Case No. 49207

IN THE
SUPREME COURT OF NEVADA

TERESA BAHENA, individually, and as Special Administrator for EVERTINA M. TRUJILLO TAPIA, deceased; MARIANA BAHENA, individually; MERCEDES BAHENA, individually; MARIA ROCIO PERREYA, MARIA LOURDES BAHENA-MEZA, individually; MARICELA BAHENA, individually; ERNESTO TORRES and LEONOR TORRES, individually, and LEONOR TORRES, as Special Administrator for ANDRES TORRES, deceased; LEONOR TORRES for ARMANDO TORRES and CRYSTAL TORRES, minors, represented as their guardian ad litem; VICTORIA CAMPE, as Special Administrator of FRANK ENRIQUEZ, deceased; PATRICIA JAYNE MENDEZ, for JOSEPH ENRIQUEZ, JEREMY ENRIQUEZ, and JAMIE ENRIQUEZ, MINORS, represented as their guardian ad litem; and MARIA ARRIAGA for KOJI ARRIAGA, represented as his guardian ad litem,

Appellants/Cross-Respondents

vs.

GOODYEAR TIRE & RUBBER COMPANY,

Respondent/Cross-Appellant.

Appeal from the Eighth Judicial District Court
Clark County, Nevada
Judge Sally Loehrer, Case No. A503395

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF RESPONDENT/CROSS-APPELLANT

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, American Tort Reform Association, American Insurance Association, American Chemistry Council and American Legislative Exchange Council ("*Amici*") represent large and small businesses throughout the United States and state legislators. Their members have a substantial interest in ensuring that courts follow constitutional and traditional tort law principles. The nature of the issue at bar extends far beyond this individual case. It is a derogation of the constitutional right of a business to defend itself against liability charges without the proper procedural and substantive safeguards required under the United States Constitution. Should the Court deny the motion for a re-hearing, many of *Amici's* members would be adversely affected.

ISSUE PRESENTED

Whether to re-hear *Bahena v. Goodyear* in light of an overwhelming body of case law stating that a sanction striking all defenses to liability is a claim-determinative sanction for which due process protections are required.

STATEMENT OF THE CASE

Amici curiae adopt Respondent/Cross-Appellant's summary of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decision in *Bahena v. Goodyear Tire* was a shot heard around the United States business community. The ruling deprived a business of its most fundamental right in the American civil litigation system: the constitutional right to defend oneself in court. When the trial court struck Goodyear's answer, it took away Goodyear's right to defend itself against Plaintiffs' charges. Goodyear was precluded from showing that the tire in question was not defective, that its tire did not cause the accident, that its product was misused or that instructions were not followed. Goodyear was deemed liable. Full stop. No defenses allowed. All that was left for the jury to decide was how much Goodyear would have to pay. The finality of striking a

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defendant's answer as to liability is the reason the sanction is nicknamed "the civil death penalty" in some courts and the business community throughout the United States. *See, e.g., In re Carnival Corp.*, 193 S.W.3d 229 (Tex. Ct. App. 2006) (referring to striking pleadings on liability issues with damages to be assessed after hearing as the "death penalty sanction"); Sherman Joyce, *The Emerging Business Threat of "Civil Death" Sanctions*, 18:21 Legal Backgrounder (Wash. Legal Found. Sept. 10, 2009).

Amici are taking this unusual step of submitting a brief in support of a motion for re-hearing because the Court's decision to classify the striking of one's defenses to liability as a "non-case concluding" sanction, and thereby not entitled to procedural due process protections, significantly shakes the confidence that businesses are guaranteed a fair trial when operating in this state. In Nevada, as elsewhere in the United States, the greatness of the civil justice system includes the fact that courthouse doors are open to anyone to file a lawsuit. Many lawsuits filed in this country have merit both in the law and fact. Many plaintiffs' lawyers honorably advocate for their clients. Most judges fairly adjudicate claims. But, experience has shown that this is not always the case, and as this Court can appreciate, Nevada is not immune from such allegations.[1]

The one safeguard that provides comfort and protection to American businesses, who are regularly named in civil cases, is that in every lawsuit filed in a court, the plaintiff has the burden to prove the case and the defendant has the constitutional right to defend itself. *See Baker v. General Motors*, 86 F.3d 811 (8th Cir. 1996) ("[O]pportunity to be heard is a litigant's most precious right."). In this case, however, that constitutional right was taken away, without warning. Also, no lesser sanction, such as a fine or adverse inference, was tried first. In a case where a party's right to defend itself was at risk, the trial court did not hold a full hearing to fully understand and document the

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[1] *See, e.g.*, George Knapp, *I-Team: Conspiracy, Fraud Trial of Lawyer Underway*, Las Vegas Rev. J., Feb. 26, 2008, *at* http://www.lasvegasnow.com/Global/story.asp?s=7887545; Sam Skolnick, *Accused Lawyers Rarely Investigated*, Las Vegas Sun, July 8, 2007, at A1; Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006, at 1.

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1 actual discovery dispute. Thus, it was never fully shown that the alleged discovery
2 violations were so severe, such that they irreparably prejudiced the plaintiff, or that
3 Goodyear was so recalcitrant that it forfeited its most basic right in the American civil
4 justice system.

5 Goodyear's motion for rehearing gives this Court a second opportunity to make
6 clear that in Nevada a defendant's constitutional rights cannot be stricken without proper
7 due process. In the amorphous cloud of trial judge discretion, all businesses, and
8 particularly those who are "unpopular" in some sectors and often targeted for speculative
9 or aggressive litigation, must have confidence that if they do business in this state and are
10 sued in Nevada courts their fundamental legal rights will not be taken away unless they
11 have engaged in conduct justifying that result. As this brief will show, the Court should
12 join with courts around the country holding that, except in extraordinary circumstances,
13 sanctions should not deprive a party its right to defend itself and the jury the opportunity
14 to sort through evidence and determining claims and defense on the merits.

15 **ARGUMENT**

16 The false foundation for the Court's ruling is its position that the striking of a
17 party's defenses to liability does not implicate a defendant's constitutional procedural
18 due process right to defend itself because the sanction does not conclude all matters in
19 the case. *See* Op. at *8 ("[W]e do not impose a somewhat heightened standard of review
20 because the sanctions in this case did not result in [a] case concluding sanction . . .").
21 This assertion directly contravenes well-settled constitutional law and the application of
22 those laws in federal and state courts throughout the country. *See* Retta A. Miller &
23 Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to*
24 *Keep Them*, 46 Baylor L. Rev. 737 (1994) (discussing a broad array of cases). Nevada
25 residents and businesses rely on the fact that this Court will adhere to and uphold
26 common understanding of constitutional principles in providing a stable, fair legal
27 system in which they can operate. Because the Court's ruling improperly denied
28 Goodyear its constitutional right to due process, the Court should revisit its decision.

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I. Striking a Defense to Liability Is Case-Determinative and Implicates Due Process Rights

A. Trial Court's Sanction Had the Effect of an "Ultimate Sanction"

In denying the Defendant its fundamental constitutional procedural due process safeguards, this Court contended that "striking Goodyear's answer as to liability only" was not akin to a default judgment, but is "of [a] lesser nature." *See* Op. at *18. It equated the sanction to the attempted sanction in *Clark County School District v. Richardson Construction, Inc.,* 123 Nev. 382, 168 P.3d 87 (2007), where the trial court sought to strike only a defendant's affirmative answers, not its responsive defenses. In *Clark County*, the trial court did not intend to determine any issue of fact, on liability or otherwise, as all dispositive issues were to remain unresolved for trial. The Court stated that the trial judge's intended sanction was appropriate under the circumstances. *Id.* at 391. But, it properly struck down the trial court's sanction nonetheless, holding that "the district court's application of its sanction order effectively defaulted CCSD." *Id.*

The Court stated the proper policy in *Clark County*, but is misapplying it here. As courts have widely held, striking a defendant's answer on liability, while allowing a damages-only trial, is a case-determinative sanction akin to a default judgment. *See, e.g., Pinkstaff v. Black & Decker Inc.*, 211 P.3d 698 (Colo. 2009) (striking answer on liability with damages hearing to be held is "tantamount to an entry of default judgment"); *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019-20 (8th Cir. 1999) (referring to sanction as "a default judgment for [Plaintiff] on the issue of liability"; also, calling it an "extreme sanction" and a "drastic sanction"); *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991) (referring to any sanction that serves to "adjudicate claims or defenses, not on their merits, but on the matter in which a party or his attorney has conducted discovery" as a "death penalty" sanction); *General Motors Corp. v. Conkle*, 486 S.E.2d 180, 183, 188 (Ga. Ct. App. 1997) (calling sanction granting default judgment on liability the "ultimate sanction"); *In re Carnival Corp.*, 193 S.W.3d 229 (Tex. 2006) (explaining when a court strikes claims or defenses, it has "influenced, if not dictated" the outcome).

1 The recent case before the Colorado Supreme Court is particularly illustrative
2 because the plaintiff argued "that striking the answer is a 'moderate' sanction not equal
3 to default because [defendants] may still contest the issue of damages." *Pinkstaff,* 211
4 P.3d at 703. The Colorado high court held, "even though the trial court imposed the
5 sanction of striking the answer instead of entry of default judgment, it had the same
6 effect." *Id.* "Had the trial court entered default judgment in favor of [plaintiff],
7 Defendant-Petitioners would be in the same position regarding their ability to litigate the
8 case as they are in today – that is, the only issue they may contest is the amount of
9 damages." *Id.*

10 **B. Striking All Defenses to Liability Raises Serious Due Process Concerns**

11 When the trial court struck all of Goodyear's defenses to liability without regard
12 to its merits, it subjected the sanction to constitutional procedural due process review.
13 *See Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers,*
14 357 U.S. 197 (1958) (court-imposed sanctions "must be read in light of the provisions of
15 the Fifth Amendment that no person shall be deprived of property without due process of
16 the law"). As the United States Supreme Court held, "[t]here are constitutional
17 limitations upon the power of courts, even in aid of their own valid processes." *Id.* at
18 209.

19 Consistent with this case law, courts have widely held that this constitutional
20 principle is equally in force when, as here, damages remain to be determined at trial.
21 *See, e.g., Carey*, 186 F.3d at 1023 (where district court "struck the defendants' answer,
22 resulting in a default judgment for Chrysler on the issue of liability," due process can
23 only be "satisfied if the sanctioned party has a real and full opportunity to explain its
24 questionable conduct before sanctions are imposed"); *In re Independent Serv. Org.*
25 *Antitrust Litig.*, 168 F.R.D. 651, 653 (D. Kan. 1996) ("Exclusion of evidence is a severe
26 sanction because it implicates due process concerns."); *Otis Elevator Co. v. Parmelee*,
27 850 S.W.2d 179, 180-81 (Tex. 1993) (applying heightened scrutiny for any "case-
28 determinative" sanction); *Clark County School District*, 123 Nev. at 392 (acknowledging

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1 that judicial sanctions implicating constitutional rights require heightened scrutiny). As
2 indicated, these courts properly struck down trial court sanctions when the sanctions
3 were not imposed properly, *i.e.*, in ways that protect one's procedural due process rights.
4 The courts understood that once liability is determined, particularly as here when
5 there is no dispute over whether plaintiffs incurred catastrophic injuries, the
6 constitutional import of the sanction does not hinge on how high damages are set. The
7 impact of depriving a defendant its constitutional procedural due process rights is the
8 same, regardless of whether the jury returned a verdict for $15 million, $30 million or
9 $50 million. It is a false premise to suggest that Goodyear's due process rights were not
10 implicated because the court had yet to decide how much Goodyear would have to pay.
11 As the Dissent suggests, Defendant appeared to have meritorious defenses to liability.
12 *See* Dissent n. 1 (stating that Goodyear's success in defeating punitive damages due to a
13 road hazard "suggests that its defenses to liability had a reasonable chance of success").
14
15 **II. The Court Did Not Assure that the Trial Court Sanction Was Consistent with Goodyear's Due Process Rights**
16 This honorable Court has acknowledged, as in *Clark County*, that when a sanction
17 is "akin to a dismissal with prejudice" it requires heightened scrutiny. *Clark County*,
18 123 Nev. at 392 (citing for this proposition *Baker v. General Motors Corp.*, 83 F.3d 811
19 (8th Cir. 1996)). *Baker* has significant parallels to the case at bar, as the underlying
20 matter involved a car accident case with tragic loss of life. *Baker*, 83 F.3d at 814. In
21 *Baker*, the trial court struck GM's answer for alleged discovery violations. The
22 appellate court properly reversed and held that those sanctions deprived GM of its "right
23 to be heard. Instead, the jury was asked, essentially, to place a monetary value on the
24 loss of human life." *Id*. When placing the sanction here under heightened scrutiny, the
25 Court must assure that the trial court followed specific safeguards to assure that it did
26 not deprive Goodyear of its constitutional procedural due process rights.
27 ///
28 ///

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A. The Trial Court Did Not Follow the Constitutionally Required Process

As courts have widely held, a trial court must hold an evidentiary hearing because assessing appropriateness of claim-dispositive sanctions "requires a matter of proof that should be subject to cross-examination." *Century Rd. Builders Inc. v. City of Palos Heights*, 670 N.E.2d 836, 839 (Ill. Ct. App. 1996); *see Conkle*, 486 S.E.2d at 188 ("due process required hearing in this case, even more so because the ultimate sanction was imposed"); Judge Sheldon Garnder and Scott William Gertz, *A Guide to Understanding Discovery Sanctions Under Illinois Supreme Court Rule 219 (C) and Fashioning an Appropriate Judicial Response to Serious Discovery Misconduct*, 34 Loy. U. Chi. L.J. 613, 619 (2003) (party must have full opportunity "to challenge and defend against the misconduct allegations"). Only through a full evidentiary hearing can the judge "consider the unique factual situation that each case presents" and issue a just order. *Shimanovsky v. Gen. Motors Corp*., 692 N.E.2d 286, 292-93 (1998).[2]

As this Court acknowledged, the trial court did not provide a full evidentiary hearing, conducting only a prove-up hearing. *See* Op. at *19. As is clear from the tension between the majority and dissenting opinions, the lack of an evidentiary hearing left several factual issues unanswered, including "whether Goodyear's alleged discovery abuse was willful and whether it prejudiced" the Plaintiff. Dissent, at *1. The lack of a full hearing, thus, deprived the Court of a proper record for assessing whether the sanctions met constitutional muster. When constitutional rights are implicated, the Court cannot defer to the district court's finding that Goodyear failed to comply with the discovery violations. The Court must have a detailed record to assess dispassionately whether the trial court's findings and sanctions were warranted. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("the question whether a fine is constitutionally excessive calls for the application of a constitutional standard of the facts

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[2] Scholars noted that it is incumbent upon the party seeking the sanction to "request an evidentiary hearing, make a record, and, in an appropriate case, request findings of fact and conclusions of law." Miller & Thompson, 46 Baylor L. Rev. at 776.

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of a particular case, and in this context *de novo* review of that question is appropriate") (citing *United States v. Bajakajian*, 524 U.S. 321, 336-337 (1998)).

The importance of meaningful appellate review is demonstrated by the fact that other states provide those receiving claim-determinative sanctions the right to seek immediate review, through a petition for a writ of mandamus or an interlocutory appeal. *See, e.g., TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991). Immediate review is particularly important when, as here, damages remained for trial. *Id.* ("The order is not final and appealable because the trial court ordered that damages would be assessed at a later hearing.").

B. The Trial Court Did Not Issue Sufficient Findings to Support Sanctions that Strikes Defenses to Liability

Substantively, taking away a party's right to defend itself against liability charges has been a sanction reserved only for when that party denies another the right to a trial on the merits, either through "repeated violations of court orders or the destruction of evidence." *Id.* The United States Supreme Court has explained that under these egregious circumstances, a trial court has the "permissible presumption" to interpret the party's "refusal to produce material evidence" to be "an admission of the want of merit" of its own claim or defense. *Societe Internationale*, 357 U.S. at 210; *see TransAmerican*, 811 S.W.2d at 915 ("Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit."). These offenses are "far more egregious conduct than simple foot-dragging or even making unfounded challenges to discovery requests." *Carey*, 186 F.3d at 1021.

To protect procedural due process rights and safeguard these sanctions for extreme misconduct, specific findings are required. *See, e.g., Conkle*, 486 S.E.2d at 188 ("court must make an *express* finding as a precondition to sanctions") (emphasis in original). The Court need not adopt standards paralleling federal authority, but

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constitutional procedural due process requires findings substantiating the following principles:

(1) Intentional, malicious conduct: Striking a claim or defense "without a showing of actual bad faith . . . would be excessive." *Denton v. Texas Department of Public Safety Officers Association*, 862 S.W.2d 785, 793-94 (Tex. Ct. App. 1993); *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983) (requiring "bad faith, willful disregard to a trial court's order, or conduct which evinces deliberate callousness" to justify sanctions that strike a claim or defense).

(2) Prejudice on material element of case: Striking pleadings is a drastic remedy such that prejudice must be considered. *See Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 872 N.Y.S.2d 166, 168 (N.Y. App. Div. 2009); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 845 (Tex. 1992) ("there has simply been no showing that [plaintiffs] are unable to prepare for trial without the additional" discovery); *Stephens v. Trust for Public Land*, 479 F. Supp. 2d 1341, 1346 (N.D. Ga. 2007) (requiring a showing of prejudice).

(3) Failure of lesser sanctions to correct the problem: A court *must* "test" lesser sanctions before striking a pleading "in all but the most egregious and exceptional cases." *Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004) (it must be "fully apparent that no lesser sanctions would promote compliance with the rules"); *Blackmon*, 841 S.W.2d at 849 ("[A]lthough punishment, deterrence, and securing compliance with our discovery rules continue to be valid reasons to impose sanctions, these considerations alone cannot justify a trial by sanction. . . . Even then, lesser sanctions must first be tested to determine whether they are adequate to secure compliance, deterrence, and punishment of the offender."); *Pinkstaff*, 211 P.3d at 704 ("[T]he court had a variety of sanctions available which are less drastic than striking the answer. However, the first sanction the court turned to, other than instructing the parties regarding professionalism and proper discovery practices, was the drastic sanction of striking the answer.").

(4) Direct relationship between the offensive conduct and the sanction imposed: The sanction must be directed against the abuse and toward remedying the

prejudice caused to the innocent party. *See id.* at 702 (courts must "impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party"); *Blackmon*, 841 S.W.2d at 850 (where the prejudice is the expenditures of attorney's fees and expenses in pursuing their motion to compel and for sanctions, a discovery sanction reimbursing these expenses "would appear to be better calculated to remedy such prejudice than would death penalty sanctions"); *General Ins. Co. of Am. v. Eastern Consol. Utils., Inc.*, 126 F.3d 215, 220 (3rd Cir. 1997) (the sanction must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery").

The Court sought to address some of these factors in its *Goodyear* ruling, but excused the absence of specific findings on these issues under the incorrect premise that the striking of one's defenses to liability is not a case-determinative sanction. There was no specific finding of intent or bad faith. There was no finding that the plaintiffs were materially prejudiced by the alleged violations, as Plaintiffs reportedly stated they were prepared for trial. No lesser sanctions had been tried, and there was no direct relationship between the alleged violations and sanctions.

As this Court can appreciate, requiring the above due process elements does not suggest that this Court condones a defendant's failure to meet its discovery obligations. *Baker*, 86 F.3d at 817. If a party fails to act in a timely manner, the court can impose a proper penalty. In deciding on that penalty, the court can also balance, as *amici* understand is the case here, that Plaintiffs may have received funds for health care bills from other defendants who have already settled. "[U]nless enforcement of procedural requirements is essential to shield substantive rights, litigation should be determined on the merits and not on formulistic application of the rules." *Pinkstaff*, 211 P.3d at 703.

III. Allowing this Case to Stand Will Invite Abusive "Litigation by Sanction" Trial Strategies

In today's complex civil litigation, discovery disputes have become increasingly common. Sometimes, a violation that appears to the court to be intentional could be the

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result of mistake, misunderstanding or the inability to adhere to voluminous or complex production orders. In recent years, particularly with the advent of e-discovery, production burdens have grown significantly. As one report suggested, "e-discovery has penetrated even 'midsize' cases, potentially generating an average of $3.5 million in litigation costs for a typical lawsuit." Inst. for the Advancement of the Am. Legal Sys., Electronic Discovery: A View from the Front Lines 25 (2008).[3]

As alluded to in the introduction of this brief, sometimes something more calculated is behind those disputes, and a dispassionate appellate court is needed to assure that the parties and the trial court have accurately assessed the characteristics of a particular dispute. As knowledgeable and respected observers of personal injury litigation have noted, creative plaintiffs' lawyers have figured out that they can set discovery-related "traps" to trigger sanctions. *See* Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 Fordham L. Rev. 959, 965 (1995) (explaining that the "pattern [of instigating sanctions] is now a standard part of the modern litigator's play book"); Miller & Thompson, 46 Baylor L. Rev. at 738 ("[D]iscovery 'gamesmanship' has become an integral part of litigation practice."). This practice has been termed "litigation by sanction," because some plaintiffs' lawyers have intentionally provoked discovery disputes to turn judges' anger against corporate defendants. Joyce, 18:21 Legal Backgrounder at *1; *see also* William Large, *Fair Rules For 'Civil Death Penalty' Needed*, Fla. Sun-Sentinel, Sept. 3, 2009. When a judge is primed, the lawyers accuse defendants of intentionally obstructing justice and seek claim-dispositive sanctions to win lawsuits, even where the facts and law are against them. *See* Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 Rev. Litig. 267, 270 (1996) ("By

[3] More than 90 percent of discoverable data is generated and stored electronically, increasing the volume of information that is discoverable or must be reviewed to in order find discoverable information. *See* Christopher D. Wall, *Ethics in the Era of Electronic Evidence*, Trial, Oct. 2005, at 56. Large organizations, on average, receive 250 to 300 million e-mail messages per month, which represents the equivalent of about 500 million typed pages. *See* Comm. on Rules of Practice and Procedure, Summary of the Report of the Judicial Conference 23 (2005).

racking up enough sanctions during discovery, the merits of the case might never be reached at all."); Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991 at 22 (describing the "new arena of outcome-determinative pretrial gamesmanship").

Amici make no accusation that any such mischief has occurred here. The Court's ruling, however, increases the potential for such mischief in the future. If such abusive gamesmanship were permitted, then civil defendants could be severely punished without being evasive or avoiding any responsibilities to the court or opposing counsel. *See* William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease?,* 54 Tex. Bar J. 658 (1991). This honorable Court can use this case as an opportunity to make clear to both small and large businesses in this nation that in Nevada, a party's right to defend itself will not disappear in a cloud of trial court discretion, but only after a full review of the evidence and an application of clear rules as to when a claim-determinative sanction is appropriate.

CONCLUSION

For these reasons, this Court should grant defendant's motion for rehearing.

DATED this 26th day of July, 2010.

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APPENDIX: STATEMENTS OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil

litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and casualty insurers writing business nationwide and globally. AIA members range in size from small companies to the largest insurers. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

ALEC is the nation's largest non-partisan individual membership association of state legislators. ALEC counts numerous Nevada state legislators as members and nearly 2000 state legislators from across the country. ALEC is concerned with state civil justice issues, developing state policy through its Civil Justice Task Force. ALEC's efforts in this regard include the pretrial discovery process, for which ALEC has developed important state policies as embodied in its *Civil Procedural Rule Equity Resolution* and its *Model Rules Governing Electronic Discovery*. ALEC also has guiding policies supporting appropriate sanctions when called for and encouraging judgments that accurately reflect the facts of a case as embodied in its *Accuracy in Pleading Act*, *Civil Procedural Rule Equity Resolution*, and *Full and Fair Non-Economic Damages Act*.

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CERTIFICATE OF SERVICE

I hereby certify that *Amicus Curiae* Brief of Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, American Tort Reform Association, American Insurance Association, American Chemistry Council, and American Legislative Exchange Council in Support of Respondent/Cross-Appellant was filed electronically with the Nevada Supreme Court on the 26th day of July, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this *Amicus Curiae* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of July, 2010.

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