S232754

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM et al.,
Plaintiffs and Appellants,

v.

TOYOTA MOTOR CORPORATION et al.,
Defendants and Respondents.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN • CASE NO. B247672

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF RESPONDENTS TOYOTA MOTOR CORPORATION ET AL.

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
*JOHN A. TAYLOR, JR. (BAR NO. 129333)
EMILY V. CUATTO (BAR NO. 260394)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
lperrochet@horvitzlevy.com
jtaylor@horvitzlevy.com
ecuatto@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
ALLIANCE OF AUTOMOBILE MANUFACTURERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM JAE KIM et al.,
Plaintiffs and Appellants,

v.

TOYOTA MOTOR CORPORATION et al.,
Defendants and Respondents.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN • CASE NO. B247672

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF RESPONDENTS TOYOTA MOTOR CORPORATION ET AL.

Pursuant to California Rules of Court, rule 8.520(f), the Alliance of Automobile Manufacturers (the Alliance) respectfully requests permission to file the attached amicus curiae brief in support of respondents Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Toyota Motor North America, Inc., Toyota Motor Engineering & Manufacturing North America, Inc., and Power Toyota Cerritos.

The Alliance is a nonprofit automotive trade association formed in 1999. Its members account for approximately 77 percent of all car and light truck sales in the United States, and include BMW of North America, LLC; FCA US LLC (comprising the Chrysler and Fiat companies); Ford Motor Company; General Motors Company; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motor Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota North America, Inc.; Volkswagen Group of America, Inc.; and Volvo Cars North America, LLC.

The Alliance's members are routinely subject to products liability litigation in California. Accordingly, the Alliance has an interest in the development of California's product liability jurisprudence, including whether evidence of industry custom and practice is admissible in evaluating plaintiffs' strict liability claims for product defect. Because the context for deciding that question here involves automotive technology, the Alliance can offer a unique perspective based on the collective experience of its membership, which should be helpful to this Court in resolving that question.

Accordingly, the Alliance respectfully requests that this Court accept and file the attached amicus curiae brief.

October 5, 2016

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN A. TAYLOR, JR.
EMILY V. CUATTO

By: _____
John A. Taylor, Jr.

Attorneys for Amicus Curiae
ALLIANCE OF AUTOMOBILE MANUFACTURERS

AMICUS CURIAE BRIEF

INTRODUCTION

If a plaintiff claims that a product was defective because it did or did not incorporate certain design features, one might naturally wonder, how do other manufacturers design their products? Do they include those features? Are there competing pros and cons? In their merits briefing, plaintiffs here argue that plaintiffs in design defect cases should be allowed to offer answers to the jury regarding these questions when the answers favor plaintiffs, but defendant manufacturers like Toyota should be precluded from presenting precisely the same evidence of industry custom and practice. In this amicus brief, the Alliance explains why evidence of industry custom and practice should be admissible when used by *either* side in connection with the risk/benefit design defect analysis outlined by this Court in *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432 (*Barker*).

As will be shown, plaintiffs' argument rests on the fallacy that evidence of industry custom should be admissible only when there is *direct* evidence of risk/benefit balancing by other manufacturers who omitted or included a design feature from their own products, and *not* when offered by defendants to indirectly support the same proposition. Plaintiffs' argument violates the bedrock principle, on which every California jury is instructed, that there is no legal difference between direct and indirect evidence. Juries may rely on

an inference arising out of indirect evidence, and reject direct evidence on the same point, or do the opposite.

Plaintiffs' argument also reveals a blatant double standard. Plaintiffs would allow custom and practice evidence of other manufacturers' designs if it indirectly shows that the defendant manufacturer departed from what some other manufacturers have done, to support an inference that a different design was, on balance, better overall. But they would not allow a defendant to introduce the same class of evidence to show the defendant followed a custom and practice, to support the fair inference that industry testing and experience confirm the design was a good one when all costs and benefits to consumers are weighed.

Plaintiffs' position further ignores that the type of industry custom evidence at issue here is helpful to jurors in evaluating consumer preferences, which are directly relevant as one factor under *Barker's* risk/benefit design defect test. The jurors were required to evaluate whether, as plaintiffs argue, defendant's 2005 pickup truck was defective for failure to require that all consumers purchase electronic stability control (ESC) with their vehicles. Plaintiffs would conceal from jurors evidence strongly corroborating that purchasers in that time frame rejected ESC as a desired option—something that manufacturers were entitled to consider in designing their vehicles.

Plaintiffs concede that whether a product is defective should be judged as of the time of its manufacture. But the exclusion of industry custom at the time of manufacturer would hinder juries from making an even-handed determination of that issue due to the

well-documented phenomenon of hindsight bias. It's only natural for jurors to think that what is generally understood and what is generally done at the time of trial should have similarly been understood and done previously, even many years earlier. But technologies and consumer preferences evolve, and experience with a design feature can confirm or rebut risks and benefits that initially are sketched out on the drawing board or tested only with dummies and computers. Manufacturers thus inevitably phase in new features—including safety features—over time. Jurors should be entitled to consider such evidence, without being under the misperception that—for example—a feature ubiquitous at the time of trial should immediately have been included as a required feature on all cars the moment it was technologically feasible.

Finally, to shore up their proposed exclusion of industry custom evidence in product defect cases, plaintiffs argue that its consideration would result in a "race to the bottom" by manufacturers whose goal would be to produce and sell vehicles incorporating no more safety features than minimally necessary, as measured by competitors' designs. But competition, consumer preference, and corporate responsibility all drive the development of safety innovations. There's no evidence that admitting evidence of industry custom in product liability litigation will impede such innovations. On the contrary, for reasons explained below, plaintiffs' proposed approach is more likely to stifle innovation than promote it, to consumers' ultimate detriment.

LEGAL ARGUMENT

I. THE ONE-WAY EVIDENTIARY RULE URGED BY PLAINTIFFS WOULD UNFAIRLY ALLOW INDUSTRY CUSTOM AND PRACTICE EVIDENCE TO PROVE A PRODUCT IS UNREASONABLY DANGEROUS, BUT NOT THAT IT'S REASONABLY SAFE.

A. Both sides in a design defect case should be entitled to present evidence of industry custom and practice.

In *Barker*, *supra*, 20 Cal.3d at page 432, this Court held that a product may be found defective in design if the product's design proximately caused injury and "on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." In evaluating the adequacy of a product's design under this test, "a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Id.* at p. 431.)

Plaintiffs concede that evidence of industry custom and practice can be relevant to these factors, but only when it is used by a plaintiff to prove the existence of a product defect, rather than by a defendant to show its absence. (See RBOM 13 [arguing "evidence of competing models which embody alternative designs" should be

admissible, while evidence that no competing model embodies the alternative design should be excluded].)

Plaintiffs' one-way approach to the handling of industry custom and practice evidence is carefully crafted. They attempt to justify their own presentation of such evidence at trial to assert that Toyota had no good reason for not making ESC standard on all its pickups in 2005, while simultaneously arguing on appeal that Toyota should have been precluded from defending itself based on the very same evidence.

Plaintiffs thus argue the *risk* side of the risk/benefit analysis by focusing exclusively on harms that might befall if a feature is omitted from a product, without acknowledging defendants' right to present evidence on the *benefit* side regarding industry practice that accounts for consumers' preferred experience and cost considerations. Such a "heads I win/tails you lose" approach is obviously unfair.

B. Plaintiffs' approach violates the rule that direct and indirect evidence are equally relevant and admissible.

Plaintiffs argue that evidence of "established technical standards" and "specific instances involving alternative designs" are "direct evidence of true *Barker* factors" that is admissible at plaintiffs' urging, and "[f]ailure to comply with minimal technical standards is especially probative of design deficiency." (OBOM 2, 22, fn. omitted; see also OBOM 31.) But according to plaintiffs, "only the details of design experience, and not the bare fact that a

design has or has not been implemented in the industry," should be admissible in support of the defense. (OBOM 27-28.) As we now explain, plaintiffs' carve-out allowing defendants to admit only "direct" evidence of design experience details finds no support in the law.

Under California law, both direct and indirect evidence of a fact is relevant and probative. The California Law Revision Commission's comments to the Evidence Code state that "under [Evidence Code] Section 210, 'relevant evidence' includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred." (Evidence Code With Official Comments (Aug. 1965) 7 Cal. Law Revision Com. Rep. (1965) p. 1034 <http://www.clrc.ca.gov/pub/Printed-Reports/Pub064.pdf>.)

Consequently, juries are commonly instructed that "[a]s far as the law is concerned, it makes no difference whether evidence is direct or indirect." (CACI No. 202.) "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. [Citations.] Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 ; see also *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110 ["circumstantial evidence can provide the sole basis for a verdict and, in such a case, can meet the substantial evidence test on appeal"].)

Plaintiffs nonetheless argue that industry custom evidence is admissible only when it is in the form of *direct* evidence that other manufacturers have actually weighed the costs and benefits of implementing a safety feature. (See, e.g., OBOM 27-28 ["only the details of design experience, and not the bare fact that a design has or has not been implemented in the industry, will enhance the jury's ability to weigh risks and benefits"]; RBOM 12 [arguing that industry-standard evidence should not be allowed to "undermine *direct actual evidence* of feasibility and cost effectiveness" of a safety feature because it invites "conjecture" by the jury about whether the failure to offer the product is due to "lack of feasibility or consumer rejection" (emphasis omitted)]; RBOM 17 ["evidence of *actual* [risk/benefit] balancing and the reason therefore are unobjectionable" (emphasis added)]; RBOM 17 [industry custom evidence should be admissible only when there is direct evidence that it "was the result of experience or a deliberative process"].)

Conversely, plaintiffs argue that defendants should *not* be able to rely on any "inference that the fact that nobody in the industry has adopted a given safety feature is the result of industry experience" or "that the industry has based its custom on a weighing of risks and benefits." (RBOM 1.) According to plaintiffs, "in truth" such evidence "may reflect nothing more than industry inertia" or that "the manufacturer felt no competitive pressure to adopt the design." (*Ibid.*)

But the fact that competing inferences can be drawn from indirect evidence does not make such evidence inadmissible: "Evidence is relevant if one reasonable inference from it is

relevant . . . even if other reasonable but nonrelevant inferences are more compelling." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2016) § 21.18.)

Here, one reasonable (indeed, most logical) inference is that no manufacturer other than Toyota offered ESC because, balancing all the pros and cons of implementing the design at that time, using the then-available technology, and the contemporaneous interests of consumers, the manufacturers concluded the balance favored that decision. Perhaps plaintiffs' "inertia" inference is also reasonable, if one assumes manufacturers in the highly competitive automotive industry essentially forgot to keep striving to produce the most marketable product. The proper approach in such a situation is to admit the evidence and let the jury determine what inferences should be drawn after considering argument from counsel and appropriate limiting instructions from the court. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 (*Howard*) ["evidence of compliance with industry standards, while not a complete defense, is not 'irrelevant,' but instead properly should be taken into account through expert testimony as part of the design defect balancing process"].)

Plaintiffs further argue that they should not be required to "assume the burden of disproving the merits of industry practice and standards" in order to rebut an inference arising out of industry practice. (OBOM 34.) But when a plaintiff attempts to establish strict liability based on evidence that an omitted safety feature was incorporated in a competing product, they are likewise relying on the inference that the continued *inclusion* of the feature followed an

actual weighing of the risk/benefit factors by another manufacturer. And yet plaintiffs expect defendants to rebut that inference—which is precisely why it is important for defendants to be able to point to indirect evidence about industry custom that raises a contrary inference.

C. Industry custom and practice reflecting consumer acceptance of a design feature is relevant to the wide category of factors to be considered in a risk/benefit analysis under *Barker*.

Even if there were some basis for excluding all but direct evidence relevant to the *Barker* risk/benefit analysis, the type of industry custom and practice at issue here would be admissible, because it *is* directly relevant to appropriate risk/benefit factors—consumer demand, choice, and acceptance, based on affordability and other considerations. Plaintiffs argue that consumer acceptance or rejection of a design "is entitled to no weight at all" unless it reflects the actual weighing by consumers "of the decreased danger against the increased costs" of that design. (RBOM 5, 10.) But because consumer acceptance is an *independent* factor in the risk/benefit analysis, it should be considered regardless whether consumer demand (or lack thereof) reflects consumers' explicit weighing of safety risks and costs.

In *Barker*, this Court articulated a list of risk/benefit factors, including "the financial cost of an improved design" and "adverse consequences . . . to the consumer that would result from an

alternative design." (*Barker*, *supra*, 20 Cal.3d at p. 431; see ABOM 29.) Thus, it is important for juries to hear evidence inferentially showing, for example, that implementing for all cars a technology that is initially marketable only in the luxury vehicle class (e.g., autonomous emergency braking and other collision avoidance technology) could eliminate "economy" from the economy car price range, rendering that vehicle class far less marketable and depriving consumers of lower cost options. Consistent with that common sense fact, we have all seen the progression of technologies from specialty class vehicles to mainstream economy cars—such as certain hands-free blue tooth technology, air bags (and eventually side or curtain air bags), and so forth. Because adverse consequences to the consumer are an express *Barker* factor, this Court should not endorse an evidentiary rule driven by plaintiffs' apparent notion that a safety technology made available in one car *must* be included in all, regardless of consumers' desire to choose among products based on their individual price point and other values.

Courts have similarly held that consumer acceptance should be considered in the risk/benefit analysis because it is relevant to "feasibility," a factor expressly listed in *Barker*: a design feature might be *technologically* feasible and yet not be *economically* feasible if consumers will resist purchasing a product incorporating that feature. (See *Glover v. BIC Corp.* (9th Cir. 1993) 6 F.3d 1318, 1331 ["the evidence must show that the suggested alternative is 'not only feasible but also practicable in terms of cost and the over-all design and operation of the product' "]; *Rix v. General Motors Corp.*

(Mont. 1986) 723 P.2d 195, 202 [risk/benefit balancing should consider the "relative costs both to the manufacturer and the consumer of producing, distributing and selling the original product as compared to the product with the alternative design"]; Owen, *Design Defects* (2008) 73 Mo. L.Rev. 291, 331 ["Feasibility requires at least technological capability, but it normally is viewed more broadly to include cost, commercial practicability (including practicable availability of materials and components), and even *the likelihood of consumer acceptance*" (emphasis added)].)

Moreover, while *Barker* identified several factors (including those described above) that were applicable in the context of that case, this Court described the listed considerations as being "among other relevant factors"—clearly indicating that the list in *Barker* was non-exhaustive. (*Barker*, *supra*, 20 Cal.3d at p. 432.) Thus, CACI No. 1204, in addition to instructing juries to consider the factors specifically listed in *Barker*, includes "[(f) [*Other relevant factor(s).*]"—to be inserted in the standard instruction as appropriate.

Among the additional factors to be considered beyond those listed in *Barker* are the "aesthetics" of a product, when "there is evidence that appearance is important in the marketability of the product." (Directions for Use to CACI No. 1204 (2016) p. 659.) As the court held in *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131, "much of the perceived benefit of a car lies in its appearance. . . . We believe that a jury properly may consider aesthetics in balancing the benefits of

a challenged design against the risk of danger inherent in the design."

The aesthetic characteristic of a product insofar as appearance affects its marketability is just one variation of consumer acceptance in the risk/benefit analysis. As explained in the latest Restatement of Torts, "a plaintiff must introduce evidence from which the jury can find not only that the proposed alternative would have afforded greater safety, but also that it would not have substantially impaired the function, utility, economy, convenience, *and other features that drive consumer demand for and acceptance of the product.*" (Rest.3d Torts, Products Liability (1998) § 2, com. f, emphasis added; see also Knaier, *Are Cigarettes Defective in Design? California and New York Diverge in Approach and Result* (2009) N.Y. St. B.J., 10, 15 ["in some circumstances, 'consumer acceptance' is a crucial factor to consider in evaluating whether a proposed alternative design unacceptably sacrifices *utility*"]; see *Goodner v. Hyundai Motor Co., Ltd.* (5th Cir. 2011) 650 F.3d 1034, 1041 ["consumer preference is a consideration in the risk-utility analysis"].)

Put another way, consumers may legitimately decide that an uncomfortable or unattractive design is unacceptable, even if the design is marginally safer *and costs no more to make.* (See Rest.3d Torts, Products Liability (1998) § 2, com. f ["[A]n alternative design may impose significant nonmonetary costs on product users and consumers. It may deprive a product of important features which make it desirable and attractive to many users and consumers."].) Broadly speaking, the "benefits" of some designs may be aesthetic or

ergonomic, or otherwise reflect consumers' desire to have choices among products, even when those choices negatively implicate safety concerns. (Ultra-lightweight motorcycle helmets come to mind.)

That is why plaintiffs here are wrong to grant "no weight at all" to such factors absent affirmative evidence that consumers consciously engaged in a cost-to-risk ratio analysis. Defendants must have the chance to introduce all evidence—including industry custom—bearing directly or indirectly on the question of consumer acceptance. (See, e.g., *Singleton v. International Harvester Co.* (4th Cir. 1981) 685 F.2d 112, 115 [regarding the jury issue of liability for defective design, the evidence should show "the chances for consumer acceptance" of the alternative design].) For at least some drivers, the ESC feature at issue in this case detrimentally affects utility because it impinges on a skilled driver's direct control of the vehicle, especially during critical situations or aggressive driving. (Fed. Motor Veh. Safety Standards: Electronic Stability Control, 72 Fed.Reg. 17236, 17250 (Apr. 6, 2007) [noting consumer objections to proposal by the National Highway Traffic Safety Administration (NHTSA) requiring ESC on various vehicles based on consumer "concerns that it inappropriately may wrest vehicle control from the driver during critical situations"]; *Tough Crowd: Four Countries, 12 Sports Cars, One Winner,* MotorTrend <https://goo.gl/ZK51oY> [as of Sept. 22, 2016] [expressing car reviewer's frustration and indignation with ESC until it was deactivated: " 'I was bored 10 minutes into driving it on the street' "].)

But even if an alternative design does not severely restrict a product's utility, "it still may not be sufficient for defective-design liability if it overly restricts consumer choice." (*Hernandez v. Tokai Corp.* (Tex. 1999) 2 S.W.3d 251, 259.) In *Hernandez*, the defendant made lighters with and without child-resistant devices, and the court held that "[w]hether adult users of lighters should be deprived of this choice of product design because of the risk that some children will obtain lighters that are not child-resistant and cause harm is the proper focus of the common-law risk-utility test" because "[c]onsumer preference . . . is one consideration" in that test. (*Id.* at p. 260; see also *Flock v. Scripto-Tokai Corp.* (5th Cir. 2003) 319 F.3d 231, 242 ("the risk and harm . . . factors should be weighed by the finder of fact against the consumer's preference for non-child resistant utility lighters"].)

Here, the evidence established that pickup purchasers are quite price sensitive and that the ESC option added $300 to $350 per vehicle. (ABOM 11.) Independent surveys showed that less than 15 percent wanted ESC *even at no additional cost.* (*Ibid.*; see OBOM 13.) In fact, when ESC was offered as an option in 2005 on the Tundra model at issue here, less than five percent of purchasers chose it. (OBOM 12.) Plaintiffs' position would deprive consumers of the choice—based on cost, utility or subjective driving experience preferences—to forego a safety design feature. (See ABOM 12 [citing testimony that ESC cannot counteract most loss of control].)

To sum up, industry custom and practice evidence of the type at issue here is admissible in design defect litigation because it is directly relevant to several of the factors a jury must consider in the

Barker risk/benefit analysis—including the financial cost, adverse consequences to the consumer, feasibility, and consumer acceptance of an alternative design.

II. CONSIDERATION OF INDUSTRY CUSTOM AND PRACTICE IS NECESSARY TO AVOID THE UNFAIR PREJUDICE OF HINDSIGHT BIAS.

Jurors in a design defect case are more likely to make a well-reasoned decision if industry custom and practice information is available to them. Juries cannot as intelligently weigh the contemporaneous risks and benefits of a design without knowing what others who design similar products were doing at the time the product in question was manufactured and marketed. For example, it would be unfair to impose liability in a 2012 trial based on failure to include particular technology in a 2005 vehicle that was unavailable, infeasible, or just being phased in at that time. Indeed, plaintiffs concede here that the role of the jury was to evaluate Toyota's "design decisions *based upon the technology available in 2005*." (RBOM 9, emphasis added.)

In *Chavez v. City of Los Angeles* (2010) 47 Cal. 4th 970, this Court expressed concern about the danger of "hindsight bias" on the part of factfinders, warning trial courts when determining FEHA attorney fee motions to "exercise caution to avoid 'hindsight bias,' which is the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred." (*Id.* at pp. 986-987; see also *KSR Intern. Co. v. Teleflex Inc.* (2007)

550 U.S. 398, 421 [127 S.Ct. 1727, 167 L.Ed.2d 705] ["A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning"]; *Cain v. Rijken* (1986) 300 Or. 706, 720 [717 P.2d 140, 149] [noting risk of "hindsight's 20/20 vision," and holding "[p]roof aided by hindsight" was insufficient to establish liability]; *Monroe Auto Equipment Co. v. Heckethorn Mfg. & Sup. Co.* (6th Cir. 1964) 332 F.2d 406, 412.) ["Many things may seem obvious after they have been made, and for this reason courts should guard against slipping into use of hindsight."].)

Concerns regarding hindsight bias in litigation are well-founded, and backed up with research by cognitive psychologists, who "have demonstrated repeatedly that people overstate the predictability of past events." (Rachlinski, *A Positive Psychological Theory of Judging in Hindsight* (1998) 65 U. Chi. L.Rev. 571 (hereafter Rachlinski).) One such researcher, Baruch Fischoff, described the phenomenon as follows:

> In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared 'relatively inevitable' before it happened. People believe that others should have been able to anticipate events much better than was actually the case.

(*Ibid.*, citing Fischhoff, *Hindsight ≠ Foresight: the effect of outcome knowledge on judgment under uncertainty* (1975) 1 J. Exp. Psych. 288.) Fischoff's studies showed that providing subjects with the actual outcome of a scenario with multiple possible outcomes increased their estimates of the likelihood of that outcome by up to

44 percent, even though he asked them to judge the predictability of past events as if they did not know the actual outcome. (Rachlinski, at pp. 571-572.)

Specific to the context of litigation, two studies "demonstrate explicitly that [hindsight] bias causes people to hold decisionmakers legally liable for outcomes that they could not have predicted." (Rachlinski, *supra,* 65 U. Chi. L.Rev. at p. 588.) According to two other studies, "even state and federal judges are susceptible to the bias." (*Id.* at p. 580.) "The bias seems to produce unjust results; it ensures that potential defendants cannot rely on the legal standard to avoid liability" because "[h]indsight, in effect, raises the bar after an accident." (*Id.* at p. 600.)

Evidence regarding industry custom and practice *at the time the vehicle was manufactured* is therefore relevant and important to combat hindsight bias on the part of the jury in design defect cases, where jurors are called upon to perform the risk/benefit analysis based on state of the art at that time and not at the time of trial. This poses a particular challenge where the vehicles jurors are currently driving—in the present case, almost a decade later—have technologies that were unavailable, rare, more expensive, or less developed at the relevant time.

Once every new vehicle has a particular feature, hindsight bias will make it more difficult for jurors to assess the risks and benefits of a technology that was only first available in limited numbers. In a product defect case, a jury should be informed of industry practice at the time of the vehicle's manufacture, to help

guard against hindsight bias and more accurately assess whether the vehicle was defective.

Modern vehicle standards and technologies are analogous to post-accident remedial measures. This Court held in *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 119, that the exclusionary rule of Evidence Code section 1151, under which evidence of remedial repairs is inadmissible to prove negligence or culpable conduct, does not apply in strict liability cases. Subsequently, in *Magnante v. Pettibone-Wood Manufacturing Co.* (1986) 183 Cal.App.3d 764, one Court of Appeal extended that rule to permit the admission of evidence in strict liability actions of post-accident design modifications made by *non*parties in strict products liability actions. Thus, even when jurors are not already aware from personal experience of updated designs, that evidence will come in at plaintiff's election. Without the balance of information from the defense regarding industry custom and practice at the time the allegedly defective product was manufactured, the consideration of evidence of post-accident modifications by other manufacturers would add to the risk of hindsight bias on the part of juries.[1]

In short, because juries are called upon to determine whether a product was defective at the time of manufacture, they should be informed of industry custom and practice at that time, to mitigate the phenomenon of hindsight bias.

---

[1] Here, to combat hindsight bias, Toyota was able to remind the jury that ESC was not required as standard equipment until 2013, and argue that the jury should not accept the argument that it should " 'force standard [ESC] on all vehicles back in [the] 2004/2005 time period.' " (OBOM 17.)

III. ADMISSION OF INDUSTRY CUSTOM AND PRACTICE IN PRODUCT LIABILITY LITIGATION WILL PROMOTE RATHER THAN STIFLE SAFETY INNOVATION.

Plaintiffs assert that evidence of industry custom and practice should be inadmissible in product defect cases for public policy reasons because it "invites a race to the bottom and undermines the product improvement objective of products liability law." (RBOM 9.) Plaintiffs argue further that if juries are permitted to consider industry custom and practice during the cost/benefit analysis, all manufacturers will do no more than what others are doing, stifling safety innovation. (See OBOM 32 [consideration of industry custom and practice would "encourag[e] the *status quo*"].) Plaintiffs' argument is entirely speculative.

First, conformance with industry practice is not a complete defense in product liability litigation. The standard CACI instructions (and the versions given to the jury in this case) do not permit a jury to decide a product was not defective merely because it conformed with what other manufacturers were doing. (See CACI Nos. 1203, 1204; see also *Howard, supra*, 203 Cal.App.4th at p. 426 ["expert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances," despite the fact that "*such compliance is not a complete defense*" (emphasis added)].) Accordingly, because industry custom is at most relevant to, but not conclusive of, the absence of a design defect, any manufacturer would act its peril in

resting on the position that " 'nobody does it so it must be safe.' " (RBOM 8.)

Second, plaintiffs' argument founders on the false premise liability must be increased because that is the means to inspire safety innovations. Indeed, there is abundant evidence that safety innovations are primarily the result of competition among manufacturers to develop and incorporate features that will make their products safer and therefore more desirable and marketable. Contrary to the contention that "[c]onsumer demand for unknown technology is nil" (RBOM 3), it is consumer demand for new technologies—even if those technologies are presently unknown—that drives product innovation.

Commentators support this common understanding of consumers' interest in safety. "Consumer demands for safety influence manufacturer decision making about the implementation of safety technologies. Because modern consumers are more 'sensitive about safety,' manufacturers compete for a 'pro-safety reputation.' " (Garza, Note, *"Look Ma, No Hands!": Wrinkles and Wrecks in the Age of Autonomous Vehicles* (2012) 46 New Eng. L.Rev. 581, 614 (hereafter Garza.)

Plaintiffs cite Justice Traynor's observation in *Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, that the " 'consumer no longer has means or skills enough to investigate for himself the soundness of a product.' " (*Id.* at p. 467; RBOM 4.) Whatever force that may have had in 1944 when those words were penned, it is no longer true in the internet age of today, where information about new technologies abounds and consumer organizations provide

product reviews in which safety ratings are given prominence. (See, e.g., *16 Best Family Cars of 2016* (Feb. 4, 2016) Kelley Blue Book <https://goo.gl/zphsfN> [as of Sept. 23, 2016] ["safety" was "[t]ops on the list" of criteria for ranking 16 best cars of 2016]; Rechtin, *10 Top Picks of 2016: Best Cars of the Year* (Mar. 15, 2016) Consumer Reports <https://goo.gl/MYt0E9> [as of Sept. 23, 2016] [vehicle must "shine[ ]" for "safety" to be included on 10 best car list]; *Best Small Cars*, U.S. News & World Report <https://goo.gl/obAAh7> [as of Sept. 23, 2016] [small car with highest safety rating ranked first].)

"Studies show that consumers are more likely to purchase vehicles that score highly on government crash tests and that contain safety devices" (Garza, *supra*, 46 New Eng. L.Rev. at p. 614), and that significant investment is made in safety technologies because manufacturers believe "better safety can be used as a major selling point" for motor vehicles (Viereckl et al., *Connected Car Report 2016: opportunities, risk, and turmoil on the road to autonomous vehicles* (Sept. 28, 2016) <https://goo.gl/EVtZuT>). Accordingly, "[i]ncreased consumer awareness about product safety—enhanced by the publication of crash-test results and studies by NHTSA—provides market-based incentives to automobile companies" to develop new safety technologies. (Garza, *supra*, citing McCarthy, *Consumer Demand For Vehicle Safety: An Empirical Study* (1990) 28 Econ. Inquiry 530 [finding purchase probability rises with an increase in an automobile's safety features].) Thus, regardless whether industry custom and practice is admitted in product defect cases, consumer choice and

competition among vehicle manufacturers will continue to foster the development of new safety technologies.

Furthermore, product liability claims are generally based on technologies that have *already* been developed, as in this case involving ESC. Because safety feature innovation generally precedes litigation, rather than the opposite, there will be a constant race to innovate regardless whether custom and practice evidence is admissible in product defect cases. In other words, the admission of industry custom and practice will not inhibit the development of new safety technologies because product liability claims are almost always a step or two behind the technologies that are actually being developed.

And contrary to plaintiffs' contention that the admission of industry custom and practice will stifle innovation, it is actually likely to *promote* it. The Court of Appeal here held that "testimony about how new safety technologies evolve and are phased in to vehicles in general, first as an option and then as standard equipment, is relevant to the risk-benefit analysis." (Typed opn. 24, fn. 10.) Safety technologies have historically been phased in over time until they are eventually standard on all vehicles.

> There's a well-established process of flashy new car technology eventually migrating to more proletariat vehicles. In the case of safety technologies, it started decades ago with air bags, pre-collision warning systems, and electronic stability control—first seen in brands like Mercedes or BMW models as costly options, and then finding its way to Ford, Chevy and the like.

(Berman, *The Rear-View Camera Is No Longer Just An Option For Cars—It's The Law* (Apr. 16, 2014) ReadWrite <https://goo.gl/p1TFB7> [as of Sept. 23, 2016] (hereafter *Berman*.)

Were juries precluded from hearing evidence of industry practice regarding the phase-in of new technologies, they would be far more likely to impose liability on a manufacturer if the relevant safety feature were contemporaneously available on *any* vehicle, regardless of class or price range. Such an approach, under which manufacturers would be discouraged from introducing new safety technologies gradually, would have the effect of delaying or preventing entirely the implementation of such technologies.

Similar concerns have arisen historically with technologies that are now standard equipment: "From seat belts to air bags to cruise control, manufacturers have been historically resistant to the incorporation of new technologies" because of "the anticipated increase in liability, which would make incorporation unfeasible."[2] (Garza, *supra*, 46 New Eng. L.Rev. at pp. 605-606.) "U.S. products liability law—specifically the potential for high damage awards, the use of expert testimony, and civil juries" has in the past "severely

---

[2] The airbag, for example, was first offered commercially in 1970. (Garza, *supra*, 46 New Eng. L.Rev. at p. 597.) But "car manufacturers were hesitant to adopt the air bag then because of both 'technological uncertainties' and the 'threat of product liability.' " (*Ibid.*) It was not until the late 1980s and early 1990s that most manufacturers began to install airbags. (*Ibid.*; see *Public Citizen v. Steed* (D.C. Cir. 1988) 851 F.2d 444, 449 [addressing airbag phase-in, NHTSA determined that airbags should not be required on all vehicles when considering "long-term, overall safety" for all vehicles for the entire country].)

restrict[ed] the deployment of [advanced vehicle safety technologies]." (*Id.* at p. 610.)

The risk that a technology innovation will generate increased litigation can be minimized by phasing in such technologies while observing their acceptance by consumers and determining whether they lead to increased safety in real world application. The history of the industry's phase-in of backup cameras illustrates this process. (See OBOM 14 [citing expert testimony at trial that it is "common to propagate new technology from the most to the least expensive product lines"].)

Originally designed and priced at a premium to be included in low volume sales of luxury cars, the cost of backup cameras has dropped dramatically as technology has evolved and the feature has gone mainstream. NHTSA estimates that even without a regulation requiring their installation, "due purely to market forces . . . 73% of the new vehicle fleet will be equipped with rearview video systems by 2018." (Fed. Motor Veh. Safety Standards: Rear Visibility, 79 Fed.Reg. 19178, 19179 (Apr. 7, 2014).) By 2018, when a NHTSA regulation will require all vehicles to be equipped with rear visibility systems, the estimated cost will have dropped to "approximately $43 to $45 for vehicles already equipped with a suitable visual display and between $132 and $142 for all other vehicles." (*Id.* at p. 19181.) The NHTSA mandate meets cost-benefit scrutiny for regulation because the "cost of cameras has significantly dropped in recent years—mainly because camera components have integrated into hundreds of millions of

smart phones and mobile devices." (Berman, *supra*, ReadWrite <https://goo.gl/p1TFB7F> [as of Sept. 23, 2016].)

Other technologies that will lead to increased safety are at the stage backup cameras were when they first appeared in high-end luxury vehicles. " 'The revolution, which has already started, is with collision avoidance—auto braking, steering, and autonomous driving.' " (Dyer, *This Is Why Cars Are Safer Than Ever* (Sept. 12, 2016) Road and Track <https://goo.gl/LeQ3vX> [as of Sept. 26, 2016].) Within the past two years, Lincoln, Infiniti, and Mercedes-Benz have introduced self-steering, which help maintain a car's position in a lane, in their top-of-the-line models. (*Ibid.*) Several manufacturers, including Nissan, Audi, Volvo, and even Google are working on fully autonomous driving systems. (*Ibid.*) In addition, "vehicle-to-vehicle" communication technology is advancing, which will allow vehicles to "relay speed, braking, and position information to each other," allowing "predictive accident avoidance . . . to avoid an unfolding situation that you can't yet see." (*Ibid.*) "These advanced systems blur the line between safety and luxury" (*ibid.*), and if the past is predictive, innovations first implemented in high-end models will eventually be included at all product levels.

These types of innovations would be stifled by litigation if industry custom were inadmissible, because manufacturers would be reluctant to implement safety features at all if their products that do *not* contain the features during a phase-in period are alleged to be defective, and they cannot introduce industry custom evidence in product litigation to show why phase-in is a reasonable approach.

In sum, far from creating a "race to the bottom" by automotive manufacturers, the admission of industry custom and practice evidence as part of the risk/benefit analysis in a product defect case will support manufacturers' "race to the top," helping promote the vigorous competition that has historically driven innovation in a marketplace where consumer demand constantly pushes manufacturers to create better, safer cars.

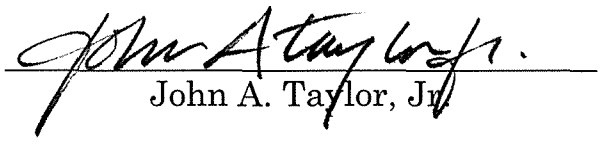
CONCLUSION

For the reasons explained above, this Court should affirm that evidence of industry custom and practice is admissible in product liability litigation to determine whether a product was defectively designed at the time of manufacture.

October 5, 2016

Respectfully submitted,

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN A. TAYLOR, JR.
EMILY V. CUATTO

By: 
John A. Taylor, Jr.

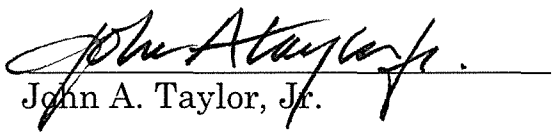
Attorneys for Amicus Curiae
ALLIANCE OF AUTOMOBILE MANUFACTURERS

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 6,579 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: October 5, 2016



John A. Taylor, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On October 5, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF RESPONDENTS TOYOTA MOTOR CORPORATION ET AL.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on October 5, 2016, at Burbank, California.

Millie Cowley

Millie Cowley

SERVICE LIST

Kim v. Toyota Motor Corporation
Case No. S232754

Ian Herzog Thomas F. Yuhas Evan D. Marshal 11400 West Olympic Blvd., Suite 1150 Los Angeles, CA 90064	Attorneys for Appellants **WILLIAM JAE KIM and HEE JOON KIM**
Robert A. Brundage Nicolette L. Young Morgan, Lewis & Bockius LLP One Market Spear Street Tower San Francisco, CA 94105-1596	Attorneys for Respondents **TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC. and POWER TOYOTA CERRITOS**
Patrick Rogan 20406 Seaboard Rd. Malibu, CA 90265	Attorneys for Respondents **TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC. and POWER TOYOTA CERRITOS**

David P. Stone
Bowman and Brooke LLP
2501 North Harwood, Suite 1700
Dallas, TX 75201

Attorneys for Respondents
TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC. and POWER TOYOTA CERRITOS

California Court of Appeal
Second Appellate District, Div. Seven
300 S. Spring St., 2nd Fl., N. Tower
Los Angeles, CA 90013-1213

Case No. B247672

Hon. Raul A. Sahagun
Los Angeles Superior Court
Norwalk Courthouse
12720 Norwalk Blvd., Dept. D
Norwalk, CA 90650

Case No. VC059206