


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE NEW MEXICAN, INC.,

Petitioner, Original Defendant,
and Plaintiff on the Counterclaim,

vs.

S.Ct. No. S-1-SC-38199

PUBLIC SERVICE COMPANY OF
NEW MEXICO;
and BHP BILLITON NEW MEXICO
COAL, INC.,

First Judicial District Court No.
D-101-CV-2015-01823

Respondents, Plaintiffs-
Intervenors, and Defendants on the
Counterclaim,

NEW MEXICO PUBLIC
REGULATION COMMISSION,

Original Plaintiff, and Real Party
In Interest.

**BRIEF OF AMICI CURIAE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 24 MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER**

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone: (505) 983-9433
Email: dyohalem@aol.com

Caitlin Vogus
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Email: cvogus@rcfp.org
*Application for admission pro hac
vice pending*

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF THE AMICI CURIAE..... 1

BACKGROUND..... 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

 I. PNM’s and BHP’s request for a prior restraint against The New Mexican is not legitimate petitioning activity shielded by the *Noerr-Pennington* doctrine..... 6

 A. The *Noerr-Pennington* doctrine is intended to protect First Amendment rights, not immunize attacks on the exercise of First Amendment rights, and it does not apply to “sham” lawsuits. 6

 B. The *Noerr-Pennington* doctrine does not apply to PNM’s and BHP’s claims against The New Mexican because they were a sham..... 7

 II. The district court’s dismissal of The New Mexican’s counterclaims under the *Noerr-Pennington* doctrine could inhibit future news reporting on matters of public concern..... 14

CONCLUSION 16

APPENDIX A 18

CERTIFICATE OF SERVICE..... 26

TABLE OF AUTHORITIES

New Mexico Cases

<i>Cordova v. Cline</i> , 2017-NMSC-020, 396 P.3d 159	<i>passim</i>
<i>New Mexico Pub. Regulation Comm’n v. The New Mexican, Inc.</i> , Case No. D-101-CV-2015-01823 (First Jud. Dist. Ct., Feb. 18, 2020)	4

Federal Cases

<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	5
<i>Cal. Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972)	6
<i>CBS, Inc. v. Davis</i> , 510 U.S. 1315 (Blackmun, Circuit Justice 1994).....	9, 10
<i>City of Columbia v. Omni Outdoor Advert., Inc.</i> , 499 U.S. 365 (1991).....	14
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961).....	5, 6
<i>Ford Motor Co. v. Lane</i> , 67 F. Supp. 2d 745 (E.D. Mich. 1999).....	10
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	14
<i>N.Y. Times Co. v. United States</i> , 403 U.S. 713 (1971).....	8, 9
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	8
<i>Nebraska Press Ass’n v. Stuart</i> , 427 U.S. 539 (1976).....	2, 8
<i>Procter & Gamble Co. v. Bankers Trust Co.</i> , 78 F.3d 219 (6th Cir. 1996)	8, 10
<i>Religious Tech. Ctr. v. Lerma</i> , 897 F. Supp. 260 (E.D. Va. 1995).....	10
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965)	4, 6
<i>United States v. Morison</i> , 844 F.2d 1057 (4th Cir. 1988)	16

Other Authorities

Eriq Gardner, <i>HBO Fights Energy Co.’s Bid to Prevent Rebroadcast of John Oliver’s “Last Week Tonight”</i> , The Hollywood Reporter (July 24, 2017), https://perma.cc/LN5R-3SLD	14
Hannah Grover, <i>How San Juan Generating Station Went from Powerhouse to Possible Closure</i> , Farmington Daily Times (Sept. 25, 2018), https://perma.cc/7UCL-AMS4	11
Kevin G. Hall, <i>Bankruptcy Court Approves McClatchy’s Mediation Request, Fueling Hope of Resolution</i> , McClatchy DC (Feb. 18, 2020), https://bit.ly/2V7Hh9P	15

Mary Duan, *Greenfield Sues The Weekly for Doing Journalism, and The Weekly Fights Back.*, Monterey County Now (Aug. 23, 2018), <https://perma.cc/WH2W-AE95> 14

Newspapers Fact Sheet, Pew Research Center (July 9, 2019), <https://perma.cc/CUA9-AP5S>..... 15

Penelope Muse Abernathy, *The Expanding News Desert*, UNC Hussman School of Journalism and Media (last visited Feb. 20, 2020), <https://perma.cc/L5QF-9MNH> 15

Steve Terrell, *PNM, Coal Companies Drop Case Against ‘New Mexican’*, New Mexican (Aug. 12, 2015), <https://perma.cc/AU7P-G6GY> 12

Rules

Rule 12-320(C) NMRA 1

INTEREST OF THE AMICI CURIAE

Amici are the Reporters Committee for Freedom of the Press (the “Reporters Committee”), The Associated Press, Committee to Protect Journalists, First Amendment Coalition, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MPA - The Association of Magazine Media, National Freedom of Information Coalition, National Newspaper Association, National Press Photographers Association, New Mexico Broadcasters Association, New Mexico Foundation for Open Government, New Mexico Local News Fund, New Mexico Press Association, The News Leaders Association, News Media Alliance, Nexstar Broadcasting, Inc., Radio Television Digital News Association, Searchlight New Mexico, Society of Environmental Journalists, Society of Professional Journalists, The Society of Professional Journalists Rio Grande Chapter, and Tully Center for Free Speech.¹ Amici are members of the news media or advocates for journalists, open government, and press freedom.² Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media

¹ Pursuant to Rule 12-320(C) NMRA, amici state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

² Full descriptions of each of the amici are included below in Appendix A.

lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

This case concerns an attempt by a public agency and private companies to obtain a prior restraint against a newspaper. Amici write to emphasize the potential detrimental impact of the district court’s decision, if it is permitted to stand, on the public and news organizations across New Mexico. Prior restraints on publication are “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). While application of the *Noerr-Pennington* doctrine is appropriate to protect petitioning activity in many cases, the district court’s erroneous application of the doctrine in this case leaves the news media vulnerable to similarly meritless litigation seeking prior restraints, with no ability to recoup the significant costs these suits impose, and it could chill the press from reporting on important matters of public concern.

BACKGROUND

In this case, the New Mexico Public Regulation Commission (“PRC”) and three private companies—Public Service Company of New Mexico (“PNM”),

Westmoreland Coal Company (“Westmoreland”), and BHP Billiton New Mexico Coal, Inc. (“BHP”)—attempted to obtain a prior restraint prohibiting The New Mexican from publishing documents PRC inadvertently disclosed to it in response to The New Mexican’s request under New Mexico’s Inspection of Public Records Act (IRPA). *See* Order Granting BHP Billiton New Mexico Coal’s Mot. for J. on the Pleadings and PNM’s Mot. for J. on the Pleadings as to All Claims Raised by the New Mexican at 2, *New Mexico Pub. Regulation Comm’n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-01823 (First Jud. Dist. Ct., Dec. 4, 2019) (hereinafter “Order Granting Motions”); Second Amended Answer and Counterclaim by The New Mexican, Inc. at 14, *New Mexico Pub. Regulation Comm’n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-01823 (First Jud. Dist. Ct., July 27, 2016) (“Second Amended Answer and Counterclaim”).

In accordance with well-established precedent, the district court correctly refused to impose the requested prior restraint that would have unconstitutionally prohibited The New Mexican from publishing the documents lawfully in its possession. Order Granting Motions at 2. Shortly after the district court denied PRC’s motion for a temporary restraining order, PNM and BHP filed respective Notices of Withdrawal as Intervenors and Notices of Dismissal. *Id.* The New Mexican objected to the dismissal of PNM and BHP’s claims and filed counterclaims against PNM and BHP for malicious abuse of process; violations of

The New Mexican's rights under the First and Fourteenth Amendments; violation of 42 U.S.C. § 1985, as well as conspiracy to violate § 1985(3); violation of the state's Constitution; and violation of the IRPA, among other claims.³ See Second Amended Answer and Counterclaim at 17-21.

The district court granted PNM and BHP judgment on the pleadings on The New Mexican's counterclaims and entered final judgment dismissing the New Mexican's claims against PNM and BHP on February 18, 2020. See Order Granting Motions; Final J. on All Claims Against BHP Billiton New Mexico Coal, *New Mexico Pub. Regulation Comm'n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-01823 (First Jud. Dist. Ct., Feb. 18, 2020); Final J. on The New Mexican's Claims Against PNM, *New Mexico Pub. Regulation Comm'n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-01823 (First Jud. Dist. Ct., Feb. 18, 2020). The district court held that the *Noerr-Pennington* doctrine immunized PNM and BHP from The New Mexican's claims. Order Granting Motions at 7.

SUMMARY OF THE ARGUMENT

The *Noerr-Pennington* doctrine is rooted in the protection of First Amendment rights. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)

³ The New Mexican also filed counterclaims against PRC and Westmoreland. PRC and The New Mexican later settled. Westmoreland filed a Notice of Bankruptcy and Notice of Discharge of claims against it and was removed as a party to the case. Order Granting Motions at 2-3.

(“*Pennington*”); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (“*Noerr*”). However, in this case, the district court allowed PNM and BHP to use the doctrine as a shield for their attack on the First Amendment rights of the press. While in many instances the application of the *Noerr-Pennington* doctrine is necessary and appropriate to protect petitioning activity, it does not apply to “sham” lawsuits. *Cordova v. Cline*, 2017-NMSC-020, ¶ 27–28, 396 P.3d 159, 167–68. The *Noerr-Pennington* doctrine should not be used to immunize PNM and BHP from liability when they frivolously attempt to obtain a prior restraint, which is presumptively unconstitutional. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Indeed, the district court’s application of the *Noerr-Pennington* doctrine in this case leaves The New Mexican—and potentially other news organizations in New Mexico—exposed to chilling lawsuits with no recourse. Media outlets are frequently the target of meritless lawsuits, including attempts to obtain unconstitutional prior restraints. Even when the attempt to obtain a prior restraint fails, these lawsuits take up news organizations’ time and can impose significant costs on them. While the *Noerr-Pennington* doctrine appropriately protects legitimate petitioning activity, the district court’s application of the doctrine here, if not corrected, could chill news media’s willingness to report on matters of public concern, to the detriment of the public. Accordingly, amici urge the Court to grant

The New Mexican’s Petition for a Writ of Superintending Control and reverse the dismissal of The New Mexican’s claims against PNM and BHP.

ARGUMENT

I. PNM’s and BHP’s request for a prior restraint against The New Mexican is not legitimate petitioning activity shielded by the *Noerr-Pennington* doctrine.

- A. The *Noerr-Pennington* doctrine is intended to protect First Amendment rights, not immunize attacks on the exercise of First Amendment rights, and it does not apply to “sham” lawsuits.

The *Noerr-Pennington* doctrine originated in two cases in which the Supreme Court held that the Sherman Antitrust Act could not be read to impose liability on those who attempted to influence legislation and public officials through public relations campaigns. *Pennington*, 381 U.S. at 671; *Noerr*, 365 U.S. at 136. Since then, courts have expanded the doctrine to protect a broader right to petition guaranteed by the First Amendment. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (applying the doctrine to “the right to petition . . . all departments of the [g]overnment” including courts).

In *Cordova v. Cline*, this Court applied the *Noerr-Pennington* doctrine to shield citizens who initiated a recall petition for a local official. 2017-NMSC-020, ¶ 24, 396 P.3d 159, 167. In that case, Arsenio Cordova filed a lawsuit against members of a citizens’ association after they created a recall petition to remove Cordova from his position on a local school board. *Id.* at ¶ 1, 396 P.3d at 162.

This Court, acknowledging the First Amendment rights of the citizens, ultimately held that the *Noerr-Pennington* doctrine protected their activity and affirmed the district court's grant of the citizen's motion to dismiss. *Id.* at ¶ 24, 40, 396 P.3d at 167, 171.

The Court in *Cordova* also held that the protection the *Noerr-Pennington* doctrine affords is not absolute. It stated: "To be entitled to First Amendment protection under the [] doctrine, the [petitioning] activity must be genuine and not a mere sham." *Id.* at ¶ 27, 396 P.3d at 168. Formulated as a two-part test, a sham claim is one that (1) is "objectively baseless," meaning that "no reasonable litigant could realistically expect success on the merits" and (2) is brought with a subjectively improper motive. *Id.*

B. The *Noerr-Pennington* doctrine does not apply to PNM's and BHP's claims against The New Mexican because they were a sham.

In determining whether PNM's and BHP's litigation against The New Mexican was a "sham," the Court must consider the First Amendment's heavy presumption against prior restraints. PNM and BHP could not have realistically expected to succeed on the merits, *see Cordova*, 2017-NMSC-020, at ¶ 27, 396 P.3d at 168, given that prior restraints can only be imposed in the most exceptional circumstances, and no such circumstances were present here. That PNM and BHP sought a prior restraint even with a clear lack of exceptional circumstances also suggests that their subjective motive was improper. *See id.*

1. The heavy presumption against prior restraints can only be overcome in “exceptional circumstances.”

Prior restraints pose the greatest threat to the Constitution’s guarantee of freedom of speech and of the press. The U.S. Supreme Court has long recognized that “prior restraints on speech and publication are the most serious and least tolerable infringement on first amendment rights.” *Nebraska Press Ass’n*, 427 U.S. at 559. Indeed, the Supreme Court has noted that the First Amendment’s “chief purpose” is to prevent “previous restraint upon publication.” *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

This strong presumption against prior restraints can be overcome only in “exceptional cases.” *Id.* at 716. Indeed, “the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial.” *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). Beginning in 1931, the Supreme Court has without fail rejected all prior restraints on the press. *See, e.g., Near*, 283 U.S. at 716–18 (invalidating prior restraint against defamatory and racist publication that allegedly disturbed the “public peace”); *Nebraska Press Ass’n*, 427 U.S. at 570 (rejecting prior restraint intended to protect Sixth Amendment rights of criminal defendant); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (rejecting prior restraint sought on the basis of alleged national security concerns) (hereinafter the “*Pentagon Papers Case*”).

Perhaps most famously, the Supreme Court in the *Pentagon Papers Case* held that The New York Times could not be restrained from publishing a classified study of the Vietnam War it had received from a source, despite the government's claim that an injunction was necessary to prevent a "grave and immediate danger" to national security. *Pentagon Papers Case*, 403 U.S. at 741 (Marshall, J., concurring). As Justice Black stated in his concurrence to the Court's per curiam opinion: "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717 (Black, J., concurring).

More than twenty years later, Justice Blackmun, sitting as Circuit Justice, also rejected an attempt by a private company to impose a prior restraint on the publication of information. *CBS, Inc. v. Davis*, 510 U.S. 1315 (Blackmun, Circuit Justice 1994). Notably, the attempted restraint involved information that could be considered "confidential" or "proprietary" in nature. *Id.* at 1316. In *Davis*, a meat packing company sought a prior restraint to prevent a television network from broadcasting footage taken at the company's factory. *Id.* at 1315. The court below granted the company an injunction prohibiting CBS from broadcasting the footage, based in part on its finding that "[p]ublic dissemination of [the company's] confidential and proprietary practices and processes would likely cause irreparable

injury.” *Id.* at 1316. Justice Blackmun, however, granted an emergency stay of the injunction, finding that it was an unconstitutional prior restraint. *Id.* at 1318.

Other courts have since rejected requests for prior restraints intended to prevent disclosure of information a party claims is confidential. *See, e.g., Procter & Gamble Co.*, 78 F.3d at 225-27 (holding preliminary injunction preventing Business Week’s publication of information from sealed court filings alleged to be confidential trade secrets was an unconstitutional prior restraint); *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 750 (E.D. Mich. 1999) (denying Ford’s motion for preliminary injunction against publication of trade secret information as an unlawful prior restraint); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 262–63 (E.D. Va. 1995) (holding preliminary injunction in a trade secret and copyright infringement against The Washington Post was an unconstitutional prior restraint).

In short, an unbroken line of cases from the Supreme Court over the last 90 years, as well as decisions by other courts around the country, have made clear that prior restraints are justified in only the rarest, most extraordinary circumstances; no such circumstances are present here.

2. Because PNM and BHP sought a prior restraint absent any exceptional circumstances, the Court should find that their petitioning activity was a sham.

In light of the extraordinarily high bar that must be overcome to obtain a prior restraint and the clear lack of any basis for a prior restraint in this case, this

Court should hold that the *Noerr-Pennington* doctrine does not shield PNM and BHP from liability because their litigation was both “objectively baseless” and “had a subjectively improper motive.” *Cordova*, 2017-NMSC-020, at ¶ 27, 396 P.3d at 168. The records PNM and BHP sought to restrain were demonstrably important public records. They pertained to contractual agreements surrounding plans for the San Juan Generating Station, which provides power to an estimated 2 million customers, and are of great concern to the citizens of Santa Fe and the surrounding area. Hannah Grover, *How San Juan Generating Station Went from Powerhouse to Possible Closure*, Farmington Daily Times (Sept. 25, 2018), <https://perma.cc/7UCL-AMS4>. The New Mexican sufficiently pleaded both that PNM’s and BHP’s request for a prior restraint of these records was objectively baseless and that PNM and BHP had a subjectively improper motive; accordingly, the district court erred in granting PNM and BHP’s motions for judgment on the pleadings.

PNM’s and BHP’s request for a prior restraint was objectively baseless under the first prong of the “sham exception” to the *Noerr-Pennington* doctrine, *Cordova*, 2017-NMSC-020, at ¶ 27, 396 P.3d at 168, because they had no reasonable, realistic expectation of success on the merits of that request. As The New Mexican pleaded in its counterclaim, PNM and BHP asked the district court to impose a “blatantly unconstitutional prior restraint” on The New Mexican.

Second Amended Answer and Counterclaim at 7. Decades of unbroken caselaw clearly demonstrated that their attempt to impose a prior restraint on The New Mexican would be in vain.⁴ See Section I.B.1, *supra*. Officials for PRC, an original party to the case, even acknowledged that the lawsuit was unwarranted. As The New Mexican reported in August 2015, Commissioner Patrick Lyons, R-Cuervo, stated that PRC “[] should never have filed that lawsuit.” Steve Terrell, *PNM, Coal Companies Drop Case Against ‘New Mexican’*, New Mexican (Aug. 12, 2015), <https://perma.cc/AU7P-G6GY>. Lyons also stated that he did not believe that the documents at issue should have been secret. *Id.*

⁴ Amici recognize that petitioning activity can be legitimate even when controlling legal authority weighs against a litigant’s legal position, such as when a party argues, in good faith, for a change in existing law. However, in this case, PNM and BHP did not address controlling Supreme Court precedent on prior restraints in their intervention motions, let alone argue such cases were wrongly decided. In moving to intervene, BHP merely claimed that The New Mexican could not “demonstrate an injury arising from lack of access” to the documents at issue, and that it could not “demonstrate any First Amendment violation.” BHP Billiton New Mexico Coal, Inc.’s Complaint-In-Intervention for Preliminary Injunction, Permanent Injunction, Violation of the Uniform Trade Secrets Act, and Unjust Enrichment at 13-14, *New Mexico Pub. Regulation Comm’n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-1823 (First Jud. Dist. Ct., Aug 10, 2015). Similarly, PNM barely alluded to the First Amendment interests at stake in its intervention motion, stating only that The New Mexican “will no doubt argue that First Amendment rights supersede any confidentiality rights that PNM has in the [materials PNM sought to prevent The New Mexican from publishing].” Motion of Public Service Company of New Mexico to Intervene as a Party Plaintiff at 6, *New Mexico Pub. Regulation Comm’n v. The New Mexican, Inc.*, Case No. D-101-CV-2015-1823 (First Jud. Dist. Ct., Aug 10, 2015). Thus, PNM’s and BHP’s petitioning activity here was an objectively baseless sham.

The New Mexican also sufficiently pleaded that PNM and BHP had a subjectively improper motive, satisfying the second prong of the “sham exception” to the *Noerr-Pennington* doctrine. *See Cordova*, at ¶ 27, 396 P.3d at 168. The New Mexican alleged in its counterclaim that PNM and BHP filed suit against The New Mexican to chill and infringe The New Mexican’s First Amendment rights. *See* Second Amended Answer and Counterclaim at 5, 16, 18.⁵ It also alleged that PNM and BHP’s meritless demand for a prior restraint against The New Mexican in fact “chilled and impaired the newspaper’s reporting,” by hampering the newspaper’s ability to report on the information at issue and by consuming scarce time and resources. *See id.* at 8.

In addition, PNM’s and BHP’s request for a prior restraint in the absence of any exceptional circumstances to justify it also indicates that their subjective motivation underlying their petitioning activity was improper. The Supreme Court has noted that a classic example of a “sham” lawsuit is one in which a party files

⁵ The Supreme Court has held that there is no “conspiracy exception” to the *Noerr-Pennington* doctrine, *i.e.*, an exception “which would apply when government officials conspire with a private party to employ government action *as a means of stifling competition.*” *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 382 (1991) (emphasis added). The New Mexican’s pleading on its counterclaim does not assert a “conspiracy exception” to the *Noerr-Pennington* doctrine as defined by *City of Columbia*. Rather, it asserts that PNM and BHP sought to violate The New Mexican’s First Amendment rights through the very process of petitioning the courts for a prior restraint, a subjectively improper motivation that the *Noerr-Pennington* doctrine does not shield. *See id.* at 381.

frivolous objections “simply in order to impose expense and delay.” *City of Columbia*, 499 U.S. at 380. Sham lawsuits are a common tactic for imposing expense on the news media and delaying reporting. For example, in *N.Y. Times Co. v. Sullivan*, the Supreme Court warned of the potential chilling effect of defamation litigation on the press. 376 U.S. 254, 279 (1964). Lawsuits seeking prior restraints have a similar chilling effect, as the news media must expend time and resources fighting them. In some instances, that chilling effect is the very reason a litigant brings, or threatens to bring, a lawsuit. *See, e.g.*, Mary Duan, *Greenfield Sues The Weekly for Doing Journalism, and The Weekly Fights Back.*, Monterey County Now (Aug. 23, 2018), <https://perma.cc/WH2W-AE95>; Eriq Gardner, *HBO Fights Energy Co.’s Bid to Prevent Rebroadcast of John Oliver’s “Last Week Tonight”*, The Hollywood Reporter (July 24, 2017), <https://perma.cc/LN5R-3SLD>.

PNM and BHP had no legitimate basis or motive in attempting to suppress the records at issue. As such, PNM and BHP’s request for a prior restraint met the two-part test for the sham exception under the *Noerr-Pennington* doctrine.

II. The district court’s dismissal of The New Mexican’s counterclaims under the *Noerr-Pennington* doctrine could inhibit future news reporting on matters of public concern.

In addition to erroneously applying the *Noerr-Pennington* doctrine, the district court’s decision dismissing The New Mexican’s counterclaims under that

doctrine sets a troubling precedent for other media outlets in New Mexico.⁶ By applying the *Noerr-Pennington* doctrine to prevent a news organization who defeated a frivolous request for a prior restraint from recovering the attorney's fees and costs incurred in doing so, the district court's decision could discourage reporting on matters of public concern.

A news organization facing a legal complaint seeking a prior restraint is immediately drawn into a costly, potentially lengthy legal battle. Litigation requires media outlets to divert limited financial resources away from reporting to defending themselves, often for an extended period of time. Indeed, this case began in 2015. Order Granting Motions at 2. Costly, protracted litigation is all the more problematic for the press given the current financial constraints of many media outlets, especially local newspapers. See Penelope Muse Abernathy, *The Expanding News Desert*, UNC Hussman School of Journalism and Media (last visited Feb. 20, 2020), <https://perma.cc/L5QF-9MNH>; Kevin G. Hall, *Bankruptcy Court Approves McClatchy's Mediation Request, Fueling Hope of Resolution*, McClatchy DC (Feb. 18, 2020), <https://bit.ly/2V7Hh9P>; *Newspapers Fact Sheet*, Pew Research Center (July 9, 2019), <https://perma.cc/CUA9-AP5S>.

⁶ The district court dismissed The New Mexican's counterclaims against PNM and BHP solely on the basis of the *Noerr-Pennington* doctrine. See generally Order Granting Motions.

When news outlets must divert valuable financial resources to litigation costs, it is the public that ultimately loses. *See United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (“We have placed our faith in knowledge, not in ignorance, and for most, this means reliance on the press.”) (Wilkinson, J., concurring). Money and time spent by news organizations fighting meritless requests for prior restraints cannot be spent on reporting on matters of public concern. In addition, faced with the risk of litigation and no prospect of recovering their attorney’s fees and costs, some news organizations may simply choose not to cover controversial topics or litigious entities or individuals.

The district court’s decision could thus embolden individuals or entities seeking to silence the press in New Mexico and decrease news outlets’ ability and willingness to report on matters of public concern. A plaintiff need only file a frivolous lawsuit seeking a prior restraint and then rely on the *Noerr-Pennington* doctrine as a safeguard against attempts by the press to recoup attorney’s fees and costs. To avoid this potential chilling effect, this Court should grant The New Mexican’s writ and reverse the district court’s decision.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant The New Mexican’s Petition for a Writ of Superintending Control.

Respectfully submitted,

/s/ Daniel Yohalem

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone: (505) 983-9433
Email: dyohalem@aol.com

Caitlin Vogus
REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS
1156 15th Street NW, Ste. 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Email: cvogus@rcfp.org
*Application for admission pro hac vice
pending*

Attorneys for Amici Curiae

Dated: March 16, 2020

APPENDIX A

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The Committee to Protect Journalists is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. A board of prominent journalists from around the world helps guide CPJ's activities.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition’s mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Association of Magazine Media, (“MPA”) is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA’s membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Newspaper Association is a 2,000-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New Mexico Broadcasters Association (NMBA) is a not-for-profit corporation chartered by the State of New Mexico in 1951. Its membership includes radio and television stations, as well as other community members with a stake in broadcasting. NMBA’s key responsibilities include assisting its members with general and broadcast-specific business challenges through educational seminars, legal hotlines, grassroots lobbying (in-state and on Capitol Hill), and additional opportunities to receive industry-specific assistance, locate helpful resources and network with fellow broadcasters.

New Mexico Foundation for Open Government is a non-profit, nonpartisan organization committed to helping citizens, students, educators, public officials, media and legal professionals in New Mexico understand, obtain and exercise their rights and responsibilities under New Mexico’s “sunshine laws,” including the Inspection of Public Records Act and Open Meetings Act.

The New Mexico Local News Fund works with journalists and community leaders on programs and activities that support the local news ecosystem and identify ways to serve the news and information needs of all New Mexicans.

Founded in 1901, the **New Mexico Press Association** is the industry representative for member newspapers throughout the state. As the leading advocate, the Association is on the front when it comes to defending and protecting issues important to not only the industry, but for anyone who supports transparency in government. The New Mexico Press Association exists to improve the quality of member newspapers, encourage high journalistic standards, promote journalism education and will seek to protect the rights of Free Speech for its members as guaranteed by the Constitution of the United States of America.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to

fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

Nexstar Broadcasting, Inc. (“Nexstar”) is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 197 television stations and related digital multicast signals reaching 115 markets or approximately 62% of all U.S. television households. In New Mexico, Nexstar owns television station KRQE.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries.

RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Searchlight New Mexico is a nonprofit investigative news organization that strives to produce high-impact journalism on topics of local, regional and national interest in order to allow the public to see into the remote recesses of government and to expose abuses of power. Searchlight partners with 33 media outlets throughout the state and its stories are also frequently published by newspapers and online magazines across the U.S.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Society of Professional Journalists Rio Grande Chapter is a chapter of the national Society of Professional Journalists, representing independent and staff journalists working across all platforms throughout New Mexico and El Paso.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

CERTIFICATE OF SERVICE

I hereby certify that I conditionally filed this **Amicus Curiae Brief**, on the 16th day of March, 2020 using the New Mexico Supreme Court E-file system which caused counsel of record to be electronically served and I emailed a courtesy copy to counsel, as follows:

Counsel for The New Mexican, Inc

Victor R. Marshall
12509 Oakland NE
Albuquerque, NM 87122
Telephone: (505) 332-9400
victor@vrmarshall.com

Counsel for Public Service Company Of New Mexico

Richard L. Alvidrez, Dylan O'Reilly, & Luke Salganek
MILLER STRATVERT, P.A.
P.O. Box 1986
Santa Fe, NM 87504-1986
Telephone: (505) 989-9857
ralvidrez@mstlaw.com
doreilly@mstlaw.com
lsalganek@mstlaw.com

Counsel for BHP Billiton New Mexico Coal, Inc.

Martha G. Brown
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
P.O. Box 2168
500 Fourth St. NW, Suite 1000
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800
mgb@modrall.com

Respectfully Submitted.

/s/ Daniel Yohalem
Daniel Yohalem