Id. at 137-38.

87. See generally McGowan & Lemley, *supra* note 68, at 293. They argue that because of conceptual confusion in the *Noerr-Pennington* doctrine, the scope of petitioning immunity recognized by the Court has been broader than would be justified by the First Amendment. See *id.* at 300.

"State action" in the antitrust context is not the same as "state action" under the Fourteenth Amendment. See AREEDA AND HOVENKAMP, *supra* note 81, at 357. Under the antitrust laws, the term refers to "government policies that are articulated with sufficient clarity that it can be said that these are in fact the state's policies, and not simply happenstance, mistakes, or acts reflecting the discretion of individual officials." *Id.* Under the Fourteenth Amendment, the term is more broadly defined, and can even include private actions with a quasi-public character and the unilateral acts of state officials. See *id.* However, *Noerr* can be read to protect petitioning to all levels of government, not merely those whose actions can validly constitute "state action" within the antitrust laws, so that the right to petition protected by *Noerr* essentially encompasses the Fourteenth Amendment definition of "state action." *Id.* at 524-25.

88. 381 U.S. 657

89. 404 U.S. 508. Like actual lawsuits, threats of unfounded litigation may give rise to liability under antitrust law. See AREEDA AND HOVENKAMP, *supra* note 81, at 237-39.

90. The language of the *California Motor Transport* decision raised the question of whether a single baseless lawsuit is sufficient to create a sham. The Court stated: "[O]ne claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *California Motor Transport*, 404 U.S. at 512-13. Most lower courts have recognized that this is an illustration, rather than a requirement, and that a single lawsuit can indeed fall within the sham exception, and the *Professional Real Estate Investors* opinion supports this interpretation. See Myers, *supra* note 44, at 1231-33.

91. *Professional Real Estate Investors*, 508 U.S. 49.

92. See *id.* at 57.

favorable outcome.”⁹³ The Court outlined a two-part definition of sham litigation. First, the lawsuit must be objectively baseless, so that no reasonable litigant could expect success on the merits.⁹⁴ If the lawsuit is objectively meritless, the court should examine whether the lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor” through the use of governmental process, as opposed to the outcome of that process, as an anticompetitive weapon.⁹⁵ In a concurring opinion, Justice Stevens dissented from this formulation, arguing that it “might not be objectively reasonable to bring a lawsuit just because some form of success on the merits--no matter how insignificant--could be expected.”⁹⁶

In setting forth the rule that subjective motivation does not determine whether a lawsuit has a reasonable basis, the Court noted that it had applied the same rule in another context--the National Labor Relations Act--by its opinion in *Bill Johnson's Restaurants, Inc. v. NLRB*, the decision that provides the best analogy

93. *See id.* at 60. “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.’” *Id.* at 60 n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978); *accord Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam)). “The court must remember that ‘[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.’” *Id.* (quoting *Christiansburg*, 434 U.S. at 422) (alteration in original). The *Christiansburg* decision involved a petition for attorney’s fees brought against the EEOC after it unsuccessfully sued the petitioner for racial discrimination under Title VII of the Civil Rights Act of 1964. *See Christiansburg*, 434 U.S. 412. Section 706(k) of that Act provides that district courts may, in their discretion, award attorney’s fees to the prevailing party. *See id.* at 422. In considering the appropriate rule governing the award of attorney’s fees for successful defendants, the Court in *Christiansburg* noted that “it has long been established that even under the American common-law rule attorney’s fees may be awarded against a party who has proceeded in bad faith.” 434 U.S. at 419. The Court further noted that it could not lightly presume that Congress had intended to distort the judicial process by creating disparate incentives for plaintiffs and defendants. *See id.* The Court held that an award of attorney’s fees to a defendant in a Title VII case required a finding that the plaintiff’s lawsuit was “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” *Id.* at 421. To allow attorney’s fees against plaintiffs merely because they ultimately lost would “undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.” *Id.* at 422.

94. *See Professional Real Estate Investors*, 508 U.S. at 60.

95. *See id.* at 60-61. The foundation for this reasoning is the complementary relationship between the state action doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and the right to petition. Because states were allowed under *Parker* to take action which would otherwise violate the antitrust laws, the Supreme Court held in *Omni Outdoor Advertising* that the antitrust laws “also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.” *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 379-80 (1991).

96. *Professional Real Estate Investors*, 508 U.S. at 68 (Stevens, J., and O’Connor, J., concurring). The concurring opinion cited Judge Posner’s decision in *Grip-Pak*, which argued that the existence of the abuse of process tort shows that a lawsuit may be considered improper even when it has a reasonable basis. *See id.* at 73-75 (citing *Grip-Pak*, 694 F.2d at 472). Therefore, according to Justice Stevens, the difference between “sham” lawsuits and “genuine” lawsuits does not depend only upon the existence of a reasonable basis. *See id.* at 75.

for Fair Housing Act cases.⁹⁷

IV. *BILL JOHNSON'S RESTAURANTS, INC. v. NLRB*

One of the main sources of law regarding the interplay between petitioning immunity for litigation with statutory limits on lawsuits is a line of cases drawn from labor law, chiefly *Bill Johnson's Restaurants, Inc. v. NLRB*, in which the Supreme Court established a two-part test for determining whether a lawsuit violates a statutory prohibition on retaliation.

A. *The Right to Petition Restricts the Power of the NLRB to Enjoin State Court Lawsuits as Illegal Retaliation*

In *Bill Johnson's*, the Supreme Court addressed the limits of the right to petition in the context of an attempt by the National Labor Relations Board ("NLRB") to enjoin "retaliatory" lawsuits.⁹⁸ The case grew out of an attempt by waitresses at a Phoenix, Arizona restaurant chain to organize a union. When one of the waitresses, Myrland Helton, was fired, allegedly as the result of her organizing activities, she filed charges against the restaurant with the NLRB.⁹⁹ After an investigation, the NLRB issued a complaint on September 20, 1978, and on the same day Helton and her colleagues picketed the restaurant.¹⁰⁰ The restaurant manager confronted the picketers and threatened to "get even" with them, and the president of the company made similar threats.¹⁰¹ Several days later,

97. See *id.* at 59 ("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.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743-44 (1983).").

98. The court in *Bill Johnson's* framed its opinion in light of the question before it: whether a lawsuit pending in state court could be enjoined as an unfair labor practice. See *Bill Johnson's*, 461 U.S. at 737. Section 3617 of the Fair Housing Act is similar to § 8 of the National Labor Relations Act [hereinafter NLRA], which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed [by the NLRA]" and to "otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]." See 29 U.S.C. § 158(a)(1), (4). Therefore, the two acts may be considered sufficiently comparable for the reasoning in *Bill Johnson's* to apply to the Fair Housing Act. But see discussion at Part B., *infra*, of *United States v. Robinson*, a Title VIII case, regarding distinctions between that case and *Bill Johnson's*.

99. See *Bill Johnson's*, 461 U.S. at 733.

100. See *id.*

101. See *id.* at 733-34. Manager Sherrie Sturgeon:

[C]onfronted the picketers and took down their names. She said, 'You might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing.' She told Helton that 'I'll get even with you if it's the last thing I do.' That afternoon, [president] Gene Johnson telephoned waitress Cheryl Nichols and asked to talk with her husband.

the restaurant filed a complaint in Arizona state court against the picketers, alleging that they had libeled the restaurant, harassed customers, and created a threat to public safety.¹⁰² In response, Helton filed a second charge with the NLRB, including, among other claims, an allegation that the petitioners had filed their state court suit in retaliation for Helton's protected activities under the NLRA.¹⁰³ The NLRB issued another complaint, and after a hearing, an administrative law judge concluded that the petitioners' state lawsuit had been filed for a retaliatory purpose, lacked a reasonable basis, and therefore violated the NLRA's prohibitions on retaliation.¹⁰⁴ The Ninth Circuit enforced the Board's order.¹⁰⁵

The Supreme Court vacated and remanded the decision. In a unanimous opinion by Justice White, the Court recognized that lawsuits may be used as instruments of retaliation or coercion, but "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."¹⁰⁶ Adopting the reasoning of *California Motor Transport*, the Court held that the First Amendment does not protect lawsuits that lack a reasonable basis.¹⁰⁷

The Court held that the NLRB could enjoin prosecution of "a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by [the NLRA]."¹⁰⁸ It stated that the prosecution of a lawsuit may not be enjoined, "regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law."¹⁰⁹ Although the Court recognized that the NLRB could find that filing an "unmeritorious" lawsuit for a retaliatory purpose constituted an unfair labor practice, the NLRB could not enjoin that lawsuit unless it lacked a reasonable basis.¹¹⁰

In an important footnote, the Court also recognized that its holding in this case did not deal with suits that are beyond the jurisdiction of state courts because of

Johnson asked Carl Nichols why they had been picketing the restaurant. Carl said they were protesting Helton's discharge. Then Johnson said that she would hate to see the Nichols lose their new home, and also that she would hate to see them 'get hurt by all this.'

Bill Johnson's Restaurants v. NLRB, 660 F.2d 1335, 1339 (9th Cir. 1981).

102. See *Bill Johnson's*, 461 U.S. at 734.

103. See *id.* at 734-35.

104. See *id.* at 735-36.

105. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 660 F.2d 1335, 1338 (9th Cir. 1981). The Ninth Circuit found that the record supported the NLRB's finding that the restaurant's lawsuit lacked a reasonable basis in fact and was filed to retaliate against Helton. The court pointed to the fact that the restaurant produced no evidence to support its allegations of mass picketing, trespass, and libel. See *id.* at 1342-43.

106. See *Bill Johnson's*, 461 U.S. at 740-41; see also Myers, *supra* note 44, at 1239 ("Bill Johnson's Restaurants is undoubtedly the broadest application of the *Noerr* principle Moreover, Justice White's opinion . . . treats *Noerr* and *California Motor Transport* as analytical benchmarks for the First Amendment, analogous to *New York Times* and its progeny . . .").

107. See *Bill Johnson's*, 461 U.S. at 743-44.

108. *Id.* at 744.

109. *Id.* at 748 (emphasis added).

110. See *id.* at 741.

federal-law preemption or suits that have objectives that are illegal under federal law.¹¹¹ The Court stated that the NLRB could enjoin such lawsuits.¹¹²

B. *The Bill Johnson's Test*

The Court's opinion, therefore, established a two-part test, with certain important exceptions. In order for the NLRB to enjoin a lawsuit filed in state court as an unfair labor practice, the lawsuit must: (1) lack a reasonable basis in law or fact, and (2) have been filed with improper intent. If the state court lawsuit has already been resolved and found "unmeritorious," however, the lawsuit may be the basis for liability under the NLRA. In addition, lawsuits with illegal objectives and lawsuits beyond the jurisdiction of state courts because of federal preemption can be enjoined without a "no reasonable basis" finding, and presumably can be the basis for substantive liability.

1. No Reasonable Basis And An Improper Motive

In attaching a meaning to the term "reasonable basis," the Court adopted the standards employed in antitrust jurisprudence.¹¹³ The Court cited with approval an article restating the *Noerr-Pennington* doctrine arguing that the First Amendment interests involved in private litigation are not advanced by litigation "based on intentional falsehoods or on knowingly frivolous claims."¹¹⁴

In evaluating whether a lawsuit lacks a reasonable basis, the Court stated that while the NLRB need not limit its inquiry to the pleadings alone, suits that present a genuine issue of material fact should not be enjoined.¹¹⁵ The plaintiff's First Amendment interest in petitioning for redress of grievances, his interest in having his claim heard by a jury, and the state's own interest in protecting its citizens militate against allowing the NLRB to take over this factfinding authority.¹¹⁶ The

111. *See id.* at 737 n.5. It is important to distinguish improper motives from illegal objectives. Retaliation is an improper motive. *See id.* at 744 ("[W]e hold that it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating . . ."). As an example of an illegal objective, the Court cited cases upholding NLRB orders which enjoined unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the NLRA. *See id.* at 737 n.5.

112. *See id.*

113. *See Bill Johnson's*, 461 U.S. at 743-44.

114. *See id.* at 743. Although the Court does not repeat this language elsewhere in the opinion, this does suggest a standard closer to the subjective "reckless disregard" test enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and later cases like *St. Amant v. Thompson*, 390 U.S. 727 (1968), rather than the objective test later adopted in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993).

115. *See Bill Johnson's*, 461 U.S. at 745.

116. *See id.*

Court recommended that the NLRB look to the summary judgment and directed verdict jurisprudence for guidance.¹¹⁷ Similarly, in cases involving questions of law or mixed questions of law and fact, the NLRB is required to leave such matters to the state court, unless the plaintiff's position is "plainly foreclosed as a matter of law or is otherwise frivolous."¹¹⁸

Where a plaintiff wins a case in state court, the lawsuit is deemed to be meritorious and cannot provide the basis for a retaliation claim.¹¹⁹ Where the plaintiff loses in state court, or where the case is withdrawn or otherwise shown to lack merit, the NLRB may adjudicate its case, and may take into account the ruling of the state court in determining whether the state lawsuit was retaliatory.¹²⁰ If a lawsuit results in a judgment adverse to the plaintiff, it may be the basis for a finding of liability.¹²¹ However, the decision does not appear to require the conclusion that losing cases are necessarily unreasonable, and the concurring opinion states that this is a policy decision for the appropriate government agency.¹²²

The circuits that have addressed this question have varied in their interpretations of the Supreme Court's decision. In *NLRB v. Vanguard Tours, Inc.*,¹²³ the Second Circuit rejected an administrative law judge's interpretation of *Bill Johnson's* that any termination favorable to the defendants required a finding of no reasonable basis.¹²⁴ The court also rejected the NLRB's interpretation that a termination favorable to the defendants gives rise to a rebuttable presumption of no reasonable basis.¹²⁵ In *NLRB v. International Union of Operating Engineers Local 520*,¹²⁶ the Seventh Circuit upheld the NLRB's decision, based on *Bill Johnson's* and the NLRB's "consistent interpretation" of the NLRA that a lawsuit was meritless because it had been finally adjudicated and the plaintiff did not prevail.¹²⁷ The court denied enforcement of the NLRB's order, however, because the NLRB's

117. *See id.* at 745 n.11.

118. *See id.* at 746-47.

119. *See id.*

120. *See id.*

121. *See Bill Johnson's*, 461 U.S. at 749.

122. *See id.* at 747, 749, 753 n.3 (Brennan, J., concurring) ("Reasonable people could differ over the wisdom of deciding that a nonfrivolous suit which is withdrawn, or in which the plaintiff ultimately does not prevail, constitutes an unfair labor practice . . . but that is a question of labor policy for the NLRB to decide in the first instance."). It should be noted that Justice Brennan was concurring in the Court's unanimous decision and none of the other justices joined in his concurrence.

123. 981 F.2d 62 (2d Cir. 1992).

124. *See id.* at 65. In summarizing the *Bill Johnson's* test, the Court held that "a pending lawsuit can be an unfair labor practice only if it is retaliatory in motive and lacks a reasonable basis in fact or law. Once the suit has been adjudicated, however, the standard is less forgiving to persons who have filed a retaliatory suit. If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing suit—the Board may consider the filing of the suit to have been an unfair labor practice." *Id.*

125. *See id.* at 65-66.

126. 15 F.3d 677 (7th Cir. 1994).

127. *See id.* at 679.

finding of retaliatory motive was not adequately supported by the evidence.¹²⁸ Similarly, in *Diamond Walnut Growers, Inc. v. NLRB*,¹²⁹ the Ninth Circuit upheld an NLRB decision that a state libel suit, which had been dismissed by demurrer, was retaliatory and an unfair labor practice.¹³⁰ The court rejected the appellant's argument that the NLRB erred when it failed to make a finding that the appellant's lawsuit lacked a reasonable basis.¹³¹ It stated that whether a lawsuit lacks a reasonable basis is relevant only to whether the NLRB can enjoin the lawsuit, and that "bringing an action that proves unmeritorious can constitute an unfair labor practice even though the suit did not lack a reasonable basis . . . at the time it was filed."¹³² It also stated that the cases relied on by appellant—including *Professional Real Estate Investors*--were not on point.¹³³

The second prong of the test is whether the lawsuit was brought with an "improper motive." The Court in *Bill Johnson's* looked to the substantive law at issue for guidance on the issue of its improper motive analysis and determined that, for the purposes of that case, "retaliatory motive" is the second prerequisite to the issuance of an injunction, as well as the basis for a finding that a lawsuit constituted an unfair labor practice.¹³⁴ The determination of motive is a question of fact.¹³⁵

Similarly, in the antitrust context, the second tier of the analysis is one that addresses the substantive violation at issue. The *Noerr-Pennington* sham analysis requires consideration of whether the 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

128. *See id.* at 679-80.

129. 53 F.3d 1085 (9th Cir. 1995).

130. *See id.* at 1090.

131. *See id.* at 1088-89.

132. *See id.* at 1088.

133. *See id.*

134. At issue were Sections 8(a)(1) and (4) of the NLRA, which make it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by that act or to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under that act. 29 U.S.C. §§ 158(a)(1) and (4). The improper motive at issue was "retaliatory purpose," which the Court drew from the ALJ's opinion. The ALJ noted that there was direct evidence that the suit had been filed for a retaliatory purpose and that the suit "violated the [National Labor Relations] Act because it was 'an attempt to penalize [the complainant] for having filed charges with the Board, and to penalize the other defendants for assisting [the complainant] in her protest of the unfair labor practice . . .'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 736 (1983).

135. *See NLRB v. Int'l Union of Operating Engineers Local 520*, 15 F.3d 677, 679 (7th Cir. 1994) (holding that NLRB's decision that suit was retaliatory was not substantially supported by circumstantial evidence of retaliatory motive).

anticompetitive weapon.”¹³⁶

2. The Illegal Objective Exception.

In adopting this two-part test, the Court noted that its ruling dealt only with a particular kind of case: *one involving a “lawsuit that federal law would not bar except for its allegedly retaliatory motivation.”*¹³⁷ It distinguished this fact pattern from situations involving suits in which federal law preempts state court jurisdiction or suits with objectives that are illegal under federal law.¹³⁸ The Court recognized its own history of upholding NLRB injunctions against unions suing to enforce fines that could not lawfully be imposed.¹³⁹

Several circuits picked up the illegal objective exception in cases under the NLRA.¹⁴⁰ In *International Longshoremen’s & Warehousemen’s Union v. NLRB*,¹⁴¹ the D.C. Circuit held that a union’s challenge of an NLRB award in state court was an attempt to enforce a contractual claim that was preempted by the NLRB ruling and, therefore, met the illegal objective standard.¹⁴² It read the *Bill Johnson’s* decision as distinguishing suits that have an illegal objective from those that federal law would not bar but for their improper motivation. The court reasoned that, in suits with illegal objectives, “the plaintiff’s motivation and the reasonable basis of the action presumably is irrelevant.”¹⁴³ The court held that the union’s “squarely contrary” contract claim constituted an illegal attempt to coerce an employer in

136. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993) (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (emphasis in original)). Professor Myers argues that litigation which is objectively unreasonable likely will have been initiated for anticompetitive reasons, making the second prong of the *Professional Real Estate Investors* test redundant. See Myers, *supra* note 44, at 1226.

137. See *Bill Johnson’s Restaurants*, 461 U.S. at 737 n.5 (emphasis added).

138. See *id.*

139. See *id.* (citing *Granite State Joint Bd., Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), *enforcement denied sub nom NLRB v. Granite State Joint Bd.*, 446 F.2d 309 (1st Cir. 1971), *rev’d*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), *aff’d in relevant part sub nom Booster Lodge No. 405, Int’l Ass’n of Machinists v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972), *aff’d* 412 U.S. 84 (1973)); see, e.g., *Chauffeurs, Teamsters & Helpers Local 776 v. NLRB*, 973 F.2d 230, 235-36 (3d. Cir. 1992); *International Longshoremen’s & Warehouse’s Union v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989).

140. See e.g., *Chauffeurs*, 973 F.2d at 235-36; *Int’l Longshoremen’s & Warehousemen’s Union*, 884 F.2d at 1414.

141. 884 F.2d 1407 (D.C. Cir. 1989).

142. See *id.* at 1414; see also *Sheet Metal Workers’ Int’l Ass’n v. NLRB*, 716 F.2d 1249, 1264-65 (9th Cir. 1983) (remanding the case for further proceedings consistent with just-released opinion in *Bill Johnson’s*).

143. See *International Longshoremen’s & Warehouse’s Union*, 884 F.2d at 1414. In *Bill Johnson’s*, the facts “presented a delicate issue of the legitimacy of the Board’s prohibition of a party’s recourse to state legal remedies not generically preempted.” *Id.* The court did not find the union’s motive or the reasonableness of its claims relevant, because the NLRB’s decision effectively preempted the union’s argument under its collective bargaining agreement. See *id.*

contradiction of the Board's award.¹⁴⁴

In *Chauffeurs, Teamsters & Helpers Local 776 v. NLRB*,¹⁴⁵ the Third Circuit relied on the illegal objective standard in upholding a similar injunction against a federal suit.¹⁴⁶ In this case, the union continued to seek enforcement of an award granted by the contract arbitrator, despite a prior decision on the case by the NLRB holding that the arbitrator's decision had been superseded by a subsequent decision and order by the NLRB.¹⁴⁷ The NLRB argued that the union's continual attempts to press its contractual claim unlawfully restrained and coerced the warehouse employees and attempted to cause their employer to discriminate against them, and that it constituted an illegal attempt to change the scope of the bargaining unit.¹⁴⁸ The Third Circuit interpreted the distinction between the two-part test and the illegal objective exception in *Bill Johnson's* to lie in "the plaintiff's objective goals in bringing the action."¹⁴⁹ It summarized the lawsuit in *Bill Johnson's* as seeking, "on the surface," objectives that were not illegal under federal law.¹⁵⁰ The lawsuit before the Third Circuit did have an illegal objective (circumventing the NLRB's decision), and the union could not obtain the relief it sought no matter what evidence it produced.¹⁵¹ The court analogized the union's position to that of a litigant subject to Rule 11 sanctions because of its objectively unreasonable

144. *See id.*

145. 973 F.2d 230 (3rd Cir. 1992).

146. *See id.* at 235-36. In a civil rights case predating the Fair Housing Act and the *Bill Johnson's* decision, the Ninth Circuit applied a test similar to the illegal objective standard, analogizing it to the common-law abuse of process claim. *See Mayer v. Wedgwood Neighborhood Coalition*, 707 F.2d 1020, 1023 (9th Cir. 1983). The plaintiff, who had been frustrated with his attempts to build low-income housing by defendants' administrative proceedings and court actions, sought damages from the defendants under § 1985, and the defendants counterclaimed for attorneys' fees under § 1988. *See id.* at 1021. In its analysis of the fee claim, the court ruled that plaintiff's claim was not frivolous, citing a Third Circuit decision indicating that "an abuse of process that results in a deprivation of constitutional rights can give rise to a § 1983(5) action. *See id.* at 1023 (citing *Jennings v. Shuman*, 567 F.2d 1213, 1220-21 (3d Cir. 1977)). "While normally protected by the First Amendment, the invocation of administrative or judicial proceedings may be tortious and actionable if employed for a purpose that is unlawful and is other than and in addition to the goal sought openly in the proceeding itself." *Id.* at 1022-23 (citing, among others, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-15 (1972) (emphasis added). *See Chauffeurs*, 973 F.2d at 232-33.

147. *See Chauffeurs*, 973 F.2d at 232-33.

148. *See id.* at 232-233.

149. *See id.* at 236 (emphasis added). The court recognized that "[t]he difference between a lawsuit brought because of the plaintiff's retaliatory motivation and a lawsuit with an illegal objective under federal law is subtle, for it may be possible for a retaliatory suit to have an illegal objective." *Id.*

150. *See id.* "On the surface, as the suit did not seek objectives which were illegal under federal law, it had legitimate goals and, depending upon the proofs at trial, could have been won by the plaintiff. . . . Thus, in *Bill Johnson's*, the Court indicated that the suit could be restrained as an unfair labor practice only if the plaintiff had an improper motivation, a subjective criterion." *Id.*

151. *See id.*

position, and stated that the litigant's "subjective good faith" would not defeat liability.¹⁵²

It is not clear from the cases interpreting the illegal objective exception whether an improper motive is also required to find a violation under the illegal objective exception, but it appears not to be. The Third and D.C. Circuit opinions interpreting the illegal objective exception required only that the NLRB show that a state court plaintiff had effectively violated the NLRA by filing a lawsuit that was "contrary" to the Board's prior decision.¹⁵³ In *Chauffeurs, Teamsters, & Helpers Local 776*, the Third Circuit appeared to hold that, under the illegal objective exception, no showing of retaliatory motive was necessary to prove a violation where the union attempted to enforce an arbitration award contrary to the NLRB's previous decision.¹⁵⁴ It agreed with the NLRB's holding that an illegal objective is something other than a retaliatory motive and that the Board may restrain a lawsuit with an illegal objective even if it is "otherwise meritorious."¹⁵⁵ In *International Longshoremen's & Warehousemen's Union*, the D.C. Circuit stated that the issue of motivation was not relevant under the illegal objective exception.¹⁵⁶ The NLRB decided that the union's "collateral attack" on the NLRB's order was "coercion" under Section 8(b) of the NLRA.¹⁵⁷

It should be noted that the *Noerr-Pennington* doctrine did not recognize an equivalent exception for "illegal" state court litigation; however, that does not mean that the circuit court decisions applying the illegal objective exception are suspect. The difference seems to lie in the fact that, as recognized in *City of Columbia v. Omni Outdoor Advertising*,¹⁵⁸ the Court limited the Sherman Act and exempted anticompetitive restraints imposed by the states based on state sovereignty principles and federalism.¹⁵⁹ Therefore, the conflict between federal and state authority under the NLRA that the illegal objective and federal preemption exceptions address has no analogy under the antitrust laws.¹⁶⁰ On the contrary, in the antitrust context, the state has clear authority in some situations to ignore the federal law. The illegal objective exception might be considered somewhat analogous to the point made by the Court in *Professional Real Estate Investors* that litigation that is "objectively baseless" loses its *Noerr* immunity.¹⁶¹ Where federal

152. *See id.*

153. *See Int'l Longshoremen's & Warehousemen's Union*, 884 F.2d 1407, 1413-14; *Chauffeurs*, 973 F.2d at 236.

154. *See Chauffeurs*, 973 F.2d at 236.

155. *See id.*

156. *See International Longshoremen's*, 884 F.2d at 1414.

157. *See id.* at 1413. Section 8(b)(4)(ii)(D), the provision at issue, made it an unfair labor practice "to threaten, coerce, or restrain" any person covered. *See* 29 U.S.C. § 158(b)(4)(ii)(D) (1982).

158. 499 U.S. 365 (1991)

159. *See id.*

160. *See infra* notes 140-43 and accompanying text (discussing state action doctrine in antitrust law).

161. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 n.5 (1993).

law trumps state law, the state law action could be considered objectively baseless; however, under the *Bill Johnson's* formulation, the suggestion would be that an improper motive is also a necessary prerequisite for liability, and that does not appear to be the case.

3. The State Action Doctrine

The illegal objective exception highlights the importance of the state action doctrine in understanding *Noerr-Pennington* and *Bill Johnson's* and, consequently, in determining how to apply these precedents in other contexts.

The existence of the state action doctrine in antitrust law derives in part from the fact that Congress did not intend the Sherman Act to preempt state laws, and the courts have not inferred it has such an effect.¹⁶² During debate on that Act, Senator Sherman himself stated that his bill was intended "to supplement the enforcement of the established rules of the common and statute law by the courts of the several states . . ."¹⁶³ According to Professor Areeda, "Congress has never expressed the least willingness to limit state antitrust by making federal antitrust 'occupy the field.'"¹⁶⁴ However, a state or local government act may be preempted on its face when its requirements compel a result that the federal antitrust laws clearly prohibit.¹⁶⁵

Under the NLRA, however, there is no equivalent grant of authority to the states. In his concurring opinion in *Bill Johnson's*, Justice Brennan addressed the issue of federal preemption of state authority. He noted that, "with regard to labor disputes, federal pre-emption of state law is the rule, not the exception."¹⁶⁶ However, in enacting those laws, Congress did not completely preempt state law. The Court had previously held, in *Linn v. Plant Guard Workers*,¹⁶⁷ that Congress had not preempted the right to sue in state court for defamation occurring in connection with a labor dispute.¹⁶⁸ Therefore, while it appears that the right to petition in cases under the NLRA is not supported by the broad state action doctrine available under the Sherman Act, the right to petition in *Bill Johnson's* was buttressed by a legitimate state interest that had not been preempted by federal law.

162. See AREEDA AND HOVENKAMP, *supra* note 81, at 308, 319-22.

163. *Id.* at 293 (quoting 21 CONG. REC. 2456-2457 (1890)),

164. *See id.* at 294.

165. *Id.* at 387.

166. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 753 (Brennan, J., concurring).

167. 383 U.S. 53 (1966).

168. *Bill Johnson's*, 461 U.S. at 752-53 (Brennan, J., concurring) (citing *Linn*, 383 U.S. 53).

V. THE RIGHT TO PETITION IN FAIR HOUSING CASES

Given a similar concern with preempting state law, the NLRA appears to be more analogous to the Fair Housing Act than the Sherman Act is, and it might be expected that *Bill Johnson's* and its progeny would furnish the appropriate precedent for courts examining the limits of petitioning immunity for lawsuits in the fair housing context. This has been the case. However, several members of Congress have attempted to chart a different course, one based on Rule 11 of the Federal Rules of Civil Procedure.

A. *In Fair Housing Cases, Courts Have Accepted Bill Johnson's As the Relevant Precedent*

To date, two federal district courts (Texas and Connecticut) have considered the question of when a lawsuit loses its petitioning immunity and violates the Fair Housing Act. Both cases involved attempts to locate homes for children with disabilities in residential neighborhoods. Although those courts have differed in approaches, both held that *Bill Johnson's* provided the proper framework for determining when a lawsuit violates the Act. In the first case, *United States v. Robinson*,¹⁶⁹ the court refused to apply the illegal objective exception to a lawsuit challenging the right of a family with a number of foster children to reside in a neighborhood zoned for single-family use.¹⁷⁰ In the second case, *United States v. Wagner*,¹⁷¹ the court held that a lawsuit to enforce a restrictive covenant to prevent a group home for children with disabilities from purchasing a house in a single-family neighborhood fell within the illegal objective exception and, additionally, lacked a reasonable basis in law.¹⁷²

In *United States v. Robinson*, the question of whether the *Bill Johnson's* standard should be applied under the Fair Housing Act was considered in federal court for the first time.¹⁷³ In considering whether the zoning suit at issue constituted unlawful retaliation under the Fair Housing Act, the *Robinson* court held that *Bill Johnson's* provided the appropriate precedent, being "particularly on

169. Civ. No. 3:92CV0345 (slip op.) (D. Conn. 1995).

170. *See id.* at 20-26.

171. 940 F. Supp. 972 (N.D. Tex. 1996).

172. *See id.* at 978.

173. *See Robinson*, Civ. No. 3:92CV0345 (slip op.) (D. Conn. 1995). Members of a neighborhood association in New Haven, Connecticut filed suit against a family attempting to move into that neighborhood. The suit alleged that occupancy of the property by the family, which had seven adopted children and three foster children, all with disabilities, would violate the neighborhood's single-family zoning designation. The plaintiffs' suit sought an order barring the defendants from occupying the property unless they obtained a variance or a special use permit. The suit also sought a temporary restraining order, on the grounds that occupancy by the defendants would cause the plaintiffs imminent harm by diminishing the attractiveness and value of their property and infringing upon their use and quiet enjoyment of that property. *See id.* at 2-5.

point because it involved a construction of a statute which Congress drafted to reach . . . discrimination or coercion.”¹⁷⁴ The court found that “the act of filing the state lawsuit alone forms the basis for the [Fair Housing Act] violations alleged in this action, placing the defendants within the heartland of the Petition Clause.”¹⁷⁵ Relying on *Noerr*, which stated that “the right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms,”¹⁷⁶ the court considered the legislative history of the Fair Housing Act and determined that it did not demonstrate any Congressional intent to prohibit a well-founded lawsuit without some showing that the lawsuit was intended to effectuate “illegal extra-judicial conduct.”¹⁷⁷ The court, invoking the *Bill Johnson’s* test, held that the defendants’ motion to dismiss must be granted if their state court lawsuit had a reasonable basis in fact or law.¹⁷⁸

The issue of whether a lawsuit can violate section 3617 of the Fair Housing Act also came up in *United States v. Wagner*.¹⁷⁹ The Pines claimed that a lawsuit brought to enforce allegedly discriminatory deed restrictions violated the Fair Housing Act. The court found that the defendant homeowners had filed their lawsuit with the intent to interfere with the Pines’ rights under the Act because of the disabilities of the prospective residents of their house. The court also found that filing the lawsuit constituted a violation of section 3617 of the Act.¹⁸⁰

174. *Id.* at 26 n. 25.

175. *Id.* at 23.

176. *See id.* at 138.

177. *See Robinson*, Civ. No. 3:92CV0345 at 26 (citing *Bill Johnson’s*, 461 U.S. at 743).

178. *See id.* at 26. After consideration of applicable zoning law, the court concluded that, from the perspective of a reasonable litigant, the lawsuit presented a genuine issue of law, and the defendants’ motion to dismiss was granted. *See id.* at 33-34, 37 (adopting the *Bill Johnson’s* decision as guiding its analysis of the case, and explicitly rejecting the *Noerr-Pennington* standard). In its discussion, the court stated that the reasonableness of the lawsuit at issue should be viewed from the perspective of an objective litigant at the time the suit was filed. *See id.* at 33-34. It also stated that the fact that a party does not ultimately prevail is not dispositive with regard to the reasonableness of the lawsuit. *See id.* at 34. It is worth noting that in *Robinson*, the Department of Justice argued that the plaintiffs’ conduct violated the *Bill Johnson’s* standard both because the lawsuit had an illegal objective and because it had no reasonable basis in law and fact and had an improper motive. *See id.* at 14, 20-21. The court rejected the illegal objective argument. *See id.* at 20-26.

179. *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996). In *Wagner*, a group of homeowners in a subdivision in Fort Worth filed a state lawsuit against their neighbors, the Pines, to prevent them from selling their home to a local mental health organization, which planned to use the house as a group home for six mentally retarded children. The homeowners claimed that the sale violated a deed restriction and sought temporary and permanent injunctions against the sale. *See id.* at 973. The homeowners also circulated leaflets and petitions opposing the use of the house as a group home for retarded children. *See id.* at 973-78. The Pines filed a complaint alleging that the homeowners violated section 3601 et seq. of the Fair Housing Act, and the Department of Justice charged the homeowners with violating Section 3617. *See id.* at 978.

180. *See id.* at 978-80.

Rejecting the defendants' argument that *Noerr-Pennington* provided the relevant framework, the court applied the *Bill Johnson's* standard and found that the First Amendment did not protect the lawsuit.¹⁸¹ The court noted that *Noerr-Pennington* was an antitrust doctrine and was not constitutionally mandated by the First Amendment.¹⁸² Although it did not specifically recognize *Bill Johnson's* as the relevant precedent, the court expressly adopted the *Bill Johnson's* test urged by the Government, and further held that it could consider the defendants' other protected speech activities as evidence of improper motive.¹⁸³

The court found that the defendants' lawsuit had both an illegal objective and was improperly motivated and lacking in a reasonable basis.¹⁸⁴ In analyzing the illegal objective exception, the court looked at both federal and state law and found that because both prohibited the use of restrictive covenants to prevent the property from being used as a group home, the defendants had sought an objective that was illegal under both federal and state law.¹⁸⁵ It rejected the defendants' contention that the objective of the lawsuit was to "enforce a facially valid deed restriction," stating that the evidence of the defendants' conduct showed that the illegal purpose of the lawsuit was to prevent the use of the property as a group home.¹⁸⁶

Furthermore, the court found that "ample authority" existed that showed the lawsuit violated both the Fair Housing Act and state law. In addition, evidence at trial showed that the defendants' attorneys did not have support for arguments to the contrary.¹⁸⁷ Evidence that the defendants knew of the proposed use of the

181. Order on Defendants' Joint Motion to Exclude Evidence of Defendants' Participation in Constitutionally Protected Activities at 4-7, *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996) (Civ. No. 3:94-CV-2540-H). The court found the leafletting and petitioning activities were protected speech. See *Wagner*, 940 F. Supp. at 980-982; see also Memorandum Opinion and Order on Defendants' Motion to Dismiss Par. 14 of the Complaint at 13-16, *Wagner* (Civ. No. 3:94-CV-2540-H).

182. See Motion to Exclude Evidence at 5-7, *Wagner* (Civ. No. 3:94-CV-2540-H). The court cited for support *Professional Real Estate Investors, Inc. v. Columbia Picture-Industries, Inc.*, 508 U.S. 49 (1993) and *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) ("*Noerr* was based on a construction of the Sherman Act. It was not a First Amendment decision."). See *id.* at 5. The court continued:

Defendants note that the *Professional Real Estate Investors* court stated: "Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose cannot transform otherwise legitimate activity into a sham." 113 S. Ct. at 1927 (emphasis added). Nonetheless, Defendants overlook the fact that the "other contexts" language is limited by the remaining language that restricts the holding to cases involving evidence of anticompetitive intent or purpose" [sic] rather than cases involving improper motivation in general.

Motion to Exclude Evidence n.2, *Wagner* (Civ. No. 3:94-CV-2540-H) (alteration in original).

183. See *Wagner*, 940 F. Supp. at 980-82.

184. See *id.*

185. See *id.* at 980-81.

186. See *id.*

187. See *id.* at 981-82.

It appears that Defendants' lawyers completely ignored the federal [Fair Housing Act], federal case law regarding group homes, the Equal Protection Clause, and the landmark case *City of*

house as a group home for persons with disabilities was sufficient to demonstrate that their suit was improperly motivated.¹⁸⁸

The different outcomes in *Robinson* and *Wagner* may be attributable to the different state interests involved. In *Robinson*, the court clearly granted some deference to the local interest in zoning. The court's decision—that a lawsuit to enforce a facially neutral ordinance that effectively discriminated against individuals with disabilities presented a genuine issue of law—may result from an unwillingness to invade the state's authority, despite a clear expression of Congressional intent to override exactly that kind of discriminatory zoning. In *Wagner*, on the other hand, the court showed little patience with the homeowners' assertion that their suit was not brought out of any discriminatory animus. The fact that the lawsuit was clearly contradicted by both federal and state law convinced the court that the lawsuit fell within the illegal objective exception.

B. Congressional Proposals to Amend the Fair Housing Act Have Adopted the Rule 11 Standard

There have been a handful of bills proposed in Congress over the last several years which have attempted to expand the petitioning immunity for lawsuits under the Fair Housing Act. These bills have rejected the two-part test that the courts have drawn from *Bill Johnson's* and have instead put forth a standard closely based on Rule 11.¹⁸⁹ One such bill was H.R. 3206, entitled "The Fair Housing Amendments Act of 1998," which proposed to amend the Fair Housing Act by

Cleburne v. Cleburne Living Center. Instead, Defendants' lawyers apparently relied on a summer intern's research memorandum limited to the constitutionality of [the] Texas Property Code

Id. at 982 (citations omitted).

188. See *id.* at 982. The court held that it was not necessary to prove that the defendants intended to coerce, intimidate, or threaten the Pines, or interfere with their rights. See *id.* at 979-80. Instead, the court held that "[e]vidence that Defendants brought the lawsuit because of the handicaps of the prospective residents is sufficient to prove liability" *Id.* at 980 (citations omitted). The court in *Wagner* cited, among others, *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) ("[W]hether motivated by animus, paternalism, or economic considerations, intentional handicap discrimination is prohibited by the Act."). The *Scott* decision, however, primarily addressed an alleged violation of § 3604 of the Act (although it did include a finding of liability under § 3617 as well), and this formulation of motive is more appropriate for a finding under that section. See *id.* at 1560-62. The *Wagner* court did note that "the Government and the Pines have probably demonstrated intentional discrimination against the handicapped" in violation of § 3604, but the court declined to expand its holding to include that violation because of the clear intentional interference violation under § 3617. See *Wagner*, 940 F. Supp. at 980 n.12.

189. See Michael P. Seng, *Hate Speech and Enforcement of the Fair Housing Laws*, 29 J. MARSHALL L. REV. 409, 434-37 (1996) (discussing Rule 11 standards for sanctioning lawsuits and the outcomes in Fair Housing Act cases).

adding a new section, “Protection of First Amendment Rights”:

Sec. 821

(a) Nothing in this Act shall be construed to make the expression of an opinion or the seeking of redress from public authority a violation of this Act.

(b) A party shall not be held liable or otherwise sanctioned under this Act for engaging in litigation or administrative proceedings unless –

(1) the party does so for an improper purpose, such as to harass or cause unnecessary delay or needlessly to increase the cost of the litigation or proceedings; and

(2)(A) the claims, defenses, and other legal contentions of the party in the litigation or proceedings are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; or

(B) the allegations and other factual contentions, for which the party in the litigation or proceedings has the burden of going forward with the evidence, have no evidentiary support.”¹⁹⁰

While H.R. 3206 employed the structure of the *Bill Johnson’s* two-part test, it derived its language from Rule 11 of the Federal Rules of Civil Procedure. Where Rule 11 provides that a litigant may be sanctioned based on an improper purpose or a lack of reasonable basis in law or fact,¹⁹¹ H.R. 3206 tightened the standard for Fair Housing Act sanctions significantly, by importing the Rule 11 language to define “improper purpose” and to establish the boundaries of the “reasonable basis in law or fact” standard.¹⁹²

Rule 11 of the Federal Rules of Civil Procedure provides a modern response to the ancient problem of what to do with baseless or improperly motivated lawsuits.¹⁹³ It allows courts to impose sanctions on attorneys or parties bringing

190. H.R. 3206, 105th Cong. (1998) (introduced by Rep. Bilbray for himself, Rep. Canady, and Rep. Harman). (Please send this source). The bill further amends section 815 of the Fair Housing Act to provide that parties must exhaust state or local administrative remedies before a state or local law may be found to violate the Act, amends the familial status definition in section 3602(k), and adds exemptions for state or local regulations requiring dispersal of residential facilities for individuals with disabilities, state or local restrictions on the maximum number of unrelated drug addicts or alcoholics who may occupy a dwelling zoned for single-family use, and other state or local restrictions on the occupancy of residential facilities for individuals with disabilities, persons convicted of crimes, and juvenile delinquents. *See id.*

191. *See* Fed. R. Civ. Proc. 11 (1995).

192. *See* H.R. 3206, 105th Cong. § 821 (1998).

193. *See* William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985). Before Rule 11 was amended in 1983, it provided only that a court could strike a pleading found to lack proper support or intended to cause delay. *See id.* at 181. In 1813 Congress first addressed abuse of judicial processes. *See id.* at 182. The Supreme Court has described the power of courts

claims that have improper purposes, that are not warranted by existing law or by a good faith argument for a change in law, or that lack evidentiary support for any claims of fact.

Rule 11 states, in part:

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

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

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

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

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.¹⁹⁴

Under the explicit language of the rule, all sub-elements must be present for a pleading or motion to meet the standards of Rule 11. Therefore, according to the rule, either an improper purpose (Rule 11(b)(1)) or a lack of reasonable basis in law or fact (Rule 11(b)(2)-(4)) should be sufficient to allow a court to impose sanctions. Circuit courts have differed, however, over whether an improper purpose alone can warrant the imposition of sanctions for an otherwise nonfrivolous filing.¹⁹⁵ The Second, Fifth, Sixth, Ninth, and Tenth Circuits state that sanctions may be applied for complaints with improper purposes only if the complaint itself

to assess attorneys' fees for suits brought vexatiously or in bad faith as an "*assertion[] of inherent power in the courts* to allow attorneys' fees in particular situations, unless forbidden by Congress." See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975); Schwarzer, *supra*, at 193. An early English attempt to sanction lawsuits brought without probable cause is noted in Part II, *supra*.

194. Fed. R. Civ. Pro. 11 (1995) (emphasis added).

195. The Ninth Circuit has interpreted the term "frivolous" as "a shorthand that this court has used to denote a filing that is both baseless and made without a reasonable and competent inquiry." See *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991). The court further stated that complaints which initiate actions are not filed for an improper purpose if they are not frivolous, "even when the motives for asserting those claims are not entirely pure." See *id.*

is frivolous.¹⁹⁶ The First, Third, and Seventh Circuits have taken the opposite approach, holding that an improper purpose alone is a basis for imposition of Rule 11 sanctions.¹⁹⁷ Several also distinguish between complaints and other court papers, indicating that special care must be taken to avoid penalizing the filing of complaints merely on the grounds of improper purpose.¹⁹⁸

Case law establishes that the standard for determining which claims are frivolous under Rule 11 is, like the standard applied in Sherman Act cases, “an objective standard, focusing on what a reasonably competent attorney would believe.”¹⁹⁹ A court should not “use the benefit of hindsight’ but ‘should test the

196. See *Sussman v. Bank of Israel*, 56 F.3d 450, 458 (2d Cir. 1995) (applying *Townsend* analysis); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) (“[A] determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue.”); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (holding that if a complaint is not frivolous, “then any suggestion of harassment would necessarily fail”); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 n.20 (5th Cir. 1987), *overruled in part on other grounds by Thomas v. Capital Security Servs.*, 836 F.2d 866, 872-73 (5th Cir. 1988) (commenting that if a complaint is well-grounded in fact and warranted by law, the complaint by itself cannot constitute harassment); see also *In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990) (declining to decide whether improper purpose alone supports sanctions, but stating that district courts should look to legal and factual basis before deciding improper purpose).

197. See *Lancellotti v. Fay*, 909 F.2d 15, 20 (1st Cir. 1990) (finding that either improper purpose or lack of reasonable basis will justify sanctions); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) (“[F]iling a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning [would be sanctionable.]”); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987) (stating claims made not in good faith but for harassment or undue delay can be sanctioned). This approach, if applied to § 3617 complaints under the Fair Housing Act, would go beyond *Bill Johnson’s* and *Robinson*, which recognize that, regardless of motive or purpose, a lawsuit is protected by the First Amendment unless it lacks a reasonable basis or seeks an illegal objective. See *Bill Johnson’s*, 461 U.S. at 749-50; *Robinson*, slip op., at 25-26.

198. Courts and commentators have expressed concern over the “chilling effect” of Rule 11. See, e.g., *Sussman*, 56 F.3d at 458 (“A party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper”); Schwarzer, *supra* note 193, at 195 (stating that inquiries into subjective bad faith may result in “inhibiting speech and chilling advocacy”); Note of Advisory Committee on Rules, 1983 Amendment (“The rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories”). This concern has been used to justify the position that sanctions should not be imposed for filings with improper purposes unless those filings also lack reasonable bases. See Schwarzer, *supra* note 193, at 195-96.

In this respect, the Rule 11 cases are similar to *Bill Johnson’s*, which held that lawsuits, regardless of purpose, are protected speech under the First Amendment, unless they lack a reasonable basis in law or fact. See *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 748-749 (1983). While the contexts of Rule 11 and the First Amendment are different, the concern over the “chilling” effect of sanctioning lawsuits is common to both, and that concern appears to have prompted courts to refrain from allowing sanctions in both contexts based on improper motive alone. See *id.*

199. See *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir. 1990) (quoting *Greenberg v. Hilton Int’l Co.*, 870 F.2d 926, 934 (2d Cir. 1989)), *overruled in part on other grounds by Mareno v. Rowe*, 910 F.2d 1043 (2d Cir. 1990).

Similarly, *Robinson* endorsed a test of reasonableness based on “the perspective of an objective litigant at the time the state lawsuit was filed.” See *United States v. Robinson*, Civ. No. 3:92CV0345 at 34 (slip op.) (D. Conn. 1995).

conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted."²⁰⁰

VI. FINDING THE PROPER FAIR HOUSING ACT STANDARD

The Supreme Court's decision in *New York Times v. Sullivan*²⁰¹ opted to overprotect speech not traditionally protected by the First Amendment.²⁰² In *New York Times*, the Court established the "actual malice" standard to protect certain false statements of fact, ordinarily not covered by the First Amendment, in order to ensure that protected speech involving the criticism of government officials was not punished by mistake.²⁰³

Should courts establish similar overprotection for the right to petition? Should lawsuits that are used to discriminate receive immunity in order to avoid a chilling effect on legitimate petitioning? Or should such lawsuits instead be punished, in order to effectuate the goals of the Fair Housing Act, even at the risk of discouraging lawful litigation?²⁰⁴ To understand the limits of the right to petition in this context, it is necessary first to consider the interplay of the federal and state interests at stake.

The *Bill Johnson's* and the *Noerr-Pennington* cases are the chief source of guidance on the right to petition. As discussed earlier, the *Noerr-Pennington* doctrine is a product of the interplay between the Sherman Act, the state action doctrine, and the right to petition.²⁰⁵ Similarly, *Bill Johnson's* represents a careful

200. See *McGhee v. Sanilac County*, 934 F.2d 89, 93 (6th Cir. 1991) (quoting *INVST Fin. Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir. 1987)).

201. 376 U.S. 254 (1964).

202. See Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect.'* 58 B. U. L. REV. 685, 706-07 (1978); McGowan and Lemley, *supra* note 68.

203. See Schauer, *supra* note 202, at 707.

204. See *id.*; see also McGowan and Lemley, *supra* note 68, at 392-93. While courts have found some speech to be deserving of overprotection, such as criticism of public officials as in *New York Times v. Sullivan*, some speech should be deterred, because of the costs it imposes on society and the lack of benefits it provides. See *id.*

Congressional hearings addressed the potential chilling effect of HUD's enforcement actions. See *First Amendment Impact of HUD Enforcement Actions Criticized*, 22 Hous. & Dev. Rep. (BNA) 323 (Oct. 20, 1994).

205. According to McGowan and Lemley:

The state action and petitioning doctrines have some important things in common. First, both doctrines deal with important questions involving the relationship between government and its constituents. . . . As stated in *City of Columbia v. Omni Outdoor Advertising, Inc.*, at least with respect to requests directed at state legislators or those vested with state authority, the antitrust immunity doctrines 'are complementary expressions of the principle that the antitrust laws regulate business, not politics; [Parker] protects the States' acts of governing, and [Noerr] the citizens' participation in government.' . . . There is an additional similarity between the

balancing of the individual, state, and federal interests involved—an attempt to reconcile the individual right to petition, recognized by *California Motor Transport*, and the state’s legitimate interests in providing remedies for conduct affecting interests “deeply rooted in local feeling and responsibility,”²⁰⁶ with the authority of the federal government to set national labor policy. In doing so, the Court found that the state’s interest in protecting the health and welfare of its citizens justified some degree of deference from the federal government. When interpreting these cases, it is important to remember that not only the right to petition is at issue, but the relevant state interest involved as well.²⁰⁷

It is clear, then, that the limits of the Constitutional protection for individual petitioning when state interests are involved can be affected by the nature of those state interests, as well as by the relevant federal statute.²⁰⁸ In the *Noerr-Pennington* cases, a strong state interest in trade regulation justified broad protection for genuine, non-sham litigation. In *Bill Johnson’s*, a greater amount of federal authority and a correspondingly reduced state role in labor policy justified a narrower exception: lawsuits that are merely “unmeritorious” can be the grounds for liability under the NLRA, as can lawsuits that are preempted or that have objectives prohibited by federal law.²⁰⁹ On the other hand, the state’s interest in providing a forum for legitimate disputes justified petitioning immunity for

doctrines, which helps to explain the confused state of the cases.... In both cases the Court noted that the issue before it presented a potential conflict between important constitutional principles and strict adherence to the antitrust laws. In both cases the Court construed the antitrust laws so as to avoid the conflict

See id. at 297-98 (citations omitted).

Many commentators ignore the importance of the state action doctrine in *Noerr-Pennington* jurisprudence and focus entirely on the First Amendment principles implicated. *See, e.g., Myers, supra* note 44; Getzoff, *supra* note 69. This may be a source of much of the confusion surrounding the limits of the right to petition.

206. *See* *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)). As earlier cases had recognized, because the NLRA provided no recourse for employers, they had the right to seek judicial protection from tortious conduct during labor disputes in state court. *See id.* at 741-42.

207. *See* *NAACP v. Button*, 371 U.S. 415, 453 (1963) (Harlan, J., dissenting).

This Court has repeatedly held that certain forms of speech are outside the scope [of the First Amendment] and that, in addition, ‘general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise,’ are permissible ‘when they have been found justified by subordinating valid governmental interests.’ The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights.

Id. (citations omitted).

208. The suggestion of *NAACP v. Button* and *Grip-Pak* is that the individual’s interest, as well as the state’s, should be taken into account. The modern interpretation of the right to petition as a right of access to legislative, executive, and judicial fora may be the source of this ad hoc balancing test. As the state is given some authority to limit petitioning, and as the right to petition, like speech, is not the source of absolute immunity, the Court may be balancing the extent of that immunity with the importance of the state interest involved. *See Button*, 371 U.S. at 441-43.

209. *See Button*, 371 U.S. at 441-43.

nonfrivolous lawsuits before state courts, regardless of the litigant's motive.²¹⁰

This balancing framework seems appropriate for Fair Housing Act cases as well. Similar to the NLRA, the Fair Housing Act was a broad attempt to set a single, consistent standard for the nation. Congress explicitly preempted conflicting state law in the area of housing discrimination.²¹¹ Rather than indicating any interest in protecting state interests in such issues, the language of section 3615 indicates a clear intent to preempt conflicting state law. Because that preemption is limited to conflicting state law, however, states retain their authority to enact their own substantially equivalent fair housing statutes and to take other action that does not violate the Act.²¹²

In addition, a state has a legitimate interest in hearing certain disputes and "protecting the health and welfare of its citizens," as stated in *Bill Johnson's*.²¹³ In *Casa Marie, Inc. v. Superior Court of Puerto Rico*,²¹⁴ the First Circuit found that the *Younger v. Harris* federal abstention doctrine required the court to abstain from hearing the Fair Housing Act claim.²¹⁵ The court held that "the district court should have abstained, in the interests of comity and federalism, from interfering with pending state court proceedings which implicate such vital state interests: namely, the Commonwealth's important stake in protecting the integrity of the contempt

210. *See id.*

211. *See* 42 U.S.C. § 3615 (1994) ("[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."). *See id.*

212. Title 42, § 3610 provides that the Secretary of HUD may certify state or local public agencies as "substantially equivalent" for the purposes of enforcement under the Act. *See* 42 U.S.C. § 3610(f)(3)(A)(IV). Section 3615 provides that "[n]othing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter"

213. *See* *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 (1983). In *Bill Johnson's*, the Court stated that its analysis did not cover suits that are beyond the jurisdiction of state courts because of federal law preemption. *See id.* at 737 n.5. The Court cited its previous decision in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), in which it concluded that "a District Court [could] enjoin enforcement of a state-court injunction 'where federal [law] preempt[ed] the field.'" *See id.* at 737-38 n.5.

214. 988 F.2d 252 (1st Cir. 1993).

215. *See id.* at 262. The court also concluded that the Anti-Injunction Act prohibited the federal district court from enjoining the allegedly discriminatory state court action, because "Congress contemplated concurrent state-federal court jurisdiction over Title VIII claims." *See id.* at 261. A detailed discussion of the Anti-Injunction Act is beyond the scope of this paper. However, it is worth noting that the Supreme Court stated that the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), did not preclude the NLRB from enjoining a state-court suit, since the purpose of the Act is to avoid conflicts between state and federal courts where the litigants are private persons, rather than to "hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." *See Bill Johnson's*, 461 U.S. at 737-38 n.5 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971)).

power as the ultimate means of ensuring compliance with the final judgments of its courts, and of 'vindicat[ing] [the State's interest in] the regular operation of its judicial system.'"²¹⁶

Another state health and welfare interest that is frequently involved in fair housing cases is the state's exercise of its zoning power.²¹⁷ The authority of a state or locality to adopt zoning regulations and building codes derives from its sovereign authority under the police power to take action to protect the health and welfare of its citizens.²¹⁸ This authority was preempted *insofar as it conflicts* with the Fair Housing Act and does not justify a broad exception for petitioning to implement a "state action doctrine" similar to the one in antitrust law.

Therefore, the state's interests in regulating development to protect the health and welfare of its citizens and in having questions regarding those regulations heard by its own courts would seem to justify only a narrow exception under the right to petition, similar to the one applied in *Bill Johnson's*. The Act's prohibitions on zoning against group homes bring those cases clearly within the Act's coverage, and attempts to invoke facially discriminatory zoning rules against group homes should fall within the illegal objective exception to immunity.²¹⁹ States

216. See *Casa Marie, Inc.*, 988 F.2d at 262 (internal citations omitted). In a more recent case, *Skipper v. Hambleton Meadows Architectural Review Comm. No. CCB-97-3697*, a federal district court rejected a similar argument for abstention under the Burford and Colorado River analyses. See 996 F. Supp 478, 485-87 (D. Md. 1998). The court found that a neighborhood association's lawsuit to enforce a restrictive covenant against a group home did not implicate a state regulatory scheme, so abstention was not appropriate. See *id.* at 481. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 367 (1926).

217. See *Village of Euclid*, 272 U.S. at 367 (1926).

218. See *id.* at 387. See also 1 ANDERSON'S AMERICAN LAW OF ZONING 98-105 (4th ed. 1996) (summarizing the effect of decisions upholding zoning rules under state or local police power).

219. The illegal objective exception may encompass more than facially discriminatory lawsuits, and such lawsuits might be rejected under the "no reasonable basis in law" standard instead. See *Bill Johnson's*, 461 U.S. at 743 (describing the "no reasonable basis" standard). What this proposed interpretation lacks in subtlety, however, it makes up for in simplicity.

Franklin argues that the "illegal objective" approach is inappropriate in the fair housing context as "inaccurate" and lacking a limiting principle. See Franklin, *supra* note 16, at 1628-29. This argument, however, misconstrues the nature of the illegal objective idea enunciated in the NLRA cases. Specifically, in stating that the illegal-objective test contains "an obvious circularity," this argument confuses "illegal" with "not the law." See *id.* at 1629. For instance, when a litigant asks a court to enforce a racially restrictive covenant, the litigant has attempted to petition the government to achieve an illegal objective—that is, an objective specifically forbidden by federal law. See *id.* On the other hand, when that litigant "asks a court to enforce a contract that is later deemed invalid, or to grant immunity from tort liability where no such immunity exists . . .," that litigant seeks relief for which the law does not provide relief, but he has *not* sought an illegal objective. See *id.* Although no remedy exists in the second case, the litigant has taken no action for which the law says she should be penalized; in the first case, however, she has attempted to use the petitioning process as part of her pursuit of an end which has been proscribed, and the fact that she has done so through the courts, rather than in some nonjudicial manner, will not immunize her conduct. See *id.*

It is not clear whether the illegal objective exception has its roots in the traditional limits to the right to petition derived from the abuse of process tort or the malicious prosecution tort or in some other source altogether. Because abuse of process requires no showing of intent, but only a showing of

have a lesser interest in deed restrictions, which do not involve the exercise of the state police power; therefore, lawsuits to enforce facially discriminatory restrictive covenants should also fall within that exception.²²⁰

A lawsuit which does not, on its face, violate the Act, but which may have been brought because of some discriminatory or retaliatory motivation, should be addressed under the *Bill Johnson's* two-part test.²²¹ This category of cases includes lawsuits involving the application of other permissible zoning rules. First, the court should determine whether the claim is meritless or without a reasonable basis in law or fact; if so, the court should determine whether filing the lawsuit violated one of the provisions of the Fair Housing Act.²²² Violations might be proved using the same methods available for proving other violations of the Act, by showing either disparate treatment or disparate impact.²²³

This approach is consonant with the standard for petitioning immunity established in *Bill Johnson's*, but it raises a serious problem, one familiar from First Amendment jurisprudence—it allows the use of legal process to effect one's discriminatory animus.²²⁴ Unlike traditional First Amendment protection for the expression of unpopular views recognized in cases like *National Socialist Party of America v. Village of Skokie*,²²⁵ however, granting immunity for legitimate lawsuits brought for improper reasons goes beyond mere expression and effectively makes

"perversion" of authorized process to accomplish some harm, it may be the best analogy. However, as discussed above, the mere institution of an action is usually not sufficient to establish liability for abuse of process. In the NLRA context, as discussed above, filing a lawsuit with an illegal objective seems to give rise to a presumption of retaliation or other "perversion" of the judicial process. *See id.*

220. *See Hurd v. Hodge*, 334 U.S. 24, 34-35 (1947).

The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.

Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Id. (citations omitted). *See Bill Johnson's*, 461 U.S. at 748-49.

221. *See Bill Johnson's*, 461 U.S. at 748-49.

222. As discussed above, the *Bill Johnson's* decision stated that adjudication of frivolous lawsuits may be grounds for liability under the NLRA, and the court may also enjoin lawsuits that have no reasonable basis. *See id.*

223. *See generally* SCHWEMM, *supra* note 4, at § 10. Using the disparate treatment analysis, a plaintiff may introduce direct evidence of discriminatory motive or may make out a prima facie case based on circumstantial evidence. *See id.* at § 10.4(2)(b). In a case involving an allegedly discriminatory lawsuit, discriminatory intent might be established in the absence of direct evidence of motive by a showing that the defendant (and plaintiff in the prior suit) took frivolous or meritless legal action against the plaintiff, who is a member of a protected class, and did not take such action against similarly situated persons who were not members of the same protected class.

224. *See Bill Johnson's*, 461 U.S. at 748-49.

225. 432 U.S. 43 (1977).

the courts active participants in the discriminatory behavior at issue.²²⁶ This outcome, however, runs counter to the principle, enunciated in *California Motor Transport Co. v. Tracking Unlimited*,²²⁷ that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control."²²⁸ Surely using the courts as a means to give effect to one's discriminatory animus could be considered just the sort of substantive evil proscribed in *California Motor Transport*.

Franklin suggests one remedy for this problem, arguing persuasively for an intent-based standard for Fair Housing Act liability.²²⁹ Under this view, the validity of the litigation is not a defense; rather, discriminatory or retaliatory intent alone suffices to impose liability.²³⁰ In addition, groundless claims would also give rise to liability under the Fair Housing Act.²³¹

A purely intent-based standard could prove unsupportable because it would fail to give sufficient deference to the state interest in hearing legitimate grievances concerning the application of its laws in particularly those involving its exercise of the police power.²³² The *Bill Johnson's* standard recognizes this, and it represents

226. For instance, under this analysis a homeowner who made a practice of filing legitimate, nonfrivolous lawsuits against all of his minority neighbors to drive them from the neighborhood would not violate the Fair Housing Act. However, the constitutionality of such litigation is uncertain under the constitutional state action doctrine. See RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW § 16.3 (2d ed. 1992). According to Professors Rotunda and Nowak:

A court can uphold trespass convictions which are based on a private party's decision to refuse to open their home or other private property to members of a racial minority. If a home owner refuses to allow persons into his home because of their race he is allowed to have that decision enforced

Id. at 546. On the other hand, cases like *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), support the argument that governmental sanctioning of a private litigant's discrimination in courtroom proceedings itself violates the Constitution. See *Edmondson*, 500 U.S. at 615 (holding that excluding jurors from civil trial jury because of their race violates the Equal Protection Clause); *McCollum*, 505 U.S. at 59 (holding that using race-based peremptory challenges to exclude jurors is unconstitutional); *J.E.B.*, 511 U.S. at 129 (holding that excluding jurors because of gender violates the Equal Protection Clause).

227. 404 U.S. 508, 515 (1992).

228. See *id.* at 515.

229. See Franklin, *supra* note 16, at 1630-34.

230. See *id.* Franklin argues for immunity for plaintiffs who prevail in state court. See *id.* at 1632. This immunity appears to bring his approach closer to the *Bill Johnson's* test. See *id.*; see also *supra* notes 186-87 and accompanying text.

231. See Franklin, *supra* note 15, at 1632. It is not clear whether Franklin intends such liability to apply to groundless claims that lack a discriminatory intent.

232. In addition, Franklin bases his argument for the intent-based standard on the idea, derived from the abuse of process tort, that an otherwise well-founded lawsuit loses its right to petition immunity if filed with improper intent. See *id.* at 1630. However, as noted above, the filing of a lawsuit for improper reasons is the basis for a malicious prosecution, not an abuse of process, claim. The difference between the two torts is subtle but important, because it forms the basis for the Supreme Court's ruling in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* that subjective motivation alone will not defeat First Amendment immunity for non-sham litigation. See

a careful balancing of the state interests and individual rights with the goals of the federal policy at issue.²³³ Some might argue that the goals of the Fair Housing Act deserve greater deference than those of the NLRA, but existing Supreme Court precedent does not indicate any willingness on the part of the courts to override those individual rights and state interests by adopting a solely intent-based standard.²³⁴

Instead, the outcome described above—in which nonfrivolous litigation is a tool for discrimination—may be seen as the result, however unfortunate it may seem, that the First Amendment requires.²³⁵ Just as the freedom of speech allows those with unpopular views to air them before the public, so the right to petition allows them to bring their legitimate grievances before the government.²³⁶ In its interpretations of the right to petition, the Supreme Court clearly stated that, in most cases, improper motivation alone is insufficient to overcome First Amendment immunity.²³⁷ If there are limits on courts that prevent deciding such lawsuits in favor of discriminatory litigants, those limits probably exist elsewhere in the Constitution.²³⁸ To adopt an intent-based standard would underprotect legitimate judicial petitioning.

By the same token, the Rule 11-based standard proposed in H.R. 3206 might actually overprotect discriminatory lawsuits by adopting a much stricter standard for liability than the one articulated by the Supreme Court.²³⁹ Where the interest protected determines the scope of the protection granted, using a standard developed to ensure the efficient conduct of litigation might not adequately address the unique and important interests at issue in the fair housing context. By adopting the language of Rule 11, H.R. 3206 would have significantly narrowed the *Bill Johnson's* standard by eliminating the exceptions attributable to federal preemption of conflicting state law and restricting the definition of “improper purpose.”²⁴⁰ In

Professional Real Estate Investors v. Columbia Pictures Industries 508 U.S. at 60-61.

233. See *Bill Johnson's*, 461 U.S. at 740-43 (concluding that the NLRB's analysis of the state Act is “untenable” in light of the First Amendment right of access to courts).

234. See *id.* at 749 (holding that although lawsuits instigated for retaliatory purposes are unfair, this intent is not dispositive and will instead only be enjoined where “the suit lacks a reasonable basis”).

235. See *id.* at 742-43.

236. See *id.*

237. See *id.* For a discussion of the *Noerr-Pennington* doctrine and the *Bill Johnson's* decision, see Parts II and III.

238. For a discussion of constitutional state action and *Mayer v. Wedgwood Neighborhood Coalition*, 707 F.2d 1020 (1983), see *supra* notes 80, 139, and note 129, respectively.

239. See H.R. 3206, 105th Cong. § 2 (1998).

240. See *id.*; FED. R. CIV. P. 11. H.R. 3206 also states: “Nothing in this Act shall be construed to make the expression of an opinion or the seeking of redress from public authority a violation of this Act.” If the principles of petitioning immunity are adopted for fair housing from antitrust law, what are the implications for petitioning other than litigation? Professors Areeda and Hovenkamp state that

doing so, H.R. 3206 would have expounded the level of petitioning immunity beyond what the Supreme Court recognizes in other contexts. Although some might view this expansion positively, as a way to increase the avenues of free expression and political action available to the public, in the fair housing context the effect would be to expand the immunity available to those who would use the courts to discriminate against their neighbors.

The applicability of the Rule 11 standard to these cases is questionable because Rule 11 is fundamentally a procedural rule. As discussed in Part II above, the authority of courts to limit courtroom petitioning in procedural matters differs in nature from the authority of government to control petitioning in other contexts.²⁴¹ There is some precedent for relying on Rule 11 to establish the limits of petitioning immunity: in *Professional Real Estate Investors*, Justice Thomas referred to Rule 11 in deciding whether a lawsuit dismissed on summary judgment was objectively baseless.²⁴² In response, however, Justice Souter cautioned in his concurrence against construing the decision's citation of Rule 11 to "signal the importation of every jot and tittle of the law of attorney sanctions."²⁴³

VII. CONCLUSION

In the furor following the Berkeley case, the intent of the Fair Housing Act has often been ignored. Congress wrote the Act to prohibit harassment and intimidation, by criminal and other means, of people exercising their rights to equal opportunity in housing. When amending the Act in 1988, Congress intended to eliminate the use of zoning rules and deed restrictions to discriminate against people with disabilities. Although advocates of the right to protest group homes may wrap their actions in the mantle of community concern, it is clear that bias against persons with disabilities often plays a significant part in such opposition.²⁴⁴ For those inclined to act on that bias, lawsuits can be an effective means of intimidating and harassing their enemies.

On the other hand, Professor Seng notes that civil rights groups have been "the primary beneficiaries" of the rights guaranteed by the First Amendment.²⁴⁵ As the Supreme Court recognized when it upheld the NAACP's attempts to use the courts

courts have been reluctant to recognize legislative petitioning to be the grounds for antitrust liability, but they suggests that one of the few cases in which a legislative petitioner could lose her immunity is when she makes knowingly false statements in her petitions. See AREEDA AND HOVENKAMP, *supra* note 81, at 177.

241. See McGowan and Lemley, *supra* note 68, at 384-85. "Because of the nature and purpose of these fora, the First Amendment should not impair the ability of courts and agencies to enforce their own rules, including rules designed to punish claimants who bring worthless claims and abuse the relevant judicial processes." *Id.* at 389.

242. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 65 (1993).

243. See *id.* at 67 (Souter, J., concurring).

244. See, e.g., *United States v. Wagner*, 940 F. Supp. 972, 974-982 (1996) (finding such bias motivated defendants to violate the Act).

245. See Seng, *supra* note 189, at 410. See 461 U.S. at 748-49.

to fight school segregation in Virginia, litigation is a powerful weapon in the fight for civil rights. This dual character of litigation makes it difficult to determine when a lawsuit should lose its First Amendment immunity, it also suggests that we should be wary of attempts to limit the right to petition the courts based on the perceived intent of that litigation.

In adopting a framework for addressing lawsuits which may violate the Fair Housing Act, the Supreme Court's recognition in *Bill Johnson's* that state court lawsuits that violate federal law are not protected by the right to petition should guide the courts.²⁴⁶ Applying the illegal objective exception to cases involving zoning, restrictive covenants, or other lawsuits that clearly violate the Act ensures that Congress' goal to provide fair housing throughout the nation is upheld. Courts may assess other lawsuits under *Bill Johnson's* two-part test to impose liability on those who would file frivolous lawsuits for improper reasons. This standard protects the lawful exercise of the right to petition and provides a proper measure of deference to legitimate state concerns without abandoning our national commitment to fair housing.

246. See *Bill Johnson's*, 461 U.S. at 748-49.

