No. _______

IN THE
SUPREME COURT OF THE UNITED STATES

PUERTO RICO TELEPHONE COMPANY, INC.,
Applicant,

v.

SAN JUAN CABLE LLC,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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January 18, 2018

PARTIES TO THE PROCEEDINGS

Applicant Puerto Rico Telephone Company, Inc. was the plaintiff in the district court and the appellant in the court of appeals.

Respondent San Juan Cable LLC was the defendant in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, applicant Puerto Rico Telephone Company, Inc. states the following:

Puerto Rico Telephone Company, Inc., is a Puerto Rico corporation. It is an indirect, wholly owned subsidiary of América Móvil, S.A.B. de C.V., which is a publicly traded Mexican corporation. América Móvil, S.A.B. de C.V., has no parent company, and no publicly held company owns 10% or more of its stock.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, applicant Puerto Rico Telephone Company, Inc. ("PRTC") respectfully requests a 30-day extension of time, up to and including February 28, 2018, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the First Circuit. The court of appeals entered its judgment on October 31, 2017 (the court of appeals' opinion, reported at 874 F.3d 767, is attached hereto as Exhibit A). The petition would be due on January 29, 2018. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question concerning the scope of the "sham" exception to immunity from antitrust liability for petitioning activity under this Court's decisions beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, this Court held that legitimate petitioning activity, designed to secure favorable government action, could not give rise to antitrust liability. From the start, however, the Court made clear that this immunity would not apply in the case of activity that is a "mere sham" designed "to interfere directly" with a competitor's efforts to compete. *Id.* at 144.

2. This Court has elaborated on the scope of this "sham litigation" exception to *Noerr* immunity in two cases. First, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court held that "concerted action by [defendants] to institute state and federal proceedings" met the "sham litigation" exception because "the aim and purpose of the conspiracy was 'putting their competitors . . . out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business.'" *Id.* at 509, 511. Second, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Court held, in the context of a *single* lawsuit, that a petition or lawsuit cannot be "sham litigation" unless "the lawsuit [is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60.

After *California Motor* and *Professional Real Estate*, the courts of appeals (and the Federal Trade Commission ("FTC")) have been unanimous in determining that *Professional Real Estate*'s "objectively baseless" test applies to allegations of anticompetitive conduct based on a *single* lawsuit or petition, and that *California Motor*'s intent test applies to allegations of anticompetitive conduct based on a series of lawsuits and/or petitions. *See, e.g.*, *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 179-80 (3d Cir. 2015) ("Three other Courts of Appeals have reconciled *California Motor* and *Professional Real Estate* by concluding that they apply to different situations: *California Motor* to a series of sham petitions and *Professional Real Estate* to a single sham petition. . . . We agree with the approach to *California Motor* and *Professional Real Estate* that has been adopted by the Second, Fourth, and Ninth Circuits.") (citing *Primetime 24 Joint Venture v. National Broad. Co.*, 219 F.3d 92, 101 (2d Cir. 2000), *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363-64 (4th Cir. 2013), and *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 810-11 (9th Cir. 1994)), *cert. denied*, 136 S. Ct. 2451 (2016); FTC, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine* 28-38 (2006).*

In the decision below, the First Circuit held that the filing of a series of meritless actions – "twenty-four separate petitions," none of which "resulted in a meaningful victory," 874 F.3d at 769 – that preserved a cable incumbent's monopoly for four years, inflicting tens if not hundreds of millions of dollars in consumer harm, could not give rise to antitrust liability so long as none of the individual petitions was "objectively baseless." *Id* at 770. That decision thus conflicts with prior decisions of the Second, Third, Fourth, and Ninth Circuits – none of which requires any petitions in a series to be objectively baseless for the sham exception to apply.

3. In 2008, petitioner PRTC, the incumbent telephone company in Puerto Rico, applied for a license to provide pay-TV service (based on Internet Protocol Television, a technology used by other telephone companies like AT&T and Verizon) in competition with cable companies operating in Puerto Rico, including respondent (which did business as "OneLink"). Under the regulatory scheme that applies in the Commonwealth, the Telecommunications Regulatory Board of Puerto Rico ("TRB") has sole discretion to grant (or to deny) a license to provide pay-TV services; it is

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* *Available at* https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

required to grant or refuse a license within 180 days from filing of an application; and third parties are not permitted to intervene in the administrative proceeding.

4. Notwithstanding the rule against third-party intervenors, OneLink filed a petition to intervene in PRTC's licensing proceeding, which the TRB denied nine days later. After PRTC amended its licensing application in late 2008, OneLink again sought to intervene. The TRB again denied that petition; OneLink appealed, lost, sought reconsideration, lost, sought review in the Puerto Rico Supreme Court, lost, sought reconsideration, lost, filed a second motion for reconsideration, lost, filed a third motion to intervene, which was denied, appealed, lost, sought reconsideration, lost, petitioned for certiorari, lost, sought reconsideration of the denial of intervention, lost, appealed again, and lost again.

In the meantime, OneLink also filed a motion to make PRTC's application public, which was denied; filed a motion to extend time to file comments, which was denied; filed a motion to dismiss the application, which was ignored; filed a motion to require PRTC to report testing results, which was ignored; filed a motion to set aside the public hearing on PRTC's petition, which was denied; filed a petition to stay proceedings, which was ignored; filed a motion to recuse a TRB commissioner, which was rejected by the Office of Government Ethics; filed a motion requesting access to documents, which was ignored; and filed a motion seeking disqualification of the same TRB commissioner, which was denied.

OneLink also filed (1) a federal court lawsuit against PRTC (dismissed as moot); (2) a second (identical) suit with a motion for preliminary injunctive relief (dismissed); (3) a First Circuit appeal of the dismissal (affirmed); (4) a complaint to the Department of Justice (ignored); (5) a complaint to the FCC (ignored); (6) a complaint to the Puerto Rico Office of Monopolistic Affairs (no action); (7) a complaint in the Puerto Rico Court of First Instance (dismissed); (8) an appeal of the dismissal (affirmed); (9) a petition for certiorari (denied); (10) an emergency mandamus petition in the Puerto Rico Court of First Instance (dismissed); (11) an appeal of the dismissal (affirmed); (12) a motion for reconsideration (denied); (13) a § 1983 action in federal court (dismissed). OneLink also funded an unsuccessful suit by another cable incumbent, Choice.

5. PRTC filed an antitrust suit in November 2011 (before its application was granted the following year), charging OneLink with unlawful monopolization and attempted monopolization of the markets for pay-TV and for bundles of pay-TV, Internet, and telephone service in Puerto Rico. After discovery, the parties filed summary judgment motions; as most relevant here, the district court found that OneLink's petitioning activity was immune from antitrust liability because it found no evidence that OneLink was "using the governmental process, not the outcome of that process, as a means to delay PRTC's entry into the market or drive up litigation costs." 196 F. Supp. 3d 248, 338 (D.P.R. 2016).

6. PRTC appealed, and the First Circuit affirmed. The court of appeals noted that four circuit courts to have addressed the question had "adopt[ed] some variant of th[e] view" that a defendant's "decision to file [a] series of petitions" without regard to "whether they had merit" could give rise to liability not withstanding *Noerr*. 874 F.3d at 771. But the court pronounced itself "quite skeptical of the notion that a defendant's willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases." *Id.* The court "struggle[d] to see how a jury could reasonably conclude that the party was filing petitions 'regardless of the merits of the cases,'" *id.* at 772 (quoting *California Motor*, 404 U.S. at 512), if each was objectively reasonable.

7. This case is an ideal vehicle to decide this important question that has now divided the courts of appeals: whether a series of lawsuits – allegedly brought solely to prevent a rival's ability to compete – is immune from antitrust scrutiny so long as no individual action is "objectively baseless." The First Circuit affirmed the district court's summary judgment in favor of San Juan Cable based solely on its determination that even a series of 24 unsuccessful petitions, brought merely to delay PRTC's market entry, was not sham litigation because none of the actions was objectively baseless.

8. The 30-day extension to file a certiorari petition is necessary because undersigned counsel was only recently retained in this matter and needs the additional time to review the record and to prepare the petition and appendix, and because of other, previously engaged matters, including: (1) a merits brief in this Court for certain respondents in *Ohio, et al. v. American Express Co., et al.*, No. 16-1454 (filed Jan. 16, 2018); (2) an appellant's reply brief in *Kleen Products LLC v. Georgia-Pacific LLC*, No. 17-2808 (7th Cir.) (due Jan. 19, 2018); (3) an opening brief as court-appointed pro bono counsel in *Sillah v. United States*, No. 16-3882 (3d Cir.) (due Jan. 23, 2018); and (4) preparation for trial in *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C.).

Accordingly, applicant respectfully requests a 30-day extension of time, up to and including February 28, 2018, within which to file a certiorari petition in this case.

Respectfully submitted,

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January 18, 2018

EXHIBIT A

874 F.3d 767
United States Court of Appeals,
First Circuit.

PUERTO RICO TELEPHONE COMPANY, INC.,
Plaintiff, Appellant,
v.
SAN JUAN CABLE LLC, Defendant, Appellee.

No. 16-2132
|
October 31, 2017

Synopsis
Background: Telecommunications company brought action alleging that competitor violated federal and state antitrust laws by conducting sham litigation to delay its entry into competitive market. The United States District Court for the District of Puerto Rico, John A. Woodcock, Jr., J., sitting by designation, 196 F.Supp.3d 207, 196 F.Supp.3d 248, entered summary judgment in competitor's favor, and company appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

[1] company waived any challenge to district court's finding that competitor's regulatory filings were objectively reasonable, and

[2] competitor's series of regulatory petitions was immunized from antitrust liability under *Noerr-Pennington* doctrine.

Affirmed.

Barron, Circuit Judge, concurred and filed opinion in which Torruella, Circuit Judge, joined.

West Headnotes (3)

[1] **Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

Telecommunications company waived any challenge to district court's finding in its antitrust suit that its competitor's regulatory filings in opposition to its application for license to offer internet protocol television service were objectively reasonable, even though none of competitor's filings resulted in meaningful victory, where district court found that filings were reasonable, and company did not challenge that finding in its main brief on appeal or make any case for excusing waiver in its reply brief or at oral argument.

Cases that cite this headnote

[2] **Antitrust and Trade Regulation**
Petitioning government
Constitutional Law
Antitrust

Incumbent telecommunication provider's series of regulatory petitions opposing putative competitor's efforts to enter local internet protocol television service market was immunized from antitrust liability under Sherman Act and Puerto Rico law under *Noerr-Pennington* doctrine, even if provider had no subjective expectation of success, and none of its filings resulted in meaningful victory, where filings were all objectively reasonable. Sherman Act § 2, 15 U.S.C.A. § 2; 10 L.P.R.A. § 257.

Cases that cite this headnote

[3] **Antitrust and Trade Regulation**
Petitioning government

Monopolist might be liable under antitrust laws for engaging in pattern of petitioning, even though no single filing in that pattern is objectively baseless, if monopolist's uses petitioning process to make costs of rival's petitioning activity so high that rival cannot secure legal relief that would enable it actually to become competitor. (Per concurring opinion of Barron, Circuit Judge, for majority of the court). Sherman Act § 2, 15 U.S.C.A. § 2.

Cases that cite this headnote

***768** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, [Hon. John A. Woodcock, Jr.,* U.S. District Judge]

Attorneys and Law Firms

Patrick J. Pascarella, Jr., with whom Benjamin C. Sassé and Tucker Ellis LLP, Cleveland, OH, were on brief, for appellant.

Jacob (Yaakov) M. Roth, with whom Brinton Lucas, Washington, DC, Thomas Demitrack, Brian K. Grube, Cleveland, OH, Jones Day, Orlando Fernandez, and Orlando Fernandez Law Offices were on brief, for appellee.

Before Torruella, Kayatta, and Barron, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

Puerto Rico Telephone Company, Inc., (PRTC) sought permission from the Puerto Rico Telecommunications Regulatory Board (TRB) to offer internet protocol television service to the residents of Puerto Rico. At the time, San Juan Cable LLC, doing business as "OneLink," provided cable television service to residents of several municipalities in Puerto Rico, including San Juan. Not eager to face competition, OneLink petitioned the TRB and other government officials and tribunals, including Commonwealth and federal courts, to deny, slow down, or otherwise impede PRTC's efforts. After eventually obtaining the needed permission from the TRB, PRTC filed this antitrust action claiming that OneLink's interference with PRTC's permitting efforts constituted unlawful monopolization and attempted monopolization in violation of both the Sherman Act, 15 U.S.C. § 2, and the Puerto Rico Anti-Monopoly Act, P.R. Laws Ann. tit. 10, §§ 257–276. Granting summary judgment to OneLink, the district court concluded that OneLink's actions were immunized from suit under the Noerr-Pennington doctrine, which conditionally protects the right to petition the government. See ***769** E. R.R. Presidents Conference v. Noerr Motor Freight, Inc. (Noerr), 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); United Mine Workers of Am. v. Pennington (Pennington), 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In so ruling, the district court rejected PRTC's argument that the facts could support a finding that OneLink abused its right to petition and could be found liable under the so-called "sham" exception to the Noerr-Pennington immunity. See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511–12, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) (extending both Noerr-Pennington immunity and the sham exception to petitioning of courts and administrative agencies). For the following reasons, we agree with the district court that the facts in this case could not subject OneLink to liability under the sham exception.

I.

A.

The parties' disagreement on appeal begins with OneLink's win-loss record in its multi-tribunal petitioning activity aimed at impeding PRTC's efforts to secure permission to compete against OneLink. A detailed description of OneLink's filings with the TRB, the Puerto Rico courts, and the federal courts, its communications with Puerto Rico officials and federal officials, and the resolutions of those filings and communications can be found in the district court's two published opinions. See P.R. Tel. Co. v. San Juan Cable Co. (PRTC I), 196 F.Supp.3d 207, 215–24 (D.P.R. 2016); P.R. Tel. Co. v. San Juan Cable Co. (PRTC II), 196 F.Supp.3d 248, 253–98 (D.P.R. 2016). PRTC claims that those filings and communications collectively constituted twenty-four "petitions" in the form of requests that a court or other government tribunal, agency, or official take action adverse to PRTC's license application, and that OneLink failed to prevail on any of those petitions. OneLink avoids taking a firm position on its win-loss record apart from suggesting that the district court's count (four wins out of thirteen petitions) was closer to the mark.

The parties' divergent counts flow from disagreements about whether to treat motions filed in the course of a single proceeding as separate petitions, and whether to rank an interlocutory procedural win as a loss if the proceeding ultimately resulted in a decision against OneLink. Thus, for example, the district court counted OneLink's request to intervene in the second franchise proceeding before the TRB along with several other motions filed in connection with that request as a single petition, see PRTC II, 196 F.Supp.3d at 324, 337, while PRTC argues that each motion filed with the TRB constitutes a separate petition. Likewise, the district court counted as a win the issuance of an order to show cause why a temporary restraining order should not issue by a federal district court in a suit that was ultimately dismissed as moot, see id. at 279–80, 325, 338, while PRTC argues that merely securing a show cause order is not a win.

[1]For our purposes, we need not resolve these disputes concerning OneLink's win-loss record. Rather, we can assume, as PRTC argues, that OneLink's various filings can be viewed as twenty-four separate petitions, and that none resulted in a meaningful victory. We must also assume, though, that all twenty-four filings were "objectively reasonable" in the sense that a "reasonable litigant could realistically expect success on the merits." Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (PREI), 508 U.S. 49, 60, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). We make this latter assumption because the district court so found after examining each of OneLink's various filings, see ***770** PRTC II, 196 F.Supp.3d at 325-35, and PRTC has waived any challenge to those findings. PRTC did not make any such challenge in its main brief on appeal. See Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 29 (1st Cir. 2015) ("[W]e do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief."); see also Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 60 n.17 (1st Cir. 1999) ("We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived."). It also failed to make any case for excusing the waiver in its reply brief[1] or at oral argument. Indeed, the entire oral argument proceeded on the assumption that the district court's findings that all the petitions were objectively reasonable would stand. Although we can excuse waiver of this sort in certain cases, this is not such a case. Assessing the merits of OneLink's petitions requires detailed analyses of a large number of different filings. We decline to undertake those analyses without briefing.[2]

B.

PRTC's waiver of any argument that some of OneLink's numerous filings were baseless creates an immediate obstacle to PRTC's ability to maintain this lawsuit. The general rule is that a defendant cannot be held liable under the Sherman Act for petitioning the government, including by filing a lawsuit. See Cal. Motor Transp., 404 U.S. at 510–13, 92 S.Ct. 609. PRTC relies on an important exception to that rule, known as the "sham" exception. See id. (citing, inter alia, Noerr, 365 U.S. at 144, 81 S.Ct. 523). In PREI, however, the Supreme Court held that a lawsuit, even when employed as an anticompetitive weapon, could only fall within the sham exception if the suit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 508 U.S. at 60–61, 113 S.Ct. 1920. We assume, as do the parties, that PREI also applies to a petition filed before an administrative agency or another executive official. See 508 U.S. at 59–60, 113 S.Ct. 1920 ("We dispelled [in Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991)] the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's purposes were to delay [the plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate ... administrative and legislative fora.")(internal quotation marks omitted, brackets and ellipsis in original). Given PRTC's failure to argue that any one of OneLink's petitions was objectively baseless, it is clear that no single petition could support the imposition of antitrust liability on OneLink. Accordingly, PRTC must predicate its appeal on the contention that the serial nature of OneLink's petitioning materially distinguishes this case from PREI; that is to say, a jury could find OneLink liable for launching a fusillade of ultimately unsuccessful petitions even if no one petition was sufficiently ***771** baseless to fit within the "sham" exception under PREI. We therefore turn next to that contention.

C.

In pursuit of its effort to distinguish PREI, PRTC tries to find company in the decisions of several other circuits that have construed California Motor Transport and PREI as compatibly establishing different tests depending on whether more than one petition is challenged as abusive. In brief, this argument first restricts PREI's "objectively baseless" requirement to cases involving a single petition rather than a series of petitions. To assess a series of petitions, the argument relies instead on language in California Motor Transport describing as outside the scope of Noerr-Pennington immunity the "institut[ion of] proceedings and actions ... with or without probable cause, and regardless of the merits of the cases," 404 U.S. at 512, 92 S.Ct. 609. As construed by PRTC, this argument also reads "with or without probable cause" and "regardless of the merits," id., as including both petitions brought "with ... probable cause" and with "merit[ ]" where the defendant's decision to file the series of petitions paid no heed to whether they had merit. So framed, the argument views PREI very much through the lens of Justice Stevens's concurrence. See PREI, 508 U.S. at 73, 113 S.Ct. 1920 (Stevens, J., concurring in the judgment) ("Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive." (citing Cal. Motor Transp., 404 U.S. 508, 92 S.Ct. 609)).

The circuit court opinions to which PRTC points—that is to say opinions of the four circuits to have addressed similar arguments directly—all in one way or another adopt some variant of this view of the respective applicability of PREI and California Motor Transport. See Hanover 3201 Realty LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 179–81 (3d Cir. 2015), cert. denied, ––– U.S. ––––, 136 S.Ct. 2451, 195 L.Ed.2d 264 (2016); Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 363–64 (4th Cir. 2013) (doing so in the context of the Noerr-Pennington doctrine as applied to an unfair labor practices claim); Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 100–01 (2d Cir. 2000); USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, AFL-CIO (USS-POSCO), 31 F.3d 800, 810 (9th Cir. 1994) (concluding that PREI and California Motor Transport "appl[y] to different situations").

[2]We find ourselves quite skeptical of the notion that a defendant's willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases. Although presented with a record involving the filing of only one lawsuit, the court in PREI wrote nothing to suggest that its ruling would have been different had the defendant filed a series of objectively reasonable suits. Rather, the Court addressed the more categorical question "whether litigation may be a sham merely because a subjective expectation of success does not motivate the litigant," and ruled that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." 508 U.S. at 57, 113 S.Ct. 1920. Similarly, in describing California Motor Transport, PREI trained its attention not on the difference between a single suit and a series of suits, but rather on the difference between "objectively reasonable claims" and "a pattern of baseless, repetitive claims." ***772** Id. at 58, 113 S.Ct. 1920.[3] Nor is there any pragmatic reason to presume that PREI's protections for nonfrivolous petitioning activity disappear merely because the defendant exercises its right to engage in such activity on multiple occasions. One large lawsuit or intervention in an agency proceeding can impose much more of a burden on a competitor than might a series of smaller claims. Also, where a party files a large number of petitions-here twenty-four according to PRTC—and every single one is objectively reasonable, we struggle to see how a jury could reasonably conclude that the party was filing petitions "regardless of the merits of the cases." Cal. Motor Transp., 404 U.S. at 512, 92 S.Ct. 609. To the contrary, the larger the sample size provided by the accumulating petitions, none of which are objectively baseless, the more likely it is that the serial litigant must have exercised a fair amount of discretion in eschewing frivolous claims. Cf. USS-POSCO, 31 F.3d at 811 ("The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success."). And while some circuits treat less skeptically than do we the notion that PREI does not apply fully to the filing of a series of suits, none of those circuits have ever sustained a finding of liability while simultaneously determining that no frivolous petitions were filed.

Of course the absence of any outright victory in so many forays similarly makes it quite clear that the likelihood of prevailing was not paramount in OneLink's calculus when deciding whether to petition. But the task here is to identify sham litigation, not probable winners. And while we can see the logic inherent in reasoning that a nonfrivolous suit might be viewed differently when flown in a flock of frivolous suits, we see little logic in concluding that an exercise of the right to file an objectively reasonable petition loses its protection merely because it is accompanied by other exercises of that right.

This is not a case in which it could reasonably be said that the petitioning activity provided no reasonable prospect of a benefit to OneLink apart from inflicting costs on PRTC. See PREI, 508 U.S. at 68–69, 113 S.Ct. 1920 (Stevens, J., concurring in the judgment) ("The label 'sham' .... might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone."). Rather, had OneLink received the relief for which it petitioned, it would have received the benefits of lawfully delaying or restricting the entry of a competitor into its market. Nor is this a case in which a monopolist deterred competition by threatening to file suits without regard to their merit, as in California Motor Transport. We therefore need not decide how we would rule in either of those sorts of cases.

II.

For the foregoing reasons, we affirm the district court's orders granting summary judgment in favor of OneLink.[4]

***773** BARRON, Circuit Judge, with whom TORRUELLA, Circuit Judge, joins, concurring.

The parties ask us to decide—one way or the other—whether a monopolist may be held liable under antitrust law for filing a series of petitions against a competitor (whether in a court or in an administrative proceeding) when no single one of those filings is baseless.[5] An unequivocal "no" would close off the so-called "sham" exception to Noerr-Pennington immunity in such a case. And, in doing so, such an answer would afford litigious monopolists a potentially significant safe harbor from antitrust liability. In particular, it would protect even a monopolist that used a barrage of filings to make an upstart's own attempt to petition for an operating license so costly that the upstart must give up its attempt to compete for market share.

[3]But, in affirming the grant of summary judgment in the defendant's favor, we do not establish such a limit on the scope of the sham exception. We avoid doing so because we do not hold that the "objectively baseless" requirement for triggering the sham exception set forth in the single-petition case of Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993), necessarily applies to each and every case involving a pattern of petitioning. We instead rely on a more record-based, case-specific line of reasoning that, as I read our opinion, leaves open the possibility that, PREI notwithstanding, a monopolist might be liable under the antitrust laws for engaging in a pattern of petitioning, even though no single filing in that pattern is objectively baseless. I agree with this prudent approach. I write separately, however, to say more about the particular type of pattern petitioning case to which I have alluded, for it is not expressly mentioned in our opinion and bears some resemblance to the case at hand.

I.

The Sherman Act seeks to "preserv[e] free and unfettered competition as the rule of trade." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). To further that aim, Congress used broad terms in the Act "in order to prevent creative monopolists from escaping liability by adopting ever new forms of combinations or anticompetitive conduct." 2 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation § 25.01 (2d ed. 2017).

In response, the federal courts have adopted a "common-law approach" in construing the limits that the antitrust laws place on the efforts of market incumbents to leverage their power to unfairly restrict competition. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007). Courts thus generally analyze restraint-of-trade claims according to the ***774** "rule of reason," which in operation is hardly a rule at all, and instead requires the "finder of fact [to] decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors." State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). And, likewise, courts apply what amounts to a quite similar " 'common law' against monopolizing." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979).

At the same time, market participants, including monopolists, enjoy a broad right to petition their government under the First Amendment. See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). This right protects not only lobbying the legislature but also litigating in court and participating in administrative proceedings. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

Recognizing that courts "cannot ... lightly impute to Congress an intent to invade these freedoms," Noerr, 365 U.S. at 138, 81 S.Ct. 523, the Supreme Court established the Noerr-Pennington doctrine. See United Mine Workers of America v. Pennington, 381 U.S. 657, 669, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); Noerr, 365 U.S. at 136, 81 S.Ct. 523. That doctrine generally makes petitioning activity immune from antitrust liability, subject, however, to the important exception that immunity is not available to petitioning activity that is just a "sham" for impermissible anti-competitive conduct. Noerr, 365 U.S. at 144, 81 S.Ct. 523.

Courts thus necessarily confront the following difficulty in defining the scope of the sham exception. A decision to immunize monopolists from antitrust liability for their filings—by narrowly construing the exception's scope—surely protects the First Amendment right of petition. But, such a decision also may provide unnecessarily broad protection and thereby unduly impede the "free and unfettered competition" that Congress wished to foster when it broadly empowered courts to hold monopolists accountable for their anti-competitive schemes. N. Pac. Ry. Co., 356 U.S. at 4, 78 S.Ct. 514.

To navigate this difficulty, it is important not to view the sham exception as a rigid rule. Rather, we should construe that exception—just as we construe the antitrust laws generally—in accord with a rule of reason. I am therefore reluctant to conclude that the "objectively baseless" requirement set forth in PREI, which involved a single filing in a particular context, necessarily governs every type of case involving the filing of a series of petitions.

Heightened antitrust concerns might arise in particular pattern cases that would warrant an approach that is more sensitive to circumstance, so as to provide greater protection of competition from monopolistic schemes. Nor is it clear to me that such a common-law like approach to defining shams would invariably trench on First Amendment rights. After all, the tort of abuse of process is itself sensitive to circumstance, but, presumably, the First Amendment is not infringed just because the tort imposes liability on some suits that have some merit. See, e.g., Poduska v. Ward, 895 F.2d 854, 857 (1st Cir. 1990); Restatement (Second) of Torts § 682 cmt. a (Am. Law Inst. 1977).

I also am not convinced that precedent forecloses this more context-sensitive approach to pattern cases. I note that PREI concerned an attempt to apply the sham exception to the filing of a single copyright infringement suit, 508 U.S. at 52, 113 S.Ct. 1920, and thus did not directly address ***775** whether a pattern of filings outside that context might raise distinct concerns. And while the Court did speak broadly in setting forth the "objectively baseless" requirement in that case, id. at 60-66, 113 S.Ct. 1920, three concurring Justices did not appear to read that decision to set forth a holding that imposed the baseless requirement to pattern cases. See id. at 66, 113 S.Ct. 1920 (Souter, J., concurring); Id. at 67, 113 S.Ct. 1920 (Stevens, J., concurring).

Nor have we or any other circuit held that PREI automatically imposes its "objectively baseless" requirement in each and every pattern case. In fact, the four circuits to have addressed the issue generally apply a "holistic" analysis that broadly considers a variety of factors in pattern cases to determine whether what is claimed to have been the exercise of the right of petition was really just a sham for concealing anticompetitive conduct. See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 180-81 (3d Cir. 2015); Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 363–64 (4th Cir. 2013); see also Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 101 (2d Cir. 2000); USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 810–11 (9th Cir. 1994).

Finally, PREI did not purport to overrule California Motor, which rejected the dismissal of an antitrust complaint that challenged a pattern of petitioning as a sham without alleging that any of the defendants' underlying filings was baseless. The Court held that the case could proceed to trial, 404 U.S. at 516, 92 S.Ct. 609, even though the complaint alleged merely that the defendants had publicly announced and then implemented a policy of opposing "with or without probable cause, and regardless of the merits" any of the plaintiffs' applications for licenses that the plaintiffs needed in order to enter the market at all. Id. at 512, 92 S.Ct. 609.

II.

Assuming, then, that PREI's "objectively baseless" requirement does not necessarily control the outcome of this case, there is still the question whether PRTC has provided enough evidence of sham petitioning to survive OneLink's motion for summary judgment. PRTC's case does not much resemble either type of pattern case involving only non-baseless filings that our opinion expressly identifies as ones that might survive PREI. See Ct. Op. at 772. But, PRTC does contend that its allegations are close enough to those involved in California Motor to warrant application of the sham exception, and that argument merits further consideration.

PRTC's case is not on all fours with California Motor in that PRTC does not allege that OneLink made a public threat to make baseless filings like the antitrust defendant in California Motor allegedly did. But, I am not convinced that the scope of the sham exception described in California Motor is necessarily limited by the fact that the complaint in that case alleged such a public threat.

In California Motor, the complaint alleged that certain incumbent trucking companies had set up a trust fund to finance opposition to their would-be competitors' applications for truck operating rights, informed their would-be competitors that they intended to oppose "every application" "with or without probable cause and regardless of the merits," and then made a slew of adverse filings, seemingly in accord with that threat. 404 U.S. at 518, 92 S.Ct. 609 (Stewart, J., concurring). Faced with that alleged abuse of the governmental process, California Motor ***776** reasoned that the right of petition under the First Amendment does not extend to the use of that right to deprive would-be competitors of their own right of petition to secure a right to enter the market and thereby take on the monopolist. Id. at 513–15, 92 S.Ct. 609 (majority opinion).

The Court drew that fairly uncontroversial proposition from Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), which held that the Associated Press's exclusive membership policies could still incur antitrust liability because the freedom to publish protected by the First Amendment does not extend to a "freedom to combine to keep others from publishing." California Motor, 404 U.S. at 514, 92 S.Ct. 609 (quoting Associated Press, 326 U.S. at 20, 65 S.Ct. 1416). And, it is not clear to me that the Court, in relying on that logic, was suggesting that a campaign of harassing litigation aimed at destroying a would-be market entrant's effort to petition for a license to operate—by making it too costly to pursue—is any less a sham just because no public threat of baseless filings is made.

Nor is it clear to me that PREI requires that we limit California Motor' s reach to cases involving such threats. After all, PREI did not involve an attempt by an incumbent market actor to destroy a rival's right to petition for a license to compete for a share of the incumbent's market. Rather, in PREI, various movie studios filed a copyright infringement action against hotel operators who rented videodiscs of the studios' movies to hotel guests and sought to develop a market for the viewing of the videos at other hotels. 508 U.S. at 51-52, 113 S.Ct. 1920. The hotel operators then counterclaimed that the studios' suit was a sham because that claim for copyright protection, even though potentially meritorious, "cloaked" the studios' effort to monopolize and restrain trade in video entertainment services at hotels. Id. at 52, 113 S.Ct. 1920.

PREI thus did not face an alleged clash of petition rights remotely like in California Motor. PREI confronted only the stark contention that challenged petitioning activity is a sham for anticompetitive conduct if one market participant petitions to secure its legal right in order to maintain an economic advantage over a competitor (in that case by vindicating the right not to have its intellectual property infringed) by filing a non-frivolous suit. In PREI, the Court quite understandably reasoned that an anti-competitive motive in seeking legal relief is not in and of itself enough to make the request for relief an abuse of the right of petition. Id. at 59, 113 S.Ct. 1920. Such reasoning flows quite naturally from the logic underlying Noerr-Pennington immunity, which protects the First Amendment rights of all market actors to seek competitive advantage through the nonfrivolous assertion of legal rights that, if vindicated, would prove to be economically beneficial.

Thus, in my view, PREI does not necessarily compel the conclusion that, in a pattern case more akin to California Motor, each filing in a series must be baseless to make the petitioning activity a sham. The antitrust violation—if it exists—in a pattern case of that kind inheres in the monopolist's use of the petitioning process to make the costs of the rival's petitioning activity so high that the rival cannot secure the legal relief that would enable it actually to become a competitor. And, for that reason, there is no claim in such a case, as there was in PREI, that the antitrust violation inheres merely in the monopolist's desire to disadvantage the competitor by actually winning legal relief. Simply put, while there is no question after PREI that a monopolist may use its petitioning right to seek to win, I have my doubts about whether PREI also means ***777** that a monopolist may use that same right to ensure—by seeking to deprive a rival of its own petitioning right—that the monopolist cannot lose.

Of course, in the abstract, I suppose that a monopolist could use even a single filing in this concerning manner. And, I acknowledge that PREI's "objectively baseless" requirement would bar holding the monopolist liable for that filing, if it is not frivolous. But, even so, California Motor suggests that, for a monopolist to be effective in this regard, it will need to file multiple petitions, as opposed to a single one. Thus, the fact that PREI imposed an "objectively baseless" requirement in a case involving a single copyright infringement claim does not suggest to me that this same requirement necessarily applies to the kind of seemingly abusive serial filing that I have just described.

Here, however, PRTC does not have the kind of direct evidence of OneLink's attempt to destroy PRTC's right to petition for a license to compete that the California Motor plaintiffs had in consequence of the public threat that the incumbent trucking companies had allegedly made. Nor does PRTC identify other comparable evidence.

Instead, PRTC relies on circumstantial evidence from which, PRTC alleges, a jury could permissibly infer that OneLink filed its underlying petitions without regard to merit. PRTC points to OneLink's poor win-loss record in the underlying proceedings and the fact that (in PRTC's estimation) the relief sought was, in any event, unlikely to

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be of much benefit. But, PRTC concedes that each filing had some merit, and it is difficult to deny the value of the legal relief sought where, as is alleged here, a market incumbent seeks procedural rights to challenge a putative competitor's application for an operating license and injunctive relief against that would-be competitor's construction and funding of rival services.

The only other evidence that PRTC asks us to consider is that OneLink abandoned its "efforts to intervene and challenge PRTC's license" once its adversary obtained the license, the licensing board's observations concerning OneLink's litigiousness, and the possibility that OneLink financed half of another market incumbent's lawsuit seeking to enjoin PRTC from developing the infrastructure to enter their market. But, no circuit has actually permitted a suit to go forward in which the underlying petitions were not baseless and there was no clear and convincing evidence that an alleged monopolist sought to "use the governmental process... as an anticompetitive weapon." City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). And for good reason, given the First Amendment interests at stake. Cf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[W]here the New York Times 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant."); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (establishing a clear-and-convincing standard of proof for a public official's libel claim, in light of the defendant's First Amendment rights).

For these reasons, I am convinced that if we were to let this suit proceed, we would be tilting the balance too far against OneLink's right of petition. Accordingly, I join the Court's opinion, which affirms the District Court's grant of summary judgment but reserves for future cases a fuller ***778** accounting of whether and when a series of non-baseless petitions might constitute a sham within the meaning of the Noerr-Pennington doctrine.

All Citations

874 F.3d 767, 2017-2 Trade Cases P 80,181

Footnotes

* Of the District of Maine, sitting by designation.

1 Although the reply brief contains arguments in two footnotes that some of the petitions were not objectively reasonable, it does not make any effort to explain why this court should excuse PRTC's failure to make these arguments in its opening brief.

2 As indicated above, PRTC does argue that the district court erred in finding that OneLink actually prevailed on four petitions. PRTC also claims that the district court neglected to assess one petition filed by a third party because it erroneously deemed the petition not to have been funded by PRTC. PRTC does not, however, argue in its main brief that any of those five petitions were actually baseless in the sense of lacking any reasonably realistic prospect of success.

3 California Motor Transport does at the same time remain independently relevant to misconduct, such as fraud, bribery or threats, in connection with the filing of claims, baseless or not. 404 U.S. at 512-13, 92 S.Ct. 609. See also id. at 518, 92 S.Ct. 609 (Stewart, J., concurring) (chronicling threats).

4 PRTC does not dispute that Noerr-Pennington immunity applies to the claim under the Puerto Rico Anti-Monopoly Act. It has also not argued that the district court should have remanded the Puerto Rico claims instead of granting summary judgment on those claims along with the federal claims. We also need not consider PRTC's argument that the district court erred in its finding on causation in the first summary judgment decision. Our holding accepts that Noerr-Pennington immunity applied to each petition because of its objective reasonableness, not because of its causal role.

5 The case concerns an alleged monopoly violation under both the Sherman Act, 15 U.S.C. § 2, and the Puerto Rico Anti-Monopoly Act, P.R. Laws Ann. tit. 10, § 260. Puerto Rico's anti-monopolization provision corresponds with that of the Sherman Act, and the parties have not suggested that the provisions are interpreted differently.