No. 22-____

# In the Supreme Court of the United States

WILLOW GRANDE, LLC,

*Petitioner,*

v.

CHEROKEE TRIANGLE ASSOCIATION, INC.; TIM HOLZ; RHONDA PETR; RUTH LERNER; NICK MORRIS; ANNE LINDAUER; DAVID DOWDELL; PEGGY ELGIN; JOHN ELGIN; KEITH AUERBACH; JOHN FENDIG; BILL SEILLER; AND JOHN DOWNARD,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), the United States Supreme Court recognized that litigants are immune from antitrust liability under the Sherman Antitrust Act, unless the litigants are engaged in objectively baseless, "sham" litigation. Does the sham exception to the *Noerr-Pennington* Doctrine also apply to common law torts between noncompetitors, such as state law claims for abuse of process and wrongful use of civil proceedings?

2. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the Supreme Court found that pursuing of a "pattern of baseless, repetitive claims" may qualify as sham litigation, and is thus left unprotected under the *Noerr-Pennington* Doctrine. Over a span of six years, the Respondents pursued multiple legal challenges against the Petitioner, which were all rejected at various stages. Is application of the sham exception to *Noerr-Pennington* Doctrine a legal question to be resolved on a motion to dismiss, or a fact issue for a jury to decide?

3. KRS 100.347 states that person or entity "claiming to be injured or aggrieved" by a zoning decision "shall appeal" that decision "to the Circuit Court of the County in which the property . . . lies." Is a litigant "claiming to be injured or aggrieved" automatically shielded from claims of abuse of process or wrongful use of civil proceedings merely because he or she has standing to bring such a legal challenge?

## PARTIES TO THE PROCEEDINGS

**Petitioner and Plaintiff-Appellant-Movant below**

Willow Grande, LLC ("Willow Grande")

**Respondents and Defendants-Appellees-Respondents below**

Cherokee Triangle Association, Inc. ("the CTA") and its members:

Tim Holz
Rhonda Petr
Ruth Lerner
Nick Morris
Anne Lindauer
David Dowdell
John Downard
Peggy Elgin
John Elgin
Keith Auerbach
John Fendig
John Downard

along with their former attorney

Bill Seiller

## CORPORATE DISCLOSURE STATEMENT

Willow Grande, LLC has no parent corporation and is privately owned. No publicly held company owns 10% or more of its stock.

## LIST OF PROCEEDINGS

**Direct Proceedings**

Kentucky Supreme Court

No. 2020-SC-0458-D (2019-CA-0208)

Willow Grande, LLC, *Movant,* v.
Cherokee Triangle Association, Inc., et al., *Respondents*

Date of Final Order: June 8, 2022

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Commonwealth of Kentucky Court of Appeals

No. 2019-CA-000208-MR

Willow Grande, LLC, *Appellant,* v.
Cherokee Triangle Association, Inc.; Tim Holz; Rhonda Petr; Ruth Lerner; Nick Morris; Anne Lindauer; David Dowdell; Peggy Elgin; John Elgin; Keith Auerbach; John Fendig; Bill Seiller; and John Downard, *Appellees*

Date of Final Opinion: August 21, 2020

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Jefferson Circuit Court

No. 16-CI-005124

Willow Grande, LLC, *Plaintiff,* v.
Cherokee Triangle Association, Inc., et al., *Defendants*

Date of Final Order: January 7, 2019

## Related Proceedings

Kentucky Court of Appeals

No. 2016-CA-001512-MR

Cherokee Triangle Association, Inc. Keith Auerbach, M.D. John Downard, Rhonda Petr, *Appellants* v. Louisville Metro Planning & Appellees Zoning Commission, Louisville Metro Council and, Louisville Metro Government, Willow Grande, LLC, *Appellees*

Date of Final Opinion: December 1, 2017

Kentucky Supreme Court Denied Discretionary Review on September 19, 2018

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Kentucky Court of Appeals

No. 2014-CA-000685-MR

Cherokee Triangle Association, Inc. Keith Auerbach, M.D., chenault McClure Conway, *Appellants* v. Willow Grande, LLC, Louisville Metro Landmarks Commission, and Cherokee Triangle Architectural Review Committee, *Appellees*

Date of Final Opinion: February 10, 2017

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## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Willow Grande, LLC ("Willow Grande") respectfully petitions the United States Supreme Court for a writ of certiorari to review the June 8, 2022 decision of the Supreme Court of Kentucky in which it denied discretionary review of the August 21, 2020 Opinion of the Kentucky Court of Appeals, affirming the Jefferson Circuit Court's December 19, 2018 Opinion and Order (Amended).

## OPINIONS BELOW

The August 21, 2020 Opinion of the Kentucky Court of Appeals is not reported, and is reproduced at App.2a and available at 2020 WL 4910127. The January 8, 2019 Opinion and Order (Amended) of the Jefferson Circuit Court is not reported and is reproduced at App.21a. The December 18, 2018 Opinion and Order of the Jefferson Circuit Court is not reported and is reproduced at App.28a.

## JURISDICTION

When the highest court of a state renders a final judgment, the United States Supreme Court has jurisdiction to consider a writ of certiorari under 28 U.S.C. § 1257(a). *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954) ("[W]hen

the jurisdiction was declined [by the state supreme court], the Court of Appeal was shown to be the highest Court of the State in which a decision could be had"). The Kentucky Court of Appeals' Opinion became the judgment of the highest state court when the Supreme Court of Kentucky denied discretionary review on June 8, 2022. As a result, the Supreme Court has jurisdiction to consider this certiorari petition under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**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.

**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.

## INTRODUCTION

The *Noerr-Pennington* Doctrine arises out of two cases, *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("*Noerr*"), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) ("*Pennington*"), from which this Court recognized that litigants are immune from antitrust liability for engaging in conduct aimed at influencing decision-making by the government. *See Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 56 (1993) ("*PRE*") ("We first recognized in [*Noerr*] that 'the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.' *Id.*, at 136. *Accord*, [*Pennington*].").

According to the Supreme Court in *PRE*, "[t]hose who petition government for redress are generally immune from antitrust liability." *PRE*, 508 U.S. at 56. Born out of the right to petition the government under the First Amendment of the U.S. Constitution (U.S. Const. amend. I), the *Noerr-Pennington* Doctrine was intended to protect private competitors from anti-trust liability under the Sherman Anti-Trust Act (15 U.S.C. §§ 1-15) (the Sherman Act) when an individual or entity lobbies the government for legislative or regulatory reform.[1]

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[1] *Noerr*, 365 U.S. at 137-38; *Pennington*, 381 U.S. at 669. However, it must be noted that eleven years ago, Justice Antonin Scalia determined that the Supreme Court has not directly held that "a lawsuit is a constitutionally protected

Although the *Noerr-Pennington* Doctrine protects antitrust litigants that legitimately petition the government for a redress of grievances, it does not protect a party engaged in "sham" litigation, that is litigation which is objectively baseless, and is subjectively pursued for a purpose other than securing proper adjudication of the underlying claims on the merits. *PRE*, 508 U.S. at 56, 61 ("*Noerr*, however, withheld immunity from 'sham' activities because application of the Sherman Act would be justified when petitioning activity 'ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'").

After its adoption, the *Noerr-Pennington* Doctrine was later extended to include First Amendment "petitions for grievance" to administrative agencies and courts, at least in the context of antitrust law in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("*California Motor*"). In *California Motor*, the Supreme Court recognized that the pursuit of a "pattern of baseless, repetitive claims" may qualify as sham litigation, and is therefore, left unprotected by the *Noerr-Pennington* Doctrine. *California Motor*, 404 U.S. at 513. The Supreme Court recognized that whether such a pattern constitutes sham litigation is a question for the jury to resolve,

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'Petition,'" under the Petition Clause under the First Amendment. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 402 (2011) (Scalia, J., concurring in part, dissenting in part). This case would provide an important vehicle for the Supreme Court to resolve this question, as well as whether the *Noerr-Pennington* Doctrine applies to non-competitive actors, such as a neighborhood association and a developer.

as the "factfinder." *Id.* Under the framework of *California Motor*, certainly, Willow Grande's claims should not have been resolved on a motion to dismiss. As discussed herein, in this case, the CTA and its members pursued a pattern of baseless, and repetitive claims against Willow Grande filing four complaints in three lawsuits, for the sole purpose of perpetually tying this matter up in frivolous delays.

After *California Motor*, the Supreme Court revisited the sham exception to the *Noerr-Pennington* Doctrine in *PRE*, while developing a two-part test for that exception. *PRE*, 508 U.S. at 60-61. According to *PRE*, to qualify as sham litigation, (1) the lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) 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 anticompetitive weapon." *Id.* (emphasis in original). In other words, if a lawsuit is objectively meritless, a court may proceed to "examine the litigant's subjective motivation," and determine whether that suit was brought for "an improper purpose." *Id.* at 60.

While the Supreme Court in *PRE* outlined the test for the sham exception, since 1993, the Court has not reviewed that exception in the context of applying *Noerr-Pennington*. Indeed, since *Noerr* and *Pennington* were decided, the Supreme Court has chosen not to expand *Noerr-Pennington* significantly. Indeed, the only expansion of the test appears to be in the context of retaliatory actions in front of the National Labor Relations Board (NLRB), where the Court determined that such actions are shielded from

liability unless they constitute a sham under the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1). *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 529 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983). Invoking *Noerr-Pennington* in the context of federal statutes, such as the National Labor Relations Act, is far different than applying the *Noerr-Pennington* Doctrine to state common law claims between non-competitors.

However, courts in Kentucky have gone much further than the Supreme Court when applying the *Noerr-Pennington* Doctrine. Aside from this case, Kentucky courts have since applied *Noerr-Pennington* to preclude state law claims of wrongful use of civil proceedings stemming from various zoning challenges, including in *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (2004), and in *Seiller Waterman, LLC v. Bardstown Capital Corp.*, 643 S.W.3d 68 (Ky. 2022).[2] By extending the *Noerr-Pennington* Doctrine to actions outside the realm of statutory causes of action under the Sherman Act, courts in Kentucky have significantly departed from the original application of *Noerr-Pennington*.

In this case, in particular, the CTA and its members pursued a multi-years long pattern of asserting baseless and repetitive claims against Willow Grande for the purpose of perpetually tying this matter up in appeals, which made it impossible for Willow Grande to secure financing for a multi-million-dollar condo-

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[2] On June 22, 2022, a petition for a writ of certiorari was filed in *Bardstown Capital* in the United States Supreme Court (No. 21-1591), and that writ petition is available at 2022 WL 2318669.

minium complex. Between 2012 and 2017, the CTA and its members, through their attorney, Bill Seiller filed four separate complaints against Willow Grande in efforts to stop Willow Grande from building a multi-story condominium complex on the property the Petitioner owns in Louisville, Kentucky.[3]

The cases the CTA filed against Willow Grande were considered by three different divisions of the Jefferson Circuit Court, two separate panels of the Kentucky Court of Appeals, and the Kentucky Supreme Court. Each of those lawsuits were rejected by every court to consider them. Indeed, the Court of Appeals recognized in February and December of 2017 that the arguments presented on appeal by the CTA were either "groundless," "unacceptable," and not "reasonably argue[d] or "maintaine[d]."[4] Although every court to consider the legal challenges have found them to be baseless, the Respondents have still succeeded in stopping Willow Grande's development from proceeding, thereby rendering it impossible for the project to obtain financing.

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[3] Respondent Seiller also represents the homeowners in *Bardstown Capital* and has engaged in similar conduct there. *Bardstown Capital*, 643 S.W.3d at 73 (where Appellees alleged that Respondent Seiller "approached counsel for Bardstown Capital and stated their intent to appeal the rezoning approval in order to induce Bardstown Capital to buy the homeowners' properties for a higher price.").

[4] *Cherokee Triangle Association, Inc. v. Louisville Metro Planning & Zoning Commission*, No. 2016-CA-001512-MR, 2017 WL 5953521 at *5 (Ky. App. Dec. 1, 2017), attached as Appendix F; *Cherokee Triangle Association, Inc. v.* Willow *Grande, LLC*, No. 2014-CA-000685-MR, 2017 WL 541082 at *7 (Ky. App. Feb. 10, 2017), attached as Appendix G.

In turn, in October of 2016, Willow Grande filed suit against the CTA and its members, alleging abuse of process and tortious interference, while subsequently amending that complaint to include a claim of wrongful use of civil proceedings, and adding claims against Respondent Seiller. As Willow Grande alleged in its complaint against the Respondents, the true motivation for their lawsuits and their subsequent appeals was not to influence any governmental action or change any zoning decision, but rather to use the existence of those legal challenges—the very pendency of those challenges—as leverage given that Willow Grande could not obtain financing as those challenges were pending. By tying this matter up in endless appeals, the Respondents made it impossible for Willow Grande to accomplish the project, costing the Petitioner millions of dollars.

Nevertheless, in January of 2019, the Jefferson Circuit Court entered its Opinion and Order dismissing this case under CR 12.02 of the Kentucky Rules of Civil Procedure, finding that the CTA and its members had an absolute statutory right to appeal any legal challenge to circuit court under KRS 100.347(3). App.21a. While the trial court determined that *Noerr-Pennington* applied to this case, it found the sham litigation exception, as a matter of law, inapplicable, determining that KRS 100.347 afforded the CTA and its members an absolute right to pursue any legal challenges it sought against Willow Grande, as the statute allowed "any person or entity claiming to be injured or aggrieved" by a zoning decision the ability to "appeal from the action to the Circuit Court of the county in which the property . . . lies." App.24a, *citing* KRS 100.347. In other words, because KRS

100.347 afforded standing to challenge a zoning decision in circuit court, the trial court held that the Respondents' conduct in litigation could not be found to be "objectively baseless," as a matter of law. *Id.* In August of 2020, the Kentucky Court of Appeals affirmed the trial court's dismissal of Willow Grande's complaint for the same reasons. App.2a. In June of 2022, the Kentucky Supreme Court denied discretionary review of that decision. App.1a.

By selectively applying the *Noerr-Pennington* Doctrine to this case, while simultaneously failing to recognize the sham exception to that Doctrine, courts in Kentucky have effectively extinguished a whole swath of viable claims one might have against litigants who engage in such abusive tactics. At a minimum, the *Noerr-Pennington* Doctrine is intended to protect legitimate attempts to petition the government and influence the legislative process. It does not protect parties engaged in objectively unreasonable conduct, including the filing of "a pattern of baseless, repetitive claims," which is precisely what the CTA and its members pursued against Willow Grande for years. *California Motor*, 404 U.S. at 513.

## STATEMENT OF THE CASE

This case stems from the Respondents' improper interference with the development of the property located at 1418 and 1426 Willow Avenue in Louisville, Kentucky, 40204, which is owned by the Petitioner. In late 2011, Willow Grande first applied for a certificate of appropriateness with the Cherokee Architectural Review Committee ("ARC") for the property in order to develop a residential structure on the property. App. 51a, 56a. After an extensive presentation, in February of 2012, ARC granted a certificate of appropriateness. App.57a. The CTA and its members then appealed that decision to the Historic Landmarks and Preservation Commission ("Landmarks"), where Landmarks dismissed each argument the CTA presented opposing the certificate, voting "unanimously" to uphold the ARC decision. App.64a.

On July 20, 2012, the CTA and two of its members filed its first complaint against Willow Grande in Jefferson Circuit Court based upon the certificate of appropriateness which was approved of by ARC and affirmed by Landmarks. App.54a. In their Complaint, the CTA and its members argued that both ARC and Landmarks acted without "substantial evidence" and that the CTA and its members were denied "due process" when the certificate of appropriateness was approved. App.54a. Subsequently, Willow Grande moved for summary judgment on those claims. App. 56a. Based on what the trial court characterized was "extensive" evidence, the trial court grant summary judgment in favor of the Willow Grande, "issu[ing] [a] twelve-page opinion." App.56a-57a. In that decision,

the trial court upheld the issuance of the certificate of appropriateness, finding that ARC had "considered all factors mentioned in the ordinance and issued the [c]ertificate." App.57a. After the CTA and its members sought reconsideration of that order, the circuit court entered, what the Kentucky Court of Appeals characterized was, a "succinct opinion and order" on March 27, 2014, in which it denied the motion to alter, amend or vacate its decision. App.59a.

After the trial court upheld the issuance of the certificate of appropriateness, the CTA appealed that decision to the Kentucky Court of Appeals. App.50a. In February of 2017, the Court of Appeals affirmed summary judgment in favor of Willow Grande, finding that the arguments the CTA and its members presented regarding the lack of "due process" to not be reasonable:

> One cannot reasonably maintain notice was defective when CTA and its members were in the room and spoke . . . Similarly, one cannot reasonably argue Landmarks was unaware of concerns voiced by some residents about developer's financial soundness and the desire that a performance bond be posted.

*See* App.65a (emphasis added).

Over the next three years, the CTA and three of its members filed three more complaints against Willow Grande in efforts to stop the development. App.34a. Since the property for the development needed to be rezoned in 2013, Willow Grande provided a 174-page submission to the Louisville Metro Planning & Zoning Commission (the "Planning Commission"). App.36a-38a. Thereafter, a public hearing was held by Louisville Metro Council ("Metro Council"), which

resulted in the property being rezoned. App.36a-38a. In turn, on September 6, 2013, the CTA and its members filed another complaint against Willow Grande in Jefferson Circuit Court, contending that Metro Council abused its discretion in allowing the property to be rezoned, while asserting that the CTA and its members were again denied "due process." App.36a-38a.

After Willow Grande moved for summary judgment, on November 20, 2015, the circuit court entered its opinion and order granting summary judgment, while dismissing the arguments concerning the rezoning of the property and rejecting the position of the CTA that its members were denied due process. App.38a. Two circuit judges in Jefferson County considered the arguments presented on summary judgment as to these claims, first by Judge Olu Stevens in Jefferson Circuit Court, Division 6, and then by Judge Brian Edwards in Circuit Court, Division 11. App.46a. Both of them found the CTA's arguments to not be credible and without merit. App.38a, 46a.

Meanwhile, in March of 2015, the Planning Commission considered certain variances and waivers needed for the Willow Grande development (*i.e.*, dimensional changes and provisions to implement zoning regulations). App.36a. Public hearings were held, where "[b]oth sides" had a full opportunity to present evidence and arguments. App.36a. Ultimately, the Planning Commission unanimously granted the variances and waivers, while recommending that Metro Council approve of the development plan. App.37a. On April 16, 2015, the CTA and two of its members filed a third complaint against Willow Grande after

the Planning Commission approved of the variances and waivers. App.37a.

A month later, on May 14, 2015, Metro Council agreed with the recommendation of the Planning Commission, approving of the district development plan. Then, on June 10, 2015, the CTA and its members filed an "Amended and Supplemental Complaint" after the development plan was approved by Metro Council. App.7a. After those challenges were consolidated, on August 26, 2016, the trial court granted summary judgment in favor of Willow Grande. App.38a. Once again, the trial court granted summary judgment in favor of Willow Grande. In its opinion, the court found that (i) the CTA and its members were afforded due process; (ii) neither the Metro Council nor the Planning Commission exceeded their statutory authority; and (iii) their decisions were supported by substantial evidence. App.38a. The CTA and its members then appealed that decision, once again, to the Court of Appeals. App.38a.

On December 1, 2017, the Court of Appeals denied that appeal, while dismissing some of the arguments from the CTA and its members as "groundless and unacceptable," and not "remotely" supported by the evidence:

> Counsel for the CTA's position that Judge Edwards "just guessed at what Judge Stevens meant to do" and only entered summary judgment after "trying to read Judge Stevens' mind" is both groundless and unacceptable. Courts only speak through written orders *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010), and there is nothing in the circuit court's

> judgment remotely supporting counsel for the CTA's claim that either of the judges who presided over this case failed to "read the briefs, [consider] the record, [hear] oral arguments, and [understand] the law and facts of the case."

*See* App.46a-47a. After the Court of Appeals denied a petition for rehearing, the CTA and its members filed a motion for discretionary review in the Kentucky Supreme Court. On September 19, 2018, the Motion for Discretionary Review was denied. App.7a-8a.

In October of 2016, Willow Grande filed suit against the CTA and its members for abuse of process and tortious interference, while subsequently amending that complaint to include a claim of wrongful use of civil proceedings and a claim against their attorney, Respondent, Bill Seiller. App.8a. In July of 2018, the Respondents moved for dismissal, arguing that the *Noerr-Pennington* Doctrine should not apply, as the Doctrine was intended to protect legitimate attempts to petition the government and influence the legislative process, specifically with respect to antitrust law. Willow Grande further argued that at the very least, the sham exception to the *Noerr-Pennington* Doctrine presented a factual issue for a jury to consider. In response, the Respondents relied upon *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (Ky. App. 2004), arguing that their actions could not be baseless as a matter of law, while contending that the *Noerr-Pennington* Doctrine provides an absolute shield for liability.

As discussed herein, the *Noerr-Pennington* Doctrine originated in the context of antitrust litigation, as it was intended to protect private competitors from

liability under the Sherman Act when an individual or entity lobbies the government for legislative or regulatory reform. *Noerr*, 365 U.S. at 129; *Pennington*, 381 U.S. at 659, 670. In turn, under the sham litigation exception to the *Noerr-Pennington* Doctrine, actions that would otherwise be protected from liability lose such protection if the following elements are met: (1) "the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) the lawsuit "conceals an attempt to interfere with the business relationships of a competitor." *PRE*, 508 U.S. at 60, 61. At the trial court level and the appellate level, the Respondents argued that Willow Grande does not satisfy the second prong of the two-pronged test because the CTA was not a competitor to Willow Grande. Although Willow Grande agrees that it is not a competitor to the CTA, the Respondents cannot have it both ways: either the *Noerr-Pennington* Doctrine applies in its totality (which means the sham exception to *Noerr-Pennington* Doctrine also applies), or the *Noerr-Pennington* Doctrine does not apply as Willow Grande and the CTA are not competitors, meaning that there is no protection under that Doctrine, whatsoever.

On January 8, 2019, the trial court granted Respondents' Motions to Dismiss, while applying the *Noerr-Pennington* Doctrine, finding that the CTA's position could not be considered "objectively baseless," under the *Noerr-Pennington* Doctrine as a matter of law. App.18a-19a. On July 11, 2019, Willow Grande filed its appeal of that decision to the Kentucky Court of Appeals. App.8a. Ultimately, on August 21, 2020, the Court of Appeals affirmed the trial court's decision. App.20a.

In its decision, the Court of Appeals recognized Respondents' legal challenges were not filed to influence governmental action or change an administrative decision, but rather for purposes of "delay."[5] And yet, the Court of Appeals held that "the CTA's efforts to delay the project in order to influence governmental approval of the size and scope of the development cannot be considered to be objectively baseless as a matter of law." App.18a. 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 of Appeals reasoned that the CTA's various challenges could not be considered sham litigation. App.16a-18a.

On September 21, 2020, Willow Grande filed its Motion for Discretionary Review with the Kentucky Supreme Court. On June 8, 2022, the Supreme Court denied discretionary review. App.1a. This Petition for Certiorari followed.

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[5] App.18a. Indeed, the evidence reflected that the CTA and its members recognized that their appeals served no legitimate purpose, but instead served merely as leverage (or a "bargaining chip," as Respondents characterized it) in settlement discussions with Willow Grande.

## REASONS FOR GRANTING THE PETITION

The *Noerr-Pennington* Doctrine is a federal doctrine designed to protect individuals and entities from antitrust claims when they legitimately seek to petition the government for action or redress. Ultimately, in this case, at both the trial court level and appellate court level, the courts applied the *Noerr-Pennington* doctrine to prohibit claims for wrongful use of civil proceedings and abuse of process, stemming from a zoning dispute between noncompetitors under state law, which is far different than *Noerr-Pennington's* historical antitrust foundations.

In *Noerr*, a trucking association sued a group of railroad companies, alleging that they "conspired to restrain trade" by conducting a publicity campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive to the trucking business . . ." *Noerr*, 365 U.S. at 129. The Court held that these purportedly anti-competitive tactics could not qualify as violations of the Sherman Act; that a Sherman Act violation could not be "predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135.

On the other hand, *Pennington* involved a group of large coal mine operators, together with a union, petitioning the United States Secretary of Labor to set minimum wages in coal mines, and the smaller coal mine operators thereafter asserted a claim that the larger mine operators violated the Sherman Act by conspiring to "drive smaller operators out of business." *Pennington*, 381 U.S. at 659, 670. However, the

*Pennington* Court explicitly denied that claim, finding that "[j]oint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition." *Id.* at 670.

The Supreme Court's only other apparent expansion of *Noerr-Pennington* outside the realm of antitrust law is in the context of retaliatory actions in front of the NLRB, where the Court determined that such actions are shielded from liability unless they constitute a sham. *BE & K Const. Co.*, 536 U.S. at 529; *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 744. Whether or not that even qualifies as an expansion of the *Noerr-Pennington* Doctrine (or merely an expansion of the sham exception), it is far different than applying the *Noerr-Pennington* Doctrine to state common law torts for abuse of process and wrongful use of civil proceedings.

While the United States Supreme Court has only minimally expanded the *Noerr-Pennington* Doctrine, courts in Kentucky have significantly extended its application to include common law torts, including those for abuse of process and wrongful use of civil proceedings. App.2a, 21a. Under the framework set forth by the Kentucky Court of Appeals in this case, any person who merely "claim[s] to be injured or aggrieved" by an action of any agency of local government—whether that is "the board of adjustment" under KRS 100.347(1), "the planning commission" under KRS 100.347(2), or the legislative body of any city, county, consolidated local government, or urban-county government under KRS 100.347(3)—is automatically shielded from liability for their conduct in pursuing legal challenges. App.16a-18a. The United States Supreme

Court should grant this Petition for Certiorari, and review that decision.

## I. THE SUPREME COURT HAS NEVER APPLIED THE *NOERR-PENNINGTON* DOCTRINE TO STATE COMMON LAW TORTS UNRELATED TO ANTITRUST

Since *Noerr* and *Pennington* were decided, the Supreme Court has chosen not to expand the *Noerr-Pennington* Doctrine significantly. In *BE & K Const. Co.*, U.S. at 529, the Supreme Court suggested it was invoking a doctrine similar to the *Noerr-Pennington* Doctrine, recognizing that unsuccessful retaliatory lawsuits against unions could not serve as the basis for the NLRB to impose unfair labor practice liability under the federal National Labor Relations Act, absent a finding that the lawsuit was a sham. *BE & K Const. Co.*, 536 U.S. at 529; *see Bill Johnson's Restaurants, Inc.*, 461 U.S. at 744 (same).

However, the *Noerr-Pennington* Doctrine has never been reviewed by this Court in the context of state common law torts unrelated to antitrust. Instead, the Supreme Court has consistently applied *Noerr-Pennington* to federal actions, *i.e.*, those under the Sherman Act and the National Labor Relations Act. *PRE*, 508 U.S. at 56; *BE & K Const. Co.*, 536 U.S. at 529. Moreover, the Supreme Court has recognized that the sham exception to the *Noerr-Pennington* Doctrine is satisfied if a lawsuit is objectively baseless, and the subjective motivation of the litigant "conceals an attempt to interfere with the business of a competitor." *PRE*, 508 U.S. at 60-61 (emphasis added). Either the *Noerr-Pennington* Doctrine, along with the sham exception, applies in its totality to situations involving non-competitors, or the *Noerr-Pennington* Doctrine does not apply in this context, whatsoever.

The Supreme Court's decision in *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 390 (2011) supports Willow Grande's position that *Noerr-Pennington* should not apply to cases unrelated to antitrust. In *Guarnieri,* the police chief was terminated from his position, however, he filed a union grievance and was reinstated. After his reinstatement, the borough issued various directives instructing him on how to perform his duties. In response, Guarnieri filed suit under 42 U.S.C. § 1983, alleging that the directives were issued in retaliation for him engaging in a constitutionally-protected activity. On appeal, the Third Circuit applied a standard derived from *Noerr* and held that Guarnieri was immune from retaliation so long as his grievance was not a sham. *Guarnieri v. Duryea Borough*, 364 Fed. App'x 749, 753 (3d Cir. 2010). However, the Supreme Court refused to apply the sham exception to determine whether Guarnieri's grievance was protected by the First Amendment. *Guarnieri*, 564 U.S. at 389. By relying upon Speech Clause precedent, rather than the Petition Clause, the Supreme Court suggested that *Noerr* has limited relevance outside the context of antitrust law. *Id.*

Instead of relying upon the *Noerr-Pennington* Doctrine, in *Guarnieri*, the Supreme Court invoked *McDonald v. Smith*, 472 U.S. 479 (2011), finding that the same test used to determine whether a public employee's speech is protected by the Speech Clause should apply to that employee's claims under the Petition Clause. *Id.* Even still, in *McDonald*, the Supreme Court acknowledged that the Framers likely did not believe the Petition Clause provided "absolute immunity" from preexisting common law claims (in

that case, claims for libel). *McDonald,* 472 U.S. at 483. However, that is precisely what the Court of Appeals found in this case as to Willow Grande's claims. App.16a-18a, *see id.* at 15a ("Since the First Amendment protects the right of citizens to petition for redress of grievances, the doctrine generally provides immunity from legal action to persons who bring a zoning appeal to induce the passage or enforcement of law or to solicit governmental action.").

Some legal commentators have argued that the *Noerr-Pennington* Doctrine should not apply outside the antitrust cotext. *See e.g.*, Robert A. Zauzmer, *The Misapplication of the Noerr-Pennington Doctrine in Non-antitrust Right to Petition Cases*, 36 STANFORD LAW REVIEW 1243, 1253 (1984). The author of that law review article maintained that *Noerr-Pennington* should only apply to antitrust actions because further extension risks elevating the right of petition over other constitutional freedoms to the extent that it becomes an absolute right. *Id.* at 1256-65. As Zauzmer recognized, "[a]lthough the Supreme Court has never addressed *Noerr-Pennington* outside the antitrust field, a number of courts have not only misread the doctrine but have also applied it in other areas." *Id.* at 1256 ("Several recent cases have created a *new Noerr-Pennington* doctrine – one offering immunity from any civil liability for petitioning activity as long as the petitioning is not a 'sham.'").

Ultimately, the Court's guidance in this case is necessary because courts in Kentucky have since applied the *Noerr-Pennington* Doctrine to common law claims that have nothing to do with the Sherman Act, the National Labor Relations Act, or any federal laws whatsoever. Instead, courts in Kentucky have

applied the *Noerr-Pennington* Doctrine to purely state law claims of wrongful use of civil proceedings and abuse of process, including in *Grand Communities, Ltd. v. Stepner*, in *Seiller Waterman, LLC v. Bardstown Capital Corp.*, and in the case-at-hand.

## II. A LITIGANT IS NOT AUTOMATICALLY SHIELDED FROM LIABILITY MERELY BECAUSE HE OR SHE HAS STANDING TO BRING A LEGAL CHALLENGE UNDER KRS 100.347

Although the *Noerr-Pennington* Doctrine protects a party legitimately petitioning the government for a redress of grievances, it does not protect parties engaged in unreasonable conduct (i.e., sham litigation). As the Supreme Court recognized in *PRE*, actions that would otherwise be protected under the *Noerr-Pennington* Doctrine lose the benefit of said protection if the following elements are satisfied: (1) the lawsuit is objectively baseless, and no litigant could realistically expect success on the merits; and (2) the lawsuit conceals a subjective attempt to interfere with a business relationship by using the government process as a weapon. *PRE*, 508 U.S. at 60. In other words, if a lawsuit is "objectively baseless," the litigant's "subjective motivation" may be examined. *Id.* Since *PRE*, however, this Court has not reviewed the sham litigation exception directly, at least, not in the *Noerr-Pennington* context.

Prior to *PRE*, while the sham exception to the *Noerr-Pennington* doctrine existed, it had yet to be extensively outlined. *California Motor*, 404 U.S. at 513. Nevertheless, in *California Motor*, the Supreme Court considered the sham exception in the context of an antitrust claim, finding that pursuing "a pattern of baseless, repetitive claims" qualifies as sham

litigation, and is therefore, left unprotected by the *Noerr-Pennington* Doctrine. *California Motor*, 404 U.S. at 513; *see Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (noting that "repetitive lawsuits carrying the hallmark of insubstantial claims" are unprotected under the *Noerr-Pennington* doctrine.); *see also City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 380 (1991) (explaining that "the filing of frivolous objections . . . simply in order to impose expense and delay" is the "classic example" of a sham).

In *California Motor*, a group of trucking companies (the petitioners) engaged in a "consistent, systematic and uninterrupted program of opposing with or without probable cause and regardless of the merits of every application" by opposing the applications of a separate group of trucking companies (the respondents) in court and through various administrative agencies. *California Motor*, 404 U.S. at 518. For the petitioners, the purpose of this program was to "defeat applications of [their] competitors for certificates as highway carriers," and to "eliminate an applicant as a competitor." *Id.* at 515. While the Supreme Court recognized the petitioners had the "right of petition" under the First Amendment, the presence of that right did not end the analysis of whether the respondents were entitled to immunity for their actions under *Noerr-Pennington*. *Id.* at 513 ("Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carries. That right, as indicated, is part of the right of petition protected by the First Amendment.").

However, the Supreme Court in *California Motor* recognized that this right under the Petition Clause "does not necessarily give them immunity from the

antitrust laws." *Id.* The Supreme Court found that resolution of the sham litigation exception was a question for the "factfinder" to resolve. *Id.* Indeed, multiple courts across the country have recognized that the application of the sham exception to the *Noerr-Pennington* Doctrine is a question of fact for the jury.[6]

Ultimately, in *California Motor*, this Court reversed the dismissal of the case under the *Noerr-Pennington* Doctrine, and remanded it for the jury to decide based on the evidence as to whether the petitioners were engaged in sham litigation.[7]

If the *Noerr-Pennington* Doctrine applies to non-antitrust disputes involving claims purely under state common law (such as Willow Grande's claims), the

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[6] *See In re Flonase Antitrust Litigation*, 795 F. Supp. 2d 300, 310 (E.D. Pa. 2011) ("The question whether a petition is a sham is generally a question of fact for the jury."); *Hoffman-La Roche Inc. v. Genpharm Inc.*, 50 F. Supp. 2d 367, 380 (D.N.J. 1999) ("Reasonableness is a question of fact, and the Court cannot make such factual determinations on a factual controversy roiled by a motion to dismiss."); *and Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982) ("Whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.").

[7] *Id.* at 515-16. Even if the CTA had been successful in one of its legal challenges (it was not), courts have found that fact alone does not automatically shield individuals from claims that they are engaged in sham litigation. *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 180 (3d Cir. 2015), *citing USS–POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL–CIO*, 31 F.3d 800, 810-11 (9th Cir.1994) ("Even if a small number of the petitions turn out to have some objective merit, that should not automatically immunize defendants from liability . . . Even a broken clock is right twice a day.").

*Noerr-Pennington* Doctrine should be applied in its totality, which includes a determination of the application of the sham exception. And the mere fact that a party has standing under KRS 100.347 should not be outcome determinative as to whether they are engaged in sham litigation.

Similar to the petitioners in *California Motor*, the CTA and its members pursued a "consistent, systematic and uninterrupted program" of opposing the development, without probable cause to do so. *California Motor*, 404 U.S. at 518. The CTA and its members filed four separate complaints and pursued such litigation (including numerous appeals, motions to reconsider, motions to set aside and petitions for rehearing), all for the sole purpose of perpetually tying this matter up in frivolous delays. Under the framework set forth in *California Motor*, the Petitioner was entitled to have its claims heard by a jury. *California Motor*, 404 U.S. at 513.

In its decision, the Kentucky Court of Appeals even determined that the CTA was not seeking to secure proper adjudication of its claims in this case, but rather expended "efforts to delay the project in order to influence governmental approval of the size and scope of the development." App.18a (emphasis added). Nonetheless, the Court found that those efforts could not be "considered objectively baseless as a matter of law" under KRS 100.347. *Id.*

Yet previously, the Court of Appeals characterized the arguments presented by the CTA on appeal in 2017 as being those that a litigant "c[ould] not reasonably maintain," or "reasonably argue," "groundless," "unacceptable," and not "remotely" supported by the evidence. App.65a; App.46a-47a. As a minimum, those

characterizations by the Court of Appeals created an issue of material fact as to whether those legal challenges could be construed as sham litigation under the law. App.65a; App.46a-47a. Ultimately, a writ of certiorari is warranted because the Court of Appeal's decision strays from the Supreme Court's precedent, by determining that the sham exception to the *Noerr-Pennington* Doctrine could not apply as a matter of law, given the actions the Respondents have taken in pursuing endless legal challenges against the Petitioner.

## III. STANDING, ALONE, DOES NOT GUARANTEE THAT A LAWSUIT IS NOT OBJECTIVELY BASELESS OR THAT THE SUIT IS SOUGHT FOR A PROPER PURPOSE

When reviewing whether the Respondents' zoning challenges were "objectively baseless," the trial court and the Court of Appeals merely reviewed whether there was a statutory right to appeal under KRS 100.347(3). However, a litigant's ability to bring a claim does not mean that they should bring that claim, or that they had "probable cause" for the claim. *PRE*, 508 U.S. at 62-63. According to *PRE*, probable cause to institute civil proceedings requires a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Id.* Similarly, standing is irrelevant to the issue of whether "a reasonable litigant could realistically have expected success on the merits," under the first prong of the sham exception to the *Noerr-Pennington* Doctrine. *PRE*, 508 U.S. at 67.

Nonetheless, 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 Kentucky Court of Appeals reasoned

that the CTA's various challenges could not be considered sham litigation, as a matter of law, because the CTA had standing to bring suit. App.16a-18a. In its decision, the Court of Appeals affirmed the trial court's decision, while citing *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 414 (Ky. App. 2004), in which 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." *Stepner*, 170 S.W.3d at 416.

*Stepner*, however, concerned a single zoning challenge that was dismissed, not on the merits, but rather "on procedural grounds" for failure to "join all owners of the development as parties." *Stepner*, at 413, 416. However, this case is not about a single zoning challenge as in *Stepner*, but rather about a consistent systematic and uninterrupted program of sham litigation similar to *California Motor. California Motor*, 404 U.S. at 518. As discussed herein, unlike in *Stepner,* both elements of the sham exception to *Noerr-Pennington* (an objectively baseless lawsuit and a subjectively improper purpose) were alleged by Willow Grande. Furthermore, *Stepner* is inconsistent with Supreme Court precedent, as detailed above, and with prior case law set forth in Kentucky, as detailed below.

In *Bourbon County Joint Planning v. Simpson*, 799 S.W.2d 42, 46 (Ky. App. 1990), the Court of Appeals considered this issue of whether "the grant of a statutory privilege" under KRS 100.347 "automatically exempts those who use it from accusations of improper motive," and determined it does not, thereby reversing the dismissal of claims of abuse of process. Similar to Willow Grande, the appellant, Harry Laytart, filed a

counterclaim alleging abuse of process and interference with a contract against the fifteen property owners after he was required to release the prospective purchasers of the property from their agreement to purchase the property because of that "procedural nightmare" the property owners had created. *Bourbon County*, 799 S.W.2d at 44. This distinguishing feature, which is consistent with the facts in question, was not present in the *Stepner* decision, which applied to a single legal challenge to a zoning decision. As with the CTA in this case, fifteen property owners filed a motion to dismiss the abuse of process claims asserted by Laytart under CR 12.02, arguing that presence of KRS 100.347 "automatically exempt[ed]" them from such claims, and the trial court granted that motion. *Id.* at 44.

On appeal, the Court of Appeals rejected the trial court's opinion that claims for abuse of process were subject to dismissal merely because of the statutory privilege under KRS 100.347:

> By claiming abuse of process and interference with contract, Laytart has alleged that the appellees acted with an improper purpose or without justification. The burden of proof is on Laytart, and it is a difficult one: the appellees are entitled to attend planning commission hearings, and "injured or aggrieved" persons have a right of appeal from adverse decisions of that body. See KRS 100.347. However, we do not think that the grant of a statutory privilege automatically exempts those who use it from accusations of improper motive.

> We reiterate, the burden of proof may be a difficult one, but Laytart has been given no opportunity to meet it. We conclude that Laytart should be allowed to pursue his cause of action, however quixotic it may seem.

*Id.* at 46 (emphasis added). Ultimately, the Court of Appeals remanded the case to the trial court to determine whether there was sufficient factual evidence to support the claims of abuse of process and contractual interference. *Id.*

If standing, alone, is sufficient to initiate a lawsuit, the sham exception to the *Noerr-Pennington* Doctrine is completely eviscerated. However, just because legislature provided an avenue "to open the courthouse door" does not mean there is merit once inside.[8]

In this case, the trial court's decision and the decisions of the appellate courts have completely eliminated the ability of a developer to bring a claim against a landowner in a zoning dispute for abusive tactics in litigation. If those decisions stand, a developer in Kentucky would have absolutely no recourse against a litigant who launches a series of baseless lawsuits under KRS 100.347, so long as the litigant "claim[s] to be injured or aggrieved" by some decision of an administrative board over the use of the property. The Supreme Court should review the decisions below

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[8] *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); *Hanover 3201 Realty, LLC*, 806 F.3d at 182 ("That the Department of Transportation was required to consider Defendants' challenge does not mean that their arguments had any bite.")

as they completely extinguish the sham exception to the *Noerr-Pennington* Doctrine, and they are inconsistent with relevant precedent.

## IV. THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIORARI GIVEN THE CIRCUMSTANCES PRESENTED HERE

This case provides a perfect vehicle for determining whether *Noerr-Pennington* applies outside of the context of antitrust law as Willow Grande and the CTA are unquestionably not competitors. Moreover, for the sham exception to *Noerr-Pennington* to apply, the lawsuit must be first, objectively baseless and second, subjectively motivated for an improper purpose. *PRE,* 508 U.S. at 60.

As discussed herein, over the last several years, the CTA filed four complaints against Willow Grande in efforts to stop that development, resulting in three lawsuits. Those cases have been considered by numerous courts, and each of them was rejected, including by the Court of Appeals, which recognized in February and December 2017, that the arguments presented were effectively baseless. App.34a; App.49a. When the Petitioner filed suit for wrongful use of civil proceedings and abuse of process, the Court of Appeals determined that the CTA's efforts were to "delay" the project. App.18a. However, the Court of Appeals held that the CTA was absolutely shielded from liability under the *Noerr-Pennington* Doctrine and that the claims could be not considered to be "objectively baseless as a matter of law." App.18a.

Ultimately, this case has exemplary facts for the Court to hear to consider the limits of the *Noerr-Pennington* Doctrine, as the issue in question involves

purely state common law tort claims between two unquestionably non-competitive parties. Furthermore, this case is perfectly situated to address the limits of the *Noerr-Pennington* Doctrine as the Petitioner has alleged sufficient facts under which a jury could easily find that the CTA and its members were engaged in sham litigation.

## CONCLUSION

According to Rule 10(c) of the United Supreme Court Rules, when determining whether to grant a writ of certiorari, the Supreme Court will consider whether "a state court" has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." This case involves an important federal constitutional question that has not been settled as to the application of the *Noerr-Pennington* Doctrine. As a result, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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