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I. INTRODUCTION

Employer lawsuits motivated by a desire to retaliate against employees exercising their self-organization rights under the National Labor Relations Act[1] (NLRA or the Act) raise difficult problems. On the one hand, the National Labor Relations Board[2] (NLRB or the Board) and the courts have construed section 8(a)(1) of the Act[3] to prohibit a wide range and variety of conduct designed to defeat employees' organizational rights.[4] On the other hand, courts have construed the first amendment[5] to protect a litigant's right of access to the courts.[6] Moreover, a prohibition on

1. 29 U.S.C. §§ 151-169 (1982).

2. The NLRB is the agency created by Congress to administer the Act. 29 U.S.C. § 153(b)(1982) sets forth the Board's powers.

3. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1982), provides: "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title . . . ."

Section 7 of the Act, 29 U.S.C. § 157 (1982), provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

4. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2803 (1984) (employer violated Act by requesting the Immigration & Naturalization Service to investigate the status of undocumented alien employees solely because the employees supported the union); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (employer violated Act by permanently and unconditionally granting economic benefits to its employees during the course of an organizational campaigu, for the purpose of inducing the employees to reject the union in the Board-ordered representation election); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (employer violated Act by restricting employee union solicitation during nonworking time and distribution during nonworking time in nonworking areas because the restrictions were not necessary to maintain production or discipline); Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967) (employer polling of employees concerning their union activities generally violates the Act, absent legitimate purpose and proper safeguards).

5. The first amendment forbids governmental action that abridges "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

6. *See* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

civil suits involving state law claims ignores substantial state interests traditionally asserted to protect the general welfare.[7]

In the NLRA context, the employer's right to sue employee-organizers during a union-organizing campaign is in tension with the right of employees to organize.[8] When employees seek to improve their bargaining status by attempting to band together, their attempts are undercut if their employer hales them into court for conduct and activities carried out in furtherance of their efforts to persuade other employees to join with them. But under the petition clause of the first amendment, to protect employees from retaliatory lawsuits by prohibiting and enjoining such suits would impinge upon an employer's right of access to seek judicial redress of wrongs that it has suffered notwithstanding any retaliatory motive.

The Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB*[9] recently resolved this tension in favor of the employer by holding that the filing and prosecution of a well-founded, albeit retaliatory, lawsuit may not be enjoined permanently as an unfair labor practice. Employers may misperceive the *Bill Johnson's* decision as tacit permission to initiate nonfrivolous, retaliatory lawsuits[10] in response to union-organizing campaigns without fear of

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7. *See, e.g.*, Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966) (holding that if party to labor dispute circulates false and defamatory statements during union-organizing campaign, court has jurisdiction to apply state remedies; plaintiff must prove malice and injury, however).

8. *See infra* text accompanying notes 66-92. There have been three discussions of the status of retaliatery lawsuits under the NLRA. *See* Note, Bill Johnson's Restaurants, Inc. v. NLRB: *Reasonably Based, Unpreempted Lawsuits Pronounced Palatable and Unenjoinable, Despite Improper (Retaliatory) Motivation*, 45 LA. L. REV. 951 (1985) (concluding that Board should find retaliatory motive when employer files state court lawsuit only in most extreme cases); Recent Cases, *Employers' Right of Access to State Courts*, 33 DE PAUL L. REV. 611 (1984) (concluding that the Supreme Court in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), correctly held that reasonably based retaliatory suits may not be permanently enjoined); Comment, *Employer Lawsuits Against Employees—The Right to Invoke the Legal Process Despite Anti-Union Motivation or Coercive Effect on Section 7 Rights*, 1980 B.Y.U. L. REV. 880 (arguing that initiating a retaliatory suit is a management prerogative that the NLRA does not prohibit); *see also* Note, *The NLRB's Discovery Practice and the Procedural Effect of* Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 25 B.C.L. REV. 805 (1984) (pointing out that the *Bill Johnson's* holding may encourage frivolous state court suits for purpose of utilizing state court discovery procedures). In addition, a journalist has argued that the Supreme Court's decision in *Bill Johnson's* will cause employees to refrain from speaking critically of their employer. Hentoff, *Libel and Labor*, THE PROGRESSIVE, Nov. 1983, at 25.

9. 461 U.S. 731 (1983).

10. Using the factors of the employer's motivation for suing and the substantiality of the suit's claims, lawsuits may be divided into four categories: (1) retaliatory and frivolous; (2) retaliatory and nonfrivolous; (3) nonretaliatory and frivolous; and (4) nonretaliatory and

NLRB intervention.[11] Consequently, the likelihood exists that employers may begin using this weapon in a sophisticated fashion to thwart organizing drives by their unorganized employees.[12]

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nonfrivolous.

This Article focuses on nonfrivolous, retaliatory lawsuits initiated during a union-organizing campaign. Neither nonretaliatory lawsuits, whether frivolous or not, nor frivolous, retaliatory lawsuits raise the concerns addressed in this Article. Nonretaliatory suits apparently do not run afoul of § 8(a)(1) of the Act regardless of whether they are well-founded, and frivolous, retaliatory suits are not entitled to any first amendment protection. *See infra* text accompanying notes 14-65.

A suit is retaliatory if the employer was motivated, at least in part, by a desire to retaliate against its employees for engaging in activities protected by § 7 of the Act. A suit is nonretaliatory if the employees' exercise of statutory rights was not a motivating factor in the employer's decision to sue. A nonretaliatory suit sometimes is referred to as a good faith suit. *See id.*

A suit is frivolous if it lacks a reasonable basis either in fact or in law. A frivolous suit sometimes is referred to as baseless, a sham, lacking a reasonable basis, based on insubstantial claims, or lacking probable cause. A suit is nonfrivolous if some basis exists for a judgment favorable to the employer. A nonfrivolous suit sometimes is referred to as well-founded, having a reasonable basis, having a substantial claim, or raising a genuine issue of fact or law. Nonfrivolous is not, however, synonymous with meritorious. After trial an employer may lose a reasonably based suit on the merits, at which time the Board may determine that the suit is an unfair labor practice if it finds that the employer's motivation in filing the suit was retaliatory. *See id.* Note that the factors of motivation and substantiality of the suit are not unrelated, however, because the frivolous nature of a lawsuit may be used to infer the employer's true motive in initiating the suit. *See id.*

11. Such suits, however, are not totally free of regulation. If the employer's nonfrivolous, retaliatory suit is not litigated to a successful conclusion, the Board may find that the suit was an unfair labor practice and order appropriate remedial relief, after the suit is concluded. *Bill Johnson's*, 461 U.S. at 747.

12. The standard for avoiding a Board initiated permanent injunction of a lawsuit during an organizational campaign is rather easy to meet. An employer need only allege a claim that raises a genuine issue of material fact or law. If the employer's complaint raises such an issue, the Board may not seek to have the suit permanently enjoined until after the court has decided the disputed issue. This is true even if the employer's reason for filing the suit was to interfere with the organizing drive. *Id.* at 745-47. It probably would be a very unusual organizational campaign if the employer could not state a claim that raised a genuine question as to whether it had been defamed, whether the employees had interfered with its business, or whether they had trespassed upon its property.

The fears of union lawyers and the hopes of management lawyers concerning the impact of the Court's decision in *Bill Johnson's* have been vividly stated as follows:

> *Bill Johnson's Restaurant* is going to be the delight of those employers who want to keep their workers in their docile place.
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> As one labor attorney told me, "Until now, most of what workers and organizers say during a labor dispute has had strong protection under Federal labor law and several previous Supreme Court decisions. But management has now been given a license—through the law of libel—to punish labor organizers and dissident workers. . . . And half of management's own legal fees in these [libel suits] are tax-deductible as business expenses. . . . *Bill Johnson's Restaurant* may eventually *freeze* workers' free-speech rights against management."
>
> The apparent loophole offered by the Supreme Court—if the boss's libel action is frivolous, you can have it thrown out—is not going to be of much use. Arthur Fox, an

The national labor policy of encouraging collective bargaining[13] will be threatened if the use of retaliatory suits to deter workers from organizing becomes widespread. In the wake of *Bill Johnson's* the Board must be prepared to respond to the retaliatory suit tactic in a manner that safeguards employees' statutory self-organization rights without impinging impermissibly upon employers' constitutional petition rights or ignoring the states' interest in maintaining domestic peace.

The purpose of this Article is to examine the right of an employer to commence a nonfrivolous, retaliatory suit during an organizational campaign, and to suggest a reasonable reconciliation of the conflict between the employees' right to form and join unions without employer interference and the employer's right to petition the judiciary for redress of wrongs. Part II describes the Court's *Bill Johnson's* decision and its accommodation of competing interests. Part III addresses the weaknesses of the current remedies available to the Board and proposes an accommodation that better promotes the national labor policy of encouraging collective bargaining. This proposal regulates the timing of the employer's suit

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attorney for the Public Citizen Litigation Group in Washington, points out that "any plaintiff's lawyer can always frame a libel complaint in sufficient detail to preclude its being dismissed as baseless."

"And once the case is in the system," Fox adds, "the plaintiffs—the employers, in this instance—are entitled to go on the most sweeping voyages of discovery. They can depose everyone involved, and you're vulnerable in a deposition unless you have a lawyer. . . . Moreover, depositions in these libel suits can be used to intimidate workers. . . . They can ask all kinds of chilling questions."

Hentoff, *supra* note 8, at 27 (emphasis in original).

13. This statement of national labor policy is incorporated expressly in § 1 of the Act, 29 U.S.C. § 151 (1982): "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of . . . self-organization . . . ." The policy statement of § 1 is not mere surplusage safely to be ignored. This point is particularly clear in light of the express language of § 10(c), which commands the Board to fashion such remedies "as will effectuate the policies of this Act." 29 U.S.C. § 160(c) (1982).

The Act seeks to enhance collective bargaining for its own sake because of its presumed mediating or therapeutic impact on industrial conflict. In the words of Congress: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . ." 29 U.S.C. § 151 (1982). This premise has developed into a philosophy of collective bargaining as an ideal of rational and informed persuasion. According to this view, much industrial conflict could be alleviated simply by an intelligent exchange of views and information at the bargaining table. *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408-09 (1958) (collective bargaining enables both parties to work around their prejudices and exchange viewpoints).

during a union organizing drive without altogether prohibiting such a suit. Part IV examines the history of the Board's effort to regulate retaliatory lawsuits. This history reveals that giving employers an unfettered right to sue is unsatisfactory but that the right of access to the courts is an important interest that must be protected. Part V analyzes the constitutional aspects of the Court's decision in *Bill Johnson's* and suggests that the constitutional right of access to the courts is not as clear cut as *Bill Johnson's* might indicate. Finally, part VI explains why the proposed accommodation is neither insensitive to the state's interest in protecting the health and welfare of its citizens nor an impermissible infringement of the employer's right to sue.

II. *Bill Johnson's Restaurants, Inc. v. NLRB*

In *Bill Johnson's Restaurants, Inc. v. NLRB*[14] the Supreme Court was confronted with the legality of an employer's retaliatory lawsuit under the NLRA. *Bill Johnson's* arose out of an effort by a few waitresses to organize for the purpose of bargaining collectively with their employer.[15] One of the waitresses filed an unfair labor practice charge with the Board, alleging that she had been discharged because of her union-organizing efforts. On the same day that the Board's General Counsel issued a complaint alleging that the employer had violated subsections 8(a)(1) and (3) of the Act by discharging the waitress, she and four other waitresses began picketing the employer.[16] Five days after the picketing began, the employer[17] filed a civil complaint against the picketers, which con-

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14. 461 U.S. 731 (1983).

15. The particular restaurant involved was known publicly as "Bill Johnson's Big Apple East" and was located in Phoenix, Arizona. *Id.* at 733.

16. Shortly after the picketing began, the restaurant manager confronted and threatened to "get even" with the picketers. Later, the employer's president threatened the husband of one of the picketing waitresses by telephone. The husbands of two of the waitresses participated in the picketing, which continued for three days. Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 161-62 (1980).

The afternoon the picketing began, the employer's president telephoned the husband of one of the picketing waitresses, who himself had participated in the picketing, and asked why he and his wife had been picketing the restaurant. When the husband said they were protesting the discharge of one of the waitresses, the employer's president said that she would hate to see them lose the new home they had bought and, twice during the conversation, stated that she would hate to see them "get hurt by all of this." *Id.* at 162.

On the third day of picketing, the picketers distributed a leaflet that accused the employer's management of making "[u]nwarranted sexual advances" and maintaining a "filthy restroom for women employees." *Id.*

17. Besides the employer, three co-owners of the employer joined as plaintiffs. 249 N.L.R.B. at 162 n.20; 461 U.S. at 734.

tained claims for defamation and interference with business.[18] The complaint sought compensatory damages, $500,000 in punitive damages, and injunctive relief.[19]

The discharged waitress filed a second charge with the Board alleging that the lawsuit had been filed with the intent to retaliate against the defendants for their exercise of statutory rights.[20] The General Counsel issued a complaint based on this charge, alleging that the employer's lawsuit violated subsections 8(a)(1) and (4) of the Act.[21]

After a four-day hearing during which the administrative law judge (ALJ) heard evidence concerning the employer's basis for its lawsuit, the ALJ concluded that the employer's lawsuit lacked a reasonable basis and had been filed with a retaliatory motive.[22] Pursuant to the Board's decisions in *Power Systems, Inc.*,[23] *George R. Angle*,[24] and *United Credit Bureau of America, Inc.*,[25] the ALJ

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18. The complaint alleged that the named defendants, John Does I to X, and Jane Does I to X had engaged in mass picketing, harassed customers, blocked public access to the restaurant, and created a threat to public safety. The complaint also alleged that the picketers had distributed with malicious intent a leaflet containing false and outrageous statements. 461 U.S. at 734. On the same day it filed its lawsuit the employer distributed a letter to its employees urging them to reject organization efforts. 249 N.L.R.B. at 162.

19. 249 N.L.R.B. at 162; 461 U.S. at 734. At the same time the employer filed the complaint, it also sought a temporary restraining order and filed a motion to shorten the time for taking depositions. 249 N.L.R.B. at 162-63. Although the defendants were not represented by counsel, the court issued a temporary restraining order granting most of the relief the employer requested. The court also granted the employer's motion setting the depositions of the defendants to begin two days after the filing of the complaint.

At the depositions of the defendants, the employer's attorney asked numerous questions regarding the nature and extent of the defendants' union activities, the identities of other employees involved in such activities, and the extent to which the supervisors knew of these activities. The employer's attorneys also sought to discover evidence possessed by the defendants concerning the employer's union animus and information about the defendants' compliance with various restaurant rules. *Id.* at 163.

20. 461 U.S. at 734-35.

21. Four days after the General Counsel's complaint issued, the regional director petitioned the federal district court, pursuant to § 10(j) of the Act, 29 U.S.C. § 160(j) (1982), for an order enjoining the employer from maintaining its lawsuit pending a final Board decision. The district court denied the regional director's request. 461 U.S. at 735 n.2.

22. 249 N.L.R.B. at 168-69. While the ALJ had the matter under submission, the state court granted the defendants' motion for summary judgment on the business interference claims but denied summary judgment on the libel count. 461 U.S. at 735 n.2.

23. 239 N.L.R.B. 445, 449-50 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979); *see infra* text accompanying notes 166-70 (discussion of history and import of *Power Systems* analysis).

24. 242 N.L.R.B. 744, 749 (1979), *enforced*, 683 F.2d 1296 (10th Cir. 1982); *see infra* text accompanying notes 166-70.

25. 242 N.L.R.B. 921, 925-26 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); *see infra* text accompanying notes 166-70.

held that the employer had violated subsections 8(a)(1) and (4) of the NLRA by initiating the lawsuit. The Board adopted the ALJ's decision and ordered the employer to withdraw the civil suit and to reimburse the defendants for the legal expenses they had incurred.[26]

The United States Court of Appeals for the Ninth Circuit affirmed the Board's decision and enforced its order.[27] The court agreed with the Board that the filing of a civil suit against an employee in bad faith and without a reasonable basis could be an unfair labor practice. In concluding that the lawsuit lacked a reasonable basis,[28] the court reviewed the record and noted that the employer failed to produce any evidence that would demonstrate that its complaint had a reasonable basis in fact.[29] According to the court, the employer's threats, the timing of the lawsuit, and the employer's immediate use of the lawsuit to depose the discharged employee about the identities of other prounion employees all combined to demonstrate the employer's retaliatory motive.[30]

The court rejected the employer's contention that "its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction."[31] According to the court, "[m]ore than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis."[32] The court also rejected the employer's assertion that the Board could not order the employer to withdraw the state court lawsuit.[33] Although the court noted that this case "involved a delicate balance between federal and state interests," it concluded that the Board's power to enforce the NLRA would be "largely crippled if it could not order the withdrawal of retaliatory lawsuits."[34]

The Supreme Court granted the employer's petition for certiorari[35] to determine whether the Board properly could order the employer's retaliatory lawsuit to be withdrawn permanently. The

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26. 249 N.L.R.B. at 170.

27. Bill Johnson's Restaurants, Inc. v. N.L.R.B., 660 F.2d 1335 (9th Cir. 1981).

28. The court of appeals found "substantial evidence in the record to support the Board's findings that [the employer's] lawsuit lacked a reasonable basis in fact, and that it was filed to penalize [the discharged employee] for filing charges with the Board and to penalize the picketers for engaging in protected activity." *Id.* at 1342.

29. *Id.* at 1342-43.

30. *Id.* at 1343.

31. *Id.*

32. *Id.*

33. *Id.* at 1344.

34. *Id.*

35. 459 U.S. 942 (1982).

Court vacated the judgment of the court of appeals and remanded the case for further proceedings.[36] Justice White, writing for a unanimous Court, began by declaring that the issue was whether the Board may prohibit the prosecution of a retaliatory suit "without also finding that the suit lacks a reasonable basis in fact or law."[37] Neither the Board nor the court of appeals had addressed this issue because both had found expressly that the employer's suit lacked a reasonable basis in fact. Whether the Board could prohibit the prosecution of a reasonably based retaliatory suit became the issue only after the Court determined that the Board's procedure for making the reasonable basis determination was improper.[38]

After conceding that a lawsuit may be a "powerful instrument" for restraining employees from exercising their statutory rights,[39] the Court emphasized that prohibiting the filing or prosecution of a state court suit infringes upon constitutional rights and compelling state interests.[40] The constitutional right is the first amendment petition right.[41] The state's interest is maintaining domestic peace by providing a civil remedy for tortious conduct during a labor dispute.[42] In light of these two considerations, the Supreme Court held that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."[43]

The Court, however, distinguished a meritorious action[44] from a suit based on insubstantial claims.[45] Prosecuting a meritorious

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36. 461 U.S. 731, 749 (1983).

37. *Id.* at 733.

38. *See infra* text accompanying notes 49-53.

39. 461 U.S. at 740.

40. *Id.* at 741-42.

41. *See supra* note 5.

42. 461 U.S. at 741-42.

43. *Id.* at 743. The Court conceded that § 8(a)(1) and (4) reasonably could be construed to prohibit the filing of a well-founded lawsuit for a retaliatory motive were it not for the "weighty countervailing considerations" of the first amendment and the states' compelling interest. *Id.* at 742-43.

44. A "meritorious" suit is not to be confused with a "well-founded" or "reasonably based" suit. A reasonably based suit may prove to be unmeritorious "[i]f judgment goes against the employer in the state court . . . or if bis suit is withdrawn or is otherwise shown to be without merit." *Id.* at 747. Thus, a reasonably based suit that proves to be unmeritorious may be found to be an unfair labor practice, even though it could not have been enjoined permanently. *Id.*

45. The Court also used the terms "baseless litigation" and a suit having "no basis" to

action is immunized by the first amendment petition right but a baseless suit is not.[46] Moreover, the state's interest in providing a remedy for the breach of domestic peace is not implicated when the suit has no basis because "by definition, the plaintiff in a baseless suit has not suffered a legally protected injury."[47] Thus, the Court concluded that the Board could prohibit the prosecution of a baseless lawsuit brought with a retaliatory intent against an employee who was exercising rights protected by section 7 of the Act.[48]

Because a baseless suit initiated for retaliatory purposes constitued a violation of the Act and could be enjoined,[49] the Court had to decide whether the Board and the lower court properly had concluded that the employer's suit lacked a reasonable basis. The petition for certiorari did not challenge the Board's factual findings, which had been affirmed by the court of appeals. Instead, the employer argued that the Board used an improper procedure for determining whether its suit had a reasonable basis. The employer contended that the Board should have limited its inquiry to the four corners of the complaint. So long as the complaint stated a claim for relief that the state court had jurisdiction to grant, the Board could not enjoin the suit as an unfair labor practice. The Board, however, claimed that the proper way to determine whether a suit was baseless was to conduct a hearing on the merits of the employer's state court claims, which the ALJ had done.[50]

The Court rejected both arguments. Instead, the Court concluded that if a suit presents "a genuine issue of material fact"[51] or "genuine state-law legal questions,"[52] the Board may not decide whether an otherwise improperly motivated suit is an unfair labor practice until after final judgment. The Court reasoned that the first amendment and the state's interest in providing a remedy precluded the Board from conducting a prejudgment hearing on

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describe suits that may be enjoined as unfair labor practices. *Id.* at 743. A "groundless" suit also may be enjoined. *Id.* at 746 n.12.

46. *Id.* at 743.

47. *Id.*

48. *Id.* at 744.

49. *Id.*

50. *Id.* After a four-day hearing, the ALJ concluded that "on the basis of the record and from my observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties, [the employer] did not have a reasonable basis for the filing of its lawsuit." 249 N.L.R.B. at 164.

51. 461 U.S. at 745.

52. *Id.* at 746. Genuine state-law legal questions involve claims tbat are governed only hy state law. *See id.*

the merits of a suit that raised genuine factual issues or state law questions.[53]

In an attempt to provide the Board with some guidance, the Court discussed two hypothetical situations that loosely resembled the facts of *Bill Johnson's*.[54] In the first situation, the defendant in a libel suit testified at an unfair labor practice hearing that an accusation of an employer's sexual advance contained in a leaflet distributed by picketing employees was true. The employer failed to produce any evidence that the leaflet was maliciously false. The Court advised that the Board could enjoin the suit permanently because the employer had failed to establish "any genuine issues for the state court to decide, and the inference that the suit is groundless is too strong to ignore, in light of the strong federal policy against deterring the exercise of employees' collective rights."[55]

The second hypothetical assumed that the employer testified that he was elsewhere on the date of the alleged sexual incident. In this situation, the Court counseled that Congress did not intend for the Board to enjoin the libel suit permanently because the lawsuit's merit depended, at least in part, on the truth or falsity of the employer's testimony.[56]

After deciding those two hypothetical situations, the Court

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53. The Court gave little guidance on how the Board is to decide whether a suit presents genuine factual or legal issues: "[W]e leave the particular procedures for making reasonable-basis determinations entirely to the Board's discretion . . . ." *Id.* at 745 n.11. The Court did suggest, however, that the Board may want to turn to civil procedure jurisprudence and seek guidance from the standards developed in motions for summary judgment and directed verdict. *Id.* Furthermore, the Board need not stay its hand until the suit has been concluded when "plainly unsupportable inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law" are involved. *Id.*

The Court did say, however, that the plaintiff has the burden of "present[ing] the Board with evidence that shows his lawsuit raises genuine issues of material fact." *Id.* at 745-46. Once the plaintiff has met its burden, the Board immediately should stay the unfair labor practice proceedings until the suit has been concluded. *Id.* The Court even implicitly showed concern for the Board's caseload and stated that it "see[s] no reason why the Board should want to hear all the employer's evidence in support of his state suit, or any more than necessary, if it can be determined at an early stage that the case involves genuine issues of material fact or law." *Id.* at 745 n.11.

54. *See id.* at 746 n.12.

55. *Id.* Analogizing to FED. R. CIV. P. 56(f), the Court suggested, however, that if the plaintiff merely comes forward with an "acceptable explanation" of why it has no evidence to support its suit, the suit may not be enjoined. 461 U.S. at 746 n.12.

56. 461 U.S. at 746 n.12. Additionally, the Court advised that the Board could not enjoin a suit even though the facts are undisputed if a question of what inferences are to be drawn from the undisputed facts exists, or a question of state law is involved. *Id.* at 745-46. Similarly, the Board may not enjoin state court suits involving a mixed question of fact and law. *Id.* at 746.

turned to the case before it and concluded that "the only disputed issues in the state lawsuit appear to be factual in nature."[57] According to the Court, the ALJ erred by making the factual determination, based on his evaluation of the evidence, that the employer's suit was groundless. Instead of weighing the evidence and making credibility determinations, the ALJ should have limited his inquiry to determining whether the employer introduced sufficient evidence to raise genuine issues of material fact. Consequently, the Court remanded the case to the Board for the purpose of making this limited inquiry. The Court, however, never indicated which hypothetical situation was more akin to Bill Johnson's suit.[58]

Additionally, the Court emphasized that in those situations in which the Board must allow the suit to proceed, no unfair labor practice is committed regardless of the plaintiff's motive for filing the suit if the plaintiff ultimately prevails in state court.[59] If, however, the plaintiff loses in state court, if the plaintiff withdraws the suit, or if the suit is otherwise shown to be without merit, then the Board may resume adjudication of the unfair labor practice case.[60] An unfair labor practice finding after the plaintiff has withdrawn or lost the suit does not run afoul of either the first amendment or any compelling state interest. The plaintiff has had its day in court and the interest of the state in providing a forum has been vindicated.[61] The Court further declared that the Board justifiably could take the employer's failure to prevail into account in determining whether the employer had filed its suit in retaliation for the employees' exercise of their collective bargaining rights.[62]

Finally, the Court noted that employees are not limited to state law actions such as malicious prosecution if an unmeritorious suit is brought with a retaliatory motive.[63] The Court declared that the Board could award the defendants the attorneys' fees and expenses incurred in defending the unmeritorious suit plus "any

57. *Id.*

58. *See id.* at 748. In a concluding footnote, the Court did attempt to apply its rulings of law to the facts of the case before it. *See id.* at 749-50 n.15. First, the Court suggested that, absent cogent reasons for not doing so, the Board should defer to the state court's denial of summary judgment on the libel count. The Court then said that the Board could reinstate its finding that the employer committed an unfair labor practice by filing and prosecuting the claims that the state court dismissed. The dismissal of all claims except the libel count was an adjudication that the claims were "lacking in merit." *Id.*

59. *Id.* at 747.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 747 n.14.

other proper relief that would effectuate the policies of the Act."[64]

Bill Johnson's thus establishes the rule that the Board must find both a retaliatory motive and a lack of reasonable basis before it can order an employer to cease prosecuting a lawsuit permanently. In addition, the Board is prohibited from deciding genuine issues of material fact or law in evaluating the basis of a lawsuit, regardless of the employer's motive for filing the action. This standard will restrict the Board's ability to halt retaliatory suits permanently. The Court's opinion is silent, however, concerning the Board's ability to enjoin a retaliatory suit temporarily when the injunction is necessary to promote "the strong federal policy against deterring the exercise of employees' collective rights."[65] This Article argues that the appropriate remedy would be the temporary suspension of an employer's right to initiate a retaliatory lawsuit during an organizational campaign. This remedy not only would protect the individual and group rights of employees but also would minimize the impingement of other countervailing interests.

III. The Problem of Retaliatory Suits During Organizational Campaigns and a Proposed Accommodation

A. *Two Alternative Remedies*

The *Bill Johnson's* decision will curtail the Board's ability to halt permanently lawsuits brought during a union-organizing drive for the purpose of retaliating against employees who are engaging in protected activities. Consequently, employers may resort to the

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64. *Id.* at 747. State remedies such as malicious prosecution are not preempted by the availability of federal remedies from the Board because both the state and the federal government have substantial interests to protect—the state's "interest in deterring the filing of baseless litigation in its courts", *id.* at 747 n.14, and the federal government's "interests in enforcing the federal labor law," *id.*

65. *Id.* at 746 n.12. The power of the Board to take remedial action short of a permanent injunction was acknowledged expressly by Justice Brennan, however, in his concurring opinion:

> Thus, the Board retains broad power to deal with the ways in which resort to judicial process may be used as a "powerful instrument of coercion or retaliation." . . . The Board may not enjoin prosecution of an unpreempted state lawsuit unless it finds that the suit bas no reasonable basis, and it may not decide that a suit has no reasonable basis in fact if a reasonable jury could view the facts differently. But it may take otber measures which have less direct impact on the plaintiff's First Amendment rights, and it may investigate the matter to the full extent it deems necessary to vindicate tbe federal interest in protecting participants in labor disputes from coercive state-court lawsuits.

Id. at 755-56 (Brennan, J., concurring) (citation omitted).

courts for assistance in defeating an organizational campaign by suing union supporters to discourage them and other employees from taking an active role in the campaign. Unless the Board can reduce the effectiveness of the retaliatory lawsuit tactic, the national policy of encouraging collective bargaining[66] will be undercut.

An acceptable solution to the retaliatory suit problem must (1) prevent employers from discouraging employee-organizing activities; (2) take into account the limited resources of employee-defendants, the judiciary, and the Board; (3) recognize the right of employers to assert valid claims; and (4) be sensitive to the states' interest in maintaining domestic peace. A basic goal of our system of justice is to accord every individual possessing a meritorious claim an opportunity to have that claim adjudicated.[67] This goal is undermined if the Board can enjoin permanently all well-founded retaliatory suits. On the other hand, it is the national labor policy to promote worker collective activities by insulating them from employer interference or coercion.[68] This policy is undermined if employers are free to bring retaliatory suits during organizing campaigns without fear of sanction as long as they raise a genuine issue of fact or law.[69] Any solution must confront these conflicting

66. *See supra* note 13.

67. One may argue that a retaliatory lawsuit is not a petition for redress even though the claims are well-founded. Instead, a retaliatory suit could be viewed as an act of spite that should not be accorded constitutional protection even though the suit is meritorious. The *Bill Johnson's* Court, however, appears to have rejected this view. *See* 461 U.S. at 740-43.

68. Congress declared in the Act that employees have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and protection. 29 U.S.C. § 157 (1982). In § 8(a)(1) Congress labeled as an unfair labor practice an employer's restraint or coercion of employees in the exercise of § 7 rights. In addition, § 9(c)(1) authorizes the Board, under certain conditions, to conduct representation elections and certify the results thereof. Finally, § 10 grants the Board exclusive power to enforce the prohibitions of the Act.

69. The retaliatory suit tactic is not reserved exclusively for employers. Workers confronted with retaliatory suits could respond with a countersuit of their own based on malicious prosecution or abuse of process theories. This tactic is of little aid, however, to workers lacking financial resources and experience in litigation. A counteraction by employee-defendants does not preclude the assertion of retaliatory suits by employers and at best is only a costly confrontation device available after the employee has incurred substantial litigation expense. Indeed, it may be financially impossible for many employees to assert a counteraction, although mitigation of this expense factor is possible if employees can retain lawyers by offering a contingent fee. Moreover, the prospect of prolonged litigation may be undesirable to an individual whose original purpose was to organize her coworkers rather than to engage in costly legal battles with her employer. Finally, widespread use of the "employee counteraction" tactic ultimately would result in increased court congestion. A solution that prevents the assertion of retaliatory suits in the first instance would increase judicial

policies.

The *Bill Johnson's* Court authorized the Board to grant reimbursement for legal expenses incurred in defending a nonfrivolous, retaliatory lawsuit in which the defendants ultimately prevail.[70] This remedy is inadequate because it comes too late, focuses on the wrong party in that it does nothing to remedy the injury to group rights, and fails to deter further violations of employees' organizational rights. The remedy is designed only to reimburse employee-defendants for expenses incurred in defending a meritless lawsuit. It does not rectify the injury to the organizational rights of the defendants' fellow workers occasioned by the intimidation inherent in retaliatory suits. Moreover, reimbursement of legal expenses is available only after substantial litigation. When asserted against hourly workers of modest means with little litigation experience, pending retaliatory suits facilitate employee harassment by instilling a fear of liability. To minimize this harassment and to protect group organizational rights, the Board must create a remedy that will protect workers during the most sensitive stages of an organizational campaign.[71]

In addition to reimbursement for legal expenses, one possible remedy under current Board doctrine is to overturn an employer victory in a union certification election if the employer filed a retaliatory suit during the union election campaign.[72] Under the Board's *General Shoe*[73] doctrine, conduct that falls short of being classified as an unfair labor practice nevertheless may be sufficient grounds for overturning a representation election.[74] Although the

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economy.

70. 461 U.S. at 747.

71. *See infra* text accompanying note 76.

72. For a discussion of conduct that may invalidate an election under § 9, see L. MODJESKA, NLRB PRACTICE 232-42 (1983).

73. General Shoe Corp., 77 N.L.R.B. 124 (1948).

74. In *General Shoe* the Board declared:

> Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice . . . .
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> . . . .
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> . . . [T]he criteria applied by the Board in a representation proceeding to determine whether certain alleged misconduct interfered with an election need [not] necessarily be identical to those employed in testing whether an unfair labor practice was committed . . . . In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When . . . the standard drops too low, because of our fault or that of others, the requi-

Board has not faced the issue yet, under *General Shoe* the Board may find that the pendency and prosecution of a suit during an election campaign so taints the laboratory conditions in which the election was conducted that the Board may overturn an employer election victory even though the suit was meritorious and therefore not an unfair labor practice under the *Bill Johnson's* rationale.

The overturning of election results has two major deficiencies as a remedy for a retaliatory lawsuit. First, to the extent that the first amendment protects the filing of a nonfrivolous, retaliatory suit, serious constitutional questions arise if the Board is permitted to penalize the employer's right to petition in this manner. Second, this remedy is available only if the NLRB holds a union certification election. An election petition usually can be filed, however, only after at least thirty percent of the employees have designated union support.[75] Thus, if an employer can prevent thirty percent of the employees from indicating union support, this remedy is unavailable.

Furthermore, the employees are most vulnerable to employer retaliation during the earliest stages of an organizing campaign. When only two or three employees are sympathetic to an organizing effort, even the mildest employer reaction may be sufficient to deter other employees from joining the organizing effort. There are too few union sympathizers in the bargaining unit for the employees to feel a sense of solidarity or security in the numbers of similarly situated coworkers. Because the most fragile period of an organizing drive is during the incipient stages, it usually is conducted secretly.[76] Consequently, overturning an employer's victory in a representation election will not be an available remedy in those situations where it is needed most—where the retaliatory suit stymies the organizational campaign before thirty percent of the employees seek a union election.

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site laboratory conditions are not present and the experiment must be conducted over again.

Id. at 126-27 (footnotes omitted).

75. 29 C.F.R. § 101.18 (1984). The usual method for designating union support is signing an authorization card. *See* 29 C.F.R. § 101.17 (1984). Because of the Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), which authorized the issuance of a bargaining order if a majority of the employees in a bargaining unit signed authorization cards and the employer committed serious unfair labor practices during the course of an election campaign, election petitions usually are not filed until more than half the employees have indicated their support for the union.

76. *See* J. BARBASH, THE PRACTICE OF UNIONISM 37-38, 42-44 (1956); M. GITELMAN, UNIONIZATION ATTEMPTS IN SMALL ENTERPRISES: A GUIDE FOR EMPLOYERS 23-26 (1963).

B. Costs and Benefits of Retaliatory Suits

Employers derive several benefits from suing the proponents of an organizational campaign. By suing the individual employees, the employer successfully demonstrates its economic power to the workers and its willingness to use that power when challenged. A retaliatory suit suppresses the union voice at the workplace by causing the named defendants to cease organizing, or inhibiting other employees from joining the organizing drive because they fear they will be sued. This suppression occurs at a time when the union voice would be most effective in organizing the employees and may result in either aborting a union drive or helping the employer win a representational election.

The costs that might deter employer lawsuits, such as current legal fees and a possible future reimbursement of defendant's legal expenses,[77] are relatively insignificant. Employers remain free to utilize the substantial delays inherent in state court proceedings and the intrusiveness of largely unmonitored discovery[78] to punish union activists, to stifie their activities, and to frustrate the group rights of other remaining employees.

C. Effect of Retaliatory Suits on Group Rights

A retaliatory lawsuit against a union activist directly affects the rights of the group. A union voice may be silenced, thus restricting the fiow of union information among workers. Meanwhile, the employer remains free to circulate its supervisors among the workforce, campaigning for the employer and against the union. Additionally, a climate of fear and intimidation spreads among the workers. The employer's actions make it clear, either explicitly or *sub rosa*, that anyone who campaigns for the union or who even "talks union" will suffer the same fate as the defendant-employee—several years waiting for the state court machinery to grind to a conclusion, frustration, depression, payment of legal

77. Reliance on reimbursement of tbe defendant's legal expenses is doubly insidious. First, reimbursement does not make whole the defendants in retaliatory lawsuits who may have had to borrow money or deprive their families to pay legal expenses. In a contested case, the defendant's legal fees need not be reimbursed by the employer until the court of appeals has reviewed the case and ordered enforcement of the Board's order. Second, reliance on reimbursement of legal expenses focuses on the harm done to the defendant and ignores the harm done to the remaining employees. This approach blatantly disregards the employee group rights gnaranteed by § 7 and thus destroys the very rights that § 10(c) remedies were designed to protect. *See infra* noto 79.

78. *See generally* Note, *The NLRB's Discovery Practice*, *supra* note 8 (discussion of use of state court discovery procedures in unfair labor practice proceedings).

fees, possible loss of home, and other undesirable consequences. The remedy authorized in *Bill Johnson's* focuses on the individual harm done to the defendant and ignores both the concept of group rights inherent in section 7[79] and the effect of a retaliatory suit against a union adherent during an organizational campaign.

Thus, any remedy must be aimed substantially at vindicating group rights. It must attempt restoration of the group status quo by reestablishing prounion information flows and dissipating the employee intimidation caused by the retaliatory lawsuit. A remedy designed to deter retaliatory suits by making them futile should prevent such lawsuits.

D. Likely Characteristics of Retaliatory Suits

Although few reported cases concerning the retaliatory lawsuit strategy by employers during union-organizing drives existed prior to *Bill Johnson's*,[80] the likely characteristics of future retaliatory

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79. The employees' right to self-organization is a group right or a collective right. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788-89 (1983) (arguing that reinstatement and backpay in discriminatory discharge cases during an organizing campaign do not adequately protect the group right to self-organization); Brousseau, *Toward a Theory of Rights for the Employment Relation*, 56 WASH. L. REV. 1, 19-27 (1980) (classifying employment rights as collective, participatory or individual); Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984) (suggesting that certain § 7 rights are communal rights).

80. Only two reported cases prior to *Bill Johnson's* concerned a lawsuit brought by an employer in bad faith during a union-organizing campaign. Clyde Taylor, 127 N.L.R.B. 103 (1960) (lawsuit to enjoin peaceful picketing that was part of a bad faith scheme to defeat union organization was not an unfair labor practice); W.T. Carter & Brother, 90 N.L.R.B. 2020 (1950) (lawsuit to enjoin all union-organizing meetings on employer's property in a company town was an unfair labor practice when employer's motivation in filing suit was to frustrate the self-organization of the employees). In several reported cases, an employer sued union supporters during an organizing campaign, but the Board made no finding of bad faith. *See, e.g.*, Mid-America Mach. Co., 238 N.L.R.B. 537 (1978) (lawsuit to enjoin picketing and seeking $50,000 in damages during an organizing campaign not an unfair labor practice), *enforced mem.*, 89 Lab. Cas. (CCH) ¶ 12,157 (7th Cir. 1979); S.E. Nicbols Marcy Corp., 229 N.L.R.B. 75 (1977) (slander action seeking $50,000 during an organizing campaign not an unfair labor practice).

The reported cases also contain instances in which an employer initiated a lawsuit for the purpose of retaliating against an employee who filed an unfair labor practice charge with the Board. *See, e.g*, United Credit Bureau of Am., Inc., 242 N.L.R.B. 921 (1979) (employer's fraud suit for $10,000 was a § 8(a)(4) unfair labor practice because it was filed to retaliate against an employee for seeking redress from the Board), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744 (1979) (employer's malicious prosecution suit for $10,000 was a § 8(a)(4) unfair labor practice because the suit lacked a reasonable basis and was intended to penalize an employee for utilizing the Board's processes), *enforced*, 683 F.2d 1296 (10th Cir. 1982); Power Sys., Inc., 239 N.L.R.B. 445 (1978) (employer's suit for legal fees incurred as a result of an unfair labor practice charge by an employee was a § 8(a)(4) unfair labor practice because the suit had no "reasonable

suits may be hypothesized. First, the common law torts of defamation, trespass, and wrongful interference with business are the most likely theories of action.[81] Second, the retaliatory suit probably would include a request for damages in the prayer for relief in addition to requests for declaratory and injunctive relief.[82] Third, the likely targets of the suit would be individual workers who have no union backing.[83] Fourth, the suit probably would be initiated during the incipient stages of an organizing drive before an election petition could be filed.[84] Last, the retaliatory suit probably would not be litigated to final judgment.[85]

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basis" and had an "unlawful objective"), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In *Bill Johnson's* the Board found that the employer's suit was filed not only for the purpose of penalizing one employee for filing a charge with the Board but also to retaliate against her and the other defendants for engaging in protected activity. 249 N.L.R.B. at 165.

Unions on occasion also have retaliated against those who have filed unfair labor practice charges against them by suing the charging party. *See, e.g.*, Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773 (1981) (union violated § 8(b)(1)(A) by suing an employee for $30,000 because he filed unfair labor practice charges with the Board), *aff'd in part and vacated in part sub nom.* Sheet Metal Workers Int'l Ass'n v. NLRB, 716 F.2d 1249 (9th Cir. 1983).

The issues presented by lawsuits motivated by a desire to retaliate against employees for filing charges with the Board are beyond the scope of this Article. It is worth noting, however, that such suits seem to be worthy of even less first amendment protection than suits brought to deter the exercise of self-organization rights, even though the *Bill Johnson's* Court did not draw this distinction. When an employee files a charge with the Board she is petitioning the government for redress of grievances within the meaning of the first amendment. Consequently, Congress should have the power to prohibit the charged party from using the judiciary to retaliate against the charging party for her exercise of her first amendment petition right, particularly when the Board's enforcement machinery depends entirely upon private individuals to file charges with it.

81. *See* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (complaint contained wrongful interference with business and libel counts); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977) (complaint contained a slander count); W.T. Carter & Brother, 90 N.L.R.B. 2020 (1950) (complaint contained a trespass count).

82. Claims for both compensatory and punitive damages have ranged from $50,000, *see, e.g.*, Mid-America Mach. Co., 238 N.L.R.B. 537 (1978), *enforced mem.*, 89 Lab. Cas. (CCH) ¶ 12,157 (7th Cir. 1979); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977), to $500,000, *see, e.g., Bill Johnson's*, 461 U.S. at 734 (seeking compensatory damages and $500,000 in punitive damages), and conceivably could be much higher.

83. *See, e.g.*, Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); Mid-America Mach. Co., 238 N.L.R.B. 537 (1978) (claims against both individual employees and union officials), *enforced mem.*, 89 Lab. Cas. (CCH) ¶ 12,157 (7th Cir. 1979); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977).

84. *See, e.g.*, cases cited *supra* note 83.

85. The employer's conduct in *Bill Johnson's* is instructive. After successfully contesting the Board's power to enjoin its retaliatory lawsuit, the employer voluntarily withdrew its suit. *NLRB General Counsel's First Quarter, 1983, Report*, 115 LAB. REL. REP. (BNA) 323, 323 (1984). The employer's lawsuit presumably had served its intended purpose of thwarting the employees' organizing campaign. For a more complete description of the subsequent history of the lawsuit, see Note, *Reasonably Based, Unpreempted Lawsuits,*

E. Objectives and Consequences of Retaliatory Suits

The retaliatory suit strategy seeks to produce two results. The immediate objective is to cause the organizers to cease organizing. The second goal is to discourage future organizing attempts. A suit seeking tens of thousands of dollars portends the possibility of similar suits in future organizing drives and thus may inhibit workers from bargaining collectively. Workers may desire to organize their coworkers but may balk at the possibility of incurring liability for thousands of dollars in the process.

The widespread use and success of the retaliatory suit tactic could have far-reaching consequences. It is the national policy to encourage collective bargaining. The viability of the NLRA depends in large measure upon worker willingness to encourage fellow workers to join together for collective bargaining purposes. The retaliatory suit technique conceivably could threaten to destroy whatever equality exists in the organizational setting. The right to engage in collective activity becomes a myth if an employer, through the assertion of a retaliatory suit seeking substantial damages, effectively can force workers to cease organizing. The retaliatory suit tactic undermines a principal means of effectuating national policy because it discourages worker organization through the threat of liability and litigation expense. As a result, organizing efforts may be left exclusively to huge, financially sound unions, rendering worker welfare a ward of distant union bosses.

The implications of the retaliatory suit tactic extend beyond its chilling effect upon workers. The tactic wastes the judicial resources necessary to supervise the filing of bad faith pleadings, to set up pretrial conferences and discovery, and to conduct a formal trial. With the workload of courts increasing at almost astronomical rates, the expenditure of judicial resources for any purpose other than settling genuine disputes is especially odious.

There is one caveat to this indictment of retaliatory suits in the union-organizing setting. Although the organizing efforts of workers generally might be laudable, a possibility always exists that organizers either intentionally or inadvertently will engage in a course of conduct that will seriously and irreparably harm the employer. Consequently, a retaliatory suit may be meritorious and may be essential to the future viability of the employer. Any proposed solution to the retaliatory suit problem must recognize and

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supra note 8, at 974 n.119.

preserve not only the first amendment interests of the employer but its right to avoid irreparable harm.

The current remedy for retaliatory suits established in *Bill Johnson's* is inadequate because it implicitly assumes that an employer has the right to sue employee-organizers during an organizational campaign. Such a premise finds its roots in the first amendment petition clause. It simply is taken for granted that an employer has total discretion in the timing of its suit. If in suing an employee, an employer commits an unfair labor practice, then it may be forced to reimburse the employee for her legal expenses and to agree not to file another meritless, retaliatory suit. But it is the filing of the suit that triggers the enforcement machinery. Absent an unfair labor practice, the Board has no power to act.

F. Proposed Accommodation for the Problem of Retaliatory Suits

The ability to make the first move—to sue a union adherent—lies at the heart of the problem. When an employer compares the benefits of a suit to the costs, it simply has too tempting a weapon in its hand. The current remedy for a meritless, retaliatory suit focuses on minimizing the effect of the fired bullet, reassuring the startled bystanders, and taking away the remaining ammunition. It does not focus on temporary disarmament. The current remedy does not question the employer's discretion to control the timing of a retaliatory suit.

The characteristics of such disarmament would be as follows. First, it would be temporary. A temporary suspension of an employer's right to sue would last only during a "protected time," that is, only for the shortest of the following three periods:[86] (1) until the union certification election were held, (2) until the termination of the organizational campaign, or (3) until a fixed

86. An alternative way to measure the "protected time" would be to require the employees or the organizing union to file an "intent to organize" statement with the regional office and the employer. This filing would insulate the employees from a retaliatory suit for a fixed period of time after the filing of such a statement. This alternative, however, has at least three drawbacks. First, it would provide no protection for employees prior to the filing of the "intent to organize" statement. Second, in order to obtain protection from a retaliatory suit, the employees might be forced to announce their organizing drive at a less advantageous time than they otherwise might choose. Third, although sophisticated union organizers who had the benefit and guidance of labor law counsel might not consider this filing requirement to pose any problem, the requirement would provide no protection for those most in need of protection—an employee-initiated organizing effort undertaken without the assistance of an international union or labor law counsel.

number of days from the time the employer first learned of the organizational campaign.[87] Second, the temporary suspension would bar only the right to initiate a retaliatory suit. Employers still would be free to bring suits in good faith.[88] Retaliatory motive would be established using the *Wright Line*[89] test. The Board's

87. A fixed period of time is necessary to prevent employees from prolonging the organizational campaign until the statute of limitations has run, thereby cutting off the employer's right to file a retaliatory suit altogether. No scientific method exists for establishing the proper length of this period. Instead, the Board must engage in a balancing of the employees' right to organize free of employer retaliation with the employers' right to petition. Moreover, the Board must be certain that the fixed period is short enough that the statute of limitations does not preclude a lawsuit entirely. The Board must rely on its experience in setting the appropriate period. One hundred twenty days seems to he an appropriate maximum period. That time period would given the employees four months to organize their coworkers without the fear of retaliatory lawsuits, and yet would be short enough to avoid statute of limitations problems.

The process of arriving at the proper suspension period may be similar to the process the Board experienced in establishing the starting date for the laboratory period in representation election campaigns. In 1952, in Great Atl. & Pac. Tea Co., 101 N.L.R.B. 1118 (1952), the Board established the starting date as either (1) the execution date of a consent-election agreement, or (2) in contested cases, the issuance of a notice of hearing. Two years later, in F.W. Woolworth Co., 109 N.L.R.B. 1446 (1954), *enforcement denied*, 235 F.2d 319 (9th Cir. 1956), the Board moved the starting date in contested cases closer to the election date, namely, to the date of "issuance of the decision and direction of election." 109 N.L.R.B. at 1448-49. In 1961 the Board reconsidered the starting date in the light of its experience and overruled *Woolworth*. In Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275 (1961), the Board held that the petition filing date rather than the direction of election date started the laboratory period.

88. The characterization of a particular lawsuit as retaliatory or good faith rarely is an easy task. Seldom will an employer expressly declare that its motive for suing is retaliatory. The critical factual determination in these cases will be whether the employer's purpose in filing the suit was to retaliate against the exercise of protected activities or whether the employer merely sought redress for a wrong it believed was perpetrated against it. The state of an employer's mind necessarily must be established by inferences drawn from circumstantial evidence.

The characterization of a lawsuit by the motivation of the plaintiff is a difficult task because lawsuits may be motivated by a mixture of concerns. At one end of the continuum are suits motivated purely by a desire to retaliate; at the opposite end are suits motivated purely by a desire to seek redress for an alleged wrong. Those suits embodying varying mixtures of motives lie in between. Distinguishing retaliatory suits from good faith suits is critical if, as this Article proposes, treatment of the suits under the NLRA will differ. The Board does possess some expertise in evaluating employer intent to determine the lawfulness of a particular act. *See, e.g.*, Wright Line, 251 N.L.R.B. 1083 (1980) (determining employer's motive for discharging an employee), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

89. Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). In *Wright Line* the Board reformulated the allocation of the burden of proof in cases in which the employee alleges that she was disciplined or discharged because of her union activities and the employer asserts legitimate motives for its decision. Under the *Wright Line* test, the General Counsel must persuade the Board that antiunion sentiment influenced the employer's decision to discipline or discharge the em-

General Counsel first would have to make a prima facie case that retaliation was a motivating factor in the employer's decision to sue.[90] The employer then could rebut the General Counsel's evidence of retaliation, or establish the affirmative defense that it would have brought the suit regardless of the employee's organizational activities.[91] Third, only the plaintiff-employer's own employees would be entitled to this protection. Nonemployee organizers are less vulnerable because their livelihood is not dependent on the whims of the employer, and they have the support and resources of the labor organization they represent.

A temporary suspension of tbe employer's right to sue, limited to the relatively short time period of an organizational campaign, would protect employees' section 7 rights at little cost to the employer. Employees' self-organization rights would be safeguarded because an employer could not sue an employee with the purpose of affecting an organizational cainpaign or representation election

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ployee. Even if the employer is unable to meet or neutralize the General Counsel's prima facie showing that protected conduct was a motivating factor in its decision, the employer may establish the affirmative defense that the challenged action would have been taken regardless of the protected conduct. *Id.* at 1088. The Supreme Court approved the *Wright Line* test in § 8(a)(1) and (3) cases in NLRB v. Transportation Management Corp., 462 U.S. 393, 395 (1983).

90. The General Counsel generally will not be able to produce direct evidence of the employer's intent. Consequently, the General Counsel must rely on inferences from evidence similar to that present in *Bill Johnson's*—employer threats, requests for exorhitant compensatory and punitive damages, the commission of other unfair labor practices, and the use of unnamed John Doe and Jane Doe defendants. Additionally, the scope of employer discovery may be powerful evidence of the employer's true intent. If the employer, for example, embarks upon a course of discovery similar to that in *Bill Johnson's* by conducting expedited depositions seeking to discover the extent of organization, the names of union sympathizers, and evidence that could be used in a pending unfair labor practice case, the Board may decide that the employer's true purpose for suing was not to vindicate a legally protected interest. The availability of the proposed remedy, therefore, may produce the salutary effect of discouraging employers from using well-founded suits to gather information for use in thwarting employee-organizing efforts.

91. In addition to the employer's causation defense, the Board could impose a furtber limitation on the employee's right to temporary suspension. The Board could confine the suspension of the right to bring retaliatory suits to those employers who have committed otber unfair labor practices during the organizing campaign. The availability of this exemption would deter employers from committing other types of unfair labor practices during a campaign.

The availability of the affirmative defense aids in obviating constitutional objections to the proposed remedy. *See infra* text accompanying notes 200-24. If the employer can show that the suit is necessary to avoid irreparable injury or that it must proceed expeditiously in order to assure recovery, tben the Board will not suspend the prosecution of the suit because the employer presumably would be able to establish that it would have brought the suit notwithstanding its retaliatory motive.

during the "protected time."[92] Moreover, individual employees would be protected from retaliatory suits not only during the campaign but also afterwards. Once a campaign has ended and the votes have been cast, the employer has little incentive to sue a union adherent. Although a particularly vindictive employer might sue a union adherent after an election, such suits are likely to be few in number.

Thus, the accommodation proposed in this Article will not permanently preclude an employer from initiating a retaliatory suit. Instead, the right to sue merely will be suspended during the earliest stages of an organizational campaign. Before assessing whether this scheme to limit an employee's access to the judicial process is sufficiently sensitive to the constitutional and state interests at stake, it is instructive to trace the history of the Board's efforts to regulate retaliatory lawsuits. This history reveals that total Board abdication is unsatisfactory in the long run and that the Board and the courts can strike a balance that is consistent with the *Bill Johnson's* opinion.

IV. The Board's Regulation of Retaliatory Suits: An Evolution of Precedent

The *Bill Johnson's* Court correctly noted that the history of the Board's regulation of retaliatory lawsuits has been "checkered."[93] Rather than explore the reasons for the Board's inconsistent responses to retaliatory suits, the Court essentially ignored it. A review of that history reveals that bright line rules have not fared well in the regulation of retaliatory lawsuits.[94] The Board encountered repeated difficulty in applying a fixed standard to various factual settings. Because of the competing interests at stake—(1) the national labor policy of protecting employees' self-organization rights, (2) the right to sue, and (3) the state's interest

92. The commencement of a retaliatory lawsuit against employee-organizers during the "protected time" would be a § 8(a)(1) unfair labor practice. If such a suit were filed and an unfair labor practice charge were lodged with the Board, the Board would issue a complaint pursuant to § 10(b), 29 U.S.C. § 160(b) (1982). If necessary, the Board is authorized to petition a federal district court to enjoin temporarily an alleged unfair labor practice upon issuance of a complaint. 29 U.S.C. § 160(j) (1982). Thus, under § 10(j) of the Act, the Board may halt the employer's retaliatory suit temporarily until the Board has an opportunity to hear the case and issue its order. Under this proposal, however, the employer would be free to reactivate a nonfrivolous, retaliatory lawsuit at the conclusion of the protected period.

93. 461 U.S. at 737.

94. *See infra* text accompanying notes 95-170.

in providing a remedy to injured parties—it was inevitable that no one accommodation of these interests would satisfy all situations. The *Bill Johnson's* Court reached one accommodation. This Article hypothesizes that employers will use retaliatory lawsuits to thwart organizational campaigns and suggests a new accommodation that is sensitive to all three competing interests. The following history of Board regulation of retaliatory lawsuits supports the thesis that *Bill Johnson's* cannot be the final accommodation.

The legality of lawsuits and the Board's authority to issue a cease-and-desist order to halt a pending suit generally have arisen in three broad contexts:[95] (1) suits by employers during an organizing drive;[96] (2) suits by employers or unions against employees who have filed unfair labor practice charges with the Board;[97] and (3)

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95. In addition to these three situations, the Board has considered whether an employer's lawsuit is an unfair labor practice in a variety of other contexts that defy generalization. *See* Peddie Bldgs., 203 N.L.R.B. 265 (1973) (trespass suit to enjoin peaceful picketing was not an unfair labor practice, although a threat to cause the arrest of the picketers for trespassing violated § 8(a)(1)); United Aircraft Corp., 192 N.L.R.B. 382 (1971) (employer did not commit an unfair labor practice by threatening to sue a union for property damage resulting from violence on a picket line unless the union withdrew its unfair labor practice charges or by filing suit when the union did not withdraw its charges), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); Fashion Fair, Inc., 159 N.L.R.B. 1435 (1966) (employer's suit to enjoin picketing by discharged employees was not an unfair labor practice); Texas Foundries, Inc., 101 N.L.R.B. 1642, 1689 (1952) (employer's suit to enjoin picketing was not an unfair labor practice because the suit was not brought "maliciously, abusively, and in bad faith"); Atlanta Metallic Casket Co., 91 N.L.R.B. 1225 (1950) (employer's recourse to court proceedings was inextricably a part of the employer's unlawful refusal to bargain and the Board ordered the suit to be withdrawn even though the Board declined to consider whether the suit constituted an independent unfair labor practice).

96. Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155 (1980); Mid-America Mach. Co., 238 N.L.R.B. 537 (1978) (suit to enjoin picketing during an organizing campaign and to recover $50,000 in alleged damages was not an unfair labor practice); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977) (the filing of a civil suit seeking $50,000 in alleged damages during an organizing campaign was not an unfair labor practice); Clyde Taylor Co., 127 N.L.R.B. 103 (1960) (obtaining court injunction banning peaceful picketing as part of a bad faith scheme to defeat union organization was not an unfair labor practice); W.T. Carter & Brother, 90 N.L.R.B. 2020 (1950) (securing court order to prevent union meetings in a company town during an organizing campaign was an unfair labor practice).

97. Since 1978 the Board consistently has held that an employer or union who sues an employee for filing charges with the Board is gnilty of violating the Act. In each of these cases, the Board found that the suit was retaliatery and lacked a reasonable basis. Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 778-80 (1981) (union's lawsuit seeking $30,000 in damages against a former union member was an unfair labor practice because the union's objective was unlawfully to penalize the former union member for filing a charge with the Board, thus depriving him of, and discouraging employees from, seeking access to the Board processes); Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155 (1980); United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, 925-26 (1979) (employer's fraud action seeking $10,000 in damages against an employee was an unfair labor practice because it was filed purely for purposes of retaliation to punish the employee for seeking redress from the Board

suits by unions.[98] In terms of motive and claim substantiality, all

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and to discourage other employees from seeking to enforce their rights), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744 (1979) (employer's lawsuit for malicious prosecution against an employee seeking compensatory damages of $10,000 was an unfair labor practice because it was aimed at penalizing the employee for utilizing the Board's processes), *enforced*, 683 F.2d 1296 (10th Cir. 1982); Power Sys., Inc., 239 N.L.R.B. 445, 449-50 (1978) (employer violated § 8(a)(4) by filing an action for wrongful use of civil proceedings seeking more than $7,000 in damages against an employee who had filed an unmeritorious unfair labor practice claim against the employer because the employer's objective was unlawfully to penalize the employee for filing a charge with the Board), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979).

98. The union-plaintiff cases can be broken down into four categories: (1) suits to enforce a contract provision that violates the § 8(e) proscription of any contract whereby an employer agrees not to handle products of, or agrees to cease doing business with, any other person; (2) suits to enforce a disciplinary fine imposed upon an employee who has resigned from the union before engaging in the conduct for which the discipline was imposed; (3) suits to enforce a union-security clause that violates the union-security proviso of § 8(a)(3); and (4) suits prohibited by § 8(b)(1)(B) for seeking enforcement of a contract providing for grievance-adjustment representatives not of the employer's own choosing.

The Board consistently has held that a good faith suit claiming rights pursuant to a contract provision prohibited by § 8(e) is not an unfair labor practice. International Union of Operating Eng'rs, Local 12, 220 N.L.R.B. 530 (1975) (absent bad faith, lawsuit to enforce a contract interpretation prohibited by § 8(e) was not an unfair labor practice even though the suit sought $31,000 in compensatory damages and $50,000 in punitive damages); Retail Clerks Union Local 770, 218 N.L.R.B. 680 (1975) (suit to enforce arbitrator's award enforcing a contract clause prohibited by § 8(e) was in good faith to enforce a colorable contractual right and, therefore, was not an unfair labor practice); *see* Los Angeles Bldg. & Constr. Trades Council, 217 N.L.R.B. 946 (1975) (suit seeking $250,000 in damages wholly unrelated to any actual loss for breach of a valid § 8(e) construction industry proviso clause did not violate 8(b)(4)(B)(ii)).

The Board generally has held that union suits enforcing a disciplinary fine violative of § 8(b)(1)(A) because the fine was imposed upon an employee who resigned from the union before engaging in the conduct for which the discipline was imposed were an unfair labor practice. *E.g.*, Booster Lodge No. 405, 185 N.L.R.B. 380 (1970) (suit to enforce a disciplinary fine imposed upon an employee who had resigned before engaging in the conduct for which the discipline was imposed "restrains" or "coerces" the employee within the meaning of § 8(b)(1)(A)). *Contra* Local 283, UAW, 145 N.L.R.B. 1097, 1121 (1964) (union suit to collect a fine was not an unfair labor practice "quite apart from, and without regard to whether, the assessment of the fine itself would violate 8(b)(1)(A)").

Union lawsuits to compel employees to become union members pursuant to an unlawful union-security clause or pursuant to the unlawful construction of a valid union-security clause have been held to be § 8(b)(1)(A) unfair labor practices. *E.g.*, United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977) (suit for breach of contract against employees violated § 8(b)(1)(A) because the suit was filed in pursuit of the unlawful objective of compelling employees to become union members); Television Wis., Inc., 224 N.L.R.B. 722 (1976) (union's suit for $150,000 to enforce an unlawful union-security clause violated § 8(b)(1)(A) not because of the union's subjective intent but because of the union's unlawful objective); *see* United Food Workers, District 227, 247 N.L.R.B. 195 (1980) (union's suit against the employer to compel arbitration violated § 8(b)(1)(A) and (2) when the union's motivation was to penalize an employee). *But see* American Bakery Workers, Local 173, 128 N.L.R.B. 937 (1960) (Board did not rely on the union's lawsuit to enforce a valid union-security contract clause when it found that the union violated § 8(b)(2) in attempting to cause the discharge of an employee).

the lawsuits can be classified within one of four categories:[99] (1) retaliatory and frivolous; (2) retaliatory and nonfrivolous; (3) nonretaliatory and frivolous; and (4) nonretaliatory and nonfrivolous. Only the fourth category has been treated consistently by the Board. The Board never has found a nonfrivolous suit initiated without a retaliatory motive to be an unfair labor practice. The Board's response to the other three categories of lawsuits, however, has varied. The Board initially held in *W.T. Carter & Brother*[100] that a lawsuit brought with a retaliatory motive could be an unfair labor practice and that the Board could halt the prosecution of the suit, regardless of the substantiality of the claims. Ten years later the pendulum swung in the other direction. The Board decided in *Clyde Taylor*[101] that it must accommodate the employer's right to sue and concluded that it had no authority to halt the prosecution of a lawsuit, irrespective of the motive or basis for the suit. In the years immediately preceding the Supreme Court's decision in *Bill Johnson's*, the Board retreated from its position that the filing of a lawsuit could not be an unfair labor practice, and held in some instances that baseless suits filed with a retaliatory motive could be enjoined.[102]

The first case that raised the issue whether a lawsuit could be an unfair labor practice was *W.T. Carter & Brother.*[103] In *Carter*

The Board has held that union suits to compel an employer to use grievance-adjustment representatives who were not of the employer's own choosing were § 8(b)(1)(B) unfair labor practices. *E.g.*, International Org. of Masters, 224 N.L.R.B. 1626 (1976) (suit to compel employer to designate its grievance-adjustment representatives in accordance with a contract to which the employer was not a party violated § 8(b)(1)(B)), *enforced*, 575 F.2d 896 (D.C. Cir. 1978); *see* Iron Workers Local 75, 268 N.L.R.B. 1453 (1984) (General Counsel failed to prove that union's lawsuit sought to enforce a contract clause that would have designated the employer's representatives for collective bargaining).

99. *See supra* note 10.

100. 90 N.L.R.B. 2020, 2023-24 (1950).

101. 127 N.L.R.B. 103, 109 (1960).

102. *E.g.*, Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 778-80 (1981); Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155 (1980); United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, 925-26 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744 (1979), *enforced*, 683 F.2d 1296 (10th Cir. 1982); Power Sys., Inc., 239 N.L.R.B. 445, 449-50 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979); United Stanford Employees, Local 680, 232 N.L.R.B. 326, 327 (1977); International Org. of Masters, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978); Television Wis., Inc., 224 N.L.R.B. 722 (1976).

103. 90 N.L.R.B. 2020 (1950), *discussed in* Recent Cases, *Securing Injunction from State Court Held Unfair Labor Practice*, 64 HARV. L. REV. 507 (1951). A Board case prior to *Carter* entailed an injunction suit by an employer against a union and several of its officers and members. Although the Board held that the employer did not commit an unfair labor practice when he "summoned to his office those defendants who were employees of the re-

the employer engaged in a "policy of absolute exclusion"[104] to prevent union organizers from holding open air meetings in a company town.[105]

The employer eventually filed suit in state court and obtained an *ex parte* temporary restraining order prohibiting union meetings without the employer's consent and had the organizers arrested for violating the court's order.[106] In a two-to-one decision, the Board held that the employer's refusal to permit the holding of outdoor union meetings in the company town and all the means used to prevent such meetings, including the prosecution of the lawsuit, violated section 8(a)(1).[107]

The Board recognized that the right to resort to court proceedings was a "basic right"[108] but concluded that the right was not absolute. Instead, it was limited by doctrines such as the law of malicious prosecution and wrongful initiation of civil proceedings.[109] Because the employer in *Carter* filed suit "for the purpose of preventing [its] employees from exercising their rights under the Act, rather than for the purpose of advancing any legitimate interest of [its] own,"[110] the Board held that the initiation and prosecu-

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spondent, and berated them for certain derogatory statements concerning him which they had made in their answer [to the complaint]," there was no discussion whether initiation of the suit was an unfair labor practice. Se-Ling Hosiery Mills, Inc., 14 N.L.R.B. 485, 488 (1939).

104. 90 N.L.R.B. at 2022.

105. *Id.* The employer had the organizers arrested when they attempted to hold an open meeting in the company town, restricted the organizers to broadcasting over a loudspeaker as they drove through the public streets, followed the organizers as they drove, and had the organizers arrested for driving off a dirt road while making a turn. *Id.* at 2021-22.

106. *Id.* at 2021-22.

107. *Id.* at 2022.

108. *Id.* at 2023.

109. The Board emphasized that the law of malicious prosecution and wrongful initiation of civil proceedings "establishes the broad principle that there is an abuse of legal process when such process is invoked in bad faith." *Id.* at 2024.

The Board's statement of the law of malicious prosecution and wrongful initiation of civil proceedings was somewhat flawed in that such actions required a showing that the earlier suit was brought (1) without probable cause and (2) primarily for a purpose other than that of adjudicating a claim. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 119, 120 (4th ed. 1971). Neither of these requisites was present in *Carter* because the employer wished to assert what it apparently thought was an owner's right to exclude unwanted persons, regardless of motive. This misstatement of the law does not deprive *Carter* of its authority, however, because the Board referred to the law of malicious prosecution merely to point out that the "right of a person to resort to the courts is not absolute." 90 N.L.R.B. at 2023-24. In *Carter* the Board created another limitation on the right to resort to the courts when an employer filed a lawsuit to prevent employees from exercising their statutory rights.

110. 90 N.L.R.B. at 2024.

tion of the suit was an unfair labor practice.[111] The employer was ordered to request the state court to vacate the outstanding injunction prohibiting union meetings on the employer's property without the employer's consent. In essence, the *Carter* Board held that a lawsuit brought with a retaliatory motive was an unfair labor practice, regardless of the merits of the underlying suit.[112] In his dissent, Chairman Herzog agreed that the employer's motive in initiating its lawsuit was to interfere with its employees' right to organize. Nevertheless, he believed that the "Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than hold it to be an unfair labor practice for them to attempt to do so."[113]

After *Carter* the Board found an unfair labor practice and ordered appropriate relief when the employer's resort to the courts demonstrated that it had adopted a policy of absolute refusal to bargain with a union. In *Atlanta Metallic Casket Co.*[114] the Board found that the employer's instigation of a lawsuit in federal district court challenging the Board approved representation election and certification of the union, which followed repeated refusals to bargain and other dilatory conduct, was "inextricably a part of the [employer's] unlawful refusal to bargain."[115] Accordingly, the Board found that the employer's actions "were motivated not by a good faith desire to seek the adjudication of its legitimate interests,"[116] but by a desire "to delay the performance of its obliga-

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111. *Id.* The Board expressly declared that the employer's lawsuit was an unfair labor practice solely because the employer was "motivated by a desire to stop the union organization of [its] employees rather than by any bona fide concern to protect [its] property." *Id.* at 2023.

112. The state court apparently determined, at least preliminarily, that the employer's suit was meritorious. After a hearing, the state court converted the restraining order into a temporary injunction, which the defendants did not appeal. *Id.* at 2022. The Board did not comment directly on the merits of the lawsuit, although its citation of Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), could suggest that the Board was of the opinion that the employer's trespass suit was not meritorious. 90 N.L.R.B. at 2023 n.11.

The Board ordered the employer to request the state court to vacate the injunction. 90 N.L.R.B. at 2028. The employer also was ordered to cease and desist from resorting to court proceedings to prevent the holding of outdoor union meetings in the company town. *Id.* at 2027.

113. 90 N.L.R.B. at 2029. Chairman Herzog did not indicate the source or derivation of this "traditional right." *See infra* text accompanying notes 171-99.

114. 91 N.L.R.B. 1225 (1950).

115. *Id.* at 1235 n.24.

116. *Id.* at 1235-36.

tions under the Act and to deny its employees their guaranteed right to be represented for the purposes of collective bargaining by an agent of their own choosing."[117]

Prior to the Board's shift in its treatment of employer lawsuits in the 1960 *Clyde Taylor*[118] decision, the only other reported Board case involving the legality of the initiation of a lawsuit concerned a nonretaliatory and nonfrivolous suit. In *Texas Foundries, Inc.*,[119] the Board adopted the trial examiner's decision that an employer's lawsuit to enjoin picketing was not an unfair labor practice because it was brought with probable cause[120] and in good faith. In 1955 the Board signaled a possible shift in its thinking. In an amicus brief to the Supreme Court in *Amalgamated Clothing Workers v. Richman Brothers*,[121] the Board argued that *Carter* was "limited to situations in which the employer's resort to the state court [was] part of a bad faith scheme to defeat union organization."[122]

In *Clyde Taylor*,[123] however, the Board rejected even the limited reading of *Carter* set forth in its *Amalgamated Clothing* amicus brief and overruled *Carter* entirely. The employer in *Clyde Taylor* discharged five employees, in violation of section 8(a)(3),[124] because of their union activities. After the discharged employees

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117. *Id.* The Board reasoned that it was unnecessary to determine whether the instigation of court proceedings in and of itself constituted an independent violation of § 8(a)(1) because the employer was ordered to cease its unfair lahor practices and to take all steps necessary to remedy the effects thereof. *Id.* at 1235 n.24. Because "recourse to court proceedings constituted one of the means whereby [the employer] sought to avoid the duties imposed on it by Section 8(a)(5)," the Board's remedy presumably required the employer to withdraw its lawsuit contesting the Board approved representation election. *Id. Atlanta Metallic Casket* involved a retaliatory and frivolous suit because the employer brought the case in bad faith and it lacked a reasonable basis.

118. 127 N.L.R.B. 103 (1960); *see infra* text accompanying notes 123-29.

119. 101 N.L.R.B. 1642 (1952).

120. In light of the *Carter* holding that a retaliatory suit was an unfair labor practice regardless of whether the plaintiff had probable cause to bring the suit, it is not clear why the Board in *Texas Foundries* considered the employer's basis for bringing the suit. The Board's consideration in *Texas Foundries* of the basis for the suit lends itself to two possible inferences: (1) that well-founded suits, even though retaliatory, would not be unfair labor practices, or (2) that good faith suits lacking probable cause would be violative of the Act. Nothing in the Board's opinion indicates which reading of *Texas Foundries* is more accurate.

121. 348 U.S. 511 (1955).

122. *Id.* at 520 n.6.

123. 127 N.L.R.B. 103 (1960).

124. Section 8(a)(3) provides: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1982).

filed unfair labor practice charges with the Board, the employer threatened to sue them for libel unless they withdrew the charges. When the union that sought to organize the employer's workers began picketing peacefully in protest against the discriminatory discharges, the employer filed a lawsuit in state court and obtained an injunction banning the peaceful picketing. The trial examiner found that the employer's resort to court proceedings was part of a bad faith scheme to defeat union organization and that it thus violated section 8(a)(1) under the *Carter* doctrine.[125]

The Board reversed the trial examiner without discussing the findings that the suit was without merit and was initiated with a retaliatory motive. The majority in *Clyde Taylor* adopted the dissenting view in *Carter* "that the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice."[126] Because the majority failed even to refer to the merits of or motivation for the employer's suit, *Clyde Taylor* appears to stand for the proposition that under no circumstances could the commencement and prosecution of a lawsuit amount to an unfair labor practice.[127] The Board appeared to take the position that it should abandon enforcement of the Act whenever coercive conduct took place under the aegis of litigation.

Although the *Clyde Taylor* Board held that the exercise of the right to litigate should not be condemned as an unfair labor practice, the Board unanimously held that the employer's threat to sue discharged employees for libel after they filed unfair labor practice

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125. 127 N.L.R.B. at 120-21. Specifically, the trial examiner found (1) that the lawsuit was unmeritorious because the subject matter of the suit was entirely within the area in which state jurisdiction had been wholly preempted by the Act, *id.* at 119-20, and (2) that the employer's suit was motivated by a desire to prevent its employees from exercising their statutory right rather than to advance any legitimate interest of its own, *id.* at 121.

126. *Id.* at 109.

127. Member Fanning's concurring opinion agreed with the majority, who reversed the trial examiner's finding of an unfair labor practice. However, he disagreed with the overruling of *Carter*. Fanning did not believe that the employer's motivation for suing in *Clyde Taylor* was to defeat union organization of its employees rather than to protect a legitimate interest of the employer even though the suit was baseless because the subject matter of the suit was preempted. Fanning distinguished *Carter* on the ground that the evidence of the employer's retaliatory motive was stronger in *Carter* because the underlying unfair labor practices were "more pervasive" in *Carter* and bore a "closer relationship" to the employer's lawsuit. 127 N.L.R.B. at 109-10 (Fanning, Member, concurring). Thus, in Member Fanning's view, *Carter* was limited to situations in which the employer's retaliatory motive was manifested by higbly pervasive underlying unfair labor practices and the lawsuit was closely related to the underlying unfair labor practices.

charges did violate the Act.[128] The Board explained its holding as follows:

> [W]e do not mean to deny the existence of the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims. We interdict here only the making of a threat by an employer to resort to the civil courts as a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act.[129]

The accommodation reached by the *Clyde Taylor* Board, therefore, was that an employer could not threaten to sue its employees, but that it could carry out the threat.

The Board followed *Clyde Taylor* strictly for several years. It refused to find that any lawsuit initiated by an employer or by a union violated the Act, regardless of the motive or substantiality of the claim. In *Local 283, UAW*,[130] for example, the Board held that a union's suit to collect a fine did not violate the Act "for reasons quite apart from, and without regard to whether, the assessment of the fine itself would [be an unfair labor practice]."[131] Similarly, in *Fashion Fair, Inc.*,[132] the Board affirmed the trial examiner's holding that a lawsuit to enjoin employee picketing was not an unfair labor practice even though the suit had no legal basis under Indiana law and the employer was "essentially motivated by [its] continuing aversion to the Union and by a desire to harass the picketers in the exercise of their protected concerted activities."[133]

In cases concerning lawsuits by employers, the Board continued to apply *Clyde Taylor* strictly until 1978.[134] In cases concern-

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128. 127 N.L.R.B. at 108.

129. *Id.* Of course, an employer could use an actual suit as a "tactic calculated to restrain employees" in the exercise of their rights as successfully as it could use a threat of a suit. The Board offered no explanation for this distinction between the filing of a suit and the threat of a suit except its reference to the "normal right of all persons to resort to the civil courts to obtain an adjudication of their claims." *Id.* The Board failed to explain the source of this "normal right" or why this "right" should be paramount to the § 7 rights of workers in all circumstances. These inconsistencies and weaknesses in the *Clyde Taylor* decision aided the gradual process by which the *Clyde Taylor* doctrine was eroded without actually being overruled. *See infra* text accompanying notes 159-60.

130. 145 N.L.R.B. 1097 (1964), *enforced*, 393 F.2d 49 (7th Cir. 1968), *aff'd sub nom.* Scofield v. NLRB, 394 U.S. 423 (1969).

131. 145 N.L.R.B. at 1121.

132. 159 N.L.R.B. 1435 (1966).

133. *Id.* at 1449. *Clyde Taylor* also was relied upon to protect the employer's photographing of picketers for the purpose of obtaining evidence to support the employer's retaliatory lawsuit. *Id.* at 1450 n.36.

134. *See* DC Int'l, Inc. 162 N.L.R.B. 1383, 1394, *enforcement denied*, 385 F.2d 215 (8th Cir. 1967); G.C. Murphy Co., 171 N.L.R.B. 370, 377 (1968), *aff'd sub nom.* Food Store Employees Union, Local 347 v. NLRB, 422 F.2d 685 (D.C. Cir. 1969); United Aircraft Corp., 192 N.L.R.B. 382, 384 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975); Frank Visceglia, 203

ing the imposition and attempted enforcement of fines by unions against members who had resigned from the union and crossed picket lines during strikes, however, the Board departed from its liberal attitude toward litigation as early as 1970. The Board—with the ultimate approval of the Supreme Court—found that because the fines themselves were illegal, attempts to enforce the fines in court also were illegal.[135] When it prohibited these nonretaliatory lawsuits,[136] the Board did not consider the applicability of *Clyde Taylor* or refer to its apparently contrary position in *Local 283, UAW*[137] that a union's suit to collect a fine did not violate the Act, regardless of the lawfulness of the fine.

The Board originally refused to extend the rationale of the union fine cases to other types of cases. Thus, the Board held that union lawsuits initiated to enforce contract provisions violative of section 8(e)[138] were not independent unfair labor practices.[139] The

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N.L.R.B. 265, 272 (1973), *enforcement denied*, 498 F.2d 43 (3d Cir. 1974); San Clemente Gen. Hosp., 224 N.L.R.B. 378, 380 (1976); S.E. Nichols Marcy Corp., 229 N.L.R.B. 75, 75 n.2 (1977); Mid-America Mach. Co., 238 N.L.R.B. 537, 546-47 (1978), *enforced mem.*, 89 Lab. Cas. (CCH) ¶ 12,157 (7th Cir. 1980).

135. Granite State Joint Bd., Textile Workers Local 1029, 187 N.L.R.B. 636 (1970), *enforcement denied*, 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972); Booster Lodge No. 405, 185 N.L.R.B. 380 (1970), *enforced in relevant part*, 459 F.2d 1143 (D.C. Cir. 1972), *aff'd sub nom.* NLRB v. Boeing Co., 412 U.S. 67 (1973).

136. The lawsuits prohibited in *Granite State* and *Booster Lodge* are best characterized as nonretaliatory because nothing in the opinions suggests that the unions' lawsuits were motivated by anything but a good faith desire to enforce disciplinary fines that the unions genuinely believed were lawful. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (the union did not violate the Act by seeking judicial enforcement of a fine imposed on a member who had engaged in strikebreaking activities). The suits in *Granite State* and *Booster Lodge* were not well-founded, however, because the fines were found to be unlawful and therefore unenforceable.

137. 145 N.L.R.B. 1097 (1964), *enforced*, 393 F.2d 49 (7th Cir. 1968), *aff'd sub nom.* Scofield v. NLRB, 394 U.S. 423 (1969); *see supra* text accompanying notes 130-31.

138. Section 8(e) provides, in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void . . . .

29 U.S.C. § 158(e) (1982).

139. International Union of Operating Eng'rs, Local 12, 220 N.L.R.B. 530 (1975); Retail Clerks Union Local 770, 218 N.L.R.B. 680 (1975). Both cases involved lawsuits brought in good faith but that were not well-foimded because an unlawful contract clause was unenforceable.

In *Retail Clerks* the union believed that the employer was violating a contract clause and submitted the matter to an arbitrator who agreed with the union and ordered the em-

Board found that such suits were brought "in good faith to enforce a colorable contract right"[140] and expressly distinguished the union fine cases.[141]

The gradual modification of the *Clyde Taylor* doctrine that began with the union fine cases became more pronounced in *Television Wisconsin, Inc.*.[142] In *Television Wisconsin* the union sued ten members who had resigned prior to a strike, worked during the strike, and circulated decertification petitions. The union alleged that by these actions the employees had violated both the union-security clause of their contract and their obligations as members. The union also claimed that the employees had conspired with the employer to undermine the union.[143]

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ployer to abide by the contract clause. When the employer failed to comply with the arbitrator's award, the union filed a lawsuit to confirm the award. The employer then filed a charge against the union asserting that the contract clause violated § 8(e) and that the union's lawsuit to enforce the arbitration award was an unfair labor practice. The Board held that the contract clause did violate § 8(e), but concluded that the union's lawsuit was not an unfair labor practice because the union's "conduct in resorting to the courts to confirm the arbitrator's award was done in good faith to enforce a colorable contract right and was not the kind of tactic calculated to restrain employees or employers in the exercise of rights guaranteed by the Act." 218 N.L.R.B. at 683.

140. *Retail Clerks*, 218 N.L.R.B. at 683.

141. The Board concluded:

> [The union fine cases] are significantly distinguishable from the instant situation. The vice in collecting a fine by means of a lawsuit is manifestly not independent of the illegality of the fine and its imposition. The illegality lies not in the lawsuit to collect the fine but in the union's act of imposing the illegal fine. In other words, but for the imposition of the illegal fine there would be no unfair labor practice and no lawsuit. This is not the situation in the instant case. Here, absent the lawsuit, there would be no unfair labor practice. The lawsuit in effect is the unfair labor practice.

International Union of Operating Eng'rs, Local 12, 220 N.L.R.B. 530, 538 (1975). In *IUOE* the Board held that, absent bad faith, a union's lawsuit to enforce an unlawful interpretation of a contract is not an unfair labor practice because the merit of the union's lawsuit "is a matter for the court and is not relevant in deciding whether the act of bringing the suit constitutes impermissible restraint or coercion." *Id.* at 538-39.

142. 224 N.L.R.B. 722 (1976). It is unclear from the ALJ's opinion whether the lawsuit at issue in *Television Wisconsin* was a retaliatory suit. On the one hand, the ALJ found that the union's purpose was to coerce and restrain the defendants in their exercise of protected activity. On the other hand, the ALJ found "no evidence from which to conclude that the action was conceived or brought in malice or bad faith." *Id.* at 779. This ambiguity was rendered moot, however, by the Board's position that the lawsuit was an unfair labor practice "not because of the Union's subjective intent but because of the unlawful objective sought by the Union." *Id.* at 722 n.2 (footnote to Board's "Decision and Order"). *Hayward Baker Co.*, 275 N.L.R.B. No. 48, [1985-86 Transfer Binder] NLRB Dec. (CCH) ¶ 17,277 (Apr. 26, 1985), overruled *Television Wisconsin*'s denial of the reimbursement of legal expenses incurred by employees in defending against a union's retaliatory lawsuit. The Board's decision in *Hayward Baker Co.* does not alter the significance of *Television Wisconsin* for the purposes of this Article.

143. 224 N.L.R.B. at 779.

The ALJ found that the filing of this suit violated the Act. The ALJ construed the union fine cases and the *Retail Clerks* case, in which the Board had held that a lawsuit brought in good faith to enforce a colorable contract right was not an unfair labor practice,[144] as adopting an intent test.[145] Because the ALJ found that the union's purpose in suing was to coerce and restrain the employee-defendants in the exercise of their statutory rights, he concluded that the union's resort to court proceedings was an independent unfair labor practice.[146] Although the Board affirmed the ALJ's findings, in an influential but ambiguous footnote it stated that it did so "not because of the Union's subjective intent but because of the unlawful objective sought by the Union."[147] The Board thus rejected the ALJ's view that *Retail Clerks* adopted an intent test and apparently adopted its own view that the suit was illegal because its objective was the enforcement of an illegal union-security clause. The Board made no attempt to distinguish its holding in *Retail Clerks* that a suit brought "in good faith to enforce a colorable contract right" does not violate the Act.[148] Nor did the Board explain why a contract clause that violates section 8(e) is a "colorable contract right" even though a contract clause that violates section 8(b)(1)(A) is not.[149]

The Board thus extended the rationale of the union fine cases to make an exception to *Clyde Taylor* when the suit has an "unlawful objective."[150] In rejecting an intent test, however, the Board in *Television Wisconsin* indicated that it was distinguishing a suit to enforce an illegal fine or contract clause (unlawful objective) from a suit "to restrain and coerce [employees] . . . in the exercise of their rights"[151] (wrongful subjective intent, but not a basis for

144. *See supra* note 139.

145. According to the ALJ, "the rationale of the *Retail Clerks* case indicates that despite reliance on [*Clyde*] *Taylor* therein intent has become determinative." 224 N.L.R.B. at 780. Although the ALJ expressly found that the union's suit was not brought maliciously or in bad faith, he also found that the union's purpose for suing was to enforce an unlawful union-security clause and to restrain and coerce the defendants in the exercise of their rights to cross a picket line and to file a decertification petition. *Id.* at 779.

146. *Id.* at 780.

147. *Id.* at 722 n.2.

148. 218 N.L.R.B. at 683.

149. In *Retail Clerks* the union initiated its suit to enforce an arbitrator's award that adopted an interpretation of a contract clause violative of § 8(e). Although the existence of an arbitrator's award may have made a finding of good faith easier in *Retail Clerks*, it does not explain why the contract right in *Television Wisconsin* was any less "colorable" than the contract right in *Retail Clerks*.

150. 224 N.L.R.B. at 722 n.2.

151. *Id.* at 780.

finding a violation).[152] This distinction still is maintained by the Supreme Court.[153]

The Board apparently had difficulty either in understanding or applying the distinction, for it abandoned it in *International Organization of Masters, Mates & Pilots*.[154] *IOMMP* arose in the context of a dispute between rival unions over which union had a valid contract covering a ship previously operated under an agreement with the IOMMP. The IOMMP picketed the ship and brought an in rem action against the ship seeking lost wages for the IOMMP's members who allegedly had been unjustly discharged.[155] The ALJ found that the picketing violated subsections 8(b)(4)(A) and (b)(1)(B) of the Act and that the filing of the in rem suit also violated the Act because the suit was "caused by [the IOMMP] to be filed in this instance in support of its picketing activities and in furtherance of its 'larger objective' of compelling [the employer] and its subsidiaries to agree to [the IOMMP's] contract and enforce it aboard the [ship]."[156]

The Board agreed with the ALJ, based on this "larger objective" and its finding that the lawsuit "may not have been taken in complete good faith."[157] Both the majority and the dissent in

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152. Certain kinds of nonretaliatory but frivolous lawsuits, those seeking a remedy prohibited hy the Act, were unfair labor practices, therefore, even though brought in good faith and without any intent to restrain and coerce employees. But nonfrivolous lawsuits, those stating claims having a reasonable basis, were not unfair labor practices even though initiated with the intent to restrain and coerce employees.

153. *See Bill Johnson's*, 461 U.S. at 737 n.5. The basis for this distinction is difficult to comprehend. Enforcement of an unlawful fine or union-security clause is no more a violation of the Act than is restraint or coercion of the exercise of § 7 rights; in fact the Board found that the fines were unlawful because the fines had the effect of impinging on the exercise of § 7 rights. *See* Booster Lodge No. 405, 185 N.L.R.B. 380, 382 (1970). A union's imposition of fines on strikebreaking former union members was not patently unlawful. The First Circuit found a fine lawful when the strikebreakers had participated in the strike vote. NLRB v. Granite State Joint Bd., Textile Workers Local 1029, 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972). Justice Blackmun agreed, NLRB v. Granite State Joint Bd., Textile Workers Local 1029, 409 U.S. 213, 218-23 (1972) (Blackmun, J., dissenting), but the Chief Justice found it a "close and difficult" question, *id.* at 218 (Burger, C.J., concurring). It is difficult to understand why an attempt to enforce a fine or contract clause that is not clearly unlawful, but is later found to be so, should receive more severe treatment than a suit brought with the intent of preventing employees or employers from exercising their statutory rights, and that has the effect of doing so.

154. 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978). *IOMMP* involved a retaliatory, frivolous lawsuit because the Board concluded that the suit was not brought in complete good faith and the plaintiffs claimed no valid basis for recovery. 224 N.L.R.B. at 1626 n.2.

155. 224 N.L.R.B. at 1629-30.

156. *Id.* at 1634.

157. *Id.* at 1626 n.2.

IOMMP expressly adopted a "bad faith" exception to *Clyde Taylor* but disagreed on its application.[158]

The Board's opinion in *IOMMP* was ambiguous. Although the language of the opinion referred to an unlawful objective, in reality the holding was prefaced on a finding regarding the plaintiffs' intent in the in rem action. The plaintiffs filed the suit with the ostensible objective of recovering alleged lost wages; however, because the Board found that the "larger objective" of the suit was to support picketing and enforce an unlawful contract, the Board held that the suit violated the Act. This decision was nothing more, however, than a determination of the motivation of the plaintiffs in bringing the suit.

Moreover, the Board did not clarify what it meant when it adopted a bad faith exception to *Clyde Taylor*. Apparently, it was harking back to a distinction that was made, but that was not dispositive, in *Retail Clerks* between a suit filed "in good faith to enforce a colorable contract right" and the "kind of tactic calculated to restrain employees or employers in the exercise of rights guaranteed by the Act."[159] The Board used that language in *Clyde Taylor* to refer only to the threat of a suit and not to an actual suit, which *Clyde Taylor* held was immune from prosecution as a violation of the Act.[160] To determine whether a suit was brought as a "tactic calculated to restrain . . . the exercise of rights guaranteed by the Act" clearly requires an inquiry into the motivation of the party bringing suit. Thus, only nine days after the Board rejected the notion of findiug a violation based on subjective intent in *Television Wisconsin*, the same panel adopted an intent test in *IOMMP*.

In subsequent cases concerning suits filed by unions against employers or employees, the Board consistently has used an intent test to determine whether the suit violated the Act.[161] The Board

158. Member Jenkins dissented, arguing that under his reading of *Clyde Taylor*, as modified by International Union of Operative Eng'rs, Local Union No. 12, 220 N.L.R.B. 530 (1975), a suit does not violate the Act "absent bad faith" and that there was no evidence of bad faith. 224 N.L.R.B. at 1627 (Jenkins, Member, dissenting in part). According to Member Jenkins, *IUOE* stood for the proposition that a lawsuit to enforce a contract clause violative of the Act is not an unfair labor practice in the absence of bad faith. *Id.*; *see supra* note 141 and accompanying text.

159. 218 N.L.R.B. 680, 683 (1975).

160. 127 N.L.R.B. 103, 108-09 (1960).

161. *See* Teamsters Local Union No. 515, 259 N.L.R.B. 678, 681 (1981); Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 779 (1981), *modified*, 716 F.2d 1249 (9th Cir. 1983); United Food & Commercial Workers, Dist. Union 227, 247 N.L.R.B. 195, 196 (1980); United Stanford Employees, Local 680, 232 N.L.R.B. 326, 331 (1977), *aff'd* 601 F.2d 980 (9th Cir. 1979).

and the Eighth Circuit also have applied a motivation test in determining whether an attempt by an employer to obtain court enforcement of an illegal contract clause violated the Act.[162]

Despite the shift in the Board's approach in the union-plaintiff cases as indicated by *Retail Clerks, Television Wisconsin*, and *IOMMP*, the Board initially continued to follow its previous interpretation of *Clyde Taylor* as mandating absolute protection for employer lawsuits. In 1977 in *S.E. Nichols Marcy Corp.*,[163] for example, the Board noted that *IOMMP* was an exception to the *Clyde Taylor* rule,[164] but relied on the "longstanding Board precedent consistently holding that the filing of a civil suit . . . does not constitute an unfair labor practice."[165] The Board did not inquire into either the motive or basis for the suit in *S.E. Nichols*.

A year and a half later, in *Power Systems, Inc.*[166] the Board found, for the first time since deciding *Clyde Taylor*, that an employer's lawsuit was an unfair labor practice. In *Power Systems* the employer's suit against its former employee alleged that the employee's unfair labor practice charges and Occupational Safety and Health Administration (OSHA) complaint against the employer were malicious civil proceedings. The suit claimed as damages the employer's legal fees in defending against the Board charges and the OSHA complaint and sought a permanent injunction barring the former employee from filing cases against the employer with administrative agencies or in court, although it later dropped the request for injunctive relief.[167] The former employee claimed that the suit was an unfair labor practice, and the Board agreed, finding that the employer had no "reasonable basis" for its claim that the former employee's charges were filed without probable cause. The Board also found that "the true purpose behind [the employer's] lawsuit was to penalize [the employee] for asserting his rights under the [NLRA]."[168] The Seventh Circuit denied enforcement of the Board's order on the grounds that the record contained no basis for the Board's finding that the employer lacked probable cause for the filing of its suit.[169] Although the court rejected the Board's

162. Associated Gen. Contractors, 245 N.L.R.B. 328, 330-31 (1979), *enforced*, 637 F.2d 556 (8th Cir. 1980).

163. 229 N.L.R.B. 75 (1977).

164. *Id.* at 75 n.2.

165. *Id.* at 75.

166. 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979).

167. *Id.* at 446-47.

168. *Id.* at 449.

169. Power Sys., Inc. v. NLRB, 601 F.2d 936, 939-40 (7th Cir. 1979).

finding that the employer had committed an unfair labor practice, both the Board and the court accepted the use of the two-pronged test of motive and claim substantiality to determine the legality of employer lawsuits.

Under the two-pronged test of *Power Systems*, all lawsuits brought with a retaliatory motive and without a reasonable basis were unfair labor practices. From 1978 until the Supreme Court's decision in *Bill Johnson's*, the Board consistently held that a retaliatory lawsuit lacking a reasonable basis was an enjoinable unfair labor practice whether filed by an employer or by a union.[170]

The evolution of Board precedent concerning the legality of retaliatory lawsuits reflects a concern on the part of Board members in balancing the right to sue with the national labor policy promoting self-organization. Balancing these interests has not been easy, and no one accommodation has stood the test of time. This history suggests that the *Bill Johnson's* accommodation also will prove unsatisfactory if employers use retaliatory suits to thwart organizational campaigns. Consequently, the constitutional basis of the first amendment petition right must be explored to determine whether this Article's proposed accommodation—the temporary suspension of the right to initiate a retaliatory lawsuit during an organizational campaign—is constitutionally permissible.

V. The Constitutional Considerations in Regulating Retaliatory Suits

Before considering the constitutionality of the accommodation proposed in part III of this Article, an examination of the Court's constitutional analysis in *Bill Johnson's* is necessary. Notwithstanding declarations to the contrary elsewhere,[171] the *Bill Johnson's* Court did not hold expressly that the first amendment petition right immunizes nonfrivolous, retaliatory lawsuits from Board initiated permanent injunctions.[172] Nevertheless, it is analytically

170. Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 778-80 (1981), *modified*, 716 F.2d 1249 (9th Cir. 1983); United Credit Bureau of Am., Inc., 242 N.L.R.B. 921, 925-26 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744 (1979), *enforced*, 683 F.2d 1296 (10th Cir. 1982).

171. For example, in United States v. Hylton, 710 F.2d 1106, 1111 (5th Cir. 1983), the court declared that in *Bill Johnson's*, "the Supreme Court has held expressly that the first amendment right to petition protects the individuals [sic] right to file an action with a 'reasonable basis' in a state tribunal." Similarly, one commentator stated that the *Bill Johnson's* holding was "constitutionally based." Note, *The NLRB's Discovery Practice*, *supra* note 8, at 824.

172. The Court, however, made no attempt to show that Congress did not intend the

appropriate to consider the right to petition defense in constitutional terms even though the Court did not expressly declare that the Constitution required its construction of the NLRA.[173]

Because the Court's reasoning in *Bill Johnson's* was somewhat sketchy, this Article states the arguments supporting the constitutional defense more completely. Thus, it will be easier to evaluate the viability and extent of the Court's conclusion that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."[174] The Court should have applied the constitutional defense in *Bill Johnson's* only if it found that the following two requirements were satisfied: First, that the employer's action in bringing suit against its workers for the purpose of interfering with their exercise of statutory rights amounted to petitioning the government for redress of grievances;[175] and sec-

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Act to apply to retaliatory lawsuits. Indeed, the Court admitted that the Board's construction of the Act to prohibit retaliatory lawsuits was "not irrational." 461 U.S. at 742. Instead, the Court relied solely on its interpretation of the first amendment petition right and the state's interest in maintaining domestic peace to construe the Act not to apply to nonfrivolous, retaliatory lawsuits. *See, e.g., id.* at 741 ("We should be sensitive to these First Amendment values in construing the NLRA in the present context."); *id.* at 742-43 ("Considering the First Amendment right of access to the courts and the state interests . . . , we conclude that the Board's interpretation of the Act is untenable."). Consequently, it is appropriate to analyze the petition right as a constitutional defense.

173. The Court conceded that it "has liberally construed [the NLRA] as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities." 461 U.S. at 740. It further noted that an employer easily could use a lawsuit "as a powerful instrument of coercion or retaliation." *Id.* at 740 (footnote omitted). In light of this admission and the Court's extended discussion of the constitutional issues, it is not unreasonable to believe that a majority of the Court was of the view that the Board's construction of the Act was unconstitutional. Justice Holmes once wrote that the Court's doctrine of avoiding constitutional issues "more often is invoked in aid of a conclusion reached on other grounds than made itself the basis of decision." Ruddy v. Rossi, 248 U.S. 104, 111 (1918) (Holmes, J., separate opinion).

Writing for the Court, Justice White avoided indicating what test he used to construe the Act. He thus avoided an explicit decision on the constitutional questions. Four years earlier the Court split five to four on the proper test "for construing statutes wherein constitutional questions may lurk." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 510 (1979) (Brennan, J., dissenting).

174. 461 U.S. at 743.

175. The Court stated that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances," *id.* at 741, and used the terms "right of access to the courts" and "right to petition" interchangeably. Consequently, one could analyze this first requirement in terms of whether there is a first amendment right of access to the courts to sue for the purpose of interfering with workers' exercise of statutory rights.

Unlike most state constitutions, which expressly protect the right of access to state

ond, that enjoining the suit would infringe the employer's right to petition the government without an adequate countervailing justification.

A. *Right to Petition the Government for Redress of Grievances*

The *Bill Johnson's* Court presumed that the employer's retaliatory suit constituted petitioning the government. In support of the proposition that a civil lawsuit between private citizens to resolve private differences amounted to a constitutionally protected petitioning of the government for redress of grievances, the Court cited only its earlier decision in *California Motor Transport Co. v. Trucking Unlimited.*[176]

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courts, *see, e.g.*, FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."); *see also* COLO. CONST. art. II, § 6; MISS. CONST. art. III, § 24; *see generally* 16A Am. Jur. 2d *Constitutional Law* § 613 (1979), the United States Constitution lacks such an explicit guarantee, Bounds v. Smitb, 430 U.S. 817, 839-40 (1977) (Rehnquist, J., dissenting) (The " 'fundamental constitutional right of access to the courts' . . . is found nowhere in the Constitution.") (citation omitted); *see also id.* at 833-34 (Burger, C.J., dissenting). Nevertbeless, this "nebulous" and "ill-defined" right, Doe v. Schneider, 443 F. Supp. 780, 784, 787 (D. Kan. 1978), appears to be imbedded in federal constitutional law, *see* Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150, 160-63, 165-66 (1897).

The right of court access is most often regarded as arising under the due process clauses of the fifth and fourteentb amendments. *See* Barbier v. Connolly, 113 U.S. 27, 31 (1885) (the fourteenth amendment requires tbat all persons "have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs"); *see also* Truax v. Corrigan, 257 U.S. 312, 332 (1921) (the due process clause mandates that all persons "shall have the protection of [their] day in court"); Doe v. Schneider, 443 F. Supp. 780, 788 (D. Kan. 1978) (fairly comprehensive treatment of the Supreme Court's recent views on the right of access to the courts).

The first amendment rigbt to petition the government for redress of grievances also has been construed as a guarantee of the rigbt of access to the courts. In California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court concluded it would be destructive of the rights of association and petition to deny groups with common interests the use of civil courts to advocate their causes and points of view. *Id.* at 510-11. Protection of the right to bring a civil suit, however, is not unlimited under the first amendment right of petition. The Supreme Court has justified limitations on the petition right when it serves as a means or pretext for acbieving substantive evil. *See id.* at 513-14 (holding right to petition not immunized from regulation when used as an integral part of conduct that violates a federal statute); NAACP v. Button, 371 U.S. 415, 438-44 (1963) (state interest in regulation of legal profession did not justify prohibition of NAACP solicitation activities).

176. 461 U.S. at 741 (citing 404 U.S. 508 (1972)). *California Motor Transport* concerned an antitrust suit between two associations of trucking firms. The complaint alleged that the defendant association had attempted to prevent the plaintiff firms from entering the California market by filing lawsuits in opposition to the plaintiffs' operating applications and their attempts to transfer or register their operating rights. 404 U.S. at 509. The Court declared tbat "[t]he right of access to tbe courts is indeed but one aspect of the right of petition," 404 U.S. at 510, and concluded that in accordance with rights of association and of petition, and without violating the antitrust laws, groups with common interests were

The notion that a lawsuit between private citizens to resolve private differences constitutes petitioning the government is not intuitively obvious.[177] The employer, the petitioning party in *Bill*

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entitled to utilize state and federal proceedings "to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors," 404 U.S. at 510-11. At the same time, however, the Court recognized an exception to this first amendment immunity established in Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). The plaintiffs in *California Motor Transport* alleged that the defendants had instituted lawsuits with the intent "to bar their competitors from meaningful access to adjudicatery tribunals and so to usurp that decisionmaking process." 404 U.S. at 512. Relying on *Noerr*, the Court concluded that any effort intended to deter the plaintiffs from invoking "the processes of the administrative agencies and courts" would meet the *Noerr* exception to the first amendment immunity from antitrust liability. 404 U.S. at 512.

177. The first amendment protects the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. As its terms suggested, this guarantee was understood at the time of its adoption principally as a protection of political activity to influence the legislature. *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 198 (1971) (Declaration of Rights and Grievances of the Congress, 1765, art. XIII); *id.* at 217 (Declaration and Resolves of the First Continental Congress, 1774, Resolve 8); *id.* at 266 (Pennsylvania Declaration of Rights, 1776, art. XVI); *id.* at 277 (Delaware Declaration of Rights, 1776, art. XVIII); *id.* at 324 (Vermont Declaration of Rights, 1777, art. XVIII); *id.* at 372-73 (Massachusetts Declaration of Rights, 1780, art. XX); *id.* at 379 (New Hampshire Bill of Rights, 1783, art. XXXII); *id.* (Vol. 2) at 681 (proposed amendment in Massachusetts ratifying convention); *id.* at 735 (proposed amendment 14 in Maryland ratifying convention); *id.* at 842 (proposed amendment 15 in Virginia ratifying convention); *id.* at 913 (proposed amendment in New York ratifying convention); *id.* at 968 (proposed amendment 15 in North Carolina convention); *id.* at 1026, 1089-95, 1103 (debates in House of Representatives). *But see id.* at 73 (Massachusetts Body of Liberties, 1641, art. 12) ("liberties to come to any publique Court, Councel, or Towne meeting, and either by speech or writing to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, Bill, or information"); *id.* at 377 (New Hampshire Bill of Rights, 1783, art. XIV) (every subject entitled to a certain remedy, by recourse to the laws).

The judiciary generally ignored the petition clause. Its meaning was debated hotly in 1840, however, when the House of Representatives, in response to a large number of petitions demanding the abolition of slavery, adopted a standing rule whereby it would refuse even to accept petitions touching on slavery. John Quincy Adams led a protracted battle against this rule, arguing that it violated the petition clause. Eventually, Adams prevailed, and the rule was rescinded. *See* J.Q. ADAMS, SPEECH OF JOHN QUINCY ADAMS UPON THE RIGHT OF PEOPLE TO PETITION (J. McPherson & W. Katz eds. 1969) (reprinting portions of the congressional debate); D. SMITH, THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES: CONSTITUTIONAL DEVELOPMENT AND INTERPRETATIONS 81-108 (1971). The petition clause, however, received virtually no judicial elaboration until recent years. United States v. Criukshank, 92 U.S. 542 (1875), apparently was the first Supreme Court case in which the right to petition received any substantial discussion. The Court stated, "The very idea of a government, republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 552. Only in the last few decades have the courts begun to define the scope of the petition clause in any serious way. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 221-24 (1967).

The substantive nature of the petition right nevertheless remains highly obscure. The

Johnson's, had no grievance whatsoever with the government. Its only grievance was with its own employees and their families.[178] At most, the employer wanted the judicial branch of government to issue a legally enforceable order requiring the defendants to refrain from any further alleged wrongdoing and to pay the employer the damages they allegedly had caused the employer to suffer. The employer was not seeking redress from the government; it wanted only to use the government's powers of coercion to resolve a private dispute.

Furthermore, the employer's primary intent in filing the suit was to retaliate against the defendants for exercising their statutorily protected rights. Thus, given the employer's true motive, a more accurate and realistic characterization of the suit would be that the employer petitioned the judiciary branch to use its coercive powers to aid the employer in retaliating against the defen-

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courts neither have offered a detailed specification of the right's content nor situated it within a larger vision of the first amendment. Instead, the courts usually have cited the petition clause in conjunction with invocations of the first amendment's speech and assembly clauses, a pattern that impedes a clear understanding of the petition right itself. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428-30 (1963) (expression, association, and petition); *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945) (rights to freedom of speech, press, assemhly, and petition, "though not identical, are inseparable").

Commentators generally have ignored the petition clause. *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963) (devoting no systematic discussion to the petition right). Given Alexander Meiklejohn's emphasis on the first amendment's role in protecting political speech, his silence concerning the petition right is even more surprising. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). The index to the leading casehook on constitutional law, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (10th ed. 1980), contains no entry for the petition right. Nor does Gunther devote a chapter, or a section of any chapter, to the petition clause.

A few writers nonetheless have discussed the petition clause. *See* D. SMITH, *supra*; Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973). For an excellent treatment of the historical antecedents to the petition clause, see Smellie, *Petition, Right of*, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 98 (1933).

178. Although the petition clause does not say that the right to petition the government is limited to grievances against the government, the Supreme Court has suggested in dictum that the resolution of private differences is not entitled to first amendment protection. In NAACP v. Button, 371 U.S. 415 (1963), the Court concluded that the NAACP actions in organizing and sponsoring litigation constituted political association protected by the first amendment. The Court reasoned:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the memhers of the Negro community in this country. . . . [U]nder the conditions of modern government, litigation may well be the sole practicahle avenue open to a minority to petition for redress of grievances.

Id. at 429-31. One cannot contend seriously tbat litigation is "tbe sole practicable avenue open" to employers wlien they have grievances against their employees.

dants for exercising their statutory rights.[179]

Additionally, the Court's reliance on *California Motor Transport* was ill placed. The *California Motor Transport* Court did not hold that a purely private suit between private litigants to resolve private differences amounted to petitioning the government for redress of grievances. *California Motor Transport* did not involve purely private disputes; instead, the right to petition administrative agencies to seek review of adverse agency decisions was at stake. The right to obtain judicial review of administrative agency orders affecting the heavily regulated trucking industry, in which operating rights must be obtained from government agencies, is a far cry from the right to obtain judicial resolution of a purely private dispute.[180]

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179. Moreover, to the extent that freedom of association was invoked by the defendants' efforts to join together to bargain collectively, the employer's suit was an attempt to enlist the coercive powers of the state to retaliate against the defendants' exercise of statutory rights with clear constitutional overtones.

Under this analysis, the most appropriate precedent is Sbelley v. Kraemer, 334 U.S. 1 (1948). In *Shelley* judicial enforcement of valid but racially restrictive covenants was denied because courts could not provide the critical power to effectuate discrimination between private individuals. Viewing courts as accomplices to retaliatory lawsuits produces a far different constitutional conclusion than the one reached in *Bill Johnson's*. The *Shelley* Court summarily rejected the property owners' claim that denying tbem the right to seek judicial enforcement of valid racially restrictive covenants impermissibly denied tbem access to tbe courts. *Id.* at 22. The Court did not find that the property owners in *Shelley* were exercising the right to petition government for redress; instead, they simply were enlisting the government for assistance in promoting their racism. *Cf.* Norwood v. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.").

180. In this context of a heavily regulated industry, the Court stated that "[t]he right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510. In support of this statement the Court cited two cases that struck down restrictions on prisoners' rights to file writs of habeas corpus. The two cases cited were Johnson v. Avery, 393 U.S. 483, 485 (1969) ("Since the basic purpose of the writ is to enable tbose unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."), and *Ex parte* Hull, 312 U.S. 546, 549 (1941) ("The state and its officers may not abridge or impair [a prisoner's] right to apply to a federal court for a writ of habeas corpus.").

It now is well established that prisoners have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDounell, 418 U.S. 539 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969). The origin of that right is the due process guarantee of the fifth and fourteenth amendments. Procunier v. Martinez, 416 U.S. 396, 419 (1974). The right of access includes collateral review of criminal convictions, and civil cases involving constitutional rights. *See In re* Green, 669 F.2d 779, 785 (D.C. Cir. 1981) (per curiam) (collecting cases in which various financial barriers to suit were held unconstitutional). The right, however, is neither absolute nor unconditional. *Id.*

Access to the courts to file the "Great Writ", 28 U.S.C. §§ 2241-2255 (1982), however, is distinguishable from access to the courts to resolve a private dispute. *See* Johnson v. Avery,

Prior to *Bill Johnson's*, the leading decision on whether the commencement of a civil suit constituted petitioning the government was *NAACP v. Button.*[181] In *Button* the Court invalidated a state's attempt to preclude the NAACP from funding group legal services. The Court concluded that the NAACP activities in organizing and sponsoring litigation constituted political association protected by the first amendment.[182]The *Button* Court, however, was careful to distinguish litigation undertaken by members of a minority group to achieve equality of treatment from litigation undertaken as "a technique of resolving private differences."[183]

The language in *California Motor Transport* was less precise, but the facts required the Court to consider only litigation arising out of decisions by government agencies concerning applications to acquire operating rights or to transfer or register those rights. The Court suggested that the right of access to the courts was one aspect of the right of petition, but it did not indicate that this right of petition included private lawsuits resolving private differences. Any such broad right would be inconsistent with decisions that have rejected arguments that access to the courts in private lawsuits has constitutional implications.[184] Certainly the authorities

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393 U.S. 483, 485 (1969) ("This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.' " (footnotes and citations omitted)).

181. 371 U.S. 415 (1963).

182. See *supra* note 178 for a discussion of the Court's decision.

183. 371 U.S. at 429.

184. The Court has allowed the state to impose access costs on litigants seeking to petition the judiciary. *See* Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (permitting $25 filing fee as condition for review of denial of welfare benefits when alternative avenues for appeal were available); United States v. Kras, 409 U.S. 434 (1973) (permitting $50 filing fee in voluntary bankruptcy proceeding). *But see* Boddie v. Connecticut, 401 U.S. 371 (1971) (due process dictates that states may not abridge indigent litigants' access to the courts based solely on their inability to pay a filing fee in divorce action).

The *Boddie* holding on the right of access to civil courts is severely restricted. The Court indicated this restriction when, soon after *Boddie* was decided, it denied certiorari in a handful of suits by indigents seeking free access to civil courts for a variety of purposes. *See, e.g.,* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971). Among the unheard cases was a suit by an indigent mother who was denied court-appointed counsel to defend her in a state civil suit to declare her an unfit mother and take away five of her seven children. Kaufman v. Carter, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678, *cert. denied*, 402 U.S. 964 (1971).

In United States v. Kras, 409 U.S. 434 (1973), a particularly sympathetic indigent—with a tale of woe that included a blameless falling into debt, a pack of ruthless creditors, no income, no assets, a dependent wife and mother, and an infant child hospitalized with cystic fibrosis—sought escape from his unfortunate past and a new start in life through release in bankruptcy. The only obstacle was the $50 bankruptcy fee which, accord-

cited by the *California Motor Transport* Court—two decisions that struck down regulations limiting access to the courts by prisoners filing writs of habeas corpus[185]—lend no support to the argument that a private lawsuit constitutes petitioning the government.

Moreover, the *California Motor Transport* Court held that the right of access to government agency hearings "[did] not necessarily give [the carriers] immunity from the antitrust laws."[186] Indeed, the Court expressly limited a carrier's right of access. The carrier's right of access exists "to defeat applications of its competitors for certificates as highway carriers."[187] But if the carrier's purpose in petitioning the agencies and courts is "to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts,"[188] then the carrier's petitioning activity is not protected by the first amendment.[189]

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ing to the trial court's findings, he was completely unable to pay, and which under the rule of *Boddie* he asked the Court to hold violative of due process. The Court rejected his claim because he did not satisfy the two requirements of *Boddie* that a fundamental interest be at stake and that the state's monopoly over resolution of disputes concerning that interest be complete. *Id.* at 445. Although not expressly articulated, the Court's holding in *Kras* implied that the right of access to bankruptcy court was not a fundamental interest.

Similarly, the Court rejected a claim of right to access to civil courts in Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam), in which the Court refused to find an equal protection or due process violation in Oregon's requirement of a $25 appellate filing fee from an indigent seeking judicial review of an administrative reduction in his old-age assistance. The Court characterized the case as implicating no fundamental interest. *Id.* at 659. Because independent constitutional rights cannot be denied to indigents by means of a fee, *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel), the Court apparently did not consider access to the courts to be an independent constitutional right.

185. *See supra* note 180.

186. 404 U.S. at 513.

187. *Id.* at 515. "[A]ny carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers." *Id.*

188. *Id.*

189. The Court stated:

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (*see NAACP v. Button*, 371 U.S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another . . . . If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

404 U.S. at 515.

B. *Adequate Justification for Infringement of Petition Right*

The Court's view in *Bill Johnson's* that lawsuits to resolve private disputes are protected by the petition clause is debatable.[190] Assuming, however, that the Court continues to construe the first amendment to mean that litigation initiated to resolve private disputes amounts to petitioning the government for redress of grievances, an adequate countervailing justification may exist for permitting the temporary enjoining of retaliatory suits arising out of labor disputes. The Court apparently assumed that no governmental interests could justify the restriction of a genuine exercise of the freedom to petition the government.[191] Not only is this absolute view of the first amendment freedom difficult to support, but it also conflicts with dicta in *Button* and with the holding in *California Motor Transport.*[192]

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190. An alternative analysis exists for reaching the same result. Under this analysis, retaliatory employer lawsuits do not amount to petitioning the government for redress of grievances. Not every lawsuit that appears as an effort to influence the government actually is an exercise of the first amendment petition right. A retaliatory lawsuit, although disguised as petitioning, is simply an effort to interfere directly with workers' self-organization rights. In that case, the petitioning activity is not entitled to first amendment protection because it is not a genuine exercise of first amendment rights. *See* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982) (lodging formal protests with the Interstate Commerce Commission (ICC) was not petitioning activity entitled to first amendment protection because the object of the protests was to interfere with a competitor rather than to influence the ICC), *cert. denied*, 459 U.S. 1227 (1983).

191. The Court seemed to assume that merely raising the first amendment issue precluded application of the NLRA. Recognition of the existence of a potential conflict between the first amendment and the NLRA should constitute the beginning of the analysis, not the resolution of the conflict. As the Supreme Court stated in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949):

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed . . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

The issue presented by *Bill Johnson's* was whether a retaliatory lawsuit should be removed from NLRA scrutiny simply because of a first amendment interest. Because it held only that first amendment interests were implicated, the Court did not resolve this issue adequately.

192. Arguably, the doctrines of standing and justiciability are restrictions on the first amendment petition rights of plaintiffs who, in good faith, believe that they have been aggrieved and who earnestly desire to persuade the judiciary to act. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (denying standing to persons challenging HEW's gratuitous conveyance of property to a religious college); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (denying standing to persons unable to obtain medical services at hospitals granted federal tax benefits; plaintiffs challenged revenue rulings that defined the hospitals as "charitable"

In *Button* the Court suggested that state interests in regulating the solicitation of legal work could support a narrow statutory limitation on first amendment freedoms.[193] Because governmental interests can justify infringement in some situations, the *Bill Johnson's* Court should have weighed conflicting interests and foregone an absolutist position. The nation has significant interests in having its workers engage in collective activity in a coercion-free atmosphere.[194] The extent to which these interests support restrictions on the freedom to petition unfortunately was never clarified in *Bill Johnson's*.

In *California Motor Transport* the Court emphasized that although the defendants had joined together to exercise their first amendment right of petition, they were not immune from liability under the antitrust laws. The Court expressly acknowledged that there were limits to the exercise of the right of petition. First amendment rights could not be used to achieve unlawful results, regardless of the lawfulness of the means employed.[195]

This recognition that a court could infringe upon the right of petition and that a statute could regulate the right if adequate justification existed was stated over the vigorous objection of Justices Stewart and Brennan. They took the absolutist position that no governmental interests should support restrictions on the freedom to petition.[196] The majority, however, rejected this absolutist position and held that the defendants violated the antitrust laws if their exercise of the right of petition was "used as the means or the pretext for achieving 'substantive evils' which the legislature has

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institutions qualifying for such benefits). The Court has not suggested that the doctrines of standing and justiciability conflict with the petition right, but it is possible that a standing or justiciability standard could be adopted that would unduly restrict the right to petition.

193. 371 U.S. at 438-43.

194. On the other hand, states have significant interests in allowing their residents to recover for injuries suffered. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-45 (1974) (finding that states have great latitude in enforcing legal remedies for private individuals suing for defamation).

195. *See supra* note 189.

196. 404 U.S. at 516-17 (Stewart, J., concurring). Justice Stewart, who was joined by Justice Brennan, disagreed with the majority's statement that the defendants' joint agreement to exercise their petition right "does not necessarily give them immunity from the antitrust laws." *Id.* at 517 (Stewart, J., concurring) (quoting the majority's opinion at 513). Justice Stewart concurred, however, because the application of the antitrust laws would have been justified if "the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes." *Id.* at 518 (Stewart, J., concurring) (emphasis in original).

the power to control."[197]

The *Bill Johnson's* Court's discussion of whether any justification would permit infringement of the right of petition was limited to an acknowledgment that a frivolous suit might he enjoined. According to tlie Court, however, that prohibition would not infringe upon the right of petition because the commencement of a frivolous suit is not constitutionally protected. In prohibiting the permanent enjoining of all suits that raise a genuine issue, the Court appears to have adopted the absolutist position that tlie majority rejected in *California Motor Transport*.[198]

In sum, tlie *Bill Johnson's* Court ignored two principal obstacles to employing tlie riglit to petition tlie governinent as a bar to enjoining an employer's retaliatory suit. The Court did not address (1) why retaliatory lawsuits to resolve private disputes were petitions to the government, and (2) why the government's interest in protecting employees' collective activities from employer interference failed to justify regulation of the right to petition the government.

This Article does not, however, advocate the overruling of tlie *Bill Johnson's* holding that the Board cannot permanently enjoin a nonfrivolous, retaliatory lawsuit. In view of the Court's unanimous opinion, there is no reason to believe that tlie Court will reconsider its construction of the petition clause as protecting private lawsuits initiated with a retaliatory motive. Moreover, a permanent ban on initiating a reasonably based suit ignores tlie very substantial state interest in providing a remedy to an aggrieved party. As Justice Brennan's concurring opinion emphasizes, however, the Court's decision does not preclude the possibility of Board regulation of re-

197. 404 U.S. at 515. The "substantive evil" that the defendants were accused of attempting to achieve by their exercise of the right of petition was the harassment of competitors in an effort to deter them from enjoying free and unlimited access to the agencies and the courts.

198. In view of the *Bill Johnson's* Court's position that instituting a baseless suit is not even an exercise of a constitutional right, an alternative interpretation of *California Motor Transport* is possible. Because *California Motor Transport* concerned the repeated filing of baseless lawsuits, the case could be read as not involving the exercise of a constitutional rigbt at all. If *California Motor Transport* did not concern the exercise of a constitutional right, then the Court's statement that the exercise of first amendment rights may be prohibited when they are used to achieve a result prohibited by statute was entirely unnecessary. Even if one assumes that the *California Motor Transport* Court's observation was unnecessary to the outcome in tbat case, there is no doubt that compelling governmental interests may justify regulating the exercise of a constitutional right. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (The government may prohibit nonpartisan government workers from engaging in overt, partisan political activity on behalf of particular candidates or particular political viewpoints.).

taliatory suits in a manner that has "less direct impact on the plaintiff's First Amendment rights."[199] A temporary suspension of the right to initiate a retaliatory lawsuit during an organizing campaign has a less direct impact on the right of petition. In the next part, this Article concludes that such a temporary ban is consistent with well-established first amendment doctrines, is sensitive to the state's interest in providing a remedy, and promotes the national labor policy of prohibiting employer interference with employees' self-organization rights.

VI. Temporarily Suspending the Right to Initiate a Retaliatory Suit During an Organizational Campaign Is a Proper Accommodation

The Court has not outlined the perimeters of the first amendment petition right. An analogy to first amendment protections afforded speech will demonstrate, however, that this proposal does not violate first amendment principles.

A. The O'Brien *Test*

In *United States v. O'Brien*[200] the defendant was convicted of burning his Selective Service registration card. He contended that his act was a symbolic gesture intended to express his opposition to the war in Vietnam and to persuade others to adopt his point of view. Therefore, he claimed that his action was protected by the first amendment.[201]

The Court held that the act of burning a draft card was not protected by the first amendment and developed a four-part balancing test to determine the constitutionality of statutes that incidentally impinge upon speech. A government regulation is constitutional if it (1) is within the constitutional power of the government, (2) promotes an important government interest, (3) does not suppress free expression, and (4) is an incidental restriction on a first amendment freedom.[202]

Under the *O'Brien* test retaliatory lawsuits may be stayed temporarily under the NLRA. The first two elements of the test do not present analytically difficult problems. It was established long ago that Congress may regulate labor-management relations pursu-

199. 461 U.S. at 756 (Brennan, J., concurring).
200. 391 U.S. 367 (1968).
201. *Id.* at 370.
202. *Id.* at 377.

ant to its commerce power.[203] Thus, the NLRA is "within the constitutional power of the Government."[204] NLRA regulation also passes the second part of the *O'Brien* test because "it furthers an important . . . governmental interest."[205] The Court has asserted the need for governmental protection of employee self-organization from employer interference.[206]

The third element of the test examines the intent of the regulation in question. The NLRA is not desigued to regulate speech. The primary aims of the Act are (1) to protect free choice of workers to associate amongst themselves and to select representatives of their own choosing and (2) to promote collective bargaining. Any impact the Act may have on speech is incidental to this main purpose.

The balancing element of the *O'Brien* test requires that the regulation's "incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest."[207] The regulation must be analyzed to determine if its purpose could have been accomplished by some means less burdensome on first amendment freedoms.[208]

The temporary suspension of the right to initiate a retaliatory lawsuit during an organizational campaign seeks to achieve the protection of employee self-organization activity during the early stages of a campaign. Whether a lawsuit can be suspended depends solely on the employer's motivation for filing the lawsuit. The proposed accommodation, therefore, is less restrictive than a permanent prohibition of all retaliatory lawsuits and is less restrictive than a temporary ban on all lawsuits, regardless of motive, filed during an organizational campaign. As shown earlier,[209] however, the *Bill Johnson's* accommodation, which permits sanctions only after the suit is concluded, is not sufficient to accomplish the Act's purpose in the organizational setting.

Even though the Supreme Court considers retaliatory lawsuits

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203. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

204. 391 U.S. at 377.

205. *Id.*

206. *E.g., Jones & Laughlin Steel*, 301 U.S. at 33 ("Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.").

207. 391 U.S. at 377.

208. For a discussion of the least restrictive alternative analysis, see Ely, *Flag Desecration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-85 (1975).

209. *See supra* text accompanying notes 66-92.

to be an aspect of petitioning the government and, therefore, entitled to first amendment protection, the first amendment should not prevent a temporary prohibition on retaliatory lawsuits during an organizing drive. Because the temporary ban does not regulate the content of the lawsuit, the proposed Board regulation of retaliatory lawsuits should satisfy the *O'Brien* test.

B. Other Doctrines Supporting a Temporary Ban

Three other established doctrines in first amendment jurisprudence also suggest that the proposed temporary ban on retaliatory suits should survive a constitutional attack. First, the "time, place and manner" doctrine articulated in *Cox v. New Hampshire*[210] authorizes content-neutral regulations designed to protect significant state interests. Under this doctrine, "activities . . . protected by the First Amendment are subject to reasonable time, place, and manner restrictions."[211] The proposal in this Article is strictly content-neutral; it regulates only the timing of the lawsuit. Regardless of the content of the lawsuit, if it is initiated at a particularly sensitive time with the requisite intent, it is subject to a temporary injunction. The proposal is concerned with the impact on employee self-organization that a lawsuit may have because of its timing.[212] Consequently, the proposal should withstand judicial scrutiny under the "time, place and manner" doctrine.

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210. 312 U.S. 569, 575-76 (1941). In *Cox* the Court upheld a statute prohibiting parading on a public street without a special license. The statute did not contravene the first amendment because it was confined to limiting the "time, place, and manner" of parades so that they would not "unduly disturb" other public uses of the streets. *Id.* at 575-76. For a critique of the view that content-neutral time, place, and manner restrictions adequately protect speech interests, see Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175 (1983).

211. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981). In *Heffron* the Court upheld a regulation prohibiting the Hari Krishnas from distributing literature or soliciting donations at a state fair except at fixed booths, which they could rent.

212. It might be claimed that the proposal is not content-neutral on two grounds. First, the restriction focuses only on one speaker, the one taking the management viewpoint. Second, the content of the lawsuit will be examined to determine the amount and type of damages sought and to evaluate the nature of the deposition questions. *See supra* note 90. Upon examination, however, both of these claims fail. First, the Board remains free to proscribe any union lawsuit that impermissibly interferes with the operation of the Act. *See supra* text accompanying notes 135-62. Second, the reason for examining the prayer for relief and the nature of discovery is to determine the true motive for the suit, *see supra* note 90. The motive requirement protects the employer because it requires the General Counsel to establish improper motive to enjoin the lawsuit temporarily, and it provides a defense for the employer who can show that it would have brought the suit notwithstanding its retaliatory motive. *See supra* text accompanying notes 88-91.

Second, the Court has held that a content-based regulation does not contravene the first amendment when the restriction on first amendment activity is concerned with the secondary impact of the activity, not the primary impact of the message itself, and when first amendment freedoms are only partially impaired and not totally denied.[213] The proposal satisfies the requirements of this doctrine even if it is viewed as a content-based regulation.[214] The restriction is concerned with the secondary impact of the suit on the employees and not on the nature of relief sought or the fact that management is the allegedly aggrieved party. Furthermore, regulating the timing of the suit is merely a partial impairment of the right to sue and is not a total denial of the exercise of that right.

Third, the Court has distinguished between the first amendment interests inherent in different types of first amendment activity and upheld limitations when the first amendment interests are marginal.[215] Although the Court has declared that the right to initiate a purely private lawsuit is constrained by first amendment prohibitions, a careful examination of this right reveals that it is on the periphery of the first amendment petition right.[216] The right to initiate a retaliatory lawsuit against private individuals has such a tangential relationship to first amendment values that it should not outweigh the primary purpose and effect of the proposed limitation on the right to sue: reducing employer coercion during the most sensitive stages of an organizing campaign. Because the restriction on the timing of a retaliatory lawsuit does not have a substantial effect on the ability of the employer to sue at a later time, such a limitation should be within the power of the gov-

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213. In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court upheld a zoning ordinance that prohibited "adult movie theatres" from locating in close proximity to each other. The Court reasoned that the law was concerned with the secondary impact of a high concentration of adult movie theatres—a concentration of these theatres resulted in undesirable changes to the neighborhood—and not with the suppression of the message. The Court also noted that the law did not ban these theatres totally; it just dispersed them. *Compare* Schad v. Mount Ephraim, 452 U.S. 61 (1981) (zoning ordinance that forbade all live entertainment, including nude dancing, in a commercial zone violated the first amendment).

214. *See supra* note 212.

215. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). In *Buckley* the Court distinguished between the speech interest inherent in federal election campaign contributions and campaign expenditures, and upheld the limitations imposed on contributions, but invalidated those related to expenditures. The Court found that the speech interests in campaign contributions were marginal, but that campaign expenditures were related directly to the expression of political values and, therefore, were on a higher level of constitutional values.

216. *See supra* notes 177-90 and accompanying text.

ernment to control.

Private lawsuits contain elements of petitioning activity and, therefore, are entitled to first amendment protection. Yet, because the proposal does not regulate the content of the suit and merely regulates the timing of the suit without prohibiting it altogether, the first amendment should not prevent the application of the NLRA to retaliatory lawsuits brought at the outset of an organizational campaign.

C. *State Interest in Providing Employers Access to Judiciary*

Furthermore, the proposed temporary ban properly accounts for the state interest in maintaining domestic peace. Unlike the permanent injunction the Board sought in *Bill Johnson's*, a temporary ban does not frustrate the state concern by refusing the states the right to redress an otherwise actionable wrong. The refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. A temporary ban of a lawsuit, as contrasted with a permanent ban, does not create the same disrespect for the law or the same encouragement of violence.

The state also has an interest in providing a timely remedy. Between the commission of the tort and the end of the organizational campaign, conditions may change, witnesses may disappear, and possible evidence may become stale or unavailable. The proposal, however, should not unduly impinge upon the state's interest in adjudicating issues in a meaningful manner and at a meaningful time. If the employer can show that its reason for suing during the midst of an organizational campaign is to avoid having its claim foreclosed by circumstances beyond its control, then the General Counsel will be unable to demonstrate that the employer's suit is retaliatory, and the suit will be allowed to continue.[217] On the other hand, if the employer's claim that a delay will foreclose its opportunity to assert its cause of action is a sham, then the Board is likely to find a retaliatory motive, and the suit will be enjoined until the termination of the protected period.

D. *Striking the Proper Balance*

On balance, the public interest in collective bargaining that is served by the temporary condemnation of employer use of judicial

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217. *See supra* note 89.

adjudicative processes to interfere with employee organizing efforts outweighs the resulting restraint upon first amendment freedoms and state interests. In allowing retaliatory lawsuits, the Court now has armed the employer with a new weapon entirely alien to the statutory scheme and with absolutely no relevance to the merits of the labor dispute.[218]

It appears that the courts and the Board have a dilemma. On the one hand, the protection of the right to sue has been a basic and cherished ideal of our democracy. On the other hand, collective bargaining with its emphasis on self-organization has been the cornerstone of our national labor policy since the passage of the NLRA in 1935. The ambiguity of some of the Board decisions concerning the legality of retaliatory lawsuits and the not "entirely consistent"[219] character of those decisions reflects a real concern on the part of Board members regarding this issue.

This predicament, however, occurred essentially because of the dilemma posed in balancing the rights of the individual employer with the self-organization needs of the workers. "Rights" are relative. It is not possible to have a right of petition that considers only employer rights and does not provide for the rights of the workers. The proposed temporary suspension of the employer's right to file a retaliatory suit is an attempt to strike a balance between the rights of employees and the rights of employers, as well as to take into account the state's interests.

The original thrust of the NLRA was to make collective bargaining the law of the land and a protected activity under that law. The Board was created to function as an agency administering the representation process and to protect the section 7 rights of employees. One of the most important reasons for the Board's creation was to remove the representation issue from the arena of economic conflict and to substitute an administrative procedure that provided employees with the right to organize unions. In carrying

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218. As Justice Black has said, "The object of the National Labor Relations Act was to bring about agreements by collective hargaining, not to add fuel to the fire by encouraging libel suits with their inevitable irritations and dispute-prolonging tendencies." Linn v. Plant Guard Workers, 383 U.S. 53, 68 (1966) (Black, J., dissenting). The *Bill Johnson's* Court underestimated the damage that retaliatory suits might inflict on the equilibrium between the employees' organizational right and the employers' right to resist an organized work force. It also overestimated the effectiveness of the restraint that will result from the superimposed requirement that the suit contain a genuine issue of material fact or law and the after the fact remedy of reimbursement for legal expenses if the employee ultimately prevails in the lawsuit.

219. *Bill Johnson's*, 461 U.S. at 742.

out its charge, the Board must utilize innovative ways to lessen the efficacy of creative attempts by both labor and management to thwart the purposes of the Act. Resolute and sophisticated employers are very likely to attempt to use nonfrivolous, retaliatory lawsuits to impede employee self-organization. The proposed temporary suspension of the right to institute a retaliatory lawsuit is exactly the type of solution that will reduce the might of the "powerful instrument of coercion"[220] that the Court apparently legalized in *Bill Johnson's*.

A requirement that the Board seek a federal court injunction under section 10(j) to suspend the prosecution of a state court lawsuit poses no constitutional problems or significant impairment of state interests. The Constitution does not prohibit federal courts from intervening in state court proceedings. The basic principles of comity and separateness, although not constitutional in scope, are designed to prevent unseemly conflicts between the federal courts and the state courts in private litigation. These principles have been determined inapplicable, however, when the federal government invokes jurisdiction of its courts in aid of its rights and in the enforcement of its laws.[221]

Moreover, the Supreme Court has stated clearly that the Board may move to prevent "irreparable injury to a national interest."[222] In preventing irreparable injury to the national interest in preserving self-organization rights, "[i]t has long been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the act."[223]

The proposal does not conflict with the Court's *Bill Johnson's* decision. In *Bill Johnson's* the Court held that the Board could not permanently enjoin the prosecution of a well-founded retaliatory lawsuit. As Justice Brennan's concurring opinion emphasizes, however, the Board "may take other measures which have less direct impact on the plaintiff's First Amendment rights."[224] A temporary suspension of the right to sue during an organizational campaign is a less restrictive means of assuring employees their right to engage in self-organization free of employer interference.

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220. *Id.* at 740.

221. *E.g.*, United States v. Phillips, 33 F. Supp. 261 (N.D. Okla. 1940), *rev'd on other grounds*, 312 U.S. 246 (1941).

222. NLRB v. Nash-Finch Co., 404 U.S. 138, 145 (1971).

223. *Id.* at 142.

224. *Bill Johnson's*, 461 U.S. at 756 (Brennan, J., concurring).

VII. CONCLUSION

Retaliatory lawsuits during union-organizing drives present an interesting mix of competing interests. Because the suit may interfere with employee self-organization, the NLRA's prohibition of employer interference with union-organizing drives is implicated. However, these lawsuits also constitute a form of petition that warrants protection under the first amendment. Any regulation of a retaliatory lawsuit, therefore, must not impinge unduly upon the employer's petition rights. Moreover, the states have an interest in providing a remedy for violations of their laws. This Article has suggested how employer lawsuits during organizing campaigns can be regulated without either violating the first amendment or ignoring the state's interest.

The *Bill Johnson's* decision reflects a concern for the first amendment rights of employers. It was clear to the Court that a permanent ban on a retaliatory suit would impinge unduly on the first amendment rights of employers. To protect these rights, the Court struck down the Board's efforts to enjoin such suits permanently. This Article has argued that a more sound approach for the Board, and one that is not inconsistent with the Court's decision in *Bill Johnson's*, is to forego permanent injunctions and instead to seek temporary bans on retaliatory lawsuits. This approach ensures that the first amendment rights of employers are protected but still recognizes that coercive effects must be regulated by the least restrictive alternative available. The approach presented in this Article accommodates the competing first amendment values and the NLRA issues that are inherent in any retaliatory lawsuit and preserves the state's interest in providing a remedy.

"[U]nion busting remains one of the hottest games in town. Destroying initial organizational efforts, thwarting employee free choice of union representation, and neutralizing or ousting the incumbent union remain a very large part of the employer sphere."[225] In *Bill Johnson's* the Supreme Court paved the way for employers to add another weapon to their arsenal to use in frustrating the organizational efforts of their employees. As more employers seek judicial aid in thwarting organizing drives, use of the retaliatory suit tactic likely will increase. Unfortunately, the constitutional constraints and the state interests at stake do not allow for an easy solution to this problem. The proposal outlined in this

225. L. MODJESKA, NLRB PRACTICE 123 (1983).

Article, however, should reduce the harassment and fear of liability engendered by retaliatory suits during organizational campaigns and, perhaps, would reduce the incidence of frivolous suits.