IN THE SUPREME COURT
STATE OF GEORGIA

ARVIN RITCHEY MASON and CLAUDIA MASON, Appellants, v. THE HOME DEPOT U.S.A., INC. and THE FLECTO COMPANY, INC. Appellees.	CASE NO. S07A1486

AMICUS BRIEF OF THE COCA-COLA COMPANY; DELTA AIR LINES, INC.; GEORGIA PACIFIC LLC; GEORGIA POWER COMPANY; MUELLER WATER PRODUCTS, INC.; NEWELL RUBBERMAID INC.; ROLLINS, INC.; AND UNITED PARCEL SERVICE, INC. IN SUPPORT OF APPELLEES

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The Coca-Cola Company; Delta Air Lines, Inc.; Georgia Pacific LLC; Georgia Power Company; Mueller Water Products, Inc.; Newell Rubbermaid Inc.; Rollins, Inc.; and United Parcel Service, Inc. ("the Amici") respectfully submit this Amicus Brief.

I. INTEREST OF THE *AMICI CURIAE*

The Amici are Georgia-based corporations that do substantial business in Georgia. Like other Georgia businesses, the Amici frequently are parties in Georgia litigation that requires expert testimony. The Amici thus have a strong interest in this Court upholding clear standards which ensure that only reliable and relevant expert testimony is admitted into evidence in the trial courts of this State.

To that end, in recent years, many of these same Amici have joined in filing other amicus briefs with this Court in cases involving the admission of expert testimony. For example, in *Orkin Exterminating Co. v. Carder*, No. S03G0650, these Amici supported the adoption of clear standards for lower courts to follow with regard to the admissibility of expert testimony in civil cases. This Court initially granted *certiorari* in *Carder*, specifically asking: "What standards should govern the admissibility of expert scientific evidence in Georgia" and inviting the parties to compare the standards set by this Court in *Harper v. State*, 249 Ga. 519, 525 (1982), with the U.S. Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526

U.S. 137 (1999). The Court, however, subsequently dismissed the petition without considering the question. *Carder*, No. S03G0650 (Ga. Sept. 8, 2003).

A year later, several of these Amici filed another amicus brief, this time in *Home Depot U.S.A., Inc. v. Tvrdeich*, No. S04C1974, again supporting clarification of the standard for admitting expert testimony in civil cases. This Court, however, denied *certiorari* in *Tvrdeich*. *Tvrdeich*, No. S04C1974 (Ga. Oct. 24, 2004).

In the wake of these decisions and the considerable confusion that existed in the lower courts as to the appropriate standard for admissibility of expert testimony in civil cases, the Georgia General Assembly itself took up the issue in what became known as Senate Bill 3. In SB3, the General Assembly promulgated rules governing the admissibility of expert testimony in civil cases. These provisions took effect in February 2005 and are now codified at O.C.G.A. § 24-9-67.1.

Since its adoption, challenges to the statute have been raised and rejected by the Court. Recently, in *Nathans v. Diamond*, No. S07A0738, 2007 WL 4118285 (Ga. Nov. 21, 2007), the Court upheld the constitutionality of O.C.G.A. § 24-9-67.1(c) against a challenge that it was impermissibly retroactive. The Court held that the expert witness requirements are procedural, not substantive, and thus apply to pending cases. *Nathans*, No. S07A0738, 2007 WL 4118285 at *4. The Court also clarified that an abuse of discretion standard of review applies to the exclusion of expert testimony. *Id.* at *2 n.8.

In this case, Plaintiffs challenge the constitutionality of O.C.G.A. § 24-9-67.1(b) on a wide variety of constitutional and policy grounds, from equal protection, to due process, to retroactivity, to the proper standard of review, to right to jury trial, and so on. In recent weeks, three amicus briefs have been filed in support of the Plaintiffs' challenges, raising still other arguments. The above-captioned Amici now file this friend-of-the-court brief to counter what they believe to be the meritless attacks leveled against the important and much-needed requirements for admitting expert testimony contained in O.C.G.A. § 24-9-67.1(b).

II. SUMMARY OF ARGUMENT

In this brief, the Amici do not attempt to address all of the various issues and challenges raised by the Plaintiffs and their amici. These issues are convincingly refuted in Defendants' briefs. The Amici, however, wish to respond in further detail to the arguments raised in two of the other amicus briefs recently filed in support of the Plaintiffs.

First, the amicus brief submitted by the Georgia Trial Lawyers Association ("GTLA") devotes nearly 20 pages to the assertion that the expert witness requirements set forth in O.C.G.A. § 24-9-67.1(b) intrude upon the constitutional right to jury trial. Their argument focuses on subsection (b)(3), which requires a threshold determination that the witness "has applied the principles and methods reliably to the facts of the case." Like the Plaintiffs, GTLA appears to concede that

the two other relevant subsections — (b)(1) and (b)(2) — pose no constitutional problem. These subsections, respectively, require trial courts to make threshold determinations that the expert evidence is "based upon sufficient facts or data" and, further, is "the product of reliable principles and methods."

GTLA offers no reasoned basis for distinguishing between these subsections beyond their assertion that the test found in subsection (b)(3) has not been required historically. This purported distinction, however, is problematic on several levels. First, if mere change from past practice were the determining factor in resolving the right to jury trial question, then no new rule excluding evidence previously admitted for jury consideration would ever be permitted. Moreover, GTLA's theory fails to account for the decisions of this Court since our first Constitution upholding new restrictions on the admissibility of evidence, including expert testimony. The most telling of these cases is this Court's decision in *Harper v. State*, 249 Ga. 519, 525 (1982), which adopted a new "verifiable certainty" test for evaluating scientific procedures and techniques. Indeed, the rule adopted in *Harper* is similar to, and arguably more stringent than, *Daubert* itself.[1]

GTLA also ignores the fact that the origin of subsection (b)(3) traces back to the U.S. Supreme Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and, further, that the U.S. Supreme Court has expressly found the type of

[1] As will be discussed below, the confusion that existed prior to the adoption of O.C.G.A. § 24-9-67.1(b) was whether the *Harper* rule applied in civil cases.

evidentiary requirements set forth there do not violate the right to jury trial. In addition, GTLA glosses over the fact that a growing number of states across the country have followed *Joiner* and that no court has struck down a statute like O.C.G.A. § 24-9-67.1(b) on right-to-jury-trial grounds. Moreover, of the ten states that GTLA admits have adopted provisions like subsection (b)(3), nine have constitutional provisions stating that the right to jury trial shall remain "inviolate," just as in Georgia's Constitution. Nothing in the Federal or Georgia Constitutions prohibits the General Assembly from changing the applicable rules of evidence.

Second, the amicus brief filed by the University Professors and Research Scholars ("Professors") makes two further points. The first half of the Professors' brief describes the dangers of admitting junk science in the criminal context, postulating that forensic science is particularly unreliable. Then, in the second half of their brief, the Professors bemoan how difficult the *Daubert*-like requirements of O.C.G.A. § 24-9-67.1(b), designed to keep junk science out of civil cases, might be for Georgia's trial courts to administer. In other words, the Professors' brief simultaneously argues, first (1) in support of *Daubert*, that judges in criminal cases ought to take a more active role in excluding unreliable expert testimony, but then, (2) in an attack on *Daubert*, that more stringent evidentiary standards would create difficulties for the courts. The inconsistency between these two halves of the brief is never resolved or even directly acknowledged by the Professors.

The alleged problems with criminal forensic science will not be addressed here other than to note that the Professors ignore completely the decision in *Harper*, which still controls the admission of expert testimony in criminal cases. *See Vaughn v. State*, 282 Ga. 99, 101 (2007). Moreover, any questions concerning the admissibility of expert testimony in criminal cases ought, at a minimum, to be resolved in a criminal case, where the State would have an opportunity to weigh in. In any event, the concerns about forensic science summarized by the Professors provide no basis for allowing unscrutinized expert testimony in civil cases.

With respect to the arguments raised by the Professors in the second half of their brief, their primary point appears to be that these heightened evidentiary standards are more difficult, even "daunting," for trial courts to apply. These policy arguments, however, are more appropriately made to the legislature; they provide no basis for striking down the statute as unconstitutional. Moreover, the Professors' argument is troubling even on policy grounds. Many evidentiary rules require extra work and are sometimes difficult to apply, but that is no reason to do away with them. The primary objectives of our legal system are truth and justice, not expedience and ease of application. Admission of testimony based on junk science subverts these objectives. Tellingly, and contrary to the Professors' suggestion otherwise, recent studies reveal that trial court judges overwhelmingly believe that the rule is worth the extra effort.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs and Their Amici Ignore this Court's Decision in *Harper*

Before addressing these specific arguments, a brief discussion of the development of the Georgia standards for admitting expert testimony may be helpful. Indeed, when this context is properly acknowledged, several weaknesses with GTLA's and the Professors' arguments become readily apparent.

Long before the U.S. Supreme Court rendered its decision in *Daubert*, this Court ruled that scientific evidence must be "an accurate and reliable means of ascertaining" the facts at issue in order to be admissible. *Harper*, 249 Ga. at 526. To that end, this Court held it "proper for ***the trial judge*** to decide whether the procedure or technique in question has reached ***a scientific stage of verifiable certainty***." *Id.* at 525 (emphasis added). Thus, at least since *Harper*, Georgia trial courts have had an important "role as gatekeeper" when it comes to expert testimony. *Leftwich v. State*, 245 Ga. App. 695, 695 (2000) (applying *Harper*). Indeed, a trial court's failure to perform this gatekeeping obligation under *Harper* is an abuse of discretion. *See, e.g., Carr v. State*, 267 Ga. 701, 703-04 (1997), *overruled on other grounds*, *Clark v. State*, 271 Ga. 6 (1999).

Moreover, in cases after *Harper*, both this Court and the Court of Appeals made it clear, just as the U.S. Supreme Court did in *Joiner*, that the *Harper* verifiable certainty standard applies to all expert testimony, not just to procedures,

tests, or methods. In *Carr*, this Court held that an expert's "***analysis and data gathering*** leading to the testimony should be subject to the [*Harper*] requirements of scientific verifiability." 267 Ga. at 703 (emphasis added). Eight months later, using strikingly similar language, the U.S. Supreme Court in *Joiner* upheld the exclusion of expert evidence where "there is simply too great an ***analytical gap between the data and the opinion proffered***," 522 U.S. at 146. This parallel approach is further demonstrated by the numerous Georgia cases holding that the *Harper* rule applies to the scientific *theory* used by the expert.[2] In short, in *Harper* and its progeny, this Court adopted very similar rules to those in the *Daubert* trilogy, but did so well before the U.S. Supreme Court made its rulings.[3]

Why then, one might ask, is there an issue here? And why did the Georgia General Assembly feel it necessary to adopt *Daubert* legislatively? The answer, which has been overlooked by Plaintiffs and their amici, is that prior to O.C.G.A.

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[2] *See Mobley v. State*, 265 Ga. 292, 293 (1995) (*Harper* test applies to theory that there is "a possible genetic basis for violent and impulsive behavior in certain individuals"); *Godfrey v. State*, 258 Ga. 28, 29 (1988) (*Harper* test applies to theory that a person accurately repeats the events of the day in his sleep talk); *Prickett v. State*, 220 Ga. App. 244, 246-48 (1996), *overruled on other grounds*, *State v. Belt*, 269 Ga. 763 (1996) (*Harper* test applies to "post-traumatic stress disorder and rape trauma syndrome"); *Stewart v. State*, 210 Ga. App. 474, 476 (1994) (*Harper* test applies to "expert testimony on the Sexual Abuse Allegation in Divorce Syndrome"); *Rolander v. State*, 202 Ga. App. 134, 141-42 (1992) (*Harper* test applies to theory that victims of child abuse exhibit specific behaviors).

[3] Indeed, the "verifiable certainty" standard, by its literal terms, arguably is stricter than the "scientific reliability" standard of *Daubert*, thus turning the equal protection argument on its head.

§ 24-9-67.1, neither the trial courts nor even the Court of Appeals applied *Harper* consistently or rigorously in civil cases. Rather, while the standard for admission of expert testimony in criminal cases was, and remains, verifiable certainty, the *de facto* standard in civil cases was that as long as a purported expert had "adequate" credentials, his or her testimony was admitted. The fact that he or she might have no scientific basis for the particular opinion offered "merely went to weight."

In other words, prior to the adoption of O.C.G.A. § 24-9-67.1, there were two standards for the admission of expert testimony in Georgia, at least as applied in the trial courts: (1) the verifiable certainty standard, applied in criminal cases; and (2) the unrestricted, everything-goes-to-weight-except-credentials standard, applied in civil cases.[4] It was against precisely this backdrop — i.e., because the lower courts applied a strict rule for admissibility of expert testimony in criminal cases, but an extremely liberal one in civil cases — that the General Assembly adopted O.C.G.A. § 24-9-67.1.

Given this background, several problems become apparent with regard to the arguments made by Plaintiffs and their amici. As an initial matter, the fundamental theme that runs through all of their briefs — that prior to O.C.G.A. § 24-9-67.1, trial judges never assessed the reliability of expert testimony, and that now a strict

[4] As this Court will recall, when it granted *certiorari* in *Orkin Exterminating v. Carder*, a civil case, the Court posed specific questions to the parties both prior to and at oral argument about whether *Harper* applied to the case and how *Harper* compared to *Daubert*.

standard is applied in civil cases while a liberal one is applied in criminal cases — simply has no basis. For example, at the outset of its jury trial argument, GTLA baldly states, without citation to authority, that "this Court and the Court of Appeals have held that it is for the jury to decide . . . whether the expert's tests were conducted properly, whether the expert's conclusions are or are not too speculative, whether the expert's thinking is logical, and whether the expert's methodology is persuasive, etc." GTLA Br. at 6. Given *Harper* and its progeny, this statement is not accurate, at least in criminal cases.[5]

Similarly, GTLA (and Plaintiffs) base their entire equal protection argument on the proposition that the standard for admission of expert testimony in criminal cases in Georgia is now much more liberal than that in civil cases. Again, that proposition depends entirely on the notion that *Harper* either does not exist or is highly limited in its applicability. But GTLA cites no case that says either of these

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[5] In a passing attempt to explain away *Harper*, GTLA drops a footnote suggesting that *Harper* applies only to "new" principles and methods, not "accepted" ones. But this is a circular argument. Under *Harper*, a principle or method is new — or "novel," the word used by this Court — until such time as it "reache[s] a scientific stage of verifiable certainty." *Lattarulo v. State*, 261 Ga. 124, 126 (1991); *see also Izer v. State*, 236 Ga. App. 282, 282-84 (1999). Every principle or method utilized by an expert in a criminal case must meet this standard. "Novel" simply describes those expert techniques that have not yet met the *Harper* standard. Thus, to say that *Harper* only excludes novel evidence is true — in fact, it is true by definition — but it does not support GTLA's assertion that only juries, and not trial courts, determine "the reliability of opinions of otherwise qualified experts." GTLA Br. at 5. The cases cited above disprove that claim.

things. Indeed, if GTLA were correct, there would have been no need for this Court to pose the questions that it did in *Orkin Exterminating v. Carder*.

Likewise, GTLA bases its jury trial argument on the proposition that the reliability of expert testimony has always been determined by juries in Georgia and that this is somehow a fundamental right. Again, *Harper* and its progeny contradict this proposition.

Finally, the entire first half of the Professors' brief is based on the premise that in criminal cases in Georgia, expert testimony is subject to little or no scrutiny, while in civil cases it is subject to strict scrutiny. The Professors then conclude that there is no rational basis for this distinction. Nowhere, however, do the Professors mention, much less discuss, *Harper*. Given the existence of *Harper*, however, and the fact that since 1982 the standard for admissibility of expert testimony in criminal cases in Georgia has been whether the techniques and theories upon which it is based have "reached a scientific stage of verifiable certainty," the premise of the Professors' arguments evaporates. Further, one can easily articulate a rational basis underlying the adoption of O.C.G.A. § 24-9-67.1: the legislature wanted trial courts also to apply stricter standards in civil cases, since the lower courts did not apply *Harper* in civil cases.[6]

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[6] As shown below, the fact that the standards are not exactly the same is not a constitutional infirmity. Here, prosecutors and criminal defense lawyers have long been applying *Harper*. Perhaps the General Assembly felt they should stick

This Court need not speculate whether faith in *Harper* was what ultimately motivated the General Assembly to leave the current system in place for criminal cases. So long as that is possible, Plaintiffs' equal protection challenge fails. Under the rational basis test, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communs.*, 508 U.S. 307, 315 (1993).

With this background, the Amici now turn in greater detail to the specific claims raised by GTLA and the Professors.

B. GTLA's Jury Trial Arguments Are Without Merit

GTLA asks this Court to take the unprecedented step of holding a legislatively enacted rule of evidence regarding the admissibility of expert testimony unconstitutional as a violation of the right to a jury trial. Although similar evidentiary rules exist in numerous states, no court has ever held such a rule unconstitutional. Moreover, the U.S. Supreme Court has expressly found that the federal version of this rule satisfies the Seventh Amendment right to jury trial.

In support of its contrary position, GTLA offers little more than the uncontroversial and irrelevant point that prior to the legislative enactment of O.C.G.A. § 24-9-67.1(b), Georgia courts permitted civil juries to consider expert

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with a known rule in criminal cases. Since *Harper* was not applied in civil cases, however, the General Assembly may have felt that it would be better to take advantage of the extensive case law that exists under *Daubert*. That, certainly, would not be "irrational."

testimony now inadmissible under subsection (b)(3). Of course, the same thing could be said of any new evidentiary rule. Nothing in the Federal or Georgia Constitutions, however, bars legislatures from establishing and revising standards for expert testimony. GTLA's jury trial argument should be rejected.

1. GTLA Faces a High Bar in Asking this Court to Invalidate Subsection (b)(3)

At the outset, it is worth noting the high hurdles that GTLA and Plaintiffs must clear to prevail on their constitutional arguments. In considering such claims, "all presumptions are in favor of the constitutionality of an act of the legislature." *State Ports Authority v. Arnall*, 201 Ga. 713, 722 (1947). "We will not pronounce a law unconstitutional, unless it be plainly unconstitutional. If we have doubts, those doubts determine the question in favor of the law." *Mayson v. Davis*, 227 Ga. 399, 401 (1971) (Hawes, J., dissenting). Indeed, even municipal ordinances enjoy immunity from legal challenge on all but the most serious grounds:

> This ordinance may be a venture in municipal fraternalism which may prove of great benefit to the city, or it may be vicious or mischievous paternalism, which, like the cry of the Roman populace for "bread and the circuses," will finally lead to the overthrow of our form of government. With these matters and considerations, however, the courts have nothing to do. The responsibility therefor rests upon the mayor and general council of the city, and not upon the courts. . . . If unwise or vicious legislation is enacted by that body, and remains upon the municipal statute book, the fault is upon the voters. Its continuance is due to the unpardonable lethargy of the people. The courts can not strike down legislation, whether State or municipal, unless it plainly and palpably violates some provision of the Federal or State constitution.

Atlanta v. Associated Builders & Contractors, 240 Ga. 655, 657 (1978) (quoting *Wilson v. City of Atlanta*, 164 Ga. 560, 564 (1927) (Hines, J., dissenting)).

2. Subsection (b)(3)'s Federal Equivalent Does Not Violate the U.S. Constitution's Right to Jury Trial, Which Is Broader Than Georgia's Right to Jury Trial

These already high hurdles are even harder to surmount because O.C.G.A. § 24-9-67.1 is based on the U.S. Supreme Court's rulings in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), commonly known as the "*Daubert* trilogy." Indeed, O.C.G.A. § 24-9-67.1(f) specifically provides that "in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in [the *Daubert* trilogy] and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."

Earlier this year, the U.S. Supreme Court explicitly stated that *Daubert* does not violate the Seventh Amendment right to a jury. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2512 n.8 (2007). *See also* FED. R. EVID. 702 advisory committee's notes to 2000 amendments (the amendment to Rule 702 "is not intended to limit the right to jury trial"). This should come as little surprise, as the Supreme Court presumably would not have adopted and repeatedly expounded upon this standard had they thought otherwise. The point is important here,

because even Plaintiffs agree that subsection (b)(3) essentially adopts the Supreme Court's interpretation of Federal Rule of Evidence 702(3) in *Joiner*. *See* Appellants' Reply Br. at 17. Indeed, no one before the Court has offered any distinguishing basis on which to argue that subsection (b)(3) is unconstitutional while the standard in *Joiner* is not. To the contrary, because the Georgia jury trial right has been held to be *narrower* than that guaranteed by the Seventh Amendment,[7] such an argument would be doomed to failure.

3. Subsection (b)(3) Does Not Violate the Georgia Constitution

GTLA suggests several reasons why it believes subsection (b)(3) violates the Georgia Constitution's right to a jury. Each is without merit.

a. The Georgia Constitution's Use of the Word "Inviolate" Does Not Create Any Substantive Rights

GTLA initially points to the fact that the Georgia Constitution requires that the right to a jury trial be held "inviolate." Contrary to their contention, this word does not create substantive rights. Instead, the use of "inviolate" means simply that a jury trial must be preserved in those cases where it was originally provided: "In civil actions, the right to trial by jury exists only where the right existed prior to the adoption of the first Georgia Constitution." *Hill v. Levenson*, 259 Ga. 395, 359 (1989). As further explained by this Court in *Bell v. Cronic*, 248 Ga. 457 (1981):

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[7] *See Swails v. State*, 263 Ga. 276, 278 (1993) ("The right to a jury trial under our State Constitution is not as broad as that afforded under the Federal Constitution.").

> The rule in Georgia on the right to a trial by jury is clear. In construing the provision of the Georgia Constitution which states that the right of trial by jury shall remain inviolate, this court has consistently held that ***in civil actions*** the right of a jury trial exists ***only in those cases*** where the right existed prior to the first Georgia Constitution, and the Constitution guarantees the continuance of this right unchanged as it existed at common law.

Id. at 458 (emphasis added) (citation omitted); *see also Swails v. State*, 263 Ga. 276, 278 (1993). In sum, the term "inviolate" preserves the right to jury trial in certain types of cases, but it does not freeze for all time the rules and procedures that might affect jury trials or the evidence admitted therein.

GTLA takes this simple concept and seeks to engraft upon it a requirement that the rules of evidence that existed in the 1700s must likewise be held inviolate. Specifically, GTLA argues that unless a rule of evidence existed in the 1700s, it is constitutionally invalid. That is not the law, as this Court has long recognized: "The constitutional guaranty of jury trial does not limit the power of the Legislature to prescribe rules of evidence or of procedure." *Crowell v. Akin*, 152 Ga. 126, 138 (1921).[8] Stated differently for present purposes, there is no constitutional right to the admission of unreliable scientific evidence to the jury.

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[8] The U.S. Supreme Court has similarly explained that the federal right to trial by jury refers to "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure," and that the Seventh Amendment "does not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791." *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (quotations omitted). Instead, "new devices may be used to

The language of other states' constitutional provisions regarding the right to jury trial underscores the failure of GTLA's argument. GTLA identifies ten states that have adopted the equivalent of subsection (b)(3). Of those ten states, nine specifically require that the right to a jury trial be held "inviolate."[9] (Only Delaware does not use similar wording.) Thus, rules similar to subsection (b)(3) validly co-exist in nine other states with the "inviolate" right to a trial by jury. GTLA does not explain why the rule in Georgia should be any different.

b. GTLA's Case Law Suggesting that Certain Testimony Was Admissible Under Prior Law Does Not Resolve the Issue

GTLA next cites numerous Georgia cases for the proposition that litigants are constitutionally entitled to have a jury determine all factual questions, including expert testimony. *See* GTLA Br. at 10-12, 15-18. In point of fact, not a single one of GTLA's cited cases says this. Indeed, none of these cases even

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adapt the ancient institution to present needs and to make it an efficient instrument in the administration of justice." *Id.* at 157 (quotations omitted).

[9] *See* Ark. Const. art. 2, § 7; Miss. Const. art. 3, § 31; Neb. Const. art. I, § 6; 12 Okl. St. § 2018(D); Tenn. Const. art. I, § 6; Wyo. Const. art. 1, § 9; Mass. Const. Pt. 1, Art. XV (the right to jury trial "shall be held sacred"); *Islami v. Needham*, 38 Mass. App. Ct. 442, 445 (1995) (right to jury trial under Massachusetts Constitution "shall be preserved to the parties inviolate"); *State ex rel. Rhodes v. Saunders*, 66 N.H. 39, at **36-37 (1889) (New Hampshire Constitution's provision that right to jury "shall be as heretofore" has the same meaning as provisions in other state constitutions holding the right "inviolate"); *Phillips v. Mirac, Inc.*, 470 Mich. 415 (2004) (original text of the Michigan Constitution stating that right to trial by jury is "inviolate" remains part of the constitutional scheme despite the omission of the word in later versions).

mentions, much less bases its holding on, the Georgia Constitution's right to a jury trial. To the contrary, the cases simply stand for the proposition that the evidence now excluded under O.C.G.A. § 24-9-67.1(b) may have been admissible, at least in civil cases, prior to the adoption of SB3. This, of course, was the very reason the General Assembly found it necessary to adopt the bill.

GTLA's cases also suffer from other problems. For example, two of the cases cited to support its jury trial argument were actually bench trials.[10] Also, a significant number of the cases cited to attack Georgia's new expert standards do not involve a challenge to the admissibility of expert testimony at all.[11] Moreover, some of the cases cited actually support judicial restrictions on expert testimony even under the pre-(b)(3) framework.[12]

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[10] *Wilson v. Prudential Industrial Prop., LLC*, 276 Ga. App. 180, 181 (2005); *Fayette Promenade v. Branch Banking & Trust Co.*, 258 Ga. App. 323, 326 (2002).

[11] *Boswell v. State*, 275 Ga. 689, 691 (2002); *Howard v. Howard*, 258 Ga. 846, 847 (1989); *Jackson v. Jackson*, 253 Ga. 576 (1984); *Ponce de Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 191 (1977); *Merritt v. State*, 107 Ga. 675 (1899); *Baker v. Richmond City Mill Works*, 105 Ga. 225, 227-28 (1898); *Parker v. Chambers*, 24 Ga. 518, 524 (1858); *Barrington Hills Condo. Ass'n v. Lewis*, 277 Ga. App. 510, 511 (2006); *Byrd v. Medical Center of Central Georgia, Inc.*, 258 Ga. App. 286, 291 (2002); *Williamson v. Ward*, 192 Ga. App. 857, 858 (1989); *Dep't. of Transp. v. Pilgrim*, 175 Ga. App. 576, 579 (1985).

[12] *See, e.g., Fayette Promenade, LLC v. Branch Banking & Trust Co.*, 258 Ga. App. 323, 326 (2002) (trial court may exclude expert testimony based on "sheer speculation").

Looking beyond the cases cited by GTLA, other decisions further demonstrate the long history of Georgia courts in limiting the type of expert evidence that can go to the jury. As discussed above, *Harper* required trial courts to act as gatekeepers in assessing the scientific reliability of expert testimony. Similarly, in *O'Neal v. State*, 254 Ga. 1, 3 (1985), this Court upheld the exclusion of expert testimony on grounds that it was irrelevant because the expert could only testify as to general insanity, not to defendant's insanity. In *Mimms v. State*, 254 Ga. App. 483, 487 (2002), the Court of Appeals upheld the exclusion of expert testimony on effects of alcohol as irrelevant because no blood or alcohol test had been administered. And in *Rogers v. State*, No. S07A1210, 2007 WL 3237638, at *6 (Nov. 5, 2007), this Court upheld the exclusion of testimony regarding affidavits used by an expert as a basis for his opinions, as the affidavits contained hearsay and their probative value did not outweigh their prejudicial impact.

These decisions are hardly aberrations. If juries were left to sort out all evidentiary problems, there would be no hearsay rule, no authentication requirement, and no other evidentiary rule designed to insure reliability. Juries could simply determine what evidence is reliable; everything would "go to weight." But that is obviously not the law. Allowing junk science to be considered by a jury is just as destructive, if not more so, to the truth-seeking process as allowing a jury to consider hearsay or any other unreliable evidence.

3. GTLA's Out-of-State Authority Is Inapposite

Finally, GTLA points to decisions from Arizona and North Carolina as support for their argument that subsection (b)(3) is unconstitutional. Those cases are inapplicable here, however, because those courts were not considering the constitutionality of a legislatively enacted rule, but instead simply addressing whether judicially adopting such a rule would be good policy.

In the Arizona case of *Logerquist v. McVey*, 196 Ariz. 470 (2000), for example, the Arizona Supreme Court considered a variety of reasons for and against adopting the *Daubert* trilogy as an interpretation of the Arizona Rules of Evidence, and concluded that interpreting Arizona's Rules in that manner would be contrary to Arizona's public policy. *Id.* at 482-89. Among the issues the court considered was whether the standard was consistent with Arizona's right to jury trial, and the court suggested that it might not be so. This constitutional issue, however, did not form the basis for the court's holding; instead, the court simply disagreed with the U.S. Supreme Court's decisions as a matter of policy:

> We do not reject *Kumho* on a constitutional basis but because the authority over the admission of evidence given to trial judges by *Kumho* is much different from the authority long recognized by the Federal Rules of Evidence and the common law of evidence.

Id. at 489. Conversely, in this case, the General Assembly has determined as a matter of public policy that the *Daubert* trilogy shall be applied in full as explicitly stated in O.C.G.A. § 24-9-67.1(f). Accordingly, the question the Arizona Supreme

Court decided in *Logerquist* — whether adopting *Daubert* is good public policy — has already been decided to the contrary in Georgia and is not before this Court.

Similarly, in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (N.C. 2004), the North Carolina Supreme Court considered whether to adopt the *Daubert* trilogy. After considering a range of policy arguments like those considered in the Arizona case (including right to jury), the court declined to adopt that standard. *Id.* at 463.

In stark contrast to these two decisions are the rulings of countless federal courts, including, most importantly, the U.S. Supreme Court, as well as the considered judgment of ten other states that GTLA concedes have adopted the equivalents of subsection (b)(3). Of course, far more than ten states follow *Daubert* generally or apply *Daubert*-like factors. *See* Alice B. Lustre, *Post Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Court*, 90 A.L.R. 5th 453 (2001) (updated as of 2007) (listing 29 states that have affirmatively adopted *Daubert* or a similar analysis and another 6 states that apply the *Daubert* factors but have not completely rejected the prior approach in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). GTLA and Plaintiffs, in short, find themselves in the clear minority even on the policy question.

But again, the critical point is that the Georgia General Assembly has determined that adopting *Joiner* through passage of O.C.G.A. § 24-9-67.1 is good public policy for the State of Georgia. This Court should refuse the invitation of

Plaintiffs and GTLA to substitute their judgment for that of the General Assembly. This Court may strike down subsection (b)(3) only if it "plainly and palpably" violates the Georgia Constitution, and no such case has been made.

C. The Policy Attacks in the Professors' Amicus Brief Are Misguided and Misdirected

In the second of the two amicus briefs discussed here, the Professors' brief, two basic arguments are made which, as noted above, are inconsistent. As to the first argument — that it is "irrational" to have allegedly wildly differing standards in criminal and civil cases — we add nothing to Defendants' arguments other than what we have said above. Rather, we direct our comments to the second half of the Professors' brief, which argues that it is hard and time-consuming for courts to apply *Daubert* and hence it is irrational for the legislature to require them to do so.

1. The Professors' Policy Claims Fall Far Short of a Constitutional Argument for Invalidating O.C.G.A. § 24-9-67.1

The Professors offer no reason why the alleged practical difficulties of *Daubert* justify striking down O.C.G.A. § 24-9-67.1 on constitutional grounds. Indeed, as noted at the outset, these sorts of arguments provide no basis for rejecting legislative enactments. *See Froug v. Harper*, 220 Ga. 582, 585 (1965) ("The wisdom of legislation does not address itself to the judiciary, but to the legislature."). Moreover, the first half of the Professors' brief suggests that Georgia criminal courts actually ought to be *more* rather than *less* involved in

preventing junk science from reaching the jury. If true, that is all the more reason to uphold *Daubert* in civil cases.

Rather than mounting any sort of constitutional argument that might require the invalidation of O.C.G.A. § 24-9-67.1, the Professors instead argue that when a legislature adopts *Daubert*'s evidentiary requirements, it ought to provide "sufficient resources" for the courts to carry out their duties "in a fully professional manner." Univ. Prof. Br. at 25. This suggestion is misplaced here. Such concerns would be more properly directed to the General Assembly itself. Moreover, the Professors offer nothing — not even an anecdote — to suggest that the new expert witness standard has rendered Georgia courts unable to fulfill their judicial obligations. In fact, the experience of undersigned counsel, all of whom actually try cases in the courts of this State, is precisely the opposite.

2. The Professors' Jaundiced View of *Daubert* Is Contradicted by Many of Their Own Sources

Beyond these problems, a closer examination of the authorities cited by the Professors does not depict the bleak picture painted. To the contrary, many of their sources actually contradict their claims.

The Professors begin their criticism by quoting former Chief Justice Rehnquist's separate *Daubert* opinion where he discusses the potential difficulty judges might have in applying the *Daubert* factors. *See Daubert*, 509 U.S. at 600-

01.[13] Contrary to the implication otherwise, however, Chief Justice Rehnquist did not oppose heightened requirements for admitting expert testimony; rather, he merely expressed concern about discussing these factors in the abstract. *Id.* Indeed, the Chief Justice later wrote the majority opinion in *Joiner*, which clarified that *Daubert* can reach the opinion of an expert:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Joiner, 522 U.S. at 146. Chief Justice Rehnquist's authorship of the majority opinion in *Joiner* is directly at odds with the Professors' argument here.

The Professors next include quotations from Judge Weinstein of the Southern District of New York and Judge Kozinski of the Ninth Circuit to the effect that *Daubert* will make the lives of federal judges more difficult. Of course, just because something is difficult does not mean that it is not worthwhile. For example, Judge Weinstein, in the article quoted by the Professors, notes that judges "are going to have to give a more reasoned statement about why they are letting in

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[13] The Professors fail to mention Justice Blackmun's assessment, joined by six other Justices, that "[w]e are confident that federal judges possess the capacity to undertake this review." *Daubert*, 509 U.S. at 593. Similarly, the Professors omit Justice Breyer's conclusion "that *Daubert*'s gatekeeping requirement will not prove inordinately difficult to implement" and "will help secure the basic objectives of the Federal Rules of Evidence, which are . . . the ascertainment of truth and the just determination of proceedings." *Joiner*, 522 U.S. at 150.

evidence. They can't do it on a rubber-stamp basis the way some of them did it in the past." Rorie Sherman, *Judges Learning* Daubert, THE NATIONAL LAW JOURNAL at 3 (Oct. 4, 1993). Giving more reasoned opinions and not simply rubber-stamping the admission of unscientific evidence are desirable objectives, because they enhance the likelihood of just and truthful results.

Other research cited further demonstrates that judges, on balance, find *Daubert* beneficial. *See* Sophia I. Gatowski, et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 L. & HUM. BEHAV. 433, 443 (2001) (quoted in Univ. Prof. Br. at 19-20 n.16). In a national survey of judges, 55% responded that *Daubert* had a "great deal" of value for judicial decision-making, and another 39% said it had "some" value. *Id.* at 443. These judges advanced several reasons in support of *Daubert*, including:

- its "provision of a decision-making framework";
- the "articulation of the 'steps to consider when making admissibility decisions' and 'the basis provided for justifying or explaining the decision-making process' ";
- its potential to create " 'greater consistency among the states with respect to admissibility decisions' "; and
- the heightened "ability to ensure that 'junk science is kept out of the courtroom.' " [14]

[14] *Id.* A mere 6% stated that *Daubert* had "no value at all." *Id.* When asked more generally whether the role of "gatekeeper" was an appropriate one for a judge, 91% agreed that it was. *Id.*

As this survey makes clear, the overwhelming majority of judges (like our own legislature) believe that *Daubert* has been valuable and that judges ought to play a gatekeeping role in evaluating scientific evidence, notwithstanding the additional responsibilities it imposes. As stated by the U.S. Court of Appeals for the Eleventh Circuit: "The *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning required in science, has greatly improved the quality of the evidence upon which juries base their verdicts." *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

In addition to their few selective quotes from jurists, the Professors also cite several other law professors and commentators who criticize *Daubert*. The Professors generally cite these commentaries for the basic point that *Daubert* has created more difficult and even "daunting" work for courts. Again, such criticisms, viewed in isolation, fail to take into account whether this added effort is beneficial, particularly when judged against the relative merits of the prior approach. Indeed, few have advocated rejection of *Daubert* in favor of a return to prior law. Given these considerations, it should not be too surprising that many of the sources cited by the Professors affirmatively reject the position advocated by the Plaintiffs in this case — the return to a pre-*Daubert* era.

A few examples demonstrate the point. For example, the Professors quote Professor Paul Milich's article for the proposition that "judges find it very hard to

'decid[e] what is or is not good science.' " Univ. Prof. Br. at 21 n.17 (quoting Paul S. Milich, *Controversial Science in the Courtroom*, 42 EMORY L.J. 913, 919 (1994)). They neglect to mention, however, Professor Milich's conclusion that juries are "the least scientifically capable component of the trial system." *Id.* at 921. They also overlook Professor Milich's assessment that "[t]he key problem with any soft or lenient approach to the admission of novel and controversial evidence is that it dumps the scientific disputes onto the laps of the jury." *Id.* at 922. But that is precisely what Plaintiffs and their amici advocate here.

The Professors similarly quote Professor Daniel Capra's article in the *Georgia Law Review* for the point that it can be hard for judges to decide what makes good science. Univ. Prof. Br. at 21 n.17 (citing Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699 (1998)). Their brief, however, fails to note Professor Capra's conclusion at the end of his article:

> While it may seem a daunting prospect for trial judges to regulate the work of experts, the task is not really so difficult. The trial judge must simply assess whether the expert came to her conclusion by employing the same methodology that the expert would employ in professional life. This requires more of an explication by the expert than simply a statement that "I relied on my vast experience."

Capra, 32 GA. L. REV. at 781.

As yet another example, the Professors quote a law review article by another group of professors for the proposition that *Daubert* has made "a judge's job intellectually more demanding." Univ. Prof. Br. at 22 (quoting David L. Faigman,

et al., *How Good Is Good Enough*, 50 CASE W. RES. L. REV. 645, 656 (2000)). They neglect to mention, however, that this same article, on both the page before and the page after this quotation, makes clear that these professors "have welcomed the qualitatively new test" found in the *Daubert* trilogy, going so far as to call these rulings by the Supreme Court "good sense" that "should help insure that expert evidence will be more often informative than misleading." Faigman, et al., 50 CASE W. RES. L. REV. at 655 & 657.

Finally, the Professors cite an article by Michael Fenner, again for the point that *Daubert* is difficult. Univ. Prof. Br. at 21 n.17 (citing G. Michael Fenner, *The Daubert Handbook*, 29 CREIGHTON L. REV. 939 (1996)). The Professors, however, fail to note Professor Fenner's assessment in his opening paragraph that "*Daubert* is a pretty good decision." Fenner, 29 CREIGHTON L. REV. at 942. Moreover, the Professors omit Professor Fenner's findings concerning the benefits of pretrial *Daubert* hearings, benefits that extend to "the judge, the jury, the lawyers, the parties, everyone." *Id.* at 957. These benefits include:

- educating the judge in advance of trial "regarding the special vocabulary of the science before the court";
- making resolution of these issues more "cost effective" by addressing them before trial, thus "saving both time and money"; and
- helping to better utilize the jury so that their time is not wasted while these issues are debated and resolved. *Id.*

In point of fact, there are any number of legal requirements that involve expenditures of time, money, and effort by parties and courts, from the hearsay rule to authentication requirements. But that alone is no basis for discontinuing these efforts. As explained by Justice Breyer in *Joiner*:

> [N]either the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the "gatekeeper" duties that the Federal Rules impose — determining, for example, whether particular expert testimony is reliable and "will assist the trier of fact," or whether the "probative value" of testimony is substantially outweighed by risks of prejudice, confusion or waste of time. To the contrary, when law and science intersect, those duties often must be exercised with special care.

Joiner, 522 U.S. at 148 (citations omitted). The Professors provide no basis for overturning the adoption of *Daubert* standards by the Georgia General Assembly. Their efforts to challenge Georgia's expert witness statute should be rejected.[15]

V. CONCLUSION

Plaintiffs and their amici are asking the Court for a truly unprecedented ruling. They assert constitutional violations that have been expressly rejected by the U.S. Supreme Court on grounds that are more limited in Georgia than under

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[15] It is worth nothing that before the adoption of SB3, the Court of Appeals refused to apply *Daubert* on grounds that the General Assembly had not adopted the Federal Rule of Evidence upon which *Daubert* was based. *See, e.g.*, *Home Depot U.S.A., Inc. v. Tvrdeich*, 268 Ga. App. 579, 583 n.9 (2004) ("As we have repeatedly noted, Georgia has not adopted Federal Rule of Evidence 702 or the standards set out in *Daubert*[]. We decline to do so here.") (citations omitted). The suggestion made by Plaintiffs and their amici that this Court should now reject the General Assembly's express effort to do just that is more than a little ironic.

federal law. In so doing, they ignore this Court's prior rulings, particularly this Court's ruling in *Harper*. It has long been the rule in Georgia that trial courts serve an important gate-keeping function when it comes to expert testimony. This Court should uphold the General Assembly's effort to further clarify that role.

Contrary to the contentions of Plaintiffs and their amici, setting clear guidelines for the admissibility of expert testimony is not unconstitutional and would not place an undue burden on the trial courts or deprive litigants of their day in court. Although the trial court's gatekeeping obligation is not without difficulty, the alternative, as noted by the Eleventh Circuit, is "dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999). Indeed, experience has born out that *Daubert* "has greatly improved the quality of the evidence upon which juries base their verdicts." *Rider*, 295 F.3d at 1197.

It is a telling fact that no court in the country has ever struck down a statute like O.C.G.A. § 24-9-67.1 on the grounds asserted here. This Court should not be the first. We respectfully request that the Court reject Plaintiffs' efforts to strike down this rule of evidence.

Respectfully submitted, this 7th day of December, 2007.

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IN THE SUPREME COURT
STATE OF GEORGIA

ARVIN RITCHEY MASON and CLAUDIA MASON,	)	
Appellants	)	
v.	)	CASE NO. S07A1486
THE HOME DEPOT U.S.A., INC. and THE FLECTO COMPANY, INC.	)	
Appellees.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **AMICUS BRIEF OF THE COCA-COLA COMPANY; DELTA AIR LINES, INC.; GEORGIA PACIFIC LLC; GEORGIA POWER COMPANY; MUELLER WATER PRODUCTS, INC.; NEWELL RUBBERMAID INC.; ROLLINS, INC.; AND UNITED PARCEL SERVICE, INC. IN SUPPORT OF APPELLEES** via United States Mail, postage paid and addressed as follows:

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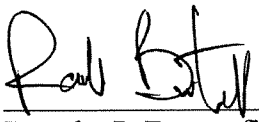

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