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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2026-CP-40-01257 & 2023-CP-40-06111

Debra McAndrew Barnett, Plaintiff- Respondent,

v.

Johnson & Johnson; Kenvue, Inc., et. al. Defendants

Of which Johnson & Johnson and Kenvue, Inc. are the Petitioners,

And

Andrew T. Gerken, as Personal Representative of the
Estate of Anna Marie L. Gerken,
Deceased..... Plaintiff-Respondent,

v.

Johnson & Johnson; Kenvue, Inc., et. al., Defendants,

Of which Johnson & Johnson and Kenvue, Inc. are the Petitioners.

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

South Carolina imposes clear “limits” on discovery, including that the requested information must actually be relevant to a “central issue” being litigated in the case and not interfere with any applicable privileges. *See Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’t Control*, 387 S.C. 380, 387-89, 692 S.E.2d 920, 924-25 (2010). If a circuit court is “unwilling to recognize and enforce” these clear limitations, the proper course is for this Court to immediately “vacate” the improper discovery requests rather than force the responding party to endure the burdens of such “abusive” discovery. *Id.* Here, the Circuit Court overseeing two different talc cases¹ violated these limits by compelling broad discovery sought by Plaintiffs regarding lobbying by Petitioners Johnson & Johnson (“J&J”) and Kenvue Inc. (“Kenvue”)

¹ There are two separate captions for this Petition, because Plaintiffs served the deposition notices under two different, separately-captioned cases.

(collectively, “Petitioners”).² In ordering discovery on this attenuated topic, the Circuit Court breached this Court’s clear limits on discovery in several key respects.

First, the ordered discovery is plainly irrelevant to the “central issue” in these cases—i.e., whether J&J’s cosmetic talc products contained asbestos, whether they caused Plaintiffs to develop mesothelioma, and whether Petitioners failed to warn them of this purported risk. *See Oncology*, 387 S.C. at 387. The regulatory actions to which the lobbying was directed all began *after* Plaintiffs were allegedly injured and the talc products were *withdrawn* from the market. Any such lobbying, therefore, has no pertinence to the merits of Plaintiffs’ claims. Moreover, Plaintiffs already have at their disposal extensive information regarding lobbying, *including 19,000 documents on regulatory communications and about 69,000 on talc testing*. The only conceivable reason why Plaintiffs are demanding—and the Circuit Court ordered—a corporate representative deposition on this subject is to harass Petitioners with needless discovery.

Second, discovery into Petitioners’ lobbying activities is highly improper because it would violate the *Noerr-Pennington* doctrine, and unfairly penalize them for exercising their First Amendment rights. In holding otherwise, the Circuit Court relied on a dated Fourth Circuit decision that construed *Noerr-Pennington* as “‘an exemption from antitrust liability,’” rather than a “bar to the discovery of evidence.” Order at 3 (quoting *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52-53 (4th Cir. 1981)). That narrow reading misapprehends a fundamental purpose of the doctrine, which is to avoid chilling a defendant’s constitutionally protected right to petition the government. *See Australia/Eastern U.S.A. Shipping Conf. v. United States*, 537 F. Supp. 807, 809 (D.D.C. 1982) (criticizing *North Carolina*’s cursory treatment of “‘chilling effect’ argument,” which it “dismissed” without any persuasive reasoning), *appeal dismissed as moot*, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986). The burdens of discovery are themselves highly disruptive, regardless of whether evidence is ultimately admitted at trial. Thus, allowing discovery would subvert the *Noerr-Pennington* doctrine, by discouraging defendants from lobbying for laws and regulations, “which is absolutely protected by the First Amendment.” Order on Pls.’ Mot. for Order Compelling Mktg. & Lobbying Documents at 9, *In re Uber Rideshare Cases*, No. CJC-21-005188 (Cal. Super. Ct. Feb. 6, 2024) (“Uber Order”) (Mot. Ex. 15). This Court should reach the same conclusion.

² Petitioner Kenvue Inc. is not even a proper party to these lawsuits, as it had no role in manufacturing or selling any talc products to which Plaintiffs/decedent were exposed.

Third, the ordered discovery also jeopardizes Petitioners’ rights under the attorney-client privilege and work-product doctrine. Given the pendency and potential for additional talc-related litigation, Petitioners had to carefully rely on the advice of their in-house and outside counsel in preparing and ultimately undertaking any lobbying efforts. The Circuit Court brushed this argument aside because Petitioners did not “specifically” identify any communications for which they would be claiming privilege. Order at 3. But that misses the point—i.e., that requiring Petitioners to cull through voluminous materials that will be overwhelmingly privileged would be an enormously onerous exercise in futility.

This Court’s immediate intervention is critical because the harms to Petitioners outlined above cannot be remedied through ordinary appellate channels. For one thing, Petitioners will only be able to appeal the Circuit Court’s erroneous discovery ruling in the event they lose at trial. But even if either Plaintiff prevailed on their claims, the damage to Petitioners’ rights will have already occurred, and it could not possibly be remedied by an ordinary post-judgment appeal. Moreover, the harms would extend beyond these two immediate cases to all talc litigation in this State. And writ review would also safeguard the integrity of South Carolina’s civil justice system. All of these concerns make writ review the proper vehicle for addressing the Circuit Court’s abuse of discretion.

In short, the Circuit Court’s ruling is not just erroneous; it endorses precisely the kind of “scorched-earth approach” to discovery that warrants this Court’s immediate intervention. *See Oncology*, 387 S.C. at 387-89. Accordingly, pursuant to Rules 245 and 240 of the South Carolina Appellate Court Rules, Petitioners respectfully urge the Court to vacate the Circuit Court’s October 2, 2026 discovery order denying in substantial part Petitioners’ Motion to Quash and for Protective Order.

FACTUAL BACKGROUND

A. Plaintiffs’ Claims

Plaintiff Debra Barnett alleges that she developed mesothelioma from asbestos exposure “from approximately the early 1950s to 2009.” Compl. ¶¶ 29, 178, 181. She attributes that exposure in part to the work of her father, a welder, from the early 1950s to 1973; and her husband, a builder and laborer, from 1972 through 2009. *Id.* ¶¶ 179-81. Ms. Barnett further claims that she “was exposed to asbestos and/or asbestos-containing cosmetic talc products and body talc products through her personal use, and her family’s use, of talcum products throughout her life.” Barnett

Interrogatory Responses at 4 (Mot. Ex. 2). She conceded at her deposition that she only used Petitioners' talc products until "the mid '90s." Barnett Dep. 62:23-63:3 (Mot. Ex. 3).

Plaintiff Andrew Gerken alleges that his late wife, Ms. Marie Gerken, developed mesothelioma as a result of asbestos exposure. Am. Compl. ¶ 2. Specifically, he claims that Ms. Gerken's "exposure to asbestos and/or asbestos-containing talcum powder products and talc make-up products at various times in her life, from her birth in 1944 to approximately 2023," caused Ms. Gerken's mesothelioma and subsequent death. *Id.*

Accordingly, neither Ms. Barnett nor Ms. Gerken claims to have been exposed to J&J's cosmetic talc products after 2023.

Based on these allegations, Plaintiffs both assert claims against Petitioners and numerous other defendants, alleging that they are responsible for Ms. Barnett's and Ms. Gerken's development of mesothelioma. Both Plaintiffs' claims against Petitioners sound principally in negligence, strict liability, and fraud. Trial in the *Gerken* matter is scheduled to commence on November 9, 2026.

B. Petitioners' Extensive Discovery Efforts

Plaintiffs in the two underlying cases (*Gerken* and *Barnett*) allege that they or their decedent developed mesothelioma as a result of their use of cosmetic talc products. Although Petitioners strongly dispute this allegation, they have provided Plaintiffs with approximately 260 *days* of deposition testimony from current and former employees and/or corporate representatives, as well as almost 2.5 *million pages* of documents and data collected from more than 200 *individuals and other sources*. In *Gerken*, Petitioners also produced case-specific discovery including yet another corporate representative deposition in September 2025 by Dr. Edwin Kuffner covering 40 individual topics and spanning two days of testimony. *See generally* 9/4/2025 *Gerken* Am. Notice (Mot. Ex. 4). That deposition notice was also accompanied by 60 additional requests for production of documents. *See id.*

As relevant to the instant Petition, the discovery produced to date already includes extensive information regarding lobbying, including 19,000 documents on regulatory communications and about 69,000 on talc testing.

C. Plaintiffs' Notice Of Deposition

Despite the wealth of discovery at their disposal, on August 17, 2026, Plaintiffs served two additional corporate representative deposition notices and document requests on Petitioners.

Plaintiffs then served amended notices on September 2, 2026. As further detailed below, the notices seek extensive and burdensome discovery—including both document productions and yet more corporate representative deposition testimony regarding post-2023 regulatory actions in the United States and in Europe, as well as Petitioners’ lobbying efforts with respect to such actions (collectively, the “Lobbying Topics”).³

United States Government Actions. Plaintiffs seek corporate representative testimony and production of documents pertaining to recent regulatory actions in the United States, including the Consolidated Appropriations Act in 2023, the Modernization of Cosmetics Regulation Act of 2022 (“MoCRA”), the FDA proposed rule entitled “Testing Methods for Detecting and Identifying Asbestos in Talc-Containing Cosmetic Products” (which was subsequently withdrawn), and a May 20, 2025 event titled “Expert Panel on Talc”—and Petitioners’ alleged lobbying efforts regarding those actions. *See* Kenvue Not. at 5 (Mot. Ex. 1) (Topics 1-7); *id.* at 8 (Document Requests 1-4); J&J Not. at 5 (Mot. Ex. 5) (Topics 1-7); *id.* at 8-9 (Document Requests 1-4, 15).⁴

Congress enacted the Consolidated Appropriations Act, 2023, which included MoCRA. *See* PL 117-328. The implementation date for major MoCRA provisions began to take effect on December 29, 2023. Within MoCRA is a directive to the FDA to issue regulations to establish standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products. Accordingly, on December 27, 2024, the FDA published a proposed rule entitled “Testing Methods for Detecting and Identifying Asbestos in Talc-Containing Cosmetic Products,” which purported to establish a methodology for testing cosmetic talc for asbestos. *See* 89 Fed. Reg. 105490-01 (Dec. 27, 2024). The proposed rule was never finalized, and on November 28, 2025,

³ The notices define the terms “you”/“your” so broadly as to effectively (and improperly) expand Plaintiffs’ discovery requests to encompass hundreds of J&J subsidiaries that are not even named as defendants in this case. *See* J&J Not. at 4 (“You” and “Your” defined to “mean responding party and all of its divisions, predecessors-in-interest, successors-in-interest, subsidiaries, parent companies, sister companies, joint ventures, partners and divisions thereof, including all current and former owners, employees, managers, officers, directors, agents, attorneys and any other person(s) acting upon its behalf.”). This alone highlights the overbroad and abusive nature of the notices. *See Tabanfar v. State Farm Gen. Ins. Co.*, No. 2:23-CV-00835-MRA-JC, 2024 WL 6077888, at *5 (C.D. Cal. June 14, 2024) (“sustain[ing] Defendant’s objection to the definition of ‘YOU’/‘YOUR’” and “agree[ing] that it is appropriate to limit such term to State Farm itself”).

⁴ Plaintiffs also seek the production of documents pertaining to “testing done by the FDA of talc products in 2009 and 2010,” “the 1993 FDA Talc Symposium” and “the dangers of talc as relayed by the FDA.” J&J Not. at 8-9 (Document Requests 12, 14, and 20). All of these documents have already been produced to Plaintiffs as part of the approximately 19,000 regulatory communication documents included in Petitioners’ document production.

the FDA formally withdrew it. *See* 90 Fed. Reg. 54603-01 (Nov. 28, 2025) (to be codified at 21 C.F.R. pt. 730).

On May 20, 2025, the FDA held a roundtable event titled “Expert Panel on Talc” (hereafter, the “Roundtable”).⁵ At the Roundtable, FDA Commissioner Martin Makary convened nine purported “experts”—including multiple paid plaintiffs’ experts in talcum powder litigation—to discuss talc safety. The discussion was a one-sided airing of Plaintiffs’ litigation theories, with no defense perspective presented, no opportunity for public comment, and no resulting official FDA action. Nothing said at the Roundtable constitutes the official position of the FDA, and the FDA has taken no regulatory or enforcement action in connection with the Roundtable.

In response to the Roundtable, Dr. Andrey Korchevskiy and additional co-signatories prepared and sent a June 9, 2025 letter to Dr. Makary regarding the Roundtable. Although this letter was indisputably written some two years after Ms. Gerken’s alleged exposure to talc ended, Petitioners have nevertheless already produced discovery regarding the letter. At his September 2025 deposition, Dr. Kuffner testified that “it was Dr. Korchevskiy’s idea to write the letter” and “Dr. Korchevskiy [] determined who . . . he would like to invite to participate in the letter.” 9/10/2025 Kuffner Dep. 215:21-252:1 (Mot. Ex. 6).

Foreign Regulatory Actions. Plaintiffs also seek corporate representative testimony and documents pertaining to Petitioners’ alleged involvement with “any European health agency relating to its assessment of a potential ban on talc.” Kenvue Not. at 6 (Topic 15); J&J Not. at 6 (Topic 16); *id.* at 9 (Document Request 19). This is even more tangential to their claims because neither Ms. Gerken nor Ms. Barnett alleges that she was exposed to J&J’s cosmetic talc products in Europe.

D. Proceedings Below

On September 2, 2026, Petitioners moved to quash Plaintiffs’ deposition notices and for a protective order. As most relevant to this Petition, Petitioners sought to quash the Lobbying Topics on several independent grounds. On September 29, 2026, Plaintiffs responded to the motion and cross-moved to compel certain discovery. On October 2, 2026, the trial court issued an order denying Petitioners’ motion with respect to the Lobbying Topics.⁶ This Petition follows.

⁵ *See* FDA, FDA Expert Panel on Talc (May 20, 2025), <https://www.fda.gov/patients/fda-expert-panels/fda-expert-panel-talc-05202025>.

⁶ The Circuit Court granted Petitioners’ motion as to a variety of deposition topics and document requests relating to compensation of experts outside these litigations.

ARGUMENT

This Court has the “power to issue writs or orders of . . . certiorari” to “correct errors of law, particularly where a trial court exceeded its authority.” *State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638-39 (2023) (citing Const. Article V, section 5 and S.C. Code § 14-3-310). “Although [this Court] will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist.” *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 542 n.2, 503 S.E.2d 445, 447 n.2 (1998)

A trial judge’s discovery rulings “will not be disturbed by an appellate court absent a clear abuse of discretion.” *Oncology*, 387 S.C. at 387 (internal citations omitted). But discovery has “limits, which we see trial courts generally unwilling to recognize and enforce.” *Id.* Moreover, “‘discovery practice’ has become a cottage industry and the merits of a claim are being relegated to a secondary status.” *Id.* at 388. Accordingly, this Court has repeatedly held that “exceptional circumstances” exist, warranting a writ, where a trial court orders discovery exceeding the permissible scope of discovery under South Carolina Rule of Civil Procedure 26. *See, e.g., Oncology*, 387 S.C. at 389 (vacating discovery order where “a party abuse[d] discovery” by serving “requests [that were] not remotely relevant”); *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (“exceptional circumstances which warrant the issuance of a writ of certiorari” existed where trial court ordered discovery exceeding the scope of Rule 26); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 480 n.13, 674 S.E.2d 154 (2009) (granting writ and reversing trial court’s discovery order because the proponent failed “as a matter of law to meet the applicable standard” to obtain discovery). This Court has also exercised its writ authority to resolve recurring “questions of law concerning issues of significant public interest[.]” *In re Breast Implant*, 331 S.C. at 543 n.2 (“Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter.”).

All of those concerns are present here. The relevance, First Amendment, and attorney-client privilege arguments raised in this Petition involve pure questions of law, and they lie at the foundation of the State’s civil justice system. Moreover, as this Court is aware, Richland County has become a magnet for talc litigation. Thus, absent this Court’s immediate intervention, the Circuit Court (which oversees most of those cases) will likely continue to endorse Plaintiffs’ “scorched-earth approach” to discovery, *see Oncology*, 387 S.C. at 389, transforming the global

talc litigation into an unfair and burdensome foray into Petitioners’ constitutionally protected lobbying activities and confidential communications with their counsel.

For these reasons, discussed further below, this case presents “exceptional circumstances” justifying the exercise of the Court’s writ authority. “A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues,” *In re Breast Implant*, 331 S.C. at 543 n.2, 545 n.3; rectifying “abusive” practices that are distorting the judiciary and the fair administration of justice, *see Oncology*, 387 S.C. at 387-88; and preventing irreparable harm to Petitioners that they could not adequately remedy through an ordinary appeal, *see Hollman*, 384 S.C. at 577.

I. THE CIRCUIT COURT EXCEEDED ITS AUTHORITY IN ORDERING THE REQUESTED DISCOVERY.

The Circuit’s Court’s order abused the court’s discretion because: (1) the information is irrelevant; (2) the discovery would unfairly chill Petitioners’ rights under the First Amendment to the U.S. Constitution; and (3) the discovery would invade the attorney-client privilege and work-product doctrine.

A. The Ordered Discovery Is Not Relevant.

First, Petitioners’ lobbying of U.S. and European government and regulatory agencies from 2023 to present is irrelevant. The Circuit Court did not even address this threshold requirement, which alone is dispositive.

South Carolina Rule of Civil Procedure 26(b)(1) limits discovery only to matters that “relate[] to [a] claim or defense” in the litigation. As this Court has reaffirmed, to be discoverable, “information must be *specifically relevant to the issues involved in the litigation*, not merely relevant to the subject matter of the litigation.” *Hollman*, 384 S.C. at 578-79 (emphasis added). This Court has further clarified that the requested information must bear on a “central issue” in the litigation. *Oncology*, 387 S.C. at 388.

Plaintiffs’ claims are principally for negligence and products liability. The relevant issue for these claims is whether Petitioners’ cosmetic talc products *caused* Plaintiffs/decedent to develop mesothelioma. Whether and to what extent Petitioners lobbied the government regarding talc safety or talc testing—at any point in time—has no conceivable bearing on that question. Even as to Plaintiffs’ fraud claims, the relevant question is whether Petitioners made material misstatements that Ms. Gerken or Ms. Barnett relied on. *See Hollman*, 384 S.C. at 579-80 (listing elements of fraud). Lobbying during the time periods Ms. Gerken or Ms. Barnett were allegedly

using Petitioners’ products is therefore conceivably relevant to fraud, but *Petitioners have already produced such discovery*. By contrast, lobbying that occurred *after* Ms. Barnett’s and Ms. Gerken’s alleged exposures ceased (2023, at the latest) by definition is irrelevant because no statement made by Petitioners to the government during that time period could have been relied on by Ms. Gerken or Ms. Barnett in using the relevant products. Significantly, the discovery Plaintiffs requested and the trial court ordered unquestionably relates to that *later*, irrelevant time period—and the trial court entirely failed to offer any rationale as to how this discovery could be even remotely relevant. Far less did the Circuit Court address lobbying to European governments or regulatory agencies, which is doubly irrelevant because neither Ms. Gerken nor Ms. Barnett allegedly used Petitioners’ products in Europe.

This Court has not been shy about granting writs where trial courts order discovery into similarly irrelevant topics. That was exactly the situation in *Oncology*, where this Court inferred from the irrelevance of the discovery at issue that the propounding party had “abuse[d]” the discovery process. 387 S.C. at 389. Moreover, in *Oncology*, this Court took note of the fact that even the administrative agency below that had compelled the discovery had deemed it a “fishing expedition.” *Id.* at 386. This Court should place similar significance on the fact that the trial court here articulated no rationale as to how the discovery Plaintiffs seek is even remotely relevant.

Although this Court does not appear to have directly addressed the question, federal courts around the country have repeatedly held that discovery into a defendant’s lobbying activities is irrelevant to negligence, products liability, and even fraud cases. *See, e.g., UnitedHealthCare Servs., Inc. v. Team Health Holdings, Inc.*, No. 3:21-CV-364-DCLC-DCP, 2025 WL 3240962, at *14 (E.D. Tenn. May 16, 2025) (“The Court finds that Plaintiffs’ request for Defendants’ lobbying efforts does not make it more or less likely that Defendants defrauded Plaintiffs”), *appeal denied*, No. 3:21-CV-00364-DCLC-DCP, 2025 WL 3217033 (E.D. Tenn. Nov. 18, 2025); *Smith v. Life Invs. Ins. Co. of Am.*, No. 2:07-CV-681, 2009 WL 2045197, at *7 (W.D. Pa. July 9, 2009) (denying motion to compel discovery on lobbying activities because defendant’s lobbying in support of passage of laws was not relevant to plaintiff’s claims); *Primary Care Physicians Grp., P.C. v. Ledbetter*, 102 F.R.D. 254, 257 (N.D. Ga. 1984) (granting defendant’s motion for protective order regarding all documents related to its lobbying efforts because the information was “irrelevant and not calculated to lead to the discovery of admissible evidence”); *Shaffer v. Toyota Motor Corp.*, No. 5:22-cv-00151-R, 2024 WL 3682234, at *2 (W.D. Okla. Aug. 6, 2024) (denying

plaintiffs’ motion to compel because their discovery requests sought information pertaining to “unrelated lobbying efforts [which do not] have any bearing on the claims and defenses involved in this action, which concern an alleged design defect”).⁷ This Court should follow the overwhelming weight of authority on this topic.

In their briefing below, Plaintiffs contended that Petitioners’ lobbying “is relevant to show the J&J Defendants knew of the dangerous nature of their products and chose not to warn consumers.” Pls.’ Resp. at 13. At best, however, this would only establish that lobbying that occurred before or during Ms. Barnett’s and Ms. Gerken’s alleged exposures could be relevant—and Plaintiffs already have extensive discovery on earlier lobbying, as demonstrated by the several pages of their briefing spent reciting such evidence. *Id.* at 5-7. Indeed, Plaintiffs’ cited cases *confirm* that any post-2023 lobbying is *not* relevant. In *Wolfe v. McNeil-PPC, Inc.*, cited by Plaintiffs below, the court held that petitions submitted to the FDA in 1984 (a decade before plaintiff became ill) were “relevant to defendants’ knowledge regarding the safety of ibuprofen and the adequacy of its labeling.” No. 07-348, 2012 WL 38694, at *6 (E.D. Pa. Jan. 9, 2012) (cited in Pls.’ Resp. at 12). But the court *excluded* evidence that “was filed nearly a decade *after* plaintiff became ill” because such evidence “could not have put defendants on notice[.]” *Id.* at *5 (emphasis added). And Plaintiffs did not even claim (let alone establish) that lobbying in Europe is relevant. *See id.* at *7 (granting Defendants’ motion “to preclude plaintiff from introducing any evidence of foreign labeling materials and regulatory actions involving ibuprofen products”) (cited in Pls.’ Resp. at 12).

Plaintiffs also asserted in a conclusory fashion that the Lobbying Topics are relevant to their fraud and punitive damages claims. Pls.’ Resp. at 13. But as to fraud, as noted above, Plaintiffs do not explain how either Ms. Barnett or Ms. Gerken could possibly have used cosmetic talc in reliance on a misstatement made by Petitioners *after they admit their use of cosmetic talc products had ceased*, or a misstatement made to a regulator in Europe, where Plaintiffs do not live. Similarly, the notion that post-2023 and foreign lobbying are somehow relevant to punitive

⁷ Federal court decisions interpreting FRCP 26 are persuasive authority because South Carolina Rule of Civil Procedure 26 is worded very similarly. As this Court has consistently articulated, “since [the State’s] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure,” *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991); *see also James v. S.C. Dep’t of Transp.*, 393 S.C. 440, 451 n.13, 711 S.E.2d 919, 925 n.13 (Ct. App. 2011) (finding that the S.C. R. Civ. P. is “based on the comparable Federal Rule” and thus federal cases are persuasive authority) (quotations omitted).

damages is foreclosed by the longstanding precept (enshrined in South Carolina law and binding U.S. Supreme Court precedent) that due process only permits punitive damages to be recovered for conduct that harmed *these particular plaintiffs*. S.C. Code Ann. § 15-32-520(D) (“Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant’s willful, wanton, or reckless conduct.”); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003) (holding that Due Process Clause of U.S. Constitution is violated where punitive damages are awarded “to punish and deter conduct that bore no relation to the [plaintiffs’] harm”). Again, it is beyond dispute that Petitioners’ post-2023 lobbying—and foreign lobbying—could not possibly have harmed Plaintiffs, and this conduct is therefore irrelevant to punitive damages.

In short, this case is on all fours with *Oncology*. There, as here, the Circuit Court ordered discovery at Plaintiffs’ request into wholly irrelevant topics, even while apparently acknowledging that the topics were irrelevant. This Court granted a writ there, and it should do the same here.

B. The Ordered Discovery Would Chill Petitioners’ First Amendment Rights.

Second, extraordinary circumstances warranting a writ exist here because the discovery ordered by the Circuit Court would impermissibly impinge on Petitioners’ First Amendment right to petition the government. Discovery regarding the Lobbying Topics effectively penalizes Petitioners for exercising their First Amendment rights and therefore chills the exercise of those rights by other litigants in the future. And it does so without any countervailing benefit, because the law is well established that evidence relating to lobbying is not admissible at trial. As one court recently explained, “[i]t cannot be a violation of a party’s duty of care to lobby for laws and regulations, which is absolutely protected by the First Amendment.” *Uber* Order at 9.

That result follows from the *Noerr-Pennington* doctrine, which “safeguards the First Amendment ‘right to petition the government for a redress of grievances[]’ . . . by immunizing citizens from the liability that may attend the exercise of that right.” *Navient Sols., LLC v. Lohman*, 136 F.4th 518, 522 (4th Cir. 2025). Originally a narrow doctrine applied only in the antitrust context, *Noerr-Pennington* has since “been extended to preclude virtually all civil liability for a defendant’s petitioning activities before not just courts, but also before administrative and other governmental agencies.” *People ex rel. Gallegos v. Pac. Lumber Co.*, 158 Cal. App. 4th 950, 959, 964 (2008), *as modified* (Feb. 1, 2008). And because evidence of lobbying is no longer actionable, various courts have held it inadmissible at trial. *See, e.g., Datatrans Corp. v. Wells Fargo &*

Co., No. 2:06-CV-72 DF, 2010 WL 11468934, at *21 (E.D. Tex. Oct. 5, 2010) (“[E]vidence of Defendants’ lobbying activities would risk chilling the First Amendment activities of Defendants and others.”); *U.S. Football League v. Nat’l Football League*, 634 F. Supp. 1155, 1171 (S.D.N.Y. 1986) (“The low probative value of this [lobbying] evidence is substantially outweighed by the defendants’ strong interest in preserving their First Amendment rights to petition Congress.”); *Med. Mut. of Ohio v. Air Evac EMS, Inc.*, No. 1:16 CV 80, 2019 WL 4573700, at *3 (N.D. Ohio Sept. 20, 2019) (excluding evidence of lobbying related to air ambulance regulations as irrelevant to breach-of-contract case).

The Circuit Court held that *Noerr-Pennington* is *only* a rule of admissibility, *not* a rule of discoverability. Order at 3 (citing *North Carolina Elec. Membership*, 666 F.2d at 52-53). But *North Carolina* has been criticized for effectively gutting a central purpose of *Noerr-Pennington*, which is to safeguard a defendant’s constitutionally protected right to petition the government. See *Australia/Eastern U.S.A.*, 537 F. Supp. at 809 (criticizing Fourth Circuit’s cursory treatment of “‘chilling effect’ argument,” which it “dismissed” without any persuasive reasoning). Holding protected lobbying evidence inadmissible but nonetheless discoverable would abrogate that core objective by chilling a defendant’s right to petition the government. It would also contravene the well-settled rule that discovery is only permissible if it “appears reasonably calculated to lead to the discovery of admissible evidence.” S.C. R. Civ. P. 26(b)(1). Simply put: if a topic is categorically inadmissible at trial, it must not be discoverable, because no discovery request regarding such a topic could be “reasonably calculated to lead to the discovery of admissible evidence.” That is true of Petitioners’ lobbying here. See *Uber* Order at 7 (noting that discovery requests regarding lobbying are not “reasonably likely to lead to the discovery of admissible evidence”).

In their briefing below, Plaintiffs cited two trial court decisions in which the court admitted evidence of the defendant’s lobbying as evidence of the defendant’s knowledge of the dangerous nature of a product. *Hernandez v. Amcord, Inc.*, 215 Cal. App. 4th 659 (2013); *Wolfe*, 2012 WL 38694, at *6. But these cases are, first and foremost, against the weight of *Noerr-Pennington* authorities above. They are also inapposite in two respects. First, in neither case did the requested discovery entirely post-date the plaintiff’s alleged exposure to the purportedly dangerous product. See, e.g., *Hernandez*, 215 Cal. App. 4th at 667 (lobbying occurred in 1975, while exposure

occurred from the 1960s through the 1980s); *Wolfe v. McNeil-PPC, Inc.*, 773 F. Supp. 2d 561, 565 (E.D. Pa. 2011) (lobbying occurred in 1984, while exposure occurred in the 1990s).

Second, in contrast to *Hernandez* and *Wolfe*, the requested discovery concerns Petitioners' *current* lobbying activities with respect to *ongoing* regulatory issues. This makes the First Amendment interests at issue—and the corresponding chilling effect on Petitioners—much greater. To the extent the FDA continues to consider rules related to testing cosmetic talc for asbestos, allowing Plaintiffs to obtain discovery about Petitioners' advocacy efforts would punish and deter them from continuing to take part in that process. Every new comment submitted or letter sent to a regulator would become a discovery issue in this or some other talc litigation, imposing burdens and costs on Petitioners simply for exercising their constitutional rights. Discovery would, in other words, become a weapon against the right to petition itself. That is precisely the kind of First Amendment harm that *Noerr-Pennington* is intended to prevent, and this impingement on Petitioners' First Amendment rights constitutes an exceptional circumstance requiring this Court to intervene and grant a writ.

C. The Ordered Discovery Is Largely Privileged Or Attorney Work Product.

Finally, extraordinary circumstances justifying a writ exist for another reason: The discovery Plaintiffs requested and the Circuit Court compelled is largely privileged or protected by the attorney work product doctrine, contravening South Carolina Rule of Civil Procedure 26(b)(1) ("Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . ."). Moreover, it would be enormously burdensome for Petitioners to attempt to separate out those documents, if any, that are not privileged. This too justifies a protective order, especially given the irrelevance of this discovery. *See* S.C. R. Civ. P. 26(a) (discovery "*shall* be limited by the court if it determines that . . . the discovery is unreasonably burdensome or expensive taking into account the needs of the case") (emphasis added).

As an initial matter, much of the information would be privileged. Petitioners' lobbying efforts were largely led by attorneys who also direct litigation, precisely because of the legal implications of government actions. Thus, discovery into those matters inherently carries attorney-client and work product privilege concerns. Given the ongoing talc litigation and likelihood of additional lawsuits, all lobbying efforts were intertwined with litigation concerns and were necessarily undertaken *with an eye towards litigation*. Indeed, because Petitioners had already

withdrawn their talc products from the market, there was no credible business reason for involving counsel in this process. Rather, Petitioners sought their counsel's *legal* advice on whether (and, if so, how) any lobbying activities would affect their current and future litigation risks. For this reason, a substantial number of documents related to the noticed topics are themselves privileged or involve communications sent by or to Petitioners' in-house or outside litigation counsel and are thus protected by the attorney-client privilege. *See Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293-94, 692 S.E.2d 526, 530 (2010) (attorney-client privilege extends to confidential communications by or to "attorneys for legal advice"). In addition, any written materials (e.g., memoranda) would necessarily reflect counsel's mental impressions as to potential implications of the lobbying efforts on the global talc litigation and constitute attorney work product under S.C. R. Civ. P. 26(b)(3). *See State v. Daise*, 421 S.C. 442, 462, 807 S.E.2d 710, 720 (Ct. App. 2017) (agreeing that materials were "generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State's preparations for trial") (citation omitted).

The burden and expense of separating out the relatively sparse non-privileged documents from the mass of privileged documents would be enormous. Petitioners would be forced to devote significant resources to searching files for responsive documents, culling through large numbers of facially privileged documents, and ultimately creating an enormously long privilege log just to protect this non-discoverable information. Federal courts routinely grant protective orders or deny motions to compel on analogous grounds, and the same result is proper here. *See, e.g., Rodriguez-Torres v. Gov't Dev. Bank of Puerto Rico*, 265 F.R.D. 40, 44 (D.P.R. 2010) (denying plaintiff's motion to compel where the court was "very concerned over the increase in costs that will result from the privilege and confidentiality review that Defendant GDB will have to undertake on what could turn out to be hundreds or thousands of documents"); *United States Equal Emp. Opportunity Comm'n v. George Washington Univ.*, No. 17-cv-1978 (CKK/GMH), 2020 WL 3489478, at *12 (D.D.C. June 26, 2020) (holding defendants' estimated cost of \$484,200 to review the requested discovery for privilege imposed an undue burden and was "disproportionate to the benefit that could be derived"); *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016) (denying plaintiff's discovery requests for "all communications" that defendant's foreign subsidiaries "have had with foreign regulatory authorities" because the "burden of this foreign discovery would be substantial").

The Circuit Court’s only response is that Petitioners have not identified any specific documents for which they assert attorney-client or work product privilege. *See* Order at 3. But Petitioners are not claiming that isolated documents are privileged. Rather, their fundamental point is that the majority of documents are privileged, and that the resulting burden of identifying the non-privileged documents vastly outweighs any conceivable benefit of the discovery that the trial court ordered. That is particularly so because, as previously noted, and as Plaintiffs do not dispute, Plaintiffs already have access to extensive discovery regarding lobbying and regulatory communications covering the period applicable to Plaintiffs’ claims (which were not as heavily intertwined with litigation), including approximately 19,000 documents and corporate representative testimony given in the *Gerken* case just last year.

For all of these reasons, Petitioners have demonstrated that the discovery order would cause “particularized harm,” and Plaintiffs have failed to show that the requested materials were “necessary”—i.e., that “the lack of information [would] impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.” *Hollman*, 384 S.C. at 578 (quoting *Laffitte*, 674 S.E.2d at 163). Accordingly, a writ is justified for all the same reasons recognized in *Hollman*.

II. PETITIONERS WOULD BE IRREPARABLY HARMED BY COMPLYING WITH THE CIRCUIT COURT’S ORDER.

Finally, any end-of-case appeal of the Circuit Court’s erroneous discovery ruling would not be an adequate remedy for Petitioners. By the time of any post-judgment appeal, it would be far too late to redress the harms Petitioners would incur as soon as they complied with the trial court’s erroneous discovery order. The harms to Petitioners are the burdens and expense of producing the extensive discovery Plaintiffs seek (on top of the extensive discovery already produced), as well as the additional burdens detailed above of sifting through enormous amounts of privileged lobbying-related documents in order to identify the relatively few that are not privileged (but would still be irrelevant). The First Amendment harms described throughout this Petition would also accrue immediately and chill Petitioners’ participation in *ongoing* agency actions. And forcing Petitioners to engage in discovery that is improper on its face (and would never withstand normal appellate scrutiny) would unfairly distract Petitioners from preparing for the trial in *Gerken*, scheduled to begin next month, creating even more prejudice.

These are analogous to the circumstances that led this Court to grant a writ in *Hollman*. There, the Court noted that “allowing the [discovery] will moot any claim petitioners could raise

on appeal that the discovery was erroneously allowed.” 384 .C. at 577. Here, too, the damage from complying with the Circuit Court’s order cannot be undone, rendering any end-of-case appeal inadequate and of little consolation to Petitioners.

CONCLUSION

For all of these reasons, Petitioners request that the Court vacate the trial court’s October 2, 2026 order with respect to the Lobbying Topics and remand with instructions for the trial court to grant Petitioners’ motion to quash and for protective order with respect to those topics.

Respectfully submitted,

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