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Is the NFL Playing Dirty with Super Bowl Clean Zones?: Will the Noerr-Pennington Doctrine Be Successfully Applied By the NFL in Williams v. City of Arlington and Future Cases Involving the Super Bowl Clean Zone Ordinance

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**IS THE NFL PLAYING DIRTY WITH SUPER BOWL CLEAN ZONES?:
WILL THE NOERR-PENNINGTON DOCTRINE BE SUCCESSFULLY APPLIED BY THE
NFL IN *WILLIAMS V. CITY OF ARLINGTON* AND FUTURE CASES INVOLVING THE
SUPER BOWL CLEAN ZONE ORDINANCE**

ANDREW SACHS

INTRODUCTION

The National Football League (NFL) is the foremost professional football league in the world.¹ Each year, tens of millions of people watch the league's championship game, the Super Bowl. The 2012 Super Bowl between the New York Giants and the New England Patriots was the most-watched show in U.S. television history, having an estimated average audience of 111.3 million viewers according to The Nielsen Company.² Official sponsors of the NFL include marketing powerhouses such as Bud Light, Verizon and Visa.³ These companies pay a hefty price for this sponsorship and apparently the NFL will go to great lengths to preserve the value in them.

Official sponsorships are a source of big money for the league. Anheuser-Busch was able to out bid MillerCoors in 2010 so that its flagship brand Bud Light would be the official beer sponsor of the NFL.⁴ This sponsorship reportedly costs the brewer almost \$1.2 billion over six years, which just recently began in 2011.⁵ Companies that are not fortunate enough to strike a deal to be an official NFL sponsor are left looking for other ways to associate themselves with the NFL which may include \$3.5 million for an average commercial aired during the Super Bowl.⁶ This marketing association is so valuable and sought after because the league is the premier channel for companies that target men.⁷

This paper will examine how the NFL protects its valuable official sponsors from ambush marketing tactics during the Super Bowl.⁸ The NFL is typically contractually obligated to

protect official sponsors against ambush marketing and some sponsors even negotiate provisions that reduce the sponsorship fees if the sponsorship rights are devalued.⁹

To preserve the value of its official sponsorships, the NFL has taken steps to limit marketing activity by companies that are not official sponsors at recent Super Bowl locations. Prior to selecting a venue for each Super Bowl the league sends out bid packages to potential host cities. In the bid package the NFL requires host cities to enact an ordinance prohibiting “temporary signs, inflatables and buildings wrapped with advertising banners” around the game site during Super Bowl week.¹⁰ Such clean zone ordinances are ultimately enacted by the host city to protect the league and the Super Bowl against ambush marketing.¹¹

This paper will explore the NFL’s current and potential exposure to lawsuits that arise out of the clean zone ordinances. It will begin by defining ambush marketing and what clean zones are and their history as related to the Super Bowl. Part II will discuss a trial case in which the NFL is currently being challenged over the legality of the clean zone in Arlington, Texas during Super Bowl XLV in 2011. Part III will review the Noerr-Pennington doctrine, which the NFL is using as a defense in the Arlington case and believes, exempts them from liability relating to the legislature’s ordinance creation and enactment. Finally, Part IV will analyze the applicability of the Noerr-Pennington doctrine to the current test case.

I. AMBUSH MARKETING, CLEAN ZONES, AND THE SUPER BOWL

Ambush marketing is a strategy that advertisers use to associate themselves with an event without paying any official sponsorship fees.¹² Four of the most prevalent forms of ambush marketing techniques are:

“(1) purchasing advertising time around an event in order to associate a nonsponsoring company as a sponsor of the event; (2) negotiating with individual players or teams, who are participating in a larger sponsored event or league, to have them endorse a nonsponsoring company; (3) using event tickets in a promotional contest to tie a

nonsponsoring company to that event; and (4) [aggressive] marketing [by] a nonsponsoring company around the location of an event.”¹³

Ambush marketing is designed for a company to capitalize on the goodwill, reputation, and popularity of an event without the authorization of the organizer.¹⁴

Ambush marketing traditionally has two victims – the sponsored sports organizations and their affluent corporate sponsors.¹⁵ Event organizers like the NFL believe the practice of ambush marketing is morally wrong and should be considered unfair competition.¹⁶ However, some ambush marketers believe it is "ethically and legally correct since official sponsors only buy the official association with a particular event such as the Olympics or World Cup rather than the entire thematic space surrounding the event."¹⁷ This can be simplified by stating that “one cannot sell what one does not own, and no sport organization owns the entire concept of or aura surrounding a sport such as ... football”¹⁸

The majority of ambush marketers avoid using trademarks,¹⁹ which removes the possibility of infringement litigation under the Lanham Act that is likely the most effective remedy to this problem.²⁰ With the possibility of trademark infringement litigation removed, the victims are left with only a two viable litigation options. The remaining options are (i) claiming unfair competition under the Lanham Act, or (ii) claiming unfair competition under common law.²¹

Clean zone ordinances are not new and are not limited to the NFL’s Super Bowl. These ordinances have been adopted at other major worldwide sporting events including NCAA tournament games, the 2002 Winter Olympics in Salt Lake City,²² the NBA All-Star Week,²³ and FIFA’s World Cup.²⁴ Indianapolis’ recently enacted ordinance did not only govern the Super Bowl but it covers all large sporting events in the city going forward including the Big Ten Football Championship held on December 3, 2011.²⁵ A clean zone has even been proposed for

the 2012 Republican National Convention in Tampa, modeled off of the one they created when they hosted the 2009 Super Bowl.²⁶

Local clean zone ordinances allow the NFL to control who can advertise and how they can advertise in and around the city during Super Bowl week. The ordinances have essentially given the league ownership of the concept and aura that surrounds the sport in the immediate vicinity of the venue. It is a small price to pay for the host city because the NFL estimates that the Super Bowl generates an average of \$400 million in economic benefit for the region and results in worldwide media exposure.²⁷

The most recent clean zone ordinance for Super Bowl XLVI enacted by the City of Indianapolis defines a clean zone as:

Clean zone means a geographically defined area within a special event zone during a civic sponsored special event that no temporary advertising, signage, or structures shall be erected or transient merchant, vendor, or otherwise licensed activity may take place without the person or entity performing such activity first having received approval from the event sponsor and a limited duration license from the bureau of license and permit services.²⁸

The NFL is forthright with their clean zone requirement to prevent ambush marketing. The league requires potential host committees to work with the local government to pass the ordinance in the bid request package sent to all cities interested in hosting the Super Bowl.²⁹ The clean zones are required to include one-mile radius around the stadium as well as at local airports, within six blocks of the NFL headquarters hotel, and around the NFL Experience location.³⁰

Clean zone ordinances must include the following provisions:

1. Temporary Structures – A prohibition against temporary structures, including but not limited to temporary retail locations not approved in writing by the NFL.
2. Temporary Sales Permits—No temporary sales permits may be granted within the Clean Zone during Super Bowl week

3. Temporary signage- A prohibition against temporary signage or banners, video screens, electronic message boards, or nighttime projections of commercial messages during Super Bowl week.
4. Inflatables- A prohibition against the installation or display of inflatables.
5. Building Wraps- A prohibition against existing buildings temporarily wrapped with advertising banners or signage (except for event-related signage approved by the NFL).
6. Preventive Fund- If such prohibitions cannot be obtained, the Host Committee must provide a fund of one million dollars (\$1,000,000) for the NFL to use to prevent Ambush Marketing.³¹

The bid package is the start of building a contractual relationship between the NFL and the host committee.³² The NFL and the host committee have no direct way to force the local government to enact the required clean zone ordinance other than traditional lobbying channels.³³ The sixth required provision does provide the NFL with some additional leverage over the host city to pass the ordinance. It outlines a one million dollar penalty from the host committee if the clean zone is not established.³⁴

The NFL informs local government officials that problems have occurred in Super Bowl host cities that did not have clean zone ordinances in place ranging from traffic issues to national security concerns at the high profile event.³⁵ The league apprised one of the host cities of the 2011 Super Bowl about

experiences in other cities where failure to regulate temporary structures, outdoor sale/distribution of merchandise and temporary outdoor advertising displays visible from public streets or sidewalk in the vicinity of Super Bowl related events resulted in pedestrian and vehicular traffic issues that caused traffic and pedestrian safety problems, obscured lines of sight and affected public safety operations.³⁶

Some cities recently used this information to claim they had a legitimate governmental interest to enact the ordinance in order to protect the safety of drivers and pedestrians in the immediate vicinity of Super Bowl activities.³⁷ Some analysts even believe that “everything changed on

September 11” and the clean zone restriction on commerce “is the necessary response to protecting our freedom.”³⁸

The sizes of the clean zones have varied significantly over the years.³⁹ Detroit, Michigan instituted a 300-mile clean zone for Super Bowl XL in 2006, while Arlington,⁴⁰ Texas and Indianapolis, Indiana both adopted one mile clean zone ordinances for Super Bowl XLV and XLVI respectively.⁴¹

II. WILLIAMS V. CITY OF ARLINGTON

During Super Bowl XLV hosted at Cowboys Stadium in the City of Arlington, Texas, Eric Williams organized an anti-bullying campaign sponsored by Best Buy.⁴² Williams created after-school programs for at risk youth, which teaches students to produce music videos and short films.⁴³ Williams also runs safe-driving and anti-bullying campaigns with the aid of corporate sponsors.⁴⁴ His event with Best Buy was intended to raise awareness for his anti-bullying campaign and be a fundraiser for his after school programs that were struggling due to state budget cuts.⁴⁵ Williams was charging the participants in a John Madden video game tournament that would take place in a bus parked in Best Buy’s parking lot near Cowboys Stadium during the Super Bowl.⁴⁶

On February 6, 2011, Super Bowl Sunday morning, an Arlington code compliance officer approached Williams at the event and told him to move the bus immediately because he did not have a permit to be there.⁴⁷ Williams called the property manager and his Best Buy contact to tell them what was happening and asked them to come talk to the officer.⁴⁸ When they arrived at the bus they promptly informed the code officer that they granted their permission for the event to take place there.⁴⁹ With this new knowledge, the officer still told Williams he must leave and gave him an hour and a half to leave before issuing a ticket.⁵⁰ The code officer returned

approximately an hour and a half later and issued Williams a ticket because he had not moved the bus as requested.⁵¹ After issuing the ticket, the officer gave him an additional 30 minutes to leave.⁵² Best Buy and the property management company were not cited for violating the clean zone ordinance.⁵³

The code compliance officer returned to the site about thirty minutes later and informed Williams that he had been instructed by the NFL to have the bus moved out of the clean zone.⁵⁴ The officer returned to his vehicle and made a phone call and about fifteen minutes later two police cars arrived at the location.⁵⁵ The police officers told Williams that if he failed to comply with the code officer's instructions and move the bus, he would be arrested and the bus would be towed at his expense.⁵⁶ Williams was allowed to wait for the bus driver to arrive and left the property about twenty to thirty minutes later.⁵⁷

Williams plead not guilty in his criminal case.⁵⁸ At a bench trial held in September 2011, the court found him guilty of ambush marketing.⁵⁹ The judge utilized the strict interpretation standard of the clean zone ordinance in finding him guilty of the crime of ambush marketing.⁶⁰

Williams is claiming that the ambush marketing ordinance in the City of Arlington of his first amendment rights to free speech and association.⁶¹ He claims that he was criminally charged for merely engaging in political and commercial protected speech under the ambush marketing ordinance passed "pursuant to contractual obligations it owed the NFL."⁶² He further claims that the NFL and the City of Arlington were pervasively entwined in protecting the official sponsors of the Super Bowl and the passage and enforcement pursuant to this relationship violated his constitutional rights.⁶³

Anyone not obtaining sponsorship rights from the NFL was subject to the regulation while official sponsors were exempt from it.⁶⁴ Therefore, Williams claims that the ordinance

violates the equal protection clause of the Fourteenth Amendment. He claims that he was discriminated against by the police and code compliance officers in their selective enforcement of the ordinance, under NFL direction, based on his inability to become an official Super Bowl sponsor.⁶⁵

The NFL believes that Williams' "claims are barred by the Noerr-Pennington Doctrine which protects private entities from liability based on their efforts to influence the passage or enforcement of laws, even if the laws they advocate for are for their own commercial benefit."⁶⁶ Williams believes that the NFL cannot assert the Noerr-Pennington defense.⁶⁷ It claims that the doctrine should not be extended to protect "commercial activity with at political impact," as the NFL is seeking here, from its intended protection of "political activity with a commercial impact."⁶⁸

This case is currently before Judge Terry R. Means, United States District Judge for the Northern District of Texas, Fort Worth Division,⁶⁹ and is scheduled to go to trial no sooner than August 27, 2012.⁷⁰ In December 2011, the parties participated in mandated alternative dispute resolution mediation but were unable to reach a settlement at that time.⁷¹ The parties are currently believed to be conducting discovery,⁷² heading into "a trial [that] could provide a landmark test case on the legality of clean zone ordinances."⁷³

III. ANTITRUST LAW AND THE NOERR-PENNINGTON DOCTRINE

Antitrust law protects and promotes consumer welfare by preventing collaborative or unilateral private conduct that impedes competition.⁷⁴ Free and fair competition will ultimately result in lower prices and better goods and services.⁷⁵ Ultimately, the courts must balance the value of free competition with other paramount values, even if competition would be hindered. The Supreme Court had to balance fundamental first amendment rights and limit the

enforcement of antitrust laws against actors that urge government action in a line of cases that has established the Noerr-Pennington doctrine.⁷⁶

The Noerr-Pennington doctrine allows people and businesses to petition their government for laws without being exposed to future liability as a result of their petitioning.⁷⁷ If someone believed that they would later get sued for trying to get a law passed, they probably would not get involved, directly stifling first amendment rights and basic democratic principles.⁷⁸ This doctrine affords, those urging a valid governmental action which results in restraint upon trade, absolute immunity from antitrust liability for the anticompetitive restraint.⁷⁹

One of the most efficient methods for a party to improperly acquire and exercise or maintain market power to the detriment of consumers is through the abuse of governmental process.⁸⁰ The cost to the petitioners typically minimal in this type of scenario but the resulting anticompetitive effect is often substantial.⁸¹ Under the Noerr-Pennington doctrine, courts are required to interpret the Sherman Act in a way that trusts the lobbying process, even when it results in government action that stifles or eliminates competition.⁸²

The Noerr-Pennington doctrine has several notable exceptions that may deprive a petitioner of its protection. The most notable of these is the “sham” exception.⁸³ The Supreme Court has not yet ruled on the applicability of the commercial activity exception and a circuit split exists on its support.⁸⁴ The third notable exception is the conspiracy exception that the Supreme Court has implied in *dictum* and has since rejected.⁸⁵ Additional exceptions have been presented to the Court but have been met with little success.⁸⁶

A. EVOLUTION OF THE NOERR-PENNINGTON DOCTRINE

The Supreme Court has relied on the fundamental first amendment right to petition the government for redress of grievances.⁸⁷ The right to petition government is “among the most

precious of the liberties safeguarded by the Bill of Rights.”⁸⁸ In 1961 the Court initially set forth the doctrine recognizing that liability under the Sherman Act as improper when based on petitioning to secure government imposed restraints on competition.⁸⁹ In *Noerr*, a group of railroads and their public relations firms were sued by trucking companies for conspiracy to monopolize the long distance freight business.⁹⁰ The railroads were allegedly conspiring to conduct a public relations campaign that was aimed at the adoption of laws that would be destructive of the trucking business.⁹¹ The Court held that the claim failed to state a cause of action because the Sherman Act does not prohibit efforts to influence the passage of laws.⁹²

The Supreme Court emphasized that the motive behind the petitioning was irrelevant: “[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.”⁹³ The Court continued by stating that a reading of the Sherman Act which makes the liability turn on the intent of the petitioner would “deprive people of their right to petition in the very instances in which that right may be of the most importance to them.”⁹⁴

In 1965, the Court later expanded the scope of the doctrine in the 1965 *United Mineworkers of America v. Pennington*.⁹⁵ In *Pennington*, the doctrine was expanded to cover petitioning the executive branch for the enforcement of laws.⁹⁶ This case prohibited an antitrust challenge to a petition by a mineworkers’ union to the Secretary of Labor, seeking a higher minimum wage for companies that wanted to sell coal to a federal agency.⁹⁷ The Court again stated, “joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”⁹⁸

Finally, in 1972, the Court expanded the doctrine even further to include coverage when petitioning for relief before a court or administrative agency in *California Motor Transport Co.*

v. Trucking Unlimited.⁹⁹ In this case a group of interstate carriers were sued by a group of in-state highway carriers for antitrust violations.¹⁰⁰ The interstate carriers allegedly conspired to institute federal and state court proceedings to prevent the in-state carriers from obtain rights to operate interstate.¹⁰¹ The Court held that the right to petition protects access to the courts, extending the Noerr-Pennington doctrine to generally apply to judicial and administrative proceedings.¹⁰²

B. THE “SHAM” EXCEPTION TO THE NOERR-PENNINGTON DOCTRINE

Lobbying efforts do not qualify for immunity under the doctrine if the purpose is actually to interfere directly with a competitor’s business with the lobbying constituting a mere “sham”.¹⁰³ The Supreme Court initially acknowledged this “sham” limitation in the doctrine’s earliest case. In *Noerr*, the Court noted that some petitioning situations that, although are “ostensibly directed toward influencing governmental action, are mere “shams” to cover what is actually nothing more than attempts to interfere directly with the business relationships of a competitor.”¹⁰⁴ The Court explained that the full application of antitrust laws would be appropriate in these situations.¹⁰⁵

The Supreme Court applied the “sham” exception to the Noerr-Pennington doctrine in *California Motor Transport*.¹⁰⁶ The Court found that the specific conduct in question “effectively barr[ed] respondents from access to the agencies and courts.”¹⁰⁷ While the “sham” exception was not specifically dictated here, the Court did list some examples that would likely qualify including (i) unethical conduct in the adjudicatory process like witness perjury, (ii) use of a patent obtained fraudulently, (iii) conspiracy to eliminate a competitor with a licensing authority, and (iv) bribery of a public purchasing agent but the list is not exhaustive.¹⁰⁸ In addition the Court rejected the definition of “sham” applies to actions that “genuinely seeks to

achieve [a] governmental result, but does so through improper means” because it would basically render “‘sham’ no more than a label courts could apply to activity they deem unworthy of antitrust immunity.”¹⁰⁹

The Supreme Court rejected two applications of the “sham” exception in *City of Columbia v. Omni Outdoor Advertising, Inc.*¹¹⁰ The Court first held that the exception to the doctrine only applies to the petitioning process itself and does not apply to the resulting anticompetitive effect.¹¹¹ Specifically, “the ‘sham’ exception to Noerr encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon”¹¹² Therefore, the Court said, the “sham” exception applies only when the participation in the governmental process itself is used to impose cost and delay.¹¹³

The second application of the “sham” exception rejected by the Court in *Omni* was the conspiracy exception.¹¹⁴ The Court ruled that the conspiracy exemption must be rejected because “it is impracticable or beyond the purpose of the antitrust laws ... to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.”¹¹⁵ The Court allowed the possibility of the commercial activity exception open while rejecting the other exemption scenarios in the decision.¹¹⁶

C. THE COMMERCIAL ACTIVITY EXCEPTION TO THE NOERR-PENNINGTON DOCTRINE

The Supreme Court has suggested in the past that the Noerr-Pennington doctrine will not apply to situations where the government is acting in a commercial capacity. The Court initially raised this exception in *California Motor Transport* in explaining that “bribery of a public purchasing agent” may be exempt from Noerr-Pennington protection.¹¹⁷ It found the defendant’s actions to be “commercial activity with a political impact.”¹¹⁸ The Court suggested, however did not rule, that this type of action should not receive the beneficial treatment of the Noerr-

Pennington doctrine because the restraint was ultimately due to the private action and not government rules.¹¹⁹ The Court also said that the exception may apply to situations “where the State acts not in a regulatory capacity but as a commercial participant in a given market.”¹²⁰

In *Allied Tube*, the Court again indicated that an exception for commercial transactions involving the government may exist.¹²¹ The Court also suggested that it may recognize a commercial exception in *Omni Outdoor Advertising*.¹²² It stated that the Noerr-Pennington doctrine may not provide immunity “where the State acts not in a regulatory capacity but as a commercial participant in a given market.”¹²³ Through these subsequent cases to *California Motor Transport*, the Court as still left open the possibility that Noerr-Pennington does not apply when the government is acting in a commercial capacity.¹²⁴ Alternatively, this exception has also been rejected in *Superior Court Trial Lawyers* where the doctrine did not immunize the association who boycotted the Washington, D.C. government to force them to pay higher prices for legal services.¹²⁵

The commercial activity exception still does not hold any precedential value from the Supreme Court and lower courts have been divided on the issue. While the First and District of Columbia Circuits have recognized the exception, the Fourth, Fifth, and Ninth Circuits have rejected it.¹²⁶ The Second and Eleventh Circuits have both deferred ruling on the exception.¹²⁷

Courts typically apply *Allied Tube*'s “source, context and nature of the anticompetitive restraint” test to distinguish situations involving political, as opposed to economic, petitioning to determine Noerr-Pennington applicability.¹²⁸ If the resulting anticompetitive restraint flows from governmental conduct the court applies the Noerr-Pennington doctrine.¹²⁹ If it flows from private conduct the doctrine will not be applied.¹³⁰

IV. NOERR-PENNINGTON'S AVAILABILITY TO THE NFL IN *WILLIAMS V. CITY OF ARLINGTON*

The NFL has moved to dismiss Eric Williams' complaint for failing to state a claim,¹³¹ citing, among other things, its immunity to liability pursuant to the Noerr-Pennington doctrine.¹³² Defendants contend that they were merely exercising their constitutional right in petitioning the government for a favorable new law and that the First Amendment protects that right "no matter how harmful their incidental impact may be."¹³³ They continue to argue that their motivations to pass the law or its effect on Plaintiff are irrelevant to the immunity they should be afforded by the Noerr-Pennington doctrine.¹³⁴ Defendants believe dismissal is warranted because "the Noerr-Pennington doctrine affirmatively negates NFL-Cowboys Defendants' liability in this case as a matter of law, so it is properly considered in a 12(b) motion to dismiss and has in fact been considered at the pleadings stage by this Circuit before."¹³⁵ If the NFL is allowed to claim Noerr-Pennington doctrine protection, it would be immunized from the "injuries caused by [the] government action which result[ed] from [its] petitioning."¹³⁶

Williams contends that the Defendants' reliance on the Noerr-Pennington doctrine is misplaced.¹³⁷ He argues that the pervasive entwinement of the NFL and the City exceed "*mere* attempts to influence the passage or enforcement of laws" the Noerr-Pennington doctrine protects.¹³⁸ Williams believes that his complaint goes past merely lobbying government and the two "in effect merged so as to create a substantive identity of interests" making "the whole concept of lobbying a little ridiculous; one cannot, after all, lobby oneself."¹³⁹

On October 11, 2011 Judge Means denied the NFL's Motion to Dismiss.¹⁴⁰ In this ruling, the court agreed with Williams in his assertion that the Noerr-Pennington doctrine is not immunity from suit.¹⁴¹ The doctrine is only a defense to liability and facts that negate an affirmative defense are not required in the complaint.¹⁴² The order did not mention whether the

doctrine would be invoked in this case, only that at this point, it would be inappropriate to dismiss Williams' claims based on the affirmative defense.¹⁴³

The NFL petitioned the City of Arlington, Texas for a favorable municipal ordinance. An *extremely* favorable ordinance that harmed Eric Williams and the countless at risk youth that he was planning to help with the funds raised at his event. The ordinance also harmed at least fourteen other individuals that were also cited for clean zone ordinance violations on February 6, 2011 alone.¹⁴⁴ Are the clean zone ordinances truly the result of lobbying efforts protected by the First Amendment or are they the result of something outside the scope of that protection? How will the court rule on the doctrine's application in *Williams v. City of Arlington*?

The Noerr-Pennington doctrine provides a broad protection of the First Amendment to petition the government for redress of grievances.¹⁴⁵ The doctrine applies to petitioning directed towards all levels of federal, state, and local legislative, executive, judicial, and administrative bodies.¹⁴⁶ The NFL petitioned the local governments to obtain legislative action and the action was clearly intended to restrain trade. Some people may not approve of the legislation that resulted from the lobbying but it is precisely the situation that the doctrine was designed to protect.¹⁴⁷

The NFL petitioned the City of Arlington and several other cities to pass clean zone ordinances. The First Amendment generally protects the petitioning of the municipalities as the NFL did.¹⁴⁸ If immunity from legitimate lobbying efforts were not offered, our form of representative government would not work.¹⁴⁹ In the doctrine's earliest embodiment, the Supreme Court stated:

A construction of the Sherman Act that could 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 people of their right to petition in the very instances in which that right may be of the most importance to them.¹⁵⁰

This statement applies to the NFL today as much as it did to Noerr Motor Freight in 1961. The NFL petitioned local governments in several host cities to enact a law that would protect its highly lucrative sponsorships that cost advertisers into the billions of dollars.¹⁵¹ This may not be the instance that is the most importance to them but it is likely very high on the list. The NFL undoubtedly has a vested interest in the passage of the clean zone ordinances.

By rejecting the application of the Noerr-Pennington doctrine in cases where lobbying is a “sham,” courts uphold the original intention of the doctrine. But that is not what we have here. When the Supreme Court sculpted the “sham” exception it was careful to point out, “the ‘sham’ exception to Noerr encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon”¹⁵² Therefore, the Court said, the “sham” exception applies only when the participation in the governmental process itself is used to impose cost and delay.

The sham exception can also apply to situations where defendant’s actions are “accompanied or characterized by illegal and reprehensible practices such as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation... that the Noerr-Pennington cloak of immunity provides no protection.”¹⁵³ The question then becomes, does the one million dollar penalty that the host city must pay if the clean zone ordinance is not passed constitute “conspiracy with or bribery of government decision makers.” Under the Texas Penal Code section dealing with bribery of public officials,¹⁵⁴ it does not appear that the NFL committed bribery of any city officials. The Texas bribery statute requires that it is the actual official involved in the beneficial transaction.¹⁵⁵ Here, the NFL did not have direct contact with

the government officials. It created the contractual relationship with the host city bid committee and will be out of reach of the Texas statute.

In *Williams*, the governmental process itself did not cause any harm to Eric Williams. The only harms claimed are those that resulted from the clean zone ordinance itself. The clean zone ordinance is the outcome of the governmental process and therefore the Noerr-Pennington doctrines use will not be hindered by its “sham” exception.

The Supreme Court ruled on a similar matter in *Omni Outdoor Advertising* in regards to the applicability of the Noerr-Pennington doctrine and whether the anticompetitive effect resulted from private as opposed to governmental conduct. In *Omni*, the defendant sought to disrupt a competitor’s business relationships by petitioning the city to create new zoning ordinances.¹⁵⁶ The Court emphasized that:

Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act.¹⁵⁷

Following this thinking, the court in *Williams* will likely employ *Allied Tube’s* “source” test to decide if Noerr-Pennington immunity applies because the direct cause of William’s injury is “the government action that the private defendant has helped to secure.”¹⁵⁸

The Court of Appeals for the Seventh Circuit succinctly explained how the *Allied Tube* test determines the source of injury:

[I]t is important to identify the source of the injury to competition. If the injury is caused by persuading the government, then the antitrust laws do not apply to... the persuasion (Noerr-Pennington). If the injury flows directly from the “petitioning”—if the injury occurs no matter how the government responds to the request for aid—then we have an antitrust case. When private parties help themselves to a reduction in competition, the antitrust laws apply.¹⁵⁹

Applying this test to *Williams*, it will be burdensome for the Plaintiff to prove that their injury resulted from the NFL's petitioning and not the resulting duly passed government zoning ordinance. Williams will likely be unable to prove that the anticompetitive effects of the zoning ordinance resulted from the NFL's action and not the government's action.

Even though the Supreme Court has not explicitly endorsed the commercial activity exception, it has not rejected it either. A court may allow the exception to Noerr-Pennington doctrine to apply in this unique case. The municipalities stood to lose hundreds of millions of dollars in economic benefit if they did not host the Super Bowl. This economic activity directly translates into tax revenue dollars. The income potential seems to indicate that the local government is acting as commercial market participant and passed the ordinance as "compensation" in exchange for being a Super Bowl host city. Conversely, if the municipality did not end up enacting the NFL's requested ordinance, it would not lose the ability to host the Super Bowl and make receive substantial tax revenues. All that would be lost is a small fine that pales in comparison to what they will earn.

Unfortunately for Williams the commercial activity exception does not have any precedential value from the Supreme Court. The case is currently before the United States District Court for the Northern District of Texas, which falls into the jurisdiction of the Fifth Circuit Court of Appeals.¹⁶⁰ In *Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, the Fifth Circuit rejected the commercial activity exception, allowing Noerr-Pennington immunity.¹⁶¹ Unless Judge Means wants to reject Fifth Circuit precedent and affirm a commercial activity exception, the Noerr-Pennington doctrine will be a valid affirmative defense available to the NFL, immunizing them from all of Williams' claims.

The NFL has been in this position in the past and has successfully applied the Noerr-Pennington doctrine as immunity to liability.¹⁶² As in previous situations, the NFL was simply petitioning for a favorable ordinance and “efforts to persuade government officials simply by appealing to their political interests have Noerr-Pennington protection.”¹⁶³ Noerr-Pennington immunity will extend to the NFL again because William’s claim is based on a direct injury that is itself “an incidental effect” of the NFL’s permissible campaign to influence the government.¹⁶⁴

V. CONCLUSION

Is Eric Williams truly a victim of the Arlington clean zone ordinance? His event was stopped by the local code enforcement and police officers, but was Williams left with no other option? No. Williams had several options available to him. He could have hosted the fundraiser inside the Best Buy, or simply applied for the necessary permit under the clean zone ordinance. What really stopped the event was Williams’ own lack of knowledge regarding the ordinance that whether or not constitutional, was valid at the time.¹⁶⁵

Even if the NFL’s petitioning for the clean zone ordinance is unable to obtain Noerr-Pennington protection that does not mean that they violated the Sherman Act.¹⁶⁶ An underlying antitrust violation by them must still be established. Williams will be prove a substantive antitrust violation because proof of a valid Noerr-Pennington exception will merely deprive the NFL of the immunity and will not relieve him of the obligation to establish all other elements of the antitrust claim.

If liability exists, it rests with the legislatures that passed the ordinances by their own free will and volition. Some may say the one million dollar fine that the cities are required to pay to the NFL is nothing short of extortion.¹⁶⁷ Extortion is simply not the case here. If a majority of the legislatures truly believed the ordinance should not be passed “for” the NFL, they should

have voted it down. Their municipality would still be the host city, would still gain world-wide recognition, and, most importantly, would still earn the millions of dollars in additional tax revenue from the Super Bowl's presence. Ticketholders, event staff, and fans that simply want to be in the town for the game, empty their pockets and fill hotel rooms, restaurants, and shops. The economic impact on the host cities is tremendous. Super Bowl weekend itself along with the future events that are drawn by the resulting publicity and improved infrastructure can bring in hundreds of millions of dollars.¹⁶⁸ The punitive fine the host city would be required to pay is paltry compared to the economic benefit expected.

The Subcommittee on Intellectual Property, Competition, and the Internet of the House Judiciary Committee has even discussed Williams.¹⁶⁹ While several members of the Committee sympathized with Williams, they believe his redress should be to petition local government to change the law and not litigation.

On June 10, 2011, Eric Williams filed a voluntary petition for bankruptcy reorganization protection under Chapter 13 of the U.S. Bankruptcy Code.¹⁷⁰ The case was later converted to a Chapter 7 liquidation case.¹⁷¹

¹ Frank P. Jozsa, *Sports capitalism: the foreign business of American professional leagues*. Ashgate Publishing. p. 270 (2004) ("Since 1922, [the NFL] has been the top professional sports league in the world with respect to American football").

² *Super Bowl is Most-Watched TV Show in U.S. History – Again*, NFL.com, available at <http://www.nfl.com/superbowl/story/09000d5d826b388c/article/super-bowl-is-mostwatched-tv-show-in-us-history-again> (last visited Apr. 24, 2012).

³ David Broughton, *Avid Fans Know Their NFL Sponsors*, SPORTS BUS. J. (Feb. 20, 2012), available at <http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/20/Research-and-Ratings/NFL-Sponsor-Loyalty.aspx> (last visited Mar. 18, 2012).

⁴ Matthew Futterman, *Bud Light to Be NFL's Official Beer*, The Wall Street Journal (May 4, 2010), available at <http://online.wsj.com/article/SB10001424052748704866204575224843309316732.htm> (last visited Apr. 24, 2012).

⁵ *Id.*

⁶ Jessica Damiano, *How Much Does a Super Bowl Commercial Really Cost?*, Newsday (January 26, 2012), available at <http://www.newsday.com/entertainment/pet-rock-1.811972/how-much-does-a-super-bowl-commercial-really-cost-1.3481154> (last visited Apr. 24, 2012).

⁷ Michael A. Prospero, *The Money Game*, Fast Company (Jan. 19, 2007), available at <http://www.fastcompany.com/magazine/119/the-money-game.html> (last visited Apr. 24, 2012).

⁸ Ambush marketing is typically defined as “a company’s attempt to capitalize on the goodwill, reputation, and popularity of a particular event by creating an association without the authorization or consent of the necessary parties.” Stephen McKelvey, *Atlanta ’96: Olympic Countdown to Ambush Armageddon?*, 4 SETON HALL J. SPORT L. 397, 401 (1994); Jason K. Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 NW. J. OF TECH. AND INTELL. PROP. 205 (2005); Noelle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, The United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORT L. 53, 65 (2003); Patrick Donahue Sheridan, *An Olympic Solution to Ambush Marketing: How the London Olympics Show the Way to More Effective Trademark Law*, 17 SPORTS LAW. J. 27, 28 (2010) (“ambush marketing is a practice whereby companies attempt to make the consumer think their product or service is somehow affiliated with a popular sporting event or league”).

⁹ Steve McKelvey & John Grady, *Ambush Marketing: The Legal Battleground for Sport Marketers*, 21 ENT. & SPORTS LAW. 8, 14 (2004).

¹⁰ *Arlington Addresses NFL's Needs in 2011 Super Bowl Bid*, SPORTS BUS. J. DAILY (Apr. 13, 2007), available at <http://www.sportsbusinessdaily.com/article/111100> (last visited Apr. 24, 2012).

¹¹ See Super Bowl Bid Summary, N. Tex. Super Bowl XLV Host Committee 62-63 (2008), available at <http://www.star-telegram.com/Multimedia/News/Super%20Bowl%20bid2.pdf> (last visited Mar. 18, 2012).

¹² Brian Pelanda. *Ambush Marketing: Dissecting the Discourse*, 34 HASTINGS COMMUNICATIONS & ENTERTAINMENT LAW J. (forthcoming Spring 2012).

¹³ Patrick Donahue Sheridan, *An Olympic Solution to Ambush Marketing: How the London Olympics Show the Way to More Effective Trademark Law*, 17 SPORTS LAW. J. 27, 32 (2010).

¹⁴ Pelanda, *supra* note 12.

¹⁵ Sheridan, *supra* note 13, at 29.

¹⁶ Anita M. Moorman & T. Christopher Greenwell, *Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices*, 15 J. LEGAL ASPECTS SPORT 183, 184 (2005).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Sheridan, *supra* note 13, at 29.

²⁰ See Lanham Act, 15 U.S.C. § 1114 (2011).

²¹ See Lanham Act, 15 U.S.C. § 1125(a)(1)(A) (2011); John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players from Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507, 519-21 (2005) (discussing unfair competition claims under the Lanham Act involving ambush marketers); See Stephen M. McKelvey, *Atlanta '96: Olympic Countdown to Ambush Armageddon?*, 4 SETON HALL J. SPORT L. 397, 414 (1994) (discussing unfair competition claims under common law involving ambush marketers); Clean zone ordinances open up a third possible litigation route for victims of ambush marketing.

²² Michael McCann, *As Super Bowl Week Commences, NFL's Clean Zones Still an Issue*, SI.com (Jan. 31, 2012) available at http://sportsillustrated.cnn.com/2012/writers/michael_mccann/01/30/cleanzones/index.html (last visited Apr. 24, 2012).

²³ Susan Schrock, *Arlington to Consider Advertising Rules to Protect NBA All-Star Game Sponsors from Rivals*, Star-Telegram.com (Fort Worth, Tex.) (Nov. 29, 2009), available at <http://www.star-telegram.com/2009/11/29/1798287/arlington-to-consider-advertising.html> (Last visited Mar. 18, 2012).

²⁴ See The FIFA Rights Protection Programme at the 2010 FIFA World Cup South Africa (2010), available at http://es.fifa.com/mm/document/affederation/marketing/01/18/98/99/march2010/rightsprotection_a5_20100308.pdf (last visited Apr. 24, 2012).

²⁵ McCann, *supra* note 22.

²⁶ Kevin Wiatrowski, *Super Bowl Clean Zone Differs From RNC Plan*, The Tampa Tribune (April 21, 2012), available at <http://www2.tbo.com/news/breaking-news/2012/apr/21/memeto1-2009-super-bowl-zone-differed-from-rnc-pla-ar-394921/> (last visited April 24, 2012).

²⁷ Third Amended Complaint for Plaintiff at 7, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Oct. 31, 2011).

²⁸ Paul K. Ogden, *City Decides Agreed-Upon Mile Radius Super Bowl "Clean Zone" Is Not Big Enough; Ordinance Would Grant Licensing Administrator Unlimited Power to Create Clean Zones*, Ogden on Politics (July 1, 2011), available at <http://www.ogdenonpolitics.com/2011/07/city-decides-mile-radius-super-bowl.html> (last visited Apr. 24, 2012).

²⁹ See Super Bowl Bid Summary, N. Tex. Super Bowl XLV Host Committee, 144 (2008), available at <http://www.star-telegram.com/Multimedia/News/Super%20Bowl%20bid2.pdf> (last visited Apr. 24, 2012).

³⁰ *Id.* at 63.

³¹ *Id.*

³² Super Bowl Bid Summary, N. Tex. Super Bowl XLV Host Committee, *supra* note 18, at 63.

³³ *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

³⁴ *Arlington Addresses NFL's Needs in 2011 Super Bowl Bid*, SPORTS BUS. J. DAILY (April 13, 2007), available at <http://www.sportsbusinessdaily.com/Daily/Issues/2007/04/Issue-139/Leagues-Governing-Bodies/Arlington-Addresses-Nfls-Needs-In-2011-Super-Bowl-Bid.aspx> (last visited Apr. 24, 2012).

³⁵ See Fort Worth, Tex., Ordinance No. 19492-12-2010, 2 (Dec. 14, 2010).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Kimberly S. Schimmel, *Protecting the NFL/Militarizing the Homeland: Citizen Soldiers and Urban Resilience in Post-9/11 America*, INTERNATIONAL REVIEW FOR THE SOCIOLOGY OF SPORT (Jan. 30, 2012).

³⁹ McCann, *supra* note 22.

⁴⁰ *Id.*

⁴¹ Super Bowl Bid Summary, N. Tex. Super Bowl XLV Host Committee, *supra* note 11, at 63.

⁴² Third Amended Complaint, *Williams*, *supra* note 32, at 12.

⁴³ *Id.*
⁴⁴ *Id.*
⁴⁵ *Id.* at 13. *See also* McCann, *supra* note 22.
⁴⁶ McCann, *supra* note 22.
⁴⁷ Third Amended Complaint, *Williams*, *supra* note 32, at 14.
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.* at 15.
⁵² *Id.*
⁵³ *Id.* at 16.
⁵⁴ *Id.* at 15.
⁵⁵ *Id.*
⁵⁶ *Id.* at 16.
⁵⁷ *Id.*
⁵⁸ *Id.* at 17.
⁵⁹ *Id.*
⁶⁰ *Id.*
⁶¹ *Id.* at 18.
⁶² *Id.*
⁶³ *Id.*; *See also* *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288 (2001). (ruling that a nongovernmental statewide association’s actions constitute state action if state officials are “pervasively entwined” in the association. Here the Court said the association could not exist without the control and daily efforts of state public officials. Conversely, the City of Arlington has little to no impact on the existence of the NFL).
⁶⁴ Third Amended Complaint, *Williams*, *supra* note 42, at 20.
⁶⁵ *Id.*
⁶⁶ NFL/Cowboys Defendants’ Joint Original Answer to Plaintiff’s Third Amended Complaint at 9, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Nov. 14, 2011).
⁶⁷ Eric William’s Response to Docket Entries 41 & 42 and Brief in Support at 9, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Aug. 26, 2011).
⁶⁸ *Id.* The distinction between the two types of speech will be the topic of Part III, C of this paper.
⁶⁹ Transfer and Assignment Notice, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Feb. 14, 2011).
⁷⁰ Order Granting Motion to Modify Scheduling Order, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Dec. 16, 2011).
⁷¹ Alternative Dispute Resolution Summary, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Dec. 7, 2011).
⁷² Order, *supra* note 70.
⁷³ McCann, *supra* note 22.
⁷⁴ FTC Guide to The Antitrust Laws, *available at* http://www.ftc.gov/bc/antitrust/antitrust_laws.shtm (last visited Apr. 24, 2012)
⁷⁵ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

⁷⁶ The doctrine obtained its name from the first two Supreme Court cases to establish it. See *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Forest Ambulance Serv. Inc. v. Mercy Ambulance of Richmond, Inc.*, 952 F. Supp. 296 (E.D. Va. 1997).

⁸⁰ See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST LAW J. 975 (2005).

⁸¹ *Id.*

⁸² The immunity afforded by the Noerr-Pennington doctrine is not limited to claims under the Sherman Act. The doctrine also precludes claims under other antitrust laws and federal statutes, as well as many state law claims. E.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (FTC Act); *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983) (National Labor Relations Act); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000) (42 U.S.C. § 1983); *International Broth. of Teamsters, Etc. v. Philip Morris Inc.*, 196 F.3d 818, 826 (7th Cir. 1999) (RICO); *White v. Lee*, 227 F.3d 1214, 1220 (9th Cir. 2000) (Federal Housing Act); *Video Int'l Prods., Inc. v. Warner-Amex Cable Communications*, 858 F.2d 1075, 1084 (5th Cir. 1988) (Doctrine was extended to state claim of tortious interference with contracts).

⁸³ *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

⁸⁴ Matthew Bender, *3-50 Antitrust Laws and Trade Regulations*, 2nd Edition § 50.04 (2011); The Supreme Court has suggested that the Noerr-Pennington doctrine may have a commercial activity exception while not ruling directly on the matter and later held that the Noerr-Pennington doctrine did not apply to a situation where a foreign government was acting in a commercial capacity. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-02 n.7 (1988); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Ann Wooster, *"Sham" Exception to Application of Noerr-Pennington Doctrine, Exempting from Federal Antitrust Laws Joint Efforts to Influence Governmental Action Based on Petitioning Administrative or Judicial Body*, *American Law Reports Federal*, 193 A.L.R. Fed. 139 (2012).

⁸⁸ *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

⁸⁹ *Noerr*, 365 U.S. 127.

⁹⁰ *Id.*

⁹¹ *Id.* at 135.

⁹² *Id.* at 144.

⁹³ *Id.* at 139.

⁹⁴ *Id.*

⁹⁵ *United Mine*, 381 U.S. 657.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 670.

⁹⁹ *Trucking Unlimited*, 404 U.S. 508.

¹⁰⁰ *Id.* at 512.

¹⁰¹ *Id.*

¹⁰² *Id.* at 510. While the Court expanded the doctrine’s coverage generally, it did not apply here due to the “sham” exception.

¹⁰³ Ann Wooster, *Application of Noerr-Pennington Doctrine by State Courts*, American Law Reports 5th, 94 A.L.R.5th 455 (2011).

¹⁰⁴ *Noerr*, 365 U.S. at 144.

¹⁰⁵ *Id.*

¹⁰⁶ *Trucking Unlimited*, 404 U.S. at 513.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 512-13.

¹⁰⁹ *Id.* at 507.

¹¹⁰ *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365 (1991).

¹¹¹ *Id.* at 380.

¹¹² *Id.*

¹¹³ *Id.* at 381.

¹¹⁴ *Id.* at 383 (rejecting the conspiracy exception to state and federal actions).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 374-75. (“immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”).

¹¹⁷ *Trucking Unlimited*, 404 U.S. at 513.

¹¹⁸ *Id.* at 507.

¹¹⁹ *Id.*

¹²⁰ *Omni*, 499 U.S. at 374–75.

¹²¹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501–02 n.7, (1988) (quoting California Motor Transport).

¹²² *Omni*, 499 U.S. 365.

¹²³ *Id.* at 374–75. (Although the Court was explicitly speaking of the state action doctrine here, it continued to say that the state action and the Noerr-Pennington doctrines “present two faces of the same coin.”).

¹²⁴ Matthew Bender, *3-50 Antitrust Laws and Trade Regulation, 2nd Edition* § 50.04 (2011)

¹²⁵ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

¹²⁶ *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970) (exception would apply to attempts to influence changes in procurement statutes); *Federal Prescription Serv. v. American Pharm. Ass’n*, 663 F.2d 253 (D.C. Cir. 1981) (following *Whitten*, upheld exception where drug producers attempt to persuade the FDA to ban competitors’ drugs); *A Fisherman’s Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 194 (4th Cir. 2002) (Court stated that *Whitten* did “not create a discrete competitive bid exception to Noerr. Competitive bidders are free to lobby the relevant government, but they cannot do so by corrupting the bid process.”) ; *Independent Taxicab Drivers’ Employees v. Greater Houston Transp. Co.*, 760 F.2d 607, 612–13 (5th Cir. 1985) (exception rejected and immunity allowed for granting a cab company exclusivity at the city airport); *In re Airport Car Rental Antitrust Litig.*,

693 F.2d 84, 87–88 (9th Cir. 1982) (explicitly rejected the exception stating “there is no commercial exception to Noerr-Pennington”).

¹²⁷ *Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 248 n.4 (2d Cir. 1985); *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1573, modified, 86 F.3d 1028 (11th Cir. 1996) (Court did not consider the validity of the exception since it did not apply to the case but indirectly ruled that the exception would not apply to a quazi-government regulatory body).

¹²⁸ *Allied Tube*, 486 U.S. at 499.

¹²⁹ Matthew Bender, 3-50 *Antitrust Laws and Trade Regulation, 2nd Edition* § 50.04 (2011)

¹³⁰ *Id.*

¹³¹ Fed. R. Civ. P. 12(b)(6).

¹³² Defendants’ Joint Motion to Dismiss Second Amended Complaint at 4, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Aug. 8, 2011).

¹³³ *Id.* at 4, 9.

¹³⁴ *Id.* at 4.

¹³⁵ *Id.* at 8. *citing Love Terminal Partners, L.P. v. City of Dallas, TX.*, 527 F. Supp. 2d 538 (N.D. Tex. 2007).

¹³⁶ *A .D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 251 (3d Cir. 2001), cert. denied, 534 U.S. 1081 (2002).

¹³⁷ Eric Williams’ Response to Docket Entry 44 and Brief in Support at 12, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Sep. 20, 2011) (Plaintiff only filed a brief in response to the Host Committee Defendant’s Motion to Dismiss and not directly to the NFL. The Host Committee and NFL have parallel arguments in support of the Noerr-Pennington doctrine. William’s brief in response to the Host Committee is used here as the argument against applicability of the Noerr-Pennington doctrine.).

¹³⁸ *Id.* at 8. *citing Noerr*, 365 U.S. at 135. Emphasis added.

¹³⁹ *Id.* at 9.

¹⁴⁰ Order Denying in Part and Granting in Part Motions to Dismiss and Granting Leave to File Amended Complaint at 14, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Oct. 11, 2011) (the court dismissed “Williams’s (1) intentional-infliction- of-emotional-distress claim against the NFL-Cowboys Defendants and the Host Committee, (2) request for punitive damages against Arlington, and (3) request for a permanent injunction against all defendants” while allowing all other charges to proceed.).

¹⁴¹ *Id.* at 6. *citing Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 295 (5th Cir. 2000); *citing Jones v. Bock*, 549 U.S. 199, 216 (2007).

¹⁴² *Id.*

¹⁴³ *Id.* *citing Marrone Co. v. Barbour*, 241 F. Supp. 2d 683, 690 (S.D. Miss. 2002); *CamSoft Data Sys, Inc. v. S. Elecs. Supply, Inc.*, No. 09-1047-JJB, 2011 WL 3204701, at *4 (M.D. La. July 27, 2011); *L-3 Commc’ns Integrated Sys., LP v. Lockheed Martin Corp.*, 2009-1 Trade Cas. (CCH) 76,520, 2008 WL 4391020, at *9 (N.D. Tex. Sept. 29, 2008) (Boyle, J.).

¹⁴⁴ Third Amended Complaint, *Williams*, *supra* note 32, at 16. (Claiming the number of citations issued on February 6, 2011).

¹⁴⁵ Wooster, *supra* note 87.

¹⁴⁶ Bender, *supra* note 129.

¹⁴⁷ *See Pennington*, 381 U.S. 657; *Noerr*, 365 U.S. 127.

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- ¹⁴⁸ See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002).
- ¹⁴⁹ *Noerr*, 365 U.S. at 139.
- ¹⁵⁰ *Id.*
- ¹⁵¹ See Futterman, *supra* note 4.
- ¹⁵² *Omni*, 499 U.S. at 380.
- ¹⁵³ *Razorback Ready Mix Concrete Co., Inc. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985).
- ¹⁵⁴ Tex. Penal Code § 36.02.
- ¹⁵⁵ *Id.*
- ¹⁵⁶ *Omni*, 499 U.S. at 382.
- ¹⁵⁷ *Id.*
- ¹⁵⁸ *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 159 (3d Cir. 1999), cert. denied, 530 U.S. 1261, (2000).
- ¹⁵⁹ *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987).
- ¹⁶⁰ Court Locator, United States Courts, available at http://www.uscourts.gov/court_locator.aspx (last visited Apr. 24, 2012).
- ¹⁶¹ *Taxicab Drivers'*, 760 F.2d at 612-13.
- ¹⁶² *United States Football League v. National Football League*, 842 F.2d 1335, 1373-75 (2nd Cir. 1988).
- ¹⁶³ *Id.*
- ¹⁶⁴ See *Allied Tube* 486 U.S. at 499 (an anticompetitive restraint "cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action").
- ¹⁶⁵ It is worth noting that Williams presented several claims in relation to the events of that day but none of them attacked the legitimacy of the statute itself.
- ¹⁶⁶ *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993).
- ¹⁶⁷ I myself thought something seemed wrong with this quid pro quo when originally setting out my thoughts to draft this paper but altered my thesis after a closer examination of the interpretation of the doctrine.
- ¹⁶⁸ Anthony Schoettle, Cory Schouten, *Landing another Super Bowl might not be such a long shot after all*, Indianapolis Business Journal (Feb. 4, 2012), available at <http://www.ibj.com/landing-another-super-bowl-might-not-be-such-a-long-shot-after-all/PARAMS/article/32432> (last visited Apr. 24, 2012).
- ¹⁶⁹ *Litigation as a Predatory Practice: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 2 (2012).
- ¹⁷⁰ Suggestion of Bankruptcy, *Williams v. City of Arlington*, No. 4:11-CV-093-Y (N.D. Tex. filed Apr. 5, 2012).
- ¹⁷¹ *Id.*