



## TRADE ASSOCIATIONS: BOUNDARIES IN ANTITRUST LITIGATION (PART ONE)

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### Introduction

Imagine you are counsel to a trade association named as a defendant in an antitrust lawsuit. Plaintiffs allege that members of the association agreed to fix prices and used trade association meetings to implement the conspiracy. The court has denied your motion to dismiss, even though the complaint contained no specific factual allegations describing the unlawful agreement or any of the acts in which the association supposedly engaged in furtherance of the conspiracy. Now you are in the midst of discovery on the merits. The plaintiffs propound broad discovery requests that would require the association to produce the minutes from meetings of the board of directors and its principal committees, and other highly confidential information. Among the documents responsive to the requests are highly sensitive descriptions of the association's advocacy plans on various issues of public policy important to your industry, including specific internal deliberations about lobbying strategies and tactics. You are asked if there is anything the association can do to resist disclosure of that information. What will you have to say? Maybe more than you initially thought.

Trade associations are ubiquitous in the United States and around the world. For instance, searching the term "trade association" in

Google™ results in 114,000,000 hits. A trade association is "an association of business organizations having

similar concerns and engaged in similar fields, formed for mutual protection, the interchange of ideas and statistics, and the establishment and maintenance of industry standards."<sup>1</sup> There are over 15,000 national, regional, state and local trade associations in the United States.<sup>2</sup> Trade associations are an important aspect of the United States economy. In fact, although many trade associations are tax exempt, associations pay more than \$1.1 billion per year in local, state, and federal taxes and association sponsored meetings and conventions translate into 26 million overnight stays in hotels each year.<sup>3</sup>

Trade associations are also important to business organizations in general. Trade associations advocate for public policies that affect their industries and members, facilitate the exchange of ideas and information, and provide a forum in which their members can communicate. Common association activities include education, training, public information activities, industry research and setting industry product and service standards.<sup>4</sup> Trade associations are lawful and tend to promote competition.<sup>5</sup> In fact, the antitrust laws encourage the gathering and dissemination of information concerning industry that is not competitively sensitive, which is typically the principal activity of a trade association.<sup>6</sup>

Despite the benefits of trade associations, and to the chagrin of

many trade association lawyers who counsel their clients on ways to manage antitrust risk proactively, trade associations become embroiled in antitrust litigation, either as parties or third-parties, for the obvious reason that their members typically compete with one another.<sup>7</sup> No question there is plenty of risk to manage. For example, discussion of prices or price setting practices at trade association meetings could be interpreted as evidence of unlawful price fixing.<sup>8</sup> Likewise, denying membership in a trade association to a qualified applicant could be deemed unlawful concerted action.<sup>9</sup> Indeed, trade associations themselves are more frequently being named as defendants in antitrust cases, and plaintiffs often seek discovery from trade associations even if the trade association itself is not named as a defendant in an antitrust lawsuit.<sup>10</sup>

Given the increasing value of trade associations to the economy and to business organizations, it is important for counsel representing trade associations to be aware of at least three separate issues that frequently arise in the context of antitrust litigation. First, members of a trade association have the fundamental right to associate freely and without fear that their identities will be publicly disclosed. As a result, courts have recognized the qualified constitutional privilege, which protects the rights of individuals and groups from having to disclose private information that would

chill First Amendment rights, including protection for internal deliberations by members about lobbying strategies and tactics. Second, the *Noerr-Pennington* doctrine is an affirmative defense that renders the antitrust laws (and other laws) “inapplicable to individual or group action intended to influence legislative, executive, administrative or judicial-decision making.”<sup>11</sup> Third, the mere fact that a trade association holds meetings of its members, creating an opportunity for unlawful agreements, is not enough in itself to prove an antitrust conspiracy because trade associations cannot be liable simply for gathering and disseminating information.<sup>12</sup> Trade association counsel should understand, therefore, what industry activities courts have considered to constitute “tipping points” for proof of an antitrust conspiracy.

This article is presented in two parts. In this Part One, we will focus on antitrust litigation discovery issues, while in Part Two, which is expected to appear in the next issue of *Antitrust Litigator*, we will focus on antitrust litigation liability issues and *Noerr-Pennington* immunity. Part One of the article will first address how the associational privacy doctrine developed. It will then explain the qualified constitutional privilege. Next, the article will provide two detailed examples of cases that have discussed the qualified constitutional privilege. Lastly, the article will explore how the privilege has been applied in the antitrust litigation context and how counsel representing a trade association may be able to protect an association, on the basis of this privilege, from having to disclose private information in the litigation context, especially internal deliberations about lobbying strategy and tactics.

## The Associational Privacy Doctrine

Some background is necessary before exploring how courts have applied associational privacy to cases involving antitrust law. The freedom to associate is rooted in the First Amendment to the United States Constitution.<sup>13</sup> The term “associational privacy” means the “right of individuals to maintain anonymity in their group affiliations.”<sup>14</sup>

The associational privacy doctrine developed within the context of Supreme Court cases involving civil rights during the 1950s and 1960s. In 1958, the Supreme Court decided *N.A.A.C.P. v. Alabama ex rel. Patterson*,<sup>15</sup> the seminal decision that articulated the right of associational privacy. In that case, the Attorney General of Alabama brought suit in the State Circuit Court to enjoin the N.A.A.C.P. from operating in Alabama because it allegedly failed to comply with the State’s business qualification statute.<sup>16</sup> The State sought documents relating to the names and addresses of all Alabama members and agents of the Association.<sup>17</sup> The State claimed the documents were relevant to dispute the Association’s claim that it was not engaged in intrastate business within the meaning of the statute.<sup>18</sup> The State Circuit Court held the Association in contempt because the Association refused to produce the documents pursuant to a court order.<sup>19</sup> The State Supreme Court of Alabama dismissed plaintiffs’ petitions for certiorari for review of the judgment twice.<sup>20</sup>

The Association filed a petition for writ of certiorari in the Supreme Court and argued that compelled disclosure of its membership lists would “abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.”<sup>21</sup> The Supreme Court agreed with the Association. The Supreme Court, in recognizing the freedom to associate, stated that: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group

association . . . . It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>22</sup>

The Court then weighed the relevance of the information against the potential that disclosure of the information would limit the constitutional rights of the N.A.A.C.P. and its members.<sup>23</sup>

On the one hand, the membership lists had no substantial bearing on whether the N.A.A.C.P. should be subjected to the registration statute and whether it should be permanently ousted from the State.<sup>24</sup>

On the other hand, the Court reasoned that compelling disclosure of the identity of the N.A.A.C.P.’s members could expose them to economic reprisal, loss of employment, and public hostility, and cause members to withdraw from the association and

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dissuade others from joining because of the fear of public exposure of their beliefs.<sup>25</sup>

Thus, the Court held that the contempt judgment violated due process.<sup>26</sup> In so ruling, the Court concluded that: (1) “the immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment,” and (2) the State fell “short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have.”<sup>27</sup>

Observers may have wondered whether the Court would extend the protections of associational privacy beyond the N.A.A.C.P. or similar groups. The *N.A.A.C.P. v. Alabama ex rel Patterson* decision, however, stated that the right of associational privacy protects members of any legitimate group, not just the N.A.A.C.P.<sup>28</sup> Five years later, the Court reiterated this principle and stated that “all legitimate organizations are the beneficiaries of [the right of association].”<sup>29</sup> The Supreme Court went on to explain that the right of association is “all the more essential” where persons are “espousing beliefs already unpopular” to others.<sup>30</sup>

Thus, for example, in addition to precluding the discovery of the N.A.A.C.P.’s membership lists based upon the freedom of the N.A.A.C.P.’s members to associate freely, the Supreme Court during the 1950s and 1960s also applied the right of associational privacy to members involved in political and public interest organizations. In *Sweezy v. State of New Hampshire*,<sup>31</sup> the Supreme Court, in finding that petitioner could not be compelled to answer questions regarding membership and activities in

the Progressive Party, explained that “[i]t 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 . . . .”<sup>32</sup> Four years later, in *Louisiana ex rel. Gremillion v. N.A.A.C.P.*,<sup>33</sup> the Court held that a state statute requiring certain associations to file an affidavit that none of their officers were members of a Communist organization was unconstitutional because it would “stifle, penalize, or curb the exercise of First Amendment rights.”<sup>34</sup> Indeed, as the Supreme Court later expressed “[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.”<sup>35</sup>

On the other hand, however, the Supreme Court made clear during the 1960s that associational privacy is not without limit. For instance, it does not extend to individuals or groups engaged in illegal activities.<sup>36</sup> Examples of groups that have been found to be engaging in improper activities are the Communist Party and the Ku Klux Klan.<sup>37</sup>

In sum, the right of associational privacy, which evolved in the context of Supreme Court cases during the 1950s and 1960s, protects the speech and privacy rights of individuals and groups who wish to advocate their ideas in a public forum.<sup>38</sup> Moreover, associational privacy applies to mainstream associations as well as unorthodox or unpopular groups and applies whether the belief sought to be advanced pertains to political, economic or religious matters.<sup>39</sup>

### **The Qualified Constitutional Privilege**

The right of associational privacy matters in the context of litigation because an individual or group served with a discovery request may be able to protect itself from having to disclose certain private information protected by the First Amendment. Based on the right of associational privacy, courts have invoked a “qualified constitutional privilege.”<sup>40</sup> This privilege “protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret.”<sup>41</sup> In the context of discovery, the privilege operates to bar or limit disclosure of information that intrudes on the associational privacy rights of individuals or groups.<sup>42</sup>

Unlike the attorney-client privilege, however, the qualified constitutional privilege is not absolute and in some circumstances courts may compel disclosure, including allowing discovery when the information or documents are subject to a protective order that prevents further disclosure by the receiving party.<sup>43</sup> In determining whether the privilege operates to bar disclosure of private information, courts apply a balancing test and weigh the need for discovery against the magnitude of the privacy invasion.<sup>44</sup> The “strength of an individual’s interest in keeping personal information private depends in large part on the consequences of disclosure” and “Courts look to human experience to determine the likely effect of disclosure of the information at issue.”<sup>45</sup> The next section explores in detail two cases that have discussed the qualified constitutional privilege.

### **Examples of Cases Applying the Privilege**

Two California state court decisions illustrate the application of these concepts. In *Britt v. Superior Court of San Diego County*,<sup>46</sup> a case that “most

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prominently gave recognition to [the] qualified constitutional privilege,”<sup>47</sup> owners and residents of homes located near an airport sought compensation from the port district for diminution of property values, personal injury and emotional distress caused by noise, vibrations, air pollution and smoke from operation of the airport. During the litigation, the district requested discovery concerning plaintiffs’ local political activities, including their involvement in organizations opposed to the district’s operations, meetings attended, persons in attendance, contents of discussions regarding the meetings, and financial contributions.<sup>48</sup> Plaintiffs sought a protective order to restrain the district’s investigations of plaintiffs’ political associations.<sup>49</sup> On the same day, defendant moved the trial court for an order compelling plaintiffs to answer its questions.<sup>50</sup> The trial court denied plaintiffs’ motion for a protective order and granted defendant’s motion to compel.<sup>51</sup> Plaintiffs thereafter filed a petition seeking extraordinary relief.<sup>52</sup>

On appeal, the district argued that the constitutional interest in associational privacy attaches only to members of dissident organizations and does not apply to those who choose to participate in organizations with more general popularity.<sup>53</sup> The district further contended it had a compelling interest in plaintiffs’ associational activities because they could be

relevant to its defenses.<sup>54</sup> For example, the district asserted that the plaintiffs’ associational activities could relate to its statute of limitations defense because the activities could disclose when a plaintiff first became so significantly annoyed at the airport operations that it would be reasonable to have expected him to file suit.<sup>55</sup> Likewise, the district asserted that it should be permitted to probe plaintiffs’ associational activities to determine whether the plaintiffs’ discussions at any meeting indicated that they were aware of the challenged operations at the time they moved to their present residence and therefore whether they failed to mitigate damages.<sup>56</sup>

The Supreme Court of California held that the trial court’s order allowing such discovery was an unconstitutional infringement on the residents’ rights of association. First, the Court stated that the constitutional protection of associational privacy does not apply only to unpopular and dissident groups.<sup>57</sup> Second, in applying the balancing test, the Court reasoned that the trial court’s disclosure order reached “far beyond the privacy interests of the plaintiffs” and “open[ed] virtually all of the associations’ most intimate information” to view, including the “names of all persons who have attended association meetings, the dates and subject matter of all such meetings, and details of the association’s finances and contributions.”<sup>58</sup> At the same time, the Court observed that the asserted relationship between plaintiffs’ associational activities and the district’s defenses was “extremely tenuous at best” and unrelated to the claims at issue.<sup>59</sup> Specifically, the Court reasoned that the facts concerning exactly when the plaintiffs became annoyed at the airport operations did not provide a proper basis for resolving the statute of limitations issue, and that the district’s contention

that plaintiffs’ private associational activities were relevant to the failure to mitigate damages was “purely speculative.”<sup>60</sup> The Court further reasoned that if plaintiffs’ knowledge of the airport operations at the time of the purchase of property had any bearing on the action at all, “defendant must attempt to obtain that information by means other than a wholesale invasion of plaintiffs’ constitutionally protected associational privacy.”<sup>61</sup>

The *Britt* decision should be read as a guide to explaining the main principles implicated by the associational privacy privilege. First, as the Court made clear in *Britt*, the privilege applies to both popular and unpopular groups.<sup>62</sup> Second, the individual or entity seeking discovery of information involving association affiliations and activities must demonstrate a compelling need for the information.<sup>63</sup> Third, even where a strong purpose is shown, any compelled disclosure of information must be narrowly tailored to “assure maximum protection of the constitutional interests at stake.”<sup>64</sup>

Two years later, the California Court of Appeal in *Bodenheimer v. Superior Court of California*,<sup>65</sup> held that membership in the defendant organization, the Grass Roots Alliance, was discoverable. In *Bodenheimer*, plaintiff board members of a community health center alleged that associations, including Grass Roots Alliance, and individuals conspired to defame them. Asserting his First Amendment right to associational privacy, one of the individual defendants refused to answer three questions in his deposition: (1) Are you a member of the organization (the Grass Roots Alliance)? (2) Do you know any members of the Grass Roots Alliance? (3) Have you participated in any meetings of the Grass Roots Alliance?<sup>66</sup> The trial court directed the defendant to answer the questions subject to a protective order.<sup>67</sup>

On appeal, the defendant (now petitioner) asserted that the questions impinged on his right to freedom of association. The Court found that, unlike in *Britt* where the material sought “had a tenuous connection to the pleaded defenses proffered,” the pertinence to the lawsuit of the relationship between petitioner and Grass Roots Alliance was “close.”<sup>68</sup> In fact, the plaintiffs alleged that the petitioner was an agent of Grass Roots Alliance and working under its direction and supervision with knowledge of its purpose, and all defendants, including petitioner and Grass Roots Alliance, were alleged to have conspired to defame plaintiffs.<sup>69</sup> Moreover, the allegedly defamatory material, including a letter signed by petitioner and other individual defendants, suggested that the petitioner and Grass Roots Alliance were on the “same side of a narrow local issue” designed to defame the plaintiffs.<sup>70</sup> Thus, to ask if petitioner was a member of the Grass Roots Alliance was found to be a “narrow question having an important connection with the lawsuit.”<sup>71</sup> The Court also found that although the pertinence of the other two questions to the lawsuit was “less close,” if the fact of membership is discoverable, “the impact on privacy of the other two questions [was] too minimal to warrant extraordinary relief.”<sup>72</sup> Thus, in *Bodenheimer*, the Court recognized that on balance, information directly relevant and narrowly tailored to the claims at issue, and which has little impact on the privacy rights of the defendant, is discoverable.

Although the outcomes of *Britt* and *Bodenheimer* differ because of the application of the balancing test to the facts of each case, both courts recognized that compelled disclosure of associational activity may pose a threat to First Amendment rights in the discovery context. The following

section will explore how the privilege applies in antitrust litigation.

### The Qualified Privilege in Antitrust Litigation

Courts have applied the qualified privilege in antitrust cases. For example, in *Etsi Pipeline Project v. Burlington N., Inc.*,<sup>73</sup> plaintiff Etsi Pipeline sued a group of railroads and alleged that the group violated federal antitrust laws. The plaintiff sought discovery from the Environmental Policy Institute (“EPI”), a third-party public interest organization, regarding contacts between it and any person regarding coal slurry pipelines, the EPI’s involvement in legislative, judicial or administrative proceedings regarding coal slurry pipelines and contributions made to EPI by railroads or any other similar organization.<sup>74</sup> EPI was engaged in research, public education, litigation, and lobbying seeking to influence policy making involving energy and the environment.<sup>75</sup> EPI moved to quash the subpoena and claimed that disclosure of the information would violate the First Amendment rights of the organization, its officers, members, and contributors, by subjecting them to reprisals or harassment.<sup>76</sup> The court agreed and precluded discovery of the requested information.<sup>77</sup>

It is important for counsel representing trade associations to be aware that plaintiffs may seek discovery of information protected from disclosure by the First Amendment in the context of antitrust litigation. For example, plaintiffs might request all defendants’ documents relating to association meetings in their attempt to prove the defendant members engaged in illegal price fixing or other unlawful concerted action. In *In re Folding Carton Antitrust Litigation*,<sup>78</sup> a horizontal price-fixing case, the plaintiff sought documents relating to meetings of any trade association in the folding carton industry of which any defendant

belonged and contended that the documents could contain information about the prices of folding cartons and defendants’ possible violations of the antitrust laws.<sup>79</sup> The defendants objected to the request on the grounds that the requested information was irrelevant and could contain documents relating to engineering, technological and environmental matters or other subjects permissible for industry members to discuss, rather than prices and sales of folding cartons.<sup>80</sup> The court disagreed and permitted discovery because it found that the trade association’s documents relating to its meetings could “contain evidence, or could lead to evidence, of organized and concerted action by the defendants.”<sup>81</sup>

If a plaintiff seeks a trade association’s documents, counsel should consider whether the qualified constitutional privilege may limit or bar discovery of those documents. In the antitrust context, the principles espoused by courts concerning the right of associational privacy and the qualified constitutional privilege can be used to argue that a trade association’s documents, particularly the contents of its meeting minutes or other documents reflecting internal deliberations about public policy positions, should be protected from disclosure.

### Conclusion

The examples provided above are not an exhaustive list of every case dealing with the right to associate or the qualified constitutional privilege, but they illustrate the principle that society is well served if a trade association and its members can associate freely, and candidly debate matters of public policy in which they share an interest, without undue fear that their privileged discussions will be discoverable in civil litigation. It is important for counsel representing a trade association to be aware of this privilege and how it may

be applied to protect the association and its members in the litigation context. Furthermore, it is equally important to be familiar with the judicially recognized limits of such protection. Stay tuned for Part Two of this article, which will examine antitrust liability issues relating to trade associations.

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<sup>1</sup> ABA SECTION OF ANTITRUST LAW, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS (2005) Ch. 13 at 145.

<sup>2</sup> The calculation of the number of associations in the United States recognizes only tax exempt associations. Thomson Gale (2005) at <http://www.galenet.galegroup.com>.

<sup>3</sup> ASAE and the Center for Association Leadership, Associations Unlimited, *Associations Advance America: Advancing the Economy*, at <http://www.asaenet.org/index.cfm>.

<sup>4</sup> *Id.*, *Associations Advance America: Defining the Value of Associations*.

<sup>5</sup> In *Biljac Assocs. v. First Interstate Bank*, 218 Cal.App.3d 1410, 1430 (1990), the California Court of Appeal observed:

In general, trade association activities tend to promote competition and are lawful. . . . Individuals engaged in trade association activities, including the exchange of information on market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information.

(citations and internal quotations omitted).

<sup>6</sup> As leading commentators on antitrust law have recognized:

Even if ‘opportunity’ were defined narrowly and limited to proven interfirm contacts, deeming opportunity to be prima facie proof of conspiracy would lead to widespread condemnation of procompetitive collaborations. Once competitors assemble for lawful activity, they would be presumptive conspirators – even though subject to some opportunities for rebuttal – on every parallel action subsequently occurring. Because parallel pricing is common even in competitive markets, juries would be entitled to infer that competitors had agreed on prices, and price agreements are condemned absolutely. Thus, the effect of holding opportunity sufficient would be to discourage all trade associations, industry gatherings, or joint ventures. ***Thereby to imperil reasonable and procompetitive collaborations would be inconsistent both with the purposes of the antitrust laws and with well-established Supreme Court permission for many kinds of collaboration among competitors.*** Mere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding.

P. AREEDA & H. HOVENKAMP, ANTITRUST LAW (2d ed. 2003) ¶ 1417b at 105 (footnotes omitted and emphasis added).

<sup>7</sup> ABA SECTION OF ANTITRUST LAW, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS (2005) Ch. 13 at 145.

<sup>8</sup> *Id.* at 146.

<sup>9</sup> *Id.* at 147.

<sup>10</sup> *See, e.g., In re Automobile Antitrust Cases I and II*, 135 Cal.App.4th 100 (2005) (plaintiffs brought antitrust conspiracy action against motor vehicle manufacturers, automobile distributors and motor vehicle trade associations); *Biljac*, 218 Cal.App.3d 1410 (action against banks and bank trade associations for violation of antitrust laws); *In re Automotive Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482 (E.D. Pa. 2005) (plaintiffs served a subpoena upon a European trade association of paint suppliers). See also notes 72 through 79 and accompanying text.

<sup>11</sup> WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK (2006) § 8:9 at 812.

<sup>12</sup> P. AREEDA & H. HOVENKAMP, ANTITRUST LAW (2d ed. 2003) ¶ 1417b at 105.

<sup>13</sup> The First Amendment to the Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*” U.S. Const., 1st Amendment (emphasis added). The First Amendment is applicable to the states by operation of the Fourteenth Amendment. *Id.*, 14th Amendment.

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<sup>14</sup> *Save Open Space Santa Monica Mountains v. Superior Court of L.A.*, 84 Cal.App.4th 235, 250 (2000).

<sup>15</sup> 357 U.S. 449 (1958).

<sup>16</sup> *Id.* at 452.

<sup>17</sup> *Id.* at 453.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 453-54.

<sup>20</sup> *Id.* at 454.

<sup>21</sup> *Id.* at 458 and 460.

<sup>22</sup> *Id.* at 460 (citations omitted).

<sup>23</sup> *Id.* at 461-65.

<sup>24</sup> *Id.* at 464.

<sup>25</sup> *Id.* at 462-63.

<sup>26</sup> *Id.* at 466.

<sup>27</sup> *Id.*

Similarly, a number of Supreme Court cases following *N.A.A.C.P. v. Alabama ex rel Patterson* applied the right of associational privacy to protect the names of individuals involved in the N.A.A.C.P. and the activities of the N.A.A.C.P. from disclosure. See *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (finding that municipal ordinances could not require the disclosure of N.A.A.C.P. membership lists and noting that “it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.”); *N.A.A.C.P. v. Button*, 371 U.S. 415, 444-45 (1963) (Virginia statutes could not prohibit the activities of the N.A.A.C.P., its affiliates and legal staff because “the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.”); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) (internal quotations and citation omitted) (precluding discovery of an N.A.A.C.P. membership list in connection with legislative investigative committee inquiry into Communist membership in the Association and noting that “[t]he First and Fourteenth Amendment rights of free speech and free association are fundamental and highly priced, and need breaching space to survive.”).

<sup>28</sup> *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. at 460-61 (“Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . .”).

<sup>29</sup> *Gibson*, 372 U.S. at 556.

<sup>30</sup> *Id.* at 556-67.

<sup>31</sup> 354 U.S. 234 (1957).

<sup>32</sup> *Id.* at 245.

<sup>33</sup> 366 U.S. 293 (1961).

<sup>34</sup> *Id.* at 297.

<sup>35</sup> *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). Numerous courts following these Supreme Court decisions have applied the right to associate freely to members involved in political organizations and other groups. See, e.g., *Crocker v. Revolutionary Communist Progressive Labor Party*, 178 Ill.App.3d 401, 407 (1988) (holding that defendant could not be compelled to disclose identities of members of political organizations with whom he had chosen to associate because it would chill First Amendment rights, the information sought did not appear to go “to the heart of the matter,” and plaintiff failed to exhaust “every reasonable alternative source of information.”); *United States v. Garde*, 673 F.Supp. 604 (D.D.C. 1987) (Nuclear Regulatory Commission subpoena seeking the identities of members of a group challenging safety of nuclear plant, was not “narrowly drawn to avoid unnecessary abridgment of constitutionally protected associational rights.”); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 1985 WL 315 (S.D.N.Y. Feb. 28, 1985) (interrogatories seeking identification of persons associated with the consciousness society, financial affairs and other information “posed a cognizable danger to the consciousness society’s ability to carry out First Amendment activities without deterrence and accordingly justified invocation of a qualified privilege.”); *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978) (grand jury could not “delve into the membership, meetings, minutes, organizational structure, funding and political activities” of black citizens’ association on the pretext that their membership might have some information relevant to a crime because they failed to show that members of association had “remotest relationship” to the crime); *Save Open Space Santa Monica Mountains*, 84 Cal.App.4th at 252 (noting that right of privacy applies to “membership in and contribution to public interest organizations,” such as environmental groups), *Pacific-Union Club v. Superior Court of S.F. County*, 232 Cal.App.3d 60, 73 (1991) (“purely private social group [consisting of restaurant and other club facilities] entitled to the protection of the freedom of intimate association.”).

<sup>36</sup> *Gibson*, 372 U.S. at 558 (“groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association.”).

<sup>37</sup> *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928).

<sup>38</sup> *Rancho Publ’ns v. Superior Court of Orange County*, 68 Cal.App.4th 1538, 1547 (1999).

<sup>39</sup> *Church of Hakeem, Inc. v. Superior Court of Alameda County*, 110 Cal.App.3d 384, 387, 390 (1980) (action by church members against church seeking damages for fraud, church members could not obtain disclosure of church’s file of all of its members because church members failed to show compelling state interest to obtain disclosure and, thus, “membership remain[ed] protected by their right of associational privacy.”); see also *Eilers v. Palmer*, 575 F.Supp.1259, 1261 (D. Minn. 1984) (precluding discovery of individuals supporting plaintiff’s suit against religious group because discovery would have “effect of chilling or curtailing the exercise of [first] amendment freedoms.”); *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960) (statute

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requiring teachers to file affidavits providing names and addresses of all organizations to which they belonged as prerequisite to employment would “impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”).

<sup>40</sup> *Rancho Publ’ns*, 68 Cal.App.4th at 1548.

<sup>41</sup> *Id.* at 1547.

<sup>42</sup> *Id.* at 1547-50. In explaining the privilege, the Court noted: “. . . the need to protect associational privacy is no less powerful in litigation, controlled by the judicial branch of the government, than it is when the legislative branch seeks to compel disclosures: the dangers of exposure are no less.” *Id.* at 1548 (citation and quotations omitted).

<sup>43</sup> *Church of Hakeem*, 110 Cal.App.3d at 388; *Dole v. Serns. Employees Union*, 950 F.2d 1456 (1991) (upholding trial court’s decision to grant a protective order but limiting the discovery of a labor union’s meeting minutes).

<sup>44</sup> *See, e.g., Rancho Publ’ns*, 68 Cal.App.4th at 1549.

<sup>45</sup> *Save Open Space Santa Monica Mountains*, 84 Cal.App.4th at 253 (citation and internal quotations omitted).

<sup>46</sup> 20 Cal.3d 844 (1978).

<sup>47</sup> *Rancho Publ’ns*, 68 Cal.App.4th at 1548.

<sup>48</sup> *Britt v. Superior Court of San Diego County*, 20 Cal.3d at 850.

<sup>49</sup> *Id.* at 851.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 853-54.

<sup>54</sup> *Id.* at 860-61.

<sup>55</sup> *Id.* at 861, n. 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 854-55.

<sup>58</sup> *Id.* at 858 and 861.

<sup>59</sup> *Id.* at 859.

<sup>60</sup> *Id.* at 861, n. 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 855.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 859.

<sup>65</sup> 108 Cal.App.3d 885, 889-90 (1980).

<sup>66</sup> *Id.* at 887-88.

<sup>67</sup> *Id.* at 888.

<sup>68</sup> *Id.* at 889.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> 674 F.Supp. 1489 (D.D.C. 1987).

<sup>74</sup> *Id.* at 1490.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 76 F.R.D. 420 (N.D. Ill. 1977).

<sup>79</sup> *Id.* at 426.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* A trade association’s minutes may be relevant in other types of cases as well. *See In re Related Asbestos Cases*, 543 F.Supp.1152, 1155 (N.D. Cal. 1982) (minutes of trade association of asbestos textile manufactures may be relevant to show that defendant members of the association knew of hazards of asbestos from their receipt of minutes of trade association meetings at which such hazards were discussed); *Biljac*, 218 Cal.App.3d at 1434 (plaintiffs argued that inference of antitrust conspiracy should be drawn in their favor based on assertion that trade associations destroyed documentary evidence, including committee meeting minutes; Court found that defendant trade association explained that those minutes were never kept during the years in question and, therefore, was not evidence that could raise inference of conspiracy.); *But see American Int’l Cos. v. J.E.S., Inc.*, 1989 WL 4458, \*1 (E.D. Pa. 1989) (“Conjecture and speculation furnish too insubstantial ground upon which to justify discovery” of meeting minutes of insurance trade associations).