

In The  
Supreme Court of the United States

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NATSO, INC., ET AL.,

*Petitioners,*

v.

3 GIRLS ENTERPRISES, INC., ET AL.,

*Respondents.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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**MOTION OF THE RUTHERFORD INSTITUTE  
FOR LEAVE TO FILE AN *AMICUS CURIAE*  
BRIEF AND *AMICUS CURIAE* BRIEF  
IN SUPPORT OF PETITIONERS**

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No. 11-350

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**MOTION OF THE RUTHERFORD INSTITUTE  
FOR LEAVE TO FILE AN AMICUS CURIAE  
BRIEF**

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.2(b), for leave to file an *amicus curiae* brief in support of the Petitioners in the above-styled case presently before this Court on a Petition for Writ of Certiorari.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of the parties to this case, but consent was withheld by the Respondents. The Rutherford Institute also avers that it provided counsel of record to the parties with notice of the intent to file an *amicus curiae* brief

more than 10 days prior to the due date of this brief pursuant to Sup. Ct. R. 37.2(a).

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in protecting the civil liberties of associations formed for political purposes from interference and infringement. The issues presented in this case, the extent of protection afforded to confidential information of associations regarding actions connected to the right to petition the government and whether an order mandating disclosure is immediately appealable, are issues with great ramifications for First Amendment freedoms. It is crucial that the right to associate for political purposes and to petition the government be recognized and provided sufficient “breathing room.”

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Whether a First Amendment objection to a federal district court discovery order requiring the production of private political communications and petitioning strategies by trade associations and their members falls within the *Cohen* collateral order or *Perlman* doctrines of appellate jurisdiction, or whether a timely objection to such an order may be raised on appeal only via an extraordinary petition for writ of mandamus.
2. Whether a district court order compelling trade associations and their members to disclose private political communications and petitioning strategies to their political opponents without limitation has so self-evident a chilling effect on First Amendment rights as to trigger First Amendment scrutiny without the need for any additional evidentiary showing.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because the lower court decision fails to afford adequate protection to the freedom of association and right to petition the government set forth in the First Amendment. The Institute urges the Court to grant the petition so that uncertainty is

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<sup>1</sup> No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission. *Amicus curiae* provided counsel of record to the parties with notice of its intent to file an *amicus curiae* brief more than 10 days prior to the due date of this brief.

resolved regarding the scope of an association's right to maintain the confidentiality of activities in pursuit of its political goals and which constitute core communications in exercise of its right to petition the government.

### **SUMMARY OF THE ARGUMENT**

The order at issue in this case requiring the Petitioners to divulge confidential communications regarding their lobbying on a matter of public interest presents a grave threat to the right to petition the government set forth in the First Amendment to the United States Constitution. That right is clearly implicated in this case in light of this Court's *Noerr-Pennington* doctrine jurisprudence which establishes immunity from anti-trust liability for petitioning activities by trade associations. It is precisely that kind of confidential communications related to lobbying and legislative activity that is sought under the order affirmed by the court of appeals.

In affirming the order, the court of appeals wholly failed to give adequate weight to the First Amendment interests at stake in at least two ways. First, it refused to find that there is a self-evident chilling effect on the right to petition the government when this kind of confidential information is sought, placing it in conflict with decisions from other courts. Second, it treated the request for First Amendment-protected materials as a "run-of-the-mill" discovery request, placing on the Petitioners the burden of demonstrating a justification for refusing to disclose the information sought. This Court should grant the

petition to establish that the First Amendment interest at stake with this kind of discovery request require greater protection for the targets.

## ARGUMENT

The instant case and the court of appeals' decision that the Petitioners' confidential communications regarding lobbying activities on a matter of public importance have grave implications for a fundamental aspect of the First Amendment—the right “to petition the government for a redress of grievances.” This Court has recognized “this right to petition as one of ‘the most precious of the liberties safeguarded by the Bill of Rights,’ *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and ha[s] explained that the right is implied by ‘[t]he very idea of a government, republican in form,’ *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).” *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-525 (2002). The right to petition is cut from the same cloth as the other rights protected by the First Amendment, *McDonald v. Smith*, 472 U.S. 479, 482 (1985) and stands on equal footing with those other rights for purposes of judicial enforcement and protection. See *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 911-12 (1982) (the protected activities of speech, association and petition, while not identical, are inseparable).

Of particular relevance here, given the facts and posture of this case, is this Court's recognition that the guarantee of the right to petition the government is broad enough to protect concerted activity by industry groups aimed at legislative or

administrative action even if that activity is aimed at protecting narrow economic interests. Thus, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), it was recognized that anti-trust liability under the Sherman Act may not be premised upon joint activity aimed at affecting legislation or executive action even if that action would impose a restraint on trade:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly

unjustified in this case in view of all the countervailing considerations enumerated above.

*Noerr Motor Freight, Inc.*, 365 U.S. at 137-138.

The immunity, which was further fleshed-out in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), establishes that the right of the people to inform their representatives of their desires regarding the passage and enforcement of laws cannot be the basis for trade-related liability, regardless of the intent or purpose of the petitioning activity. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 58 (1993). Any doubt that the immunity is based upon the First Amendment was put to rest by the holding in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), that “it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.”

The *Noerr-Pennington* doctrine is important here given that the association and communications the Respondents seek access to with their broad discovery request (Petition at 7) relate to trade association relationships. *Noerr* involved a Sherman Act claim against a trade association of railroads, *Noerr*, 365 U.S. at 129, and this Court found the joint activity of this association petitioning the

government constitutionally immunized. That this kind of commerce-driven petitioning is within the ambit of the First Amendment was reaffirmed recently by *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 907-09 (2010), which held that the First Amendment protects corporations to petition legislative and administrative bodies, and to do so cooperatively (citing *Noerr*, 365 U.S. at 137-38 and *California Motor Transport*, 404 U.S. at 510-11).

Notwithstanding the First Amendment rights implicit in the *Noerr-Pennington* doctrine, the court of appeals' decision did not address the discovery order at issue here as one implicating or chilling the Petitioners' right to petition the government. Instead, the lower court viewed this case as primarily, if not only, implicating the right of association. *In re Motor Fuels Temperature Sales Practice Litigation*, 641 F.3d 470, 479 n.5 (10<sup>th</sup> Cir. 2011). Thus, in framing the First Amendment right at issue the lower court referred only to the privilege "to maintain private associations[.]" *Id.* at 479. More to the point, in describing the showing the Petitioners were required to make to support the application of a privilege against discovery, the court asserted that the Petitioners had not shown how disclosure "will hinder their associational rights" or "how the disclosure of information would degrade their ability to associate." *Id.* at 489-90.

The court of appeals failed to give sufficient weight or consideration to the right to petition underlying the *Noerr-Pennington* doctrine and thereby placed itself in conflict with other decisions

deciding the right of a party to litigation to resist discovery demands for communications relating to lobbying and other petitioning activities. In particular, the court below erred in shifting to the Petitioners, the target of a discovery request broadly seeking material related to constitutionally-protected petitioning activities, the heavy burden of demonstrating that compliance with the request would burden their First Amendment rights. This is inconsistent with the recognition in other cases that a request for confidential communications relating to associations formed for political reasons presumptively chills the exercise of First Amendment rights meriting judicial protection. See *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring) (“In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority.”).

For example, in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9<sup>th</sup> Cir. 2010), the court granted a protective order against a discovery request that broadly sought internal campaign communications relating to campaign strategy and advertising from a group supporting a state ballot proposition. In holding the material privileged under the First Amendment, the court noted the “self-evident conclusion that important First Amendment interests are implicated by the plaintiffs’ discovery request.” *Id.* at 1163. The court also pointed out that “[t]he potential chilling effect on political participation and debate is therefore substantial, even if the district court’s error were eventually

corrected on appeal from final judgment.” *Id.* at 1158.

Similarly, in *Wyoming v. U.S. Dept. of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002), the court refused to enforce a subpoena issued to third parties in an action challenging a federal regulation. The subpoena sought discovery of, *inter alia*, communications the third parties engaged in among themselves and with governmental authorities concerning the regulation. In upholding the objection to the subpoena based upon the First Amendment rights of free association and to petition the government, the court stressed that the subpoena would intrude upon the essence of the First Amendment—the freedom to protest policies to which one is opposed. It is not only association membership lists that are protected from disclosure by the First Amendment, but also communications by and among group members relating to their political activities. Compelling release of such information has a potential for chilling the free exercise of political speech. *Id.* at 454 (citing *Fed. Election Comm’n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981)).

A privilege from disclosure was specifically linked to the right to petition recognized under the *Noerr-Pennington* doctrine in *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982), *vacated as moot*, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986). There, the court considered a civil investigative demand for information that was conceded to be protected by *Noerr-Pennington*, *i.e.*, protests filed with

administrative agencies and contacts with government officials. After noting the long history of precedent recognizing the harm to First Amendment interests arising from forced disclosure, whether through a governmental demand or through a private civil discovery request, of the activities of associations formed for political purposes, the court ruled that there is no doubt that petitioning the government is central to First Amendment values. “Although the balance has been struck differently in different situations, there is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information.” *Id.*, 537 F. Supp. at 810. “[W]here information about first amendment activities is sought, the usual standards applied to the enforcement of investigative subpoenas must be modified to give more protection to first amendment values.” *Id.* (citing *Machinists Non-Partisan League*, *supra*). The court went on to hold that “some harm to first amendment values in this case can be presumed[.]” *Australia/Eastern U.S.A.*, 537 F. Supp. at 812.<sup>2</sup>

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<sup>2</sup> Although the court referred to the contrary decision in *Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50 (4<sup>th</sup> Cir. 1981), which ruled that the *Noerr-Pennington* doctrine was not a basis for resisting a civil discovery request. However, the *Australia/Eastern U.S.A.* decision pointed out that the *Carolina Power* decision “rests on its unique facts” and should not be read as a precluding consideration of the harm to the First Amendment right to petition government in considering whether to order compliance with a discovery request. *Australia/Eastern U.S.A.*, 537 F. Supp. at 810. Moreover, to the extent *Carolina Power*

These principles were applied more recently in *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, 2007 WL 852521 (D. Kan. March 16, 2007). As in the instant case, the subpoena at issue broadly sought communications related to lobbying efforts by a trade association. The court initially ruled that the trade association's "advocacy for modification of Kansas Laws concerning general and speciality [sic] hospitals would appear to be a type of political or economic association that would also be protected by the First Amendment privilege." *Id.* at \*3 (citing *Noerr* and *Pennington*, *supra.*). It then went on to reject the claim of the party seeking the information that the trade association had not shown its First Amendment interests would be infringed by production of the requested materials:

Here, the attempt to require production of KHA's "evaluations of possible legislation and legislative strategy" . . . is the type of action that would appear to interfere with KHA's internal organization and with its lobbying activities, and therefore would have a "chilling effect" on the organization and its members.

*Heartland Surgical Specialty Hospital, supra.*, at \*4.

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conflicts with the *Australia / Eastern U.S.A.* decision, this shows an uncertainty in the controlling law that warrants granting the petition. Sup. Ct. R. 10.

The decision below is in conflict with these and other cases which have found that broad discovery requests for information regarding an association's petitioning activity have an inherent chilling effect on First Amendment rights. See also *Britt v. Superior Court of San Diego County*, 20 Cal. 3d 844, 855, 574 P.2d 766, 773 (1978) ("the authorities establish that private association affiliations and activities such as those at issue here are 'presumptively immune from inquisition[.]'"). Indeed, a chill on an association's petition right is even more likely in cases such as the instant one where it is the discovery target's political opponent which seeks disclosure of the target's political communications. This problem is exacerbated by the fact that parties subject to a discovery request have an ongoing duty to supplement disclosures. See Fed. R. Civ. P. 26(e). A party which is subject to this duty will likely be deterred from engaging in further petitioning activities if it knows that the substance of those activities must be revealed to persons on the other side of an ongoing political debate.

The lower court's failure to appreciate the self-evident chill upon petitioning rights resulting from forced disclosure of an association's confidential communications led it to provide inadequate protection to those rights. It treated this case as a run-of-the mill discovery dispute and placed the burden on Petitioners to justify the need for a protective order. This is contrary to the solicitude normally afforded First Amendment rights through the adoption of substantive rules and procedures that protect those rights and allow them to thrive. As pointed out in *N.A.A.C.P. v. Button*, 371 U.S. 415,

433 (1963), “First Amendment freedoms need breathing space to survive.”

With respect to the right to petition the government recognized under the *Noerr-Pennington* doctrine, this “breathing space” is allowed through rules limiting litigation actions which have the potential to chill those rights. Thus, in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9<sup>th</sup> Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), the court required that a complaint alleging that petitioning activities facially protected from anti-trust liability under the *Noerr-Pennington* doctrine be subject to dismissal absent the allegation of specific facts showing that the actions of the defendant fall within the “sham” exception to that doctrine. Notwithstanding the general rule against dismissing claims unless it appears “beyond doubt” that the plaintiff cannot recover, the court ruled that an action alleging liability based upon petitioning activity is not an ordinary case. After noting that an action like this can be a most potent weapon to deter the exercise of First Amendment rights, the court wrote as follows:

The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. See, e. g., *Time, Inc. v. Hill*, 385 U.S. 374, 387-91 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 267-83 (1964); *N.A.A.C.P. v. Button*, 371 U.S. 415, 431-

33 (1963). Because we think that similar values are endangered in this case, we hold that in order to state a claim for relief under the ["sham"], a complaint must include allegations of the specific activities, not protected by *Noerr*, which plaintiffs contend have barred their access to a governmental body. The deficiencies of McDonald's amended complaint in this regard are evident from what we have said above. Dismissal of that complaint was proper.

*Franchise Realty Interstate Corp.*, 542 F.2d at 1082. The court went on to hold that "for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.* at 1083.

The same reasoning should apply to discovery requests and third-party subpoenas seeking confidential information relating to an association's petitioning of the government. The minimal relevancy standard normally applied under Fed. R. Civ. P. 26 should not control when there is an evident danger to First Amendment rights. Safeguards are traditionally imposed to assure the robust exercise of the fundamental rights of freedom of speech and to petition government. The court of appeals' failure to fully appreciate the threat to the First Amendment posed in this case led it to adopt a procedure that fails to assure discovery is not used to inhibit the right to petition.

## CONCLUSION

For the reasons set forth above, amicus curiae urges this Court to grant the petition for writ of certiorari for the purpose of establishing contours and standards for the First Amendment privilege from discovery and disclosure where the information sought is core information relating to the freedom of association and the right to petition the government.

Respectfully submitted,

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