S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

REPLY TO ANSWER BRIEF ON THE MERITS

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REPLY TO ANSWER BRIEF ON THE MERITS

INTRODUCTION

In its opening brief on the merits, Ford explained that the court in *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*) correctly interpreted Evidence Code section 1291 (section 1291) concerning the admissibility at trial of testimony elicited during depositions in different cases. This Court should reverse the Court of Appeal decision here, which disagrees with *Wahlgren,* because it fails to account for section 1291's statutory language, the legislative history, and the realities of trial court litigation practice.

Parties are expected to undertake the discovery needed in each case, but in the interest of efficiency, the Legislature crafted section 1291 to provide a *narrow* path to using hearsay testimony from prior litigation, including deposition testimony, in a later proceeding, but only under certain conditions. The party offering the hearsay evidence must establish that, at the prior proceeding, its opponent had an interest and motive to cross-examine the witness similar to the motive it would have if the witness were testifying live at the later proceeding. That motive, however, differs fundamentally in the contexts of deposition testimony and trial testimony. The Legislature understood that, but the Court of Appeal here did not.

When it enacted section 1291, the Legislature explained that a party's motive to cross-examine a friendly witnesses at a *deposition* noticed by the opponent generally would *not* be the same as its motive to question the witness at trial, in part

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because such examination could disclose trial counsel's strategy or reveal a weakness in the party's case. In *Wahlgren*, the Court of Appeal appropriately relied on this explanation of the statute when it affirmed the trial court's conclusion that deposition testimony from prior out-of-state litigation involving the same allegedly defective product was not admissible.

In reversing the trial court's evidentiary ruling here, which followed *Wahlgren*, the Court of Appeal essentially stripped the trial court of the discretion afforded under section 1291. The Court of Appeal substituted its judgment about deposition practice in place of the trial court's. It held that an interest and motive to cross-examine witnesses who are deposed by the opposing party *presumptively* exists, and the deposition testimony is admissible in subsequent litigation so long as the subject matter of the prior action in which the deposition was taken and the current action in which the testimony is offered at trial overlap. Under the opinion in this case, the burden then falls on the party objecting to the introduction of hearsay deposition testimony to prove the *lack* of a motive for cross-examination—without relying on real-world litigation strategy reasons that may induce counsel defending the deposition to forgo examining the deponent.

None of Berroteran's disjointed arguments in support of the Court of Appeal's construction of section 1291 hold up. Berroteran offers rank speculation about modern-day deposition practice to argue, without evidence to support the faulty assumption (contrary to the Legislature's understanding) that

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lawyers should, and do, routinely cross-examine witnesses aligned with the lawyer's clients. Berroteran sidesteps the legislative history of section 1291, presenting a distraction regarding one law professor's comment in the legislative history about a different statute. He relies on authority approving a trial court's discretion to admit testimony elicited in adversary pretrial criminal proceedings, which bear no similarity to depositions in civil cases. He misconstrues federal court decisions interpreting federal rules that, in the end, support *Wahlgren* rather than the Court of Appeal decision here.

We address each of these and other subsidiary arguments Berroteran raises in turn. But the overarching principle that warrants reaffirmance of *Wahlgren*'s interpretation of section 1291 over three decades ago is that courts should respect the Legislature's reliance on trial courts to determine whether, on the facts of a particular case, the party seeking to introduce hearsay testimony from a different case has met his or her burden of satisfying the requirements of section 1291. The Court of Appeal here has upended that scheme, and this Court should reject its analysis.

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LEGAL ARGUMENT

I. *Wahlgren*—not the Court of Appeal here—correctly set the standards for determining whether deposition testimony from one case is admissible at trial in a different case under Evidence Code section 1291.

A. The Court of Appeal's analysis improperly relieves the proponent of hearsay testimony of the burden to prove the interest and motive needed for admissibility under section 1291.

Section 1291, subdivision (a)(2) creates a limited exception to the hearsay exclusionary rule for testimony given in prior litigation: such hearsay is admissible only if "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and *had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing*." (Emphasis added.) Prior testimony includes depositions. (*Id.*, § 1290, subd. (c).)

In *Wahlgren, supra*, 151 Cal.App.3d at pages 546-547, the Court of Appeal recognized that a party rarely has a motive to cross-examine a witness aligned with that party's side of the case at a deposition conducted by opposing counsel. The deposition testimony therefore generally would *not* be admissible in a later legal proceeding absent a sufficient showing to the contrary by the proponent of the evidence. Citing *Wahlgren*, the trial court exercised its discretion in this case to find that Berroteran did not meet his burden under section 1291 of demonstrating that the depositions of Ford's employees taken during the early stages

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of an Illinois class action were admissible against Ford in this subsequent state court trial. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 778 (*Livaditis*) ["The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation"].)

The Court of Appeal reversed. In doing so, it relieved Berroteran of his burden by holding the trial court was required to *assume* Ford had a motive to cross-examine the deposed witnesses because the subject matter of the prior case and this one overlap. (Typed opn. 25 ["Ford had a . . . motive to disprove the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine"].) It held the deposition testimony must be admitted because *Ford* failed to demonstrate "that it *lacked* a similar motive to examine its witnesses in the former litigation." (Typed opn. 26, emphasis added; see typed opn. 25 ["Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions"].) The court cited with approval federal authority holding that one objecting to hearsay evidence cannot overcome the presumption of a motive for cross-examination by pointing to legitimate strategies in forgoing cross-examination to advance the client's interests. (Typed opn. 19.)

Berroteran's scattershot arguments for affirming these holdings all fail.

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The videotaped deposition argument. Berroteran argues this Court should approve the Court of Appeal's presumption of a motive to cross-examine deposition witnesses, and reject *Wahlgren*'s contrary conclusion that a party rarely has a motive to cross-examine friendly witnesses, contending that *Wahlgren* "rests on the outdated notion that 'a deposition hearing normally functions as a discovery device' only"—an assumption he claims is no longer valid now that depositions can be videotaped. (ABOM 10-11.) In Berroteran's view, video depositions nowadays are used primarily to preserve testimony that will then be used as trial court evidence in the case for which the deposition is taken, and parties *necessarily* have a motive to cross-examine deposed witnesses—even those aligned with the party, and available to be called as live witnesses. (ABOM 13, 39.) The Court of Appeal endorsed this concept about the advent of videotaped depositions changing the entire landscape of modern discovery practice, creating a new motive to cross-examine friendly witnesses during a deposition noticed by one's opponent. (See typed opn. 3, 23.)

One glaring problem with this analysis is that neither Berroteran nor the Court of Appeal provide evidence or authority for the idea that the fundamental purpose of depositions, and trial attorneys' corresponding strategy in how to defend witnesses at depositions noticed by the opposing party, has in fact changed since *Wahlgren* was decided. Berroteran's advocacy and the Court of Appeal's instincts are an insufficient basis upon which to depart from the rationale of *Wahlgren.*

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While they can be videotaped, depositions still are not ordinarily exercises in preservation of recorded testimony in lieu of live testimony at trial. They still "generally function as a discovery device." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1150.) While a party who *notices* a deposition may want to nail down what a witness will say for impeachment purposes later at trial, the party *defending* the deposition still generally has no motive to cross-examine the witness for any reason. Moreover, just because deposition testimony *may* be admitted at trial under certain circumstances (see Code Civ. Proc., § 2025.620) does not mean a party *must* give up the opportunity to bring a witness to testify live at trial, so counsel defending a deposition—videotaped or not—will decide as a matter of strategy whether to engage in cross-examination at the deposition or to hold off and wait for trial. Videotaping does not change that fact.

In fact, the incentives that have always weighed against cross-examining friendly witnesses remain the same, with or without videotaping of depositions. As *Wahlgren* explained, a party rarely has a motive to cross-examine witnesses aligned with its side of the case because "[a]t best, such examination may clarify issues which could later be clarified [at trial] without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense." (*Wahlgren, supra,* 151 Cal.App.3d at pp. 546-547.) In addition, an attorney defending the deposition already usually knows what the witness has to say, and thus has no reason to drag out the deposition to

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"discover" that information. (*Ibid.*) And counsel defending a deposition generally will not serve their client's interests by "cross-examination" to test the witness's credibility or memory. Those strategic considerations, which support *Wahlgren's* common sense interpretation of section 1291, have not changed merely because depositions can be videotaped.

***The "blanket bar" criticism of* Wahlgren.** Berroteran contends that *Wahlgren* misconstrued section 1291 by creating a "blanket bar" to admitting deposition testimony if the party opposing admission of the evidence chose in the earlier proceeding not to question the witness. (ABOM 10.) On the contrary, *Wahlgren affirmed* a trial court's exercise of discretion in excluding deposition testimony from a different case, but did not hold the trial court was *required* under a "blanket bar" to do so. (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 547.) The court held that the exclusion was consistent with the fact that a deposition "normally" functions as a discovery device, but *Wahlgren* did not hold that hearsay depositions are never admissible absent cross-examination by the party defending the deposition. (*Id.* at pp. 546-547.)

Under *Wahlgren,* for example, parties can agree to use a deposition to preserve the testimony of a witness who is gravely ill, uncooperative, and resistant to participating in legal proceedings, or who for some other reason likely will be unavailable to either party at trial. In that situation, a trial court could find that *both* parties had a motive to question the witness, and the deposition testimony would be admissible both

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under Code of Civil Procedure section 2025.620 at the trial in which the deposition was taken, and under Evidence Code section 1291 in future legal proceedings.

It is the Court of Appeal here—in *reversing* a trial court's exercise of discretion—that set up a blanket rule unsupported by the language of section 1291. The court added a gloss to the statute, holding that a trial court examining the question of "interest" and "motive" to engage in cross-examination while defending a deposition must presume the party had a motive to cross-examine the witness without regard to the realities of defending counsel's litigation strategy. (Typed opn. 2, 19-20, 25 [Ford had a motive at the deposition to "disprove the allegations of misconduct"].) The court offered no explanation for tying trial judges' hands in that manner. *Wahlgren,* by contrast, properly vests in trial judges the discretion to apply the statutory standards to the specific facts of each case to decide whether the proponent of hearsay evidence has met its burden—the burden of showing the opposing party had an interest and motive to cross-examine the witness at the deposition, considering factors such as whether the witness was aligned with the party defending the deposition.

The "reliability" argument. Berroteran attempts to support the Court of Appeal's presumption in favor of admissibility by arguing that hearsay evidence should be admissible as long as it is reliable, and there are steps a party can take other than cross-examination to ensure that a witness's deposition testimony taken in one case is reliable evidence for

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purposes of a later case. For example, Berroteran says, a party could help refresh a witness's memory before the deposition to ensure the witness's testimony is accurate. (ABOM 45.) The point is a non sequitur. The Legislature did not write a statute that dispensed with the hearsay rule for any deposition testimony a trial judge might find was, or could have been made to be, "reliable" through means such as predeposition preparation. Rather, reliability under section 1291 is established through meaningful cross-examination, and the Legislature determined that if the proponent of the hearsay evidence cannot prove a sufficient interest and motive for cross-examination, that party must make his or her case without that hearsay evidence.

In a variation on the reliability theme, Berroteran argues that, when a party such as he submits evidence of witness unavailability and a "similarity between the issues and parties" in the prior action and the present action, "the party opposing admissibility must present evidence of the testimony's untrustworthiness." (ABOM 57.) But similarity of issues and parties is not the statutory test for admitting hearsay deposition testimony under section 1291. Similarity of issues and parties would be a *factor* for the trial court to consider, but it is not a substitute for the "similar motive" requirement under the statute, and it is not sufficient to shift the burden of proof to the objecting party to demonstrate "untrustworthiness."

Simply put, the hearsay rule exists to exclude inherently unreliable evidence. (*In re Cindy L.* (1997) 17 Cal.4th 15, 27.)

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Exceptions to the hearsay rule exist for evidence the Legislature deems inherently reliable, but the proponent offering the hearsay evidence bears the burden of proving that evidence falls within one of those exceptions. (See *Livaditis*, *supra*, 2 Cal.4th at p. 778.) By definition, if the exception is not shown to apply, the hearsay evidence cannot properly be admitted merely because the *objecting* party has not proven the evidence is *un*reliable for reasons other than its status as hearsay.

Berroteran argues that *People v. Samayoa* (1997) 15 Cal.4th 795, 851, supports his position that the party *opposing* the admission of hearsay evidence has the burden of showing the hearsay evidence is *un*reliable. (ABOM 57.) That is not what this Court held. In *Samayoa*, the trial court found the prosecutor established that testimony from a preliminary hearing was admissible under section 1291 at a later proceeding because "[d]efendant's motive and interest in cross-examining Raymond at the 1976 preliminary hearing were closely similar to defendant's objectives at the penalty phase of the trial in the present capital case." (*Samayoa,* at p. 850.) In affirming that ruling, this Court held "we conclude the trial court properly concluded that defendant's 'motive and interest' in cross-examining Raymond at the preliminary hearing and at the capital trial were sufficiently similar to satisfy the requirements of Evidence Code section 1291." (*Id.* at p. 851.) *Samayoa* applied the basic rule that the moving party has the burden of proving that the evidence comes within an exception to the hearsay rule. That is not the rule that Berroteran seeks to apply here.

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The Code of Civil Procedure section 2025.620 argument. Berroteran next argues that Evidence Code section 1291 should be construed in conjunction with Code of Civil Procedure section 2025.620, subdivision (g). (ABOM 46-47.) That statute provides that hearsay deposition testimony is admissible when "another action involving the same subject matter is subsequently brought *between the same parties*." (Code Civ. Proc., § 2025.620, subd. (g), emphasis added.) The parties disagree about whether section 2025.620, subdivision (g) applies to this case. (Compare PWM 55-64 with Return to PWM 28-38.) The trial court ruled the statute did not apply (see PWM, vol. 1, exh. 7, p. 331 [granting motion to exclude deposition testimony]), and the Court of Appeal did not address the issue (typed opn. 14, fn. 8). For this Court to *reverse* the trial court's evidentiary ruling in the first instance based on section 2025.620, subdivision (g) would be improper under the procedural posture here. In any event, as Ford explained in its Return to Berroteran's writ petition, section 2025.620, subdivision (g) does not apply in this case because subdivision (g) applies only when successive suits are filed between the same parties (Return to PWM 28-29), the issues in the class action and in Berroteran's individual suit were significantly different (Return to PWM 29-32), and Berroteran was not a party to the Illinois class action (Return to PWM 32-37).

The comparison to preliminary hearing testimony. There is no merit to Berroteran's position that the holding in *Wahlgren* was undermined by this Court's subsequent opinion in

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People v. Zapien (1993) 4 Cal.4th 929 (*Zapien*). *Zapien* did not involve deposition testimony, and thus did not discuss *Wahlgren*. It raised the question whether a hostile witness's testimony at the preliminary hearing stage of a criminal proceeding could be introduced against the defendant at the subsequent trial in the same case. And it *affirmed* the trial court's ruling admitting the evidence on the facts there. Unlike depositions, preliminary hearings are adversary court proceedings that determine whether there is sufficient evidence to bind the defendant over for trial. An adverse finding may result in the defendant remaining in jail. In that context, the Court's conclusion that the trial court could properly find the defendant had a motive to discredit the hostile witness makes good sense.

A defendant in a civil case has no similar motive to discredit a *friendly* witness during a pretrial deposition, and the Court of Appeal's conclusion here that a trial court is bound as a matter of law to find an inherent motive to cross-examine one's own employees or former employees who are being deposed by the other side makes no sense. *Wahlgren* continues to state the correct rule for trial courts' exercise of discretion to evaluate the highly limited circumstances that may motivate cross-examination of a friendly witness outside the context of trial testimony. *Zapien* provides no basis for the presumption of a motive for civil litigants to cross-examine witnesses whose deposition has been noticed and conducted by their opponents.

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B. The legislative history supports *Wahlgren*, not the Court of Appeal decision here.

As the opening brief explained, section 1291 is part of a comprehensive Evidence Code that the California Law Revision Commission drafted between 1956 and 1965 and that the Legislature enacted in 1965. In one of its first comments on the proposed legislation, the Commission explained that section 1291 would allow deposition testimony to be introduced in future legal proceedings only rarely. Under the statute, a judge would be expected to

> exclude former testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action if he determines that the deposition was taken for discovery purposes and that a party did not subject the witness to a thorough cross-examination in order to avoid a premature revelation of the weaknesses in his testimony or in the adverse party's case. In such a situation, the *interest and motive for cross-examination on the previous occasion is substantially different than the interest and motive of the party against whom such evidence is being offered at the trial of another action.*

(Ford MJN, vol. 4, exh. 1, pp. 797-798, emphasis added.)

Wahlgren echoed these points when it held that a litigant generally has no motive to cross-examine a friendly witness. "[G]iven the [deposition's] limited purpose and utility, examination of one's own 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."

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(*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) *Wahlgren*'s interpretation of the term "interest and motive" is precisely the interpretation the Legislature intended.

Berroteran describes the legislative history quoted above as merely a "snippet" of the background that should be given little weight, much like an offhand comment by a random legislator. (ABOM 54.) Far from being a random piece of background evidence, the section of the legislative history quoted above is the Commission's considered explanation of how it intended section 1291 to work. The Commission repeated the explanation verbatim in each of its subsequent reports. (OBOM 28-29.) And the Legislature recited the same explanation in the published version of the statute. (§ 1291, subd. (a)(2); Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291.) Any interpretation of the statute should take this explanation of the Legislature's intentions into account.

Berroteran argues that another piece of legislative history indicates that the Legislature believed courts could dispense with the need for cross-examination if the choice was between the jury hearing unchallenged hearsay deposition testimony or no testimony from the witness at all. (ABOM 51.) In support of that proposition, Berroteran quotes Professor McCormick's comment on a different statute—Evidence Code section 1292—which the Legislature incorporated into the statute's legislative history. (ABOM 51, quoting Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code, *supra*, foll. § 1292, p. 120.)

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Professor McCormick did not suggest it would ever be permissible to do away with the opportunity for cross-examination. Evidence Code section 1292, subdivision (a)(3)—the subject of Professor McCormick's comment—permits prior deposition testimony to be played at the trial of a party even if that party did not participate in the prior proceeding so long as a *different* party "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." This essentially is a privity issue. The Legislature believed "[t]he trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that of the present adverse party." (Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code, *supra*, foll. § 1292.) In the present case, the class action deponents were (understandably) not cross-examined by *any* party, and the policy underlying section 1292 is irrelevant.

Berroteran is also mistaken when he argues the legislative history shows it is the *opportunity* to cross-examine, not *actual* interest and motive to undertake such an examination, that matters. (ABOM 52.) But under the plain language of Evidence Code section 1291, opportunity is necessary but not sufficient for admissibility. The statute requires that the opportunity to cross-examine be accompanied by "an interest and motive [to cross-examine at the prior proceeding] similar to that which [the party opposing use of the deposition] has at the

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[current] hearing." (Evid. Code, § 1291, subd. (a)(2).) The legislative history explicitly states that the statute "does *not* make the former testimony admissible where the party against whom it is offered did not have a similar interest and motive to cross-examine the declarant." (Assem. Com. on Judiciary com., 29B pt. 5 West's Ann. Evid. Code, *supra*, foll. § 1291, subd. (a)(2), emphasis added.) Berroteran omits this important qualification from the legislative history he cites. (See ABOM 52, citing Ford MJN, vol. 11, exh. 3, p. 2561.)

Berroteran also is mistaken when he argues the legislative history distinguishes between depositions taken to create trial evidence and depositions taken "solely" for discovery purposes and never intended to be seen in a courtroom. (ABOM 53-54.) The Legislature did not draw that distinction, and it would not have made any sense to do so. Every deposition explores the witness's knowledge of the facts (a discovery purpose), and every deposition can be introduced at the trial in which it was taken if it falls within one of the categories listed in Code of Civil Procedure section 2025.620. The Legislature made no effort to create separate categories of depositions that would presumptively be admissible in future trials between different parties. Instead, the Legislature left it up to trial courts to exercise their discretion to decide when, taking all strategic circumstances into account, the proponent of hearsay evidence has demonstrated that the party objecting to the hearsay actually had an interest and motive during the prior deposition proceedings to test the witness's answers in that context similar

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to how the party would have done if the witness were called live at trial in a later, different case. The Court of Appeal opinion here interferes with the discretion created by the Legislature.

C. Federal court authorities do not support the Court of Appeal's construction of section 1291.

Federal Rules of Evidence, rule 804(b)(1), provides that former testimony is admissible if it was given at "a trial, hearing, or lawful deposition," and is "offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Because of the rule's similarity to Evidence Code section 1291, Berroteran argues the interpretation of rule 804(b)(1) by federal courts is instructive.

Berroteran posits that under Federal Rules of Evidence, rule 804(b)(1), deposition testimony is admissible in later proceedings as long the proceedings involve substantially similar issues. (ABOM 62.) Berroteran says that if a party made a strategic decision not to question the witness at the earlier proceeding, that is not a valid basis for excluding the evidence in a later federal proceeding. (ABOM 60-62.)

The federal rule does not work the way Berroteran claims. The question whether a party had a motive to cross-examine a witness is considered a factual issue that must be resolved on a case-by-case basis. (See *U.S. v. Miles* (11th Cir. 2002) 290 F.3d 1341, 1353 ["this inquiry is inherently factual, depending in part on the similarity of the underlying issues and on the context of the questioning"]; accord, *U.S. v. Geiger* (9th Cir. 2001) 263 F.3d

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1034, 1038; *U.S. v. Bartelho* (1st Cir. 1997) 129 F.3d 663, 671; *Kirk v. Raymark Industries, Inc.* (3rd Cir. 1995) 61 F.3d 147, 166.) As the Ninth Circuit held in *U.S. v. Duenas* (9th Cir. 2012) 691 F.3d 1070, 1089, "we have not developed a bright-line test for determining similarity of motive. Nor should we. . . . [T]the 'similar motive' analysis is 'inherently a factual inquiry' based on 'the similarity of the underlying issues and on the context of the . . . questioning.' "

The factors federal courts take into account in analyzing motive include " '(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties.' " (*United States v. Feldman* (7th Cir. 1985) 761 F.2d 380, 385 (*Feldman*), abrogated on another ground in *United States v. Rojas-Contreras* (1985) 474 U.S. 231, 232, fn. 1 [106 S.Ct. 555, 88 L.Ed.2d 537]; see, e.g., *U.S. v. Ausby* (D.D.C. 2019) 436 F.Supp.3d 134, 148-151 [same]; *Engel v. Buchan* (N.D.Ill. 2013) 981 F.Supp.2d 781, 798-799 [conducting extensive multifactor analysis on similar motive issue]; *Barraford v. T & N Ltd.* (D.Mass. 2013) 988 F.Supp.2d 81, 85-86 [same]; *U.S. v. Ozsusamlar* (S.D.N.Y. 2006) 428 F.Supp.2d 161, 180 [same]; *In re Jenkins* (Bankr. N.D.Ala. 2001) 258 B.R. 251, 260 [same].)

Applying these factors, courts have denied motions to introduce depositions at later trials, even where the issues in the cases were similar. (See, e.g., *U.S. v. Baker* (5th Cir. 2019) 923 F.3d 390, 401-402 [affirmed exclusion of deposition testimony and finding of no similar motive to develop testimony because stakes,

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focuses, motivations, and litigation strategies were different]; *S.E.C. v. Jasper* (9th Cir. 2012) 678 F.3d 1116, 1127-1128 [the S.E.C. had a different motivation in examining the witness at an early "investigat[ive]" proceeding so the transcript of the earlier testimony could not be offered against the S.E.C. at trial]; *Securities Investor v. Bernard L. Madoff Inv.* (Bankr. S.D.N.Y. 2019) 610 B.R. 197, 228 [no similar motive due to lack of "an 'interest of substantially similar intensity to prove . . . the same side of a substantially similar issue' "]; *U.S. v. Carson* (D.C. Cir. 2006) 455 F.3d 336, 378-379 ["district courts are to make 'fact-specific' inquiries into the motives of the prosecution during these different stages of the investigation and trial"]; *Stanley Martin Companies v. Universal Forest* (D.Md. 2005) 396 F.Supp.2d 606, 613-614 [no similar motive between conducting deposition to defend against claims and developing record that could be used in subsequent litigation].) Berroteran's implication that federal depositions are *always* used to preserve evidence that is always admissible under Federal Rules of Evidence, rule 804 is not correct.

Berroteran cites cases in which appellate courts affirmed district court rulings *admitting* deposition testimony under Federal Rules of Evidence, rule 804, but no general rule can be drawn from these cases. (ABOM 61-63.) Each turned on its own facts, and none support the Court of Appeal's conclusion in this case *reversing* a trial court's evidentiary ruling on the ground that a party should be presumed as a matter of law to have a

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motive during a deposition to engage in questioning that would disprove the allegation of its opponent's case.[1]

Berroteran argues that in federal court, a party's decision to forgo cross-examination for *strategic* reasons does not foreclose use of the deposition in subsequent proceedings. (ABOM 60-63, citing *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506 (*Hendrix*).) However, there is a split in the federal courts on that issue. (See, e.g., *Feldman*, *supra*, 761 F.2d at p. 385 [trial strategy should be considered in analyzing motive].) The Rutter Group treatise discusses this split:

> Cases are split as to whether the examiner's motive at a *discovery deposition* is sufficiently similar to what it would be if the witness were actually "available" at trial.
>
> One case holds that it would be error to admit an expert's deposition at trial because the deposing party's motive was to gather information and learn as much as it could about the expert's opinions, *not* to test the expert's methodology or challenge the expert's skill, credibility and confidence, as it would be on cross-examination. [*Polozie v. United States* ([D.Conn.] 1993) 835 F.Supp. 68, 72.]

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[1] For example, in *Pearl v. Keystone Consol. Industries, Inc.* (7th Cir. 1989) 884 F.2d 1047, 1052, the only argument raised by the party opposing introduction of the deposition testimony was that she did not have enough notice to attend the deposition. The court disagreed. *DeLuryea v. Winthrop Laboratories, Etc.* (8th Cir. 1983) 697 F.2d 222, 227, involved deposition testimony taken specifically to adjudicate the merits of the plaintiff's workers' compensation claim at an administrative hearing, without the witness being brought in for live testimony.

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* * *

> However, another case holds that a party's decision to *limit* cross-examination in a discovery deposition is a *strategic choice* and does not preclude his or her adversary's use of the deposition at a subsequent proceeding. [*Hendrix*[, *supra*,] 776 F.2d [at p.] 1506—party took "calculated risk" in limiting cross-examination of witness]

(Jones et al., Rutter Group Practice Guide: Federal Civil Trials and Evidence (The Rutter Group 2020) ¶¶ 8:3069 to 8:3071.)

There is also a split in the federal courts about whether the *degree* of interest a litigant had in questioning a witness at an earlier proceeding should be taken into account. (Compare *United States v. DiNapoli* (2d Cir. 1993) 8 F.3d 909, 912 [it is relevant whether at the earlier proceeding the questioner had "a substantially similar degree of interest in prevailing"] with *U.S. v. McFall* (9th Cir. 2009) 558 F.3d 951, 961 ["We cannot agree . . . with the Second Circuit's gloss on [r]ule 804(b)(1) [of the Federal Rules of Evidence]"].)

Whatever the rule might be in federal court, the legislative history of Evidence Code section 1291 makes clear that strategic considerations and the intensity of a party's motive *do* play a role in California in deciding whether deposition testimony in one case should be admitted in a later case. The Legislature explained that the testimony should be excluded if the party opposing admission "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.,

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29B pt. 5 West's Ann. Evid. Code, *supra,* foll. § 1291, subd. (a)(2).) There is no comparable legislative history underlying Federal Rules of Evidence, rule 804, and there is no reason the Court should rely on federal court case law when it interprets section 1291.

Berroteran discusses the operation of a different federal rule, regarding the burden of proving that a defendant's interest differs from that of a predecessor in interest. (Fed. Rules Evid., rule 804(b)(1)(B) [evidence from a prior proceeding is admissible against a party if a "*predecessor in interest* had . . . an opportunity and similar motive to develop it by direct, cross . . . , or redirect examination" (emphasis added)].) In that context, the proponent of the evidence still bears the burden of demonstrating a similar motive to cross-examine, but if that showing has been made as to a predecessor in interest, the successor entity that is opposing the introduction of evidence may still defeat admissibility of the evidence by showing that "the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant [successor] defendant would have presented to the witness." (*Dykes v. Raymark Industries, Inc.* (6th Cir. 1986) 801 F.2d 810, 817.)

In this case, there are no successor in interest issues. Ford does not deny that it was the defendant in the class action and it is the defendant in this case. That fact changes nothing about Berroteran's threshold burden of proving that during the class action, Ford had a motive to have its counsel cross-examine its own employee deponents, when to do so would not advance

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Ford's interests at trial and could in fact harm those interests. Federal Rules of Evidence, rule 804(b)(1)(B) thus provides no support for Berroteran's legal argument.

D. Under the Court of Appeal decision here, counsel would be compelled to unduly expand the scope of deposition examinations, and parties would be unfairly prejudiced by untested hearsay testimony.

If this Court were to disapprove *Wahlgren* and adopt the analysis of the Court of Appeal in this case, it would fundamentally change the way depositions are conducted. Counsel who previously defended a deposition by simply objecting to improper questions will have to thoroughly cross-examine each witness—even though counsel has *no plan to use that deposition testimony at trial in that case*—anticipating the hearsay deposition testimony will be admitted against counsel's client in unknown future cases that are found to raise similar issues. Counsel will be hard pressed to predict what issues might be relevant in future cases that arise in different factual contexts, or what strategies the client's counsel in the future case might like to employ. Depositions will take on the tenor of trials, undermining their goal of providing a streamlined method to develop evidence.

Berroteran argues the new rule will apply only where two cases raise "overlapping issues and where the same interest existed in the prior examination." (ABOM 74, emphasis omitted.) However, that is not a small number of cases. The court's interpretation of section 1291 would apply to any case that raises

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institutional issues, be it product liability, employment discrimination, insurance coverage or bad faith, wrongful termination, or an action like this one alleging fraud on a class of consumers.

Berroteran's argues that expanding section 1291's exception to the nonadmissibility of hearsay evidence will not open the floodgates to new evidence because parties can object to introducing deposition testimony on other grounds. (ABOM 75.) But without knowing how future courts will rule on future evidentiary objections, counsel in the underlying action must assume the entire deposition will be fair game at a future trial and conduct the cross-examination accordingly.

Berroteran downplays the significance of the court's opinion by arguing it applies only to the narrow facts of this case: an opt out case on the heels of a class action involving the deposition of witnesses who (according to Berroteran) could be recalled as witnesses by the defendant in a follow-on trial. (ABOM 75.) That does not even describe Berroteran's own case. There is no evidence Ford can subpoena the deposed witnesses to testify at this trial, many years after they were deposed. And there is nothing in the Court of Appeal opinion suggesting the new rule is limited to class actions. It holds every litigant necessarily has a motive to disprove its opponent's claims when defending depositions noticed by the opponent. (See typed opn. 25.) That holding will influence deposition practice in an untold number of cases.

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II. Under *Wahlgren*, the trial court's evidentiary ruling here should be affirmed.

A trial court has broad discretion in deciding whether hearsay evidence is admissible, particularly where the issue turns on issues of fact. (E.g., *Montez v. Superior Court* (1992) 4 Cal.App.4th 577, 583 ["appellate courts have applied the abuse of discretion standard in reviewing a trial judge's determinations to admit hearsay evidence when there was conflicting inferences and evidence concerning questions of trustworthiness of hearsay declarations or the existence of elements of a hearsay rule exception"].) But for the Court of Appeal holding that categorically finds counsel necessarily have an interest and motive to cross-examine witnesses during depositions taken by an opponent, the trial court's decision would clearly be proper under *Wahlgren*.

Berroteran's argument to the contrary rests on several false assumptions.

First, the argument assumes the trial court was compelled to find the Illinois depositions were taken to allow both parties to preserve testimony for trial and not for the purpose of discovery. (See ABOM 71.) The record does not support that assumption, and the trial court was free to rule otherwise.

Second, Berroteran argues the depositions involved undisputed historical facts that would not have induced cross-examination in any forum. (ABOM 71.) That contradicts Berroteran's own position that "[a]fter depositions of Ford witnesses showed fraud, Ford stipulated to class certification and settled." (PWM 11; ABOM 19 ["These depositions established

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Ford's knowledge"].) A cursory review of the depositions shows they dealt with the substance of the class action's claims, which were hardly undisputed matters. (PWM, vol. 1, exh. 9, pp. 1265, 1874-1875, 2171-2172, 2221-2222, 2234.) And again, the trial court could conclude that, if the witnesses were brought live at trial, Ford would have asked questions of them that were not asked in deposition.

Third, Berroteran assumes a party's tactical decision not to cross-examine a witness cannot be a legitimate basis not to cross-examine the deponent. (ABOM 71.) The legislative history of section 1291 says the opposite, explaining that a trial court may find deposition testimony inadmissible if an attorney made a tactical decision not to question a witness "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., 29B pt. 5 West's Ann. Evid. Code, *supra,* foll. § 1291, subd. (a)(2).)

Fourth, and relatedly, Berroteran incorrectly assumes Ford had a motive to disprove the factual allegations in the class action complaint *at the depositions*, an assumption the Court of Appeal shared. (ABOM 72, quoting *Berroteran v. Superior Court* (2020) 41 Cal.App.5th 518, 534 (*Berroteran*).) Berroteran offers no explanation why Ford had a motive to litigate its case at the deposition stage.

Fifth, Berroteran assumes Ford had the burden of proving it did not have a motive to examine its employees at their depositions. (ABOM 58.) As explained above, the burden of proof was on Berroteran to prove that Ford *did* have a motive to

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cross-examine its own employees. The trial court concluded Berroteran failed to meet that burden, and the Court of Appeal had no basis to overturn that finding.

Finally, Berroteran argues that even if *Wahlgren* was correctly decided on the facts of that case, it is distinguishable because (he says) the deponents in that case were officers of the defendant corporation who "could be compelled to attend any trial." (ABOM 37.) From that premise, he infers their depositions were different from the depositions at issue here, having been taken purely for discovery purposes rather than for the preservation purpose that Berroteran says was the point of the Illinois depositions in the class action. (ABOM 37-38.) And building further on these assumptions, Berroteran concludes the trial court on the facts here was required to admit the proffered evidence under section 1291. (ABOM 71) There are fundamental flaws in that reasoning.

Nothing in *Wahlgren* supports that interpretation of the factual and procedural history of the case. *Wahlgren* held it was "undisputed that these individuals [i.e., the deponents] were *unavailable* as witnesses." (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 546, emphasis added; see Code Civ. Proc., §§ 1987, subd. (b), 1989 [officer, director, or managing agent of a party who resides out of state cannot be compelled to attend trial as a witness].) If the defendant's employees in *Wahlgren* had been available to testify in the California proceedings, Evidence Code section 1291 would not have come into play. (See section 1291, subd. (a) [depositions admissible "if the declarant is *unavailable* as a

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witness"]; *id.*, § 240, subd. (a)(5) [a witness is unavailable if "the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process"].) *Wahlgren* arose in the same context as this case: both cases involve depositions taken in prior out-of-state cases with witnesses who could not be compelled by the proponent of the party's evidence to testify in person at a later California trial.

Moreover, regardless of the witness's availability or unavailability for trial in the Illinois action for which the deposition testimony at issue here was taken, the fact remains that the trial court in the present California action could, and did, properly find that Berroteran failed to show Ford had a motive in the Illinois action to cross-examine those witnesses—just as the trial court found to be true in *Wahlgren*. Nothing about the identity of the deponents in *Wahlgren* or those in the present case *required* the trial court to find there necessarily was an interest and motive to undertake cross-examination during the Illinois proceedings similar to what would have occurred had the deponents been called live at trial in this case.

There is certainly no merit to Berroteran's repeated contention that the trial court was compelled to find the parties understood the class action deposition testimony would be introduced at trial in place of live testimony, and thus compelled to find that Ford had an interest and motive to cross-examine them because (according to Berroteran) the depositions represented Ford's only opportunity to question the witnesses.

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(ABOM 12-13, 21, 27-28, 38-39.) The sole support for this argument are comments by plaintiffs' counsel at the depositions asking witnesses to clarify testimony for "the jury." (ABOM 27-28.) Those comments are not evidence of an agreement to allow the depositions to be introduced at trial, much less evidence requiring a finding about Ford's interest and motive to conduct cross-examination.

In federal court, where the Illinois depositions were taken, deposition testimony may be introduced under a specified set of circumstances, commonly for the purpose of *impeaching* a witness's *live* testimony. (1 McCormick, Evidence (8th ed. 2020) Impeachment and Support, § 34; see Fed. Rules Evid., rule 804.) The same is true in state court. (See Code Civ. Proc., § 2025.620, subd. (a) ["Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code"].) Ensuring that a witness's deposition testimony can be understood by the jury if it is played at trial is not evidence of an agreement that depositions will be used *in place* of live testimony. If the parties had such an agreement, it would have been placed on the record, but Berroteran has produced no such agreement. And even if he had, that alone would not have established, as a matter of law, that there necessarily was a motive for cross-examination at the depositions similar to what would have been undertaken if the depositions were taken in this individual fraud action.

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And it is irrelevant that deposition testimony from the class action suit was introduced in subsequent individual suits against Ford. (ABOM 56 ["each deposition already has been admitted as evidence in other opt-out trials and 'thus did not serve only discovery purposes' "].) Section 1291 provides that testimony introduced at a trial is admissible in a later trial *only* if the party against whom the testimony was offered had an opportunity to cross-examine the witness. Ford obviously had no opportunity to cross-examine the deposition testimony that was played at prior opt-out trials. The fact it was played does not make the testimony admissible in later suits. Section 1291 does not allow one court's ruling that prior deposition testimony from one case may be admitted at trial in a different case to "launder" the problem of a lack of interest and motive to cross-examine the deponent so as to allow introduction of the evidence in a *third* trial.

III. If this Court overrules the *Wahlgren* rule and endorses the *Berroteran* rule, the decision should have only prospective effect.

An opinion should have only prospective effect if it " 'disapprove[s] a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities.' " (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967.) The Court of Appeal's opinion does just that. As the letters submitted by the amicus parties attest, defense counsel have relied on *Wahlgren*'s holding that cross-examining friendly witnesses whose depositions are called by opposing counsel is

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counterproductive and should be avoided. (See, e.g., Alan J. Lazarus, Product Liability Advisory Council, letter to Hon. Tani Cantil-Sakauye, Jan. 15, 2020, p. 3 ["the strong preference is to reserve the 'direct' examination of the company witness in support of the defense case to the trial itself, if any"]; Ongaro PC, letter to Hon. Tani Cantil-Sakauye, Jan. 10, 2020, p. 1 ["defense attorneys rarely have a motive to cross-examine witnesses aligned with their side of the case. The advent of videotaped depositions has not changed this practice."]; Fred J. Hiestand, Civil Justice Association of California, letter to Hon. Tani Cantil-Sakauye, Jan. 17, 2020, p. 5 (hereafter CJAC letter) [defense counsel "rarely ask or cross-examine their clients or 'most knowledgeable persons' for their clients questions because to do so gives the other side insight as to what the defense will be at trial and potentially open-up a new line of questioning for opposing counsel"].)

Changing the interpretation of section 1291 in ongoing cases would be unfair to parties who relied on *Wahlgren* and who may be confronted at trial with untested deposition testimony of the type at issue in this case.

Berroteran responds that *Wahlgren* is just one opinion and attorneys should not have relied on it to establish a uniform rule of law. (ABOM 79.) That ignores the fact that the legislative history appended to the statute says precisely what *Wahlgren* said. It also ignores the fact that leading treatises for years have cited *Wahlgren* as the governing rule. (See, e.g., 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 266; Wegner et al.,

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Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2019) ¶¶ 8:1408 to 8:1409; Dunne, Dunne on Depositions in California (Sept. 2019 update) Use of depositions given in another action, § 13:12.)

As one amicus party observed, if the Court of Appeal analysis in this case, rather than that in *Wahlgren*, were to become the law of California, it "will create chaos and confusion concerning the conduct of depositions in cases arising from facts that may give rise to repeat, similar claims against the same defendant." (CJAC letter 2.) Any such change in the law should apply to affect the admissibility only of depositions taken after the date of the decision in this case.

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CONCLUSION

For the reasons explained above and in Ford's opening brief on the merits, this Court should hold that *Wahlgren* properly construed section 1291 and the trial court correctly exercised its discretion in ruling that the hearsay deposition testimony from earlier proceedings is not admissible at trial in this case.

October 21, 2020

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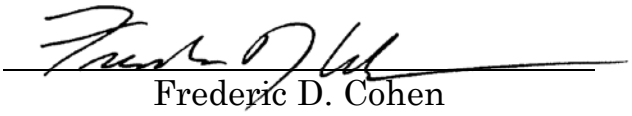
By: 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 8,182 words as counted by the program used to generate the brief.

Dated: October 21, 2020

Frederic D. Cohen

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PROOF OF SERVICE

Berroteran v. The Superior Court of Los Angeles County
Supreme Court Case No. S259522

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On October 21, 2020, I served true copies of the following document(s) described as **REPLY TO ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

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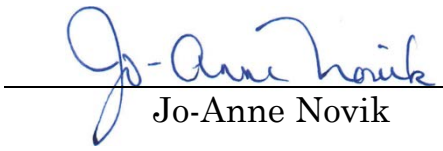
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 21, 2020, at Burbank, California.



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