RUNNING INTERFERENCE: LOCAL GOVERNMENT, TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS, AND THE CONSTITUTIONAL RIGHT TO PETITION

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Local governance is a participatory sport. Businesses bring preemption claims; constituents and other entities enforce municipal laws; and individuals and interest groups enthusiastically engage in significant grassroots petitioning and lobbying. The boundary between the governed and those doing the governing is at its most porous here, with constituents and leaders often moving in and out of such roles. Citizens can easily access leaders, and leaders show a high level of receptivity to resident requests.

This public participation in local governance is usually applauded. However, when constituents complain about a municipality's ongoing contract with a private party, they may find themselves in a very different position. Instead of being praised for their political participation, they might face a lawsuit for tortious interference with contractual relations. Tortious interference with contractual relations is an unruly tort at the best of times, but it becomes even more so in the context of local government, when what otherwise be commended as contributing to participatory democracy or exercising the constitutional right to petition is instead portrayed as unlawful interference. A recent case from a Florida appellate court affirming that an environmental activist owes $4.4 million in damages for disparaging a public-private partnership illustrates the tort's many problematic features and its poor fit within the context of local government.

Fortunately, the clash between tortious interference and the right to petition can be resolved, as numerous other courts have found, with a robust application of the Noerr-Pennington rule. Especially when combined with more capacious anti-SLAPP legislation and the new narrowed version of tortious interference set forth in the recent Restatement (Third) of Torts, the Noerr Pennington doctrine properly protects the rights of petition crucial to local government functioning, while still retaining a small sphere of potential liability for egregious wrongdoing.

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I. INTRODUCTION

Although public participation in government is never as high as political theorists would like, constituents are most active in *local* governance.[1] Businesses bring preemption claims when they are unhappy with local regulations, constituents and not-for-profit organizations sometimes have power to enforce local laws in their communities, and individuals and interest groups engage in significant grassroots petitioning and lobbying.[2] The boundary between the governed and those doing the governing is at its most porous at the local level: constituents typically have easy

1. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IN BRIEF: CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 1 (1979) [hereinafter ADVISORY COMMISSION] (noting "[c]itizen participation is formal and informal, is found at all governmental levels (but mostly at the local) . . .").

2. *See* infra Part II.

access to local leaders and find them to be a receptive audience.[3] Citizens organize and actively participate in the processes of local government, attending meetings, voicing opinions, and advocating for changes they want to see in their towns and cities.[4]

Normally, these political activities are praised and encouraged as representing democratic governance in its ideal form.[5] Indeed, community engagement in local governance is often held up as the gold standard that other levels of government should strive to achieve.[6] However, when the activities of participatory democracy impact a local government's contract with a private party, suddenly things can look very different.[7] Rather than a triumph of participatory democracy, these activities are sometimes jarringly reframed as wrongful interference. Consider the following scenario:

> A group of citizens in a local town is focused on environmental protection and other green initiatives. One of their main goals is to prohibit limestone mining in and around the town. The group knows that the city has recently contracted with a corporation to do such mining, and they believe the mining will wreak irreparable harm on the town and its surrounding sensitive ecosystem. After months of lobbying and advocacy work, the group's efforts succeed, and the town announces that it has cancelled the contract. The group's elation at their political success, though is short-lived. Almost immediately following the announcement, the corporation files suit against the group, alleging tortious

3. *See, e.g.*, Mike Maciag, *The Citizens Most Vocal in Local Government*, GOVERNING (July 2014), https://www.governing.com/topics/politics/gov-national-survey-shows-citizens-most-vocal-active-in-local-government.html (describing how residents frequently walk up and interrupt the mayor of Park City, Utah, with their concerns while he is out for lunch, and how he will "go door-to-door along the town's main corridor to gauge resident sentiment about everything from new development projects to air quality . . .").

4. *Id.*

5. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (12th ed. 1848, J.P. Mayer ed., G. Lawrence trans. 1966 (1969).

6. *Id.*

7. Similar problems can also occur via tortious interference with prospective economic advantage. This tort is known by numerous names, including "tortious interference with business relations," "tortious interference with economic relations," and "tortious interference with prospective advantageous relationship," but it is nevertheless "a recognized tort in nearly all jurisdictions." See Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of this Commercial Tort*, 35 CUMB. L. REV. 317, 323–4 (2004) and ALR 4th 9.

> interference with contractual relations, and arguing that the group is now liable for significant damages.[8]

If the group does not live in a state with robust anti-SLAPP legislation and generous immunity for petitioning activities, the group may find itself liable for inducing the town's breach of contract, and potentially subject to extensive damages.[9] A recent case from the Florida 4th District Court of Appeals, *Hurchalla v. Lake Point Phase I, LLC*, in which a 77-year-old environmental activist was found liable for $4.4 million in damages for tortious interference, illustrates the high stakes of such situations.[10]

Tortious interference is a controversial tort at the best of times,[11] but it becomes even more so in the context of local government, where petitioning activities that might otherwise be praised as constitutionally-protected efforts at participatory democracy are instead transformed into unlawful interference. While there is a small subset of malicious behavior even in the government context that the tort should be able to access, the value of political participation is such that this sphere must necessarily be quite cabined. When the tort runs unchecked, it chills a wide swath of political activity and dissuades would-be participants from becoming involved in controversial local government issues.[12]

In order to properly safeguard the constitutional right to petition from tortious interference with contractual relations, states should employ three prophylactic layers. First, states should adopt robust anti-SLAPP protections. SLAPP suits (an acronym for "strategic lawsuit against public participation") are often premised on tortious interference with contractual relations.[13] Because SLAPP suits deter democratic activities and stifle the right to petition, a majority of states have anti-SLAPP legislation, which allows SLAPP suits to be dismissed early in the process.[14] However, many versions of this legislation are overly narrow and too anemic to capture the multitude of lawsuits that infringe on rights of petition.

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8. This is a modified version of the scenario that appears in Aaron R. Gary, *Sued for Speaking Out*, 73 WISC. LAWYER 14, 14 (2000). This modified scenario is loosely based on the fact of Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d, 58 (Fla. 4th DCA 2019).

9. *See* Texaco v. Pennzoil, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987). The plaintiff was awarded a total of $10.5 billion at trial for the defendant's tortious interference with its contractual relations. On appeal, the award was reduced to $1 billion. *Id.*

10. Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58 (Fla. 4th DCA 2019).

11. *See, e.g.*, Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 337 (1980); Harvey Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 62 (1982).

12. *See infra* Part III.

13. *See infra* Part IV.

14. *Id.*

Second, as is done in most states, anti-SLAPP legislation should be supplemented by the Noerr-Pennington "sham" standard.[15] The sham standard holds that in circumstances where the right to petition is implicated, liability should be limited to instances where the petitioning activity is a "sham" or bald-faced attempt to harm another through the guise of petitioning.[16]

Third, as per the Restatement (Third) of Torts, tortious interference with contractual relations should be more narrowly defined.[17] The Restatement (Third)'s new definition, which replaces the vague and overly capacious 'improper' standard, will, as a threshold matter, preclude in the first instance some of the tortious interference claims that have been made in the local government context.

To show how these measures correctly resolve the tension between tortious interference with contractual relations and participatory local governance, this Article proceeds as follows. Part II describes participatory democracy at the municipal level, outlining some of the many forms of participation in local governance. Part III analyzes the tort of interference with contractual relations and how it conflicts with this participatory governance system. Part IV describes the proposed tripartite solution. This three-pronged approach protects the right to petition while ensuring that contractual rights are appropriately preserved as well.

II. ROLE OF THIRD PARTIES AND CONSTITUENTS IN LOCAL GOVERNMENT

While constituents lobby and vote at all levels of government,[18] the local level is where most constituents devote their highest level of political participation.[19] In some ways, this is by design: local governments are usually consciously structured "to give local constituents a critical role in directing their activities and shaping their performance."[20] Participation in local governance occurs through various channels, including preemption litigation, private enforcement of local ordinances, and petitioning. First, in preemption, private commercial parties police the scope of local

15. *Id.*

16. *Id.*

17. *Id.*

18. ADVISORY COMMISSION, *supra* note 1.

19. *Id.*

20. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 9 (8th ed. 2016).

power by bringing preemption challenges. The outcome of such litigation articulates the boundaries between the state and local spheres of authority. Second, constituents and other entities are sometimes empowered to enforce municipal laws that are tailored to solve local issues in their communities. Third, significant grassroots petitioning and lobbying occurs at the local level, as residents and interest groups urge local governments to adopt or reject numerous policies, ordinances, and positions.

A. Preemption

Private third parties, through preemption claims, play a prominent role in structuring the balance of power between local governments and states.[21] Although states have recently begun to more consciously and rigorously structure the state-local power balance themselves through hyper-preemption practices, prior to the rise of state-driven hyper-preemption, private third parties drove the bulk of the activity that occurred in the preemption landscape.[22] Through this form of public participation, private parties help dictate the scope of local government power and challenge the boundaries of "the political authority of the City."[23]

Most preemption claims are brought by one of three groups: criminal defendants, public-sector labor unions, and business and industry groups.[24] Criminal defendants frequently contest the validity of local criminal ordinances, arguing that the ordinances exceed a city's granted powers and that the city cannot govern through this tool.[25] Public-sector labor unions often bring preemption claims when city ordinances conflict with their interests, such as by requiring changes in hiring practices or pay.[26]

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21. Paul Diller, *Intrastate Preemption*, 87 B. U. L. REV. 1113, 1116 (2007).

22. Jeffrey Swanson & Charles Barrilleaux, *State Government Preemption of Local Government Decisions through the State Courts*, 56 URB. AFFAIRS REV. 671, 673 (2018). Hyper-preemption refers to "the increasingly aggressive methods" states use in preemption, including "[t]he threat of fiscal penalties, removal of local officials from office, and even criminal sanctions." Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 343 (2020).

23. City of Keene v. Cleaveland, 167 N.H. 731 (2015).

24. Diller, *supra* note 21, at 1136.

25. *Id.* at 1137. "Criminal defendants . . . argue [that] . . . local [criminal] ordinances . . . 'conflict' with state law by prohibiting an activity permitted – i.e., not criminalized – by state law, or invade a field of criminal law that has been occupied fully by the state through its comprehensive (usually, more lenient) regulation."

26. *Id.*

In addition, businesses routinely challenge cities' authority to pass regulatory measures that affect them in what they perceive as negative ways.[27]

Of these three, business organizations are by far the major players in the preemption game.[28] In fact, "when a city adopts a new policy that differs from state law and may harm some segment of the business community, a preemption challenge is almost certain to follow."[29] Businesses sued cities when cities first passed smoking bans, when cities passed anti-discrimination ordinances that offered additional protections on the basis of sexual orientation, and when cities imposed mandatory minimum wage laws.[30] Indeed, any suggestion that an ordinance "may impose additional costs and regulatory burdens" has a good chance of triggering a preemption lawsuit.[31]

Preemption claims are but one method by which people and entities participate in local governance, testing the bounds of its authority and scope. Through preemption, businesses play a significant role in constructing the limits of what cities can do. The pressure preemption exerts on governance is almost always in one direction – towards less authority. Even when a state may want or be agnostic about a city's exercise of power in a particular area, preemption claims function to curb city power. In this way, third parties—particularly businesses—play a large role in delineating the sphere of their local governments.

B. Enforcement of Private Right of Action

In addition to participation in local governance via preemption claims, individuals and entities also participate in local governance by enforcing city ordinances against violators.[32] Recently, cities have been increasingly empowering third parties to bring private rights of action against those who violate certain ordinances that target specific problems.[33] Most often, these laws grant private

27. *Id*. at 1138.

28. *Id*. at 1114.

29. *Id*. at 1115.

30. *Id*. at 1114.

31. *Id*.

32. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1135 (2012).

33. Scott Ferron, *Suing for the City: Expanding Public Interest Group Enforcement of Municipal Ordinances*, 50 COLUM. HUM. RTS L. REV. 220, 231–232 (2018). A similar trend has now migrated into the abortion context. Beginning in 2019, a number of municipalities, particularly in Texas, passed constitutionally-problematic ordinances that purport to ban abortion and "empower [] 'the unborn child's mother, father, grandparents, siblings and half-

rights of action only to persons who have been directly harmed by the violation, but they can also empower "any individual . . . or any entity the members of which have been aggrieved" to bring suit.[34] For example, Los Angeles allows affordable-housing organizations to bring claims for violations of ordinances related to "the conversion of residential hotels to other forms of housing," even though the organizations are not directly harmed by the violations.[35]

When individuals and entities voluntarily take on this municipal law enforcement role, they are participating in the project of governance and ensuring that the rules and policies initiated at the local level have adequate enforcement mechanisms.

C. Petitioning

The main form of participation in local governance, though, is through petitioning and grassroots advocacy.[36] Petitioning obviously occurs at all levels of government, but local government petitioning has four special features which make petitioning at this level of government particularly popular.

First, citizens have easy access to local government officials.[37] Citizens routinely encounter members of local government in community settings, like at the coffee shop or grocery store.[38] Local government meetings and hearings are regularly held and easily attended.[39] Not surprisingly, then, "citizens personally contact local elected officials more frequently than their federal or state counterparts,"[40] and "local governments interact frequently

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siblings' to sue for damages someone who helps others access an abortion." Shannon Najmabadi, *Lawsuit to Block Lubbock's Abortion Bans is Dismissed Tin Court as the Ordinance Takes Effect*, TEX. TRIB. (June 2, 2021) https://www.texastribune.org/2021/06/01/abortion-planned-parenthood-lubbock/; Edgar Walters, *ACLU Sues Seven Texas Towns for Passing Local Anti-Abortion Ordinances*, TEX. TRIB. (Feb. 25, 2020) https://www.texastribune.org/2020/02/25/aclu-sues-seven-texas-towns-passing-local-anti-abortion-ordinances/.

34. Ferron, *supra* note 33, at 232.

35. *Id*.

36. ADVISORY COMMISSION, *supra* note 1. *See also* BRIFFAULT & REYNOLDS, *supra* note 20, at 2. Even though there are many participatory activities undertaken at the local level, this participation does not actually extend to voting for local government actors: "Turnout in local elections is typically far lower than in elections for federal or state office." *Id*. at 28.

37. Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 374 (2008).

38. Nathan Cobb, *PCB City Council to Meet with Community Starting With 'Coffee with the Councilman*,' NEWS HERALD (Oct. 17, 2020). https://www.newsherald.com/story/news/2020/10/17/panama-city-beach-offering-chances-public-meet-city-leaders/3683130001/.

39. Maciag, *supra* note 3.

40. Roderick M. Hills Jr., *Romancing the Town: Why we Still Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2027 (2000). *See also* GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (Princeton Univ. Press ed., 1999).

with the people they serve."[41] Convenient access, with limited barriers to making contact with officials, "facilitates democratic involvement" in community affairs and encourages participation in local government.[42]

Second, citizens themselves often become local government officials, and, conversely, local government officials often step down and become just citizens. The boundary between the governed and those governing is permeable at the local level, as the "abundance of local offices makes it much more likely that citizens will serve as local elected officials than as state legislators or members of Congress."[43] Beyond just running for office, opportunities like "campaigning for or against a ballot proposition, or appearing before such critical governing institutions as the school board, the planning and zoning commission, or a town meeting" are most achievable at the local level.[44] Localities offer many chances to serve in public office, and citizens often move in and out of official roles, serving in different capacities over time and blending the boundaries between the governors and the governed.[45]

Third, "citizens are more likely to care about issues that are local in scope."[46] The quotidian lives of residents are deeply impacted by local decisions, from where traffic lights are placed, to the development of new parks and community centers, to garbage pick-up schedules and rules, to time limits on noisy activities.[47] Because of these immediate consequences, residents are motivated to offer input on the implementation and impact of such local governance matters. Contesting issues around land use is particularly common, as "[l]and use in particular deals with the very nature of community composition and growth," about which many constituents have intensely strong opinions and feelings.[48] Homeowners, housing advocates, and developers often vociferously debate the merits of various projects.[49]

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41. BRIFFAULT & REYNOLDS, *supra* note 20, at 2. Even though there are many participatory activities undertaken at the local level, this participation does not actually extend to voting for local government actors: "Turnout in local elections is typically far lower than in elections for federal or state office."

42. Diller, *supra* note 32, at 1135.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. BRIFFAULT & REYNOLDS, *supra* note 20, at 9.

48. Agustin Leon-Moreta & Vittoria Totaro, *What Can Local Governments Do? Variation Across States, in* COOPERATION AND CONFLICT BETWEEN STATE AND LOCAL GOVERNMENT (Russel L. Hanson & Eric S. Zeemering eds., 2020).

49. *Id.*

Finally, local governments are likely to actually respond to citizen grievances. When the government itself is small, and the size of the constituent group is small, governments can nimbly serve and react to reasonable constituent complaints.[50] Perhaps because of this, most individuals are happy with their relationships with their local government.[51] Both citizens and governments together are pleased with the "citizen-making" quality of local governments, highly valuing the self-government of active participation.[52] Constituents can get their grievances "on the agenda" and the institutional capacity of local government is such that it can readily respond.

In fact, local government responsiveness and the constitutional right to petition government are historically linked. The First Amendment right to "petition the Government for a redress of grievances," as it was understood in the colonies, was actually an "affirmative, remedial right which *required* governmental hearing and response."[53] In other words, the right to petition included a "corresponding" duty of governmental consideration.[54] Since government had to respond to petitions, control of legislative agendas rested largely with citizens,[55] blurring the line between constituents and their representatives and creating "a seamlessness of public and private governance."[56] Constituent petitions, for better or worse determined the legislative agenda, and colonial governments were "led 'willy-nilly'" by these petitions.[57]

Not surprisingly, this duty eventually became untenable at the federal level.[58] Inevitable in any event, as the "sheer volume of business" would eventually have overwhelmed the duty, it was when savvy abolitionists "flooded Congress with petitions during the debates over slavery,"[59] that the right of petition became

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50. Emily S.P. Baxter, *Protecting Local Authority in State Constitutions and Challenging Intrastate Preemption*, 52 U. MICH. J. L. REFORM 947, 954 (2019).

51. *Id*. at 6. For the last twenty years, approximately 63% of survey respondents have consistently confirmed that they have "a favorable opinion of their local governments." Comparatively, in 2013, 57% said the same about their state governments, while only 28% agreed when it came to the federal government. *Id*.

52. Pew Research Center, State Governments Viewed Favorably as Federal Rating Hits New Low (Apr. 15, 2013), discussed in BRIFFAULT & REYNOLDS, *supra* note 20, at 6.

53. Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L. J. 142, 142 (1986) (emphasis added).

54. *Id*. at 143.

55. *Id*. at 142.

56. *Id*. at 144.

57. *Id*.

58. *Id*. at 142.

59. *Id*.

officially redefined.[60] The right to petition morphed into a "right of free speech and expression- a definitional narrowing which persists to this day."[61]

The modern right to petition remains at the core of the political rights protected by the federal Constitution.[62] Defined broadly, as encompassing essentially "any form of communication to a governmental body (whether legislative, executive, agency, or judicial), any request for governmental action, or any other attempt to influence public officials or influence the passage or enforcement of laws," petitioning is often acknowledged to be one of the most important political rights enshrined in the federal constitution, and in many state constitutions as well.[63] Because of its importance, the motivation for performing petitioning activity is not heavily policed: even petitioning that is "driven solely by a desire for personal or economic gain," as often occurs with corporate lobbying, for example, receives robust protection.[64]

III. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Through bringing preemption claims, suing to enforce municipal law, and petitioning, constituents and community members are continually engaging with their local governments and participating in the workings of a democratic polity. Normally, petitioning in particular is praised as a quintessential practice of democracy.[65] However, when the issue at the heart of petitioning involves a municipality's ongoing contract with a private party, a complaining constituent may find themselves in a very different position: not praised, but sued. Private parties who have contracted with local governments sometimes sue constituents for lodging petitions and complaints when this petitioning impacts those agreements.[66]

60. *Id*. at 143.

61. *Id*.

62. Gary, *supra* note 8, at 14–15.

63. *Id.*

64. *Id*.

65. Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 406 (1990).

66. *Id*.

A. Background to Tortious Interference with Contractual Relations

Tortious interference with contractual relations is a common cause of action for private parties who have entered into agreements with local governments and feel aggrieved by petitioning activities.[67] The Restatement (Second) of Torts defines tortious interference with contractual relations as follows:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[68]

Usually classified as a "business" tort, tortious interference with contractual relations is typically imagined and discussed as arising between two competing commercial parties.[69] Even in the purely commercial context, though, commentators and scholars have heavily criticized the tort.[70] Critics complain that the tort "violates the doctrine of privity of contract by imposing rights and obligations on non-contractual parties, transforms an in personam right in contract into an in rem right in tort," and ignores the more significant action of the breaching promisor.[71] Moreover, despite these shortcomings, "[n]o real reasons seem to have been given why a third person should be liable for honest persuasion of another."[72]

Critics have also noted that the tort has been put to notoriously nefarious uses.[73] Following the Civil War, white plantation owners used the tort to limit the options of former slaves and artificially

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67. *Id.*

68. RESTATEMENT (SECOND) OF TORTS, § 766 (AM. LAW INST. 1979).

69. *See, e.g.*, Jeff Basso, *Deficient Tortious Interference Claim Leads to Dismissal of Complaint*, 32 THE SUFFOLK LAWYER 1, 3 (2018) (describing tortious interference with contractual relations as "one of the more common 'business tort' causes of action we see in the world of commercial litigation").

70. *See* Dobbs, *supra* note 10; Perlman, *supra* note 10.

71. Sarah Swan, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye*, 35 HARV. J. L. & GENDER 167, 168 (2012).

72. Dobbs, *supra* note 10, at 344.

73. For a discussion of these issues, *see* Swan, *supra* note 71, at 194.

restrain the market for their labor.[74] Later, employers used the tort to suppress employee attempts to unionize.[75] The tort continues to be used to reduce labor mobility and value.[76]

Part of the reason tortious interference with contractual relations has been used for exploitative purposes is that the "improper" interference standard is often interpreted very broadly, encompassing behaviors that many people would see as common and not particularly wrongful. The presence of 'improper' interference is often divined by applying a cumbersome seven factor test set out in the Restatement (Second) of Torts. Those factors include

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the others, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.[77]

Although they sound plausible in theory, in practice these factors have led to vague and often conflicting decisions, in part prompting the revised version now in the Restatement (Third) of Torts.[78]

B. Tensions Between Tortious Interference and Local Government Contracts

Although tortious interference with contractual relations is already problematic in the commercial context, it becomes even more so when one of those parties is not a private commercial party, but a municipality or local government.[79] Some local government contracts resemble private ones, in that they have little to do with matters of public concern, but many local government contracts are distinctly *public*.[80] As a matter of participatory democracy,

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74. *Id.*

75. *Id.* at 196.

76. *Id.* at 197.

77. RESTATEMENT (SECOND) OF TORTS, § 767 (AM. LAW INST. 1979).

78. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 cmt. a (AM. LAW INST. 2020).

79. Another remaining issue is whether tortious interference with contractual relations could arise from government-government contracts. Other issues arising from inter-governmental contracts are explored in Bridget A. Fahey, *Federalism by Contract*, 129 YALE L. J. 2232 (2020).

80. Sometimes contracts that at first glance look more 'private' than public can be regulatory because of the government's unique position as a market participant. For instance,

then, public-private contracts should be fair game for constituent commentary and complaints. However, as a matter of tort law, the *private* aspect of the contract may limit the form and substance of petitioning activity in some jurisdictions.

1. Public Contracts

Local governments, like their state and federal counterparts, are increasingly using public-private partnerships to accomplish a range of governmental goals. Because an enormous amount of public infrastructure is in dire need of repair, creation, and upgrade at the same time as many local governments are still reeling from the financial impacts of the 2008 recession,[81] many local governments are turning to public-private partnerships to fund and develop infrastructure projects that in the past they likely would have funded and developed themselves.[82] These partnerships offer quicker and initially inexpensive paths to facility and infrastructure construction, and allow the public sector to tap into "private sector expertise."[83] Public-private partnerships are now used in all sorts of instances, from infrastructure to "health care and welfare programs, public education, and prisons."[84]

The increasingly widespread use of public-private partnerships has given rise to a number of critiques. First, the typical public-private partnership involves a long-term contract, which shares risk between the entities and allows for "joint decision-making."[85] Allowing joint decision-making means that decision-making authority on public matters is increasingly privatized through these contracts, as governance becomes vested in "non-governmental arrangements operating outside electorally

in Airport Transport Ass'n of America v. City and Cty. of San Francisco, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998), the court stated that state or local governments are "more powerful than private parties," and, when the state or local government "refuses to enter into a contract based on . . . 'policy concern[s],' the state or local government is acting as a regulator, not as a market participant.

81. LAWRENCE L. MARTIN, PUBLIC-PRIVATE PARTNERSHIPS (P3S): WHAT LOCAL GOVERNMENT MANAGERS NEED TO KNOW, INT'L. CITY/CTY. MGMT. ASS'N 1 (2018).

82. *See id*. Municipalities can rely on state P3 legislation or their own home rule authority to enter into these agreements. *Id*. at 5. Examples of local government P3 projects include an airport terminal in Snohomish County, Washington; a water treatment plant in Phoenix, Arizona; and a water main and sewer upgrade in Rialto, California. *Id*. at 10–11. The contract at issue in Hurchalla v. Lake Point Phase I, LLC was a public-private partnership, which came about because the county lacked the funds to purchase the property outright. 278 So. 3d 58, 61 (Fla. 4th DCA 2019).

83. Martin, *supra* note 81, at 2.

84. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

85. Paul Landow & Carol Ebdon, *Public-Private Partnerships, Public Authorities, and Democratic Governance*, 35 PUB. PERFORMANCE & MGMT. REV. 727, 728 (2012).

accountable channels."[86] Further, because these contracts are sometimes for periods of several decades, governments may be vesting that authority for a significant period of time, and "reducing their own capacity and flexibility to make future decisions in the public interest."[87]

Second, other anti-public aspects are also present with these contracts. Constituents often complain that such contracts are ceding public goods and amenities to private actors. Comments like "'they are selling our roads' and 'they are privatizing our libraries and parks" are commonplace when the public learns of public-private partnerships.[88] They have also been criticized for being more expensive in the long run.[89]

Third, the "private" aspect of public-private partnerships also allows these contracts to often cloak themselves in opacity.[90] Public-private partnership contracts involve "complex procurement and contracting" procedures that are not well understood or open to adequate public access.[91] Particularly for projects related to urban land development, public-private partnerships are often entered into under processes that perpetuate "[t]he routine exclusion of the community from the deal-making process."[92] The exclusion of the public from the initial contracting process gives rise to the complaint that "public-private partnerships are dominated by business interests" at the expense of the public interest.[93] A lack of access to information compounds the problem: whereas projects that are financed and operated only by public actors are required to be transparent and "[f]inancial documents, planning documents, usage projections, wages, construction contracts, and performance reports" are deemed public documents in that context, "the rules are different" for public-private partnerships.[94] Those same documents are instead "deemed private."[95] This leaves constituents in the dark about projects which profoundly impact them,[96] such

86. *Id*. at 730.

87. *Id*. (citation omitted).

88. Martin, *supra* note 81, at 10.

89. *Id*.

90. *See* In The PUB. Interest, A GUIDE TO UNDERSTANDING AND EVALUATING INFRASTRUCTURE PUBLIC-PRIVATE P'SHIPS, 5 (2017).

91. Martin, *supra* note 84, at 3.

92. Patience A. Crowder, *More than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment*, 17 GEO. J. ON POVERTY L. & POL'Y 287, 288 (2010).

93. *Id*. at 293.

94. Landow & Ebdon, *supra* note 85, at 729 (citation omitted).

95. *Id*.

96. *See* Martin, *supra* note 81, at 2 (noting that "[c]itizens do not understand P3s, and many projects are criticized for a lack of transparency.").

that "[t]ransparency and accountability concerns" are widely expressed regarding public-private partnership agreements.[97]

These anti-democratic tendencies create a special need for robust public commentary on these contracts. When a government undertakes projects alone, constituents have significant liberty to speak and petition government on these matters. But when a private party has been contracted to partner on the project, the possibility of liability for tortious interference with contractual relations may stifle petitioning, even though it is in these very situations where public input and political push-back is increasingly important.

2. Constituents as Real Parties in Interest for Public-Private Contracts

Because of the 'public' aspect of a public-private partnership, the idea that tortious interference with contract could stem from petitioning activities is almost inherently nonsensical. The structural logic of tortious interference with contractual relations is in direct conflict with the reality that in the realm of government contracting, the private contracting entity and the contracting government are not the only entities impacted by these agreements.[98] The public is not a stranger to a government contract, but is in a sense the true underlying party.[99] Specifically, "applying the straightforward principal-agent framework that grounds theories of representative government, a governmental promise acts on behalf of its constituents, conceivably making those constituents real parties in interest, not strangers, to the agreements made by their agent-governments."[100] In other words, since "governments exist to serve the public, in a sense all these contracts are intended to benefit the members of the public."[101] Members of the public are situated entirely differently from strangers to a contract between two commercial parties, and it requires significant mental contortion to accept that a constituent could "interfere" in a contract to which it is the real party in interest.[102]

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97. Landow & Ebdon, *supra* note 85, at 729 (citation omitted).

98. Crowder, *supra* note 92, at 293.

99. *Id*. *See* also Fahey, *supra* note 79, at 2388.

100. Fahey, *supra* note 79, at 2388 (emphasis omitted).

101. David M. Lawrence, *Third-Party Beneficiaries of Contracts Entered into by Local Governments*, 126 U. N.C. Loc. Gov't L. Bull. 1, 3–4 (2011).

102. Fahey, *supra* note 79, at 2388.

Interestingly, though, while constituents are parties in interest as a matter of political and democratic theory, they are not deemed intended beneficiaries for the purposes of third-party contractual enforcement, and typically have "no third-party rights to challenge or enforce the contracts or to receive damages for their breach."[103] The fact that courts have been reluctant to let third-parties enforce public-private contracts, and yet have sometimes been quick to find tortious interference when constituents want the contract broken poses a problem for participatory democracy. By refusing to allow citizens to enforce public-private contracts while at the same time finding tortious interference when citizens contest them, the legal frameworks in both contexts work against public processes and democratic participation, and threaten the right to petition.

The anti-democratic tendencies often built into the processes and structures of public-private partnerships make the right to petition particularly crucial in this context. Citizens have a constitutional First Amendment right to petition government under the federal constitution, and many state constitutions also explicitly recognize the right to petition.[104] Courts have often commented that this right is of the utmost significance: it has been described as "central to the concept of open-government and democracy in the United States"[105] and a "core value" of the First Amendment.[106] The importance of the right is such that petitioning need not take any particular form, and what counts as petitioning activity is interpreted very broadly.[107] Tortious interference with contractual relations conflicts on its face with that constitutional right. And even though the United States Supreme Court "has noted the 'Constitution's special concern with threats to the rights of citizens to participate in political affairs,'"[108] some state courts continue to allow civil liability for petitioning activities in questionable circumstances.[109]

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103. Lawrence, *supra* note 101, at 4. *See also* RESTATEMENT (SECOND) OF CONTRACTS, § 313 (AM. LAW INST. 1981).

104. *See* Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, fn 5 (1996).

105. Sarah Klaper, *The Eye-Roll Heard 'Round the World: Protecting Citizens' Free Speech and Petition Rights in Accessing Local Government,* 10 CARDOZO PUB. L. POL'Y & ETHICS J. 299, 302 (2012).

106. *Id*.

107. *See id*.

108. Borough of Duryea v. Guarnieri, 564 U.S. 379, 394 (2011).

109 The lax protections some states provide in their anti-SLAPP legislation has led to allegations of forum shopping by plaintiffs, and continued calls for federal anti-SLAPP legislation. See, e.g, Jeremy Rosen and Felix Shafir, *Helping Americans to Speak Freely*, 18 FED. SOC'Y REV. 62, 70 (2017).

C. Recent Case Examples: Hurchalla v. Lake Point Phase I, LLC and Texas Campaign for the Environment v. Partners Dewatering International, LLC

One case illustrating the conflict between tortious interference with contractual relations and the right to petition is *Hurchalla v. Lake Point Phase One, LLC*, a decision of Florida's Fourth District Court of Appeal.[110] In *Hurchalla*, the court upheld a jury trial verdict finding a local senior citizen environmental activist liable for tortiously interfering with a public-private partnership.[111] Lake Point, a mining company owned by "billionaire real estate investor" George Lindemann Jr. (who was convicted and incarcerated in the 1990s for "hiring a hit man to electrocute [his] show horse" so he could collect the insurance money) sued Maggy Hurchalla, a 77 year old environmental activist, for tortious interference with contractual relations.[112] Lake Point had entered into a contract with the South Florida Water Management District, under which Lake Point would obtain lucrative mining rights to limestone in exchange for constructing a stormwater treatment project and then slowly conveying the property back to the Water District over a period of many years.[113] The property was uniquely positioned "at the intersection of three different water basins" that had "potential for storing, cleansing, and then conveying water to different areas," and was thus of high value.[114]

Convinced that the mining and the treatment plant would harm the delicate eco-system in the area, Maggy Hurchalla sent a series of emails to county commissioners that outlined her concerns

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110. Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58 (Fla. 4th DCA 2019). Additional attempts to appeal were unsuccessful. An en banc hearing was denied. *See* Petition for a Writ of Certiorari, Appendix B, Hurchalla v. Lake Point Please I, LLC, 141 S. Ct. 1052 (2021). The Florida Supreme Court refused to hear the case. Hurchalla v. Lake Point Phase I, LLC, 2020 WL 1847637. And the Supreme Court of the United States denied certiori. Hurchalla v. Lake Point Phase I, LLC, 141 S. Ct. 1052 (2021).

111. *Id.* at 68.

112. Martin Merzer, *Maggy Hurchalla's Free Speech Right Just Cost Her Millions*, FLA. POL. (Apr. 24, 2018), https://floridapolitics.com/archives/261967-maggy-hurchallas-free-speech-right-just-cost-her-millions. The jury was not informed of these background facts related to George Lindemann. *See* Lisa Broadt, *Maggy Hurchalla Found Liable, Ordered to Pay $4.4 Million in Damages to Lake Point*, TREASURE COAST NEWSPAPER (Feb. 14, 2018), https://www.tcpalm.com/story/news/local/shaping-our-future/2018/02/14/maggy-hurchalla-found-liable-ordered-pay-4-4-million-damages-lake-point/337652002/.TCPalm.com (Feb. 14, 2018). See also Patricia Mazzei, *The Florida Activist is 78. The Legal Judgment Against her is $4 Million*, NY TIMES (Sept. 17, 2019).

113. Hurchalla, 278 So. 3d at 61. The District entered into an Interlocal Agreement with Marin County as well. *Id.*

114. *Id.*

and objections.[115] The emails "encouraged the commissioners to copy and paste Hurchalla's statements and forward them in emails to the other county commissioners and county staff," and contained "explicit instructions . . . to her commissioner friends as to how to stop the Project with various maneuvers."[116] These emails were frequently signed with the fictitious names of "Deep Rockpit" and "Ms. Machiavelli."[117]

After Martin County and the Water District cancelled the contract, Lake Point sued.[118] The county and district settled with Lake Point for $12 million for that breach,[119] but Lake Point continued a separate action against Maggy Hurchalla.[120] After an eight-day trial[121] and approximately two hours of deliberations,[122] a six-member jury found Maggy Hurchalla liable for tortious interference with contractual relations, and assessed the damages against her at approximately $4.4 million.[123]

On appeal, the court upheld the verdict, and the Florida Supreme Court later declined to hear any further appeals from that decision.[124] The appellate court's decision turned largely on one specific email Maggy Hurchalla had sent to certain local government officials.[125] The email said that "[a] study was to follow that documents the benefits [of the stormwater treatment area]. That study has not been provided . . . . Neither the storage nor the treatment benefits have been documented."[126] At trial, the plaintiff argued this email showed evidence of malice, since "Hurchalla admitted [at trial] that there actually were documented treatment

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115. *Id*.

116. *Id*. at 62.

117. *Id*. at 68.

118. *Id*. at 62.

119. *Id.* at 63. The Restatement (Second) of Torts describes the relationship between a breach of contract action and an action for tortious interference with a contractual relation: "The fact that the plaintiff has an available action for breach of contract against the third person does not prevent him from maintaining an action under the rule stated in this Section against the person who has induced or otherwise caused the breach. The two are both wrongdoers, and each is liable to the plaintiff for the harm caused to him by the loss of the benefits of the contract.[…] Even a judgment obtained against the third person for the breach of contract will not bar the action under this Section so long as the judgment is not satisfied. Payments made by the third person in settlement of the claim against him must, however, be credited against the liability for causing the breach and so go to reduce the damages for the tort." (See § 774A(2))." RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (AM. LAW INST. 1979).

120. *Hurchalla*, 278 So.3d 58 at 62.

121. Broadt, *supra* note 112.

122. *Id*.

123. Merzer, *supra* note 115.

124. The court also specified that it would not entertain any motion for rehearing. Hurchalla v. Lake Point Phase I, LLC, 2020 WL 1847637

125. *Hurchalla*, 278 So.3d 58 at 62.

126. *Hurchalla*, 278 So. 3d at 65 (emphasis omitted).

benefits" shown by a study.[127] Hurchalla clarified that the study the plaintiff was referring to was only a preliminary study, not the gold standard of a peer-reviewed study Hurchalla was advocating for. Despite the discrepancy and ambiguity surrounding this issue, the appellate court found that the email about the benefits not being "documented" met the actual malice standard sufficient to defeat the First Amendment privilege arising from the right to petition, and that the misrepresentation of that email met the express malice standard as well. Further, the appellate court held that the email signature further tilted the scale such that the standard of spite-based malice was also met.[128]

The decision failed in many respects to take into account the importance of the local government context. First, the appellate court seemed to believe that Hurchalla's former role as a county commissioner and her social connection to newly elected members of the Board of the Martin County Commission rendered her most recent participation in local governance somehow unseemly.[129] Hurchalla had served as the Martin County Commissioner for twenty years between 1974 and 1994, and following that role had remained an active participant in local government matters connected to the environment, including, obviously, on the issue of this public-private contract.[130] Although the court suggested there was something troubling about her continued participation and involvement with local governance, in fact this is a common feature of participatory local governance:[131] citizens and officials continually move through these categories, taking on local government positions and then leaving them, and perhaps taking on others.[132] Perhaps unaware of this normal fluidity, the court's opinions seems to imply that there was something nefarious about Maggy Hurchalla's continued interest and participation in local issues, which pushed it towards viewing her actions as malicious.

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127. *Id.* (emphasis omitted).

128. *Id.* at 68. The court pointed out that Hurchalla's counsel had confused the two privileges. *See id.* at 63–64. The court noted that both privileges could be defeated by malice: actual malice, meaning "knowledge of falsity or reckless disregard of truth or falsity . . . shown by clear and convincing evidence" in the case of the First Amendment privilege, and express malice, meaning that the interferer acted either out of spite or through separate independent torts or bad acts, in the case of common law privilege. *Id.* at 65–66.

129. For example, the court notes the emails were sent to "her commissioner friends," and that she had "significant influence" with them.

130. *Hurchalla*, 278 So. 3d at 65. See also Broadt, *supra* note 113, noting that Hurchalla "has been an 'active, outspoken,' participant in local government for most of her adult life."

131. *See infra* Part II.

132. *Id.*

Second, the court was perturbed by the fact that the emails were sent privately.[133] Again, though, pursing informal channels for petitioning is quite common in the local context.[134] While the decision suggests that petitioning government outside the context of a public forum is suspect, the high level of accessibility of officials to their communities means that often communications take place through more intimate channels.[135] The idea that Hurchalla's emails to members of the board were illegitimate because they did not take place in a county meeting is contrary to how local governments tend to operate.[136] In fact, local governments often have rules in place that anticipate private communications occurring, and require those communications to be disclosed so that they will become part of the public record, regardless of what form they were received in.[137]

Finally, the appellate court undervalued the importance of the right to petition and the future chilling effect of this ruling.[138] The closest the court came to acknowledging the conflict was when it noted that Hurchalla had argued she was acting in the public interest, and the court applied the Restatement (Second)'s recommendation on how to address such arguments. However, the text of that section suggests that it is meant to apply to

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133. *See Hurchalla*, 278 So. 3d at 62, 66–67. The court quotes the plaintiff's allegation characterizing the emails as "surreptitious."

134. *See infra* Part II.

135. *Id.*

136. Moreover, it is well-established that "[a] plaintiff's use of private channels to make expressions will not preclude the expression from being considered a matter of public concern." Wehran-Puerto Rico, Inc. v. Municipality of Arecibo, 106 F. Supp. 2d 276, 284 (D.P.R. 2000) (citing Rankin v. McPherson, 483 U.S. 378, 386 n. 11 (1987)). *See also* Brief for the Florida Wildlife Federation, Inc. & Bullsugar.org et al. as Amicus Curiae Supporting Appellant, Hurchalla v. Lake Point Phase 1, LLC., 278 So. 3d 58 (Fla. 4th DCA 2019).

137. Disclosure was a problem in this case: three Martin County Commissioners were charged with misdemeanors related to public-record violations in relation to this case. After the first was acquitted at trial, charges against the other two were dropped. See Kimberly Miller, *State Drops Cases Against Former Martin County Commissioners in Public Records Dispute*, PALM BEACH POST (Aug. 20, 2019).

138. There may also be gendered notions surrounding women being manipulative and not normally belonging in public hearings at play. For a discussion of the gendered nature of the origins of tortious interference with contractual relations, *see* Swan, *supra* note 71. *See also* Klaper, *supra* note 109, at 299–300, describing an interesting incident at a recent local government meeting: "On June 14, 2010, Darlene Heslop, a resident of Elmhurst, Illinois, decided to attend an Elmhurst City Council Finance Committee meeting. When the committee chairman denied Ms. Heslop's request to speak, she did not yell. She did not throw anything. She did not make any threats. Instead, she signed audibly and rolled her eyes. That eye-roll promptly got her ejected from the meeting, as the chairman determined that '[m]aking faces behind the mayor's back is disruptive, in my opinion.' It was the eye-roll heard 'round the world' when local, national, and blogosphere media picked up the story. The incident prompted the Elmhurst City Council to request that the city attorney render an opinion as to the regulation of nonverbal speech in public meetings. His opinion was reportedly consistent with most federal courts—protecting a citizen's right to free speech and right to petition the government."

situations where the contract is between two commercial parties, and does not appear transferable to public-private partnerships.[139]

Even using this inapposite test, the court acknowledged that "several of the factors clearly weigh in favor of Hurchalla."[140] Nevertheless, the court found that the impugned email and Hurchalla's "significant influence with a majority of the commissioners," combined with "her ability over time" to convince them to change their minds about the contract and her facetious email signatures, "was sufficient to support an inference of malevolent intent to harm Lake Point."[141] Thus, despite that ambiguity surrounding whether benefits were "documented" and whether the study that was performed counted as a study, the appellate court upheld Hurchalla's liability.

This reliance on ambiguous statements as evidence of malice undermines the right to petition. As the court in *Baker v. Parsons* notes, "It would be a rare case in which a plaintiff was unable to attest that something said by the petitioner was untrue or misleading."[142] A finding of liability against a senior environmental activist for contesting a public-private partnership, even if her statements were misleading, has significant potential to chill political speech and petitioning activity.[143] As noted in an amicus brief filed in the appeal: "If statements made by citizens about complex, scientific, debatable, opinion-laden, matters can be deemed tortious falsehoods if a judge or jury subsequently disagrees with their complete accuracy, free speech on such matters will end for all but the wealthiest of citizens."[144] Moreover, the court's reasoning suggests that before communicating with governmental officials, a citizen must "perform an analysis of his or her standing in the community, relationship with the intended target of the speech, the target's depth of knowledge about the matter, and the

139. *See* RESTATEMENT (SECOND) OF TORTS, § 767 (AM. LAW INST. 1979).

140. Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58, 67 (Fla. 4th DCA 2019).

141. *Id*. at 68.

142. Baker v. Parsons, 434 Mass. 543, 553 (2001).

143. See also In Re IBP Confidential Bus. Documents Litigation, Bagley v. Iowa Beef Processors, 755 F.2d 1300, 1310 (1985) where the court noted that "Although not worthy of constitutional protection, erroneous statements of fact arise inevitably in the course of free and open communication between citizen and government. Punishing all such errors, whether by sanction or civil liability, would induce a cautious and restrictive exercise of the constitutionally guaranteed right to petition."

144. Brief for the Florida Wildlife Federation, Inc. & Bullsugar.org et al. as Amicus Curiae Supporting Appellant, Hurchalla v. Lake Point Phase 1, LLC., 278 So. 3d 58 (Fla. 4th DCA 2019).

potential that a future judge or jury might deem the intended statement to lack full accuracy, context and fairness" in order to safely exercise their right to free speech.[145]

Few constituents would brave miscalculating this equation when the risk of error could result in a multi-million dollar damage awards.[146] Public participation is often a thankless activity, and when combined with the risk of significant liability, many would choose to simply not partake.

A finding in *Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC*, that an environmental not-for-profit organization might be subject to liability for tortious interference with contractual relations creates a similar chilling effect.[147] In this case, Partners Dewatering Int'l ("PDI), "a grease and grit trap processing business," alleged that an individual plaintiff, Robin Schneider, and a non-profit environmental organization, Texas Campaign for the Environment ("TCE"), tortiously interfered with a contract between PDI and the City of Rio Hondo.[148] When the defendants sought dismissal of the claim under Texas's anti-SLAPP suit, the court declined to dismiss the suit.[149] The court found that PDI had met its burden to show that the elements of tortious interference with contractual relations had been met.[150] Specifically, the court found the following activities to constitute the basis of a tortious interference claim: canvassing neighborhoods impacted by the PDI contract, posting information on TCE's website that "informed residents of their right to request a public meeting" and declared "[w]e need our City Commissioners to take a stand for our air, water and community by getting out of this deal!," asking citizens "to sign 'a statement in support' and to write letters to the TCE and other city and state officials expressing their concerns about PDI," and appearing and speaking at public meetings.[151] According to the court, PDI only needed to show "(1) it had a valid contract; (2) the defendant willfully and intentionally interfered

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145. *Id*.

146. In Re IBP Confidential Bus. Documents Litigation, Bagley v. Iowa Beef Processors, 755 F.2d 1300, 1310 (1985)

147. *Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC,* 485 S.W.3d 184, 200 (Tex. App. 2016). Additionally, in Cheryl Lloyd Humphrey Land Investment Company LLC v. Resco Products, Inc., 2021 NCSC 56, the trial court had dismissed a claim for tortious interference arising from statements made a rezoning hearing, but the appellate court had held that dismissal was in error. The Supreme Court of North Carolina overturned the appellate decision and noted that "[p]rotecting the right to petition requires early dismissal of lawsuits that impermissibly seek to infringe on the right and thus chill petitioning activity."

148. *Id*. at 187.

149. *Id*. at 187.

150. *Id*. at 200.

151. *Id*. at 196.

with the contract; (3) the interference proximately caused the plaintiff's injury; and (4) the plaintiff incurred actual damage or loss."[152] Since PDI met this test, the court held that the environmental group's petitioning activities could create liability in this instance.[153]

IV. BALANCING THE RIGHT OF PETITION AND TORTIOUS INTERFERENCE

Robust protection of the right to petition is necessary for democracy to function, and particularly in the local government context, must be accorded a broad protection the reflects the importance of participation to local governance and the realities of what that participation looks like in practice. Nevertheless, total civil immunity for all petitioning activity would also thwart the functioning of local government.[154] Even local government themselves benefit where there is a sphere of egregiously wrongful acts that does not attract immunity.

City of Keene v. Cleaveland dramatically illustrates this point. In this case, a group of individuals who believe that parking fines are an illegitimate exercise of government power engaged in a series of both benign and more troubling behaviors.[155] On the more benign front, they followed parking enforcement officers around on a daily basis, rushing to fill meters before officers could issue tickets.[156] On the more troubling front, in one instance multiple individuals from the group followed one officer from "only a foot away," standing so close that if an officer "turned around, they would bump into him."[157] They frequently yelled insults at the parking officers, calling them names like "f***ing thief, coward, racist, and b****h."[158] They sometimes "waited outside restrooms" for officers to emerge, and, in one instance, an individual "grabbed [the wrist of one officer] when she attempted to remove one of the respondents' cards from a car windshield."[159] Numerous parking officers quit or complained of the anxiety and distress caused by these activities.[160]

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152. *Id.*

153. *Id.* at 193.

154. See discussion In Re IBP Confidential Business Documents, 755 F.2d at 1300

155. City of Keene v. Cleaveland, 167 N.H. 731, 734–35 (2015).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

When the city sued the members of this group for interfering with the city's contractual relationship with its employees, the court held that despite the harassing nature of much of this conduct, "holding the respondents liable for tortious interference based upon their alleged activities would infringe upon the respondents' right to free speech under the First Amendment."[161] The New Hampshire Supreme Court held that "'absent acts of *significant violence*, the First Amendment protects [these] non-verbal acts from tort liability."[162]

City of Keene v. Cleveland exemplifies a circumstance where protection of the right to petition appears too broad, and illustrates the dangers associated with what looks like total immunity. For good reason, the First Amendment does not offer *total* immunity to claims of wrongdoing involving petitioning or speech.[163] It is not difficult to envision other instances where wrongdoing is so egregious that the right to petition should not protect the activity.[164] In fact, at a certain point, protecting the *defendant's* right to petition may actually infringe on the *plaintiff's* right to petition the government for redress of grievances.[165]

At the same time, though, protection that is too skimpy has deleterious political consequences. As one commentators noted, "[t]he rights of political association are fragile enough without adding the additional threat of destruction by lawsuit."[166] The right to petition must have robust (though not absolute) protection in order to ensure the continued input and participation of constituents on public matters and particularly on matters involving public-private partnerships.

To realign the mechanisms of political power and adequately protect the right to petition, three layers of protection must all

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161. *Id*. at 738.

162. *Id*. at 740. Although the Court held that tortious liability for interference with contractual relations was not available here, the Court also held that the City could possibly get an injunction against the individuals, because the court has "authority to grant equitable relief to enforce a valid public policy of [the] State." City of Keene v. Cleaveland, 167 N.H. 731, 744 (2015) (citing Murray v. Lawson, 649 A.2d 1253, 1263 (N.J. 1994)).

163. Gary, *supra* note 104, at 69–70.

164. Petitioning cases that raise civil rights issues may be an example of this. *See* e.g. Robert A. Zauzmer, *Note: The Misapplication of the Noerr-Pennington Doctrine in Non-AntiTrust Right to Petition Cases*, 36 STANFORD L. REV. 1243, 1257 (1984), describing Weiss v. Willow Tree Civic Association, 467 F. Supp. 803 (S.D.N.Y. 1979) in which "a congregation of Hasidic Jews used local residents who allegedly had delayed construction of a planned Jewish housing development by complaining to local authorities about technical and procedural problems and about the Hasidim's 'peculiar way of life.' The claims were dismissed, in part because they related to legitimate petitioning activity immunized by the new Noerr-Pennington doctrine." *Id*.

165. *See* Gary, *supra* note 8, at 68.

166. City of Keene v. Cleaveland, 167 N.H. 731, 740 (2015) (citing N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 931–32 (1982)).

be expansive. First anti-SLAPP legislation must be broad and interpreted generously. Second, the Noerr-Pennington 'sham' standard should govern claims of tortious wrongdoing. Third, courts should apply the Restatement (Third) of Torts definition of wrongfulness over the former Restatement (Second) standard.

A. Anti-SLAPP Legislation

One means of trying to strike the appropriate balance between the constitutional right to petition and tortious interference with contractual relations is through anti-SLAPP legislation. SLAPP suits, an acronym for a "strategic lawsuit against public participation," are lawsuits filed for the purposes of intimidating or silencing others.[167] The most common plaintiffs in a SLAPP suit are "large, well-financed organizations," who bring suit "against private citizens or local citizen's groups whose political activism may be detrimental to the organization's business interests."[168] A "classic example" is "a land developer suing area residents who are protesting a new development."[169] SLAPP suits often rely on "defamation and business torts" like tortious interference with contractual relations.[170]

SLAPP suits are problematic for a number of reasons. One is that they transfer the dispute "from the political forum to the legal forum."[171] This works to the detriment of those exercising their right to petition.[172] When constituents politically contest a public-private partnership, for example, the focus is on the business' actions.[173] The SLAPP suit, though, transports the dispute into the legal arena, where that focus is reversed, and trained instead on the individual or not-for-profit.[174] And whereas "a group of vocal individuals can wield significant clout by mobilizing the voting populace" and exercise *political* power in this way, few individuals or not-for-profit groups have formidable *legal* power: most lack the

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167. *See* Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J. L. & ARTS 431, 432 (2017).

168. Cosentino, *supra* note 65, at 402.

169. *Id.*

170. Gary, *supra* note 8, at 15.

171. Cosentino, *supra* note 65, at 403.

172. *Id.*

173. *Id.*

174. *Id.*

resources to mount a robust legal defense.[175] For this reason, the very threat of a lawsuit can have a chilling effect on political speech and the right to petition.

A majority of states have enacted anti-SLAPP legislation to help ward off these lawsuits.[176] But anti-SLAPP legislation has not always been an adequate gatekeeper for rights of petition in the local government context. For instance, in *Hurchalla v. Lake Point*, the two professors who coined the SLAPP term and are recognized as the leading experts in the area concluded that "they have rarely," during the decades long course of their careers, "seen a case that so obviously fits the definition, so clearly violates the First Amendment's Petition Clause, and yet was unrecognized and mishandled by the trial court."[177] Despite the fact that these experts easily identified the tortious interference suit in that case as "a remarkably obvious violation of the Constitution's First Amendment Right to Petition the Government for a Redress of Grievances,"[178] it was not dismissed through anti-SLAPP legislation and ultimately environmental activist Maggy Hurchalla was found liable on this cause of action.[179]

Similarly, in *Texas Campaign for the Environment v. Partners Dewatering International, LLC*, the defendant environmental groups were unable to mobilize Texas's anti-SLAPP legislation to fend off a suit alleging tortious interference with contractual relations.[180] The petitioning activities of drumming up constituent support and "appearing and speaking at public meetings" subjected the not-for-profit to potential liability, despite Texas' anti-SLAPP legislation.[181] Robust versions of anti-SLAPP legislation are needed in order to ensure that SLAPP suits are shunted out of court quickly.

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175. *Id.* at 403.

176. *See* Sherwin, *supra* note 167, at 433 noting that "since 1989, twenty-eight states, as well as the District of Columbia and the territory of Guam, have passed what are known as anti-SLAPP statues.

177. Brief for Dr. Penelope Canan & George W. Pring as Amicus Curiae Supporting Appellant, Hurchalla v. Lake Point Phase 1, LLC., 278 So. 3d 58 (Fla. 4th DCA 2019).

178. *Id.*

179. A later case also seemed to acknowledge that this was functionally a SLAPP lawsuit. *See* Logue v. Book, 297 So. 3d 605, 620–21 (Fla. 4th DCA 2020), noting that "[r]ecently, cases have surfaced where politicians have attempted to use the court system to stifle political opposition. There have also been the similar cases involving the right to petition the government, see, e.g., Hurchalla v. Lake Point Phase I" (citations omitted).

180. Texas Campaign for the Env't v. Partners Dewatering Int'l, LLC, 485 S.W.3d 184 (Tex. App. 2016).

181. *See* Marc D. Katz et al., *Texas Narrows Anti-SLAPP Law*, DLA PIPER (June 10, 2019), https://www.dlapiper.com/en/us/insights/publications/2019/06/texas-narrows-broad-anti-slapp-law/#:~:text=On%20June%202%2C%202019%2C%20Texas,such%20laws%20in%20the%20country (describing the version of the anti-SLAPP legislation which governed this case as "one of the broadest such laws in the country.")

B. Noerr-Pennington

In addition to capacious anti-SLAPP legislation and application, all courts should apply the *Noerr-Pennington* standard when tort suits implicate the right to petition. The *Noerr-Pennington* doctrine arose from a series of Supreme Court cases, and initially centered around anti-trust activities.[182] However, courts have since expanded the doctrine well-past anti-trust's borders, and a majority of courts apply the *Noerr-Pennington* standard to defamation and other torts.[183] Further, *Noerr-Pennington* has frequently been applied to petitioning activities undertaken at the local government level.[184] *Noerr-Pennington* offers "a sweeping protective immunity for communications to influence public officials regardless of intent or purpose—even if improper means, deception, or dishonesty are used—if the communications are aimed at procuring favorable government action."[185] The *Noerr-Pennington* doctrine thus gives significant protection to petitioning activities, allowing liability only when those activities are merely a 'sham,' or bare pretense "to cover an attempt to directly harm the business practice of a competitor."[186]

To establish the sham exception, a plaintiff must meet two hurdles. First, the plaintiff must show that "the petitioning activity was objectively baseless; that is, the petitioning was not genuine

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182. Those cases were E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); and California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). "In *Noerr*, trucking companies alleged and the trial court found that railroads had violated the Sherman Act by engaging in a vicious, corrupt, and fraudulent lobbying effort, which was deceptively conducted and motivated by an intent to destroy the truckers as competitors. The U.S. Supreme Court held that no violation of the Sherman Act 'can be predicated upon mere attempts to influence the passage or enforcement of laws,' and that attempts 'to persuade the legislature or the executive to take particular action' will not give rise to antitrust liability. In *Pennington*, the Court reiterated, '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.' The antitrust case of *California Motor Transport Co. V. Trucking Unlimited* rounded out the *Noerr-Pennington* doctrine, explicitly recognizing that *Noerr's* petitioning immunity applies regardless of which branch or department of government is petitioned." Gary, *supra* note 8.

183. Adam Kreuzer, *More Speech, Less Litigation: Extending the Noerr-Pennington Doctrine to the Law of Defamation*, 18 J. MARSHALL L. REV. 683 (1985). *See also* Gary, *supra* note 8, noting that "[t]he *Noerr-Pennington* doctrine has been applied to claims for tortious interferece with contract/business relations, defamation, civil rights violations, abuse of process, and intentional infliction of emotional distress."

184. Zeller v. Consolini, 59 Conn. App. 545, 552 (2000) (citing "*Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379–84 (1991) (city council); *Juster Associates v. Rutland*, 901 F.2d 266, 270–72 (2d Cir. 1990) (city); *Racetrac Petroleum, Inc. v. Price George's County*, 786 F.2d 202, 203 (4th Cir. 1986) (county zoning board); *Bob Layne Contractor, Inc. v. Bartel*, 504 F.2d 1293, 1296 (7th Cir. 1974) (city zoning board and council)").

185. Brief for Dr. Penelope Canan & George W. Pring as Amicus Curiae Supporting Appellant, Hurchalla v. Lake Point Phase I, LLC., 278 So. 3d 58 (Fla. 4th DCA 2019).

186. Kreuzer, *supra* note 183.

and no reasonable person could have expected it to result in a favorable outcome or governmental action."[187] This is an objective standard: the intent of the defendant, even if malicious, is not relevant if the petitioning was genuine.[188] If the petitioning was objectively baseless, the plaintiff must then prove "the defendant's subjective motivation and demonstrate that the petitioning was not made for any legitimate purpose, but was solely an attempt to misuse the governmental process to directly harm the plaintiff."[189] In essence, "a sham involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action in any form."[190]

The *Noerr-Pennington* doctrine not only offers much more significant substantive protection to the right to petition: the procedural rules surrounding the *Noerr-Pennington* doctrine are also highly protective of petitioning rights. First, for example, "where Noerr-Pennington immunity is implicated," the Ninth Circuit has held that the complainant must meet a "heightened pleading standard," and "include specific allegations of defendant's conduct demonstrating that the sham exception applies."[191] Further, the burdens of proof under *Noerr-Pennington* are also protective of the right to petition: once "the petitioner makes a prima facie showing of petitioning immunity," an easy bar to meet given the breadth of activities that fall into the category of petitioning, immunity is presumed, and the plaintiff then "bear[s] the burden of proving that the sham exception applies."[192]

Because of these high substantial and procedural hurdles, the *Noerr-Pennington* sham standard would provide immunity for tortious interference with contractual relations in most instances.[193] In fact, a plaintiff may face great difficulty in proving that an alleged interference with a contract was a sham, because the two tests in some sense directly conflict. To overcome *Noerr-Pennington* immunity, a plaintiff needs to show that "no reasonable person could have expected [the petitioning] to result in a favorable outcome."[194] If the government cancelled the impugned contract, that would

187. *Id.*

188. *Id.*

189. *Id.* at 15–16.

190. Zeller v. Consolini, 59 Conn. App. 545, 552 (2000).

191. Gary, *supra* note 8, at 58 (noting that "[t]he Seventh Circuit has recognized the justification for such a standard, but has provided a more limited application. The heightened pleading standard allows resolution of petitioning cases on a motion to dismiss the pleadings.").

192. *Id.*

193. Gary, *supra* note 8, at 18.

194. *Id*. at 16

constitute a "favorable outcome," such that the defendant would be immune from liability.[195] At the same time, though, a plaintiff alleging tortious interference with contractual relations must show that the petitioning resulted in the breach of contract in order to establish tortious liability. So, the breach of contract is necessary to establish liability for tortious interference, but once it is established, the breach may simultaneously demonstrate the petitioning was not a sham and is thus immune from any liability.[196]

A majority of courts, recognizing the importance of the right to petition, apply the *Noerr-Pennington* standard whenever the First Amendment right to petition is implicated.[197] But a minority of courts, like the court in *Hurchalla v. Lake Point Phase I*, use the malice standard to determine whether the privilege afforded by the constitutional right to petition applies.[198] The malice standard provides that petitioning activities are not immune from civil liability if for instance, a statement was made with "'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[199]

The malice standard offers much lower protection for petitioning than the alternative *Noerr-Pennington* standard.[200] Courts that apply the malice standard to defeat First Amendment right to petition protections typically ground their position in *McDonald v. Smith*, a 1985 Supreme Court case.[201] In *McDonald*, the plaintiff sued the defendant for defamation arising from letters the defendant sent "to the President opposing the plaintiff's application for appointment as U.S. Attorney."[202] The Court declined to apply *Noerr-Pennington* protections to defamation, and instead held that the "appropriate standard of immunity was the actual malice test of

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195. *Id.*

196. *See* Jackson Hill Road Sharon, CT, LLC, v. Town of Sharon, 2010 WL 2596927, noting that the defendant's "conduct was not 'objectively baseless' because he succeeded in preventing plaintiffs from receiving the special exception. [..] Although a jury may conclude that one reason why [the defendant] succeeded was because of his alleged misrepresentation, the fact that the Commission found other reasons to reject the applications leads the Courts to conclude that [the] opposition was not objectively baseless."

197. See Gary, *supra* note 8, at 16 noting that "Most states' courts (including Wisconsin, Illinois, Minnesota, Iowa, Michigan, California, and New York) and federal circuits (including the Seventh) have applied the doctrine to bar state tort and statutory claims." . . . . "The rationale for these decisions is that, although they Noerr-Pennington doctrine grew out of antitrust law, the doctrine is one of constitutional dimension which defines necessary protections for First Amendment petitioning activity, and therefore must be applied to all claims."

198. Gary, *supra* note 104, at 69–70.

199. New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964), discussed in Gary, *supra* note 104, at 123.

200. *Id.* at 124.

201. 472 U.S. 279 (1985).

202. Gary, *supra* note 104,

New York Times Co. v. Sullivan; that is, tort liability may be imposed if the defendant knew the statement was false or acted with reckless disregard of its truth or falsity."[203]

The *McDonald* decision is "perplexing" for many reasons.[204] One is that, paradoxically, *McDonald* uses the lower malice standard for political activities, while *Noerr-Pennington* applies a higher standard for anti-trust activities.[205] Matching higher protection to commercial activities appears to "exalt commercial and economic interests over political, societal, and liberty interests" and "contradicts the core concept of constitutional interpretation that commercial interests are inferior in constitutional terms to individual liberty and political interests."[206] Applying a malice standard to political activities and a higher Noerr-Pennington standard to commercial ones seems to invert the levels of protection normally attached to specific interests.[207]

Applying a malice standard to tortious interference with public-private contracts poses a similar problem. The usual posture of tortious interference with contractual relations implicating the right to petition consists of a powerful business suing a significantly less powerful constituent or not-for-profit group.[208] Thus, allowing tortious interference with contractual relations to override the right to petition helps create an overall system in local governance where businesses win, and constituents and not-for-profit organizations lose. Businesses already have an outsized role in local governance: they are constantly curbing the exercise of local power through preemption litigation.[209] If they are also able to enter contractual relationships with local governments that are completely shielded from complaints and critiques, businesses will arguably exercise significant governance power relative to individual constituents. Individuals will retain their political voting power, of course, but since contracts outlast changes in government, even this source of political power will be somewhat muted.[210] The *Noerr-Pennington* doctrine should thus be applied to tortious interference claims, with

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203. *Id.*

204. Gary, *supra* note 8, at 18.

205. Gary, *supra* note 104, at 124.

206. *Id*. at 70.

207. *Id*.

208. Of course, not every case evinces this same dynamic. *See*, e.g, Zauzmer, *supra* note 164, at 1257.

209. *See infra* Part II.

210. *See* Christopher Serkin, *Public Entrenchment through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011) for a discussion of the power of contracts to bind future local governments.

only sham activities subject to liability.[211] Many courts have already adopted this position;[212] in fact, there is a plausible argument that *Noerr-Pennington*, if it is a constitutional doctrine as many scholars have suggested, might now be constitutionally required.[213]

C. The Restatement (Third) of Torts

In addition to revealing the holes in anti-SLAPP legislation, and the dangers of ignoring the *Noerr-Pennington* doctrine, the cases of *Hurchalla v. Lake Point* and *Texas Campaign for the Environment v. Partners Dewatering International, LLC* illustrate a third problem with tortious interference with contractual relationship in the context of local governance: the tort itself is sometimes defined over-inclusively. The Restatement (Third) offers a new definition, resolving the ambiguities and over-capaciousness of the "improper" interference standard by instead limiting liability to three specific instances. The three narrow categories of 'wrongful' conduct that can ground tortious interference with contractual relations under the Restatement (Third) are: "(a) "the defendant acted for the purpose of appropriating the benefits of the plaintiff's contract; or (b) the defendant's conduct constituted an independent and intentional legal wrong; or (c) the defendant engaged in the conduct for the sole purpose of injuring the plaintiff."[214] These three categories create a much smaller liability net, and under them, substantially fewer instances will be deemed 'wrongful.'[215]

When citizens petition local governments about existing contracts, they rarely do in order to appropriate the contract's benefits, nor do they often do so with the sole purpose of injuring the plaintiff.[216] The most relevant potential grounds for liability related

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211. Gary, *supra* note 104, at 71.

212. *Id*., noting that "Most states' courts (including Wisconsin, Illinois, Minnesota, Iowa, Michigan, California, and New York) and federal circuits (including the Seventh) have applied the doctrine to bar state tort and statutory claims."

213. *Id*., noting that "[i]f Noerr-Pennington is a constitutional doctrine, it should be applied equally to all claims implicating the First Amendment right to petition."

214. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (AM. LAW INST. 2020). The first ground sounds reminiscent of the "market exception" for Noerr-Pennington. "The 'market participant' exception to the Noerr-Pennington doctrine, adopted in some jurisdictions, but rejected in others, generally provides that a petitioner is not insulated from liability for defamation while petitioning the government where the governmental entity is acting as a market participant, as opposed to making policy." J & J. Construction CO. v. Bricklayers and Allied Craftsmen, July 9, 2003.

215. Jamie Maggard et al., *What Constitutes 'Wrongful Conduct' in Interference with Contractual or Economic Relations?* ABA (May 6, 2019), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2019/wrongful-conduct-interference-contractual-economic-relations/.

216. However, it is not difficult to envision a situation where a business might do this.

to local government private-public contracts is thus that the defendant's conduct constituted an independent or intentional wrong. As the comments to the Restatement (Third) note, an independent wrong exists separately from the alleged interference, and "can be conduct regarded as culpable by the law of tort, by criminal law, by equity, or by regulation," but not by "negligence or breach of contract."[217]

This "wrongfulness" standard, however, may not actually help activists like Maggy Hurchalla. In the *Hurchalla* case, the court found that there was a fraudulent misstatement, and that the defendant was reckless regarding whether her words could have been understood to refer to any conceivable study, no matter how poor.[218] Thus, even under the Restatement (Third)'s version, citizens petitioning governments regarding public-private partnerships might still be found liable in circumstances that violate the right to petition. The *Noerr-Pennington* standard is thus needed to govern any instances where First Amendment petitioning rights are implicated.[219]

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Together, these three protective mechanisms and doctrines—robust anti-SLAPP legislation, the *Noerr-Pennington* standard, and the new narrower version of tortious interference with contractual relations outlined in the Restatement (Third) of Torts—all can ensure that the right to petition is appropriately safeguarded. The deep and abiding concern that these doctrines show for the First Amendment right to petition should be honored in application, and preclude liability in cases like *Hurchalla v. Lake Point* and *Texas Campaign for the Environment v. Partners Dewatering International, LLC.*

V. CONCLUSION

Citizen participation is key to the democratic functioning of local government. Through multiple channels, including preemption, ordinance enforcement, and petitioning and

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217. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (AM. LAW INST. 2020).

218. Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58 (Fla. 4th DCA. 2019).

219. The Restatement (Third) seems to envision governments as common contractual actors in its recent illustrations (Illustrations 18, 28, 26, 29, 39, for example), but does not explicitly account for the differing considerations raised by the public aspect of those contracts. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (AM. LAW INST. 2020).

lobbying, local businesses and residents engage in the work of democratic governance. When local residents face potential civil liability for contesting the contracts their governments create, that democratic work is threatened. Cases like *Hurchalla v. Lake Point* and *Texas Campaign for the Environment v. Partners Dewatering International LLC* illustrate moments where courts incorrectly navigate the space between the constitutional right to petition and tortious interference. However, the combined mechanisms of robust anti-SLAPP legislation, the Noerr-Pennington doctrine, and the narrowed version of tortious interference offered in the Restatement (Third) can ensure that the right to petition is more carefully protected.