

In the
Supreme Court of the United States

B&G FOODS NORTH AMERICA, INC.,

Petitioner,

v.

KIM EMBRY AND NOAM GLICK,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

FORREST A. HAINLINE, III
COUNSEL OF RECORD
J. NOAH HAGEY (LEAD COUNSEL)
MATTHEW B. BORDEN
DAVID H. KWASNIEWSKI
ROBERT T. PETRAGLIA
BRAUNHAGEY & BORDEN LLP
351 CALIFORNIA St., 10TH FLOOR
SAN FRANCISCO, CA 94104
(415) 599-0210
HAINLINE@BRAUNHAGEY.COM

QUESTION PRESENTED

Whether the judge-made *Noerr-Pennington* doctrine immunizes state actors who seek to enforce unconstitutional laws and regulations.

PARTIES TO THE PROCEEDINGS

Petitioner B&G Foods North America, Inc. was the plaintiff in the District Court and appellant in the Court of Appeals. Respondents Kim Embry and Noam Glick were defendants in the District Court and appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner B&G Foods North America, Inc. is owned by B&G Foods, Inc., a publicly traded company (NYSE: BGS).

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 20-16971

B&G Foods North America, Inc., *Plaintiff/Appellant*
v. Kim Embry and Noam Glick, *Defendants/Appellees*

Date of Final Opinion: March 17, 2022.

Date of Rehearing Denial: April 26, 2022.

United States District Court, for the Eastern District
of California

No. 2:20-cv-00526-KJM-DB

B&G Foods North America, Inc., *Plaintiff*
v. Kim Embry and Noam Glick, *Defendants*

Date of Final Order: October 7, 2020.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
LIST OF PROCEEDINGS	iii
TABLE OF AUTHORITIES	ix
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	3
INTRODUCTION	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
I. THE PETITION CLAUSE DOES NOT PROTECT GOVERNMENT ACTORS, MUCH LESS THOSE ENGAGED IN UNCONSTITUTIONAL PROSECU- TIONS	10
A. <i>Noerr-Pennington</i> Originally Was Divined to Address Private Competitors' Concerns About Antitrust Liability	10
B. <i>Noerr-Pennington</i> is Bounded by the Text of the Petition Clause, Whose History and Meaning Foreclose Appli- cation to State Actors	12
1. English Law Origins of the Right to Petition Were Reserved to Citizens, Not Governments or Rulers	14

TABLE OF CONTENTS – Continued

	Page
2. Protection of Petitioning Rights in Colonial America Were Reserved to Citizens as the Colonies Could Not “Petition Themselves”	16
3. After Independence, Petitioning Rights Were Reserved to Citizens, Not Governments	18
4. At the Constitutional Convention, Petitioning Rights Were Understood as Important to Citizens	18
5. The Federalist Papers Affirmed the Founders’ Concern with Protecting Citizens’ Rights Against Government Incursion, Not Vice-Versa	19
6. The First Amendment Embodied the Founders’ Interest in Protecting Citizens’ (Not States’) Ability to Obtain Redress	20
C. The Ninth Circuit’s “Representative Democracy” Theorem is Poorly Reasoned and at Odds with the Constitution’s Framework	21
II. THE NINTH CIRCUIT’S EXPANSION OF <i>NOERR-PENNINGTON</i> IS BAD FOR EVERYONE (EXCEPT UNCONSTITUTIONAL STATE ACTORS)	24
III. GRANTING THE WRIT WILL RESOLVE A CIRCUIT SPLIT AND PROVIDE CLARITY TO AN IMPORTANT ISSUE WITHOUT BURDENING STATES	27

TABLE OF CONTENTS – Continued

	Page
A. There Is a Conflict Between the Third, Fifth, Seventh, and Ninth Circuits	27
B. The Writ Involves an Important Questions, Namely, “Is the Government Really Immune from Suit When it Enforces Unconstitutional Laws”?	29
C. Properly Limiting <i>Noerr-Pennington</i> Immunity Will Not Cause Undue Burdens	30
CONCLUSION.....	31

TABLE OF CONTENTS – Continued

	Page
OPINIONS AND ORDERS	
Opinion of the United States Court of Appeals for the Ninth Circuit, Published at 29 F.4th 527 (9th Cir. 2022) (March 17, 2022).....	1a
Order of the United States District Court for the Eastern District of California Granting Motion to Dismiss (October 7, 2020)	24a
REHEARING ORDER	
Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc (April 26, 2022)	32a
OTHER DOCUMENTS	
Plaintiff B&G Foods’s Complaint for Declaratory and Injunctive Relief (March 6, 2020)	33a
Defendants Embry and Glick’s Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff’s Complaint (May 1, 2020) ..	62a
Plaintiff B&G Foods’s Opposition to Defendants’ Motion to Dismiss (June 1, 2020)	95a
Defendants Embry and Glick’s Reply in Support of Motion to Dismiss Plaintiff’s Complaint (June 15, 2020)	126a
Hearing on Motion to Dismiss, Transcript (September 4, 2020).....	144a
Appellant B&G Foods’s Opening Brief (February 16, 2021)	161a

TABLE OF CONTENTS – Continued

	Page
Brief of Amicus Curiae Consumer Brands Association Urging Reversal (March 1, 2021)	214a
Appellees Embry and Glick’s Answering Brief (June 25, 2021)	245a
Appellant B&G Foods’s Reply Brief (August 17, 2021)	280a
Audio and Video of Oral Argument in the Ninth Circuit (January 12, 2022)	308a
Appellant B&G Foods’s Petition for Rehearing En Banc (March 31, 2022)	309a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ashby v. White</i> ,	
14 Howell's State Trials 695 (H.L. 1704)	15
<i>Borough of Duryea, Pa. v. Guarnieri</i> ,	
564 U.S. 379 (2011)	12, 13
<i>Brogan v. Scott-Harris</i> ,	
523 U.S. 44 (1998)	30
<i>Cal. Chamber of Commerce v. Becerra</i> ,	
529 F. Supp. 3d 1099	
(E.D. Cal. Mar. 30, 2021)	6, 25
<i>Cal. Chamber of Commerce v. Council for Educ. & Rsch. On Toxics</i> , 29 F.4th 468	
(9th Cir. 2022)	6
<i>Cal. Motor Transp. Co. v. Trucking Unlimited</i> ,	
404 U.S. 508 (1972)	11
<i>Campbell v. Penn. Sch. Bds. Ass'n</i> ,	
972 F.3d 213 (3d Cir. 2020)	9, 28, 30
<i>CBS, Inc. v. Democratic Nat'l Comm.</i> ,	
412 U.S. 94 (1973)	24
<i>Consumer Cause, Inc. v. SmileCare</i> ,	
91 Cal. App. 4th 454 (2001)	6
<i>Consumer Def. Grp. v. Rental Hous. Indus. Members</i> , 137 Cal. App. 4th 1185 (2006)	6
<i>District of Columbia v. Heller</i> ,	
554 U.S. 570 (2008)	12, 13, 23
<i>Dretke v. Haley</i> ,	
541 U.S. 386 (2004)	12

TABLE OF AUTHORITIES – Continued

	Page
<i>E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961)	10, 11
<i>Entick v. Carrington.</i> , 2 Wils. 275 (K.B. 1765).....	15
<i>Garland v. Ming Dai</i> , 141 S. Ct. 1669 (2021)	11
<i>Herr v. Pequea Township</i> , 274 F.3d 109 (3d Cir. 2001).....	25
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	30
<i>Kearney v. Foley & Lardner, LLP</i> , 590 F.3d 638 (9th Cir. 2009)	8, 21, 22
<i>Manistee Town Ctr. v. City of Glendale</i> , 227 F.3d 1090 (9th Cir. 2000)	8, 21, 22
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972)	26
<i>Noerr-Pennington Doctrine</i> , <i>E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961); <i>United Mine Workers of Am. v. Pennington</i> , 381 U.S. 657 (1965)	passim
<i>Pawlett v. Attorney General</i> , 145 Eng. Rep. 550 (1668)	15
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	11
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	30

TABLE OF AUTHORITIES – Continued

	Page
<i>Ross v. Blake</i> , 578 U.S. 632 (2016).....	11
<i>Sosa v. DIRECTV, Inc.</i> , 437 F.3d 923 (9th Cir. 2006)	11
<i>Tarpley v. Keistler</i> , 188 F.3d 788 (7th Cir. 1999)	9, 28
<i>United Artists Theatre Cir., Inc. v. Township of Warrington</i> , 316 F.3d 392 (3d Cir. 2003).....	25
<i>United Mine Workers of Am. v. Pennington</i> , 381 U.S. 657 (1965)	10, 11
<i>United States v. Sprague</i> , 282 U.S. 716 (1931)	12
<i>Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'n Corp</i> , 858 F.2d 1075 (5th Cir. 1988)	passim
<i>Whole Woman's Health v. Jackson</i> , 142 S. Ct. 522 (2021)	27
<i>Williams v. Mayors & City Council of Balt.</i> , 289 U.S. 36 (1933)	23, 24
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	30

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....	passim
U.S. Const. amend. II	4, 13
U.S. Const. amend. IV	4, 13
U.S. Const., art. III	18, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983.....	3, 7
Cal. Civ. Proc. Code § 1798.150.....	26
Cal. Code Regs. tit. 27, § 25704.....	7
Cal. Health & Safety Code § 25249.5 <i>et seq.</i> (Proposition 65)	5, 7, 26
Fla. Stat. § 760.10.....	26

LEGISLATIVE MATERIALS

Cal. Senate Bill No. 1327	26
---------------------------------	----

OTHER AUTHORITIES

Alexander Hamilton, THE FEDERALIST PAPERS.....	20, 23
Charles Howard McIlwain, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1910)	16
Christopher Hill, THE CENTURY OF REVOLUTION, 1603-1714 (1982)	17
Edward Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1957)	17
G. M. Trevelyan, THE ENGLISH REVOLUTION, 1688-89 (1938).....	17

TABLE OF AUTHORITIES – Continued

	Page
Joseph Chitty, Jr., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN (1820).....	14, 16
Julie M. Spanbauer, <i>The First Amendment Right To Petition Government for a Redress of Grievances: Cut From a Different Cloth</i> , 21 HASTINGS CONST. L.Q. 15 (1993).....	17
Karen Roche, <i>Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines</i> , 45 LOYOLA OF L.A. LAW REV. 4 (2012)	29
Ludwik Erhlich, <i>Proceedings Against the Crown (1216- 1377)</i> , 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (P. Vinogradoff ed., 1921).....	14
Mark G. Yudof, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).....	24
Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911).....	19
Ralph V. Harlow, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825 (1917)	17
Raymond C. Bailey, POPULAR INFLUENCE ON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA (1979)	17

TABLE OF AUTHORITIES – Continued

Page

Richard Huzzey & Henry J. Miller, <i>The Politics of Petitioning: Parliament, Government, and Subscriptional Cultures in the United Kingdom, 1780–1918</i> , 106	
HISTORY 221 (2021)	13
Time/Life Books, <i>Cookies and Crackers</i>	14
William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 141(1765-1769)	16, 20
William Holdsworth, A HISTORY OF ENGLISH LAW 226-31 (A.L. Goodhart & H.G. Hanbury eds., 1903)	15, 16

In the
Supreme Court of the United States

B&G FOODS NORTH AMERICA, INC.,

Petitioner,

v.

KIM EMBRY AND NOAM GLICK,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioner B&G Foods North America, Inc. (“B&G Foods”) respectfully petitions for a writ of certiorari to review the opinion below of the United States Court of Appeals for the Ninth Circuit. The opinion dramatically expands the *Noerr-Pennington* doctrine to bar suit against state actors involved in prosecuting unconstitutional laws and regulations.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 29 F.4th 527. (App.1a). The opinion of the United States District Court for the Eastern District of California, granting Respondents' motion to dismiss, is not reported, but can be found at 2020 WL 5944330. (App.24a).

JURISDICTION

The Court of Appeals entered its opinion on March 17, 2022. The court denied B&G Foods's petition for rehearing and rehearing en banc on April 26, 2022. (App.32a) This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const, amend. I Provides:

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 to peaceably assemble, and to petition the Government for a redress of grievances.



INTRODUCTION

This case presents a question of heightened importance that has divided various Courts of Appeals: whether the judge-made *Noerr-Pennington* doctrine can be extended under the Petition Clause of the First Amendment to completely immunize state actors who enforce unconstitutional laws and regulations. The Ninth Circuit believes that states enjoy such privilege and has adopted a rule that will prevent any citizen from obtaining redress in federal court from otherwise unlawful state legal action. The decision conflicts with other Circuits and longstanding federal practice by divorcing *Noerr-Pennington* from its roots in the Petition Clause of the First Amendment which protects the rights of “the people” to redress grievances, not the interests of governments to shield unconstitutional activity from judicial review. U.S. Const. amend I. (protecting “the right of the people . . . to petition the Government for a redress of grievances.”); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'n Corp.*,

858 F.2d 1075, 1086 (5th Cir. 1988) (“*Noerr-Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment.”).

The Ninth Circuit nonetheless has endorsed a dramatic expansion of *Noerr-Pennington* which prevents citizens from obtaining federal review of unconstitutional state action, such as the invasion of B&G Foods’s Free Speech rights in this case. This is not all. The ruling below is almost nonsensical in its approach to the First Amendment and will lead to bad outcomes in other cases. To begin, it ignores the history of the Petition Clause, its antecedents, and its textual construction within the Constitution. Long before and during the adoption of our Constitution, the right to petition solely was reserved to individual citizens. Never had the State enjoyed immunity to “petition” itself. Nor had the “right of the people” ever been expansively used to give new rights to state and local governments as now advanced by the Ninth Circuit. If upheld, numerous sections of the Bill of Rights would need to be reconsidered, including “the people’s” right to bear arms (U.S. Const. amend. II) and be free from government searches and seizures (U.S. Const. amend IV).

Other absurd results will follow, such as ending citizens’ ability to redress coercive and unconstitutional state prosecutions in a whole host of areas affecting basic civil liberties, such as free speech, gun rights, reproductive rights, voting rights, and so on. Reversal is needed to restore the proper balance of federalism and respect citizens’ ability to obtain redress. Doing so comports with the historical role of our federal courts and imposes little to no burden on

state actors who already enjoy significant defenses and resources from which to respond to complaints about unconstitutional state action.



STATEMENT OF THE CASE

Petitioner B&G Foods makes and sells food products around the country. It seeks review of the Ninth Circuit’s opinion below holding that *Noerr-Pennington* bars suit against state actors enforcing unconstitutional laws or regulations. The dispute arises from a federal lawsuit B&G Foods filed against California “bounty hunter” enforcement agents who sought to compel the company to place false cancer warnings on packages of its cookies sold in the State. Those regulatory warnings are false and misleading and contrary to the State’s own scientific understanding, and thus violate the First Amendment. B&G Foods refused to comply and was threatened with state court action to compel the false speech and to impose potentially millions of dollars in fines and penalties.

The underlying law in question is California’s “Proposition 65” which uses state enforcement agents to prosecute businesses if a product or facility contains chemicals “known to the state to cause cancer.” Cal. Health & Safety Code § 25249.5 *et seq.* The attorney general and its private enforcement agents are empowered to give notice and file suit against businesses to enforce the regulation. A sub-industry now exists within California’s legal profession that reaps

millions of dollars from such activity, often regardless of the underlying merit of those cases.¹

One of B&G Foods's cookie products was targeted under this regime because it contains acrylamide, a chemical that naturally exists in certain foods (like olives) or is formed when plants (such as potatoes or cereal grains or coffee beans) are cooked. The State placed acrylamide on a list of chemicals that cause cancer, notwithstanding consensus in the scientific community that it poses no risk to humans. *See Cal. Chamber of Commerce v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478-80 (9th Cir. 2022) (“[R]eputable scientific sources” have concluded “dietary acrylamide isn’t likely to be related to risk for most common types of cancer”). The State, in fact, has conceded that acrylamide is not known to cause cancer in humans. *Id.* at 479 (“Even the State of California has stipulated that it ‘does not know that acrylamide causes cancer in humans, and is not required to make any finding to that effect in order to

¹ See, e.g., *Cal. Chamber of Commerce v. Becerra*, 529 F. Supp. 3d 1099, 1109–1110 (E.D. Cal. Mar. 30, 2021) (“CalChamber”) (“[Prop. 65’s] private enforcement regime[] sets up a framework that may permit unscrupulous attorneys to ‘shake down’ vulnerable targets wielding dubious claims of carcinogenic exposure.”); *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1189 (2006) (noting “the perversity of a shake down process” enabled by Prop. 65 “in which attorney fees are obtained by bargaining away the public’s interest in warnings that might actually serve some public purpose”); *Consumer Cause, Inc. v. SmileCare*, 91 Cal. App. 4th 454, 477 (2001) (Vogel, J., dissenting) (“[L]awsuits under Proposition 65 can be filed and prosecuted by any evidence of an actual violation—or even a good faith belief that a defendant is using an unsafe amount of a chemical known by the state to cause cancer. . . .”).

list the chemical under Proposition 65.”).² Nonetheless, California’s enforcement agents repeatedly have threatened and sued businesses like B&G Foods to force publication of the following false warning:

WARNING: This product can expose you to [acrylamide], which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

B&G Foods’s complaint was filed against Respondents, a litigious state private enforcer and her lawyer, to redress their efforts to compel a violation of B&G Foods’s First Amendment free speech rights. (App.33a). The suit sought declarative and injunctive relief, as well as monetary damages under 42 U.S.C. § 1983. (App.33a).

The District Court recognized that Respondents were assumed state actors but nonetheless granted Respondents’ motion to dismiss on grounds that the enforcement of Proposition 65, regardless of the effect on B&G Foods’s Constitutional rights, was protected by *Noerr-Pennington*. (App.24a). The Ninth Circuit affirmed that *Noerr-Pennington* applied.³ It held that

² The State even exempts coffee (which contains more acrylamide than virtually any other food) from the warning requirement because there is compelling evidence that moderate coffee consumption reduces cancer risk. Cal. Code Regs. tit. 27, § 25704.

³ The Ninth Circuit issued a limited remand on the basis that Petitioner had not been permitted to amend its complaint to plead allegations around Respondents’ “sham litigation” tactics, a highly qualified exception to *Noerr-Pennington*. (App.21a-23a). The ruling, however, maintained the State’s and its agents’ general immunity from suit and imposed an exceptionally high burden and due process restriction on Petitioner’s ability to seek basic redress of a Constitutional impairment. *Id.*

“Assuming Defendants are state actors, our precedent compels the conclusion that their activities were protected by the Petition Clause.” (App.10a). The panel reasoned that *Noerr-Pennington* applies to all government actors based on what it terms “the representative democracy rationale,” that “government ‘petitioning’ is “as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens.” *Id.*

The decision principally relied on two Ninth Circuit decisions: *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643 (9th Cir. 2009) and *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) . (App.7a-8a). Each invoked a novel “three-step analysis” to determine the application and scope of *Noerr-Pennington* immunity: “(1) whether the lawsuit imposes a burden on petitioning rights, (2) whether the alleged activities constitute protected petitioning activity, and (3) whether the statute at issue may be construed to avoid that burden.” (App.8a). (*citing Kearney v. Foley & Lardner, LLP*, 590 F.3d 638 at 644 (9th Cir. 2009)) (internal quotation marks omitted). The Ninth Circuit held that B&G Foods’s lawsuit “burdens” petitioning rights because, if successful, it would prevent the State’s representatives from proceeding with unconstitutional threats and prosecutions in court. (App.9a). Because *Noerr-Pennington* immunity applies to “lawsuits brought by government actors,” Respondents enjoy immunity even though they are state actors prosecuting an unconstitutional law. (App.12a).

The Court did not address the Fifth Circuit’s decision holding that *Noerr-Pennington* cannot extend to protect government actors, or the decisions of

other Circuits narrowly limiting such application to the context of a state’s political petitioning activity. (App.188a, App.309a); *see also* *Video Int’l Prod.*, 858 F.2d 1075 (rejecting government immunity *in toto*); *Tarpley v. Keistler*, 188 F.3d 788, 796 (7th Cir. 1999) (limiting government immunity to politically oriented petitioning activity); *Campbell v. Penn. Sch. Bds. Ass’n*, 972 F.3d 213 (3d Cir. 2020) (similar).



REASONS FOR GRANTING THE WRIT

The Court should grant the writ because a state has no constitutional First Amendment privilege to “petition” itself, especially when doing so directly impairs a citizen’s Constitutional rights. The Ninth Circuit’s decision below is at odds with the text and history of the First Amendment and Constitutional structure generally, creates a split in the Circuits, and provides dangerous blanket immunity for a litany of government intrusions into basic civil rights. Such expansion of *Noerr-Pennington* is precisely the specie of judge-made law susceptible to unintended consequences and mischief. Reversing the Ninth Circuit’s rule will reaffirm the proper working of the Petition Clause and ensure that citizens’ efforts to redress government abuse is not barred at the courthouse steps.

I. THE PETITION CLAUSE DOES NOT PROTECT GOVERNMENT ACTORS, MUCH LESS THOSE ENGAGED IN UNCONSTITUTIONAL PROSECUTIONS.

The *Noerr-Pennington* doctrine is a judge-made rule originally derived from the Petition Clause of the First Amendment to insulate lobbying and collective action of private citizens from Sherman Act liability. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). The provision provides that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” This straightforward formulation has evolved over the years in the Ninth Circuit and a few other courts to mean something entirely different: that the clause protects the rights of “States” or “Governments” to “petition” because those entities are serving the will of the “the people” — even in such cases as this where states’ actions (prosecution of regulatory laws) directly impinge their own citizens’ Constitutional rights. This new and untethered formulation is antithetical to the text of the First Amendment, to the history of petitioning rights during ancient English common law and when the provision was adopted, and expands a judge-made immunity in manner that is contrary to the scheme envisioned by the Founders.

A. *Noerr-Pennington* Originally Was Divined to Address Private Competitors’ Concerns About Antitrust Liability.

Noerr-Pennington began as a judge-made antitrust doctrine. It was formulated out of the Petition Clause of the First Amendment to protect private competitors

from “restraint of trade” liability under the Sherman Act when they sought to lobby the government for legislative or regulatory reform. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 at 669; *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 at 137-38.

In the decades since *Noerr* and *Pennington*, courts have expanded the doctrine’s reach to a “generic rule of statutory construction,” under which courts “construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006). Courts also have broadened the doctrine to encompass certain petitioning of the judicial branch by private citizens filing lawsuits, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and to conduct “incidental to the prosecution of the suit,” including pre-suit demand letters, as long as the “underlying litigation [falls] within the protection of the Petition Clause,” *Sosa*, 437 F.3d at 934-36.

The doctrine’s metastasizing nature illustrates a jurisprudential concern frequently expressed by this Court regarding the imposition of “judge-made procedural requirements . . . that Congress has not prescribed and the Constitution does not compel.” *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021) (Gorsuch, J.) (courts are “generally not free to impose additional judge-made procedural requirements . . . that Congress has not prescribed and the Constitution does not compel”). *See also Ross v. Blake*, 578 U.S. 632, 640 (2016) (Kagan, J.) (when construing a statute, rather than “a judge-made doctrine,” courts “must honor Congress’s choice”); *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)

(Alito, J.) (reversal appropriate when “rule is judge made and implicates an important matter” and “experience has pointed up the precedent’s shortcomings”); *Dretke v. Haley*, 541 U.S. 386, 394 (2004) (O’Connor) (as the “stewards” of “judge-made rule . . . courts . . . must exercise restraint, adding to or expanding them only when necessary”). Even the concept of an immunizing “petition right” has come under fire. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 403-04 (2011) (Scalia, J., concurring) (“I find the proposition that a lawsuit is constitutionally protected ‘Petition’ quite doubtful. . . . There is abundant historical evidence that ‘Petitions’ were directed to the executive and legislative branches of the government, not the courts.”).

However expansively read in the context of protecting private citizens, this Court has never held *Noerr-Pennington* to preclude suit against government or state actors; It should not allow the Ninth Circuit to do so here.

B. *Noerr-Pennington* is Bounded by the Text of the Petition Clause, Whose History and Meaning Foreclose Application to State Actors.

“The constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (“Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”).

The plain language of the Petition Clause forecloses the interpretation rendered by the Ninth Circuit.

The Petition Clause recognizes a “right of the people,” not a right of the State. This Court has held the phrase “right of the people” “unambiguously refer[s] to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.” *Heller*, 554 U.S. at 579; *see also id.* at 580 (noting that nowhere in the Constitution “does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”). This Court has repeatedly and specifically affirmed that the text of the Petition Clause codifies an individual right, just like the other “rights of the people” codified in the First, Second, and Fourth Amendments. *Borough of Duryea v. Guarnieri*, 564 U.S. 379 at 387 (“[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”) (collecting cases).

The idea of ensuring citizens’ ability to petition the courts flows from a longstanding tradition which predated and presaged the right to vote,⁴ but was always conceived of as a citizenry right from the state, and has nothing to do with the Ninth Circuit’s fanciful “representative democracy” syllogism. (*see infra* § I(C)).

⁴ See Richard Huzzey & Henry J. Miller, *The Politics of Petitioning: Parliament, Government, and Subscriptional Cultures in the United Kingdom, 1780–1918*, 106 HISTORY 221 (2021) (“Before they enjoyed the right to vote in parliamentary elections, most Britons represented their opinions or hopes in signatures and marks applied to petitions, addresses and other written requests to authorities.”)

1. English Law Origins of the Right to Petition Were Reserved to Citizens, Not Governments or Rulers.

Beginning with the reign of Edward I, the English Crown encouraged citizens to seek relief unavailable at common law through the submission of petitions for redress of grievances. Ludwik Erhlich, *Proceedings Against the Crown (1216-1377)*, 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (P. Vinogradoff ed., 1921) at 86-90 (agreeing with the traditional view that Edward I introduced petitions to the law of England).⁵

Although some sought the grant of a royal favor as a matter of pure grace, many petitions grounded their claims in legal right. *Id.* at 188. Such “petitions of right” sought royal consent to the litigation of legal claims in the courts of justice, which was necessary because the common law courts could not otherwise entertain proceedings against the Crown. If the King supplied the proper endorsement (“let right be done to the parties”) (*Id.* at 97-98), the petition went to Chancery for an investigation. If seemingly well-founded, then the action proceeded to litigation in the proper court with the attorney general appearing for the Crown. Joseph Chitty, Jr., *A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN* (1820) at 346-52. The Crown’s endorsement authorized the court to hear the case, to decide it on legal principles, and to render a judgment against the Crown. 1 William

⁵ It is perhaps no coincidence that the emergence of the right to petition coincided with the arrival of cookies in Europe, which were developed in the seventh century in Persia and brought to Spain when it was part of the Umayyad Caliphate. *Cookies and Crackers*, Time/Life Books (1982) at 5.

Holdsworth, A HISTORY OF ENGLISH LAW 226-31 (A.L. Goodhart & H.G. Hanbury eds., 1903) at 16-17.

Citizens' right to seek redress of government wrongdoing continuously expanded in the ensuing centuries, with Parliament authorizing the alternative remedies of *monstrans de droit* and *traverse*, which did not require leave of the Crown to proceed, 9 Holdsworth at 25-26, and the Court of the Exchequer subsequently authorizing injunctive relief against the Crown in *Pawlett v. Attorney General*, 145 Eng. Rep. 550 (1668).

In addition to an array of remedies against the Crown, English law also came to recognize the individual right to bring their tort claims against the King's subordinate officers, as well as the "high prerogative writs": mandamus, prohibition, certiorari, habeas corpus, and quo warranto. *See* 1 Holdsworth at 93-95; *cf.* deSmith, at 584.

Following the Glorious Revolution, the King's officials and servants could be held personally responsible for their own violations of the law and could not defend on the ground that they were just following orders. *See Entick v. Carrington*. 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765). Official responsibility extended to officials outside the ministry as well. For example, the House of Lords upheld an action in tort to challenge vote-counting in a parliamentary election. *See Ashby v. White*, 14 Howell's State Trials 695 (H.L. 1704).

Even William Blackstone, who famously asserted "the king can do no wrong," acknowledged that citizens possessed certain absolute rights, including the rights to life, limb, liberty, and property, which if infringed

gave rise to a claim against the Crown. 3 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 141(1765-1769); *See also* Chitty at 341 (indicating that in every case “in which the subject hath a right against the Crown, and yet no *monstrans de droit* or *traverse* of office lies, a petition of right is the birth-right of the subject”). When the ordinary course of law failed, as it did by definition in a claim against the Crown, the subject enjoyed a (similarly) absolute right to seek relief of a different character through a petition for redress of grievances:

If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.

3 Blackstone at *143.

2. Protection of Petitioning Rights in Colonial America Were Reserved to Citizens as the Colonies Could Not “Petition Themselves”.

The right of petition remained individualized throughout the colonial period. The “petition of right” and the many related British remedies against the Crown that made up the right to petition found their way into the codes of the independent American states. *See* 1 Holdsworth at 170-73; *see* Charles Howard McIlwain, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 109-256 (1910); *see* Mary P. Clarke, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 14-60

(1943) (early colonial assemblies consciously modeled their actions on those of the House of Commons); *see* Ralph V. Harlow, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, 1-23 (1917) (emphasizing influence of the British example in the rise of the committee system among American assemblies); *see also* Raymond C. Bailey, *POPULAR INFLUENCE ON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA* 9-19 (influence of the British House of Commons).

As British subjects, the colonists enjoyed an individual right to petition the Crown for redress without fear of prosecution. *See generally* Christopher Hill, *THE CENTURY OF REVOLUTION, 1603-1714*, 198-99, 237-39 (1982); G. M. Trevelyan, *THE ENGLISH REVOLUTION, 1688-89*, 87-94 (1938) (quoted in Schnapper, *supra* note 2, at 312-13); Edward Dumbauld, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 168 (1957) (“That it is the right of the subjects to petition the King, and all committments [sic] and prosecutions for such petitioning are illegal.”)

The right to petition enabled the revolutionaries to assemble, to criticize the Crown, and to embody their complaints in published petitions for redress—all with explicitly political goals in mind. The individual right to petition was thus the antecedent to the individual freedoms of speech, press, and assembly that appear alongside the Petition Clause of the First Amendment. Julie M. Spanbauer, *The First Amendment Right To Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993), at 16-17 (right to petition superior to, and distinct from, the other expressive rights in the First Amendment). The right to petition

in Colonial America was, in effect, a right to protest against the government. *Id.* None of the Framers of the First Amendment would have understood, or even comprehended, that the notion that a government had the right to petition against its citizens.

3. After Independence, Petitioning Rights Were Reserved to Citizens, Not Governments.

After Independence, the States included bills or declarations of rights in their written constitutions, and many of these bills of rights included affirmations of the individual right to petition. Pennsylvania was first, declaring in 1776 that “the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.” Similar declarations appeared in the bills of rights adopted in Delaware, Maryland, North Carolina, and Massachusetts. 1 Schwartz at 266, 277, 281, 287, 343. In the Commonwealth of Virginia, in 1785, James Madison persuaded the legislature to reenact a provision drafted by Thomas Jefferson, which authorized citizens to bring suit on any claim or demand against the Commonwealth by submitting a petition for the redress of grievances to an appropriate court. *Id.*

4. At the Constitutional Convention, Petitioning Rights Were Understood as Important to Citizens

While the Right to Petition was not formally codified in the original Constitution, the underlying principles influenced the final text of Article III. Their

most vigorous advocate was Charles Pinckney, the delegate from South Carolina. 3 Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 595 (1911) (reprinting “Pinckney Plan”). Pinckney proposed a federal court with jurisdiction to “try Officers of the U.S. for all Crimes &c in their Offices” and to hear appeals from the state courts wherein questions shall arise “on the Regulations of the U.S. concerning trade and revenue or wherein U.S. shall be a party.” 3 Farrand 595-604, 608. The language of these grants of jurisdiction closely resembled the scope of federal judicial power that Pinckney advocated in a lengthy pamphlet that contained remarks of the kind he may have made to the convention on the subject. *See Id.* at 106-23 & n.1. Pinckney’s pamphlet urged the creation of a “Tribunal in the Union capable of taking cognizance of their officers who shall misbehave in any of their departments, or in their ministerial capacities out of the limits of the United States” and to try questions “arising on . . . any of the regulations of Congress in pursuance of their powers, or wherein they may be a party.” *Id.* at 117. Consistent with the English and Colonial legal tradition, Article III implicitly recognizes an individual right to petition by establishing an independent judiciary vested with the jurisdiction to redress grievances against the government.

5. The Federalist Papers Affirmed the Founders’ Concern with Protecting Citizens’ Rights Against Government Incursion, Not Vice-Versa.

The FEDERALIST PAPERS confirm that the Framers intended the federal courts to be, first and foremost, a forum for individuals to seek redress against the Government for abuses of power. THE FEDERALIST

No. 78 (Alexander Hamilton) (describing the federal courts as “designed to be an intermediate body between the people and their legislature.”) Further, it was understood that the “power of the people is superior to both [the judicial and legislative power]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.” *Id.*

6. The First Amendment Embodied the Founders’ Interest in Protecting Citizens’ (Not States’) Ability to Obtain Redress.

The drafters of the First Amendment’s Petition Clause closely tracked the petition right as it had been established and developed through the English and Colonial legal systems. Just like Blackstone, the drafters codified the right to petition as belonging to “the people,” *i.e.*, to individual citizens. The drafters likewise employed language that closely tracked the English model of citizen petitioning, by authorizing the submissions of petitions to the courts “for redress of grievances.” See Engdahl at 5-21 (reviewing in detail the rules of agency that controlled officer liability in tort in the United States); Jaffe at 21-29 (tracing the development of the officer suit in the United States); *see* Goodman at 334 (following a running battle between the Massachusetts colonial assembly and the royal courts over the writ of mandamus, the state legislature conferred mandamus power on the Supreme Judicial Court in an Act of 1782); *Id.* at 1, 8, 14, 25-26, 33-34, 131-34, 139-41, 142-43 (describing the introduction of mandamus into the laws of New Hampshire,

Connecticut, Maryland, New York, New Jersey, Pennsylvania, and Delaware).

By establishing a constitutional right to petition the government for a redress of grievances, the drafters of the First Amendment followed the centuries of tradition by adopting language that authorizes individual citizens (and related organizations, such as lawful businesses) to pursue a determination of claims against the government. The Ninth Circuit's creation of a state's supposed petitioning rights that can trump the rights of the people is contrary to this longstanding history and tradition.

C. The Ninth Circuit's “Representative Democracy” Theorem is Poorly Reasoned and at Odds with the Constitution’s Framework.

In 2000, the Ninth Circuit untethered *Noerr-Pennington* from these moorings in *Manistee Town Center v. City of Glendale*, in which it extended petitioning immunity to government officials because they sometimes “intercede, lobby, and generate publicity to advance their constituents’ goals.” 227 F.3d 1090, 1092-93 (9th Cir. 2000). The court reasoned that such activities were akin to citizens’ own petitioning efforts and applied *Noerr-Pennington* to immunize the state and its officials from liability. The court went a step further a few years later in *Kearney*, 590 F.3d at 644-45, holding that “a governmental entity or official may receive *Noerr-Pennington* immunity for the petitioning involved in an eminent domain proceeding.” *Id.* at 645. It further explained that “[t]here is no reason . . . to limit *Manistee*’s holding to lobbying efforts” and that “an eminent domain proceeding is

consistent with the principles laid out in *Manistee*: a governmental entity acts on behalf of the public it represents when it seeks to take private property and convert it to public use.” *Id.* at 644-45. With *Kearney*, the Ninth Circuit expanded *Noerr-Pennington* was expanded from a judge-made antitrust doctrine into a way for the government to immunize itself when taking its citizens’ property.

Each decision was founded on the idea that states embody the will of the people and act in the public interest; and thus should be afforded protection to petition their own judicial organs. *Kearney*, 590 F.3d at 644-45. In this case, the Ninth Circuit applied these precedents and reasoned that California’s First Amendment right to petition itself completely immunizes even unconstitutional regulatory action because a state engages in such “litigation activities . . . to advance public goals.” (Ninth Cir. Op. at 13.) The Court relied on *Kearney* and its broader explication of the public interest theory:

In a representative democracy . . . branches of government often act on behalf of the people and intercede to advance their constituents’ goals, both expressed and perceived. Such intercession is just as likely to be accomplished through lawsuits—the very act of petitioning—as through lobbying. Furthermore, an eminent domain proceeding is consistent with the[se] principles . . . : a governmental entity acts on behalf of the public it represents when it seeks to take private property and convert it to public use.

Kearney, 590 F.3d at 644-45.

Read the paragraph twice, or three times. It is nonsensical to the point of absurdity: because states effect the will of the people, they must have the same rights as the people, even in a Bill of Rights system designed to protect the people from state overreach of basic rights. Of course, this formulation lacks support anywhere in the purpose, history and textual construction of the Petition Clause or the structure of the Constitution itself. *See Heller*, 554 U.S. at 580 (distinguishing a “right of the people” from “collective” rights).

Those who drafted and ratified the Constitution believed that “[n]o man of sense will believe” that the States would regard the limitations imposed on their power without enforcement of the Constitution by the federal judiciary. FEDERALIST No. 80, at 535. A state actor empowered by the state “for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.” *Williams v. Mayors & City Council of Balt.*, 289 U.S. 36, 40 (1933). Governments in our system thankfully do not have the same rights and privileges as “the people”, much less the “privilege” to petition their own organs with impunity, *viz*, just as they do not have the right to assemble, to bear arms, or to be free from unreasonable searches and seizures. *See Video Int'l Prod.*, 858 F.2d at 1086 (“[I]t is impossible for the government to petition itself within the meaning of the first amendment.”).

As discussed *infra*, our Founders sought to fortify such rights in the citizenry against state government action rather than erect a gaping loophole through

which bad laws can be threatened or prosecuted without judicial recourse

II. THE NINTH CIRCUIT’S EXPANSION OF *NOERR-PENNINGTON* IS BAD FOR EVERYONE (EXCEPT UNCONSTITUTIONAL STATE ACTORS).

In addition to being inconsistent with the text and history of the Petition Clause, the Ninth Circuit’s decision erodes citizens’ constitutional rights in favor of state regulation, and upends the structure of the system of representative democracy established in the Constitution by prioritizing “states’ rights” over those of the citizens. Extending *Noerr-Pennington* protections to state actors has the perverse effect of stripping citizens of their First Amendment rights to seek redress for constitutional violations. Such a rule enables all sorts of coercive regulation, unfettered invasion of liberties and other horribles, *viz*, so long as their enforcement takes the form of a lawsuit or similar petitioning activity — which is almost always the case.

Government actors historically have never enjoyed blanket immunity to use state enforcement powers to effect unconstitutional ends. To the contrary, an agency “created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.” *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36 at 40. It is “inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community,” and doing so in this context especially “would be standing the world on its head.” Mark G. Yudof, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 44-45 (1983); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139

(1973) (Stewart, *J.*, concurring) (“The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.”); *Herr v. Pequea Township*, 274 F.3d 109, 129-30 (3d Cir. 2001) (Garth, *J.*, dissenting) (“*Noerr-Pennington* immunity applies to *private parties* — *not governmental entities* — seeking redress from the government,” otherwise “a governmental entity’s. . . . 1st Amendment right to petition always trumps an individual citizen’s [constitutional rights, to, among other things,] be free from arbitrary and capricious government activity”), *abrogated by United Artists Theatre Cir., Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003).

Here, Respondents seek to force a food business to label its cookies with a large, overt, and false cancer warning. Respondents and the State then reap millions of dollars entering settlements enacting a “safe harbor” around which the same products then can be sold without the rhetorical skull and crossbones. All of this takes place even though because the State itself knows the coercion is based on a false idea — because acrylamide is not “known to the State to cause cancer.” *See CalChamber*, 29 F.4th 468. Yet, under the Ninth Circuit’s expansion of *Noerr-Pennington*, B&G Foods has no ability to redress such unlawful regulatory imposition on its First Amendment rights.

All of this is bad enough. But the rule’s consequence is not limited to an obscure corner of labeling regulation. The Ninth Circuit’s ruling sets the table for states to pass laws regulating businesses or curtailing individual rights without regard to Constitutional limits, provided the government and/or its agents assert that such regulatory enforcement is “petitioning” activity like a lawsuit. For example, states

could pass laws enabling attorney generals or bounty hunters to sue anyone who carried a gun outside their home, or anyone who convened a prayer at school, or anyone who operated a crisis pregnancy center. Even in the face of contrary precedent from this Court, businesses and citizens targeted by such unconstitutional state laws would have no recourse to a federal forum to vindicate their rights—despite Congress expressly anticipating that a federal forum would be necessary for precisely this reason. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law. . . .”).

These examples are no idle abstraction, like whether Thin Mints are tastier than Samoas. States currently are engaged in creating precisely such regimes using the same framework for laws like Proposition 65, which delegate state enforcement to citizens. See, e.g., Cal. Senate Bill No. 1327, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1327 (proposed legislation that would make it illegal to sell or manufacture nearly fifty different types of guns and would be enforced by private citizens, who would receive a \$10,000 bounty for each suit filed); Cal. Civ. Proc. Code § 1798.150 (California law permitting any consumer to sue companies that fail to comply with any of dozens of restrictions on the use of consumer data and can seek statutory penalties of up to \$750 per violation per resident); Fla. Stat. § 760.10 (Florida Statute permitting any individual to sue any school district that teaches “critical race theory”). Under Ninth Circuit precedent,

a defendant subjected to such suit would be unable to challenge its constitutionality, as any would-be citizen enforcer would be shielded by *Noerr-Pennington*. And the defendants would similarly be unable to prevail on pre-enforcement attack on the law. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) ("As our cases explain, the chilling effect associated with a potentially unconstitutional law being on the books is insufficient to justify federal intervention in a pre-enforcement suit.") (internal quotation marks omitted). A defendant subject to regulatory enforcement in these states would be left with no recourse to challenge such unconstitutional acts in federal court. Left, right and center, this is bad for everyone.

III. GRANTING THE WRIT WILL RESOLVE A CIRCUIT SPLIT AND PROVIDE CLARITY TO AN IMPORTANT ISSUE WITHOUT BURDENING STATES.

The writ will help this Court address an increasingly persistent issue arising in federal courts around the country — with dramatically conflicting results.

A. There Is a Conflict Between the Third, Fifth, Seventh, and Ninth Circuits.

A litigant filing suit in Texas or Louisiana currently holds rights to remedy unconstitutional state prosecutions which she does not enjoy in places like California, Oregon, Washington or New Jersey. This is because the Circuits do not agree on whether *Noerr-Pennington* is so expansive as to immunize not just private persons, but state and government actors as well, and how far such protection might extend.

The first Circuit to directly address this question was the Fifth Circuit, which held that "*Noerr-*

Pennington protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment.” *Video Int’l Prod., Inc. v. Warner-Amex Cable Commc’ns Corp.*, 858 F.2d 1075 at 1086 (5th Cir. 1988).

Ten years later, the Seventh Circuit weighed-in, concluding that *Noerr-Pennington* may, in certain limited cases, apply to state actors engaged in “traditional political activity,” but suggested that the rule would not extend “to cases where the attempt itself (rather than the intended result) created the alleged harm” or “where political speech is not at stake. . . .” *Tarpley v. Keistler*, 188 F.3d 788, 796 (7th Cir. 1999).

The Third Circuit, in *Campbell v. Penn. Sch. Bds. Ass’n*, 972 F.3d 213 (3d Cir. 2020), also held that *Noerr-Pennington* applies to state actors in certain contexts. While the Third Circuit acknowledged that “there is some confusion over *Noerr-Pennington*’s applicability to state actors,” it concluded that “[s]tripping state actors of protection would expose them to an unreasonably increased risk of interference.” *Id.* at 220-21. Like the Seventh Circuit, the Third Circuit clarified that *Noerr-Pennington* should not “be applied formulaically across every field of law.” *Id.* at 221.

None of these courts go so far as the Ninth Circuit. As detailed *supra* II.B., the court’s “representative democracy rationale” has led it to the most extreme and expansive view of *Noerr-Pennington*, immunizing all state actors engaging in any sort of “petitioning” activity, even if that activity has nothing to do with political discourse. Indeed, as here this ad hoc and unprincipled rationale even immunizes state actors enforcing admittedly unconstitutional laws and regu-

lations. As a result, the law in the Ninth Circuit is profoundly different from the rest of the country, and its rulings conflict with those of all the other circuits, and most clearly with Fifth Circuit’s opinion in *Video Int’l.*

This would be an especially obvious case from which to resolve the Circuit split and clarify the issue for courts and litigants nationwide.

B. The Writ Involves an Important Questions, Namely, “Is the Government Really Immune from Suit When it Enforces Unconstitutional Laws”?

The Ninth Circuit’s decision disrupts the balance struck by this Court between states’ interests in regulating businesses and citizens’ rights to challenge the enforcement of unconstitutional laws and regulations. *See Karen Roche, Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 LOYOLA OF L.A. LAW REV. 4:1295 (2012) (detailing how *Noerr-Pennington* immunity has departed from what the First Amendment requires and urging courts to simply “use the First Amendment . . . to define the outer limits of *Noerr*”). If left unresolved, some states will be free to sue businesses and ordinary citizens with virtual impunity to enforce any manner of unconstitutional regulations. There also are broader implications for other “rights of the people” beyond the Petition Clause. If States have the right to petition themselves under the First Amendment, they logically also have the rights to assemble, bear arms, and be free from unreasonable searches and seizures and secure in their homes.

C. Properly Limiting *Noerr-Pennington* Immunity Will Not Cause Undue Burdens.

Properly cabining *Noerr-Pennington* immunity will not unduly interfere with state regulation, *see Campbell*, 972 F.3d at 220-21. States enjoy at least four distinct forms of immunity from lawsuits: legislative function immunity, *Brogan v. Scott-Harris*, 523 U.S. 44 (1998); judicial act immunity, *Pierson v. Ray*, 386 U.S. 547 (1967); prosecutorial immunity, *Imbler v. Pachtman*, 424 U.S. 409 (1976); and qualified immunity, *Wood v. Strickland*, 420 U.S. 308 (1975). They also enjoy a host of other procedural defenses, including various abstention doctrines aimed to avoid federal court interference with state court proceedings.

These immunities and procedural hedges have been carefully established and refined over many decades with consideration given to the competing interests of states' ability to enforce regulations without meritless interference, with citizens' rights to seek legal redress of unconstitutional government action. The Ninth Circuit's decision disrupts this considered balance and effectively immunizes states actors doing bad things . . . even to people selling cookies.



CONCLUSION

For the foregoing reasons, the Court should grant Petitioner B&G Foods's petition for a writ of certiorari.

Respectfully submitted,

FORREST A. HAINLINE, III
COUNSEL OF RECORD
J. NOAH HAGEY (LEAD COUNSEL)
MATTHEW B. BORDEN
DAVID H. KWASNIEWSKI
ROBERT T. PETRAGLIA
BRAUNHAGEY & BORDEN LLP
351 CALIFORNIA ST., 10TH FLOOR
SAN FRANCISCO, CA 94104
(415) 599-0210
HAINLINE@BRAUNHAGEY.COM
HAGEY@BRAUNHAGEY.COM
BORDEN@BRAUNHAGEY.COM
KWASNIEWSKI@BRAUNHAGEY.COM
PETRAGLIA@BRAUNHAGEY.COM

COUNSEL FOR PETITIONER

JULY 25, 2022