

**S259522**

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**RAUL BERROTERAN II,**  
*Petitioner,*

*v.*

**THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,**  
*Respondent.*

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**FORD MOTOR COMPANY,**  
*Real Party in Interest.*

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

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**MOTION FOR JUDICIAL NOTICE;  
DECLARATION OF FREDERIC D. COHEN;  
DECLARATION OF JAN S. RAYMOND;  
[PROPOSED] ORDER  
[FILED CONCURRENTLY WITH  
REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS]**

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**FORD MOTOR COMPANY,**  
*Real Party in Interest.*

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**MOTION FOR JUDICIAL NOTICE**

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**INTRODUCTION**

Pursuant to Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, Ford Motor Company requests that this Court take judicial notice of the legislative history of Evidence Code section 1291, attached as exhibits 1 through 6 to the declaration of Jan S. Raymond. Section 1291 creates an exception to the hearsay rule for testimony taken in a prior proceeding. The statute's legislative history sheds light on the proper interpretation of the statute, which is the central issue presented for review.

This appeal arises from a pretrial ruling in a suit alleging that the 6.0-liter engine in plaintiff Raul Berroteran's 2006 truck experienced failures that Ford should have anticipated and disclosed, and that Ford failed to fix. During a hearing on the parties' motions in limine, the trial court ruled that plaintiff could not introduce hearsay deposition testimony of Ford employees taken in connection with prior litigation against Ford that involved 6.0-liter engines produced in a range of vehicles between 2002 to 2006.

The court ruled the evidence did not fall within any exception to the hearsay rule, including section 1291. That statute provides that hearsay testimony from an earlier case is admissible in a later trial if the party against whom the testimony is offered "had the right and opportunity to cross-examine the declarant [in the earlier proceeding] with an *interest and motive similar to that which he has*" at the later trial. (§ 1291, subd. (a)(2), emphasis added.)

The trial court's ruling was supported by *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*), which held that a party rarely has a motive to cross-examine friendly witnesses at a deposition conducted by opposing counsel, and deposition testimony from such witnesses generally is not admissible in later trials. Berroteran filed a petition for writ relief, arguing that *Wahlgren* was wrongly decided.

The Court of Appeal agreed, holding that *Wahlgren* is outdated now that depositions are frequently videotaped, and that a party is presumed to have a motive to cross-examine friendly

witnesses because it theoretically might become necessary to use the deposition in the *same case* in which the deposition was taken. (Typed opn. 23.)

According to the Court's docket, the Court granted review to answer the following question: "Does a party against whom former deposition testimony in a different case is sought to be admitted at trial under Evidence Code section 1291, subdivision (a)(2), have a similar interest and motive at both hearings to cross-examine a friendly witness?" The statute's legislative history will assist the Court's analysis of that issue.

## LEGAL ARGUMENT

### **I. Reviewing courts have authority to take judicial notice of a statute’s legislative history where it is relevant to construing the statute.**

Under Evidence Code section 452, subdivisions (c), (d), and (h), judicial notice may be taken of legislative acts, court records, and “[f]acts and propositions that are not reasonably subject to dispute.” (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9 (*Soukup*); *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519, fn. 5 (*Hoechst*); *Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 284, fn. 4.) Under these provisions, courts may take judicial notice of a statute’s legislative history, including “various versions of the legislation and committee reports” (*Soukup*, at p. 279, fn. 9), and appellate courts have the same right, power, and duty to take judicial notice as trial courts (Evid. Code, § 459; see *Soukup*, at p. 279, fn. 9 [Supreme Court taking notice of legislative history]; *Arroyo*, at p. 284, fn. 4 [Supreme Court taking judicial notice of the complaint in a prior action]).

Under Evidence Code section 453, judicial notice is compulsory if “a party requests it and: [¶] (a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and [¶] (b) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter.”

**II. This Court should take judicial notice of the legislative history of California’s Evidence Code section 1291, which is relevant to the statutory interpretation issues raised in this case.**

Determining the scope of the hearsay exception in section 1291 is the central issue before the Court. As explained in greater detail in Ford’s opening brief on the merits, the legislative history sheds light on that issue.

The legislative history reflects an understanding that a party normally does *not* have an interest and motive to cross-examine a friendly witness during a deposition, in part because doing so threatens to prematurely reveal a weakness in the party’s case. The fact that parties’ interests and motives at depositions is substantially different from their interests and motives when questioning a witness at a later trial is clear from the fact that such cross-examination very rarely takes place. This understanding of the statute by the Legislature that enacted it will be helpful to this Court’s analysis of how the statute should be construed and how it applies in this case.

Because the drafting history sheds light on the proper interpretation of section 1291, this Court should take judicial notice of the legislative history and the views of the Law Revision Commission that were instrumental in drafting the statute. (See *Soukup, supra*, 39 Cal.4th at p. 279, fn. 9 [taking notice of “various versions of the legislation and committee reports, all of which are indisputably proper subjects of judicial notice”]; *Hoechst, supra*, 25 Cal.4th at p. 519, fn. 5 [taking notice of legislative history, model



act, and related analysis promulgated by the National Conference of Commissioners on Uniform State Laws]; *Estate of Joseph* (1998) 17 Cal.4th 203, 210, fn. 1 [taking notice of reports of the Law Revision Commission]<sup>1</sup>; *Hale v. Southern Cal. IPA Medical Group, Inc.* (2001) 86 Cal.App.4th 919, 927 [“In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute”].)

### CONCLUSION

Because legislative history sheds light on the central issue in this case, this Court should take judicial notice of the legislative history attached hereto as exhibits 1 through 6.

May 13, 2020

**HORVITZ & LEVY LLP**  
FREDERIC D. COHEN  
LISA PERROCHET  
**SANDERS ROBERTS LLP**  
JUSTIN H. SANDERS  
DARTH K. VAUGHN  
SABRINA C. NARAIN

By:   
Frederic D. Cohen

Attorneys for Real Party in Interest  
**FORD MOTOR COMPANY**

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<sup>1</sup> Exhibits 1-4 constitute memoranda prepared by the California Law Revision Commission prior to the enactment of section 1291.

## DECLARATION OF FREDERIC D. COHEN

I, Frederic D. Cohen, declare as follows:

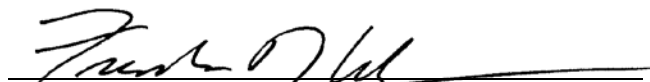
1. I am an attorney duly admitted to practice law in the State of California and an attorney with Horvitz & Levy LLP, counsel of record for real party in interest Ford Motor Company.

2. In November 2019, my firm retained Jan S. Raymond of Legislative History & Intent to provide the complete legislative history of California Evidence Code section 1291.

3. Legislative History & Intent provided us with the legislative history that accompanies this motion as exhibits 1 through 6. The only alteration we made to what we received was to consecutively paginate the exhibits for ease of reference in the opening brief on the merits. The legislative history attached as exhibits 1 through 6 is described and authenticated in the accompanying declaration of Mr. Raymond.

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

Executed May 13, 2020, at Burbank, California.

  
Frederic D. Cohen

## DECLARATION OF JAN S. RAYMOND

I, Jan S. Raymond, declare as follows:

1. My business is researching the history and intent of legislative and regulatory enactments and adoptions; I have over 30 years of experience in research and analysis of legislative and regulatory intent. In cooperation with persons working under my supervision, I undertook to research the legislative history of California Evidence Code section 1291. All references to "project" in this declaration refer to this historical research.

2. At all times, all persons working on this project operated under instructions to locate all documents available pertinent to this adoption. This research was compiled in the months prior to the date of this declaration and gathered all the documents from all identified sources available during that time pertinent to this project.

3. The documents listed are selected substantive documents collected pertinent to the history of this project. The term "substantive documents" as used in the previous sentence refers to those documents relevant to the scope of the project. Some documents related to this project may not be forwarded in this report but are available upon request.

4. All documents listed are included with this declaration, except as otherwise noted in this declaration. All documents included are true and correct copies of the original documents. Unless otherwise noted in this declaration, all documents were obtained at one of the following sources: legislative offices at the State Capitol, the California State

Library, the California State Archives, or the websites of the California Law Revision Commission (<http://www.clrc.ca.gov/> and <http://www.clrc.ca.gov/pub/>). Some documents copied from microfilm originals may be of poor quality; all copies included with this report are the best available copies.

5. The following listed documents that accompany this declaration are true and correct copies:

Exhibit 1: California Law Revision Commission – All memoranda pertaining to California Law Revision Commission Study Number 34(L)

Exhibit 2: California Law Revision Commission – Tentative Recommendation re Hearsay Evidence dated August, 1962

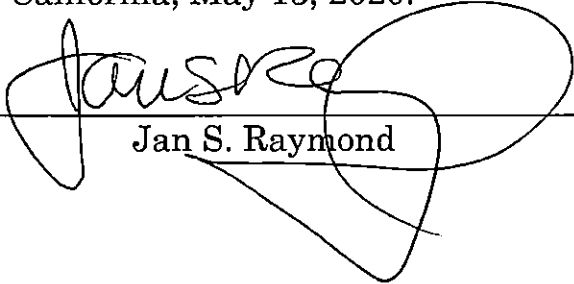
Exhibit 3: California Law Revision Commission – Recommendation proposing an evidence code dated January, 1965

Exhibit 4: California Law Revision Commission – Evidence Code with Official Comments dated August, 1965

Exhibit 5: Materials pertaining to the legislative process and enactment of Assembly Bill 333 of 1965, Chapter 299 of the California Statutes of 1965; including the Assembly Final History, excerpted bill copies, the complete Chaptered Bill File of Governor Pat Brown, and Senate and Assembly Journal excerpts

Exhibit 6: Bill copies pertaining to Senate Bill 110 of  
1965

I declare under penalty of perjury the foregoing is true and  
correct, executed at Berkeley, California, May 13, 2020.

  
Jan S. Raymond

**S259522**

**IN THE  
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*Respondent.*

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**FORD MOTOR COMPANY,**  
*Real Party in Interest.*

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

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**[PROPOSED] ORDER**

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IT IS HEREBY ORDERED that, pursuant to the pertinent provisions of Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, judicial notice is taken of the legislative history documents relating to Evidence Code section 1291, true and correct copies of which are attached to real party in interest Ford Motor Company's motion for judicial notice as exhibits 1 through 6.

Dated: \_\_\_\_\_

**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 May 13, 2020, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE; DECLARATION OF FREDERIC D. COHEN; DECLARATION OF JAN S. RAYMOND; [PROPOSED] ORDER [with 14-Volume Exhibits]** on the interested parties in this action as follows:


**SEE ATTACHED SERVICE LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on May 13, 2020, at Burbank, California.

  
\_\_\_\_\_  
Jo-Anne Novik

## SERVICE LIST

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

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<p>Clerk of the Court  California Court of Appeal  Second Appellate District,  Division One  300 S. Spring Street  2nd Floor • North Tower  Los Angeles, CA 90013</p>	<p>[Case No. B296639]</p> <p>[Electronic service under Cal. Rules  of Court, rule 8.212(c)(2)]</p> <p><i>[via Truefiling]</i></p>

STATE OF CALIFORNIA  
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA  
Supreme Court of CaliforniaCase Name: **BERROTERAN v. S.C. (FORD MOTOR COMPANY)**Case Number: **S259522**Lower Court Case Number: **B296639**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **fcohen@horvitzlevy.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S259522_OBOM_FordMotorCompany
REQUEST FOR JUDICIAL NOTICE	S259522_MJN_FordMotorCompany
ADDITIONAL DOCUMENTS	S259522_01 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_02 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_03 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_04 of 14 - Exhs. to MJN
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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.

5/13/2020

Date

/s/Frederic Cohen

Signature

Cohen, Frederic (56755)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm