C.A. Nos. 18-55478, 18-55483, 18-55558

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BAHAMAS SURGERY CENTER, LLC,
Plaintiff/Appellee/Cross-Appellant.

v.

KIMBERLY-CLARK CORPORATION AND HALYARD HEALTH, INC.,
Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Central District of California, Case No. 14-cv-8390-DMG-PLA
The Honorable Dolly M. Gee, United States District Judge

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the associations represented on this brief have no parent corporations and have issued no stock.

Pursuant to Rule 29(a)(4)(E), counsel for *amici curiae* hereby state that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the *amici curiae* associations, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Rule 29(a)(2), all parties have consented to the filing of this brief.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector and geographical region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases addressing constitutional safeguards on punitive damage awards and class action issues.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The NAM, Chamber, ATRA, and their members have a substantial interest in protecting the constitutional due process rights of businesses, particularly with respect to punitive damage awards and litigation of class actions involving product manufacturers. *Amici* submit this brief because the lower court's chosen punitive damages ratio and classwide extrapolation of individualized evidence are out-of-step with due process safeguards and will adversely impact *amici*'s members if permitted to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Supreme Court has incrementally circumscribed due process limits on punitive damage awards with the stated objective of eliminating "unpredictable outlier cases that call the fairness of the system into question." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2009). In articulating the now-familiar ratio "guidepost" which compares the amount of punitive damages imposed to the compensatory damages awarded, the Court has also incrementally tightened

constitutional limits from a suggested single-digit "relevant ratio," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996), to indicate that when "compensatory damages are *substantial*, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (emphasis added).

The case before this Court, which involves compensatory awards totaling more than $4 million, directly implicates the constitutional limits of this ratio guidepost. At issue was whether class members overpaid for MicroCool Breathable High-Performance Surgical Gowns because the product's manufacturers did not disclose that the gowns did not meet the "AAMI Level 4" standard, the Association for Advancement of Medical Instrumentation's highest level of barrier protection. The district court entered a judgment of more than $20 million in punitive damages—a 5:1 ratio of punitive to compensatory damages—with no explanation why the compensatory damages awarded were deemed so insubstantial that a punitive award at this level was permissible.

A ratio at this level lacks justification since the lawsuit sought damages purely for economic harm—the difference in value between a gown meeting and not meeting the Level 4 standard. Despite millions of sales, there was not a single report of physical harm to a class member from a failure of the product that might present an extraordinary case justifying a departure from a 1:1 punitive damages

ratio. The nature of the conduct—an alleged omission rather than an affirmative misrepresentation—and U.S. Food and Drug Administration (FDA) clearance of the product's marketing as meeting the AAMI standard also weigh against imposing a higher ratio.

This Court and other federal appellate courts have determined in comparable cases that a 1:1 ratio provides the outer limit of punitive damages that will satisfy due process. *Cf. Baker*, 554 U.S. at 487-98 (reviewing studies of punitive damages and stating "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1"). By way of contrast, where courts applying the Supreme Court's most recent precedents have permitted significantly higher ratios, they have generally done so in circumstances involving lower compensatory damage amounts or where the alleged injury involved physical harm.

Further, in enabling a situation in which the jury returned a plaintiffs' verdict along with a massive punitive damage award, the district court transformed individual evidence into classwide proof. This included particular class member views regarding the material nature of allegedly concealed information, reliance on that omission, and damages. The Supreme Court, however, has expressly repudiated attempts to construct a class around the unique qualities and circumstances of a class representative to bind others with dissimilar attributes. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

For these reasons, the Court should reverse the decision below.

ARGUMENT

I. PUNITIVE DAMAGES EXCEEDING A 1:1 RATIO ARE INCONSISTENT WITH DUE PROCESS WHERE THERE IS A MULTI-MILLION DOLLAR COMPENSATORY DAMAGE AWARD FOR A PURELY ECONOMIC INJURY

Where compensatory damages are substantial, and the harm involves purely economic loss and no physical injuries, a 1:1 ratio between punitive and compensatory damages ordinarily represents the constitutional line. The $4 million in compensatory damages awarded in this case, which involves the value of a surgical gown, falls squarely within this threshold. This is particularly true when there were no reported injuries or strikethroughs (breaches of the gown when fluids splash or spray onto the fabric) affecting class members out of over three million gowns sold.

A. Supreme Court Jurisprudence Reserves Punitive Damage Awards Exceeding Compensatory Damages for Cases Involving Low Compensatory Awards, Physical Harm, or Exceptional Circumstances

The ratio guidepost first expressed by the Supreme Court in *Gore* is the product of an important history regarding the circumstances in which punishment may be meted out in civil cases. Although the Court has refrained from adopting a "bright-line ratio which a punitive damages award cannot exceed" in all cases, it has gradually tightened standards for punitive awards to comport with due process

under the Fourteenth Amendment. *Campbell*, 538 U.S. at 425. This history underscores why punitive awards must reflect principled analysis, not a ratio bearing an uncertain connection to a defendant's conduct.

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic and noneconomic losses. Punitive damages are intended to "punish the tortfeasor whose wrongful action was intentional or malicious," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-76 (1981), and amount to a "windfall" for the plaintiff. *Hawkins v. United States*, 30 F.3d 1077, 1083-84 (9th Cir. 1994).

The modern Anglo-American doctrine of punitive damages dates back to two English cases, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763) and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), which first used the term "exemplary damages" and expressed that "the punitive and deterrent purposes of damages awards could be separated from their compensatory function." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984). Punitive damages, however, were awarded rarely and were limited to a narrow category of quasi-criminal torts involving conscious and intentional harm inflicted by one person on

another, such as assault and battery, false imprisonment, and trespass. Punitive damages were allowed in these cases to supplement the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 St. Mary's L.J. 351, 355 (1983).

As in England, punitive damages in early America were limited to quasi-criminal tort cases. In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." Ellis, 56 S. Cal. L. Rev. at 2. Typically, punitive damages approximated compensatory damage awards.

Beginning in the late 1960s, courts began to allow punitive damages in unintentional tort cases. *See Toole v. Richardson-Merrell, Inc*., 251 Cal. App. 2d 689 (1967). Nevertheless, appellate court decisions upholding punitive damages in these cases involved relatively modest awards. *See Gillham v. Admiral Corp*., 523 F.2d 102 (6th Cir. 1975) ($125,000 compensatory, $100,000 punitive); *Toole*, 251 Cal. App. 2d at 694 ($175,000 compensatory, $250,000 punitive); *Moore v. Jewel Tea Co*., 253 N.E.2d 636 (Ill. Ct. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill 1970).

It was not until the late 1970s and 1980s that the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 Ala. L. Rev. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years").

By 1991, the Supreme Court had expressed concern that punitive damages had "run wild." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."); *see also* Victor E. Schwartz *et al*., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003 (2000). Between 1996 and 2001, the annual number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 392 (2004). As scholars observed, "high stakes and high variability of punitive damages are of substantial concern to

companies, as punitive damages may pose a catastrophic threat of corporate insolvency." Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 285 (1998).

It is against this backdrop that the Supreme Court began to impose increasingly strict limits on punitive damages. In *Haslip*, the Court for the first time acknowledged that excessive punitive damage awards could violate the Fourteenth Amendment. 499 U.S. at 18. Even at this early juncture, the Court stated that a 4:1 punitive damages ratio "may be close to the line" of "constitutional impropriety." *Id*. at 23-24. In *TXO*, a plurality of the Court said "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" 509 U.S. at 454. In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), the Court departed from substantive due process questions, holding that states must allow for judicial review of the size of punitive damages awards.[1] The Court, however, noted that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," and affirmed "that the Constitution imposes a substantive limit on the size of punitive damages awards." *Id*. at 432, 420.

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[1] *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002) (holding that appellate courts reviewing punitive damages for excessiveness must apply a *de novo* standard of review).

Then, in 1996, the Court in *Gore* struck down an excessive punitive damages award for the first time, finding that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In doing so, the Court established the three now familiar "guideposts" for lower courts to follow in evaluating punitive damage awards: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the harm inflicted on the plaintiff, and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 575. The Court also indicated that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id*. at 581. The Court again "rejected the notion that the constitutional line is marked by a simple mathematical formula," explaining that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards." *Id.* at 582.

In *Campbell*, the Court again reversed a large award. With respect to the ratio guidepost, the Court recognized that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," and also referred to "a long legislative history . . . providing for sanctions" in the low single-digits. 538 U.S. at 425. The Court reiterated that a

larger ratio might be permissible where extremely egregious behavior resulted in a small compensatory award. *See id.* The Court recognized, however, that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id*. at 425-26.[2] This principle is especially applicable where "the harm arose from a transaction in the economic realm, not from some physical assault or trauma." *Id.*

In *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), the Court issued another decision that resonates with the $450 million punitive damages verdict in the instant case for a class of several hundred by holding that due process "forbids a State to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially strangers in the litigation." This directive includes punishment for "harm to others [which] shows more reprehensible conduct," for example harm to differently situated consumers that may include personal injuries and not purely economic harm. *Id*. at 355.

Most recently, in *Baker*, the Court, recognized that "punitive damages overall are higher and more frequent in the United States than they are anywhere

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[2] *See also Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (finding *Campbell* "emphasizes and supplements" the limitation expressed in *Gore* that a 1:1 ratio may be the outermost limit when substantial compensatory damages are awarded).

else" and that data over the past several decades "suggest that in many instances a high ratio of punitive to compensatory damages is *substantially greater than necessary* to punish or deter." 554 U.S. at 496, 499 (emphasis added). The Court identified the "real problem" with punitive damage awards as their "stark unpredictability"—"the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." *Id*. 499, 500. It found the "median ratio for the entire gamut of circumstances at less than 1:1" such that in "a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum." *Id.* at 512-13.

After reiterating its instruction in *Campbell* that a "lesser ratio, perhaps only equal to compensatory damages" may represent the constitutional limit where "substantial" compensatory damages are awarded, 554 U.S. at 501 (internal quotation marks omitted), the Court settled on a 1:1 ratio of punitive to compensatory damages as a "fair upper limit" in maritime cases. *Id.* at 502. The "penalty scheme [Defendants] face," the Court found, "ought to threaten them with a fair probability of suffering in like degree when they wreak like damage." *Id.* at 502. In reaching this conclusion, the Court emphasized that "a penalty should be reasonably predictable in its severity." *Id*. These public policy rationales echo the

Supreme Court's due process jurisprudence and counsel a 1:1 maximum punitive damages ratio in this case.[3]

B. The Ratio of Punitive to Compensatory Damages Should Not Exceed 1:1 Where, as Here, Compensatory Damages are Substantial and the Harm is Purely Economic in Nature

The gradual refinement of due process limitations in the Supreme Court's punitive damages jurisprudence, culminating in express statements regarding a 1:1 punitive damages ratio in *Campbell* and in the holding of *Baker*, is instructive where a compensatory damages award exceeds $4 million. This Court and its sister Circuits have generally appreciated that compensatory damage awards in the hundreds of thousands or millions of dollars are "substantial" when assessing the outer bound of a punitive damages award.

For example, this Court, in *Dawe v. Corrections USA*, 506 Fed. App'x 657, 660 (9th Cir. 2013), highlighted the statement in *Campbell* regarding "substantial" compensatory damages in affirming the reduction of a $10 million punitive damages award to reflect a 1:1 ratio with the jury's award of approximately $2.6 million in compensatory damages. In reaching this conclusion, the Court expressly recognized that "Plaintiffs did not suffer physical harm" with respect to

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[3] *See* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. Rev. 881, 897-901 (2009) (discussing the value of a 1:1 punitive damages ratio).

their contract and tort claims and that a defendant's conduct "did not evince a reckless disregard of bodily health" such that the "overall degree of reprehensibility suggests that, under the circumstances, a 1:1 ratio was proper." *Id.*[4]

The Tenth Circuit reached a similar result in *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012), reducing a $2 million punitive award to an amount equal to the $630,307 compensatory award in a retaliatory discharge action. There, the court indicated that the compensatory award was indeed "substantial" for the purpose of applying *Campbell*'s 1:1 ratio guideline. *Id.* at 1208. In evaluating the degree of reprehensibility of a defendant's conduct, the Tenth Circuit found that "courts are to consider . . . whether the harm caused was physical as opposed to economic," and that the primary reason for the decision to impose a 1:1 punitive damages ratio was because the defendant's conduct "resulted solely in economic injury." *Id.* at 1207.

The Sixth Circuit in *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007), found that a $400,000 compensatory award was "substantial" for the purpose of applying *Campbell*'s 1:1 ratio guideline. That case involved a bank's breach of the Fair Credit Reporting Act resulting in purely economic harm, but led

[4] *See also Noyes v. Kelly Servs., Inc.*, 349 Fed. App'x 185, 187 (9th Cir. 2009) (affirming reduction of $5.9 million punitive damages award in religious discrimination suit to roughly $650,000 to reflect a 1:1 ratio of punitive to compensatory damages).

to a punitive damage award exceeding $2.6 million. *See id.* at 152. In reducing the punitive award to $400,000, the court reasoned that the case "simply [did] not justify a departure from the general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent *special circumstances*." *Id.* at 156 (emphasis added).[5]

Other federal appellate courts have similarly applied a 1:1 ratio to comport with due process where a lower court awarded "substantial" compensatory damages for purely economic harm.[6] Notably, courts have also applied a 1:1 ratio where substantial compensatory damages are awarded for harm that includes personal injury, which may suggest a greater degree of reprehensible conduct than

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[5] *See also Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009) (vacating $10 million punitive award that was 1.67 times the compensatory award and ordering remittitur "in an amount . . . compatible with due process, not to exceed the amount of compensatory damages"); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (finding a $366,939 compensatory award for purely economic harm in a copyright action to be "substantial" and reversing a $3.5 million punitive award because "a ratio in the range of 1:1 to 2:1 is all that due process will allow").

[6] *See, e.g., Jurinko v. Medical Protective Co.*, 305 Fed. App'x 13, 27-32 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately $2 million "[i]n light of the substantial compensatory award and the harm being exclusively economic"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (reducing punitive damage award of more than $6 million on workplace harassment claim to $600,000, an amount equal to the compensatory damages).

solely economic harm. *See, e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069, 1073-75 (10th Cir. 2016) (reducing award of punitive damages in personal injury action involving carbon monoxide exposure from malfunctioning furnace from $22.5 million to approximately $2 million, reflecting a reduction from a ratio of 11.5:1 to a 1:1 ratio of punitive damages); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 53, 56 (1st Cir. 2009) (reducing $350,000 punitive award to $35,000, equaling compensatory damages, in action involving unlawful arrest and "a real and serious threat of violence"); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 Fed. App'x 628, 631 (2d Cir. 2009) (affirming reduction of punitive award from $2.5 million to $600,000 where compensatory damages were approximately $1.5 million, including $100,000 in emotional distress).[7]

Here, "all evidence of harm presented at trial was economic." Amended Order re Defendants' Motion for Judgment as a Matter of Law at 23 n.13. There were no reports of personal injury or strikethroughs among class members, even as three million products were sold to them during the class period. The $4 million

[7] *See also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing ratio from 3.7:1 to 1.2:1 where compensatory damages were about $4 million in product design defect case); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (ordering remittitur of compensatory award in action involving police brutality to $250,000 and remittitur of punitive damages from $1,275,000 to $75,000).

compensatory damages award exceeds amounts this Court and others have considered "substantial" in applying *Campbell*.

Two additional, related factors suggest that this was not a case involving high reprehensibility. First, the sole theory certified for class action treatment was whether the manufacturer failed to disclose that its gowns did not meet the AAMI Level 4 standard. As the Supreme Court has recognized, "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists." *Gore*, 517 U.S. at 579-80.

Second, the manufacturer marketed its product, the MicroCool gown, as meeting the AAMI Level-4 standard only after receiving clearance from the FDA based on the testing method used by AAMI and permitted by the agency at that time. *See* Opening Br. of Appellant Kimberly-Clark Corp. at 7-9 (citing record). Only later was the AAMI standard altered, including a new testing procedure, which was then adopted, prospectively, by the FDA. *See id.* It is not sound public policy to impose liability, let alone punish, businesses when they market products in a manner that is cleared by federal regulators. *See generally* Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *"That's Unfair!" Says Who—The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93 (2007).

Due process requires more than simply selecting, without explanation, any single-digit ratio. This is a case involving an economic loss and no physical harm, an omission rather than an affirmative misrepresentation, and an FDA-cleared representation. One-to-one is the constitutionally permissible ratio in these circumstances.

II. DUE PROCESS REQUIRES THAT A CLASS ACTION AVOID USING INDIVIDUALIZED EVIDENCE OF CLASS REPRESENTATIVES AS A SHORTCUT FOR SHOWING COMMON CLASSWIDE EVIDENCE

This case, involving the rare trial of a class action, illustrates the type of due process violation that is prone to occur when a court permits the testimony of class representatives, whose experience does not reflect others to serve as the basis for imposing classwide liability. The trial court's questionable certification of this class despite differences in why class members decided to purchase the surgical gowns at issue was compounded by its improper instruction to the jury that "[y]ou may assume that the evidence at this trial applies to all members," 2ER332.

The class action mechanism is intended to facilitate efficient resolution of disputes involving many potential claimants, but it cannot be used by plaintiffs to circumvent the need to satisfy elements required to prove a viable claim or in a manner that strips companies of their defenses. *See Carrera v. Bayer Corp*., 727 F.3d 300, 307 (3d Cir. 2013) (holding that a "defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class

action cannot be certified in a way that eviscerates this right or masks individual issues"); *McLaughlin v. American Tobacco Co*., 522 F.3d 215, 232 (2d Cir. 2008) (explaining that when "the mass aggregation of claims" is used "to mask the prevalence of individual issues," "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation").

In *Dukes*, the Supreme Court rejected an attempt to misuse a "sample set" of class members to extrapolate their unique characteristics onto the entire class "without further individualized proceedings." 564 U.S. at 367; *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (finding use of "representative or statistical sample" evidence is proper only where "each class member could have relied on that sample to establish liability if he or she had brought an individual action"). These requirements promote the fair and efficient adjudication of claims, while safeguarding parties' due process rights in class action litigation.

With respect to the extrapolation of damages, the Supreme Court has also rejected arguments that "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013) (decertifying class action due to inability of plaintiff's classwide damages

model to "bridge the differences" between supportable and unsupportable liability theories).

And this Court has recognized that if an "omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011) (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)).

During the trial of the case at bar, however, the district court allowed the same type of extrapolation of individual evidence repudiated in *Dukes* by holding that evidence specific to the named plaintiff regarding the material importance of whether the Defendant's product met the AAMI-Level-4 standard, reliance on that alleged omission, and damages applied classwide. As courts have appreciated, when "the issue of materiality or reliance . . . is a matter that would vary from consumer to consumer" it "is not subject to common proof." *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201 (2012). Courts should refrain from creating a "fictional composite" plaintiff by comingling class members' highly individualized evidence. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

In addition, the Plaintiff's damages model assumed class members received an affirmative misrepresentation that Defendants' surgical gowns met the AAMI-

Level-4 standard, a theory the district court found too individualized for certification. Instead, Plaintiffs were required to prove that Defendants' failure to inform consumers that their gowns did not meet this standard was material to the purchase decisions of the corporate healthcare entities and individuals in the class. The Defendants presented evidence that it was not.[8]

Even if the district court properly certified the class, conducting a trial in a manner that disregarded these significant potential differences among class members by instructing the jury to assume that the evidence applies to all class members ran afoul of due process. Presuming that class members with such varied individual circumstances relied on the alleged omission is the very type of "ad hoc lawmaking" and "substantive and evidentiary shortcuts" that courts and commentators have criticized. *See, e.g.*, Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1012-13 (2005) (criticizing a trend of courts creating "presumptions to avoid having to consider individualized questions of fact on legal elements such as reliance").

[8] *See* Opening Br. of Appellant Kimberly-Clark Corp. at 30 (citing record support indicating "evidence showed at trial [that] many class members were never exposed to an affirmative representation that the MicroCool gowns were AAMI-Level-4 before purchasing them").

Dukes and *Behrend* instruct courts to reject class actions predicated on individualized evidence that is extrapolated for classwide treatment. Due process demands that efficiency aims regarding representative actions do not overshadow basic fairness, especially where substantial compensatory and punitive damage awards are implicated.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *amici curiae* brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief contains 4,943 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ Cary Silverman
Cary Silverman

Dated: August 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief of National Association of Manufacturers, Chamber of Commerce of the United States of America, and American Tort Reform Association with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 29, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Cary Silverman
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Dated: August 29, 2018