Supreme Court of California
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Supreme Court of California
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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

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

There is nothing surprising about the Court of Appeal's well-reasoned opinion in this case ("Opinion"), let alone a reason for this Court to intervene. Yes, the Opinion declines to follow a decision by a sister court, *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*). But *Wahlgren* is an anachronism that is out of step with modern litigation practice *and* the uniform view of every other jurisdiction with a statute analogous to Evidence Code section 1291, the hearsay exception for former testimony by unavailable witnesses.

Wahlgren has rarely been cited, and for good reason. The case was decided in 1984, back when the videotaping of depositions was rare and the California Legislature had yet to even statutorily authorize videotaped depositions. *Wahlgren* rests on an outdated, erroneous notion that "a deposition hearing normally functions as a discovery device" only, and therefore no motive ever exists to examine a party's own witnesses at a deposition. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.)

While that notion might have been true for the particular deposition testimony at issue in *Wahlgren*, it certainly is not true for *videotaped* depositions that were, on their face, intended to be used as trial testimony—the type of depositions at issue in this

case. The primary purpose of videotaping a deposition is to ensure that the witness's testimony can be *seen* and *heard* by others, namely *by a jury at trial*, in the event that witness is unavailable to personally appear at trial. In fact, the videotaped depositions in this case are replete with references by the questioning attorneys asking the deponents to tell things "to the jury." Videotaped depositions are not mere discovery devices; they also have trial-evidence-preservation purposes. A lawyer who declines to ask questions at a videotaped deposition, despite the right and opportunity to do so, assumes the strategic risk that the witness might be unavailable at trial and the deposition testimony might come in as trial evidence.

Equally important, *Wahlgren* has always been an unsupported outlier. Even though most, if not all, state and federal jurisdictions in the United States have a hearsay exception for former deposition testimony, *no* other jurisdiction has adopted *Wahlgren*'s view. And, as the Opinion emphasizes, California courts interpreting California's evidence and civil procedure codes usually look to the law construing analogous federal statutes, and *Wahlgren* is directly contrary to *uniform* federal law interpreting Federal Rules of Evidence, rule 804(b)(1), the analogous federal hearsay exception.

Federal courts correctly recognize that "'pretrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony that might otherwise be unavailable for trial.'" (Typed opn. 19, citations and bracket omitted.) Thus, the relevant issue for purposes of applying the former-testimony hearsay exception "is not whether the party had a 'tactical or strategic incentive' to question its witnesses" but "whether the party had 'an opportunity and similar motive to develop the testimony.'" (*Ibid.*, citations omitted.) In federal cases, "'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*.'" (Typed opn. 19-20, quoting *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506, italics added and bracket omitted.)

This is not even a battle between majority and minority views. There is no true minority view here. As the Opinion correctly recognizes, the assumptions underlying *Wahlgren* "are 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." (Typed opn. 3.) This is not a conflict between two well-reasoned lines of authority, both consistent with modern

practice and precedent. Instead, the outdated, thinly-reasoned and rarely-cited *Wahlgren* stands alone.

Although the Opinion may technically "conflict" with *Wahlgren*, not every conflict rises to the level of warranting this Court's review. To the extent *Wahlgren* created a risk of confusion, the Opinion eliminates that risk and promotes consistency between the federal and California rules. In the highly unlikely event that a Court of Appeal decides in a future case to follow *Wahlgren* instead of the Opinion, this Court's review may be warranted *at that time*. But, unless and until that highly unlikely event occurs, this Court's intervention is unnecessary.

The petition should be denied.

STATEMENT OF THE CASE

A. A class action is brought against Ford, alleging breach of warranty and consumer fraud claims based upon problems with a particular 6.0 liter engine in various Ford vehicles.

In 2010, a class action lawsuit was initiated against Ford Motor Company ("Ford") in the United States District Court for the Northern District of Illinois, *Custom Underground, Inc. v.*

Ford Motor Company, on behalf of certain owners, lessees and/or operators of Ford vehicles equipped with an allegedly defective 6.0-liter diesel engine manufactured by Navistar. (Vol. 1, Petitioner's Exhibits ("[vol]PE") 488-509.)

Over a year later, the Judicial Panel on Multidistrict Litigation created a multidistrict litigation and class action case in that Illinois court, entitled MDL No. 2223, *In re: Navistar 6.0L Diesel Engine Products Liability Litigation* (the Class Action), and transferred to that court for consolidation thirty-nine additional lawsuits from across the country involving similar class or individual claims against Ford, including multiple California class actions. (See 1PE 25-26, 374.)

The plaintiff here, Raul Berroteran, was a putative member of the Class Action because in March 2006 he purchased a 2006 model Ford truck equipped with the defective 6.0-liter engine, and also because he was a putative class member of two California class actions and the *Custom Underground* class action that were consolidated into the multidistrict-litigation Class Action. (See Typed opn. 5; 1PE 12-13, 24-37.)

A Master Class Action Complaint (Class Action Complaint) was filed in the multidistrict-litigation Class Action alleging on behalf of the named plaintiffs and all putative class members

that Ford installed a defectively designed and manufactured 6.0-liter diesel engine in a range of pick-up trucks, sports utility vehicles, vans and ambulances between 2003 and 2007, and that those defects caused poor performance and safety hazards, expensive repairs, and loss of vehicle usage. (Typed opn. 5-6; 1PE 374-509.)

The Class Action Complaint alleged that Ford "knew from the outset that there were severe and pervasive design, manufacturing, and quality issues plaguing the Ford 6.0L Engines," yet "never disclosed any of these issues to consumers" and instead made false representations to consumers about the engine. (Typed opn. 6; 1PE 387-388, 404.) The Class Action Complaint further alleged that Ford breached its warranty obligations, "failed to authorize necessary major engine repairs during the warranty period, instead authorizing only inadequate repairs," and concealed from consumers its inability to repair the engines. (Typed opn. 6; 1PE 395-403.)

The Class Action Complaint asserted a variety of legal claims against Ford based on the engine's defective design, Ford's misleading marketing of the vehicles, and Ford's deficient repair practices, including breach of express and implied warranties and consumer fraud in violation of state consumer protection laws, including California law. (1PE 447-481.) The Class Action

Complaint included specific claims that Ford's conduct toward California consumers (such as plaintiff Berroteran) violated California's Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (CLRA) and California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). (Typed opn. 6.) It created a "California Consumer Fraud Sub-Class." (1PE 442).

The Class Action Complaint "sought damages related to the cost to repair or replace the 6.0-liter diesel engine, and to the diminution in value as a result of the alleged defective engine." (Typed opn. 6.) It also sought punitive damages for Ford's fraudulent misrepresentations and omissions about the engine's quality and inability to be repaired. (1PE 454-456, 458.)

B. During the Class Action discovery, while the plaintiff here (Raul Berroteran) was still a putative class member, videotaped depositions are taken of Ford witnesses with the understanding that the testimony will be used at any class action/multidistrict-litigation trial.

During the Class Action, while Berroteran was a putative class member, the Class Action plaintiffs took the videotaped depositions of key Ford employees who were integrally involved with the development, repair, warranty issues and marketing of

the 6.0-liter diesel engine, including Ford's knowledge of the defects and repair problems and Ford's failure to apprise consumers. (Typed opn. 7; see 1PE 792-1045, 1150-1376, 1827-2315.) Berroteran intends to use excerpts from five of those videotaped depositions (the "Class Action depositions") at his trial against Ford in this lawsuit:

(a) *Frank Ligon*. During the relevant time period, Ligon worked as Ford's director of service engineering operations. (Typed opn. 7.) He "testified about the 6.0-liter engine and testified about e-mails related to the engine" (*ibid.*), including Ford's awareness of problems with the engine and Ford's efforts to conceal the problems (see 1PE 2119-2315).

(b) *Scott Eeley*. During the relevant time period, Eeley was Ford's North American Sales Manager. (1PE 808-809.) He testified as to Ford's problems in trying to fix the 6.0-liter engine (Typed opn. 7; 1PE 792-1045), including senior management's comments that the engine was a "crap" product that could not be fixed (1PE 862-865).

(c) *John Koszewnik*. During the relevant time period, Koszewnik had multiple supervisory roles, culminating in chief engineer for three engines. (Typed opn. 7; 1PE 1841-1852.) He testified about Ford's knowledge of the engine's problems and the

excessive warranty problems, and Ford's knowledge that certain engine components were going to fail. (Typed opn. 7; 1PE 1827-2117.)

(d) *Mike Frommann*. During the relevant time period, Frommann was Ford's warranty program manager. (Typed opn. 7; 1PE 1263, 1279.) He testified "about his knowledge of defects in Ford's 6.0-liter diesel engine." (Typed opn. 7.)

(e) *Mark Freeland*. During the relevant time period, Freeland "worked in 'engine research.'" (Typed opn. 7; PE 1156-1158.) He testified about the engine's known problems and how Ford's inadequate attempts to recalibrate the engine adversely impacted engine and vehicle performance. (Typed opn. 8; 1PE 1150-1229.)

All five witnesses appeared at their videotaped depositions as Ford witnesses and were represented by Ford's attorneys. (Typed opn. 7.) Ford had the unrestricted opportunity to prepare and coach each witness before the deposition, and to examine each witness at the deposition. (Typed opn. 25, fn. 11; 1PE 796, 799-802, 1163, 1236, 1248-1249, 1836-1837, 2134-2135.) Ford chose not to examine them. (*Ibid.*) At the time of their depositions, three of these witnesses—Ligon, Freeland, and Koszewnik—had retired from Ford (Typed opn. 7), meaning that

Ford itself could not be sure it could get those witnesses to attend any future trial.

The contemporaneous comments of counsel at the depositions make it clear that everyone knew the videotaped depositions were being taken with the understanding that they would be used as evidence at any Class Action or multi-district litigation trial. (See, e.g., 1PE 1277 [Frommann deposition: "Q. What causes cylinder pressure? I know that's a simple question, *but the 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: "Q. Okay. And just to be clear, 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, it's a part that the dealership would use to replace a bad part, right?" (italics added)], 1169 [Freeland deposition: "A. I'm not entirely sure what you're asking. Are you asking me just to tell you the whole story of everything I ever did? Q. No, sir, that's why I said the big picture overview; sort of, I started, I did some initial work, I had formulated a hypothesis. I'm sort of asking for a brief overview. Maybe that's a better way to put it, a brief over -- *please give the ladies and gentlemen of the jury a brief overview of this project*

from your standpoint, from your perspective." (italics added)], 1174 [Freeland deposition: "Q. Now, you make the statement -- *well, and for the ladies and gentlemen of the jury*, the codes that you refer to, DO2, DO3 and D21, you also reference D42 and D50, et cetera, where do these codes come from? A. From the warranty -- AWS system." (italics added)].)

C. Berroteran opts out of the Class Action at the settlement stage, and then individually sues Ford in this lawsuit for the same claims.

In November 2012, after the Class Action depositions were taken, Ford stipulated to class certification and agreed to a settlement; the court approved the settlement and certified the class. (Typed opn. 6.)

Berroteran, the plaintiff in this lawsuit, opted out of the Class Action at the settlement stage. (1PE 25-26.) Shortly thereafter, he brought this individual action against Ford, modeling the facts and claims in his complaint on the facts and claims alleged in the Class Action Complaint, discussed above in Section A. (See Typed opn. 3-5; compare 1PE 11-75 with 1PE 374-509, 3PE 2766-2906 & MJN 30-175.)

Berroteran's complaint alleges "causes of action for multiple counts of fraud, negligent misrepresentation, violation of

the Consumers Legal Remedies Act (Civ. Code, §1750 et seq.), and violation of the Song-Beverly Consumer Warranty Act (*id.*, § 1790 et seq.)." (Typed opn. 3.) The complaint alleges that Berroteran purchased a Ford truck in 2006 with "a defective 6.0-liter diesel engine," relying "on Ford's representations that the engine was reliable and offered superior power." (Typed opn. 4.) It also alleges that the truck "experienced numerous breakdowns" and that Ford's attempts to repair the engine "did not remedy the problems despite Ford's representations that it had fixed the engine," and it "described Ford's purported deceptive repair history regarding his and other consumers' 6.0-liter Navistar diesel engines. . . ." (Typed opn. 4.)

D. The Class Action depositions are used against Ford as evidence at trials adjudicating claims by opt-out plaintiffs alleging the same claims as the Class Action and Berroteran.

Because of the settlement, the multidistrict-litigation Class Action never went to trial. Nonetheless, the videotaped Class Action depositions have been admitted as evidence *at the trials* of other lawsuits brought by putative members of the Class Action who opted out at the settlement/certification stage, exactly as Berroteran did, and then sued Ford individually for facts and

claims modeled on the Class Action Complaint, exactly as Berroteran did (the "opt-out lawsuits"). As the Opinion explains, "[t]he [Class Action] deposition testimony Berroteran seeks to introduce was admitted in four lawsuits by other putative plaintiffs who also had opted out of the settlement in the multidistrict litigation." (Typed opn. 6-7.) "It is undisputed that the depositions have been admitted at trial in multiple cases, and thus did not serve only discovery purposes." (Typed opn. 27.)

E. Key Ford witnesses, including designated "persons most knowledgeable," are deposed for trial-evidence-preservation purposes in other lawsuits alleging the same claims as Berroteran.

In addition to the Class Action depositions, videotaped depositions of key Ford witnesses have been taken in opt-out lawsuits alleging the same claims against Ford as the Class Action and Berroteran's lawsuit. Berroteran intends to use excerpts from four of those depositions (the "opt-out depositions") at his trial against Ford in this lawsuit:

(a) *Scott Clark*. Clark's videotaped deposition was taken in an opt-out lawsuit entitled *Preston v. Ford Motor Company* (*Preston*) that alleged the same claims against Ford as

Berroteran's lawsuit. (Typed opn. 6-7, 9-10; compare 1PE 646-690 with 1PE 11-75.) Clark testified as Ford's designated person most knowledgeable regarding Ford's policies, standards and training from 2003 onward regarding California Lemon Law claims and California consumer complaints to the Better Business Bureau. (Typed opn. 10.) He testified "regarding Ford's policies and procedures for warranty claim buybacks." (*Ibid.*)

(b) *Eric Gillanders*. Gillanders' videotaped deposition was taken in *Preston*; he testified "as Ford's designated person most knowledgeable regarding Ford's policies and procedures for the reduction of warranty claim buybacks under California law from 2003 onward." (Typed opn. 10.) "Gillanders was Ford's global business process manager and former dealer operations manager," and he also "testified as a custodian of records." (*Ibid.*) He testified that his testimony "would 'be the same in any Ford lemon law case pending in California.'" (*Ibid.*)

(c) *Eric Kalis*. Kalis's videotaped deposition was taken in two opt-out lawsuits, *Dokken v. Ford Motor Company* and *Brown v. Ford Motor Company*, both of which alleged the same claims against Ford as Berroteran's lawsuit. (Typed opn. 6, 8-9 & fn. 5; compare 1PE 511-644 with 1PE 11-75.) "Kalis testified as Ford's person most knowledgeable on the repair rates for the 6.0-liter diesel engine and Ford's analysis of the root causes of the

engine's problems" and "as Ford's custodian of records." (Typed opn. 8.) He was employed "in Ford's automotive safety office's design analysis group." (Typed opn. 9.)

(d) *Bob Fascetti*. Fascetti's videotaped deposition was taken in a federal lawsuit alleging Ford equipped ambulances with the defective 6.0-liter engine. (Typed opn. 11.) "Fascetti was the director of gas and diesel engineering for Ford." (*Ibid.*) He testified as to Ford's problems with the engine, including that "the repair rates were 'very high'" and the worst in Ford's history, and that Ford was still unable to fix the problems 3-4 years after the engine's launch. (Typed opn. 11; 1PE 1046-1146.)

All four witnesses—Clark, Gillanders, Kalis and Fascetti—were current Ford employees at the time of their depositions, and they appeared as Ford witnesses represented by Ford's counsel. (Typed opn. 8-10; see 1PE 699, 1049, 1383-1385, 1595-1596.) Ford had an unrestricted opportunity at these depositions to examine each witness. (Typed opn. 25, fn. 11.) In fact, Ford examined Clark and Gillanders at the end of their depositions. (Typed opn. 10; see 1PE 766-768, 1582-1586.)

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 which stated that

the videotaped depositions would be used for both discovery *and as evidence at trial*. (Typed opn. 8-10; Berroteran's Petition for Writ of Mandate, 2d Civil No. B296639, p. 37, ¶ 45.)

The contemporaneous comments of counsel at these four depositions make it clear that everyone knew the videotaped depositions were being taken with the understanding that the testimony would be played to the jury at trial as evidence in the case. (See, e.g., 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's deposition: "[S]o would you *describe for the ladies and gentlemen of the jury* the process of installing an engine to the extent you're familiar with that or have some familiarity with it?" (italics added)], 1743 [plaintiff's counsel commenting that he is inquiring as to Kalis' background for the benefit of jurors in this case], 1812-1814 [Ford's counsel agreeing that a copy of the video can be used for all purposes at the trial of all 6.0-engine opt-out cases of which his firm is counsel of record].)

The videotaped deposition testimony of these four witnesses has already been played as evidence in trials by opt-out plaintiffs against Ford other than the lawsuit in which the depositions were taken; they "thus did not serve only discovery purposes." (Typed opn. 27.)

F. Relying on *Wahlgren*, the trial court bars Berroteran from using the videotaped Class Action and opt-out depositions as trial evidence, even though the witnesses are unavailable due to Ford's refusal to have them appear at trial.

Ford moved in limine to bar Berroteran from using as evidence at his trial against Ford any excerpts from the five Class Action depositions (Ligon, Eeley, Koszewnik, Frommann, and Freeland) and the four opt-out depositions (Clark, Gillanders, Kalis and Fascetti). (Typed opn. 11.)

Ford acknowledged that Evidence Code section 1291, subdivision (a)(2), provides a hearsay exception allowing former testimony to be presented as trial evidence, where: (1) the declarant is unavailable at trial; (2) the testimony is offered against "a party to the action or proceeding in which the testimony was given"; and (3) that party "had the right and

opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (§ 1291, subd. (a)(2); see 1PE 79.) Ford did not dispute that the first two prongs are met here. It is undisputed that Ford was a party—the defendant—in each of the lawsuits, and that Berroteran cannot compel any of the deponents to appear at trial as they live outside California. *Ford has refused to make any of the witnesses available at trial*, even though each is still alive and most are still Ford employees.

Relying solely on *Wahlgren*, *supra*, 151 Cal.App.3d 543, Ford argued that section 1291's former-testimony hearsay exception was inapplicable, and use of the depositions was categorially barred, because "'Ford clearly did not have a similar interest and motive to examine its employees at those depositions as it will have at trial in this case.'" (Typed opn. 12; see also Typed opn. 13.)

The trial court granted Ford's motion. (Typed opn. 15.) Berroteran filed a petition for writ of mandate. (*Ibid.*)

G. The Court of Appeal reverses, finding the deposition testimony of the unavailable witnesses is admissible under Evidence Code section 1291's hearsay exception.

The Court of Appeal granted the petition for writ of mandate and directed the trial court to vacate its in limine order excluding Berroteran from presenting the videotaped deposition testimony of the nine unavailable Ford witnesses. (Typed opn. 28.) The Opinion holds that "although *Wahlgren* arguably supported Ford's argument and the trial court's conclusion, we disagree with *Wahlgren*'s categorical bar to admitting deposition testimony under section 1291 based on the unexamined premise that a party's motive to examine its witnesses at deposition always differs from its motive to do so at trial. Our conclusion that no such categorical bar exists is consistent with federal authority interpreting a similar provision in the Federal Rules of Evidence." (Typed opn. 16-17.) That holding rests on the following reasoning:

- *Wahlgren* is inconsistent with post-*Wahlgren* decisions by this Court, specifically, cases establishing that (a) "[w]hether evidence is admissible under section 1291 . . . depends on whether the party against whom the former testimony is

offered had a motive and opportunity for cross-examination, not whether counsel actually cross-examined the witness"; (b) "a party's 'interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars'"; and (c) "[w]here the party had the same motive to discredit the witness and challenge the witness's credibility, the former testimony would be admissible under section 1291." (Typed opn. 22, quoting/citing *People v. Harris* (2005) 37 Cal.4th 310, 333 and *People v. Williams* (2008) 43 Cal.4th 584, 626-627.)

- *Wahlgren* is contrary to uniform precedent construing Federal Rules of Evidence, rule 804(b)(1) ("rule 804"), the federal analogue to section 1291. (Typed opn. 3, 17-21.) "Because rule 804 contains a similarly worded exception to the hearsay rule, federal authority is instructive in interpreting and applying section 1291." (Typed opn. 17-18., citing *In re Joyner* (1989) 48 Cal.3d 487, 492.) "[I]f the 'objectives and relevant wording' of a federal statute are similar to a state law, California courts 'often look to federal decisions' for assistance in interpreting this state's legislation[.]'" (Typed opn. 18, citation omitted.) Federal

authority construing the former-testimony hearsay exception is uniform: "Under rule 804, former deposition testimony is *not* categorically excluded based on the assumption that a motive to examine a witness differs during deposition and at trial. '[P]retrial depositions are not only intended as a means of discovery, but also serve *to preserve relevant testimony that might otherwise be unavailable for trial*.'" (Typed opn. 19, citations omitted, italics added.) "The relevant issue is not whether the party had a 'tactical or strategic incentive' to question its witnesses. Instead the relevant question is whether the party had 'an opportunity and similar motive to develop the testimony.'" (*Ibid.*, citations omitted.) "[A]s 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.'" (Typed opn. 19-20, quoting *Hendrix v. Raybestos-Manhattan, Inc., supra,* 776 F.2d at p. 1506, italics added.) Under federal law, a "party who makes the decision not to cross-examine [a] witness in deposition cannot complain that the failure to cross-examine renders the deposition inadmissible." (Typed opn. 20, citation omitted.)

- "In contrast to [California Supreme Court and federal] cases, *Wahlgren* appears categorically to exclude

deposition testimony from the section 1291 hearsay exception." (Typed opn. 22.) "[I]n a sparse opinion, [*Wahlgren*] held the evidence was inadmissible under section 1291, subdivision (a)(2) because the defendant did not have the opportunity to cross-examine the declarant with the interest and motive similar to the current case." (Typed opn. 23.) *Wahlgren* relied on the following reasoning: "'[I]t should be noted that a deposition hearing normally functions as a discovery device. All respected authorities, in fact, agree that given the hearing's limited purpose and utility, examination of one's client is to be avoided. At best, such examination may clarify issues which could later be clarified without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense.'" (Typed opn. 23, quoting *Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) This reasoning is unsupported, outdated and dubious because:

(a) "*Wahlgren*—a 1984 case—cites no support for its assertions that a deposition functions only as a discovery device. That assumption is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice." (Typed opn. 23.)

(b) "*Wahlgren* cites no authority for the proposition that examination of one's 'client is to be avoided.'

([Citation.]) That blanket assumption appears inconsistent with the reality of often overlapping lawsuits in different jurisdictions and the prospect that an important witness could retire or otherwise become unavailable." (Typed opn. 23; see also Typed opn. 24 [Ford's argument "that a party never has the same motivation to examine its own witnesses in a deposition as it has at trial . . . is contrary to the weight of authority and modern litigation practice"].) *Wahlgren* likewise provides no support for its reasoning that "all respected authorities, in fact, agree" with the proposition that depositions are merely a discovery device with little other value.

(c) "*Wahlgren*'s analysis also conflicts with the plain language of section 1291, subdivision (a)(2), which, on its face is unqualified: The statute states that it applies to '[t]he former testimony' and is not limited to former 'trial testimony.' (§ 1291, subd. (a)(2).)" (Typed opn. 23.)

- "Ford had a similar motive to examine each of the nine deponents. The videotaped deposition testimony from the former federal and state litigations was on the same issues Berroteran raises in his current lawsuit—whether the 6.0-liter engine was defective, Ford's knowledge of the alleged defect, and Ford's repair strategy. The deponents' testimony concerned

matters relevant to the former and current actions. Ford had a similar motive to disprove the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine." (Typed opn. 25.) "Each deponent was represented by Ford's counsel, and Ford had the same interest to disprove allegations related to the 6.0-liter diesel engine. . . . Although each case involved a different plaintiff or additional plaintiffs, the gravamen of each lawsuit was the same or similar. [¶] [T]he crux of the litigation is the same in each case." (Typed opn. 26-27.)

- "It is undisputed that the [nine] depositions have been admitted at trial in multiple cases, and thus did not serve only discovery purposes." (Typed opn. 27.)

- "While a party's motive and interest to cross-examine may potentially differ when the prior questioning occurs in a pre-trial deposition, Ford failed to demonstrate any such different motive or interest here." (Typed opn. 2.)

WHY REVIEW IS UNWARRANTED

A. The technical "conflict" between the Opinion and the outdated, poorly-reasoned, rarely-cited and unsupported outlier *Wahlgren* does not warrant this Court's intervention.

The so-called "conflict" between the Opinion and *Wahlgren* does not warrant this Court's intervention. The Opinion comports with this Court's precedent construing section 1291, with uniform federal authority construing the federal statutory analogue to section 1291, and with modern litigation and trial practice. *Wahlgren*, in contrast, is an unsupported, outdated and poorly-reasoned decision that is contrary to this Court's own section 1291 precedent and uniform federal law construing section 1291's federal analogue. *Wahlgren* is a rarely-cited outlier.[1] *No* other jurisdiction, state or federal, has embraced *Wahlgren*'s view.

[1] In the 35-plus years since it was decided, *Wahlgren* has been cited only *six* times other than the Opinion here, and half of those were unpublished decisions. No non-California case has ever cited *Wahlgren*.

1. *Wahlgren* rests on an outdated assumption that depositions are merely discovery devices.

Wahlgren rests on the outdated premise that "a deposition hearing normally functions as a discovery device" only, and has "limited purpose and utility." (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) *Wahlgren* was decided in 1984, a time when the videotaping of depositions was rare and *was not even authorized in California*. The California Legislature did not amend the Code of Civil Procedure to authorize the videotaping of depositions until 1986. (See *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1108-1109.)

As the Opinion correctly recognizes, *Wahlgren*'s premise that depositions are simply a discovery device is inaccurate as to videotaped depositions. There is only one reason for a party to incur the extra cost of videotaping depositions: *To be able to play the testimony to the jury at the trial in the lawsuit*, so the jury can view the deponent's demeanor and more effectively assess credibility. (See Dunne, Dunne on Depositions in California (Sep. 2019 ed.) § 10:5 ["a videotaped deposition records the nuances of the deponent's demeanor, manner of speech, facial expression, and body language" and "[v]ideotaped testimony is much more

interesting and effective at trial than the reading of a deposition transcript"].) There is no reason to videotape depositions taken solely for discovery purposes.

Wahlgren's comment that "[a]ll respected authorities . . . agree that given the hearing's limited purpose and utility, examination of one's own client is to be avoided" (151 Cal.App.3d at p. 546) only makes sense when limited to mere discovery depositions that were *never* intended to see the light of day in court.[2] The statement is wholly unsupported and wrong when applied to videotaped depositions or any other deposition taken for trial-evidence-preservation purposes.

Where, as here, a plaintiff takes videotaped depositions of potentially-unavailable witnesses, all respected authorities *agree* that the defendant *takes a huge gamble* in choosing not to

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[2] The Opinion correctly recognizes that *Wahlgren*'s reasoning is "sparse." (Typed opn. 23.) *Wahlgren*'s description of the subject depositions is vague, other than that they were taken in an "unrelated" out-of-state action. (See 151 Cal.App.3d at pp. 545-546.) Because *Wahlgren* was decided in 1984, the depositions almost certainly were *not* videotaped. Moreover, the two deponents at issue in *Wahlgren* were officers of the corporate defendant, meaning the plaintiff had the power to compel them to appear as witnesses at trial and the depositions were not needed for trial-evidence-preservation purposes. (See *id.* at p. 545.) Also, both the trial and appellate courts excluded the deposition testimony on the alternative ground that the plaintiff failed to authenticate the depositions. (See *id.* at p. 546.)

examine its own witness: "[I]t is incumbent upon the parties to thoroughly question a deponent when it is known that the deposition will be used in lieu of live testimony. Failure to do so, when not caused by an impediment by the adversary or deponent, is *a tactical decision with which a party must live*." (*Ware v. Howell* (W.Va. 2005) 614 S.E.2d 464, 470, italics added; *Henkel v. XIM Products, Inc.* (D.Minn. 1991) 133 F.R.D. 556, 557 (*Henkel*) ["A party who makes the tactical decision during a deposition to refrain from examining a witness who is beyond the subpoena power of the court, takes the risk that the testimony could be admitted at trial if the witness will not or cannot appear voluntarily."].) The fact that depositions often serve trial-evidence-preservation purposes is why the general rule under the federal analogue to Evidence Code section 1291 is that "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." (*Hendrix v. Raybestos-Manhattan, Inc.*, *supra*, 776 F.2d at p. 1506, italics added; see Typed opn. 19-20.)

Ford tries to manufacture support for *Wahlgren*'s statement about depositions' limited purpose by claiming "*Wahlgren*'s reasoning tracks the legislative history of section 1291," citing a snippet from an Assembly Committee comment.

(Petition for Review, p. 8.) But that comment does not say, as Ford suggests, that deposition testimony must be excluded whenever the party against whom the testimony is to be offered chose not to examine the witness. Instead, with the relevant words emphasized, the comment states: "[T]estimony contained in a deposition that was taken, *but not offered in evidence at the trial*, in a different action should be excluded *if the judge determines that the deposition was taken for discovery purposes* and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case." (Assem. Com. on Judiciary com., West's Ann. Evid. Code (2015 ed.) foll. § 1291, p. 87, italics added.)

Thus, the committee plainly drew a distinction between deposition testimony intended to *be used at trial* and deposition testimony that was *solely* for discovery purposes: It is only when the deposition "was not offered in evidence at trial" (such as a case settling before trial, as occurred with the Class Action here) that the court must determine whether the deposition was "taken for discovery purposes." Since every deposition occurs in discovery, the committee obviously meant more than just that the deposition occurred. The only way to give meaning to all the

words, rather than render most of the comment surplusage, is to recognize that the deposition testimony should only be excluded where it was taken solely for discovery purposes and was never intended to see the light of day in court. In that context, a party would never have a reason to question its own witness and inadvertently ferret out information for the other side. But if the deposition testimony is intended for potential use at trial—such as where it is videotaped and the plaintiff likely lacks the ability to compel the deponent to attend trial—then a party *does* have a motive to ask its own witness questions and *the party takes a tactical risk* in not examining where, as here, the other side cannot compel the witness to appear at trial.

No authority supports *Wahlgren*'s outdated reasoning. (See, e.g., 2 McCormick, Evidence (7th ed. 2016) Hearsay, § 304, p. 498 ["The cases emphatically hold that judgments to limit or waive cross-examination at that earlier proceeding based on tactics or strategy, even though these judgments were apparently appropriate when made, *do not undermine admissibility*. Instead, the courts look to the operative issue in the prior proceeding, and *if basically similar and if the opportunity to cross-examine was available*, the prior testimony is admitted," italics added]; 12A Fed. Proc., L. Ed. § 33:492 ["a party's decision to limit cross-examination in a discovery deposition is a strategic

choice and does not preclude the opposing party's use of the deposition at a subsequent proceeding"].)

2. *Wahlgren* is contrary to this Court's section 1291 precedent and uniform precedent construing section 1291's federal analogue.

The Opinion correctly recognizes that *Wahlgren* is contrary to persuasive, uniform federal law applying Federal Rules of Evidence, rule 804(b)(1), the federal analogue to section 1291. (Typed opn. 3, 17-21; see also Berroteran's Petition for Writ of Mandate, 2d Civil No. B296639, pp. 72-75.) *Wahlgren* never mentions or considers section 1291's federal analogue. Ford's petition for review, likewise, never mentions the contrary federal law even though it is central to the Opinion.

Ford's petition further ignores that *Wahlgren*'s categorical bar of deposition testimony is, as the Opinion recognizes, also contrary to this Court's own section 1291 decisions. (See Typed opn. 21-22.) "Except for *Wahlgren*, California law is consistent with federal law." (Typed opn. 21, bold omitted; see Typed opn. 22 ["In contrast to these cases, *Wahlgren* appears categorically to exclude . . . ."].) This Court holds that "[w]here the party had the same motive to discredit the witness and challenge the witness's

credibility, the former testimony would be admissible under section 1291" (Typed opn. 22, citing *People v. Harris*, *supra*, 37 Cal.4th at p. 333) and that admissibility under section 1291 "depends on whether the party against whom the former testimony is offered had a motive and opportunity for cross-examination, not whether counsel actually cross-examined the witness" (Typed opn. 22, citing *People v. Williams, supra*, 43 Cal.4th at pp. 626-627).

Wahlgren was decided in 1984, before these decisions were rendered and at a time when this Court's section 1291 precedent was far less developed. *Wahlgren* is an outdated outlier for this reason too. For example, the Court had yet to decide the seminal case *People v. Zapien* (1993) 4 Cal.4th 929 (*Zapien*). In *Zapien*, a criminal defendant claimed that he lacked a similar motive and interest in cross-examining a now-unavailable witness at his preliminary hearing as he would have at trial because—similar to Ford's assertions here as to why a defense attorney would never cross-examine its own witnesses at a deposition—he did not want to risk revealing damaging information at the preliminary hearing that could hurt him at trial. (*Id.* at pp. 957-976.) This Court held that the motive and interest for cross-examining need not be identical or "an exact substitute for the right of cross-examination at trial." (*Id.* at p. 975.) It noted that

the defendant had an interest and motive at both proceedings in discrediting any adverse testimony, and that defense counsel's explanation that he *strategically chose* not to vigorously cross-examine the witness "does not render her former testimony inadmissible." (*Ibid.*) "As 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*." (*Ibid.*, italics added.)

Thus, this Court's authority already confirms, contrary to Ford's *Wahlgren*-based interpretation of section 1291, that where the two actions or proceedings involve similar issues, the *right and opportunity to ask questions* can control over a party's strategic decision not to utilize that opportunity.

B. The parade of horribles Ford claims will result unless the Opinion is disapproved is fictional.

Ford argues that unless this Court disapproves the Opinion, the way that depositions are taken "in any case raising institutional issues" will "fundamentally change," and attorneys will be unfairly burdened with having to ask questions "not only about the issues in the case at hand but about every possible

issue that could arise in future litigation." (Petition for Review, pp. 23-24, boldface omitted.)

This purported parade of horribles is fiction. In terms of strategies and risks regarding videotaped depositions, the Opinion changes nothing.

Ford ignores that, under the Opinion, attorneys in California state cases merely face the same tactical choices regarding videotaped depositions that already exist in every federal jurisdiction across the country, including California federal cases, and apparently every other state jurisdiction too. Ford's cries about potential problems and fundamental changes are simply unsupported hyperbole. Ford does not and cannot point to any problems or complications associated with the taking of depositions in federal cases or any other jurisdiction. There is no evidence, for example, that depositions in federal cases are somehow more burdensome or problematic. Under the Opinion, depositions in California state cases are merely treated the same way as in every other jurisdiction.

Equally important, the Opinion does not change the risks or strategic choices that lawyers in California state cases *already face* when defending videotaped depositions. A defense lawyer defending the videotaped deposition of a defense witness already

faces the risk that the videotaped deposition will be admitted as evidence at any trial in the case in which the deposition is being taken. Given that risk, the defense attorney can:

- choose to examine the defense witness at the deposition, as Ford *did here* with respect to Clark and Gillanders. (See Typed opn. 10; see 1PE 766-768, 1582-1586.)
- rely on the ability to prepare and coach the witnesses and to raise objections at the depositions, and then later rely at trial on counter-designating portions of the videotaped testimony—the option Ford *used here* in the other opt-out lawsuits in which the subject Class Action and opt-out depositions were admitted as trial evidence. (See Typed opn. 27 [noting "the depositions have been admitted at trial in multiple cases, and thus did not serve only discovery purposes"].)
- decline to ask questions on the strategic assumption that the defendant will be able to call the witness live at trial if needed to clarify or add to testimony, thereby assuming the risk that the witness will die or otherwise become unavailable (e.g., retire and refuse to appear). (See *Henkel*, *supra*, 133 F.R.D. at p. 557 [party making "the tactical decision during a deposition to refrain from

examining a witness who is beyond the subpoena power of the court, takes the risk that the testimony could be admitted at trial if the witness will not or cannot appear voluntarily"]; W*right Root Beer Co. of New Orleans v. Dr. Pepper Co*. (5th Cir. 1969) 414 F.2d 887, 890 ["[t]he unexpected is to be expected at the trial of cases, including the necessity for using depositions when the deponent has met an untimely death before trial"].)

Ford tries to confuse matters by claiming the Opinion will require lawyers to ask questions "not only about the issues in the case at hand but about every possible issue that could arise in future litigation," and "defense counsel will be hard pressed to know what questions to ask . . . ." (Petition for Review, p. 24.) Not so. Only testimony regarding *overlapping* issues, where the same interest in examination exists, is potentially admissible under Evidence Code section 1291's hearsay exception. (See, e.g., Typed opn. 25 ["The videotaped deposition testimony from the former federal and state litigations was on the same issues Berroteran raises in his current lawsuit—whether the 6.0-liter engine was defective, Ford's knowledge of the alleged defect, and Ford's repair strategy. The deponents' testimony concerned matters relevant to the former and current actions."].)

Ford's concerns are overblown because the Opinion does not result in all deposition testimony being automatically admissible. Instead, it applies to just one of the various evidentiary hurdles for admission of evidence, i.e., the hearsay status of the deposition or trial testimony itself. Deposition testimony subject to section 1291's hearsay exception can still be objected to on other inadmissibility grounds, such as relevance. (See Typed opn. 27, fn. 12 [expressing "no opinion concerning whether the evidence is objectionable on other grounds"].) And, questions that would only be relevant to unknown future lawsuits would be irrelevant and need not be asked by anyone.

Lastly, Ford's cries of burden and prejudice ignore that although the nine deponents are "unavailable" to Berroteran because they live beyond the trial court's subpoena powers, Ford does not claim they are unavailable *to Ford itself*. Most are still Ford employees and even the retired employees are still alive. Nothing precludes Ford from asking the witnesses to appear at trial. "Any prejudice arising from the use of depositions taken in other actions may be eliminated by allowing the objecting party to recall individuals previously deposed to correct, amplify, or clarify any existing ambiguities or gaps in the record and to conduct further discovery proceedings." (1 Discovery Proceedings in Federal Court (3d ed. 2019) Depositions taken in other actions,

§ 13:3; see *Fullerform Continuous Pipe Corp. v. American Pipe & Const. Co.* (D.Ariz. 1968) 44 F.R.D. 453, 456 ["[t]he additional right to recall individuals previously deposed affords defendants the opportunity to correct, amplify or clarify any existing ambiguities or gaps in the record," and any such burden is less burdensome than requiring plaintiff to take "depositions over again from scratch"].)

Ford has never even intimated that the content of any of the subject depositions, or circumstances in which they were taken, prevents Ford from presenting a full defense. In the other opt-out lawsuits in which the depositions were used at trial without any *Wahlgren* objection from Ford, Ford relied entirely on counter-designated portions of the depositions. And if Ford wants more testimony, it can have the witnesses appear at trial. But, as the Opinion recognizes, neither logic nor the law requires Berroteran to go through the pointless, entirely 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.

CONCLUSION

Although the Opinion technically conflicts with the outdated, poorly-reasoned and rarely-cited *Wahlgren*, review is unnecessary and unwarranted. The Opinion accurately explains that *Wahlgren* 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." (Typed opn. 3.) In the highly unlikely event that a Court of Appeal follows *Wahlgren* in the future instead of the Opinion, review may be warranted *at that time*. But unless and until that highly unlikely event arises, there is no need for this Court to intervene.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this **ANSWER TO PETITION FOR REVIEW** contains **7,669** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 30, 2019 /s/ Cynthia E. Tobisman

Cynthia E. Tobisman

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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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