No. S259522

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RAUL BERROTERAN Petitioner and Respondent, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY Respondent.
FORD MOTOR COMPANY Real Party in Interest

California Court of Appeal, Second District, Division One Civil No. B296639
Appeal from Los Angeles Superior Court, Case No. BC542525
Honorable Gregory Keosian, Judge Presiding

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED BY (1) THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND (2) THE PRODUCTS LIABILITY ADVISORY COUNCIL, INC.

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INTRODUCTION

Plaintiff Raul Berroteran, II submits this consolidated response to the two amicus briefs filed in support of real party in interest Ford Motor Company—the briefs by The Civil Justice Association of California (CJAC) and the Product Liability Advisory Council, Inc. (PLAC) (collectively, "Ford's amici").

DISCUSSION

A. The Court Of Appeal Correctly Found That *Wahlgren*[1] Imposes A Categorical Bar Against Admissibility.

PLAC accuses the Court of Appeal of "misreading *Wahlgren* as imposing a 'blanket rule' and 'categorical bar' against admissibility of prior deposition testimony, and rejecting its analysis based on that misimpression." (PLAC Br., p. 12.) But in attempting to show why *Wahlgren* purportedly does not impose a categorical bar, PLAC achieves the opposite: It confirms that *Wahlgren* imposes a categorical bar.

Emphasizing *Wahlgren*'s language that "'a deposition *normally* functions as a discovery device,'" PLAC argues that

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[1] *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*)

"[n]ormally is not equivalent to 'always,'" and thus *Wahlgren* "did not purport to issue a rigid rule that former deposition testimony is *always* inadmissible at trial, and it should not be read that way." (PLAC Br., pp. 15, 18, fn. 4, PLAC's original italics; see also CJAC Br., p. 33 ["'Normal' and 'only' are not synonymous adjectives; they are not even closely related"].)

But PLAC identifies only one instance where, according to PLAC, a deposition of a company witness is not a mere discovery device—where the "*company [defendant]* actually undertakes to preserve the witness' testimony for trial." (PLAC Br., p. 20, italics added.) PLAC argues that in this situation the defendant "is *not* treating the deposition as a mere 'discovery device,'" and the testimony therefore is admissible under Evidence Code section 1291. (*Ibid.*, italics added.)[2] As PLAC puts it, "[t]hat a defendant will occasionally decide to use a deposition to preserve the testimony of a company witness for trial—for example, a witness it fears may become unavailable—does not justify admission of those depositions where it does not." (PLAC Br., p. 20; see also PLAC Br., p. 13 ["Absent unusual circumstances, such as a real threat (not merely a conceivable possibility) that a

[2] All further statutory references are to the Evidence Code unless otherwise indicated.

favorable witness will be unavailable for a likely trial, there is significant risk and little reward" for the defendant to examine a company witness].)

So, under PLAC's (and Ford's) construction of *Wahlgren* and section 1291:

- If a defendant chooses to examine its own witness at the deposition because it fears the witness is dying or won't be unavailable to testify on the company's behalf at trial, the deposition testimony is not a mere discovery device and is admissible in future trials.
- But if the company chooses *not* to examine its own witness, the deposition is a mere discovery device and the testimony is inadmissible under section 1291.

This *Wahlgren*-based construction *does* impose a categorical bar: If the defendant chooses not to examine its own company witness, such as its own current or former employee, the deposition testimony is *categorically* barred from use under section 1291 no matter the circumstances, because the defendant purportedly lacked the same interest in cross-examination at the deposition than it would have at a trial.

In criticizing the Court of Appeal for construing *Wahlgren* as imposing a categorical bar, PLAC ignores that that is exactly

how Ford itself characterized *Wahlgren* to the trial court. As the Court of Appeal recognized, Ford's in limine motion "offered no analysis, explanation, or support" for excluding the deposition testimony other than relying on *Wahlgren* for the contention that Ford necessarily lacked the same motive to examine its own company witnesses at the deposition as it would have at a trial. (*Berroteran v. Superior Court* (2019) 41 Cal.App.5th 518, 526 (*Berroteran*).)[3]

CJAC, Ford's other amicus, similarly misses the point by claiming the trial court "acted well within its discretion" in excluding the depositions. (CJAC Br., p. 17.) Ford's motion in limine was not about discretion; it treated Ford's decision not to examine its own witnesses *as dispositive*. (See 1PE/76-89; Answering Brief on the Merits, pp. 29-31.) As the Court of Appeal noted, Ford's motion "offered no analysis of the causes of

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[3] Ford's in limine motion erroneously asserted that "it is not established that Ford's counsel undertook any re-direct examination at the depositions." (1PE/80.) In truth, Ford examined two of the deponents, Clark and Gillanders, but the trial court followed Ford's misstatement. (See 1PE/766-768, 1582-1586; *Berroteran*, *supra*, 41 Cal.App.5th at p. 525.) Under PLAC's interpretation of section 1291, Clark's and Gillanders' deposition testimony *is admissible* because Ford examined the witnesses. Ford itself has never offered a cogent explanation as to how Clark's and Gillander's deposition testimony could be inadmissible when Ford chose to examine them.

action in the prior litigation generating the challenged depositions and did not argue that those causes of action were different from the current litigation." (*Berroteran, supra*, 41 Cal.App.5th at p. 534.) Consistent with the *Wahlgren*-based bar that Ford urged, the trial court ruled the depositions were inadmissible without ever even reviewing the relevant pleadings or any of the subject deposition testimony. (See Answering Brief on the Merits, p. 32.)[4]

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[4] CJAC claims the trial court found that "[t]he 'former litigation and the present case did not have enough overlapping subject matter, so Ford had an insufficient motive to cross-examine on the specific issues relevant to the present case.'" (CJAC Br., p. 15, citing 1PE 331 but erroneously as 1 C.T. 331.) The trial court never said that. The attributed quote doesn't exist. And as the Court of Appeal recognized, any such finding would have been wrong given the lawsuits' overlapping nature. (See *Berroteran*, *supra*, 41 Cal.App.5th at pp. 534-536.)

The trial court did make a confusing reference about the class action. But that comment, made without the court reviewing any pleadings, ostensibly pertained to whether Code of Civil Procedure section 2025.620, subsection (g) ("CCP 2025.620(g)"), applied—an issue the Court of Appeal never reached. That hearsay exception applies if the class action and this lawsuit involved the *same parties* (Berroteran and the other opt-out plaintiffs here were putative members but not named plaintiffs) and *same subject matter*. The trial court confusingly stated that "[i]n terms of whether or not they are *actual parties*—and specifically on just the broadness of the other cases and lawsuits and specifics of our particular case—. . . they involve multiple issues that are not really at issue here" (1PE 331, italics added)—comments pertinent to CCP 2025.620(g).

B. The Court Of Appeal Correctly Rejected *Wahlgren*'s Categorical Bar.

PLAC's argument also demonstrates why the Court of Appeal got it right in rejecting *Wahlgren*'s categorical bar.

Under PLAC's (and Ford's) *Wahlgren*-based view of section 1291, a company defendant has absolute control over the future admissibility of its own witnesses' depositions: If the company defendant decides that its own witness is dying or otherwise might be unavailable to testify later *on the company's behalf*, the company can examine the witness and make the testimony admissible under section 1291; however, if the company opts not to ask questions and the witness dies or is otherwise unavailable to *a consumer plaintiff*, the sworn testimony is gone forever as though it never existed even if the original plaintiff took the deposition to establish trial evidence.

Nothing in the statute's language, purpose, and legislative history, or in just plain common sense, supports this "heads I win, tails you lose" view of section 1291. Section 1291's purpose is to allow the use of prior sworn testimony if the declarant is "unavailable" and the testimony is being offered *against* "a party to the action or proceeding in which the testimony was given." (§ 1291, subd. (a)(2).) The focus is on the declarant being

unavailable to the party *who wants to use the testimony*—here, a plaintiff consumer who cannot compel out-of-state witnesses to attend trial. Ford and its amici seek to impose an arbitrary, artificial barrier against consumers using the sworn testimony of witnesses that are unavailable to plaintiff consumers.[5] That is contrary to section 1291's purpose of preserving the sworn testimony of unavailable witnesses.

In terms of whether a deposition was a mere discovery device, the proper focus is why the deposition was taken in the first place, not whether a company defending the deposition opted to ask questions. Deposition testimony that a consumer plaintiff takes to establish *trial evidence* is not a mere discovery device. *Wahlgren*'s treatment of depositions as having "limited purpose and utility" and as normally just a "discovery device" (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 546), is outdated and wrong. As the Consumer Attorneys of California explain in their amicus brief supporting Berroteran, "civil discovery practice has changed in the decades since *Wahlgren* was decided," including the use of

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[5] CJAC even goes so far as to claim that "[t]he purpose of section 1291 is to exclude hearsay testimony *from an aligned witness* to a party in *previous pre-trial deposition* from infecting a later and different case involving that same party." (CJAC Br., p. 19, italics added.) As the statutory language makes plain, section 1291's purpose is permit the use at trial of prior sworn testimony by unavailable witnesses.

videotaped depositions, which were not even authorized when *Wahlgren* was decided. (Consumer Attorneys of California Br., pp. 10-11; see Answering Brief on the Merits, pp. 38-39.)

The depositions at issue here cannot even remotely be considered mere discovery devices:

- *Each* deposition was videotaped. The only reason for plaintiffs to incur the additional cost of videotaping is to be able to present the testimony to a jury at trial. Kalis's deposition in *Brown v. Ford Motor Company* was used as evidence *at the trial* in that lawsuit. The only reason the other depositions were not used at a trial in the lawsuits in which they were taken is because those cases settled. Ford even conducted examination at Clark's and Gillanders' depositions.

- Comments and questions by the attorneys representing the plaintiff, or by class counsel in the Class Action, make clear that the plaintiffs intended to play the videotaped testimony *at trial to the jury* as evidence. (See, e.g., 1PE/1277 [Frommann deposition: "*[T]he jury that's going to be hearing this might not know much about engines*, so can you explain in general terms what causes pressure to build up in a cylinder in a diesel engine?"; italics added], 1299-1300 [Frommann deposition: "I think I know what you mean, *but to be clear for the judge and*

the jury, a service part means a—a part used when someone brings their vehicle in for repair, . . ., right?"; italics added], 1169 [Freeland deposition: "*[G]ive the ladies and gentlemen of the jury* a brief overview of this project"; italics added], 1174 [Freeland deposition: "[A]nd *for the ladies and gentlemen of the jury*, the codes that you refer to, . . . where do these codes come from?"; italics added]; 1PE/748 [Clark deposition: "*You are telling the jury* . . . Ford Motor Company doesn't know that that is a repurchase/replacement request?"; italics added], 1448-1449 [Gillanders deposition: "Just so that *when we're playing this in trial later on or dealing with this in trial*, can you break down the acronyms when we haven't gone over them"; italics added], 1122 [Fascetti deposition: "[S]o would you *describe for the ladies and gentlemen of the jury* the process of installing an engine"; italics added], 1743 [Kalis deposition: counsel commenting that he is inquiring as to Kalis's background for *the jurors'* benefit].)

- Clark, Gillanders and Kalis testified as Ford's "person most knowledgeable" designees under Code of Civil Procedure section 2025.230, and pursuant to deposition notices expressly stating that their testimony would be used for both discovery and *as evidence at trial*. (Petition ¶ 45; Return, p. 20 [response to Petition ¶ 45].)

- Three of the class action deponents had retired from Ford at their depositions, meaning Ford had no assurance it could get them to attend trial. And all five class action depositions occurred in a master class action (Class Action) that consolidated multi-district lawsuits from across the country, meaning plaintiffs opting out would likely reside in different states than Ford and its witnesses. In addition, the Ford witnesses deposed in the California opt-out lawsuits all resided outside California and could not be compelled to attend trial. The plaintiffs took these depositions to establish and preserve trial evidence, not just for investigatory purposes. The witnesses were all key to the plaintiffs' liability claims; most were specifically referenced in the pleadings. (See Answering Brief on the Merits, pp. 19-29.)

- Each of the subject depositions already has been admitted as evidence *in the trials* of other opt-out lawsuits in California—suits that yielded verdicts against Ford, including three fraud verdicts exceeding $1 million. (Petition ¶¶ 31, 32, 44; Return, pp. 19-20 [responses to Petition ¶¶ 31, 32, 44]; *Berroteran*, *supra*, 41 Cal.App.5th at pp. 523, 536.)

Thus, as the Court of Appeal correctly recognized, the deposition testimony at issue here "did not serve only discovery purposes." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 536.) Ford's

amici acknowledge none of this. None. Their suggestion that Ford's decision not to ask questions rendered these depositions mere discovery devices is nonsensical. It also ignores that Ford *did* ask questions at Clark's and Gillanders' depositions.

Section 1291's legislative history also refutes Ford's amici's one-sided view that a company defendant's decision to not ask questions renders the deposition a mere discovery device. PLAC contends that *Wahlgren* was simply following the Law Revision Commission's direction in concluding that depositions normally have limited utility. (PLAC Br., pp. 18-19.) But that's not what the Commission said. The Commission noted that when a deposition taken in a prior proceeding "was not offered at the trial" in that proceeding, in *that* situation a trial court should assess whether "the deposition was taken 'for discovery purposes' only" and not for purposes of establishing trial evidence. (See Answering Brief on the Merits, pp. 54-55.) The Commission's comment effectively recognizes that if a plaintiff deposes a company witness and uses that deposition testimony as evidence at the trial in the lawsuit, then that deposition testimony necessarily was *not* a mere discovery device *even if the company defendant chose not to examine the witness at the deposition*.

Again, here, Kalis's deposition in *Brown* was used at the *Brown* trial, and the only reason the other depositions were not

used at the trials in which they were taken is because those cases settled. The plaintiffs in those cases did not take the videotaped depositions merely for some investigatory purpose; they took comprehensive depositions of key company witnesses to establish trial evidence, that is, to prove Ford's liability. The depositions were not mere discovery devices never intended to see the light of day in a courtroom. Section 1291's hearsay exception applies.

In criticizing *Berroteran*'s analysis of *Wahlgren*, Ford's amici confuse matters by emphasizing practice guides that advise company defendants, for strategic reasons, to exercise caution before examining their own witnesses at a deposition. (See PLAC Br., pp. 23-28.) They fault *Berroteran* for not citing any "of this scholarship." (PLAC Br., p. 23; see also PLAC Br., p. 33 [accusing the Court of Appeal of "misapprehend[ing] the prevailing custom and practice in defending company witness depositions"].) But the scholarship that Ford's amici cites is beside the point. What *Berroteran* criticized as being outdated and unsupported was *Wahlgren*'s general assumption "that deposition testimony is limited to discovery and has a 'limited purpose and utility.'" (*Berroteran*, *supra*, 41 Cal.App.5th at p. 521.)

Berroteran correctly recognized that treating depositions that way, and ignoring that plaintiffs often take depositions not

just for investigatory purposes but *to establish trial evidence*, is "unsupported by legal authority, inconsistent with modern trials and the omnipresence of videotaped depositions during trial, and contrary to persuasive federal law interpreting an analogous hearsay exception." (*Id.* at p. 521; see *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506 (*Hendrix*) ["'pretrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony'"].)

Ford's amici offer nothing contrary on this point. They instead distort the issue by noting that defendant companies might make tactical decisions to not examine their own witnesses and that certain practice guides support that tactic.

At bottom, Ford's amici (and Ford itself) conflate two different concepts: Whether the company defendant has the same interest and motive in discrediting adverse testimony, versus whether the defendants might have had a tactical reason not to act on that motive and interest at the prior proceeding. As this Court held in *People v. Zapien* (1993) 4 Cal.4th 929 (*Zapien*), decided after *Wahlgren*, determining whether the defendant had the same motive and interest for section 1291 purposes does not depend on whether the defendant might have had strategic reasons to hold off on cross-examination for trial; it instead depends on whether the defendant had a similar interest

in discrediting adverse testimony. Although the *Zapien* defendant argued he had a different cross-examination motive at a preliminary hearing because "for strategic considerations" he did not want to risk "reveal[ing] damaging evidence" or alienating the witness whose testimony would be crucial at trial, this Court held the testimony of the now-unavailable witness was admissible because "[d]efendant's interest and motive in discrediting this testimony was identical at both proceedings." (*Zapien*, *supra*, 4 Cal.4th at pp. 974-975; see Answering Brief on the Merits, pp. 48-49.)

As the Consumer Attorneys of California demonstrate in their amicus brief supporting Berroteran, "the Court of Appeal relied on this Court's criminal jurisprudence involving section 1291" in rejecting *Wahlgren*, and this Court's criminal jurisprudence is compelling because "[t]he Legislature could not have intended to afford civil litigants a greater right to exclude former testimony than a criminal defendant whose rights are secured by the federal Constitution." (Consumer Attorneys of California Br., pp. 7-8; see *id.* at pp. 8-9, discussing *People v. Alcala* (1992) 4 Cal.4th 742, 784-785; *People v. Wilson* (2005) 36 Cal.4th 309, 340; *Zapien*, *supra*, 4 Cal.4th at p. 974; *People v. Samayoa* (1997) 15 Cal.4th 795, 850; and *People v. Gonzalez*

(2012) 54 Cal.4th 1234, 1262; see *Berroteran*, *supra*, 41 Cal.App.5th at pp. 532-533.)

The Consumer Attorneys correctly summarize that "[w]hat emerges from these [criminal] cases is the principle that a motive and opportunity to discredit a witness—here Ford's desire to discredit adverse testimony from its former employees, while not alienating them—will be sufficiently similar to its purposes at trial such that section 1291's requirements are met." (Consumer Attorneys of California Br., p. 9.)

This Court's analysis in criminal cases about tactical strategies comports with federal law construing section 1291's federal analogue—which Ford's amici ignore, too. (See, e.g., *Hendrix*, *supra*, 776 F.2d at p. 1506 ["as a general rule, a party's decision to limit cross-examination in a discovery deposition is a *strategic choice* and does not preclude his adversary's use of the deposition at a subsequent proceeding," italics added]; *U.S. v. Mann* (5th Cir. 1998) 161 F.3d 840, 861 [recognizing that the federal analogue does not require "a compelling *tactical or strategic* incentive to subject the testimony to cross-examination, only that an opportunity and similar motive to develop the testimony existed," italics added]; 2 McCormick, Evidence (8th ed. 2020 update) The Hearsay Rule and Its Exceptions, § 304 ["The cases emphatically hold that judgments to limit or waive

cross-examination at that earlier proceeding *based on tactics or strategy* . . . do not undermine admissibility," italics added]; Federal Trial Objections (7th ed., 2020 update) § H150 ["that *tactical* decisions are made with respect to the extent of questioning does not negate the existence of opportunity and similar motive to develop the testimony," italics added]; Answering Brief on the Merits, pp. 63-64.)

A party might lack the same interest in discrediting adverse testimony if the prior deposition or proceeding involved a fundamentally different issue than the current litigation. For example, if a Ford employee commented about faulty brakes during a deposition about a defective engine, that testimony might be inadmissible at a subsequent trial over defective brakes. In that situation, Ford would not have had the same interest in discrediting stray comments about brakes at a deposition concerning defective engines than it would have in a trial about defective brakes. But that's not the situation here. As the Court of Appeal recognized, all the testimony and all the lawsuits concerned the same defective engine and same fraud issues; Ford had the same motive and interest in discrediting adverse testimony. (See *Berroteran*, *supra*, 41 Cal.App.5th at pp. 520, 534-535; Answering Brief on the Merits, pp. 71-74.)

C. Ford's Amici Ignore The Factual Backdrop That Makes This Lawsuit An Archetypal Context For Section 1291 Admissibility.

Ford's amici suggest this case is the archetypal situation where deposition testimony cannot come in under section 1291—a case where the deposition witness was aligned with the party defending the deposition, and so the defending party chose not to ask questions. In truth, this is the archetypal case where deposition testimony *should come in*. Ford's amici, following Ford's approach, ignore why it was an abuse of discretion to exclude *this* particular deposition testimony.

These were not unrelated lawsuits, nor could Ford ever legitimately claim surprise that a plaintiff who opted out of the Class Action sought to use such deposition testimony. The very reason Berroteran opted out of the Class Action was to sue Ford individually for the same claims; he specifically modeled his complaint on the Class Action allegations. The same is true of the other opt-out lawsuits in which the subject depositions were taken; in fact, the same attorneys who represent Berroteran represented the other opt-out plaintiffs and the pleadings in those opt-opt lawsuits all allege identical defect and fraud causes of action and virtually identical allegations.

As the Consumer Attorneys of California explain in their amicus brief, Berroteran's lawsuit and the Class Action are so inter-connected that the Class Action depositions are independently admissible under CCP 2025.620(g), because Berroteran was a putative class member before opting out. (See Consumer Attorneys of California, Br., pp. 12-13.) CCP 2025.620(g) authorizes using as trial evidence any depositions from a prior action "involving the same subject matter" and "the same parties," regardless whether the party defending the prior deposition examined its own witness. Although the Court of Appeal never reached the issue (*Berroteran*, *supra*, 41 Cal.App.5th at p. 528, fn. 8), the statute is an independent basis for affirmance as to the five Class Action depositions. But, at a minimum, CCP 2026.620(g) confirms that the interrelationship between the parties and issues matters for hearsay-exception purposes.

Ford's amici acknowledge none of this. They instead speak in broad generalities about depositions being cherry-picked from random suits across the country. (See, e.g., CJAC Br., p. 36 [arguing that, absent reversal, plaintiffs will "quarry[] out old depositions from around the country for use in future trials, obviating the need to engage in their own case-specific discovery"].) But, in fact, the context here is the poster child for

admissibility: opt-out lawsuits from a class action involving similarly-situated plaintiffs and product-defect and fraud pleadings that are specifically modeled on each other and regard the same defective engine.

This is an archetypal case for admissibility for additional reasons—reasons that Ford's amici also ignore. Not only are these lawsuits interrelated, *each* of the subject depositions has already been used as *trial evidence* at trials in other lawsuits by opt-out plaintiffs alleging the same defect and fraud claims against Ford as Berroteran. (See Answering Brief on the Merits, pp. 28-29; *Berroteran*, *supra*, 41 Cal.App.5th at pp. 523, 536.)

In addition, although the deponents are unavailable to Berroteran because they reside beyond the trial court's subpoena powers, the witnesses are still alive and *available to Ford*. Six are current Ford employees; and three are retired Ford employees, and those three were retired at the time of their depositions but Ford opted not to ask any questions because it assumed it could get them to voluntarily attend trial. (See Answering Brief on the Merits, pp. 19-28.) In the other opt-out lawsuits in which these depositions were used as trial evidence, however, Ford opted not to have these witnesses attend trial even though doing so would have eliminated the section 1291 issue and let Ford conduct any examination it wanted. (*Id.* at pp. 28-

29.) Ford instead relied on counter-designated deposition excerpts, thus confirming the deposition testimony's trustworthiness and that Ford did not need to elicit additional information. (*Ibid.*)

If these depositions are not admissible under section 1291, section 1291's hearsay exception would be a hollow shell as to deposition testimony. The circumstances of this case—videotaped depositions involving the same defendant; similarly-situated plaintiffs that were members of the same class action who then opted out to sue the defendant individually for identical claims; witnesses unavailable to the plaintiff but whom the defendant could call live at trial were further testimony actually needed; and depositions consumers took to establish trial evidence that already have been admitted as evidence in other trials by consumers who opted out of the same class action to pursue the same claims—present an archetypal case for admissibility, not inadmissibility as Ford's amici suggest.

D. Hearsay Exceptions Exist Where, As Is True Of The Sworn Testimony Here, Statements Are Considered Sufficiently Trustworthy.

CJAC asserts that how this Court resolves the split between *Wahlgren* and *Berroteran* "will determine whether

section 1291 serves to promote the search for truth or hinders it." (CJAC Br., p. 10.) We agree.

But it is Ford and its amici's construction of section 1291 that hinders the search for truth. Under their view, if a defendant company chooses not to examine its own witness at a deposition, the deposition testimony is gone forever despite the testimony being sworn under oath, despite the plaintiff having conducted a full examination intended to establish trial evidence, and despite the company having had full opportunity to coach and prepare the witnesses and to correct or clarify any erroneous comments—and even where, as here, the company presents no evidence that any testimony was inaccurate or that the company would have done anything different had the deposition occurred in the current lawsuit, and the same deposition testimony has already come as trial evidence in similar lawsuits that yielded fraud verdicts against the company.

Seeking to exclude these depositions is hardly a search for truth. It's gamesmanship. It's an effort to hinder the truth.

CJAC erroneously suggests that trustworthiness—for hearsay-exception purposes—requires *actual* cross-examination. CJAC argues that *Berroteran*'s "peculiar reading" defeats section 1291's purpose by "admitting into trial of this and future cases,

deposition testimony from a previous case that lacks the critical element of *meaningful cross-examination*," a consequence CJAC labels "absurd." (CJAC Br., p. 23, italics added.) CJAC similarly accuses *Berroteran* of "upend[ing]" *Wahlgren* by permitting deposition testimony to be introduced at trial "regardless of whether it was *cured* of its inadmissible hearsay nature *by a party's cross-examination* of its own witness noticed by the opposing party." (CJAC Br., p. 17, italics added.)

CJAC misconstrues both section 1291 and settled law. It is the *opportunity* for cross-examination that makes testimony sufficiently trustworthy for hearsay exception purposes, not actual cross-examination. As this Court has recognized in applying section 1291, "[a]s long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether the defendant availed himself fully of that opportunity." (*Zapien*, *supra*, 4 Cal.4th at p. 975; see also *People v. Sul* (1981) 122 Cal.App.3d 355, 367 ["Section 1291, subdivision (a)(2), of the Evidence Code does not require cross-examination as a prerequisite to admissibility. It is enough if defense counsel '. . . had the right and opportunity to cross-examine the declarant . . .'"].)

Section 1291's legislative history recognizes this too. (See Assembly Com. on Judiciary com. foll. § 1291 ["Since the party has had his *opportunity* to cross-examine, the primary objection to hearsay evidence—*lack of opportunity* to cross-examine the declarant—is not applicable," italics added]; see also 11FMJN/2561; 12FMJN/2955.) That is why section 1291 only requires "the right and opportunity to cross-examine the declarant," not actual cross-examination. (§ 1291, subd. (a)(2).)

CJAC further misses the mark by citing Wigmore for the proposition that "the importance of cross-examination to cure the unreliability of hearsay cannot be gainsaid." (CJAC Br., p. 21.) Wigmore has acknowledged, over and over, that "[t]he principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired." (5 Wigmore, Treatise on the Anglo-American System of Evidence in Trials at Common Law (3d ed. 1940) § 1371, p. 51, original italics; 5 Wigmore, Evidence in Trials at Common Law (1974 Chadbourn rev.) § 1371, pp. 55-56; see 2 Wigmore, A Treatise on the System of Evidence in Trial at Common Law (1904), § 1371, p. 1710, [version cited by CJAC; using "doctrine" instead of "principle"].)

CJAC further confuses the trustworthiness issue by arguing the hearsay rule exists because the law prefers live testimony at trial. (CJAC Br., pp. 19-21.) Section 1291's hearsay exception applies to witnesses who are *unavailable* to testify at trial, either because they are dead, incapacitated or beyond the trial court's subpoena powers, and thus "the choice is not between perfect and imperfect conditions for the giving of testimony but between imperfect conditions *and no testimony at all*." (McCormick, Evidence (3d ed. 1984) § 256, pp. 765-766, italics added; see Answering Brief on the Merits, pp. 50-52.) The law may prefer live trial testimony, but where, as here, witnesses cannot be compelled to attend trial, section 1291 authorizes the substitute of prior sworn testimony.

Ford's amici also improperly discount the fact that these depositions were videotaped. CJAC itself acknowledges that a main concern underlying the hearsay rule is that the absence of "in person" testimony deprives the jury of "'the opportunity to judge credibility by viewing the witness at the time he or she makes the damaging statement.'" (CJAC Br., p. 20, quoting David P. Leonard, *Rules of Evidence and Substantive Policy* (1992) 25 Loy. L. Rev. 797, 810.) Videotaped deposition testimony gives jurors that opportunity.

In addition, Code of Civil Procedure provisions further demonstrate that a company defendant's strategic decisions about examining its own witnesses at a deposition do not affect trustworthiness for hearsay exception purposes. Under Code of Civil Procedure section 2025.620, subdivision (c), when a plaintiff deposes a company defendant's witness and cannot compel the deponent to attend trial, either because the witness is deceased, incapacitated or resides beyond the trial court's subpoena powers, the plaintiff can admit that testimony as evidence at trial, even though the testimony is hearsay and *regardless whether the company defendant opted to ask questions at the deposition*. And under subdivision (g) of that statute, a plaintiff can use as trial evidence depositions taken in a prior action involving the same parties and subject matter, even though the testimony is hearsay and *regardless whether the company defendant opted to ask questions at the deposition.* (See CCP 2026.620(g).)

In both contexts, it is the interrelationship of the issues and parties, and the opportunity to examine the deponent, that establishes the trustworthiness sufficient for a hearsay exception. It makes no difference in either context that a company defendant may have chosen for tactical reasons not to examine its own witnesses at the depositions. Section 1291 is no different.

Aside from general hyperbole about the importance of cross-examination, Ford's amici never identify any basis for deeming the depositions at issue here to be untrustworthy. Ford has never identified—at the depositions themselves, in its in limine motion, or in subsequent briefing—any of the testimony as being inaccurate or misleading. Even secondary authorities cited by Ford's amici recognize that a company defendant should examine its own witnesses at a deposition where "[n]ecessary to clarify or correct testimony on a significant issue." (PLAC Br., p. 27, quoting Bryce L. Friedman, *Taking and Defending Depositions* (March 6, 2018) at 165, Practicing Law Institute (Item 276169).)

And as a review of the depositions (something the trial court never performed) reveals, much of the testimony here regarded the authentication of documents and establishment of historical facts—matters unlikely to pose reliability concerns or any need for "cross" examination by Ford. Indeed, the Legislature's use of the term "cross" indicates the Legislature's focus was the opportunity to ask questions of *non-aligned* witnesses. As Ford's amici acknowledge, generally a defendant company conducts "direct" examination of one's own witnesses. (See PLAC Br., p. 17 ["Absent a true concern that the case may actually go to trial *and* the witness will by then by unavailable to

testify, the custom and practice is to defer the 'direct' examination of the company witness to the trial, if any," original italics].)

Moreover, each of these depositions already has been used as trial evidence in lawsuits by other opt-out plaintiffs. And in each of those lawsuits Ford, instead of calling the witnesses live to elicit any new testimony, confirmed no additional testimony was necessary by relying on counter-designating portions of the deposition transcript to present its defense.

There was, and is, no trustworthiness issue.

Ford and its amici's construction of section 1291 reduces to the following: No matter how trustworthy the deposition testimony seems to be, and no matter how damaging the testimony might be to the defendant company (such as supporting fraud claims, as here), the defendant can exclude the testimony's future use simply by choosing not to ask questions. That artificial bar has nothing to do with trustworthiness.

E. Ford's Amici Ignore And Misstate Cases Construing Section 1291's Federal Analogue.

The Court of Appeal correctly recognized that *Walhgren* is contrary to federal cases construing Federal Rules of Evidence,

rule 804(b)(1) (rule 804(b)(1)), the federal analogue to section 1291. (*Berroteran*, *supra*, 41 Cal.App.5th at pp. 529-532.)

PLAC, whose members include product manufacturers across the country such as Ford, and thus presumably would be familiar with product-liability laws and cases across the country, does not cite a single federal or state case following *Wahlgren*'s approach. Instead, PLAC avoids the issue with a footnoted assertion that "Ford's briefing thoroughly analyzes the federal authorities . . . and the court of appeal's misguided reliance on inapposite cases" and so "PLAC will not repeat that analysis here." (PLAC Br., pp. 19-20, fn. 5.)

But as the *Berroteran* court has already demonstrated, Ford's briefing does not—and cannot—cite to any case from any other jurisdiction following *Wahlgren*'s approach or cite to any case that would support finding the depositions at issue here would be inadmissible under rule 804(b)(1), even as an exercise of discretion. (See Answering Brief on the Merits, pp. 58-71.) In addition, federal treatises, summarizing federal law applying Rule 804(b)(1), reject the construction of Ford and its amici. (See *id.* at pp. 40, 58, 63-64.)

CJAC's only attempt to address *Berroteran*'s analysis of federal law is to quote language from a letter supporting review,

which misleadingly claimed *Berroteran* relied on only two cases and they are distinguishable because the witnesses purportedly were adverse. (CJAC Br., p. 34.) Ford made the exact same argument in its opening brief. (Op. Br., pp. 40-41.) As already explained, that argument is wrong because:

- *Berroteran* relied on more than just two cases;
- Numerous cases and federal treatises not mentioned in *Berroteran*, including products liability and manufacturing defect cases, confirm *Berroteran*'s analysis of federal law;
- The witnesses in the two cases singled out by Ford and its amici were a defendant's former employee and a plaintiff's own psychiatrist being deposed by the other side, and nether was hostile or adverse to the party defending the deposition; and
- No case applying Rule 804(b)(1) has held to be inadmissible the type of deposition testimony at issue here.

(See Answering Brief on the Merits, pp. 60-65.)

CJAC also claims that *Berroteran* flips the burden of proof established by federal and California law, arguing "[e]ven the federal authorities applying Rule 804 hold that the burden for

introducing deposition testimony falls on the party seeking to do so, not the opposing party." (CJAC Br., p. 35.)

Berroteran does not change the burden of proof. As the consumer advocacy amici explain, a party seeking to admit evidence under section 1291 must only establish preliminary facts, such as unavailability. (See Consumers for Automobile Reliability and Safety/Consumer Action/Consumer Federation of California/California Public Interest Research Group Br., p. 8; see also *People v. Sul*, *supra*, 122 Cal.App.3d at p. 361 ["Unavailability of a witness is a preliminary fact to be established to the satisfaction of the trial court by the proponent of the evidence"].) After that preliminary showing, the party *opposing* admissibility has the burden to present evidence that only that party would possess—such as specifically showing why prior testimony was unreliable and what the defendant might have elicited through cross-examination. (See, e.g., Consumers for Automobile Reliability and Safety/Consumer Action/Consumer Federation of California/California Public Interest Research Group Br., p. 8; *People v. Samayoa* (1997) 15 Cal.4th 795, 851 [emphasizing that the defendant failed to suggest what evidence might have been elicited from the witness at the prior proceeding that would have placed the testimony in a different light].)

Contrary to CJAC's assertions, federal authorities applying Rule 804 are to the same effect. Federal law does *not* allow defendants opposing admissibility to simply sit on their hands and say I didn't ask questions. After a plaintiff shows that a witness is unavailable and that lawsuits involve similar claims, the defendants must specifically explain what they would have done differently and how they were prejudiced—information only the defendants would possess. Under Rule 804(b)(1), "[i]t is incumbent upon *counsel objecting to admissibility of former testimony* to explain *precisely* why motive and opportunity of defendants in the first case were not adequate to develop cross-examination that the instant defendant would have presented to the witness." (Jones et al., Prac. Guide: Fed. Civil Trials & Evidence (The Rutter Group 2020) ¶ 8:3062, italics added[6]; see

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[6] This same treatise suggests cases are split as to whether an examiner's motive at a deposition is sufficiently similar as at trial for Rule 804 purposes, citing *Polozie v. U.S.* (D.Conn. 1993) 835 F.Supp. 68, 72 and *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506. (See Jones et al., Prac. Guide: Fed. Civil Trials & Evidence, *supra*, at ¶¶ 8:3069-8:3071.) Those two cases, however, involve fundamentally different contexts. In *Polozie*, the party *who noticed the deposition* claimed its deposition had a limited purpose. A defendant deposed the plaintiff's expert but only elicited the expert's opinions; it withheld evidence criticizing the expert because it intended to criticize the expert at trial. The district court thus held that the testimony, *which was not intended to establish trial evidence*, could not be introduced later against the party *who took the deposition*. (See 835 F.Supp. at p. 72.) In contrast, in *Hendrix*,

Horne v. Owens-Corning Fiberglas Corp. (4th Cir. 1993) 4 F.3d 276, 283 ["the party against whom the deposition is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"]; *Battle ex rel. Battle v. Memorial Hosp. at Gulfport* (5th Cir. 2000) 228 F.3d 544, 553 [defendants "do not suggest a single question or line of questioning that would have added reliability to the deposition"]; *Dykes v. Raymark Industries, Inc.* (6th Cir. 1986) 801 F.2d 810, 817 [the defendant, when objecting to admissibility, must "explain as clearly as possible to the judge precisely why the motive and opportunity" was inadequate].)

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the plaintiff took the deposition of a retired company witness to establish liability/trial evidence (the scenario here), and the Circuit Court recognized that the defendant company's tactical decision to not ask questions did not prevent Rule 804 from applying. (776 F.2d at p. 1506.) Those are very different scenarios. Indeed, *Polozie* specifically distinguishes *Hendrix*. (See 835 F.Supp. at p. 72.)

The *Hendrix* scenario is what applies here, not the *Polozie* scenario. (See Answering Brief on the Merits, pp. 60-61, 69.) No federal case holds that when a party takes a deposition for trial evidence purposes, the other side can bar Rule 804 from applying simply by choosing not to ask questions. (See, e.g., *Hynix Semiconductor Inc. v. Rambus Inc.* (N.D.Cal. 2008) 250 F.R.D. 452, 458-459 [applying *Hendrix* to company employer's decision not to question its own employee at a deposition taken by plaintiff].)

Federal cases and federal law treatises construing Rule 804 support *Berroteran*'s construction of section 1291. Ford's amici do not show otherwise.

F. Public Policy Supports The Court Of Appeal's Holding.

Ford's amici, like Ford itself, try to conjure up a parade of horribles that will purportedly result if the Court of Appeal's decision is not reversed. They claim "[i]f *Berroteran* and its mistaken gloss on section 1291 is upheld, the likely result does not bode well for the administration of justice." (CJAC Br., p. 36.) They claim an affirmance "threatens [product] manufacturers with expansive and unfair use of the deposition testimony of their witnesses and substantially increased costs and burdens attached to the depositions of company employees." (PLAC Br., pp. 10-11.)

Such hyperbole gets the public policy issue backwards. Public policy supports, indeed compels, an affirmance. Ford and its amici are trying to create artificial barriers against similarly-situated consumers with limited resources suing large wealthy corporations over defective products and, here, over *fraudulently* withholding and misrepresenting information about defective products. Multiple juries have already found that Ford

committed fraud based on the same deposition testimony that Ford now seeks to exclude.

Under the one-sided view of Ford and its amici, a company can preserve testimony *favoring the company* by choosing to ask questions of its own witnesses at their depositions but can bar testimony *favoring consumers* simply by choosing not to ask questions. Under that view, if the company doesn't ask questions and a key company witness dies, that defective-product testimony dies with the witness, and any other consumers suing the company over the same defect are out of luck. And if the witness remains alive but outside the trial court's subpoena powers, as is usually the case with large manufacturers such as Ford selling products across the country, the company can limit access to key witnesses by not asking questions at their depositions and avoiding having them appear live at trial, as Ford does.

The artificial bar that Ford and its amici seek to impose is contrary to sound public policy, as confirmed by the four separate consumer advocacy groups that have filed an amicus brief supporting Berroteran: (1) the Consumers for Automobile Reliability and Safety, (2) Consumer Action, (3) the Consumer Federation of California and (4) the California Public Interest Group. As they explain, the resolution of this appeal "will have a profound impact on California consumers' ability to obtain

redress under state tort and consumer protections laws." (Consumers for Automobile Reliability and Safety/Consumer Action/Consumer Federation of California/California Public Interest Research Group App. To File Br., p. 4.) "Product liability litigation, like litigation involving drugs, tobacco and asbestos, transcend the individual litigants in specific cases. *Evidence concerning what companies know and when they knew critical facts about the products are matters of public safety and national concern*." (Consumers for Automobile Reliability and Safety/Consumer Action/Consumer Federation of California/California Public Interest Research Group Br., at p. 12, italics added.)

Allowing defendant manufacturers to prevent the use at trial of sworn testimony of unavailable company witnesses regarding defective products and fraudulent practices simply by refusing to ask questions at their depositions would "withhold[] from the fact-finding process relevant and probative evidence about the defect" and "punish[] the consumer purchaser for a strategic decision the company made in an effort to conceal the information from public scrutiny." (*Id.* at p. 14.) Public policy does not condone that result.

PLAC, an organization whose purpose is to protect the interests of product manufacturers, including its member Ford,

shows its true colors by arguing that the depositions of company witnesses should be inadmissible in future lawsuits because "[t]he witness (or another with comparable knowledge) will often be available for live trial testimony in the future case, and if not, then the witness may be deposed for trial *in that case* and fully examined to preserve their testimony." (PLAC Br., p. 31, original italics.)

In truth, company witnesses usually are *un*available to consumers. Again, under PLAC's view, if the deposed witness dies, the sworn testimony is gone forever. But if the witness is still alive, consumers rarely can compel trial attendance because the company typically will be headquartered outside the range of the trial court's subpoena powers (as here) and thus the company's current and former employees usually reside beyond those subpoena powers (as here). The type of witnesses at issue here (non-officers) are "available" for trial only if the company *voluntarily* has them appear, which manufacturers rarely, if ever, do. Ford certainly doesn't. The only reason this section 1291 issue exists is because Ford refuses to moot the issue by having the witnesses appear live at trial.

If Ford truly needed additional information from any of these witnesses beyond what they said in their depositions, it could have them appear at trial and elicit any testimony it wants.

But Ford's section 1291 dispute is not about Ford's need to elicit further testimony from these witnesses; it is about Ford's desire to deny key defect and fraud evidence to consumers. Placing consumers at the mercy of manufacturers voluntarily making witnesses appear at trial makes no sense from a public policy standpoint.

Once one pierces PLAC's suggestion about company witnesses usually being available for trial, PLAC's policy argument reduces to the following: Ford and the other product-manufacturer members of PLAC want a rule that forces consumers in each and every case—even in opt-out cases from the same class action—to re-depose the same witnesses over and over again, so each plaintiff can then use the deposition testimony as trial evidence because the deposition was taken "*in that case*." (PLAC Br., p. 31, original italics.)

PLAC's policy argument thus confirms what Berroteran said in his opening brief: Ford's position, and now PLAC's position, is that "Berroteran cannot use the prior testimony at his trial because he did not go through the pointless, duplicative and expensive task of re-deposing each deponent in other states, asking them to confirm what they said in their prior depositions years before when their memories were fresher." (Answering Brief on the Merits, pp. 14-15.)

The Legislature, however, specifically rejected that view when enacting section 1291. It rejected a proposal that would have based unavailability on whether the witness could be deposed in the current lawsuit without undue hardship or expense. (See Answering Brief on the Merits, pp. 52-53.) And for good reason: From a public policy standpoint, the needless re-taking of duplicative and expensive depositions makes no sense. That is particularly true where, as here, the company defendant has never shown it would have done anything different than before if the depositions were re-taken and the defendant could have the witnesses appear at trial if needed.

Large product manufacturers such as Ford have huge litigation war chests. Consumers, in comparison, have limited financial resources and are vulnerable to manufacturer efforts to drive up litigation and discovery costs in the hopes of forcing a settlement. The class action remedy exists because of such concerns. Class actions let consumers pool resources and promote judicial efficiency through common discovery. But under Ford's and PLAC's world view, if thousands of consumers then opt out of the class action because they believe a proposed settlement lets the product manufacturer off the hook for fraud—which is exactly what happened here—the manufacturer can force each of the thousands to start from scratch and only rely on

depositions taken in their own individual lawsuits. Few consumers have the financial resource to incur such expense, and out-of-state depositions can entail non-financial costs as well, as the COVID-19 pandemic demonstrates. It is far easier for manufacturers to incur the cost of having witnesses appear at trial if the manufacturer wants to elicit direct examination (a need Ford has never shown here), than to saddle opt-out consumers with the huge expense of needlessly re-taking duplicative depositions.

Ford's and PLAC's position that consumers must needlessly re-take duplicative depositions is particularly arbitrary where, as here, the same deposition testimony already has come in as trial evidence at the trials of other opt-out lawsuits. In fact, PLAC acknowledges that "prior *trial* testimony of the company witness stands on materially different admissibility footing." (PLAC Br., p. 31, original italics.) Since these depositions already have come in as *trial evidence* in other opt-out lawsuits, how are they inadmissible? Ford's amici offer no answer.

Ford's amici present additional policy arguments, but those mostly regurgitate Ford's prior hyperbole about how upholding *Berroteran* will fundamentally transform depositions into mini-trials. (See, e.g., CJAC Br., p. 36 ["Pre-trial depositions of a party's own friendly witnesses noticed by an opponent will, of

necessity, turn into mini-trials, adding significantly to the cost and expense of litigation"]; *id.* at p. 18 [an affirmance would be "deleterious" by causing "a likely expanse of and expense for depositions of one's own friendly witnesses in pre-trial depositions"]; PLAC Br., p. 31 [*Berroteran*, if upheld, will lead to "lengthier, costlier, and more burdensome depositions" and "increased litigation costs"].)

As already explained, claims about depositions become nightmarish mini-trials are overblown. (See Answering Brief on the Merits, pp. 76-77.) Parties defending depositions don't have to present their entire case at a deposition; they have always had, and still have under *Berroteran*, multiple options. (*Ibid.*) *Berroteran* follows the federal approach, and federal depositions are hardly the nightmares that Ford's amici envision. Nor are third-party depositions in California onerous minitrials.

In any event, PLAC's concern reflects the one-sided view about litigation that pervades its brief. PLAC's product-manufacturer members have no qualms about increasing litigation costs for consumers (by requiring them to needlessly re-take duplicative depositions) but claim it is bad policy to increase litigation costs for manufacturers. PLAC also ignores that litigation expenses to manufacturers would likely be higher under PLAC's and Ford's version of section 1291, because

manufacturers would have to defend, over and over again, the same depositions taken by similar-situated consumers alleging the same claims.

CJAC also parrots Ford's prior assertions that *Berroteran* requires defendant companies "to foresee how testimony of every friendly witness to it in pre-trial deposition may be harmful in later cases." (CJAC Br., p. 22.) As already explained, that's not how section 1291 works. Attorneys only need focus on the case before them. Testimony that would only be relevant to some future lawsuit is inadmissible under section 1291. (See Answering Brief on the Merits, p. 74.)

CJAC further overstates the impact of *Berroteran*'s construction of section 1291 by asserting that "[d]eclining for 'tactical or strategic' reasons to take advantage of the opportunity to cross-examine such witnesses, forfeits any objection to future use of that testimony in a different case." (CJAC Br., p. 22.) Section 1291 is merely a hearsay exception. Parties can still object to any portions of testimony as irrelevant or inadmissible on any applicable ground. (See Answering Brief on the Merits, p. 75.) Section 1291 expressly provides that "[t]he admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying

at [the trial]"; objections are preserved, not forfeited. (§ 1291, subd. (b).)

Lastly, CJAC argues that affirming *Berroteran* would trigger an "increase in appeals of trial court orders on the admissibility of piggy-backed deposition testimony from previous cases." (CJAC Br., p. 18; see *id.* at pp. 36-37 [if a trial court's section 1291 rulings are "to be determined by the watered down 'abuse of discretion' standard employed here, an influx of appeals will understandably ensue"].) Such orders, however, are not directly appealable. Although they are reviewable by discretionary writ petition, those are rarely granted. Indeed, that's why the *Wahlgren* issue evaded review until *Berroteran*.

CONCLUSION

The Court of Appeal got it right. The decision is right in terms of statutory construction. It is right in terms of legislative purpose and history. And it is right in terms of public policy. The amicus briefs of PLAC and CJAC do not show otherwise.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED BY (1) THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND (2) THE PRODUCTS LIABILITY ADVISORY COUNCIL, INC.** contains 8,716 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 23, 2020

/s/ Cynthia E. Tobisman
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 23, 2020, I served the foregoing document described as: **CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS FILED BY (1) THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND (2) THE PRODUCTS LIABILITY ADVISORY COUNCIL, INC.** on the parties in this action by serving:

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(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Chris Hsu
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Supreme Court of California

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Supreme Court of California

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/23/2020

Date

/s/Chris Hsu

Signature

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