IN THE SUPREME COURT OF GEORGIA

S21G1147

GENERAL MOTORS LLC,
Appellant,

v.

ROBERT RANDALL BUCHANAN,
individually and as Administrator of the
ESTATE of GLENDA MARIE BUCHANAN
Appellee.

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC., ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN TORT REFORM ASSOCIATION AND GEORGIA ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST[1]

This case is of importance to *amici* and their members because it raises the core issue of whether Georgia courts can be relied upon to fairly administer Georgia's rules of discovery when high-level executives are targeted. Allowing the deposition of a CEO or other high-level corporate executive is unduly burdensome when, as here, the executive does not have direct, unique knowledge of the facts at issue in the case and other, less intrusive means of discovery have not been exhausted. If allowed to proceed, depositions of high-level executives will become part of a regular pre-trial discovery arsenal in a way that would undermine, not advance justice. The Court should instruct lower courts to properly evaluate the factual underpinnings before permitting depositions of high-level executives.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.35 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and

[1] *Amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Product Liability Advisory Council ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international products. These companies seek to contribute to the improvement and the reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries of various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The Alliance for Automotive Innovation ("AAI") represents virtually the entire automotive industry. Its members include automobile manufacturers that

make nearly 99% of all of the new cars and light trucks sold in the United States. Its members also include key suppliers to the automotive industry, such as manufacturers of automotive parts and components. AAI's members have an interest in ensuring that rules of procedure promote the prompt, efficient, and fair resolution of lawsuits involving automobile manufacturers.

The American Tort Reform Association ("ATRA") is a broad coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. Over the past thirty years, ATRA has repeatedly expressed concern with discovery abuse, particularly as here, where there is no basis for a discovery demand. ATRA also has a long history of filing *amicus* briefs with the Court on important litigation issues and supports efforts in Georgia to adhere to traditional liability principles.

The Georgia Association of Manufacturers ("GAM") is the statewide trade association that represents Georgia's manufacturing businesses in legislative, regulatory and public relations matters. Its members collectively employ more than half of Georgia's 400,000-plus manufacturing workforce. Founded in 1900, GAM advocates for Georgia manufacturers on a wide range of public policy issues, including but not limited to legal climate, taxation, utility rates and energy,

workforce development, environmental quality, human resources, safety and health, labor and employment and general business matters.

Amici filed separate briefs in support of the Petition and submit this brief collectively to advance judicial efficiency.

STATEMENT OF THE CASE

Amici adopts Appellant's Statement of the Case to the extent necessary for the arguments stated herein.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case lies at the heart of the integrity of discovery in Georgia's civil justice system. The goal of discovery, as the Court has recognized, is to facilitate "the fair resolution of legal disputes." *Int'l Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000). However, there are times, as here, when discovery can be leveraged to *distort* and *impede*, rather than *advance* justice. The practice of subpoenaing a high-level corporate executive with no unique or superior knowledge of a matter, as Plaintiff has done below, can generate an unwarranted litigation advantage unconnected to the merits of a case. Indeed, such demands routinely occur, making this a recurring issue in civil litigation. The Court should take this opportunity to set forth clear rules, using existing Georgia authority, to ensure that when a high-level executive's deposition is sought, discovery is truly

needed for the pursuit of justice, rather than an attempt to gain an improper litigation advantage irrespective of the facts of a given case.

Although Georgia's discovery rules are intentionally broad to facilitate the search for truth, they also have their limits. Litigants must be protected "from annoyance, embarrassment, oppression, or under burden of expense." O.C.G.A. § 9-11-26(c). As courts in Georgia and other states have found, seeking to depose a high-level executive during discovery "creates a tremendous potential for abuse or harassment." *Apple, Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). Yet, the trial court allowed such a deposition to proceed here, stating it cannot limit such discovery without a showing of "*substantial evidence* that *bad faith or harassment motivates the* discoveror's *action*." (emphasis added) Georgia's discovery rules and relevant case law, however, require no such showing of intent. They look at the *effect*, not the *motivation*, of a discovery demand. Thus, protecting high-level executives from unnecessary depositions is an expression of existing Georgia rules.

Accordingly, *amici* respectfully request the Court to hold that, under Georgia's existing rules, a party cannot depose a high-level corporate executive when the executive has no unique personal knowledge of the matter. If it is shown that the executive has such knowledge, the Court should still require that "good

cause" be shown under O.C.G.A. § 9-11-26(c) before the deposition is permitted, namely that less intrusive means of discovery have been exhausted. Here, Plaintiff made no showing below that the deposition of the executive in question is necessary for this case. To the contrary, the corporate executive attested she has no unique, specialized or superior knowledge of any of the issues in this case, and General Motors has established that there are less intrusive means to obtain the information sought. Thus, the Court should find that it was error for the trial court to deny General Motors' motion for a protective order.

ARGUMENT

In the underlying personal injury case, Plaintiff alleges his wife was involved in an accident while driving a 2007 Chevrolet Trailblazer and that the Electronic Stability Control System and a component steering wheel angle sensor were defective and failed to prevent the accident. He is seeking to depose Ms. Barra, the CEO of General Motors, based on *general* statements Ms. Barra made, publicly and in congressional testimony, as well as broad changes she directed in her effort to advance her company's culture of safety. As the trial court noted, Ms. Barra, who became CEO in January 2014, implemented several such *general* initiatives, including efforts to investigate and eliminate safety issues and the "Speak Up for Safety" program to emphasize safety reporting.

Ms. Barra's leadership on these important institutional changes has *no* direct connection with the incident giving rise to this case. In 2018, as part of Appellant's GM's Speak Up for Safety program, the company investigated the stabilization and sensor systems in the 2007 Trailblazer and other models. Appellant provided Plaintiff with information, materials and depositions of technical witnesses regarding this investigation under Georgia discovery rules. As General Motors has stated, Ms. Barra was not involved in the design or investigation of these systems and has no unique, specialized or superior knowledge of issues related to this case.

I. GEORGIA LAW PROVIDES COURTS WITH THE ABILITY AND MANDATE TO PROTECT AGAINST THIS TYPE OF DISCOVERY DEMAND

Georgia law requires courts to issue the protective order sought here. Courts in this state have long embraced the importance of preventing depositions that are "oppressive, unreasonable, unduly burdensome or expensive, harassing, harsh, insulting, annoying, embarrassing, incriminating or directed to wholly irrelevant and immaterial or privileged matters, or as to matter concerning which full information is already at hand." *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 296, 658 S.E.2d 619 (2008) (quoting *Young v. Jones*, 149 Ga. App. 819, 824-825, 256 S.E.2d 58 (1979)); *Sechler Family P'ship v. Prime Grp., Inc.*, 255 Ga. App. 854, 857, 567 S.E.2d 24 (2002).

Decades ago, Georgia courts ruled in *Tankersley v. Security Nat'l Corp.* that Georgia law provides trial courts with the authority to quash deposition notices improperly directed to high-level executives of a company. *See* 122 Ga. App. 129, 176 S.E.2d 274 (1970). The court explained the deposition demand should be quashed because the information "sought was already admitted or had already been secured by the use of interrogatories, and if any further information was needed it could be secured by further interrogatories." *Id*. at 130. More recently, the Court of Appeals in *Wheeling-Culligan v. Allen* upheld a ruling quashing a deposition subpoena on a former Delta Airlines CEO, as the trial court determined the CEO had "responded to the interrogatories and that Wheeling-Culligan had alternate sources with more direct, specific or unique knowledge of the matters of which she sought to depose [CEO]." 243 Ga. App. 776, 776-777, 533 S.E.2d 797 (2000).

These rulings are consistent with how federal courts have applied comparable provisions in the Federal Rules of Civil Procedure, which the Court has instructed may aid "in determining the purpose and meaning of the Georgia rule." *Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC*, 305 Ga. 401, 404, 825 S.E.2d 206 (2019) (internal punctuation and citations omitted). Consistent with the Georgia cases cited above, federal courts have also looked to whether the deposition would be oppressive, inconvenient, harassing, or burdensome given the

information available from other sources. Accordingly, using the same reasoning *amici* urge this Court to use now, federal courts have routinely declined to permit depositions of high-level corporate executives under Federal Rule of Civil Procedure 26(c) when those executives lack personal or specialized knowledge about the facts at issue in the pending litigation. *See*, *e.g.*, *Jiminez-Carillo v. Autopart Int'l, Inc.*, 285 F.R.D. 668, 670 (S.D. Fla. 2012) (explaining depositions of corporate executives "who lack personal knowledge of the particular facts" are unwarranted); *Degenhart v. Arthur State Bank*, No. CV411-041, 2011 U.S. Dist. LEXIS 92295, at *7 (S.D. Ga. Aug. 8, 2011) (requiring deposing party to show the witness has "unique or superior knowledge of discoverable information that cannot be obtained by other means"); *see also Givens v. Newsome*, No. 2:20-cv-0852-JAM-CKD, 2021 U.S. Dist. LEXIS 3135, at *11 (E.D. Cal. Jan. 7, 2021) (explaining depositions of high-level government officials "are generally not permitted absent 'extraordinary circumstances' because 'high ranking government officials have greater duties and time constraints than other witnesses").

As these courts have explained, the actions of high-level executives in setting corporate policy, speaking for the company on important safety issues, and advancing corporate culture are not sufficient bases for permitting such depositions. *See*, *e.g.*, *Guest v. Carnival Corp.*, 917 F. Supp. 2d 1242, 1243 (S.D.

Fla. 2012) (quashing a subpoena for these reasons); *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-cv-01528-REB-KLM, 2011 U.S. Dist. LEXIS 68940, at *14-15 (D. Colo. June 27, 2011) (holding the involvement of an executive in a PowerPoint presentation was insufficient to permit the deposition of the executive).

These sorts of activities—typical for many high-level corporate executives—do not give these individuals the necessary personal involvement or knowledge to be useful in a specific lawsuit. *See Simon v. Pronational Ins. Co.*, No. 07-60757-CIV-COHN/SELTZER, 2007 U.S. Dist. LEXIS 96320, at *3-*5 (S.D. Fla. Dec. 13, 2007); *accord Carnival Corp. v. Rolls-Royce, PLC*, No. 08-23318-CIV-SEITZ/O'SULLIVAN, 2010 U.S. Dist. LEXIS 143607, at *8 (S.D. Fla. Apr. 22, 2010) (denying motion to compel deposition because executive's "knowledge regarding the underlying facts . . . are at best speculative"); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *8 (N.D. Cal. Jan. 25, 2007) ("Where a high-level decision maker 'removed from the daily subjects of the litigation' has no unique personal knowledge of the facts at issue, a deposition of the official is improper"). They risk becoming "a tool for harassment." *Treppel v. Biovail Corp.*, No. 03 Civ. 3002 (PKL) (JCF), 2006 U.S. Dist. LEXIS 7836, at *4 (S.D.N.Y. Feb. 28, 2006).

Amici do not intend to suggest that under no circumstances may a high-level executive be deposed. Such a deposition may be appropriate and necessary to the pursuit of justice when a person, in fact, has direct, unique personal knowledge not obtainable elsewhere and less intrusive means of discovery have been exhausted. *See, e.g., Bose Corp. v. Able Planet, Inc.*, No. 11-cv-01435-MSK-MJW, 2012 U.S. Dist. LEXIS 155383, at *3 (D. Colo. Oct. 30, 2012) (granting motion to compel because executive had "unique personal knowledge as to the critical aspects of the claimed technology that is at the centerpiece of this litigation" and it did not appear "that such critical information [could] not be obtained from other sources or from other witnesses"); *Apple, Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 265 (N.D. Cal. 2012) (granting motion to compel deposition because court was persuaded the executive "may have engaged in 'the type of hands-on action which demonstrates the unique personal knowledge required to compel a deposition of a CEO'"); *Resort Props. Of Am. v. El-Ad Props. NY, LLC*, No. 02:07-CV-00964-LRH-RJJ, 2008 U.S. Dist. LEXIS 117003, at *7-*8 (D. Nev. July 10, 2008) (permitting deposition of high-level executive when witness was "personally responsible for initiating [the defendant company's] disputed purchase" and attended meetings, the details of which were unable to be ascertained from any other witnesses).

Plaintiff has not demonstrated that any such circumstances exist for Ms. Barra's deposition in the litigation below. *Amici* ask the Court to use this case to reinforce the need for Georgia courts to protect against this type of discovery request and provide guidance that such depositions are permitted only when the high-level executive has direct, unique personal knowledge not obtainable elsewhere and less intrusive means of discovery have been exhausted.

II. THIS COURT SHOULD KEEP GEORGIA COURTS WITHIN MAINSTREAM AMERICAN JURISPRUDENCE REGARDING DISCOVERY PRACTICES

Courts in other jurisdictions with rules comparable to Georgia's standard for protective orders under O.C.G.A. § 9-11-26(c) have similarly precluded depositions of high-level corporate executives when those persons lack unique or specialized knowledge and less intrusive means have not been exhausted. These jurisdictions include those which have not adopted the "apex doctrine," as well as those which have. Formal adoption of the "apex doctrine" is not needed for Georgia courts to properly protect executives from abusive litigation demands. The nomenclature of the "apex doctrine" is simply an explication of existing principles identifying under what circumstances executives can be deposed. *See, e.g., Givens*, 2021 U.S. Dist. LEXIS 3135, at *11-*12 (observing the apex doctrine was developed as "a framework for determining whether 'good cause' exists to forbid

the deposition under Rule 26(c)"). It provides a yardstick for weighing competing interests with respect to senior executive depositions.

For example, the Missouri Supreme Court declined to adopt the apex doctrine *per se*, but nonetheless granted a motion for a protective order of a high-level executive. *See State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 609 (Mo. 2002). The court explained that in determining whether to allow "top-level employee depositions, the court should consider: whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent." *Id.* at 607. The Oklahoma Supreme Court also declined to adopt the "apex doctrine," but nonetheless applied the same standard urged herein under existing state case law. *See Crest Infiniti II, LP v. Swinton*, 174 P.3d 966, 1004-1005 (Okla. 2007) (allowing a protective order when the deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense" or where an "appropriate corporate official" may "provide the information sought").

State attorneys general—including Georgia's Attorney General—have similarly observed that "[e]ven states that have not adopted [the apex doctrine] have recognized the importance of limiting the ability of litigants to force high-

ranking officials to sit for depositions." Amici Curiae Brief of 15 State Attorneys General, *U.S. Dep't of Commerce v. U.S. Dist. Court for the Southern Dist. of New York*, Case No. 18-557 (U.S. Dec. 21, 2018), at 33 (joined by Georgia Attorney General Christopher M. Carr). "[F]ailing to require litigants to exhaust other means of obtaining relevant information will only increase the risk of high-level officials facing harassing depositions." *Id*. at 4. Carr and the other attorneys general were concerned that similar tactics could be used against state officials.[2]

In addition, this Court may find rulings adopting the "apex doctrine" useful in setting forth factors lower courts should consider when a party seeks to depose a high-level executive. *See Netscout Sys., Inc. v. Gartner, Inc.*, 63 Conn. L. Rptr. 2, 2016 Conn. Super. LEXIS 2266, at *18-*19 (Conn. Super. Ct. Aug. 22, 2016) (observing "many of the principles applied in the apex witness cases fit comfortably within Connecticut's analysis of the good cause necessarily shown to justify a protective order precluding a CEO's deposition"); *Lawson v. Spirit Aerosystems*, Case No. 18-1100-EFM-ADM, 2020 U.S. Dist. LEXIS 66892, at *13

[2] *See also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 386 (2004) (observing that depositions of high-level state officials can "disrupt the functioning of the Executive Branch"); *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (explaining that "If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation.") (internal quotation omitted).

(D. Kan. Apr. 16, 2020) (finding it unnecessary to decide whether the apex doctrine should apply, as "the principles discussed by courts analyzing the apex doctrine are useful to determining whether a protective order is appropriate").

In Texas, for example, the state Supreme Court requires a showing the executive has some "unique or superior *personal* knowledge of discoverable information." *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (emphasis added). As courts there held, actions more connected to the incident giving rise to litigation than those alleged here—namely, briefing the media and families about an accident, mobilizing an investigation to learn the cause of the accident, and sending personal letters to affected passengers—did not constitute sufficient personal involvement to warrant a deposition. *See In re Continental Airlines*, 305 S.W.3d 849, 853-858 (Tex. Ct. App. 2010). The Texas Supreme Court most recently upheld these principles in *In re American Airlines, Inc.*, No. 20-0789, 2021 WL 4928296, --- S.W.3d --- (Tex. Oct. 22, 2021) (vacating order compelling an apex deposition).

The Court of Appeals of Michigan issued a similar ruling in *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490 (Mich. Ct. App. 2010), a case which, like the case at bar, involved a motor vehicle products liability lawsuit. There, the plaintiff sought to take the deposition of the defendant's chairman, CEO and COO.

The plaintiffs argued the COO made public statements regarding safety and had testified before Congress regarding vehicle recalls; the CEO had testified before Congress that he would be involved in the quality-control review. *See id*. at 491-92. Nonetheless, the appellate court found it was an abuse of discretion for the trial court to deny the protective orders given, in part, the lack of any personal knowledge of the witnesses. *See id.* at 497. As this and other cases indicate, "[v]ast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved." *Liberty Mut. Ins. Co. v. Sup. Ct.*, 10 Cal.App.4th 1282, 1287 (1992).

Most recently, in neighboring Florida, the state Supreme Court announced an amendment to its civil procedure rules to codify the apex doctrine for corporate and government officers. *See In re: Amendment to Florida Rule of Civil Procedure 1.280*, 324 So. 3d 459 (Fla. 2021). While other state and federal courts acted pursuant to specific cases and under existing rules, as is sought here, the Florida Supreme Court deemed the issue of such importance that it chose to provide clear guidance in Florida's Rules of Civil Procedure. It noted the broad acceptance of the rule, and affirmed that it was "codif[ying] a doctrine of long legal standing" and "well-established" principles. *Id*. at 462. In the past, Florida's intermediate appellate courts had invoked the apex doctrine with respect to high-level

government officials, but not corporate executives. *See id.* at 459. In extending the doctrine to the private sector, the court explained: "Preventing harassment and unduly burdensome discovery has always been at the heart" of the apex doctrine and there is "no good reason to withhold from private officers the same protection that Florida courts have long afforded government officers." *Id.* at 460, 461.

The existing version of Florida's apex doctrine rule, currently the subject of notice and comment, reads as follows:

> A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated.
>
> If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.

Id. at 461-62 (to be codified at Fla. R. Civ. P. 1.280(h)).

The common theme among all these state laws is to ask whether the person sought for deposition is a high-ranking executive and has unique or superior knowledge of the information sought, and whether there are less intrusive means of

obtaining the information. Speaking on broad issues of safety, testifying in Congress, and setting in motion important safety programs and cultural changes are not sufficient involvement to warrant a deposition in a products liability case.

III. ALLOWING UNFETTERED DEPOSITIONS OF HIGH-LEVEL EXECUTIVES WOULD BE OVERLY BURDENSOME AND LEAD TO LITIGATION ABUSE

In adopting similar frameworks to that advocated by *amici*, the courts did not protect high-level corporate executives out of some sort of deference to corporate officers, or as Plaintiff contended, to create a "caste" system in litigation. Rather, they found that such depositions, "when conducted before less intrusive discovery methods are exhausted, raise a tremendous potential for abuse and harassment." *Liberty Mut. Ins. Co.*, 10 Cal.App.4th at 1287. These dynamics raise an acute problem for manufacturers, particularly of mass consumer goods like automobiles, given the cumulative effect such depositions would have if allowed in cases where the executives have no unique knowledge of the relevant facts. Opposing lawyers could use these deposition demands to increase the business risks and costs of a case (or category of cases) in an effort to drive settlement, regardless of the merits of the case or cases.

The unfortunate reality, particularly in today's mass tort environment, is that some businesses can have large numbers of pending cases at any moment. In the

automobile industry, there are more than 275 million registered motor vehicles in the United States driven by nearly 235 million licensed drivers. *See* Michael Wayland, *U.S. Auto Sales Fall in 2019, But Still Top 17 Million for Fifth Consecutive Year*, CNBC (Jan. 6, 2020); Hedges & Co., *How Many Licensed Drivers Are There in the US?*[3] Even with today's increased focus on safety, there are more than 8 million crashes each year, resulting in more than 3 million injuries. *See* NHTSA, Traffic Safety Facts Annual Report Tables, NHTSA (May 25, 2021), at tbl. 3.[4] Many lawsuits resulting from these injuries will involve claims only against other drivers, while others will claim a defect in the vehicle caused the alleged injuries. According to statistics available through Bloomberg Law, there were about 8,800 civil lawsuits filed against the largest automobile manufacturers in the United States in 2020, including nearly 700 product liability or tort cases.[5] While these represent a small proportion of the vehicles on the road, these are sizable numbers in absolute terms.

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[3] https://hedgescompany.com/blog/2018/10/number-of-licensed-drivers-usa/

[4] https://cdan.nhtsa.gov/tsftables/tsfar.htm

[5] Bloomberg Law is a commercial database that aggregates federal and state dockets for all civil cases. These results reflect all civil cases tagged in the database as product defect or tort cases filed in 2020 against the eleven leading automobile manufactures in the United States. Bloomberg does not include all state dockets, so the results are almost certainly under-inclusive.

Automobile manufacturers, like other large companies, also face lawsuits on a wide range of other issues, including employment, real estate, tax, securities, commercial matters, antitrust, intellectual property, the environmental, and more. If all that is required to depose a senior corporate official is evidence that he or she has some generalized knowledge of company policies in a pertinent area, every chief executive officer of every American company might be compelled to appear as a deponent in every case where it fits the "strategy" of an opposing lawyer. The cumulative effect would make it nearly impossible for the executives to fulfill their considerable responsibilities to their companies, employees and consumers *See Gonzalez Berrios v. Mennonite Gen. Hosp., Inc.*, No. CV 18-1146 (RAM), 2019 WL 4785701 at *6 (D.P.R. Sept. 30, 2019) (observing that allowing the deposition would "open the door to the taking of his deposition in every single case against the [defendant], significantly disrupting his managerial responsibilities.").

Even if well-intentioned, executive depositions could be taken at the whim of any lawyer, for any party, regardless of the cumulative havoc that they would wreak by preventing these officers from effectively doing their jobs. "[S]uch officials would spend an inordinate amount of time tending to pending litigation." *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). But, a high-level executive's job "is to manage the company, not to fly

around the United States participating in depositions." *General Star Indem. Co. v. Atlantic Hospitality of Florida, LLC*, 57 So. 3d 238, 240 (Fla. Ct. App. 2011).

Adding to the concern is many such depositions are not well-intentioned. For decades, courts around the country, including in Georgia, have expressed concern over the ability of parties to abuse discovery rules. *See, e.g., Borenstein v. Blumenfeld*, 151 Ga. App. 420, 421, 260 S.E.2d 377 (1979) (observing that discovery "could become a device for the unscrupulous litigant to squeeze concessions from the opposing side in cases where such concessions were totally unwarranted. This sort of abuse simply cannot be tolerated in an ordered system of justice"). In some lawsuits, "[d]iscovery has now become the main event—the end game—in pretrial litigation proceedings," as litigants try to use discovery requests like the one herein to pressure a party to settle, rather than litigate, the merits of the case. Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004). "As a result, discovery has become the focus of litigation, rather than a mere step in the adjudication process." John H. Beisner, *"The Centre Cannot Hold"— The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. Chamber Inst. for Legal Reform (2010), at 1-2.

Senior executives are especially vulnerable to such abuse given the nature and breadth of their responsibilities. *See Mulvey v. Chrysler Corp.*, 106 F.R.D.

364, 366 (D.R.I. 1985) (observing they "can easily be subjected to unwarranted harassment and abuse" so "courts have a duty to recognize [their] vulnerability"). As renowned Professor Moore has explained, trying to depose "the busiest member of the corporate hierarchy or governmental agency, when the information sought could . . . be obtained by deposing subordinate officials" is frequently used to coerce settlement unsupported by the merits. 4 James Wm. Moore, et al., Moore's Federal Practice ¶ 26.69 at p. 26-433 (2d ed. 1990). Collateral litigation over these requests, as well as tying up the executive's time, will be expensive and burdensome. Indeed, practitioners have found that such executives will "commonly approve a higher settlement in an effort to avoid the intrusive and harassing discovery." Kevin C. Baltz, *The Apex Deposition Protecting High-Level Executives*, 48 No. 4 DRI For Def. 59 (Apr. 2006); *see also* Scott A. Mager & Elaine J. LaFlamme, *At the "Apex" of the Problem: Stopping the Abuse of Requests for Depositions of High Ranking "Apex" Executives*, 23 No. 3 Trial Advoc. Q. 19 (2004) ("Corporate officials, fearful of the intrusive and abusive deposition process, either choose to pay larger settlement amounts or fail to take aggressive steps to protect themselves against this kind of improper discovery.").

"Virtually every court that has addressed this subject has noted that deposing officials at the highest level of corporate management creates a tremendous

potential for abuse and harassment." Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006). As they have appreciated, protecting against these depositions does not diminish or undermine a lawsuit, change the rules of discovery, or eliminate the discretion that trial judges have to manage discovery. Rather, it stops litigation gamesmanship from dictating outcomes. The fair and efficient functioning of the civil justice system is a critical element of American global competitiveness and the Court should ensure that the costs and imperfections of discovery do not interfere with justice in Georgia.

IV. DISCOVERY TACTICS SHOULD NOT INTERFERE WITH THE VITAL ROLE OF COMPANY LEADERSHIP IN IMPROVING CORPORATE CULTURE, PARTICULARLY ON SAFETY ISSUES

Finally, the specter of unrestrained executive depositions, without the focused inquiry into the need required, would be enormously disruptive to public benefits of the manufacturing industry. Officers of America's large manufacturers oversee multiple facets of operations, from corporate investments to strategic planning, and from product line decisions to personnel policies. The ability of each company to function successfully depends on its officers' availability to manage its affairs. This is also an age when corporations are encouraged to pay heed to events in society and speak out more on matters of public concern. Consumers, employees

and other members of the public benefit significantly when leaders take a personal stake in a better corporate culture, particularly on issues of product safety.

Again, the motor vehicle industry provides a vivid example of these dynamics. The industry is highly regulated, particularly when it comes to safety. The National Highway Traffic Safety Administration ("NHTSA") promulgates and enforces the Federal Motor Vehicle Safety Standards, which specify design, construction, performance, and durability requirements. *See* 49 C.F.R. § 571.101 *et seq.* The National Transportation Safety Bureau ("NTSB") investigates crashes and other incidents to make safety recommendations. *See* 49 C.F.R. § 831.5. State agencies also investigate car crashes. Therefore, high-level auto manufacturer executives regularly engage on safety-related matters, including providing legislative testimony and regulatory comments on their programs. These activities enhance the regulatory structure and the overall safety of cars on the road, but they do not mean that the executive has unique, specific knowledge of any car's design.

Further, based on *amici's* experience, developing a strong culture of safety demands that high-level executives publicly and repeatedly articulate the cultural attributes and put in place policies and processes they want to see in their organizations, much like Ms. Barra has done. Others in the organization are then relied upon to implement that vision in designing, testing, and manufacturing

vehicles and vehicle components. GM leadership, for example, instituted the Speak Up for Safety program to encourage all employees to raise safety issues when they arise and establish consistent and comprehensive processes for investigating and resolving those issues. *See* Jena McGregor, *Getting GM Employees to Speak Up About Safety*, Wash. Post (Apr. 11, 2014). The industry's efforts are working. The number of accidents, injuries, and fatalities have fallen significantly. *See* Traffic Safety Facts Annual Report Tables, NHTSA, *supra*. For example, between 1989 and 2019, the number of accidents each year involving passenger cars fell by one-third, and the number of fatalities fell by nearly one-half. *See id*. at tbl. 3.

In addition to product safety, it is important that executives advance other programs and policies beneficial to a company's overall culture. These other areas include workplace safety, employment matters and environment, social, and governance issues, where high-level executive leadership is integral to achieving important corporate cultural advances. Many people both within and outside a company benefit when executives personally invest in positive cultural change, whereas subjecting executives to frivolous depositions in every case in every jurisdiction inures only to the benefit of litigants. This needed visibility on driving cultural changes cannot occur if senior executives must worry about being hauled into court and taken away from running their businesses, solely for publicly

discussing these important issues of public concern. Thus, the result Plaintiff seeks here would effectively chill corporate speech without advancing a legitimate, let alone compelling, countervailing interest. This consequence is troubling.

In sum, this Court should incentivize senior corporate leadership to engage and energize their organizations and the public on such important matters as safety without fear of opening themselves and their companies to vexatious litigation tactics. Large product manufacturers, at any moment in time, can have hundreds, if not thousands, of pending cases. The executives tasked with running such a company should have to sit for depositions only when they have direct involvement and superior knowledge of the issues in the pending litigation and all other avenues for the information have been exhausted. As here, litigants should be directed to the individuals, other than the executive, who have personal knowledge about the issues relevant to the case. Seeking to depose an executive is a pressure tactic that, when misused, is corrosive to the goals of the civil justice system.

CONCLUSION

For these reasons, this Court should reverse the decision of the Court of Appeals and hold that the trial court erred when it denied GM's motion for a protective order.

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Dated: November 22, 2021

CERTIFICATE OF SERVICE

I certify that on the 22nd day of November, 2021, I caused to be served the foregoing *AMICI CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC., ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN TORT REFORM ASSOCIATION AND GEORGIA ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT in a first-class postage-prepaid envelope addressed to the following:

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