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Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment

*Carol Rice Andrews**

Yes, too much ink already has been spent discussing Paula Jones's sexual harassment case against then-President Bill Clinton. However, precisely because the case is so well known, it is a good case to study the conflict between Rule 11 and the Petition Clause of the First Amendment. While political pundits, legal scholars, and the general public will never agree on the merits of the case, they cannot dispute that the case of *Jones v. Clinton* was (and remains) politically charged. Indeed, most observers would agree that at least some of the persons behind the suit—whether Paula Jones, her lawyers, or her financial backers—had political or other aims in bringing suit that were in addition to, or even in lieu of, obtaining relief for Ms. Jones's alleged injuries. For this reason, *Jones v. Clinton* is a nearly perfect case for assessing the tension between Rule 11(b)(1) of the Federal Rules of Civil Procedure, which bars plaintiffs from bringing civil suit for “any improper purpose,”¹ and the Petition Clause,

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1. Under Rule 11, a litigant in federal court must certify that her civil pleading meets specified standards, and the court later may sanction the litigant or her lawyer if either has breached those standards. The certification provisions of paragraph (b) are the heart of Rule 11:

(b) *Representations to Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

which guarantees persons the right to petition courts for redress of grievances.²

In this article, I examine whether application of Rule 11(b)(1) to Paula Jones's suit, to dismiss her claim or otherwise sanction Ms. Jones or her lawyers, would have violated her right of court access under the Petition Clause.³ The question is hypothetical, for the parties in the actual case never pressed the issue of whether Ms. Jones's filing of her suit violated Rule 11(b)(1), let alone whether such an application of the rule would offend the First Amendment. Yet, the question is not so speculative that it strains reality. The possibility of Rule 11(b)(1) sanctions was suggested by both the United States Supreme Court⁴ and Judge Susan Webber Wright, the District Court

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b).

2. The Petition Clause is the last protection of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I (emphasis added). The United States Supreme Court has held that "[t]he right of access to the courts is indeed but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). I further discuss *California Motor Transport* and the application of the Petition Clause to courts *infra* Part II.A.

3. I focus my analysis on the Petition Clause, and not other clauses of the First Amendment, which would have protected some aspects of Ms. Jones's activity during her litigation. For example, Ms. Jones had a right of speech, but that right was not absolute during the litigation process. Due to the unique nature of courts and the trial process, the Court gives the government considerable latitude in controlling speech in court proceedings. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (holding that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting" (citations omitted)). By contrast, the petition right addresses a unique step in the process, the point of initial access, and does not speak directly to the expression during the litigation. Ms. Jones also had a First Amendment right to associate with others, including financial backers, in connection with this suit. *See generally* Lester Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595 (1973) (addressing the right to associate in litigation). In fact, the parties litigated this issue of association in connection with the President's efforts to gain discovery of and from these persons. *See infra* notes 258-59 (discussing the discovery debate). That debate, however, primarily addressed the rights of these other persons, outsiders to the litigation, and not the individual right of Ms. Jones to petition the court for redress.

4. The Supreme Court addressed the issue in ruling that the President did not enjoy immunity from civil suits. After rejecting his plea for immunity, the Court commented on the argument that such a ruling would expose President Clinton and his successors to a barrage of frivolous suits brought to politically harass the President:

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judge presiding over the *Jones* case.⁵ President Clinton echoed this theme when, in a nationally televised address, he attempted to justify his deposition testimony in the *Jones* case by arguing that the lawsuit had been “politically inspired.”⁶ The President’s plea to the American people was ironic, for if Ms. Jones in fact had improper motives in bringing suit, he could have at least attempted to rid himself of the case through use of Rule 11(b)(1). Under this strategy, President Clinton might have avoided all discovery in the case, and Ms. Jones,

We are not persuaded that [this risk] is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment.

Clinton v. Jones, 520 U.S. 681, 708–09 (1997) (citing FED. R. CIV. P. 12, 56). In a footnote to this statement, the Court noted the various powers of a court to sanction litigants, including Rule 11(b)(1): “As Rule 11 indicates, sanctions may be appropriate where a claim is “*presented for any improper purpose*, such as to harass,” including any claim based on “allegations and other factual contentions [lacking] evidentiary support” or unlikely to prove well-grounded after reasonable investigation.” *Id.* at 709 n. 42 (quoting FED. R. CIV. P. 11(b)(1), (3)) (emphasis added).

5. Judge Wright mentioned the potential use of Rule 11(b)(1) against Ms. Jones when she sanctioned President Clinton in April 1999, under Rule 37 (the discovery sanctions rule) for giving misleading deposition testimony in the case. She rejected the suggestion that the President’s behavior was justified because Ms. Jones’s case had been “politically inspired”:

Certainly the President’s aggravation with what he considered a “politically inspired lawsuit” may well have been justified, although the Court makes no findings in that regard. Even assuming that to be so, however, his recourse for the filing of an improper claim against him was to move for the imposition of sanctions against plaintiff The President could, for example, have moved for sanctions pursuant to FED. R. CIV. P. 11 if, as he intimated in his address to the Nation, he was convinced that plaintiff’s lawsuit was *presented for an improper purpose* and included claims “based on ‘allegations’ and other factual contentions [lacking] evidentiary ‘support’ or unlikely to prove well-grounded after reasonable investigation.” . . . The President never challenged the legitimacy of plaintiff’s lawsuit by filing a motion pursuant to Rule 11, however, and it simply is not acceptable to employ deceptions and falsehoods in an attempt to obstruct the judicial process, understandable as his aggravation with plaintiff’s lawsuit may have been.

Jones v. Clinton, 36 F. Supp. 2d 1118, 1130–31 (E.D. Ark. 1999) (citing *Clinton v. Jones*, 520 U.S. 681, 708-09 (1997) and Rule 11(b)(1) and (b)(3)) (emphasis added).

6. On August 17, 1998, the President in a televised address acknowledged that he had given misleading testimony in his deposition in the *Jones* case, in part because the case was a “politically inspired lawsuit.” *See, e.g., id.* at 1123 (quoting the President’s address). In addition, the President in his formal answer to the complaint, stated that Ms. Jones filed suit in order “to maximize plaintiff’s potential to derive economic benefit and simultaneously to harm the President.” The answer is on file with the author and is available online. *See* washingtonpost.com: Jones v. Clinton Resources and Links (visited Feb. 3, 2001) <<http://washingtonpost.com/wp-srv/politics/special/pjones/docs/answer.htm>>.

not the President, would have been the subject of a sanctions inquiry.

In assessing the potential use of Rule 11(b)(1) sanctions in the *Jones* case, I assume that at least some of Ms. Jones's underlying claims⁷ had sufficient legal and factual bases to meet the "merit" standards of Rule 11(b)(2) and (b)(3).⁸ I acknowledge that this assumption is subject to debate, but it is not far-fetched given the low threshold of merit required by Rule 11(b). To be sure, if Ms. Jones falsely stated facts in her complaint, she violated the factual merit standard of Rule 11(b)(3). But the true facts surrounding the incident in the hotel may never be known to us since it is essentially a "he said, she said" conflict. Assuming Ms. Jones's version of the hotel incident to be true, many would argue that her claims had some merit.⁹ The district court ultimately granted summary judgment

7. Ms. Jones named both President Clinton and Danny Ferguson, a former Arkansas state police officer, as defendants. In this article, I focus only on her several claims against the President. These claims are primarily Section 1983 claims that charged that the President sexually harassed her and thereby deprived Ms. Jones of her civil rights, both equal protection and due process. These claims were somewhat unusual, in that such allegations typically are pled under Title VII (42 U.S.C. § 2000e et seq.), but the limitation period for Title VII claims expired before Ms. Jones filed suit. Ms. Jones also asserted a Section 1985 conspiracy claim based on the same theories as her Section 1983 claims. Finally, she asserted state law claims for defamation and intentional infliction of emotional distress. *See Jones v. Clinton*, 974 F. Supp. 712, 715–18 (E.D. Ark. 1997) (summarizing claims). Ms. Jones later filed an amended complaint, which dropped her claims relating to reputation and which clarified her constitutional claims. *See Jones v. Clinton*, 990 F. Supp. 657, 662 n.1 (E.D. Ark. 1998) (summarizing amended complaint).

8. Paragraph (b)(2) of Rule 11 sets the legal standard for pleadings and motions: they must be "warranted by existing law or a nonfrivolous argument" for change in the law. Paragraph (b)(3) requires that factual assertions in a complaint have "evidentiary support" (or be identified as likely to have such support after reasonable opportunity for discovery). A fourth standard found in Rule 11(b)(4) addresses denials of factual assertions and thus has no application to claims for relief. FED. R. CIV. P. 11(b)(2)–(4). *See supra* note 1 (reprinting Rule 11(b) in full).

9. The merit of Ms. Jones's suit has been the subject of on-going debate in the media. One particularly influential article, by Stuart Taylor, Jr., in the November 1996 issue of *American Lawyer*, argued that Ms. Jones's evidence and case against President Clinton was "far stronger" than that charged by Anita Hill against Justice Clarence Thomas. Stuart Taylor, Jr., *Her Case Against Clinton*, AM. LAW. 57 (Nov. 1996). The article prompted further debate, including one online between Stuart Taylor and Professor Susan Estrich. *See Principle, Politics, and Paula Jones*, XIX AM. LAW. 49 (Feb. 1997) (reprinting excerpts of the online debate). In addition, some women's groups and legal scholars opposed summary judgment in the case or at least cited *Jones* as an example in their arguments that courts inappropriately grant summary judgment in hostile work environment cases. *See* Amicus Brief of Women's Equal Rights Legal Defense & Education Fund and of National Organization for Women, Dulles Area Chapter, *Jones v. Clinton* (8th Cir.) (No. 98-2161) (on file with author and available online); *see also*

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against her because Ms. Jones did not have sufficient evidence of a legally cognizable injury,¹⁰ but the court earlier held that most of her claims had enough legal merit to withstand a motion to dismiss.¹¹ Failure to survive summary judgment alone does not render a complaint so factually insufficient that it violates Rule 11(b)(3).¹² In any event, I do not purport to argue the merits of her claims here. Instead, I assume sufficient merit to satisfy the other prongs of Rule 11(b) so that the improper purpose clause of Rule 11(b)(1) is squarely at issue.

The propriety of Rule 11(b)(1) improper purpose sanctions in the *Jones* case raises issues on two levels. The first is procedural and looks solely at the potential application of Rule 11, without considering any constitutional constraints. How, if at all, does Rule 11 apply to sanction a litigant who brings colorable claims for purposes other than, or in addition to, obtaining relief for injuries? This is by no means a settled question. On the one hand, it would seem illogical to bar plaintiffs from court if they have bad motives, because, as a practical matter, most plaintiffs bear some sort of ill feelings toward the defendant. Yet, the literal terms of the rule seem to preclude any and all ill motives. In Part I of this article, I examine these and other procedural issues and conclude that the President could have made a persuasive argument to sanction Ms. Jones and her lawyers under Rule 11(b)(1). Indeed, Rule 11 was a tool by which President Clinton could have attempted to dismiss the suit, before the case pro-

Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (noting *Jones* and arguing the federal courts misuse summary judgment in hostile environment cases); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999) (refusing to comment on *Jones v. Clinton* because of its "uniquely political character" but arguing that district courts improperly grant summary judgment in cases such as *Jones*).

10. See *Jones v. Clinton*, 990 F. Supp. 657, 679 (E.D. Ark. 1998) (granting summary judgment on Jones's remaining claims in amended complaint).

11. See *Jones v. Clinton*, 974 F. Supp. 712, 732 (E.D. Ark. 1997) (dismissing Jones's defamation and due process claims but holding that Jones's remaining claims in original complaint were viable causes of action).

12. The advisory committee for Rule 11 cautioned courts on this issue:

That summary judgment is rendered against a party does not necessarily mean . . . that it held no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

FED. R. CIV. P. 11 advisory committee's note (1993). As to the meaning of and role of the "advisory committee" for the Federal Rules of Civil Procedure, see *infra* note 43.

ceeded to the merits. If this were the case, the President could have avoided testifying about the Monica Lewinsky matter, which of course would have altered history. This is not to say that Judge Wright would have applied Rule 11 to dismiss Ms. Jones's claims, only that Rule 11 left open this possibility.

The procedural interpretation is not the end of the analysis. The second level of inquiry is constitutional. Assuming that the literal terms of Rule 11 would have allowed dismissal or other sanctions against Ms. Jones, would this application of Rule 11 have violated her right to petition courts under the First Amendment? In previous articles, I have examined in detail the history and scope of the right to petition courts.¹³ In Part II of this article, I recap that analysis and then focus specifically on whether Rule 11(b)(1) sanctions would have violated Ms. Jones's right to petition courts. I conclude that the Petition Clause would have precluded any assessment of Rule 11 sanctions¹⁴ against Ms. Jones that were based solely on her purpose in filing suit, whatever purpose that may have been.

Finally, in Part III, I broaden my analysis and assess the future of Rule 11(b)(1) and of "political lawsuits." I argue that the First Amendment allows motive to play only a minimal role in Rule 11. Rules of procedure cannot bar (or punish) access to court based solely on the motives of the plaintiff, as opposed to the merit of her

13. In my first article, I generally assessed the bases for, scope of, and protections due the right to petition courts. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) [hereinafter *Access to Court*]. In two additional articles, I analyzed whether the right to petition courts invalidates or limits a variety of statutes and rules that purport to limit access to court based on the motive of the plaintiff. Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000) (assessing a wide array of laws ranging from court rules to civil rights statutes) [hereinafter *Motive Restrictions*]; Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13 (2000) (focusing on the motive restrictions in the rules of professional rules of conduct for lawyers) [hereinafter *Rules of Professional Conduct*]. To varying degrees, all of this previous work addresses the issues in this article. This article refines and clarifies the analysis by focusing on one particular rule—Rule 11(b)(1)—and its interaction with the Petition Clause in a specific case—*Jones v. Clinton*.

14. Other legal doctrines, such as the tort of abuse of process, also potentially would have allowed sanctions or damages against Ms. Jones based solely on her motive, but none so clearly isolate motive as does Rule 11(b)(1). Most other doctrines are ambiguous and arguably require a finding of lack of merit before they will permit an award of damages for filing a civil suit. Nevertheless, to the extent that they allow sanctions based solely on motive, they (for the most part) will violate the Petition Clause. See generally *Motive Restrictions*, *supra* note 13 (discussing other restrictions and analyzing their validity under the Petition Clause).

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claim. As long as the underlying claims have some merit, courts must allow politically motivated lawsuits. These suits may test our collective patience, but preservation of First Amendment freedoms requires patience. Just as we must tolerate a wide range of speech and people who speak out of spite, the First Amendment demands that we tolerate those who use our courts for similar aims.

I. THE PROCEDURAL QUESTION: APPLYING RULE 11(b)(1) IN
JONES V. CLINTON

Even without considering the implications of the Petition Clause, the application of Rule 11(b)(1) in the *Jones* case raises a number of procedural uncertainties. The first concerns the actual motives of Ms. Jones and her lawyers and the level of proof necessary to find that they had some motive in bringing her claim other than obtaining relief. A second problem is determining whether these ulterior motives are “improper” within the meaning of Rule 11(b)(1). A third issue is whether such improper motive is alone a basis for sanctions under Rule 11, when the claim itself has some merit (as I assume for Ms. Jones’s claims here). In other words, if her claims met the legal basis standard of Rule 11(b)(2) and the factual support test of Rule 11(b)(3),¹⁵ could the court nevertheless sanction Ms. Jones for having an improper purpose? Finally, even assuming all of these hurdles are overcome, questions remain as to the appropriate sanction procedure. Could the court, for example, rely on Rule 11(b)(1) to dismiss Ms. Jones’s complaint without ever reaching the merits of her claim? I explore each of these issues in the four parts below and conclude that the literal terms of Rule 11(b)(1) would have supported sanctions in the *Jones* case. The President could have filed a Rule 11 motion and argued in good faith that the court should dismiss Ms. Jones’s complaint in its entirety, based solely on her alleged improper motives.

A. *Determining the Motives of Ms. Jones and Her Legal Team*

We may never know the true motives of Ms. Jones and her lawyers. The actual state of a person’s mind is exclusively within the knowledge of that person. But this does not mean that the President

15. See *supra* notes 7–12 (discussing the Rule 11(b) merits standards as applied to Ms. Jones’s claims).

could not challenge Ms. Jones's aims or that Judge Wright could not make findings as to Ms. Jones's purposes. Courts and litigants regularly assess motives. State of mind is a key element in most crimes, in many civil causes of action, and even under some other rules of civil procedure.¹⁶

The question here is whether President Clinton had sufficient evidence on which to charge that Ms. Jones or her lawyers had at least some improper purposes, including political aims, that were in addition to, or in lieu of, her stated aim of redressing injury. The level of evidence needed to make this charge would itself be governed by Rule 11.¹⁷ Paragraph (b)(3) of Rule 11 required the President to have "evidentiary support" for any factual assertions regarding Ms. Jones's purposes or at least a reasonable belief that his assertions would be borne out through discovery.¹⁸ As I discuss with regard to Ms. Jones's factual allegations,¹⁹ this is a low threshold. The President apparently had enough factual support to challenge Ms. Jones's motive by the time he filed his answer in July 1997, for in his formal answer he charged that she had ill motives.²⁰ The President certainly had a sufficient basis on which to believe that discovery would further uncover evidence of her other motives.²¹ Indeed, information currently in the public record is more than the President

16. Application of a few rules of civil procedure turn on the litigant's state of mind. *E.g.*, FED. R. CIV. P. 13(f) (providing for amendment to add a counterclaim where it was omitted due to "oversight, inadvertence, or excusable neglect"); FED. R. CIV. P. 16(f) (providing for sanctions where a party or attorney fails to participate in "good faith" in the pre-trial conference); FED. R. CIV. P. 37(g) (same as to discovery plan); FED. R. CIV. P. 60(b) (setting forth grounds to set aside judgments, including "excusable neglect" and "fraud").

17. Rule 11, by its express terms, applies to "[e]very pleading, written motion, and other paper," so its certification standards would apply to a Rule 11 motion. FED. R. CIV. P. 11(a); *see also* FED. R. CIV. P. advisory committee's note (1993) (noting that the filing of a Rule 11 "motion for sanctions is itself subject to the requirement of the rule and can lead to sanctions").

18. *See supra* note 1 (reprinting the Rule 11(b) factual merit standard).

19. *See supra* notes 7-12.

20. *See supra* note 6 (reprinting part of the President's answer).

21. Discovery is available to gather facts to support a Rule 11 motion, but federal rule-makers urge courts to grant such discovery only in rare cases. FED. R. CIV. P. 11 advisory committee's note (1983) (noting that discovery should be conducted only by leave of court, and then only in extraordinary circumstances). In addition, Judge Wright could have held an evidentiary hearing to inquire further into these issues. *See* FED. R. CIV. P. 11 advisory committee's note (1993) (noting that "[w]hether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for an evidentiary hearing), will depend on the circumstances").

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needed, under Rule 11, to charge that Ms. Jones and her lawyers had some “other” motives in bringing suit.²²

First, the President could have argued that Ms. Jones’s actual purpose in filing suit was to gain publicity and profit through book or movie deals. Ms. Jones’s sister and brother-in-law insist that this was her aim.²³ Ms. Jones has denied this, but her avowed purpose in bringing suit calls her denial into question. Ms. Jones claims she filed suit to clear her good name following an adverse report in an obscure magazine article in the *American Spectator*.²⁴ Yet, the magazine article did not identify her by name and merely mentioned one incident between then-Governor Clinton and a “Paula.”²⁵ It was Ms. Jones who, at a news conference that she initiated, publicly identified herself as the Paula in the article and brought the issue to the nation’s attention.²⁶

This is not to say that a victim of inappropriate behavior by a famous person can never seek redress, lest she be labeled a publicity seeker, but it does call into question Ms. Jones’s purported aim of preserving her good name. Similarly situated parties have sought re-

22. Countless articles and books recount the events surrounding the *Jones* case and the related Lewinsky scandal and impeachment proceedings. In this article, I rely principally on contemporaneous news articles, actual papers filed in the *Jones* case and, as a general reference, the book by Jeffrey Toobin, which chronicles the *Jones* case and purports to quote key documents in the case. See JEFFREY TOOBIN, *A VAST CONSPIRACY* (1999). Many of the news articles and civil filings from the case are available (as of the publication date of this article) online at a variety of sites, including the Court TV website (www.courtstv.com/legaldocs/government/jones) and that of the Washington Post (<http://washingtonpost.com/wp-srv/politics/special/pjones>).

23. See Howard Schneider, *Paula Jones and a House Divided*, WASH. POST, June 9, 1994, at C1.

24. Ms. Jones’s first appearance before the national press was at a press conference in February 1994, a few months before she filed her complaint. At that conference, she announced the possibility of her lawsuit and stated her purposes behind the suit. See Michael Hedges, *Woman Accuses Clinton of Sexual Advances in '91*, WASH. TIMES, Feb. 12, 1994, at A1 (reporting that “Mrs. Jones said she was motivated to come forward now to clear her name and to attempt to resolve the emotional distress and publicity caused by the incident” with President Clinton in the Little Rock hotel room); Robert Shogan, *Ex-Arkansas State Worker Says Clinton Harassed Her*, LOS ANGELES TIMES, Feb. 12, 1994, at A21 (reporting that her lawyer said that Ms. Jones came forward due to a story in the January issue of *American Spectator* and that she was “[t]rying to clear her name”). See generally TOOBIN, *supra* note 22, at ch. 1 (describing the events leading to Ms. Jones’s filing suit).

25. See David Brock, *Living With the Clintons*, AM. SPECTATOR, Jan. 1994, at 18, 26. See TOOBIN, *supra* note 22, at 1–3, 11–14 (discussing article).

26. Hedges, *supra* note 24, at A1 (noting that Ms. Jones at the February 1994 news conference identified herself as the woman identified as “Paula” in the *American Spectator* story); see also *supra* note 24 (discussing press conferences).

dress and affirmatively avoided such publicity. Other plaintiffs making sensitive sexual allegations have concealed their identity through sealed records and even the use of fictitious names, such as “Jane Doe.”²⁷ Women deponents in the *Jones* case itself were allowed such protection.²⁸ Ms. Jones could have gone one step further if she did not want the notoriety inherent in suing the President of the United States. She could have named the President as a John Doe party and asked to proceed under seal.²⁹ To be sure, such procedures would not have allowed Ms. Jones to publicly clear her name, but she at least could have gotten financial redress for the injury caused by the *American Spectator* reference to a “Paula” and for the President’s alleged work place harassment, without making “Paula Jones” a household word.

The evidence also shows that Ms. Jones repeatedly considered the financial value of her suit, apart from any recovery she might obtain in the case. Her contract with her first lawyer, Daniel Traylor, specifically contemplated future book and movie deals.³⁰ In 1997, while the case was still pending, Ms. Jones’s public relations advisor tried to negotiate a book deal for Ms. Jones.³¹ Other of her lawyers reminded Ms. Jones of the financial value of her version of the details of her hotel encounter with the President.³² They warned that release

27. The most famous example is the use of the “Jane Roe” pseudonym to protect the privacy of the pregnant woman who challenged abortion laws in *Roe v. Wade*, 410 U.S. 113, 120 n.4 (1973). The actual plaintiff in *Roe v. Wade*, Norma McCorvey, chose to reveal her name to gain publicity in 1984, as part of her campaign in support of abortion rights, and later, in 1995, as part of her “conversion” and arguments against abortion. See Steven Waldman & Ginny Carroll, *Roe v. Roe*, NEWSWEEK, Aug. 21, 1995, at 22. See generally Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 908–13 (1996) (discussing use of fictitious name pleading to promote confidentiality).

28. See *Jones v. Clinton*, 16 F. Supp. 2d 1054 (E.D. Ark. 1998) (releasing documents from under seal except that which relates to “Jane Doe” deponents).

29. See Rice, *supra* note 27; see also Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity when a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659 (1995) (advocating use of pseudonyms to protect defendants in notorious cases).

30. See TOOBIN, *supra* note 22, at 24–26 (reprinting excerpts of a contract between Jones and Traylor, including Ms. Jones’s agreement that Traylor could negotiate “all television, radio or movie contracts” and that Traylor would receive one-third of Ms. Jones’s earnings from such contracts).

31. See TOOBIN, *supra* note 22, at 123–25.

32. In two August 1997 letters to Ms. Jones, attorneys Gilbert Davis and Joseph Cammarata, who then represented Ms. Jones, urged her to accept the President’s offer of settlement and noted that such settlement would best preserve the financial value of a book or

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of her affidavit, which described distinguishing characteristics of the President's genitalia, would lose most of its commercial value if released during discovery in the case.³³ Ms. Jones reaped some of this outside value while the case was still pending. Non-charitable fundraising efforts helped her raise money that she spent on items only loosely related to litigation, such as clothing and hairstylists (as opposed to her attorney's fees and other legal expenses).³⁴

Finally, and most importantly for this article, Ms. Jones, or at least her backers, apparently had political reasons for bringing or continuing suit against the President. From the very beginning, Ms. Jones sought out the advice of lawyers and other advisors who were associated with conservative, republican, or anti-Clinton causes. Before Ms. Jones filed suit, Daniel Traylor, her first lawyer, conferred with Cliff Jackson, who had a reputation in Arkansas for his continued and ardent opposition to Bill Clinton.³⁵ Particularly telling is Ms.

movie deal. These letters are on file with the author and are publicly available online at the Court TV website, *supra* note 22. As stated in the second letter, Davis and Cammarata withdrew from representing Ms. Jones as a result of their disagreement over settlement. *See Jones v. Clinton*, 990 F. Supp. 2d 657, 662 (E.D. Ark. 1998) (noting substitution of counsel).

33. Among other things, attorneys Davis and Cammarata in their first August 1997 letter to Ms. Jones argued:

You are in the best posture now to increase your financial gain from outside sources. If you decide not to settle, you will have to eventually turn over the Affidavit, and you will have to describe the distinguishing characteristics in discovery. It will be leaked by someone, as these things seem always to be, even if there is a protective order. There will be no value left to your revealing this information to any other entity. Likewise, any interest in your writing a book, and appearances, after a settlement for the full amount sued, but before the discovery has been pursued, will be very high. So much information is not in the public domain now but will be after discovery, and certainly after trial.

Letter from Gilbert Davis & Joseph Cammarata, to Paula Jones (Aug. 19, 1997) (on file with author and available on the Court TV website, *supra* note 22).

34. This fundraising created controversy even among groups supporting Jones's cause, due to both the amounts kept by the fundraising firm, Bruce W. Eberle & Associates, and the amounts distributed to Ms. Jones personally. *See* Peter Baker & Amy Goldstein, *Firm Raising Money For Jones But Funds Don't Go To Lawyers*, WASH. POST, Feb. 28, 1998, at A1. The President reported that his discovery showed that the money was used to pay for Ms. Jones's "clothing, hair cuts, a personal computer, care and boarding for a pet, the towing of her car, and first and foremost, her public relations operation." *Jones v. Clinton*, President Clinton's Opposition to Motions of Paula Jones and Paula Jones Legal Defense Fund For Protective Order, Oct. 30, 1997 (on file with author).

35. *See generally* TOOBIN, *supra* note 22, at ch. 1 (describing Ms. Jones's relationship with Traylor and Jackson and Jackson's activities in opposition to the President). *See also Clinton Accused of Unwanted '91 Sexual Advance*, CHI. TRIB. Feb. 12, 1994, at 16 (reporting that Cliff Jackson had "devoted the last two years to turning up embarrassing information from the president's past") [hereinafter *Clinton Accused*]; Shogan, *supra* note 24 (reporting that Cliff

Jones's appearance with Mr. Jackson to announce her suit at a press conference organized by Mr. Jackson.³⁶ They chose to hold the news conference at the annual meeting of the Conservative Political Action Conference, which has been described as a gathering of "the hard core of the right wing of the Republican Party" and at which Cliff Jackson was scheduled to be a guest speaker concerning President Clinton.³⁷

As the case progressed, Ms. Jones attracted many more advisors and financial supporters from conservative political causes. Her public relations advisor was Susan Carpenter-McMillan, who had long been associated with causes on the political right, such as anti-abortion crusades.³⁸ The "Rutherford Institute," which actively pursues conservative causes, agreed to pay Ms. Jones's legal expenses (excluding attorney's fees) and secured a law firm to represent her on a contingency fee basis.³⁹

I do not mean to say that Ms. Jones personally shared all of the views of her lawyers or advisors or that any of the motives were improper. Nor is this listing of evidence an argument that her motives and associations may properly be used against her in assessing sanctions. I address those issues in the remainder of this article. I list the evidence here as a starting point for envisioning the potential application of Rule 11(b)(1). The evidence sufficiently suggested that Ms. Jones and her lawyers had some aims behind the suit,

Jackson was raising money for a "whistle-blower" fund for people who would corroborate stories against President Clinton).

36. See *Clinton Accused*, *supra* note 35 (reporting that Cliff Jackson organized the news conference at the annual meeting of the Conservative Political Action Committee); Hedges, *supra* note 24 (reporting that "a large number of political activists [were] attending sessions of the Conservative Political Action Conference" at which Ms. Jones held her news conference); TOOBIN, *supra* note 22, at 26-28 (describing the press conference).

37. TOOBIN, *supra* note 22, at 26; see also Shogan, *supra* note 24 (reporting that Cliff Jackson was "scheduled to participate in a panel discussion of Clinton and the media").

38. See generally TOOBIN, *supra* note 22 at 122-36 (describing Ms. Jones's relationship with Carpenter-McMillan). See also Stephen J. Hedges et al., *A Case of Hijacking: How Conservatives Made the Paula Jones Lawsuit Their Own*, U.S. NEWS & WORLD REP., Apr. 13, 1998 (describing Ms. Jones's relationship with Carpenter-McMillan and noting that Carpenter-McMillan was a "conservative Los Angeles political activist" who had "campaign[ed] against abortion" and "for the chemical castration of child molesters").

39. See Hedges et al., *supra* note 38 (reporting that the Rutherford Institute is "a group of Christian lawyers scattered throughout the country who do legal work to support school prayer, back anti-abortion activists, and promote other conservative causes"); TOOBIN, *supra* note 22, at 134-36 (describing the role of the Rutherford Institute); see also *Jones v. Clinton*, 57 F. Supp. 2d 719 (E.D. Ark. 1999) (awarding the Rutherford Institute its costs associated with the President's misleading deposition testimony).

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Jones and her lawyers had some aims behind the suit, beyond receiving relief for her alleged injury.

B. *Defining “Improper” Purposes Within the Meaning of Rule 11(b)(1)*

Having established that the President could make a plausible argument that Ms. Jones and her lawyers had motives in addition to vindication of her rights, the next question is whether these motives are improper under Rule 11(b)(1). The meaning of this seemingly simple clause is far from clear, as is demonstrated by an attempt to apply it to the *Jones* suit. I start with the text of the clause, which outlaws the filing of a complaint⁴⁰ for “any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”⁴¹ Ms. Jones seemingly did not have the last two listed bad intentions—to cause delay or to impose unnecessary financial burdens. That leaves harassment. This example might describe some of the supposed political purposes behind the suit—harassment of the President—but it does not fully capture the motives of gaining publicity for collateral financial reward and of generally advancing conservative political causes.

We thus must step back and more broadly assess the meaning of Rule 11(b)(1). This assessment raises a number of issues. An initial question is whether the listing of improper purposes in Rule 11(b)(1) is exclusive. If not, that leaves us with the task of determining what motives, in addition to the listed examples, are “improper.” This requires more than an evaluation of whether a single motive is good or bad. *Jones*, and likely most cases, are cases of mixed motive, where the plaintiff has both good and bad purposes. The assessment therefore must address the impact of the multiple motives and ask whether proper motives override improper ones. A final question raised by the *Jones* case is whether Rule 11(b)(1) addresses the motives of the plaintiff, her lawyers, or both.

First, the fact that the motives do not precisely fit one of the enumerated examples of improper purpose does not save Ms. Jones’s

40. Rule 11(b) also bars the presenting of other litigation papers for improper purpose and includes within this prohibition “the signing, filing, submitting, or later advocating.” See *supra* note 1. I further discuss the “later advocating” application of Rule 11, see *infra* Part II.C.3.

41. FED. R. CIV. P. 11(b)(1); see *supra* note 1.

complaint. The list in Rule 11(b)(1) is not exclusive. The rule explicitly lists the three motives as examples through a “such as” clause, and the history of the rule shows that the rulemakers intended to bar all possible forms of abusive intentions. The original 1938 version of Rule 11, in the first compilation of the Federal Rules of Civil Procedure, barred only a single improper purpose, that of delay.⁴² In 1983, federal rulemakers⁴³ sought to strengthen the rule in order to provide a more effective deterrent against litigation abuse.⁴⁴ They made several changes to the rule, including broadening the delay

42. The 1938 version of Rule 11 provided in part:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

FED. R. CIV. P. 11, 308 U.S. 645, 676 (1938).

43. In this article, I refer frequently to “rulemakers.” That body of persons has changed over time, as has the procedure for revising the rules. Congress has power under Article I to promulgate rules governing the procedure in federal courts. *See* *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (stating that “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts”). Congress has delegated most of its rule-making authority to the Supreme Court, through the Rules Enabling Act. *See* 28 U.S.C. § 2072 (1994). Congress also has set forth an elaborate system of committees and public hearing by which the rules of procedure must be adopted or revised. *See* 28 U.S.C. § 2072-2077. In particular, the “advisory committee” makes recommendations as to rule revisions and reports, through its official notes, on the history and meaning of those revisions. *See id.* § 2077. I cite these advisory committee notes throughout this article in discussing the intent of the “rulemakers” and the meaning of the rule revisions.

44. The advisory committee notes to the 1983 amendments state the aims of Rule 11 and its revision:

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings

Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . .

. . . Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

FED. R. CIV. P. 11 advisory committee’s note (1983) (repealed 1993).

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clause (to its current form),⁴⁵ in order to clarify that the rule forbade abusive intentions “other than delay.”⁴⁶

What are these other “improper” intentions? The only additional guidance in the official comments is the advisory committee’s citation to the Second Circuit decision in *Browning Debenture Holders’ Committee v. DASA Corp.*⁴⁷ In *DASA*, holders of convertible debenture bonds sued the issuing corporation, the bank trustee, and its accountant for fraud arising from an allegedly false proxy statement.⁴⁸

45. The 1983 version of Rule 11 provided:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

FED. R. CIV. P. 11 (1983). The most significant change to the rule in 1983 was the addition of the “reasonable inquiry” standard for the factual and legal merit of the pleading. *See* FED. R. CIV. P. 11 advisory committee’s note (1983). (“The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.”). I further discuss the 1983 revision *infra* at notes 48–65 and accompanying text.

46. FED. R. CIV. P. 11 advisory committee’s note (1983). The 1983 advisory committee’s only comment as to improper purpose was the following: “The expanded nature of the lawyer’s certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay.” FED. R. CIV. P. 11 advisory committee’s note (1983) (citing *Browning Debenture Holders’ Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977)). I discuss the *DASA* case *infra* at notes 48–56 and 110–115 and accompanying text.

47. 560 F.2d 1078 (2d Cir. 1977).

48. *See id.* at 1087–88.

After entering judgment for the defendants, the trial court used its inherent power (not Rule 11) to sanction the plaintiffs for their bad faith in bringing suit and in filing subsequent motions.⁴⁹ The trial court held that the plaintiffs had the collateral purpose of coercing the defendant to lower the conversion price of the bonds.⁵⁰ The Second Circuit reversed the award of sanctions as to the filing of the complaint, primarily on the ground that the complaint stated at least a colorable claim.⁵¹ This was consistent with the Second Circuit standard for issuing sanctions under the court's inherent power: such sanctions require that the court find *both* that the paper is frivolous *and* that it was made for an improper purpose.⁵² However, the Second Circuit then suggested, in dictum, that the plaintiffs' purpose of obtaining a collateral advantage was not improper, at least as to this colorable complaint.⁵³

Despite this suggestion, I believe that we can fairly infer that the advisory committee considered this collateral aim improper under Rule 11. The committee cited *DASA* immediately after noting that litigation can be abused for purposes "other than delay,"⁵⁴ and the only abusive purpose found in *DASA* was the attempt to gain an outside advantage. Moreover, the Second Circuit upheld sanctions for plaintiffs' subsequent filing of frivolous motions.⁵⁵ Because the Second Circuit requires a finding of improper purpose before it will sanction under its inherent powers, the court must have concluded

49. The trial court entered judgment for defendants, after trial on one count and summary judgment on all other counts, and awarded attorneys' fees to defendants. *Id.*

50. *See id.* at 1088 (noting that "what appellants really sought was a further reduction in the conversion price").

51. *See id.*

52. *See id.* (stating the two-part test for awarding sanctions under its inherent power: "the claim is entirely without color *and* has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons" (emphasis added)).

53. *See id.* ("The fact that the present suit was instituted to force a further reduction in the conversion price does not necessarily mean that it was brought in bad faith.") This statement is somewhat ambiguous, for some courts use "bad faith" as a short-hand reference to a pleading that is both frivolous and filed for improper purposes. *See Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986) (stating that an attorney who filed a motion to amend "did not act in bad faith in filing the pleading, because there was a legal basis for the claims he asserted" but affirming district court's finding that the attorney acted for an improper purpose). *See infra* notes 67–70 and accompanying text (discussing *Cohen*).

54. Fed. R. Civ. P. 11 advisory committee's note (1983); *see also supra* note 46.

55. *See DASA*, 560 F.2d at 1088–89.

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that the plaintiffs had an improper aim and that was likely the plaintiffs' collateral bargaining aim, as found by the trial court.⁵⁶

Thus, the rulemakers gave the three motives in the rule itself and perhaps this collateral motive as examples of improper purpose. They did not give any more guidance as to what otherwise constitutes an improper motive. The case law following the 1983 adoption of the improper purpose clause offers little additional insight. The first problem is the scarcity of case law on the issue. Few cases address improper purpose, and those that do usually involve litigation papers that are patently frivolous. In these cases, the courts tend to focus on the frivolous pleading and then simply assume from the baselessness of the pleading that the litigant had an improper motive, usually a motive of harassment. Litigants rarely press the issue of the other's motive in litigation. This is perhaps due to the fact that a defendant can more easily determine whether a complaint is frivolous than whether the plaintiff has an improper state of mind. The typical plaintiff does not volunteer or otherwise discuss her actual motives.

Nevertheless, in a very few cases, the courts have assessed the litigant's purpose, either through circumstantial evidence or through a litigant's rare admission of her purpose. For the most part, these cases show that the assessment of motive is done on a case-by-case basis with very little consistency.⁵⁷ A particular motive might seem improper to a court in one case but not in another. Courts, for example, have found improper the plaintiff's hatred for the defendant, when coupled with an intent to "harass and badger" the defendant⁵⁸ or to cause him to lose his job.⁵⁹ Courts also have condemned collateral purposes such as the desire to gain publicity⁶⁰ and the intention

56. The Second Circuit hinted that these motions might have been filed for delay or harassment purposes, but the only specific purpose found by the trial court was the desire to lower the conversion price. *See id.*

57. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 13(A)(1) (3d ed. 1994) (surveying purposes found to be improper).

58. *Nielson v. Hart*, No. 93-1237-CV-W-1, 1995 WL 901297, at *2 (W.D. Mo. Oct. 5, 1995) (holding that the plaintiff-employees' ERISA claims against TWA "was a frivolous case pursued in bad faith and for an improper purpose" and noting that "[t]he only common thread among the four [p]laintiffs seems to be their antagonism toward TWA" and that plaintiffs pursued this claim "for no purpose other than to harass and badger TWA").

59. *See Ballentine v. Taco Bell Corp.*, 135 F.R.D. 117 (E.D.N.C. 1991). I discuss *Ballentine* in more detail *infra* at notes 80-85 and 123-24.

60. *See Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 665, 670 (W.D. Mo. 1990), *aff'd*, 932 F.2d 697 (8th Cir. 1991) (holding that plaintiff is subject to sanctions for filing for an improper purpose because "the complaint was filed solely to attract publicity to plaintiff's

to gather evidence for or intimidate witnesses in other cases.⁶¹ Yet, the Second Circuit held in one case that the plaintiffs' intention to seek publicity and put pressure on the defendants to drop other claims was not an improper purpose under Rule 11(b)(1).⁶²

Courts have also taken mixed views regarding the political aims of the plaintiff. Some courts condemn use of the courts to pursue political gain while others seem to bend over backwards to accommodate such motives. For example, in two taxpayer cases, both of which the courts deemed to state only frivolous claims, one court sanctioned the plaintiff's use of the courts to pursue an anti-tax "tirade"⁶³ while the other refused to condemn the plaintiff's use of the courts as a forum for his "political and religious views" about the tax laws.⁶⁴ The Ninth Circuit has held that even a "transparent political interest" is not necessarily improper under Rule 11 and that courts

claims and to harass defendants"). I discuss *Bryant* in more detail *infra* at notes 126–30.

61. See *Davisson v. Engelke*, No. CO-97-265, 1997 WL 585818, at *5 (Minn. Ct. App. Sept. 23, 1997) (interpreting Minnesota Rule 11 improper purpose clause and holding that filing a civil suit "to engage in discovery to circumvent the limited discovery allowed in criminal matters or to intimidate state witnesses are improper purposes under Rule 11"). *But see* *Storage Technology Partners II v. Storage Technology Corp.*, 117 F.R.D. 675 (D. Colo. 1987) (holding that plaintiff's aim to take advantage of more liberal federal discovery was not improper under Federal Rule 11).

62. See *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995). *Sussman* was a defendant in a suit in an Israeli court concerning a failed bank operated by *Sussman* in Israel. *Sussman* then threatened his own suit in New York and warned of negative publicity and damage to Israeli investment in the United States. When the Israeli plaintiffs refused to drop their suit, *Sussman* (and another) sued in New York. The trial court dismissed, based on forum non conveniens, and later sanctioned *Sussman's* attorneys under Rule 11(b)(1) for filing suit for the improper purpose of pressuring the Israeli government, through adverse publicity, to drop the Israeli suit. See *Sussman v. Bank of Israel*, 154 F.R.D. 68, 71 (S.D.N.Y. 1994). The Second Circuit reversed. As to the characterization of the motive, the Second Circuit said that the aim of negative publicity was not improper given that the claim itself was not frivolous:

It is hardly unusual for a would-be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced.

Sussman, 56 F.3d at 459; see also *infra* note 94 (discussing other Rule 11 issues in *Sussman*).

63. *Allnutt v. Friedman*, Bank, No. 92-5-7401-JS, 1995 WL 222067, at *6 (D. Md. Apr. 10, 1995) (holding that taxpayer's bankruptcy challenge was frivolous and that his purposes were improper, including that of "continuing his tirade against the government's authority to impose an income tax on him").

64. *Auen v. Sweeney*, 109 F.R.D. 678, 680 (N.D.N.Y. 1986) (holding that taxpayer complaint against IRS agents was frivolous but refusing to assess an additional penalty for his purpose in "using the court as a forum for his political and religious views about what the law should be").

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generally must tolerate such purposes.⁶⁵ However, in a suit against President Reagan arising out of the bombing of Libya, the District of Columbia Circuit held that federal courts were not proper forums for “protests” and that a political motive would not save a plaintiff from sanctions where his claim is frivolous.⁶⁶

One circuit, the Fourth Circuit, stands out in its attempt to define improper purpose. The Fourth Circuit’s first effort, in *Cohen v. Virginia Electric & Power Co.*,⁶⁷ was not particularly instructive. In *Cohen*, the trial court assessed Rule 11 improper purpose sanctions against a plaintiff and his counsel because they filed a motion to amend their complaint with the intention of determining whether the defendant would oppose the new claims (and with the intention of withdrawing the new claims if defendant opposed them).⁶⁸ The trial court found this purpose to be improper even though the aim of testing the resolve of an opposing party seemingly is a common liti-

65. In *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), the plaintiffs filed suit under the Voting Rights Act and claimed that recall election materials violated the rights of Spanish-speaking people to read the materials. The trial court held that the claim was frivolous and sanctioned the plaintiffs, in part for bringing the suit for the improper purpose of gaining political advantage for the plaintiffs’ favored candidate. The Ninth Circuit reversed on several grounds, including the finding that this political aim was improper. See *infra* note 98 (discussing the *Zaldivar* court’s other ground for reversing sanctions). The Ninth Circuit did not approve of this motive. See *Zaldivar*, 780 F.2d at 834 (“In this case, the law was deployed as a weapon in a controversy for which it was ill-suited: a purely political dispute”). However, the court held that such purpose was not improper within the meaning of Rule 11:

We may assume that plaintiffs were at least as concerned with defeating the recall attempt against Councilman Snyder as with the right of Spanish-speaking voters to read election materials in Spanish, and filed their claim intending to achieve a political purpose. But the political inspiration for the federal law suit does not necessarily mean that the action is “improper” within the meaning of Rule 11. Much of the redistricting litigation under the Equal Protection Clause has been inspired by those with a transparent political interest. Whatever the true purpose of the litigant, the vindication of voting rights secured by the Fourteenth Amendment cannot be deemed impermissible harassment.

Id.

66. See *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989). Here, the plaintiffs argued their political purpose *saved* them from sanctions. The trial court agreed and ruled that although the claims were frivolous, it would not enter sanctions because the suit was brought as a political protest. See *Saltany v. Reagan*, 702 F. Supp. 319, 322 (D.D.C. 1988). The court of appeals reversed: “We do not conceive it a proper function of a federal court to serve as a forum for ‘protests,’ to the detriment of parties with serious disputes waiting to be heard.” *Saltany*, 886 F.2d at 440.

67. 788 F.2d 247 (4th Cir. 1986).

68. See *id.* at 249.

gation goal and even though the proposed new claims had merit.⁶⁹ The Fourth Circuit affirmed, simply by stating that the trial court did not abuse its discretion in finding improper purpose and without giving any explanation as to what distinguished this motive from proper litigation aims.⁷⁰

Four years later, in 1990, the Fourth Circuit in *In re Kunstler*,⁷¹ set a more formal standard for assessing improper purpose and also tackled the problem of the mixed motive case. The case was a civil rights suit in which the trial court sanctioned William Kunstler and other attorneys because, as the court found, they filed suit in order to gain publicity, embarrass government officials, and obtain evidence for use in a criminal case.⁷² In affirming the sanctions, the Fourth Circuit stated that the test under Rule 11 should be whether the plaintiff sincerely intended to vindicate rights:

The factors mentioned in [Rule 11(b)(1)] are not exclusive. If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere.⁷³

The court also instructed that, in assessing whether the plaintiff had this sincere central purpose of vindicating his rights, the trial court

69. *See id.* (noting that “there was a legal basis for the claims” asserted in the amended complaint).

70. *See id.* (finding no abuse of discretion that party and attorney acted for an improper purpose in violation of Rule 11 where they filed “a motion that they had no intention of pursuing if it were opposed”).

71. 914 F.2d 505 (4th Cir. 1990).

72. *See id.* at 519. The complaint grew out of events following an incident in which two of the plaintiffs staged an armed takeover of a North Carolina newspaper to protest corruption in local law enforcement. *See id.* at 510–11. The suit charged local government officials of civil rights violations in the subsequent criminal prosecution of the two plaintiffs and general persecution of their associates, who also joined as plaintiffs. The plaintiffs filed their civil suit on the one-year anniversary of the takeover, during the pendency of the criminal proceedings, and held a press conference to announce the suit. After the two plaintiffs pled guilty in the criminal cases, all of the plaintiffs voluntarily dismissed their claims with prejudice under Federal Rule of Civil Procedure 41(a)(2), and the defendants moved for sanctions under Rule 11. *See id.* at 512.

73. *Id.* at 518.

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must judge the plaintiff's intent objectively, from the point of view of the plaintiff and not from the defendant's perspective.⁷⁴

The Fourth Circuit found that the trial court did not abuse its discretion in finding that Mr. Kunstler and the other lawyers did not have the central purpose of vindicating the plaintiffs' rights.⁷⁵ That lack of proper purpose alone constituted a violation of Rule 11(b)(1).⁷⁶ However, the Fourth Circuit warned that some of the purposes listed by the district court would not by themselves support sanctions:

At least some of these motives would not warrant sanctions under the improper purpose portion of Rule 11, if [plaintiffs'] central purpose in bringing suit had been to vindicate rights of the plaintiffs. Holding a press conference to announce a lawsuit, while perhaps in poor taste, is not grounds for a Rule 11 sanction, nor is a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant, so long as there is evidence that a plaintiff's central purpose in filing a complaint was to vindicate rights through the judicial process.⁷⁷

This language seems somewhat at odds with the Fourth Circuit's condemnation of the seemingly common litigation goal in *Cohen*, but the court cited *Cohen* with approval⁷⁸ and also stated that it was not error for the trial court in *Kunstler* to consider these other purposes, once it found an absence of a central purpose to vindicate rights.⁷⁹

74. *See id.* at 518–19. The court explained:

An opponent in a lawsuit, particularly a defendant, will nearly always subjectively feel that the lawsuit was brought for less than proper purposes; plaintiffs and defendants are not often on congenial terms at the time a suit is brought. However, a court must ignore evidence of the injured party's subjective beliefs and look for more objective evidence of the signer's purpose.

Id. at 519.

75. *See id.* at 519–20.

76. The court, however, found that sanctions also were warranted under the other clauses of Rule 11(b) and therefore did not decide whether this purpose would be sufficient to warrant sanctions had the claim been meritorious. *See id.* at 518 (noting that because the complaint was “not well grounded in law or in fact” the court “need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was filed for an improper purpose”). I further discuss this issue under Rule 11 *infra* Part I.C and the Fourth Circuit's position in particular *infra* note 122.

77. In re *Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990).

78. *See id.* at 518.

79. *Id.* (noting that because plaintiffs had no proper purpose for filing suit, the district

*Ballentine v. Taco Bell Corp.*⁸⁰ is one of the few cases in the Fourth Circuit to apply the *Kunstler* test. There, the manager of a Taco Bell restaurant, Stanley Ballentine, sued Taco Bell Corporation and his supervisor, Denny Koenig, for sexual discrimination in staffing procedures.⁸¹ The trial court granted summary judgment for the defendants and held an evidentiary hearing on Rule 11 sanctions. The court found that Ballentine named Koenig as a defendant in part to harass Koenig and to cause Koenig to lose his job.⁸² The court held that this intent warranted sanctions under Rule 11 even though Ballentine's claim was arguably colorable and even though Ballentine also had the legitimate motive of wanting to remedy the alleged discrimination.⁸³ The trial court initially awarded sanctions without considering the impact of *Kunstler*.⁸⁴ After learning of the new *Kunstler* test, the trial court reconsidered the motives of Ballentine and affirmed the sanctions because Ballentine's improper aims outweighed the proper ones.⁸⁵ Thus, the Fourth Circuit test does not preclude sanctions merely because the plaintiff may have a proper motive in filing suit but instead asks whether that proper motive was the central aim behind the claim.

The Fourth Circuit approach has appeal as a restrained interpretation of Rule 11(b)(1) and as a solution to the mixed motive case,⁸⁶

court's "consideration of other possible motives for the suit . . . was proper").

80. 135 F.R.D. 117 (E.D.N.C. 1991).

81. He alleged that the restaurant gave preferential work schedules to female managers and that the restaurant fired him in retaliation for his filing of a complaint with the Equal Employment Opportunity Commission. *See id.* at 119–20.

82. *See id.* at 120–21.

83. *See id.* at 122 (finding that "Ballentine had a dual motive in filing the lawsuit: the legitimate purpose of seeking relief for the loss of his job and the improper purpose of harassing Koenig").

84. The trial court's initial sanction order followed *Kunstler* by only one month. *See id.* at 124–25.

85. In its supplemental opinion, the trial court found:

Although Ballentine, at the time of the filing of the complaint, felt that he had a legitimate claim, he also filed the suit in bad faith to harass and intimidate Koenig and in an attempt to make Koenig lose his job with Taco Bell. Ballentine's central purpose in adding Koenig to the lawsuit was to harass him. Ballentine's purpose in naming Koenig to the lawsuit was so excessive as to eliminate any proper purpose. Ballentine's purpose of vindicating rights in court was not central and sincere.

Id. at 125.

86. *See* JOSEPH, *supra* note 57, § 13(B)(2) (endorsing *Kunstler* test for cases of mixed purposes: "if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel").

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but it may not be correct. The text and history of Rule 11 suggest that the rule prohibits any bad motive of the plaintiff, regardless of her other motives. Rule 11 bars pleadings filed for “*any* improper purpose.” Unlike a few other rules of its kind, Federal Rule 11 does not qualify what role that purpose should take.⁸⁷ Indeed, federal rulemakers, in amending Rule 11 in 1983, considered but rejected adding the word “primarily” to the improper purpose clause. A proposed draft required that a litigant certify that the pleading “is not interposed *primarily* for any improper purpose,” but the advisory committee changed the final language and deleted “primarily.”⁸⁸ The committee reported that it made the change “to eliminate any ambiguity arising out of the use of the word ‘primarily,’”⁸⁹ and it likely acted in response to earlier criticism that the term “primarily” would improperly immunize motions filed *partly* to harass or delay.⁹⁰

In 1993, rulemakers made modest changes to the improper purpose clause: it now states that the litigation paper “is not being presented” (rather than the 1983 language of “not interposed”) for any improper purpose.⁹¹ They, however, did not change the description or example of improper purpose. Nor did they add any clarification in the comments about *Kunstler* and the impact of a proper purpose. Thus, Rule 11 leaves open the possibility that the presence of any improper motive renders a plaintiff in violation of the rule.

Finally, this leaves the question of whose abusive intentions are relevant. Some of the alleged ill motives in *Jones*, especially the political aims, are more easily attributed to the lawyers than to Ms. Jones herself. The introductory clause to Rule 11(b) expressly applies the certification standard to the person who signs the pleading—usually the lawyer—but the improper purpose clause of Rule 11(b)(1) does not say whose purpose the signing lawyer must certify.

87. See CAL. CIV. PROC. CODE § 128.7(b)(1) (West 1998) (requiring certification that the paper is not filed “primarily” for an “improper purpose”).

88. See Letter from Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure (Mar. 9, 1982), reprinted in 97 F.R.D. 190, 191 (1983).

89. *Id.*

90. Federal rulemakers released the draft of the rule for public comment in June 1981. See *id.* In response, critics charged, among other things, that the “primarily” clause was too limiting and would not have barred papers filed for mixed motives. See Comments Re: Rule 7 (and 11) (1981), microformed on CIS No. 7920-05 (Congressional Information Service).

91. Compare *supra* note 1 (reprinting current version of Rule 11), with *supra* note 45 (reprinting 1983 version of Rule 11).

The rule says only that the signing person, whether “an attorney or unrepresented party,” must certify that the pleading “is not being presented for any improper purpose.”⁹² One may ask who “presents” a complaint—the plaintiff or the attorney who files the complaint for her? The likely answer is both. A complaint is “presented” for an improper purpose regardless of whether the purpose is of the signing attorney or of his client.

This seems to be the view taken by the courts. The few courts that have analyzed purpose under Rule 11 have looked at the purpose of both the attorney and plaintiff. Indeed, courts rarely make any distinction between the motives of a client and her lawyer. For example, in *Kunstler*, the Fourth Circuit affirmed sanctions against the plaintiff’s counsel, in part based on improper purpose, without addressing whether the plaintiffs, their counsel, or both, had this intention.⁹³ A court might choose to not assess sanctions against a plaintiff, if the only violation were her lawyer’s bad purposes,⁹⁴ but sanctions are a separate question that I address in Part I.D below. The point here is that Judge Wright could have read Rule 11 as barring any improper motive, whether a motive of Ms. Jones or of her lawyers, and the case law suggests that at least some of their motives were improper under Rule 11(b)(1).

Perhaps the best indication that the motives in *Jones* might be “improper” within the meaning of Rule 11 came from Judge Wright and the Supreme Court in this very case. Both intimated that political motivation would be an improper purpose under Rule 11(b)(1).⁹⁵ They reserved question on whether the suit was in fact so motivated,

92. See *supra* note 1 (reprinting Rule 11(b)).

93. See *supra* notes 71–79 (discussing *Kunstler*). The trial court in assessing the sanctions based the finding of improper purpose in large part on the actions of counsel (e.g., writing a letter to a judge in a related criminal case to announce the filing of the suit) but the purpose that the trial court found improper (e.g., attempt to obtain leverage in the criminal case) likely belonged to plaintiffs and attorneys alike. See *Robeson Defense Comm. v. Britt*, 132 F.R.D. 650 (E.D.N.C. 1989) (lower court opinion in *Kunstler*).

94. In *Sussman v. Bank of Israel*, 154 F.R.D. 68 (S.D.N.Y. 1994), the trial court sanctioned the plaintiffs’ lawyer but refused to sanction the plaintiffs even though the plaintiffs may have shared their purpose: plaintiffs “could share counsel’s strategic objective without perceiving that the strategy was improper, as counsel were bound to do with the benefit of professional standards.” *Id.* at 71. The Second Circuit reversed the award of sanctions on other grounds. See *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995); see also *supra* note 62 (discussing the Second Circuit’s decision in *Sussman*).

95. See *supra* notes 4–5 (reprinting the Supreme Court’s and Judge Wright’s statements concerning Rule 11 sanctions).

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but they strongly suggested that if it were, the suit would be improper within the meaning of Rule 11. Judge Wright's statement was particularly telling. She did not speak of Ms. Jones's personal motives but instead of the general inspiration behind the suit. Judge Wright advised the President that if the suit were in fact "politically inspired" as the President claimed, then his proper recourse was to file a Rule 11 motion to challenge the complaint.⁹⁶ Thus, the possibility was very real that Judge Wright could have found the motives to be improper under Rule 11(b)(1).

C. *Assessing Improper Purpose Behind Meritorious Claims*

The more difficult procedural question is not whether the aims in *Jones* were improper under Rule 11(b)(1), but instead whether this bad purpose was by itself a violation of Rule 11. If the answer is yes, Rule 11(b)(1) would have been particularly advantageous to President Clinton because it would have focused the court's inquiry solely on Ms. Jones's motives and not the merits of her claims. The rule appears to say that motive alone can trigger sanctions. In fact, Rule 11 seemingly is straight-forward on this issue. The improper purpose clause of Rule 11 paragraph (b)(1) and the merit standards of paragraphs (b)(2) and (b)(3) are joined with the conjunction "and."⁹⁷ The plaintiff must certify *each* of these standards, so violation of any one should be sufficient to subject the plaintiff to sanctions.

Some courts have refused to follow the literal letter of Rule 11(b)(1). They hold that the filing of a colorable complaint (as opposed to other litigation papers) is not sanctionable under Rule 11, no matter what the plaintiff's purpose. The Ninth Circuit has led the circuits in this restrictive interpretation of Rule 11.⁹⁸ In a 1991 en

96. See *supra* note 5.

97. See *supra* note 1 (reprinting Rule 11(b)).

98. The Ninth Circuit first expressed this view in *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-34 (9th Cir. 1986). See *supra* note 65 (discussing the *Zaldivar* court's characterization of the plaintiff's political motive). There, the court acknowledged that the text of Rule 11 was to the contrary, but it nonetheless refused to apply the improper purpose clause to a non-frivolous complaint:

A more difficult question of interpretation exists as to whether a pleading or other paper which is well grounded in fact and in law as required by the Rule may ever be the subject of a sanction because it is signed and filed for an improper purpose. In short, may an attorney be sanctioned for doing what the law allows, if the attorney's motive for doing so is improper? . . . The "well grounded in fact and warranted by existing law" clause is coupled with "improper purpose" clause by the conjunction

banc decision in *Townsend v. Holman Consulting Corp.*,⁹⁹ the Ninth Circuit held that a complaint is not subject to sanctions under Rule 11 if it states non-frivolous claims.¹⁰⁰ The Second,¹⁰¹ Fifth,¹⁰² and Tenth Circuits¹⁰³ also follow this interpretation of Rule 11 and do not allow sanctions for a plaintiff's improper purpose if her complaint is otherwise meritorious.

For the most part, these courts base their restrictive reading of Rule 11 on the policy ground of promoting free access to court. Indeed, most of these courts distinguish initial access, the filing of the complaint, from later litigation steps, such as the filing of a motion. They refuse to sanction meritorious complaints but leave open the possibility of sanctions against litigants who file motions for improper purposes. As explained by the Ninth Circuit in *Townsend*:

The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced. . . . [I]t would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive

"and." By signing the pleading or other paper, the attorney certifies to both, thus suggesting that the two clauses are to be viewed independently.

For purposes of deciding this case, it is unnecessary to answer this difficult question in other situations [e.g., excessive but well-grounded motions]. We deal here with the signing of a complaint that initiates the action. We hold that a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the "well grounded in fact and warranted by existing law" clause of the Rule.

Id. at 832.

99. 929 F.2d 1358 (9th Cir. 1991) (en banc).

100. *See id.* at 1362.

101. *See Sussman v. Bank of Israel*, 56 F.3d 450, 458–59 (2d Cir. 1995) (noting split in circuits and adopting *Townsend*); *see also* Barbara Comminos Kruzansky, *Sanctions for Nonfrivolous Complaints? Sussman v. Bank of Israel and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359 (1998) (discussing *Sussman* and the Second Circuit position in relation to other circuits).

102. *See National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223–24 (5th Cir. 1988) (adopting Ninth Circuit distinction between complaints and subsequent papers in applying the improper purpose clause of Rule 11).

103. *See Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (holding that if a plaintiff filed a meritorious complaint "then any suggestion of harassment would necessarily fail").

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claims, even when the motives for asserting those claims are not entirely pure.¹⁰⁴

This formulation may be good policy, and it closely resembles the Petition Clause argument that I make below in Part II. Indeed, I argue that the Petition Clause *requires* such a limitation on Rule 11 for filing of the complaint. Nevertheless, this restrictive reading of Rule 11 contradicts the literal text of the improper purpose clause.¹⁰⁵

The restrictive interpretation finds mixed support in the history of the clause. The original version of Rule 11 imposed a delay prohibition, which seemingly was an independent requirement. Under the 1938 rule, a litigant's signature certified she had read the pleading, there was good ground to support it, *and* it was not interposed for delay.¹⁰⁶ Despite this language, apparently no court struck a pleading under the 1938 rule based solely on an alleged motive of delay.¹⁰⁷ The absence of such an application, however, is not particularly significant because the 1938 rule was largely ignored in its entirety.¹⁰⁸ Courts likely did not consider whether delay was an independent basis for sanctions.¹⁰⁹

104. *Id.* at 1362. *But see* JOSEPH, *supra* note 57, § 14(A)(2) (arguing that the Ninth Circuit view “developed almost inadvertently and clearly as an offshoot of the minority view that nonfrivolous papers [of any kind] are never subject to improper purpose analysis” and that a “balanced reading of the text of the Rule does not support either of those doctrines”).

105. *See* JOSEPH, *supra* note 57, § 14(A)(2) (noting that there “is no textual reason why a harassing complaint should be exempt from sanction when the next paper presented in the case clearly is not”).

106. *See supra* note 42 (reprinting the 1938 version of Rule 11). The delay clause was a remnant from the predecessor Federal Equity Rule 24, which also imposed a delay prohibition. RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES 24, 226 U.S. 629 (1912) (stating that the signature of counsel was “a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the cases there is good ground for the same; that no scandalous matter is inserted in the pleading; *and that it is not interposed for delay*” (emphasis added)).

107. *See generally* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 30–40 (1976) (surveying the reported cases under the 1938 rule). Likewise, the delay element in the predecessor Equity Rule 24 was never used to strike an otherwise meritorious pleading. *See* Risinger, *supra* at 28 (“*There is not one reported case prior to the adoption of the Federal Rules [of Civil Procedure] where a finding of falsity was not required before a plea could be deemed a sham.*”).

108. *See* Risinger, *supra* note 107 (criticizing the rule and surveying the 23 reported cases of adversarial Rule 11 motions prior to 1977); *see also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 at 11–12 (2d ed. 1990) (reporting that the 1938 version of Rule 11 was “rarely used”).

109. Professor Risinger, however, argued in 1977 that the delay clause should not be

When rulemakers in 1983 broadened the delay clause, they did not explicitly address whether motive was an independent basis for sanctions. The committee's only explanatory comment on purpose addressed the broadening of the type of motive, not whether improper motive alone was sanctionable.¹¹⁰ The committee's citation to *DASA* arguably touches upon but does not clarify the issue. As discussed above,¹¹¹ the Second Circuit in *DASA* reversed the sanctions as to the complaint because it stated a colorable claim even though plaintiffs had an improper collateral aim.¹¹² The court affirmed sanctions as to subsequent motions because the motions were both frivolous and improperly motivated.¹¹³ The court thus imposed a test for sanctions similar to the restrictive reading of Rule 11. The problem in interpreting the committee's citation to the case is that *DASA* did not involve Rule 11 but instead sanctions under the court's inherent power.¹¹⁴ The restrictive two-part test is the prevailing approach for inherent power sanctions.¹¹⁵ What did the advisory committee mean when it cited *DASA*? Did it intend to endorse—or reject—the restrictive common law test for application of Rule 11? Or, did the committee intend to not comment on the issue at all but instead

read as an independent requirement:

The insertion [in the 1938 rule] of the certification that the pleading has not been interposed for delay seems logically redundant, since a pleading interposed *only* for delay could not have "good ground" no matter how that term is ultimately defined, and a pleading with independent "good ground" is not likely to be rendered improper because tactical considerations of delay entered into the ultimate decision of whether or not to file an otherwise honest, meritorious, and proper pleading.

Risinger, *supra* note 107, at 8. I further discuss Professor Risinger's criticism of the 1938 rule *infra* notes 142–46, 160–62.

110. See *supra* note 46 (reprinting advisory committee's note).

111. See *supra* notes 47–56 (discussing *DASA*).

112. See *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088–89 (2d Cir. 1977).

113. See *id.*

114. See *id.*

115. See *supra* note 52 (discussing *DASA* standard for imposing sanctions). Most, but not all, courts apply this strict two-part test before they will rely upon their inherent power to award attorney's fees as a sanction, in part because such an award is in derogation of the so-called American rule, under which each party bears his own attorney's fees, win or lose. See *infra* notes 273–74 and accompanying text (discussing American rule). Nevertheless, at least some courts have suggested that they might award such sanctions based on bad purpose alone. See generally JOSEPH, *supra* note 57, ch. 4 ("Inherent Power: Bad Faith Litigation Abuse"); see also *Motive Restrictions*, *supra* note 13, at Part II.B.3 (discussing sanctions under inherent power based on a litigant's improper purpose alone).

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mean merely to give another example of bad motive? The committee did not explain its position.¹¹⁶

The advisory committee was again silent on the issue when it modified Rule 11 in 1993 (to its current form), but this time the committee made some form changes to the rule that tended to reinforce the view that proper purpose is an independent requirement. Rulemakers numbered each of the certification standards as separate subparagraphs¹¹⁷ and gave the improper purpose clause added prominence by listing it as the first (rather than last) certification standard.¹¹⁸ Yet, the rulemakers did not tinker with one crucial element: the new Rule 11 continues to join the improper purpose clause to the merits standards with the word “and.” To be sure, the drafters could have clarified the issue in the advisory committee notes, but it is difficult to imagine any other changes to the rule itself that would have more firmly underscored the idea that proper purpose is an independent requirement.

Moreover, although the *Townsend* case was a prominent en banc decision in 1991, it was (and is) not the lone view on this issue. The Seventh Circuit declared in 1987 that improper purpose was an independent basis for Rule 11 sanctions. In *Szabo Food Service, Inc. v. Canteen Corp.*,¹¹⁹ the Seventh Circuit, in remanding to the district court for more factual findings, directed the trial court not to focus exclusively on whether the pleading had legal and factual merit, but also to consider the plaintiff’s purpose in filing suit:

116. One other comment might be read as touching on the issue. The advisory committee, in explaining the 1983 deletion of the reference to “scandalous” material, stated:

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an *improper purpose* underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) [motion to strike, among other things, scandalous matter] as well as dealt with under the more general language of amended Rule 11.

FED. R. CIV. P. 11 advisory committee’s note (1983) (emphasis added). Although ambiguous, this comment could be read as indicating the committee view that improper purpose alone is a sanctionable event and that under the 1983 rule, scandalous matter is merely evidence of such improper purpose, as opposed to an independent basis for sanctions as it arguably was under the 1938 rule.

117. The 1983 rule listed the standards as clauses of a single sentence. *See supra* note 45.

118. As to the text of the clauses themselves, rulemakers made somewhat significant changes to the merit certification standards but left the improper purpose language virtually unchanged. *Compare supra* note 1 *with supra* note 45.

119. 823 F.2d 1073 (7th Cir. 1987).

Much of [plaintiff's] brief in this court is devoted to a demonstration that it had an objectively sufficient basis for its claim of racial discrimination. Perhaps it can persuade the district court that it did, but this is not enough. Because Rule 11 has a subjective component as well, *the district court must find out why [plaintiff] pursued this litigation.*¹²⁰

This portion of *Szabo* is dictum, but this and other statements by the court informed federal rulemakers that at least the Seventh Circuit read Rule 11 literally.¹²¹ Other circuit and district courts likewise have suggested in dicta that they would read Rule 11 literally and apply proper purpose as an independent standard for complaints.¹²²

120. *Id.* at 1083 (emphasis added).

121. *See* *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc) (stating in dictum that Rule 11 “has both a subjective and an objective component” and that a paper filed for an improper purpose “is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the pre-filing investigation”); *Kapco Mfg., Inc. v. C & O Enters., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989) (noting in dictum that “the language of [the 1983 version of] Rule 11 is mandatory; if a district court concludes that a party or attorney filed a pleading or other document for an improper purpose, then the court must impose a sanction”); *see also* *Kruzansky*, *supra* note 101, at 1382 (noting that the Seventh Circuit “has ruled—and ruled repeatedly—that a court may freely impose sanctions” against “the filer of a nonfrivolous complaint brought for an improper purpose”).

122. For example, Justice Breyer, when sitting on the First Circuit, stated that proper purpose was a requirement independent of and in addition to merit under Rule 11:

Although the wording of the amended Rule may possibly be ambiguous in this respect, the historical context and advisory committee notes unquestionably override any syntactical uncertainties. Not surprisingly then, the amended Rule has rather consistently been read by federal appellate courts to reach groundless but “sincere” pleadings, as well as those which, while not devoid of all merit, were filed for some malign purpose

Lancelloti v. Fay, 909 F.2d 15, 18–19 (1st Cir. 1990). The Fourth Circuit specifically reserved this question in *Kunstler*, but it cited with approval the *Cohen* case, where the Fourth Circuit had sanctioned an improperly motivated motion to amend a complaint even though the new claims had sufficient legal bases. *See also supra* notes 67–86 (discussing *Cohen* and *Kunstler*). The Third, Sixth, and Eleventh Circuits have in broad dicta described the certification elements of Rule 11 as independent standards and thus suggest that they would sanction plaintiffs for improper motive alone. *See* *CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991) (noting in dictum that “[e]ach duty is independent; the violation of one triggers Rule 11 sanctions”); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 402 (6th Cir. 1987) (noting that motion “violates all three sanctionable circumstances of Rule 11,” including “improper purpose of delaying the default judgment”); *United States v. Milam*, 855 F.2d 739, 742 (11th Cir. 1988) (noting in dictum that “at least three distinct, but at times overlapping, types of conduct . . . might warrant the imposition of Rule 11 sanctions,” including improper purpose). The District of Columbia Circuit apparently has not addressed the issue, but its district court has suggested that it would impose sanctions for bad motive alone. *See* *Kerner v. Cult Awareness Network*, 843 F. Supp. 748, 750 (D.D.C. 1994) (refusing sanctions based on lack of legal merit and noting that “[d]efendant’s stronger

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It is difficult to find any cases—before or after the 1993 amendment—where the court relied solely on motive to sanction a plaintiff. Most cases in which the improper purpose clause is implicated also involve pleadings or motions that are factually or legally frivolous. Nevertheless, at least one court, that in *Ballentine v. Taco Bell Corp.*,¹²³ relied solely upon the improper purpose clause to sanction a plaintiff. The court sanctioned Ballentine for having an harassing motive in naming his supervisor in his employment discrimination case even though his lawyer conducted a reasonable inquiry and even though Ballentine’s claim was not frivolous.¹²⁴

This split in authority suggests, at a minimum, that President Clinton could have argued in good faith that Ms. Jones violated Rule 11, even if her claims had some merit. Precedent in the Eighth Circuit, where the *Jones* case was pending, supports such an argument. The Eighth Circuit has not spoken directly on the issue, but it has affirmed trial courts that have stated sanctions are appropriate for improper purpose alone.¹²⁵ The best example is *Bryant v. Brooklyn Barbeque Corp.*¹²⁶ The court dismissed a civil RICO complaint for plaintiff’s failure to timely serve the complaint,¹²⁷ and also found that

charge is that plaintiff’s suit . . . is motivated by an ‘improper purpose’”). I discuss the Eighth Circuit cases *infra* at notes 126–30. See also Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1320, 1331 (1986) (noting that the improper purpose clause is a “separate element”).

123. 135 F.R.D. 117 (E.D.N.C. 1991); see also *supra* notes 59 and 80–85 (discussing *Ballentine*).

124. The court stated:

I found that Ballentine had made a reasonable inquiry into the facts and law. Despite this, I have found that Ballentine had a dual motive in filing the lawsuit: the legitimate purpose of seeking relief for the loss of his job and the improper purpose of harassing Koenig. Under these circumstances, I conclude that even though the pleading may have been well grounded in law or fact, the fact that it was filed for an improper purpose violates Rule 11.

Id. at 122.

125. See *Nielson v. Hart*, No. 93-1237-CV-W-1, 1995 WL 901297, at *2 (W.D. Mo. Oct. 5, 1995) (finding that the claims were frivolous and brought for an improper purpose and that improper purpose alone supported sanctions under Rule 11(b)(1)); *Perkins v. Gen. Motors Corp.*, 129 F.R.D. 655, 658 (W.D. Mo. 1990) (finding that plaintiffs pursued a number of frivolous litigation tactics and stating, in dictum, that “[s]anctions may be warranted under the ‘improper purpose’ clause even if a competent attorney could form a reasonable belief as to the viability of the original complaint”), *aff’d* 965 F.2d 597 (1992).

126. 130 F.R.D. 665 (W.D. Mo. 1990), *aff’d* 932 F.2d 697 (8th Cir. 1991).

127. See *id.* at 666–69 (finding no good cause for failure to serve the defendants within 120 days as required by Rule 4).

plaintiff's filing of the complaint violated Rule 11 in two ways. First, the plaintiff's attorney admitted that he did not conduct a factual inquiry prior to filing the complaint.¹²⁸ Second, the court found that the plaintiff's purpose was to gain publicity and harass the defendants, which was by itself sanctionable under Rule 11:

Even if, however, the court found that plaintiff had established that a reasonable basis existed for the filing of the original complaint, the court would find that sanctions must be assessed based on the Rule 11 language prohibiting the filing of a pleading for an improper purpose. . . . [P]laintiff admits that the pleading was filed to coincide with the sentencing of one of the defendants and that plaintiff made absolutely no effort to serve the complaint after it was filed. From these two admissions the court can reasonably conclude that the complaint was filed solely to attract publicity to plaintiff's claims and to harass defendants, and not because plaintiff's attorney had conducted an inquiry revealing that the claims had a reasonable basis in law or in fact.¹²⁹

The Eighth Circuit affirmed the sanction award even though the district court never reached the actual merit of plaintiff's RICO claims.¹³⁰ At a minimum, this holding means the Eighth Circuit views one of the two grounds (lack of inquiry or bad purpose) as a sufficient basis for sanctions. In other words, merit is not the sole test for sanctions under Rule 11. *Bryant* is an important departure from the restrictive view followed by other circuits, where merit is the sole test for complaints. In *In re Keegan Management Co.*,¹³¹ for example, the Ninth Circuit held that a meritorious complaint is not subject to Rule 11 sanctions even though the plaintiff failed to conduct a reasonable inquiry.¹³² *Keegan* is an extension of the *Town-*

128. The attorney admitted that he conducted his factual inquiry after filing the complaint, with the intention of amending the complaint to conform to the results of his investigation. *See id.* at 670.

129. *Id.* at 670.

130. *See Bryant*, 932 F.2d at 699 (noting only that the "violation in this case occurred when the original complaint was filed for an improper purpose and without the 'reasonable inquiry' required by Rule 11").

131. 78 F.3d 431 (9th Cir. 1996).

132. *See id.* at 434-35. The Ninth Circuit confuses the analysis by calling its view the "conjunctive" approach: it will not sanction a plaintiff unless his claims are "both baseless *and* made without a reasonable and competent inquiry." *Id.* at 434 (quoting *Townsend*) (emphasis added). The literal reading of Rule 11 arguably is the more appropriate use of the "conjunctive" label, given that Rule 11 states the standard in the affirmative and requires the plaintiff to conduct a reasonable inquiry *and* certify both proper purpose and merit.

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*send*¹³³ doctrine in which the Ninth Circuit held that purpose was not itself sanctionable. In other words, under the restrictive view, merit is controlling, at least for complaints, and the plaintiff is not subject to sanctions for either failure to investigate or bad motive. The Eighth Circuit affirmance in *Bryant* tells us that it rejects this restrictive view at least where plaintiff violated both the inquiry and purpose requirements. There is no reason to think that it would not so hold where plaintiff violated only one requirement, including the purpose standard.¹³⁴

In *Jones*, the statements of the Supreme Court and Judge Wright are ambiguous on this issue. The Supreme Court stated that “sanctions may be appropriate where a claim is ‘presented for any improper purpose,’ including any claim [that lacked evidentiary support].”¹³⁵ Use of the term “including” suggests that a factually deficient claim is just one example of a claim that might be brought for an improper purpose, leaving open the question of the other types of claims that fit this category. Other examples of improper claims could include not only a claim that lacked legal foundation but also a claim that had both factual and legal merit but was politically inspired. Judge Wright quoted the Supreme Court, but, rather than using the “including” language of the Supreme Court, Judge Wright substituted the word “and.”¹³⁶ This substitution suggests the restrictive interpretation of Rule 11, but it does not necessarily foreclose the literal reading. By mentioning claims that were brought for an improper purpose *and* lacking evidentiary support, Judge Wright

133. See *supra* notes 99–104 (discussing *Townsend* with regard to the improper purpose clause). The *Keegan* court relied upon *Townsend* in narrowly interpreting the reasonable inquiry standard. See *In re Keegan Management Co.*, 78 F.3d at 434–35.

134. Two other circuits, which like the Eighth Circuit have not taken the restrictive view of the improper purpose clause, have stated that they will issue sanctions for a plaintiff’s violation of the reasonable inquiry requirement, even though his complaint may have merit. The best illustration is *Garr v. U.S. Healthcare Inc.*, 22 F.3d 1274 (3d Cir. 1994), in which the Third Circuit held that a plaintiff who does not conduct an adequate pre-filing investigation “will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified.” *Id.* at 1279. I further discuss *Garr infra* at notes 168–73. The Third Circuit elsewhere suggested that this reading extends to all of the certification elements of Rule 11, including purpose. See *CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991). Likewise, the First Circuit cited *Garr* with approval in *Lichtenstein v. Consolidated Servs. Group*, 173 F.3d 17, 23 (1st Cir. 1999) and elsewhere stated in dicta that proper purpose is an independent requirement. See *Lancelloti v. Fay*, 909 F.2d 15, 18–19 (1st Cir. 1990).

135. *Clinton v. Jones*, 520 U.S. 681, 708–09, n.42 (1997).

136. *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1130–31 (E.D. Ark. 1999).

arguably is giving only one example of a sanctionable complaint. She did not intend to state the lone standard for sanctions unless she also meant to omit the Rule 11(b)(2) legal merit standard.

In sum, President Clinton reasonably could have argued to Judge Wright that the court should sanction Ms. Jones and her lawyers based on their purpose alone, regardless of the merit of Ms. Jones's claims. Both Eighth Circuit precedent and the law of the case left the issue open for argument, and more importantly, the text of Rule 11 seemingly mandates this view. Ms. Jones and her lawyers had to certify that they had a proper purpose *and* that her claims had legal and factual merit. If they did not have a proper purpose, they violated at least the literal terms of Rule 11.

D. Imposing Sanctions for Improper Purpose

The final question is the nature of the sanction if in fact Judge Wright had found Ms. Jones or her lawyers in violation of Rule 11. A particularly interesting procedural question is whether the President could have relied upon Rule 11(b)(1) to dismiss the entire lawsuit early in the case and avoid any discussion of, or discovery into, the merits of Ms. Jones's claims. This question is closely related to that of the preceding part. It would seem that if improper purpose is alone a sufficient basis on which to sanction a plaintiff, the President should have been able to raise the issue in an early defensive measure and obtain whatever sanctions the court deemed appropriate, including dismissal. The issue of sanctions, however, is more complex, particularly after the 1993 amendments to Rule 11. These amendments instruct the court to impose minimal sanctions upon "separate motion."¹³⁷ They also urge careful consideration of whether the lawyer or the client is at fault, which in turn raises an issue as to whether the court should sanction Ms. Jones for her lawyers' bad motives. These issues have burdened the interpretation of Rule 11 since its promulgation in 1938, and although the 1993 amendments send a message of caution in issuing Rule 11 sanctions, the literal terms of the rule have always permitted and continue to allow dismissal as a sanction even for a lawyer's violation of the rule.

The original 1938 version of Rule 11 required that the attorney representing a party sign the complaint¹³⁸ and provided that when-

137. See *infra* note 183 (reprinting the sanctions provisions of the current 1993 rule).

138. See FED. R. CIV. P. 11, 308 U.S. 645, 676 (1938). See *supra* note 42 (reprinting

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ever the “pleading is signed with the intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.”¹³⁹ The rule separately provided for sanctions against the attorney: the court could take “disciplinary action” against an attorney for a “willful violation.”¹⁴⁰ Thus, the original rule allowed the ultimate sanction against a party—striking of his pleading—if his attorney signed the pleading in violation of the rule.

Implementation of the sanction provisions of the 1938 rule presented problems. One arose from the phrase that the pleading “may be stricken as *sham and false*.” Was such a finding a prerequisite to striking the pleading? In other words, did the rule require the court to make a determination on the merits before imposing the “striking” sanction of Rule 11? On the one hand, the “sham and false” clause seemed to require that the pleading be at least false in fact before the court could strike it (putting aside the more difficult question of what constitutes a “sham” pleading). Yet, the rule’s trigger for sanctions—“signed with an intent to defeat the purpose of the rule”—did not mention falsity but instead referred back to the other provisions of the rule, the good ground and delay clauses.¹⁴¹ A pleading could violate either of those clauses even if it stated true facts. A pleading seemingly could be interposed for delay and be factually true. It also is possible that a pleading could be true in fact even though signing counsel at the time of filing does not believe she has “good ground to support it.” Thus, a pleading stricken on one of these two grounds would not necessarily be “false.”

This ambiguity drew criticism in an influential 1977 article by Professor Michael Risinger.¹⁴² Professor Risinger studied the rule, criticized its poor drafting, and argued that courts should never use Rule 11 to strike a pleading without independently assessing the merits of the claims, usually through the summary judgment procedure or at trial. This criticism was primarily academic, for as Professor Risinger noted, parties rarely invoked the 1938 rule in any fashion. Professor Risinger found only one case (as of 1977) in which a

1938 version of Rule 11).

139. FED. R. CIV. P. 11, 308 U.S. 645, 676 (1938).

140. *Id.*

141. *Id.*

142. *See* Risinger, *supra* note 107.

court struck a pleading based solely on Rule 11.¹⁴³ In that case, *Freeman v. Kirby*,¹⁴⁴ the court dismissed a complaint because the plaintiff's counsel did not have sufficient ground to support the allegations when he filed the complaint.¹⁴⁵ The court never addressed the actual merits of the claim. This was precisely the concern raised by Professor Risinger: Rule 11 seemed to permit a court to dismiss a pleading under the good ground clause, without first determining whether the pleading had factual merit. He argued that the court should employ the summary judgment procedures of Rule 56, not the striking provision of Rule 11, to dispose of claims.

Interestingly, Professor Risinger was not concerned that a court would dismiss any pleading based on the delay clause. He believed that a pleading that had "good ground to support it" could never be "interposed *only* for delay."¹⁴⁶ Professor Risinger, however, took liberties with the language of the 1938 rule. The rule's actual language did not include the word "only" and joined the good ground and delay clauses with the conjunctive. Its prohibition thus reached a plaintiff who filed a meritorious suit to achieve delay. To be sure, this situation was (and is) uncommon because plaintiffs rarely file a complaint to achieve delay. Delay is a more serious concern in motion or discovery practice. Yet, there are some conceivable circumstances in which a plaintiff would file suit to achieve delay. She could seek delay in some matter collateral to the litigation. However, she could frame and file her suit in such a way as to multiply the proceedings and maximize the time necessary to resolve the dispute or the fees due plaintiff's counsel.¹⁴⁷ The literal language of the original Rule 11 would have permitted a court to strike such a complaint.

143. *See id.* Professor Risinger reported a total of only 23 cases in which a party even attempted to have the other party's pleading stricken under Rule 11. Of these, only two resulted in the court striking the pleading based solely on Rule 11 and one of those was reversed on appeal. *Id.* The one case of striking was the *Freeman* case, which Professor Risinger discussed at length. *Id.* at 38–42.

144. 27 F.R.D. 395 (S.D.N.Y. 1961).

145. The court dismissed the complaint in response to defendant's "motion to strike the complaint as sham within the meaning of Rule 11." *Id.* at 396. The court found that the plaintiff's pre-filing inquiry was inadequate because his attorney filed the complaint based solely on drafts of similar complaints before receiving crucial supporting facts. *See id.* at 398–99.

146. Risinger, *supra* note 107, at 8.

147. This concern prompted Congress to enact the federal vexatious litigation statute. *See* 28 U.S.C. § 1927 (1994); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 n.6 (1980) (re-capping the history of Section 1927 and noting that United States Attorneys "who were paid on a piecework basis, apparently had filed unnecessary lawsuits to inflate their compensation").

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In 1983, rulemakers revised Rule 11. One of the chief concerns prompting the 1983 rule change was the reluctance of judges under the original rule to impose sanctions.¹⁴⁸ Accordingly, rulemakers made sanctions mandatory upon a finding of a violation of the rule.¹⁴⁹ They also opened up the available sanctions by authorizing the court to impose “an appropriate sanction” for a “violation of the rule,”¹⁵⁰ as opposed to limiting the court to the sanctions of striking a pleading or discipline of attorneys, as the 1938 rule had done. Although rulemakers made these changes to clarify the sanction procedure, some questions still remained as to whether dismissal was a proper sanction.

First, the 1983 rule mentioned the striking of a pleading only with regard to the failure to sign the pleading.¹⁵¹ Was this lone reference a limitation on that sanction? The history of this revision suggests that it was not a limitation. The reference was an effort to soften the rule; an earlier draft of the 1983 rule instructed the court to refuse to accept a pleading that was not signed.¹⁵² The final version told the court to accept the non-signed pleading and strike it only after giving the litigant an opportunity to correct his mistake and sign the pleading.¹⁵³ Moreover, the aim of the 1983 revisions was to encourage judges to issue sanctions and thereby limit litigation abuse. This would be accomplished by broadening the court’s options (hence, the “appropriate sanction” language), not by denying it the sanction of dismissal.

A second ambiguity arose from the deletion in 1983 of the “sham and false” language. This would seem to be a logical improvement, given the problems that the clause presented under the old rule. The problem came from the advisory committee’s explanation of the change. The advisory committee cited Professor Risinger’s article and noted that “decisions [under the ‘sham and false’ clause] have tended to confuse the issue of attorney honesty with the merits of the action.”¹⁵⁴ The meaning of this comment is difficult to

148. See FED. R. CIV. P. 11 advisory committee’s note (1983) (noting that the “new language [of the 1983 rule] is intended to reduce the reluctance of courts to impose sanctions”).

149. See *supra* note 45 (reprinting the 1983 rule).

150. *Id.*

151. See *id.*

152. See Mansfield letter, *supra* note 88, at 191.

153. See *id.*

154. *Id.* at 199.

discern. Did the committee mean to reject the *Freeman v. Kirby* approach and endorse Professor Risinger's view that the court should never employ Rule 11 to dismiss an action?¹⁵⁵ This is a possible reading given that the committee also cited *Murchison v. Kirby*.¹⁵⁶ *Murchison* was a companion case to *Freeman v. Kirby*, the case that Professor Risinger had criticized.¹⁵⁷ Professor Risinger approved of the court's action in *Murchison*¹⁵⁸ because the court (a different judge than that in *Freeman*) refused to strike the complaint under Rule 11 on the ground that dismissal would unduly deprive plaintiff of his right to trial.¹⁵⁹

Although possible, it does not seem likely that the 1983 advisory committee meant in this comment to suggest that dismissal is never a proper sanction under Rule 11. First, Professor Risinger cited only one instance where the court had struck a pleading for violation of Rule 11, that in *Freeman*.¹⁶⁰ A single case hardly would constitute the "decisions" that had confused the rule and which the committee seemingly condemned.¹⁶¹ Moreover, the *Freeman* court did not "confuse" the merits with the Rule 11 standards, which observers frequently termed "attorney honesty" under the 1938 rule.¹⁶² In *Freeman*, the court did not purport to decide the merits, but instead based its ruling on the lack of investigation of plaintiff's counsel.¹⁶³

155. See *supra* notes 142–47.

156. After citing Professor Risinger's article, the advisory committee continued: "Motions under this provision [the sham and false clause] generally present issues better dealt with under Rules 8, 12, or 56." FED. R. CIV. P. 11 advisory committee's note (1983) (citing *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961)).

157. The different plaintiffs in *Freeman* and in *Murchison*, through separate but cooperating counsel, brought virtually identical claims against the same defendant. See generally Risinger, *supra* note 107, at 38–42 (discussing *Freeman* and *Murchison*).

158. *Id.*

159. See *Murchison*, 27 F.R.D. at 19.

160. See *supra* note 143.

161. See *supra* note 154.

162. See Risinger, *supra* note 107.

163. The *Freeman* court distinguished *Murchison* without explanation. See *Freeman*, 27 F.R.D. at 397 n.1. Yet, the court relied upon an affidavit from the *Murchison* attorney in finding that the *Freeman* attorney had not conducted a reasonable investigation. See *id.* at 398. Thus, although the 1938 rule did not impose an affirmative duty of investigation, the *Freeman* court imposed one and its ruling mirrors those under later versions of the rule, in which some courts hold that failure to conduct a reasonable inquiry is sanctionable even though plaintiff was lucky in its "shot in the dark" and stated a claim that turned out to be supported by the facts. See *supra* notes 128–34 and *infra* notes 171–77 and accompanying text (discussing the reasonable inquiry cases under the 1983 and 1993 rules).

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Freeman thus underscores the *difference* between a merits decision and one based solely on Rule 11.¹⁶⁴

Unquestionably, the rulemakers, in revising Rule 11, meant to distinguish the ultimate merit of the case from the Rule 11 standards for filing. Indeed, the advisory committee elsewhere suggested that Rule 11 issues are best deferred until after decision on the merits.¹⁶⁵ A decision on the merits should be made in response to a motion under Rule 12 or Rule 56, or at trial. Yet, applying the proper procedure for determining the merits of an action is a different question than determining whether the court can dispose of the case for failure to abide by one of the filing standards of Rule 11. On the latter question, the court is not deciding the merits of the case, but is instead deciding the narrower issue of whether the plaintiff complied with the standards of Rule 11. Dismissal in this case would be a form of deterrence or punishment, not a decision on the merits. Although the Federal Rules of Civil Procedure strive to determine actions on their merits, rather than by procedural defaults,¹⁶⁶ the rules nevertheless recognize dismissal as a form of punishment for rule violations.¹⁶⁷

164. The Supreme Court in 1966 also noted the possibility of such a non-merits dismissal under a former version of Rule 23, which required a plaintiff in a shareholder derivative action to verify his complaint. In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966), the Court found that the plaintiff had sufficient basis on which to swear to her complaint, but it noted that the rule seemed to allow a trial court to stop proceedings and investigate, before trial, whether the plaintiff falsely swore to her complaint and to dismiss the complaint with prejudice if it found the verification lacking. *See id.* at 371.

165. The advisory committee stated that the court should ordinarily defer resolution of Rule 11 motions challenging the pleadings, until after litigation on the merits, but that the timing is within the discretion of the trial court:

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration.

FED. R. CIV. P. 11 advisory committee's note (1983).

166. *See* FED. R. CIV. P. 1 (mandating that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action").

167. *See* FED. R. CIV. P. 41(b) (providing for dismissal with prejudice for "failure of the plaintiff . . . to comply with these rules or any order of the court"); FED. R. CIV. P. 37(b)(2)(C) (providing for sanction of "dismissing the action or proceeding" for failure to obey court discovery orders).

At least the Third Circuit has continued the tradition of *Freeman* and dismissed a complaint because the plaintiff or his counsel did not meet the filing standards of Rule 11. In *Garr v. U.S. Healthcare Inc.*,¹⁶⁸ the trial court considered Rule 11 sanctions against two lawyers who filed virtually identical lawsuits concerning an alleged insider trading scheme that they read about in the *Wall Street Journal*.¹⁶⁹ The first lawyer conducted some minimal investigation in addition to reading the article, but the counsel in *Garr* relied upon only the *Wall Street Journal* article and the complaints filed by the first lawyer. The defendants moved for sanctions in all three cases on the day that the *Garr* complaint was filed (only two days after the *Wall Street Journal* article appeared).¹⁷⁰ The court held that the first lawyer had conducted a reasonable inquiry but that the *Garr* counsel had not,¹⁷¹ and assessed a number of sanctions, including dismissal of the *Garr* complaint without prejudice.¹⁷² The Third Circuit affirmed.¹⁷³

Some courts, such as the Ninth Circuit in *Keegan*, have rejected *Garr*,¹⁷⁴ but their problem is not with the use of dismissal as a sanction but rather with the underlying ground for sanctions. The Ninth Circuit does not consider the filing of a meritorious complaint to be a violation of Rule 11, regardless of the plaintiff's failure to investigate or her improper purpose,¹⁷⁵ but it has allowed dismissal as a

168. 22 F.3d 1274 (3d Cir. 1994).

169. *See id.* at 1274–76 (discussing facts leading to the filing of the complaint).

170. The defendants anticipated the complaints and charged that they were a part of an “all too familiar pattern of an instant class action lawsuit based on newspaper reports followed by a covey of cut and paste copycat complaints.” *Id.* at 1277.

171. *See id.* The court found a Rule 11 violation in the first lawyer's other case because counsel had not sufficiently investigated whether that class representative was adequate. In fact, the representative read the complaint for the first time after it was filed and promptly withdrew his support. The court, however, found that the lawyer's investigation as to the claim itself was adequate. *See id.*

172. *See id.* The district court also referred the matter to the Disciplinary Board of the Supreme Court of Pennsylvania and ordered the lawyers to pay the attorney's fees of the defendants. *See id.*

173. *See id.* at 1283. The Third Circuit did not directly address the propriety of the dismissal as a sanction but affirmed the Rule 11 sanctions, which included dismissal. The plaintiffs in *Garr* challenged the finding of inadequate inquiry and the amount of the monetary sanctions but not the sanction of dismissal or the trial court's referral of the matter to the state bar. *See id.* at 1282.

174. *See In re Keegan Management Co.*, 78 F.3d 431 (9th Cir. 1995); *see also supra* notes 131–33 (discussing *Keegan*).

175. *See supra* notes 99–104 (discussing the Ninth Circuit's restrictive view).

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form of sanctions for activity that it finds in violation of Rule 11.¹⁷⁶ The Eighth Circuit, where *Jones* was pending, has not yet addressed dismissal based solely on inadequate inquiry (or violation of the improper purpose clause), but its precedent suggests that it would follow *Garr* and also allow dismissal for improper purpose. As I note above, *Bryant* shows that it shares the *Garr* view that pre-filing inquiry is a separate standard.¹⁷⁷ Similarly, the Eighth Circuit has affirmed dismissal as a sanction against a plaintiff for other violations of Rule 11 that were independent of the merits of the complaint.¹⁷⁸

Most cases involving dismissal under Rule 11 arose under the 1983 version of the rule.¹⁷⁹ Ms. Jones, however, filed her complaint in 1994 and thus fell under the 1993 amendments. The 1993 rule sends a different message about sanctions.

The 1993 amendments were in response to criticism that litigants used the 1983 rule too frequently¹⁸⁰ and that the rule had gone too far in its efforts to curb litigation abuse.¹⁸¹ Federal rule-

176. The Ninth Circuit elsewhere has approved of dismissal as a form of sanction under Rule 11. See *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486 (9th Cir. 1991) (affirming dismissal of complaint, under Rule 11, for discovery abuse).

177. See *supra* notes 126–34.

178. In *Carman v. Treat*, 7 F.3d 1379 (8th Cir. 1993), a prisoner brought a pro se civil rights suit, based on an alleged assault during his transfer between correctional facilities. He later moved for injunctive relief and charged that all of the defendants had retaliated against him for filing his original complaint. Three of the defendants moved for sanctions arising from this motion because they had no control over plaintiff's current confinement. The district court gave the plaintiff repeated opportunities to provide evidence to support the allegations in the motion, but he failed to satisfy the court. The court then dismissed his complaint as a sanction for plaintiff's motion. The Eighth Circuit affirmed, noting that although it "might have chosen a different sanction" the district court did not abuse its discretion in dismissing the complaint. *Id.* at 1382.

179. The *Garr* complaint was filed in 1992 but did not reach the courts of appeals after the 1993 amendments. See *Garr*, 22 F.3d at 1274. See also *supra* notes 169–73 and accompanying text. The Third Circuit did not address the impact of the rule change in *Garr* because the parties did not contend that it made a difference. The 1993 amendments would not have changed the result as to the underlying ground for sanctions because the 1993 rule uses essentially the same reasonable inquiry language as the 1983 version. The 1993 rule referred to the presenting person's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," see *supra* note 1, whereas the 1983 rule referred to the signer's "knowledge, information and belief formed after reasonable inquiry." See *supra* note 45.

180. See generally WRIGHT & MILLER, *supra* note 108, §§ 1331, 1333 (discussing history of rule and noting that the 1983 changes "triggered a dramatic change in the nature of civil practice in the federal courts" and put Rule 11 in "the forefront of the consciousness of almost everyone who engages in civil litigation in the federal courts").

181. Some scholars claimed that the 1983 Rule was too harsh and had a disproportionate effect on civil rights plaintiffs. See generally FED. R. CIV. P. 11 advisory committee's note

makers made a number of changes to Rule 11 in 1993 (changing the rule to its current form¹⁸²), but their most significant change was to relax the sanctions provisions in a number of ways.¹⁸³ First and fore-

(1993) (surveying authorities and criticisms of the 1983 rule); WRIGHT & MILLER, *supra* note 108, § 1332 (same). Some critics cited the *Kunstler* case, discussed *supra* at notes 71–79, as an example of unfair application of Rule 11 sanctions. See Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 90 (1992). Not everyone agreed with this assessment. In fact, Justices Scalia and Thomas, in a move that is relatively rare for the Supreme Court, dissented from the 1993 amendments based in part on their concern that the changes to Rule 11 would take away the incentive to raise Rule 11 issues. Order of the Supreme Court Forwarding Rule Changes to Congress, 507 U.S. 1091, 1096–97 (1993) (J. Scalia, dissenting); see also *id.* at 1098 (arguing that the “net effect” of the rule changes is “to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system”).

182. See *supra* notes 91, 117–18 for a discussion of the format changes and the clarifications to the certification standards, now embodied in Rule 11(b).

183. In place of the two sentences concerning sanctions in the 1983 rule, see *supra* note 45, the 1993 rule has a separate section consisting of several paragraphs dedicated to sanctions:

C. *Sanctions*. If, after notice and a reasonable opportunity to respond, the court determines that R11(b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision(b) or are responsible for the violation.

(1) *How Initiated*

(A) *By Motion*. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision(b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney’s fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

(B) *On Court’s Initiative*. On its own initiative, the court may enter an order describing the specific conduct that appears to violate R 11(b) and directing an attorney, law firm, or party to show cause why it has not violated R 11(b) with respect thereto.

(2) *Nature of Sanctions; Limitations*. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision(b)(2).

(B) Monetary sanctions may not be awarded on the court’s initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the

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most, Rule 11 sanctions are again discretionary.¹⁸⁴ In addition, Rule 11(c)(2) now instructs that sanctions “shall be limited to what is sufficient to deter repetition” of the offending conduct.¹⁸⁵ It prioritizes certain forms of sanctions, encouraging courts to impose “directives of a non-monetary nature”¹⁸⁶ and to award attorney’s fees to the other party only in extraordinary cases.¹⁸⁷ It also forecloses any monetary sanctions against a client for her lawyer’s violation of the legal merit standard of Rule 11(b)(2).¹⁸⁸

Although these changes seem to send the collective message that courts should back off and not impose severe sanctions, such as dismissal, the current rule does not foreclose dismissal as a sanction. First and foremost, the rule continues to authorize a court to impose “an appropriate sanction.”¹⁸⁹ The appropriate sanctions, according to the advisory committee, not surprisingly, continue to include dismissal.¹⁹⁰ Dismissal is uniformly recognized as within the inherent power of the court,¹⁹¹ and the federal rules compilation elsewhere provides for dismissal as a punishment for rule violations.¹⁹² In fact,

claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order*. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

FED. R. CIV. P. 11(c).

184. *See id.* (“may” impose sanctions).

185. *Id.*

186. *Id.*

187. *See id.*

188. *See id.*

189. *Id.*

190. The advisory committee listed dismissal as its first example of available sanctions: The court has available a variety of possible sanctions to impose for violations, *such as striking the offending paper*; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or in the case of government attorneys, to the Attorney General, Inspector General, or agency head).

FED. R. CIV. P. 11 advisory committee’s note (1993) (emphasis added).

191. *See Guyer v. Beard*, 907 F.2d 1424, 1429 (3d Cir. 1990) (holding that courts have inherent power and authority under Rule 41(b) to dismiss a complaint as punishment against a plaintiff’s rule violation, “where the plaintiff has caused delay or engaged in contumacious conduct” and where the “ends of justice would be better served”); *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987) (“Courts have inherent equitable powers to dismiss actions . . . for failure to prosecute, contempt of court, or abusive litigation practices.”).

192. *See supra* note 167.

Rule 11 allows dismissal in circumstances in which it does not permit monetary sanctions. Rule 11(c)(2) forbids imposition of monetary sanctions against a client for the lawyer's legal errors,¹⁹³ but, as the advisory committee explained, this restriction "does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, *such as dismissal of a claim.*"¹⁹⁴ Accordingly, courts following the 1993 amendments have continued to recognize dismissal as a potential sanction under Rule 11.¹⁹⁵

In some cases, dismissal is the only sanction that would meet the Rule 11(c)(2) mandate of deterrence, and Rule 11(b)(1) improper purpose violations might present that type of case.¹⁹⁶ If a plaintiff was bent on pursuing an improper purpose and had considerable financial means, a monetary sanction would not deter her.¹⁹⁷ By contrast, dismissal, especially a dismissal "with prejudice" (forever barring the claim), would deter this plaintiff from using at least this claim to pursue her improper motives. *Jones* might have been just the type of case in which dismissal would be the best means to achieve deterrence. Given Ms. Jones's considerable financial backing from political opponents of the President and assuming that Ms. Jones herself pos-

193. See *supra* note 183 (reprinting Rule 11(c)).

194. FED. R. CIV. P. 11 advisory committee's note (1993) (emphasis added).

195. See *Marina Management Servs., Inc. v. Vessel My Girls*, 202 F.3d 315 (D.C. Cir. 2000) (affirming dismissal of counterclaims "designed primarily to harass"); *Kramer v. Tribe*, 156 F.R.D. 96, 101 (D.N.J. 1994) (granting Rule 11 dismissal as an alternative ground to dismiss a vindictive and harassing frivolous suit). See generally JOSEPH, *supra* note 57, § 16(B)(9) ("The courts' authority to dismiss an action, pleading, claim or defense as a remedy for a Rule 11 violation is well settled."). See also *Hutchinson v. Hensley Flying Serv., Inc.*, No. 98-35361, 2000 WL 11432, at *1 n.1 (D. Mont. Jan. 6, 2000) (rejecting the argument that dismissal is not an appropriate remedy after the 1993 amendments to Rule 11).

196. Rulemakers evidently considered improper purpose as a special form of violation that must be brought home to the party herself. At one point in the drafting of the 1993 amendments, rulemakers considered isolating Rule 11(b)(1) as the lone rule violation that might warrant monetary sanctions against the client. See Letter from Sam Pointer, Jr., Chairman Advisory Committee on Civil Rights, to Robert Keeton, Chairman Standing Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146 F.R.D. 519, 525 (1993) (stating that the "draft would have restricted the imposition of monetary sanctions upon a represented party to situations in which the party was responsible for a violation of Rule 11(b)(1) papers filed to harass or for the improper purpose"). The final version kept the full range of sanctions for Rule 11(b)(1) violations and also made the client potentially responsible for monetary sanctions for factual errors in violation of Rule 11(b)(3) or (b)(4).

197. See *Dixon v. Caulfield*, No. C-96-3837-VRW, 1997 WL 414163 (N.D. Cal. July 11, 1997) (determining that dismissal was the only effective deterrent where plaintiff filed complaint to harass defendants).

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sessed an improper motive, the best way to stop her continued violation of Rule 11(b)(1) would be to dismiss her claim and bar her from ever bringing it again.

But what if Judge Wright found Ms. Jones had a proper purpose but her lawyers did not?¹⁹⁸ The short answer is that Judge Wright technically could have dismissed the complaint even under these circumstances but it is not likely she would have done so. The advisory committee warned courts to be wary of punishing any person, whether party or lawyer, for a violation for which he or she was not responsible. The committee instructed: “The sanction should be imposed on the persons— whether attorneys, law firms, or parties— who have violated the rule or who may be determined to be responsible for the violation.”¹⁹⁹ Under this admonition, the court likely would have issued sanctions only against Ms. Jones’s lawyers or their law firms, in the form of monetary fines or disciplinary referrals.²⁰⁰ Yet, nothing in the rule itself would have foreclosed dismissal if the court found it to be the best deterrent.

A final concern related to the hypothesized Rule 11 motion by President Clinton is the 1993 revision of the methodology for raising Rule 11 issues. The 1993 rulemakers were troubled by the frequency with which parties relied upon the 1983 rule to launch attacks against their opponents and thus distract the courts and parties from the main case.²⁰¹ Rulemakers amended the procedure for raising Rule 11 issues in order to reduce this satellite litigation.²⁰² First, they provided a “safe harbor,” under which the party could withdraw the supposedly offending paper and avoid Rule 11 sanctions. The

198. As noted in Part I.C, if Ms. Jones’s lawyers had a political motive, they violated Rule 11(b)(1) by “presenting [the complaint] for any improper purpose.”

199. FED. R. CIV. P. 11 advisory committee’s note (1993).

200. A lawyer who pursued a case for his own ill motives usually would violate a number of rules of professional conduct. In particular, such a situation would likely constitute an impermissible conflict of interest between lawyer and client. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (prohibiting a lawyer from representing a client if the lawyer’s own interests material limit his representation of the client). In addition, some rules arguably bar a lawyer from presenting a claim for improper purposes, even meritorious claims. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(1) (barring a lawyer from filing suit “when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another”); see also *Rules of Professional Conduct*, *supra* note 13 (assessing the motive restrictions in the professional rules under the Petition Clause).

201. See generally WRIGHT & MILLER, *supra* note 108, § 1332.

202. See FED. R. CIV. P. 11 advisory committee’s note (1993) (stating that the changes “should reduce the number of motions for sanctions”).

safe harbor takes an odd form. Under the new Rule 11(c)(1)(A), a party cannot simply file a Rule 11 motion with the court. He first must serve the motion on his opponent, wait 21 days, and then file his motion with the court only if his opponent does not withdraw or otherwise correct the paper within the waiting period.²⁰³

Second, rulemakers required that Rule 11 motions be made by separate motion.²⁰⁴ No longer can a defendant simply ask for Rule 11 sanctions at the end of his Rule 12 motion to dismiss or Rule 56 motion for summary judgment. He must file a separate motion dedicated solely to Rule 11. Although this change might seem to increase paperwork—through the requirement of a separate paper—it forces parties to more carefully consider (and perhaps not raise) their Rule 11 arguments.²⁰⁵

These revisions may deter motions for sanctions, but they do not foreclose them and they would not have prevented the President from attempting to use Rule 11 as a means to dismiss the *Jones* suit. First, the President could have complied with the safe harbor rule. He simply had to serve the motion on Ms. Jones and wait to see if she dropped her case. When she did not, he could have filed his motion with the court. Second, he could make this Rule 11(b)(1) argument by separate motion. This requirement did not require that the President file any other motion, such as a motion for summary judgment, but rather only that he not combine his Rule 11 arguments if he in fact filed such other motion. The President's motion would not be joined with any other. In fact, this would be the point of the hypothetical motion by the President: ask for an independent determination of Ms. Jones's compliance with Rule 11, entirely separate from the merits of her claims.

203. See *supra* note 183 (reprinting Rule 11(c)(1)(A)). The advisory committee noted that “[u]nder the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.” FED. R. CIV. P. 11 advisory committee’s note (1993).

204. See *supra* note 183 (reprinting Rule 11 (c)) (providing that a “motion for sanctions under this rule shall be made separately from other motions or requests”).

205. The advisory committee did not elaborate on the purpose of this requirement, other than noting that it was tied to safe harbor provision, which in turn was meant to secure voluntary compliance and curb the number of motions filed with the court: “The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days . . . after being served.” FED. R. CIV. P. 11 advisory committee’s note (1993).

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Whether the President could have used this procedure to avoid addressing the merits altogether would have been a timing question within the discretion of Judge Wright. The President would have needed some court action if he wanted to avoid filing his answer to the complaint. The new twenty-one-day waiting period in Rule 11(c) ordinarily means that a defendant must file his answer before his Rule 11 motion, since the time for answering is twenty days.²⁰⁶ However, any defendant can move to extend the time for filing an answer.²⁰⁷ In the actual *Jones* case, the President requested and received a special stay to present his immunity arguments.²⁰⁸ Given the Supreme Court's instruction to accommodate the President,²⁰⁹ Judge Wright might have been open to the idea of staying other proceedings and first hearing a Rule 11 motion, which would have focused exclusively on the plaintiff's motive and therefore not have distracted the President from his official duties. On the other extreme, Judge Wright could have taken the advisory committee's suggestion and deferred the President's Rule 11 motion until after she ruled on the merits of Ms. Jones claims.²¹⁰

In sum, although the history and purpose of the 1993 rule changes certainly do not encourage such a motion, the rule would permit the President to raise Rule 11(b)(1) as a basis to dismiss Ms. Jones's claims. This view is not as extraordinary as it might seem. Judge Wright in her statement concerning Rule 11 sanctions suggested such an approach. By noting that "[t]he President never challenged the legitimacy of plaintiff's lawsuit by filing a motion pursuant to Rule 11,"²¹¹ she suggested that she would have been open to the possibility of dismissal—the ultimate "challenge" to a lawsuit. Af-

206. See FED. R. CIV. P. 12(a)(1)(A).

207. Generally, a party may ask the court for more time to do any act required under the rules. See FED. R. CIV. P. 6(b) ("the court for cause shown may at any time in its discretion . . . order the period enlarged").

208. See *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994).

209. See *Clinton v. Jones*, 520 U.S. 681, 707 (1997) (stating that "[t]he high respect that is owed to the office of Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery").

210. See *supra* note 165 and accompanying text; see also *Lichtenstein v. Consol. Servs. Group*, 173 F.3d 17, 23 (1st Cir. 1999) (noting that "[c]ourts should, and often do, defer consideration of certain kinds of sanctions motions until the end of trial to gain a full sense of the case and to avoid unnecessary delay" and that "[t]his is a sensible practice where the thrust of the sanctions motion is that institution of the case itself was improper").

211. See *supra* note 5.

ter all, dismissal, as opposed to monetary sanctions, would be the only way in which the President could have avoided giving the misleading deposition testimony for which she chastised the President. This does not mean that Judge Wright would have awarded this sanction, only that she would consider it. Rule 11 allowed her, and the President, that option.

II. THE CONSTITUTIONAL QUESTION: MEASURING MS. JONES'S RIGHT TO PETITION COURTS AGAINST RULE 11(b)(1)

The next inquiry is whether the Petition Clause would have permitted Judge Wright to assess Rule 11 sanctions based solely on Ms. Jones's motive. The Petition Clause itself—the right “to petition the government for redress of grievances”²¹²—does not immediately suggest an answer. The issue requires a multiple level analysis: first, establish that the right to petition extends to the courts; second, define the right; and finally apply a variety of protective doctrines to test the right against Rule 11(b)(1).

In Part II.A, I confirm that court access is part of the right to petition. This idea was the focus of extensive analysis in my first article concerning the Petition Clause, and I only briefly recap that analysis here.²¹³ Likewise, in Part II.B, I recap my prior efforts to define the scope of the right of court access. I conclude that the “core” right under the Petition Clause is the right of an individual to file a winning claim in court, regardless of her motive. Although it would seem that this definition would end the analysis—given that Ms. Jones lost her suit at summary judgment—the first two steps of my analysis are only discussions in the abstract. Actual safeguarding of the right depends on application of the protective doctrines of the First Amendment, which can have the effect of broadening the zone of protected activity. Application of these doctrines is the heart of the Petition Clause analysis. Thus, in Part II.C, I apply strict scrutiny and breathing room analyses and test application of Rule 11(b)(1) against Ms. Jones's First Amendment right of court access. Under this analysis, I conclude that any use of Rule 11(b)(1) to sanction or deter Ms. Jones from filing her claims, based solely on her motive, would have violated her rights under the First Amendment.

212. See *supra* note 2 (reprinting First Amendment).

213. See *Access to Court*, *supra* note 13.

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The right to petition dates back to at least 1215, when the Magna Carta allowed barons to petition the king for redress of at least some of their grievances.²¹⁴ In 1685, the English Bill of Rights guaranteed the “right of the subjects to petition the king” and provided “that, for redress of all grievances . . . [P]arliaments ought to be held frequently.”²¹⁵ English colonists in America petitioned both the government in England²¹⁶ and their local colonial governments concerning public and private matters.²¹⁷ When the colonies declared independence, many new state constitutions specifically preserved the people’s right to petition the state legislatures.²¹⁸

Although most historical expressions of the petition right spoke only of the legislative branch, the right to petition traditionally included the right to seek private redress. Petitions to the legislature often were private claims. Both the English Parliament and the colonial legislatures regularly acted as courts in deciding private disputes.²¹⁹ This was the practice even in the state governments that de-

214. See 1215 MAGNA CARTA, ch. 61, *translated and reprinted in* J.C. HOLT, MAGNA CARTA 468–73 (Cambridge University Press 2d ed. 1992) (1965) (“[I]f we or . . . any of our servants offend against anyone in any way . . . four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay.”)

215. BILL OF RIGHTS (1689), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (1971).

216. Colonial charters typically granted colonists the “liberties of an Englishman.” See Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 10–45 (1971) (unpublished dissertation in Government, Texas Tech University) (on file with author) (describing charters and their relationship to the right to petition).

217. Some colonial charters expressly preserved the right to petition the local government. See, e.g., THE MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* 1 SCHWARTZ, *supra* note 215, at 73 (“Every man . . . shall have libertie to come to any publique Court, Council, or Towne meeting, and either by speech or writeing, . . . to present any necessary motion, complaint, petition, Bill or information.” (original spelling)).

218. Maryland, for example, declared that “every man hath a right to petition the Legislature, for the redress of grievances, in a peaceable and orderly manner.” MARYLAND DECLARATION OF RIGHTS art. XI (1776), *reprinted in* 1 SCHWARTZ, *supra* note 215, at 281. For a complete listing and reproduction of the early state constitutional statements of the right to petition, see *Access to Court*, *supra* note 13, at n.159.

219. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 154–55 (1969) (describing colonial legislative practice and noting that “[t]hey continually tried cases”); see also JAMES S. HART, JUSTICE UPON PETITION: THE HOUSE OF LORDS AND THE REFORMATION OF JUSTICE 1621–1675, at 3 (1991) (describing the judicial practices of the House of Lords in the seventeenth century).

clared, in their new constitutions, a separation of powers between the judicial and legislative branches.²²⁰ The legislature was the most powerful and active branch of the early state governments, and it was to that branch that the people often turned when they needed help from their government.

The framers of the Federal Constitution broke away from the state model of government, in which the legislature was supreme, and established the new federal government as three co-equal branches. The Federal Constitution gives the judicial power to the courts alone.²²¹ Significantly, the Federal Petition Clause also departs from the early state examples of petition clauses. The First Amendment gives the people the right to petition “*the government*,” not just the legislature, and corresponds with the new division of federal power.²²² Thus, when read in light of its history and in context of the Federal Constitution, the Petition Clause seems to preserve the right to petition courts for redress of private claims.

Likewise, the policies behind the petition right extend to the courts. The Petition Clause serves many of the same values as the Speech Clause, but the right to petition protects a particular type of speech—requests to the government for redress of grievances—and serves special policies. Petitions give citizens a chance to peacefully seek change and participate in and inform their government.²²³ These

220. Six of the original thirteen states—Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia—expressly declared a separation of powers in their constitutions. See *Access to Court*, *supra* note 13, at 609 n.170. In the Federalist Papers, James Madison stated that the Virginia legislature “*in many instances, decided rights which should have been left to judiciary controversy*” and that the intrusion was “*becoming habitual and familiar*.” THE FEDERALIST NO. 48, at 62 (James Madison) (*quoting* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 195 (Lester DeKoster ed., 1976)).

221. Article III states that “[t]he *judicial power* of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1 (emphasis added). Congress, on the other hand, received under Article I only “*legislative [p]owers*.” *Id.*, art. I, § 1 (emphasis added).

222. U.S. CONST. amend. I. See *supra* note 2 (reprinting First Amendment). James Madison’s proposed first draft of the Petition Clause mentioned only petitions to the federal legislature and seemingly would not have included the right to ask for judicial relief from the federal government, in light of the new distribution of powers in the federal constitution. See 2 SCHWARTZ, *supra* note 215, at 1026 (reprinting Madison’s proposal). The House Select Committee, of which Madison was a member, soon revised Madison’s proposal and stated a right to petition the entire “government.” See *id.* at 1122. The House approved the proposed amendment on August 24, 1789. See *id.* at 1138. The Senate modified slightly the House version but left intact the reference to the government. See Senate Journal (Aug.–Sept. 1789), reprinted in 2 SCHWARTZ, *supra* note 215, at 1149.

223. See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (declaring that the peti-

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aims are served by petitions to the courts as well as the other branches. Courts certainly provide a peaceful mechanism for dispute settlement, and they also allow people, through their civil complaints, to attempt to advance the law and cure societal ills.

The Supreme Court first recognized this link between the petition right and courts in 1963, in the landmark case of *NAACP v. Button*.²²⁴ In *Button*, the NAACP encouraged blacks in Virginia to utilize NAACP lawyers and file school desegregation suits. Virginia attempted to stop the NAACP activity by charging that the group violated statutes against solicitation of legal business. The Court held that the First Amendment protected the NAACP litigation efforts. The Court relied primarily on other First Amendment rights, that of association and expression, but it also recognized that the Petition Clause extended to the NAACP litigation activity:

[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, *litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.*²²⁵

Since *Button*, the right of court access has had a turbulent history in the Court. The Court in the early 1970s rejected most efforts to

tion right is implicit in the “very idea of government, republican in form”).

224. 371 U.S. 415 (1963).

225. *Id.* at 429–30 (emphasis added). The Court further explained the relationship between litigation and more traditional views of First Amendment freedoms:

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. . . .

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of the members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id. at 430–31.

establish a due process right of civil plaintiffs to gain access to court,²²⁶ but it repeatedly recognized an independent right of prisoners to gain access to court, at least to challenge their sentence or conditions of confinement.²²⁷ The right of court access under the Petition Clause was largely overlooked in these due process²²⁸ and prisoner cases even though the Court elsewhere was developing the petition right.

First, beginning in 1964, the Court applied *Button* to private, personal injury litigation in a trilogy of cases involving labor union efforts to encourage and assist members in litigation against their employers. In each, the Court relied on the rights of association and expression but also the right to petition. For example, in *Brotherhood of Railroad Trainmen v. Virginia State Bar*,²²⁹ the Court protected a union service for settlement of claims under the Federal Employer's Liability Act:²³⁰ "The State can no more keep these workers from us-

226. In a trilogy of cases, indigent individuals challenged the requirement that they pay a fee in order to file their complaint. The Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), held that due process protected the right of indigent divorce claimants to gain free access to court, but only because courts are the only means to dissolve a marriage and marriage is of fundamental importance. *See id.* at 375–76, 382–83. The Court held that most other indigent plaintiffs do not enjoy such a due process right of access to court. *See United States v. Kras*, 409 U.S. 434, 444–45 (1973) (denying due process right of access to bankruptcy petitioner because an alleged bankrupt's interest "does not rise to the same constitutional level" as the "associational" interest in dissolving a marriage and that "a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors"); *Ortwein v. Schwab*, 410 U.S. 656, 656 (1973) (per curiam) (denying due process right of access to welfare claimant because the interest in welfare payments "has less constitutional significance" than divorce and the claimant has access to the administrative hearing process). *See generally Access to Court*, *supra* note 13, at 567–71 (discussing the Court's treatment of court access under due process).

227. The right of court access for prisoners does not apply to ordinary citizens. The Court has suggested that this unique right of court access rests upon both the habeas clause and equal protection, but it now bases this right on due process. *See Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts, upon which [prisoner access cases] were premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). *But see Bounds v. Smith*, 430 U.S. 817, 838–40 (1977) (Rehnquist, J., dissenting) (arguing that the Court's declaration of a "fundamental right of access to the courts [for prisoners] . . . is found nowhere in the Constitution"). *See generally Access to Court*, *supra* note 13, at 571–76 (discussing the Court's holdings in prisoner court access cases).

228. During this "early" period, a very few academic commentators urged reliance on the First Amendment, including the Petition Clause, as an alternative to the Court's restrictive reading of due process, to give indigent plaintiffs the ability to gain access to court. *See Brickman*, *supra* note 3; Note, *A First Amendment Right of Access to the Court for Indigents*, 82 YALE L.J. 1055 (1973).

229. 377 U.S. 1 (1964).

230. *See id.* at 1–5.

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ing their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped.*²³¹ Within the next seven years, the Court twice again applied the right to union efforts to organize private injury litigation²³² and thus put to rest any notion that the Petition Clause protected only “political” litigation such as that in *Button*.²³³

Meanwhile, the Court was further developing the right of court access under the Petition Clause in an entirely separate line of cases, under the antitrust laws. It began in 1961 with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²³⁴ There, railroads lobbied the governor to veto legislation that benefited truckers, and the truckers sued the railroads in antitrust, charging that the railroads’ lobbying efforts were intended to “destroy” competition by the truckers.²³⁵ The Court held that, despite the apparent breadth of the Sherman Act,²³⁶ the Act did not reach such lobbying activity. The Court based this limitation on both antitrust policies²³⁷ and the Petition Clause: the “right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute

231. *Id.* at 7 (emphasis added).

232. *United Mine Workers, District 12 v. Illinois State Bar Assoc.* 389 U.S. 217, 223 (1967) (holding that “*Button* and *Trainmen* cases are controlling” and that “the grievances for redress of which the right of petition was insured . . . are not solely religious or political ones”); *United Transp. Union v. State Bar of Mich.* 401 U.S. 576, 585–86 (1971) (holding that the “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment”). *Id.* at 585.

233. *See* *United Mine Workers*, 389 U.S. at 223 (noting that “in *Trainmen*, where the litigation in question was, as here, solely designed to compensate victims of industrial accidents, we rejected the contention made in dissent, . . . that the principles announced in *Button* were applicable only to litigation for political purposes”).

234. 365 U.S. 127 (1961).

235. *See id.* at 129, 139.

236. The filing of a meritorious suit could constitute an unfair trade practice under the literal terms of the Sherman Act, if its intent and effect were to restrain competition. Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.” 15 U.S.C. § 1 (1994). Section 2 punishes “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or person, to monopolize any part of the trade or commerce.” *Id.* § 2.

237. The Court held that political activity is essentially different from the commercial activity that the Sherman Act was meant to regulate. *See* *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961) [hereinafter *Noerr*]; *see also* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293 (1994) (discussing the “essential dissimilarity” rationale for *Noerr*).

to Congress an intent to invade these freedoms.”²³⁸ In 1972, the Court in *California Motor Transport v. Trucking Unlimited*²³⁹ extended *Noerr* antitrust immunity to petitions directed at courts:

The same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly, the right to petition extends to all departments of the Government. *The right of access to the courts is indeed but one aspect of the right of petition.*²⁴⁰

In a significant development for broader recognition of the right to petition courts, the Court in 1983, applied *California Motor Transport* outside of the antitrust arena, to the federal labor laws, and to an individual plaintiff. In *Bill Johnson's Restaurants, Inc. v. NLRB*,²⁴¹ an employer retaliated against picketing employees by suing them for defamation, based on the leaflets that the employees distributed.²⁴² The National Labor Relations Board (“NLRB”) enjoined the employer’s lawsuit as an unfair labor practice, in violation of the National Labor Relations Act (“NLRA”).²⁴³ A unanimous Court reversed, holding that the NLRB had unduly interfered with the employer’s petition right of access to court:

238. *Noerr*, 365 U.S. at 138.

239. 404 U.S. 508 (1972).

240. *Id.* at 510 (emphasis added). The *California Motor Transport* pronouncement was dictum in that the Court ultimately held that the defendants’ adjudication efforts were “sham” (i.e., baseless claims) and therefore not protected petitioning. *See id.* at 510, 513. *See also infra* notes 245–52, 262–66 and accompanying text (discussing the Court’s “sham” exception to petitioning immunity).

241. 461 U.S. 731 (1983).

242. *See id.* at 733–34. The employer also alleged that the employees tortiously interfered with its business. The state court granted summary judgment on the tortious interference claim but denied it for the defamation claim. *See id.*

243. The Court acknowledged that the literal terms of the NLRA were broad enough to attach to a meritorious civil suit. *See id.* at 742. The NLRA provides that is an “unfair labor practice” for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7 of the NLRA, which guarantees employees the right to self-organize, form unions, and engage in other concerted actions of their mutual aid or protection];

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this chapter . . .

29 U.S.C. § 158 (1994). *See Motive Restrictions*, *supra* note 13, at Part II.C.2 (discussing NLRA and its potential prohibition of meritorious lawsuits).

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In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. . . . We should be sensitive to these First Amendment values in construing the NLRA in the present context. . . . The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.²⁴⁴

In this line of cases, however, the Court did not recognize an unqualified right of court access. Beginning as early as *Noerr*, the Court imposed a "sham" limitation on the petition right: petitions that were not "genuine" were not protected from antitrust liability.²⁴⁵ In *California Motor Transport*, the Court confused the issue by stating a number of different tests for unprotected sham litigation.²⁴⁶ In *Bill Johnson's Restaurants*, the Court stated a two-tiered test: the plaintiff's right to continue ongoing litigation was protected

244. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). *See also id.* at 742-43. "Considering the First Amendment right of access to the courts and the state interests . . . we conclude that . . . [t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiffs desire to retaliate." *Id.* at 751-52 (Brennan J., concurring) (acknowledging that the Petition Clause extended to the courts and that the narrow interpretation of the NLRA has "constitutional resonances").

245. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (holding that the railroads' lobbying efforts were not sham and were "not only genuine but also highly successful").

246. On the one hand, the Court suggested that "sham" litigation was that used to harass. *California Motor Transp. Co.*, 404 U.S. at 511 (noting that the power, strategy, and resources of the petitioners were used "to harass and deter respondents in their use of administrative and judicial proceedings"). At other points, the Court seemed to define "sham" as litigation without objective merit. *See id.* at 512 ("petitioners 'instituted the proceedings and actions . . . with or without probable cause and regardless of the merits of the cases'"); *id.* at 513 (suggesting that defendants' actions constituted "a pattern of baseless, repetitive claims"). The Court also suggested that sham *litigation* might be broader than the sham test applicable to political lobbying, such as that in *Noerr*. *See id.* at 512-13. *See generally* Thomas A. Balmer, *Sham Litigation and the Antitrust Law*, 29 BUFF. L. REV. 39, 47 (1980) (discussing the "perplexity" of *California Motor Transport*); William R. Jacobs, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281, 301 (1973) (noting problems created by *California Motor Transport*).

so long as her suit presented some genuine issue of fact, but after completion of the suit, only a prevailing plaintiff enjoyed absolute protection.²⁴⁷

I discuss this merits limitation at length in the next part,²⁴⁸ but its importance here is that it prompted the Court in 1993 to issue its most influential decision concerning the right to petition courts.²⁴⁹ In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,²⁵⁰ another antitrust case, the Court attempted to clarify *California Motor Transport* and held that, in order to constitute a “sham,” and thus fall outside of *Noerr* petitioning immunity, litigation must be both objectively unreasonable and made in subjective bad faith.²⁵¹ If the claim is objectively reasonable, motive is irrelevant, the claim is not a sham and its filing is immune from antitrust liability.²⁵² Perhaps due to this clear definition of litigation protected under the *Noerr* petitioning immunity, an ever growing number of legal commentators²⁵³ and other courts²⁵⁴ are recognizing a universal

247. See *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 748–49. See also *infra* notes 263–64 (reprinting the *Bill Johnson's Restaurants* tests).

248. See *infra* Part II.B.1.

249. In two other cases since *Bill Johnson's Restaurants*, the Court has recognized the right to petition courts, but only in dicta. See *McDonald v. Smith*, 472 U.S. 479 (1985) (“Filing of a complaint is a form of petitioning activity.”); *Sure-Tan v. NLRB*, 467 U.S. 883, 897 (1984) (“The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a ‘right of access to the courts . . . for redress of alleged wrongs.’”).

250. 508 U.S. 49 (1993).

251. See *id.* at 57.

252. “Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.” *Id.* at 60.

253. See, e.g., David K. Godschalk, *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits Under the Fair Housing Act*, 27 PEPP. L. REV. 477 (2000) (recognizing that the Petition Clause protects access to court and limits the literal terms of the Fair Housing Act); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) (arguing that the Petition Clause protects the right to pursue claims against the government); Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199, 1253 (1994) (noting that *Professional Real Estate Investors* asks a constitutional question that requires a “reevaluation of an array of state and federal law governing litigation behavior”); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 58–64 (1993) (arguing that the Petition Clause applies to courts); Kara Elizabeth Shea (Recent Development), *San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697 (1995) (assessing the public employee’s right to petition courts); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111 (1993) [hereinafter, Note, *Suits Against the Government*] (arguing that suits against the gov-

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right, under the Petition Clause, to gain access to federal and state courts.²⁵⁵

An individual's First Amendment right of court access now seems to be the law of the land. Yet, it is still not a commonly known constitutional precept. Indeed, in the *Jones* case itself, the parties and court litigated issues on the periphery of the Petition Clause right of court access but stopped short of acknowledging such a right. One such debate concerned the President's claim of immunity and his

ernment are "double" petitions deserving of heightened protection under the Petition Clause and requiring relaxation of Federal Rule of Civil Procedure 11).

254. See e.g., *Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000) (recognizing a right to petition courts and citing the "[n]umerous other courts" that have applied the right to limit "a range of common law torts"); *Mansky v. Moraghan*, 127 F.3d 243 (2d Cir. 1997) ("It is well established that all persons enjoy a constitutional right of access to the courts, although the source of this right has been variously located in the First Amendment right to petition for redress, the Privileges and Immunities Clause . . . , and the Due Process Clause."); *San Filippo v. Bongiovanni*, 30 F.3d 424, 434–35 (3d Cir. 1994) (The filing of "lawsuits . . . implicate[s] the petition clause . . . of the first amendment."); *Lyon v. Del Vande Krol*, 940 F. Supp. 1433, 1437 (S.D. Iowa 1996) (recognizing a fundamental right of court access under the right to petition); *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 955 (S.D. Cal. 1996) (applying *Noerr-Pennington* to state law claims attacking the filing of a patent suit: "[t]he majority of courts who have considered the issue have concluded that the immunity is constitutional and rooted in the First Amendment right to petition"); *Armuchee Alliance v. King*, 922 F. Supp. 1541, 1549 (N.D. Ga. 1996) ("It is well-established that 'the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.'"); *Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc.*, 916 F. Supp. 692, 702 (S.D. Ohio 1995) ("This Court agrees that the *Noerr-Pennington* doctrine is not limited in application to antitrust claims. The doctrine is grounded on the First Amendment principle that an individual or entity has the right to pursue legitimate efforts to influence government decision-making and to approach the courts in order to obtain redress of grievances."); *Cove Road Dev. v. Western Cranston Indus. Parks Assoc.*, 674 A.2d 1234, 1237–38 (R.I. 1996) (holding that the Petition Clause protects access to court and thus limits common law torts, such as abuse of process and interference with contractual relations, that might otherwise impose liability based solely on a plaintiff's filing suit).

255. The Petition Clause is ambiguous as to whether its petition right protects petitions to federal and state governments, and hence their courts. The clause refers only to "the government" and does not say which government. The drafters may have envisioned application only to the federal government, but the Court has not so limited the right to petition. For example, in both *Noerr* and *Bill Johnson's Restaurants*, the Court considered the extent to which federal law could restrict petitions to state government (the governor in *Noerr* and state courts in *Bill Johnson's Restaurants*). This petition restriction problem is a different question than whether the limitation on the federal Congress in the Petition Clause also bars state governments from abridging the right to petition. This latter question has been termed one of "incorporation," and despite early decisions to the contrary, the Court held in 1937 that the dictates of the federal Petition Clause apply to states, by incorporation in the Fourteenth Amendment. See *DeJonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (applying the petition right to the states through the Fourteenth Amendment).

characterization of Ms. Jones's claims as political and not worthy of distracting the President from his duties.²⁵⁶ In rejecting the President's claim, the Eighth Circuit recognized Ms. Jones's "constitutional" right of court access, but it did not base that right in the Petition Clause.²⁵⁷ The parties engaged in a similar debate when President Clinton sought discovery concerning Ms. Jones's financial sponsors and their activities.²⁵⁸ Ms. Jones and her backers opposed the discovery and invoked the First Amendment, including *Button*, but they did not rely upon any separate right of court access under the Petition Clause.²⁵⁹ I am not suggesting that Ms. Jones's right to

256. Indeed, the President's arguments on this immunity issue were remarkably close to what they would have been under Rule 11(b)(1). He argued that Ms. Jones's suit was politically motivated and not significant enough to trump his claim of immunity. *See Jones v. Clinton*, 72 F.3d 1354, 1359–60 (8th Cir. 1996) (summarizing the President's argument: "Mr. Clinton . . . would have us consider the nature of Mrs. Jones's complaint, as well as the timing of the filing of her suit," and rejecting "the suggestion that Mrs. Jones's motives in filing suit, alleged to be political should be examined, and that her suit should be dismissed if we are persuaded that her objective in bringing suit is less than pure").

257. The Eighth Circuit did not specify any provision of the constitution but instead relied upon *Marbury v. Madison*:

Mrs. Jones is constitutionally entitled to access to the courts and to the equal protection of the laws. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison* . . . Mrs. Jones retains that right in her suit against Mr. Clinton, regardless of what her claims may be or when her suit was filed (if otherwise timely filed), provided that she is not challenging actions that fall within the ambit of official presidential responsibility. We further reject the suggestion that Mrs. Jones's motives in filing suit, alleged to be political, should be examined, and that her suit should be dismissed if we are persuaded that her objective in bringing suit is less than pure.

Id. (citations omitted). Likewise, Chief Justice Marshall in *Marbury* did not cite any particular constitutional provision and instead relied upon only the English legal historian, Sir William Blackstone. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). For a discussion of Sir Blackstone's writings on the right to judicial remedy, see *Access to Court*, *supra* note 13, at 600–03.

258. *See Jones v. Clinton*, Order, Nov. 25, 1997 (granting limited discovery concerning the legal fund-raising but denying discovery concerning the individual donors on the ground that such compelled disclosure "would chill expressive activity not only in this case, but in future cases as well").

259. *See Jones v. Clinton*, Memorandum In Support of Plaintiff's Motion for Protective Order Regarding the Subpoena For Documents Served on the Paula Jones Legal Fund, Oct. 30, 1997 (arguing that "[s]upport of litigation is a form of expression and association protected by the first amendment"). The President constructed the issue as whether the rights of association and expression protect "non-political" litigation and related activities. *See Jones v. Clinton*, President Clinton's Opposition to Motions of Paula Jones and Paula Jones Legal Fund For Protective Order, Oct. 30, 1997 (on file with author) (arguing that the Jones suit

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petition would have trumped a claim of executive immunity, or that the Petition Clause governed the discovery dispute (those questions are for another day and another article²⁶⁰), but instead merely noting that the petition right never arose in the debate.

We are thus left with an emerging right of court access, one that seems to be accepted but yet not well known. Recognition of the right itself is only the first step in assessing the impact of the Petition Clause in the *Jones* case. The next step is to define the basic parameters of the right.

B. Defining the Scope of the Right to Petition Courts

The right of “court access” has little meaning without some definition. Does it mean that a litigant such as Ms. Jones can do and say anything in court, or, on the other extreme, does it merely allow her entry into the courthouse? The petition right, like its companion right of speech, will require many years, perhaps decades, to gain definition. Each new case will add further insight into the scope of the right to petition courts. This article, which tests the right in the *Jones* case, is one more step toward a better understanding of the Petition Clause right of court access.²⁶¹

There are a number of ways in which we could attempt to define the right to petition courts. Here, I set out four basic parameters of the right that I believe are relevant to Ms. Jones’s case. I draw these primarily from the Supreme Court’s few decisions concerning judicial petitions, but I also rely upon the history and context of the petition right. These four parameters of the “core right” to petition courts are: (1) the right extends only to winning claims; (2) the right applies regardless of motive; (3) the right extends to both an indi-

does not involve “over-arching political or policy goals” and that the fund’s activities do not involve expressive activity).

260. Professor James Pfander argues that the Petition Clause right of court access trumps the concept of sovereign immunity, but he does address the President’s claim of executive immunity in *Jones*. See Pfander, *supra* note 253.

261. Indeed, in each of my efforts to define the meaning of the right to petition courts, I have refined and subtly adjusted both my analysis and my conclusions. For example, in a prior article, I wrote that the “government is free . . . to assess subsequent punishment on baseless claims” and that motive could “enhance the penalty for violations of Rule 11.” *Motive Restrictions*, *supra* note 13, at 788, 797. In this article, I caution against use of motive as a punishment or penalty enhancement, even as to frivolous suits, where the prohibition is vague or directed to the political motives of the plaintiff in filing suit. See *infra* at notes 371–85 and accompanying text.

vidual and to groups of plaintiffs; and (4) the right is one of initial access only and does not extend to the subsequent processing of the claim. These parameters define the core right under the Petition Clause—that which the First Amendment most values—and they do so only in the abstract. Meaningful understanding of the right requires application of protective doctrines such as strict scrutiny and breathing room analyses to an actual constraint on the right, such as Rule 11. As I will show in Part II.C below, these protective doctrines will have the practical effect of broadening the protection of the Petition Clause beyond the narrow parameters of the core right.

1. *The right to file winning claims*

As I note in the preceding Part, the Court has not recognized an absolute right to petition courts. In *Bill Johnson's Restaurants* and *Professional Real Estate Investors*, the Court imposed a “sham” or merits limitation on the right and suggested this limitation, as opposed to the plaintiff’s motive, defines the right to seek redress in court.²⁶² Thus, the Court has given us a starting point for defining the Petition Clause right of court access, but it is only a start. The Court’s opinions leave a number of gaps. In order to determine the proper definition of the right to petition courts, we must not only dissect the cases in detail but also review the history, context and policies of the Petition Clause.

An initial problem presented by *Bill Johnson's Restaurants* and *Professional Real Estate Investors* is the fact that the two cases use a different standard of merit for civil complaints. The Court in *Bill Johnson's Restaurants* defined “meritorious” suits as claims that prevail and proceed to judgment, and it gave absolute immunity only to those winning claims.²⁶³ Under *Bill Johnson's Restaurants*, losing

262. See *supra* notes 245–52 and accompanying text (discussing sham limitation).

263. The Court’s explanation of its meritorious standard is confusing, but, as the italicized portions below illustrate, the Court ultimately equated claims on which the employer wins judgment as the “meritorious” claims demanding full protection from the NLRA:

In instances where the Board must allow the lawsuit to proceed, if the employer’s case in the state court ultimately proves *meritorious and he has judgment against the employees*, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice. *If judgment goes against the employer* in the state court, however, or if his suit is withdrawn *or is otherwise shown to be without merit*, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor case. The *employer’s*

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claims, no matter how meritorious, are not protected from ultimate liability under the NLRA; such claims receive protection only from injunction while they are on-going.²⁶⁴ The Court in *Professional Real Estate Investors*, on the other hand, fully protected meritorious claims. If the claim has objective merit at the time of its filing, its filing is immune from antitrust liability even if the claim ultimately loses at summary judgment or at trial.²⁶⁵ The winning claim standard of *Bill Johnson's Restaurants* was dictum (the appeal concerned injunction of an on-going suit, not one that had lost at trial), and it is possible that the Court in *Professional Real Estate Investors* meant to change the *Bill Johnson's Restaurants* winning claim standard. This interpretation is doubtful, given that the *Professional Real Estate Investors* Court relied upon *Bill Johnson's Restaurants* and cited it with approval.²⁶⁶ Unfortunately, the Court did not attempt to distinguish

suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' . . . rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 747 (1983) (emphasis added); *see also* *Godschalk*, *supra* note 253 at 498–99 (describing the *Bill Johnson's Restaurants* test as one of objective merit but noting that an “unmeritorious” suit is one that does not prevail).

264. For on-going litigation, the Court adopted the test for summary judgment, whether the employer's suit presents “any genuine issues of fact”:

When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, leads us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Bill Johnson's Restaurants, Inc., at 745. Non-meritorious suits that fail this test enjoy no protection from injunction. *See id.* at 744 (holding that “it is an enjoined unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected [under] the NLRA”).

265. The claim at issue in *Professional Real Estate Investors* lost on summary judgment. *See Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 53 (1993). The Court urged caution against too quickly condemning losing claims as lacking merit, *id.* at 60 n.5, and found that the claim there had sufficient merit to avoid antitrust implications. *See id.* at 63. *See supra* notes 250–55.

266. The Court based its rejection of a subjective limit on *Noerr* immunity in part on *Bill Johnson's Restaurants*:

Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. . . . Indeed, by analogy to *Noerr's* sham exception, we held that even an “improperly motivated” lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is “baseless.” *Bill Johnson's Restaurants* Our decisions

Bill Johnson's Restaurants, so we must make the distinction.

The difference in the standard likely results from the fact that the Petition Clause was only one factor in the Court's interpretations of the statutes at issue in both cases. In *Bill Johnson's Restaurants*, the Court expressed its reluctance to narrow the NLRA due to both the Congressional intent that the NLRA be applied as a broad remedial statute and the high risk of abuse in suits by a powerful employer against individual employees.²⁶⁷ Despite this reluctance, "weighty countervailing considerations"—the employer's right to petition and the states' interest in providing a judicial forum to its citizens—compelled the Court to give some limited protection to the employer's right to sue.²⁶⁸ The antitrust laws in *Professional Real Estate Investors* presented a different Congressional intent and a different mix of policies. First, the Court has not found a Congressional intent to broadly read the antitrust laws. The Court found as early as *Noerr* that Congress intended the antitrust laws to regulate only economic activity, not political petitioning.²⁶⁹ Furthermore, the risks of litigation abuse are not as high in the antitrust setting as they are in the labor context, because the typical dispute is between commercial competitors. There may be disparity between the competitors, but

therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had."

Professional Real Estate Investors, Inc., 508 U.S. at 59 (citations omitted).

267. The Court stated:

Sections 8(a)(1) and (4) of the Act are broad, remedial provisions that guarantee that employees will be able to enjoy their rights . . . [B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . . Furthermore, . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. . . . Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Bill Johnson's Restaurant, Inc., 461 U.S. at 740–41.

268. See *id.* at 741 (finding that these interests were "weighty countervailing considerations . . . that militate against allowing the [NLRB] to condemn the filing of a suit as an unfair labor practice"). I discuss the two countervailing interests in the next subsection, *infra* Part II.B.2.

269. *Noerr*, 365 U.S. 127, 137 (1961). This is called the "essential dissimilarity" rationale of *Noerr* petitioning immunity. See *supra* note 237 and accompanying text.

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not as much as between an employer and an hourly worker. Thus, these policies, and not the Petition Clause, can explain the difference in protection between *Professional Real Estate Investors* and *Bill Johnson's Restaurants*.²⁷⁰

We are still left with the task of determining the constitutional standard. This task is not easy, given that even *Bill Johnson's Restaurants*, the case setting the lesser standard, involved a mix of policies and First Amendment constraints. I further explore the constitutional meaning of *Bill Johnson's Restaurants* in the next subsection, but here we can conclude at a minimum that *Professional Real Estate Investors* does not set the constitutional standard. This is for the simple reason that *Bill Johnson's Restaurants* would have permitted liability to attach to the claims that *Professional Real Estate Investors* protected—meritorious but losing claims. In other words, the “core” right under the First Amendment extends only to winning claims.

A winning claim standard seems unworkable. How could any plaintiff ever know at the outset whether her claim will prevail? Indeed, as I argue in Part II.C below, this practical reality mandates protection beyond the core right and results in some protection to the plaintiff's ability to file losing but meritorious claims. However, this protection comes as a form of *New York Times* “breathing room” aimed at safeguarding the core right of filing winning claims,²⁷¹ not through definition of the core right itself, that which the First Amendment most values.

That the core right covers winning claims is not an extraordinary concept. After all, only prevailing claims get “redress” from the government. Anglo-American courts have long placed a special value on winning claims. They historically required losing litigants, including plaintiffs, to pay damages, in the form of costs and attorney's fees, to the winning party, but the courts did not so burden a winning plain-

270. Most observers take an all or nothing approach—*Professional Real Estate Investors* is either a constitutional mandate or entirely a question of antitrust policy. See generally *supra* notes 253–54 (citing relevant cases and commentary). A few courts, however, have recognized that part of the protection in *Professional Real Estate Investors* is required under the Petition Clause and that the remainder is a policy choice. See also *Cardtoons v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 n.4 (10th Cir. 2000) (distinguishing *Professional Real Estate Investors* from *Bill Johnson's Restaurants* and concluding that although the Petition Clause played a role in both cases, they involved other factors and must be limited to their particular contexts).

271. I discuss the *New York Times* breathing room standards *infra* Part II.C.

tiff.²⁷² The “American Rule,” which purports to limit fee awards against losing plaintiffs, is a relatively modern innovation and one that is riddled with exceptions in both federal and state courts.²⁷³ These exceptions to the “American Rule” do not always distinguish between meritorious and frivolous losing suits, and some of the exceptions burden losing plaintiffs.²⁷⁴ These burdens might not survive modern breathing room analysis, but they underscore the special value of winning claims, that which is at the core of the petition right.

2. *The right to file claims regardless of motive*

A second question of definition is whether a plaintiff’s motive also defines the core right. Put another way, must the plaintiff have a proper motive in order to petition “for redress of grievances” within the meaning of the First Amendment? *Bill Johnson’s Restaurants* and *Professional Real Estate Investors* seem to say no. The issue in both cases was the effect of bad motive. The Court in *Bill Johnson’s Restaurants* stated the issue there as whether the NLRB could base NLRA liability solely on the employer’s retaliatory motive in filing suit, regardless of the merit of the underlying claim.²⁷⁵ The Court said no.²⁷⁶ The Court in *Professional Real Estate Investors* asked “whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant,”²⁷⁷ and the Court again answered no.²⁷⁸ Thus, under both *Bill Johnson’s Restaurants*

272. See generally *Motive Restrictions*, *supra* note 13, at Part II.A.

273. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1570–90 (1993) (summarizing the common law exceptions and the more than 2000 state and 200 federal statutes shifting attorney’s fees).

274. See *id.* Moreover, the “American rule” applies only to attorneys’ fees: losing plaintiffs routinely pay other of the defendant’s expenses. See 28 U.S.C. § 1920 (1994) (providing that “[a] judge or clerk or any court of the United States may tax as costs” certain listed items, such as marshal and clerk fees, court reporter fees, printing costs, and witness fees).

275. The Court summarized the Board’s position: “[T]he Board does not regard lack of merit in the employer’s suit as an independent element of the § 8(a)(1) and § 8(a)(4) unfair labor practice. Rather, it asserts that the *only* essential element of a violation is retaliatory motive.” *Bill Johnson’s Restaurant, Inc.*, 461 U.S. at 740.

276. *Id.* at 741. See also *id.* at 743 (“The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against the defendant for exercising rights protected by the Act.”).

277. *Professional Real Estate Investors*, 508 U.S. at 57.

278. See *id.* (“We now answer this question in the negative and hold that objectively rea-

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and *Professional Real Estate Investors*, improper motive cannot by itself expose the plaintiff to liability.

However, because both *Bill Johnson's Restaurants* and *Professional Real Estate Investors* were exercises in statutory interpretation, the question arises as to whether policy, and not the First Amendment, prompted the Court's treatment of improper motive. *Bill Johnson's Restaurants* gave less protection and therefore is the better case for assessing this question. In the case, two influences—the Petition Clause and the state interest in providing a civil remedy to its citizens²⁷⁹—prompted the Court to set a dual standard for protection. An employer is not liable for NLRA damages unless she both had a retaliatory motive *and* lost her suit. It is possible that the First Amendment requires only one of the two protections. Under this view, the Petition Clause in isolation would permit punishment of a plaintiff if she were at “fault” by *either* filing a losing claim *or* filing a claim for a bad motive,²⁸⁰ whereas the state interest in civil remedies would require either the other protection or both. This is unlikely. The state interest in providing a redress for civil injuries is almost indistinguishable from the First Amendment's interest in safeguarding court access, and to the extent that they are different, one would assume that the First Amendment freedom would require the greater protection.

sonable effort to litigate cannot be sham regardless of subjective intent.”).

279. *Bill Johnson's Restaurant, Inc.*, 461 U.S. at 742–43. The Court described the state interests as “maintenance of domestic peace,” the need to provide “a civil remedy for conduct touching interests ‘deeply rooted in local feeling and responsibility,’” and “protecting the health and well-being of its citizens.” *Id.* at 741.

280. Justice Scalia pondered a similar possibility with respect to speech in the oral argument in the Supreme Court's review of Jerry Falwell's emotional distress judgment against Larry Flynt and his *Hustler* magazine. In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988), the Court rejected such a motive standard for speech about public figures, but in oral argument, the Court questioned whether intent alone could ever trigger civil liability for speech. See RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL*, ch. 37 (1988) (reprinting excerpts of oral argument). For example, Justice Scalia asked:

[A]ll *New York Times* says is if you state falsehood with knowledge of the falsehood, the First Amendment does prevent it. All I'm asking you is why can't that principle be extended to say you can cause emotional harm to your heart's content, just as you can state falsity to your heart's content, but where you intend to create that emotional harm, we have a different situation? Isn't that a possible line?

Id. at 268. Flynt's Attorney, Alan Issacman, argued that intent to cause harm should not by itself trigger liability, but that knowing falsity may. *Id.* at 269; see also *infra* notes 285, 320 (discussing *Falwell*).

Moreover, the text, history, and policies of the Petition Clause tend to argue against a motive limitation on the scope of the right to petition courts. The text of the clause is the best argument for such a limitation, but even this basis is weak. The argument turns on the meaning of the word “for.” On the one hand, a plaintiff who does not genuinely seek relief from his claim, regardless of its merit, arguably is not petitioning “for redress of grievances.”²⁸¹ On the other hand, “for” could distinguish one form of petition from another—those that request relief and those that do not.²⁸² A complaint that states a meritorious or winning claim certainly requests relief, regardless of whether the plaintiff actually wants or expects that relief. Moreover, both readings of “for” would include a plaintiff who wants relief but also has some other motive. Thus, the textual argument at most would exclude only those plaintiffs who desire no relief at all.

The policies underlying the Petition Clause argue against making any distinction for a plaintiff’s motive, whatever that may be. The presentation of a meritorious claim serves the aims of informing the government and advancing the law, regardless of the plaintiff’s intentions. These aims might not be served if the government checked the motives of plaintiffs, for often only a highly motivated person is willing to endure the burdens of modern civil litigation.²⁸³ That motivation is rarely benevolent. Indeed, another policy basis for extending the petition right to the courts—to provide an opportunity for peaceful resolution of disputes—assumes hostility by the petitioner. Civil plaintiffs necessarily bear ill feeling toward the defendant with whom they are in a dispute.

281. A late eighteenth century dictionary defines the word “for” as meaning, among other things, “for the reason.” JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE (1784).

282. *See id.* (listing “with respect to” as an alternative meaning of the word “for”).

283. The Court in *Noerr* recognized this practical reality when it noted that most petitions are accompanied by some selfish or other “less than ideal” motive:

The right of the people to inform their . . . 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. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Noerr, 365 U.S. 127, 139 (1961).

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Moreover, defining the right to petition courts in terms of the plaintiff's motive runs the risk of imposing community preferences and undermining the freedom of thought inherent in First Amendment liberties.²⁸⁴ An acceptable motive in one place and time may not be acceptable in another. For the same reasons that the First Amendment right of speech is not defined by community preference,²⁸⁵ the right to petition courts should not be so defined.

Historical practice likewise supports the view that a plaintiff's motive in seeking relief does not define the right to petition courts. The requirement that a plaintiff have a proper motive in filing suit is a modern one. Such standards apparently began in the late nineteenth century as an effort to improve the ethics of lawyers²⁸⁶ and did not apply to litigants themselves, through the procedural rules, until federal rulemakers added the delay element to the 1912 Federal Equity Rules (Equity Rule 24, the predecessor to Rule 11).²⁸⁷ Likewise, the tort of abuse of process, designed to redress the use of litigation as a weapon, is a relatively new tort, created by English courts in the mid-nineteenth century.²⁸⁸ Even today, application of this tort to an

284. See *Bridges v. California*, 314 U.S. 252, 270 (1941) (noting that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"). I further discuss motive regulation and viewpoint preferences *infra* at notes 373–87 and accompanying text.

285. Professor Post argues that this is the reason for the result in *Hustler v. Falwell*, where the Court refused to allow damages for emotional distress based solely on the ill intentions of the speaker, at least where the victim was a public figure. See *supra* note 280 and *infra* note 320 (discussing *Falwell*). Professor Post argues that "[b]ecause it enforces a civility rule, the intent element at issue in *Falwell* maintains a particular vision of community life, and so is inconsistent with the neutrality necessary for public discourse." See generally Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990). See also Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 36 (1993) (arguing that government may use motive to define what facts the actor knows and what he perceives about his injury, but not to regulate his beliefs: "one of the presumptive rights people . . . have under our constitutional system is that their values and beliefs ordinarily should not define what they are permitted to do, or shape the consequences that attach to how they choose to act").

286. See *Motive Restrictions*, *supra* note 13, at Part II.A (discussing history of motive restrictions on court access).

287. See *supra* note 106 (discussing Equity Rule 24 and the origin of Rule 11).

288. Professor Prosser credits the 1848 English case of *Grainger v. Hill*, 132 Eng. Rep. 769, 773 (1848), as the origin of the tort of abuse of process. PROSSER & KEETON ON TORTS, § 121, 856 (4th ed. 1984). See also *Jacobsen v. Garzo*, 542 A.2d 265, 267 (Vt. 1988) (noting that "[t]he tort now known as abuse of process first appeared in *Grainger v. Hill*").

otherwise meritorious lawsuit is rare.²⁸⁹

The question remains as to whether the improper motives of the petitioner's representative, her lawyer, defines her right to petition. The textual analysis of the Petition Clause would be the same regardless of the lawyer's motive because the plaintiff herself would be petitioning *for* redress. She has an individual right to do so. The policies of free court access also support a plaintiff's right to present legal claims for review, regardless of her lawyer's motive. She would be advancing the law, informing the government, and seeking a peaceful end to her dispute, just as she would if her lawyer had no ill motive. As to historical practice, some lawyer oaths may have imposed motive restrictions on lawyers prior to the adoption of the First Amendment, but these provisions did not define the right to petition. These early oaths apparently spoke to the motives or self-interests of the individual lawyer, not of the client, and thus would not have barred the assistance of all lawyers.²⁹⁰ Moreover, as a historical matter, even a restriction against all lawyer assistance would not have been a significant impediment to court access. Early Americans usually represented themselves, without the help of lawyers.²⁹¹

In sum, the history, text, and policies of the Petition Clause establish that a petitioner's motive does not define the core right to petition courts. Nor does the motive of her lawyer define her right. In other words, the mere fact that Ms. Jones and her lawyers may have had aims other than redress does not by itself remove her from the protection of the Petition Clause.

3. *The right of an individual to file claims*

Another issue of definition concerns whether the petition right of court access is an individual right or merely a collective right. This issue has been the source of some uncertainty. *Button, Railroad Trainmen*, and the other union cases all spoke in terms of the collective right to litigate,²⁹² and some observers, including the Court on occasion, have continued to suggest this limitation on the right to

289. Many courts refuse to extend the tort of abuse of process to the filing of a meritorious complaint for an abusive purpose. See *Motive Restrictions*, *supra* note 13, at Part II.B.4.

290. See *id.* at Part II.A (discussing early lawyer oaths and ethics codes).

291. See generally Charles Warren, A HISTORY OF THE AMERICAN BAR 3-18 (1966) (discussing "Law without Lawyers").

292. See *supra* notes 224-31 and accompanying text (discussing *Button* and *Trainmen*).

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petition courts.²⁹³ Some textual basis exists for this definition of the right as a collective right. The First Amendment ties the right to petition to the right to assemble, and also states the right as one of “the people” to petition.²⁹⁴ This purported limitation, however, does not survive closer scrutiny.

First, the Court has not in fact limited the petition right to assembled petitioners. In *California Motor Transport*, where the Court first extended *Noerr* immunity to the courts, the Court stated that the right belonged to “citizens *or* groups of them.”²⁹⁵ *California Motor Transport* was dictum on this point because the litigation at issue was a collective effort by several truckers, but the Court in *Bill Johnson’s Restaurants* applied the petition right to a single plaintiff. Other petition right cases also have involved a single petitioner.²⁹⁶

Moreover, the history of the Petition Clause suggests that the linkage of the assembly and petition rights was in response to English attempts to limit the ability of groups to petition and thus was an effort to secure the collective right to petition, as opposed to an effort to restrict the individual right.²⁹⁷ Finally, other freedoms in the Bill of Rights, such as the Fourth Amendment, use the term “people” but nonetheless protect individuals.²⁹⁸ Thus, an individual has

293. See *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 334–35 (1985) (noting “conceptual difficulties” in applying the union litigation cases to an individual claim because “the First Amendment interest at stake [in the union cases] was primarily the right to associate collectively”); see also McGowan & Lemley, *supra* note 237, at 386 n.447 (suggesting that *Button* addressed only pre-filing group organization and planning of litigation); Spanbauer, *supra* note 253, at 43–49 (interpreting the group litigation cases as requiring the presence of a First Amendment freedom other than petitioning); Brickman, *supra* note 3, at Part IV.B (noting the associational elements of the court’s First Amendment court access doctrine).

294. The term “right” appears only once, as a preface to both assembly and petition, and these rights appear together in one clause, separated by a semicolon from the Speech and Religion Clauses: “Congress shall make no law . . . abridging . . . ; the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

295. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (emphasis added).

296. See *McDonald v. Smith*, 472 U.S. 479 (1985), discussed *infra* notes 336–38.

297. See *id.* at 484 n.5 (noting that the right to petition was under attack in England in the late eighteenth century particularly with regard to the right of large groups to petition). See *generally Access to Court*, *supra* note 13, at nn. 228–47 (discussing the history of the right to assemble in relation to the right to petition).

298. The Fourth Amendment, for example, guarantees only the right of “the people” to be safe from unreasonable searches. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

the right to gain access to court and need not join with other plaintiffs before her right is protected under the First Amendment.

4. *The right to gain initial access through filing a claim*

A final issue of interpretation is the extent of the right in terms of the processing of the claim. Does the Petition Clause protect only initial access to court or does it extend beyond the filing of the complaint and protect the processing of the claim? The protection against injunction of meritorious suits in *Bill Johnson's Restaurants* suggests some protection of the processing of the claim, but as I will explain in more detail in Part II.C below, I contend that this protection arises as a form of “breathing room” and does not define the core right. In other words, I argue the core right under the Petition Clause is the right of initial access only—the right to file a claim for relief—and any further protection of the processing of the claims comes either under this First Amendment breathing room doctrine,²⁹⁹ or, as a matter of due process, under the Fifth and Fourteenth Amendments.

That the Petition Clause protects only the ability to request relief seems to be a logical reading of the Petition Clause, which preserves the right “*to petition*.” This is the view taken by the Supreme Court with regard to petitions to the other branches of government. In *Minnesota State Board for Community Colleges v. Knight*,³⁰⁰ the Court held that the Petition Clause does not impose any duty on the government to listen or respond to executive petitions: “Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.”³⁰¹ Instead, “[d]isagreement with public

299. I discuss breathing room analysis in detail *infra* Part II.C.

300. 465 U.S. 271 (1984). In *Knight*, state employees challenged a statute that required the state employer to meet only with the designated representative of public employees and did not require it to meet with individuals. The employees claimed “an entitlement to a government audience for their views.” *Id.* at 282.

301. *Id.* at 285 (relying in part on THE FEDERALIST No. 23 (James Madison)); *see also* Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979) (per curiam) (“The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so But the First Amendment does not impose any affirmative obligation to listen, to respond or, in this context, to recognize the association and bargain with it.”).

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policy and disapproval of official's responsiveness . . . is to be registered principally at the polls."³⁰²

This is a bone of contention to some scholars. They argue that the petition right is meaningless without a duty of response and that the petition right historically included at least some form of response.³⁰³ These arguments have some merit. Petitions certainly are more meaningful if the petitioner knows the government must respond in some form. Additionally, petitions played an important role in the early development of our state and federal governments. Indeed, the agenda of the First Congress (the authors of the Petition Clause) was shaped largely by citizen petitions.³⁰⁴ But these consid-

302. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)). In *Bi-Metallic*, Justice Holmes rejected the argument that due process required that individual taxpayers be heard before the government increased taxes: "Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule There must be a limit to individual argument in such matters if government is to go on." 239 U.S. at 445-46.

303. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2169 (1998); Spanbauer, *supra* note 253, at 33-34, 49-51; Note, *Suits Against the Government*, *supra* note 253, at 1116-17; David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 *L. & HIST. REV.* 113, 114-15 (1991); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142, 145-149, 155-167 (1986); Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 *YALE L.J.* 569 (1987); Edmund G. Brown, *The Right to Petition: Political or Legal Freedom*, 8 *U.C.L.A. L. REV.* 729, 732-33 (1961). This is not the universal view of legal academics; some advocate that the petition right is one of access only. See Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 *NW. U. L. REV.* 739, Part III (1996) (arguing that the right to petition does not necessarily include a duty of response and that the duty and nature of the response must be considered independently as to each branch of government); McGowan & Lemley, *supra* note 237, at 385, 389 (noting that under *California Motor Transport* "the First Amendment grants a right of access—it gives a petitioner the right to get inside the courthouse door" and that "[o]nce in court, plaintiff's First Amendment rights are at the mercy of the rules of the forum"); Norman B. Smith, *Shall Make No Law Abridging . . . : An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 *U. CIN. L. REV.* 1153, 1191 (1986) (stating that "the petition clause of the first amendment protects only the core petitioning activities—preparing and signing a written petition and transmitting it to the government" and that "[a]ny protection of activities beyond this scope is derived from other constitutional rights"). See generally *Court Access*, *supra* note 13 (summarizing academic commentary concerning a duty of response).

304. See 8 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS* xxv.

The accomplishments of the petitions submitted to the First Congress were considerable. Their impact on the legislative agenda transcended private claims, in several instances influencing legislative business of far-reaching significance; for example, the acts relating to copyrights and patents, federal revenues and their collection, the

erations do not necessarily mean that a response is part of the core right. Petitions, even without a guaranteed response, still act to inform the government and give the petitioner at least the chance of a response. In addition, some historical evidence suggests that even members of the First Congress might have viewed responses as discretionary and as a matter of political prudence,³⁰⁵ as suggested by the Court in *Knight*.³⁰⁶

This debate may be of little consequence when applied to judicial petitions. To the extent that the scholars advocate a response duty under the Petition Clause, most argue that the duty is minimal and may require only a summary denial.³⁰⁷ Due process already requires

federal debt, the location of the capital, the mitigation of revenue penalties, and the land office.

Id.; see generally *id.* at 1–462 (surveying actions on petitions presented to the First Congress).

305. For example, in the House debates concerning the adoption of the Bill of Rights, Representative Gerry phrased the government's response to petitions as a "hope" and described it as a matter within the discretion of the individual government agent. House Debates, August 15, 1789, reprinted in 2 SCHWARTZ, *supra* note 215, at 1095–96. "I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents. I hope we shall never presume to think that all the wisdom of the country is concentrated within the walls of this House." *Id.* at 1269 ("[T]he amendment [proposing a right to instruct] does not carry the principle to such an extent [to bind representatives], it only declares the right of the people to send instructions; the representative will, if he thinks proper, communicate his instructions to the house, but how far they shall operate on his conduct, he will judge for himself."). See generally *Access to Court*, *supra* note 13, at Part III. B.1 (surveying evidence and arguments against a duty of response).

306. See *supra* notes 300–02 (discussing *Knight*). Some academics also cite political practicality as the explanation for the early Congressional response to petitions:

It is true that the early congresses took petitions quite seriously and sought, at least through committee referrals, to address them all. There may have even been individual members of Congress who thought it their legal duty to treat petitions in this fashion. But this confuses expectations with legal requirements. There are very good reasons why legislative bodies will make every effort to treat citizen petitions seriously. Petitions are, or at least were in the seventeenth and eighteenth centuries, among the best sources of information for legislatures about citizen concerns, and careful attention to those concerns may improve the perceived legitimacy of the government, or even stave off revolution. But that does not mean that such treatment of petitions is a legal requirement. That is especially true given the Constitution's express provisions for periodic election of legislative officials The right to petition emerged in England largely as a substitute for such formal mechanisms of representation. The Constitution, however, expressly chooses electoral representation as the primary means of citizen input and control.

Lawson & Seidman, *supra* note 303, at 761.

307. See Spanbauer, *supra* note 253, at 51 (noting that the historical "right to petition did include both the right to present a written petition and the right to receive a response, which, at a minimum, might be a summary denial").

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at least that much and likely more. Unlike executive or legislative petitions,³⁰⁸ a civil complaint, once filed, invokes a property interest that is subject to due process protection.³⁰⁹ Due process requires that the government give fair and reasonable consideration to a civil complaint once it is filed.³¹⁰ Thus, there is a good “fit” between the two protections. The Petition Clause, with its attendant heightened scrutiny, protects the initial access, the ability to ask for justice, and due process steps in thereafter to guard, through its reasonableness standards, the procedure used to resolve the claim.³¹¹

As I will explain in Part II.C, the First Amendment also applies to processing of the claim, to the extent that governmental denial of fair process would unduly chill the initial filing of winning claims. That protection, however, takes the form of breathing room, which depends on a balancing of interests and which likely would reach the same outcome as a due process reasonableness analysis. This view is consistent with the holding in *Bill Johnson’s Restaurants*. In other words, the core right to file a winning suit, regardless of motive, gets some “breathing room” by allowing a meritorious claim to proceed to judgment. Otherwise, exercise of the core right would be unduly chilled.

308. The Court has held that legislative and executive petitions do not trigger any due process obligation on the government to respond. *See* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

309. *See generally* *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950) (noting that civil actions are a form of property interest and that “there can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing”); *see also infra* note 317 (discussing due process standard).

310. The filing of the complaint puts the government in control of the claim. Filing distinguishes the cases recognizing the due process right of civil plaintiffs to reasonable procedures from those decisions in which the Court narrowly defined due process in terms of the plaintiff’s ability to gain initial access to court. *See supra* note 226 (discussing *Boddie* and other due process cases addressing initial access). In addition, some observers argue that the federal courts’ duty to respond derives from the nature of the “judicial power” under Article III of the Constitution. *See* *Lawson & Seidman, supra* note 303, at 757–58.

311. The Supreme Court explained this different level of protection afforded due process and First Amendment freedoms, including the right to petition, in *Thomas v. Collins*, 323 U.S. 516 (1945), which I discuss *infra* notes 313–15. *See also* *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316, 351–52 (E.D.N.Y. 2000) (noting the difference between the right of initial access, which is protected by the First Amendment, and the subsequent right to prosecute or defend the claim, which raises questions of procedural due process under the Fifth and Fourteenth Amendments).

The difference in defining the core right under the Petition Clause and protecting closely related activity through breathing room or due process analysis may seem like one of semantics. However, as I explain and demonstrate below, the correct definition of the core First Amendment right is essential to protection of the petition right because the definition determines the level of protection. Application of doctrines such as strict scrutiny and breathing room analysis turn on the definition of the core right. Here, that core right was the right of Ms. Jones individually to file winning claims in court regardless of her motive.

C. *Testing Rule 11(b)(1) Against Ms. Jones's Right to Petition Courts*

Although *Bill Johnson's Restaurants* and *Professional Real Estate Investors* are useful tools in recognizing and defining the right of court access under the Petition Clause, they do not tell us what the right of petition would have meant in the *Jones* case in response to a Rule 11 challenge. Those cases interpreted the Petition Clause in the context of two specific statutes and their related policies. A court rule such as Rule 11 necessarily differs from those substantive statutes, both in its terms and in its policies. We must turn to broader First Amendment principles and methodology, principally the strict scrutiny and breathing room analyses, to actually test Rule 11 against Ms. Jones's rights.³¹² I explain this basic methodology in the first

312. A few commentators have briefly examined the validity of the improper purpose clause against a Petition Clause challenge, but not in detail and with mixed results. See Myers, *supra* note 253, at 1246–50 (arguing that *Professional Real Estate Investors* has a constitutional element that would apply to limit application of the Rule 11 improper purpose clause); Thies Kolln, Comment, *Rule 11 and the Policing of Access to Courts after Professional Real Estate Investors*, 61 U. CHIC. L. REV. 1037 (1994) (arguing that *Professional Real Estate Investors* is based on policy, but noting that if it were based on the First Amendment, it would call into question the Rule 11 improper purpose clause); Note, *Suits Against the Government*, *supra* note 253, at 1123–24 (concluding that the improper purpose clause carries out the sham exception and does not violate the interests of the Petition Clause); Charles S. Heish, Note, *Professional Real Estate Investors: The Line Between Patent and Antitrust*, 7 HARV. J.L. & TECH. 173, 183–86 (1993) (arguing that *Professional Real Estate Investors* will not have much impact because Rule 11 still imposes an improper purpose standard). In addition, some scholars have suggested that other aspects of Rule 11 might present a Petition Clause problem. See MONROE H. FREEDMAN, UNDERSTANDING LAWYER ETHICS 80–81 (1990) (questioning the chilling effect of Rule 11 and noting that “adequate regard has not been given to constitutional . . . objections to Rule 11 and similar rules”); Spanbauer, *supra* note 253, at 58–63 (arguing that Rule 11 infringes upon the right to petition by imposing sanctions for merely negligent conduct as opposed to subjective bad faith); Thomas A. Waldman, Comment, *SLAPP Suits*:

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section below and apply it in the second. Ultimately, I conclude that the First Amendment would have overridden any potential use of Rule 11(b)(1) against Ms. Jones based solely on her motive. I reach this conclusion even with regard to sanctions imposed after Ms. Jones lost her claims on summary judgment. I therefore arrive at a different outcome than that suggested by *Bill Johnson's Restaurants*, not by rejecting that case's holding, but instead by balancing the different interests at stake in a Rule 11 challenge.

1. *The methodology of First Amendment protection*

The Court has not developed a comprehensive scheme to analyze challenges under the Petition Clause. In its few petition cases, the Court for the most part has announced its decision, without dictating a particular mode of analysis. Nevertheless, the Court has suggested use of its Speech Clause methodology. In the 1945 case of *Thomas v. Collins*,³¹³ the Court declared that the rights of petition, speech, and press, “though not identical, are inseparable,”³¹⁴ and

Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation, 39 U.C.L.A. L. REV. 979 (noting a First Amendment right of court access and arguing that Rule 11 is vague and chills public interest litigation); Note, *Suits Against the Government*, *supra* note 253, at 1124–27 (arguing that the reasonable inquiry prong of Rule 11, as applied in suits against the government, unduly chills such suits and is invalid under the Petition Clause); Donna Marino, Note, *Rule 11 and Public Interest Litigation: The Trend Toward Limiting Access to Federal Courts*, 44 RUTGERS L. REV. 923 (1992) (arguing that Rule 11 is vague and chills First Amendment values and resort to court). A few courts have considered the validity of state statutes similar to Rule 11, but the federal courts apparently have not yet so examined Rule 11. See *Wolfgram v. Wells Fargo Bank*, 61 Cal. Rptr. 2d 694, 704 (Cal. Ct. App. 1997) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983), recognizing that “[b]aseless litigation is not immunized by the First Amendment right to petition” and examining the California “vexatious litigant” statute); *Gordon v. Marrone*, 616 N.Y.S.2d 98, 102 (App. Div. 1994) (considering New York sanctions statute and rejecting the “contention that an award of sanctions . . . here impermissibly infringes upon his First Amendment right of access to the courts”); see also *Eastway Constr. Corp. v. New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986) (noting that in awarding sanctions under Rule 11, the court should consider the deterrent effect on court access, especially in suits against the government: such suits “publicize grievances and thus permit the ventilation of private outrage that the First Amendment’s right to petition protects”).

313. 323 U.S. 516 (1945).

314. The Court explained the relationship of petition and speech:

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article’s assurance.

Id. at 530 (citations omitted).

demand greater protection than other rights:

[T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice. . . .

For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, . . . particularly when this right is exercised in conjunction with peaceable assembly.³¹⁵

This greater protection often takes the form of “strict scrutiny” under which the government may intrude on a First Amendment right only if it has a compelling state interest and the government narrowly tailors its regulation to achieve that interest.³¹⁶ As the *Thomas* Court noted, this strict scrutiny is more protective than the analysis applied to protect due process. Protection of due process requires only that the state reasonably aim—not narrowly tailor—its regulation to achieve a legitimate state object—not necessarily a compelling state interest.³¹⁷

Unfortunately, a conclusion that Speech Clause doctrines govern Petition Clause cases does not necessarily simplify the analysis. The Court’s speech jurisprudence is notorious for its varying, and sometimes inconsistent, standards and approaches. Despite the *Thomas* Court’s invocation of strict scrutiny doctrines in 1945, the Court cannot today even agree as to what constitutes strict scrutiny, let

315. *Id.*

316. *See* NAACP v. Button, 371 U.S. 415, 438–44 (1963) (describing and applying the strict scrutiny test applicable to First Amendment freedoms); *see infra* note 335 (quoting *Button*).

317. *See* Jones v. Union Guano Co, Inc., 264 U.S. 171, 181 (1924) (holding that a court will not invalidate a precondition to filing suit under due process if “the condition imposed has a *reasonable* relation to a *legitimate* object” (emphasis added)).

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alone whether it applies to a particular speech challenge.³¹⁸ I try to avoid this controversy and complexity by borrowing perhaps one of the more well known speech doctrines—that of the *New York Times* line of defamation cases³¹⁹—and applying it only in broad strokes. I propose a two-part approach to Petition Clause court access analysis. First, strict scrutiny should govern restrictions that intrude upon activity within the core right to petition, or in other words, the petition activity that the First Amendment most values, the filing of winning claims. Second, breathing room analysis should apply to restrictions that regulate activity related to but on the periphery of the core First Amendment activity, such as the processing of claims.

The *New York Times* approach to defamation cases suggests this two-tiered analysis. In these cases, the Court first categorizes speech as within or without the core First Amendment right. False speech is outside the core right. The *New York Times* case concerned false speech, so the Court did not address the proper treatment of true speech there, but true speech seemingly would garner protection under some form of heightened scrutiny. In the defamation context, such scrutiny likely would mean that “true” speech may not be subject to civil liability.³²⁰ In other contexts, the Court has applied dif-

318. See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring) (arguing that the strict scrutiny standard found its way into First Amendment jurisprudence “by accident”). In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), for example, members of the Court disagreed as to whether strict scrutiny applied to a hate speech ordinance that regulated “fighting words,” a category of speech not traditionally considered to be within the core right of protected speech. Justice Scalia, writing for the Court, characterized the ordinance as one invoking viewpoint and mandating strict scrutiny. *R.A.V.*, 505 U.S. at 395–96; see also *infra* notes 372–81 (discussing *R.A.V.*, but Justice White argued that fighting words warranted no protection); *R.A.V.*, 505 U.S. at 399–400 (“This Court’s decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression.”). Likewise, in recent cable access cases, members of the Court have disagreed as to the proper standard of review. See *Denver Area Educ. Sys., Inc. v. F.C.C.*, 518 U.S. 727, 786 (1996) (Kennedy, J., concurring in part, dissenting in part) (criticizing the plurality opinion for not applying strict scrutiny despite its use of “synonyms” for strict scrutiny).

319. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

320. The Court has suggested this result, but it has not completely foreclosed defamation liability for all true speech, such as true but defamatory speech about private individuals and private subjects. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that the First Amendment barred criminal sanctions against a speaker whose statements were true but spoken with ill will, but the Court expressly limited its holding to statements about the performance of public officials in their jobs. See *id.* at 77–78. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Court extended the doctrine to public figures and to civil liability other than

ferent standards, which have allowed some regulation of even true speech; however this analysis involves the issue that I seek to avoid, the complex question of the varying standards of review.³²¹ Moreover, these different holdings, while not the product of “strict scrutiny” analysis in its literal sense, reflect at least the spirit of strict scrutiny in that they tolerate very little regulation of “true” speech, the “core” right under the Speech Clause.³²²

The primary import of *New York Times* was its treatment of false speech as outside of the core right. The Court gave true speech “breathing room” by applying the actual malice standard to false speech: it immunized from liability false and defamatory speech about public issues or public figures, unless the speaker spoke with actual knowledge or reckless disregard for the falsity of the statement.³²³ Because liability does not attach to merely negligent false speech, the actual malice standard protects speech by putting the speaker in control of his liability.³²⁴ Thus, in order to protect the ex-

defamation, but again limited its holding. *See id.* at 53 (“In [*Garrison*], we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”). In *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986), the Court held that the First Amendment required a private figure plaintiff to prove the falsity of the statement (as opposed to placing the burden of proof and risk of doubt on the speaker), but even the *Hepps* decision left some gaps. The case involved a media defendant and speech of public concern, and the Court limited its holding to these facts. *See id.* at 778, 779 n.4. Thus, the Court has suggested but not unequivocally held, that all true speech is absolutely immune from civil liability, regardless of the motive of the speaker. *See generally* Linda Kalm, *The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Nonmedia Defendants*, 62 N.Y.U. L. REV. 812 (1987) (summarizing current law and arguing that private plaintiffs should not have to prove falsity in defamation suits arising from speech about private issues).

321. The Court, for example, gives the government greater leeway in regulating commercial speech and speech in private fora. It allows reasonable regulation of the time, place, and manner of such speech. *See generally* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH (1998).

322. *See generally id.* at ch.2 (providing an overview of free speech methodology and noting that the term “heightened scrutiny” describes the Court’s approach in most speech cases).

323. *See New York Times, Co.*, 376 U.S. at 279–80. The Court also gave the speech at issue in *New York Times* added breathing room in the form of a higher burden of proof: public figure plaintiffs must prove actual malice by clear and convincing evidence. *See id.* at 285.

324. Professor Post explains how the *New York Times* actual malice standard protects speech, whereas a bare intent requirement can unduly restrict speech:

The reason the use of an intent requirement is constitutionally impermissible in the tort of intentional infliction of emotion distress, but constitutionally acceptable in the actual malice standard, is that the latter does not use the criterion of intent to

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pression of *true* speech about important issues, the Court immunizes some false speech outside the core right of the First Amendment (i.e., negligent false speech about public officials).³²⁵

The form of breathing room depends upon the relative interests at stake and requires a balancing of interests. In *New York Times*, the speech received the protection of the actual malice standard because it concerned public officials and important social issues. In *Gertz v. Welch*, the Court refused to extend the protection of the actual malice standard to persons who defamed private persons, as opposed to public figures.³²⁶ Liability based solely on a negligence standard still has a chilling effect on the speech, but the *Gertz* Court allowed this chilling effect due to the different balance of interests. Private speech is not as important, under the First Amendment, as speech about public figures, and the state interest in protecting a private person is greater than that in protecting public officials who can protect themselves.³²⁷ Nevertheless, the *Gertz* Court gave some breathing room to

enforce a civility rule. . . . The purpose of the actual malice standard is not to demarcate any such “boundary between morally acceptable and unacceptable modes of political discussion”; it is rather to forge “an instrument of policy, to attain the specific end of minimizing the chill on legitimate speech.” The element of intent in the actual malice standard accomplishes this objective by placing a defendant, to the maximum extent possible, in control of the legality of his own speech.

Post, *supra* note 285, at 649 (citations omitted). See also *Motive Restrictions*, *supra* note 13, at 2 n.6 (discussing the different restrictive and protective roles of motive in regulating speech).

325. See *Gertz v. Welch*, 418 U.S. 323, 342 (1974) (“[W]e have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.’ To that end this Court has extended a measure of strategic protection to defamatory falsehood.”).

326. See *id.* at 334, 342.

327. The *Gertz* Court explained these different interests:

[W]e have no difficulty in distinguishing among . . . plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

. . .

[Public officials and public figures also assume some of the risk of defamation]. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an “influential role in ordering society.” . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in

speech about private persons by forbidding presumed or punitive damages because such damages had too chilling an effect.³²⁸

Other speech doctrines, such as the presumption against prior restraints, the vagueness rule, and the overbreadth doctrine, grow out of a similar concern about chilling effect. First, courts look critically at prior restraints on speech, even of non-core speech, because, unlike subsequent punishment, prior restraints stop speech, rather than merely deter it.³²⁹ Although prior restraints usually take the form of an injunction, preconditions to speech, such as a permit scheme, can have the same effect.³³⁰ The vagueness doctrine requires specificity in laws governing speech so that persons can determine what speech the law permits.³³¹ A vague statute that does not clearly

their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.

Id. at 344–46 (citations omitted).

328. The *Gertz* Court explained that the possibility of punitive and presumed damages both increased the chilling effect on speech and had less governmental interest:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms . . . More to the point, the States have no substantial interest in securing for plaintiffs, such as this petitioner, gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.

Id. at 349–50. The Court later refined this aspect of breathing room by distinguishing *Gertz* as involving speech of public concern and holding that presumed and punitive damages could be awarded if the speech concerned purely private matters and persons. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).

329. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (setting out prior restraint rule); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1020 (5th ed. 1995) (noting that with subsequent punishment “the ideas or speech at issue can be placed before the public” but that “prior restraint limits public debate and knowledge more severely. *Punishment of speech, after it has occurred, chills free expression. Prior restraint freezes free speech.*” (emphasis added)). *See generally* SMOLLA, *supra* note 321, at ch. 15 (discussing prior restraints).

330. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (noting that an “ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in ‘the archetype of a traditional public forum’ . . . is a prior restraint on speech”).

331. Vagueness is a due process concern as to all statutes. *See Connally v. General Constr.*

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differentiate between permissible and outlawed speech unduly chills exercise of the permitted speech. Finally, the related doctrine of overbreadth invalidates laws that unduly deter speech by reaching too broadly and restricting both protected and unprotected speech.³³² A key aspect of the overbreadth doctrine, sometimes termed a rule of standing, is that it allows a person to challenge an overbroad statute even though the plaintiff's own conduct falls outside of the core activity protected by the First Amendment.³³³ This helps avoid the chilling effect that the statute may have on other persons.

Thus, in the defamation context, the Court protects core speech through two principal means. First, the speech within the core right of free expression—true speech—gets nearly absolute protection. Second, the core speech is protected through the application of the various breathing room doctrines. By protecting non-core speech under certain circumstances, such as barring harsh penalties or prior restraints, the Court gives breathing room to the exercise of the core right.

As noted above, I advocate that the courts use this two-tiered approach to protect the right to petition courts. This is not a great leap, for the Court itself has suggested this approach for petition

Co., 269 U.S. 385, 391 (1926) (“a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”). When applied to First Amendment freedoms, however, the doctrine is even more exacting. *See NAACP v. Button*, 371 U.S. 415 (1963).

332. Not just any potential improper application will invalidate a statute that otherwise properly reaches activity within the police power of government. The test is whether the statute substantially burdens protected activity. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1077 (1991). (“The ‘overbreadth’ doctrine applies if an enactment ‘prohibits constitutionally protected conduct.’ . . . To be unconstitutional, overbreadth must be ‘substantial.’”) (citations omitted).

333. *See NAACP v. Button*, 371 U.S. 415, 432 (1963) (“[I]n appraising a statute’s inhibiting effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.”). Professors Nowak and Rotunda assert that “it is not precise to think of the overbreadth problem as a form of standing”:

Rather, one should recognize that when the Court is asked to strike a law on its face as being overbroad, the individual is asserting that no one—including persons who speech is unprotected by the First Amendment—can be subjected to punishment under a statute so sweeping that it could include both protected and unprotected speech within its scope.

NOWAK & ROTUNDA, *supra* note 329, at 999.

cases. First, the *Thomas* case established the rights of petition and speech as corollary freedoms to which strict scrutiny applies.³³⁴ Likewise, the Court in *Button* warned that statutes touching on First Amendment rights, including the right to petition, mandate strict scrutiny and “narrow specificity”:

[S]tandards of statutory vagueness are strict in the area of free expression [T]he danger [is] tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.³³⁵

In *McDonald v. Smith*,³³⁶ the Court applied the *New York Times* breathing room doctrine to petitions. There, a defamation defendant claimed that his allegedly defamatory statements enjoyed absolute immunity because they were stated in a petition, as opposed to another form of speech.³³⁷ The Court rejected this view and held the statements to the standards of *New York Times*.³³⁸ *McDonald* drew attention (and criticism) due to its rejection of absolute immunity for petitions,³³⁹ but the Court already had rejected this in the *Noerr* line

334. See *supra* notes 313–15.

335. *Button*, 371 U.S. at 432–33 (citations omitted).

336. 472 U.S. 479 (1985).

337. McDonald wrote President Reagan to urge that he not appoint Smith as United States Attorney. Smith sued for defamation, and McDonald claimed that his letter was absolutely protected under the Petition Clause. See *id.* at 480–81.

338. The Court rejected preferential treatment of petitions:

To accept petitioner’s claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. . . . These First Amendment rights are inseparable, . . . and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

Id. at 485 (citations omitted).

339. A number of academic commentators have criticized *McDonald*, primarily because it did not adequately protect petitions. See Mark, *supra* note 303; Spanbauer, *supra* note 253; Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); Higginson, *supra* note 303; Smith, *supra* note 303 at 1154–70; Robert A. Zauzmer, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 (1984).

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of cases.³⁴⁰ Instead, *McDonald* is important here because it applied the breathing room analysis to a petition challenge.³⁴¹

We nevertheless must use caution in applying the defamation breathing room doctrine to petition cases, such as a Rule 11 challenge in the *Jones* case. The actual malice standard was appropriate for the executive petition in *McDonald*, because it was a defamation case, but the defamation distinctions between public and private speech likely are not suitable for judging challenges to restrictions on court access. The *New York Times* defamation standards turn in large part on whether the speech at issue involves a matter of public interest, but all civil lawsuits involve matters of some public concern in that they invoke laws or ask for change in the law. The governmental interests in avoiding harm also differ in the wrongful litigation context from that in defamation suits. For example, a wronged defendant often suffers the same reputational harm as the plaintiff in a defamation case, but unlike a defamation plaintiff, he also must incur the cost of defending a lawsuit, a cost “forced” upon him by the government itself.³⁴² Rather than applying the particular protections of the defamation cases, such as the actual malice standard, we should protect the right to petition courts by looking at the factors underlying the Court’s development of the breathing room standards—the potential effect of the law (Rule 11) and the competing interests underlying both the rule and the First Amendment freedom at issue (Ms. Jones’s right of court access).

The Court in *Bill Johnson’s Restaurants* reflected this general approach. Citing *Gertz*, the Court excluded losing suits from the core right to petition,³⁴³ and although the Court did not use the terms

340. See *supra* notes 245–52 and accompanying text.

341. See *Cardtoons v. Major League Baseball Players Ass’n*, 208 F.3d 885, 896–99 (10th Cir. 2000) (J. Lucero dissenting from en banc decision of 10th Circuit) (arguing that the “breathing space” philosophy of *McDonald* and *New York Times* required some protection to pre-litigation letters between private parties even though the letters were not directed to the government and thus not within the core right to petition the government).

342. I further explain these differences in *Access to Court*, *supra* note 13, at 675–76. See also *McGowan & Lemley*, *supra* note 237, at 392–97 (analyzing *Noerr* immunity as applied to courts and arguing that *New York Times* “buffer zone” is not appropriate for courts because courts must have “near-plenary authority to control the speech” in courts).

343. *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“Just as false statements are not immunized by the First Amendment right to freedom of speech [citing *Gertz*], baseless litigation is not immunized by the First Amendment right to petition.”) (citations omitted). The Court elsewhere in the opinion defined baseless litigation as losing suits. See *supra* note 263.

“breathing room” or “prior restraint,” it gave some breathing room by applying a lower standard of merit to protect ongoing suits from injunction.³⁴⁴ I expand on this approach. I apply strict scrutiny to the extent that a rule directly regulates the core right to file a winning claim, and I apply general breathing room standards to test restrictions on losing claims and other activity outside of the narrow scope of the core right to petition courts.

2. *Strict scrutiny and breathing room analyses of Rule 11(b)(1) in Jones*

My Petition Clause analysis of Rule 11(b)(1) in the *Jones* case consists of three parts. The first looks at Rule 11 as an initial barrier to court access and applies strict scrutiny to the certification component of Rule 11(b)(1). Because this aspect of Rule 11 would bar even winning claims, if improperly motivated, Rule 11 is invalid on its face, and Ms. Jones could have raised this challenge to defeat any motion by the President, regardless of the stage at which the President filed it. The other two parts are additional arguments against use of Rule 11(b)(1). They apply breathing room doctrine and depend on the stage at which President Clinton would have raised his Rule 11 motion. If the President had tried to use Rule 11(b)(1) to dismiss the case early, before any determination on the merits, the analysis would ask if such a dismissal—an obvious and complete impediment of the *processing* of her claim—would unduly chill exercise of the core right to *file* claims. If the President instead waited and sought monetary sanctions after Judge Wright granted summary judgment against Ms. Jones, the analysis would ask if the imposition of sanctions to her *losing* claim would unduly chill exercise of the core right to file *winning* claims. I conclude that Rule 11(b)(1) would have failed First Amendment analysis at both stages, even after Ms. Jones lost her claims.

a. Strict scrutiny of Rule 11(b)(1) as a precondition to filing suit. Rule 11 is not just a post-litigation sanctions provision. It also is a precondition to court access. It requires litigants to stop, think, and

344. That the Court allowed injunctions under some circumstances—if the employer’s on-going state court suit lacked merit and was filed for a retaliatory purpose—further suggests a balancing of interests test. See *Bill Johnson’s Restaurants, Inc.*, 461 U.S. at 743; see also *supra* note 264 (reprinting excerpt from *Bill Johnson’s Restaurants*).

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certify their pleadings before they can gain access to court.³⁴⁵ Rule 11(b)(1), in particular, tells potential plaintiffs to consider their motives before they file suit and instructs them that they may file their complaint only if they can certify to the court that they do not have any improper purpose. The rule thus acts as an initial barrier to court access for those plaintiffs with improper purposes.³⁴⁶

The Rule 11(b)(1) motive barrier is indifferent to the merit of the claim. This barrier directly impacts the plaintiff's ability to file even a winning claim, the core right protected under the Petition Clause. The rule therefore is invalid unless it can pass strict scrutiny. This strict scrutiny analysis is a two-part test. Rule 11(b)(1) must both serve a compelling state interest and narrowly achieve that aim.

As a preliminary matter, we must consider how this issue would have arisen in the *Jones* case. After all, Rule 11(b)(1) obviously did not stop Ms. Jones from filing her claims for ulterior aims. Moreover, because she did not win her suit, her claim was not within the core right of the Petition Clause. This may be true, but Ms. Jones could have attacked Rule 11(b)(1) as invalid on its face. Otherwise, the deterrent effect of Rule 11(b)(1), when viewed solely as a precondition to filing suit, might never be challenged. A litigant with an improper purpose will either choose to forego her suit or file suit and wait for her opponent to raise Rule 11(b)(1). Because the former litigant has chosen not to pursue her claim and therefore has no opportunity to challenge Rule 11(b)(1), the Court allows the latter litigant to raise the First Amendment challenge—and subject the rule to strict scrutiny—even if she is not directly impacted.³⁴⁷

The first step of strict scrutiny analysis is to determine whether the government has a compelling interest behind its regulation of the First Amendment activity. Although the federal rules advisory committee has never succinctly stated the precise purpose of Rule 11,³⁴⁸

345. FED. R. CIV. P. 11 advisory committee's note (1993) (noting that the 1993 rule "continues to require litigants to 'stop-and-think' before initially making legal or factual contentions").

346. The certification requirement thus is akin to the permit scheme that the Court in *Forsyth County* characterized as a prior restraint. See *supra* note 330. However, the certification requirement is self-implementing and does not require prior government action and therefore is less burdensome than a permit or license requirement.

347. This is part of the overbreadth doctrine, under which the Court allows litigants to challenge statutes even though their own activity may not be within the core protected right. See *supra* notes 332–33 and accompanying text.

348. The advisory committee notes instead state the aims of the two revisions to Rule 11.

the Supreme Court, which has ultimate rulemaking authority,³⁴⁹ has stated that “the central purpose of Rule 11 is to deter baseless filings and thus . . . streamline the administration and procedure in federal courts.”³⁵⁰ This deterrence seems to be a compelling purpose, for a number of reasons. First, baseless suits consume the limited resources of the courts, waste taxpayer dollars, and hinder the processing of meritorious claims.³⁵¹ Frivolous suits also burden the defendant with the costs of defending such suits, damage his reputation, and cause him emotional distress. To be sure, many of these costs, whether to taxpayers, other litigants, or the defendant, are incurred with every lawsuit, frivolous or not, but the suit brings no positive return when it is frivolous. The government has a compelling interest in avoiding this waste and in protecting its citizens from these injuries.

The problem with this justification for Rule 11(b)(1) is the second prong of strict scrutiny. Rule 11(b)(1) is not narrowly tailored to achieve the end of avoiding frivolous claims. Rule 11(b)(1) might deter some frivolous lawsuits—because such suits usually are accompanied by ill motives—but the improper purpose prohibition is not necessary for this deterrence. Paragraphs (b)(2) and (b)(3) of Rule 11 bar legally and factually deficient lawsuits.³⁵² Since these other clauses of Rule 11(b) already bar a frivolous suit, the only added effect of Rule 11(b)(1) is to reach meritorious suits (even those that state winning claims) that the plaintiff files for an improper aim. Thus, if deterrence of frivolous claims is the sole interest behind Rule 11(b)(1), it fails strict scrutiny.

This leaves the question whether Rule 11(b)(1) can be justified as serving any other compelling purpose. Does the government have

Perhaps the most succinct statement is in the notes to the 1983 revision to the rule, which state that the rule, since its inception, has provided sanctions “to check abuses.” FED. R. CIV. P. 11 advisory committee’s note (1983). *See also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (noting that the purpose of Rule 11 must be drawn from its history and “by an understanding of the deficiencies in the original version of Rule 11”).

349. *See supra* note 43 (discussing the Court’s rulemaking authority under the Rules Enabling Act).

350. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

351. In a Petition Clause challenge to federal restrictions on lobbying, the Court held that Congress had a “vital national interest” in regulating lobbying to prevent the voice of the people from otherwise being “drowned out by the voice of special interest groups.” *United States v. Harriss*, 347 U.S. 612, 625 (1954).

352. *See supra* note 1.

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an interest in regulating motive itself? Rulemakers obviously had some purpose behind Rule 11(b)(1), but whether this aim extended beyond deterrence of frivolous claims is open to question. In fact, as discussed in Part I.C, we are not sure that the rulemakers meant to apply Rule 11(b)(1) to meritorious complaints, let alone what their purpose might have been in such an application. The rulemakers' silence on this question, combined with the refusal of many courts to apply the improper purpose clause to meritorious claims, certainly undermines any argument that the rule serves a compelling interest.³⁵³

However, the literal language of the rule would apply the improper purpose standard to non-frivolous claims, and there is some suggestion in the advisory committee notes that the clause was meant to prevent "other" types of abuse. The committee's citation to the *DASA* case suggests that the clause was intended to stop litigants from using the federal courts for their own collateral economic purpose.³⁵⁴ Similar forms of abusive collateral purposes would include use of the litigation process as a weapon or, as in the *Jones* case, to achieve publicity and political gain. The government has a reasonable interest in avoiding the use of its courts for such personal gain or other ill purposes. By prohibiting such uses, the government maintains the integrity of its courts and protects citizens from this type of harm. But a reasonable aim is not enough to survive strict scrutiny analysis, and this justification for Rule 11(b)(1) fails on a variety of levels.

First, the interest in avoiding these collateral aims does not seem compelling. The filing of a *winning* claim with the intent to use the litigation for a collateral purpose does not on balance create the same degree of harm that frivolous claims do. Such plaintiffs may selfishly consume scarce judicial resources for private uses, but they still convey the societal benefits of a winning claim: advancement in the law and cure of wrongdoing by the defendant. The defendant will suffer but mostly to the same degree that he would if the plaintiff did not have this ulterior motive. The plaintiff is presenting a winning claim, and the Petition Clause reflects the judgment, made two hundred

353. See *supra* notes 99–104 (discussing Ninth Circuit's decision in *Townsend* and that of other circuits adopting the restrictive view of Rule 11(b)(1)).

354. See *supra* notes 46–56, 110–15 (discussing 1983 advisory committee citation to *DASA*).

years ago, that the benefits of these claims outweigh the burdens. The defendant may incur some unique emotional distress if he knows the plaintiff's ill feelings, but the government's interest in avoiding this marginal additional emotional harm is not compelling.

Moreover, even if the government had a compelling interest in avoiding some collateral aims, Rule 11(b)(1) sweeps too broadly and comes perilously close to regulating the political or other views of plaintiffs. The government obviously does not have a compelling interest in regulating the political views of its citizens; for freedom of political thought is the heart and soul of the First Amendment.³⁵⁵ Yet, the improper purpose clause could have this effect. Take, for example, the *Button* case.³⁵⁶ The majority of society today may cheer the NAACP's political aims behind its desegregation suits, but a significant segment of Virginia society in the early 1960s had the opposite reaction. Had the current version of Rule 11 been applicable at the time, it is not an impossible stretch of the imagination to envision a Virginia court in 1963 making the assessment that the NAACP's purpose was "improper."

The *Jones* case provides a modern example of political mood swings. One observer has provocatively argued that popular politics caused many to condemn Ms. Jones's motives but applaud those of Anita Hill, who made similar charges against the conservative nominee for the Supreme Court, Clarence Thomas.³⁵⁷ Again, it is not difficult to imagine the risk of applying such political preferences through Rule 11(b)(1), under which a court would find Ms. Jones's political motives "improper" and those of Ms. Hill (if she filed suit) proper. This aspect of Rule 11(b)(1) thus fails strict scrutiny. The government does not have a compelling interest in regulating the political views of persons who use its courts to file winning claims, and the rule is impermissibly vague and overbroad in that it arguably reaches the political views of plaintiffs.

The final potential justification of Rule 11(b)(1) is the negative effect of improper purposes on the legal profession. The Court in some cases has recognized such interests as justifying a limited intru-

355. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (noting that political speech is at the "zenith" of First Amendment protection). *See also* *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting) (stating that it is "unassailable" that "[p]olitical speech is the primary object of First Amendment protection").

356. *See supra* notes 224-25, 335 (discussing *Button*).

357. *See supra* note 9 (noting the article by Stuart Taylor, Jr.).

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sion upon First Amendment rights.³⁵⁸ Here, the argument would be that the legal profession is harmed by any use of lawyers to achieve ill aims, whether that of the lawyer or of the client. Again, this justification fails. First, the reputational concern arising from a *client's* motives is too remote to justify an intrusion on the client's right of court access.³⁵⁹ A lawyer who personally has pure motives will not do much, if any, harm to the legal profession when he files a winning claim, even if his client has ill motives. In short, this governmental interest is not compelling.

On the other hand, the government might have a compelling interest in regulating the personal motives of the plaintiff's attorney, as opposed to those of the client. When a lawyer acts out of his own ill motives, he directly injures the reputation of the legal profession. The government has an interest in avoiding not only this reputational harm, but it also has the more important interest of preventing harm to the plaintiff herself. Personal ill motives of the lawyers likely constitute a conflict of interest under which the lawyer will pursue his own aims to the detriment of his client.³⁶⁰ Moreover, a ban on the lawyer's bad motives would have less impact on the plaintiff, who presumably could hire another lawyer without these personal motives. The problem with Rule 11(b)(1), however, is that it is not narrowly tailored to address only the motives of the lawyers. Although a modified rule that addressed only the purposes of the lawyer might pass strict scrutiny, the current rule does not. Its vague wording arguably reaches both the motives of the plaintiff and of her lawyers.

358. The Court recently relied in part upon such "reputational" interests to uphold a moderate limitation on lawyer speech. In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld a 30-day waiting period on lawyer solicitation of accident victims and surviving family members. The Court noted that the state presented substantial evidence of "the outrage and irritation with the state-licensed legal profession," *id.* at 631, and concluded that the state "has a substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Id.* at 635. The dissenting Justices charged that the majority's reliance on the "reputation and dignity of the bar" was antithetical to the principles of the First Amendment. *Id.* at 639–40 (Kennedy, J., dissenting).

359. The Court's decisions in the group litigation cases of the 1960s suggest this remoteness test when assessing the impact of a regulation of lawyers against various First Amendment values in litigation. For example, the Court in *United Mine Workers v. Illinois State Bar Ass'n* held that concerns about lawyer professionalism were "too speculative" to justify their significant intrusion into the union members' First Amendment rights to organize litigation. *See* 389 U.S. 217, 223, 225 (1967); *see supra* notes 232–33.

360. *See supra* note 200 (discussing the professional rules barring conflicts of interests).

This justification for Rule 11(b)(1) thus fails the second prong of strict scrutiny as well as the vagueness and overbreadth doctrines.

For these reasons, Rule 11(b)(1) does not pass strict scrutiny in that it bars the filing of winning claims for improper purposes. The rule is facially invalid. Ms. Jones could have made this argument in response to any Rule 11(b)(1) motion by the President, whether at the beginning of the suit or after its completion. Judge Wright could not have applied Rule 11(b)(1) to sanction Ms. Jones. This would be all that Ms. Jones would have needed to defeat a Rule 11 motion. However, in the next two sections, I outline two additional arguments that she could have made against application of Rule 11(b)(1) to her case, depending on the timing of, and the relief requested, in the President's motion.

3. *Breathing room analysis of early dismissal of Ms. Jones's claims under Rule 11(b)(1)*

Ms. Jones would have an additional First Amendment argument against Rule 11 if President Clinton filed his Rule 11 motion early in the case, to dismiss the suit before Judge Wright ever reached the merits of the claims on summary judgment or otherwise. At this stage, neither the court nor the parties would know whether Ms. Jones had stated winning claims. This argument may seem settled already, either by my analysis of the certification element of Rule 11 in foregoing section, or, by *Bill Johnson's Restaurants*, which held that the NLRB could not enjoin ongoing suits. Yet, neither definitively answers the question here.

The difference between this motion and the pre-filing certification use of Rule 11, discussed above, lies in the fact that the rule's application under this motion would not be to the core right of filing the claim but instead to the related activity of processing the claim. Judge Wright would have been applying Rule 11 to stop Ms. Jones's further pursuit of her claims, not the original filing of her claim. Indeed, to isolate the issue, assume that Judge Wright on this motion would rely solely on the portion of Rule 11(b) that applies to the "later advocating" of a claim, as opposed to its initial filing.³⁶¹ Because this application of the rule would not directly regulate the core right of *filing* claims, it is not judged under strict scrutiny but

361. *See supra* note 40.

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instead breathing room analysis. *Bill Johnson's Restaurants* addressed the processing of the claim, but it does not answer the question here because the Court was concerned with the NLRA, not Rule 11. Breathing room analysis necessarily differs depending on the relative interests at stake. Thus, we must conduct independent breathing room analysis of the potential use of Rule 11(b)(1) to dismiss Ms. Jones's ongoing suit.

Breathing room analysis looks first at the chilling effect of the rule on the core right. Under the assumed use of Rule 11 in this scenario, Judge Wright would dismiss the complaint based solely on Ms. Jones's motive without looking at the merit of her claims. It would not matter if Ms. Jones's suit stated winning claims. If a plaintiff such as Ms. Jones, who had ulterior motives, understood this risk, she might choose not to file suit even if she had winning claims. To be sure, the assumed restriction of the rule to later advocacy would have permitted her to file, but she would have at most only a few weeks or months in court, with no development of the merits and facts of the case. In most cases, the benefits of this short-lived suit would not be worth the time and money necessary to prepare and file the complaint. Some plaintiffs might go ahead and file to achieve at least some of their ulterior motives, such as publicity, but others would forego filing any claim, even winning claims, under this scenario. This use of Rule 11 therefore would have a chilling effect on the exercise of the core right to file winning claims.

The next question is whether this chilling effect is justified by the dangers that Rule 11(b)(1) aims to avoid in this context. The governmental interests behind a ban on improperly motivated advocacy seemingly are the same as those for the initial filing of the claim: deterring advocacy of frivolous claims, preserving the integrity of the judicial system, preventing emotional or other harm to defendants, and maintaining the reputation of the legal profession. As concluded in the preceding section, these interests do not justify a direct ban on the core right, but the analysis here is under the breathing room doctrine, as opposed to strict scrutiny, and the interests need not be compelling or narrowly connected to the regulation at issue. Instead, the interests need only be sufficient to justify the chilling effect on the exercise of the core First Amendment right and its resultant impact on First Amendment values. As noted previously, the effect on the core right is less in this scenario because the plaintiff can at least gain initial access to court and achieve some of her aims (and those

of the Petition Clause) through the mere filing of her complaint. The question is whether the chilling effect is sufficiently minor when balanced against the governmental interests in stopping abusive litigation tactics.

The relative balance of interests might be best seen by comparing the motive ban on later advocacy to yet another form of motive ban, one against filing a particular motion or a discovery paper for an improper purpose.³⁶² A ban on later advocacy would stop processing of the claim altogether. Dismissal of the entire suit obviously will have a far greater impact than a ban on a single motion or discovery paper. The mere threat that a particular motion might not be available would not prompt a rational plaintiff to forego an otherwise winning claim, but the threat of dismissal of the suit itself likely would.

Furthermore, the First Amendment interest in continued general advocacy of a claim is greater than that in preserving every available motion or discovery tactic. A meritorious claim serves important interests throughout its life in the court system. It continues to inform the government of societal problems, advance the state of the law, and provide a peaceful outlet for resolution of disputes. These aims are no longer served if the court dismisses the claim altogether. By contrast, only a rare motion or discovery paper is essential to the claim. Modern systems of procedure provide almost endless possibilities for motions, hearing, and discovery. The claim may be advocated and resolved—and the First Amendment interests served—in any number of ways.

Moreover, individual motions and other litigation papers can undermine First Amendment interests. A motion or discovery paper may have factual and legal merit but detract from resolution of the dispute. A plaintiff, for example, might file technically legitimate discovery requests (asking for relevant material that might lead to admissible evidence),³⁶³ not for the purpose of advancing her case, but instead to harass the defendant or embarrass a third party. This type of discovery can consume the time and energy of the court and litigants, even to the detriment of the claim.

362. The improper purpose standard of Rule 11(b) applies to most written motions, but Rule 11(d), added to the rule in 1993, provides that the rule does not apply to discovery papers and motions. *See* FED. R. CIV. P. 11(d). However, Rule 26(g) imposes a virtually identical purpose restriction on discovery papers. *See* FED. R. CIV. P. 26(g)(2)(B).

363. *See* FED. R. CIV. P. 26 (setting forth the general standards and scope of civil discovery in federal court).

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One need only think of the seemingly single-minded determination of Ms. Jones and her lawyers to uncover damaging and embarrassing evidence of President Clinton's sexual dalliances, including the Lewinsky affair. This discovery, although marginally relevant, was not essential to her claims. Yet, Ms. Jones and her lawyers used considerable resources on these issues, resources that might have been better spent on more central issues. Indeed, given that Judge Wright granted summary judgment against Ms. Jones based on lack of evidence of a legally cognizable injury,³⁶⁴ Ms. Jones and her lawyers could have better used their discovery developing this aspect of the claim. Thus, a motive ban on a particular litigation step not only serves the government's various interests in avoiding collateral uses of its courts, but in some applications, such a ban might also promote the First Amendment interest in general advocacy and resolution of the claim.

In sum, the balance of interests might allow a motive ban on particular stages of the process, because such a prohibition would have only a minor chilling effect and serve both governmental and First Amendment interests. By contrast, a motive limitation on all advocacy of the claim would exact too great a cost. It would not give enough breathing room to the right to file winning claims. The First Amendment thus would have barred Judge Wright from relying upon Rule 11(b)(1) to dismiss Ms. Jones's complaint, based solely on her motive.

4. Breathing room analysis of post-judgment monetary sanctions under Rule 11(b)(1)

Ms. Jones would have had a different breathing room argument if the President relied upon Rule 11(b)(1) to seek monetary sanctions after Ms. Jones lost at summary judgment. Unlike the motion to dismiss in the prior section, the President would base this sanctions motion on the wrongful act of filing, as opposed to its processing. In other words, his motion would assert that Ms. Jones violated Rule 11(b)(1) in May 1994 when she initially filed her complaint for improper purposes. Moreover, the motion here would seek only monetary damages and not impede development of the claim. Judge Wright would have been able to assess damages for Ms. Jones's ini-

364. See *supra* note 10.

tial violation of Rule 11 only after Ms. Jones lost at summary judgment.

Analysis of this use of Rule 11(b)(1) must assume that the rule were re-written to apply only to losing claims, because as the rule now stands, Ms. Jones could attack it as facially invalid under the overbreadth doctrine. Assuming such a revised Rule 11(b)(1), the analysis is under the breathing room doctrine. Would post-judgment sanctions against a losing claim unduly chill the initial filing of winning claims? Again, *Bill Johnson's Restaurants* seems to answer this question by allowing damages against a losing but meritorious suit, but the Court there applied Petition Clause analysis to the NLRA, not Rule 11. The difference in governmental interests as well as the difference in effect on the core right mandate another result here.

Again, the first step in breathing space analysis is to assess the chilling effect of the post-judgment sanctions. Would their assessment against losing claims, long after plaintiff originally filed for an improper purpose, impact the filing of winning claims? The answer is yes. The problem is that a potential plaintiff who has an improper motive at the time of filing will have no way of absolutely avoiding the Rule 11(b)(1) sanctions other than foregoing her claim altogether. If her claim has sufficient merit to meet the factual and legal standards of Rule 11(b), a potential federal litigant cannot know whether her suit will prevail. Too many uncertainties surround this outcome. She would have to guess as to matters such as the course of discovery, the availability of witnesses, and the court's interpretation of the law. The risk of sanctions if she guesses wrong will be too much for some potential plaintiffs to bear, even those who in fact have winning claims. Therefore, even if Rule 11(b)(1) were applied solely to plaintiffs who had both improper motive and lost their claims on the merits, its potential for sanctions would have a chilling effect on the core right to file winning claims.

Contrast the effect of post-judgment sanctions assessed against a plaintiff who files a frivolous claim for an improper purpose. At the time plaintiff files suit, she likely can ascertain whether a claim meets the legal and factual merit standards of Rule 11(b)(2) and (b)(3).³⁶⁵ These standards set minimum requirements of reasonableness, at the time of filing, and do not require the plaintiff to guess as to the future. To be sure, any risk of sanctions, even one tied to objective rea-

365. *See supra* note 1.

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sonableness, might deter some plaintiffs from filing a winning suit, but not nearly to the degree that a winning claim standard would do so. The chilling effect of a sanction against improperly motivated frivolous claims would be far less than one applied to losing but meritorious claims.

Perhaps the best means of assessing the chilling effect of the Rule 11 motive restriction on losing claims is to compare it to that which the Court seemingly tolerated in *Bill Johnson's Restaurants*. The Court there allowed damages under the NLRA based on retaliatory motive so long as the suit progressed to completion and the plaintiff lost. Unquestionably, this risk has a chilling effect on plaintiff-employers who are contemplating suit against their employees. The Court allowed this chilling effect. The difference in this effect and that under Rule 11 comes from the definition of the improper motive. Under the NLRA, the plaintiff-employer still must guess as to whether she will prevail, but she also knows that she will not be subject to damages unless she also possesses a retaliatory intent in violation of the NLRA. This she can easily ascertain. The NLRA narrowly defines the prohibited motive and therefore has only an isolated impact on the filing of winning claims (only those claims that are filed for the specified retaliatory motive).

By contrast, Rule 11 broadly bans “any improper purpose,” and thus, in terms of sheer numbers, Rule 11(b)(1) deters far more claims than the NLRA. More significantly, the vague prohibition in Rule 11(b)(1) compounds the uncertainty facing the plaintiff. Even if a plaintiff is conscious of her motives (e.g., she wants to get publicity or pursue a political vendetta), she has no way of knowing whether this purpose is improper within the meaning of Rule 11. After all, the courts cannot agree on a single definition and have conflicting opinions as to whether publicity and political motives are proper aims.³⁶⁶ Thus, under Rule 11, a potential plaintiff must guess not only as to whether her claim will prevail but also as to whether her particular motive is “improper.”

The government interests behind the two forms of motive restrictions also differ. One of the government’s primary aims in a substantive statute such as the NLRA is to stop acts that are defined by

366. See *supra* notes 57–66 and accompanying text (discussing the courts’ attempts to define improper purpose in the context of publicity and other ulterior aims).

the retaliatory motive.³⁶⁷ The motive element is essential to achieving a goal of the NLRA, to guarantee free exercise of labor rights without retaliation. By contrast, the motive element is not essential to the central purpose of Rule 11, which is intended to deter baseless suits. To be sure, the government also may have some interest in stopping general ill motives—to protect the integrity of the process and attorney professionalism interests discussed above³⁶⁸—but these interests are secondary to the deterrence of frivolous claims. Indeed, there is some question, as illustrated by the Ninth Circuit’s “restrictive view” of the improper purpose clause, as to whether such an interest exists. This ambiguity is in marked contrast to the central role of retaliatory motive in implementing the NLRA.

The difference in the effect and purpose of the two restrictions may be subtle, but a subtle difference can change the result in a balancing test. The differences here are enough to tip the scales. Rule 11 does not give enough breathing room to the plaintiff’s ability to file winning claims and therefore runs afoul of the Petition Clause. Thus, even when viewed in isolation as applied only to losing claims, Rule 11(b)(1) fails First Amendment scrutiny and would have barred imposition of sanctions against Ms. Jones, even after she lost on summary judgment.

III. THE CONCLUDING QUESTION: ASSESSING THE CONTINUED USE OF MOTIVE IN RULE 11 AND THE FUTURE OF POLITICAL SUITS

The analysis in Part II demonstrates that at least some aspects of Rule 11 are fatally flawed and that the courts must tolerate some politically motivated lawsuits. The next question is how far we can take these conclusions. Can federal rulemakers, through Rule 11, ever impose any form of motive restriction or penalty? Are parties free to use the federal courts to pursue political vendettas? The short answer is that while the First Amendment may permit some penalties tied to motive, it does not allow any penalties based on the political purposes of the plaintiff.

We now know Rule 11(b)(1) is facially invalid to the extent it requires plaintiffs to pre-certify that they have proper motive in filing suit. The chief problem with the motive certification requirement is

367. *See supra* note 243 (reprinting excerpts from the NLRA).

368. *See supra* notes 353–59 and accompanying text.

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that it applies to all claims and thus regulates the core right under the Petition Clause to file winning claims. The government does not have an interest compelling enough to justify this ban on winning claims.

We also know this problem cannot be corrected through revision of the rule so that the purpose certification, and sanctions for its violation apply only to losing claims. The complication here is that the plaintiff, at the time she files suit, cannot isolate the winning claims from the losing but meritorious claims. She would have to guess as to the outcome of many contingencies in order to have any inkling as to whether her claim would prevail. She would be put in the dilemma of either foregoing her right to file winning claims or suffering punishment if she guesses wrong. This does not give enough breathing space to the right of court access.

The rule might be able to impose a motive certification as to frivolous claims, those that do not meet the legal and factual merit standards of Rule 11(b)(2) and (b)(3). This check would have little chilling effect on the filing of winning claims because a plaintiff could determine at the time she files suit whether her claim meets the minimum merit requirements. But this revision would not serve the general policy goals of Rule 11. It would have one of two ill effects, depending upon the wording of the rule revision. The rule would be meaningless if it required plaintiff to certify merit as to only those claims that the rule already forbids, namely frivolous claims. If, on the other hand, the rule outlawed only those claims that lack merit *and* have an improper purpose, the revision would undermine the rule's aim of deterring frivolous claims. Such a revision would allow frivolous claims brought for proper purposes and thus would substantially narrow the current rule, which bars *all* frivolous lawsuits.

Rule 11 might be amended to use motive to limit the plaintiff's litigation steps after filing suit. The validity of such a limitation would depend on its effect. The First Amendment would not permit a broad ban on "advocacy" for an improper purpose. It might allow a motive ban on individual motions or other litigation papers, but even this ban may sweep too broadly. If a plaintiff had an ill motive in bringing her winning claim, she presumably would have ill purposes behind each step she takes to win that lawsuit. In such a case, a motive ban applicable to "motions" would invite the defendant to question, and the court to prohibit, each motion she files. This ban

would have too great of a chilling effect on the right to file the winning claim. This is not to say that a motive ban on motions could never survive First Amendment scrutiny, only that such a rule must be carefully approached, both in its drafting and in its application.

The Petition Clause would allow Rule 11 to continue to limit the motive of the *defendant*. Because the right to petition applies only to claims for relief, the lone application of the Petition Clause to the defendant would be to his counterclaims.³⁶⁹ Even as to counterclaims, federal rulemakers likely could impose a number of constraints so long as they limit only the manner of its presentation and not bar the claim altogether. Even a motive restriction on counterclaims might serve the purpose of streamlining the main case and safeguarding the plaintiff's interest in processing her claims. So long as such a prohibition did not bar the defendant's right to ever present the claim and only would bar its presentation in this particular suit, the restriction likely would survive strict scrutiny.

Rule 11 also might appropriately regulate the motives of the plaintiff's lawyer.³⁷⁰ The government has a much stronger interest in limiting the motives of the lawyer because such personal interests risk harm not only to society, the defendant, and the legal profession, but also to the plaintiff herself. The primary concern here is the conflict of interest presented by the attorney's own motivations. This issue might be better addressed by state rules of professional conduct, which already prohibit such conflicts,³⁷¹ but the federal court could separately control the motives of lawyers appearing before it through a modification of Rule 11.³⁷²

Finally, Rule 11 might use motive solely as an aggravating factor or penalty enhancement in assessing sanctions (against the plaintiff or

369. Due process, however, would mandate that the defendant be given a reasonable and fair opportunity to defend his claim. *See supra* notes 309–11, 317 and accompanying text (discussing due process standards).

370. I further analyze the validity of restrictions on the motives of lawyers in *Rules of Professional Conduct*, *supra* note 13.

371. *See supra* note 200 (noting the model rule on conflict of interest).

372. Federal courts to some extent already enforce state conflicts rules through motions to disqualify counsel. These motions usually are raised by an aggrieved party, who is adverse to the party that his former (or current) counsel now represents in the litigation. By contrast, in this hypothesized revision of Rule 11 to outlaw the motives of the plaintiff's lawyer, the aggrieved party, from a conflicts perspective, would be the plaintiff, but the defendant would more likely have the incentive to raise the issue in a motion to disqualify under the new Rule 11.

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her lawyers) for other violations of the rule. This penalty enhancement seems to be the most logical use of motive in Rule 11. It would apply only after the claim, motion, or other paper reached its natural completion, and then only to frivolous papers. However, even a penalty enhancement use of motive would face some uncertainty under First Amendment analysis, due to the fact that some restrictions on motive come close to regulating ideas or beliefs. To be sure, many penalties in law turn on the state of mind of the actor—indeed, intent is a critical limiting feature in most criminal statutes—but special problems arise when laws use the amorphous concept of motive to limit activity close to that protected under the First Amendment. The Court’s hate crime and hate speech cases illustrate this difficulty.

In *Wisconsin v. Mitchell*,³⁷³ the Court allowed the state to use racial motivation as a penalty enhancement for conduct that the state otherwise could regulate and outlaw, such as battery. However, in *R.A.V. v. City of St. Paul*,³⁷⁴ the Court held a city could not prohibit messages based on “bias-motivated hatred” and “virulent notions of racial supremacy.”³⁷⁵ The ordinance targeted language that the Court traditionally has not protected—fighting words—but singled out for prohibition only those fighting words that insulted or provoked violence on the basis of race, color, creed, religion, or gender. The Court held the ordinance was invalid because its particular effect, as opposed to that of a broad prohibition on fighting words, “was to invoke the viewpoint of the city.”³⁷⁶ The city’s interest in

373. 508 U.S. 476 (1993).

374. 505 U.S. 377 (1992).

375. The Minnesota Supreme Court described as “a prohibition of fighting words that contain . . . messages of ‘bias-motivated’ hatred and in particular . . . messages ‘based on virulent notions of racial supremacy.’” *Id.* at 392. The actual ordinance did not speak directly to the speaker’s motive:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

376. “[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.” *Id.* at 396. The concurring Justices agreed with the outcome, but disagreed with the majority’s approach to regulation of speech that the Court traditionally held outside of First Amendment protection. *See supra* note 318.

preventing racial or other discrimination may be compelling, but its interest in imposing the city's viewpoint on race is not.³⁷⁷

As an abstract matter, use of motive as a penalty enhancement against frivolous claims in a revised Rule 11 seems to fall closer to the penalty enhancement permitted under *Mitchell* than to that barred under *R.A.V.*³⁷⁸ A motive penalty, at least in the abstract, is less intrusive on First Amendment values than a viewpoint regulation. A viewpoint regulation limits the content of what is communicated. An example in the context of courts would be a rule that the plaintiff could not file a suit that itself reflected or incited racial hatred, regardless of what the plaintiff intended or felt toward the defendant. This rule would look to the content of the plaintiff's suit.³⁷⁹ By contrast, a motive penalty would punish the particular state of mind of the plaintiff in filing her claim and not necessarily the content of her claim. To again use the race example in the context of courts, a motive restriction would punish the bringing of any suit, no matter its type, for reasons of racial discrimination (e.g., a landlord who chooses to sue a defaulting black tenant, as opposed to a defaulting white tenant, based on his race).³⁸⁰

377. The Court held that the government's asserted interest in enacting the ordinance was compelling—"to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish." *R.A.V.*, 505 U.S. at 395. The ordinance seemingly achieved that end, but, the Court held, because the city council could have achieved the end through other more benign means—such as through a prohibition on all fighting words—it failed strict scrutiny. *See id.* at 395–96.

378. I further discuss motive restrictions on court access in relation to *Mitchell* and *R.A.V.* in *Motive Restrictions*, *supra* note 13, at Part III.C.3.b.

379. That the government might impose a viewpoint preference on civil suits is not mere academic conjecture. Although the government typically does not impose direct bans on disfavored viewpoints, it has on occasion attempted to influence the content of suits through other means. *See e.g.*, *In re Workers' Compensation Reform*, 46 F.3d 813 (8th Cir. 1995) (holding that Minnesota statute that deferred challenges to the workers' compensation statute through shifting all costs to plaintiffs, win or lose, violated the Petition Clause right of court access). The Supreme Court in April 2000 granted certiorari to determine whether Congress impermissibly imposed a preferred viewpoint in prohibiting lawyers who receive federal Legal Service Corporation funds from challenging welfare laws. *Legal Services Corp. v. Velazquez*, 164 F.3d 757 (2d Cir. 1999), *cert. granted*, *United States v. Velazquez*, 529 U.S. 1052 (2000). The validity of these restrictions is beyond the scope of this article.

380. The literal terms of the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, arguably would outlaw such an action even if the landlord's suit had merit. *See* Godschalk, *supra* note 253 (assessing the limits of the Act under the Petition Clause); David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits Under the Fair Housing Act*, 63 U. CHIC. L. REV. 1607 (1996) (advocating application of the Act to lawsuits in-

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A carefully defined motive regulation also would differ from a regulation of belief. To say that a person was motivated to act in a particular instance out of racial hatred is different than saying that he is a racial bigot. A belief restriction in the context of the courts would bar all court access to bigots regardless of the nature or content of their suits. It would regulate his general belief system. The government has no legitimate interest in regulating our beliefs, but it has some interest in penalizing the specific motive with which one actually acts because the motive creates a higher risk of that type of harm and causes more concrete damage to a particular person.³⁸¹ Thus, the Court in *Wisconsin v. Mitchell* distinguished a situation where a state might (impermissibly) punish a defendant for his “abstract beliefs”³⁸² from the Wisconsin penalty enhancement statute which (permissibly) addressed the specific harms caused by racially-inspired conduct.³⁸³

However, this does not mean that motive penalties are free of First Amendment concern. In some applications, they come too close to infringing on First Amendment rights, even when used merely as a penalty enhancement for otherwise sanctionable conduct. A key to distinguishing *Mitchell* and *R.A.V.* is the degree to which the regulation intrudes into First Amendment values.³⁸⁴ Under this

tionally targeted against groups protected under the Act). See generally *Motive Restrictions*, *supra* note 13, at Part III (assessing under the Petition Clause the validity of various civil rights laws as applied to the act of filing civil suit).

381. See Tribe, *supra* note 285. See generally Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994) (outlining the ill effects of bias motivated crimes, including their added propensity to be violent crimes, their emotional impact on the victim and their adverse effects on the targeted group as well as society as a whole).

382. The Court stated that where evidence admitted by a sentencing judge “proved nothing more than [the defendant’s] abstract beliefs,” . . . its admission violated the defendant’s First Amendment rights.” *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993). “[A]bstract beliefs, however obnoxious to most people, may not be taken into consideration.” *Id.* at 485 (citations omitted).

383. The Court stated:

[T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, . . . bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The State’s desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.

Id. at 487–88 (citations omitted).

384. See *id.* at 488 (applying the overbreadth doctrine and noting that the predicted ef-

test, the government may impose some forms of motive penalty enhancements against frivolous claims. Frivolous lawsuits are outside the core right, they serve little, if any, societal values, and they are particularly offensive if filed for certain motives. However, the motive restriction must be carefully drawn. The government might properly enhance the penalty for filing a frivolous lawsuit for any number of *itemized* purposes, such as racial discrimination (as in *Wisconsin v. Mitchell*) or the cost and delay examples currently listed in Rule 11(b)(1). The catch-all “improper purpose” language, however, of the current rule may not withstand scrutiny, even if used solely as a penalty enhancement.

The first problem with the language is its vagueness. Vague statutes present due process problems even when they do not attach to First Amendment activity.³⁸⁵ As illustrated by the current struggle of courts to define what is proper and improper under Rule 11(b)(1), the “improper purpose” language does not put persons on notice as to what motives would be subject to such a penalty.³⁸⁶ Thus, although the provision would only penalize activity outside the core right of the First Amendment—the filing of frivolous suits—this raises due process concerns.

More importantly, the broad language could attach to punish some motives that are themselves at the heart of the First Amendment, such as political aims. Freedom in political belief, expression and debate is at the very heart of the First Amendment.³⁸⁷ Indeed, the degree of protection afforded in the *New York Times* defamation cases turns on the extent to which the speech touches upon public or political issues.³⁸⁸ The greater extent to which the speech touches on political issues, the greater the protection under the First Amendment.

fect on speech was “attenuated” and “unlikely”). The degree of intrusion appears to be the test that the Court had used when judging civil rights laws against challenges that they infringe upon the First Amendment right of association. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

385. *See supra* note 331.

386. *See supra* Part I.B.

387. *See supra* note 355 and accompanying text.

388. *See supra* notes 319–28 (discussing *New York Times* breathing room standards). The Court in *New York Times* said that the purpose of the freedom of expression was “to assure unfettered interchange of ideas for the bringing about of *political* and social changes desired by the people.” *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

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To be sure, a political motive is different than political content, but political motive can provoke political debate even in the context of seemingly non-political suits. The *Jones* case itself shows that political motive can create debate about content. The very fact that the suit, against a sitting President, seemed so obviously motivated by politics itself spurred a national debate on the meaning of sexual harassment and the persons who should be held accountable.³⁸⁹ It especially caused debate and dissension within women's groups, such as the National Organization of Women, that had supported President Clinton's policies on women's issues.³⁹⁰ Similar debates conceivably could arise from any form of lawsuit against a public official, since all such suits would seek to hold the official accountable for his or her actions and would draw attention to the law governing the case.

The suit need not be against governmental officials to be politically inspired and provocative of political debate. Many plaintiff's lawyers claim they bring product liability suits for the public good and to act where Congress or other elected officials have failed to act. The recent product suits against tobacco and gun manufacturers illustrate the newly political nature of suits. These suits are taking over subjects that traditionally were the province of politically elected bodies. To say these suits, if they turned out to be frivolous, warranted added penalty because of the plaintiff's arguably political motive would cut against the core purpose of the First Amendment to foster debate about issues of public concern.

A penalty assessment based on political motive also runs the risk of imposing a preferred political viewpoint. Although the penalty provision could be drafted so that it punishes all political motives, rather than one particular view, the practical reality, as illustrated by

389. The Court in *Gertz* explained the importance of any speech about a public official: [S]ociety's interest in the officers of government is not strictly limited to the formal discharge of official duties [T]he public's interest extends to "anything which might touch on an official's fitness for office Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (citing *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

390. The Dulles (or Northern Virginia) chapter of NOW broke away from the national organization because it believed that "the national leadership [had] been too easy on President Clinton over his alleged sexual improprieties." Dana Schwartz, All Politics CNN, (Feb. 24, 1998) <www.cnn.ru/ALLPOLITICS/1998/02/24/now/>. Indeed, the Dulles chapter separately filed an amicus brief with the Eighth Circuit, arguing that Judge Wright had improperly granted summary judgment against Ms. Jones. See *supra* note 9.

the NAACP, Ms. Jones, and Anita Hill examples, is that such a rule runs the risk of penalizing suits based on political popularity.³⁹¹ A court might conclude that the political motive of a plaintiff who shares the court's or the majority's political viewpoint is properly motivated by a desire to correct societal ills but also conclude that a plaintiff who has contrary views is simply acting for improper personal political reasons.

Finally, a political motive penalty in a case such as *Jones* runs some risk of intruding on the plaintiff's First Amendment interest in free political association. The fact that led most people to conclude that Ms. Jones might have a political motive, rather than merely the aim of seeking publicity or financial gain, was her association with politically conservative groups. Ms. Jones (as well as her backers) had a First Amendment right to form these political associations. The Court in *Mitchell* allowed the court to consider evidence of the defendant's associations when deciding whether he possessed the requisite racial motivation.³⁹² However, interpreting an association as an expression of political views raises special concerns because such association is closer to the core of the First Amendment than one formed to share and promote notions of racial hatred. At a minimum, this near encroachment upon associational freedoms further underscores the dangers and sensitive nature of any use of political motive as a penalty.

So what does all of this mean for politically motivated lawsuits in general and the *Jones* case in particular? The short answer is that we must tolerate the suits, so long as they have the requisite factual and legal merit. A court should not consider the political motivation of the plaintiff in applying Rule 11.³⁹³ To the extent the suit is frivolous and also accompanied by an itemized ill motive, such as those already listed in Rule 11(b)(1), the First Amendment would allow the court

391. See *supra* notes 356–57 and accompanying text.

392. The Court rejected Mitchell's argument that prosecution under the statute would impermissibly consider evidence of his speech and associations. *Mitchell*, 508 U.S. at 487–89; see also *id.* at 489 (stating that “[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish elements of a crime or to prove motive or intent”).

393. This is not to say that inquiry into the political motives of the plaintiff are entirely off bounds in a civil lawsuit. Such motives might properly be the subject of discovery or cross-examination, in determining bias or other issues of credibility. In fact, this is the basis on which the President sought, and Judge Wright permitted, some limited discovery into Ms. Jones's fund-raising and financial backing. See *Jones v. Clinton*, Nov. 25, 1997 order; see also *supra* note 258.

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to use the plaintiff's motive as a penalty enhancement. This amendment also would permit the court to consider motive in determining whether particular motions or discovery requests are proper. In none of these assessments, however, may the court consider that the suit is politically motivated.³⁹⁴

In *Jones*, assuming an appropriately narrowed version of Rule 11, the First Amendment would have allowed very little consideration of Ms. Jones's motives with respect to her initial filing of the suit. At most, Judge Wright could have considered Ms. Jones's non-political aims (e.g., her desire for publicity and collateral financial reward), in assessing the amount of sanctions, if and only if Judge Wright found Ms. Jones's claims to be frivolous, in violation of Rules 11(b)(2) and (b)(3).³⁹⁵ As to Ms. Jones's subsequent conduct of the lawsuit, Judge Wright would have had somewhat more leeway and could have considered Ms. Jones's non-political motives in determining whether to sanction her individual motions or discovery acts, so long as such consideration was not so pervasive that it unduly burdened Ms. Jones's general pursuit of the claim. Judge Wright also could have disqualified or otherwise sanctioned Ms. Jones's attorneys if she found their motives in conflict with their duties to Ms. Jones. However, in none of these assessments could Judge Wright have considered the political aims of Ms. Jones.

These limits do not leave much for courts to consider other than the merit of the claims. This is how it should be. The principles underlying the First Amendment strive to have us evaluate ideas on their merit. We may not appreciate plaintiffs using our courts for their own political vendettas, particularly those that are contrary to our own views, but this is true with respect to any form of speech that we find annoying. As the Court recognized in *New York Times*,

394. This cuts both ways. The fact that the plaintiff had a political motive behind her suit will not save her from sanctions, if they are otherwise warranted. In other words, plaintiffs may not use courts to pursue political vendettas through frivolous claims. Thus, the Circuit of the District of Columbia was correct in the suit against President Reagan and other government officials, when it held that the political motivation behind the suit did not save the plaintiffs from sanctions for filing a frivolous claims. See *supra* note 66 (discussing the *Saltany* case).

395. The First Amendment likely would have permitted Judge Wright to assess a penalty enhancement based on such motive, even if only some, but not all, of Ms. Jones's claims were frivolous. However, such penalty enhancement must be narrowly confined to the added burden caused by the pleading of the frivolous claims themselves, which in most cases would be minimal when viewed in relation to the suit as a whole. See *Access to Court*, *supra* note 13 (discussing the definition of "losing suits" for purposes of Petition Clause analysis).

we have a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁹⁶ We must be patient. First Amendment freedoms do not come without cost, and in the context of the Petition Clause right of court access, that cost is toleration of politically motivated suits, so long as they have factual and legal merit. Because Rule 11 does not embody this tolerance, it violates the First Amendment.

396. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).