IN THE SUPREME COURT
STATE OF GEORGIA

GENERAL MOTORS LLC, Appellant/Defendant, v. ROBERT RANDALL BUCHANAN, Individually and as Administrator of the Estate of GLENDA MARIE BUCHANAN, Appellee/Plaintiff.	Case No. S21G1147 Appeal Case No. A21A0043

AMICI CURIAE BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE ROBERT RANDALL BUCHANAN

Respectfully submitted by Counsel for Amici Curiae:

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Georgia Trial Lawyers Association ("GTLA"), comprised of over 2,000 members of the State Bar of Georgia, is dedicated to the civil justice system and the principle of full compensation for the victims of intentional torts and negligence.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Georgia. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Amici submit the following brief in support of the Appellee's position.

INTRODUCTION AND SUMMARY OF ARGUMENT

The heart of Amici's concern in this case is the Appellant and its amici's attempt to rewrite Georgia's Civil Practice Act to include an "apex doctrine," which would create a new, one-sided barrier for any plaintiff seeking to depose a high-level executive having first-hand knowledge and/or responsibility to address

issues relevant to the claims presented. Because the "apex doctrine" is contrary to Georgia law, the doctrine should not be adopted by the Courts of this State.

While this Court is housed only a stone's throw away from its sister branches of government, the organized lobbying efforts expended thus far in support of this so-called "apex doctrine" bear a striking resemblance to those customarily (and properly) confined beneath the gold dome. Bringing truth to the old saying, "where there's smoke, there's fire," the Appellant and its amici, in advocating for the judicial adoption of the apex doctrine, necessarily ask this Court to turn a blind eye to another preexisting doctrine: Georgia's Constitutional separation of powers.

Apparently unable to gain traction in enacting a caste system-based discovery regime through more traditional (legislative) routes, the Appellant and its amici have instead chosen the case before this Court as an alternative vehicle for accomplishing their goal. However, the doctrine of separation of powers determines who possesses the authority to rewrite statutes. Under this doctrine, legislation belongs to the legislature. And while statutory construction is reserved to the courts, fulfilling the intent of the legislature is the ultimate aim.

Despite having many opportunities, the General Assembly has never elected to adopt an "apex doctrine." Instead, the legislature has left the current standards untouched for half a century. History is the best teacher: the strictures of Rule 26

are wholly sufficient to address any supposedly "abusive" discovery, including the parade of horribles the Appellant and its amici have strategically conjured. Georgia's economy has somehow managed to survive without a C-Suite loophole. In fact, Georgia's business environment has thrived.

Georgia citizens have a right of access to Georgia's civil justice system, including the discovery tools expressly afforded under the Civil Practice Act. These tools place ordinary consumers and white-collar executives on the same footing in civil actions seeking to recover damages suffered as a result of corporate negligence. Regardless of title or class status, the same standard applies to all deponents. A "high society" exception which shifts the burden of demonstrating good cause away from the party opposing discovery cannot co-exist with the plain language of Rule 26, nor should it. By the same token, any rule imposing mandatory consideration of preferential factors for certain classes of litigants or witnesses, but not others, is incongruous with O.C.G.A. § 9-11-26(c) and longstanding Georgia precedent that invariably vests broad discretion in the trial court to determine what constitutes "good cause." As the Court of Appeals unanimously confirmed, the trial court correctly applied the Rule 26 standard, and no valid reason exists to alter its reasoned analysis. This Court should affirm the decisions of the trial court and the Court of Appeals.

ARGUMENT AND CITATIONS TO AUTHORITIES

The "apex doctrine" is a dying judicial construct that presumptively bars the deposition of high-level executives unless the party seeking the deposition can prove that the would-be deponent's unique personal knowledge of relevant facts overrides the assumed oppression and abuse manifested by taking the deposition. *See Serrano v. Cintas Corp.,* 699 F.3d 884, 900-901 (6th Cir. 2012). This Court should deny Appellant's invitation to adopt an "apex doctrine" because (1) Georgia's Constitutional separation of powers doctrine precludes the Court from engaging in legislative functions, (2) Georgia is already thriving under Rule 26 protections, and (3) the "apex doctrine" is declining in use and increasingly rejected.

I. THIS COURT CANNOT ADOPT THE "APEX DOCTRINE"

In advocating for the judicial adoption of the "apex doctrine," the Appellant and its amici necessarily ask this Court to turn a blind eye to Georgia's Constitutional separation of powers doctrine. The "apex doctrine," which shifts the burden of showing good cause to the proponent of a deposition, is irreconcilable with the plain language of O.C.G.A. § 9-11-26(c), and its application is incompatible with the purpose for issuing protective orders pursuant to Rule 26(c). While courts are permitted to interpret statutes, they cannot add new lines to the

law. *See Allen v. Wright,* 282 Ga. 9, 12(1) (2007*)* ("[U]nder our system of separation of powers this Court does not have the authority to rewrite statutes. The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. Under that doctrine, statutory construction belongs to the courts, legislation to the legislature. We cannot add a line to the law."); *see also State v. Fielden,* 280 Ga. 444, 448 (2006) (same).

While the Appellant and its amici urge the Court to unilaterally adopt this so-called apex rule born from (and inconsistently applied by) federal district courts citing federal standards, "[o]ver the past [50] years…Federal Rule of Civil Procedure 26 has been substantially amended, including several amendments to narrow the scope of discovery[.]" *Bowden v. The Med. Ctr., Inc*., 297 Ga. 285, 291 n.5 (2015). In contrast, and as the Court of Appeals correctly noted, "Georgia's provision governing the scope of discovery is broader than the federal rule*." Gen. Motors, LLC v. Buchanan*, 359 Ga. App. 412, 418 n.11 (2021) (highlighting that, unlike Georgia's standard, the federal rules require courts to consider additional factors, such as proportionality, importance of the issues, amount in controversy, and party resources, among others). Notably, "[a]side from technical amendments, O.C.G.A. § 9–11–26 has not been revised since 1972." *Bowden*, 297 Ga. at 291 n.5.

Despite having many opportunities, the General Assembly has never elected to adopt an "apex doctrine." In fact, much can be drawn from the legislature's continued reliance upon the current standards codified in Rules 26 and 30 of the Civil Practice Act, which Georgia's courts have seamlessly applied for the past half-century. Indeed, "[a] reinterpretation of a statute after the General Assembly's implicit acceptance of the original interpretation would constitute a judicial usurpation of the legislative function." *RadioShack Corp. v. Cascade Crossing II, LLC*, 282 Ga. 841, 843 (2007) (quoting *Abernathy v. City of Albany*, 269 Ga. 88, 90 (1998)). Because this Court cannot implement a doctrine that conflicts with the protective order provisions of the Civil Practice Act, the Court should decline the invitation to do so in this case.

II. BUSINESS IN GEORGIA: AT THE APEX WITHOUT THE DOCTRINE

The General Assembly codified the current Rule 26 protections decades ago. Both then and now, Georgia has never needed an "apex doctrine." As demonstrated time and again, the strictures of Rule 26 are more than capable of handling any supposedly "abusive" discovery, including the parade of horribles the Appellant and its amici have fabricated regarding the business climate in Georgia. In fact, the economic realities paint a much different picture.[1]

[1] "Gov. Kemp Welcomes Rivian for Single-Largest Economic Development Project in State History," *at https://gov.georgia.gov/press-releases/2021-12-*

Significantly, in October of 2021, Georgia was named "Top State for Doing Business" for the eighth consecutive year.[2] This accomplishment is due, in large part, to Georgia's attractive labor market (i.e., the hardworking citizens of Georgia). As Governor Brian Kemp stated himself, "…make no mistake about it, this ranking is because of the hardworking Georgians who work tirelessly to create opportunities and build success in their communities."[3] While the Appellant and its amici believe Georgia cannot be a "business-friendly environment" without the imposition of mandatory, preferential treatment for the corporate elite, Speaker David Ralston of the Georgia House of Representatives clarified that "[b]eing the No. 1 state for business means good quality jobs for Georgia citizens," which "helps us keep the state a great place to live, to work, and to raise a family."[4]

Corporations are comprised of individuals from all walks of life. Logically, a judicial system that provides a fair and equal process for all (regardless of job title)

16/gov-kemp-welcomes-rivian-single-largest-economic-development-project (last visited January 11, 2022); *see also* "Gov. Kemp: SK Group to Locate First of its Kind Glass-based Semiconductor-part Venture in Covington," *at https://gov.georgia.gov/press-releases/2021-10-28/gov-kemp-sk-group-locate-first-its-kind-glass-based-semiconductor-part* (last visited January 11, 2022).

[2] "Gov. Kemp: Georgia Earns 'Top State for Doing Business' for 8th Consecutive Year." *at https://gov.georgia.gov/press-releases/2021-10-01/gov-kemp-georgia-earns-top-state-doing-business-8th-consecutive-year* (last visited January 10, 2022).

[3] "Georgia Named 'Top State for Doing Business' for 7th Consecutive Year." *at https://gov.georgia.gov/press-releases/2020-09-02/georgia-named-top-state-doing-business-7th-consecutive-year* (last visited March 3, 2021).

[4] *Supra* note 1.

creates a conducive environment for growth and opportunity. Georgia citizens, for example, have a right of access to Georgia's civil justice system, including the discovery tools expressly afforded under the Civil Practice Act. These tools place ordinary consumers and white-collar executives on the same footing in civil actions.

While individual victims suffer from an inherent asymmetry of information when bringing claims against large corporate entities, the broad scope of discovery provided under the Civil Practice Act works to create an even playing field, with the interest of justice and efficiency as its guiding principles. O.C.G.A. §§ 9-11-26(b); 9-11-1. Accordingly, parties are entitled to depose party witnesses on any matter, not privileged, which is relevant to anything that is or may become an issue in the case. O.C.G.A. § 9-11-26(b)(1). A party wishing to deviate from this liberal, baseline presumption has the burden of demonstrating good cause. O.C.G.A. § 9-11-26(c).[5]

Regardless of title or class status, the same standard applies to all deponents. A "high society" exception which shifts the burden of demonstrating good cause

[5] Determining what constitutes good cause sufficient to grant "a motion for protective order generally lies within the sound discretion of the trial court[.]" *Alexander Properties Grp. Inc. v. Doe*, 280 Ga. 306, 307 (2006); *see also Emory Clinic v. Wyatt,* 200 Ga. App. 184, 185 (1991) ("Broad discretion is vested in the trial court to determine whether 'good cause' exists and what constitutes 'good cause.'").

away from the party opposing discovery cannot co-exist with the plain language of Rule 26, nor should it. By the same token, a caste system-based discovery regime is not only incompatible with the economic and judicial values of this state but has been flat out rejected at the federal district court level when applying Georgia law. *See Synovus Trust Co. v. Honda Motor Co.,* No. 4:03-CV-140-2, ECF 104 (M.D. Ga. Aug. 11, 2004) ("The Court is unpersuaded by Defendants' implication that we have a 'caste' litigation system which divides witnesses into two classes—a privileged class that must be protected from the inconveniences associated with litigation and everyone else who must put aside private matters temporarily for the administration of justice.").

While every major corporation in Georgia may have a CEO, each employs a significantly greater number of Georgia citizens. These hardworking individuals are the bedrock of this State's economy. A class-based discovery system that caters to 0.01% of Georgia's workforce undermines the other 99.99% that lifted Georgia to the apex of this nation's economy and worked hard to keep it there for the past eight consecutive years. The "apex doctrine" does not belong in Georgia.

III. THE "APEX DOCTRINE" IS NOT FAVORED

The "apex doctrine," itself applied by a very limited number of courts, is declining in use and frequently rejected. To date, forty-five states have declined to adopt the doctrine, and courts in at least six states—Oklahoma, Missouri,

Colorado, Connecticut, New York, and North Carolina—have expressly rejected it, including those, like Georgia, that model their rules of civil procedure on the federal rules. *See Serrano,* 699 F.3d 884; *Crest Infiniti II, LP v. Swinton*, 174 P.3d 996, 1003-04 (Okla. 2007); *Blue Mountain Credit Alternatives Master Fund, L.P. v. Regal Entertainment Corp.,* 465 P. 3d 122 (Colo. App. 2020); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606-07 (Mo. 2002) (en banc); *Nescout Systems, Inc. v. Garner, Inc*., 2016 WL 5339454 (Conn. Superior Ct.); *Thomson v. Zillow, Inc*., 32 N.Y.S.3d 455, 459 (N.Y. Sup. Ct. 2016); *Bradshaw v. Maiden*, No. 14 CVS 14445, 2017 WL1238823, at *5 (N.C. Super. Ct. Mar. 31, 2017).

Even federal courts purporting to apply the doctrine have maintained that the apex doctrine is limited to protections identical to those already provided under Georgia's Civil Practice Act. For example, the Northern District of California, District Court recently ordered Apple CEO, Tim Cook, to sit for a seven-hour deposition after Apple's failed attempt at invoking the apex doctrine. *See In re Apple Iphone Antitrust Litig*., No. 11CV06714YGRTSH, 2021 WL 485709, at *3 (N.D. Cal. Jan. 26, 2021). Despite Apple's claims that the plaintiffs were not entitled to depose Cook at all, the court noted that "the apex doctrine limits the length of a deposition, rather than barring it altogether, because of the heavy burden a party faces in blocking a deposition entirely." *Id.* Accordingly, even though the parties were normally entitled to depose witnesses for ten hours,

"several factors lead the Court to conclude that Cook's deposition should be seven hours of record time." *Id.*

Similar to the court in *In re Apple Iphone*, the trial court here used the discretionary tools provided under Rule 26(c) to limit Barra's deposition to only three-hours, in-office, via zoom. In fact, the trial court imposed harsher limitations on Barra's deposition than that of Tim Cook, the CEO of the world's largest publicly traded company based on market capitalization.[6] If anything, this demonstrates that Georgia's discretionary protections are working exactly as the General Assembly intended.

CONCLUSION

A caste-based discovery regime has no place in Georgia. The members of the Georgia General Assembly were each individually elected by the citizens of Georgia. Each of these members represented the interests of their constituents in enacting the current protections provided under the Civil Practice Act. The citizens of Georgia, the same hardworking individuals who have propelled this state to its economic apex, have not called upon their elected officials to adopt an "apex" discovery system. Georgia's discretionary discovery protections under Rule 26 are working as intended, and many courts across the nation appear to be fixing a

[6] "Apple Becomes First Company to Hit $3 Trillion Market Value," *at https://www.nytimes.com/2022/01/03/technology/apple-3-trillion-market-value.html* (last visited January 11, 2022).

problem Georgia preemptively avoided decades ago. As the Court of Appeals unanimously confirmed, the trial court correctly applied the Rule 26 standard, and no valid reason exists to alter its reasoned analysis. This Court should affirm the decisions of the trial court and the Court of Appeals.

Respectfully submitted this 14th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this **AMICUS CURIAE BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE ROBERT RANDALL BUCHANAN** via electronic mail to the following counsel of record:

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This 14th day of January, 2022.

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Exhibit A

SUPREME COURT OF GEORGIA
Case No. S21G1147

December 22, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

GENERAL MOTORS, LLC v. ROBERT RANDALL BUCHANAN et al.

Your request for an extension of time to file the brief of appellee in the above case is granted until January 17, 2022.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk