No. S19C1009

IN THE SUPREME COURT
STATE OF GEORGIA

FORD MOTOR COMPANY,
Appellant/Defendant,

v.

KIM HILL and ADAM HILL,
Surviving children and Co-Administrators of the
Estates of Melvin Hill and Voncile Hill, deceased,
Appellees/Plaintiffs.

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF APPELLANT'S PETITION FOR CERTIORARI

Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
Phone: (202) 783-8400
Of Counsel for Amici Curiae

Leonard Searcy, II
(Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Counsel of Record for Amici Curiae

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 464-5948
Of Counsel, Chamber of Commerce of the United States of America

John T. Whatley
David Bright
ALLIANCE OF AUTOMOBILE MANUFACTURERS
803 7th Street, N.W., Suite 300
Washington, DC 20001
Of Counsel, Alliance of Automobile Manufacturers

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STATEMENT OF INTEREST

This case is of major importance to *amici* and their members because it raises fundamental issues of whether Georgia courts can be relied upon to uphold a defendant's constitutional rights to present a full and fair defense and have liability rest on the merits of a claim. The significance of the sanctions in this case, which essentially impose liability on the defendant by precluding any defense on the merits of the plaintiffs' claims, and the inconsistent rulings by two panels of the same appellate court in this same case on whether the appellate court must hear this immediate appeal, scream for this Court's review.

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 70 percent of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The unusual events of this appeal and the gravity of the underlying issues present this Court with a case that is clearly appropriate for *certiorari*. Here, two appellate panels on the same court reached opposing results on the threshold question of whether this appeal meets the criteria for immediate review as set forth in *Waldrip v. Head*, 272 Ga. 572 (2000) and O.C.G.A. § 5-6-34(a)(2). This Court should hear this case to resolve this lower court split. Further, the standards and issues raised by this appeal go to the heart of a litigant's access to justice in Georgia: can a judge, through the inherent authority to punish a party for the

[1] 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
(Footnote continued on next page)

alleged contemptuous behavior of its counsel's in-trial conduct, take away that party's right to defend itself against liability? As the U.S. Supreme Court has held in recent years, inherent authority sanctions must be tailored to the alleged wrong so courts do not improperly determine substantive issues of liability. It is clear from this case that Georgia's state courts need this same guidance.

Here, the trial judge determined that Ford's counsel did not follow orders regarding inadmissible evidence on the issue of causation. Rather than arrive at a sanction that would remedy the violation, the judge struck all of Ford's defenses to liability, including on separate product liability issues. It then issued findings from the bench essentially guaranteeing a punitive damages award. These substantive, outcome determinative sanctions, though, had little to do with the evidentiary orders Ford's counsel allegedly breached and deprived Ford of its constitutional right to have a jury, not a judge, resolve the facts underpinning the alleged liability.

This appeal, therefore, satisfies the two grounds for immediate appeal under Georgia law. First, because the sanction goes far beyond what is needed to cure the counsel's alleged misconduct, the sanction is punitive and triggers the right to an immediate appeal as provided in O.C.G.A. § 5-6-34(a)(2) for contempt orders.

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monetary contribution intended to fund the preparation or submission of this brief.

Second, it invokes the scope of inherent authority sanctions, which increasingly has become "an issue of great concern, gravity, and importance to the public." *Waldrip v. Head*, 272 Ga. 572, 575 (2000) (setting further criteria for immediate review). When a court exercises its inherent authority in a way that strikes all defenses to liability, there is "no timely opportunity for appellate review" after final judgment, thereby requiring immediate review under *Waldrip*. *Id.*

Amici urge the Court to grant Ford's Petition for *Certiorari*. Businesses and other members of the public must have confidence that if they do business in Georgia and are sued here, their fundamental rights will be honored by the courts.

ARGUMENT

Ford has the constitutional right to defend itself against the allegations of liability at bar. *See* Ga. Const. Art. I, § I, Para. XII ("No person shall be deprived of the right to . . . defend, either in person or by an attorney, that person's own cause in any of the courts of this state."); Ga. Const. Art. I, § I, Para. I. ("No person shall be deprived of . . . property except by due process of law."). In the event a party or its counsel violates a court order, the trial court has the inherent authority to "exercise [its] powers as necessary in aid of its jurisdiction." Ga. Const. Art. VI § I, Para. IV. But, both the Georgia Supreme Court and the Supreme Court of the United States have made clear that "limitations imposed by a trial judge [cannot]

prevent a full and meaningful presentation of the merits." *Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 573-74 (2008) (internal quotations omitted); *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 209 (1958) (Court-imposed sanctions "must be read in light of the provisions of [the Constitution] that no person shall be deprived of property without due process."). Yet, that is exactly what happened here.

I. The Trial Court's Sanction Is a Punitive Contempt Order Requiring Immediate Review Under Georgia Law.

This Court is obligated to assess for itself whether the sanction at bar exceeds the trial court's authority to sanction a party under its inherent powers and, consequently, raises to the level of criminal contempt. While the trial court was careful not to label this punishment a contempt order, this label must not shield the order from a rightful appeal. *See Am. Med. Sec. Grp., Inc. v. Parker*, 284 Ga. 102, 104 (2008) ("[T]he appealability of an order is determined, not by its form or the name given to it by the trial court, but rather by its substance and effect.").

When a sanction is, in effect, a contempt order, O.C.G.A. § 5-6-34(a)(2) requires this Court to provide a direct appeal. The General Assembly defined contempt as "[d]isobedience or resistance by any officer of the court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the courts." O.C.G.A. § 15-1-4(3). The Georgia Supreme Court has

also explained that the trial courts have inherent authority "to *punish* for contempt, any person in disobedience of its judgments, orders, and processes." *In re Orenstein*, 265 Ga. App. 230, 232 (2004) (emphasis added) (internal quotations omitted). Such a punishment is categorized as "a crime in the ordinary sense, requiring proof of the elements of the alleged contempt . . . beyond a reasonable doubt." *Cousins*, 283 Ga. at 575. The question for this Court, then, is whether the sanction striking Ford's answers qualifies as such punishment.

The U.S. Supreme Court has answered this question. It has held on multiple occasions that a sanction crosses into the sphere of criminal contempt when it exceeds that which is necessary to cure the alleged misconduct. *See Int'l Union v. Bagwell*, 512 U.S. 821 (1994) (discussing contempt orders); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017) (applying the same approach to excessive fee awards). The Court has explained that sanctions that punish conduct rather than coerce compliance are, by definition, criminal and, as in *Cousins*, require heightened due process protections. *See Bagwell*, 512 U.S. at 829; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (stating that punitive awards raise the "acute danger of arbitrary deprivation of property"). To "level that kind of separate penalty, a court must provide procedural guarantees applicable in criminal cases, such as 'beyond a reasonable doubt' standard of proof." *Haeger*, 137 S. Ct.

at 1186. Thus, Georgia and federal law are aligned: a sanction in excess of what is needed to cure the alleged misconduct is criminal, criminal sanctions require heightened protections, and Georgia affords criminal sanctions immediate review.

To be clear, the sanctions against Ford here cross far over the curative-criminal line. The trial court found that Ford's counsel violated its order by allegedly eliciting testimony on the use of seat belts, the cause of Plaintiffs' death, and Plaintiffs' fault regarding the accident. At that point, the court had statutory authority to rebuke the attorney, provide the jury with a neutralizing instruction, or declare a mistrial if the trial could not result in a fair verdict. *See* O.C.G.A. § 9-10-185 (providing for such remedies). The trial court declared a mistrial and invoked its inherent authority powers to issue compensatory sanctions to reimburse the court and Plaintiffs for costs incurred from the alleged misconduct. Specifically, the trial court charged Ford with the court's costs of empaneling the jury and indicated that it would set a hearing to determine whether to award attorneys' fees to compensate Plaintiffs for Ford's conduct in allegedly causing a mistrial.

The trial court, though, did not stop there. It also punished Ford by striking its answers to liability. It precluded Ford from contesting that (1) Ford's truck was defectively designed and dangerously weak, (2) the truck's roof was susceptible to being crushed, (3) such a crush was foreseeable, (4) Ford's decision to sell such

products "amounted to a willful, and reckless, and a wanton disregard for life," (5) Ford "knew of the dangers" posed by the products, (6) Ford had a duty to warn that it "willfully failed" to comply with, and (7) this alleged defect caused Plaintiffs' injuries and deaths. Thus, the sanctions exceeded the magnitude of the alleged offense, governed topics different from the alleged offense, and took away Defendant's right to have the jury be the finder of fact on these issues.

The trial court plainly did not "fashion an appropriate sanction." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) ("[A]n inherent power must be a reasonable response to a specific problem."); *Degen v. United States*, 517 U.S. 820, 827 (1996) ("A court's inherent power is limited by the necessity giving rise to its exercise."). This case can still be determined on its merits, and Ford has not forfeited its right to have its case heard on the merits. The trial court should be instructed before the retrial that it may use its inherent authority to address the alleged sanctionable conduct, but only in tailored, less sweeping ways, consistent with its statutory authority. "Although punishment and deterrence are legitimate purposes for sanctions, they do not justify trial by sanctions." *TransAmerica Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991).

Other states have provided for an immediate appeal when, as here, there is no relationship between the offensive conduct and sanction and the sanctions are excessive. *See, e.g., id.* at 917-20. An immediate appeal will ensure that Ford does not "suffer a trial limited to damages." *Id.* at 919.

II. This Appeal Presents an Issue of Great Importance Requiring Immediate Review To Be Properly Adjudicated.

The second basis for this immediate appeal is that the trial court's extreme order raises "an issue of great concern, gravity, and importance to the public [with] no timely opportunity for appellate review." *Waldrip*, 272 Ga. at 575. The issues of inherent authority sanctions and sanctions that determine liability have been under increased scrutiny in recent years, including by the U.S. Supreme Court. *See*, *e.g.*, *Haeger*, 137 S. Ct. at 1178 (striking down excessive inherent authority sanctions); *Bagwell*, 512 U.S. at 821 (providing due process protections for punitive inherent authority sanctions); *Chambers*, 501 U.S. at 44-45 (instructing courts to "exercise caution" when using inherent authority sanctions). The Court, on several occasions, has expressed concern that because inherent authority sanctions have no textual guidelines, they can become punitive and excessive.

In this regard, *Parker*, where the Georgia Supreme Court assessed Rule 37 discovery sanctions, presents a different situation than the case at bar. *See* 284 Ga. at 105. In cases like *Parker*, statutes and rules provide courts with specific

sanctions for prescribed misconduct. By contrast, the General Assembly has not authorized death-penalty sanctions as a means of addressing the alleged evidentiary offenses at issue here. Justice Kennedy cautioned that when a statute or rule does not authorize a sanction, appellate courts must provide scrutiny to ensure that inherent authority sanctions are not "without specific definitional or procedural limits." *Chambers*, 501 U.S. at 70 (Kennedy, J., dissenting on other grounds). There are "constitutional limitations on the power of courts, even in aid of their own valid processes." *Rogers*, 357 U.S. at 209.

The Supreme Court has further cautioned that while many judges will show proper restraint in exercising this authority, some do not. *See Bagwell*, 512 U.S. at 831 (finding judicial-based sanctions "uniquely . . . liable to abuse"); *see also Bloom v. Illinois*, 391 U.S. 194, 207-08 (1968) ("[T]he unwisdom of vesting the judiciary with completely untrammeled power to punish contempt . . . makes clear the need for effective safeguards against the power's abuse."). As Justice Scalia explained, "[t]hat one and the same person would be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." *Id.* at 840 (Scalia, J., concurring). This rationale is exactly why the Court should reconsider and grant review here.

Experience also has shown that, when sanctions are available, there are lawyers who will "exploit or abuse judicial procedures" to generate such sanctions. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980). Indeed, some lawyers have developed techniques for setting "traps" to trigger sanctions. *See, e.g.*, Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 Fordham L. Rev. 959, 965 (1995) (instigating sanctions "is now a standard part of the modern litigation's play book"); Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, Litigation, Vol. 36, No. 2 (Winter 2010) (providing tips for sanctions motions). They may intentionally provoke disputes to create the perception of bad faith, for example, by inundating courts with "motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent." *Id.* The lawyer attempts to stoke a judge's anger at the opposing party, accusing it of intentionally obstructing justice, and seeks broad sanctions.

This tactic has proven to be extremely effective. Part of the reason is that, as the U.S. Supreme Court has stated, "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament." *Bagwell*, 512 U.S. at 831; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 738 (2001) (observing that "sanctions sometimes reflect [judges'] personal pique"). "[E]ven the best-tempered

judges can lose their impartiality when dealing with misconduct that they perceive as a personal attack." Pushaw, 86 Iowa L. Rev. at 765.

This practice has become so pervasive and dangerous that it has been termed "litigation by sanction" or the "sanction tort." *See* Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991, at 22 (describing how lawyers engage in "outcome-determinative" gamesmanship); Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 Baylor L. Rev. 737, 738 (1994) (finding "'gamesmanship' has become an integral part of litigation practice"). By "racking up enough sanctions . . . the merits of the case might never be reached at all." Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 Rev. Litig. 267, 270 (1996). Their ultimate goal is to make the judge "sufficiently irritated with the defendants" that the court will hold the defendant "liable by fiat. No trial. No evidence." Sherman Joyce, *The Emerging Business Threat of Civil 'Death Penalty' Sanctions*, 18:21 Legal Backgrounder (Wash. Legal. Found. Sept. 10, 2009), at 1.

This sanction, which was used here, has been nicknamed "the civil death penalty" because of its finality. *See, e.g.*, *In re Carnival Corp.*, 193 S.W.3d 229 (Tex. Ct. App. 2006) (referring to the "death penalty sanction"). The "civil death penalty" is available when a party deprives another of the right to a trial on the

merits, namely by withholding or destroying evidence. *See, e.g.*, *Parker*, 284 Ga. at 102; *Rogers*, 357 U.S. at 210 (there can be a "permissible presumption" that a party's "refusal to produce material evidence" can be "an admission of the want of merit" of its own claim or defense). In those situations, there can *never* be a fair trial on the merits; striking the affected claims or defenses is the *only* sanction that cures the infraction. Because these sanctions are appropriate only when no lesser sanction can cure the misconduct, they are inappropriate here.

Because of the severity and finality of "death penalty" sanctions, such orders must be immediately appealable for the right of appeal to be effective. The Texas Supreme Court explained: "Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in a rendition of an appealable judgment, then the eventual remedy by appeal is inadequate." *Powell*, 811 S.W.2d at 919. Many companies cannot afford the financial and reputational risk of a massive verdict, including for punitive damages, irrespective of whether it should be liable in the first place. When such sanctions result in excessive verdicts, the incentive to settle may be so great that a final judgment may never reach this Court. Justice delayed will be justice denied.

If this Court does not provide its immediate review, it will incentivize further leveraging of inherent authority sanctions to deprive defendants of the right of defense irrespective of the merits. The Court should not allow tort litigation in Georgia to be skewed in favor of plaintiffs without review.

Here, the trial court took away Ford's rights without the needed safeguards. The Court of Appeals originally granted an immediate appeal, as required by Georgia law, and then another panel changed course without addressing the merits of the claims. The Court should reconsider this appeal to provide businesses and other members of the public with confidence that if they do business in Georgia and are sued here, their fundamental rights will be honored by the courts.

CONCLUSION

For these reasons, this Court should grant Ford's Petition for *Certiorari*. This submission conforms with Rule 26 for Amicus Curiae Briefs and Rule 24(b)-(g) for the Preparation of Briefs.

Respectfully submitted,

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
Counsel of Record for Amici Curiae

Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211
Of Counsel for Amici Curiae

Daryl Joseffer
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 464-5948
Of Counsel for the Chamber of Commerce of the United States of America

John T. Whatley
David Bright
ALLIANCE OF AUTOMOBILE MANUFACTURERS
803 7th Street, N.W., Suite 300
Washington, DC 20001
Of Counsel for the Alliance of Automobile Manufacturers

Dated: April 26, 2019

PROOF OF SERVICE

I certify that on April 26, 2019, I served a true and correct copy of the foregoing *Amici* Brief was sent by U.S. Mail in a first-class postage-prepaid envelope addressed to the following:

James E. Butler, Jr.
Brandon L. Peak
David T. Rohwedder
Chris B. McDaniel
BUTLER WOOTEN & PEAK LLP
105 13th St., PO Box 2766
Columbus, GA 31902

Gerald Davidson, Jr.
MAHAFFEY PICKENS TUCKER, LLP
1550 North Brown Rd., Ste. 125
Lawrenceville, GA 30043

Michael D. Terry
Frank Lowrey VI
BONDURANT MIXSON & ELMORE
1201 W. Peachtree St. NW, Ste. 3900
Atlanta, GA 30309

Michael G. Gray
WALKER, HULBERT, GRAY
& MOORE, LLP
909 Ball St., P.O. Box 1770
Perry, GA 31069

Counsel for Appellees

William N. Withrow, Jr.
James B. Manley, Jr.
TROUTMAN SANDERS LLP
600 Peachtree St. NE, Ste. 3000
Atlanta, GA 30308-2216

Pete Robinson
KING & SPALDING LLP
1180 Peachtree Street, NE, Ste. 1600
Atlanta, GA 30309

Michael R. Boorman
Audrey K. Berland
Philip A. Henderson
HUFF, POWELL & BAILEY, LLC
999 Peachtree St. NE, Ste. 950
Atlanta, GA 30309

Paul F. Malek
D. Alan Thomas
HUIE FERNAMBUCQ & STEWART, LLP
2801 Highway 280, Ste. 200
Birmingham, AL 35223

Michael W. Eady
THOMPSON COE COUSINS
& IRONS, LLP
701 Brazos St., Ste. 1500
Austin, TX 78701

Patrick T. O'Connor
OLIVER MANER, LLP
218 W. State St.
Savannah, GA 31401

Counsel for Appellant

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (908) 848-6310