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NOTE: A PETITION CLAUSE ANALYSIS OF SUITS AGAINST THE GOVERNMENT: IMPLICATIONS FOR RULE 11 SANCTIONS.

SUMMARY:
... The handful of Supreme Court cases that have explicitly considered petitioning have construed the clause to limit federal and state interference with the right to petition any department of the government with regard to any matter. ... Congress's response to petitions in the early years of the Republic also indicates that the original understanding of petitioning included a governmental duty to respond. ... Second, a suit against the government, unlike other general petitions, triggers a governmental duty to respond to petitions; this in turn ensures the advancement of the interest in government accountability through citizen participation. ... Filing such a suit is a proper *judicial* petition -- it represents a citizen's appeal to the courts to redress a grievance caused by some governmental agency. ... The eradication of the government's duty to respond to petitions signalled the erosion of the guarantee that general petitions would advance the interest of government accountability through citizen participation. ... Suits against the government, as double petitions, implicate *both* core values of the Petition Clause and are the most valuable type of petition; accordingly, courts should apply strict scrutiny to government regulation that infringes upon a citizen's right to file a double petition. ... These arguments in support of the unfettered application of the reasonable inquiry prong, however, suffer from three flaws. ...

TEXT-1:
[*1111] The ability to petition the government is a venerable Anglo-American political right guaranteed by the First Amendment. [1] Despite the rich history of the petition right in both the development of popular sovereignty [2] and in the resolution of important political issues, [3] courts and scholars alike have virtually ignored the Petition Clause in developing First Amendment jurisprudence. [4] The handful of Supreme Court cases that have explicitly considered petitioning have construed the clause to limit federal and state [5] interference with the right to petition any department of the government [6] with regard to any matter. [7] The Court has also defined "petitions" to include a wide variety of activities, from sending letters to decisionmaking bodies to litigation, [8] lobbying efforts, [9] boycotts, [10] and other forms of protest. [11]

However, the Court has not clearly delineated the contours of the substantive right to petition. This failure contrasts sharply with the long line of cases in

which the Court has identified the interests embodied by the Free Speech and Press Clauses, [12] considered how **[*1112]** much those interests are furthered by different kinds of expression, [13] and then weighed those interests against the government's interest in regulation. Instead of engaging in an independent tripartite analysis for the Petition Clause, the Court has subsumed [14] the petition right into the rights of free speech and press. [15]

This Note criticizes the Court's failure to recognize the Petition Clause's distinct values [16] and develops an alternative tripartite framework. Part I argues that the Petition Clause embodies substantive interests distinct from the interests advanced by the Free Speech and Press Clauses. It then identifies government accountability through citizen participation and neutral resolution of disputes as the Petition Clause's two main values. Part II considers how much these interests are furthered by different types of petitions, and argues that filing a suit against the government is a special type of activity that merits the greatest protection under the Clause. Part III applies the argument developed in Part II to Federal Rule of Civil Procedure 11, which inhibits citizens' ability to sue the government effectively, and concludes that the courts should interpret Rule 11 narrowly in suits against the government.

[*1113] I. THE INTERESTS SERVED BY THE PETITION CLAUSE

A. The Right to Petition as a Distinct Substantive Right

The tendency of both courts and scholars to collapse the right to petition into the right to free expression renders the Petition Clause a redundancy, and thus runs afoul of the rule of construction set forth by Chief Justice Marshall in *Marbury v. Madison* [17] that "[it] cannot be presumed, that any clause in the constitution is intended to be without effect." [18] Some nonetheless argue that this construction is justified because the Petition Clause was "never meant to have an independent meaning" from the other expression clauses, [19] and that the different expression clauses were separated simply for emphasis. A careful examination of the history and original understanding of the petition right, however, demonstrates its distinct nature and scope.

Petitioning as a political activity originated in England in the eleventh century [20] and gained recognition as a political right in the mid-seventeenth century. [21] Indeed, the rights to free speech, press, and assembly originated as *derivative* rights insofar as they were necessary to protect the preexisting right to petition. Free speech rights first developed because members of Parliament needed to discuss freely the petitions they received. [22] Publications reporting petitions were the first to receive protection from the frequent prosecutions against the press for seditious libel. [23] And public meetings to prepare petitions led to recognition of the right of public assembly. [24] Moreover, the petition right was widely accorded greater importance than the rights of free expression. For example, in the eighteenth century, the House of Commons, [25] the American colonies, [26] and the first Continental Congress [27] gave official recognition to the right to petition, but not to the rights of free speech or of the press. [28]

[*1114] The historical record shows that the Framers and ratifiers of the First Amendment also understood the petition right as distinct from the rights of free expression. In his original proposed draft of the Bill of Rights, Madison listed the right to petition and the rights to free speech and press in two

separate sections. [29] Some have argued that Congress's later fusion of these sections into the First Amendment [30] undercuts the significance of Madison's original format. [31] However, Congress also fused the Religion Clauses into the First Amendment, but that conflation has not been construed as mandating the same analysis for the freedoms of religion and expression. Furthermore, a "considerable majority" of Congress defeated a motion to strike the assembly provision from the First Amendment because of the understanding that all of the enumerated rights in the First Amendment were separate rights inherent in the people that should be specifically protected. [32]

The ratifying states also shared this understanding of the petition right as separate from the other First Amendment rights; many state declarations of rights [33] and proposed lists of amendments from ratifying conventions included the petition right but not the speech right, or included the Petition Clause separately from the freedom of expression clauses. [34]

B. Interests Served by Petitioning

In light of the history of the petition right, which shows the error of subsuming the Petition Clause into the Free Speech and Press Clauses, it is necessary to develop an analysis of the interests that are uniquely served by petitioning. Many judges and scholars have identified petitioning as embodying one particular interest. [35] However, viewing the petition right as furthering *one* interest overlooks that the Petition Clause protects *two* different types of petitions, each of which serves a different function and embodies a different interest. "General **[*1115]** petitions" involve citizens' attempts to contribute to governmental decisionmaking or to change governmental behavior; accordingly, they encompass matters of relevance to the whole community, and are typically submitted to legislative or executive officials. By contrast, "judicial petitions" deal with individualized requests for mediation or resolution of a dispute and are submitted to courts, adjudicatory tribunals, or other neutral arbiters. [36] The next two subsections develop this distinction and identify the values served by each category.

1. Government Accountability Through Citizen Participation as the Interest Behind General Petitions. -- General petitioning has played a central role in the development and exercise of popular sovereignty throughout British and American history. [37] In medieval England, petitioning began as a way for barons to inform the King of their concerns and to influence his actions. [38] Later, in the seventeenth century, Parliament gained the right to petition the King and to bring matters of public concern to his attention. [39] This broadening of political participation culminated in the official recognition of the right of petition in the people themselves. [40] The people used this newfound right to question the legality of the government's actions, [41] to present their views on controversial matters, [42] and to demand that the government, as the servant of the people, be responsive to the popular will. [43] In the American colonies, disenfranchised groups could use **[*1116]** petitions to seek government accountability for their concerns and to rectify government misconduct. [44] Indeed, by the nineteenth century, petitioning was described as "essential to . . . a free government" [45] -- an inherent feature of a republican democracy, [46] and one of the chief means for enhancing government accountability through the participation of citizens. [47]

Moreover, this interest in government accountability was understood to demand government response to petitions. [48] Unrepresented American colonists, who exercised their right to petition the King or Parliament, [49] expected the government to receive and respond to their petitions. [50] The King's persistent refusal to answer the colonists' grievances outraged the colonists and was a significant factor that lead to the American Revolution. [51] Indeed, frustration with the British government led the Framers to consider incorporating a people's right to "instruct their Representatives" in the First Amendment. [52] Members of the first Congress easily defeated this right-of-instruction proposal. [53] Some discretion to reject some petitions, they reasoned, **[*1117]** would not undermine government accountability to the people, as long as Congress had a duty to consider petitions and fully respond to them. [54]

Congress's response to petitions in the early years of the Republic also indicates that the original understanding of petitioning included a governmental duty to respond. Congress viewed the receipt and serious consideration of every petition as an important part of its duties. [55] Congress referred petitions to committees or to an executive department for a report, [56] and even created committees to deal with particular types of petitions. [57] Ultimately, most petitions resulted in either favorable legislation or an adverse committee report. [58] Thus, throughout early Anglo-American history, general petitioning allowed the people a means of political participation that in turn demanded government response and promoted accountability.

2. Neutral Resolution of Disputes as the Interest Behind Judicial Petitions. -- Just as general petitions helped to shape the concept of popular sovereignty, judicial petitions helped to shape the judiciary as a separate branch of English and colonial American governments. Originally, the King (as the only body of government) entertained petitions ranging from pleas for a change in law to individual requests to settle private disputes. [59] As the King realized that general and individual requests demanded and afforded different treatment, he began to refer all individual pleas to trial by auditors and chancellors. [60] The recognition of the different functions served by these two types of petitions thus led to the separation of legislative and judicial powers. [61] In the earliest colonial American governments, assemblies performed both legislative and judicial functions and thus responded to each type of petition. [62] Most petitions involved private disputes **[*1118]** that required the assembly to investigate facts and to resolve conflicts through fair and neutral hearings. [63] Even when the colonial assemblies became inundated with petitions and needed to accelerate the process, the assemblies retained the guarantee of full consideration of judicial petitions. [64]

Eventually, the assemblies began to address more general petitions that involved grievances common to the whole community, and to refer petitions regarding individual disputes to the courts. In turn, the judiciary developed standards of neutrality and independence in resolving disputes between two parties. [65] This historical connection between the judicial petitions and the development of the norm of impartiality demonstrates that the neutral resolution of disputes should be regarded as the primary interest embodied by judicial petitions.

II. THE SPECIAL NATURE OF SUITS AGAINST THE GOVERNMENT

Given the twin interests of government accountability through citizen participation and neutral resolution of disputes, a lawsuit filed against the government [66] deserves the greatest protection under the Petition Clause [67] for two reasons. First, suits against any governmental agency actually comprise two petitions -- one general *and* one judicial -- combined into one, and thereby concurrently serve the two primary interests of petitioning. Second, a suit against the government, unlike other general petitions, triggers a governmental duty to respond to petitions; this in turn ensures the advancement of the interest in government accountability through citizen participation.

[*1119] *A. The Double Petition*

Most petitioning activity can be classified as either a general or a judicial petition. Filing a suit against a private citizen or corporation is protected as a judicial petition to the court. By contrast, sending a letter to a senator or to the president regarding a cabinet nominee is protected as a general petition. A suit against the government, however, is unique in that it combines two types of petitions to two distinct branches of the government. Filing such a suit is a proper *judicial* petition [68] -- it represents a citizen's appeal to the courts to redress a grievance caused by some governmental agency. A suit against the government also constitutes an effective *general* petition to the identified agency. [69] The plaintiff must serve a copy of the complaint -- a statement of the grievance -- upon the agency being sued. [70] This act simultaneously makes that governmental agency aware of the citizen's particular grievance [71] and demands redress by that agency, and thereby constitutes a general petition to the agency being sued. Moreover, the complaint served upon the defendant functions as a general petition because it requests that the agency take steps to correct its own wrongdoing -- for example, by changing an unconstitutional policy. Because it combines the functions of a general and a judicial petition, a suit against the government promotes *both* the interests of government accountability through citizen participation and of neutral resolution of a dispute.

B. Governmental Duty to Respond to Suits Against the Government

The initiation of a suit against the government invokes a governmental duty of response, which ensures that the petition will actually inform the government about the citizen's concerns and influence governmental decisionmaking. Courts should recognize the value of the duty to respond in furthering the goal of government accountability and protect the only general petitions that still retain this feature -- suits against the government.

In the early Republic, the petition right embodied a governmental duty to receive and respond to petitions, and early Congresses generally responded to petitions. [72] However, the governmental duty to respond to petitions dissipated during the antebellum era. In the 1830s, abolitionists began an aggressive campaign of petitions to Congress. [73] **[*1120]** At first, Congress responded by issuing motions to refuse their prayers. As more and more petitions arrived, the Southern members of Congress urged the adoption of an "absolute gag" by prohibiting abolitionist petitions from being "received by this House, or entertained in any way whatever." [74] Despite the arguments of many members

of Congress that the imposition of a "gag rule" would be unconstitutional, [75] the House of Representatives adopted by a vote of 117-58 the Pinckney Resolution, which ordered that all petitions relating to slavery "shall, without being either printed or referred, be laid upon the table, and that no further action whatsoever shall be had thereon." [76] The gag rule was eventually repealed through the efforts of John Quincy Adams, [77] but neither the practice nor the right of petitioning gained full restoration. [78] The Supreme Court recently affirmed that the government is not required to listen to or respond to petitions. [79]

The eradication of the government's duty to respond to petitions signalled the erosion of the guarantee that general petitions would advance the interest of government accountability through citizen participation. [80] In the wake of this development, some scholars have argued that the government should recognize the original meaning of the right to petition by restoring the duty to respond. [81] However, this solution is impractical for the post-New Deal era; the government has assumed responsibility for so many aspects of our society and, in the process, has become so complex that it is unrealistic to expect members of Congress or the President even to read or listen to all citizen petitions, much less respond to them. Therefore, it is clear **[*1121]** that the more traditional forms of general petitions -- letters to government officials -- are no longer as effective in ensuring government accountability as they were when the governmental duty to respond was feasible.

The general petition aspect of suits against the government, however, still retains the duty to respond that other general petitions have lost. Whereas an agency might entirely ignore a lobbying effort aimed at convincing an agency to change an unconstitutional regulatory policy, it cannot ignore a suit that seeks a declaratory or injunctive order. [82] Faced with a suit, that agency has to read and consider the claims of grievances contained in the complaint, because the agency must file an answer with the court. [83] Even apart from the requirement to file an answer, the risk of being subject to an adverse judgment would compel the agency to take the claim seriously and to consider different options for redressing the citizen's grievance. Thus, because the double petition ensures that the agency will consider citizen complaints, and, accordingly, that suits will serve the interest of government accountability through citizen participation, [84] courts should give special protection to suits against the government.

III. APPLICATION OF THE DOUBLE PETITION ANALYSIS

The double petition analysis has implications for the rules regarding the requirements for, and possible consequences of, filing a lawsuit against the government. Courts should protect a citizen's ability to petition the government against infringement through such rules and doctrines. This Part analyzes one regulation that generally affects a citizen's right to file judicial petitions and has been used most frequently against citizens who file double petitions in the form of civil rights litigation against the government: Rule 11 sanctions. [85]

[*1122] Rule 11 is a particularly appropriate example of how the double petition analysis would operate. In the past, courts have split on the issue of the Petition Clause's applicability to Rule 11. Most courts have summarily

rejected Petition Clause arguments that challenged the constitutional validity of Rule 11, [86] and have claimed that "there is no constitutional right to bring frivolous lawsuits." [87] But Judge Weinstein has recognized the constitutional value in suits against government agencies, and has argued that such litigation should not be discouraged through the imposition of Rule 11 sanctions. [88] To resolve this conflict, the following sections undertake the task of re-examining the Petition Clause argument challenging Rule 11 sanctions.

A. The Applicability of Petition Clause Analysis to Rule 11

Rule 11 allows the court to impose sanctions upon a party or that party's attorney for filing a pleading, motion, or other paper that is not "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" [89] or is "interposed for any improper purpose, such as to harass." [90] Any governmental regulation that implicates a person's right to *present* a petition to the government raises Petition Clause concerns; on its face, Rule 11 is such a regulation because it creates a possibility that a citizen will be sanctioned solely for presenting a judicial petition to the government. Although the government's duty to consider and respond to petitions has been debated in recent times, [91] the citizen's right to *present* petitions is unquestionably protected by the Petition Clause. [92] More than any other litigation-related activity, filing a complaint is a citizen's presentation of a judicial petition to the government [93] and thus attains a special status in the context of the Petition Clause. Thus, when courts apply Rule 11 sanctions to complaints, courts punish citizens' presentation of judicial petitions.

[*1123] *B. Applicability of Strict Scrutiny Analysis*

In cases involving the central interests that underlie First Amendment freedoms, the Court has applied a strict scrutiny test that requires the challenged governmental activity to be "necessary to serve a compelling state interest and [to be] narrowly drawn to achieve that end." [94] In Free Speech Clause cases, for example, the Court has applied strict scrutiny to regulations of political speech, [95] while applying a less demanding intermediate standard to regulations of lessvaluable commercial speech. [96] Suits against the government, as double petitions, implicate *both* core values of the Petition Clause and are the most valuable type of petition; accordingly, courts should apply strict scrutiny to government regulation that infringes upon a citizen's right to file a double petition. [97] This should include Rule 11 sanctions applied to complaints filed against the government. [98]

Before conducting a strict scrutiny analysis of Rule 11, however, it is necessary to consider the threshold issue of whether the different provisions of Rule 11 actually impede petitioning that genuinely furthers the two core interests of the Petition Clause and thereby mandates the application of the strict scrutiny standard.

1. The "Improper Purpose" Prong. -- The "improper purpose" prong of Rule 11 protects the judicial process from abuse by prohibiting a plaintiff from filing a complaint in order to harass the defendant. [99] This prohibition should not trigger strict scrutiny because the sanctionable activity does not further either of the two interests embodied by the Petition Clause. First, filing a complaint

merely to harass a government defendant does not further the interest in government accountability through citizen participation. It seeks only to annoy the government and to waste its time in the courts, rather than to inform it of citizens' concerns and to change governmental policies or actions. Second, a complaint that falls under the "improper purpose" prong does not further the interest in neutral resolution of **[*1124]** disputes. A person does not file a harassing complaint in order to ask a neutral governmental body to resolve a dispute with the government, but rather in the hope that invocation of the judicial process will embarrass and annoy government officials.

Ultimately, the practical effect of the "improper purpose" prong of Rule 11 is to punish efforts to disguise harassment as a legitimate petition. A complaint filed to harass the named government official or agency constitutes a fraudulent imitation of a legitimate double petitioning activity. [100] The "improper purpose" prong of Rule 11 effectively carves out a "sham" exception [101] to the Petition Clause analysis proposed in this Note. Consequently, this prong of Rule 11 should not be subject to strict scrutiny under the Petition Clause.

2. The "Reasonable Inquiry" Prong. -- Rule 11 also permits the court to sanction attorneys or parties if they did not conduct a "reasonable inquiry" to verify that the complaint "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." [102] Some would argue that this prong, like the "improper purpose" prong, is a valid exception to the Petition Clause protection because it merely guards against the filing of baseless suits and "there is no constitutional right to bring frivolous lawsuits." [103] Indeed, frivolous complaints do not even appear to fall within the language of the Petition Clause because such complaints do not present legally cognizable "grievances."

This position appears supported by an interest-driven analysis of this prong: this provision does not impair, but rather furthers, the two interests behind the Petition Clause and should therefore constitute a valid exception to the Petition Clause. The prong requires a citizen to act responsibly when using a general petition as a vehicle for participating in government decisionmaking. If a citizen need not investigate the facts relating to his grievance before making any assertions, the defendant might respond to the complaint by assuming the false allegations to be true and changing its policy accordingly. [104] The prong might also further the interest in neutral resolution of **[*1125]** disputes. The requirement ensures that the information before the judge is reliable, and thus aides accurate and fair adjudications. [105] Furthermore, this portion of Rule 11 decreases court congestion and allows more prompt and effective judicial response to the meritorious claims that deserve governmental attention. [106] Thus, the reasonable inquiry prong may be viewed as regulating only the kind of activity that does not deserve constitutional protection.

These arguments in support of the unfettered application of the reasonable inquiry prong, however, suffer from three flaws. First, the reasonable inquiry prong is not justified by the argument that there is no constitutional right to file a frivolous claim. If the objective of the reasonable inquiry prong is to deter frivolous claims, then the requirement is overinclusive: not all claims that fail the reasonable inquiry requirement are necessarily frivolous. A party could be sanctioned under Rule 11 for filing claims without researching the underlying facts, even if those factual allegations happened to be true and the claims were

not baseless. [107]

Second, some complaints that could be subject to Rule 11 sanctions under the "reasonable inquiry" prong may actually further Petition Clause interests. For example, allegations that turn out to be true, even if not substantiated by reasonable factual inquiries or legal research, could serve to inform the court and the defendant agency of governmental misconduct and thereby lead to an appropriate government response. Another example of sanctionable but constitutionally valuable complaints are those that are substantially true but that contain one factual allegation or claim that is false. [108] Such complaints as a whole are not frivolous [109] and constitute valuable petitions that should inform and influence the defendant agency's actions and should provide the bases for neutral resolution of disputes. [110]

[*1126] Third, even assuming that the reasonable inquiry prong only prohibits the filing of frivolous claims, that there is no Petition Clause right to file a frivolous claim, and that there is no constitutional value in filing such claims, it does not automatically follow that all such claims should be sanctioned. Just as it is necessary to protect some constitutionally valueless false statements in order to avoid chilling effects on valuable speech, [111] it might be necessary to refrain from sanctioning some frivolous complaints in order to avoid deterring suits that represent valuable double petitions. Rule 11 sanctions can be substantial, [112] and the possibility of sanctions for having just one claim or statement in the complaint that a judge determines unsubstantiated by an objectively reasonable inquiry could deter citizens from filing legitimate suits.

The threat of Rule 11 sanctions raises special concerns when applied to complaints against the government. Because these suits often require the assertion of a novel or controversial claim against a wellestablished governmental policy or official, [113] the possibility that Rule 11 sanctions will chill zealous advocacy [114] affects double petition suits against the government more than any other claims. Indeed, empirical studies have demonstrated that federal judges frequently invoke Rule 11 to sanction plaintiffs' civil rights claims against the government. [115] A federal judge has even stated that "insubstantial lawsuits against high public officials . . . warrant *firm* application of [Rule 11]" because such suits "undermine the effectiveness of Government." [116]

The "reasonable inquiry" prong of Rule 11 thus reaches double petitions that are not necessarily frivolous on the whole, prohibits **[*1127]** some lawsuits that would further the underlying interests of the Petition Clause, and poses a risk of chilling constitutionally protected petitioning activity. In these ways, this prong infringes upon a citizen's right to file a legitimate double petition under the Petition Clause when applied to complaints against the government. Accordingly, this prong should be subject to the strict scrutiny standard.

C. Strict Scrutiny Analysis of Rule 11

As currently construed, Rule 11 would not satisfy both the compelling interest and narrow tailoring requirements of strict scrutiny. The Supreme Court has held that "the central purpose of Rule 11 is to deter baseless filings in district court" and thereby ease congestion in federal courts. [117] Given the high

standard that a governmental interest must meet to be "compelling," [118] the deterrence of baseless filings to further judicial economy would not meet the compelling interest requirement. Moreover, even if a court held these interests to be "compelling," the reasonable inquiry prong of Rule 11 is not "narrowly tailored" to serve that interest [119] because it reaches complaints that are not baseless. [120]

To avoid this constitutional problem with the current construction of, and the proposed amendments to, Rule 11, and to protect genuine efforts to present double petitions to the government, courts should construe Rule 11 to contain a subjective element: [121] complaints against the government should be sanctionable only if the plaintiff had knowledge [122] that the complaint, taken as a whole, was not well grounded in fact or was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Through this construction, courts could sanction complaints against **[*1128]** the government that do not further the twin interests of general and judicial petitions without punishing or deterring those that further those interests.

IV. CONCLUSION

This Note has developed an interest-based tripartite analysis for the Petition Clause: first, it has identified the core values of the clause; second, it has argued that suits against the government constitute "double petitions" that advance these interests the most; and third, it has weighed these constitutional values against the interests behind one particular governmental regulation -- Rule 11. Courts should extend this model and apply the double petition analysis to other government actions that potentially deter citizen suits. [123] Courts should also further develop Petition Clause jurisprudence by carefully considering the appropriate level of protection required by each type of petition. Only by engaging in such analysis, independent of the Free Speech and Press Clauses, can courts restore the right to petition to its proper place in our constitutional scheme -- as an implicit and essential aspect of the "very idea of government, republican in form." [124]

FOOTNOTES:

n1 The Petition Clause of the First Amendment provides: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

n2 *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition,* 9 LAW & HIST. REV. 113, 114-20 (1991); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition,* 54 U. CIN. L. REV. 1153, 1153-77 (1986); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances,* 96 YALE L.J. 142, 144-65 (1986).

n3 *See* RICHARD KLUGER, SIMPLE JUSTICE 15-16 (1977) (noting the role of petitioning in the school desegregation movement); Smith, *supra* note 2, at 1179 n.164 (noting the role of petitioning in the abolition of slavery).

n4 *See* Anita Hodgkiss, *Petitioning and the Empowerment Theory of Practice,*

96 YALE L.J. 569, 569 & n.1 (1987); Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules,* 132 U. PA. L. REV. 1515, 1518 (1984).

n5 *See* Hague v. C.I.O., 307 U.S. 496, 512-13 (1939). Moreover, most state constitutions guarantee a right to petition. *See* Comment, *supra* note 4, at 1517 n.9.

n6 *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

n7 *See* United Mine Workers v. Illinois State Bar Assoc., 389 U.S. 217, 223 (1967); Thomas v. Collins, 323 U.S. 516, 531 (1945).

n8 *See* Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 741 (1983); *California Motor*, 404 U.S. at 510.

n9 *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

n10 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982).

n11 *See* Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (involving sit-ins, demonstrations, and silent protests).

n12 For example, the Court has interpreted the First Amendment Speech and Press Clauses to embody interests such as creating a marketplace of ideas, functioning as a safety valve, protecting the autonomy of speakers, and preserving democratic self-governance. *See, e.g.,* Thomas I. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 878-86 (1963).

n13 Thus, the Court considers obscenity and child pornography to be "unprotected" categories of speech. *See* New York v. Ferber, 458 U.S. 747, 753-58 (1982). Furthermore, commercial speech and sexually explicit speech have received only an "intermediate" level of protection. *See infra* p. 1123.

n14 *See* Stephen L. Carter, *Does the First Amendment Protect More than Free Speech?,* 33 WM. & MARY L. REV. 871, 873 (1992); Richard Hiers, *First Amendment Speech Rights of Government Employees,* 45 SW. L.J. 741, 784 (1991).

The one exception has involved antitrust liability. The *Noerr-Pennington* doctrine, established in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-39 (1961), and United Mine Workers v. Pennington, 381 U.S. 657, 669-70 (1965), grants absolute immunity from civil antitrust liability when the assertedly anticompetitive activities involve legitimate petitioning. For an overview of the *Noerr-Pennington* doctrine, see Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine,* 45 U. CHI. L. REV. 80, 82-94 (1977); Robert A. Zauzmer, Note, *The Misapplication of the* Noerr-Pennington *Doctrine in Non-Antitrust Right to Petition Cases,* 36 STAN. L. REV. 1243, 1249-61 (1984).

n15 *See, e.g.,* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-15 (1982); NAACP v. Button, 371 U.S. 415, 430 (1963); *see also* McDonald v. Smith, 472 U.S. 479, 485 (1985) (applying the Free Press Clause's "actual malice" standard to a Petition Clause defamation analysis); Wayte v. United States, 470 U.S. 598, 610 & n.11 (1985) (holding that the right to petition is "generally subject to the same constitutional *[O'Brien]* analysis" used in free speech).

n16 Other commentators have also criticized this failure. *See, e.g.,* Frederick, *supra* note 2, at 141-42. For an argument that free expression precedents should govern Petition Clause analysis, see Zauzmer, Note, cited above in note 14, at 1262-71.

n17 5 U.S. (1 Cranch) 139 (1803).

n18 *Id.* at 174.

n19 Zauzmer, Note, *supra* note 14, at 1265 & n.89.

n20 *See* Smith, *supra* note 2, at 1154.

n21 *See* Bill of Rights, 1689, 1 W. & M., ch. 2, §§ 5, 13 (Eng.), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 197 (Philip B. Kurland & Ralph Lerner eds., 1987); 1 WILLIAM BLACKSTONE, COMMENTARIES *138-*39.

n22 *See* Frederick, *supra* note 2, at 115.

n23 *See* Smith, *supra* note 2, at 1165-67.

n24 *See* Charles E. Rice, *Freedom of Petition, in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 789, 789 (Leonard W. Levy ed., 1986).

n25 *See* Smith, *supra* note 2, at 1165 (describing two bills that concurrently protected petitioning from prosecution but prohibited publication of political matters regarding Parliament).

n26 For example, Massachusetts secured the right to petition in its Body of Liberties in 1641, but freedom of speech and press did not appear in official documents until the mid-1700s. *See* David A. Anderson, *The Origins of the Press Clause,* 30 UCLA L. REV. 455, 463 n.47 (1983).

n27 *See id.* at 464 n.52.

n28 Even when England and the American colonies recognized free speech rights, petition rights encompassed freedom from punishment for petitioning, whereas free speech rights only extended to freedom from prior restraints. *See* Frederick, *supra* note 2, at 115-16.

n29 *See* New York Times Co. v. United States, 403 U.S. 670, 716 n.2 (1971) (Black, J., concurring). For the full text of Madison's proposal, see 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1834).

n30 *See* 5 BERNARD SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 1163-

65 (1980).

n31 *See* Thomas v. Collins, 323 U.S. 516, 530 (1945).

n32 *See* 5 SCHWARTZ, *supra* note 30, at 1089-91.

n33 *See, e.g.,* 2 SCHWARTZ, *supra* note 30, at 277 (Del. 1776); *id.* at 281 (Md. 1776); *id.* at 342-44 (Mass. 1780); *id.* at 287 (N.C. 1776); *id.* at 266 (Pa. 1776); *id.* at 324 (Vt. 1777).

n34 *See, e.g.,* 4 *id.* at 912-13 (N.Y. 1788); *id.* at 968 (N.C. 1788); *id.* at 842 (Va. 1788).

n35 *See, e.g.,* McDonald v. Smith, 472 U.S. 479, 486 (1985) (self-governance); Hodgkiss, *supra* note 4, at 570 (empowerment); Comment, *supra* note 4, at 1520-24 (legitimation of government action).

n36 The distinction between a general and a judicial petition arises from the position of the recipient governmental entity, with respect to the matter outlined in the petition. For example, a letter to the Supreme Court that proposes changes in the Federal Rules of Civil Procedure is a *general* petition because the Court is involved in the rules amendment process; a petition for certiorari to the Supreme Court is a *judicial* petition because the Justices are outsiders who are asked to resolve a dispute.

n37 *See* Don L. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 10-108 (1971) (unpublished Ph.D. dissertation) (Univ. Microforms Int'l); K. Smellie, *Right of Petition, in* 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 98, 98-101 (R.A. Seiligman ed., 1934).

n38 The Magna Carta of 1215 guaranteed this right. *See* MAGNA CARTA, ch. 61, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 187.

n39 *See* PETITION OF RIGHT chs. 1, 7 (Eng. June 7, 1628), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 187-88.

n40 In 1669, the House of Commons stated that "it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievances, and the House of Commons to receive the same." Resolution of the House of Commons (1669), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 188-89.

n41 For example, in 1688, a group of bishops sent a petition to James II that accused him of acting illegally. *See* Smith, *supra* note 2, at 1160-62. James II's attempt to punish the bishops for this petition led to the Glorious Revolution and to the enactment of the Bill of Rights. *See* Smith, *supra* note 37, at 41-43.

n42 *See* Smith, *supra* note 2, at 1165 (describing a petition regarding contested parliamentary elections).

n43 In 1701, Daniel Defoe sent a petition to the House of Commons that

accused the House of acting illegally when it incarcerated some previous petitioners. In response to Defoe's demand for action, the House released those petitioners. *See id.* at 1163-64.

n44 *See* RAYMOND BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 43-44 (1979).

n45 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (6th ed. 1890) (citation omitted).

n46 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger) (declaring petitioning an indispensable right "without which there is no citizenship" in any government); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 707 (Carolina Academic Press ed. 1987) (1833) (explaining that the petition right "results from the very nature of [the] structure [of a republican government]").

n47 The Court has characterized the interest underlying general petitioning more broadly as an interest in "self-government." McDonald v. Smith, 472 U.S. 479, 483 (1985). However, the Court has not recognized this as a unique interest, but one also embodied in the free expression clauses of the First Amendment. *See id.* at 485, 489 (Brennan, J., concurring). This characterization ignores that the Petition Clause and the Speech and Press Clauses further self-government in different ways. The Speech and Press Clauses protect citizens' ability to express opinions and to discuss issues regarding public affairs, while the Petition Clause confers a positive right for citizens to participate directly in government and to demand that the government consider and respond to their petitions. *See infra* notes 48-58 and accompanying text. To emphasize the distinction between the different aspects of self-government that the First Amendment clauses serve, this Note characterizes the interest served by the Petition Clause as one of "government accountability through citizen participation."

n48 *See generally* Frederick, *supra* note 2, at 114-15 (describing the historical development of the duty of government response to petitions).

n49 *See* DECLARATION AND RESOLVES OF THE CONTINENTAL CONGRESS 3 (Am. Col. Oct. 14, 1774), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 199; DECLARATION OF RIGHTS OF THE STAMP ACT CONGRESS 13 (Am. Col. Oct. 19, 1765), *reprinted in id.* at 198.

n50 *See* Frederick, *supra* note 2, at 115-16.

n51 *See* THE DECLARATION OF INDEPENDENCE para. 30 (U.S. July 4, 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 199; Lee A. Strimbeck, *The Right to Petition,* 55 W. VA. L. REV. 275, 277 (1954).

n52 5 SCHWARTZ, *supra* note 30, at 1091-105.

n53 The vote was 10-41 in the House and 2-14 in the Senate. *See id.* at 1105, 1148.

n54 *See* 1 ANNALS OF CONG. 733-46 (Joseph Gales ed., 1789); 5 SCHWARTZ, *supra* note 30, at 1093-94 (stating that representatives have a duty to inquire into the suggested measures contained in citizens' petitions) (statement of Rep. Roger Sherman); *id.* at 1095-96 (stating that Congress can never shut its ears to petitions) (statement of Rep. Elbridge Gerry); *id.* at 1096 (arguing that the right to petition protects the right to bring non-binding instructions to Congress's attention) (statement of Rep. James Madison).

n55 *See* STAFF OF HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 15, 1975, at 6-9 (Comm. Print 1986) (including a comment by the press that "the principal part of Congress's time has been taken up in reading and referring petitions" (quotation omitted)).

n56 *See* Higginson, Note, *supra* note 2, at 156.

n57 *See* H.J., 25th Cong., 2d Sess. 647 (1838) (describing how petitions prompted the appointment of a select committee to consider legislation to abolish dueling).

n58 *See* Higginson, Note, *supra* note 2, at 157.

n59 *See* Frederick, *supra* note 2, at 114 (petitioning "emerged during the Middle Ages when the King was believed to be the source of justice"); Smith, *supra* note 2, at 1155-56.

n60 *See* Smith, *supra* note 2, at 1155-56.

n61 *See id.*

n62 *See* Higginson, Note, *supra* note 2, at 145.

n63 *See id.* at 146-47.

n64 *See id.* at 149.

n65 *See id.* at 147-49.

n66 A person might sue a government *official* in his official capacity in order to overcome sovereign immunity barriers for suits directly against the government. Therefore, although the text of the Petition Clause appears to only protect persons who directly petition the *government,* this Note extends the Petition Clause analysis to suits against government officials in their official capacity.

n67 One might argue against this interpretation as contrary to the Framers' apparent assumption that suits against the federal and state governments were disfavored. *See* THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing in favor of federal sovereign immunity); U.S. CONST. amend. XI (barring suits against states in federal court). However, the Court has interpreted the Eleventh Amendment to constitute a mere restriction on federal court subject matter jurisdiction; the suit may still

be brought in state court. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). Moreover, because the English doctrine of sovereign immunity was "less about *whether* the [sovereign] could be sued than about *how,"* PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1108 (3d ed. 1988), the Framers' position in favor of sovereign immunity should not be interpreted as one that disfavors suits against the government. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 18-19 (1963). This Note recognizes that sovereign immunity limits citizens' ability to sue the federal government and assumes that Petition Clause protection extends only to those suits that are not so barred.

n68 *See* People v. Siragusa, 366 N.Y.S.2d 336, 342 (1975).

n69 *Cf.* NAACP v. Button, 371 U.S. 415, 429-30 (1963) (stating that litigation may represent not only "a technique of resolving private differences," but also a "form of political expression").

n70 *See* FED. R. CIV. P. 4(e).

n71 Some commentators have focused upon the informative function of petitions. *See, e.g.,* Fischel, *supra* note 14, at 98.

n72 *See supra* notes 48-58 and accompanying text.

n73 *See* Smith, *supra* note 37, at 84-85. Abolitionist petitioning began in the First Congress. *See* 2 ANNALS OF CONG. 1182-84 (1790).

n74 CONG. GLOBE, 26th Cong., 1st Sess. 150 (1840).

n75 *See* 12 CONG. DEB. 4053 (1836) (statement of Rep. John Quincy Adams). For a collection of John Quincy Adams's speeches regarding petitions, see JOHN QUINCY ADAMS, SPEECH OF JOHN QUINCY ADAMS OF MASSACHUSETTS, UPON THE RIGHT OF THE PEOPLE, MEN AND WOMEN, TO PETITION (1838).

n76 *Id.* at 4052-53.

n77 *See* Frederick, *supra* note 2, at 137-41.

n78 *See id.* at 139-142; Smith, *supra* note 37, at 107-08. Currently, the House of Representatives abides by a rule that allows, but does not require, members of the House to publish petitions in the House Journal and the Congressional Record. *See* THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 1143 (1987).

n79 *See* Minnesota State Bd. v. Knight, 465 U.S. 271, 285 (1984).

n80 *See* 11 CONG. DEB. 1137 (1835) (speech of Rep. John Dickson) ("[O]f what use to the people is the right to petition, if their petitions are to be unheard, unread, and to sleep 'the sleep of death,' and their minds to be

enlightened by no report, no facts, no argument?").

n81 *Compare* Comment, *supra* note 4, at 1525 (arguing that the petition right "must mandate some minimum level of state receptivity to citizens' grievances") *with* Smith, *supra* note 2, at 1190-91 (arguing that the right to petition should not include the right to have the government consider petitions).

n82 *Cf.* NAACP v. Button, 371 U.S. 415, 430 (1963) ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.").

n83 *See* FED. R. CIV. P. 12(a).

n84 This is not a claim that lawsuits are, as an *empirical* matter, more effective in *actually* advancing government accountability than other types of general petitions. This Note merely asserts that suits against the government impose a duty to respond on the part of the government and that this duty *guarantees* that the government will not simply ignore the petition.

n85 This Note deals only with Rule 11, which is a *federal* rule. However, because the Petition Clause applies to the states through the Fourteenth Amendment, *see supra* note 5, this Note's analysis would also apply to state sanction rules that are similar to Rule 11.

Rule 11 is currently in the process of being amended. The proposed amendments do not affect the following discussion, however, because they incorporate the current interpretations of Rule 11 criticized by this Note. *See* STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 43-58 (Sept. 22, 1992) [hereinafter PROPOSED AMENDMENTS].

n86 *See* Cheek v. Doe, 828 F.2d 395, 397 (7th Cir.), *cert. denied,* 484 U.S. 955 (1987); *In re* Kelly, 808 F.2d 549, 550 (7th Cir. 1986); *In re* Itel Sec. Litig., 791 F.2d 672, 676 (9th Cir. 1986), *cert. denied,* 479 U.S. 1033 (1987).

n87 *Cheek*, 828 F.2d at 397 (quoting Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986)); *see also Itel Sec.*, 791 F.2d at 676 ("The power of the federal courts to sanction attorney misconduct, be it frivolous litigation or contemptuous behavior, is beyond doubt."). *But see* NAACP v. Button, 371 U.S. 415, 439 (1963) ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

n88 *See* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D.N.Y. 1986).

n89 FED. R. CIV. P. 11.

n90 *Id.*

n91 *See* sources cited *supra* note 81.

n92 Historically, the only exception to the acceptance of this presentation aspect of the petition right occurred during the slavery debate. *See supra* pp. 1119-20.

n93 This is because a complaint is the first opportunity for the citizen to relate the basis of the grievance and forms the sole basis for determining issues to be litigated.

n94 Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S. Ct. 501, 509 (1991).

n95 *See* Burson v. Freeman, 112 S. Ct. 1846, 1850-51 (1992).

n96 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557, 562-64 (1980).

n97 Whether government regulations that infringe upon a citizen's right to file a *single* petition, such as Rule 11 as applied to suits against private parties, should be analyzed under a less demanding standard is beyond the scope of this Note.

n98 This argument has special force for Rule 11 sanctions, which have been imposed disproportionately in civil rights cases filed against the government. *See infra* notes 115-16 and accompanying text.

n99 This prong also prohibits any litigant from filing papers in order to "cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11. This Note only discusses the harassment provision because the delay and cost provisions are not usually applicable to complaints.

n100 It thus falls under the definition of "sham" -- a "counterfeit purporting to be genuine." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2086 (Philip B. Gove ed., 1976).

n101 Thus, this Note's treatment of this prong of Rule 11 is analogous to the "sham" exception that the Supreme Court has carved out to the *Noerr-Pennington* doctrine in the antitrust context. *See generally* Fischel, *supra* note 14, at 104-10 (discussing the "sham exception" to *Noerr-Pennington* doctrine).

n102 FED. R. CIV. P. 11. The proposed amendments also require that people perform "an inquiry reasonable under the circumstances" to ascertain that the asserted legal and factual contentions are not frivolous. *See* PROPOSED AMENDMENTS, *supra* note 85, at 45-46.

n103 Cheek v. Doe, 828 F.2d 395, 397 (7th Cir. 1987) (quoting Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986)).

n104 *See* Fischel, *supra* note 14, at 101 ("[P]resentation of falsehoods to government officials does not promote well-considered and well-founded decisions.").

n105 *See* Melissa L. Nelken, *Sanctions Under Amendmed Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and*

Punishment, 74 GEO. L.J. 1313, 1349 (1986).

n106 *See* Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir.), *cert. denied,* 474 U.S. 827 (1985).

n107 *See, e.g., In re* Kelly, 808 F.2d 549, 551-52 (7th Cir. 1986) (stating that the attorney would have been sanctioned for failure to perform a reasonable inquiry even if the claim proved accurate).

n108 *See* SANCTIONS: RULE 11 & OTHER POWERS 3 (M. Nelken ed., 3d ed. 1992) [hereinafter SANCTIONS]. Moreover, the proposed amendment to Rule 11 codifies this interpretation of Rule 11. *See* PROPOSED AMENDMENTS, *supra* note 85, at 4.

n109 *See* SANCTIONS, *supra* note 108, at 3.

n110 One could argue that sanctioning parties for filing complaints without first conducting a reasonable inquiry is appropriate regardless of the truth of the allegations because the requirement furthers responsible citizen participation. However, the courts hold people who sign complaints to an objective standard of reasonable inquiry. *See* Business Guides v. Chromatic Communications Enters., 111 S. Ct. 922, 931-32 (1991). Under the standard, a person who conducts the best inquiry that he can, but whose efforts are considered by a court to be objectively negligent, could be sanctioned. Thus, the objective standard allows sanctions even for citizens who are devoting their best efforts to participate responsibly in governmental decisionmaking. *See generally* Nelken, *supra* note 105, at 1329-31 (discussing the "objective reasonableness" standard).

n111 Although it has been stated that there is no constitutional value in false statements of fact, *see, e.g.,* Gertz v. Welch, 418 U.S. 323, 340 (1974), the Court has conferred some protection on false statements in order to avoid chilling effects on truthful speech that furthers the interests underlying the Free Speech and Press Clauses, *see, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

n112 *See, e.g.,* Avirgan v. Hull, 932 F.2d 1572, 1575 (11th Cir. 1991) (imposing more than $ 1 million in Rule 11 sanctions), *cert. denied,* 113 S. Ct. 405 (1992); Brandt v. Schal Assoc., Inc., 131 F.R.D. 485, 503 (N.D. Ill. 1990) (imposing more than $ 350,000 in Rule 11 sanctions).

n113 *See* Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation,* 22 VAL. U. L. REV. 331, 353 & n.92 (1988).

n114 *See* Nelken, *supra* note 105, at 1338-52.

n115 *See, e.g.,* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES 2-15-2-18, 4-8, G-3 (2d ed., 1992); Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case,* 63 NOTRE DAME L. REV. 788, 788-89, 789 n.5 (1988).

n116 Dore v. Schultz, 582 F. Supp. 154, 158 (S.D.N.Y. 1984) (citations omitted) (emphasis added).

n117 Cooter & Gell v. Hartmarx Corp., 296 U.S. 384, 393 (1990).

n118 *See* Metro Broadcasting v. FCC, 110 S. Ct. 2997, 3034-35 (1990) (O'Connor, J., dissenting) (stating that the Court has held that an interest in remedying societal discrimination is not compelling); Butterworth v. Smith, 110 S. Ct. 1376, 1379-80 (1990) (affirming a lower court's decision that the state interest in maintaining grand jury secrecy is not compelling).

n119 *See* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2549 (1992) (stating that the regulation must be "*necessary* to serve the asserted compelling interest"); Sable Communications v. FCC, 109 S. Ct. 2829, 2836 (1989).

n120 *See supra* p. 1125.

n121 This approach is not a retreat to the subjective bad faith standard that prevailed before the 1983 amendments to Rule 11. Rather, it is a replacement of the "reasonableness" standard with a "knowledge" standard. This construction is appropriate to avoid constitutional problems in Rule 11's application.

n122 This test is similar to the actual malice standard established for Petition Clause defamation cases in McDonald v. Smith, 472 U.S. 479, 484-85 (1985), except that it does not sanction "reckless falsity." The higher level of protection accorded against Rule 11 sanctions for complaints filed against the government is appropriate; the *McDonald* case involved only a single petition furthering the goal of government accountability, whereas the present test involves a double petition furthering both core values of the Petition Clause.

n123 This might include prudential standing limitations and tort actions arising from suits against the government.

n124 United States v. Cruikshank, 92 U.S. 542, 552 (1876)