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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Colorado Court of Appeals
Case No. 20CA0298
City and County of Denver District Court No. 19CV31940

Petitioners: Killmer, Lane & Newman, LLP; Mari Newman; and Towards Justice
v.
Respondents: BKP, Inc.; Ella Bliss Beauty Bar LLC, Ella Bliss Beauty Bar-2 LLC; and Ella Bliss Beauty Bar-3 LLC.

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Case No. 2021SC000930

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PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all requirements of C.A.R. 28, 32, and 53, including all formatting requirements set forth in those Rules. Specifically, the undersigned certifies that this document contains 3,720 words (including headings and footings but excluding the case caption, Certificate of Compliance, Table of Contents, Table of Authorities, signature blocks, Certificate of Service and the Appendix).

s/ Kathleen M. Byrne
Kathleen M. Byrne
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I. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

Class action lawyers described the contents of a filed class action to the press and then were sued for defamation. In a published opinion, a division of the Court of Appeals held that the statements were not protected either by Colorado's common law litigation privilege or by Colorado or federal constitutional speech and petition rights.

1. Whether the common law litigation privilege for party-generated publicity in pending class action litigation excludes situations in which the identities of class members are ascertainable through discovery.

2. Whether the Colorado and federal constitutional petition rights to file and publicize good-faith litigation claims do not extend either to defamation claims or to publication of the underlying allegations.

II. ORDER PRESENTED FOR REVIEW; BASIS OF JURISDICTION

The published opinion for review is *BKP, Inc., et al. v. Killmer, Lane & Newman, LLP, Mari Newman, and Towards Justice*, ___ P.3d ___, 2021COA144 (Dec. 2, 2021) ("Opinion") (**App. A**). Jurisdiction is based on C.R.S. §13-4-108.

On December 30, 2021, this Court extended the time to file this Petition to and including February 14, 2022.

Petitioners are not aware of any pending case in which the Court has granted certiorari review on the legal issues presented in this Petition.

III. STATEMENT OF THE CASE

This matter is spin-off litigation of a federal class action. On May 17, 2018, Lisa Miles, a service technician who performed manicures and pedicures, filed a class action lawsuit against her former employer. *See* Federal Compl., 5/17/18 (**App. B**), ¶¶ 9-12, 18-19. The lawsuit alleged state and federal employment law violations by the owners of Ella Bliss salons, Respondents BKP, Inc., *et al.* (collectively, "Ella Bliss" or "Employers"). Miles was represented by Petitioners Killmer Lane & Newman, LLP; Mari Newman; and Towards Justice (collectively, "Lawyers").

Through a press release and conference, the Lawyers described the factual grounds for the class action: (1) "For no pay whatsoever, [employees] have to clean the business, including the bathrooms"; (2) "Instead of paying the workers for every hour that they work [Employers] pick and choose and pay only for the hours they feel like paying"; and (3) "Ella Bliss Beauty Bar forced its service technicians to perform janitorial work without pay, refused to pay overtime, withheld tips, and shorted commissions." *See* State Compl., 5/17/19 (**App. C**), ¶¶ 1, 14-15, 17.

Employers sued the Lawyers for those statements a year later. Before filing, Employers' counsel called the Lawyers with a threat to "put [the Lawyers] in the limelight." *See* Answer Brief, 2020CA0298 (**App. D**), p. 8. The Lawyers refused to withdraw or settle the federal action. Employers then filed their Complaint in Denver District Court alleging the quoted statements to the press were defamatory and interfered with contractual relations. (App. C.)[1]

The Lawyers moved to dismiss Employers' Complaint. They argued that the challenged statements were: (1) shielded by Colorado's common law litigation privilege, which permits the announcement of class action lawsuits because such press can reach additional victims and witnesses and can educate the public, and (2) protected by free speech and petition rights under the *Noerr-Pennington* doctrine.

The trial court dismissed Employers' claims with prejudice. *See* Trial Court's Omnibus Order Re: Defendants' Motion to Dismiss, 12/30/19 ("Order") (**App. E**). The trial court did not reach the litigation privilege. Rather, the court ruled that the quoted statements were protected by the *Noerr-Pennington* doctrine

[1] Employers' defamation suit delayed the class action for nearly three years.

because the statements accurately described the contents of the federal lawsuit, a matter of public concern. Order, pp. 5-6.

Employers appealed, and a division of the Court of Appeals reversed in part.

First, the division addressed the litigation privilege. The division recognized that, by protecting attorneys from liability for speech made to advance their cases, the litigation privilege ensures that such speech does not spawn retaliatory suits against attorneys personally. App. A, pp. 7-8. And the division acknowledged that most states have adopted a rule shielding class action attorneys in particular from liability for describing their cases in press releases because the press allows attorneys to connect with absent class members and witnesses and educates the public about their rights. *See id.* at 12-19.

But the division then invented an expansive "ascertainability" exception to this rule to preclude protection for the Lawyers. Under this new exception, the litigation privilege would not protect attorney speech if the underlying class action alleged that the identities of class members would be "easily ascertainable" through discovery. The division reasoned that, where "members of the class for the federal lawsuit [are] 'easy' to identify," there is "no need to educate potential class members through the press." *Id.* at 22-23. Because the federal lawsuit had alleged

that class members were ascertainable from business records, the division held the new exception applied, and, thus, the litigation privilege did not.

Second, the division addressed the *Noerr-Pennington* doctrine, which protects the right to petition each branch of government to redress grievances, including by filing litigation. *Id.* at 24. The division noted that the doctrine protects not only statements made in litigation but also conduct that is incidental to the prosecution of a lawsuit. *Id.* at 26. But the division concluded that the Lawyers' statements "merely described the federal lawsuit," "were simply a means of publicizing it," and "were not incident to prosecuting it." *Id.* at 27.

The division then went further to hold that, regardless, the *Noerr-Pennington* doctrine is never a defense to defamation actions. *Id.* at 29-33. The division ignored the numerous precedents, cited in the Lawyers' Answer Brief (App. D, pp. 21-27), that had applied the *Noerr-Pennington* doctrine as a defense to defamation actions for press releases.

IV. STANDARDS OF REVIEW AND PRESERVATION

The issues submitted for review are questions of law reviewed de novo. *See Belinda A. Begley and Robert K. Hirsch Revocable Trust v. Ireson*, 490 P.3d 963, 968 (Colo. App. 2020) (litigation privilege); *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003) (*Noerr-Pennington*). Both issues were

preserved for review in the trial court and the Court of Appeals. *See* App. D, pp. 9, 14-21, 24-26.

V. REASONS FOR GRANTING THE PETITION

1. The division's novel "ascertainability" exception to litigation privilege for class action press releases will apply in almost every case, is unworkable, and conflicts with other divisions and states.

The division invented an "ascertainability" exception to the general rule, under the common law litigation privilege, that lawyers may freely describe their class actions to the press. Under the division's new exception, no privilege applies if a class complaint alleges that class members' identities are "ascertainable" through business records. But that novel exception will apply to almost every class action, eviscerating the general rule protecting class action press outreach. Moreover, the exception is unworkable and creates vast uncertainty for courts and lawyers, which undermines the litigation privilege's animating principles. It also creates a division split and conflicts with other states. The division's holding will chill vital speech and mire Colorado's courts in opportunistic spin-off litigation, as illustrated by the case here.

A. The division's novel exception is so broad it swallows the rule.

Certiorari is warranted because the division's novel ascertainability exception will apply in virtually every class action, thus eviscerating the principles

protecting class action press releases. The division concluded that the litigation privilege did not apply because the underlying complaint alleged that the class would "be easily ascertainable" from Employers' records. App. A at 21. But nearly every class action, by necessity, includes a similar ascertainability allegation.

In general, the "membership of the class must be ascertainable." Manual for Complex Litigation (Fourth) §21.222. "[A]n important element of class certification is that the potential class members can be . . . easily ascertained," *Ulibarri v. Southland Royalty Co.*, No. 1:16-cv-215, 2019 WL 1473079 at *5 (D.N.M. Apr. 3, 2019) (collecting authorities), and courts will not certify a class if it is not "administratively feasible" to ascertain its members. *Black Lives Matter 5280 v. City & County of Denver*, 338 F.R.D. 506, 509-510 (D. Colo. 2021). That is why sample class action complaints include the standard allegation that "[t]he identities of the class members can be ascertained through . . . records maintained by Defendants." LexisNexis(R) Forms FORM 1347-1.18.1. Such allegations are ubiquitous. The division's novel ascertainability exception would thus apply to almost every class action, swallowing the rule protecting press releases in class actions.

That nearly unbounded exception undermines the policies animating the rule. The rule exists to let lawyers use press releases to reach, among others,

potential clients, victims, and witnesses. *See Norman v. Borison*, 17 A.3d 697, 715-18 (2011); *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 26 (Tenn. 2007). Lawyers need to make those contacts early enough for the critical tasks of framing their cases, finding the best class representatives, and amending initial complaints to survive motions and to position the case for class certification. Yet, at the outset of the action, lawyers usually lack contact information for class members, even if class members may later be identified in business records. Compounding that problem, courts often "refuse[] to allow discovery of class members' identities at the pre-certification stage." *Benavides v. Serenity Spa NY Inc.*, 166 F. Supp. 3d 474, 491 (S.D.N.Y. 2016). Press releases are thus crucial early on to reach class members and witnesses when it matters, rather than after class certification has been determined, when it is too late. That is the point of the rule. But the division's ascertainability exception would remove a critically necessary tool from the vast majority of class action plaintiffs that allows them to successfully obtain class certification.

B. The division's novel exception is also dangerously unworkable.

The division's ascertainability exception is also unworkable because neither a class action lawyer contemplating a press release nor a court examining defamation claims will know, at that time, if a class will ultimately be readily

ascertainable from business records. Ascertainability is unknowable at the outset of a class action; alleging a fact does not make it so, and years often pass before allegations are tested.

That uncertainty invites the very evils the litigation privilege exists to prevent: chilling speech that courts have recognized will significantly advance the interests of class members and the public. Those attorneys who do issue press releases may be subject to costly and distracting defamation suits that may linger for years. And class action plaintiffs will suffer. Their attorneys will need to either avoid a press release that could advance clients' cases because of the risk to the attorneys or to omit allegations of ascertainability, which could leave class complaints vulnerable. Both options will leave class members worse off.

Perhaps the most insidious problem is the incentive the exception opens for defense counsel to bring defamation suits against class action plaintiffs' lawyers. Defense counsel will be free to sue class action lawyers personally to delay the underlying class action, divert the resources and attention of class counsel, and insert potential conflicts between counsel and class members. At worst, defense counsel could try to induce a class-wide settlement by offering class counsel the prospect of escaping personal liability. These are not hypothetical concerns. All of this actually happened in this case. *See* App. D, p. 8.

The Court needs to undo the division's unworkable exception. Doing so will ensure that courts and lawyers can readily assess the scope of the litigation privilege and that retaliatory suits against class counsel will not become part of the class action defense playbook in Colorado.

C. The "ascertainability" exception creates a division split and conflicts with other states.

Two other divisions of the Court of Appeals have applied rules contradicting the division's ascertainability exception. In *Aminokit Labs, Inc. v. Reinan*, Colo. App. No. 15CA0933 (Aug. 4, 2016), the division applied the litigation privilege to protect an attorney who publicly announced his representation of patients suing an allegedly fraudulent addiction center. That division, unlike this one, did not limit the privilege simply because the identities of similarly situated patients were readily ascertainable from the defendants' business records. Then, in *Roth v. DLG Law Group, LLC*, Colo. App. No. 18CA1920 (Nov. 7, 2019), another division applied the litigation privilege to protect descriptions of a shareholder suit to "parties outside the shareholder group," even though the lawyers had already contacted every potential shareholder plaintiff. That division did not circumscribe the privilege because potential clients could have been (and were) contacted through other means.

Further, the division's novel ascertainability exception conflicts with decisions of other states' highest courts. In *Helena Chemical Co. v. Uribe*, 281 P.3d 237, 245 (N.M. 2012), the New Mexico Supreme Court declined to adopt any ascertainability test, instead opting for a "general rule" that "the privilege should apply to communications with the press." Even more starkly, in *Norman*, 17 A.3d at 715-18, the Maryland Supreme Court applied the litigation privilege to a class alleging ascertainability on nearly identical terms to here - that the "Class [could] be identified from the Defendants' own records." Class Cert. Mem. at 43, *Proctor v. Metro. Money Store Corp.*, No. 8:07-1957, Dkt. 151-1 (D. Md. Nov. 14, 2008). The division's novel ascertainability exception thus puts Colorado at odds with the law of other states, and this Court should decide whether it wants Colorado to become such an outlier.

2. The division's out-of-sync rulings on the *Noerr-Pennington* doctrine undermine constitutional law and contradict this Court's precedents.

The division contradicted state and federal precedent in holding that: (1) the *Noerr-Pennington* doctrine does not protect public descriptions of litigation unless such public statements are strictly necessary to prosecution of the litigation; and (2) even when this first criterion is met, the speaker may nevertheless be subjected to a defamation claim. *See* App. A at 27-29. Neither holding was pressed by

Employers, who appropriately did not dispute that *Noerr-Pennington* protects from liability "publicity and press releases *about the fact of the suit or about its contents.*" *See* App. E. at p. 5 (emphasis in original).

The division's broadest holding – that speech privileged under the doctrine is nevertheless subject to defamation liability – chills all petition rights in defiance of this Court's precedent. Excluding press releases from the doctrine's protections sets a dangerous precedent allowing spin-off litigation against lawyers who accurately report their cases to the press and leaves lawyers without guidance on what is safe to say about their cases.

A. The division's holdings will chill publicity about litigation and other petitioning.

The division's opinion undercuts important constitutional principles recognized by the Supreme Court and this Court by chilling speech about litigation and other public petitioning, thus limiting public knowledge about matters of public concern. Members of the public, typically without time or resources to independently monitor court filings or attend proceedings, depend on the media for information on litigation. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). Publicity about judicial proceedings tends to "improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and

generally give the public an opportunity to observe the judicial system." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980) ("Without publicity, all other checks are insufficient[.]"). Publicity also educates the public about the availability of remedies for social wrongs.

The division's holding threatens this pipeline of information with the lack of clarity about what speech is protected. This is especially dangerous now, when news media often lack resources to discover and report on much important civil litigation. The right to bring that information to the attention of the media and the public is not only integral to, but is an essential component of, the right to seek justice from the courts. The division's holding limiting this right is in urgent need of this Court's review.

B. The division's holdings contradict this Court's precedent protecting the right to petition, as well as other precedents that protect party-generated publicity that accurately describes petitioning activity.

"Courts have generally applied the *Noerr-Pennington* Doctrine to preclude defamation claims, and the Doctrine has been extended to press releases unless the original petitioning conduct was baseless." *Capital Health Sys., Inc. v. Veznedaroglu*, Civ. Act. No. 15-8288, 2017 WL 751855, at *13 (D.N.J. Feb. 27, 2017); *see Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 384

F. Supp. 2d 1334, 1349-50 (S.D. Iowa 2005) (extending immunity to press releases); *Aircapital Cablevision, Inc. v. Starlink Commc'ns Grp.,* 634 F. Supp. 316, 324-26 (D. Kan. 1986) (extending immunity to publicity). In holding otherwise, the division severely undermined Coloradans' constitutional speech and petition rights.

1. Subjecting protected speech to defamation liability wholly undercuts *Noerr-Pennington*'s protections, contrary to this Court's prior decisions.

The division's ruling broadly revives liability for defamation when the challenged speech should be protected by the *Noerr-Pennington* doctrine, per this Court's precedents

But it makes no sense for constitutionally protected petition-related speech to be susceptible to tort suit, for defamation or otherwise, and the division's holding contradicts this Court's holding in *Protect Our Mountain Environment, Inc. v. District Court,* 677 P.2d 1361 (Colo. 1984) ("*POME*"). In *POME*, the Court explained that *Noerr-Pennington*'s "First Amendment right to petition has been applied to immunize various forms of . . . judicial petitioning activity from legal liability in subsequent litigation." *Id.* at 1365. The *POME* Court explained that the sole exception is where the petitioning activity is a "sham," *see POME,* 677 P.2d at 1366-68, an exception not pressed by Employers here. Colorado courts have twice

applied the *Noerr-Pennington* doctrine to bar state law claims," once under *POME* to bar abuse of process and civil conspiracy claims, and once under *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249 (Colo. App. 1983), to dismiss negligence, abuse of process, and tortious interference with business expectancy claims. *Computer Assocs. Int'l v. Am. Fundware*, 831 F. Supp. 1516, 1523 (D. Colo. 1993); *see generally Scott v. Hern*, 216 F.3d 897, 913-14 (10th Cir. 2000) (barring claims for abuse of process and false imprisonment under the doctrine)

The division inexplicably ignored both *POME* and its declaration that the *Noerr-Pennington* doctrine is limited only by the "sham" exception. The division seized upon *McDonald v. Smith*, 472 U.S. 479 (1985), for the proposition that *Noerr-Pennington* provides no absolute privilege. But *McDonald* embraced the *Noerr-Pennington* doctrine and its sham exception in rejecting the asserted absolute privilege. *See McDonald*, 472 U.S. at 484-485. This Court in *POME* acknowledged the qualified nature of the privileges afforded by both the petition and speech clauses in *POME*, 677 P.2d at 1364-65, 1367, and in subsequent decisions,[2] such as *Kemp v. State Bd. of Agriculture*, 803 P.2d 498, 505-06 (Colo.

[2] There is good reason for retaining both the *Noerr-Pennington* defense and the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 54 (1964), in defamation claims challenging petitioning activity. As exemplified by this case,

1990), without expanding the exception any further. Because *McDonald* did nothing more than reject an absolute privilege that is not in issue here, the division's adoption of *McDonald* as its lodestar here is utterly perplexing.

This Court should grant certiorari to shield constitutionally protected petition rights from defamation liability and thereby prevent eroding those rights and this Court's decision in *POME*.

2. Petition rights extend to informing the press of non-sham litigation about matters of public concern.

In rejecting the national consensus and the agreement of all counsel in this case that *Noerr-Pennington* protects party-generated publicity that accurately describes pending litigation, the division here relied upon two unreported decisions from the Northern District of California that limit this privilege to publicity that is functionally necessary to prosecution of the litigation. *See* App. A, pp. 26-27; *Wisk Aero LLC v. Archer Aviation Inc.*, No. 3:21-cv-02450-WHO, 2021 WL 4932734, at *7 (N.D. Cal. Sept. 14, 2021); *Arista Networks, Inc. v. Cisco Systems Inc.*, No.

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whether a press release describing a non-sham civil complaint is protected under *Noerr-Pennington* is readily determinable by comparing the press release with the allegations of the suit and thus is appropriate for a motion to dismiss. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1108-11 (10th Cir. 2017). When the challenged press release accurately describes those allegations, the challenge should be promptly dismissed without need for either discovery or judicial scrutiny under principles of defamation law.

16-cv-00923-BLF, 2018 WL 11230167, at *11 (N.D. Cal. May 21, 2018). But neither of these unreported decisions considered the well-established principle of inseparability of the mutual contributions of both the petition and speech clauses to state and federal constitutions' essential premise of self-government. *See POME,* 677 P.2d at 1364-65*; McDonald,* 472 U.S. at 485, 489-90 (Brennan, J., concurring). Because speech rights are needed to fully exercise petition rights, *Noerr-Pennington* protections extend to press releases, as courts throughout the country have held. *See, e.g.*, *Capital Health Sys.*, 2017 WL 751855; *Kemin Foods, L.C.*, 384 F. Supp. 2d at 1349-50; *Aircapital Cablevision, Inc.*, 634 F. Supp. at 325-26.

The Court should grant review to align Colorado law with these decisions.

C. The division's holdings leave Colorado speakers generally, and litigants and lawyers specifically, with fewer rights than counterparts in other states.

As long as the division's holding stands, individuals speaking about petitions of public concern, especially lawyers and litigants publicizing their non-sham litigation, will enjoy fewer rights in Colorado's courts than in courts in other states.

The perniciousness of this cramping of First Amendment rights cannot be understated. Publicity of litigation plays a critical role both in facilitating the

effective prosecution and defense of civil and criminal litigation and also in ensuring the quality and integrity of the process received by the litigants. As the Supreme Court has observed, the press "does not simply publish information about trials but guards against the miscarriage of justice by subjecting the [actors]… to extensive public scrutiny and criticism." *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966). "A responsible press has always been regarded as the handmaiden of effective judicial administration." *Id.*

If the division's holding is allowed to stand, the press and public discourse in Colorado will be stifled and the rights of the parties stunted.

VI. CONCLUSION

For the reasons stated above, the Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 14th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2022, the foregoing was served via CO Courts E-Filing on the following counsel of record:

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