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June 30, 2020

Via E-Filing

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Mark C. Mosley v. DaVita, Inc., et al.
Appellate Case No. 2019-001056
Our File No. 034173.01501

Dear Mr. Shearouse:

Enclosed please find a Motion for Leave to File Brief of *Amici Curiae*, along with a conditionally-filed Brief of *Amici Curiae*, for filing in the above matter. We are submitting the filing via the court's e-filing system. Pursuant to the Court's order addressing the coronavirus emergency, we will mail a check for the required filing fee to the Court.

By copy of this letter, we are serving all counsel of a record with a copy of this filing.

Respectfully,

/s Nicholas A. Charles

Nicholas A. Charles

Enclosure
cc: Martin S. Driggers, Jr.
Richard E. McLawhorn, Jr.
Brandon R. Gottschall
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2019-001056

Mark C. Mosley, ... Respondent,

v.

Christine Alston, Personal Representative of the Estate of Robert Alston, DaVita, Inc. d/b/a DaVita Walterboro Dialysis #3073, DVA Healthcare Renal Care, Inc., DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj, ...

Of which, DaVita, Inc., DVA Healthcare Renal Care, Inc., DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj are……. Petitioners.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules, the Chamber of Commerce of the United States of America and the South Carolina Chamber of Commerce (together, "the Chambers") respectfully request permission to file an *amici curiae* brief addressing the discovery and appealability issues identified in the Court's October 3, 2019 order granting an extraordinary writ, which directed that *amicus* briefs must be filed within thirty days after filing of the respondent's brief.

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and

indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, from every region of the country. An important function of the U.S. Chamber is to represent these interests in matters before Congress, the executive branch, and the courts. The U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The South Carolina Chamber of Commerce (the "South Carolina Chamber") is a non-profit organization representing businesses, industries, professions, and associations throughout the State with a unified voice. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. It aims to protect the interests of South Carolina's business community by identifying and addressing issues that may negatively affect economic development.

This case presents discovery and appealability issues that civil defendants—particularly businesses—increasingly face. The Chambers and their members have significant experience with similar issues across South Carolina and the country, and they offer a wider perspective on these issues than the parties to the case. The *amici curiae* brief is thus desirable to assist the Court not only in deciding the specific issue affecting the parties, but also in considering how the principles and policies applied in this case affect a broader spectrum of litigants. Because the Chambers have an identifiable interest in this matter satisfying Rule 213 of the South Carolina Appellate Court Rules, they respectfully request that the Court accept their conditionally-filed brief, which is attached to this motion as Exhibit A.

(signature page attached)

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Columbia, South Carolina

June 30, 2020

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SOUTH CAROLINA CHAMBER OF COMMERCE AS *AMICI CURIAE*

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Interest of *Amici Curiae*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent these interests in matters before Congress, the executive branch, and the courts, including this Court. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The South Carolina Chamber of Commerce (the "South Carolina Chamber") is a non-profit organization representing businesses, industries, professions, and associations throughout the State with a unified voice. The South Carolina Chamber's mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. It aims to protect the interests of South Carolina's business community by identifying and addressing issues that may negatively affect economic development.

This case presents issues that civil defendants increasingly face: an order compelling a defendant to participate in broad, costly discovery that is not proportional to the amount in controversy in the dispute. Since the advent of the South Carolina Rules of Civil Procedure in 1985, this Court and the Court of Appeals have effectively precluded appeals from orders compelling discovery. This categorical prohibition has allowed the use of overbroad discovery requests to increase unchecked and, in some cases, to elevate discovery above the merits as the primary concern in a case.

The Chambers appreciate the Court's invitation for *amici* briefing. They submit this brief in response to these issues and propose a revised framework, based on existing statutes and

published decisions, to allow immediate review of certain types of discovery orders. This revised framework would reinforce the courts' role in establishing and maintaining the appropriate balance between the need for discovery and the avoidance of excessive and unnecessary costs, and allow for a series of cases to be decided which will provide guidance to the trial bench and bar and lead to more efficient and speedy litigation in accordance with Rule 1 of the South Carolina Rules of Civil Procedure. Rule 1, SCRCP (providing the rules of civil procedure "should be construed to secure the just, speedy, and inexpensive determination of every action").

Argument

I. This Court should remove the artificial barrier to appealability of "discovery orders" and determine appealability on a case-by-case basis by considering the effect of a discovery order.

This Court has made clear several times that appealability of interlocutory orders must be determined on a case-by-case basis by considering the effect of the order being appealed. Despite this precedent, this Court has also held "discovery orders" *in general* are interlocutory and not immediately appealable. The Court should resolve this tension in favor of allowing a right to immediately appeal discovery orders in three circumstances: (1) when a discovery order compels production of material over which a party claims a legal privilege; (2) when a discovery order compels production of confidential information or trade secrets; and (3) when the cost of compliance with a discovery order—including the cumulative effect of complying with multiple discovery requests and discovery orders—is disproportionate to the amount in controversy. The Court's precedent requiring an analysis of the *effect* of an order when determining whether it is immediately appealable is based on a sound principle, and the Court should rely on it to revise its approach to discovery orders.

A. The appealability statute and its early interpretations date back to the 1870s.

South Carolina Code section 14-3-330 governs appealability of interlocutory orders. *See* S.C. Code Ann. § 14-3-330. The statute provides,

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case *involving the merits* in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order *affecting a substantial right* made in an action when such order (a) in effect determines the action and *prevents a judgment from which an appeal might be taken* or discontinues the action, (b) *grants or refuses a new trial* or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (emphases added). The key language in section 14-3-330 derives from the original statute addressing appealability enacted in 1873. *See* Revised Statutes of the State of South Carolina, Title 2, § 11 (1873). The 1873 statute provided,

> The Supreme Court shall have exclusive jurisdiction to review, upon appeal:
>
> 1. Final judgments in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process or removed there from any inferior Court or jurisdiction; and, upon the

> appeal from such judgment, to review any intermediate order *involving the merits* and necessarily affecting the judgment.[1]
>
> 2. An order *affecting a substantial right* made in an action, and *prevents a judgment from which an appeal might be taken*, or discontinues the action, and when such order *grants or refuses a new trial* . . . .
>
> 3. A final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits, and necessarily affecting the order appealed from.

Id. (emphases added).

South Carolina appellate courts struggled to interpret the phrases "involv[e] the merits" or "affect[] a substantial right" for over 100 years. In *Mid-State Distributors, Inc. v. Century Importers, Inc.*, the Court stated, regarding its initial interpretation of the phrases,

> At its inception . . . , the predecessor statute to S.C. Code Ann. § 14-3-330 contained the language of 'involving the merits.' This Court initially struggled with defining the phrase, and at the time of the decisions in *Stelling* and *Agnew* [in 1890 and 1885, respectively], the definition of what involved the merits was 'difficult to define.' In 1890, we stated that 'what is the precise meaning of the words ["involving the merits"] . . . has never, as far as we know, been distinctly determined.'

310 S.C. 330, 333–34, 426 S.E.2d 777, 780 (1993) (quoting *Lowndes v. Miller*, 25 S.C. 119 (1886), and *Ferguson v. Harrison*, 34 S.C. 169, 172, 13 S.E. 332, 333 (1890)). This Court equated "substantial right" and "involving the merits" in 1878: "When . . . the order affects a substantial

[1] The General Assembly amended subdivision (1) later in 1873 to provide, "1. Any intermediate judgment, order or decree, *involving the merits* in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior Courts or jurisdiction, and final judgments in such actions: *Provided*, If no appeal be taken until final judgment is entered, the Court may, upon appeal from such final judgment, revive any intermediate order or decree necessarily affecting the judgment not before appealed from." 1873 Act No. 412 (first emphasis added).

right, necessarily affecting the judgment, it must be regarded as involving the merits." *Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878). The Court recognized that "[t]he term 'merits' is not very clearly defined" but interpreted the language broadly: "The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case." *Id.* The Court found the statute did not "limit[] the sense to any particular class of rights among those that have a tendency to control the results of cases," and held, "[w]hatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself." *Id.* In 1886, however, this Court found that for an order to be appealable, it must "in effect determine the action and prevent a judgment from which an appeal could be taken." *Garlington v. Copeland*, 25 S.C. 41, 43 (1886). The *Garlington* Court's particular interpretation has not been followed consistently.

Today, our courts apply variations of the latter articulation of the rule. An order "involves the merits" and is immediately appealable "when it finally determines some substantial matter forming the whole or part of some cause of action or defense." *Mid-State Distributors*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)); *see also Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467–68 (2006) ("An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights."); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011). An order "affecting a substantial right" is appealable "in situations where the substantial right could not be vindicated on appeal after the case," although courts have generally limited the application of this subsection to orders affecting the mode of trial. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) ("Generally,

this subsection has only been used when the trial order affected the 'mode of trial' *because if those orders are not immediately appealed, no appellate review is available to correct any error*." (emphasis added)); S.C. Code Ann. § 14-3-330(2) (providing "[a]n order affecting a substantial right" is immediately appealable if it "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"). Further, this Court has stated, "by its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

Although the drafters of the original appealability statute did not anticipate modern discovery and its costs and burdens, this Court has to date interpreted the statutory language to bar appeals from an entire category of interlocutory orders—discovery orders.

B. A conflict exists between two sets of modern precedent: cases prohibiting appeals from "discovery orders" and cases requiring a court to determine appealability by considering the effect of a particular order.

After the adoption of the South Carolina Rules of Civil Procedure in 1985,[2] this Court held orders compelling discovery are not immediately appealable. *See Patterson v. Spector Broad. Corp.*, 287 S.C. 249, 249, 335 S.E.2d 803, 803 (1985) ("This appeal is from an order compelling discovery which is interlocutory and not directly appealable."); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable."). South Carolina appellate courts have relied on the categorical statements from *Patterson* and *Whetstone* in numerous other cases. *See, e.g.*, *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders, however, are interlocutory and are not immediately appealable." (citing *Whetstone*)); *Flagstar*

[2] *See* Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985.").

Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331, 334 (2000) (citing *Patterson*); *Davis v. Parkview Apartments*, 409 S.C. 266, 280–81, 762 S.E.2d 535, 543 (2014) (citing *Whetstone*).[3]

At the same time, appellate courts have stressed that appealability is controlled by the *effect* of an order, rather than its label. *See Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (noting an order granting a motion to set aside an entry of default is generally not immediately appealable, but the effect of the order at issue was equivalent to an order granting a motion to dismiss, and the order was therefore immediately appealable); *Thornton,* 391 S.C. at 303–04 & n.6, 705 S.E.2d at 478–79 & n.6 ("[A] narrow construction of section 14-3-330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it. . . . Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. . . . [A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c)." (citations omitted)).[4] Further, as stated above, appealability must be determined on a case-by-case basis. *Stone*, 426 S.C. at 295, 826 S.E.2d at 870.

[3] *See also Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[T]he fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." (quoting *Hamm*)); *Smith v. Tiffany*, 419 S.C. 548, 552 n.1, 799 S.E.2d 479, 481 n.1 (2017) ("[D]iscovery orders are interlocutory and not immediately appealable." (citing *Grossheusch*)).

[4] *See also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label."); *cf. Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114–15, 682 S.E.2d 871, 874 (Ct. App. 2009) (finding a motion to strike was "in the nature of a motion to dismiss").

Cases analyzing the effect of an order—rather than the label or general category of the order—properly assess appealability on a case-by-case basis. *Patterson* and *Whetstone*, in contrast, encircle a large category of orders based solely on labels and declare all orders in the category "interlocutory and not immediately appealable" without analyzing whether a specific order involves the merits or affects a substantial right as defined by statute. *See Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881; *Patterson*, 287 S.C. at 249, 335 S.E.2d at 803. This categorical approach conflicts with the precedent requiring an analysis of the effect of each order, and thus the categorical approach should be recognized as limited. Indeed, this Court has not always spoken so categorically: "[W]e note an order compelling discovery does not *ordinarily* involve the merits of the case and may not be appealed." *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003) (emphasis added). Accordingly, this Court should follow its precedent requiring courts to examine the *effect* of orders on the litigants and determine whether the *effect* meets any of the criteria in section 14-3-330. *See Wetzel*, 364 S.C. at 592, 615 S.E.2d at 438; *Thornton*, 391 S.C. at 303–04 & n.6, 705 S.E.2d at 478–79 & n.6. Any order—including a "discovery order"—that as a practical matter "involves the merits" or "affects a substantial right" under the statute should be immediately appealable.

C. Allowing interlocutory appeals of certain discovery orders will assist the trial bench and bar.

The purpose of discovery is to gather relevant evidence to ensure a fair trial with proper means to prepare for trial. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003) ("The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare

for trial.").[5] Unfortunately, an increasing number of litigants use discovery for improper purposes to inflict punishment, gain leverage, or alter the settlement calculus. *See, e.g.*, *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924–25 (2010) (vacating five discovery orders after finding a party "abused the discovery process with its scorched-earth approach"). When a litigant uses discovery as a weapon—to force a favorable settlement, for example—discovery ceases to be a mechanism for gathering evidence and ensuring a fair trial.[6] Under the Court's categorical approach to the immediate appealability of "discovery orders," a litigant is largely powerless to stop these tactics beyond the hope that a trial judge—who must rule on these issues lacking appellate court guidance

[5] *See also* Jack M. Sabatino, *ADR As "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1310 (1998) ("The functional objective of pretrial discovery, of course, is to assist litigants in preparing for trial. In simple terms, the process enhances the information known to each party. Trial lawyers capitalize on that knowledge, both in readying their own cases-in-chief, and in preparing to rebut or impeach the anticipated proofs of their adversaries." (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))).

[6] *See* Sabatino, *supra* note 5, at 1349 n.90 ("Many lawyers and judges believe that discovery is increasingly used 'as a weapon rather than as an information gathering mechanism.'" (quoting *Interim Report of the Committee on Civility of the Seventh Judicial Circuit*, 143 F.R.D. 371, 387 (1991))); *see also* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 453 (1994) ("'[I]mpositional abuse' [in discovery] is a request for facts in order to impose compliance costs on the other party. The threat of impositional abuse is used solely to extract a settlement."); The Honorable Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make A Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 521 (2013) ("Many critics of the current discovery rules argue that . . . the current rules actually create an economic incentive purposely to ask for excessively expensive and burdensome discovery in order to coerce the producing party to seek a settlement purely as a means to avoid excessive discovery costs and not on the basis of the merits of the case."); Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1830 (2018) (proposing a system in which parties are permitted to opt out of discovery altogether, in part because "[o]pting out of discovery . . . seems a good strategy for a defendant in a case of suspected impositional discovery: now the plaintiff, who bears the cost of discovery, loses any credible threat to impose discovery costs as a means of extracting a blackmail settlement").

and who is increasingly likely to see his or her role as steering a case toward settlement instead of trial[7]—rules in the litigant's favor.

The Court recognized this problem in *Oncology & Hematology Associates* in 2010. 387 S.C. 380, 692 S.E.2d 920. There, an entity challenged the approval of a certificate of need for a healthcare facility. *Id.* at 382–83, 692 S.E.2d at 921–22. The healthcare facility "responded to [the] challenge by inundating [the CON challenger] with discovery requests. Rather than tailoring discovery to the challenged CON, . . . [the healthcare facility] took a shotgun approach and sought virtually all information concerning every facet of [the CON challenger]'s operation." *Id.* at 383, 692 S.E.2d at 922. This Court granted an extraordinary writ to review the discovery orders so it could "speak to trial courts" about the limits of discovery. *Id.* at 381, 388, 692 S.E.2d at 921, 924. The Court explained,

> We are keenly aware that the scope of discovery is broad. . . . *Yet, there are limits, which we see trial courts generally unwilling to recognize and enforce*. [The healthcare facility's] discovery requests . . . are abusive and beyond the pale. Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial "hen's tooth." We have no desire to micromanage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally. While discovery serves as an important tool in the truth-seeking function of our legal system, *we are concerned that "discovery practice" has become a cottage industry and the merits of a claim are being relegated to a secondary status*.

[7] *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) ("Over the past five decades, first state and then federal judges have embraced active promotion of settlement as a major component of the judicial role."); *see also* Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 974 (2010) ("Although adjudication and settlements were once considered entirely distinct categories, today they have become increasingly interrelated due to the expanding role of judges in the settlement process."); Daisy Hurst Floyd, *Can the Judge Do That?—The Need for A Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 51 (1994) ("[I]t is clear that the number of judges taking an active role in settlement has increased in recent years, in part because of the growing concern over litigation delay and expense.").

Id. at 387–88, 692 S.E.2d at 924 (emphases added). The Court adopted the position of the Texas Supreme Court in another extraordinary writ case: "Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters." *Id.* at 388, 692 S.E.2d at 924–25 (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003)).

Ten years later, this Court has now granted an extraordinary writ to review the same type of "scorched-earth" discovery abuse in this case. Rather than repeat the admonition that discovery must be "reasonably tailored," the Court should take affirmative steps to rein in the "cottage industry" that often supersedes and affects the merits of a case. *See id.* at 388, 692 S.E.2d at 924. The Court need not "micromanage discovery orders," *see id.*, but it should allow appeals from discovery orders that, in effect, involve the merits or affect a substantial right by becoming the sole focus of the matter in controversy.

By allowing appeals from the limited categories of discovery orders described below, the Court can provide several important benefits to the trial bench and bar. First, the appellate courts' application of a categorical bar to discovery appeals causes discovery orders to evade appellate review. Under the current framework, a litigant facing an onerous and improper discovery order cannot obtain meaningful appellate review of the order. The litigant cannot perfect an immediate appeal because the Court of Appeals will apply *Patterson* or *Whetstone* and dismiss the appeal as interlocutory.

Rather than allowing immediate appeals, South Carolina appellate courts often suggest a party facing such an order has two options: (1) defy the order, be held in contempt, and appeal the

contempt ruling; or (2) comply with the discovery order and potentially waive any right to appellate review. *See Tucker*, 354 S.C. at 577, 582 S.E.2d at 406–07 ("Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a party in contempt. Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal."); *see also Davis*, 409 S.C. at 281, 762 S.E.2d at 543 (same) (quoting *Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881–82). Neither option is realistic or appropriate. This Court and the Court of Appeals should not encourage lawyers and litigants to defy trial court orders for the purpose of manufacturing a right to appeal; it should encourage respect for court orders. *See* (Pet. Br. 27–38) (describing numerous problems with the proposition that a party may appeal a discovery order by defying the order and being found in contempt).

Moreover, compliance with a discovery order eliminates any realistic chance for appellate review. Opinions suggest compliance waives a right to appellate review. *See id.* Even if compliance does not waive appellate review as a matter of law, however, a litigant has an arduous road to obtain meaningful appellate consideration of a discovery ruling. Of course, a litigant who loses a discovery dispute cannot—and would not—appeal the discovery issue after final judgment unless the litigant also loses the final judgment. *See* S.C. Code Ann. § 18-1-30 ("Any party aggrieved may appeal . . . ."); *State v. Looper*, 421 S.C. 384, 388–89, 807 S.E.2d 203, 205 (2017) ("[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property."). Even if the litigant loses the final judgment and appeals the judgment, he or she must establish that the discovery order was reversible error—by showing, for example, that the discovery order led to an erroneous admission of evidence at trial that prejudiced the litigant and affected the judgment. Further, a litigant who loses at trial will likely have multiple potential

appellate issues and must make a tactical decision about which issues—and how many issues—are important enough and strong enough to raise in its appellate brief.[8] Even if a litigant raises a discovery issue on appeal, an appellate court may not reach the issue. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 643 n.1, 837 S.E.2d 485, 488 n.1 (2020) (noting an appellate court need not address an issue if its ruling on another issue is dispositive (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999))); *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 392 n.5, 835 S.E.2d 509, 511 n.5 (2019) (citing *Futch*);[9] *cf. Davis*, 409 S.C. at 281, 762 S.E.2d at 543 (addressing a contempt ruling but declining to address the underlying discovery orders).

Under the Court's current categorical approach to the appealability of discovery orders, a party aggrieved by a discovery order can obtain immediate appellate review only by submitting a petition to this Court seeking an extraordinary writ. An extraordinary writ is normally not a realistic or reliable option, however. This Court has stated its "willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial 'hen's tooth,'"[10] *Oncology &*

[8] *See, e.g.*, *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."); *State v. Pelletier*, 552 A.2d 805, 807–08 (Conn. 1989) ("Most cases present only one, two, or three significant questions. . . . Usually . . . if you cannot win on a few major points, the others are not likely to help. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones." (alterations in original) (quoting R. Stern, Appellate Practice in the United States 266 (1981))).

[9] *See also Greens of Rock Hill, LLC v. Rizon Commercial Contracting, Inc.*, 411 S.C. 152, 158, 766 S.E.2d 876, 879 (Ct. App. 2014) (declining to rule on a discovery-related issue pursuant to *Futch*); *Black v. Bi-Lo, LLC*, Op. No. 2016-UP-115 (S.C. Ct. App. filed Mar. 2, 2016).

[10] *See Scarce as hen's teeth*, DICTIONARY.COM (providing the following definition of the "hen's tooth" metaphor: "Exceptionally rare, as in *On a rainy night, taxis are as scarce as hen's teeth.* Since hens have no teeth, this term in effect says that something is so scarce as to be nonexistent."), https://www.dictionary.com/browse/scarce-as-hen-s-teeth (last visited April 2, 2020).

Hematology Assocs., 387 S.C. at 388, 692 S.E.2d at 924, and the Court typically grants a writ only in obvious cases such as the present case. *See id.* at 387, 692 S.E.2d at 924 (holding the discovery requests at issue were "abusive and beyond the pale"); *see also* (Pet. Br. 1) ("This case arises out of a discovery order requiring Petitioners to spend an estimated $5 million to $22 million and search patient and employee records worldwide, while the underlying case involves a local Colleton County auto accident involving only $20,225.28 in alleged medical expenses."); *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist."). Consequently, a litigant has little hope of obtaining an extraordinary writ.

Second, the lack of appellate review of discovery orders creates, in turn, a lack of precedent addressing what constitutes proper or improper discovery. Trial judges and counsel are left to apply the language of the South Carolina Rules of Civil Procedure with little context. The state's appellate courts should be interpreting the discovery rules and establishing precedent and doctrine to guide all judges and litigants. The Court should constrain litigants who abuse the discovery process with excessive and overbroad discovery requests and assist trial judges who, left without guidance, reach overly-broad interpretations of discovery rules. *See, e.g.*, *Oncology & Hematology Assocs.*, 387 S.C. at 388, 692 S.E.2d at 924 ("[T]here are limits [to the scope of discovery], *which we see trial judges generally unwilling to recognize and enforce*." (emphasis added)). As discovery issues are actually decided by courts of record, trial judges and litigants will follow those reported decisions. Published decisions addressing appropriate discovery will create uniformity and stability within the state judicial system, avoid disparate treatment of discovery by the trial bench, and reduce costs because litigants will not fight over matters governed by precedent. As this Court has acknowledged, stare decisis best takes hold when a "series of

decisions" exists, as opposed to an "exemplar" such as *Oncology*. *See McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012) ("[S]tare decisis is far more a respect for a body of decisions as opposed to a single case standing alone.").

Moreover, while certainly well-intentioned, this Court's effort in *Oncology*, as one of the few "hen's teeth" petitions granted, ultimately has failed in its broader purpose—containment and curtailment of abuse of the rules permitting discovery. Indeed, the cost of the using the judicial system has grown so much that many litigants choose alternative dispute resolution as a cost avoidance measure. *See* U.S. District Judge Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice As We Now Know It?*, 45 ST. MARY'S L.J. 333, 351 (2014) ("Today it is well accepted that the costs associated with discovery are a significant portion of the total costs of litigation."); Katharine Traylor Schaffzin, *Is Evidence Obsolete?*, 36 REV. LITIG. 529, 533 (2016) ("Potential litigants often pursue ADR in search of a speedier, more efficient, and less costly process than that offered by traditional litigation.").

Finally, allowing litigants to appeal certain discovery orders, and the creation of a body of law regarding discovery boundaries, will have a positive effect on discovery requests. Litigants will be hesitant to serve unnecessary and overbroad requests—and hesitant to use discovery as a weapon to alter the settlement calculus—if they know they must justify the requests on appeal. Litigants will thus be more likely to pursue such requests only when necessary and in good faith.

The Court should reject and overrule the categorical approach regarding the inability to immediately appeal "discovery orders." That approach is inconsistent with the case-by-case "practical effect" analysis this Court employs when determining the immediate appealability of an order. The Court should thus begin a new era in which certain discovery orders are deemed

immediately appealable, allowing the appellate courts to provide guidance to the bench and bar for the conduct and management of modern discovery.

II. The Court should establish a right to an immediate appeal for certain types of discovery orders.

The Court should abandon the artificial barrier to direct appeals of discovery orders and adopt a revised framework allowing an immediate appeal from certain types of discovery orders. The Court should interpret section 14-3-330 as providing a right to an immediate appeal in three scenarios: (1) when a discovery order compels production of material over which a party claims a legal privilege; (2) when a discovery order compels production of confidential information or trade secrets; and (3) when the cost of compliance with a discovery order—including the cumulative effect of complying with multiple discovery requests and discovery orders—is not in proportion with the amount in controversy. Section 14-3-330 and the Court's precedent supports allowing an immediate appeal in each of these scenarios.

A. Section 14-3-330 supports an immediate appeal in each of these scenarios.

Section 14-3-330 allows appeals from interlocutory orders "involving the merits" or "affecting a substantial right." S.C. Code Ann. § 14-3-330(1) & (2). It also allows appeals from orders "granting . . . an injunction." S.C. Code Ann. § 14-3-330(4).

Section 14-3-330 allows an immediate appeal from an order "affecting a substantial right" which "***in effect*** determines an action and prevents a judgment from which an appeal might be taken." S.C. Code Ann. § 14-3-330(2) (emphasis added). This Court should find that a party has a substantial right to the attorney-client privilege,[11] a substantial right to maintain confidential

[11] *See S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619–20 (1973) ("Th[e] [attorney-client] privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in

information or trade secrets,[12] and a substantial right to engage in discovery proportional to the value of the case—in this case, for example, a substantial right not to be forced to spend tens of millions of dollars in discovery when the plaintiff's stated or alleged damages, even if his claims are proven true, will be a fraction of the cost of complying with discovery.[13] *See* (Pet. Br. 1). Such

disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications."); *see also K2 Asia Ventures v. Trota*, 717 S.E.2d 1, 4 (N.C. Ct. App. 2011) ("[W]here 'a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under [N.C. Gen. Stat. §] 1–277(a) and [N.C. Gen. Stat. §] 7A–27(d)(1).' This Court has applied th[is] reasoning . . . to the common law attorney-client privilege."). Like South Carolina's section 14-3-330, North Carolina's appealability statute allows appeals of orders affecting a substantial right. N.C. Gen. Stat. Ann. § 1-277(a) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."); *see also* N.C. Gen. Stat. Ann. § 7A-27(b)(3).

[12] The General Assembly recognized the importance of trade secrets to businesses in enacting the South Carolina Trade Secrets Act, S.C. Code Ann. §§ 39-8-10 *et seq.* *See Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 650, 813 S.E.2d 696, 700 (2018) (holding South Carolina recognizes a qualified evidentiary privilege for trade secrets and noting "the Trade Secrets Act is designed to protect trade secrets before, during, and after litigation"); S.C. Code Ann. § 39-8-30(A) ("A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means."); S.C. Code Ann. § 39-8-60(B) (requiring a party seeking discovery of a trade secret to show a "substantial need . . . for the information").

[13] The South Carolina Rules of Civil Procedure provide a proportionality restriction for discovery: "The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that . . . the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Rule 26(a), SCRCP. Federal courts are more frequently applying proportionality limits. *See* Philip J. Favro & The Honorable Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 934–35 (2012) ("As courts grapple with the data explosion and an ever-expanding volume of electronically stored information, they are more frequently turning to proportionality principles to control the costs, burdens, and delays associated with the discovery process.").

disproportion should be immediately reviewed in expedited fashion as to not delay the adjudication in the trial court.

The Court has identified a fundamental distinction that determines whether a ruling affecting a substantial right is immediately appealable: whether the ruling is correctable on appeal after final judgment. *See Breland*, 339 S.C. at 94–95, 529 S.E.2d at 14 (holding although "proper venue is a substantial right," "since any venue error will be correctable upon appeal after trial, . . . the right of proper venue has not been affected such that the order [denying a transfer of venue] would be immediately appealable"); *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (holding an order striking a pleading affects a substantial right if it "removes a material issue from the case, thereby preventing the issue from being litigated on the merits, *and preventing the party from seeking to correct any errors in the order during or after trial*." (emphasis added)); *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (Ct. App. 2010) ("An appellate court has jurisdiction to review an order affecting a substantial right when the order has the effect of discontinuing the action or *preventing an appealable judgment*." (emphasis added) (quoting *Lakes v. State*, 333 S.C. 382, 384–85, 510 S.E.2d 228, 230 (Ct. App. 1998))).

An order compelling disclosure of privileged communications or trade secrets, or requiring a cost of compliance exceeding the amount in controversy in the case, cannot be corrected after a final judgment. A party ordered to produce privileged or confidential information suffers injury upon production, regardless of whether the material has a direct impact on the merits of the case; the party's injury does not depend on an adverse final judgment. *Cf. Hollman*, 384 S.C. at 578, 683 S.E.2d at 499 (acknowledging, in a dispute over whether a plaintiff was entitled to contact and interview defendants' nonparty patients, that the patients' privacy could not be protected once contact with them was permitted). Similarly, a party forced to spend millions of dollars to comply

with an improper discovery order is, in most instances, unlikely to recover any of the spent funds from a favorable post-judgment appellate ruling. Thus, discovery orders which fall in these categories are not correctable after final judgment and, therefore, satisfy the standard for immediate appealability.

Certain discovery orders also "involve the merits" because they affect the likelihood of a party receiving a favorable final judgment on the merits and deprive a party of a just, speedy, and inexpensive determination of the action as required by Rule 1 of the South Carolina Rules of Civil Procedure. Orders compelling production or disclosure of privileged material, confidential information, or trade secrets have this effect. For example, a company facing compelled disclosure of its trade secrets may determine the long-term damage potentially inflicted by the disclosure is too great a risk and therefore accede to the plaintiff's settlement demand to avoid the risk. Similarly, a party facing a disproportionate discovery expenditure relative to its damages exposure—whether from a single discovery request or as a result of being besieged by cumulative discovery requests over the life of a case—may decide it has no reasonable choice but to pay an inflated amount of money to settle the matter to avoid the disproportionate discovery expense. Even if it complies with the order and somehow obtains a reversal of the order on appeal, the money has been spent and cannot be recouped. The order compelling production thus changes the leverage, the settlement calculus, and—by extension—the merits of the plaintiff's claims and the defendant's defenses. Thus, these types of orders "involve the merits" and should be immediately appealable.

Finally, section 14-3-330 also allows a direct appeal from any interlocutory order "granting . . . an injunction." S.C. Code Ann. § 14-3-330(4). The practical effect of some discovery orders—such as the discovery order at issue in this case, according to the petitioner—is "in the nature of

an injunction." *See Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (finding an interlocutory order "was in the nature of an injunction" and, thus, immediately appealable);[14] *see also Richland Cty. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) ("Although the petition in this case was styled as a request for a writ of mandamus, we find that based on the relief sought, the County's pleading is more properly characterized as a request for an injunction. It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.' . . . In this case, the public entity sought to require performance from private parties. An injunction is an equitable remedy that may be used to require a party to perform an action."). The types of discovery orders described above—requiring a party to divulge information that the law expressly protects or requiring a party to incur significant, disproportionate costs—have such a material effect on a party's rights that they are, in effect, "in the nature of an injunction" and should thus be deemed immediately appealable under section 14-3-330(4).[15] *See id.*

B. The Court may place controls on the appealability of discovery orders to prevent a flood of unnecessary or improper appeals from discovery orders.

Existing law and rules allow the Court to place controls to prevent a flood of appeals from run-of-the-mill discovery orders. First, by filing a notice of appeal, counsel certifies that the appeal

[14] *See also Ex parte McFarlin*, Op. No. 2007-UP-073 (S.C. Ct. App. filed Feb. 12, 2007) ("An order freezing the accounts is in the nature of an injunction." (citing *Grosshuesch*, 367 S.C. at 5, 623 S.E.2d at 835)).

[15] This interpretation of section 14-3-330 would not turn all discovery orders into appealable orders granting or denying injunctions. Discovery orders that do not fall in these categories are not injunctive. They simply resolve a dispute over what the Rules of Civil Procedure require of a party to litigation or direct a party to participate in discovery in general. *Cf. Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882 (stating the general proposition that "[a] non-party suffers no legal injury when he is ordered to participate in discovery"). These routine orders are, in effect, analogous to case management orders.

is not frivolous or taken solely for delay. *See* Rule 269, SCACR ("Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require."). An appeal is not frivolous if counsel has a good-faith basis for asserting that the discovery order falls in one of the three categories of appealable discovery orders described above. Accordingly, if the Court finds counsel does not have a good-faith basis for appealing a discovery order, it has the power to issue sanctions.

Further, where a party asserts that the cost of compliance with a discovery order—or the cumulative cost of compliance with multiple discovery requests—is not proportional to the amount in controversy, the Court should establish additional controls. In some cases, the amount of damages will be obvious and undisputed. In cases where the amount of potential damages is in dispute, the court should require that counsel must have a good-faith basis for asserting the amount of damages he or she believes is at issue. In disputed cases, a party should make a record in the trial court supporting both the cost of compliance and the claimed value of the case, including an affidavit from an appropriate person—i.e., IT personnel or an employee with the necessary expertise—stating the projected cost of compliance under penalty of perjury. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). If an appellate court determines the basis for an appeal is frivolous, it may impose sanctions under Rule 269.

III. The Court should issue a writ of certiorari in this case.

If this Court declines to change its categorical approach to the immediately appealability of "discovery orders," it should nonetheless grant a writ of certiorari in this case. Respondent

concedes in his brief that this Court is empowered to grant an extraordinary writ to review the trial judge's order. *See* (Resp. Br. 22). Respondent concedes that no "novel question" is necessary for the Court to exercise its power to do so, and admits that *Oncology* did not involve a "novel question." (Resp. Br. 10, 16–18).

Respondent states that "[t]he Court has never found that voluminous discovery is a matter of significant public concern." (Resp. Br. 14). Although this Court may not have made such a statement, "voluminous discovery" is in fact a matter of significant public concern and has been the subject of a great deal of debate, public attention, scholarly works, and focus—a small fraction of which has been referenced in this brief.

Further, Respondent claims Petitioner's request is missing a showing that "judicial economy" is served, which warrants a denial of the petition. (Resp. Br. 19–22). In circular fashion, Respondent references the very petition process before the Court as proof that judicial economy would not be served by granting the petition. (Resp. Br. 21). For the reasons set forth herein, modern discovery runs amok, and if this Court declines to alter its categorical approach to immediate appealability of discovery orders, an extraordinary writ or appeal of an order of contempt is the only available route for relief. Respondent wants the Court to foreclose the extraordinary writ route as well because it takes too long and insists on contempt for any immediate review. This Court should reject that approach for the reasons stated in the Petitioner's brief and herein. The Court can and should grant a writ of certiorari.

CONCLUSION

Section 14-3-330 and the Court's precedent provide the Court the authority and the tools to establish a right to immediately appeal the types of discovery orders discussed in this brief. The Court should seize this opportunity to establish a revised framework of appealability with regard

to discovery orders for the benefit of the court system, the trial bench, and the bar. If the Court chooses not to change its categorical approach to the immediate appealability of discovery orders, it should issue a writ of certiorari in this case.

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June 30, 2020

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2019-001056

Mark C. Mosley, ... Respondent,

v.

Christine Alston, Personal Representative of the Estate of Robert Alston, DaVita, Inc. d/b/a DaVita Walterboro Dialysis #3073, DVA Healthcare Renal Care, Inc., DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj, ...

Of which, DaVita, Inc., DVA Healthcare Renal Care, Inc., DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj are..... Petitioners.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for *Amici Curiae* Chamber of Commerce of the United States of America and South Carolina Chamber of Commerce, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleading(s): Motion for Leave to File Brief of *Amici Curiae*

Brief of Chamber of Commerce of The United States of America And South Carolina Chamber of Commerce as *Amici Curiae*

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