Chairman Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee, my name is Kevin Shimp and I am the Director of Labor & Legal Affairs for the Ohio Chamber of Commerce.

The Ohio Chamber is the state’s leading business advocate, and we represent over 8,000 companies that do business in Ohio. Our mission is to aggressively champion free enterprise, economic competitiveness and growth for the benefit of all Ohioans.

Thank you for the opportunity to provide written remarks in support of the proposed changes to the Ohio Rules of Civil Procedure. My testimony today will focus on the inclusion of the proportionality standard into Ohio’s discovery rules. Discovery is an important tool during litigation and provides each party the ability to build their case or mount a defense. The ground rules for discovery are found in Rule 26 of the Ohio Rules of Civil Procedure and currently there are few rules to limit what information is discoverable, so the addition of a proportionality standard would be welcome change.

The proportionality standard can limit the amount of discoverable documents and increase judicial economy. Proportionality in discovery increases judicial economy because it seeks to narrow the scope of discovery by balancing the needs of the case against the cost and burden of providing the information or document. This balancing test assures relevant information to a case is made discoverable while protecting against abusive discovery techniques that prolong litigation.

The Ohio Chamber of Commerce supports the addition of the proportionality standard into Ohio’s discovery rules because we believe the change is long overdo, will help align Ohio’s Rules of Civil Procedure with the federal rules, and will improve Ohio’s legal and business climates.

A standard to limit what relevant material is discoverable was first added to the Federal Rules of Civil Procedure in 1984 when it was added to Rule 26(b)(1) before it was moved to Rule 26(b)(2)(C) in 1993. After the 1984 amendment took effect, the federal discovery rules had in place many of the same proportionality factors that the Ohio Supreme Court’s proposed Rule 26 uses. These factors that have been used for nearly forty-years by federal courts to limit the extent of discovery include the consideration of the importance of the issues at stake in the action, the amount in controversy, the importance of discovery in resolving the issues, and the parties resources.

In 2015, Rule 26 of the Federal Rules of Civil Procedure, was amended again, and the term proportionality was used for the first time. However, many of the proportionality factors added to Rule 26(b)(1) were not new because the amendment simply moved the factors first inserted in 1984 from Rule 26(b)(2)(C) back to its original section
of Rule 26. The 2015 amendment did add other proportionality factors not originally added in 1984 such as a party’s relative access to relevant information and whether the burden or expense outweighs its likely benefit.

Despite a nearly forty-year precedent from the federal civil rules, Ohio's civil discovery rules still do not include any limitation other than relevancy on the scope of discovery for non-electronically stored information. This means businesses facing a lawsuit in Ohio courts have been subjected to broad discovery requests that are not proportional to the needs of a particular case and requests that could have been limited in federal courts under federal civil Rule 26. These overly broad discovery requests drain the resources of an employer that could otherwise be spent investing in their facilities, their employees, or their communities.

Adopting the proportionality standard in Ohio’s discovery rules will also better align Ohio’s Rules of Civil Procedure with the Federal Rules of Civil Procedure. While our republic and federalist form of government allows states to vary from the federal system, we believe there is no public policy reason to have Ohio litigants flip back and forth between discovery standards depending on whether they are in state or federal court.

Likewise, we believe this lack of uniformity leads to forum shopping by a party who is seeking to put pressure on the other party to settle or drop its claim by selecting to pursue the lawsuit in a state like Ohio that has more liberal discovery rules than federal courts.

Utilizing the federal proportionality standard as opposed to crafting another standard is preferable to the Ohio Chamber because the federal proportionality standard clearly delineates factors that parties and courts can analysis when determining what discovery requests are overly broad or burdensome.

The business and legal climates in Ohio are likely beneficiaries of adding the proportionality rule to Ohio’s Rules of Civil Procedure. For employers, the inclusion of a proportionality standard will better enable them to fight back against overly broad and burdensome discovery requests that are designed to push employers to settle claims. The proportionality standard will also benefit employers by reducing litigation costs since they no longer will have to foot the bill for attorneys to spend hours reviewing countless documents for any information that is relevant to a case in accordance with a discovery order.

Ohio’s legal climate – which was recently ranked the 15th worst legal climate for lawsuit abuse by the US Chamber of Commerce – will also benefit if the proportionality rule is adopted. The current relevancy standard for discovery in Ohio is so broad it harms judicial economy since parties are granted access to numerous documents that will not be used during the case. This overly broad discovery hinders judicial efficiency because it slows the pace at which actions are resolved due to parties reviewing or retrieving information that will not aid in the resolution of the case. However, adding the proportionality standard ameliorates this issue because it can limit the number of documents that are discoverable, which in turn can speed up the timeline of a case.

In closing, amending Ohio Civil Procedure Rule 26 to include the federal proportionality standard will bolster Ohio’s business and legal climates by creating more predictability for Ohio employers and through improvements to judicial economy. I urge your favorable consideration of the changes proposed by the Ohio Supreme Court.