Case No. S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM, et al.,

Plaintiffs and Appellants,

vs.

TOYOTA MOTOR CORPORATION, et al.,

Defendants and Respondents.

Second District Court of Appeal No. B247672
Los Angeles County Superior Court
The Honorable Raul A. Sahagun
Civil Case No. VC059206

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

No amicus has supported plaintiffs' call to ban industry-practice evidence. The plaintiffs' bar obviously knows this case exists; Consumer Attorneys of California even filed a letter urging depublication of the Court of Appeal opinion. Consumer Attorneys and other organizations of plaintiffs' lawyers are no strangers to filing amicus briefs in this Court.

The absence of any amicus support for plaintiffs' proposed rule, even from the plaintiffs' bar, underscores a point emphasized by Toyota and its amici. Plaintiffs *and* defendants have long introduced industry practice as probative of the existence (or non-existence) of a design defect. Relying on evidence of industry practice, appellate courts have repeatedly upheld verdicts for plaintiffs *and* defendants. *See* Answer Brief on the Merits (ABOM) 39-44. Plaintiffs' proposal to categorically exclude evidence of industry practice would deprive juries of a useful reference point, long recognized by both plaintiffs and defendants, to assist in evaluating whether a design is defective. It would likewise deprive juries of a valuable reality check on the opinions of paid expert witnesses.

The amicus briefs that *have* been filed reaffirm why industry practice evidence can be admissible, depending on its nature and purpose, and that the trial court did not abuse its discretion in admitting the evidence here. We recognize that the Court has read the amicus briefs; this brief will not repeat their arguments at length. We merely attempt to assist the Court

by explaining how points made by amici relate to some of the parties' arguments.

We cite a given amicus brief by the submitting organization and the brief's page number, referring to the amicus briefs as follows:

"Alliance" is the Alliance of Automobile Manufacturers.

"IADC" is the International Association of Defense Counsel.

"PLAC" is the Product Liability Advisory Council.

"Chamber" is the Chamber of Commerce of the United States.

"CJAC" is the joint brief of the Civil Justice Association of California and California Chamber of Commerce.

We cite the Court of Appeal slip opinion as "Op." and party briefs as "OB" (plaintiffs' opening brief), "ABOM" (Toyota's answer brief on the merits) and "RBOM" (plaintiffs' reply brief on the merits).

II. ARGUMENT

The Court of Appeal held that "evidence of industry custom and practice may be relevant and, in the discretion of the trial court, admissible in a strict products liability action, depending on the nature of the evidence and the purpose for which the party seeking its admission offers the evidence." Opinion ("Op.") 13. It held under this rule that the trial court did not abuse its discretion in denying plaintiffs' motion in limine, and that plaintiffs had not otherwise objected or requested a limiting instruction. Op. 19-25. As Toyota's brief details, the Court of Appeal's substantive and

procedural holdings were correct on this record. Amici's briefs further demonstrate why the Court's holdings make legal and practical sense for the run of cases, and why plaintiffs' contrary arguments are misguided.

A. There Is No One-Size-Fits-All Rule.

As amici demonstrate, the Court of Appeal was right to reject categorical rules either admitting or excluding industry-practice evidence. Relevance and prejudice are discretionary decisions for the trial court based on the nature and purpose of the evidence.

First, the standard of review is deferential: abuse of discretion. PLAC 12-13.

Second, plaintiffs define industry-standard evidence as evidence that everyone in an industry uses a design feature, or that no one in the industry uses it, which they call "industry standard" evidence. OB 28. But as amici point out, plaintiffs concede that evidence meeting that definition is admissible for some purposes. Alliance 7-8; PLAC 2, 8-9, 14-15; Chamber 4. Plaintiffs acknowledged in the trial court that admissibility depended on the purpose for which the evidence was offered. Op. 19, 24; ABOM 5-6, 23. The Court of Appeal provided specific examples of purposes for which such evidence is and is not admissible. CJAC 17-18[1].

[1] Toyota disagrees with the Court of Appeal's statement that the evidence here was inadmissible for certain particular purposes. ABOM 33-34, 34-35; *see* Op. 18-19. But it agrees that industry-standard evidence is not

Third, plaintiffs' proposal is brazenly one-sided. Plaintiffs try to characterize evidence comparing the defendant's design with competitors' as inadmissible "industry custom" when it tends to show no defect and admissible probative evidence when it tends to show a defect. Thus, they claim that evidence of competitors' practices is admissible when it bears on the risk/benefit factors in ways that favor plaintiffs (such as showing that a feature was *technically* feasible) but inadmissible when it bears on the *Barker* risk/benefit factors in ways that favor defendants (such as showing that consumers did not want the feature, making the feature an adverse consequence to the consumer and making the feature *economically* infeasible). Alliance 7-8, 12-13; PLAC 13-17; IADC 12-13; Chamber 4; *see Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431 (enumerating non-exclusive factors). In this very case, plaintiffs contended that evidence that competitors did not have ESC was *admissible* under the risk/benefit test to support plaintiffs' claim that the Tundra was defective, but that it was *inadmissible* to support Toyota's claim that it was not. Alliance 7-8; *see* ABOM 5-6, 23; Op. 3-4 & n.3. Plaintiffs contended that it was admissible to support their claim "under the risk benefit doctrine" *before* their motion in limine was denied. ABOM 25; RT-II-310-11.

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categorically *admissible* regardless of purpose any more than it is categorically *inadmissible* regardless of purpose.

B. Evidence That No Competing Pickup Had ESC Was Relevant to the *Barker* Risk/Benefit Factors.

The Court of Appeal explained that evidence that no competing pickup offered ESC was relevant to several issues raised by this record, at the behest of both plaintiffs and Toyota. Op. 18-25. Toyota's brief details numerous additional issues to which it was relevant. ABOM 28-39. Plaintiffs do not dispute the evidence's relevance to support their own defect claim; that relevance by itself is sufficient to support the trial court's relevance determination. Plaintiffs nevertheless contend that it was not relevant for certain other purposes. Amici demonstrate some of the reasons why plaintiffs are incorrect

For example, evidence that no competitor offered ESC tended to corroborate Lobenstein's testimony that the overwhelming majority of pickup consumers did not want ESC and they were very price-sensitive, and the evidence that ESC would add hundreds of dollars to the price. ABOM 31-32. Plaintiffs try to get around that by asserting the jury should not be able to consider such consumer preference under the risk/benefit test, unless the consumers' preference reflects actual weighing of the risks and benefits. RBOM 5, 10. As amici explain, this proposal ignores extensive case law holding that consumer willingness to buy the proposed alternative design is a crucial consideration under the risk/benefit test, and sound policy reasons why it should be admissible. Alliance 12-18 (citing

California case law, out-of-state case law, Restatement, and law reviews); IADC 8-12 (explaining law and policy); Chamber 14-15; PLAC 20-21.

As amici explain, plaintiffs' proposal defies the *Barker* test itself. The *Barker* factors include adverse consequences to the consumer and the product. *Barker,* 20 Cal.3d at 431. Thus the "benefits" of a design include consumer satisfaction. Alliance 15-16; IADC 8-9. Plaintiffs' proposal would thus impermissibly elevate some *Barker* factors (bearing on relative safety of the existing and alternative designs) over others (consequences to the consumer and the product).

Similarly, evidence that no other pickup truck had ESC was relevant to disprove plaintiffs' assertions about gravity and likelihood of harm. It would be surprising that no other manufacturer offered ESC on pickups if – as plaintiffs claimed—trucks have significant controllability problems, ESC is inexpensive and effective at resolving them, and consumers are not price-sensitive and not opposed to it. ABOM 33. Plaintiffs try to suggest the evidence was not relevant to feasibility and cost-effectiveness because feasibility and cost-effectiveness are supposedly not disputed. OB 32-33; RBOM 1. But as amici point out, they are disputed. As a matter of *engineering* feasibility, Toyota could and did put ESC on the 2005 Tundra as an available option, but as a matter of *consumer preference* and *price,* Toyota's evidence was that making it standard was not feasible. Feasibility under *Barker* includes such *economic* feasibility. Alliance 13-14; PLAC

16-18.

Amici also demonstrate that many of plaintiffs' other contentions go not to the admissibility of industry practice, but to its weight. Thus plaintiffs say industry practice should not trump "direct" evidence of risks and benefits. RBOM 12; *see id.* 2. But there is no legal difference between direct and indirect evidence. The jury decides which to believe. Alliance 8-12; PLAC 18-19, 21-22. And even if direct evidence is better, indirect evidence can be important in corroborating it. PLAC 18-19. Similarly, plaintiffs say industry practice might be due to inertia instead of conscious judgment, so it does not necessarily show how engineers have weighed costs and benefits. RBOM 1. But evidence is relevant as long as one *permissible* inference is relevant, even if another permissible inference would not be. The jury decides which inference to draw. Alliance 10-11. As to ESC, there is certainly a permissible inference that engineers at competitors weighed the costs and benefits of ESC. Alliance 11. ESC was a known technology that had been installed for years on other vehicles such as sedans, and plaintiffs' own theory was that a competitor – Ford – had previously intended to roll ESC out on pickups. ABOM 6-8. And plaintiffs' argument would not in any event support a categorical prohibition on industry-standard evidence in all cases. They make no effort to show that no evidence in any case could ever justify an inference that competitors' engineers had weighed the costs and benefits.

Similarly, the Court of Appeal explained that the reasons for phasing in ESC were relevant to the risk/utility analysis, and that Toyota's two questions eliciting that no other full-size pickup offered ESC might be relevant to the desirability of the phase-in. Op. 19, 24 n.10; ABOM 19-20, 32. Amici explain the utility of phase-ins in industry generally, and how industry practice plays in. They detail the utility of phasing in new technology, the unfairness and impairment of innovation that would result if manufacturers were held liable for not instantly installing a new technology on low-cost vehicles as soon as it is available on more expensive vehicles, and how evidence of industry practice is relevant to help jurors understand the state of the phase-in and why a phase-in made sense. Alliance 6, 13, 22-29; Chamber 9, 13-17. Amici's explanation finds ample support in this record. Explaining why ESC was phased in on pickups later than some other vehicles, Toyota's expert Carr explained that because pickups often have 4-wheel drive and must drive on multiple surfaces such as dirt and gravel, it is a "far more complex task" to design ESC for pickups than for cars and other vehicles that drive on a single surface. RT-IX-3674-77.

Amici also explain how other risk/utility jurisdictions address industry custom and how their holdings fit with California law. Most jurisdictions and the Third Restatement, which adopts the risk/utility test, hold that industry practice is admissible in strict-liability design-defect

cases. ABOM 35-37. As amici detail, other risk/utility jurisdictions admit industry-practice evidence. PLAC 10 n.2, 10-12 (citing numerous cases); Chamber 6-7; CJAC 13-14.

Plaintiffs acknowledge that many out-of-state cases hold industry practice admissible. Plaintiffs claim these cases are off point because they hold industry practice relevant to whether the design is *unreasonably* dangerous, and unreasonable danger is not part of the legal definition of design defect in California. OB 37 (citing *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121); RBOM 15-16. But as amici explain, saying that industry practice goes partly to reasonableness does not make it inadmissible. Industry practice is already relevant because it bears on specific *Barker* factors, as already described above and in Toyota's answer brief on the merits. ABOM 28-39. It is relevant *in addition* because it goes to overall reasonableness. California's risk/utility balancing seeks to achieve "*reasonable* and practical safety." IADC 6-7 (quoting *Barker,* 20 Cal.3d at 434; emphasis added; further citation omitted); IADC 19-20; Chamber 10-12; CJAC 14; ABOM 58-59.

C. Plaintiffs' Proffered Policy Arguments Do Not Support Categorically Excluding Industry Custom.

Amici also debunk plaintiffs' proffered policy reasons for excluding industry practice evidence. Of course, Evidence Code section 351 abolishes all limitations on admissibility of relevant evidence except those

based on a statute. Thus it does not allow courts to exclude relevant evidence based on non-statutory policy. ABOM 49-51. Even beyond section 351, however, amici demonstrate the fallacy of plaintiffs' policy arguments. They demonstrate that if anything, sound policy dictates that trial courts have discretion to admit industry practice – whether it tends to support the contentions of plaintiffs or defendants.

For example, plaintiffs say that allowing evidence of industry custom "invites a race to the bottom" and "encourag[es] the status quo in safety." RBOM 9; OB 32. This assertion does not withstand scrutiny, as amici point out. First, manufacturers have many incentives to adopt safety devices. Consumers prefer safer products, so manufacturers compete on safety. Alliance 23-24, 27-28; *see* PLAC 20-21; CJAC 5. This is not just theory. It demonstrably happens in the marketplace, as amicus Alliance of Automobile Manufacturers explains. Consumer websites and product reviews emphasize safety. Alliance 23-25. The automobile industry has seen a wave of safety innovations in the recent past, from backup cameras to collision-avoidance systems. Alliance 26-28. None of these were required by law when manufacturers started incorporating them into vehicles. To the contrary, the federal auto-safety regulator, NHTSA estimates that "due purely to market forces," almost three-quarters of new vehicles sold by 2018 will have backup cameras. Alliance 27.

Second, obviously the ability to introduce industry-practice evidence

does *not* deter adoption of safety technologies. These technologies are proliferating when most jurisdictions *allow* industry-practice evidence. *See* PLAC 10 n.2, 10-12 (citing numerous cases); Chamber 6-7; CJAC 13-14.

Third, a manufacturer would act at its peril in omitting safety features and planning to rely on industry practice if sued. Industry practice is not a complete defense. It is merely a fact for the jury to consider, along with all the other risk/benefit evidence. Alliance 22-23.

Plaintiffs have it backwards, as amici demonstrate. Plaintiffs' proposal to categorically exclude industry practice would *harm* safety to the extent manufacturers are driven by liability considerations. Consider a manufacturer that has a promising safety feature. Once it rolls the safety feature out on one model, plaintiffs can try to use that fact to show that it could and should have used it on their model too. Plaintiffs here did just that, contending that Toyota could and should have made ESC standard on pickups since it made ESC standard on SUVs. ABOM 5-6, 6-7, 25, 31-32, 57; Op.-19. The manufacturer would likely respond that the risk/utility balance is different for the model that had not received the safety feature (for example, it is an economy model and the feature is expensive). This defense is strongly corroborated if other manufacturers have phased the feature into their comparable models in the same order. But plaintiffs' proposed rule would bar such corroborating evidence. To avoid the "you made it standard on SUVs so you should have made it standard it on

pickups" type theory, a manufacturer concerned solely with minimizing liability would be better off *waiting* to introduce the safety feature on any product until it had perfected the feature for all products. Chamber 14-16; Alliance 26. In short: Even if manufacturers were driven solely by liability concerns (they are not), categorically barring industry-practice evidence would *disserve* safety in the very type of claim brought by plaintiffs here.

Amici also make clear that industry custom is consistent with the goals of strict products liability. Plaintiffs claim that industry custom undermines burden-shifting. OB 33-34. It does not. Under the risk/benefit test, once plaintiff proves the design caused her harm, defendant has the burden to show that the design's benefits outweigh its risks. *Barker,* 20 Cal.3d at 431-32. Industry custom will not generally be sufficient to carry the defendant's burden. The risks and benefits do not ordinarily change whether one manufacturer adopts (or omits) a design or the whole industry does. IADC 14-16.

Industry-practice evidence is also consistent with the loss-spreading and accident-reduction rationales for strict liability. Neither policy requires rules that increase plaintiffs' chances of winning simply because any plaintiffs' verdict in some sense spreads the loss to manufacturers. CJAC 15-16. Nor does industry-practice evidence inevitably help the defense. As Toyota and amici have detailed, industry-practice evidence often helps *plaintiffs*, and has been responsible for affirming many plaintiffs' verdicts.

ABOM 39-44; *see* CJAC 14; IADC 16-17.

III. CONCLUSION

The Court should affirm.

Dated: November 17, 2016

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 2,776 words, as counted by the Microsoft Word 2010 software used to generate it.

Dated: November 17, 2016

Robert A. Brundage

CERTIFICATION OF SERVICE

I, Jennifer Gray, certify and declare as follows:

I am a citizen of the United States and a resident of the State of California. I am over eighteen years of age, not a party to this action, and am employed in San Francisco County, California at One Market Street, Spear Tower, San Francisco, California 94105. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited that same day in the ordinary course of business.

On November 17, 2016, I served the following document via U.S. Mail on the parties set forth below:

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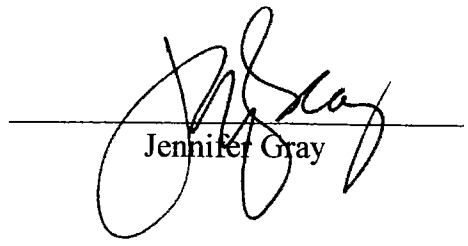
I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed on November 17, 2016, at San Francisco, California.



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