

No. A04-2150

**State of Minnesota
In Supreme Court**

In the Matter of GlaxoSmithKline plc

**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 core 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](http://www.phrma.org/who-we-are).¹

This appeal raises issues of importance to any industry trade association that exercises its First Amendment right to petition the government in order to affect public policy for the betterment of its members and society as a whole. The Attorney General has not sought documents from PhRMA, nor has it named PhRMA as a defendant in its suit alleging that the U.S. subsidiary of appellant GlaxoSmithKline plc (“GSK”) violated the antitrust laws by conspiring to prevent the importation of Canadian drugs into the United States. PhRMA was required to become involved in this action because eleven of the documents that 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 confidential communications among PhRMA and its members regarding the development and implementation of strategies to petition legislators and regulators.

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.

As with any industry trade association, the strength and effectiveness of PhRMA's advocacy rests on its ability to educate policy makers and opinion leaders on the public policy positions of its members. PhRMA staff cannot simply pull these positions out of thin air. They can develop and implement public policy advocacy positions effectively *only* by communicating in a candid and open manner with PhRMA members and preserving the confidentiality of those communications, as PhRMA goes to great lengths to do. Similarly, for PhRMA and similar trade associations to be able to function, members must have the assurance that they can freely exchange ideas and debate potential public policy advocacy strategies without the fear that the views they share confidentially with one another during this deliberative process will become public. If such communications are subject to public disclosure, PhRMA and its members will be understandably reluctant to exercise their First Amendment rights, and PhRMA's ability to advocate effectively for its members will be critically hampered.

Specifically, the documents at issue concern PhRMA and its members' deliberations about what legislative strategy to pursue regarding proposed legislation that would legalize and finalize the importation of drugs from non-U.S. sources. The Attorney General apparently alleges, in its complaint filed in Ramsey County, that GSK's U.S. subsidiary violated antitrust laws by restricting sales of its products to Canadian pharmacies that sold drugs to consumers in the United States. In reality, however, the importation of such drugs is illegal. No antitrust action is viable where the trade allegedly restrained is illegal; the antitrust laws were not designed to promote illegal trade. A

federal district court in Minnesota has recently recognized this in dismissing an antitrust claim identical to the Attorney General's. *In re Canadian Import Antitrust Litig.*, 385 F.Supp.2d 930 (D. Minn. 2005).

PhRMA continues to be concerned that, as is widely recognized by government agencies and other third-parties, such importation undermines the protections currently offered by our highly regulated U.S. drug delivery system and presents substantial risk of harm to consumers in the form of unsafe dispensing practices (such as, for instance, time-expired drugs or drugs not stored properly) and the sale of counterfeit drugs. Indeed, the State's own website on the prescription drug issue warns consumers that "[t]here are some risks that arise when you purchase medications via the Internet or mail order, and some additional risks that arise if you are purchasing from a pharmacy outside of the United States." See RxMinnesotaConnect, Legal Information, available at <http://www.state.mn.us/portal/mn/jsp/content.do?programid=536902438&agency=Rx> (August 3, 2006). Amicus App. 1.

Because the eleven PhRMA documents at issue reflect and concern confidential communications among PhRMA and its members regarding deliberations about potential legislative strategy, the documents all implicate First Amendment associational privacy rights. PhRMA had a strict confidentiality policy regarding the documents, and expected that GSK would keep them confidential.

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 statement 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, not involved in the Attorney General's investigation or litigation, whose rights are threatened by the Attorney General's proposed release of the documents at issue. Not only is PhRMA not a defendant in the Attorney General's suit, PhRMA has never *seen* a copy of the complaint, since it was filed under seal.

GSK, in response to the Attorney General's civil investigative demand, produced some PhRMA-authored documents contained in GSK's files, and PhRMA understands that three of those documents are attached to the Attorney General's complaint. 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. A.165, 168. GSK later agreed to produce 940 of its documents, including documents authored by PhRMA, 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.7-8. Indeed, GSK told PhRMA when it agreed to produce the PhRMA documents that they would be confidential. A.108. 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 documents. The district court permitted intervention. Affidavit of Charles R. Shreffler, filed in support of PhRMA's motion to participate as *amicus curiae*, ¶¶ 2-3.

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. A.105-108. 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, including specific potential lobbying strategies and tactics.

A.106-107.

PhRMA and its members take affirmative steps to maintain the confidentiality of such documents in the ordinary course of PhRMA's activities. In order to encourage a candid exchange of viewpoints and free and open debate, 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." A.106. 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." *Id.*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. *Id.*

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, goals,

² PhRMA has maintained the same or a similar policy for many years, including the entire period covered by the documents at issue. A.106.

strategies and tactics 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.

A.108.

For example, PhRMA continues to be concerned about the safety risks posed by importation of drugs from outside of the United States, a concern that is shared by the federal government. The Food & Drug Administration (FDA) has warned that Minnesota's "state endorsement of foreign internet 'pharmacies'" is "unsafe, unsound, and ill-considered." Letter of Feb. 23, 2004, from William K. Hubbard, Associate Comm'r for Policy and Planning, FDA, to the Hon. Tim Pawlenty, at 1. Amicus App. 2. Among other things, the FDA pointed out, Minnesota is "assist[ing] those who put profits before patient health," and helping to "shine a bright light on a path that can [be] (and indeed, is) used not only by profiteers masquerading as pharmacists, but by outright criminals who do not pause before actively feeding counterfeit drugs into the marketplace." *Id.* Moreover, as the FDA also observed, Minnesota's "own taskforce" found "widespread, significant problems related to illegally purchasing non-FDA approved pharmaceuticals from foreign Internet pharmacies," and noted that even Canadian pharmacies that participate in Canada's Internet Pharmacy Association were "observed engaging in dangerous practices" in a visit from Minnesota state officials. *Id.* *Accord* Visits to Canadian Pharmacies; Summary of Findings, Memorandum from Pharmacy Bd. Surveyors to Minnesota Bd. Of Pharmacy Members, Dec. 24, 2003 (describing numerous examples of "poor pharmacy practice" observed in Canadian

pharmacies). Amicus App. 7.³ PhRMA appreciates that this Court's resolution of this appeal does not require that this Court resolve the safety of foreign internet pharmacies. PhRMA provides this background solely to explain the important content of its advocacy. Public release of PhRMA's internal discussions with its members about whether and how to express concerns regarding importation to policy makers and the public could jeopardize PhRMA's ability to develop and advocate positions on this important public policy issue.

The district court denied the Attorney General's motion to permit public disclosure of the documents. A.92. The court first held that the Attorney General had agreed that

³ Consumers also face a significant and growing danger of receiving counterfeit drugs when they order from businesses that operate outside of the U.S. and therefore outside of the FDA's jurisdiction. Some reports indicate that approximately sixty percent of drugs in some developing countries – and up to twenty percent in some developed countries – are fake. Bryan A. Liang, *Fade to Black: Importation and Counterfeit Drugs*, 32 Am. J.L. & Med. 279, 281 (2006). Canada “has not been immune” from these problems – there have been recent reported deaths from counterfeit drugs and investigations into their sale. *Id.* at 296-97. *Accord* Royal Canadian Mounted Police – Federal Enforcement Branch, *The Counterfeit Report: Intellectual Property Crime Investigator's Newsletter* at 13 (Winter 2006) (describing sales of fake Tamiflu from numerous websites, including two Canadian sites, into the United Kingdom and the U.S.) (excerpt at Amicus App. 14). Moreover, in Canada drugs that are earmarked for import to the United States are *not* subject to Canada's “Health Canada” safety rules, meaning that “it is impossible to determine whether the drugs U.S. consumers are buying are legitimate and safe or not.” Liang, *supra*, at 297; *see also id.* at 310. There is also no guarantee that a site advertising itself as a Canadian pharmacy is actually registered in or regulated by Canada. A survey performed by the FDA found that of 11,000 sites claiming to be Canadian pharmacies, only 1,009 actually sold prescription drug products, and of those only 214 were registered to a Canadian entity. *Id.* at 309 (drugs ordered from “Canadian” sites “frequently came from Malaysia, Vanuatu or Eastern Europe,” locations where counterfeiting is high and drugs are likely to be time-expired or incorrectly stored). *Accord id.* at 310 (testimony of Health & Human Services official that drugs ordered from “Canadian Generics” site were counterfeit and website was managed from Belize).

the documents were to remain “confidential.” A.100. 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 (“MGDPA”). A.97-98. And, finally, the district court specifically 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. A.99.⁴

The Court of Appeals initially dismissed the State’s appeal as non-final and denied the State’s motion for discretionary appeal. This Court reversed and remanded for consideration on the merits. On April 18, 2006, the Court of Appeals entered an opinion reversing the district court’s determinations. A.8. It held that the State was permitted under the Protective Order to challenge GSK’s designations of confidentiality and that the documents were not protected from disclosure under the MGDPA once they had been attached to the State’s Ramsey County complaint. A.14, 18. It recognized that it was appropriate in certain circumstances for courts to protect First Amendment associational privacy rights by permitting documents to be kept confidential. A.20-21. It found that

⁴ It is important to remember here that the issue is not whether the Attorney General should get discovery of the documents for its investigation – it has had the documents for years. Rather, what is at issue is the Attorney General’s request to *publicize* the documents.

the district court erred, however, by ordering that GSK's and PhRMA's documents should remain confidential. A.16. This Court granted permission to appeal, and subsequently granted PhRMA's motion to submit an *amicus* brief.

SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeals' order for all the reasons stated in GSK's brief. The Court of Appeals was absolutely right that concerns for First Amendment associational privacy can justify protective orders requiring documents to remain confidential, ensuring that members of society can freely associate to express and advocate their ideas and beliefs. It committed a number of substantial errors, however, when it reversed the district court's sound exercise of its discretion.

First and foremost, with respect to PhRMA, the Court erred by holding that "the record is devoid of evidentiary support" for the district court's exercise of its discretion to keep the PhRMA documents confidential. A.22. To the contrary, the district court had before it *ample* evidence of the potential harm that would be caused by the release of the documents, including its own *in camera* review of the documents and their content and sworn affidavits from PhRMA's Bruce Kuhlik and GSK's Janie Kinney describing the documents and the harmful effect that making them public would have on PhRMA's and GSK's ability to associate and exercise their First Amendment rights of political expression.

The Court of Appeals also erred in a number of other respects as well, all as set forth in detail in GSK's merits brief:

First, it applied a *de novo* standard of review, rather than the abuse of discretion standard required by this Court's unequivocal authority, to the questions before it. A.12.

Second, the Court erred by holding that the mere *allegation* that the documents evidence an antitrust conspiracy justified their release to the public, citing inapposite case law involving a party that had actually been *convicted* of a crime. A.21. That conclusion is erroneous as to GSK, but it makes no sense at all in the case of PhRMA, a third party that the Attorney General has not even named in its complaint.

Third, the Court erred by concluding that because PhRMA and GSK allegedly associated for commercial purposes, they were not entitled to protection for their First Amendment rights of association. *Id.* (“associating purely for financial gain does not come under the umbrella of First Amendment protection”). Legally, it is clear that corporations have the same constitutional rights as any other party to associate and engage in political discourse. Factually, PhRMA and its members do not associate “purely for financial gain,” but for purposes of political and viewpoint advocacy in a number of health related areas.

Fourth, the Court erred by articulating a standard that, for documents to remain confidential, there must be some potential threat to life and limb from their release. A.21-22 (“[a]ssociational privacy has been elevated over disclosure when there is a group that has been an object of harsh retaliation and disclosure is not just embarrassing, but threatening to the personal safety, if not very survival, of its members”). The relevant case law does not impose so high a standard – particularly here, where the issue is not

whether the Attorney General will be precluded from access to the documents at all but merely whether he should be required to keep them confidential as the parties expected.⁵

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT THAT COURTS SHOULD LIMIT PUBLIC DISCLOSURE OF DISCOVERY DOCUMENTS WHEN DISCLOSURE WOULD THREATEN FIRST AMENDMENT ASSOCIATIONAL PRIVACY RIGHTS

Numerous cases from Minnesota and elsewhere confirm that the Court of Appeals was absolutely right in concluding that material implicating First Amendment and associational privacy concerns is entitled to appropriate protection in discovery, including protection from public disclosure after the documents have been produced, in appropriate circumstances.

These cases rest on well-established constitutional principles. The Supreme Court has established that the First Amendment⁶ guarantees individuals and groups the right to

⁵ The Court of Appeals also erred by determining that the documents are not entitled to protection under the MGDPA once the Attorney General decides to attach them to a complaint. A.18. That conclusion is contrary to case authority (cited in GSK's brief) providing that a document does not become part of a "court record" as required by the statute until it is used in a trial or become part of the basis for a court decision that determines substantive legal rights of the parties. GSK Br.p.22-24. It is also contrary to the settled presumption, described by this Court in its order remanding the case to the Court of Appeals for consideration on the merits and accepted by the United States Supreme Court, that "documents produced as discovery are not presumed to be public." A.88. *Accord Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

⁶ 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

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 *Metro. Rehab. Servs. 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 association for the advancement of beliefs and ideas is an inseparable aspect of ... freedom of speech.

Id. at 460-61 (citations 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).

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 even 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

for a redress of grievances.” It is applicable to the states by operation of the Fourteenth Amendment.

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 areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.").⁷

⁷ *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); *Lubin v. Agora*, 882 A.2d 833, 844-47 (Md. 2005); *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 397 (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 discovery of association membership lists, contributor lists, and past and present political activities of members); *ETSI Pipeline Project v. Burlington N., 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, 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

Courts also do not hesitate to issue protective orders requiring that the information produced in discovery remain confidential when its disclosure would threaten First Amendment associational privacy rights. *E.g., 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). The Court of Appeals, in *Caucus Distributors, Inc. v. Commissioner of Commerce*, 422 N.W.2d 264, 267-68 (Minn. Ct. App. 1988), 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), this Court recognized that entry of a protective order limiting disclosure of witness eyewitness statements would be appropriate if the trial court, after reviewing the

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) (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).

statements in camera, concluded that the need for the discovery outweighed the privacy interests of the witnesses.

II. THE COURT OF APPEALS ERRED IN REVERSING JUDGE ALBRECHT

Notwithstanding its recognition that Minnesota courts may employ protective orders to “protect the freedom of association,” A.21, the Court of Appeals reversed the district court. Its decision is based on several substantial errors, including those detailed below.

A. The Court of Appeals Erred by Finding No Record Evidence Supporting The District Court’s Exercise of Discretion

The Court primarily erred by overlooking or ignoring the record evidence from PhRMA and GSK that supported the district court’s exercise of its discretion, stating flatly that “[t]he record is devoid of any evidentiary support for ... the position” that PhRMA’s documents implicate a First Amendment associational privacy interest.” A.22.

To the contrary, there was substantial evidence in the record supporting the district court’s exercise of discretion, including (1) its own *in camera* review of the documents and their contents; (2) the declaration submitted by PhRMA’s Bruce Kuhlik; and (3) the declaration submitted by GSK’s Janie Kinney. Mr. Kuhlik’s declaration is described above and may be found in the Appendix at A.105-108; Ms. Kinney’s declaration is described in GSK’s brief (GSK Br.p.14) and may be found in the Appendix at A.101-104.

Both declarations detail the potential harm to PhRMA and its members and the chilling effect on future communications and political advocacy if the documents are made public.

Specifically, this evidence shows that PhRMA and its members would be substantially harmed by release of the documents. PhRMA is a trade association whose core mission is to develop and advocate, on behalf of its research-based pharmaceutical company and biotech members, public policy positions designed to 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, tactics, and initiatives. A.106-107.

Free association and communication among PhRMA and its members and staff regarding such strategies and initiatives are absolutely necessary for PhRMA to perform its mission. Indeed, as a trade association, PhRMA can develop and implement public policy advocacy positions effectively *only* by communicating in a candid and open manner with its members. As Mr. Kuhlik's declaration and other record evidence

demonstrate, 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, free from the expectation that the mere demand for such documents in an investigation would lead to the public release of these deliberations. If PhRMA's documents regarding actual or potential legislative priorities, strategies, and tactics are made public, PhRMA and its members understandably would be reluctant to engage in a full and candid exchange of policy views. 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 because of fear of public disclosure of these formative discussions, policy makers 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 policy deliberations on actual or potential advocacy priorities and strategies 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. With respect to PhRMA in particular, which is not even a defendant in the Attorney General’s lawsuit, there can be no countervailing considerations requiring release.

B. The Court of Appeals’ Reasoning Is Flawed In Several Other Respects

As set out in detail in GSK’s brief, the Court of Appeals also erred in several other important respects when it declined to find that continued confidentiality of the PhRMA documents was appropriate under First Amendment associational privacy principles:

First, the Court applied a *de novo* standard of review, on the basis that “the factual basis of the confidentiality of any specific document is not before us,” so “this appeal addresses legal, not factual, disputes.” A.12. To the contrary, the continued confidentiality of specific documents – including the eleven PhRMA documents – *was* before the district court, which inspected them *in camera* before it ordered that the State should continue to keep them confidential. Moreover, as GSK’s brief explains, issues related to public disclosure of judicial documents are best left to the district court’s

discretion and are governed by an abuse of discretion standard. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 206 (Minn. 1986); *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001).

Second, the Court of Appeals erred by suggesting that merely naming a party as a defendant in a complaint abrogates First Amendment associational privacy rights and compels public disclosure of discovery documents. A.21 (“First Amendment protections do not extend as a shield to keep unlawful activity in the dark”).

With respect to PhRMA, that reasoning does not even apply, because the State has not even named PhRMA as a defendant in its complaint. More broadly, there is no legal support for the proposition that a mere allegation of participation in an antitrust conspiracy permits public disclosure of confidential discovery documents. The sole case the Court of Appeals cited, *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998), involved an entirely different factual scenario, in which there was a prior court determination of illegal activity: the defendants 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.

In fact, further demonstrating that public release of the documents should not be premised on a simple allegation of involvement in an unlawful conspiracy, the PhRMA documents could not form the basis for any enforcement action by the Attorney General in any event. In the first instance, they all reflect activities that fall squarely within the

scope of *Noerr-Pennington* protection.⁸ It is black-letter law that joint actions intended to influence legislative, administrative, judicial, or executive decision-making – like the discussions and actions at issue in the eleven PhRMA documents – are immune from liability 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. Moreover, an antitrust claim is not viable when the trade restrained is illegal, as is the case with the importation of Canadian drugs. *See In re Canadian Import Antitrust Litig.*, 385 F.Supp.2d 930.

Moreover, 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.

Third, the Court of Appeals also reasoned, incorrectly, that commercial actors who “associate purely for financial gain” do not “come under the umbrella of First

⁸ The Court of Appeals’ suggestion that GSK and PhRMA have relied on the *Noerr-Pennington* doctrine as an outright bar to producing or disclosing materials (A.19) misses the mark. The parties argue instead that the fact that their petitioning activities are protected from liability by *Noerr-Pennington* is a substantial factor weighing in favor of continued confidentiality of the documents notwithstanding the fact that the Attorney General alleges that they are evidence of an unlawful conspiracy, because the doctrine and its operation make it unlikely that the Attorney General will be able to establish an antitrust violation.

Amendment protection.” A.21. However, PhRMA’s association with its members to develop and implement a legislative strategy as evidenced in the eleven PhRMA documents was *not* “purely for financial gain.” PhRMA’s advocacy focuses primarily on the health of the American consumer, supporting public policy positions designed to ensure discovery and development of important new medicines for patients. A.105. Certainly PhRMA’s members are for-profit companies, but it is incorrect that the *only* reason for which they associate and engage in public policy advocacy activities is profit. It is well-recognized that trade associations promote competition by gathering and disseminating industry information, and for-profit companies’ “participation in trade associations is a legitimate activity under antitrust laws, even when competitive information is discussed during those meetings.” *Aguilar v. Atlantic Richfield Corp.*, 78 Cal.App.4th 79, 150 (2000), *aff’d*, 25 Cal.4th 826 (2001).

As a matter of *law*, moreover, corporations are entitled to the same First Amendment and associational privacy rights as individuals. “[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. Thus, political speech and the right to associate to develop and advocate views and positions is protected regardless of the speaker’s views or identity. In *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978), for instance, the Court held explained that First Amendment’s protection of the free discussion of governmental affairs was “indispensable” even if the speech “comes from a corporation rather than an individual.” *Id.* at 776-77 (“The inherent worth of the

speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual”). See GSK Br.p.34-35 (citing other cases).

Finally, the Court suggested that PhRMA and GSK could not meet the applicable standard for maintaining discovery documents as confidential in order to protect associational privacy rights because they did not demonstrate that they or their members faced “harsh retaliation,” including threats to their “personal safety” or “very survival” if the documents were made public A.21-22. Contrary to the holding of the Court of Appeals, the correct standard is not so high. The cases that the Court of Appeals cited all related to the question whether the documents or information should be disclosed in discovery at all, and even those cases typically use a “balancing” test to assess whether the need for the discovery is outweighed by the threat of chilling First Amendment protected activity. See, e.g., *Adolph Coors Co. v. Wallace*, 570 F.Supp. 202, 205 (N.D. Cal. 1983). 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.” Significantly, the court did *not* require a demonstration that “harsh retaliation,” including threats to life or limb, was possible before preventing disclosure. It reasoned instead that disclosure was inappropriate because it “might make the plaintiff, or future plaintiffs, reluctant to accept the support of unpopular groups,” and because the supporters themselves “might

have a desire for anonymity” for “various reasons.” This is a far cry from the standard articulated by the Court of Appeals.

Moreover, Rule 26 protection is routinely granted to protect privacy rights, and Rule 26 does not require a threat to personal safety to limit disclosure. To the contrary, it permits courts to limit discovery or impose protective orders for “good cause,” including “to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” Minn.R.Civ.P. 26.03. *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”); *Miscellaneous Docket Matter No. 1 v. Miscellaneous 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”). *Accord 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).

It is particularly inappropriate to apply the stringent standard imposed by the Court of Appeals to a third party, like PhRMA, which is not even a party in the litigation at issue. *See Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 (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

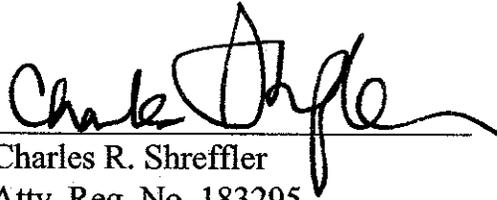
equation”); *Britt*, 574 P.2d at 775 (recognizing importance of protecting non-parties’ associational privacy rights from discovery).

CONCLUSION

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

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Respectfully submitted,



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

The undersigned certifies that this *amicus* brief contains 6688 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 2003, the word processing system used to prepare the brief.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).