NO. _____

IN THE
Supreme Court of the United States

BARDSTOWN CAPITAL CORPORATION
AND FRANK A. CSAPO,

Petitioners,

v.

SEILLER WATERMAN, LLC; BILL V. SEILLER;
TERRY MAUNEY; PHILLIP STEWART; BETTIE STEWART;
ELZIE WATSON; AND BRIDGETTE WATSON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court's precedent "finds all but sham law suits exempt from the reach of the *antitrust laws*." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 540 (2002) (Breyer, J., concurring in part) (emphasis added; citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)). Does this same precedent exempt all but sham lawsuits from the reach of *state common-law torts*, like wrongful use of civil proceedings?

2. For a lawsuit to be labeled a "sham" under this Court's *Noerr-Pennington* doctrine, the lawsuit must first be "objectively baseless" such that "no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. at 60. Does the mere fact that a litigant has standing, the statutory right, or ability to bring a legal challenge provide "probable cause" to file the lawsuit and alone prove the lawsuit is not "objectively baseless?"

3. This Court has not directly held that "a lawsuit is a constitutionally protected 'Petition,'" under the First Amendment's Petition Clause. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 402 (2011) (Scalia, J., concurring in part, dissenting in part). Yet the Supreme Court of Kentucky held that a lawsuit for wrongful use of civil proceedings was prohibited because the targeted civil proceeding—a lawsuit challenging a zoning decision—was constitutionally protected. Was this in error?

PARTIES TO THE PROCEEDING

Petitioners (collectively, "Bardstown Capital") are Bardstown Capital Corporation and Frank A. Csapo, who were the plaintiffs in the Jefferson County Circuit Court, Kentucky, appellants in the Kentucky Court of Appeals, and appellees in the Supreme Court of Kentucky.

Respondents ("the Property Owners") are Seiller Waterman, LLC, and Bill V. Seiller—the law firm and attorney who represented the following owners: Terry Mauney, Phillip Stewart, Bettie Stewart, Elzie Watson, and Bridgette Watson, all of whom were the defendants in the Jefferson Circuit Court, Kentucky, appellees in the Kentucky Court of Appeals, and appellants in the Supreme Court of Kentucky.

CORPORATE DISCLOSURE STATEMENT

Bardstown Capital Corporation has no parent corporation and is privately owned. Thus, no publicly held company owns 10% or more of its stock.

RELATED CASES

- *Mauney v. Louisville Metro Council,*
  No. 10–CI–006022, Jefferson Circuit Court;
  No. 2014–CA–000263–MR Kentucky Court of Appeals. Judgment entered by the Kentucky Court of Appeals on August 12, 2016, available at 2016 WL 4255017.

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Bardstown Capital Corporation and Frank A. Csapo (collectively, "Bardstown Capital") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

INTRODUCTION

Roughly sixty years ago, this Court recognized that anticompetitive government lobbying is exempt from antitrust liability, eventually labeling the concept the *Noerr-Pennington* doctrine. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United*

Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). However, the doctrine is not without limits—it does not apply to "sham" lawsuits that are "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (*PRE*), 508 U.S. 49, 61 (1993), and are only "an attempt to interfere directly with the business relationships of a competitor," *Noerr*, 365 U.S. at 144.

This Court has not reviewed the *PRE* test for the *Noerr-Pennington* sham exception since issuing *PRE* in 1993. In the intervening thirty years, courts across the country have expanded the *Noerr-Pennington* doctrine *well beyond* its original context in antitrust and the Sherman Act—its protection has overflowed its historical banks. During this expansion, the sham exception has not provided much comfort to litigants genuinely damaged by others' willful misuse of legal proceedings.

This Court, meanwhile, has chosen not to expand the doctrine significantly. The only expansions from the doctrine's original anticompetitive conduct have been to retaliatory actions in front of the NLRB and to 42 U.S.C. § 1983 actions—but never to state common-law torts. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983).

Yet the Supreme Court of Kentucky applied the *Noerr-Pennington* doctrine to prohibit a wrongful-use-of-civil-proceedings action stemming from a zoning challenge, areas far afield of the doctrine's historical antitrust underpinning. Here, a group of disgruntled property owners waged a years-long meritless legal

battle to force a real estate developer to pay a premium for their properties. But according to the Supreme Court of Kentucky, this battle was not a sham because the group of property owners exercised a statutory right to appeal the zoning decision making the real-estate development possible. Put another way, the court held that the Property Owners' litigation was not "objectively baseless" just because *they had standing*. The holding effectively ends this Court's sham exception to *Noerr-Pennington* and blocks any review of whether "a reasonable litigant . . . could realistically expect success on the merits of the challenged lawsuit." *PRE*, 508 U.S. at 63.

The Kentucky court cited little support for its broad pronouncement. At any rate, a litigant's *ability* to bring a claim has nothing to do with whether he or she *should* have brought the claim or had "[p]robable cause" to do so. *Id.* at 62. The Supreme Court of Kentucky's decision rendered *Noerr-Pennington*'s sham exception functionally nonexistent and cries out for this Court's review because it is unsupported by and inconsistent with both this Court's relevant doctrinal and First Amendment precedent.

OPINIONS BELOW

The Supreme Court of Kentucky's opinion (App. 1) is reported at 643 S.W.3d 68 (Ky. 2022). No petition for rehearing was filed. The Kentucky Court of Appeals' opinion (App. 30) is not reported and is available at 2020 WL 3108238.

JURISDICTION

The Supreme Court of Kentucky entered judgment on March 24, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the *Noerr-Pennington* doctrine, arising from *Noerr*, 365 U.S. 127, and *Pennington*, 381 U.S. 657, which implicates the Petition Clause of the U.S. Constitution, U.S. Const. amend. I: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances."

The underlying zoning challenge involves portions of the following Kentucky statutes: Ky. Rev. Stat. (KRS) 100.214; KRS 100.347; and KRS 100.3471, relevant portions reproduced below.

- KRS 100.214:

> "When any planning unit containing any portion of a county containing a city of the first class or a consolidated local government a hearing is scheduled on a proposal by a property owner to amend any zoning map, the following notice shall be given in addition to any other notice required by statute, local regulation, or ordinance to be given:
>
> . . . .
>
> (2) Notice of the hearing shall be given at least thirty (30) days in advance of the hearing by first-class mail, with certification by the

commission secretary or other officer of the planning commission that the notice was mailed, to the mayor and city clerk of any city with a population of less than three thousand (3,000) based upon the most recent federal decennial census so affected, to an owner of every parcel of property adjoining at any point the property classification of which is proposed to be changed, to an owner of every parcel of property directly across from the street from said property, and to an owner of every parcel of property which adjoins at any point the adjoining property or the property directly across the street from said property; provided, however, that no first-class mail notice, required by this subsection, shall be required to be given to any property owner whose property is more than five hundred (500) feet from the property which is proposed to be changed. It shall be the duty of the person or persons proposing the map amendment to furnish to the planning commission the names and addresses of the owners of all property as described in this subsection. Records maintained by the property valuation administrator may be relied upon conclusively to determine the identity and address of said owner. In the event such property is in condominium or cooperative forms of ownership, then the person notified by mail shall be the president or chairman of the owner group which administers property commonly owned by the condominium or cooperative owners. A joint notice may be mailed to two (2) or more co-owners of an adjoining property who are listed in the property valuation administrator's records as having the same address."

- KRS 100.347:

(3) "Any person or entity claiming to be injured or aggrieved by any final action of the legislative body of any city, county, consolidated local government, or urban-county government, relating to a map amendment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the map amendment, lies. Such appeal shall be taken within thirty (30) days after the final action of the legislative body. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The legislative body shall be a party in any such appeal filed in Circuit Court."

- KRS 100.3471:

(3)(c) "If the Circuit Court determines that an appeal is presumptively frivolous, the Circuit Court shall consider all costs, economic loss, and damages that the appellee may suffer or incur during the pendency of, or that will be caused by, the appeal, including attorney fees and court costs, up to a maximum bond amount of two hundred fifty thousand dollars ($250,000)."

STATEMENT OF THE CASE

In 2008, Bardstown Capital announced plans for a highly anticipated commercial development with a mixture of retail, restaurants, and commercial space, in Louisville, Kentucky. The development site consisted of several parcels directly adjoining the Property

Owners' land.[1] Bardstown Capital presented the planned development to the local community on multiple occasions in 2008 and 2009, which some of the Property Owners attended, along with hundreds of others.

Following the community meetings, Bardstown Capital sought a zoning change with Louisville Metro Planning and Design Services. The request prompted a public review of the case by the Louisville Metro Planning Commission's Land Development and Transportation Committee (LD&T). Notice of the review was mailed to first- and second-tier adjoining property owners, including the Property Owners, as required by Kentucky law. App. 77. Twice, with various members of the Property Owners present both times, the LD&T publicly announced the date that the Metro Planning Commission would review the zoning change. App. 77–78. Twelve signs were erected on the proposed development site notifying the public of the Metro Planning Commission's hearing date, and the date was published in *The Courier Journal*, Louisville's primary daily newspaper. App. 77–78.

When the advertised date arrived, the Metro Planning Commission publicly announced the hearing would be continued a month. App. 78. At the continued hearing, the Metro Planning Commission took three hours of public testimony and evidence. App. 4; App. 78. After additional continuances, the Metro Planning Commission heard an additional five-and-one-half hours of evidence and testimony. App. 4; App. 79. The zoning change was unanimously approved

[1] The identified "related case," *Mauney, et al. v. Louisville Metro Council*, involved additional property owners whose properties made up the 43.5 acres selected for the development. App. 74.

following the Metro Planning Commission's "extensive written recommendation." App. 4.

The Property Owners then filed an appeal of the zoning change, claiming that the Metro Planning Commission had not provided adequate notice of its hearings. The trial court granted summary judgment for Bardstown Capital, finding that there was "no support" for the Property Owners' position. App. 60. On appeal, the Kentucky Court of Appeals affirmed Bardstown Capital's summary judgment, relying on the "plain statutory language" and "plain text" the Property Owners simply ignored. App. 82–83. In fact, the Kentucky Court of Appeals described the Property Owners' interpretation of "simple statutory language" as "strained" and refused to "accept [their] invitation to engage in logical gymnastics." App. 82, 84.

Bardstown Capital then sued the Property Owners for wrongful use of civil proceedings, claiming that the Property Owners' purpose in the previous litigation was to force Bardstown Capital to pay a premium for their properties, well above fair market value.[2] The Property Owners' attorney acknowledged as much to Bardstown Capital's counsel, writing, "my clients do not really want to appeal, they just want your clients to buy their properties." App. 38. And the Property Owners' agreement with their counsel incentivized using a lawsuit—regardless of its outcome—to leverage a higher price for the sale of the land specifically to Bardstown Capital. App. 43. Eighteen months into this lawsuit, the Property Owners amended their answer to claim that they were protected by the *Noerr*-

[2] Bardstown Capital "offered to purchase the property owners' properties for fair market value, which they rejected." App. 5.

Pennington doctrine and the First Amendment.[3] App. 6. Soon after, the Property Owners moved for summary judgment.

Bardstown Capital argued that the *Noerr-Pennington* doctrine did not apply and that, even if it did, the sham exception excluded its application or that, at the very least, it presented a fact issue for a jury. App. 72. The trial court rejected those arguments and granted summary judgment to the Property Owners. App. 7; App. 70–73. Bardstown Capital appealed.

The Kentucky Court of Appeals acknowledged that the *Noerr-Pennington* doctrine applied here but held that the sham exception was a factual question ill-suited for summary judgment. App. 60–61. In fact, the court reasoned, "[W]e cannot hold that the circuit court's conclusion that a reasonable basis for appeal existed in this case is a proper one." App. 60. Thus, the court remanded the matter to the trial court. The Property Owners appealed to the Supreme Court of Kentucky.

The Supreme Court of Kentucky likewise acknowledged that the *Noerr-Pennington* doctrine applied, but the court went much further. Because KRS 100.347 provided a "person or entity claiming to be injured or aggrieved" by a zoning change the opportunity to challenge that decision, the court reasoned that the Property Owners' previous zoning challenge was not "objectively baseless." App. 26–27. In other words, the Supreme Court of Kentucky held that standing, *alone*, provides constitutional protection from liability. The court did not review the merits of the Property

[3] The Property Owners also cited Section 1 of Kentucky's Constitution, but that played no role in the Supreme Court of Kentucky's opinion.

Owners' zoning appeal or weigh the Kentucky Court of Appeals' outright rejection—*twice*—of the Property Owners' arguments because they were illogical and untethered to any statutory language. Instead, the Supreme Court of Kentucky simply relied on the Property Owners' *ability* to initiate their meritless action, needlessly delaying Bardstown Capital's planned real estate development. The court reversed the opinion of the Kentucky Court of Appeals and remanded the matter to the trial court with instruction to reinstate summary judgment for the Property Owners. App. 28. This petition followed.

REASONS FOR GRANTING THE PETITION

In 1961, this Court held that the Sherman Act could not punish "political activity" through which "the people . . . freely inform the government of their wishes."*Noerr*, 365 U.S. at 137. Four years later, this Court held that joint efforts to influence public officials were also immune from antitrust liability. *Pennington*, 381 U.S. at 670. Together, the two opinions became known as the *Noerr-Pennington* doctrine. For decades, this Court has applied the doctrine only to a discrete subset of cases.

However, this case represents a new frontier for the *Noerr-Pennington* doctrine: state common-law torts. More than that, though, the Supreme Court of Kentucky's analysis renders illusory any comfort or protection that harmed parties may expect from the *Noer-Pennington*'s sham exception. Even more sweeping, its precedential value will allow "courts [to] run roughshod over areas of traditional state governance." *See* Joseph B. Maher, *Survival of the Common Law Abuse of Process Tort in the Face of a Noerr-*

Pennington Defense, 65 U. CHICAGO L. REV. 627, 651 (1998). This Court should accept review.

I. The *Noerr-Pennington* doctrine has never been reviewed by this Court in the context of state common-law torts unrelated to antitrust.

To the extent the Petition Clause applies to lawsuits (*see* section III, *infra*), the *Noerr-Pennington* doctrine does not apply to state common-law torts unrelated to the antitrust arena. The Supreme Court of Kentucky erred by concluding otherwise and by applying the doctrine to Bardstown Capital's wrongful-use-of-civil-proceedings claim.

Although the *Noerr-Pennington* doctrine has, over its lifetime, been extended beyond the Sherman Act, this Court has never extended it outside a *statutory* cause of action. *See, e.g.*, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983) (applying to NLRB retaliation claim); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011) (applying to 42 U.S.C. § 1983 claim). This Court's measured use makes sense, given the doctrine's provenance. *Noerr* dealt with a provision in the Sherman Act that could have perhaps interfered with the Petition Clause, but unsurprisingly was interpreted in a way to avoid the Petition Clause or other constitutional concerns. 365 U.S. at 136–37. When faced with two plausible statutory constructions, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). So it is for the other statutory actions to which *Noerr-Pennington* has been extended.

Here, however, the *Noerr-Pennington* triggering activity cited by the Property Owners and the

Supreme Court of Kentucky is the *common-law tort* of wrongful use of civil proceedings. This Court has acknowledged that the Framers likely did not believe the Petition Clause provided absolute immunity from such preexisting common-law claims. *McDonald v. Smith*, 472 U.S. 479, 483 (1985). That is not to say that common-law torts are immune from constitutional review, but that review does not involve the *Noerr-Pennington* doctrine.

The Court's guidance is necessary because state and federal courts have applied the *Noerr-Pennington* doctrine to common-law claims that have nothing to do with right-impinging statutes, and this Court has yet to review the issue but should. *See, e.g.*, *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (applying *Noerr-Pennington* to state tort claims); *Cove Road Development v. Western Cranston Indus. Park Assocs.*, 674 A.2d 1234 (R.I. 1996) (same). That it took "almost 200 years' worth of lawsuits, untold numbers of which might have been affected by a First Amendment right to litigate" is reason enough to be suspicious of *Noerr-Pennington*'s application to common-law torts. *Guarnieri*, 564 U.S. at 403–04 (Scalia, J., concurring in part, dissenting in part).

II. The sham exception has not been reviewed by this Court in decades, and guidance is necessary.

In 1993, this Court outlined a new two-pronged test for *Noerr-Pennington*'s sham exception: (1) "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; if (1) is satisfied, (2) the court then "examine[s] the litigant's subjective motivation" and "focus[es] on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business

relationships of a competitor.'" *PRE*, 508 U.S. at 60–61. (quoting *Noerr*, 365 U.S. at 533; emphasis added). But since *PRE*, this Court has not reviewed the test directly, at least not in the *Noerr-Pennington* context. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014).

A writ of certiorari is warranted because the Supreme Court of Kentucky's analysis strays from this Court's precedent and renders unconstitutional states' traditional powers of policing conduct before their tribunals. "Objectively baseless" and "probable cause" within the *PRE* test need further clarification. This case presents an ideal opportunity to weigh whether *PRE* was "an unnecessarily broad holding that [this Court] might regret when confronted with a more complicated case." *PRE*, 508 U.S. at 68 (Stevens, J., concurring).

III. Standing, alone, does not guarantee that there is "probable cause" to bring a lawsuit such that it is not "objectively baseless." This Court has not, but needs to, resolve this issue.

The Supreme Court of Kentucky conflated *available* actions with *worthy* actions. When reviewing whether the Property Owners' zoning challenge was "objectively baseless," the Supreme Court of Kentucky looked no further than the statutory grant of a right to appeal under KRS 100.347(3). A litigant's *ability* to bring a claim does not mean that they *should* bring that claim, that the claim has any merit, or that they even have "probable cause" for the claim. Standing, after all, has nothing to do with whether "a reasonable litigant could realistically have expected success on the merits." *PRE*, 508 U.S. at 67 (Souter, J., concurring); *see also Whitmore v. Arkansas*, 495 U.S. 149,

155 (1990) (holding that standing, as a threshold question, "in no way depends on the merits of the [case]"). Put another way, the *PRE* test requires Bardstown Capital "to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." *PRE*, 508 U.S. at 61. But again, "standing does not depend on the viability of one's claim—the latter is a distinct concept analyzed on its substantive merits." *Grill v. Quinn*, 2013 WL 3146803, at *12 (E.D. Cal. June 8, 2013). The Supreme Court of Kentucky's exclusive focus on standing improperly eliminated "merits" from the "objectively baseless" determination in the first prong of the *PRE* test.

The Kentucky legislature's decision to provide an appeal to aggrieved parties in zoning scenarios has *nothing* to do with the merits of such an appeal. *See Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 182 (3d Cir. 2015) ("That the Department of Transportation was required to consider Defendants' challenge does not mean that their arguments had any bite."). Being aggrieved or otherwise having standing "may be injury enough to open the courthouse door," but it does not mean there is merit once inside. *See Doe v. Chao*, 540 U.S. 614, 624–25 (2004) (reasoning that a plaintiff may have "injury enough to open the courthouse door, but without more [may have] no cause of action" under which he can obtain relief); *see also* KRS 100.347(3).

Likewise, standing has little to do with "probable cause" as it relates to "objectively baseless" in the *PRE* test. *PRE*, 508 U.S. at 62–63. "Probable cause" requires "a reasonable belief that there is a chance that a claim may be held valid upon adjudication." *Id.*

(cleaned up). But "valid upon adjudication" is separate from standing. *See id.*

Standing, alone, has, in fact, generally not satisfied a "probable cause" standard under wrongful use of civil proceedings—the source for this Court's recognition of "probable cause" in *PRE*. *Id.* at 62. More importantly, the Supreme Court of Kentucky's reasoning puts litigation-management laws, rules, or causes of action—like wrongful use of civil proceedings, abuse of process, malicious prosecution, or even Kentucky Rule of Civil Procedure 11[4]—in the crosshairs, "impair[ing] state courts' ability to police abusive litigation behavior and to compensate the victims of that behavior." Maher, *supra*, at 651. States have a "compelling interest" in "providing a civil remedy for conduct touching interests deeply rooted in local feeling and responsibility." *Bill Johnson's Restaurants*, 461 U.S. at 741. The future of this "compelling interest" is bleak without this Court's further review.

In Kentucky, for example, over 220 years of common-law torts are now in question by the Supreme Court of Kentucky's expansion of this Court's recognized federal doctrine. Malicious prosecution,[5] which

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[4] It is difficult to see how any litigation-management rules, sanctions, or laws can survive constitutional scrutiny, in light of the Supreme Court of Kentucky's opinion. For example, the Kentucky legislature enacted sanctions for "presumptively frivolous" zoning challenges. KRS 100.3471. But given that aggrieved parties have the right to file a zoning challenge under KRS 100.347, the Supreme Court of Kentucky refuses to find any such challenge "objectively baseless" as a matter of law, let alone "presumptively frivolous." The sanctions in KRS 100.3471 would, therefore, be federally unconstitutional.

[5] In Kentucky, malicious prosecution is often used interchangeably with wrongful use of civil proceedings. App. 6; *see also Prewitt v. Sexton*, 777 S.W.2d 891, 894–95 (Ky. 1989).

this case involves, has been a fixture of Kentucky law since at least 1800, less than a decade after Kentucky's statehood and *before* Kentucky's current constitution. *See Frowman v. Smith*, 16 Ky. 7 (1800). But now, unless a litigant lacks standing, the *Noerr-Pennington* doctrine prohibits these traditional causes of action because they violate the federal constitution. Thus, under the Supreme Court of Kentucky's opinion, the Petition Clause has special status above other constitutional protections, and "there is no sound basis" for that. *See McDonald v. Smith*, 472 U.S. 479, 485 (1985).

The Supreme Court of Kentucky did not cite any legal principle to support its reasoning that standing, alone, warranted constitutional protection under the *Noerr-Pennington* doctrine. In fact, one of the only cases consistent with this principle is also from Kentucky. In 2004, in another zoning case, the Kentucky Court of Appeals held that "given [the property owner's] standing to appeal the zoning decision, his appeal cannot be said to have been objectively baseless." *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 416 (Ky. App. 2004).

Ironically, the Supreme Court of Kentucky's analysis promotes focusing on "the governmental *process*—as opposed to the *outcome* of that process," *see City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 381 (1991), the former of which historically defined a "sham." If a plaintiff has standing to initiate a lawsuit—to *use* the governmental process—their conduct is constitutionally protected, eviscerating the sham exception.

The sham exception cannot be proven by "merely . . . showing that it's competitor's purposes" were anticompetitive. *Id.* at 382. In turn, a defendant should

not be allowed to defeat the sham exception by merely showing that it had *standing* to bring the challenged claim. This Court's review is necessary.

IV. The First Amendment's Petition Clause does not apply to lawsuits and offers no protection.

A decade ago, Justice Scalia noted that "[t]he Court has never actually *held* that a lawsuit is a constitutionally protected 'Petition.'" *Guarnieri*, 564 U.S. at 402 (Scalia, J., concurring in part, dissenting in part). That statement is still accurate. The closest this Court has come was in dicta fifty years ago in *California Motor Transp. Co.*, 404 U.S. at 510.

Even so, there is good reason to doubt that the Petition Clause applies to lawsuits against private parties. The Petition Clause explicitly applies to "the right of the people," which "indicates that the Petition Clause was intended to codify a preexisting individual right." *Guarnieri*, 564 U.S. at 403 (Scalia, J., concurring in part, dissenting in part). At the time of the founding, that was the "right of the British subjects . . . to petition the King or either House or Parliament," not the courts. *Id.*

And if the Petition Clause *does* apply to lawsuits, Bardstown Capital also has a right to petition the government—a right described as "one of the most precious of the liberties safeguarded by the Bill of Rights." *See BE & K Const. Co.*, 536 U.S. at 524. But the Supreme Court of Kentucky sacrificed this "precious" right to elevate the Property Owners'. *See id.* At the very least, the Court should exercise a balancing test to ensure that all citizens have access to the courts. *California Motor Transp. Co.*, 404 U.S. at 510.

Finally, the conduct at issue "did not take place in the open political arena where partisanship is the hallmark of decisionmaking" and should thus not be subject to *Noerr-Pennington* immunity or the Petition Clause. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506 (1988).

V. This case is a good vehicle to address issues with the *Noerr-Pennington* sham exception.

This case is an excellent vehicle to address exactly when a lawsuit is "objectively baseless" under the sham exception to the *Noerr-Pennington* doctrine. The Supreme Court of Kentucky squarely addressed the issue—the sham exception was, in fact, the *sole* basis for the court's decision. Bardstown Capital preserved the issue throughout this litigation and vigorously objected to the *Noerr-Pennington* doctrine's application. There are no other issues present here that would otherwise cause vehicle problems.

This Court has yet to review the *Noerr-Pennington* doctrine as it relates to state common-law torts like wrongful use of civil proceedings. Whether simple standing or ability to bring a suit, merits aside, satisfies the "objectively baseless" *PRE* test is an issue that warrants this Court's intervention and guidance. Decades have passed since this Court last reviewed the sham exception, and in that time, the exception has been diluted to a point of nonexistence. This case is an ideal vehicle for the Court's necessary guidance.

CONCLUSION

Because this case involves an important federal constitutional question that has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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