BE & K Construction Company *and* Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO; Local 302, International Brotherhood of Electrical Workers, AFL–CIO; District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL–CIO; Contra Costa County Building and Construction Trades Council, AFL–CIO; Northern California District Council of Laborers, Laborers' International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America;[1] Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO; Local Union No. 378, International Union of Bridge, Structural, Ornamental Iron Workers, AFL–CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL–CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 32–CA–9474, 32–CA–9475, and 32–CA–12531–1–8

September 29, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

This case is before the Board on remand from the United States Supreme Court. The issues presented are (1) whether the Respondent violated Section 8(a)(1) of the Act by filing and maintaining an unsuccessful lawsuit against the Charging Party Unions in Federal district court, and (2) what standard the Board should apply in making this determination. In its prior decision, the Board, applying a test premised on the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), found that the lawsuit violated Section 8(a)(1) because the Charging Party Unions ultimately prevailed on motions for summary judgment and the Board determined that the suit was filed to retaliate against the Unions for engaging in protected concerted activity.[2] The court of appeals granted enforcement of the Board's Order.[3] The Supreme Court, however, rejected the Board's analysis and reversed.[4] Having accepted remand,[5] and having reconsidered the matter in light of the Supreme Court's decision, the record, and the parties' statements of position, we hold, for the reasons set forth below, that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the motive for bringing it. Because the Respondent's lawsuit was reasonably based in fact and law, we find that the filing of the suit did not violate Section 8(a)(1).

I. FACTS

The subject of the unfair labor practice charge in this case is the Respondent's lawsuit against the Unions. The lawsuit and the circumstances leading to it were described in our prior decision[6] and were summarized by the Supreme Court as follows:

> Petitioner [the Respondent], an industrial general contractor, received a contract to modernize a California steel mill near the beginning of 1987. 246 F. 3d 619, 621 (CA6 2001). According to petitioner, various unions attempted to delay the project because petitioner's employees were nonunion. Ibid. That September, petitioner and the mill operator filed suit against those unions in the District Court for the Northern District of California. App. to Pet. for Cert. 33a. The suit was based on the following basic allegations: First, the unions had lobbied for adoption and enforcement of an emissions standard, despite having no real concern the project would harm the environment. 246 F.3d at 621. Second, the unions had handbilled and picketed at petitioner's site—and also encouraged strikes among the employees of petitioner's subcontractors—without revealing reasons for their disagreement. Ibid. Third, to delay the construction project and raise costs, the unions had filed an action in state court alleging violations of California's Health and Safety Code. Id., at 621–622. Finally, the unions had launched grievance proceedings against petitioner's joint venture partner based on inapplicable collective bargaining agreements. Id., at 622.
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> Initially, petitioner and the mill operator sought damages under § 303 of the Labor-Management Relations Act, 1947 (LMRA), 61 Stat. 158, as amended, 29 U.S.C. § 187, which provides a cause

[1] We have amended the caption to reflect the disaffiliation of Laborers' International Union of North America from the AFL–CIO effective June 1, 2006, and of the United Brotherhood of Carpenters and Joiners of America from the AFL–CIO effective March 29, 2001.

[2] 329 NLRB 717 (1999).

[3] 246 F.3d 619 (6th Cir. 2001).

[4] *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

[5] The Board accepted the remand from the court of appeals on December 9, 2003. The Respondent, the General Counsel, and the Unions thereafter filed statements of position.

[6] 329 NLRB at 718–721.

of action against labor organizations for injuries caused by secondary boycotts prohibited under § 158(b)(4). 246 F. 3d, at 622. But after the District Court granted the unions' motion for summary judgment on the plaintiffs' lobbying- and grievance-related claims, the plaintiffs amended their complaint to allege that the unions' activities violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1–2, which prohibit certain agreements in restraint of trade, monopolization, and attempts to monopolize. 246 F.3d, at 622. The District Court dismissed the amended complaint, however, because it realleged claims that had already been decided. Id., at 622–623. The District Court also dismissed the plaintiffs' claim regarding the unions' state court lawsuit since the plaintiffs had no evidence that the suit was not reasonably based and because two unions that the plaintiffs sued were never parties to that state court action. Id., at 623.

The plaintiffs filed a second amended complaint. It included their remaining claims but again realleged claims that had already been decided. Ibid.; App. 32–33. The District Court dismissed the decided claims and imposed sanctions on the plaintiffs under Federal Rule of Civil Procedure 11. 246 F. 3d, at 623. At that point, the mill operator dismissed its remaining claims with prejudice. Ibid. The District Court then granted summary judgment to the unions on petitioner's antitrust claim once petitioner was unable to show the unions had formed a combination with nonlabor entities for an illegitimate purpose. Ibid. Petitioner dismissed its remaining claims and appealed. Id., at 623–624.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of petitioner's antitrust claim. It held that the District Court erred in requiring petitioner to prove that the unions combined with nonlabor entities for an illegitimate purpose, but found the error harmless since the unions had antitrust immunity when lobbying officials or petitioning courts and agencies, unless the activity was a sham. *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL–CIO,* 31 F.3d 800, 810 (CA9 1994). Petitioner did not argue that the unions' litigation activity had been objectively baseless, but maintained that "the unions [had] engaged in a pattern of *automatic* petitioning of governmental bodies . . . *without regard* to . . . the merits of said petitions." Ibid. (internal quotation marks omitted; emphasis added). The Ninth Circuit allowed that petitioner's claim, if proved, could overcome the unions' antitrust immunity, but rejected it nonetheless because "fifteen of the twenty-nine [actions filed by the unions] . . . have proven successful. The fact that more than half of all the actions—turn out to have merit cannot be reconciled with the charge that the unions were filing [them] willy-nilly without regard to success." Id., at 811 (footnote omitted).

The Ninth Circuit reversed the District Court's award of Rule 11 sanctions, however, after petitioner explained that it had realleged decided claims based on Circuit precedent suggesting that doing so was necessary to preserve them on appeal. Ibid. Although the Ninth Circuit decided that rule did not apply to amended complaints following summary judgment, it held that petitioner's view was not frivolous and that its counsel could not be blamed for "err[ing] on the side of caution." Id., at 812.[7]

Following the Ninth Circuit's dismissal of the Respondent's lawsuit, the Board, for the reasons set out below, found that the Respondent violated Section 8(a)(1) by filing and maintaining the suit.

II. BOARD'S DECISION

In *Bill Johnson's,* the Court held, with respect to *ongoing* litigation, that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if [the suit] would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."[8] As to *completed* lawsuits, however, the Court noted, in dicta, that if the lawsuit "result[ed] in a judgment adverse to the plaintiff . . . and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief."[9] Applying this standard, the Board concluded that the Respondent's lawsuit was unlawful because the suit resulted in a judgment adverse to the plaintiff and had been filed to retaliate against the Unions for engaging in protected activities. In so holding, the Board rejected the Respondent's contention that, under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*,[10] an antitrust case, the Respondent's suit could not be deemed to lack merit if there was a reasonable basis for pursuing it. The Sixth Circuit denied the Respondent's petition for review and granted the Board's request for enforcement of its decision.[11]

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[7] *BE & K*, 536 U.S. at 520–522 (ellipses and internal alterations in original).

[8] 461 U.S. at 743.

[9] Id. at 749.

[10] 508 U.S. 49 (1993).

[11] 246 F.3d at 619.

III. SUPREME COURT'S DECISION

The Supreme Court granted the Respondent's petition for certiorari[12] on the following question:

> Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49 (1993)?

As discussed more fully below, the Court's decision: (1) canvassed its precedent—largely developed in the antitrust field—regarding First Amendment petitioning, (2) found that NLRB adjudicatory proceedings, although different from antitrust litigation, nevertheless posed a burden to such petitioning, (3) found that the Board's test for completed lawsuits raised a difficult First Amendment issue, (4) adopted a limiting construction of Section 8(a)(1) to avoid this difficult constitutional issue, and (5) found the standard applied by the Board to be invalid because it exceeded the scope of Section 8(a)(1) as thus construed.

The Court began its analysis by noting that the right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'"[13] and is a right "implied by '[t]he very idea of a government, republican in form[.]'"[14] The Court then traced the development of its case law concerning the interplay between federal laws and the right to petition. In the antitrust context, for example, the Court noted that it had held that "'the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.'"[15] The Court explained that it later made clear that "this antitrust immunity 'shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'"[16] Next, the Court noted that it later extended these antitrust immunity principles "to situations where groups 'use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.'"[17] The Court observed, however, that "while genuine petitioning is immune from antitrust liability, *sham* petitioning is not."[18] As to sham petitioning, the court explained that, in the antitrust context, it had adopted

> a two-part definition of sham antitrust litigation: first, [the lawsuit] "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "concea[l] an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[19]

The Court recounted that the same underlying issue, i.e., under what circumstances litigation may be found to violate federal law, had been presented in *Bill Johnson's*, which concerned not antitrust statutes but an allegation that an employer's *ongoing* state lawsuit against picketers violated Section 8(a)(1) of the NLRA. *Bill Johnson's* held that, in view of First Amendment and federalism concerns, "'[t]he filing and prosecution of a well-founded lawsuit'" was immune from "being 'enjoined as an unfair labor practice,'"[20] even if it was filed with a retaliatory motive. However, analogizing to the sham exception to antitrust immunity, *Bill Johnson's* further held that the prosecution of a *baseless* ongoing suit brought with a *retaliatory* motive lacked immunity and was "an enjoinable unfair labor practice."[21]

Having reviewed its relevant precedent, the Court then considered whether the same broad immunity accorded to lawsuits in the antitrust context was appropriate with respect to the NLRA. The Court noted that, under *Professional Real Estate Investors,* antitrust immunity extended to all lawsuits except those that were both baseless and filed with an anticompetitive motive. The Court recognized that the threat of an antitrust suit may pose a greater burden on petitioning than the threat of an adjudication under the NLRA. Antitrust suits, unlike unfair

[12] 534 U.S. 1074 (2002).

[13] *BE & K,* 536 U.S. at 524 (quoting *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)).

[14] Id. at 524–525 (alteration in original) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)).

[15] Id. at 525 (ellipses in original) (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)).

[16] Ibid. (quoting *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)).

[17] Ibid. (emphasis and ellipsis in original) (quoting *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)).

[18] Id. at 525–526 (emphasis added).

[19] Id. at 526 (ellipsis, alterations and emphasis in original) (quoting *Professional Real Estate Investors,* 508 U.S. at 60–61).

[20] Id. at 526–527 (alteration in original) (quoting *Bill Johnson's*, 461 U.S. at 737, 743).

[21] *Bill Johnson's*, 461 U.S. at 744. The Court in *Bill Johnson's* further indicated that the Board could find that a completed, unsuccessful lawsuit violated the Act if it found the suit to be retaliatory. Id. at 747. In *BE & K Construction,* however, the Court found that it was not bound by this passage in *Bill Johnson's*, which it viewed as dicta. 536 U.S. at 527–528.

labor practice proceedings, carry treble-damage remedies, may be privately initiated, and may impose high discovery costs. Nevertheless, the Court found that the burdens presented by the NLRA still raised First Amendment concerns because an adjudication thereunder could result in an order requiring a respondent to cease and desist from filing similar suits and to post certain notices, and could pose the threat of reputational harm.[22]

Having identified the burden that an adjudication by the NLRB could impose, the Court then examined the petitioning activity affected by that burden. The Court noted that in *Bill Johnson's* it had dealt only with ongoing lawsuits, not completed ones. The Court observed that while the enjoining of an ongoing lawsuit, like a prior restraint, might raise greater First Amendment concerns than an order regarding a completed lawsuit, after-the-fact penalties for completed lawsuits nonetheless present significant First Amendment concerns. Similarly, while *Bill Johnson's* allowed certain baseless suits to be enjoined, that decision did not, the Court stated, suggest that the entire class of baseless litigation is completely unprotected. Indeed, the Court suggested, without deciding, that First Amendment "'breathing space' principles" might shield some objectively baseless litigation. However, the Court found it unnecessary to resolve that issue because what was before it was the class of reasonably based but unsuccessful lawsuits.[23]

As to reasonably based but unsuccessful lawsuits, the Court concluded that whether such suits fall outside the scope of the First Amendment's Petition Clause presented a difficult constitutional question, due to several considerations. First, that class of suits includes many that involve genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Second, reasonably based but unsuccessful lawsuits still advance some First Amendment interests because they allow the public airing of disputed facts, raise matters of public concern, promote the evolution of the law, and add legitimacy to the court system as an alternative to force.[24] The Court further found that, although the Board confined its penalties to suits that had a retaliatory motive, the retaliatory motive limitation failed to exclude a substantial amount of genuine petitioning.[25]

The Court then posed its "final question," specifically, "whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably based suit when it concludes the suit was brought with a retaliatory purpose."[26] Noting that it had answered a similar question negatively in the antitrust context, the Court acknowledged that "the burdens on speech at issue in this case are different from those at issue in *Professional Real Estate Investors*[.]"[27] However, the Court found that it was "still faced with a difficult constitutional question: namely, whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine."[28]

Rather than reach this difficult constitutional question, the Court, following the approach taken in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[29] adopted a limiting construction of Section 8(a)(1) so as to avoid the First Amendment issue. Thus, the Court found that there was nothing in the statutory text indicating that Section 8(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose. Therefore, the Court declined to read Section 8(a)(1) as doing so. Having determined that Section 8(a)(1) does not reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, the Court held the Board's standard—which covered all such suits—to be invalid. In doing so, the Court specifically refrained from deciding "whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity[.]"[30]

In a concurring opinion, Justice Scalia, joined by Justice Thomas, asserted that the Court's decision implied that, in a future case, it would construe the NLRA "in the same way [it had] already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process."[31] Justice Scalia contended that a difficult First Amendment question was posed if the entity making the key determination of whether an objectively reasonable suit was brought with an unlawful motive was not an Article III court but an executive agency whose factual finding as to motive would be "insulated from *de novo* review by the substantial evidence standard of 29 U.S.C. §§ 160(e), (f)[.]"[32] In

[22] *BE & K*, 536 U.S. at 529–530. The Court found it unnecessary to decide whether the Board has authority to award attorney's fees when a suit is found to violate the NLRA. It, therefore, did not pass on whether an award of attorney's fees was part of the burden that an adjudication under that statute could impose. Id. at 530.

[23] Id. at 530–531.

[24] Id. at 531–532.

[25] Id. at 533–535.

[26] Id. at 535.

[27] Ibid.

[28] Ibid. (emphasis in original).

[29] 485 U.S. 568, 575 (1988).

[30] 536 U.S. at 536–537.

[31] Id. at 537 (emphasis in original).

[32] Id. at 538. As relevant here, 29 U.S.C. Secs. 160(e) and (f) (Secs. 10(e) and (f) of the Act) provide that on review of a Board order by a United States court of appeals, "[t]he findings of the Board with respect

Justice Scalia's view, this would make "resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts."[33]

In a separate concurrence, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed that the NLRA did not permit the Board to find unlawful an employer's lawsuit "in the circumstances present here," i.e., where it was reasonably based but unsuccessful and where the Board rested its finding of retaliatory motive almost exclusively on the fact that the employer did not like the union.[34] In Justice Breyer's view, however, the Court left open the possibility of finding an employer's lawsuit unlawful under other circumstances "in which the evidence of 'retaliation' or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union."[35] He also observed that the opinion did not "address at all lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under §7(a) [sic] of the NLRA[.]"[36] Finally, Justice Breyer contended that the Court's antitrust precedents did not and should not determine the outcome because antitrust law and labor law differ significantly "in respect to their consequences, administration, scope, history, and purposes."[37]

IV. THE PARTIES' POSITIONS

A. The General Counsel's Position

The General Counsel argues that after the Court's decision in *BE&K*, the Board can no longer rely on its previous standard for judging completed lawsuits. Instead, it must determine if the lawsuit was reasonably based at the time it was filed. The Board should find that a concluded lawsuit was baseless if there was no reasonable factual basis for the suit and if it presented plainly foreclosed or frivolous legal issues.

The General Counsel concedes that the Respondent's lawsuit was not baseless at the time it was filed. According to the General Counsel, the suit's antitrust claim was not baseless due to three critical facts. First, the Ninth Circuit disagreed with the district court's interpretation of the statutory labor exemption. Second, the application of the *Noerr-Pennington* doctrine[38] and its sham exception was unclear. Third, other factors, including the language used by the court of appeals in discussing the case and the fact that the case has been cited for its novel use of antitrust law, indicate that the antitrust claim was not baseless. Nor was the Section 303 claim baseless, in the General Counsel's view. The General Counsel had, in fact, authorized issuance of a complaint on a 8(b)(4) theory similar to that alleged by the Respondent in its lawsuit.[39]

Regarding retaliatory motive, the General Counsel contends that the Court left open the possibility that the filing of a reasonably based lawsuit could be found to be an unfair labor practice if initiated for the purpose of imposing litigation costs regardless of outcome. The General Counsel admits, however, that the evidence of retaliatory motive here does not meet this standard. If the Unions can show that there is additional probative evidence available that could meet the new standard, the case should be remanded and the record reopened because the case initially was litigated under a more lenient standard for retaliatory motive. Otherwise, the General Counsel contends that the complaint should be dismissed.

B. The Unions' Position

The Unions contend that the *Professional Real Estate Investors* standard is not appropriate for unfair labor practice cases because exercise of the right to petition is more likely to be chilled by an antitrust action than by an unfair labor practice proceeding. This is so because, among other things, treble damages are available in antitrust cases and such litigation often involves expensive discovery. Thus, the Unions argue that, rather than adopt the *Professional Real Estate Investors* standard, the Board should adopt a "sliding-scale" standard for determining whether a retaliatory suit violates the Act. Under such an approach, if a suit is found to be reasonably based, a higher standard would be required to establish unlawful motive. Conversely, if the suit is found to be baseless, a lower motive showing would be sufficient. The Unions argue that the Respondent's suit was baseless because its legal theory was plainly foreclosed and key factual assertions were unsupported. The Unions also contend that the Respondent's suit had a retaliatory objective because (1) the Respondent suffered no damages, as it had been awarded the contract at issue; (2) the Respondent did not believe its own factual allegations; (3)

to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

[33] Ibid.

[34] Id. at 539.

[35] Ibid.

[36] Ibid.

[37] Id. at 541.

[38] "*Noerr-Pennington* doctrine" refers to the principle, noted above, that the First Amendment shields a party from liability for petitioning legislative bodies, public officials, and courts, regardless of the party's intent or purpose, unless the petitioning is a mere sham.

[39] See fns. 65 and 66 below and accompanying text.

the suit sought treble damages; (4) the suit attacked the Unions' exercise of Section 7 rights; and (5) the Respondent knew that the suit had virtually no chance of success. Finally, if the evidence is insufficient to satisfy the legal standard the Board ultimately adopts, the Unions request that the case be remanded for a hearing to develop the record more fully.

C. The Respondent's Position

The Respondent contends that the holding and findings of the Supreme Court are law of the case and compel dismissal of the complaint. Here, the Court determined that the Respondent's lawsuit was reasonably based and the Board is bound by this finding. In any event, the Respondent argues that its lawsuit had a reasonable basis because the suit presented issues of first impression, and at the time the suit was filed application of the *Noerr-Pennington* doctrine to sham union petitioning was not clear. Additionally, the Ninth Circuit's holding in the Respondent's lawsuit established new and significant precedent, and the court found the Respondent to have acted in good faith so that sanctions were unwarranted.

The Respondent argues that the Board should adopt the standard set forth in *Professional Real Estate Investors* for several reasons. First, the Supreme Court's decision in this case strongly implied that the Board should adopt the *Professional Real Estate Investors* standard. Second, adopting this standard would establish a "bright line," allowing parties to know what types of suits will be prohibited. Third, the standard is consistent with the standard in *Clyde Taylor*,[40] which the Board followed for almost two decades. Fourth, the Respondent argues that the *Professional Real Estate Investors* standard is the same as the Board's standard for evaluating ongoing lawsuits under the Supreme Court's decision in *Bill Johnson's,* a decision on which *Professional Real Estate Investors* relied. Both *Bill Johnson's* and the Supreme Court's decision in the present case affirmed the primacy of the First Amendment right to petition the courts over the need to protect employee or union rights under the NLRA. Thus, there is no logical reason to apply a standard other than the *Professional Real Estate Investors* standard to lawsuits under the NLRA. Despite the differences between antitrust and labor law, the Supreme Court in the present case found that the NLRA posed burdens to the right to petition. Employers who face the prospect of unfair labor practice proceedings are just as chilled in the exercise of their First Amendment right to petition as are employers who face the prospect of antitrust suits.

Even if the Board adopts the General Counsel's view that a reasonably based suit can be an unfair labor practice if the sole motive for filing the suit was to impose the costs of litigation on a union, the Respondent contends that no proof of such a motive can possibly be established in the present case. The Respondent further contends that it would be a travesty to remand the case at this late date and that, in any event, the Board is barred from retroactively applying a new standard in such a manner as to find the Respondent in violation of the Act.

V. DISCUSSION

A. Applicable Standard

Having considered the Supreme Court's decision in this case as well as the record and the parties' statements of position, we hold that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit.

As noted above, *Bill Johnson's* held that an *ongoing*, reasonably based lawsuit could not be enjoined as an unfair labor practice even if the lawsuit had a retaliatory motive. The Court deemed this holding to be necessary to safeguard the fundamental First Amendment right to petition. While acknowledging that a lawsuit could be a "powerful instrument of coercion or retaliation,"[41] the Court nevertheless stated:

> There are weighty countervailing considerations, however, that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution. 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. Id*.,* at 511. We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized, "[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. 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."

[40] 127 NLRB 103 (1960).

[41] 461 U.S. at 740.

Peddie Buildings, 203 N. L. R. B. 265, 272 (1973), enf. denied on other grounds [sub nom. *NLRB v. Visceglia,*] 498 F. 2d 43 (CA3 1974). See also *Clyde Taylor Co.,* 127 N. L. R. B., at 109.[42]

These principles, in our view, are equally applicable to both *completed* and ongoing lawsuits. When a plaintiff files a lawsuit, he does not know whether his claim will prevail. His lawsuit—even if reasonably based—may not succeed. As the Supreme Court found in this case, declaring a reasonably based, unsuccessful lawsuit to be an unfair labor practice burdens the First Amendment right to petition. Such a finding normally results in an order requiring the plaintiff to refrain from filing similar suits in the future and to post certain notices.[43] Moreover, the Board's order in such cases typically requires the plaintiff to pay the defendant's legal and other expenses, including attorney's fees.[44] In addition, such an unfair labor practice finding, in the words of the Court, "poses the threat of reputational harm that is different and additional to any burden posed by other penalties[.]"[45] Given the significant adverse consequences attendant upon a Board adjudication, a prospective plaintiff might well be deterred from filing such a lawsuit to vindicate his legal rights. Consequently, the prospect of liability for an unfair labor practice would reasonably tend to chill a prospective plaintiff from exercising the fundamental First Amendment right to petition.

This chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion, Indeed, the very prospect of liability may deter prospective plaintiffs from filing legitimate claims. Thus, the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits. In sum, we see no logical basis for finding that an ongoing, reasonably-based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to winning litigants.

We recognize that the Board's previous decisions in this and other cases applied a different standard to completed lawsuits.[46] However, that standard derived from language in *Bill Johnson's* suggesting that if the employer lost the lawsuit or the lawsuit was withdrawn, the Board could proceed to adjudicate the unfair labor practice case and could find that the suit violated the Act if it determined that the suit was retaliatory.[47] The Court in *BE & K,* however, effectively disavowed this portion of *Bill Johnson's* as dicta and refused to be bound by it. Thus, as interpreted by *BE & K, Bill Johnson's* no longer warrants lesser protection for reasonably based but completed litigation. Accordingly, we find that, just as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice.[48] In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. at 60.

In formulating our new standard, we have considered the arguments raised by our dissenting colleagues. For the following reasons, we find these arguments unpersuasive.

The dissent reiterates the view, twice rejected by the Supreme Court, that because retaliatory lawsuits undermine important goals of the Act, the Board is empowered to impose unfair labor practice liability on such suits, even if they are reasonably based. The dissent thus elevates the rights guaranteed by Section 7 of the Act over the fundamental First Amendment right to petition the government for redress of grievances. This is precisely the approach that the Court invalidated in *Bill Johnson's* and *BE & K* and that we find untenable in our decision today.

As discussed above, in *Bill Johnson's*, the Court, while acknowledging that lawsuits may be powerful instruments of coercion or retaliation, nonetheless found that the First Amendment right of access to the courts prohibited the Board from enjoining as an unfair labor practice a reasonably based lawsuit regardless of the motive with which it was filed.[49] The Court also stated, however, that where a suit has been litigated to completion and has

[42] Id. at 741.

[43] Indeed, an order barring future similar suits would seem to directly impact the right to petition.

[44] See fn. 22 above. Member Kirsanow notes that, as stated above in fn. 22, the Court in *BE & K* left undecided "whether the Board . . . has authority to award attorney's fees when a suit is found to violate the NLRA." 536 U.S. at 530. Even assuming, however, that the Board lacks that authority, Member Kirsanow finds that the remaining undisputed adverse consequences of a Board adjudication, set forth above, would themselves reasonably tend to chill a prospective plaintiff from exercising the First Amendment right to petition.

[45] 536 U.S. at 530.

[46] Cf., however, *Clyde Taylor*, supra, 127 NLRB at 109.

[47] See *BE & K Construction Co.,* 329 NLRB at 721–722, and cases cited at fn. 22 therein.

[48] In agreeing that no reasonably based lawsuit can be found to be an unfair labor practice, Members Schaumber and Kirsanow emphasize the separation of powers concern raised by Justice Scalia in his concurring opinion in *BE & K*, 536 U.S. at 537–538.

[49] 461 U.S. at 748–749.

been unsuccessful, "the Board may consider the matter further and, if it is found that the lawsuit was filed with a retaliatory intent, the Board may find a violation and order appropriate relief."[50] In *BE & K*, the Court stated that it was not bound by this passage, declaring it to be dicta. Recognizing that reasonably based lawsuits, even if unsuccessful, embody First Amendment interests, the Court invalidated as insufficiently protective of those interests the Board's standard, derived from *Bill Johnson's,* for imposing unfair labor practice liability on completed retaliatory lawsuits. The Court in *BE & K* thus reaffirmed the primacy of the First Amendment right to petition, "one of the 'most precious of the liberties safeguarded by the Bill of Rights,'"[51] even in circumstances where the right to petition collides with the interests underlying the Act.

We recognize that the Court in *BE & K* expressly stated that it was not deciding "whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity[.]"[52] However, having decided that the Board could not generally find such suits unlawful, the Court was merely following the bedrock principle of judicial restraint, pursuant to which the Court will not reach a constitutional question in advance of the necessity of deciding it. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984); see also *Ashwander v. TVA*, 297 U.S. 288, 346–347 (1936) (Brandeis, J., concurring). Simply put, the Court resolved the case on the narrowest basis.

The dissent finds lurking in the Court's refusal to decide whether there are any conceivable circumstances in which the Board could find unlawful a reasonably based, unsuccessful lawsuit filed with a retaliatory motive a suggestion that the Board is free to engage in a balancing process in the general run of cases. The balancing process the dissent has in mind is a disguised method for the Board to preserve the general rule the Court condemned in *BE & K* with the added dimension of unpredictability and its attendant chilling effect on the First Amendment right to petition. There is no justification for the dissent's conversion of the prudential restraint the Court exercised in *BE & K* into an implicit authorization for the Board to continue down its former constitutionally infirm path with a different explanation.

There is even less justification for the dissent's reliance on and extension of the standard articulated in Justice Breyer's concurring opinion, in which only three Justices joined, pursuant to which the Board could find unlawful unsuccessful but reasonably based lawsuits brought as part of a broader course of conduct aimed at harming a union or interfering with employees' exercise of their rights under Section 7. The narrow "opening" left by the majority decision clearly does not encompass the broad and indefinite standard suggested by Justice Breyer. Moreover, that standard was expressly disavowed by Justice Scalia in his concurring opinion, in which Justice Thomas joined.

In his concurring opinion, Justice Scalia expressed serious reservations about permitting reasonably based lawsuits to be held unlawful based on a determination of motive made by an executive agency that lacks the independence of an Article III court. Even apart from separation of powers concerns, we agree that it would be improper for the Board to find an objectively reasonable lawsuit to be an unfair labor practice whenever it determines that the plaintiff had one motive rather than another. Even the most consistent of legal standards and even-handed application cannot guarantee, when motive and intent must be discerned, that some objectively and subjectively reasonable lawsuits will not be found to violate the Act. As discussed above, in light of the significant adverse consequences that result from the Board's determination that an unsuccessful but reasonably based lawsuit is an unfair labor practice, the risk of liability would reasonably tend to deter prospective plaintiffs from filing even legitimate claims. Accordingly, we conclude that it is necessary to construe the Act to prohibit only lawsuits that are both objectively and subjectively baseless, in order to avoid chilling the fundamental First Amendment right to petition.

In so finding, we do not hold that First Amendment interests must always predominate over Section 7 rights. Even under the standard announced today, a lawsuit that targets conduct protected by the Act can be condemned as an unfair labor practice if it lacks a reasonable basis and was brought with the requisite kind of retaliatory purpose.[53]

[50] Id. at 749.

[51] Id at 524, quoting *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222 (1967).

[52] Id. at 536–537.

[53] As the *BE & K* Court noted, the shield of the First Amendment may well encompass even some litigation that is objectively baseless.

The dissent goes too far in asserting that our decision today will give employers greater freedom to bring lawsuits that have no legal merit. Lawsuits that lack a reasonable basis are not immunized from unfair labor practice liability by our decision.

B. Did the Respondent's Lawsuit Have a Reasonable Basis?

We now apply our new standard to the facts of this case. If the Respondent's lawsuit was reasonably based when filed, First Amendment considerations prevail and the suit may not be found to be an unfair labor practice. The Respondent contends that the Supreme Court has already resolved that precise issue and that the Board is bound by this holding as the law of the case. We agree.

The language of the Court's decision was unequivocal and concluded that the Respondent's lawsuit was reasonably based. Justice O'Connor's opinion for the Court states as follows:

> [W]e need not resolve whether objectively baseless litigation requires any "breathing room" protection, for *what is at issue here are suits that are not baseless in the first place*. Instead, as an initial matter, *we are dealing with the class of reasonably based but unsuccessful lawsuits*.[54]

Similarly, Justice Breyer's concurrence, joined by three other Justices, states:

> The Court holds that the National Labor Relations Act (NLRA or Act) does not permit the National Labor Relations Board to declare unlawful under § 8(a) of the Act, 29 U.S.C. § 158(a), an employer's filing suit *in the circumstances present here,* which is to say, in the kind of case in which the Board rests its finding of "retaliatory motive" almost exclusively upon the simple fact that *the employer filed a reasonably based but unsuccessful lawsuit* and the employer did not like the union.[55]

In light of the Court's express finding, we are bound by it as the law of the case.

Our own analysis of this issue leads to the same conclusion. We find that the General Counsel failed to show that the Respondent's lawsuit was not reasonably based. Indeed, the General Counsel concedes the point. As described above, the Respondent, believing that the Unions were improperly attempting to delay its steel mill modernization project, brought suit against them, contending that the Unions' actions violated Section 303 of the LMRA and Sections 1 and 2 of the Sherman Act. We cannot say that this lawsuit was baseless because much of the applicable law was uncertain when the suit was filed.

As the Ninth Circuit observed in its ruling, the Respondent's Sherman Act allegations involved the "nether reaches"[56] of antitrust law. Although the Ninth Circuit ultimately affirmed the district court's dismissal of the lawsuit, it held that the district court had erroneously interpreted the statutory exemption to the antitrust laws raised by the Unions as a defense. To establish that the exemption did not apply, the district court had required the Respondent (plaintiff in that case) to satisfy a two-pronged test, showing that the Unions, in taking the actions at issue, *both* (1) had combined with a nonlabor group *and* (2) had not acted in their legitimate self-interest. The Ninth Circuit, parsing Supreme Court precedent, concluded that satisfying *either* prong would defeat application of the statutory antitrust exemption. Therefore, the district court had erred in denying the Respondent discovery as to the second prong after finding that the Respondent had failed to establish the first prong. The Ninth Circuit found that discovery had been warranted, as a number of the activities allegedly undertaken by the Unions were not per se exempt from the antitrust laws.

Similarly, when the suit was filed, it was not clear whether the challenged activities were entitled to antitrust immunity under the *Noerr-Pennington* doctrine[57] or would fall within the sham exception to that doctrine. The Respondent contended that the Unions engaged in a pattern of "automatic petitioning of governmental bodies . . . without regard to and regardless of the merits of said petitions."[58] It relied on *California Motor Transport Co. v. Trucking Unlimited*,[59] in which the Supreme Court held that allegations "that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases,'"[60] were "[o]n their face . . . within the 'sham' exception[.]"[61] The Unions countered that the Supreme Court's subsequent decision in *Professional Real Estate Investors* foreclosed reliance on *California Motor Transport* and required a showing that each individual suit brought by the Unions was objectively baseless. The Ninth Circuit agreed with the Respondent that *California Motor Transport* provided the relevant precedent. The court therefore rejected the Unions' contention that the Respondent's continued prosecution of its antitrust claims after issuance of *Professional Real Estate Investors* was frivolous. Nevertheless, applying *Professional Real Estate Investors,* the court found that the Respondent could not substantiate its

[54] 536 U.S. at 531 (emphasis added).
[55] Id. at 539 (second emphasis added).
[56] *USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades Council, AFL–CIO,* 31 F.3d 800, 803 (9th Cir. 1994).
[57] See fn. 38, above.
[58] 31 F.3d at 810 (internal quotation marks omitted).
[59] 404 U.S. 508 (1972).
[60] Id. at 512.
[61] Id. at 516.

claims that the Unions had filed their lawsuits without regard to the merits because 15 of the Unions' 29 lawsuits had proven successful. Thus, the court found that the Respondent failed to show that the Unions' actions came within the sham exception to the *Noerr-Pennington* doctrine.

Although the Ninth Circuit ultimately found against the Respondent, we cannot say that the Respondent's claim was baseless. At the time that the Respondent filed the lawsuit, the outcome of some of the Unions' petitioning was not yet known. Moreover, in *California Motor Transport* itself, the Supreme Court determined that the plaintiffs were not precluded from showing that the defendants' petitioning was a sham, even though the defendants there had prevailed in 21 of the 40 suits attacked as unlawful by the plaintiffs. Thus, the Ninth Circuit's conclusion in this case was not foregone.[62]

Additionally, while the district court had awarded sanctions against the Respondent for repeatedly realleging claims that had been dismissed, the Ninth Circuit reversed the sanctions award. The court found that the Respondent's belief that the repleading was required under circuit precedent in order to preserve the claims for appeal was not frivolous and the Respondent's decision to err on the side of caution could not be faulted.

Other factors also indicate that the Respondent's antitrust claims were not baseless. The Ninth Circuit's decision created new law on the interpretation of *California Motor Transport* in light of *Professional Real Estate Investors,* and on the antitrust liability of unions for engaging in petitioning activity.[63] While the antitrust claims alleged a novel theory that was ultimately unsuccessful, the Supreme Court in the present case recognized that certain types of unsuccessful petitioning are entitled to First Amendment protection: "[U]nsuccessful but reasonably based suits . . . promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around."[64] The Respondent's theory, even if not supported by established precedent, raised a reasonable argument for the extension of existing law. Accordingly, given the precedential value of the case and the difficult issues it presented, we cannot find that the Respondent's antitrust claims lacked a reasonable basis.

Nor can we find that the Respondent's Section 303 claims were baseless. In particular, it was not axiomatic that the *Noerr-Pennington* doctrine protected the Unions' conduct from the Respondent's Section 303 claims. Thus, while the Respondent did not prevail on this issue, its theory was not frivolous. Additionally, as noted above, the General Counsel authorized issuance of a complaint on a Section 8(b)(4) theory similar to that alleged in the Respondent's Section 303 claims.[65] In *TAME T.I.C.*,[66] a contractor alleged that various unions violated Section 8(b)(4) by submitting comments to governmental agencies with an object of forcing a neutral to cease doing business with the primary employer. The General Counsel rejected the unions' argument that their activity in submitting comments was protected under the *Noerr-Pennington* doctrine. Rather, the General Counsel found that the activity fell within the sham exception to that doctrine. As in *TAME T.I.C.*, the Respondent alleged facts indicating that the Unions may have had an unlawful secondary object. For instance, union representatives allegedly stated that all permits for nonunion contractors would be automatically protested and suggested that if the contractor awarded the project to a union contractor, the Unions would stop advocating for a hazardous waste ordinance. Thus, given the similarity between the Respondent's Section 303 theory and *TAME T.I.C.*, we cannot find the Respondent's Section 303 claims lacked a reasonable basis.

VI. CONCLUSION

In sum, we find that the Supreme Court held that the Respondent's lawsuit was reasonably based, and our own analysis leads to the same conclusion. Because we have determined, for reasons discussed above, that a lawsuit that is reasonably based cannot be found to be an unfair labor practice, we dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN AND MEMBER WALSH, dissenting.

In the wake of the Supreme Court's decision in *BE & K Construction*[1]—which adopted a limiting construction of the National Labor Relations Act in order to avoid a difficult First Amendment issue—it is clear that the Board cannot find that a reasonably based lawsuit is an unfair labor practice, simply because the suit was unsuccessful and filed with the purpose of interfering with

[62] See Lemley, Antitrust Counterclaims in Patent and Copyright Infringement Cases, 3 Tex. Intell. Prop. L.J. 1, 6 fn. 32 (1994).

[63] See, e.g., *Amarel v. Connell*, 102 F.3d 1494, 1518–1519 (9th Cir. 1997) (discussing *USS-POSCO*'s test for whether *California Motor Transport* or *Professional Real Estate Investors* applies); *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 101 (2d Cir. 2000) (same).

[64] 536 U.S. at 532.

[65] Sec. 303 provides a cause of action for anyone injured in his business or property by reason of a violation of Sec. 8(b)(4).

[66] *TAME T.I.C. & United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,* Case Nos. 27–CC–826, 827, Advice Memorandum (Jan. 27, 1993).

[1] *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

conduct protected by the Act. But the *BE & K* Court did not hold, as the majority now does, that *all* reasonably based lawsuits are immune from liability under the Act. That holding goes too far in protecting potential First Amendment interests, at the expense of the rights guaranteed by Federal labor law. As we will show, the majority offers no persuasive explanation for failing to carefully balance constitutional concerns with what the *BE & K* Court described as the "important goals of the [Act]."[2] In particular, the majority errs in categorically rejecting the options left open to the Board for finding at least some retaliatory and meritless, but reasonably based, lawsuits unlawful.

I.

That there are such options is indisputable. The *BE & K* Court explicitly declined to decide

> whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA [National Labor Relations Act] protected activity.

536 U.S. at 536–537.

The *BE & K* Court also observed that it was not required to "decide what [its] dicta in *Bill Johnson's* may have meant by 'retaliation.'" Id. at 537, citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 747 (1983). At issue in *Bill Johnson's* was the Board's standard for enjoining ongoing suits. The *Bill Johnson's* Court contrasted that situation with the situation presented by a completed suit, observing:

> If judgment goes against the employer in the state court . . . 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 practice case. The employer's 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' §7 rights.

461 U.S. at 747.

What the *BE & K* decision leaves open is convincingly described by the concurring opinion of Justice Breyer in *BE & K*, which was joined by Justices Stevens, Souter, and Ginsburg: The Board may *not* "rest its finding of 'retaliatory motive' almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union." 536 U.S. at 539. Left open, in contrast, is the possibility of imposing unfair labor practice liability in "other circumstances in which the evidence of 'retaliation' or antiunion motive might be stronger or different." Id.

One example, as Justice Breyer's concurrence observes, is the situation expressly referred to by the Court's opinion: a case involving "an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union." Id. A second example is the lawsuit brought by an employer "as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under" the Act. Id.[3]

II.

The majority uses *Bill Johnson's* as its starting point, while rejecting the basic distinction made there between ongoing and completed lawsuits. In *Bill Johnson's*, as explained, the Court precluded the Board from *enjoining* reasonably based lawsuits, but permitted the Board to treat completed, meritless, retaliatory suits as unfair labor practices. In the majority's view, *BE & K* has since undermined any distinction between ongoing and completed suits, yielding the rule that all reasonably based lawsuits—whether ongoing or completed, and regardless of motive or surrounding circumstances—must be immune from unfair labor practice liability. Simply put, this is a non sequitur, based on a misreading of both *Bill Johnson's* and *BE & K*.

A.

The majority reasons that First Amendment concerns are implicated whenever the right of access to the courts is burdened. "[D]eclaring a reasonably based, unsuccessful lawsuit to be an unfair labor practice burdens the First Amendment right to petition," the majority observes, citing *BE & K*. According to the majority, there is no "logical basis," in turn, "for finding that an ongoing, reasonably based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail."

In the majority's view, insofar as *Bill Johnson's* endorsed a distinction between ongoing and completed lawsuits, and contemplated that the Board could impose unfair labor practice liability for at least some reasonably

[2] Id. at 535.

[3] See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) ("It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute").

based, but unsuccessful suits, that view was "effectively disavowed" in *BE & K;* rather, "as interpreted by *BE & K*, *Bill Johnson's* no longer warrants lesser protection for reasonably based but completed litigation."

B.

The basic flaw in the majority's argument is clear. If the *BE & K* Court intended the majority's holding, then it would have announced that rule, and not left open, as it did, the possibility that the Board could find unlawful some subset of unsuccessful, but reasonably based, suits targeting conduct protected by the Act.

Nor does it follow—whether from *Bill Johnson's*, *BE & K*, or the two decisions read together—that the Board is precluded from imposing *any* burden on the First Amendment right to petition in order to protect the rights guaranteed by Section 7 of the National Labor Relations Act. The majority's apparent position is that the balance between protecting the right to petition and preserving Section 7 guarantees can never tip in favor of the Act: if the First Amendment is implicated at all, the statute must yield. There is no support for this claim in the Supreme Court's decisions.

Indeed, *Bill Johnson's* makes clear that a balancing test is required, in which the need to preserve Section 7 rights threatened by a lawsuit is weighed against the countervailing need to protect access to the courts.[4] The *Bill Johnson's* Court observed that the National Labor Relations Act has been "liberally construed . . . as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities." 461 U.S. at 740 (footnote omitted). "A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation," the Court found, citing the financial burden on employees and unions of defending even unmeritorious lawsuits and the chilling effect that follows not only from the threat of litigation costs, but also from exposure to legal damages. Id. at 740–741. In *Bill Johnson's*, the Court, citing "countervailing" First Amendment considerations (id. at 741), precluded the Board from enjoining ongoing, reasonably based lawsuits. And, as we have seen, the Court suggested that the Board was free, in contrast, to impose unfair labor practice liability for a completed, retaliatory lawsuit that had been "shown to be without merit." Id. at 747. In that situation, the Court explained, First Amendment interests had been sufficiently vindicated and no longer posed an obstacle to the protection of Section 7 rights. Id.[5]

Although the *BE & K* Court distanced itself from *Bill Johnson's*, it did not reject the basic principle that a balancing of First Amendment and Section 7 rights is required—and thus that, in at least some cases, the Board is permitted to find unlawful an unmeritorious, retaliatory lawsuit that, because reasonably based, is constitutionally protected. It is one thing to say that a suit is constitutionally protected activity; it is another to say that the suit is therefore immune from labor-law liability.

As its decision makes clear, the *BE & K* Court's departure from *Bill Johnson's* concerned which lawsuits could properly be deemed retaliatory. *BE & K* has narrowed that category, reflecting a greater weight given First Amendment concerns, but it has not defined the category and it has certainly not defined it as the majority does here, to exclude all reasonably based suits.

The *BE & K* Court explained that in *Bill Johnson's,* the "precise scope of that term ['retaliation'] was not defined." 536 U.S. at 533. It determined that the Board's view—"that a retaliatory suit is one 'brought with a motive to *interfere* with the exercise of protected [NLRA §7] rights'"—"broadly covers a substantial amount of genuine petitioning." Id. (emphasis in original). Thus, a limiting construction of the Act was required to avoid reaching the difficult constitutional issue. Id. at 535.

But the Court left that construction to the Board, finding only that the Board's existing standard was overbroad and thus "invalid." Id. at 536. Instead of offering a limiting construction of the Act, the majority mistakenly treats *BE & K* as if it resolved the issue that the Court (in the words of Justice Scalia) "scrupulously avoid[ed] deciding." *BE & K*, supra, 536 U.S. at 537 (Scalia, J., concurring). In the majority's view, the Court merely *appeared* to leave issues open for the Board; it was exercising judicial restraint and thus "not reach[ing] a constitutional question in advance of the necessity of deciding it." This view seems backwards to us. The Court *did* exercise judicial restraint. But it did so with a

[4] The need for such a balancing test occurs in other areas where labor law intersects with the Constitution. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (discussing codification of First Amendment by Sec. 8(c) of Act and observing that "employer's [free speech] rights cannot outweigh the equal rights of the employees to associate freely").

In the labor-law context, moreover, the balancing inquiry must take into account that certain activity protected by Sec. 7 of the Act—e.g., litigation—is itself also protected by the Constitution. For an extended discussion of this point, see Paul More, *Protections against Retaliatory Employer Lawsuits after BE & K Construction v. NLRB*, 25 Berkeley J. Emp. & Lab. L. 205, 260–262 (2004).

[5] The majority is mistaken, then, in characterizing the *Bill Johnson's* distinction between ongoing and completed lawsuits as resting on a determination that the completed lawsuit "loses [First Amendment] protection solely because the plaintiff failed to ultimately prevail." Rather, as the *Bill Johnson's* Court explained, once a retaliatory suit has been permitted to proceed to its conclusion, and has failed, proper weight has been given to First Amendment interests.

narrow holding that focused on the Board's prior test, as opposed to a definitive ruling that dictated a new test for the Board.[6]

III.

We concur with the majority that the Respondent's lawsuit here must be treated as reasonably based: that is the clear implication of the Supreme Court's decision, and the General Counsel has conceded the point. That determination, under our view, does not end the case. Rather, we would remand the matter to permit the General Counsel to present evidence and argument, consistent with the position articulated in Justice Breyer's *BE & K* concurrence, that despite being reasonably based, the Respondent's lawsuit was nevertheless retaliatory, because, for example, it was brought simply to impose litigation costs on the Union or was part of a broader course of conduct aimed at harming the Union and interfering with Section 7 rights.

IV.

As Justice Breyer correctly observed, the National Labor Relations Act "finds in the need to regulate an employer's antitunion lawsuits much of its historical reason for being." Id. at 542. If it stands, the Board's decision today will give employers greater freedom to bring lawsuits that attack the exercise of labor-law rights, that have no legal merit, and that are motivated entirely by a desire to intimidate and to punish employees and their unions. The Supreme Court has not dictated this return to an older, harsher, but not forgotten legal era.

For its part, the Board, while taking constitutional concerns with all the seriousness they deserve, should also seek to preserve the guarantees made by the statute it administers. Because the majority has failed even to try, we dissent.

[6] See More, *Protections against Retaliatory Employer Lawsuits,* supra, 25 Berkeley J. Emp. & Lab. L. at 242 ("Much of the confusion over *BE & K Construction* has been over its actual holding, which, in effect, told the Board what it could not do without clearly setting forth what it could do").

The majority criticizes us for looking to Justice Breyer's concurrence for guidance in interpreting *BE & K*, but it looks to Justice Scalia's separate opinion in the same way—demonstrating, at the very least, that the Court's decision is subject to different readings. And while Justice Scalia (joined by Justice Thomas) rejected the view of Justice Breyer (and his three colleagues), the opinion of the Court did not address it.