Kathryn S. Jensen
dir 202 898 5872
kjensen@hollingsworthllp.com

February 28, 2023

Chief Justice Patricia Guerrero and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Amicus Curiae* Letter in Support of Appellants Johnson & Johnson, Johnson & Johnson Consumer Inc. and Colgate Palmolive Company Petitions for Review in *Bader v. Johnson & Johnson, et. al.*, No. S278437

Dear Chief Justice Guerrero and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the National Association of Manufacturers ("NAM"), the American Tort Reform Association ("ATRA") and the Pharmaceutical Research and Manufacturers of America ("PhRMA") submit this *amicus* letter in support of the Petitions for Review filed by Appellants Johnson & Johnson, Johnson & Johnson Consumer Inc. and Colgate-Palmolive Company in *Bader v. Johnson & Johnson* (2022) 86 Cal.App.5th 1094, as modified on denial of reh'g (Jan. 23, 2023), review filed (Feb. 2, 2023).

Amici urge the Court to grant review of the Court of Appeal's incorrect decision, which, if left in place, threatens to disrupt this Court's efforts in establishing clear guidelines on the admissibility of expert testimony under Evid. Code §§ 801(b) and 802. In its decision, rather than addressing Appellants' valid arguments challenging the admissibility of unsupported and unreliable scientific theories not accepted within the scientific community, the Court of Appeal created an artificial distinction between this Court's opinions in *Sargon Enter., Inc. v. Univ. of S. Cal.* (2012) 55 Cal.4th 747 and *People v. Kelly* (1976) 17 Cal.3d 24, so as to avoid its review of the trial court's gatekeeping role altogether. The Court of Appeal posited that the cases created "two [separate and distinct] regimes of admissibility rules for expert testimony on scientific topics in California," (*Bader*, *supra*, 86 Cal.App.5th at p. 1136 (J. Streeter, concurring)), and that *Kelly*, not *Sargon*, covered Appellants' challenge to the "unsupported" expert theory as a "novel theory not generally accepted in the relevant scientific community" (a challenge the court suggested would have been successful because the expert's opinions could "easily be characterized as 'new' for *Kelly* purposes."). (*Id.* at p. 1111 n.11, 1136 (J. Streeter,

concurring).) The Court of Appeal then penalized Appellants for citing *Sargon* to support their Section 801(b) and 802 challenges, instead of *Kelly*, a heretofore unrecognized requirement to preserve expert admissibility challenges for appeal. (*Id.* at p. 1111 n.11.)

For the past decade, civil and criminal parties have relied on the rule set forth by this Court in *Sargon* that "under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon, supra*, 55 Cal.4th 747 at pp. 771-72.) As such, Sections 801(b) and 802 have served as essential bulwarks against the admissibility of "junk" science in the courtroom and have greatly strengthened the court system's ability to provide impartial justice in all manner of scientifically complex cases. The Court of Appeal's decision threatens these important interests and creates confusion for civil and criminal parties in California, who, under the Court of Appeal's decision, must now choose between supposedly different standards of expert admissibility, with draconian consequences should they fail to make the "correct" choice.

I. *Amici's* Interests

Amici have an interest in this case because they and their members are concerned with the predictability and fairness of California's civil justice system, including the applicability of evidentiary standards designed to promote sound scientific principles in legal cases. *Amici* are organizations that represent a diverse membership of companies that do business and research in California and nationally, and a civil justice reform organization that includes an expansive network of members in California and nationwide. The issues raised by the Court of Appeal's opinion in *Bader* are of vital importance to *Amici* and their members, as well as similarly situated litigants and criminal defendants.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. Manufacturers in California account for 10.36% of the total output in the state, employing 7.57% of the workforce. There were an average of 1,222,000 manufacturing employees in California in 2020, with an average annual compensation of $112,381.20 in 2019. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs in California and across the United States.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues, such as this one.

PhRMA is a voluntary, non-profit association representing the country's leading biopharmaceutical research companies. PhRMA's members are devoted to developing innovative medicines, treatments, and vaccines which save, prolong, and improve the quality of the lives of countless individuals around the world every day. Over the past two decades, these member companies have contributed nearly $1 trillion to the research and development of new medicines. In the interest of ensuring a robust, competitive, and efficient marketplace for its members, PhRMA frequently files briefs as *amicus curiae* on issues that affect its members.

II. Why This Court Should Grant Review

For over a decade, civil and criminal defendants in California have relied upon this Court's interpretation that Evid. Code §§ 801(b) and 802 require the trial court to act as gatekeeper to scrutinize the admissibility of expert testimony, as established in *Sargon, supra*, 55 Cal.4th 747 at p. 773, and as applied by other appellate courts across the state of California. This Court in *Sargon* explained that Evid. Code §§ 801(b) and 802 require a trial court to protect the jury from so-called "expert" opinions that are "unsupported" or "speculative". (*Id.* at pp. 771-72.)

In place of these well-established principles, the Court of Appeal set forth a new and confusing method for challenging the admissibility of expert opinions, establishing "two regimes of admissibility rules for expert testimony on scientific topics in California, one under *Sargon* and one under *Kelly*." (*Bader*, *supra*, 86 Cal.App.5th at p. 1136 (J. Streeter, concurring).) The Court of Appeal held that a challenge to an expert's opinion as inconsistent with the "broader consensus of experts" in the field, or, in other words, as unsupported by reliable scientific evidence, is now *only* properly asserted under *People v. Kelly* (1976) 17 Cal.3d 24 – not under *Sargon*. (*Bader, supra,* at p. 1110.) Moreover, the Court of Appeal imposed a significant new hurdle to parties seeking to challenge expert testimony, holding that a party who proceeds under the "wrong" regime waives the right to bring what might otherwise be a valid evidentiary challenge that could substantially impact the outcome of the litigation.

Amici urge this Court to grant Appellants' Petitions for Review to resolve this confusion and "to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

A. The Court of Appeal's Ruling Has Created Uncertainty and Confusion as to the Application of *Sargon*

In the decade since this Court's *Sargon* decision in 2012, civil and criminal parties have proceeded with the understanding that trial courts should serve as gatekeepers to preclude unreliable expert testimony under *Sargon* that is: "(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, *supra*, 55 Cal.4th 747 at pp. 771-72.) Pursuant to Evid. Code §§ 801(b) and 802, *Sargon* requires trial courts to determine if the basis for an expert opinion is reasonable and to "inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning." (*Id.* at p. 771.) Appellate courts across California have consistently acknowledged the trial court's gatekeeping responsibility under *Sargon* to evaluate the admissibility of opinions offered by expert witnesses in both civil[1] and criminal matters.[2]

Eschewing this proper gatekeeping responsibility, the Court of Appeal invalidated the understood method of challenging the admissibility of expert testimony under Evid. Code §§ 801(b) and 802. The Court of Appeal created two separate and apparently non-overlapping expert admissibility standards. In some cases, where an expert is challenged for offering "unsupported" opinions, that testimony would be subject to review under the standards set forth in *Sargon*. However, in other cases, where the expert's testimony lacked "general acceptance," the testimony would be subject to review under the standard set forth in *Kelly*. Not only did the Court of Appeal fail to provide any meaningful guidance as to how parties should choose between these seemingly closely-related

[1] (See, e.g., civil cases: *Cooper v. Takeda Pharms. Am., Inc.* (2015) 239 Cal.App.4th 555, 576 (pharmaceutical products liability) ["Trial judges have a substantial gatekeeping responsibility when it comes to expert testimony."]; *Atl. Richfield Co. v. California Reg'l Water Quality Control Bd.*, (2022) 85 Cal.App.5th 338, 365, as modified on denial of reh'g (Dec. 5, 2022), review filed (Dec. 23, 2022) [same]; *Leavitt v. Johnson & Johnson* (Cal. Ct. App., Aug. 5, 2021, No. A157572) 2021 WL 3418410, at *5, reh'g denied (Aug. 27, 2021), review denied (Nov. 10, 2021) (unpublished, products liability) [same].)

[2] (See, e.g., criminal cases: *People v. Godines* (Cal. Ct. App., July 25, 2018, No. C078214) 2018 WL 3566717, at *10 (unpublished) [noting that a trial court acts as a gatekeeper to exclude any expert opinion that is "without evidentiary support, or which involve guesses or surmises"]; *People v. Azcona* (2020) 58 Cal.App.5th 504, 513, as modified (Jan. 11, 2021) [same]; *People v. Blackburn* (Cal. Ct. App., Feb. 14, 2018, No. E065030) 2018 WL 850794, at *26 (unpublished) [same].)

scenarios, but it also failed to provide any explanation why different standards of admissibility would improve litigation outcomes.

The Court of Appeal's distinction between "unsupported" expert opinions under *Sargon* and expert theories that lack "general acceptance" under *Kelly* is a distinction without difference. (*Bader*, *supra*, 86 Cal.App.5th at p. 1111 n.11.) Yet, this distinction would dramatically and artificially reduce the trial court's gatekeeping responsibility under *Sargon*. Faced with a challenge to the reliability of proffered expert testimony for lack of scientific support, the Court of Appeal interprets *Sargon* as requiring nothing more of the trial court "gatekeeper" than to ascertain whether the expert identified supporting materials, even if the materials "do not appear to provide support for his opinion." (*Id.* at p. 1107 n.6.) If the Court of Appeal's interpretation stands, the trial court's analysis under *Sargon* would be reduced to the mere clerical function of checking a box to confirm that an expert cited to *something* in support of his or her opinion, regardless of the reliability of the cited material. This ignores this Court's direction that a trial "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered," *Sargon*, *supra*, 55 Cal.4th at p. 771 (citation omitted). This Court held in *Sargon* that Section 801(b) requires the trial court to inquire into "the type of material on which an expert relies" and Section 802 requires inquiry as to "whether that material actually supports the expert's reasoning." (*Id.* at p. 771.)

This ruling, if unreviewed, would significantly undercut the protections previously afforded by this Court to litigants faced with unreliable expert opinions that seek to impose significant civil liability without proper scientific foundation. Or, worse yet, criminal liability that could improperly deprive defendants of their very liberty. *Amici's* members rely on consistent and proper standards for the admissibility of expert testimony to protect their ability to provide important products and medicines that are central to the lives and wellbeing of people in the State of California, while at the same time ensuring appropriate safeguards and compensation where dangerous products are improperly released into society. In unfairly preventing valid challenges to unreliable expert testimony, the Court of Appeal's decision undercuts the essential policy reasoning underlying evidentiary rules that limit unreliable scientific evidence from reaching the jury to "assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones." (*Gen. Elec. Co. v. Joiner* (1997) 522 U.S. 136, 149 (J. Breyer, concurring).)[3]

[3] This Court relied on *Joiner* in reaching its decision in *Sargon*. (*Sargon*, *supra*, 55 Cal.4th at p. 771 [citing *General Electric Co. v. Joiner* (1997) 522 U.S. 136].)

The Court of Appeal's complicated regime for challenging the admissibility of expert testimony would also impact criminal defendants, a policy issue of great import in California. Senate Bill 467, otherwise known as the End Wrongful Convictions Act, sponsored by the California Innocence Project, the Loyola Project for the Innocent, and the Northern California Innocence Project, and supported by the California Public Defenders Association, Initiate Justice, and California Attorneys for Criminal Justice, was recently signed into law. (Cal. Pen. Code § 1473 (Amended by Stats 2022 ch 982 (SB 467), § 1.5, eff. Jan. 1, 2023).) Notably, the bill, in part, expands the definition of false evidence to include the opinions of experts that are undermined by the state of scientific knowledge.[4] Wrongful convictions are increasingly being attributed to "junk science".[5] Application of the Court of Appeal's decision in the criminal setting would erode the work of the criminal defense bar on the End Wrongful Convictions Act and add additional uncertainty for all criminal and civil defendants in California.

B. The Court of Appeal Adopted a New, Heightened Standard for Preserving Issues for Appeal

Review is also necessary to address the Court of Appeal's draconian waiver ruling, whereby a party may be penalized with the loss of important evidentiary protections if it fails to speak "magic words," *i.e.*, citing to a specific case, in order to preserve an issue for appeal. The Court of Appeal denied Appellants' challenge to the trial court's admission of expert testimony, emphasizing "that their motion to exclude did not challenge his testimony based on *Kelly* and its progeny" and therefore would not be considered. (*Bader*, *supra*, 86 Cal.App.5th at p. 1111 n.11.) In his concurrence, Justice Streeter writes separately to expand on this point, noting that the "proper vehicle" for mounting a challenge to the admissibility of the expert testimony would have been "a *Kelly* objection" and not "a *Sargon* objection." (*Id.* at pp. 1135-36 (J. Streeter, concurring).)

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[4] See California Legislative Information, Legislative Counsel's Digest re Senate Bill 467 (Oct. 3, 2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB467.

[5] See Halle Stoic, *Wrongful Convictions: The Facts*, West Virginia Innocence Project, (Oct. 2, 2020), https://wvinnocenceproject.law.wvu.edu/innocence-project-blog/our-voices/2020/10/02/wrongful-convictions-the-facts (stating that "junk science" is one of the five common causes often attributable to wrongful convictions). These forensic disciplines are unreliable and inaccurate, and experts in these fields will often testify to conclusions beyond even what the limited science on their subject allows. The Innocence Project, *Overturning Wrongful Convictions Involving Misapplied Forensics*, https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/ (last visited Feb. 15, 2023) (noting that the three of the largest problems in the foundation or application of forensic science are *unreliable or invalid forensic discipline, insufficient validation of a method, and misleading testimony*) (emphasis added).

Preservation of an issue on appeal does not require recitation of "magic words" or citation to a specific case. This Court has held that "the requirement of a specific objection . . . must be interpreted reasonably, not formalistically. Evidence Code section 353 does not exalt form over substance." (*People v. Partida* (2005) 37 Cal.4th 428, 434-35 (citation omitted).). The objection need only "fairly inform" the trial court and the party offering the evidence of the reasons the evidence should be excluded, so they can appropriately address it. (*Ibid*.) Other California appellate courts have acknowledged the same. (See, e.g., *People v. Thompson* (2022) 83 Cal.App.5th 69, 100-01, review denied (Nov. 30, 2022) [requirement of specific objection to evidence must be interpreted reasonably, not formalistically]; *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101 [objection to admissibility of evidence deemed sufficient so long as it fairly apprises the trial court of the issue it is being called upon to decide]; *In re Joy M.* (2002) 99 Cal.App.4th 11, 20 [objection is sufficient to preserve issue for appeal if made in such way as to alert trial court to nature of anticipated evidence and basis on which exclusion is sought and to afford party opponent opportunity to establish its admissibility]); see also, *Melendez v. Pliler* (9th Cir. 2002) 288 F.3d 1120, 1123 [California courts construe broadly the sufficiency of objections that preserve appellate review, focusing on whether the trial court had a reasonable opportunity to rule on the merits of the objection before the evidence was introduced].)

The implications of the heightened standard imposed by the Court of Appeal requiring citation to specific case law to preserve an issue for appeal are far-reaching. The Court of Appeal's approach would burden civil and criminal parties, as well as trial courts, with unnecessarily duplicative and extensive objections to make sure that they have not inadvertently omitted reference to "magic words" or specific cases to preserve general evidentiary issues for appeal. Such a requirement would not serve "the strong public policy favoring the hearing of appeals on the merits." (*K.J. v. Los Angeles Unified School Dist.* (2020) 8 Cal.5th 875, 882.) This preservation burden is exponentially increased where parties – as here – are provided with ambiguous and changing jurisprudence as to which "magic words" are required in a given case.

Under the Court of Appeal's new two-tiered regime, defendants would be prejudiced in attempting to lodge and preserve objections to the admissibility of unreliable expert opinions, adding additional uncertainty in cases already fraught with procedural intricacies.[6] The substantial public interest in preventing "junk science" from reaching a

[6] See, e.g., Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in Examining Wrongful Convictions: Stepping Back, Moving Forward 217-236 (Allison D. Redlich et al. eds., 2014) (examining how the procedural focus of appellate and postconviction review has failed many who were ultimately exonerated).

jury further cautions that California should not narrow the ability to preserve such issues for appeal, but should instead resolve any doubt regarding the propriety of the appeal in favor of Appellant's right to Petition. (See, e.g., 9 Witkin, Cal. Procedure (6th ed. 2022) Appeal, § 2 ["As a matter of statutory construction, where the right to appeal is in doubt, that doubt should be resolved in favor of the right."]; *In re Matthew C.* (1993) 6 Cal.4th 386, 394.))

III. Conclusion

For the reasons stated above, NAM, ATRA, and PhRMA voice their strong support as *amici* for Appellants' Petitions for Review. Without review, confusion and disharmony will follow.

Respectfully,

Kathryn S. Jensen
Eric G. Lasker
Shannon N. Proctor
Brett F. Clements (SB# #335458)
Counsel for National Association
of Manufacturers, American Tort Reform
Association, and Pharmaceutical Research and
Manufacturers of America

HOLLINGSWORTH LLP
1350 I Street Northwest
Washington, District of Columbia 20005
(202) 898-5800

PROOF OF SERVICE

On February 28, 2023, I served the following document:

Amicus Curiae Letter in Support of Appellants Johnson & Johnson, Johnson & Johnson Consumer Inc. and Colgate Palmolive Company Petitions for Review in Bader v. Johnson & Johnson, et. al., No. S278437

on the Parties appearing on the electronic service list for the above-entitled case by transmitting a true copy via this Court's TrueFiling system. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

/s/ *Kathryn S. Jensen*

Via TrueFiling	
Party	**Attorney**
Susan Jean Bader: Plaintiff and Respondent	Joseph D. Satterley Denyse F. Clancy Ian Wilfred A. Rivamonte Michael T. Stewart Kazan McClain Satterley & Greenwood Jack London Market 55 Harrison Street, Suite 400 Oakland, CA 94607
Johnson & Johnson: Defendant and Appellant	Alexander G. Calfo Paul R. Johnson Susan V. Vargas King & Spalding 633 West 5th Street, Suite 1600 Los Angeles, CA 90071 Troy D. McMahan King & Spalding LLP 101 Second Street, Suite 2300 San Francisco, CA 94105
Colgate-Palmolive Company: Defendant and Appellant	Gary D. Sharp Foley & Mansfield 2185 North California Boulevard

	Suite 575 Walnut Creek, CA 94596 Fred A. Rowley Wilson, Sonsini, Goodrich & Rosati, P.C. 633 Fifth Street, 15th Floor Los Angeles, CA 90071 Jeffrey Y. Wu Anne K. Conley Margaret Holly Thompson Munger, Tolles & Olson LLP 350 South Grand Avenue, 50th Floor Los Angeles, CA 90071-3426
Via USPS	
Amici	Linda Kelly Erica Klenicki Michael A. Tilghman II National Association of Manufacturers 733 10th Street, NW, Suite 700 Washington, DC 20001 H. Sherman Joyce Lauren Sheets Jarrell American Tort Reform Association 1101 Connecticut Avenue, NW, Suite 400 Washington, DC 20036 James C. Stansel Melissa B. Kimmell Pharmaceutical Research and Manufacturers of America 950 F Street, NW, Suite 300 Washington, DC 20004