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No. A04-2150

State of Minnesota
In Court of Appeals

STATE OF MINNESOTA,

Appellant,

vs.

GLAXOSMITHKLINE PLC,

Respondent.

BRIEF *AMICUS CURIAE* OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

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INTEREST OF THE *AMICUS CURIAE*

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit trade association representing the United States research-based pharmaceutical industry. PhRMA's mission is to conduct effective advocacy for public policies that encourage the discovery and development of important new medicines for patients. A list of PhRMA members is available at www.phrma.org/who we are.[1]

The Attorney General has neither sought documents from PhRMA nor sued it. However, PhRMA was required to become involved in this action because eleven of the documents that appellee GlaxoSmithKline plc ("GSK") produced in response to the Attorney General's civil investigative demand and that the Attorney General now seeks to release to the public are PhRMA-authored documents. The documents reflect communications among PhRMA and its members regarding the development and implementation of legislative strategy. They implicate the First Amendment and associational privacy rights of PhRMA and its members. PhRMA had a strict confidentiality policy regarding the documents, and expected that GSK would keep them confidential. PhRMA expressly understood that the documents would be confidential when they were produced to the Attorney General.

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[1] No attorney for a party wrote any portion of this brief, and no one other than PhRMA, its members, or its counsel made a monetary contribution to its preparation or submission.

PhRMA intervened in the district court for the limited purpose of protecting the confidentiality of its documents. This Court granted it permission to participate as *amicus curiae* to protect the same interest.

STATEMENT OF THE CASE

PhRMA agrees with and adopts GSK's counterstatement of the case. PhRMA writes separately to emphasize the particular facts relevant to PhRMA's documents and PhRMA's unique status as a third party whose rights are threatened by the Attorney General's proposed release.

The Attorney General did not serve a civil investigative demand on PhRMA, nor has the Attorney General named PhRMA in the complaint it filed in Ramsey County district court. Indeed, PhRMA has never seen a copy of the complaint, since it was filed under seal in this Court and in the district court.

However, GSK, in response to the Attorney General's civil investigative demand, produced some PhRMA-authored documents contained in GSK's files. GSK initially resisted producing these documents at all – and also resisted producing similar internal GSK documents – because their production would threaten the exercise of GSK's and PhRMA's First Amendment right to petition the government and the related right to associate in order to engage in collective petitioning activities. GSK A.2, 5, 8-25. GSK later agreed to produce over 1,000 of its and PhRMA's documents, without filing a motion to protect them, based on the express understanding, negotiated and agreed to by all parties, that documents that implicated First Amendment and associational privacy

concerns would remain confidential. GSK Br. p.8-9, 36-39. Indeed, GSK told PhRMA when it agreed to produce the PhRMA documents that they would be confidential. GSK A.79. PhRMA, like GSK, relied on the Attorney General's representations of confidential treatment.

The Attorney General, notwithstanding his agreement to treat the documents as confidential, subsequently filed a motion to release forty-four of them, including the eleven PhRMA-authored documents. PhRMA immediately sought to intervene in the district court for the limited purpose of protecting the confidentiality of its eleven documents. In a chambers hearing, the district court permitted intervention. Affidavit of William F. Mohrman, filed in support of PhRMA's motion to participate as intervener or *amicus curiae*, ¶ 3.

With its notice of intervention, PhRMA submitted the declaration of its Senior Vice President and General Counsel, Bruce N. Kuhlik, setting out in detail the reasons why the eleven PhRMA documents should remain confidential. GSK A.76-81. Mr. Kuhlik's declaration described the documents, PhRMA's expectation that they would remain confidential, the PhRMA policies and procedures designed to make sure that they did, and the adverse effect on PhRMA and its members that would result from their public disclosure.

As Mr. Kuhlik's declaration stated, the PhRMA documents all reflect confidential communications between PhRMA staff and members of PhRMA's Board of Directors and PhRMA member company work groups. The documents contain detailed

information about PhRMA's proposed public policy advocacy agenda and strategic priorities on a range of issues. GSK A.78.

PhRMA and its members affirmatively maintain the confidentiality of such documents in the ordinary course of PhRMA's activities. PhRMA intended that these documents would not be shared with anyone other than PhRMA staff members and member company personnel directly involved in the relevant issues. PhRMA's confidentiality policy provides that "[t]he internal affairs of PhRMA and its members must remain strictly confidential." GSK A.77. The policy defines "confidential information" broadly to include "any information that [PhRMA employees] create, receive, maintain, or access in the course of [their] employment, whether or not directly related to [their] duties, unless the information has been publicly released by PhRMA." GSK A.80.[2] PhRMA's senior management periodically reminds all PhRMA staff about the importance of maintaining the confidentiality of PhRMA's information and communications, and encourages PhRMA Board members similarly to inform personnel within their own companies. GSK A.77.

The PhRMA documents fall squarely within the scope of PhRMA's confidentiality policy. GSK A.78. Some of the most sensitive information in PhRMA's possession includes documents like these that reflect communications among PhRMA staff or between PhRMA staff and its member companies about PhRMA's activities, plans, and

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[2] PhRMA has maintained a similar policy for many years, including the entire period covered by the documents at issue. GSK A.77.

goals in developing and implementing public policy advocacy positions for the research-based pharmaceutical industry. *Id.* PhRMA and the PhRMA Board expect PhRMA staff and members to hold in the strictest confidence materials (like these) that reflect the association's internal discussions with its members on public policy advocacy prospects and strategies. *Id.*

Indeed, PhRMA has adopted specific procedures relating to materials prepared for meetings of the PhRMA Board of Directors or Board-level committees – like these documents – as a further means of safeguarding the confidentiality of high-level deliberations relating to its policy advocacy agenda. *Id.* PhRMA's procedures dictate that distribution of these materials to individuals other than Board members requires approval from PhRMA's Office of the President, and the materials may be sent to Board members *only* by Federal Express or facsimile, not e-mail. *Id.*

Mr. Kuhlik's declaration also described the adverse effect that release of the documents at issue would have on PhRMA and its members. As Mr. Kuhlik explained, the free exchange of policy views between PhRMA and its member companies is critical to the development and implementation of PhRMA's public policy advocacy agenda, and the release of these documents to the public would compromise PhRMA's First Amendment rights and associational privacy:

> In order to effectively develop and implement its public policy advocacy agenda, PhRMA staff must have the ability to conduct a full and candid exchange of policy views with PhRMA member companies, and particularly with PhRMA board members. Disclosure of the PhRMA documents at issue in the Attorney General's motion would compromise this free exchange of information and would seriously jeopardize PhRMA's

> ability to represent its members' interests in shaping and pursuing an effective policy advocacy agenda.

GSK A.79.

The district court denied the Attorney General's motion to permit public disclosure of the documents. AG A.96-104. The court held that the Attorney General had agreed that the documents were "confidential," and it reasoned that society would not benefit from "a state of affairs that encouraged parties to enter freely into [confidentiality] agreements with the understandable foreboding that they are worth less than the paper on which they are printed." AG A.103-04. It concluded, further, that because GSK had produced the documents pursuant to a pending government investigation, they were confidential under the Minnesota Government Data Practices Act. AG A.101-02. And, finally, the district court reviewed the documents in camera, balanced the Attorney General's interest in public disclosure with PhRMA and GSK's First Amendment and associational privacy interests in continued confidentiality, and concluded that the documents were "correctly designated as petitioning documents subject to First Amendment privilege" and therefore properly were designated confidential under Minn.R.Civ.P. 26.03. AG A.103.

This Court initially dismissed the State's appeal as non-final and denied the State's motion for discretionary appeal. The Supreme Court reversed and remanded for consideration on the merits. This Court granted PhRMA's motion to submit an *amicus* brief on August 26, 2005.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order for all the reasons stated in GSK's brief. The district court properly exercised its discretion by determining that continued confidential treatment of the documents was appropriate to protect GSK and PhRMA's First Amendment and associational privacy rights under Rule 26. GSK Br. p.17-35. The district court also correctly found that the State agreed to treat documents that implicate First Amendment and associational privacy rights as confidential as a condition of the compromise that led to their production. GSK Br. p.36-39. Finally, the court properly held that the documents were confidential investigative documents under Minnesota law, and that the State could not automatically divest them of their confidential status by filing a complaint. GSK Br. p.42-49. Moreover, the district court gave appropriate consideration to the full range of relevant legal issues before it concluded that the documents at issue should remain confidential, and the Supreme Court's suggestions to the contrary in dicta are unfounded.

With respect to the PhRMA documents in particular, the trial court plainly did not abuse its discretion[3] when it determined that the interest of PhRMA and its members in continued confidentiality outweighed the State's interest in public disclosure. PhRMA demonstrated that disclosure of the documents would result in significant interference

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3 The Minnesota Supreme Court has determined that "[t]he right of access [to judicial documents] is...best left to the sound discretion of the trial court," and is reviewed on an "abuse of discretion" standard. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 206 (Minn. 1986). *Accord In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001).

with PhRMA's and its members' First Amendment rights of association and to petition the government. PhRMA is a trade association that exists for the purpose of advocating for public policies for the research-based pharmaceutical industry. PhRMA can develop and implement public policy advocacy positions effectively *only* by communicating in a candid and open manner with its members. PhRMA's ability to fulfill this mission as an effective association would be severely compromised if it could not conduct a confidential exchange of policy views among its members, and among association staff. Reversal of the district court's order would compromise the First Amendment rights of PhRMA and its members and could have a significant chilling effect on *any* association's ability to develop and advance public policy positions on behalf of its members.

No countervailing interests outweigh PhRMA's interest in preserving the confidentiality of its public policy advocacy agenda and priorities. The documents at issue reflect activities that fall within the scope of *Noerr-Pennington* protection, and thus they cannot form the basis for any enforcement action by the Attorney General. Moreover, the recent decision in *In re Canadian Import Antitrust Litigation*, 2005 U.S. Dist. LEXIS 18949 (D. Minn. 2005) (GSK A.142-64), dismissing an identical claim under federal antitrust law because import of Canadian drugs is illegal, demonstrates that it is unlikely that the Attorney General's claim under state antitrust law will survive on the merits. *See also Vermont v. Vermont Agency of Administration*, 2005 U.S. Dist. LEXIS 20864 (D. Vt. 2005) (GSK A.219-29) (State's petition to FDA regarding prescription drug importation from Canada asked the FDA to approve a program that was

illegal under federal law). Finally, the district court's order prevents only *public disclosure* of the documents, so it does not prevent the Attorney General from using the documents for continued investigation or in its pending litigation. In contrast, in many cases in which First Amendment and associational privacy rights are at issue, courts deny discovery altogether. Under these circumstances, PhRMA's interest in preserving the confidentiality of its documents and the public's interest in preserving First Amendment associational rights far outweigh any arguments for disclosure of these documents.

ARGUMENT

I. THE DISTRICT COURT CONSIDERED ALL RELEVANT FACTORS AND PROPERLY EXERCISED ITS DISCRETION TO MAINTAIN THE DOCUMENTS' CONFIDENTIALITY

The district court gave appropriate consideration to the full range of relevant legal issues before it concluded that the documents at issue should remain confidential, and the Supreme Court's suggestions to the contrary are unfounded. A close examination of case law from Minnesota and other jurisdictions, for instance, negates the Supreme Court's suggestion (AG A.118) that cases might not "clearly recognize" discovery protections for documents implicating First Amendment and associational privacy rights. Cases from this jurisdiction and others recognize that, when discovery threatens First Amendment and associational privacy rights, courts first should balance First Amendment concerns with the relevance of the information and the parties' need for it, and then may either deny production outright or impose appropriate limits, including confidentiality requirements. *See infra* at 12-17; GSK Br. p.22-27.

Similarly, the district court properly analyzed the application of the MGDPA to the documents at issue, and GSK has fully answered the Supreme Court's query "whether...commencement of the Ramsey County action makes...investigative data public" under the MGDPA. AG A.118. As GSK points out, there are a number of compelling indications in the MGDPA's language that the statute *preserves* the confidentiality of data after an action is commenced. Among other things, the statute explicitly provides that the investigation remains active, and so data remains confidential, until "exhaustion or expiration of rights of appeal by either party to a civil action," and it refers to "civil action[s]" in other provisions in a manner that unmistakably indicates that the drafters of the statute intended investigative data to remain confidential during the pendency of civil actions. GSK Br. p.44-46 (citing Minn. Stat. § 13.39(3)).

GSK also addresses, and dispels, the Supreme Court's suggestion (AG A.118) that the district court may not have fully addressed language in the protective order permitting the State specifically to challenge documents designated confidential. As GSK explains, although the State retained the ability to challenge the designation placed on specific documents, that is not what the State did. Instead, it breached the terms of the agreement it made with GSK by claiming that no document for which a First Amendment privilege was claimed could *ever* be confidential because Rule 26 protects only "trade secrets." GSK Br. p.36-39. Moreover, as GSK also points out, GSK's reliance on the State's agreement that documents implicating First Amendment concerns would remain confidential precludes the State from switching positions now and claiming that First

Amendment protected materials are not entitled to any discovery protection at all. *Id.* at 39-42 (citing cases rejecting such "bait and switch" tactics). PhRMA, like GSK, relied on the State's representations of confidentiality. PhRMA expressly understood when GSK told it that PhRMA documents would be produced that they would be confidential. GSK A.79.

Finally, the Supreme Court's suggestion that "antitrust enforcement usually must be done publicly, for educational purposes and to deter similar conduct by others" (AG A.114) does not support a reversal of the district court's order protecting confidentiality of the PhRMA documents. Publicizing the initiation, progress, or result of an enforcement effort does not require disclosure of confidential documents, but still serves the goals of education and deterrence. The State is already quite effectively publicizing its enforcement campaign without public disclosure of these documents. GSK A.66-75 (publicity about the litigation and the reimportation issue). Moreover, as the Supreme Court itself expressly recognized, "documents produced as discovery are not presumed to be public"; "district courts have broad discretion to issue protective orders" protecting such discovery; GSK (and PhRMA) "claim[] a constitutional right...is implicated"; and "the state's prediction of a 'secret' trial is premature." AG A.113-14. Numerous cases, described *infra* at 26-27 and in GSK's brief at 17-20, confirm that discovery materials, unlike materials used at trial, are *not* presumptively public. Finally, the State's claim that it needs public disclosure of the PhRMA documents in order to effectively enforce the

antitrust laws is wildly exaggerated. The State has not sued PhRMA, and its description of the documents at issue as evidencing illegal activity is completely unfounded.

II. DISCOVERY THAT THREATENS FIRST AMENDMENT AND ASSOCIATIONAL PRIVACY RIGHTS MUST BE APPROPRIATELY LIMITED

Numerous cases from Minnesota and elsewhere confirm that material implicating First Amendment and associational privacy concerns is entitled to appropriate protection in discovery.

These cases rest on well-established constitutional principles. The Supreme Court has established that the First Amendment[4] guarantees individuals and groups the right to associate in order to engage in collective activities to petition the Government. Freedom of association, and the right to privacy of association which it entails, has been described as an "essential condition[] basic to the preservation of our democracy." *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 558 (1963); *accord Metropolitan Rehab. Serv. v. Westberg*, 386 N.W.2d 698, 700 (Minn. 1986). As the Court observed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958):

> *Effective advocacy of both public and private points of view...is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.* It is beyond debate that freedom to engage in

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[4] The First Amendment provides, in pertinent part: "Congress shall make no law...abridging...the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is applicable to the states by operation of the Fourteenth Amendment.

> association for the advancement of beliefs and ideas is an inseparable aspect of...freedom of speech.

Id. at 460-61 (citation omitted; emphasis added). *Accord Associated Contract Loggers, Inc. v. U.S. Forest Serv.*, 84 F.Supp.2d 1029, 1034 (D. Minn. 2000) ("The right to petition is absolutely fundamental to the First Amendment.... [D]emocracy is founded upon [citizens] acting upon [their] beliefs in efforts to effect change."), *aff'd,* 10 Fed.Appx. 397 (8th Cir. 2001).[5]

Because the rights of free speech and free association "need breathing space to survive," *Gibson*, 372 U.S. at 544, the Supreme Court and other courts have not hesitated to protect litigants' rights to associational privacy by preventing outright compelled disclosure of information that would chill the exercise of First Amendment rights. In *NAACP*, for instance, Alabama's Attorney General had sought discovery of, among other things, the NAACP's membership roster, in connection with a suit seeking to enjoin its operation in the state for failing properly to qualify to do business. 357 U.S. at 452. The Supreme Court found that compelled disclosure would "abridge the rights of" the NAACP's members to "engage in lawful association in support of their common beliefs." *Id.* at 460. *Accord Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive

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5 "[A]ll legitimate organizations," not just groups expressing unorthodox or unpopular views, are protected by the right of associational privacy. *Gibson*, 372 U.S. at 556.

areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.").

Courts considering whether to compel discovery of information that threatens associational privacy or the exercise of First Amendment rights generally engage in a balancing test, weighing the need for the discovery and its relevance against the potential the discovery would chill or limit the exercise of constitutional rights. *E.g., Adolph Coors Co. v. Wallace,* 570 F.Supp. 202, 205, 209 (N.D. Cal. 1983) (requiring "comprehensive balancing of the plaintiffs' need for the information sought against the defendants' constitutional interests in claiming the [First Amendment] privilege" was "of paramount importance" in "vindicating the constitutional values which underlie" the controversy). Courts require that the discovery be *directly relevant* and *narrowly tailored* and further require that the need for even circumscribed discovery must outweigh the holder's First Amendment rights. *Id.*; *Grandbouche v. Clancy,* 825 F.2d 1463, 1465 (10th Cir. 1987); *Britt*, 574 P.2d at 859.[6]

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6 *Accord Britt v. Superior Court*, 574 P.2d 766, 771 (Cal. 1978) (discovery request in civil litigation did not properly seek extensive details of plaintiffs' participation in various local political associations; compelled disclosure of associational affiliations and activities poses "one of the most serious threats to the free exercise" of First Amendment freedoms); *Federal Election Comm. v. Machinists Non-Partisan Political League*, 655 F.2d 380, 397, 389 (D.C. Cir. 1981) (subpoena seeking "membership lists and internal communications of a political group" would interfere with "vitally important constitutional freedoms by which Americans conduct their political affairs"); *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978) (grand jury not permitted to "delve into the membership, meetings, minutes, organizational structure, funding and political activities" of association "on the pretext that their members might have some information relevant to a crime"); *Int'l Action Ctr. v. United States,* 207 F.R.D. 1, 3-4 (D.D.C. 2002) (precluding

Minnesota courts similarly recognize that such balancing is appropriate when requested discovery threatens First Amendment and associational privacy interests. In *Eilers v. Palmer*, 575 F.Supp. 1259, 1261 (D. Minn. 1984), for instance, the court declined to order discovery of persons supporting plaintiff's suit against a religious group, because such discovery had "only minimal relevance" and "would create a genuine risk of interference with protected [First Amendment] interests." This Court in *Caucus Distributors v. Comm'r of Commerce*, 422 N.W.2d 264 (Minn. Ct. App. 1988), recognized that limited discovery of the identity of persons who had lent funds to a Lyndon LaRouche organization was appropriate, but explained that the "compelled disclosure of an individual's affiliation with an organization may, standing alone, constitute an intrusion into the first amendment rights of privacy of association and

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discovery of association membership lists, contributor lists, and past and present political activities of members); *ETSI Pipeline Project v. Burlington Northern, Inc.*, 674 F.Supp. 1489 (D.D.C. 1987) (precluding discovery of information regarding energy policy group's involvement in legislative, judicial, or administrative proceedings); *United States v. Garde*, 673 F.Supp. 604 (D.D.C. 1987) (NRC subpoena seeking discovery of information received by group challenging safety of nuclear plant was "not narrowly drawn to avoid unnecessary abridgement of constitutionally protected associational rights"); *Australia/Eastern USA Shipping Conference v. United States,* 537 F.Supp. 807, 812 (D.D.C. 1982) (precluding civil investigative demand request for *Noerr-Pennington* protected petitioning activity after balancing government interest in obtaining information against potential chilling effect on exercise of First Amendment rights); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 1985 U.S. Dist. LEXIS 22188, at *17-28 (S.D.N.Y. 1985) (GSK A.173-91) (party need not answer interrogatories seeking membership, contribution, and other information related to International Society for Krishna Consciousness when discovery would chill exercise of First Amendment and associational privacy rights); *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E.2d 444 (Ill. App. Ct. 1988) (precluding deposition questions about membership in organization because disclosure would chill First Amendment rights).

belief." *Id.* at 268. The court found that discovery sanctions for failure to disclose were appropriate only after balancing the nature of the requested discovery with the state's need for it, finding that it was not intrusive and that it was directly relevant to the state's claims that the LaRouche organization sold illegal securities in Minnesota. *Id.* at 269.[7]

When courts do permit limited discovery of information that implicates associational privacy concerns, they do not hesitate to issue protective orders requiring that the information remain confidential. *E.g., In re Courier-Journal & Louisville Times Co. v. Marshall*, 828 F.2d 361, 367 (6th Cir. 1987) (upholding protective order limiting disclosure of membership rolls of Klan produced in civil discovery as "an appropriate means of facilitating discovery while respecting the rights of nonparties whose past or present associations might thereby be revealed"); *National Organization for Women v. Sperry Rand Corp.*, 88 F.R.D. 272, 275 (D. Conn. 1980) (permitting discovery of NOW membership list but ordering that information be kept confidential). This Court, in *Caucus Distributors*, 422 N.W.2d at 267-68, noted that the administrative law judge in the underlying proceeding had directed limited disclosure of the names of certain lenders to the LaRouche organization "subject to a protective order providing for the confidentiality of the information." In an analogous case, *Erickson v. MacArthur*, 414 N.W.2d 406, 409-10 (Minn. 1987), the Supreme Court recognized that entry of a protective order limiting disclosure of witness eyewitness statements would be

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[7] The district court expressly adopted this balancing test, and the Attorney General *agreed not to appeal* that determination. AG A.40-41. He should not now be permitted

appropriate if the trial court, after reviewing the statements in camera, concluded that the need for the discovery outweighed the privacy interests of the witnesses. *See also* GSK Br. p.26-27.

III. THE DISTRICT COURT CORRECTLY BALANCED THE PARTIES' INTERESTS AND DETERMINED THAT THE THREAT TO ASSOCIATIONAL PRIVACY AND FIRST AMENDMENT RIGHTS REQUIRED CONFIDENTIALITY

Under these principles, the district court had the discretion to preclude *any* discovery of the PhRMA documents at all. Instead, it correctly concluded, after an *in camera* review of each of the documents, that confidential treatment was authorized by the threat to associational privacy posed by public disclosure, and was appropriate under Minn.R.Civ.Proc. 26.03. The Attorney General disagrees with that conclusion, but it was indisputably *not* an abuse of discretion, and this Court should affirm. *See Minneapolis Star & Tribune Co.*, 392 N.W.2d at 206 (determination not to permit public access to discovery documents reviewed under abuse of discretion standard); *Rahr Malting Co.*, 632 N.W.2d at 576 ("[t]he [trial] court is in the best position to weigh the competing needs and interests of the parties" with respect to public access to court proceedings).

Evidence before the district court demonstrated that PhRMA and its members would be substantially harmed by release of the documents. GSK A.76-80 (PhRMA declaration). PhRMA's mission is to develop and advocate, on behalf of its research-based pharmaceutical company and biotech members, public policy positions designed to

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to claim that no First Amendment privilege exists.

ensure discovery and development of important new medicines for patients. PhRMA participates in the legislative process, and in the public debate, on a variety of policy issues, including among many others the availability of prescription drugs to seniors and uninsured patients, public policy issues surrounding the legislative drug importation debate, Medicare/Medicaid issues, issues related to the safety and efficacy of prescription medications, issues related to advertising of prescription medications, and issues related to the value of medicines in our health care system. The documents at issue memorialize PhRMA's communications with its Board and designated representatives of member companies regarding the development and implementation of legislative and advocacy strategies and initiatives. GSK A.78.

Free association and communication among PhRMA and its members and staff regarding such strategies and initiatives is absolutely necessary for PhRMA to perform its mission. If PhRMA's documents regarding legislative priorities and strategies are prematurely made public, PhRMA's ability to interact with its members to develop policy positions would be severely constrained, since PhRMA and its members understandably would be reluctant to engage in a full and candid exchange of policy views when such communications could be exposed to public scrutiny. If such communications are subject to public disclosure, they will be substantially chilled, and PhRMA's ability to effectively advocate for its members will be critically hampered.

The chilling effect on PhRMA and its members would also adversely affect the public interest in free, open, and informed political debate. The political process is most

effective when legislators, administrators, and voters are fully informed on the issues from all sides. Groups like PhRMA perform an essential function in this process – through effective advocacy of their members' views. If PhRMA's ability to present its members' views is curtailed because members are unable or unwilling to communicate freely about legislative strategies without fear of public disclosure, legislators and the public will not be as fully informed as they could be, and the efficacy of the political process will be threatened.

From a public policy standpoint, requiring disclosure of these documents will have troubling implications not only for PhRMA but for *any* association that advocates for the views of its members. Associations like PhRMA, whether they are trade or professional associations or traditional "public interest" groups, are able to develop policy positions *only* through communication with members – they exist to speak on behalf of members. Making PhRMA's internal strategy and policy papers publicly available would be a troubling precedent for all such associations.

There are no countervailing considerations that require the PhRMA documents to be made public. The district court's order only prevents public disclosure of the documents. It does *not* restrict the Attorney General's use of the documents in his continuing investigation or his lawsuit.

Moreover, the PhRMA documents all reflect activities that fall squarely within the scope of *Noerr-Pennington* protection, and thus they could not form the basis for any enforcement action by the Attorney General in any event. It is black-letter law that joint

actions intended to influence legislative, administrative, judicial, or executive decision-making are immune under the Sherman Act. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Efforts to influence the government to take action cannot provide the basis for antitrust liability, even if these efforts were intended to eliminate competition. *Pennington*, 381 U.S. at 670. The intent or motive of the parties engaged in the lobbying activities is irrelevant. *Id.* In *Associated Contract Loggers*, 84 F.Supp.2d at 1034, for instance, the court dismissed a suit by loggers alleging that defendants acted in concert to influence the Forest Service's decision-making in forest management, because the act of petitioning the government is a constitutional right and does not violate antitrust laws.

IV. THE ATTORNEY GENERAL'S CLAIM THAT THE DOCUMENTS HAVE NO FIRST AMENDMENT PROTECTION IS WITHOUT BASIS

The Attorney General claims that the PhRMA documents are not subject to First Amendment protection for a number of reasons, all of them without basis. First, the Attorney General claims that there is no case law supporting the protection of documents implicating First Amendment and associational privacy concerns from unlimited discovery. AG Br. p.29. The discussion above, and in GSK's brief, demonstrates otherwise. *See supra* at 12-17; GSK Br. p.22-27.

Second, the Attorney General claims, without citation to a single case, that *only* documents that actually constitute "communications with legislators or regulatory authorities" are entitled to First Amendment protection. AG Br. p.29. The citizens of

Minnesota would undoubtedly be surprised to discover that their Attorney General believes that they have no First Amendment right to associational privacy at all. In fact, federal and Minnesota courts explicitly have recognized that the right to privacy of association is a crucial, and protected, First Amendment right. *Gibson*, 372 U.S. at 558; (1963); *NAACP*, 357 U.S. at 460-61; *Metropolitan Rehab. Serv.*, 386 N.W.2d at 700. The freedom of association extends not only to direct petitioning activity but also to "all manner and mode of communication...to those individuals and entities whose support and influence may contribute materially to the legislative campaign being waged." *IBP Confidential Bus. Doc. Litig. v. Iowa Beef Processors Inc.*, 797 F.2d 632, 641 (8th Cir. 1986). A number of courts have determined, moreover, that discovery that would reveal a litigant's or third party association's *internal* communications, not just communications with government officials, should be protected from discovery. *E.g., Britt*, 547 P.2d at 771 (precluding discovery of subjects and contents of local political organization's meetings); *Federal Election Comm.*, 655 F.2d at 389, 397 (subpoena seeking "membership lists and internal communications of a political group" would interfere with "vitally important constitutional freedoms"); *supra* note 6 (citing additional cases).

Third, the Attorney General claims, without citation to a single document, that the documents cannot be protected by the First Amendment because they "evidence illegal activity." AG Br. p.30. The Attorney General's accusation of illegal activity is entirely unsubstantiated. PhRMA's documents demonstrate that PhRMA and its members engaged in First Amendment-protected activity, activity that is at the core of the First

Amendment and that cannot support antitrust liability under *Noerr-Pennington*. If the documents did show any kind of participation in illegal activity – which they do not – they remain fully available to the Attorney General for his investigation and the litigation in which he is currently attempting to prove that some illegal activity took place. The Attorney General, essentially, claims that an "antitrust conspiracy allegation" exception should permit him to disclose these documents, contrary to both the First Amendment and to the established rules allowing parties to maintain the confidentiality of sensitive information during the discovery process. No such exception exists.[8]

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[8] The cases cited by the Attorney General for the proposition that there is no protected First Amendment right in PhRMA's documents all are distinguishable, either because those cases involved entirely different kinds of information or because courts in those cases already had determined that illegal activity had occurred. None of them involve a claim, like the Attorney General's here, that an unsupported *allegation* that documents *may* evidence illegal activity precludes any further consideration of whether First Amendment concerns justify keeping the documents confidential. The court in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 39-40 (C.D. Cal. 1984), for instance, required disclosure of documents concerned in an alleged antitrust conspiracy, but there is no indication whatsoever that the documents recounted lobbying or public policy strategy, threatened the same kind of chilling effect on First Amendment rights as do the PhRMA documents, or were anything but run-of-the-mill business documents. *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998), involved an entirely different factual scenario, including *a prior court determination of illegal activity*: defendants there had already been convicted of violating the Federal Access to Clinic Entrances Act, which forbids the use or threat of force or physical intimidation to prevent access to abortion clinics. The court held that the statute did not implicate First Amendment or freedom of association concerns because the conduct it precluded was independently illegal whether done individually or in a group. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), similarly involved a state court *determination* based on "evidence" and "findings" that picketing activity was illegal and violated state antitrust law, so an injunction against such activity was proper notwithstanding the defendants' First Amendment objections. Likewise in *United States v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003), the Court directed discovery of various

Fourth, the Attorney General claims that documents implicating associational privacy concerns may not be the subject of a protective order under Rule 26. AG Br. p.32-43. But Rule 26 protection is routinely granted to protect privacy rights. *See, e.g., Erickson*, 414 N.W.2d at 409-10 (describing court's "broad discretion" under Rule 26 to grant protective orders, including to protect "privacy interests"); *Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999) (Rule 26 protective orders appropriate to, among other things, protect the "privacy interests of litigants and third parties"); GSK Br. p.25-26. *Accord In re Courier-Journal*, 828 F.2d at 364, 367 (district court properly balanced First Amendment rights against need for discovery and found "good cause" to enter protective order under federal Rule 26). The application of Rule 26 to protect privacy rights is particularly important when, as here, the rights of a third party are at stake. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (recognizing importance of protective orders in safeguarding the "privacy interests of litigants *and third parties*") (emphasis added); *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) ("[T]he privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure of the...material should weigh heavily in a court's balancing equation"); *Britt*, 574 P.2d at 775 (recognizing importance of protecting non-parties' associational privacy rights from discovery).

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documents over freedom of association concerns, because the court had "already made a preliminary determination that" the association at issue "facilitates...incitement of imminent lawless conduct."

Fifth, the Attorney General claims that by sharing documents with others, PhRMA waived the right to claim associational privacy rights in the documents. AG Br. p.38-39. But PhRMA is a trade association, composed of individual members. It cannot function unless it communicates with and among its members. Indeed, associational privacy rights *depend* on the freedom of persons to communicate with each other within the association. Moreover, the record demonstrates here that the documents at issue were kept, and were intended to be kept, entirely confidential within PhRMA's organization and among its members. GSK A.76-81.

Sixth, the Attorney General claims that PhRMA and GSK's *evidentiary* showing in support of confidentiality was insufficient, on the supposed basis that no affidavit supported the claim that the documents should remain confidential. AG Br. p.43-45. That is just wrong with respect to the PhRMA documents – Mr. Kuhlik's declaration set out in detail why they should be accorded confidentiality. GSK A.76-81. GSK also submitted declarations specifying the chilling effect that disclosure of lobbying communications, including the communications and public policy development reflected in the PhRMA documents, would have on GSK's ability to advocate policy positions and petition the government. *E.g.,* GSK A.32-35. The Attorney General does not cite a single Minnesota case supporting its blanket claim that affidavits from attorneys are legally insufficient to establish that confidential treatment of documents is mandated, and the cases it does cite make the unremarkable point if an attorney makes an affidavit based on something other than true personal knowledge, that affidavit has little probative value.

PhRMA's Senior Vice President and General Counsel appropriately provided a declaration here because he had personal knowledge regarding the confidentiality policy and the potential harm to PhRMA if the documents were released.

Finally, the State claims that the district court did not adequately explain the basis for its ruling. AG Br. p.43-45. The court, however, reviewed each of the documents individually *in camera*. AG A.103. And, as GSK points out, if the court had failed adequately to explain its reasoning, the remedy would be to remand for an explanation, not to order immediate release of the documents.

V. THE ATTORNEY GENERAL'S CLAIM THAT THE FIRST AMENDMENT REQUIRES PUBLIC DISCLOSURE IS WITHOUT BASIS

Finally, the State claims that general First Amendment principles regarding open trial proceedings require public disclosure. AG Br. p.33-34. As the Supreme Court explicitly recognized, however, there is a distinction between access to *court* proceedings, which traditionally have been public, and access to documents produced in discovery, which traditionally were not open to the public in common law and are generally not open to the public in modern litigation. AG A.114.

The United States Supreme Court and this Court both have recognized that same distinction. In *Seattle Times Co.*, 467 U.S. 20, a Seattle newspaper sought to publicize information obtained pursuant to court-ordered discovery. Observing that the public had not traditionally had access to discovery materials, the Court determined that there is *no* First Amendment right of access to such materials if three conditions are satisfied: (1) "a

protective order is entered on a showing of good cause as required by Rule 26(c)"; (2) the order "is limited to the context of pretrial civil discovery"; and (3) the order "does not restrict the dissemination of the information if gained from other sources." *Id.* at 37.

This Court cited the *Seattle Times* standard with approval in *Star Tribune v. Minn. Twins P'Ship*, 659 N.W.2d 287, 297 (Minn. Ct. App. 2003), to hold that the media had no First Amendment or common-law right to access pretrial discovery materials in a high-profile case involving the potential termination of Minnesota Twins franchise. *Id.* at 296 ("neither the press nor the public have a common law right to examine discovery materials as they are being generated in the course of pretrial discovery"), *review denied,* 2003 Minn. LEXIS 380 (2003). *Accord* Richard A. Givens, *Manual of Federal Practice* § 5.192 (5th ed. 1998) (First Amendment may "prevent rather than allow disclosure of discovered information to the media" when disclosure would have a chilling effect on associational activities).

Under these standards, the district court's correct conclusion that continued confidentiality for the PhRMA documents was appropriate under the "good cause" standard of Rule 26 disposes of any claim under the First Amendment to public access to the documents.[9]

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[9] That conclusion does not change simply because the Attorney General has now tried to convert certain of the discovery materials into court-filed materials by submitting them with his complaint. Although PhRMA has not seen the complaint (as it was filed under seal), PhRMA understands that three of its eleven documents were attached. The Attorney General should not be permitted to "bootstrap" documents that he has agreed to keep confidential into the public domain by attaching them to a non-dispositive court

CONCLUSION

For the reasons stated herein and in GSK's brief, the Court should affirm.

DATED: October 24, 2005

Respectfully submitted,

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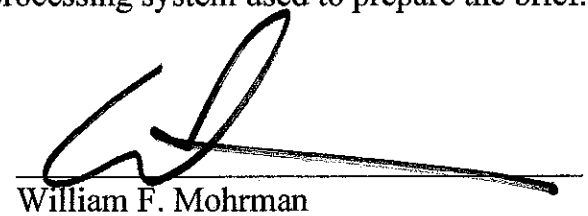
filing. "[W]here a party has sought the protection of Rule 26, the fact that sealed material is subsequently submitted in connection with a substantive motion does not mean that the confidentiality imposed by Rule 26 is automatically forgone." *Chicago Tribune Co. v. Bridge/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001). Indeed, the protective order itself provides that it "shall continue to govern" after the State "commences litigation...as a result of its investigation" until further order of the court. AG A.33-34.

CERTIFICATE OF COMPLIANCE WITH MINN.R.APP.P. 132.01, SUBD. 3

The undersigned certifies that this *amicus* brief contains 6,952 words and complies with the type/volume limitations of the Minn.R.App.P. 132. The brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2000, the word processing system used to prepare the brief.



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