# Neg Doc Doubles Wake

## Off-Case

### T---1NC

T Per Se

#### Prohibit means forbid by authority

Merriam-Webster No Date <https://www.merriam-webster.com/dictionary/prohibition> and <https://www.merriam-webster.com/dictionary/prohibiting>

Definition of prohibition 1: the act of prohibiting by authority

Definition of prohibit transitive verb 1: to forbid by authority : ENJOIN

#### Only per se illegality prohibits a practice---rules of reason prohibit anticompetitive effects for individual acts, or instances of ‘practice.’

John Paul Stevens 90, Justice, Supreme Court of the United States, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

#### Vote neg for limits and ground---per se prohibition standards are key to link uniqueness and a unidirectional topic, otherwise too many possible standards, each requiring distinct answers, makes the topic unmanageably large.

### T---1NC

#### Expanding the scope must create claims that could not currently fall under antitrust standards – simply saying they might not win the case under current law isn’t enough

Epstein, New York University School of Law, 19

[Richard A., Laurence A. Tisch Professor of Law, The New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, the University of Chicago. This Article was presented at a conference sponsored by the Classical Liberal Institute and the Nebraska Law Review, Understanding the Visible: The Undisputed Facts and Disputed Law of Platform Antitrust, held on February 22 & 23, 2019 at the NYU Law School. For the record, I have advised Qualcomm on various antitrust matters over the years, including its current litigation with the FTC. My thanks to William Dawley and Joseph Scopelitis, NYU Law School Class of 2020 for their excellent research assistance., Nebraska Law Review, “SYMPOSIUM: Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory”, 98 Neb. L. Rev. 241 \*

Justice Koh never discusses these issues in her brief and unsatisfactory treatment of the case. 60Nor does she address the particulars of the Trinkodecision, which is a powerful precedent for Qualcomm in this case. The 1996 Telecommunications Act 61radically changed the situation on the ground. Congress imposed new duties on the incumbent "Local Exchange Carriers" (LECs) - those companies that had exclusive monopolies in territories by virtue of the settlement of the 1982 antitrust lawsuit that secured the break-up of AT&T. These LECs had statutory duties to enter into interconnection agreements with the so-called "Competitive Exchange Carriers" (CLECs). Under these agreements, the LECs would grant the CLECs access to their networks on a nondiscriminatory basis by supplying the CLECs with what were termed unbundled network elements (UNEs). The new entrants could acquire UNEs selectively in order to build out their new network which allowed the CLEC to compete in the LECs' territory. This was a clear case of a statutory duty to subsidize a competitor. 62The only way to implement this scheme was to allow the [\*259] Federal Communications Commission (FCC) and the various state rate commissions to prescribe the terms under which the LECs had to pair with the multiple CLECs that wanted to enter into their territory. In effect, these were forced commercial interactions imposed by statute. The purpose of this scheme was certainly fully congruent with the antitrust laws in so far as it uprooted the LECs' local monopolies by imposing sharing obligations on the LECs. 63But, there were difficulties in the enforcement of this obligation, and Verizon was held in violation of its statutory obligations. The question then arose whether the violation of the Telecommunications Act counted as a violation of the antitrust laws as well. The statutory framework contained two key provisions. The Telecommunications Act was not allowed to preempt the operation of the antitrust laws: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 64 By the same token, the status quo was preserved because the Telecommunications Act also did nothing to expand the scope of the antitrust laws. It did not create new claims going beyond existing antitrust standards. The creation of any additional antitrust standards would be equally inconsistent with the saving clause's mandate that nothing in the Telecommunications Act would "modify, impair, or supersede the applicability" of existing law. The antitrust laws thus carried over. Trinko's claim sought to piggyback on the FCC's resolution of the statutory grievance by initiating an antitrust action that concerned the same territory based on the same theory. 65Judge Koh thus wholly misread Trinko by imposing on Qualcomm an unprecedented duty to deal with its competitors. 66In the bluntest form, the antitrust law is concerned with ensuring the maintenance of competition between rivals. Therefore, it cannot require what no competitive market would allow, namely, for one business to be forced to supply its competitors. Since these sales are compelled by the state, the price has to be set by the state, because by [\*260] definition there is no price at which the holder of a given technology finds itself better off by sharing that technology with a rival. Of course, there are many cases in which such licenses, often part of complex cross-licensing transactions, do take place in the voluntary market. But it is precisely because markets often do work in these situations that there is no need for the state to coerce any transaction. The refusal to deal is rightly regarded as wrong when committed by common carriers and public utilities. But even then, such duties have always extended only to consumers, not to competitors. 67Indeed, the standard rule has always been that one common carrier is not obligated to take at regulated rates the packages of another common carrier. Cross subsidies do not exist in competitive circumstances and should not be imposed either by the antitrust laws or by any system governing regulated industries.

#### California Motor already creates this prohibition and even if it didn’t, these behaviors are definitionally prohibited under PRE too – aff doesn’t expand scope

Wenger 20 [Katheryn M. Wenger, University of California, Hastings College of the Law, Juris Doctor Candidate, 2020; "You Don't Have to Pay the Troll Toll: Antitrust Violations of Patent Assertion Entities and the Noerr-Pennington Doctrine Sham Litigation Exception," Hastings Constitutional Law Quarterly 47, no. 4 (Summer 2020): 557-594, poapst]

In such instances of PAE serial litigation, under California Motor authority, the first prong of the PREI "sham litigation" exception test should not be based on whether any of the proceedings have merit but, rather, "whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." 83 Courts determine this alternative factor by determining whether "the legal filings [were] made, not out of genuine interest in redressing grievances, but as part of a pattern of practice of successive filings undertaken essentially for the purpose of harassment."184 For example, in the Maryland action,18 5 Judge Grimm inappropriately applied the PREI standard and failed to apply the California Motor standard to the first prong, even though IV has filed numerous enforcement actions against Capital One and dozens of other banks. As discussed earlier, IV filed suit in Maryland while the Virginia action was still pending. But also, aside from the Virginia and Maryland cases, IV also filed lawsuits against Capital One in district courts across the country, including the Southern District of Ohio and the Northern District of California.18 6 Therefore, this action and similarly situated suits should be evaluated under the California Motors Transport objective merit exception. The FTC Report found that typical PAE negotiated licenses, valued at millions of dollars, cover large portfolios (containing hundreds or thousands of patents) without first suing the alleged infringer. 18 7 These licenses generate eighty percent of reported PAE revenue, or approximately $3.2 billion.81 ' However, under the litigation business model that is invoked after an alleged infringer refuses to license these massive portfolios, PAEs initiate costly litigation that is often settled shortly after, by entering into a licensing agreement covering a smaller portfolio (approximately ten patents).'8 9 But, the early stage of litigation is estimated at $300,000.190 Meanwhile, the license of these smaller portfolios yields royalties of less than $300,000.191 Moreover, PAEs engaging in the Litigation model characteristically create new affiliate entities for each separate patent portfolio (typically ten patents or less) that they acquired. 192 These entities operate with little or no working capital and enter into agreements with patent sellers to fund their business. 193 Therefore, when building their portfolios, PAEs typically conduct business as follows. First, they acquire massive patent portfolios from patent sellers, frequently from manufacturing firms, by making large up-front payments. Individual transactions may contain hundreds or thousands of patents. 194 Or, smaller portfolio transactions are often aggregated into larger portfolios.1 95 Regardless of one lump transaction or small transaction aggregation, PAEs then organize acquired patents into one or more large portfolios and offered for licensing.196 The FTC Report found that seventyone percent of licenses were executed without litigation. 197 Thus, it's assumed that PAEs likely threatened litigation to coerce alleged infringers into entering an expensive license in order to avoid costly litigation.19 8 And, when PAEs did file suit, "76% of their cases involved five to ten patents and 74% of their cases lasted more than a year."1 99 When the California Motor standard is applied to this data, it is clear that PAEs initiate litigation for the purpose of executing an expensive licensing agreement and not for legitimate enforcement of their patent rights. It is not merely a coincidence that the large portfolios are first offered to potential infringers to license, often through a single written demand, but the smaller portfolios are those that make it to court when disputes reach that stage. Additionally, the PAEs Portfolio and Litigation business models are prima facie evidence that PAEs are not concerned with the actual enforcement of their patent rights. Rather, PAEs are concerned about monetary gain through licensing and settlements because they do not produce products that depend on patent exclusivity. Afterall, their entire business model depends on the enforcement of these patent rights in itself through licensing agreements. 201 Moreover, the discovery in the Capital One Virginia case underscores this PAE intentional disregard of the merits when they invoke the Litigation business model once the Portfolio model fails. It should be noted that this intentional disregard is likely discernible with similar PAEs when they are individually assessed. In the Capital One Virginia case, documents produced captured IV testimony confirming that the suits were brought without regard to the merits-but in order to harm Capital One and other banks. One of IV's executives responsible for licensing to banks testified that their list of certain patents demanded for license was "laughable" because "[t]hey have nothing to do with banking. 2 °2 And a spreadsheet of portfolio catalogs reveals that many of the patents IV claimed were relevant actually had nothing to do with banking, but included patents for "metal treatments, aeronautics, and land vehicles., 20 Moreover, there is expert testimony that the PAE Portfolio model holds such a monopoly over the relevant market through massive patent acquisitions where no non-infringing substitutes exist nor is a design around a viable option. In the Maryland case, Capital One's expert economist Fiona Scott Morton testified that IV had a monopoly in the financial-services technology market, and Capital One could not "realistically 'design around' the patents., 204 Scott Morton determined that IV's financial-services portfolio was analogous to a "cluster market" promoted as a single product where no close substitutes exist at a supracompetitive price. 205 Thus, no substitutes available to IV's portfolio and they do, indeed, hold an unlawful monopoly on the financial-services technology market. It logically follows, that similarly situated PAEs ensure that no viable substitutes exist in order to capitalize on the PAE Portfolio model, just like IV demonstrates. B. PAE's Portfolio Enforcement Suits Still Fail the PREI Non-Serial Litigation 1. PAE Claims are so Objectively Baseless No Reasonable Litigant Could Realistically Expect Success on the Merits Even if the PREI standard was the appropriate standard, PAE's conduct would still qualify as "sham litigation" and, thus, should not be afforded Noerr-Pennington doctrine immunity. The Court held that "[non-serial] litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless" and affirmed the Ninth Circuit's refusal to characterize a lawsuit as a sham that the antitrust defendant "admittedly had probable cause to institute. "206 The PREI Court resolved whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant, holding that "an objectively reasonable effort to litigate cannot be sham regardless of intent. , 207 In sum, for a non-senial lawsuit to qualify as a sham litigation, the suit: (1) "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) must be subjectively baseless and an attempt to interest with competitors." 208 Under the first prong of the two-prong sham litigation exception test, a claimant must prove that the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 20 9 Additionally, if the suit contains objective merit, the claimant cannot proceed to the subjective purposes prong and the action does not constitute sham litigation .210 Thus, this prong is determined by whether "no reasonable litigant could realistically expect success on the merits" by filing the lawsuit in question. 2 11 PAE enforcement claims are objectively baseless and, thus, fail the first prong of the PREI standard. In re Cardizem CD Antitrust Litigation concerns plaintiff indirect purchasers of a brand name heart medication manufactured by the defendants. The defendants asserted that plaintiffs failed to sufficiently show that the suit was not objectively baseless and brought for anticompetitive purposes.212 Plaintiffs argued but for the patent infringement litigation the Hatch-Waxman 30-month period would not have gone into effect, resulting in generic versions entering the market sooner.213 The plaintiffs supported their objectively baseless allegations with damning communications. 214 The court found that the plaintiffs alleged sufficient facts to satisfy the objective prong because allegations in the plaintiffs' complaint are construed in light most favorable to the plaintiffs. 2 15 Similar to In re Cardizem CD Antitrust Litigation, when viewed in the light most favorable to the party alleging counterclaims, facts alleged by Capital One reasonably showed that IV initiated its suits asserting only five patents out of the demanded 3,500-patent portfolio, many of which are invalid or expired, and only two of the five remained viable, for objectively baseless purposes.216 IV cofounder Edward Jung even described how IV acquires patents only for the enforcement of market power once aggregated and not the merits of the patent themselves. Jung stated, "[IV] buy [s] a bunch of low-cost asset[s], which gives us market power" and "[i]t just feels like we are on a diet of filler .... [W]e already have two funds with plenty of fluff.... We didn't kill as many deals [as] we should have, we just tried to get them cheap and in most cases it was clear there was no future bet, the patents just weren't monetizeable or practiced. 217 Moreover, one of IV's outside inventors, hired to evaluate its patents, described the portfolio as ,poor quality financial-services related patents. ''218 Furthermore, the Virginia district court determined that the remaining asserted patents were ineligible subject matter under Alice Corp. v. CLS Bank Internationa2l1.9 In Maryland, Capital One successfully sought a declaratory judgment that the asserted patents were invalid, with one patent invalid due to inequitable conduct.22 ° IV thus filed these suits against Capital One in retaliation for Capital One's refusal to expensively license. Through IV's own testimony and the asserted patents invalidation, no reasonable litigant could have expected to win on the merits, making these suits objectively baseless.221 The FTC also advises that "should the [asserted] patent be invalidated in one case ... it would make further litigation in the other cases unnecessary." 222 And, the FTC since observed that PAEs may avoid asserting patents, such as those in the Capital One cases, "if they expect that: (1) the patents likely would be found invalid under Alice analysis, or (2) that courts may dispose of the case in the early stages of litigation, under Alice analysis. 223 Therefore, it follows that any PAE suits that are likely to be invalid under Alice, and projected to settle in the early stages of litigation, are objectively baseless under the PREI standard. Between January 1, 2009, and September 15, 2014, PAEs participating in The FTC Report study filed 2,452 patent infringement lawsuits, or 8.8%, of the total 27,932 patent lawsuits filed during the study period.224 Of these lawsuits, 66% settled within a year and 87% of cases terminated within the study period.225 The FTC found that PAEs typically sued potential licensees and settled shortly after entering into a license agreement covering a small portfolio, as opposed to the large portfolios that are typically demanded under the portfolio business model.226 Because the licenses are for relatively low amounts in royalties (less than $300,000) and early stage litigation is estimated to cost $300,000, the FTC determined this PAE behavior to be "consistent with nuisance litigation." 227 Moreover, the FTC estimated that PAEs in their study held more than 75% of all U.S. patents, and "any change in PAE behavior with respect to software patents that results from Alice will likely have a significant impact on both overall volume of PAE assertion and the types of technologies that PAEs assert. 228 During its study, the FTC found that for all patents reported relating to Information and Communication Technologies ("ICT"), 88% related to Computers & Communications or Other Electrical & Electronic patent technology categories and more than 75% were software-related patents.229 These figures are consistent with the generally held view that PAEs disproportionately acquire and assert ICT and software patents. And though the FTC study does not contain a census of all PAE patents, the sample included a substantial fraction of all patents held by all PAEs during the study period.23 ° Moreover, the Alice holding suggests that many software patents may be invalid due to ineligible subject matter.23' When the FTC Report data is assessed in conjunction with the FTC's Alice ineligibility expectation advisory rule, it is reasonably inferred that PAEs are aware of ineligibility under Alice and file enforcement actions regardless. This inference is supported by PAE business models where they demand a license on entire portfolios as a single product, containing hundreds or thousands of patents. It is, thus, statistically certain that PAEs initiate litigation knowing that these asserted patents are likely invalid under Alice but still use the court system as a weapon to pressure alleged infringers into a quick licensing agreement in the early litigation stage, settling the suit. PAE enforcement suits are, therefore, objectively baseless.

#### Vote neg

#### Ground - Clarification of law is not expansion of law, means links to disads are impossible – proven in the third circuit thumpers cards they are probably going to read on disads in this debate

#### Limits – allowing clarification makes any law review saying that current standard is confusing a new aff.

### CP---1NC

States CP

#### The fifty states and all relevant entities through the National Association of Attorneys General Antitrust Task Force should substantially expand prohibitions on anticompetitive petitioning by the private sector.

#### States solve

Arteaga 21 [Juan and Jordan Ludwig; January 28; former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, J.D. from Columbia Law School; partner in the Antitrust and Competition Group at Crowell and Moring firm, J.D. from Loyola Law School; Global Competition Review, “The Role of US State Antitrust Enforcement,” <https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement>]

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[[2]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-126) In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[[3]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-125) This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[[4]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-124) Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[[5]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-123)

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[[6]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-122) As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[[7]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-121) This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[[8]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-120)

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring parens patriae suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[[9]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-119) Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[[10]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-118) These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[[11]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-117) The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[[12]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-116) No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[[13]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-115) To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[[14]](https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement#footnote-114)

### CP---1NC

#### The United States federal government should rule that private lobbying by members of Congress and fundraising for private lobbying are unconstitutional. The USFG should clarify that such lobbying is not protected under the First Amendment.

#### The United States federal government should rule that suits over possible infringement by patent assertion entities should be considered as “sham” litigation.

#### The United States Patent Office should eliminate eligibility for patent extension.

### CP---1NC

RICO CP

#### The United States federal government should rule that the constitutional right to petition immunizes anticompetitive petitioning from the antitrust laws, explicitly irrespective of statutory interpretation principles, including when petitioning is a “sham.”

#### The United State federal government should subject anticompetitive petitioning by the private sector to scrutiny under the civil RICO prohibition on racketeering activity.

#### The CP expands AND constitutionalizes the Noerr-Pennington exemption through a mutually exclusive ruling that shrinks the antitrust laws. Instead, it applies Civil RICO to petitioning---that solves the case.

Blair Silver 9, J.D., Georgetown University Law Center, 2008, “Controlling Patent Trolling with Civil RICO,” 11 Yale J.L. & Tech. 70 (2009), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1046&context=yjolt

V. CONCLUSION

The modern patent system is incapable of policing extensive fraud. This inability to control fraudulent activity has created a system susceptible for abuse. The current remedies offered by the courts to counterbalance fraudulent conduct and trolling have not proved a sufficient disincentive to curb this behavior. Specifically, the remedies for fraud have not proven capable of deterring repetitive abusers.

Other areas of law outside patent law have tried to curb repetitive abuse, especially under antitrust. Walker Process opened up violators to the treble damages under the Sherman Act. However, Walker Process proved so unworkable as to be almost dead letter. Other attempts to control abusive behavior under the patent laws using antitrust have been attempted such as the questionably legal reverse payment settlement where the plaintiff patentee pays the alleged infringer to stay out of the market, the Noerr-Pennington doctrine's sham litigation exception, and the patent misuse doctrine. All of these have proven ineffective or unworkable. Simply, there is no effective deterrent to extensive fraud and abuse.

Civil RICO may be that solution. The incentive for using civil RICO is too high to permit its use as a common counterclaim, and the limitations on civil RICO, like the number of victims and the length of activity, help keep civil RICO from overtaking ordinary fraud. While civil RICO should not apply to where the Patent Office's standard remedies of unenforceability for inequitable conduct compensate for individual instances of fraud, civil RICO can be used to limit repeated abuses of the system where these ordinary penalties do not work. Fraud that extends beyond just filing to include Lemelson litigation schemes, should be recognized to lead to civil liability under RICO.

Recognizing civil RICO in the patent context may disproportionately affect brand name pharmaceutical companies. Any concerns of the cost to brand name manufacturers are overwhelmingly counterbalanced by the incentive for companies to seek the strongest patents possible. The immediate cost to the brand name companies may be high, but the overall public good demands patents with integrity. The public benefits by confidence in the fortitude of its patents. The judicial system benefits when patents stand firm against invalidity. Civil RICO will promote honesty and fair dealing throughout the patent process, from when the brand name companies acquire their patent through when they litigate their patents.

The modern abuses of the patent system need to be addressed. Congress is attempting to remedy these problems in modern patent reform. However, effective, pre-existing law should not be ignored. As the courts have previously attempted to control patent abuse using the antitrust laws, courts should not overlook the ability of civil RICO to apply in patent litigations. Although violations may be rare and should only be found for extreme abuses, the result could be a reduction in extensive fraud on the Patent Office, a reduction in the misuse of the court systems, and a higher quality of issued patents. Patent holding companies may then think twice about using such dubious tactics in acquisition, challenging existing patentees, and enforcement.

#### The precedent set by Noerr constitutionalization spills over.

Michael Pemstein 14, Attorney, Quinn Emanuel Urquhart & Sullivan, LLP, “The Basis for Noerr-Pennington Immunity: An Argument That Federal Antitrust Law, Not The First Amendment, Defines the Boundaries of Noerr-Pennington,” 40 T. Marshall L. Rev. 79, Lexis

III. HARMONIZING SUPREME COURT PETITIONING IMMUNITY JURISPRUDENCE

As was discussed in the introduction, many lower courts have assumed that the primary basis for the Noerr-Pennington doctrine is the First Amendment right to petition. 40 This Part argues, however, that the Supreme Court's petitioning immunity decisions are best explained if the Noerr-Pennington doctrine is understood as being based on an interpretation of federal antitrust laws, not an interpretation of the First Amendment right to petition. Section A of this Part analyzes three cases from the Court's petitioning immunity jurisprudence in the context of antitrust law, E. R. R. Presidents [\*89] Conference v. Noerr Motor Freight, Inc., Allied Tube & Conduit Corp. v. Indian Head, Inc., and FTC v. Superior Court Trial Lawyers Ass'n. In the first of these cases, Noerr, the Court granted the defendants petitioning immunity 41, but it declined to do so in the other two cases. 42 Therefore, if Noerr-Pennington is based primarily on constitutional principles, then Allied Tube and Trial Lawyers must be distinguishable from Noerr on constitutional grounds. A close analysis reveals, however, that the best reading of these cases is that they are not distinguishable on constitutional grounds, but are distinguishable if they are based on an interpretation of antitrust laws.

Section B analyzes two cases from the Court's petitioning immunity jurisprudence decided outside the context of antitrust laws, McDonald v. Smith 43 and BE & K Const. Co. v. N.L.R.B. 44 In McDonald, the Court declined to extend petitioning immunity to a defendant in a defamation suit. If Noerr-Pennington were based on constitutional principles and therefore should be applicable regardless of the statutory context, then McDonald must be distinguishable on constitutional grounds from other Noerr-Pennington cases where the Court extended immunity. Again, however, a close analysis of the reasoning and result in McDonald shows that it can be best explained if Noerr-Pennington is not based primarily on the First Amendment right to petition, but instead extends a greater level of protection than the Constitution requires based on non-constitutional considerations.

In BE & K Const. Co., a case addressing the scope of petitioning immunity in the labor law context, the Court expressly left open the possibility that an unsuccessful but objectively based suit may be deemed a violation of the National Labor Relations Act if it would not have been brought but for a retaliatory purpose. 45 Such a possibility, however, was expressly rejected in the antitrust context by the Court in PRE. 46 Therefore, if Noerr-Pennington were based on constitutional principles, BE & K Const. Co. would represent a partial overruling of PRE. Once again, however, a close analysis of [\*90] the text and reasoning in BE & K Const. Co., as well as the opinions of the concurring justices, shows that the better reading of BE & K Const. Co. is that it did not overrule PRE. Instead, it implicitly recognized that because Noerr-Pennington is based primarily on an interpretation of federal antitrust laws, the scope of its protections might not necessarily apply to the same extent outside of the antitrust context.

Finally, Section C refutes a common critique of this reading of Noerr-Pennington: that California Motor Transport Co. v. Trucking Unlimited "constitutionalized" the holdings from Noerr. 47

A. Petitioning immunity in antitrust: Noerr, Allied Tube, and Trial Lawyers

This Section examines the Court's holdings and supporting reasoning in Noerr, a case where the Court extended antitrust petitioning immunity, and two subsequent cases where the court declined to provide antitrust petitioning immunity, Allied Tube, and Trial Lawyers. If Noerr provides constitutionally mandated minimum levels of protection, only constitutional considerations would allow the Court to provide a lower level of protection in Allied Tube and Trial Lawyers. An analysis of these three cases shows that the sole shared distinguishing characteristic between them is the form of the petitioning activity. Therefore, in order for Noerr to be primarily based on constitutional principles, the Constitution must provide a lower level of protection for the types of petitioning activity in Allied Tube and Trial Lawyers than the type of petitioning activity in Noerr. There is, however, no adequate constitutional justification for providing the form of petitioning in Noerr with a greater level of protection than the form of petitioning in Allied Tube and Trial Lawyers. In fact, the different treatment of the petitioning activity in these cases can best be explained if Noerr is understood as being based primarily on an interpretation of federal antitrust laws.

1. Comparing Noerr, Allied Tube and Trial Lawyers

In Noerr, a coalition of trucking companies sued a coalition of rail companies under the Sherman Act alleging that the rail [\*91] companies had conducted a publicity campaign to "foster the adoption and retention of laws and law enforcement practices destructive of the trucking business." 48 The harm underlying the action stemmed from two sources. First, the truckers claimed injury from the government action for which the rail companies had lobbied, i.e. the passage of weight limit laws. 49 Second, the truckers claimed that the publicity campaign painted the truckers in a negative light thereby causing them to lose business and goodwill with their customers. 50 The truckers argued that the rail companies could be held liable because their purpose in conducting the campaign was to cause anticompetitive harm to the trucking companies. 51 The truckers also argued that the rail companies could be held liable because the rail companies had engaged in unethical behavior in their publicity campaign by using the "third party technique." 52

The Court explicitly held that the anticompetitive motivation of the rail companies and the unethical manner of the petition were insufficient to impose antitrust liability. 53 First, the Court addressed the anticompetitive motivations. 54 It determined that a petitioner could not be held liable under the Sherman Act simply because he was subjectively motivated to bring the petition by a desire to cause harm to a competitor. 55 Speaking for a unanimous court, Justice Black reasoned that the Sherman Act was meant to regulate business, not political activity, and to interpret the Sherman act as sustaining this cause of action would raise serious constitutional questions regarding the First Amendment right to petition. 56 "A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the [\*92] very instances in which that right may be of the most importance to them." 57

The Court also found unpersuasive the suggestion that the unethical means of petitioning should lead to a different result. 58 It reasoned that unethical behavior in the political realm is not meant to be addressed by the Sherman Act. 59 Historically, Congress had been cautious in regulating political activity, and if the Court were to impute this purpose to the Sherman Act it would negate this caution. 60

If these holdings from Noerr are rooted in the First Amendment, then they are constitutionally mandated minimum levels of protection. Therefore, the Court should apply the same levels of protection in analogous situations, or in cases that have the same considerations that were present in Noerr, unless other constitutional principles dictate a different result. A close analysis of two subsequent petitioning immunity cases, Allied Tube, and Trial Lawyers, however, shows that the Court did not apply the same levels of protection in these cases, though they presented analogous situations and considerations as those present in Noerr.

In Allied Tube, the plaintiff, a manufacturer of polyvinyl chloride electrical conduits, brought an antitrust action against a manufacturer of steel electrical conduits. 61 The plaintiff claimed that the defendant conspired to prevent the inclusion of polyvinyl conduits in the industry safety standards. 62 Specifically, the plaintiff claimed that the defendant along with the top steel manufacturing companies in the country recruited and paid for over 200 people to join the National Fire Protection Association with instructions that they were to vote against the inclusion of polyvinyl conduits in the industry code. 63 The defendants claimed they were entitled to Noerr-Pennington immunity because the code was commonly adopted into state safety codes by numerous state legislatures and therefore their actions were [\*93] a means of petitioning state legislatures to exclude polyvinyl conduit from their state safety codes. 64

It may not be apparent on its face, but Allied Tube actually has a factual situation very close to the one presented in Noerr. In both cases, the suit was brought under the Sherman Act for antitrust violations. 65 Also, in both cases the petitioning was not objectively baseless, as both the rail companies and the defendant in Allied Tube succeeded in obtaining their sought after government action: the passage of anti-trucking legislation and the exclusion of polyvinyl conduits from state safety codes. 66 In both cases the defendants engaged in the petitioning activity specifically because it would cause harm to their competitors. 67 Also in both cases, the harm underlying the suit resulted from both a government decision and the petitioning activity that led to that government decision. In Allied Tube, the harm that formed the basis of the suit derived both from the adoption of the association's safety code by state legislatures (the petitioned for government action), and from being excluded from the association's safety code (the petitioning activity itself). 68 In Noerr, the harm resulted from both the harmful trucking legislation (the petitioned for government action), and the negative publicity campaign (the petitioning activity itself). 69 Finally, the petitioning activity in Allied Tube was unethical, but did not violate any of the rules of the National Fire Protection Association, 70 just as in Noerr where the publicity campaign was misleading and unethical, but not necessarily illegal. 71

There are a few notable differences, which distinguish Noerr from Allied Tube. First, the conduit used by the defendants to influence to the government decision maker differed in these two cases. In Allied Tube, the government decision maker whom the petitioning activity was ultimately intended to affect was a legislative body, as it was in Noerr. But unlike Noerr, the conduit to the legislature was not the public at large (to whom the Noerr publicity [\*94] campaign was aimed), but the members of a private standards setting association. Second, the form of the petitioning activity differed in these two cases. In Allied Tube, the petition took the form of packing the ranks of a private standards setting association, whereas in Noerr it was in the form of a publicity campaign. 72

Ultimately, the Court in Allied Tube found these differences to be dispositive, concluding that the defendant was not entitled to petitioning immunity. 73 The Court noted that the "petitioner's actions took place within the context of the standard-setting process of a private association" whereas "the publicity campaign in Noerr… [took] place in the open political arena." 74 It also noted that "[t]he essential character of the Noerr publicity campaign was … political" a type of activity which "has been regulated with extreme caution," whereas the petitioner's activity in Allied Tube was "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." 75 "[T]he activity at issue here … cannot, as in Noerr, be characterized as an activity that has traditionally been regulated with extreme caution, or as an activity that 'bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act." 76 Petitioning immunity in this instance, therefore was not appropriate.

In Trial Lawyers, private practice attorney's that worked as court-appointed counsel for indigent criminal defendants in the District of Columbia organized a boycott in order to coerce the District of Columbia to increase their compensation. 77 The boycott was ultimately successful, but the Federal Trade Commission brought antitrust charges under the Sherman Act against the trial lawyers. 78 The trial lawyers argued, in part, that their activities were protected as a means of petitioning the government and so were immune from liability under the Noerr-Pennington doctrine. 79

Trial Lawyers, like Allied Tube, presents a situation very similar to the one in Noerr. While the attorney's were able to convince the [\*95] government to raise their compensation, the harm that formed the basis of the Trial Lawyers suit actually resulted from the petitioning activity itself. As the court pointed out: "[t]he restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted." 80 The suit, like in Noerr, was brought under the Sherman Act. 81 The petitioning activity was not objectively baseless, indeed it was ultimately successful, and was engaged in specifically because it would have an anticompetitive effect, i.e., it created a supply shortage in the market for public defenders. Even the "audience" was the same in Trial Lawyers as it was in Noerr, as the boycott was directed not only toward the legislature, but also to the public at large as a conduit to the legislature.

The sole distinguishing characteristic in Trial Lawyers from Noerr is the form of the petitioning activity. In Noerr, it was a publicity campaign, but in Trial Lawyers it was by means of a boycott. 82 Like in Allied Tube, this distinguishing characteristic led the court to a different result than in Noerr. Deciding that the attorney's were not entitled to petitioning immunity, the Court, quoting Allied Tube, reasoned that "the Noerr doctrine does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'" 83 If it did, the Court reasoned that the Noerr-Pennington doctrine would immunize a whole host of anticompetitive activity simply because its purpose in doing so was to influence a government decision maker. 84

2. Constitutional Considerations Cannot Harmonize Allied Tube, Trial Lawyers and Noerr

Both Trial Lawyers and Allied Tube presented situations that were very close to the one in Noerr. The only difference with Noerr that was shared by Allied Tube and Trial Lawyers was the form of the petitioning activity. Yet the Court provided a lower level of [\*96] protection for the activity in both Allied Tube and Trial Lawyers than it afforded the activity in Noerr.

As was discussed in the introduction, the Constitution sets a mandated minimum level of protection for petitioning activity. This means that there are only two possible explanations for the differing treatment in Allied Tube, Trial Lawyers, and Noerr. Either Noerr is a constitutional decision and the Constitution requires a greater level of protection for the form of petitioning activity in Noerr than in Allied Tube and Trial Lawyers, or Noerr is not a constitutional decision and the level of protection the Court provided the petitioning activity in Noerr went beyond what the Constitution requires based on nonconstitutional considerations. In order for Noerr to be a constitutional decision there must be some constitutional justification for providing publicity campaigns with greater protection than boycotts or packing private standard setting associations with supporters.

Looking first to the reasoning in Noerr, the Court in coming to its decision specifically focused on the concern that imposing liability would inhibit people's ability to "make their wishes known" to the government. 85 If the constitutional concern in Noerr was that imposing liability would deprive the government of information, and deprive the people of their ability to provide that information, then this concern should not be present in Allied Tube or Trial Lawyers, since unlike Noerr, they were decidedly adversely to the petitioning party. This is not the case however. Depriving boycotts or the petitioning activity in Allied Tube of constitutional protection would likely inhibit people's ability to "make their wishes known" to the government to the same degree as depriving publicity campaigns of constitutional protection. In fact, the Court in Allied Tube specifically noted that the petitioners' activity might have been "the most effective means of influencing legislation." 86 Thus, the Allied Tube decision may in fact raise this concern to a greater extent than the situation in Noerr did. 87 Similarly, boycotting is a classic form of political protest, one that the Court provided with constitutional [\*94] protection in NAACP v. Claiborne Hardware. 88 In that case the Court specifically acknowledged that "a major purpose of the boycott … was to influence governmental action." 89 In extending the boycott in Claiborne Hardware constitutional protection the Court stated: "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." 90 One might argue then that the form of the petitioning in Noerr is afforded greater constitutional protection than the forms in Allied Tube and Trial Lawyers because the forms of the petitions in Allied Tube and Trial Lawyers were illegal. 91 There are three problems with this argument however. First, it is circular, essentially stating that this form of petitioning activity is not protected by the First Amendment because Congress has prohibited it and Congress cannot prohibit constitutionally protected behavior. The result presumes the premise. Second, it is premised on a definition of the right to petition that completely eviscerates that right. If petitioning activity can be moved outside the protection of the Constitution by an act of Congress or an order from the executive branch, then the Constitution would provide no protection for petitioning activity whatsoever. And while the Court does not interpret the First Amendment prohibition "Congress shall make no law" literally, this definition completely contradicts this prohibition, making the right to petition entirely dependent on laws "ma[d]e" by Congress. Finally, other cases in the Court's petitioning immunity jurisprudence refute this argument. In Noerr itself, the defendant was alleged to have "deliberately deceived the public and public officials," 92 a potentially illegal act for which the Court nonetheless [\*98] provided protection. Similarly in City of Columbia v. Omni Outdoor Advertising, 93 the Court extended petitioning immunity to a defendant who was alleged to have, as part of his lobbying strategy, conspired with and bribed public officials. 94 The Court reasoned that to allow liability under the Sherman act in such circumstances "would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid." 95 Therefore, as Omni and Noerr itself demonstrate, the fact that the form of the petitioning activity is illegal is not sufficient to explain the differences in treatment between Trial Lawyers, Allied Tube, and Noerr, if Noerr were interpreted as a constitutional decision. One final argument for why the Constitution may provide greater protection for the form of petitioning in Noerr than for the form in Allied Tube and Trial Lawyers, could be that the Constitution protects certain traditional forms of petitioning, such as the publicity campaign in Noerr, but does not protect untraditional forms of petitioning such as the boycott in Trial Lawyers, or the actions of the defendant in Allied Tube. This argument is unpersuasive for two reasons. First, nothing in the language of the Court's Noerr- Pennington line of opinions indicates that it made any such distinction. Rather, to the extent that Noerr addresses the relevance of the historical character of the petitioning activity, it does so by analyzing whether the form of the petitioning activity is the kind of activity "traditionally condemned" by antitrust laws, not the Constitution. 96 Second, this interpretation of the First Amendment right to petition does not fit with the Court's other petitioning immunity cases. For example in NAACP v. Claiborne Hardware, the Court extended petitioning immunity protection to a boycott of segregated businesses, the same form of petitioning which was denied protection in Trial Lawyers. 97 Also, in California Motor Transport Co. v. Trucking Unlimited, the Court refused to provide protection to what [\*99] would probably be considered a very traditional form of petitioning activity: filing lawsuits in courts and grievances with administrative agencies. 98 3. Allied Tube, Trial Lawyers and Noerr Can Be Harmonized as Statutory Interpretation Decisions While the results in these cases cannot be persuasively explained if Noerr were regarded as a constitutional holding, they can be explained if Noerr was a holding based on statutory interpretation principles. First, the reasoning in Noerr fits with this interpretation. Recall that the Court in Noerr stated that it must provide petitioning immunity to the defendant because interpreting the Sherman Act to sustain the cause of action "would raise important constitutional questions." 99 By applying the doctrine of constitutional avoidance, the Court was able to avoid these questions because the Sherman Act was susceptible to another interpretation that did not raise them, specifically that the Sherman Act was not meant to regulate political activity: "[t]he proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." 100 Similarly, the Court reasoned that because Congress had been historically hesitant to regulate political activity, it would be imprudent to interpret the Sherman act to do so. 101 In Allied Tube and Trial Lawyers, however, the form of the petitioning at issue precluded the Court from taking such a cautious approach. This is because the form of the petitioning activity in these cases was the type of conduct the Sherman Act specifically meant to prohibit. Boycotts are one of the per se violations of the Sherman Act. 102 Similarly, in Allied Tube, the Court pointed out that the petitioner's activity was "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." 103 [\*100] Unable to avoid the difficult constitutional questions posed by the Sherman Act, the Court was forced to address them. In Allied Tube, the Court specifically noted that it is "difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line." 104 The Court concluded, however, that the defendant's activity in this case fell in the latter category, and therefore was not entitled to petitioning immunity. In Trial Lawyers, the Court was also forced to answer difficult constitutional questions because in NAACP v. Claiborne Hardware, the Court had held that the participants in the NAACP's boycott of white merchants were protected from suit under antitrust and common law claims. 105 Therefore, in order to hold the defendants in Trial Lawyers liable the Court needed to distinguish Claiborne Hardware. It did so based on the fact the boycotters in Trial Lawyers were "at least partially motivated by the desire to lessen competition, and… stood to reap substantial economic benefits from [the anticompetitive activity]," 106 whereas the petitioners in Claiborne did not seek to destroy their competitors in the market, but "sought only the equal respect and equal treatment to which they were constitutionally entitled." 107 In Noerr, the Sherman Act and its purposes allowed the Court to avoid making such bold First Amendment pronouncements, but in Allied Tube and Trial Lawyers the Act clearly applied and the Court had no choice but to determine whether the First Amendment allowed the imposition of liability for these petitioning activities, which the Court held it did. [\*101] B. Petitioning immunity outside of antitrust: McDonald and BE & K Const. If Noerr-Pennington were based on constitutional considerations and not an interpretation of antitrust laws, then its principles should be equally applicable outside the realm of antitrust laws. An analysis of two such Supreme Court petitioning cases McDonald v. Smith, 108 a libel case, and BE & K Const. Co. v. N.L.R.B., 109 a labor law case, shows that this has not been the case. In McDonald, the defendant made knowingly false statements in order to convince the President not to appoint the plaintiff as a United States Attorney. The plaintiff brought a libel suit and the defendant claimed that he was immune from liability because his activities were protected by the First Amendment. 110 The Court declined to extend petitioning immunity to the defendant, reasoning that while the First Amendment protects the right to petition, it does not protect all petitioning activity. 111 Providing an absolute immunity for petitioning activity "would elevate the Petition Clause to special First Amendment status." 112 It concluded therefore that the state common law standard of allowing libel liability upon a showing of "actual malice," would not violate the First Amendment right to petition. 113 This ruling would seem to at least partially overrule Noerr if Noerr were a constitutional decision. Recall that in Noerr, the Court provided the defendant with petitioning immunity despite the fact that the defendant's publicity campaign had "deliberately deceived the public and public officials." 114 In McDonald, however, the Court came to the exact opposite conclusion. It specifically held that the First Amendment did not protect a petition that entailed deliberate falsehoods. This result cannot be explained away by arguing that the petitioning activity in McDonald fell under the "sham" exception recognized in Noerr. 115 First, the defendant's petition was ultimately [\*102] successful: he was able to convince the President not to appoint the plaintiff as a US attorney. Therefore it cannot be considered "objectively baseless." 116 Second, the harm in McDonald did not stem solely from the petitioning process itself, as the "sham" exception requires, but also from the government action the petitioning party sought, specifically the President's decision not to appoint the plaintiff as a US attorney. 117 If Noerr were a constitutional decision, McDonald would at the very least seem to create a new "malicious" false statement exception to Noerr. In subsequent cases, however, the Court has not treated McDonald as establishing such an exception, instead the Court has expressly declined to "decide … whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." 118 Even those jurisdictions that have recognized a fraud exception to the Noerr-Pennington doctrine limit it to petitions before adjudicative bodies. 119 Therefore, even if the Court had implicitly recognized an analogous fraud exception, the petition in McDonald, which was directed to a non-adjudicative part of the executive branch, would not fall within it. If, however, Noerr-Pennington does not delineate constitutionally mandated minimum levels of protection, but provides a higher level of protection for petitioning activity based on an interpretation of antitrust laws, these problems do not arise. In fact, this explanation seems to fit with the language and reasoning of other [\*103] cases in the Court's Noerr-Pennington jurisprudence. For example, in City of Columbia v. Omni Outdoor Advertising, the Court held that illegal lobbying activities, such as bribery and conspiracy with elected officials "can be of no consequence so far as the Sherman Act is concerned." 120 In McDonald, however, the petitioner's knowingly false statements were exactly the type of activity the tort of libel is concerned with. Therefore, the Court was forced to delve into the question of how much petitioning activity the First Amendment protects in that particular instance. BE & K Const., a Supreme Court case addressing the subject of petitioning immunity in the context of Labor law, provides further support for this interpretation of the Noerr-Pennington doctrine. 121 In that case, the petitioner, a general contractor, filed a lawsuit against a group of unions alleging that the unions had attempted to delay one of the petitioner's projects through lobbying, litigation, and other concerted activities because the petitioner used non-union employees. 122 After the petitioner's lawsuit failed, the National Labor Review Board's ("NLRB") general counsel filed an administrative complaint against the petitioner claiming its lawsuit violated the National Labor Relations Act ("NLRA"). 123 The Board ruled in the general counsel's favor finding the petitioner's lawsuit violated the NLRA because it was unsuccessful and was brought with a retaliatory purpose. 124 The case subsequently came before the Supreme Court which certified the specific question of whether the NLRB "may declare that an unsuccessful retaliatory lawsuit violates the NLRA even if reasonably based." 125 If the protections afforded by Noerr-Pennington were constitutionally based and so were mandated even outside the context of antitrust, then this question would be easy. The Court had already determined in PRE that a reasonably based lawsuit, even if unsuccessful and brought with an improper motive, was entitled to petitioning immunity. 126 The PRE Court held that this is the case [\*104] even if the suit would not have been brought but for its anticompetitive effects. 127 The Court in BE & K Const. ultimately followed PRE and the Noerr-Pennington cases, but only to a certain extent. First, it took a similar tact as in Noerr and held that an interpretation of the NLRA, which allowed it to punish all reasonably based but unsuccessful retaliatory suits would raise serious constitutional questions. 128 Turning to the statutory text, the Court found that "while [the NLRA] might be read to reach the entire class of suits the Board has deemed retaliatory, it need not be read so broadly." 129 Therefore the Court held that "[b]ecause there is nothing in the statutory text indicating that [the NRLA] must be read to reach all reasonably based but unsuccessful suits filed with retaliatory purpose, we decline to do so." 130 Up to this point the BE & K Const. Court is entirely in line with the Noerr-Pennington doctrine. In the closing paragraph of the opinion, however, the Court expressly left open the possibility "that the board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity." 131 As was just discussed, however, such a possibility was expressly rejected in the antitrust context by the Court in PRE. 132 If Noerr-Pennington provides constitutionally mandated levels of protection (and therefore is equally applicable regardless of the statutory context), then by leaving this possibility open BE & K Const. would partially overrule this aspect of PRE. But there is no indication in the text of BE & K Const. that the Court intended such a result. In fact, the Court expressly relies on the reasoning and result [\*105] in PRE in its opinion. 133 If, however, Noerr-Pennington and PRE do not dictate constitutionally mandated minimum levels of protection, but instead provide a greater level of protection based an interpretation of federal antitrust laws, then BE & K Const. need not be read as overruling PRE. Under such an interpretation the Court in BE & K Const. simply left open the possibility that a lower level of protection for petitioning activity may be warranted in the labor law context than in the antitrust context due to the differences between these laws. In fact, the debate of whether such differences justify differing treatment for petitioning activity is acknowledged in the Courts' opinion in BE & K Const. 134 and actually plays out in the concurring opinions of Scalia and Breyer. Breyer argues that the "Court's antitrust precedent [should not] determine[] the outcome here" because of the differences between antitrust and labor law "in respect to their consequences, administration, scope, history and purposes." 135 Scalia disagrees and argues that the scope of protection for petitioning activity should be equal in these two areas of law. 136 In fact, he argues that if anything, petitioning activity should be afforded greater protection in the labor law context because the burdens imposed on petitioning activity in that context are imposed by an executive agency, the NLRB, whereas in the antitrust context the burdens are imposed by an Article III court. 137 The answer to this debate, however, does not dictate the result here. The mere fact that such a debate exists demonstrates that Noerr-Pennington does not provide constitutionally mandated levels of protection because if it did then the question debated would already have been answered by PRE. [\*106] C. Rebutting the Argument that California Motor Transport Co. "constitutionalized" Noerr-Pennington.

Some commentators have argued that while the Court did not initially base its holdings in Noerr on the First Amendment, a subsequent case, California Motor Transport Co. v. Trucking Unlimited, 138 later interpreted Noerr's holdings as being based on the Constitution and thus "constitutionalized" them. 139 The following language from California Motor is frequently cited in support of this proposition: "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors." 140 This "constitutionalization" interpretation, however, is not a necessary or even the best reading of California Motor.

Even were this language read in isolation from the rest of the Court's reasoning in California Motor, it would not support the conclusion that California Motor "constitutionalized" the holdings in Noerr. Simply because imposing liability would "be destructive of rights of association and of petition" does not mean that it would violate the First Amendment. As the Court stated in Claiborne Hardware: "[t]he presence of protected activity … does not end the relevant constitutional inquiry." 141 The Court regularly upholds government regulation even if it incidentally infringes on a constitutionally protected right. 142

When read in context, though, it is even clearer that this language is not "constitutionalizing" the holdings of Noerr, but only extending the Noerr holdings to apply to petitioning activity before courts and administrative bodies. Prior to this statement, the Court in California Motor noted that in Noerr and Pennington it had provided petitioning immunity to parties who attempted to "influence the [\*107] Legislative Branch for the passage of laws or the Executive Branch for their enforcement." 143 The California Motor Court then adopted two justifications from Noerr to support the extension of petitioning immunity beyond the realms of the Legislative and Executive branches and into the realm of the Judicial branch. The first was the people's ability to communicate their concerns to the government, and the government's ability to receive this information. 144 The second was the Court's presumption that it should not "lightly impute to congress an intent to invade [freedoms protected by the Bill of Rights]." 145 The California Motor Court, finding these justifications equally applicable to "administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government," held that the protections recognized in Noerr and Pennington should therefore be applicable in these realms as well. 146 Because this extension of Noerr-Pennington protection was explicitly based on these two justifications from Noerr, the same principles on which these justifications rest should also underlie this extension. But, as was demonstrated supra Part II.A.2., neither of these justifications provides a basis to conclude that the Noerr-Pennington doctrine defines constitutional levels of protection.

A further analysis of California Motor demonstrates that its holdings and supporting reasoning are not based on constitutional considerations, but like Noerr are based on an interpretation of antitrust laws. In California Motor, the plaintiff highway carrier brought a suit against a coalition of its competitors claiming these competitors violated federal antitrust laws by opposing every one of the plaintiff's applications to acquire operating rights in California regardless of the merits of the opposition. 147 The Court, using an analogous line of reasoning as it would subsequently use in Trial Lawyers and Allied Tube, noted that while in Noerr the Court had recognized that Congress's caution in regulating unethical political activity prevented them from imputing such a purpose to the Sherman act, Congress had not been similarly cautious in regulating unethical [\*108] activity before adjudicatory bodies. 148 The Court continued: "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 149 Therefore, while the defendant may have a right to oppose the plaintiff's applications, this right does not entitle him to "to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts." 150 The Court held, therefore, that the defendant was not entitled to petitioning immunity.

#### Specifically to the ATS

ATS = Alien Tort Statute

Aaron P. Brecher 15, Attorney, Lane Powell PC, Seattle, Washington. Disclosure, “Noerr-Pennington Immunity and the Alien Tort Statute,” New York University Law Review, Vol. 90, pp 25-35

II THE NOERR-PENNINGTON DOCTRINE CAN EXCLUDE EVIDENCE OF PETITIONING

The Supreme Court has ruled that efforts to petition the government, even if undertaken for anticompetitive purposes and with anticompetitive effects, lie beyond the reach of the antitrust laws.20 The Noerr-Pennington doctrine, named for the cases that first described it, has been used to reject “attempt[s] to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials”21 and avoids transgressing First Amendment petitioning rights by extending immunity from antitrust liability to genuine efforts to influence any branch of government.22

So far, so good.

But here’s where things get a bit tricky for my theory. Pennington itself says that evidence of petitioning activities, “which . . . are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.”23 Moreover, the Supreme Court ruled in Wisconsin v. Mitchell that the First Amendment “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”24

Where, however, there is little evidence of an antitrust violation other than efforts to petition some branch of government, lower courts have sometimes concluded such evidence should be excluded.25 For example, in a class action alleging price-fixing of credit card interest rates among banks, the only evidence of a conspiracy other than the parallel interest rates was that the defendants had hired a lobbyist who had successfully pushed for legislation approving increased interest rates.26 The Seventh Circuit upheld the district court’s grant of summary judgment to the defendants and its refusal to consider the lobbying evidence, reasoning that the evidence was far more suggestive of petitioning immune from liability than conspiratorial intent.27 The Tenth Circuit also upheld summary judgment for an ambulance service accused of monopolizing the county ambulance market.28 There, the only evidence of market power was the company’s market share, yet most of the company’s business came from a city-granted franchise.29 The court held that evidence of market share derived from the defendant’s lobbying to acquire and maintain the franchise with the city could not therefore be considered.30 In addition, a district court concluded that “the exclusion of ‘purpose and character’ evidence consisting of conduct clearly embraced by Noerr-Pennington should be the rule rather than the exception in an antitrust case.”31 It’s this use of Noerr-Pennington to exclude evidence that most interests me.

III NOERR-PENNINGTON SHOULD BE EXTENDED TO ATS CLAIMS

Other legal areas have already incorporated First Amendment avoidance doctrines, whether Noerr-Pennington or something similar. Extending Noerr-Pennington immunity as an evidentiary bar to ATS claims serves two major functions: (1) it supports the Supreme Court’s requirements—narrow construction and imposing liability only for conduct that touches and concerns U.S. territory—for ATS claims; and (2) it guards against chilling First Amendment freedoms.

Noerr-Pennington has already been extended beyond the antitrust context. Other areas in which the doctrine has been held to preclude liability for petitioning activity include civil RICO32 and tortious interference with business relations.33 And at least one scholar has suggested that it might apply to ATS claims.34 NoerrPennington’s restrictions on certain uses of evidence, which lower courts have recognized, can be applied to ATS claims as well.

But just because courts can expand the doctrine, should they? For starters, a narrow, cautious approach to recognizing those federal common law claims for which the ATS provides jurisdiction is consistent with the Supreme Court’s rulings in Sosa v. AlvarezMachain and Kiobel. For violations of customary international norms, federal common law creates the substantive underlying claim brought under the ATS.35 The Court is increasingly skeptical of judicial creativity in expanding rights of action through federal common law, even in the foreign affairs realm, once an area where federal common law had flourished.36 Indeed, antitrust law is itself governed largely by federal common law,37 and Noerr-Pennington is a judge-made constitutional avoidance doctrine limiting its reach. Specifically, applying Noerr-Pennington to ATS claims is consistent with Sosa v. Alvarez-Machain’s instruction that courts be cautious in recognizing claims under the ATS, an instruction rooted in concerns about judgemade law and especially in apprehension about interfering with foreign relations without guidance from the elected branches.38 In ruling that the presumption against extraterritoriality applies to ATS claims, Kiobel similarly expressed concern about clashes with other countries’ interests absent a clear command from Congress.39 Expanding the Noerr-Pennington doctrine, which would preclude liability for certain conduct and prevent the introduction of evidence about similar conduct, would advance the interests in narrowing the recognition of ATS claims that the Supreme Court emphasized.

Second, expanding Noerr-Pennington immunity to ATS claims will guard against chilling activity protected by the First Amendment. An otherwise unobjectionable regulation may impermissibly deter expression protected under the First Amendment.40 Chilling effect reasoning cuts across several procedural and substantive aspects of First Amendment doctrine. Procedurally, the chilling effect doctrine loosens normal standing rules by allowing claims to sometimes move forward based only on a fear of future government speech restriction, rather than the concrete injury usually required for federal courts to hear cases.41 Substantively, courts are “tolerant of a certain degree of imprecision in legislative line drawing . . . [and] normally [accepting of] some overdeterrence as the inevitable result of lawmaking” outside the First Amendment context.42 But where the First Amendment is concerned, overdeterrence becomes more problematic. Where some categories of speech are not entitled to any—or receive little—constitutional protection, “courts have used chilling effect-based reasoning to insist that such categorical distinctions be bounded by bright lines in order to prevent spillover effects on protected speech.”43 Because expression of political views, including asking government officials to enact policies consistent with the speaker or petitioner’s preferences, is critical to democratic government,44 extending a judicial doctrine cognizant of this to limit the ATS is appropriate. Noerr-Pennington evidence, “which by its very nature chills the exercise of First Amendment rights, is properly viewed as presumptively prejudicial.”45

The Doe plaintiffs allege that by purchasing cocoa from the Ivorian plantations that use child slaves, giving training and equipment to plantation owners, and lobbying against federal childslavery labeling legislation—all with knowledge of child slavery in the Ivory Coast—the defendant companies aided and abetted child slavery.46 The decisions to take those actions may have been made in the United States, but because the slavery and the defendants’ training for the cocoa farmers occurred abroad, and the equipment was used abroad, the plaintiffs face an uphill battle to overcome Kiobel’s presumption against extraterritoriality. The Ninth Circuit let the plaintiffs replead their claims to show that the defendants gave the slavers substantial assistance in the commission of a crime, but it is unclear what, if any, additional conduct might be alleged.47 Regardless of what the plaintiffs allege in their amended complaint to prove the defendants’ intent, or to show that the defendants’ actions touch and concern U.S. territory, the evidence of the defendants’ lobbying should not be considered. The defendants’ lobbying against proposed slavery-labeling legislation was used to show the plausibility of alleging that the defendants acted purposely, rather than as proof of substantive wrongdoing.48 While using evidence of lobbying to show intent does not violate the First Amendment under Mitchell, it may nevertheless discourage protected activity and threatens to confuse the issues. The optics of opposing child-slavery labeling requirements are less than stellar, and that evidence is much more likely to inflame a factfinder than to shed light on whether the defendants violated a well-established international legal norm.

As for Sexual Minorities Uganda, it’s possible that the defendant’s conduct in writing homophobic books and giving similarly-themed speeches will be held protected from liability under the First Amendment itself in a later stage of the proceedings. In terms of lobbying the Ugandan government, the result under my theory would depend on how completely courts import NoerrPennington from the antitrust context: While some courts have extended Noerr-Pennington immunity to petitioning aimed at foreign governments,49 the First Amendment’s Petition Clause does not protect petitioning foreign governments.50 On the one hand, immunizing all lobbying activities from liability under ATS claims is consistent with First Amendment values, including its protections for speech generally. On the other hand, because such an extension is not strictly necessary to avoid constitutional concerns about the Petition Clause, there may be good reasons for confining Noerr-Pennington’s protections for foreign lobbying to the realm of antitrust law.51

I don’t necessarily agree with everything the Supreme Court has said in interpreting the ATS. The Court’s ruling in Kiobel risks turning the United States into “a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”52 And I readily acknowledge that there are serious human costs to further restricting an already narrow avenue of relief for human rights abuses.53 But lobbying Congress for an expanded right of action or persuading the Supreme Court that its view in Kiobel was mistaken are preferable to circumventing Kiobel by relying on activity that lies at the First Amendment’s core and is likely to confuse a factfinder about what a case is really about: whether defendants have actually violated customary international law, or merely advocated for government policies the factfinder thinks unseemly.

CONCLUSION

There will continue to be questions about which claims based on customary international law may go forward under the ATS. This Essay suggests that evidence of petitioning the government should typically be barred from consideration in such claims under an extension of Noerr-Pennington immunity. This will help limit the scope of common law claims cognizable under the ATS, and help ensure that the territoriality requirement is not circumvented. It will also prevent the undue chilling of constitutionally protected activity.

#### That prevents litigation from crushing developing economies.

Anderson et al. 20, R. Reeves Anderson, Arnold & Porter Kaye Scholer LLP; John P. Elwood, John B. Bellinger, III, Kaitlin Konkel, Sean A. Mirski, Arnold & Porter, Kaye Scholer LLP; Steven P. Lehotsky, Jonathan D. Urick, U.S. Chamber Litigation Center, Patrick Hedren, Erica Klenicki, Manufactures' Center for Legal Action, “Brief of Amici Curiae the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Foreign Trade Council, Global Business Alliance, and United State Council for International Business in Support of Petitioners,” NESTLE USA, INC., Petitioner, v. John DOE I, et al., CARGILL, INC., Petitioner, v. John DOE I, et al., 2020 WL 5501204, WestLaw

III. Clear Limitations On ATS Liability Will Blunt The Sprawling Litigation That Continues To Burden Courts And Litigants

Amici's concerns are not abstract. In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations for business activities in a wide range of industry sectors and more than sixty countries. John B. Bellinger, III & R. Reeves Anderson, Whither to “Touch and Concern”: The Battle to Construe the Supreme Court's Holding in Kiobel v. Royal Dutch Petroleum, in Federal Cases from Foreign Places 22 (U.S. Chamber Inst. for Legal Reform 2014); see also Donald E. Childress III, The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation, 100 Geo. L.J. 709, 713 (2012). Dozens of major U.S. corporations have been targeted, particularly with respect to their activities in developing and post-conflict countries.

Courts have struggled to decide these cases, and even threshold questions can often take a decade or more to resolve. This case, which has been pending at the pleading stage for 15 years, is typical of practice under the Ninth Circuit's amorphous standard. The Bauman case against Daimler was pending for 10 years before this Court finally reversed the Ninth Circuit's expansive jurisdictional holding; Chevron and Rio Tinto each defended themselves in independent ATS cases for 13 years before securing dismissal; and a case against Cisco has been pending for nine years and is now awaiting this Court's disposition here. The Ninth Circuit is not the only court that has adopted an open-ended jurisdictional rule that can take a decade or more to resolve. ATS claims filed against Exxon in the \*25 D.C. District Court in June 2001 were not fully dismissed until June 2019-18 years later.

All the while, ATS suits threaten substantial reputational harm and require considerable resources to defend. See Cheryl Holzmeyer, Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal, 43 Law & Soc'y Rev. 271,290-291 (2009). That, in turn, imposes unjustified settlement pressure on companies. Indeed, imposing pressure is often the point. See, e.g., Peiqing Cong v. ConocoPhillips Co., 250 F. Supp. 3d 229,235 (S.D. Tex. 2016) (describing an ATS case based on “factually-devoid pleadings and untenable legal theories,” having “nothing to do with the United States,” as “a strike suit”); Khu-lumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254,295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (describing the South Africa apartheid litigation as “a vehicle to coerce a settlement”). One court observed critically how “hyperactive lawyers” sometimes search for sympathetic plaintiffs and then, with barely any client involvement, file ATS suits in the hopes of coercing a quick settlement. Peiqing Cong, 250 F. Supp. 3d at 231. Such in terrorem tactics are easy to employ when courts do not properly apply the touch-and-concern test and allow ATS suits to proceed against U.S. corporations.

If the Court does not articulate clear limits on the touch-and-concern test and bar suits against U.S. corpo-rations, the decision below could affect U.S. businesses operating around the globe. See Sosa, 542 U.S. at 732-733 (requiring courts to consider the “practical consequences” of expanding ATS jurisdiction). Here, the panel's holding that routine U.S.-based business decisions clear the touch-and-concern hurdle leaves no room for U.S. defend-ants to safely invoke the extraterritorial bar. According to the panel below, even allegations of corporate oversight measures such as inspections of overseas operations could \*26 plead sufficient domestic conduct to survive a motion to dismiss. Nestle Pet. App. 43a (citing allegations that “De-fendants also had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices”). That is a counterproductive message to send to the U.S. busi-ness community.

Among other consequences, allowing ATS claims to proceed in cases like this one “could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safe-guards of United States courts.” Jesner, 138 S. Ct. at 1406 (plurality op.). The political branches, not the courts, are responsible for regulating the foreign commerce of U.S. corporations. Congress has chosen to regulate only certain foreign activities of U.S. companies - for example, by enacting the Foreign Corrupt Practices Act. See 15 U.S.C. § 78dd-1 et seq. And the State Department has encouraged commercial interaction with still-developing nations, in the hope of promoting economic development, the rule of law, and change from within the system.4

#### Extinction

UNSC 17, United Nations Security Council, “Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council,” 12/20/17, https://www.un.org/press/en/2017/sc13131.doc.htm

Prevention and development must be at the centre of all efforts to address both the quantitative and qualitative changes that were emerging in threats around the world, the Secretary‑General of the United Nations told the Security Council today, as some 60 Member States participated in an all‑day debate tackling complex contemporary challenges to international peace and security.

António Guterres said the perils of nuclear weapons were once again front and centre, with tensions higher than those during the Cold War. Climate change was a threat multiplier and technology advances had made it easier for extremists to communicate. Conflicts were longer, with some lasting 20 years on average, and were more complex, with armed and extremist groups linked with each other and with the worldwide threat of terrorism. Transnational drug smugglers and human traffickers were perpetuating the chaos and preying on refugees and migrants.

The changing nature of conflict meant rethinking approaches that included integrated action, he said, stressing that prevention must be at the centre of all efforts. Development was one of the best instruments of prevention. The 2030 Agenda for Sustainable Development would help build peaceful societies. Respect for human rights was also essential and there was a need to invest in social cohesion so that all felt they had a stake in society.

He also emphasized that women’s participation was crucial to success, from conflict prevention to peacemaking and sustaining peace. Where women were in power, societies flourished, he pointed out. Sexual violence against women, therefore, must be addressed and justice pursued for perpetrators.

Prevention also included preventive diplomacy, he said, noting that the newly established High-level Advisory Board on Mediation had met for the first time. The concept of human security was a useful frame of reference for that work, as it was people‑centred and holistic and emphasized the need to act early and prioritize the most vulnerable.

“Let us work together to enhance the Council’s focus on emerging situations, expand the toolbox, increase resources for prevention, and be more systematic in avoiding conflict and sustaining peace,” he said, emphasizing the need for Council unity. Without it, he said, the parties to conflict might take more inflexible and intransigent positions, and the drivers of conflict might push situations to the point of no return.

Japan’s representative, Council President for December, spoke in his national capacity, noting that in the 25 years since the end of the Cold War, there had been a rise in complex contemporary challenges to international peace and security. That included the proliferation of weapons of mass destruction, the expansion of terrorism, and non‑traditional challenges such as non‑State actors and inter‑State criminal organizations.

### DA---1NC

FTC DA

#### The FTC has shifted from tech mergers to gas consolidation---that solves energy concentration and hikes.

Botts ‘9/1/17 [Baker Botts is an international law firm of approximately 700 lawyers practicing throughout a network of 13 offices around the globe. Based on our experience and knowledge of our clients' industries, we are recognized as a leading firm in the technology, energy, and life sciences sectors. "FTC Chair Turns Antitrust Attention to Energy Industry." https://www.bakerbotts.com/thought-leadership/publications/2021/september/ftc-chair-turns-antitrust-attention-to-energy-industry]

For the energy sector, one silver lining of the increasingly aggressive rhetoric from antitrust regulators has been their singular focus on “big tech.” It seemed, for a time, that oil & gas had finally abdicated its long-held position as the industry most likely to be on the receiving end of heightened antitrust scrutiny. Any such hope evaporated last week, when Lina Khan, the new chair of the Federal Trade Commission, sent a letter to the White House, making clear that she has the energy industry squarely within her sights.

This renewed focus on the energy industry comes at an already sensitive time. If gas prices rise in the wake of Ida, there will be loud calls for an investigation, as was the case after Hurricanes Katrina and Rita in 2005. Similar to those storms, Ida amounted to a direct hit on the industry, barreling through the Gulf Coast and Louisiana, leaving more than 1 million without power. While it remains to be seen what will ultimately happen with fuel prices, there were already calls for an investigation after prices rose through the summer, even before the hurricane was on the horizon.

I. Ms. Khan’s Letter

The letter, sent on August 25, came in response to a request from Brian Deese, Director of the National Economic Council, for the FTC to investigate elevated gas prices. In his August 11 letter, Deese noted, “During this summer driving season, there have been divergences between oil prices and the cost of gasoline at the pump.” He asked the FTC to investigate. Khan’s response went far beyond Deese’s straightforward request, outlining a three-part enforcement plan, tightly focused on the energy industry.

First, Khan stated, she plans to “identify additional legal theories” to challenge retail fuel station mergers “where dominant players are buying up family-run businesses.” This remarkably specific initiative, possibly untethered to traditional concerns about customer impacts, could mean longer and less predictable reviews for deals involving the sale of independent gas stations.

Second, Khan indicated she would be “taking steps to deter unlawful mergers in the oil and gas industry.” While she again made clear that she is focused on retail fuel deals, she clearly left the door open for a broader industry focus. Specifically, Khan referred to a July decision to rescind a prior FTC policy that limited requirements for parties to any merger ultimately deemed unlawful to obtain prior approval from the agency for any future transactions. In her letter from last week, Khan stated: “we will impose ‘prior approval’ requirements to deter those who propose illegal mergers, including in retail gas markets.”

Finally, Khan wrote that she “will be asking our staff to investigate abuses in the franchise market.” She hypothesized that “large national chains” might be forcing their “franchisees to sell gasoline at higher prices, benefitting the chain at the expense of the franchisee’s convenience store operations.” Khan then signed off, stating, “I will continue to assess how the FTC can use its tools to police unlawful business practices in oil and gas markets.”

All of this adds up to a notably focused promise to create new hurdles for proposed transactions in the energy industry and to find new reasons to investigate a variety of conduct.

II. Pricing Investigations

Whether triggered by Hurricane Ida or by letters from concerned officials such as Mr. Deese, any FTC gas pricing investigation would bring significant discovery burdens for industry participants. The post-Katrina report, released in May 2006, explained: “Since August 2005, the Commission has expended substantial resources on this investigation, including the full-time commitment of a significant number of attorneys, economists, financial analysts, paralegals, research analysts, and other support personnel with specialized expertise in the petroleum industry.” Specifically, FTC staff conducted 65 interviews, issued 139 Civil Investigative Demands (similar to subpoenas), and 99 orders seeking profitability and tax expenditure information. Staff identified more than 105 retailers accused of price gouging.

Despite the deep dive, the Commission uncovered very little evidence of wrongdoing. While finding that seven refiners, two wholesalers, and 24 single-location retailers had higher average gasoline prices that were not substantially attributable to higher costs during the relevant period, the report ultimately concluded: “additional analysis…showed that other factors, such as regional or local market trends, appeared to explain the pricing of these firms in nearly all cases.”

This prior failure to find illegal conduct is unlikely to dissuade the current slate of enforcers from pursuing a similar investigation. Aggressive antitrust enforcement has rapidly become a central cause of the current administration. Biden’s antitrust appointees, including Khan, are clearly intent on implementing an elevated level of antitrust scrutiny.

#### Resource constraints cause case cutting---it overburdens the agency

Hoofnagle, et al, 19—Adjunct Professor of Information and Law, University of California, Berkeley (Chris, with Woodrow Hartzog, Professor of Law and Computer Science, Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law, George Washington University Law School, “The FTC can rise to the privacy challenge, but not without help from Congress,” <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>, dml)

Resources are the FTC’s greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, FTC attorneys make pragmatic choices in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy.

#### Extinction.

Koranyi ’16 [David; 2016; Chief Advisor of City Diplomacy for the Mayor of Budapest, former Director of the Atlantic Council's Eurasian Energy Futures Initiative; Atlantic Council Strategy Paper, “A US Strategy for Sustainable Energy Security,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/AC_SP_Energy.pdf>]

The United States should work toward a global energy system that is characterized by the reduction of excessive price volatility on global energy markets and the minimization of the impact of geopolitical upheavals. This requires the introduction of more competition, transparency, liquidity, better rules and regulations for energy trade, and the stabilization of global energy trading routes in concert with other key stakeholders. The liberalized global energy trade would be coupled with transparent and efficiently functioning global and regional markets. This necessitates energy market integration and interconnections in Europe, Asia, Africa, and Latin America alike to enhance regional synergies and create markets. This integration process should be supported by US experience and technical assistance.

It is of utmost importance to ensure that competition is not distorted, with special regard to cartelization in the regional and global gas markets. The United States should promote global principles for competition in the energy markets to reduce the risk of cartelization and price setting, cripple the disruptive ability of irresponsible players on the market, enhance security of supplies, and promote open and efficiently functioning markets.

Monitoring the implementation of global and regional climate agreements; promoting dialogue and cooperation between consumer and producer countries; introducing and enhancing dispute resolution mechanisms; increasing transparency and reducing volatility on the international energy markets; and devising international standards of physical and cyber energy infrastructure protection will be at the center of the US international energy governance agenda. Therefore, international institutions that serve US national interests need to be strengthened further with special regard to the International Energy Agency (IEA), the United Nations Sustainable Energy for All Initiative (SE4All,) the International Renewable Energy Agency (IRENA), and the Energy Charter Treaty. In particular, the IEA’s mandate, organization, and budget should be reinforced to allow the organization to conduct a global energy dialogue with all key stakeholders, and to play a robust role in facilitating the exchange of best practices in green technology deployment, energy efficiency, and other key issues in the context of the Paris Climate Agreement.

As the energy sector undergoes a fundamental transformation, new global actors emerge and play a decisive role in how to produce and consume energy and control the climate. The new ‘lateral energy regime’ vastly widens the circle of interested and invested actors and influencers.58 This new paradigm requires a fundamentally different approach to governance on all levels: local, national, and international. The United States should invest in the empowerment and inclusion of constructive new actors to co-govern the energy space, while depowering spoiler actors, such as terrorist organizations that target energy infrastructure. Designing a new model for public-private-people-partnerships (PPPP) is essential to managing the complex interplay between the traditional and new producers, transporters, and consumers of energy—municipal and regional governments and civil society actors.

Conclusion

The first of the Atlantic Council Strategy Paper Series, Dynamic Stability: US Strategy for a World in Transition, identified the protection of global commons by the United States as critically important for both material and moral reasons. It rightly argued that “it is important to include climate in the definition of global commons.”59 That paper defined ‘dynamic stability’ as the key conceptual framework to deal with a fast-changing ‘Westphalian-Plus’ world and argued for “harnessing change to preserve the liberal international order.”60

Harnessing change in the energy sector expeditiously is an existential issue for all humanity. Dynamic stability in the US energy sector would mean leveraging the unique natural bounty and technological prowess of the United States and using the very momentum created by the unconventional hydrocarbon revolution to gradually pivot away from fossil fuels. Leaving the current system unreformed and unmodernized will threaten the security and well-being of American citizens, hurt the US economy at home, and isolate the United States internationally. By compromising on market-friendly public policy measures and leveraging the low oil price environment, the United States can introduce the right incentives into the energy system to shepherd an accelerated energy transition into a more modern, low-carbon energy era that still relies heavily on natural gas—particularly during the transition—and nuclear power to provide baseload generation and counter seasonal intermittency.

### DA---1NC

Politics

#### Biden will shepherd though social spending---solves climate change.

Rosenstein 11-11 [Staff writer, Washington Blade, “Biden has won big twice-third win will come soon”, <https://www.washingtonblade.com/2021/11/11/biden-has-won-big-twice-third-win-will-come-soon/>]

Last week President Biden got a big win when the House passed the hard infrastructure bill. We shouldn’t forget it was his second big win; the first came in March when Democrats passed the Coronavirus Relief Bill. In the weeks ahead he will get his third big win when Democrats pass a version of the Build Back Better bill doing more for children, the elderly, the middle-class, and the poor; giving help to those living in rural communities. Democrats must remind people after four years of failed ‘infrastructure weeks’ under Trump and Republican control, President Biden delivered on his promise to work across the aisle and shepherded through a historic investment in our nation’s infrastructure. Democrats must stop talking about these bills in terms of cost and what was left out and rather talk about all the great programs in the bills and how they will lift people out of poverty, keep businesses from going under, and are rebuilding our economy. These bills are about creating jobs, the infrastructure bill alone will create 2 million good-paying new jobs a year for 10 years. It will allow us to rebuild our roads and bridges, and expand broadband so every American has access to high-speed internet. As President Biden said, “This bill is for the kids in rural communities who now have to do their homework in the McDonald’s parking lot because they don’t have WiFi. This bill is for families who have to boil their water to make it safe to drink. This bill is for those who rely on rail to get back and forth to work. This bill is for Americans who care about our climate. And yes, this bill is for the elderly man I met years ago in rural South Carolina, who just wanted his damn dirt road paved.” Most Americans, whatever their politics, agree it was past time to invest in rebuilding our nation’s infrastructure. They understand it is a major step in growing our economy and will give people in every community, large and small, rural and big cities, the chance to compete and succeed. Americans can now look forward to the Build Back Better Bill, which will go a long way in fighting climate change, keeping children out of poverty, provide universal early childhood education, help keep the elderly in their homes, reduce the cost of some drugs, and so much more. Recently Abigail Spanberger (D-Va.), a more moderate Democrat, spoke about President Biden saying to the New York Times, “Nobody elected him to be FDR they elected him to be normal and stop the chaos.” Well that is true for many voters who might just be happy they don’t have to wake up each morning to another nasty tweet, more craziness, and endless lies. Yet many Democrats, independents and Republicans voted for him to do that, but so much more. They can now celebrate President Biden and Democrats in Congress having done much more. They have passed, and will continue to pass, legislation giving all Americans a chance to succeed. They have lifted children out of poverty and given each parent hope for a better future for themselves and their children. They’ve given many a chance at a high-paying job and given all of us the chance to move on from the pandemic and return to a more normal life. Democrats need to move on from fighting each other, join hands, and fight Republicans who opposed doing any of this by opposing any legislation to help all Americans. They need to recognize the American public as a whole is moderate. They want change and to move forward but understand compromise. Democrats must find the right words to explain in detail what has been accomplished and how it will benefit families. To explain what Democrats have done by keeping their promise and making life a little better for all Americans. There is still much work to be done — defending a woman’s right to choose, passing voting rights legislation, and protections for all minorities including the LGBTQ community. In the next year Democrats must convince Americans they can only continue to move the country forward if they allow them to keep control of Congress.

#### Antitrust reform requires PC and trades off

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Prevents existential climate disaster

Moncrief 11-11 [Aliki; 2021; executive director of Florida Conservation Voters; Orlando Sentinel, “Build Back Better Act would help in climate crisis,” https://www.orlandosentinel.com/opinion/guest-commentary/os-op-climate-change-congress-act-now-20211111-44u6bgyn5fdvnp3eqievkebqpe-story.html]

Last week, Congress passed the Infrastructure Investment and Jobs Act. This bipartisan bill will address upgrades to things like our transportation system, rural broadband, public transit, and clean-water infrastructure. These are badly needed, overdue investments that will make our communities more resilient to the climate impacts we are already seeing. But we know much more is needed.

It’s not enough to just respond to extreme weather — we need to cut the pollution driving it in the first place. That’s why Congress must also pass the Build Back Better Act, the most transformational climate and jobs legislation in our nation’s history. By investing in clean energy and things like electric vehicles and more energy-efficient homes and businesses, we can stop making the problem worse and avoid a growing disaster. We don’t have time for half measures, and Floridians know it — more than 75% of registered voters in the state support bold congressional action on climate change.

The Build Back Better Act takes bold steps to dramatically reduce climate pollution for everyone. But it also centers those who have been disproportionately impacted by this crisis by taking steps to address the decades of unchecked environmental injustice, ensuring at least 40% of the benefits of this bill go to those communities hardest hit by pollution and climate change.

Building a clean energy economy is an investment that will pay dividends for families today and for generations to come. Preventing the most catastrophic hurricanes, floods and heat waves will help ensure that we still bring people from all over the world to our beaches, the Everglades, and every amazing destination across our state that supports our multi-billion dollar tourism industry.

And the robust clean-energy investments in the Build Back Better Act will create millions of good-paying jobs for Floridians in every corner of our state. Florida already ranks fourth in the nation for clean-energy employment, and this legislation would help this industry grow exponentially by tapping into the Sunshine State’s solar power potential.

Orlando has some great members of Congress who understand that climate change is an existential threat to our state and they ran on being a part of the solution to this crisis. Now, we are counting on them to take bold action and pass the Build Back Better Act. This is a win-win-win that creates jobs, lowers energy bills for Floridians, and begins to address the climate crisis at the same time.

## Innovation Adv

### Solvency---1NC

#### The plan is circumvented.

Rohit Chopra 20, Commissioner of the Federal Trade Commission, and Lina M. Khan, Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission, “The Case for "Unfair Methods of Competition" Rulemaking”, University of Chicago Law Review, 87 U. Chi. L. Rev. 357, March 2020, Lexis

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication "may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies." 7Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades. 8

#### Modifying PRE doesn’t solve multi-petition shams

Mah et al 20 [Scott Mah, Associate at Dorsney Whitney LLP; Jasdeep Kaur, Law Clerk - Gibson, Dunn & Crutcher LLP; Emily Marshall, Esquire; Michelle Wadolowski, Policy Analyst at APPRISE; Emily Wood, Senior Appellate Attorney · First District Court of Appeal, "Antitrust Violations," American Criminal Law Review 57, no. 3 (Summer 2020): 413-458, poapst]

In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., the Supreme Court established a two-part test to determine whether the "sham" exception applies.2 2 First, the suit must be objectively baseless in that no reasonable litigant could expect success on the merits.213 Second, the litigant must be using the governmental process itself, as opposed to the outcome of that process, to interfere directly with a competitor's business relationships.214 However, the Court has refused to recognize a "conspiracy" exception to liability under the doctrine for private citizens who conspire with public officials to eliminate competition.2 1 5 Four circuits-the Second, Third, Fourth, and Ninth-have reconciled California Motor and Columbia Pictures by concluding that they apply to different situations, namely that the former applies to a series of sham petitions while the latter applies to a single sham petition.216

### Squo Solves Innovation

#### The economy’s growing and innovating across every metric---it’s sustainable and resilient now

Asutosh Padhi 11-8, Managing Partner for McKinsey in North America, et al., 11/8/21, “A sustainable, inclusive, and growing future for the United States,” https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/a-sustainable-inclusive-and-growing-future-for-the-united-states

For all the United States’ economic frailties, vulnerable populations, and left-behind places, it can count on major strengths, including the resilience of its economy, the strength of its private sector, and a long tradition of innovation. On their own, the following assets will not be enough to generate sustainable and inclusive growth, but they are the essential tools needed to help the country do so:

A dynamic and resilient economy. Over the past two decades, the US economy has demonstrated remarkable resilience and dynamism. The United States rebounded from the 2008 financial crisis with robust aggregate employment growth, low inflation, and technological innovation that boosted entrepreneurship and sharply reduced prices for many consumer goods and services. Further, its economy is showing strong signs of recovery from the COVID-19 pandemic.

A robust market economy and private sector with a record of delivering. Despite the recent slowdown, US GDP per capita has more than doubled over the past 50 years, and its personal-consumption expenditure has almost tripled during that period. The domestic-business contribution to US GDP per capita has risen fourfold. Businesses account for 83 percent of US technology investment, 76 percent of US R&D investment, and 81 percent of US labor-productivity growth in the 21st century. And Americans are living longer and have more leisure time.

An unparalleled innovation engine. The United States is at the forefront of advanced technologies, from biotechnology to AI, with contributions from companies, universities, and government agencies. These technologies could be critical new sources of growth and potentially help further both inclusion and sustainability—with advances in climate science especially relevant for the latter. Innovation is not just taking place in laboratories: the COVID-19 crisis accelerated the adoption of new technologies. A McKinsey survey conducted in October 2020 found that that roughly half of the respondents reported increasing digitization of customer channels (such as through e-commerce, mobile apps, and chatbots), and two-thirds reported accelerating adoption of automation and AI.

Promising prospects for productivity growth. Evidence from some companies and sectors suggests that the United States can rebound from the COVID-19 pandemic with renewed vigor. Indeed, the pandemic accelerated trends that will likely have persistent effects with profound economic implications, hastening the potential for productivity gains—even in the sectors that have historically been slow to change. For example, in retail, with the exception of e-commerce players, companies had been slow to adopt digital sale strategies, doing so mostly as a way to complement Main Street retailing. That changed abruptly during the pandemic. It will take more companies and more sectors contributing to productivity to drive national-level productivity. If all US companies and key large sectors adopt the range of digital and productivity acceleration already seen during the pandemic, the nation could see around 1–1.5 percent higher growth across sectors over the next three years (Exhibit 5).

Prospect of robust demand in the near term, although it would need to be sustained. Stimulus programs related to the pandemic have boosted personal incomes and represent considerable savings ready to be spent. From March to April 2020 alone, the personal savings rate in the United States has shot up to nearly 34 percent, from 13 percent, and remained above 15 percent for most of the pandemic as households cut spending in the face of uncertainty. This large cache of accumulated savings and pent-up demand could drive growth momentum as people start to spend at prepandemic levels, assuming widespread vaccinations and a benign “COVID-19 exit” scenario.

Growing commitments to carbon and net zero. Looking ahead, the urgency of climate mitigation and adaptation is now more widely acknowledged in the United States and elsewhere, the resetting of government and corporate agendas is under way, green-tech costs are favorable and declining, and climate- and infrastructure-related investments can boost jobs. Many US companies are making net-zero commitments and beginning to develop plans to achieve them. Consumers may be more open to demanding more sustainable goods and services. According to a McKinsey survey in October 2020, for example, more than half of the consumers surveyed said they would buy more products with sustainable packaging if their pricing matched that of conventionally packaged ones.

Coming together on an inclusive economic agenda. Already before the COVID-19 pandemic, organizations were examining their stances regarding inclusion. For example, the US Business Roundtable revisited its purpose statement to put new emphasis on “an economy that serves all Americans,” broadening the scope from shareholders to a wider range of stakeholders.4 During the pandemic, the US social contract has been strengthened with massive state support to individuals, although it remains to be seen whether this will be a sustained change. Going forward, it will be important to harness the economic dynamism that already exists in minority communities.5 Public–private cooperation has been successful in many geographies, and technological adoption spurred by the pandemic offers new solutions—not just hybrid work but also digital finance and large-scale retraining programs.

### No Uncertainty

#### There’s no ambiguity---circuit splits have been reconciled by applying different doctrine to different situations.

Fordice et al. 21, J.D. candidate at the Georgetown University Law Center, “Antitrust Violations,” 58 Am. Crim. L. Rev. 563, Summer 2021, Lexis

[\*590] G. Petitioning the Government

In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., the Supreme Court held that any legitimate use of the political process is exempt from antitrust liability. 194In Noerr, a number of trucking companies sued a group of railroads for conspiring to monopolize the market for long-distance freight transportation via a public relations campaign to encourage laws detrimental to, and disparaging of, the trucking industry. 195The Supreme Court held that the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws, emphasizing that a potentially anticompetitive motive behind the petitioning was irrelevant to the analysis. 196The Court extended the protection to petitioning federal agencies in United Mine Workers of America v. Pennington, and reiterated the irrelevance of intent and purpose. 197

The Noerr-Pennington doctrine 198is premised on the idea that the antitrust laws may not infringe upon the First Amendment rights of citizens to petition their government. 199Specifically, the Supreme Court has concluded that the Sherman Act does not disqualify people from taking a public position to inform or influence government. 200 Thus, Noerr-Pennington immunity covers valid efforts to influence, through lobbying or litigation, the legislative, executive, 201 [\*591] and judicial 202branches of national, state, and local governments. 203 This is true even where a private party urges government action with anticompetitive intent or through wrongful conduct. 204

The "validity of such efforts, and thus the applicability of [ Noerr-Pennington] immunity, varies with the context and nature of the activity." 205 Noerr-Pennington immunity applies where anticompetitive conduct is the consequence of legislation or other government action 206 but not where anticompetitive conduct is the means for obtaining such action. 207 Accordingly, some circuits have held that certain Sherman Act violations, such as price-fixing agreements and boycotts, are not immunized merely because their objective was the enactment of favorable [\*592] legislation. 208 The Supreme Court has also refused to recognize a "conspiracy" exception to liability under the Noerr-Pennington doctrine for private citizens who conspire with public officials to eliminate competition. 209

The Noerr-Pennington doctrine does not immunize "sham" litigation--baseless litigation undertaken to impede competition. 210 This exception is grounded in the recognition, acknowledged by the Supreme Court in Noerr, that conduct purported to secure government action may be "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor [to which] application of the Sherman Act would be justified." 211 The Court explored the contours of this exception in California Motor Transportation Co. v. Trucking Unlimited, wherein a group of highway carriers alleged that rival carriers engaged in anticompetitive conduct by instituting a series of legal proceedings to defeat the former's applications for operating rights. 212 The complaint survived a First Amendment challenge because it alleged conduct that fell within Noerr-Pennington's sham exception. 213

In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., the Supreme Court established a two-part test to determine whether the "sham" exception applies. 214First, the suit must be objectively baseless such that no [\*593] reasonable litigant could expect success on the merits. 215Second, the litigant must be using the governmental process itself, as opposed to the desired outcome of that process, to interfere directly with a competitor's business relationships. 216 Four circuits--the Second, Third, Fourth, and Ninth--have reconciled California Motor and Columbia Pictures by concluding that they apply to different situations, namely that the former applies to a series of sham petitions while the latter applies to a single sham petition. 217

### Squo Solves Trolls

#### Squo solves---legislative and judicial reforms are curtailing patent trolls.

Timothy Holbrook 15, Professor of Law, Emory University, “Give existing reforms a chance to kill patent trolls,” The Conversation, 6/30/15, https://theconversation.com/give-existing-reforms-a-chance-to-kill-patent-trolls-44499

Two hundred twenty-five years ago, on July 31 1790, the first patent was issued in the United States. It covered a method of making a fertilizer ingredient, potash.

How times have changed! Over eight million patents later, we’ve moved from fertilizer to a revolution in genetics and digital technologies. Thousands of patents have been issued on computer software and methods of doing business.

Patents are supposed to encourage such dramatic innovation by providing inventors a limited period of time where they can exclude others from using their invention. Nevertheless, the law can struggle to keep up with new technologies. Software and business-method patents have created strain on the way our patent system operates. In particular, these patents have been frequently used by what critics have dubbed the “patent troll.”

Patent trolling for profit

What exactly are “patent trolls?” Their less pejorative appellation is Patent Assertion Entities (PAEs). PAEs generally are business entities that have only one asset, a patent. Typically they buy these patents from small inventors or bankrupt companies. PAEs don’t manufacture anything. Their entire business model is to threaten to sue people for patent infringement in hopes of getting licensing fees for the patent.

The PAE model is effective. Patent litigation is expensive for companies, costing potentially millions of dollars. Once sued by a PAE, many companies prefer to settle to avoid the cost, regardless of the merits of the case.

PAEs, on the other hand, have few litigation expenses. Their only asset is the patent, and often their lawyers take the case on a contingency fee basis, so the lawyer gets paid only if and when the money comes in. Settle the case, then move on to the next target.

A popular statistic thrown around is that 60% of United States patent lawsuits filed in 2013 were brought by PAEs, leading many to view PAEs as parasites.

Congress has reacted, with patent reform legislation on the verge of passing. The legislation is targeted at trolls and contains myriad provisions: creating standards for pleading a case far beyond other forms of litigation, making the loser pay in patent litigation and limiting discovery until the court has interpreted what the patent covers. There seems to be much enthusiasm for such reform, with reform bills making it out of committee in both the House and the Senate in a surprising show of bipartisanship.

Except, we don’t need it, at least not yet.

Legal changes already under way

The patent system is already in the throes of dramatic change, the impact of which we are only now beginning to feel.

Even in the two years since that 60% statistic, we’ve seen a sea change in patent law. To alter the patent landscape yet again risks undermining the value of all patents, not just the PAEs’. The proposed reforms are intended to chill abusive PAE activity, but they would have the same impact on small inventors and universities, who are also entities that don’t manufacture anything. Yet we would not consider them “trolls.”

The changes that have already taken place came from both Congress and the courts.

The Supreme Court, in particular, decided numerous cases in 2014 that could alter dramatically the ability of PAEs to operate. The court made it easier, for example, to force PAEs to pay their opponents’ attorney fees when the PAE loses, making trolls’ suits riskier and potentially less profitable.

Most importantly, the Supreme Court’s decision in Alice Corporation v CLS Bank has dramatically altered the law governing which types of inventions are eligible for patent protection.

Alice invalidated a particular business method – a way to reduce the risk in a financial transaction of one party not carrying through on the agreement. The Supreme Court concluded that the method was merely an “abstract idea.” The patent in essence claimed the idea of avoiding these risks and merely used conventional computer technology to achieve it. According to the Supreme Court, that is not enough to constitute a patentable invention.

The Supreme Court’s decision has created a flood of other decisions invalidating patents on similar inventions, along with those relating to computer software, because courts view them as merely abstract ideas that are being implemented through routine mechanisms. The US Court of Appeals for the Federal Circuit – the court hearing all patent appeals across the country – has found only one patent valid on these grounds in the post-Alice world, invalidating numerous others. These are the areas in which PAEs often operate, and many of their patents are now likely dead.

For its part, Congress substantially reworked the patent system in 2011 when it passed the America Invents Act (AIA).

Among other changes, the AIA created new procedures at the United States Patent and Trademark Office (USPTO) that provide alternatives for challenging patents that are faster and cheaper than litigation.

In particular, the AIA created the “Covered Business Method” (CBM) procedure that targets business-method patents, the favorite playground of PAEs.

Changes need time to percolate through the system

The CBM procedure began in September 2012. These proceedings can take some time, so we are only now beginning to see the fruits of this and other new procedures at the USPTO. Indeed, the Federal Circuit just decided its very first appeal from a CBM proceeding on July 9.

While these proceedings are proving to be popular with parties seeking to challenge patents, the cases are only now making their way through the USPTO and on to the Federal Circuit. Many uncertainties remain about their impact, but all signs suggest these proceedings are meeting, if not exceeding, expectations as a cheaper alternative to challenge bad patents, including those in the hands of PAEs.

As a result of these legislative and judicial actions, the patent system is already in a state of flux, and much of the change is directed to PAE abuses. So why mess with things now?

Of course, when litigants abuse the patent system, it is costly to everyone, and undoubtedly some PAEs are abusing the system. But Congress should be sure that new reforms don’t do more harm than good. Further congressional action now of the wrong kind could reduce the value of patents if it makes it too costly or risky to enforce legitimate patents.

One of the first things we are taught in drivers’ education is that over-correcting the steering wheel can actually be worse than merely staying the course. Congress’ well-meaning legislative proposals run the risk of acting prematurely and over-correcting the patent system, potentially driving it off the road.

### A2: Innovation !

#### No internal to innovation as of the 1AC

#### Innovation doesn’t solve every existential threat---no scenario for it.

### No Asteroids Impact---1NC

#### No asteroids and it wouldn’t cause extinction

Inigo Monzon 9-2, Reporter at the IBT, quoting Dr. Lewiss Dartnell, Professor of Science Communication at the University of Westminster, Doctor of Philosophy in Astrobiology at University College London, “Scientist Reveals Truth About Earth’s Chances Of Surviving An Asteroid Impact”, International Business Times, 9/2/2019, https://www.ibtimes.com/scientist-reveals-truth-about-earths-chances-surviving-asteroid-impact-2820951

Dr. Lewiss Dartnell, a professor of science communication, believes that humans have a very good chance of enduring an asteroid impact. Despite what happened to the dinosaurs 66 million years ago, Dartnell thinks that humans are not in danger of going extinct due to an asteroid strike.

The professor noted that in order to wipe out all life on Earth, an asteroid has to be hundreds or even thousands of kilometers long. Although NASA has already detected and identified asteroids that are certainly big enough to kill planets, the agency noted that none of these are currently on a collision course with Earth.

“The Earth is not going to be destroyed by an asteroid,” Dartnell told Mashable India. “Alright, so a different question might be, could all life on Earth be driven to extinction by asteroids?”

“Again, the answer would be that no,” he continued. “There’s no asteroid big enough that on a collision with the Earth could do that.”

Dartnell, however, believes that there asteroids out there that can easily take out cities. Despite this, he still believes that chances of city-killers hitting Earth are very slim.

One of the currently known asteroids that are capable of destroying entire cities is Apophis. Scientists once thought that his asteroid, which measures about 1,214 feet long, was in danger of colliding with Earth in the next decade.

However, after follow-up observations, space agencies ruled out a possible collision between Apophis and Earth in the near future.

“If we were very, very unlucky, and they strike over a major city, then they could destroy the city,” Dartnell said. “But the chances of that happening are very unlikely.”

“Asteroid Apophis is one of the asteroids that we are tracking and we know that it is not going to impact for the next few decades and will continue on trail,” the professor added.

Aside from the asteroid’s slim chances, space agencies from various countries are hatching their own plans to save Earth from getting hit by a massive space boulder.

## Lobbying Advantage---1NC

### Citizens United A/C---1NC

#### Citizens united thumps

Adam Winkler 21, Connell Professor of law at the UCLA School of Law, “How American Corporations Used Courts and the Constitution to Avoid Government Regulation,” 2/12/21, ProMarket, https://promarket.org/2021/02/12/corporations-supereme-court-constitution-avoid-regulation/

Since the early days of the Republic, corporations have turned the Constitution itself into a shield against unwanted regulation of the economy. So long as the Supreme Court adheres to the view that corporate speech is no different than any other speech, any reform designed to limit the influence of corporations on the electoral process is vulnerable.

Editor’s note: This piece is part of our series on Corporations and Democracy, designed to continue the conversation initiated at a December 2020 conference by the same name sponsored by the Corporations and Society Initiative at Stanford GSB, and eight other schools and centers, including the Stigler Center at the University of Chicago Booth School of Business. See the conference’s website for a summary of the event, the program, full videos, and other links.

American politics and elections received a shock in 2010 when the US Supreme Court handed down its landmark decision in Citizens United, which said that corporations have the same First Amendment right as individuals to spend money on election advertisements. The decision triggered a new era of “dark money”—hidden, anonymous funds used to support candidates and skirt campaign disclosure laws—and has become a symbol of the outsized influence of business corporations on American democracy.

One reason for the power of American business that has often been overlooked is the long history of Supreme Court decisions, like Citizens United, extending the Constitution’s most fundamental rights to corporations.

When Americans think of corporate power, they might conjure up an image of something like “Bosses of the Senate,” the famous late 19th century political cartoon by Joseph Keppler that shows a dozen colossal businessmen filing into the United States Senate through a doorway marked “Entrance for Monopolists.” The corpulent businessmen, labelled “Standard Oil Trust,” “Cooper Trust,” and “Sugar Trust,” tower over the Lilliputian senators, who are helpless against the corporate behemoths of the day. The power of corporations was political: they used their money and influence to dominate legislators and win favorable legislation.

Yet, throughout American history, corporations have also built and maintained their power through the courts and the judiciary. They have turned the Constitution itself into a shield against unwanted regulation of the economy.

It certainly did not begin with Citizens United. The first Supreme Court case on whether business corporations had rights under the Constitution was decided all the way back in 1809. To put that in perspective, the first Supreme Court cases on the rights of African Americans and women weren’t decided for another half-century (1857 and 1873, respectively). Americans are taught the Supreme Court is a bulwark for the protection of vulnerable minorities but African Americans and women lost most of their Supreme Court cases until the mid-20th century. In contrast, the corporation involved in the first corporate rights case, the Bank of the United States, won. And corporations have been winning an ever-expanding number of constitutional rights since—rights they use to challenge laws, enacted in the public interest, that regulate business. If the Bosses of the Senate fail to control the legislatures, there is always the Constitution and the courts to save them.

In the early 1800s, the Bank of the United States was the richest and most powerful corporation in the country. Nearly all American businesses were local concerns at the time, but the Bank of the United States was a truly national corporation, with branches from Boston to New Orleans. Due to its size and influence over the economy, the Bank of the United States spurred passionate opposition. In Georgia, opponents of the bank imposed a special tax on bank in an effort to force it to leave the state, and the bank sought refuge in the federal courts.

The Bank of the United States’ case presented a familiar question to critics of Citizens United: Are corporations people? Or, more specifically, are corporations “Citizens” under Article III of the Constitution? That provision effectively provides citizens a right to sue in federal court when they sue citizens of other states. This provision reflected the Framers’ fear that a state court might favor that state’s own residents over litigants from other states. The Bank of the United States, headquartered in Philadelphia, argued that it too would be prejudiced if forced to litigate the lawfulness of Georgia’s popular tax in Georgia’s state courts.

There was no evidence the Framers intended the Constitution to protect business corporations. The rights of corporations were never discussed at the Constitutional Convention or in the state ratifying conventions. Nonetheless, the Supreme Court, in an opinion by legendary Chief Justice John Marshall, ruled that the Bank of the United States did have the right to sue in federal court. Although corporations were not “citizens” as required by Article III, Marshall explained that the Constitution should be read expansively: “A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.” The bank, and the people behind it, were entitled to the protection against parochial state courts. The Bank of the United States case was an early example of living constitutionalism and big, wealthy corporations—not vulnerable minorities—were the beneficiaries.

“SO LONG AS THE SUPREME COURT ADHERES TO THE VIEW THAT CORPORATE SPEECH IS NO DIFFERENT THAN ANY OTHER SPEECH, ANY REFORM DESIGNED TO LIMIT THE VOICE OF CORPORATIONS IN THE ELECTORAL PROCESS IS VULNERABLE.”

In the two centuries since that first corporate rights case, business corporations have won nearly every other constitutional protection a corporation could want: freedom of speech, freedom of the press, freedom of religion, due process of law, the right to compensation for property taken by the government, the right against double jeopardy, and the right to be free from unreasonable searches and seizures, among others. The most controversial is the right to political speech recognized by the Supreme Court in Citizens United.

Business corporations first sought to establish that right nearly a century before Citizens United. Among the very first campaign finance laws were prohibitions on corporate spending on elections, enacted at the federal level in 1907 and in numerous states in the surrounding years. In the 1910s, when states were voting on whether to go “dry” in the runup to Prohibition, beer companies contributed to the opposition campaigns. When charged with violating campaign finance laws, the companies and their executives argued that the restrictions on corporate spending were unconstitutional. The courts, however, uniformly upheld the laws, with one explaining that corporations “must at all times be held subservient to the government and the citizenship of which it is composed.” To promote democratic self-government, government could limit corporate influence in elections.

Courts were willing to extend some rights to corporations but not all. The line they hewed to a century ago was that corporations were entitled to property rights but not liberty rights. Corporations were allowed to own property and the government could not take it without paying just compensation. They had basic due process and access to court rights that were essential to protecting their property. But corporations did not have liberty rights—i.e., rights of bodily autonomy, personal conscience, or political speech.

The boundary between property rights and liberty rights for corporations did not hold for long. In the 1930s, the Supreme Court ruled that newspaper companies were covered by the First Amendment’s freedom of the press even though they were corporations – and even though their publications were often political. In the 1960s, in the landmark case of New York Times v. Sullivan, the justices established the right to criticize public figures, and corporations like the New York Times Company enjoyed that right too. Then, in the 1978, in First National Bank of Boston v. Bellotti, the Supreme Court for the first time ruled explicitly that corporations had a right to spend money on at least some political campaigns.

The justice leading the charge in the 1978 case was Lewis Powell Jr. Just prior to joining the high court in 1971, Powell, then a board member of tobacco giant Philip Morris, had written a memorandum to the Chamber of Commerce outlining a program for the political mobilization of business. It was the era of Ralph Nader, and Congress had recently enacted groundbreaking legislation to protect the environment, consumer products, and highway safety. Powell thought reformers were unfairly targeting American business and his memorandum was a call to arms for business leaders to fight back to preserve the free market. The Powell Memorandum was widely shared, and today historians often credit it with inspiring the resurgence of politically active businesses in the 1980s and beyond.

In the Bellotti case, Powell transformed his memorandum into constitutional doctrine. The issue was whether corporations could make political expenditures to promote or oppose ballot measure campaigns. Writing for the Court, Powell rejected the dissenting justices’ complaint that the Court was extending to corporations broad free speech rights. Powell wrote that the issue was not whether corporations had free speech rights but whether the content of the corporations’ speech was political. If so, Powell explained, then the speech was protected regardless of who the speaker was.

The Bellotti ruling was limited; it only applied to ballot measure campaigns and, in a footnote, Powell suggested that campaigns for candidates were different. As a result, campaign finance laws restricting corporations from spending to elect officials remained good law. But Powell’s underlying approach to the First Amendment—that it protected the content of speech regardless of the speaker’s identity—would eventually overwhelm Bellotti’s limitations.

Perhaps surprising in light of the rhetoric of Citizens United’s critics, the Court in that case never said that corporations are people. Instead, the Court’s opinion echoed Powell’s principle that the identity of the speaker is irrelevant under the First Amendment. “Political speech is indispensable to decision-making in a democracy and this is no less true because the speech comes from a corporation rather than an individual.” It was a far cry from the courts of a century ago. To promote democratic self-government, government could not limit corporate influence in elections.

So long as the Supreme Court adheres to the view that corporate speech is no different than any other speech, any reform designed to limit the voice of corporations in the electoral process is vulnerable. There is every reason to suspect that each of the three Trump justices would affirm— if not expand—Citizens United. As a result, new campaign finance restrictions on corporations are likely to be struck down. Special rules for corporate political spending (such as shareholder consent requirements) may not be sufficiently neutral if only political speech is burdened. A constitutional amendment, of course, avoids the Supreme Court but faces daunting hurdles to ratification.

Mobilizing for a constitutional amendment or other legislation can, nonetheless, be useful for building political momentum for the cause of reform. The Supreme Court is not destined to be pro-corporate forever, so the job of reformers now is to formulate the arguments, do the research, and create a broader understanding of what they view as the proper role of corporations in society. And reformers should take a lesson from the corporations: constitutional revolutions are possible but may take centuries of persistent effort.

### No Populism Impact---1NC

Alt causes like Brazil, Turkey, and the UK but that proves there’s no impact

#### Global populism won’t cause war

Niall Ferguson 16, Senior Fellow at Stanford University’s Hoover Institution, Senior Fellow of the Center for European Studies at Harvard University, and Visiting Professor at Tsinghua University in Beijing, Autumn 2016, “Populism as a Backlash against Globalization - Historical Perspectives,” <https://www.cirsd.org/en/horizons/horizons-autumn-2016--issue-no-8/populism-as-a-backlash-against-globalization>

Such comparisons between the United States today and Germany in the 1930s are becoming commonplace. As a professional historian, I would like to offer what seems to me a better analogy. Our Tranquil Times Journalists are fond of saying that we are living in a time of “unprecedented” instability. In reality, as numerous studies have shown, our time is a period of remarkable stability in terms of conflict. In fact, viewed globally, there has been a small uptick in organized lethal violence since the misnamed Arab Spring. But even allowing for the horrors of the Syrian civil war, the world is an order of magnitude less dangerous than it was in the 1970s and 1980s, and a haven of peace and tranquility compared with the period between 1914 and 1945. This point matters because the defining feature of interwar fascism was its militarism. Fascists wore uniforms. They marched in enormous and well-drilled parades and they planned wars. That is not what we see today. So why do so many commentators feel that we are living through “unprecedented instability?” The answer, aside from plain ignorance of history, is that political populism has become a global phenomenon, and established politicians and political parties are struggling even to understand it, much less resist it. Yet populism is not such a mysterious thing, if one only has some historical knowledge. The important point is not to make the mistake of confusing it with fascism, which it resembles in only a few respects. Rather like a television chef, I shall describe a recipe for populism, based on historical experience. It is a simple recipe, with just five ingredients. Five Ingredients for A Populist Backlash The first of these ingredients is a rise in immigration. In the past 45 years, the percentage of the population of the United States that is foreign-born has risen from below 5 percent in 1970 to over 13 percent in 2014—almost as high as the rates achieved between 1860 and 1910, which ranged between 13 percent and an all-time high of 14.7 percent in 1890. So when people say, as they often do, that “the United States is a land based on immigration,” they are indulging in selective recollection. There was a period, between 1910 and 1970, when immigration drastically declined. It is only in relatively recent times that we have seen immigration reach levels comparable with those of a century ago, in what has justly been called the first age of globalization. Ingredient number two is an increase in inequality. Drawing on the work done on income distribution by Thomas Piketty and Emmanuel Saez, we can see that we have recently regained the heights of inequality that were last seen in the pre-World War I period. The share of income going to the top one percent of earners is back up from below 8 percent of total income in 1970 to above 20 percent of total income. The peak before the financial crisis, in 2007, was almost exactly the same as the peak on the eve of the Great Depression in 1928. Ingredient number three is the perception of corruption. For populism to thrive, people have to start believing that the political establishment is no longer clean. Recent Gallup data on public approval of institutions in the United States show, among other things, notable drops in the standing of all institutions save the military and small businesses. Just 9 percent of Americans have “a great deal” or “quite a lot” of confidence in the U.S. Congress—a remarkable figure. It is striking to see which other institutions are down near the bottom of the league. Big business is second-lowest, with just 21 percent of the public expressing confidence in it. Newspapers, television news, and the criminal justice system fare only slightly better. What is even more remarkable is the list of institutions that have fallen furthest in recent times: the U.S. Supreme Court now has just a 36 percent approval rating, down from a historical average of 44 percent, while the Presidency has dropped from 43 percent to 36 percent approval. The financial crisis appears to have convinced many Americans—and not without good reason—that there is an unhealthy and likely corrupt relationship between political institutions, big business, and the media. The fourth ingredient necessary for a populist backlash is a major financial crisis. The three biggest financial crises in modern history—if one uses the U.S. equity market index as the measure—were the crises of 1873, 1929, and 2008. Each was followed by a prolonged period of depressed economic performance, though these varied in their depth and duration. In the most recent of these crises, the peak of the U.S. stock market was October 2007. With the onset of the financial crisis, we essentially replayed for about a year the events of 1929 and 1930. However, beginning in mid to late 2009, we bounced out of the crisis, thanks to a combination of monetary, fiscal, and Chinese stimulus, whereas the Great Depression was characterized by a deep and prolonged decline in stock prices, as well as much higher unemployment rates and lower growth. The first of these historical crises is the least known: the post-1873 “great depression,” as contemporaries called it. What happened after 1873 was nothing as dramatic as 1929; it was more of a slow burn. The United States and, indeed, the world economy went from a financial crisis—which was driven by excessively loose monetary policy and real estate speculation, amongst other things—into a protracted period of deflation. Economic activity was much less impaired than in the 1930s. Yet the sustained decline in prices inflicted considerable pain, especially on indebted farmers, who complained (in reference to the then prevailing gold standard) that they were being “crucified on a cross of gold.” We have come a long way since those days; gold is no longer a key component of the monetary base, and farmers are no longer a major part of the workforce. Nevertheless, in my view, the period after 1873 is much more like our own time, both economically and politically, than the period after 1929. There is still one missing ingredient to be added. If one were cooking, this would be the moment when flames would leap from the pan. The flammable ingredient is, of course, the demagogue, for populist demagogues react vituperatively and explosively against all of the aforementioned four ingredients. Kearney’s Cause Now, my argument is not intended to dismiss or downplay those elements of Donald Trump’s campaign for President of the United States that have been implicitly, if not explicitly, racist. Nor do I treat lightly the various signals he has given of indifference to, or at least ignorance of, the U.S. Constitution. My point is that these demerits do not by themselves qualify Trump for comparison with Mussolini, much less with Hitler. Rather, I want to argue that Trump has much more in common with the demagogues of the earlier, lesser depression of the late nineteenth century, and that it is to that period that we should look for historical analogies and insights. The best illustration of my case is the now forgotten figure of Denis Kearney, leader of the Workingmen’s Party of California and the author of the slogan “The Chinese Must Go!” Himself an Irish immigrant to the United States—as opposed to the son of a Scottish immigrant and grandson of a German, which is what Donald Trump is—Kearney was part of a movement of nativist parties and “Anti-Coolie” clubs that sought to end Chinese immigration into the United States. The report of the Joint Special Committee to Investigate Chinese Immigration in 1877 gives a flavor of the times. “The Pacific coast must in time become either Mongolian or American,” was the committee’s view. The report argued that the Chinese brought with them the habits of despotic government, a tendency to lie in court, a weakness for tax evasion and “insufficient brainspace […] to furnish [the] motive power for self-government.” Moreover, Chinese women were “bought and sold for prostitution and treated worse than dogs,” while the Chinese were “cruel and indifferent to their sick.” Giving such inferior beings citizenship, the committee’s report declared, “would practically destroy republican institutions on the Pacific coast.” The realities were, it scarcely needs to be said, very different. According to the “Six Companies” of Chinese in San Francisco—corporate bodies that represented the Chinese population of the city—there was compelling evidence that Chinese immigration was a boon to California. Not only did the Chinese provide labor for the state’s rapidly developing railroads and farms; they also tended to improve the neighborhoods in which they settled. Moreover, there was no evidence of a disproportionate Chinese role in gambling and prostitution. In fact, statistics showed that the Irish were more of a charge on the city’s hospital and almshouse than the Chinese. Nevertheless, a powerful coalition of “laboring men and artisans,” small businessmen and “grangers” (the term used to describe those who aimed to shift the burden of taxation onto big business and the rich) rallied to Kearney’s cause. As one shrewd contemporary observer noted, part of his appeal was that he was attacking not just the Chinese, but also the big steamship and railroad companies that profited from employing Chinese labor, not to mention the corrupt two-party establishment that ran San Francisco politics: Neither Democrats nor Republicans had done, nor seemed likely to do, anything to remove these evils or to improve the lot of the people. They were only seeking (so men thought) places or the chance of jobs for themselves, and could always be bought by a powerful corporation. Working men must help themselves; there must be new methods and a new departure […] The old parties, though both denouncing Chinese immigration in every convention they held, and professing to legislate against it, had failed to check it […] Everything, in short, was ripe for a demagogue. Fate was kind to the Californians in sending them a demagogue of a mean type, noisy and confident, but with neither political foresight nor constructive talent. Kearney may have lacked foresight and “constructive talent,” but there is no gainsaying what he and his ilk were able to achieve. Beginning with the Page Law (1875) prohibiting the immigration of Asian women for “lewd or immoral purposes,” American legislators scarcely rested until Chinese immigration to the United States had been stopped altogether. The Chinese Exclusion Act (1882) suspended immigration of Chinese for 10 years, introduced “certificates of registration” for departing laborers (effectively re-entry permits), required Chinese officials to vet travelers from Asia, and, for the first time in American history, created an offense of illegal immigration, with the possibility of deportation as a part of the penalty. The Foran Act (1885) banned all contract laborers from immigrating to America. Legislation passed in the Scott Act (1888) banned all Chinese from travel to the United States except “teachers, students, merchants, or travelers for pleasure.” In all, between 1875 and 1924, more than a dozen pieces of legislation served to restrict and finally end altogether Chinese immigration. No one should therefore underestimate the power of populism. For all his coarseness and bombast, Denis Kearney and his allies effectively sealed the American border along the Pacific coast of the United States; indeed, one cartoon of the time depicted them constructing a wall across the San Francisco harbor. In the 1850s and 1860s, as many as 40 percent of all Chinese emigrants had travelled beyond Asia, though the numbers arriving in the United States had in fact been relatively small (between 1870 and 1880, a total of 138,941 Chinese immigrants came, just 4.3 percent of the total, a share dwarfed by the vast European exodus across the Atlantic in the same period). What exclusion did ensure in the late nineteenth was that Chinese immigration would not grow, as it surely would have, but instead dwindled and then ceased. Ironies Populism, then, is not just a form of political entertainment. One sometimes hears it said of Donald Trump: “Ah, he says wild things on the campaign trail, but when he is president it will be fine.” History suggests otherwise. It suggests that men who threaten to restrict immigration—as well as to impose tariffs and to discourage capital export, as populists generally do—mean what they say. Indeed, populists are under a special compulsion to enact what they pledge in the campaign trail, for their followers are fickle to begin with. In the case of Trump, most have already defected from the Republican Party establishment. If he fails to deliver, they can defect from him, too. Of course, populists are bound eventually to disappoint their supporters. For populism is a toxic brew as well as an intoxicating one. Populists nearly always make life miserable for whichever minorities they chose to scapegoat, but they seldom make life much better for the people whose ire they whip up. Whatever the demagogues may promise—and they always promise “jam today”—populism tends to have significantly more economic costs than benefits. Restricting immigration, imposing tariffs on imported goods, penalizing firms for investing abroad: such measures, if adopted by an American government in 2017, would be almost certain to reduce growth and employment, rather than the reverse. That has certainly been the Latin American experience—and few regions of the world have run the populist experiment more often. The foreign dimension brings us to a final irony. Despite their habitual insistence on narrow national self-interest, populists are nearly always part of a global phenomenon. Globalization had been making enormous strides prior to 1873, with world trade, migration, and international capital flows growing at unprecedented rates. But the crisis of that year generated a populist backlash against globalization that was itself global in its scope. Then, just as now, the principal targets of the demagogues were immigration, free trade, and high finance. Just as the United States excluded immigrants and raised tariffs, so did European countries by adopting similar discriminatory measures. In Bismarck’s Germany, populism was often antisemitic—as it was in the France of the Dreyfus Affair—while in late Victorian Britain it was anti-Irish. Tariffs went up almost everywhere except in Britain. Populism today has a similarly global quality. In June, the British vote to leave the European Union was hailed by populists right across the European continent as well as by Donald Trump in the United States and, implicitly, by Vladimir Putin in Russia. Yielding to the Complicators Let me conclude with a note of qualified optimism. Because populism is not fascism, populist victories should not be construed as harbingers of war—if anything, the opposite is true. In the 1870s and 1880s, populists did achieve significant reductions in globalization: not only immigration restrictions, but also higher tariffs. But they did not form many national governments, and they did not subvert any constitutions. Nor were populists much interested in starting wars; if anything, they lent towards isolationism and viewed imperialism as just another big business racket. In most countries, the populist high tide was in the 1880s. What came next—in many ways as a reaction to populism, but also as an alternative set of policy solutions to the same public grievances—was Progressivism in the United States and socialism in Europe. Perhaps something similar will also happen in our time. Perhaps that is something to look forward to. Nevertheless, we would do well to remember that World War I broke out during the progressive not the populist era. The world today is, as I observed at the outset, in much less turmoil than one might infer from television news. Nevertheless, the economic and social consequences of globalization and the most recent financial crisis sowed the seeds for the populist backlash that we now see. Populists are not fascists. They prefer trade wars to actual wars; administrative border walls to more defensible fortifications. The maladies they seek to cure are not imaginary: uncontrolled rising immigration, widening inequality, free trade with “unfree” countries, and political cronyism are all things that a substantial section of the electorate have some reason to dislike. The problem with populism is that its remedies are wrong and, in fact, counterproductive. What we most have to fear—as was true of Brexit—is not therefore Armageddon, but something more prosaic: an attempt to reverse certain aspects of globalization, followed by disappointment when the snake oil does not really cure the patient’s ills, followed by the emergence of a new and ostensibly more progressive set of remedies for our current malaise. The “terrible simplifiers” may have their day then. But they will end up yielding power to well-intentioned complicators, those more congenial to educated elites, but probably every a bit as dangerous, if not more so.

## Citizen Petition

### 1NC---Squo Solves

#### Squo solves generic uptake.

Christine S. Wilson & David A. Hyman 20, Wilson is a commissioner of the Federal Trade Commission. Hyman is the Scott K. Ginsburg Professor of Health Law & Policy at Georgetown University School of Law and former commissioner of the Federal Trade Commission, 7-10-2020, "Pharma pricing is a problem, but antitrust isn't the (only) solution," The Hill, https://thehill.com/blogs/congress-blog/healthcare/506763-pharma-pricing-is-a-problem-but-antitrust-isnt-the-only?rl=1

As current and former FTC officials, we believe these proposals represent a flawed approach. The notion that the FTC should **prevent mergers absent evidence** of an **antitrust violation** is deeply misguided – and jeopardizes the FTC’s impressive winning streak based on the many cases it has brought. During the past five years, the Commission has challenged 14 pharmaceutical mergers and required companies to divest 131 drugs. Beyond mergers, in 2013 the FTC won a landmark victory at the Supreme Court in FTC V. Actavis, essentially eliminating anticompetitive patent litigation settlements. And in January, the FTC sued Vyera Pharmaceuticals and “pharma bro” Martin Shkreli. These efforts result in massive savings for consumers and taxpayers; just ending reverse payments in patent litigation settlements saves $3.5 billion each year.

Still, **drug prices continue to rise**, especially for new drugs debuting at prices once considered unimaginable. For example, Zolgensma, a gene therapy for treating spinal muscular atrophy, has a list price of $2.1 million. Cancer drugs are so expensive that oncologists talk about “financial toxicity” as a side effect of treatment.

This is a particularly knotty problem for the elderly who receive health care coverage through Medicare and have been hard hit by COVID-19. The government is **prohibited** from using competitive bidding or direct **negotiation** when sourcing drugs for **Medicare Part B** — those administered by medical professionals. So drugmakers name their price and the federal government **must pay**.

Medicare **Part D** operates under a different model – companies use formularies to push down prices for outpatient drugs. Even that model **falls short** for drugs that do not yet face competition, and Part D is projected to cost more than $88 billion in 2020. Market exclusivity on so-called biologics like vaccines and insulin often **outlasts patent protection**, given the technological **challenges in creating** bioequivalent **generics** known as biosimilars. Incumbents often compound this problem by **restrict**ing **distribution** and **withhold**ing samples from **potential competitors**.

We support **efforts** **to** address rising drug prices **while** maintaining strong incentives for innovation. Strategies **include** the new CREATES Act, which allows drug makers to **sue for** access to **drug samples**; expedited or automatic approval for biosimilars that have passed muster with the European Medicines Agency; and incentivizing innovation with prizes.

As this list indicates, many **causes of** breathtaking **pharma prices** **lie** beyond the reach of the antitrust **laws**. Notably, the structure of the U.S. health care system inhibits consumers’ ability and incentive to **choose** among different providers and products, including prescription drugs. Because insurers pick up much of the tab, patients have little incentive to compare the prices of potentially interchangeable drugs. Even if they were so inclined, the opacity of drug prices and dearth of data available to patients about quality and outcomes inhibits comparison shopping.

To fix the **root cause**s of high pharma prices, we should focus on the drivers of those prices rather than scrapping fundamental antitrust **doctrine**, including the requirement for evidence of an actual competitive problem.

### Aging Crisis D---AT: War

#### Aging doesn’t cause conflict

Mark L. Haas 17, Department of Political Science, Duquesne University, July 2017, “Population Aging and International Conflict,” <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-589>

How is the near worldwide phenomenon of population aging likely to affect international relations (IR)? Most scholars who have examined this issue have linked the potential effects created by aging to established IR theories. Most analyses that have developed around the issue of aging, in other words, have not created new theoretical approaches to the study of international politics. They have instead argued that aging is likely to affect key variables associated with existing IR theories, which will then tend to generate particular outcomes based on these theories’ predictions. The IR theories that studies of populating aging have most frequently tied into include ones from realist, diversionary war, and constructivist research programs. Many of the arguments that link the effects of aging to these theories reach opposite conclusions, with some predicting a much higher probability of international conflict due to aging, others the reverse. There are, however, very few empirical analyses that test these competing hypotheses, largely because aging is such a new phenomenon.

### No Pandemics Impact---1NC

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill

more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

### AT: Meat

#### Farming is rapidly becoming sustainable---all environmental metrics are improving

Michael Shellenberger 20, Founder and President of Environmental Progress, Former President of the Breakthrough Institute, Apocalypse Never: Why Environmental Alarmism Hurts Us All, ISBN: 0063001705,9780063001701

As farms become more productive, grasslands, forests, and wildlife are returning. Globally, the rate of reforestation is catching up to a slowing rate of deforestation.19

Humankind’s use of wood has peaked and could soon decline significantly.20 And humankind’s use of land for agriculture is likely near its peak and capable of declining soon.21 All of this is wonderful news for everyone who cares about achieving universal prosperity and environmental protection.

The key is producing more food on less land. While the amount of land used for agriculture has increased by 8 percent since 1961, the amount of food produced has grown by an astonishing 300 percent.22

Though pastureland and cropland expanded 5 and 16 percent, between 1961 and 2017, the maximum extent of total agriculture land occurred in the 1990s, and declined significantly since then, led by a 4.5 percent drop in pastureland since 2000.23 Between 2000 and 2017, the production of beef and cow’s milk increased by 19 and 38 percent, respectively, even as total land used globally for pasture shrank.24

The replacement of farm animals with machines massively reduced land required for food production. By moving from horses and mules to tractors and combine harvesters, the United States slashed the amount of land required to produce animal feed by an area the size of California. That land savings constituted an astonishing one-quarter of total U.S. land used for agriculture.25

Today, hundreds of millions of horses, cattle, oxen, and other animals are still being used as draft animals for farming in Asia, Africa, and Latin America. Not having to grow food to feed them could free up significant amounts of land for endangered species, just as it did in Europe and North America.

As technology becomes more available, crop yields will continue to rise, even under higher temperatures. Modernized agricultural techniques and inputs could increase rice, wheat, and corn yields five-fold in sub-Saharan Africa, India, and developing nations.26 Experts say sub-Saharan African farms can increase yields by nearly 100 percent by 2050 simply through access to fertilizer, irrigation, and farm machinery.27

If every nation raised its agricultural productivity to the levels of its most successful farmers, global food yields would rise as much as 70 percent.28 If every nation increased the number of crops per year to its full potential, food crop yields could rise another 50 percent.29

Things are headed in the right direction regarding other environmental measures. Water pollution is declining in relative terms, per unit of production, and in absolute terms in some nations. The use of water per unit of agricultural production has been declining as farmers have become more precise in irrigation methods.

High-yield farming produces far less nitrogen pollution run-off than lowyield farming. While rich nations produce 70 percent higher yields than poor nations, they use just 54 percent more nitrogen.30 Nations get better at using nitrogen fertilizer over time. Since the early 1960s, the Netherlands has doubled its yields while using the same amount of fertilizer.31

High-yield farming is also better for soils. Eighty percent of all degraded soils are in poor and developing nations of Asia, Latin America, and Africa. The rate of soil loss is twice as high in developing nations as in developed ones. Thanks to the use of fertilizer, wealthy European nations and the United States have adopted soil conservation and no-till methods, which prevent erosion. In the United States, soil erosion declined 40 percent in just fifteen years, between 1982 and 1997, while yields rose.32

# 2NC/1NR

# 2NC – Doubles Wake

## CP

#### BUT the aff doesn’t solve---1AC Caspers --- we’re yellow

Nicholas Caspers 21. 3-29-21. Associate Editor on the Michigan Technology Law Review . “Patent Trolls Show Immunity to Antitrust: Patent Trolls Unscathed by Antitrust Claims from Tech-Sector Companies” <https://mttlr.org/2021/03/patent-trolls-show-immunity-to-antitrust-patent-trolls-unscathed-by-antitrust-claims-from-tech-sector-companies/>

Patent trolls have become a prominent force to be reckoned with for tech-sector companies in the United States, and tech-sector companies’ recent failure in using antitrust law to combat patent trolls indicates a continuation of that prominence. **Patent trolls have been quite the thorn in the side of tech-sector companies**. The term “patent troll” is the pejorative pop culture title for the group of firms also known as non-practicing entities, patent assertion entities, and patent holding companies. These entities buy patents, not with the purpose of utilizing the patent’s technology, but with the purpose of suing companies for patent infringement. Patent trolls have made up around 85% of patent litigation against tech-sector companies in 2018. Moreover, in comparison to the first four months of 2018, **the first four months of 2020 saw a 30%** increase in patent litigation from patent trolls. At a high-level, antitrust law appears to be a proper tool for wrangling patent trolls. Antitrust law cracks down on anticompetitive agreements and monopolies for the sake of promoting consumer welfare. Patents are effectively legal monopolies over a claimed invention, and patent trolls use these legal monopolies to instigate frivolous patent infringement lawsuits on companies. Such lawsuits increase litigation and licensing costs for companies who can then push such costs, via increased product prices, onto the downstream consumer. In an attempt to go on the offensive, tech-sector companies have brought antitrust claims against patent trolls. The antitrust claims have operated on one of two theories. In Intellectual Ventures I LLC v. Capital One from 2017, Capital One counterclaimed antitrust remedies on the basis of a patent troll suing Capital One for patent infringement. More recently, Intel Corp. v. Fortress Investment Group LLC from 2021 entailed a motion to dismiss on Intel’s antitrust claims based on a patent troll’s accumulation of patents**. Both attempts have been thoroughly crushed in the district courts.** As indicated by Capital One, **the action by patent trolls of suing for patent infringement appears to be well-shielded by Noerr-Pennington immunity**. Noerr-Pennington immunity is immunity from antitrust claims for petitioning a government body. Suing a company for patent infringement is petitioning the judiciary and, therefore, falls under Noerr-Pennington immunity. However, lawsuits can be stripped of Noerr-Pennington immunity if the lawsuit constitutes sham litigation. Sham litigation entails litigation where no reasonable litigant could expect success on the merits and has the subjective intent to directly interfere with a competitor’s business relationships. **Capital One suggests that the most baseless lawsuits by patent trolls with the sole purpose of reaching a quick settlement are still unlikely to be sham litigation.** The opinion reiterated that the subjective prong requires the sued party to be a competitor, and patent trolls, who do not produce any products or services, are unlikely to be a competitor to sued companies who do produce products and services. As indicated by the dismissal of the antitrust claims at the pleading stage in Intel, an antitrust claim against the accumulation of patents by a patent troll has some inherent, potentially insurmountable, difficulties. Antitrust liability requires showing a relevant market followed by market power and a tendency towards anticompetitive effects or followed by direct evidence of anticompetitive effects. First, relevant markets for patents tend to be too broad, and broad relevant markets reduce the probability that a single entity wields enough market power to have an anticompetitive effect. With patent trolls, the relevant markets include the patent troll’s patents and any patents or technologies that are reasonably interchangeable with the patent troll’s patents. The set of reasonably interchangeable technologies is rather amorphous and large, given the multitude of ways in any area of technology to perform the same task and the total number of patents having surpassed ten million. Some of the relevant markets in Intel, such as “mobile device-to-device communication” and “device authorization,” were so broad as to make anticompetitive effects by the patent troll implausible. Second, even with a narrower market, a patent troll is unlikely to have market power. As suggested in Intel, the total set of patents and technology in the narrower market is likely far larger than the couple of patents being asserted by the patent troll. Third, evidence demonstrating that a patent troll creates anticompetitive effects is few and far between. Showing anticompetitive effects likely requires a combination of increased, supracompetitive prices and a drop in product output or quality. Showing that a patent troll creates a supracompetitive licensing price over a patent is difficult. As in Intel, the few licensing agreements for a patent troll’s patent are likely settlements from a patent troll’s previous assertions which are hidden by confidentiality. These recent decisions are only district court decisions. However, Capital One provides a strong, clear-cut view on Noerr-Pennington immunity for patent infringement suits by patent trolls, and Intel found that the antitrust claims against the accumulation of patents could not pass the low bar of plausibility in the pleading stage. With patent trolls’ exclusive existence in the instigation of patent infringement lawsuits and the accumulation of patents, **the recent decisions appear to significantly reduce the usefulness of antitrust law against the toll-taking patent troll**

#### One and done patent rule changes solves perpetual extensions and patent thickets---but the aff can’t---takes out the advantage even if CP doesn’t solve

Feldman 19 [Robin, professor of law and director of the Institute for Innovation Law at UC Hastings College of the Law in San Francisco and author of “Drugs, Money, and Secret Handshakes” (Cambridge University Press, March 2019), ‘One-and-done’ for new drugs could cut patent thickets and boost generic competition, https://www.statnews.com/2019/02/11/drug-patent-protection-one-done/, poapst]

Drug companies have brought great innovations to market. Society rewards innovation with patents, or with non-patent exclusivities that can be obtained for activities such as testing drugs in children, undertaking new clinical studies, or developing orphan drugs. The rights provided by patents or non-patent exclusivities provide a defined time period of protection so companies can recoup their investments by charging monopoly prices. When patents end, lower-priced competitors should be able to jump into the market and drive down the price. But that’s not happening. Instead, drug companies build massive patent walls around their products, extending the protection over and over again. Some modern drugs have an avalanche of U.S. patents, with expiration dates staggered across time. For example, the rheumatoid arthritis drug [Humira](https://www.statnews.com/pharmalot/2018/11/07/abbvie-biosimilars-humira-patents/) is protected by [more than 100 patents](https://www.wsj.com/articles/biosimilar-humira-goes-on-sale-in-europe-widening-gap-with-u-s-1539687603). Walls like that are insurmountable. Rather than rewarding innovation, our patent system is now largely repurposing drugs. Between 2005 and 2015, [more than three-quarters](https://academic.oup.com/jlb/advance-article/doi/10.1093/jlb/lsy022/5232981) of the drugs associated with new patents were not new ones coming on the market but existing ones. In other words, we are mostly churning and recycling. Particularly troubling, new patents can be obtained on minor tweaks such as adjustments to dosage or delivery systems — a once-a-day pill instead of a twice-a-day one; a capsule rather than a tablet. Tinkering like this may have *some* value to *some* patients, but it nowhere near justifies the rewards we lavish on companies for doing it. From society’s standpoint, incentives should drive scientists back to the lab to look for new things, not to recycle existing drugs for minimal benefit. I believe that one period of protection should be enough. We should make the legal changes necessary to prevent companies from building patent walls and piling up mountains of rights. This could be accomplished by a “one-and-done” approach for patent protection. Under it, a drug would receive just one period of exclusivity, and no more. The choice of which “one” could be left entirely in the hands of the pharmaceutical company, with the election made when the FDA approves the drug. Perhaps development of the drug went swiftly and smoothly, so the remaining life of one of the drug’s patents is of greatest value. Perhaps development languished, so designation as an orphan drug or some other benefit would bring greater reward. The choice would be up to the company itself, based on its own calculation of the maximum benefit. The result, however, is that a pharmaceutical company chooses whether its period of exclusivity would be a patent, an orphan drug designation, a period of data exclusivity (in which no generic is allowed to use the original drug’s safety and effectiveness data), or something else — but not all of the above and more. Consider Suboxone, a combination of buprenorphine and naloxone for treating opioid addiction. The drug’s maker has extended its protection cliff eight times, including obtaining an orphan drug designation, which is intended for drugs that serve only a small number of patients. The drug’s first period of exclusivity ended in 2005, but with the additions its protection now lasts until 2024. That makes almost two additional decades in which the public has borne the burden of monopoly pricing, and access to the medicine may have been constrained.

## Solvency

#### Courts ignore intent and plain meaning, reject literature bias towards optimism.

Crane ‘21 [Daniel A Crane. Frederick Paul Furth, Sr. Professor of Law, University of Michigan. I am very grateful for many helpful comments from Tom Arthur, Jonathan Baker, Steve Calkins, Dale Collins, Eleanor Fox, Rebecca Haw, Hiba Hafiz, Jack Kirkwood, Bob Lande, Christopher Leslie, Alan Meese, Steve Ross, Danny Sokol, and other participants at the University of Florida Summer Antitrust Workshop. "ANTITRUST ANTITEXTUALISM." https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr]

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

#### Circuit courts will just apply Rule 11 sanctions instead to avoid Supreme Court sham clarification

Kölln 94 [Thies, Rule 11 and the Policing of Access to the Courts after Professional Real Estate Investors, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4842&context=uclrev>, poapst]

The Noerr-Pennington doctrine, developed in a series of Supreme Court decisions, exempts parties from antitrust liability under the Clayton Act' and Sherman Act §§ 1 and 22 when their alleged anticompetitive behavior involves petitioning any branch of the government. Under a narrow exception, the doctrine does not apply to "sham" petitions, that is, petitions that seek protection under Noerr-Pennington but are actually "nothing more than... attempt[s] to interfere directly with the business relationships of a competitor."3 Until recently, however, the Supreme Court had not definitively set the standard for determining when a lawsuit or other petitioning activity constitutes a sham. The Court resolved this question, at least with respect to lawsuits, in Professional Real Estate Investors, Inc. v Columbia Pictures Industries, Inc.4 A suit may be deemed a sham under the exception to Noerr-Pennington only if it is objectively baseless, regardless of the filing party's subjective intent.' By answering the question in this way, however, the Professional Real Estate Investors holding creates a tension between the sham exception to the Noerr-Pennington doctrine and Rule 11 of the Federal Rules of Civil Procedure, which instructs judges to examine both the objective merits of a party's suit and the party's subjective intent in bringing the suit. This tension raises two significant issues. First, may a court properly sanction a party under Rule 11 when the party brings an antitrust suit that is not a sham for the purposes of Noerr-Pennington? Second, and potentially more significant, what implications does the Court's endorsement of the objective-baselessness standard in the antitrust context have for Rule 11 jurisprudence, particularly to the extent that Rule 11 rests on similar rationales for sanctioning certain forms of behavior? This Comment addresses the tension between Professional Real Estate Investors and Rule 11 and argues that, at least in some contexts, a new interpretation of Rule 11 will be necessary to resolve the inconsistencies between these areas of the law. Sections I and II trace, respectively, the development of NoerrPennington immunity and Rule 11 sanctions based on improper subjective intent. Section III analyzes the doctrinal tension between the sham exception to Noerr-Pennington immunity and Rule 11, and suggests that Rule 11 must be curtailed in the antitrust context. This Comment argues that reinterpreting Rule 11 is both necessary in light of the Court's recent decision in Professional Real Estate Investors and justified by other considerations inherent in sanctioning mechanisms in antitrust law. Finally, Section IV examines the implications of Professional Real Estate Investors for Rule 11 sanctions in other contexts. This Comment concludes that the same considerations that favor limiting Rule 11 sanctions in antitrust proceedings are equally applicable whenever courts perform a function similar to the economic regulation of large and complex business enterprises.

#### Their Fulbright ev proves aff only messes with the objectively baseless standard – proves circumvention by Rule 11 (MASON YELLOW)

**Fulbright 2019.** Paul W. Fulbright. Assistant Professor of Business Law, University of Houston. “Antitrust Law, Entrepreneurship, And The “Patent Bully”: The “Sham” Exception To Noerrpennington Petitioning Immunity In Patent Infringement Litigation After The Professional Real Estate Decision” proquest.com/scholarly-journals/antitrust-law-entrepreneurship-patent-bully-sham/docview/2298280771/se-2

IV. THE WAY FORWARD: MOVING TOWARDS A CLARIFICATION OF PRE In the hypothetical problem presented at the opening of this paper, John Smith, the CEO of BigCorp, has proposed filing a lawsuit against a startup competitor even though its objective prospects for success are extremely poor. “I don’t care about the merits of the case,” said John. “I just want to pick the best patents we can and file suit, even if we have a 95% chance of losing the lawsuit. Winning or losing the lawsuit doesn’t matter. By filing suit now, we’ll do two things. First, it’s entirely possible that we’ll scare off WhiteKnight. I mean, after all, who wants to invest in a lawsuit? Second, without WhiteKnight’s funding, we’ll be able to bury SmallCorp in legal bills. The cost of the lawsuit alone, to say nothing of the effect it will have on SmallCorp’s customers, will likely drive it into the grave.” Unfortunately, when his general counsel performs her due diligence and consults with experienced antitrust and patent counsel, she is likely to be advised that, under the current state of the law, the strategy may very well succeed. **This is contrary to the substantive goal of antitrust**: to encourage competitors to compete on the basis of the quality and pricing of the goods and services that they offer, and, in the case of a monopolist, to ensure that it doesn’t engage in unreasonable anticompetitive exclusionary conduct. Here, CEO Smith is trying to arrange for his monopolist corporation to compete not on the basis of its superior products and services, but, rather, on the basis of filing a meritless lawsuit against a less-well-funded startup in the hope that the litigation costs and uncertainty can exclude / destroy this competitor. The question is: what can be done to discourage this kind of game-playing in the future? A. The Door to Improvement of the PRE Test – A Finding of Ambiguity As stated hereinabove, the PRE “objectively baseless” objective test suffers from two maladies: (a) it is ambiguously framed; and (b) to the extent that a single test is discernible from the express text of the decision, it is likely a sub-optimal test, a variant of the “objectively baseless” archetype. Although this undoubtedly causes great heartache to the clients and attorneys dealing with the Noerr-Pennington “sham” exception in the field (the courtroom), there is a silver lining. Court decisions create ambiguous tests, and court decisions can eliminate them.116 So **the** practical **path** **forward** for curing the infirmities of PRE **is a future U.S.** **Supreme Court decision** **that** clarifies or **corrects117 PRE.** What is the preferred clarifying formulation? An objective test that constitutes a variant of the “objectively unreasonable” archetype seems best. B. The Holding and the Dicta in PRE Clarification of PRE would be simplest if there was a cogent argument that the “**true” objective test** of PRE is, in fact, one of the variants articulated in PRE that most closely resembles the “objectively unreasonable” archetype. Fortunately, **there is just such an argument**. The argument is this: the precise holding in PRE is narrow, and the other formulations and guidelines appearing in the decision are dicta. Consider the time-honored approach to identifying the single holding in a decision when confronted with several alternatives. Which formulation is the holding? The formulation essential to the decision is the holding, and its siblings are the dicta.118 In the instant case, the core holding in PRE is simple: an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent. 119 That simple (but profound) statement is all that was needed to actually dispose of the case. All of the other formulations regarding the PRE objective test are interesting, and informative, but, **under the Court’s own tests** **for distinguishing holdings** from dicta, **they would not be viewed as the** definitive, **binding legal test**. It should be noted that Justice Stevens’ concurring opinion in PRE supports this view: While I agree with the Court’s disposition of this case and with its holding that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,” I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court’s opinion. Specifically, I disagree with the Court’s equation of “objectively baseless” with the answer to the question whether any “reasonable litigant could realistically expect success on the merits.” There might well be lawsuits that fit the latter definition but can be shown to be objectively unreasonable, and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits – no matter how insignificant – could be expected.120 C. **A Proposed Clarification** to the PRE Objective Test Several guidelines can now be enumerated regarding the contours of a clarification to the PRE objective test. The overall two-part structure for identifying “sham” claims, utilizing both subjective and objective tests, and how those tests interrelate (as shown in the matrix in Exhibit 1), remains unchanged. First, and foremost, the clarifying **court should** **clarify** that the **PRE objective test is in fact a variant of the “objectively unreasonable**” **archetype**. Language of the following sort could be profitably employed: A “sham” claim is an objectively unreasonable claim; **it lacks any reasonable chance of success in producing a reasonably favorable outcome**, based on the nature of the claim, from the vantage point of the reasonable prudent claimant. A “genuine” claim has a reasonable chance of succeeding in producing a reasonably favorable outcome, based on the nature of the claim, from the vantage point of the reasonable prudent claimant. Second, after clarifying the general nature of the PRE objective test, **the court could** **seize the opportunity to re-affirm various subsidiary matters relating to that test** (as described in relation to the court decisions referenced herein).121 \*\*\*\*\*\* FOOTNOTE 121\*\*\*\* 121 For example, the court could re-affirm that: (1) the objective reasonableness of asserting a claim is evaluated based upon the totality of the circumstances known to the claimant at the time of filing; (2) the duty to only pursue objectively reasonable claims is a continuing one (so that, if a litigant becomes aware of facts or law that converts what was once a genuine petition for redress into a sham, the citizen has an affirmative duty to timely correct the matter (including, potentially, discontinuing the proceeding)); and (3) the considerations bearing on objective reasonableness would include, but not be limited to, the following: (a) the evidentiary basis for any factual contentions upon which the suit is based; (b) the legal basis upon which the claim and prayer for relief are based; (c) the diligence of the claimant in ascertaining, prior to filing and throughout the prosecution of the matter, whether it has reasonable grounds to sue; (d) the presence or absence of effective legal advice from competent counsel; and (e) the likelihood, nature, and expected magnitude of success (considering both financial and non-financial measures of success), and the risk-adjusted cost, that a reasonable prudent person would perceive in relation to the litigation. \*\*\*\*\*\*\*FOOTNOTE ENDS Third, **the clarifying court could re-affirm that**, **only if challenged litigation is objectively unreasonable** **may a court examine the litigant’s subjective motivation.** Sham litigation is litigation motivated by something other than a genuine prayer for relief, and the litigant’s subjective motivation may be proven by direct or circumstantial evidence. The court should focus on whether the unreasonable lawsuit conceals an attempt to violate the Sherman Act through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. **Fourth, the clarifying court could harmonize and unify the PRE and Walker Process lines of authority** through the use of language along the following lines: “Fraudulent and objectively baseless claims are claims presented in bad faith and are objectively unreasonable. Claims depending upon close questions of law, or claims warranted by a reasonable argument for the extension, modification, or reversal of existing law, are not.” It is respectfully suggested that **formulations along the lines described above**, consistently applied in litigation everywhere and, in particular, in the patent field, **would dramatically increase the utility and predictability of the Noerr-Pennington** standard by capitalizing on all that has been learned since PRE was originally decided.

#### Aff fails---it’s still vulnerable to how it gets interpreted so patent trolls will roll the dice on winning the case anyway

Lianos and Regibeau 17 [Ioannis Lianos, Professor of Global Competition Law and Public Policy and the Director of the Centre for Law, Economics and Society (CLES) at UCL Faculty of Laws, London, and Pierre Regibeau, Imperial College London’s IP Centre, Centre for Law, Economics and Society, UCL Faculty of Laws, London, “Sham” Litigation: When Can It Arise and How Can It Be Reduced? The Antitrust Bulletin 2017, Vol. 62(4) 643-689, poapst]

B. A Framework and Two Policy Approaches As we explained in the introduction, there are two broad approaches to controlling the litigation behavior of parties. The first approach consists in detecting undesirable behavior and punishing it. In the case of sham litigation, this involves identifying a number of factors that indicate that the litigation likely falls within that class and then using legal status (e.g., antitrust laws) to impose a fine. The weakness of this approach is that the factors that indicate that a given litigation might be “sham” are necessarily imperfect indicators. Because of that, the associate punishment cannot be too high, lest the policy ends up imposing serious harm on innocent parties.137 The second approach consists in designing self-enforcing incentive mechanisms, that is, rules that are designed to ensure that rational agents would not find it profitable to engage in sham litigation without requiring that a third party decide whether the litigation under investigation was or not likely to be sham. There are many examples of such mechanisms among common litigation rules. For example the “English” rule whereby the losing party pays the cost of the winning party ensures that litigants only go to court if they believe that they have a reasonable chance to prevail. Much of the argument in the rest of the article relies on a formal economic analysis. While this analysis will eventually appear in a companion paper aimed at a different audience, the main elements of the framework on which we rely are described in the appendix. We begin with a stylized model of litigation. There are two parties: the plaintiff, who initiates the litigation, and the defendant. The plaintiff and the defendant disagree about a specific issue. This issue can be resolved in a binary fashion: in favor of the defendant or in favor of the plaintiff. Once litigation has begun, it can either be settled between the parties or it can proceed to a judicial decision. Sham benefits and costs are only realized if the initial lawsuit is not settled. The additional litigation involves additional costs for both parties. We will call these “litigation costs” and assume—for simplicity—that those costs are only incurred if the lawsuit is not settled. On the other hand, filing the suit itself involves a fixed cost for the plaintiff.138 In order to keep the analysis simple, we also assume that the plaintiff and the defendant agree about the probability that the plaintiff would prevail and about the payoffs of each of the two parties for each of the two possible outcomes of the judicial decision. Finally, in order to have a meaningful analysis of the role of settlements, we need to make at least some minimal assumptions about the type of settlement that can be achieved. The prospects for settlement of course depend on the type of agreements that are feasible. Under the conditions outlined above, it is well known that, absent sham benefits or sham costs, all litigations would be settled as long as the joint payoff of the parties under settlement are larger than the joint payoff from the a judicial decision minus litigation costs: under efficient bargaining, the parties agree on the outcome that “maximized the size of the pie.” Since the parties agree on their respective likelihood of winning, they might as well reach a settlement that saves them some of the expected litigation costs. If we are in a system where each party pays its own cost, this means that each party is willing to accept a settlement which gives her at least the expected payoff from a final judicial decision minus her own litigation costs. If we are in a “loser pays” system, then each party is willing to accept a settlement given her at least as much as the expected decision minus total litigation costs multiplied by the probability that the judicial decision is adverse. Where an actual settlement lies within those limits would depend on the parties’ bargaining ability and is of no direct relevance to our argument. Let us now introduce sham benefits and/or costs. This has two possible effects on settlements. Firstly, settlement might no longer be possible.

#### States incorporate sham exemptions into state anti-SLAPP cases to increase petitioning

Barylak 10 [Carson Hilary, J.D., The Ohio State University Moritz College of Law, expected 2011; Reducing Uncertainty in Anti-SLAPP Protection, Ohio State Law Journal Volume 71:4, https://core.ac.uk/download/pdf/159553441.pdf, poapst]

In the absence of contrary statutory language, the sham defense, though limited,5 3 is the primary mechanism by which a party whose claim has been identified as a SLAPP may avoid dismissal. 54 In the decades following Noerr and Pennington, the federal courts extended Noerr's principle to cases outside of antitrust 1aw 5 5 -including abuse of process, 56 tortious interference, 57 and other causes of action commonly used to disguise SLAPPs 58 -further reinforcing the protections granted to petitioning activities. In more recent years, the doctrine has emerged as a foundational element of both case law and commentary discussing SLAPPs and anti-SLAPP legislation. 59 Anti-SLAPP measures, like the Noerr-Pennington doctrine, have as their principal purpose the protection of petitioning and speech rights articulated in state and federal constitutions.60 In light of this common purpose, legislatures have looked to the Noerr-Pennington doctrine as a guide for the development of state antiSLAPP statutes, 61 and the sham exception has been recognized by courts in jurisdictions both with62 and without 63 anti-SLAPP measures. 64 *Footnote* 61 In fact, Rhode Island's legislature amended the state's anti-SLAPP measure in 1995 to more clearly conform to the sham standard under the Noerr-Pennington doctrine. R.I. GEN. LAWS § 9-33-2 (1997); Hometown Props., 680 A.2d at 62; see also LoBiondo v. Schwartz, 970 A.2d 1007, 1020 (N.J. 2009) ("[Tlhe majority of the [state anti-SLAPP] statutes find their roots in the United States Supreme Court's Noerr-Pennington doctrine, creating immunity that protects actions that fall within the parameters of the redress of one's grievances to the government.").

#### Uniform Law Commission recommendations are used as state frameworks for anti-SLAPP statutes

Prather 20 [Laura, Partner and Head of Media Law Practice Group at Haynes Boone, A New Model for Anti-SLAPP Laws, https://www.haynesboone.com/news/publications/a-new-model-for-anti-slapp-laws, poapst]

The movement to better protect citizens’ First Amendment rights won two big victories this year, when the Uniform Law Commission and the New York Legislature each approved new anti-SLAPP measures. Anti-SLAPP laws aim to safeguard individuals from the chilling effect of lawsuits brought in retaliation for the exercise of protected First Amendment rights. To date, 32 states and the District of Columbia have enacted some form of statutory anti-SLAPP protections. The victories at the ULC and in New York came as legislators in eight states introduced anti-SLAPP measures over the past year. These proposals largely reflected a new consensus over the best ways to discourage SLAPP suits. Several of these bills are still being considered, and others, although not passed, garnered strong legislative support that could carry over into future sessions. Uniform Law Commission Members of the ULC overwhelmingly approved the Uniform Public Expression Protection Act at the commission’s annual meeting in July. The ULC Act contains substantial protections for citizens who exercise their First Amendment rights, including a broad definition of public participation, automatic stays of discovery early in anti-SLAPP proceedings, interlocutory appeals of rulings on anti-SLAPP motions, and mandatory attorneys’ fees upon dismissal of a SLAPP suit. The process of developing the ULC Model Act took more than two years with commissioners, advisors and observers from all over and with vastly different levels of exposure to SLAPP suits. Now that it has been resoundingly approved, it will be promulgated and an enacting committee will be formed to assist in its consideration by legislatures nationwide. The ULC Act will serve as an important model for states that have yet to enact anti-SLAPP legislation, and those that wish to strengthen their existing laws. Strengthening Existing Anti-SLAPP Laws New York New York was one of several states with existing anti-SLAPP statutes that sought to strengthen its First Amendment protections this year. The state has had an anti-SLAPP statute for more than 25 years, but the existing law limits coverage to suits involving real estate and development. The anticipated new law, co-sponsored by Assemblywoman Helene Weinstein and state Senator Brad Hoylman, greatly expands the scope of anti-SLAPP protections, and enacts many of the key provisions that were also included in the ULC Act. The bill broadens the scope of protection to include any communication in a public forum “in connection with an issue of public interest,” or “any other lawful conduct” furthering the right to free speech and petition in connection with an issue of public interest. That expanded definition is especially significant in New York, where many of the nation’s media companies did not enjoy anti-SLAPP protection under the old law. The new law also provides for a stay of discovery upon the filing of an anti-SLAPP motion and makes attorneys’ fees mandatory when a judge finds the suit has “[no] substantial basis in fact and law.” Because New York law already freely permits interlocutory appeals from denials of dispositive motions, it was not necessary for the bill to specifically address that issue. The bill passed with strong support in both chambers, by votes of 116-26 in the Assembly, and 58-2 in the Senate. The New York Times editorialized in support of the bill shortly before its passage, writing that an “effective anti-SLAPP statute for New York is long overdue and could well prod recalcitrant legislatures, including Congress, to take action.” The bill awaits Governor Cuomo’s signature. Maryland In Maryland, a bill to strengthen the state’s existing anti-SLAPP law passed the House of Delegates by a vote of 98-40. Maryland has had an anti-SLAPP statute in place since 2004, but the law requires a showing of “bad faith” — a difficult legal standard that is often unwieldy in practice. The bill that passed the House of Delegates this year would have removed the “bad faith” requirement and expanded the scope of public participation covered by the act. The bill did not come to a vote in the state Senate before Maryland’s legislature adjourned in March. Pennsylvania In Pennsylvania, legislators have proposed a bill to bolster their state’s anti-SLAPP statute. The Pennsylvania bill, which cites a “disturbing increase” in SLAPP lawsuits in the state, would also add a discovery stay and mandatory attorneys’ fees, along with broadening the law to cover more constitutionally protected communications. The bill also includes a right to appeal a dismissal that fails to include the mandatory attorneys’ fees. This bill has been stuck in committee since February and appears to be stalled, Enacting New Anti-SLAPP Statutes Virginia Virginia has a very narrow anti-SLAPP statute. Unlike California and other states, the Virginia statute does not create a special procedure for filing anti-SLAPP motions requiring judges to conduct an early assessment of the plaintiff’s probability of success; there is no presumptive limitation of discovery, and no provision for an interlocutory appeal when anti-SLAPP motions are denied. But under the law as it stands, claims for defamation and tortious interference (and similar theories) involving statements regarding matters of public concern that would be protected under the First Amendment and that are published to a third party are subject to an immunity defense unless uttered with “actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.” Further, when such claims are dismissed pursuant to this immunity, the plaintiff may be awarded reasonable attorneys’ fees. The exception to the immunity has been slightly rephrased: it does not apply to “statements made with actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.” This year, the Virginia legislature made considerable progress toward further strengthening the state’s anti-SLAPP statute. Although Virginia had a short legislative session this year, both houses of the General Assembly passed anti-SLAPP bills, though a conference committee was unable to reconcile the two measures before the session concluded. The two chambers did agree on a provision for mandatory attorneys’ fees when a SLAPP suit is dismissed, and the sponsors of both bills have indicated they plan to re-introduce anti-SLAPP bills in the next session. In the meantime, Virginia’s lack of broad protection continues to make it a magnet for high-profile defamation suits, including actions filed by Rep. Devin Nunes of California and the actor Johnny Depp. Iowa In Iowa, the House of Representatives unanimously approved a new anti-SLAPP measure that would have protected a wide swath of public participation. At a hearing on the bill, the co-owner of the Carroll Times Herald told legislators how his small newspaper was forced to spend $140,000 in legal fees defending a libel suit that was ultimately dismissed. The paper’s plight, which included a GoFundMe page to help cover its legal costs, drew national attention to the problem of SLAPP suits. The bill attracted bipartisan support in the Iowa Senate, where a key committee recommended that it be passed. The measure ultimately failed to come to the Senate floor during the frantic end to a legislative session that was disrupted by the coronavirus, but it could be primed for approval in next year’s session. Ohio Legislators in Ohio are in the process of considering an anti-SLAPP bill that would provide broad protection for First Amendment rights. A Senate hearing on the bill drew supportive testimony from representatives of the Ohio News Media Association, the Cincinnati Enquirer, Americans for Prosperity, and the Ohio Domestic Violence Network. The Ohio bill is still in the committee process, with the legislative session scheduled to conclude at the end of the year. West Virginia and Kentucky Legislators in West Virginia and Kentucky also introduced anti-SLAPP bills that would have provided significant protections for public participation, including discovery stays, interlocutory appeals and mandatory attorneys’ fees upon dismissal of a SLAPP suit. Those measures did not emerge from committee before the end of their respective legislative sessions. Conclusion Given the increasing need for protection of one’s ability to speak out about matters of public concern, it is not surprising that so many states are engaged in efforts to try to pass and/or expand their anti-SLAPP statutes. Now that the Uniform Law Commission has passed the Uniform Public Expression Protection Act, for those states who are looking for a model approved by a group of scholars (the same group that enabled the passage of the Uniform Commercial Code), this model will provide a strong template from which to draft legislation.

#### If they win that patent trolls are still an issue, that bolsters the circumvention debate if we win patchwork because there is no clear legal delineation that will happen as a result of the aff

Harvard Business Review 17 ["The U.S. Supreme Court Is Reining in Patent Trolls, Which Is a Win for Innovation," accessed 11-14-2021, https://hbr.org/2017/06/the-u-s-supreme-court-is-reining-in-patent-trolls-which-is-a-win-for-innovation, hec]

The first decision, in TC Heartland v. Kraft Foods Group, delivered a blow to so-called “patent trolls.” Known more politely as “patent assertion entities,” these companies buy up unused and often weak patents, and then strategically sue technology companies large and small, claiming ownership of basic components of products that have long been in the market. In recent years, patent trolls found a plaintiff-friendly venue in the courts of East Texas, which attract over 40% of all U.S. patent litigation. How lopsided are the rules there? In the few cases that go to trial (in other words, that don’t settle out of court), patent holders win nearly 80% of the time — a strong incentive for defendants to settle regardless of the strength of the claimed patents. Korean tech giant Samsung, for example, finds itself hauled into court in Marshall, Texas, so often that the company now spends heavily to improve its image with local residents (and potential jurors), lavishing scholarships and other donations on the town’s 25,000 residents. It even sponsors a winter ice skating rink in front of the courthouse. The Supreme Court’s ruling in this case reversed lower court decisions that effectively allowed patent holders to sue for infringement in any federal court in the country — including in East Texas. Instead, the court said, the patent law sensibly requires that the defendant either be incorporated in the state in which the case is filed or have a regular place of business there. For most startups, that will eliminate the risk of being sued in East Texas. Stanford Law School professor Mark Lemley, a leading patent expert, told me: “I don’t think TC Heartland spells the end of lawsuits in the Eastern District of Texas, but it will definitely cause a number of cases to move elsewhere. The cases that stay there will be cases against large retailers who have stores in every district.” (For the record, Lemley organized a friend of the court brief arguing for the interpretation of patent law the court adopted.) The second decision limits the rights of patent holders to control their inventions, especially after products are sold to consumers. In Impression Products v. Lexmark, the Supreme Court weighed in on the printer maker’s decade-long litigation involving the reuse by third parties of toner cartridges the company makes and sells.

#### Sham test exception to Noerr expanded scope – shams are already covered under antitrust

Rothschild and Isaacson 21 [Cynthia and April, Partners at Kilpatrick Townsend, Balancing Hatch Waxman and the Sham Litigation Exception, March 21, 2021, https://www.kilpatricktownsend.com/en/Blog/MEMO/2021/3/Balancing-Hatch-Waxman-and-the-Sham-Litigation-Exception?pdf=1, poapst]

The Noerr-Pennington doctrine allows litigants to exercise their First Amendment right to petition the government for redress of grievances, including by litigating against a competitor without fear of antitrust liability and attendant treble damages. There is, however, an exception to this doctrine for “sham” litigation. The U.S. Supreme Court has created a two-part test for identifying “sham” suits, requiring that a plaintiff prove: (1) the challenged lawsuit was objectively baseless; and (2) the antitrust defendant was subjectively motivated by an improper purpose in bringing the challenged suit.3 Under the subjective prong, the plaintiff must establish the defendant’s subjective motivation for suing was “an attempt to interfere directly with the business relationships of a competitor” by using “the [litigation] process—as opposed to the outcome of that process—as an anticompetitive weapon.”4 A sham litigation is a suit undertaken with no expectation of achieving success but “simply in order to impose expense and delay.”5

#### Patent trolls unambiguously violate sham litigation rules.

Katheryn M. Wenger 20, University of California, Hastings College of the Law, Juris Doctor Candidate, “You Don't Have to Pay the Troll Toll: Antitrust Violations of Patent Assertion Entities and the Noerr-Pennington Doctrine "Sham Litigation" Exception,” 47 Hastings Const. L.Q. 557, Summer 2020, lexis.

B. PAE's Portfolio Enforcement Suits Still Fail the PREI Non-Serial Litigation

1. PAE Claims are so Objectively Baseless No Reasonable Litigant Could Realistically Expect Success on the Merits

Even if the PREI standard was the appropriate standard, PAE's conduct would still qualify as "sham litigation" and, thus, should not be afforded Noerr-Pennington doctrine immunity. The Court held that "[non-serial] litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless" and affirmed the Ninth Circuit's refusal to characterize a lawsuit as a sham that the antitrust defendant "admittedly had probable cause to institute." 206The PREI Court resolved whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant, holding that "an objectively reasonable effort to litigate cannot be sham regardless of intent." 207In sum, for a non-serial lawsuit to qualify as a sham litigation, the suit: (1) "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) must be subjectively baseless and an attempt to interest with competitors." 208Under the first prong of the two-prong sham litigation exception test, a claimant must prove that the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." 209Additionally, if the suit contains objective merit, the claimant cannot proceed to the subjective purposes prong and the action does not constitute sham litigation . 210Thus, this prong is determined by whether "no reasonable litigant could realistically expect success on the merits" by filing the lawsuit in question. 211

PAE enforcement claims are objectively baseless and, thus, fail the first prong of the PREI standard. In re Cardizem CD Antitrust Litigation concerns plaintiff indirect purchasers of a brand name heart medication manufactured by the defendants. The defendants asserted that plaintiffs failed to sufficiently show that the suit was not objectively baseless and [\*587] brought for anticompetitive purposes. 212Plaintiffs argued but for the patent infringement litigation the Hatch-Waxman 30-month period would not have gone into effect, resulting in generic versions entering the market sooner. 213The plaintiffs supported their objectively baseless allegations with damning communications. 214The court found that the plaintiffs alleged sufficient facts to satisfy the objective prong because allegations in the plaintiffs' complaint are construed in light most favorable to the plaintiffs. 215

Similar to In re Cardizem CD Antitrust Litigation, when viewed in the light most favorable to the party alleging counterclaims, facts alleged by Capital One reasonably showed that IV initiated its suits asserting only five patents out of the demanded 3,500-patent portfolio, many of which are invalid or expired, and only two of the five remained viable, for objectively baseless purposes. 216IV cofounder Edward Jung even described how IV acquires patents only for the enforcement of market power once aggregated and not the merits of the patent themselves. Jung stated, "[IV] buy[s] a bunch of low-cost asset[s], which gives us market power" and "[i]t just feels like we are on a diet of filler . . . . [W]e already have two funds with plenty of fluff . . . . We didn't kill as many deals [as] we should have, we just tried to get them cheap and in most cases it was clear there was no future bet, the patents just weren't monetizeable or practiced." 217Moreover, one of IV's outside inventors, hired to evaluate its patents, described the portfolio as "poor quality financial-services related patents." 218

Furthermore, the Virginia district court determined that the remaining asserted patents were ineligible subject matter under Alice Corp. v. CLS Bank International. 219In Maryland, Capital One successfully sought a declaratory judgment that the asserted patents were invalid, with one patent invalid due to inequitable conduct. 220IV thus filed these suits against Capital One in retaliation for Capital One's refusal to expensively license. Through IV's own testimony and the asserted patents invalidation, no reasonable litigant could have expected to win on the merits, making these suits objectively baseless. 221

The FTC also advises that "should the [asserted] patent be invalidated in one case . . . it would make further litigation in the other cases [\*588] unnecessary." 222And, the FTC since observed that PAEs may avoid asserting patents, such as those in the Capital One cases, "if they expect that: (1) the patents likely would be found invalid under Alice analysis, or (2) that courts may dispose of the case in the early stages of litigation, under Alice analysis." 223Therefore, it follows that any PAE suits that are likely to be invalid under Alice, and projected to settle in the early stages of litigation, are objectively baseless under the PREI standard.

Between January 1, 2009, and September 15, 2014, PAEs participating in The FTC Report study filed 2,452 patent infringement lawsuits, or 8.8%, of the total 27,932 patent lawsuits filed during the study period. 224Of these lawsuits, 66% settled within a year and 87% of cases terminated within the study period. 225The FTC found that PAEs typically sued potential licensees and settled shortly after entering into a license agreement covering a small portfolio, as opposed to the large portfolios that are typically demanded under the portfolio business model. 226Because the licenses are for relatively low amounts in royalties (less than $ 300,000) and early stage litigation is estimated to cost $ 300,000, the FTC determined this PAE behavior to be "consistent with nuisance litigation." 227Moreover, the FTC estimated that PAEs in their study held more than 75% of all U.S. patents, and "any change in PAE behavior with respect to software patents that results from Alice will likely have a significant impact on both overall volume of PAE assertion and the types of technologies that PAEs assert." 228

During its study, the FTC found that for all patents reported relating to Information and Communication Technologies ("ICT"), 88% related to Computers & Communications or Other Electrical & Electronic patent technology categories and more than 75% were software-related patents. 229These figures are consistent with the generally held view that PAEs disproportionately acquire and assert ICT and software patents. And though the FTC study does not contain a census of all PAE patents, the sample included a substantial fraction of all patents held by all PAEs during the [\*589] study period. 230Moreover, the Alice holding suggests that many software patents may be invalid due to ineligible subject matter. 231

When the FTC Report data is assessed in conjunction with the FTC's Alice ineligibility expectation advisory rule, it is reasonably inferred that PAEs are aware of ineligibility under Alice and file enforcement actions regardless. This inference is supported by PAE business models where they demand a license on entire portfolios as a single product, containing hundreds or thousands of patents. It is, thus, statistically certain that PAEs initiate litigation knowing that these asserted patents are likely invalid under Alice but still use the court system as a weapon to pressure alleged infringers into a quick licensing agreement in the early litigation stage, settling the suit. PAE enforcement suits are, therefore, objectively baseless.

#### No asteroids and it wouldn’t cause extinction

Inigo Monzon 9-2, Reporter at the IBT, quoting Dr. Lewiss Dartnell, Professor of Science Communication at the University of Westminster, Doctor of Philosophy in Astrobiology at University College London, “Scientist Reveals Truth About Earth’s Chances Of Surviving An Asteroid Impact”, International Business Times, 9/2/2019, https://www.ibtimes.com/scientist-reveals-truth-about-earths-chances-surviving-asteroid-impact-2820951

Dr. Lewiss Dartnell, a professor of science communication, believes that humans have a very good chance of enduring an asteroid impact. Despite what happened to the dinosaurs 66 million years ago, Dartnell thinks that humans are not in danger of going extinct due to an asteroid strike.

The professor noted that in order to wipe out all life on Earth, an asteroid has to be hundreds or even thousands of kilometers long. Although NASA has already detected and identified asteroids that are certainly big enough to kill planets, the agency noted that none of these are currently on a collision course with Earth.

“The Earth is not going to be destroyed by an asteroid,” Dartnell told Mashable India. “Alright, so a different question might be, could all life on Earth be driven to extinction by asteroids?”

“Again, the answer would be that no,” he continued. “There’s no asteroid big enough that on a collision with the Earth could do that.”

Dartnell, however, believes that there asteroids out there that can easily take out cities. Despite this, he still believes that chances of city-killers hitting Earth are very slim.

One of the currently known asteroids that are capable of destroying entire cities is Apophis. Scientists once thought that his asteroid, which measures about 1,214 feet long, was in danger of colliding with Earth in the next decade.

However, after follow-up observations, space agencies ruled out a possible collision between Apophis and Earth in the near future.

“If we were very, very unlucky, and they strike over a major city, then they could destroy the city,” Dartnell said. “But the chances of that happening are very unlikely.”

“Asteroid Apophis is one of the asteroids that we are tracking and we know that it is not going to impact for the next few decades and will continue on trail,” the professor added.

Aside from the asteroid’s slim chances, space agencies from various countries are hatching their own plans to save Earth from getting hit by a massive space boulder.

#### Status quo detection and deflection methods solve

Julia Jacobo 19, Reporter at ABC News, “Earth Isn't Currently In Danger Of An Asteroid Impact, But Scientists Are Coming Up With Ways To Prevent Them” ABC News, 8/9/2019, <https://abcnews.go.com/Technology/earth-danger-asteroid-impact-scientists-coming-ways-prevent/story?id=64863999>

Residents of planet Earth fret not -- a 1,000-foot asteroid whizzing by our precious planet this weekend won't even come close to making impact. In fact, while asteroid 2006 QQ23 is considered to be a "potentially hazardous asteroid," its passage will be about 5 million miles away from Earth, "just barely into the zone that we start to keep closer track of these objects," NASA Planetary Defense Officer Lindley Johnson told ABC News. Johnson added that "there isn't much significant" about the upcoming asteroid. Scientists have been aware of its existence since 2006, Paul Chodas, director of NASA's Center for Near Earth Object Studies, told ABC News. "There's nothing really special about this," Johnson said. 'We have objects, asteroids of this size that pass within 5 million miles of the earth six, seven times out of the year," he said. The animation depicts a mapping of the positions of known near-Earth objects (NEOs) at points in time over the past 20 years, and finishes with a map of all known asteroids as of January 2018.more + About 25 asteroids are expected to fly within 5 million miles of the earth in the next 60 days, and smaller asteroids pass even closer "all the time," Johnson said. "The bottom line is this happens all the time, which people don't realize," he said. A larger object, asteroid 2000 QW7 is expected to pass even closer to the earth -- at about 3.5 million miles away -- on Sept. 14. The largest that asteroid could be is about 1,700 feet across -- about the length of five football fields -- but Johnson said he still considers it "not that large." Asteroids can often be up to "several miles" in size. Asteroids do not pose any danger to the Earth unless it is on track to hit it directly, Johnson said. Scientists, using ground-based telescopes, can detect the asteroids as they near the planet, but the distance in which they are able to detect them depends on the size and brightness of the object. "A large, dark asteroid would have to be a lot closer to us than an asteroid of the same size that is brighter," Johnson said. "A bright one would be found sooner than a dark one." In addition, it's difficult for astronomers to model an exact track due to forces like solar wind, aviation pressure and the uncertainty of the exact shape of the object," Pete Worden, adviser on space resources to the Grand Duchy of Luxembourg, told ABC News. Once the asteroid gets closer, the better scientists can track it, he added. Ground-based telescopes have their limitations, so scientists are hoping to eventually utilize a space-based system to detect asteroids as far in advance as possible. Worden also expects a better telescope system to obtain "much better data from the ground" within two to four years. Still, "we're not gonna be surprised" by an asteroid, Johnson said. The better technology will simply allow experts to narrow in on all the asteroids that "would potentially hit the earth" and consider the means on how to remove them, Wordon said. "We'll figure out where they are, and if humanity decides that this is a big enough threat, we'll go move them," he said. Scientists are currently devising ways to detract any asteroid that could potentially impact the earth. In the summer of 2021, NASA's DART mission, which stands for Double Asteroid Redirection Test, will demonstrate a kinetic impactor technique on a double asteroid -- essentially bumping the smaller asteroid -- to see how much they can move it. "The thing is, if you move something years in advance, you don't have to move it very much," Wordon said. "This is a rock that's the size of a skyscraper. You would then hit it with a spacecraft kind of the size of a small car, and by impacting it, it impacts energy and momentum and will move it slightly off its orbit." Schematic of the DART mission shows the impact on the moonlet of asteroid (65803) Didymos. The theory is that an asteroid that was expected to come within 2,000 miles of Earth will eventually miss it by hundreds of thousands of miles just from one bump, Wordon said. Scientists are also considering essentially spray painting one side of an asteroid, which would cause it to be heated by the sun differently, Wordon said. As it heats, it emits radiation, which, over time, will push it off course a little, Wordon said. Researchers have also considered building a "giant laser" to slightly push an asteroid out of the way, Wordon said. Another idea would involve not even touching an asteroid but instead taking a "modest sized spacecraft" to use solar electric repulsion to move it over the course of years, Wordon said. The method involves the asteroid's gravity attracting the spacecraft, situated about a mile or so away, which would hypothetically move it over time."

## Lobbying

#### Populism thumpers---it’s high now, no impact.

---Britain’s Johnson, Italy’s Salvini, Turkey’s Erdogan, Poland’s Kaczynski, and Hungary’s Orban are all populist leaders in power now, thumps the impact

---social media makes it inevitable---they can spread their message easily

---numerous EU governments have populists in power changing policies now---Austria, UK etc. all thump

---migration threat construction makes it inevitable by driving nationalism

Balfour 7-15 (July 15, 2020, ROSA BALFOUR is the director of Carnegie Europe. Her fields of expertise include European politics, institutions, and foreign and security policy., “Why Populism Can Survive the Pandemic”, Carnegie Europe)

Bolsonaro, Johnson, Salvini, Trump. Erdoğan, Kaczyński, Le Pen. Modi, Orbán, Putin. Some of these global leaders are populists; some have authoritarian streaks; others are authoritarians using populism to consolidate power. Some will be booted out after their disastrous mismanagement of the coronavirus pandemic. Others will stay, and new ones will arrive.

Given the poor performance of many populist governments in dealing with the coronavirus, populism looks like it could be magically swept away. But such wishful thinking ignores the reasons for the rise of populism and its likely endurance. To rid the world of populism, its root causes must be addressed.

EUROPE’S POPULISM PROBLEM GOES DEEPER THAN ITS MANY CRISES

Many in Europe believe that populism came about because of external crises that have hit the continent over the past ten years. These include the impact of the 2008 financial crisis on the eurozone, which sparked displeasure with the euro and economic inequality, and the refugee influx of 2015 and 2016, which unearthed fears of identity loss and led to greater skepticism about the EU.

In short, EU scholars and policymakers assume that the EU’s success is tied to its performance. They reason that better policies and more efficient institutions will ensure that European and national politics can coexist smoothly. If populism is driven by economic grievances and fears of identity loss, it can be solved by creating more jobs and closing borders to reduce immigration.

This interpretation is wrong. The multiple crises have been a perfect storm for populists, true. But they did not cause the fundamental dissatisfaction that has rattled Europe and other democracies. People who vote for populist politicians do not usually care how well a particular policy performs. In fact, the populist politicians’ common claim—to embody the will of the people—eliminates the possibility that they could ever be wrong. So, populist leaders’ attacks on the elite are rarely questioned—even when they are part of that elite themselves.

HOW POPULISM DAMAGES DEMOCRACY

Understanding the roots of populism is the first step toward identifying how to protect democracy.

First, populism is tied to the hollowing out of advanced democracies. Political elites have become estranged from voters after decades of declining participation in elections, in party membership, and in the civic activities that created links between the electorate and the government. These links once kept the government in check and forced politicians to pay attention to their responsibilities toward citizens. But today, political parties represent fewer societal interests and people, as membership has gone down. As the Irish political scientist Peter Mair perceptively explained, politics has created a void.

Populists have filled this void, bypassing the traditional institutions—from parliaments to newsrooms—that have always been the pillars of democracy. Technological advances have forced the news media’s business model into an existential crisis. Social media enables populists to engage directly with their base, without the mediation and interpretation of the press.

This dynamic plays out at the broader international level too. For years, mainstream political leaders in Europe have played the blame-Brussels game to whip up approval at home. Others have mimicked recklessly populist positions to survive an electoral contest. It is too soon to say whether these political actors and tactics will be successful in the long run. But now, their actions have eroded the institutional machinery of the EU, making it brittle and vulnerable.

In Europe, democracy can no longer be understood only at the national level. Nor can the EU expect to improve its democratic procedures by merely tweaking its institutions. Because governance is shared at many levels—local, national, and supranational at the EU level—nothing short of fixing the relationship between all these levels will solve the populist conundrum. Making local, national, and supranational governance more participative and accountable will lead to better responses to problems of inequality and identity.

Second, even if some populist leaders will be booted out through elections, populism is likely to survive the coronavirus because its right-wing variant has been extremely successful in shifting the entire political and ideological debate further toward the right. In some cases, it has captured center-right political parties. In the most extraordinary example of a traditional center-right defeating its own populist challengers, the UK’s Conservative Party adopted the anti-EU agenda of the then-UK Independence Party and led the country to leave the EU. In other cases, recently in Austria and Italy, the populist right made it into government and changed policies to its liking. But in most countries, it has simply influenced the public debate to the extent that centrist governments have shifted toward the right.

EUROPE HAS A POPULISM PROBLEM ACROSS THE BOARD

This is most evident in European migration policy, which has become illiberal, driven by a fear of losing national identity, and in breach of international commitments. But it can be seen in many other fields, from social policy to security and anti-terrorism. The governments of Hungary and Poland have systematically eroded the rule of law and fundamental rights. Yet curbs on press freedom and civil liberties have also been registered, such as France’s fight against terrorism and Italy’s push to restrict NGO activities helping refugees and migrants. The coronavirus pandemic is accentuating some of Europe’s problems in respecting fundamental rights.

The inability of the European center right to act as a gatekeeper of democracy is one of its greatest failures. The parties of Hungarian Prime Minister Viktor Orbán and Polish Law and Justice Party leader Jarosław Kaczyński have managed to undo their countries’ democratic achievements with the complicity of European sister parties, who were supposed to keep their values and actions in check. In Poland, the victory of Andrzej Duda, thanks to a partisan media, will give the government led by the nationalist and ultra conservative Law and Justice Party more time to undo the independence of the judiciary, and unravel democracy in the country.

EU governance is undermined too. Populist leaders have discovered that they can easily achieve their goals by creating chaos. Populist governments have blocked consensus-building in the European Council, where the EU heads of state or government meet, not only on the trademark topics that keep them in power at home—such as resisting the relocation of asylum seekers—but also on other issues such as China’s abuse of human rights.

It is well known that divisions abound within the EU. Many predate the rise of populism, and vetoing tactics are nothing new. What has changed is that because populists have been successful in hedging against partners and holding political issues to ransom, others are copying them, often on matters of lesser importance. The goal is simply to sow discord, making the EU look weak, divided, and incapable of addressing its great challenges, from Chinese encroachment on European economies to transatlantic tensions.

Behind this dynamic is Europe’s broken democracy, unable to keep up with the transformations of the twenty-first century. So far, institutional reform has not worked. Populist politics pose deeper questions about legitimacy, representation, and political participation. Who are “the people?” Who decides? And for whose benefit?

Filling those voids meaningfully requires a total rethink of the relationship between the local, national, EU, and global levels of governance—instead of the top-down reform the EU has habitually pursued. Addressing this disconnect will be key to renewing the European project.

## Petition

#### No extinction from disease.

Barratt 17, PhD in Pure Mathematics, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute. (Owen Cotton-Barratt et al, “Existential Risk: Diplomacy and Governance”, pg. 9, <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>)

1.1.3 Engineered pandemics

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### Their ev assumes a level of virulence that has literally never occurred

Wendy Orent 15, anthropologist and freelance science writer whose work has appeared in The Washington Post, The LA Times, The New Republic, Discover, and The American Prospect, instructor in science journalism @ Emory, Ignore predictions of lethal pandemics and pay attention to what really matters, LA Times, 1/3/15, http://www.latimes.com/opinion/op-ed/la-oe-orent-pandemic-hysteria-20150104-story.html

Prophets of doom have been telling us for decades that a deadly new pandemic — of bird flu, of SARS or MERS coronavirus, and now of Ebola — is on its way. Why are we still listening? If you look back at the furor raised at many distinguished publications — Nature, Science, Scientific American, National Geographic — back in, say, 2005, about a potential bird flu (H5N1) pandemic, you wonder what planet they were on. Nature ran a special section titled — “Avian flu: Are we ready?” — that began, ominously, with the words “Trouble is brewing in the East” and went on to present a mock aftermath report detailing catastrophic civil breakdown. Robert Webster, a famous influenza virologist, told ABC News in 2006 that “society just can't accept the idea that 50% of the population could die. And I think we have to face that possibility.” Public health expert Michael T. Osterholm of the University of Minnesota, at a meeting in Washington of scientists brought together by the Institute of Medicine, warned in 2005 that a post-pandemic commission, like the post-9/11 commission, could hold “many scientists … accountable to that commission for what we did or didn't do to prevent a pandemic.” He also predicted that we could be facing “three years of a given hell” as the world struggled to right itself after the deadly pandemic. And Laurie Garrett, author of what must be the urtext for pandemic predictions, her 1994 book “The Coming Plague,” intoned in Foreign Affairs that “in short, doom may loom.” Although she followed that with “But note the may,” the article went on to paint a terrifying picture of the avian flu threat nonetheless. And such hysteria still goes on: Whether it's over the MERS coronavirus, a whole alphabet of chicken flu viruses, a real but not very deadly influenza pandemic in 2009, or a kerfuffle like the one in 2012 over a scientist-crafted ferret flu that also was supposed to be a pandemic threat. Along the way, virologist Nathan Wolfe published “The Viral Storm: the Dawn of a New Pandemic Age,” and David Quammen warned in his gripping “Spillover” that some new animal plague could arise from the jungle and sweep across the world. And now there's Ebola. Osterholm, in a widely read op-ed in the New York Times in September, wrote about the possibility that scientists were afraid to mention publicly the danger they discuss privately: that Ebola “could mutate to become transmissible through the air.” “The Ebola epidemic in West Africa has the potential to alter history as much as any plague has ever done,” he wrote. And Garrett wrote in Foreign Policy, “Attention, World: You just don't get it.” She went on to say, “Wake up, fools,” because we should be more frightened of a potential scenario like the one in the movie “Contagion,” in which a lethal, fictitious pandemic scours the world, nearly destroying civilization. But there were fewer takers this time. Osterholm's claims about Ebola going airborne were discounted by serious scientists, and Garrett seemingly retracted her earlier hysteria about Ebola by claiming that, after all, evolution made such spread unlikely. The scientific world has changed since 2005. Now, most scientists understand that there are significant physical and evolutionary barriers to a blood- and fluid-borne virus developing airborne transmission, as Garrett has acknowledged. Though Ebola virus has been detected in human alveolar cells, as Vincent Racaniello, virologist at Columbia University, explained to me, that doesn't mean it can replicate in the airways enough to allow transmission. “Maybe … the virus can get in, but can't get out. Like a roach motel,” wrote Racaniello in an email. H5N1, we understand now, never went airborne because it attached only to cell receptors located deep in human lungs, and could not, therefore, be coughed or sneezed out. SARS, or severe acute respiratory syndrome, caused local outbreaks after multiple introductions via air travel but spread only sluggishly and mostly in hospitals. Breaking its chains of transmission ended the outbreak globally. There probably will always be significant barriers preventing the easy adaptation of an animal disease to the human species. Furthermore, Racaniello insists that there are no recorded instances of viruses that have adapted to humans, changing the way they are spread. So we need to stop listening to the doomsayers, and we need to do it now. Predictions of lethal pandemics have — since the swine flu fiasco of 1976, when President Ford vowed to vaccinate “every man, woman and child in the United States” — always been wrong. Fear-mongering wastes our time and our emotions and diverts resources from where they should be directed — in the case of Ebola, to the ongoing tragedy in West Africa. Americans have all but forgotten about Ebola now, because most people realize it isn't coming to a school or a shopping mall near you. But Sierra Leoneans and Liberians go on dying.

#### Big ag is key to sustainability and preserves global supply

---the aff can’t solve---organic or so called sustainable ag is worse compared to big ag because organic farming requires more land for every calorie produced, so a large-scale shift to organic farming would entail converting more forest and other land to farming, resulting in greater habitat loss and more greenhouse gas emissions

Nordhaus & Blaustein-Rejto 21 – (Ted Nordhaus is director of research at the Breakthrough Institute and is a leading global thinker on energy, environment, climate, human development, and politics. Dan Blaustein-Rejto is a Master of Public Policy from University of California, the director of food and agriculture at the Breakthrough Institute and has conducted research with the Environmental Defense Fund, International Center for Tropical Agriculture, and Farmers Market Coalition, 4-18-2021, "Big Agriculture Is Best", <https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/>) nL

Debates about the social and environmental impacts of America’s food system cannot be disentangled from the basic reality that in a modern industrialized society, most people will live in cities and suburbs and will not work in agriculture. As a result, most food will need to be produced by large farms, with little labor, far away from the people who will consume it.

Many sustainable agriculture advocates tout the recent growth of organic agriculture as proof that an alternative food system is possible. But growing market share vastly overstates how much food is actually **produced organically**. In reality, organic production accounts for little more than 1 percent of total U.S. agricultural land use. Meanwhile, only a bit more than 5 percent of food sales come from organic producers, mostly because organic sales are overwhelmingly concentrated in high-value sectors of the market, namely produce and dairy, and fetch a premium from well-heeled consumers.

Moreover, organic farms, large and small, don’t actually outperform large conventional farms by many important environmental measures. Scale, technology, and productivity make good environmental sense and economic sense. Because organic farming requires more land for every calorie or pound produced, a large-scale shift to organic farming would entail converting more forest and other land to farming, resulting in greater habitat loss and more greenhouse gas emissions. And while organic farming doesn’t use synthetic pesticides or fertilizers, it often results in greater nitrogen pollution because **manure** is a highly inefficient way to deliver nutrients to crops.

Another benefit of large-scale U.S. farms is that because they are so efficient, economically and environmentally, they are also able to produce vastly more food than Americans can consume, making the country the world’s largest agricultural exporter as well.

That benefits the U.S. economy, of course, but it also comes with an environmental benefit for the world. In the contemporary environmental imagination, highly productive, globally traded agriculture is a bad thing—poisoning the land at home and undermining food sovereignty abroad. But in reality, a pound of grain or beef exported from the United States almost always displaces a pound that would have been produced with more land and greenhouse gas emissions somewhere else.2

#### Only large farms promote innovation and adjust to labor shortages.

Nordhaus & Blaustein-Rejto 21 – (Ted Nordhaus is director of research at the Breakthrough Institute and is a leading global thinker on energy, environment, climate, human development, and politics. Dan Blaustein-Rejto is a Master of Public Policy from University of California, the director of food and agriculture at the Breakthrough Institute and has conducted research with the Environmental Defense Fund, International Center for Tropical Agriculture, and Farmers Market Coalition, 4-18-2021, "Big Agriculture Is Best", <https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/>) nL

The resulting economic arrangements are rife with what economists call principal-agent problems. Many farmers don’t have incentives to invest in the long-term productivity of the land they farm because they don’t own it nor do they have the means to invest in cutting-edge capital equipment and technology.

These problems are exacerbated by the fact that many farms are family-owned but have no prospect for generational succession, as children continue to choose to pursue greener non-pastures off the farm. So for farmers who don’t own the land they farm, don’t have heirs to pass the farm on to, or both, investing time and money in technology and practices to improve land productivity over the long term does not make sense.

The prospect that a few large corporations could ultimately not only process but own much of America’s farmland and grow much of its food will strike many as fundamentally wrong. But it is likely where we are heading one way or another, as farming has always been a tough business to stay in, much less get into, and fewer and fewer Americans have any interest in doing so.

Vertical integration might bring significant benefits. Big agricultural corporations would have significantly greater incentive to invest resources into the long-term improvement of the land they own and farm, implement evidence-based farming practices, and spend on capital-intensive technology.

Large companies are also, counterintuitively, more responsive to demands for social responsibility, not less so. It is large, multinational corporations, not smaller regional operators, for instance, that have been willing to make zero-deforestation commitments in places like Brazil. That’s because, even though they can leverage their size and economic power to thwart reform, they are also easier to target, pressure, and regulate than more decentralized industries.

For these reasons, a food system that is bigger, more consolidated, and more vertically integrated might actually deliver better social and environmental outcomes than the one we have today. Either way, big farms and big agriculture are here to stay. They are a fundamental feature of global modernity, not a conspiracy by capitalists and corporations to poison people or the land.

Ultimately, improving the U.S. food system will require, first, appreciating it for the social, economic, and technological marvel that it is. It feeds 330 million Americans and many millions more around the world. It has liberated almost all of us from lives of hard agricultural labor and deep agrarian poverty. It has allowed forests to return across much of the United States while also sparing forests in many other parts of the world. It does all this while being extraordinarily efficient environmentally. A better food system will build on these blessings, not abandon them.

#### Sustainability is increasing

Alison McGrew 20, Writer for Illinois Farm Families, “3 Myths About Sustainable Agriculture”, March 2020, https://www.watchusgrow.org/2020/03/02/3-myths-about-sustainable-agriculture/

Myth #1: Today’s farms are less sustainable than they used to be.

Fact: Simply put, farmers today are doing more with less. Here are a few examples:

* Compared to 1977, today’s beef farmers produce the same amount of beef with 33% fewer cattle.
* Pig farms now use 75.9% less land than in 1960.
* Over the last 40 years, soybean farmers have nearly doubled how much they grow while using 8% less energy.
* Dairy farmers have reduced greenhouse gas (GHG) emissions by 63% over the past 60 years.
* Corn farmers have increased yields while reducing pesticide and fertilizer use, thanks in part to biotechnology.

Sustainable agriculture may look different on each farm, but the goal is always the same: make the farm better for tomorrow and for future generations while providing a safe, sustainable food supply.

## DA

#### Turns all their impacts---it’s the most existential risk---this card answers everything

Dan Brook &, Richard H. Schwartz September 30, 2020 [Dan Brook, sociology PhD, Richard H. Schwart, PhD, September 30, 2020, "Climate change: An existential threat to humanity and how we can survive," 9-30-2020, https://www.jpost.com/jerusalem-report/climate-change-an-existential-threat-to-humanity-and-how-we-can-survive-643267, hec]

Climate change goes way beyond “an inconvenient truth.” We are overheating our planet to alarming levels with catastrophic consequences. According to NASA, “Nineteen of the 20 warmest years all have occurred since 2001, with the exception of 1998” and 2020 is on a sizzling pace to be one of the hottest years. Every decade since the 1970s has been hotter than the previous decade. Picture an overheated car (and what we drive), an overcooked dinner (and what we eat), and someone sick with a fever (and how we act). Now imagine that on a planetary scale. Our climate crisis is the biggest social, political economic and environmental problem facing our planet and its inhabitants, affecting every country and every species, mostly in negative ways. Climate change refers to the increasing average surface temperature of the Earth’s air and water, and its various environmental effects. People are becoming increasingly aware of, and concerned about, the climate crisis and its consequences, despite corporate misinformation and some media obfuscation, due to frequent reports regarding record heat, droughts, wildfires, an increase in the number and severity of storms and other extreme weather events, the melting of glaciers – about 80% of the world’s glaciers are rapidly shrinking – permafrost, and polar ice caps, as well as decreasing snow on Mt. Kilimanjaro and other tropical mountains, shrinking lakes, rising sea levels, flooding, submerged islands, changes in wind directions, acidification of the oceans, endangered species and extinctions, spreading diseases, environmental refugees, and other ominous signs of disaster. Greenhouse gas levels in the atmosphere continue to rise and there are fears of “tipping points” from which we could not come back. Climatologists have asserted that concentrations of 350 parts per million (ppm) of atmospheric CO2 is a threshold level of atmospheric carbon dioxide, which had hovered below 285 ppm for thousands of years prior to the Industrial Revolution, yet surpassed 418 ppm on June 1, 2020, the highest value in human history, indeed the highest level in about three million years. As Jerry Brown, the former governor of California, a state subjected to many severe climate events, commented, “Humanity is on a collision course with nature,”calling this era “the new abnormal,” and warning that various environmental disasters will only “intensify” over the coming years. “Right now, we are facing a \*person\*~~man~~-made disaster of global scale,” says David Attenborough. “Our greatest threat in thousands of years. Climate change. If we don’t take action, the collapse of our civilizations and the extinction of much of the natural world is on the horizon.” Global climate change is also endangering polar bears, penguins, seals, walruses, salmon, elephants, giraffes, frogs, butterflies, birds, bees and many other animals, threatening up to one-third of all fauna species. In contrast, increases in carbon dioxide and heat levels will lead to an increase in the number and range of mosquitoes, further spreading discomfort and disease. Additionally, there is an increase in food insecurity, terrorism, ethnic violence and war, according to various militaries and intelligence agencies, especially in Central America, South Asia, Africa, and the Middle East, including Syria. In December 2019, World Meteorological Organization secretary-general Petteri Taalas lamented that we will witness “ever more harmful impacts on human well being” if we do not substantially reverse course. In August 2010, an “ice island” four times the size of Manhattan calved from the Petermann Glacier in Greenland into the sea (in addition, the Ayles Ice Shelf calved entirely in August 2005 and the Markham Ice Shelf broke up in 2008, to mention just a couple of other such alarming events). Recent years have marked the “historic minimum” of Arctic Sea ice. “Such a path is not merely unsustainable,” according to Harvard Prof. John P. Holdren, former president of the American Association for the Advancement of Science, “it is a prescription for disaster.” Yet, a 2019 UN report wrote that, despite many nations’ pledges to reduce them, greenhouse gases are still rising perilously, growing an average of 1.5% per year in the past 10 years. On June 20, 2020, the temperature in the Arctic Circle soared to 100.4º Fahrenheit (38ºC) for the first time in recorded history, hotter than any June day ever recorded in Miami, Florida, while it was snowing in other parts of Siberia. Houston, Texas, has been ravaged by five “500-year storms” in the last five years. Something projected to happen only once in half a millennium happened five times in a row. None of this is normal. These and various other extreme weather events and other eco-spasms have become more frequent, more intense, and are projected to multiply with dire consequences for the world. Tragically, new records are being set each year. Humanity is threatened as never before and major changes need to occur to put our imperiled planet onto a sustainable path – and as soon as possible. Even though a small number of individuals still deny the reality of climate change, there is strong scientific and environmental consensus across a wide range of disciplines that climate change is real, serious, worsening, and caused by human activity (anthropogenic) among all major scientific and environmental organizations, journals, magazines, and museums, and nearly all peer-reviewed scholarly articles, in addition to all reputable colleges and universities and most governments and large corporations. The evidence is overwhelming and continuing to pile up. A further indication of how serious climate threats are is that in the two weeks prior to the final submission of this article, the following occurred: Israel experienced a major, long-lasting heat wave, with temperature records broken in many cities; California and several other US western states experienced massive wildfires along with some record temperatures; the Koreas were struck by two severe typhoons; the US state of Louisiana was hit by a category four hurricane; there were reports that melting of ice in Greenland had passed a point of no return and that rapid melting of Arctic permafrost is releasing ’shocking amounts of dangerous gases.” This is truly an Earth emergency and earthlings are standing at a global precipice. The 2019 Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report on global warming was written by about 100 climate scientists from 40 countries, based on 6,981 scientific studies and over 42,000 expert and governmental comments. The IPCC has 195 member states. The report carefully delineates clear trends and potentially catastrophic consequences associated with climate change, warning of irreversible change, unless we very soon make radical and unprecedented efforts to counter global warming. According to the United Nations Foundation, “Overall, it is expected that every degree of warming will likely reduce crop yields, productivity and livestock production globally, while food demand continues to rise. And even worse, hunger and water crises – either caused or exacerbated by climate change – may generate ripple effects across society, leading to poverty, conflict, and migration.” “One action that the IPCC recommends,” it continues, “is to change what’s on our plates: swap out meat for more plant-based foods. While we need collective policy changes, individual actions do add up and send an important message to leaders.” Acting conservatively, the IPCC makes it plain that the current and projected climate change is not simply “natural variation” or “solar activity,” and certainly not a “Chinese hoax,” but “extremely likely” (meaning 95%-100% confidence) the result of human activity. The case is closed on the problem of anthropogenic climate change, with only the extent, mitigations, and solutions to still debate. It therefore should not be surprising that the US Pentagon states that global warming is a larger threat than even terrorism. “Picture Japan, suffering from flooding along its coastal cities and contamination of its fresh water supply, eyeing Russia’s Sakhalin Island oil and gas reserves as an energy source,” suggests a Pentagon memo on global warming. “Envision Pakistan, India and China – all armed with nuclear weapons – skirmishing at their borders over refugees, access to shared river and arable land.” The former secretary-general of the UN, Ban Ki-moon, has said that climate change needs to be taken as seriously as war and, further, that “changes in our environment and the resulting upheavals from droughts to inundated coastal areas to loss of arable land are likely to become a major driver of war and conflict.” Fighting global climate change may be one way to prevent future wars and genocides, simultaneously increasing energy security and physical security. There are additional causes for concern. The people disproportionately affected by climate chaos are the poor and socially disadvantaged, since they are in the weakest position to guard against environmental damages and will likely suffer the most harm. In the underdeveloped world, and perhaps especially in China, India and Southeast Asia, as well as much of Africa, the Middle East and Latin America, climate change is negatively affecting urban drinking water systems, agricultural output, and commercial and other transport on rivers. Further, increased suffering and increasing numbers of environmental refugees, along with greater anxiety over access to food, water, land, and housing – the material essentials of life – often lead to unstable conditions that give rise to anger, ethnic violence, gangs, terrorism, fascism, and war. “It’s the poorest of the poor in the world, and this includes poor people even in prosperous societies, who are going to be the worst hit,” states former IPCC Chair Rajendra Pachauri. Those who needlessly degrade and destroy the environment to satisfy their own selfish pleasures are like the pre-revolutionary Queen Marie Antoinette, declaring, “Let them eat carbon dioxide!” Israel is especially threatened by climate change. The coastal plain, where much of Israel’s population and infrastructure are located, could be inundated by a rising Mediterranean Sea. Climate experts project that the Middle East as a whole will become significantly hotter and drier, and military experts believe that this makes instability, terrorism, ethnic violence, and war more likely. The gravity of the climate threats to Israel was captured in the December 4, 2019 headline in The Jerusalem Post: “Hot and dry: Climate report spells disaster.” Don’t we want our children, grandchildren, and future generations to not only survive, but to thrive? To have a world that is at least as good, and hopefully better, than the one we do? Yes, we need our governments, corporations, schools, religious institutions, and other organizations to get actively involved in fighting climate change. Yes, we need to stop deforestation and increase reforestation. Yes, we need more resource conservation and more energy-efficient vehicles, appliances, electronics, batteries, and light bulbs. And, yes, our society needs to switch away from dirty and dangerous fossil fuels and toward renewable energy, such as solar, wind, tidal, wave, biomass, hydrogen, geothermal, algae and others. But while we are struggling for these important and positive large-scale social changes, we also need to say “yes!” to personal changes.

#### Nuclear winter theory false---we’d survive it

McDonald ‘19 [Samuel Miller McDonald is a writer and geography PhD student at University of Oxford studying the intersection of grassroots movements and energy transition; 1/4/19; “Deathly Salvation”; The Trouble; https://www.the-trouble.com/content/2019/1/4/deathly-salvation]

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices. An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive. In the near term, emissions would almost certainly rise as militaries are some of the world’s largest emitters. Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less ~~suicidal~~ civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows? What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### It's fast

Dr. Jim Garrison 21, PhD from the University of Cambridge, MA from Harvard University, BA from the University of Santa Clara, Founder/President of Ubiquity University, “Human Extinction by 2026? Scientists Speak Out”, UbiVerse, 7/1/2021, https://ubiverse.org/posts/human-extinction-by-2026-scientists-speak-out

This may be the most important article you will ever read, from Arctic News June 13, 2021. It is a presentation of current climate data around planet earth with the assertion that if present trends continue, rising temperatures and CO2 emissions could make human life impossible by 2026. That's how bad our situation is. We are not talking about what might happen over the next decades. We are talking about what is happening NOW. We are entering a time of escalating turbulence due to our governments' refusal to take any kind of real action to reduce global warming. We must immediately and with every ounce of awareness and strength that we can muster take concerted action to REGENERATE human community and the planetary ecology. We must all become REGENERATION FIRST RESPONDERS, which is the focus of our Masters in Regenerative Action.

#### Dems not focusing on anti-trust now---no thumper AND it requires significant PC---we control link UQ

Sagers 21[Christopher, “AMERICAN ANTITRUST AND THE NEAR TERM: CONSISTENCY, ONE IMAGINES, AND SOME REASONS WHY,” accessed 5-21-21, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>]

15. And so I reach the same conclusion being reached by many other Americans who care about antitrust and think it has been wrecked, and hoping for action that even five years ago I would have said was crazy. The only hope left is legislative reform of statutory antitrust. I think Congress should amend the law to reaffirm its own intention that the law be enforced proactively, aggressively, prophylactically, and for real, without giving every defendant the benefit of every conceivable doubt. Congress should do that in a way that keeps the courts from thwarting its intent through nullifying interpretations, as they have done many times before. Obviously, Senate control is again quite relevant. Under those Senate norms that still remain—in which we retain a filibuster rule for ordinary legislation—a party with fewer than 60 seats can typically do little. The two parties do not apparently work together in hardly any fashion. The party that holds the majority, even if only by one vote, controls the institution and its actions outright, but the minority can typically keep it from taking meaningful substantive action. Where the opposing party holds the White House, Senate minorities have filibustered essentially all legislation, apparently just to deny the opposing President any opportunity for campaign-trail self-congratulation. When the majority party can take effective action, it will only be in extraordinary circumstances or by using a filibuster exception, like the budget reconciliation procedure that was used in connection with the Obamacare legislation in 2010, and in subsequent Republican efforts to repeal it. [304] But antitrust, however important and however much it has returned to popular consciousness, seems unlikely to be so high on the Democratic agenda that it is chosen as one of the extraordinary matters Democrats prioritize in this way, even if they win Senate control. 16. And on top of all of that, it does not help that in this world, in which we dwell on ideas and not institutions—perhaps because institutions seem boring, and do not invite intellectual abstraction or Manichean dreams of good and evil—we see sharp divisions even within our factions. Only liberals and progressives in America favor more antitrust enforcement, but among us we have several hotly disputed disagreements, and some difficulties getting along. It reflects in microcosm the struggle of left and center of the election of 2016. So in 2021 and thereafter, it seems like it will be a fair bit of work to build any effective reform coalition. [305]

#### Link turns case---It causes the plan to be ignored AND external war

Jennifer Sensiba 20, Author at Clean Technica, Long Time Efficient Vehicle Enthusiast, Writer, and Photographer, “It’s All About Political Capital”, Clean Technica, 11/6/2020, https://cleantechnica.com/2020/11/06/dont-encourage-biden-to-waste-political-capital/

In short, political capital is a way to think about political power in democratic countries. Yes, winning elections does give some political power, but you can’t effectively use it unless you have coalitions, alliances, trust, goodwill, and influence. Your earned trust and connections are like money (capital). You can work hard to earn it and build it up, but it’s easy to spend it and even waste it, just like money.

If you get power from an election and then quickly spend all of the political capital impressing loyalists, you’ll get to the point where you can’t win future elections (Trump is a great example of this), can’t get votes together for legislation, and can’t get people to help you in a variety of other ways. At worst, a political leader who has run completely out of political capital might not even be able to get normal citizens to follow laws. As the consent of the governed is withdrawn, you see protests, riots, violence, terrorism, and even war.

#### New SCOTUS action links—anti-court sentiment drives

Quinn 21 [MELISSA QUINN, "Democrats vow to protect abortion rights after Supreme Court decision on Texas law", 9/3/21, https://www.cbsnews.com/news/texas-abortion-law-rights-democrats-supreme-court/]

President Biden and congressional Democrats are vowing to take action to protect a woman's right to an abortion after a divided Supreme Court allowed a Texas law outlawing the procedures after six weeks of pregnancy to remain in effect in a late-night decision Wednesday. House Speaker Nancy Pelosi pledged Thursday that once the House returns to Washington, D.C., later this month from its recess, it will take up legislation that enshrines the right to an abortion into federal law and prohibits "medically unnecessary restrictions" on abortion services or facilities. "This ban necessitates codifying Roe v. Wade," Pelosi said in a statement condemning the Supreme Court's decision. The high court established the woman's right to an abortion in its 1973 decision in Roe.

#### Court action links --- congressional debate and legislative introductions

**Pearlstein 20**, Steven, is a former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University, “Facebook and Google cases are our last chance to save the economy from monopolization,” 12/18/20, accessed 8/23/21, https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit

**To achieve that more ambitious outcome**, says Gene Kimmelman, a former chief counsel to the Justice Department’s antitrust division**, the government does not have to go so far as to convince the courts that their past decisions were wrong**. But **it would have to convince judges that those earlier precedents have to be adapted to the competitive realities of today’s winner-take-all markets** — markets **where customers all want to use the same network or supplier**, the price of a product can be zero, and the competitive threat comes from small start-ups offering a different product or technology. **Beating up on Big Tech is fun and easy. Restraining it will require rewriting the law. Even as these cases proceed through the courts, the issues** they raise **will also be actively debated in Congress**, where there is considerable bipartisan interest in restraining the power of Big Tech. And what happens in one forum is likely to inform and affect the other. **The filing of the court cases**, for example, **is likely to give further impetus to legislative proposals to strengthen the antitrust laws and create a new agency to directly regulate digital platforms**, **much in the way the F**ederal **C**ommunications **C**ommission **regulates telephone and cable companies and the F**ederal **E**nergy **Re**gulatory **C**ommission **regulates electric utilities**. In addition to **regulating business practices and approving mergers, such an agency could also address issues of privacy, data ownership and regulation of disinformation and hate speech**. Just this week, both the British government and the European Union unveiled a proposal for such an agency.

#### Court ruling tanks PC

Mr. Mirengoff 10 is an attorney in Washington, D.C. A.B., Dartmouth College J.D., Stanford Law School, June 23 The Federalist Society Online Debate Series, http://www.fed-soc.org/debates/dbtid.41/default.asp

The other thing I found interesting was the degree to which Democrats used the hearings to attack the "Roberts Court." I don't recall either party going this much on the offensive in this respect during the last three sets of hearings. What explains this development? My view is that liberal Democratic politicians (and members of their base) think they lost the argument during the last three confirmation battles. John Roberts and Samuel Alito "played" well, and Sonia Sotomayor sounded like a conservative. The resulting frustration probably induced the Democrats to be more aggressive in general and, in particular, to try to discredit Roberts and Alito by claiming they are not the jurists they appeared to be when they made such a good impression on the public. I'm pretty sure the strategy didn't work. First, as I said, these hearings seem not to have attracted much attention. Second, Senate Democrats are unpopular right now, so their attacks on members of a more popular institution are not likely to resonate. Third, those who watched until the bitter end saw Ed Whelan, Robert Alt and others persuasively counter the alleged examples of "judicial activism" by the Roberts Court relied upon by the Democrats -- e.g., the Ledbetter case, which the Democrats continue grossly to mischaracterize. There's a chance that the Democrats' latest **partisan innovation** will **come back to haunt them**. Justice Sotomayor and soon-to-be Justice Kagan are on record having articulated a **traditional, fairly minimalist view of the role of judges**. If a liberal majority were to emerge -- or even **if the liberals prevail in a few high profile cases** -- the charge of "deceptive testimony" could be turned against them. And if Barack **Obama** is still president at that time, he likely **will receive** some of **the blame**.

#### Enforcement guarantees blame

Canon and Johnson 99 [Professor of polisci at UK and vice-presiding judge on the Oklahoma court of appeals, Bradley C. Canon and Charles A. Johnson, Judicial Policies: Implementation and Impact, 1999, p. 3]

As we will see in later chapters, many judicial decisions afford a great deal of latitude for interpretation and implementation. Political actors and institutions who follow through on the decisions make the judicial policy. Certainly, the judges who enforced civil rights decisions were subject to political pressures from a variety of sources. Similar pressures affected public and private institutions after court decisions on affirmative action. Even presidential politics may become intertwined with judicial policies, as did Richard Nixon’s 1968 “law and order” campaign criticizing the Supreme Court’s criminal justice decisions or the explosive issue of abortion in virtually every presidential election since 1980. Like Congress and the president, the Supreme Court and other courts must rely on others to translate policy into action. And like the processes of formulating legislative, executive, and judicial policies, the process of translating those decisions into action is often a political one subject to a variety of pressures from a variety of political actors in the system.

#### President gets the blame for Supreme Court decisions

Toobin 15(CNN Senior Legal Analyst, “Obama’s Game of Chicken with the Supreme Court,” accessed 6-4-15, <http://www.newyorker.com/news/daily-comment/obamas-game-of-chicken-with-the-supreme-court?intcid=mod-latest>)

For many people, the President of the United States **is the government of the U**nited **S**tates. It’s why he gets the **credit and blame** for so many things, like the economy, where his influence can be hard to discern. This is particularly true for a subject in which the President has invested so much of his personal and political capital. If the Supreme Court rules against him, the President can blame the Justices or the Republicans or anyone he likes, and he may even be correct. **But the buck will stop with him**.

#### Build Back Better will pass---PC is key

---BBB will pass---PC determines whether centrist Dems come on board---Biden is all-in---the passage of the infrastructure bill demonstrates that pressure will succeed, but maintaining focus is key---that’s Barron-Lopez

Barron-Lopez 11-11 (Laura Barron-Lopez, Politico Staff, Dems to White House: The only prescription is more Biden, <https://www.politico.com/news/2021/11/11/dems-white-house-biden-520946>)

After months of deference to Congress, President Joe Biden moved more assertively last week to shepherd half his domestic agenda into law. With the other half still in limbo, Democrats want some of that Biden punch again.

Outside groups fear that congressional Democrats could come up short on Biden’s social spending package. They are concerned that moderates in the House may end up buckling if the budget scores on the bill come back worse than anticipated. And there is residual anxiety that one of the two wavering Senate Democrats — Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — could vote “no” over concerns about inflation and long-term debt.

The clearest solution to avoiding this, they argue, is more Biden.

“All eyes are on the president, all expectations are on the president,” said Lorella Praeli, co-president of the progressive Community Change Action. “We are playing our role. We are mobilizing. We're reminding people everyday what this is about.”

Praeli added that Biden must ensure there aren’t future cuts to the package, which dropped from $3.5 trillion to $1.75 trillion to accommodate centrist Democrats in the House and Senate. “This is what he campaigned on. Only the president can deliver it in the end.”

Until last week, Biden’s involvement in negotiations had been more deferential than managerial. That befuddled lawmakers, who were waiting for him to draw red lines about which priorities he wants in and out of the deal or to even demand votes. To date, Biden has publicly refrained from drawing a red line around including paid leave in the final version of the legislation, leaving the leadership in the House at odds with centrists in the Senate.

But Biden did ramp up his involvement in the negotiations last week. And Democrats viewed that as key to getting an agreement in the House on their infrastructure bill, as well as on a rule to move forward with their social spending package, which funds universal pre-K, expands Medicare access, cuts taxes for families with children 18 years old and under, and combats climate change.

Now they want more. Expectations are high for Biden to keep the House to its promise of a vote on that social spending plan the week of Nov. 15.

“They basically made a promise,” said Rahna Epting, executive director of the progressive advocacy group MoveOn. “And Biden was able to get enough progressives to vote for the bipartisan infrastructure bill, on that promise. We are expecting Biden and the Democratic Caucus will make good on their word and pass the Build Back Better Act no later than Nov 15th as stated.”

White House officials contend that Biden and his team remain in close touch with the Hill, and their legislative affairs staff continues to push the social spending bill toward a vote. The White House said it is communicating regularly with a range of lawmakers including Manchin, but did not answer when asked whether Biden has spoken to the West Virginia senator or other moderates in recent days.

“There has been no kind of slowdown when it comes to our Hill outreach,” a White House official said.

The growing demands for Biden to stay heavily involved reflect a fear in the party that the window to act on the agenda is quickly closing, especially as concerns mount about lingering inflation and the midterms near. If the House meets its deadline next week and passes the social spending bill, some Democrats want Biden to issue a deadline for the Senate to act. Others noted that the end-of-year legislative calendar is short and brutal.

The “dynamic has totally changed,” said a Democratic strategist. “The president secured this agreement with the five holdouts for House passage of BBB next week and it’s on him to enforce it.”

#### PC outweighs and overcomes challenges

**Schofield 11-9** (Rob Schofield, Director of NC Policy Watch, has three decades of experience as a lawyer, lobbyist, writer and commentator, President Biden’s remarkable record of accomplishment under nearly impossible circumstances, https://ncpolicywatch.com/2021/11/09/president-bidens-remarkable-record-of-accomplishment-under-nearly-impossible-circumstances/)

**Remind** yourself for a moment of the **scale** and **scope** of the challenges **Biden** faced when he took office in January and the limited and inadequate collection of tools that were at his disposal to tackle them.

Forty-one weeks ago, our nation had just survived a violent attempted coup d’état and the outgoing president who had spurred it on by refusing to acknowledge the fact of his defeat was about to be impeached for a second time. Meanwhile, daily deaths from a global pandemic were peaking at their highest levels, the national economy remained a mess, and a dire, worsening, and largely unaddressed environmental emergency continued to place the planet in an ever-tightening grip.

Only Abraham Lincoln and possibly Franklin Roosevelt entered their presidencies under more difficult circumstances.

What’s more, unlike Lincoln and Roosevelt who took office at a time in which their parties enjoyed large congressional majorities, Biden entered the oval office with no such advantage. Indeed, it was only thanks to two near-miraculous come-from-behind wins in a pair of January Georgia Senate runoffs that Democrats wield any authority at all on Capitol Hill.

Now add to all this the fact that the **impossibly narrow** Democratic Senate “majority” (51-50 thanks to the presence of Vice President Harris) includes determined **ideological conservatives** like West Virginia’s Manchin and Arizona’s Sinema, and that the antiquated Senate **filibuster** rule that requires 60 votes to pass almost anything meaningful, and **it’s a marvel** that the nation has **not** descended into **complete political gridlock** and chaos.

In comparison to Biden, the Apollo 13 astronauts were well-equipped when they jerry-rigged their spacecraft, quite literally on the fly, a half century ago.

**Amazingly**, however, **no national crash** has ensued.

Instead, under the **President’s** coherent, sober, and science-based **leadership**, the nation has aggressively locked horns with the pandemic by undertaking one of the largest and most successful mass vaccination campaigns in human history – a campaign that, despite persistent sabotage efforts from some on the political right, has saved millions of lives.

Meanwhile, thanks in large measure to Biden’s aggressive and on-the-mark stimulus policies, the economy has revived at a record pace and huge strides have been made in slashing poverty – especially child poverty.

And then there is the climate emergency, where, thanks to the President’s vision and simple common sense, the U.S. has rapidly transformed its role from that of science and reality-denying roadblock to a global leader. There are still miles to travel in this realm, but the massive **infrastructure** legislation finally approved this past weekend by small **bipartisan majorities** in both house of Congress further cements this vitally important policy 180.

Now add to all this the literally thousands of talented and diverse appointees Biden has named to the judiciary, the ambassadorial corps, and the leadership of numerous regulatory agencies – most of whom have already effected huge and positive federal policy shifts in everything from student loans to toxic chemicals to human rights – and the magnitude of his administration’s accomplishments in less than 300 days looms even larger.

Has the Biden presidency been perfect? **Of course not**. Like all of his predecessors, Biden has made his share of mistakes. Like Barack Obama, he’s likely wasted too much time in search of imaginary common ground with ideological conservatives determined to undermine him at every turn. While necessary, the Afghanistan withdrawal could have proceeded more smoothly. And as with many other presidents, one also yearns at times for a leader with the kind of rhetorical gifts that would enable him to easily skewer and deflate his adversaries and inspire widespread support for the kind of wholesale progressive changes the nation needs.

**But**, **in the end,** this is **quibbling**. In light of the **huge political challenges** under which he’s been forced to operate (and especially in comparison to the lawless corruption and intellectual vacuity of his predecessor that inspired night terrors in millions – maybe even billions – of humans), Joe Biden has achieved **a remarkable record of accomplishment**. Whatever the future holds, our nation will be forever in his debt.

#### Thumpers are all priced in---Biden has enough PC despite other must-pass votes like avoiding shutdown and debt default

Romm 11-6 [Tony Romm, congressional economic policy reporter at The Washington Post, “With infrastructure victory in hand, Democrats brace for next battle over $2 trillion spending bill,” The Washington Post, 11-6-2021, https://www.washingtonpost.com/us-policy/2021/11/06/congress-biden-spending-deal/]

With a roughly $1.2 trillion bill to improve the nation’s infrastructure now behind them, Democrats must prepare to turn to their next, perhaps tougher task: Shepherding the rest of President Biden’s economic agenda through Congress.

The successful vote in the House late Friday marked only the first of two spending initiatives that Biden has called on Congress to adopt for months. Still another roughly $2 trillion in new tax and spending investments are awaiting action in the House and Senate, where party lawmakers harbor grand ambitions to overhaul the nation’s health care, education, climate, immigration and tax laws.

Beginning in the spring, many Democrats had hoped to move these two bills in tandem, a strategy meant to satisfy liberals and moderates who were warring with each other over the size and scope of their spending priorities. But the House this week essentially opted to divorce them, adopting an infrastructure bill that had been stalled since August while voting to open debate on the remainder of their plans.

That tees up for Congress an eleventh-hour sprint in the waning moments of the year through treacherous political terrain. The $2 trillion tax-and-spending proposal is still unsettled policy in the eyes of moderates, including Sen. Joe Manchin III (D-W.Va.), who long has sought to whittle down its price tag. And the debate is set to arrive just as Congress is preparing to take on a host of additional challenges, including a renewed need to fund the government in December, that could distract Democrats in the end.

For all the hurdles they face, however, Democrats this week sounded an upbeat note — emboldened anew after achieving a fresh political victory.

“Let me be clear: We will pass this in the House. And we will pass it in the Senate,” Biden said during a speech Saturday heralding the passage of the infrastructure bill.

The $2 trillion measure — called the “Build Back Better Act,” which bears the name of the president’s 2020 campaign slogan — aims to expand the footprint of government to deliver more robust services to American workers and families, especially those in greatest need.

#### BBB’s top priority---Biden will sacrifice other agenda items if they conflict

O’Brien 11-2 [Connor O’Brien, defense reporter for POLITICO, covering Congress, “Delayed defense bill sparks bipartisan anger at Schumer,” Politico, 11-2-2021, <https://www.politico.com/news/2021/11/02/defense-bill-delay-bipartisan-anger-schumer-518597>] \*added [of]

The House passed its version of the defense policy bill in late September. The Senate has yet to act on its version since the Armed Services Committee approved the bill in July.

In the weeks since the blowout House vote, Smith has urged quick action on the Senate bill so that the two chambers can form a committee to hash out the differences before the end of the year, when many military special pay and bonuses and other authorities typically expire.

Smith said he has reached out to Schumer’s office to press them on the bill, but the response has essentially been “We'll get to it when we get to it.”

“I called and asked. They told me to piss off,” Smith said. “I said, 'OK, I want to talk to Schumer.' They said, 'No you can't do that.' So here we are."

Democrats on both sides of the Capitol, meanwhile, are focused on landing a final agreement on a $1.75 trillion package to fund health care, economic initiatives and fight climate change. The proposal, which all Republicans are likely to oppose, is the top legislative priority [of] Biden and congressional Democrats.

Republicans, led by Senate Minority Leader Mitch McConnell, have in recent days linked talks on the social spending plan and inaction on the defense bill, attacking Democrats for increased domestic spending at the expense of a must-pass military policy bill that has become law each year for six decades.

"Any delay by Sen. Schumer really shows a lack of prioritization for this country's defense, but it also shows a lack of seriousness about those threats that we're facing," added Sen. Deb Fischer (R-Neb.).

A spokesperson for Schumer did not respond to a request for comment on the Republican attacks, Smith’s criticism or when the NDAA might come up for debate.

**Oppositions are insufficient to tank the deal**

**Romm 11-6** (Tony Romm, WaPo staff, With infrastructure victory in hand, Democrats brace for next battle over $2 trillion spending bill, <https://www.washingtonpost.com/us-policy/2021/11/06/congress-biden-spending-deal/>, y2k)

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Democrats aspire as part of the package to expand Medicare benefits to cover hearing aids and lower the price of insulin and other prescription drugs for seniors. They also hope to institute free universal prekindergarten and provide billions of dollars to boost child care. Party lawmakers have included one of the largest investments ever to combat climate change, a new effort to reform the country’s immigration system and a slew of expanded tax benefits to help families with children. And they have proposed to fund the measure through new taxes on millionaires and profitable corporations.

What's in Biden's $1.75 trillion spending plan

The focus on what some call “social” spending differs considerably from the infrastructure bill, which trains its investments on improving the country’s roads, bridges, pipes, ports and Internet connections. But both plans grew out of the same series of policy blueprints that Biden put forward this spring, as he pledged to revitalize the U.S. economy in the aftermath of the coronavirus pandemic.

The infrastructure bill is soon set to become law. The $2 trillion package, meanwhile, has yet to clear either chamber and has drawn considerable Republican opposition. Instead, Democrats in Congress are preparing to return to the package later in November, embarking anew in a debate that has divided the party considerably since the spring.

The first hurdle is the House, where Democrats are eyeing the week of Nov. 15 to consider the $2 trillion proposal. The time frame stems from an agreement between liberals and moderates that helped put an end to months of fighting and paved the way for the infrastructure bill to clear the House on Friday.

**For months**, left-leaning lawmakers with the **C**ongressional **P**rogressive **C**aucus had held up the public-works bill as leverage in talks with centrists over their broader spending ambitions. In doing so, they insisted both proposals had to move in tandem to win their support. But they ultimately agreed to ease their **blockade** in a late-night Friday **compromise** with a group of **moderates** that had been in revolt. Liberals said they would back **infrastructure**, assuaging **centrists**, who in turn pledged they would support the **B**uild **B**ack **B**etter Act, provided they can see an official analysis of its fiscal impacts to determine if it is deficit neutral. (The bill’s top backers say it is funded in full.)

“We commit to voting for the Build Back Better Act, in its current form other than technical changes, as expeditiously as we receive fiscal information from the Congressional Budget Office,” said five moderates, including Rep. Stephanie Murphy (D-Fla.), a leader of the Blue Dog Coalition, and Rep. Josh Gottheimer (D-N.J.), who helped broker the pact. They also promised to work “to resolve any discrepancies” if the budgetary analysis is unfavorable.

Joining moderates on the steps of the Capitol to announce the truce, Rep. Pramila Jayapal (D-Wash.), the head of the Congressional Progressive Caucus, stressed the two factions are “going to **trust each other** because the Democratic Party is **together** on this.”

“We’ve always said we need to get both bills done,” Jayapal told reporters. “And tonight we have an agreement that will get both bills done.”

The agreement is **critical** in the narrowly **divided House**: Speaker Nancy Pelosi (D-Calif.) can only afford to lose three votes in the narrowly divided chamber, where Republicans vehemently oppose the measure and are unwilling to aid in the same way they did with the infrastructure deal. If **liberals** and **moderates** are not in lockstep, **the entire $2 trillion endeavor** would be **doomed**.

Speaking to reporters Friday, Pelosi expressed a measure of **confidence** that they could **finalize** the bill in the House **in the coming weeks**. “As we do, then, **we’ll have a Thanksgiving gift for the American people,**” she said.