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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.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR EXPEDITED DISPOSITION

INTRODUCTION

On October 6, Petitioners Johnson & Johnson ("J&J") and Kenvue Inc. ("Kenvue") (collectively, "Petitioners") filed a Writ of Certiorari asking this Court to vacate the Circuit Court's October 2, 2026 Order compelling Petitioner J&J to produce a 30(b)(6) witness to be deposed on lobbying of the FDA that took place *after* Plaintiffs' alleged talc exposures ended. The so-ordered deposition involves lobbying regarding a *proposed* rule for which the FDA and OMB explicitly solicited input. As Petitioners explained, any questioning about this topic would: (i) contravene the First Amendment and the related *Noerr-Pennington* doctrine by punishing J&J for lobbying activities; (ii) fail to yield any relevant evidence; and (iii) invade J&J's confidential communications with its attorneys.

The deposition is now underway, subject to Petitioners' express reservation of their rights and objections, and will continue on November 6 absent action by this Court. Petitioners submit this supplemental brief because counsel's questioning on the first day of the deposition highlights

why this discovery is "abusive and beyond the pale," *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). There is still time for this Court to intervene, enter a writ and put a stop to this gross misuse of the discovery process before the deposition continues later this week.

First Amendment/Noerr-Pennington. Plaintiffs' counsel repeatedly questioned J&J's current corporate representative and former Vice President of worldwide litigation, Erik Haas, about J&J's "***advoca[cy]***" before federal regulators, including the U.S. Food and Drug Administration ("FDA") and the Office of Management and Budget ("OMB") with regard to a proposed (and since-withdrawn) rule that would have established a methodology for testing cosmetic talc for asbestos. *See, e.g.*, Dep. of Erik Haas, Oct. 28, 2026 ("Haas Dep.") (Ex. 1) 87:20-24 (Q. "One of the things that J&J advocated for reporting was this definition . . . ."); *id.* 89:20-24 (Q. "And J&J's proposed rule, the one that it is advocating to the FDA, if adopted . . . ."); *id.* 94:5-6 (Q. "And that's what, in March of 2024, Johnson & Johnson was advocating to the FDA, correct?"); *id.* 30:23-31:13 (similar with respect to communications with OIRA). Not only did counsel question J&J's witness about this core First Amendment activity, but counsel's tactics are precisely the kind of punitive use of lobbying-related evidence that the *Noerr-Pennington* was designed to keep out of litigation. Any more questioning would further "risk chilling the First Amendment activities of Defendants and others." *Datatreasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-72 DF, 2010 WL 11468934, at *21 (E.D. Tex. Oct. 5, 2010).

Put simply, Plaintiff's efforts to invade Petitioners' First Amendment rights to petition the federal government directly or through association plainly is designed to chill—and unquestionably will chill—the exercise of Petitioners' and others' Constitutional rights. A writ is required to vindicate Petitioners' First Amendment protections, which do not evaporate during a corporate representative deposition. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly— '[b]ecause First Amendment freedoms need breathing space to survive.'") (citation omitted).

Relevance. The questioning thus far also confirms that J&J's post-exposure lobbying is not "remotely relevant to resolution of the issue[s]" that jurors will have to decide in these cases. *Oncology*, 387 S.C. at 387-88, 692 S.E.2d at 924-25. In particular, despite Plaintiffs' representations to this Court that questioning about lobbying in 2024 would shed light on what

Petitioners knew about talc decades earlier, not a single question even attempted to make that illogical connection. Instead, Plaintiffs' counsel used the deposition to disparage J&J's substantial investments in research and development and question the reliability of J&J's estimations (without any foundation) that adopting the proposed testing rule would pose serious economic consequences for American businesses and consumers alike. *See, e.g.*, Haas Dep. 131:21-132:1 (Q. "But when you tell the federal government that there's going to be an overwhelming impact and a risk . . . one of the things we want to do is make sure that's accurate, right?"); *id.* 132:7-8 (Q. "It's important to be truthful when you're talking to the federal government, right?").

Attorney-client privilege. Counsel also repeatedly disregarded J&J's attorney-client privilege. For example, counsel questioned Mr. Haas about a March 4, 2024 meeting with the FDA and OMB regarding the proposed rule, which was attended by multiple people, including J&J's outside counsel, Kristen Fournier. As part of that questioning, counsel inexplicably asked if Ms. Fournier took notes and whether he has "ever been in a room with her when you were discussing ***legal strategies***?" *Id.* 69:14-16 (emphasis added); *id.* 68:12-69:5. As defense counsel stated on the record: "We have so many problems with this. One, you're getting dangerously close to attorney-client communications, and, two, this has nothing to do with the noticed topics." *Id.* 69:22-70:1. And later in the deposition, Plaintiffs' counsel demanded that Mr. Haas reveal what J&J's CEO told him about a May 28, 2025 meeting with White House Chief of Staff Susie Wiles. *See, e.g.*, *id.* 143:20-144:5. As defense counsel explained on the record, asking J&J's former in-house lawyer to reveal confidential communications violates any reading of the attorney-client privilege. *See id.* 145:4-17. Contrary to Plaintiffs' claim, J&J's designation of its prior in-house counsel as the corporate representative did not nullify its attorney-client privilege because he did not rely on his conversations with the CEO to inform himself as J&J's representative. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995) ("the mere fact that it designated a lawyer, pursuant to FED. R. CIV. P. 30(b)(6), as its corporate representative at one deposition, is a wholly insufficient ground to hold that Marathon waived its attorney-client privilege").

In short, even a cursory review of the half-day deposition conducted last week demonstrates that the Circuit Court's order was clearly erroneous, and has already caused irreparable harm to J&J by chilling its ability to exercise its core First Amendment activities. Allowing the deposition to resume as scheduled later this week will only amplify this prejudice. This is all the more true because Plaintiffs' counsel is likely to exploit much of this testimony in

other talc trials pending throughout the country. In other words, absent this Court's immediate intervention, there is a very substantial risk that a resumption of Mr. Haas's deposition would not only distort the fair administration of justice in South Carolina but also taint the global talc litigation more broadly, causing wide-spread harm to J&J for lobbying activities, ***in clear derogation of the First Amendment***. As a result, Petitioners respectfully urge the Court to decide the fully briefed Petition on an expedited basis and grant it.

CONCLUSION

For all of these reasons, as well as those set forth in their prior briefing, Petitioners request that the Court immediately vacate the Circuit Court's October 2, 2026 order with respect to the Lobbying Topics and remand with instructions for the Circuit Court to grant Petitioners' motion to quash and for protective order with respect to those topics.

Respectfully submitted,

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