Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,
PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT/APPELLANT/CROSS-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:07-CV-5702
HON. CLAUDIA WILKEN, PRESIDING

THIRD BRIEF ON CROSS-APPEAL OF DEFENDANT-APPELLANT AND CROSS-APPELLEE ABBOTT LABORATORIES

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APPELLEE'S BRIEF ON GSK'S CROSS-APPEAL

INTRODUCTION

GSK sued Abbott alleging antitrust, unfair competition, and breach of contract claims and seeking billions of dollars in damages. After a 15-day trial, the 10-member jury rejected nearly all of GSK's claims. The jury found Abbott liable only for purported breach of an "implied covenant" and awarded $3.5 million in damages. On appeal, GSK does not identify a single error in the instructions or any lack of evidence to support the jury's rejection of GSK's claims. Instead, GSK's sole basis for seeking a new trial is the argument that Abbott improperly discriminated by exercising one of its peremptory challenges against an apparently gay prospective juror. This Court should reject GSK's argument.

No court has extended *Batson v. Kentucky*, 476 U.S. 79 (1986), to claims of sexual-orientation discrimination. Neither the Supreme Court nor this Court has recognized sexual orientation as a suspect or quasi-suspect classification under the Equal Protection Clause, which would be a necessary prerequisite for extending *Batson*. And neither court has endorsed GSK's novel and far-reaching theory for extending *Batson* based on substantive due process protections. Moreover, GSK does not address how courts properly could require prospective jurors to disclose their sexual orientations during voir dire—a step they would need to take to evaluate *Batson* challenges in a meaningful manner.

This Court also need not and should not reach the question of *Batson*'s scope because GSK did not establish a prima facie case of intentional discrimination. Several non-discriminatory reasons for striking the prospective juror are apparent in the record, including that he was unique in the jury venire for having (1) a job at the Ninth Circuit, (2) had friends who died of HIV, and (3) heard of Abbott's Kaletra, one of the two Abbott drugs at issue. That these facts preclude GSK's *Batson* argument is shown in Part I of the Argument below.

This Court also need not reach the *Batson* question because GSK's claims should have been rejected as a matter of law before the claims ever reached the jury—rendering irrelevant any *Batson* challenge. In brief: The implied contract claim fails as a matter of law for the reasons stated in Abbott's initial brief in this appeal. The antitrust claims fail as a matter of law for the reasons stated in *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009), where this Court rejected a substantively identical challenge to the very same Abbott pricing conduct brought by retail purchasers of Abbott's HIV drugs. As shown in Part II of the Argument, Doe's holding that "Abbott's conduct is the functional equivalent of the price squeeze conduct that the [Supreme] Court found unobjectionable in [*Pac. Bell Tel. Co. v.*] *linkLine* [*Commc'ns, Inc.*, 555 U.S. 438 (2009)]" also disposes of the antitrust claims here. *Id.* at 935. And GSK's North Carolina Unfair and Deceptive Trade Practices ("UDTPA") claim fails along with its federal antitrust claims.

For all of these reasons, this Court should affirm the district court's denial of GSK's *Batson* claim.

STATEMENT OF ISSUES

1. Whether GSK made a prima facie showing of discrimination under *Batson* by objecting to Abbott's strike of one apparently gay juror, where voir dire had revealed several neutral reasons for striking that juror, and where neither this Court nor any other federal court has ever held that *Batson* applies to sexual orientation.

2. Whether GSK's *Batson* argument is irrelevant because the case never should have been submitted to the jury.

3. Whether the district court properly entered judgment in Abbott's favor on GSK's UDTPA claim where the jury rejected the theory of liability GSK pursued throughout the trial and where GSK crafted a new theory after the jury verdict based on the jury's finding of a breach of the implied covenant of good faith and fair dealing.

STATEMENT OF ADDITIONAL FACTS

A. Facts Relevant to *Batson* Arguments

Jury selection occurred the first morning of trial. Appellant's Supp. Excerpts of Record ("ASER")-199-324. Prospective jurors had previously filled out questionnaires, which the Court used as the basis of its questions during voir

dire.[1] ASER-354-359; ASER-200. The court conducted the majority of voir dire questioning; the parties were permitted approximately 20 minutes each for follow-up questions. ASER-362. After challenges for cause, the court identified 17 remaining prospective jurors. ASER-317. The court allotted Abbott three peremptory challenges and the plaintiffs four. *Id.*; ASER-369. After the seven challenges, the remaining 10 jurors were seated.

Abbott used its first peremptory challenge against Juror B. During voir dire, Juror B stated he worked for the Ninth Circuit on computers and that he knew "a lot of people in the legal field from [his] job." ASER-222-224. In response to the court's question about knowing someone involved in accounting or economics, Juror B replied "[j]ust my partner," and he once referred to his partner as "he." ASER-223. When asked whether he was "close to someone who's been diagnosed with H.I.V.," Juror B answered, "Well, I've had friends in the past." ASER-224. Juror B did not state that he had any friends who were still living with HIV, or give any other information inconsistent with the inference that the "friends in the past" had died of AIDS. Responding to questions from Abbott's counsel, Juror B testified he had heard of Abbott's drug Kaletra, although he did not know whether anyone in his circle was taking it or the other drugs at issue. ASER-307-308.

[1] The district court had allowed the parties to review the completed questionnaires prior to trial, but the parties were not given copies. The completed questionnaires were not placed on the docket.

None of the other 17 eligible jurors worked at this or any other court. None of the other 17 eligible jurors said he or she had lost friends to AIDS or had heard about any of the drugs at issue.[2] Only one other of the 17 prospective jurors knew someone with HIV, Juror P, who testified "a couple of my friends" had been diagnosed with HIV. ASER-256. On further questioning by Abbott's counsel, Juror P stated she knew her friends "are on medications," but did not know the specific medications. ASER-312.

Plaintiffs[3] objected to Abbott's peremptory challenge of Juror B. Counsel argued that Juror B "is or appears to be, could be homosexual," and that Abbott had used "the peremptory challenge in a discriminatory way" because "the litigation involve[d] AIDS medications" and "it looks like Abbott wants to exclude from the pool anybody who is gay." ASER-319-320. The district court denied the challenge, providing three reasons. First, the court questioned "whether *Batson* applies [in] civil [trials]." ASER-320. Second, the court questioned "whether *Batson* ever applies to sexual orientation." *Id.* Third, the court explained: "[T]he evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here,

[2] Two others questioned during voir dire, who were not ultimately among the 17 potential jurors eligible for peremptory challenges, also knew people who had died from AIDS. ASER-219-220; 279-281.

[3] Class plaintiffs settled after opening statements.

unless somebody happens to say something. There would be no way to analyze it." *Id.* The court then offered Abbott's counsel a choice: explain the bases for the strike or stand on the court's three reasons for denying the challenge. *Id.* Abbott's counsel elected to stand on the court's reasons and not to offer any explanation for why Abbott exercised its peremptory:

> I will stand on the first three, at this point Your Honor. I don't think any of the challenge applies. I have no idea whether he is gay or not.

Id. The court then ruled that it would permit the peremptory "for now," but told Plaintiffs' counsel "[i]f somehow all three of their challenges are all gay men, then you can raise it again. . . . Although, I don't know how we will know." ASER-321.

Plaintiffs exercised their four peremptory challenges against four men. *Id.* Abbott exercised its remaining two challenges against two women. *Id.* Although nothing in the voir dire testimony of the other two jurors Abbott challenged suggested anything about their sexual orientation, ASER-214-215, 290, 307, plaintiffs' counsel made a second *Batson* objection to the final Abbott peremptory, claiming the stricken juror was "also homosexual." ASER-322. The court responded, "I don't know how you would draw that conclusion," and counsel replied, "[f]rom the demographics and where she --." *Id.* The court did not ask Abbott to respond; it simply overruled the objection, stating "I have no knowledge

of whether she's a lesbian or isn't." *Id.* GSK has dropped this *Batson* claim on appeal.[4]

B. Facts Relevant to Antitrust Arguments

Abbott sells two HIV medications, Norvir and Kaletra. The active ingredient in Norvir is ritonavir. *E.g.*, SER-166. When absorbed into the bloodstream at a relatively high concentration that requires taking 12 pills per day, ritonavir acts as a protease inhibitor ("PI"). *E.g.*, ER-180-181, 223-225, 326-327, 415; SER-215-216. But ritonavir is now used almost exclusively at relatively small blood concentrations that most commonly requires taking just one pill per day to boost the effectiveness of other PIs. ER-180-81; ASER-415. One such PI is the active ingredient in GSK's Lexiva. Another is lopinavir. Abbott sells a formulated drug product called Kaletra, which contains both lopinavir and ritonavir. ASER-80.

When it introduced Kaletra in September 2000, Abbott priced a daily dose at $18.01. *See* ASER-509 (Kaletra priced at $3.0093 per capsule); ASER-64 (six-capsule daily dosage). After modest price increases, by December 2003, Abbott's price for a daily dose of Kaletra was $18.76. ASER-143. When GSK introduced Lexiva in November 2003, GSK priced the most common boosted daily dose (two

[4] By not raising this claim in its opening brief on cross-appeal, GSK has waived it. *E.g.*, *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012) (claim not "specifically and distinctly" argued in opening brief is waived).

pills) at $16.00, which would be taken with a then-recommended boosting dose of two Norvir pills, bringing the total daily price of the treatment to $19.42 at that time. ASER-171; ASER-29. By July 2010, Abbott had raised its price for a daily dose of Kaletra to $23.40. ER-415. By the same time, GSK had raised its price for a daily dose of the Lexiva portion of a boosted Lexiva regimen (not including the price of the Norvir used for boosting) to $24.16. *Id.*[5]

GSK alleged that, in repricing Norvir for non-Medicare/Medicaid usage from $1.71 to $8.57 per capsule in December 2003 without also increasing the price of Kaletra, Abbott sought to incentivize doctors not to switch their privately insured patients from Kaletra to the more expensive Lexiva plus Norvir regimen, and not to prescribe the Lexiva plus Norvir regimen to new patients.[6] Abbott did not—indeed, could not—increase the price of Norvir for Medicare/Medicaid usage, and Abbott made the drug available for free under its patient assistance

[5] All of the prices discussed herein are Wholesale Acquisition Cost (WAC) Pricing, which refer to the prices charged to wholesale purchasers of the drugs for non-Medicare/Medicaid usage and are the pricing statistics on which both sides relied in the district court.

[6] GSK did not show that any other protease inhibitor boosted by Norvir was significantly impacted by the Norvir repricing. For example, the leading competitor, Reyataz, was introduced about four months before Lexiva, in July 2003. ASER-48, 101-102, 109. By July 2010, Reyataz had more prescriptions than Kaletra. ER-418. Likewise, in 2006, another boosted protease inhibitor called Prezista entered the market. ASER-186. A 1200 mg daily dose of Prezista was initially priced at $25.00 (not counting the Norvir taken with it). *Id*. By July 2010, doctors were prescribing Prezista more than they were prescribing Lexiva, although not as much as they were prescribing Reyataz. ER-418.

program to every uninsured patient, regardless of financial need. ER-178-179; ASER-98-100.[7]

GSK's antitrust claims were for monopolization or attempted monopolization of a market that GSK defined a subset of boosted PIs. GSK never argued that Abbott's increased pricing of Norvir constituted illegal monopolization of a market for *boosters* of PIs (Norvir is the only one currently) without regard to the alleged effects of that price increase on *boosted* PIs.[8] ER-392. GSK's own economics expert conceded that such a claim would not have been economically justified. ASER-177-178 ("If there's no implications for other markets, then you can do whatever you want."). Thus, there was no challenge in this case to Abbott's unilateral right to raise the price of Norvir. GSK's sole antitrust contention was that Abbott was improperly favoring its PI, Kaletra, over one of the other available boosted PIs, Lexiva, by not maintaining a sufficient price differential between Norvir and Kaletra for privately insured patients.

C. Procedural History Relevant to Antitrust and UDTPA Claims

Before GSK filed its complaint, a class of Norvir users and health insurers brought antitrust claims challenging the same pricing conduct as GSK challenges.

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[7] GSK also did not show a differential in doctors' prescribing behavior for Lexiva based upon whether the partient was privately insured.

[8] The direct purchaser plaintiffs (who settled with Abbott at the beginning of trial) had made such a claim but the district court entered summary judgment in Abbott's favor on that claim prior to trial. ER-392-393.

This Court considered the viability of those claims in *John Doe I v. Abbott Laboratories*, 571 F.3d 930 (9th Cir. 2009), in which GSK appeared as an *amicus*. ASER-448-479. Finding that "Abbott's conduct is the functional equivalent of the price squeeze the [Supreme] Court found unobjectionable" in *Pacific Bell Telephone Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), this Court held that the plaintiffs' "claim falls short" because "[t]hey allege no refusal to deal at the booster level, and no below cost pricing at the boosted level." *Doe*, 571 F.3d at 935.

Because GSK's antitrust claims in this case targeted the very same pricing conduct found lawful in *Doe*, Abbott moved to dismiss. ASER-418-447. The district court denied the motion. ASER-400-417. Abbott sought mandamus from this Court. Although this Court found that Abbott's petition warranted a response, ASER-398-399, the Court ultimately denied review on the basis that mandamus is unavailable to correct a district court decision that was contrary to this Court's decision in a *related* case—as opposed to an earlier mandate in the *same* case. ASER-396-397. Thus, the Court did not address the substantive question of whether *Doe* foreclosed GSK's antitrust claim.

In the district court, GSK insisted that its antitrust theories differed from those considered in *Doe* because GSK labeled Abbott's pricing as a refusal to deal under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and

bundled discounting under this Court's decision in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). *See* ER-351. The district court agreed and thus denied Abbott's motions for summary judgment, allowing GSK's antitrust claims to proceed to trial. GSK also proceeded to trial on a state-law unfair competition claim, arguing that Abbott committed three acts that violated North Carolina's UDTPA: (1) deliberately withholding consideration of plans to use Norvir to limit competition; (2) "inequitably" asserting power over Norvir by increasing its price to disrupt Lexiva's launch; or (3) timing that price increase to do the same. ASER-383-395; ASER-380.

At the close of evidence, Abbott filed a Rule 50(a) motion for judgment as a matter of law on all of GSK's claims. ER-133-166. The jury returned a verdict for Abbott on the antitrust claims on the threshold basis that GSK's market definition was too narrow, and a verdict for GSK on the contract claim. ER-72-75. As to the UDTPA claim, the jury found that Abbott had not committed the second or third alleged act, and that the first act caused GSK no injury. ER-76-77. Based on the jury's verdict, the district court entered judgment for Abbott on the UDTPA claim. ER-17-22.

SUMMARY OF ARGUMENT

No court has extended *Batson* to claims of sexual orientation discrimination. The Supreme Court has made clear that "[p]arties may . . . exercise their

peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review" under the Equal Protection Clause. *J.E.B. v. Ala. ex. rel. T.B.*, 511 U.S. 127, 143 (1994), and this Court held in *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), that rational basis review applies in equal protection challenges involving classifications based on sexual orientation.

GSK attempts to avoid this by arguing that the Supreme Court has recognized a substantive due process right to engage in private homosexual sexual activity. But no court has ever endorsed applying *Batson* to particular groups of people based on the particular impact on them of one or more substantive due process rights, and this Court and other courts have specifically held that *Batson* does not apply to a variety of groups of people despite the fact that they are particularly impacted by various substantive due process or other constitutionally protected rights.

Further, extending *Batson* to sexual orientation would present significant implementation problems. Sexual orientation is far less likely to be apparent during jury selection than race or gender, and inquiry into prospective jurors' sexual orientation would be intrusive and offensive to many. Courts would be hard-pressed to evaluate *Batson* challenges, particularly to conduct meaningful

comparative juror analysis, without information about the sexual orientations of all prospective jurors.

In any event, this Court may follow the well-established principle of avoiding to decide unnecessary constitutional questions because GSK has not made a prima facie showing of discrimination here. Juror B's voir dire responses provided several legitimate reasons for striking him that had nothing to do with sexual orientation. Juror B was the only eligible juror who: (1) worked for this Court; (2) had friends (or relatives) who apparently had died from HIV/AIDS; or (3) indicated he had heard of at least one of the drugs at issue—each of which independently warranted striking him. Moreover, nothing Abbott's counsel said during voir dire or at any other point suggested discrimination or bias. Abbott's counsel did not ask any panel member about his or her sexual orientation, and counsel's voir dire questions to Juror B were similar in scope and kind to his questions to other panel members.

This Court need not reach any of these *Batson* questions for the additional reason that GSK's claims should not have been submitted to a jury in the first place, which makes jury selection issues irrelevant. Abbott was entitled to judgment as a matter of law on GSK's implied covenant claim for the reasons shown in Abbott's opening brief and in the reply brief on Abbott's appeal contained herein. GSK's antitrust claims should not have gone to the jury either,

because GSK's theories of anticompetitive conduct were precluded by this Court's rejection of other plaintiffs' antitrust challenge to the same Abbott pricing conduct in *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (2009). Abbott's rapidly falling market share also precluded as a matter of law any finding that Abbott possessed the monopoly power that was a prerequisite to all of GSK's antitrust claims. Finally, GSK's UDTPA claim fell with its antitrust claims.

ARGUMENT

I. GSK's *Batson* Claim Is Meritless and Does Not Warrant a New Trial

A. Standard of Review

This Court ordinarily reviews a claim that a party has made a prima facie showing under *Batson* for clear error. *Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc); *accord United States v. Stinson*, 647 F.3d 1196, 1207 (9th Cir. 2011). If the district court applied the wrong legal standard, this Court reviews the claim de novo. *Wade v. Terhune*, 202 F.3d 1190, 1199 (9th Cir. 2000).

B. Existing Precedent Provides No Basis To Apply *Batson* to Sexual Orientation

1. Neither the Supreme Court Nor this Court Has Extended *Batson* Beyond Intentional Discrimination Against a Member of a Suspect or Quasi-Suspect Class Under the Equal Protection Clause

The law is clear that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to

'rational basis' review." *J.E.B.*, 511 U.S. at 143. This Court has held that rational basis review applies in equal protection challenges involving classifications based on sexual orientation. *Witt*, 527 F.3d at 821; *accord Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) ("homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment"); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996) (striking down classification based on sexual orientation under rational basis review).[9]

GSK dismisses *Witt* and *Philips* as having involved a military regulation, which is afforded extra deference. GSK Br. 34; *see also* LAMBDA Br. 3, 10-12. But regardless of whether a military regulation receives particular deference in the application of rational basis scrutiny, *e.g.*, *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1476-77 (9th Cir. 1994), the threshold question of what level of

[9] GSK also fails to establish the sort of history of exclusion from jury service based on sexual orientation that the Supreme Court relied upon in forbidding peremptory challenges of African-Americans and women. *Batson*, 476 U.S. at 85-88; *J.E.B.*, 511 U.S. at 131-41. *Batson* itself required that a defendant show that the challenged juror was "a member of a racial group capable of being singled out for differential treatment" *and* that "in the particular jurisdiction members of [that] race have not been summoned for jury service over an extended period of time." 476 U.S. at 94. The question is not whether sexual orientation, when apparent, has historically been a basis of discrimination generally, *see* LAMBDA Br. 14-15), but rather whether GSK and amici have demonstrated an historical practice of excluding homosexuals *from jury service* akin to the histories of excluding African-Americans and women discussed in *Batson* and *J.E.B.*

scrutiny to apply depends on the type classification at issue, not on whether the challenged statute applies to the military or civilians. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 531, 555 (1996) (applying heightened scrutiny to gender classifications at a state military academy and rejecting the circuit court's deferential approach).[10]

GSK also argues that *Witt* failed to discuss how *Lawrence v. Texas*, 539 U.S. 558 (2003), had allegedly undermined the "mode of analysis" applied in *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990)—which *Philips* cited. GSK Br. 33. But whether *Witt* might be criticized on this basis is irrelevant. Absent an *intervening* Supreme Court (or en banc) decision that is "clearly irreconcilable" with *Witt*, its holding remains binding. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (vacating three-judge panel's overruling of prior cases based on a sentencing guideline amendment enacted

[10] One district court has concluded that *Witt* left open whether sexual orientation is a suspect or quasi-suspect classification, reasoning that *Witt* held only that "in the context of military policy where judicial deference is 'at its apogee,' the military's policy of "Don't Ask Don't Tell' would fail even rational basis review." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012). However, that district court misread *Witt*, which held that Don't Ask Don't Tell *survived* rational basis review under the Equal Protection Clause. That was necessarily a decision that heightened scrutiny did not apply. *Cf. Perry v. Brown*, 671 F.3d 1052, 1076-95 (9th Cir. 2012) (striking down law where it *failed* even rational basis review without deciding level of scrutiny).

before the cases the three-judge panel sought to overrule); *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue"). [11] There has been no such intervening decision here. [12]

2. The Existence of Rights Protected by Substantive Due Process Is Not a Basis for Creating New Protected Classes Under *Batson*

GSK also proposes a theory that would extend *Batson* beyond suspect or quasi-suspect classes to any strike motivated by a juror's membership in a class that might be particularly likely to exercise "fundamental or important constitutional rights" whose impairment is subject to heightened scrutiny. GSK Br. 19-25. GSK argues that this applies to gay jurors because the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), recognized a substantive due process right to engage in private homosexual sexual activity. GSK Br. 21-25. No court,

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[11] Contary to GSK's suggestion, GSK Br. 33, the plaintiff in *Witt* raised an equal protection challenge to Don't Ask Don't Tell, and the opinion expressly rejected that challenge it under rational basis review. *Witt*, 527 F.3d 821 ("We next turn to Major Witt's Equal Protection Clause claim. . . . *Philips* clearly held that DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence* . . . . We thus affirm the district court's dismissal of Major Witt's equal protection claims." (citations omitted)).

[12] *Witt* held separately that the Don't Ask Don't Tell policy was subject to heightened scrutiny as a matter of substantive due process under *Lawrence*. *Witt*, 527 F.3d at 815-21. Substantive due process is discussed in the next section, directly below.

however, has endorsed application of *Batson* to a specific class of people based on its members' exercise of a substantive due process right.

Heightened scrutiny is a *necessary* condition for *Batson* to apply, but it is not *sufficient* to create a new protected class under *Batson*.[13] For example, the Supreme Court has for decades recognized a "fundamental" right to marry that is protected by substantive due process, *e.g.*, *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978) (recognizing right to marry as protected under Due Process Clause), but this Court has specifically held that "[p]eremptory challenges based on marital status do not violate *Batson*," *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993). Substantive due process rights also include the right to an abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the right to use

[13] *J.E.B.*, 511 U.S. at 129-43 (extending *Batson* to gender based on heightened scrutiny for gender classifications as well as historical discrimination against women on juries); *United States v. Santiago-Martinez*, 58 F.3d 423, 424 (9th Cir. 1995) (*Batson* does not extend to obesity because classifications on the basis of obesity not subject to heightened scrutiny under Equal Protection Clause); *see also* Supp. Br. for United States, *United States v. Osazuwa*, No. 10-50109, 2011 WL 3288062, at *5 (9th Cir. July 20, 2011) (position of United States that heightened scrutiny is necessary but not sufficient for *Batson* to apply).

The cases on which amici rely, LAMBDA Br. 7, are consistent with this principle. Both *Bowles v. Sec'y for the Dep't of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010), and *United States v. Watson*, 483 F.3d 828, 831-33 (D.C. Cir. 2007), rejected *Batson* claims for lack of heightened scrutiny, but those holdings do not establish that *Batson* applies automatically to every classification that impinges on a fundamental right.

contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to control one's child's education, *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). But no court has ever suggested that a potential juror's membership in a class of persons who would make choices about the exercise of rights in the areas of abortion, contraception, or education, or the choices those persons make, would be a basis for a *Batson* challenge. Indeed, it would make little sense to extend *Batson* in this manner: No one could tell by visual observation whether a juror had exercised the right to an abortion or to use contraception, and questioning jurors on these topics would be highly intrusive.

GSK's proposed approach to *Batson* is inconsistent with existing law.

3. Extending *Batson* to Sexual Orientation Would Present Significant Implementation Problems

Even if this Court were writing on a blank slate, applying *Batson* to sexual orientation would present formidable practical problems.

This Court's decision in *Campbell*, 92 F.3d 951, illustrates the difficulty that district courts would face in trying to ascertain jurors' sexual orientations without intrusive questioning or invidious stereotyping. After the plaintiff's counsel there challenged the defendant's peremptory strike, the court inquired at sidebar about the basis for the challenge:

> [COUNSEL]: [The challenged juror] is gay.
>
> THE COURT: How do you know that?

> [COUNSEL]: I believe, that based on my observations, just as I would observe a man to be a man, and a woman to be a woman. I listened to his answers. I watched his mannerisms. I believe him to be gay.
>
> * * *
>
> [COUNSEL]: I base this on the following: the way he is—his affect; the way he projects himself, both physically and verbally indicate to me that he is gay. The place where he lives [West Hollywood] is potential evidence of that. His marital status [single] is potential evidence of that. What he has done for a living [freelance screen writer] is potential evidence of that.

92 F.3d at 952. The district court refused counsel's request to ask the juror about his sexual orientation and denied the *Batson* challenge, and this Court affirmed. *Id.*

As this Court has explained, "comparative juror analysis is an important tool that courts *should* use" in *Batson* challenges. *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006); *see Miller-El v. Dretke*, 545 U.S. 231, 240-52 (2005) (applying comparative juror analysis). Indeed, "any notion of discrimination . . . assumes a comparison of substantially similar [parties]." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). But, as *Campbell* illustrates, there is no reliable way to ascertain a juror's sexual orientation, at least short of intrusive questioning or invidious stereotyping.

Justice Ginsburg recognized this difficulty of extending *Batson* to non-apparent classifications in the religion context, questioning how a court could

implement such a system. *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Ginsburg, J., concurring in denial of certiorari) (religious affiliation "is not as self-evident as race or gender" and "[o]rdinarily, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper."). Similarly, the First Circuit warned, in rejecting a religion-based *Batson* challenge while stopping short of deciding whether *Batson* should be extended to religion-based challenges, that courts "simply [do] not have the information to evaluate even the bare numerical assertion that all, or most, Jewish persons in the venire were struck," and "[t]his lack of information is one of the essential problems with applying *Batson* to religious groups." *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008).[14]

[14] Courts have consistently rejected extending *Batson* to peremptory strikes based on religious beliefs, *e.g.*, *United States v. DeJesus*, 347 F.3d 500, 510-11 (3d Cir. 2003), despite the fact that the free exercise of religious beliefs is a fundamental right protected under the First Amendment, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), and laws that target religious beliefs "must undergo the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeh*, 508 U.S. 520, 546 (1993). Courts have split over whether *Batson* extends to religious *affiliation*. *Compare, e.g.*, *United States v. Brown*, 352 F.3d 654, 668-69 (2d Cir. 2003) (extending *Batson* to religious affiliation); *State v. Hodge*, 726 A.2d 531, 552-54 (Conn. 1999) (same), *with Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (declining to extend *Batson* to religious affiliation); and *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (same), *cert. denied* 511 U.S. 1115 (1994). *See also Girouard*, 521 F.3d at 113 (noting split and declining to decide whether *Batson* extends to religious affiliation). Courts also have not extended *Batson* to peremptory challenges based upon other characteristics about which governmental distinctions would be subject to heightened constitutional

C. Even Assuming *Batson* Applies to Sexual Orientation, GSK Did Not Make a Valid Prima Facie Showing of Intentional Discrimination

1. This Court May Affirm the Denial of GSK's *Batson* Challenge Without Deciding Whether *Batson* Applies to Sexual Orientation

No court has extended *Batson* to claims of intentional discrimination based on sexual orientation, and the only circuit to consider the question has expressed "serious[] doubt" that *Batson* extends to sexual orientation.[15] *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005). Consistent with the principle of avoiding unnecessary resolution of constitutional issues, this Court has twice rejected *Batson* claims based on sexual orientation after finding an insufficient showing that the peremptory challenges were discriminatory. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996); *United States v. Osazuwa*, 446 F. App'x 919 (9th Cir. 2011) (unpublished); *see Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 453 (1985) (following "the rule of judicial restraint requiring us to avoid unnecessary resolution of constitutional issues"). This Court may follow the same approach here and affirm the district court's denial of GSK's *Batson*

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scrutiny, such as political beliefs. *E.g.*, *United States v. Prince*, 647 F.3d 1257, 1263 (10th Cir. 2011).

[15] One California appellate court has held that "exclusion of lesbians and gay men [from a jury] on the basis of group bias violates the California Constitution" on the basis of its provision for a jury representative of the community (not on the basis of equal protection). *People v. Garcia*, 92 Cal. Rptr. 3d 339, 77 Cal. App. 4th 1269, 1275 (2000).

challenge because GSK failed to make a prima facie showing of intentional discrimination.

The Equal Protection Clause prohibits a party from striking a potential juror "solely on the basis of the juror's gender, ethnic origin, or race."[16] *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (extending *Batson* to private civil cases).[17] But parties may otherwise use peremptory challenges "for any reason at all, as long as that reason is related to [the party's] view concerning the outcome of the case to be tried." *Batson*, 476 U.S. at 89 (internal quotation marks and citation omitted). Even if *Batson* applied to sexual orientation, the record here requires affirmance.

2. The Totality of the Circumstances Does Not Raise Any Inference of Discrimination

Batson involves a three-step procedure. First, the party making the objection must make a prima facie showing by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). Second, the burden then shifts to the party

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[16] *Batson*, a Fourteenth Amendment equal protection decision, applies in federal cases under the equal protection component of the Fifth Amendment. *United States v. Lewis*, 837 F.2d 415, 416 n.2 (9th Cir. 1988).

[17] The district court questioned whether *Batson* applies in civil cases. ASER-320. This Court, however, may affirm on any basis supported by the record. *E.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010) (en banc).

using the peremptory challenge to articulate a nondiscriminatory reason for the strike. *Id.* at 168. Third, the burden shifts back to the other side to show that the actual motivation for the strike was discriminatory. *Id.*

GSK failed to meet its initial burden. A prima facie showing requires that "(1) the prospective juror is a member of a cognizable racial group, (2) [a party] used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by race." *Boyd v. Newland*, 467 F.3d 1139, 1143 (9th Cir. 2006) (internal quotation marks omitted). In analyzing this threshold issue, this Court reviews "the totality of the circumstances, as reflected in the transcript of the voir dire," to determine whether a challenging party met its burden. *Campbell*, 92 F.3d at 953; *see also, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Wade v. Terhune*, 202 F.3d 1190, 1199 (9th Cir. 2000) (similar). This review includes a "[c]omparative juror analysis," which "involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the [party in question] did not strike. An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the [party] has challenged only the minority juror." *United States v. Collins*, 551 F.3d 914, 921-22 (9th Cir. 2009) (internal citations omitted); *accord Boyd*, 467 F.3d at 1149-51;

Wade, 202 F.3d at 1198. When "an obvious neutral reason for the challenge" appears in the record, this Court will not find a prima facie showing. *Campbell*, 92 F.3d at 953.

Assuming, *arguendo*, that Juror B's single reference to his "partner" with the "he" pronoun established he was gay—and even Plaintiffs' counsel could say only that Juror B "could be" gay, ASER-319—the totality of the circumstances, including a comparative juror analysis, does not support the inference that Abbott's peremptory challenge was motivated by discrimination.

First, Juror B worked at this Court. Juror B also stated that "he kn[ew] a lot of people in the legal field" from his job, suggesting he interacts with counsel, staff attorneys, law clerks, or even judges on this Panel. ASER-223-224. At the time of jury selection, this case had already been before this Court once, C.A. No. 10-71786, and it was clear that the case would return, as it now has. Juror B was not a staff attorney or law clerk (which likely would have led to his excusal for cause) nor a judge (which certainly would have). But Juror B might have had discussions with court personnel that affected his consideration of the case—or he might later have spoken to someone at this Court who would work on this appeal. Other jurors might also have given extra weight to Juror B's opinions given his

employment with this Court. No other prospective juror had even a remote connection to this Court.[18]

Second, Juror B was the only potential juror who testified that he had heard of any of the three drugs at issue. ASER-308 (discussing Kaletra). There was no showing that any other potential juror had heard of any particular HIV drug. Juror P, the only other eligible juror who knew people with HIV, did not know what drugs they were taking. ASER-312.

Third, Juror B was the only eligible juror whose testimony suggested he had lost friends to AIDS. Juror B testified he had friends "in the past" with AIDS, ASER-224, suggesting the friends had died. By contrast, Juror P, the only other eligible juror who knew someone with HIV, testified that her friends with HIV "are on medications," ASER-312, suggesting they are living. While a juror whose friends are being kept alive by drugs might have positive feelings towards companies that make HIV drugs, a juror who lost friends to AIDS might harbor

[18] Juror B also was the only juror among the 17 eligible jurors who claimed any conflict with sitting on the jury. Juror B began his voir dire testimony by telling the Court he had a scheduled dental procedure that conflicted with sitting on the jury. ASER-221-222. The court told him he would have to reschedule the procedure and did not dismiss him for hardship.

negative feelings about a company accused of unreasonably raising the price of an HIV drug—which would make Juror B a more high-risk juror.[19]

None of the factors that this Court has identified as supporting a prima facie showing of discrimination support an inference of discrimination here. These factors include (1) "a pattern of striking minority panel members," including striking "a large number of panel members from the same racial group, or [using] a disproportionate number of strikes against members of a single racial group"; (2) striking members of more than one racial minority group; or (3) a party's statements to the venire or the failure "to engage in meaningful questioning of any of the minority jurors." *Collins*, 551 F.3d at 921 (internal quotation marks and citations omitted).

GSK has not alleged (much less proven) any pattern of striking gay jurors nor that Abbott struck members of more than one minority group. In fact, GSK does not engage in comparative juror analysis at all. Nor can GSK point to statements by Abbott reflecting bias, animus, or the failure to engage in meaningful questioning. To the contrary, counsel asked no questions about any

[19] Indeed, one juror ultimately excused for cause because she had a problem involving an Abbott cholesterol drug, ASER-268-269, testified that she had a friend who died of AIDS and would be angry if he died because he was not able to obtain a prescription. ASER-259 ("I think I would be unhappy or angry if I felt like he, you know, ultimately died of AIDS and he wasn't able to, you know, have access to a prescription.").

prospective jurors' sexual orientation or that could be viewed as proxies for sexual orientation. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (no prima facie showing where, *inter alia*, "[t]he prosecutor's questions and statements during the selection of the jury failed to support an inference of purposeful discrimination") Counsel's questions to Juror B were similar in scope and kind to his questions to other panel members, and no prima facie showing is established where "[t]he challenged prospective juror was not treated differently than other prospective jurors who were similar in relevant aspects except race." *Id*. Counsel asked follow-up questions about Juror B's statements about his friends with HIV and about Juror B's knowledge of Kaletra. ASER-307-308. Counsel asked similar questions of other jurors who knew people with HIV, such as Juror P, who was seated on the jury, ASER-312, and other prospective jurors who were not among the 17 potential jurors for whom peremptory strikes could be exercised. ASER-312-314.

3. GSK Did Not Make a Prima Facie Showing

Despite legitimate factors having nothing to do with sexual orientation and distinguishing Juror B from the other 16 eligible jurors. GSK argues it made a prima facie showing of intentional discrimination because (a) Juror B was apparently gay and (b) the case involved HIV drugs. GSK Br. 36-38. This is far

from a prima facie showing of intentional discrimination on the basis of sexual orientation.

Even assuming Juror B was gay, there is no way to confirm that Juror B was the only gay juror on the venire. Sexual orientation is not readily apparent, no juror was asked about his or her sexual orientation, and although some jurors referred to spouses by gender, others referred to their former spouses without a gender-specific pronoun or said nothing at all suggesting their sexual orientation. Even if Juror B were shown to be the sole gay member of the venire, that would not be not have been enough to support a prima facie case. *Vasquez-Lopez*, 22 F.3d at 902 (no prima facie showing despite government striking sole black juror in venire). This would be true even if the opposing party shared the trait at issue with the struck juror, which obviously was not the situation with the corporate plaintiff here. *Tolbert v. Gomez*, 190 F.3d 985, 988 (9th Cir. 1999) (no prima facie showing where state struck black juror in trial of black defendant).[20] "More is required." *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (no prima facie showing where prosecutor struck black juror in trial of black defendant).

[20] One invoking *Batson* need not be a member of the same cognizable protected group as the juror, but shared characteristics "between the defendant and the excused person" remains relevant to making a prima facie showing. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

GSK relies on *Crittenden v. Ayers*, 624 F.3d 943 (9th Cir. 2010), *see* GSK Br. 39 n.17, which found that an African-American facing the death penalty for allegedly murdering a white couple had made a prima facie showing of discrimination when the prosecutor struck the sole black juror in the venire. In fact, *Crittenden* held that the strike of the sole black juror in the venire "d[id] not by itself raise an inference of discrimination." *Id.* at 955. There was a prima facie showing only because comparative juror analysis showed that (1) the prosecutor had not used peremptory challenges against two similarly situated white jurors, including the white juror who replaced the stricken black juror, and (2) the prosecutor had unsuccessfully attempted to strike the black juror for cause based on the juror's general objection to the death penalty, even though such a general view does not constitute cause. *Id.* at 956. There is no similar evidence here. Far from showing discrimination, comparative juror analysis here highlights the numerous neutral reasons that distinguished Juror B from other members of the venire; and Abbott did not seek to excuse Juror B for cause, let alone for an improper reason.

GSK is thus left to urge the Court to speculate that there was discrimination because the case involved pricing of an HIV drug. But the issue here was merely the extent to which pricing affected competition. In its only published decision addressing a sexual-orientation-based *Batson* claim, this Court concluded the

plaintiff had not made a prima facie showing where "nothing in the record suggested that sexual orientation of any of the parties was in issue." *Campbell*, 92 F.3d at 953. Likewise here, this case was not about whether anyone engaged in discrimination, on any basis, and no one's sexual orientation was at issue.[21]

GSK's speculation also does not stand up to the "obvious" neutral facts that distinguished Juror B from other jurors—his employment at the Ninth Circuit, his awareness of Kaletra, and his loss of friends to AIDS. *Campbell*, 92 F.3d at 953 (finding lack of prima facie showing based on "obvious" neutral reason for strike of allegedly gay juror—that he was one of two jurors with prior jury experience and, unlike the seated juror whose prior jury had reached a defense verdict, the stricken juror's prior trial result was unknown). Even assuming *Batson* extends to

[21] The cases on which GSK relies, GSK Br. 39, demonstrate the need for a direct link between the subject matter of the case and the alleged discrimination to support an inference of discrimination at the prima facie stage. In *United States v. Iron Moccasin*, 878 F.2d 226, 227-29 (8th Cir. 1989), the Eighth Circuit, in affirming the district court's denial of a *Batson* challenge, found that the defendant, a Native American, had made a prima facie showing based on the government striking the sole Native American in the venire in a "sensitive and highly emotional trial" involving a sex offense on an Indian Reservation. And in *Alexis v. Leporati*, No. 93-10003, 1996 WL 463675, at *3-*4 (D. Mass. July 30, 1996), a district court initiated and sustained its own *Batson* challenge against a defendant's strike of the sole African-American juror in a civil suit by an African-American alleging race discrimination. Neither of these cases required the sort of speculative leaps GSK makes here to infer that a party might have struck a protected juror for a discriminatory reason.

sexual orientation, GSK failed to sustain its burden to make a prima facie showing of intentional discrimination.

D. If *Batson* Applied and GSK Had Made a Prima Facie Showing of Discrimination, a Remand Would Be Required To Permit the District Court To Complete *Batson*'s Second and Third Steps

If GSK had established a prima facie *Batson* claim, the proper course would be for this Court to remand "with instructions that the [district] court require the [the striking party] to provide its reasons" for the strike and "determine, in the first instance, whether the strike was discriminatory." *E.g.*, *Collins*, 551 F.3d at 923; *United States v. Esparza-Gonzalez*, 422 F.3d 897, 906 (9th Cir. 2005) (finding prima facie showing and remanding for evidentiary hearing to allow prosecutor to provide actual reason for strike); *Paulino v. Castro*, 371 F.3d 1083, 1092 (9th Cir. 2004) (same); *Fernandez v. Roe*, 286 F.3d 1073, 1079-80 (9th Cir. 2002) (same).

GSK seeks to avoid this settled rule by arguing that the district court obtained an explanation from Abbott for why it struck Juror B—which would have been step two of the *Batson* analysis. That is untrue. When GSK made its challenge, the district court articulated three reasons to reject the challenge at the prima facie stage—(1) *Batson* did not apply in a civil case, (2) *Batson does* not extend to sexual orientation, and (3) there is "no way for us to know who is gay and who isn't here." ASER-320. The court then gave Abbott's counsel a choice to stand on the court's "three reasons" or proceed to what it called "number four" and

explain why Abbott made the strike. As the district court stated, "Number four, one turns to the other side and asks for the basis for their challenge other than the category that they are in, and if you have one, it might be the better part of valor to tell us what it is. . . . Or if you don't want to, you can stand on my first three reasons." *Id.* Abbott's counsel declined to go beyond court's first "three reasons" and offer an affirmative explanation of the strike, stating: "*I will stand on the first three at this point, your honor*. I don't think any of the challenge applies. I have no idea whether he is gay or not." *Id.* (emphasis added).

In the face of Abbott's clear statement that it would "stand on the first three" reasons why GSK had not made a prima facie showing, GSK argues that counsel nonetheless offered an affirmative reason for the strike under stage two of *Batson* by going on to state "I have no idea whether he is gay or not." But that was not an affirmative *explanation* for the strike: It was not phrased as such; it directly followed counsel's choice *not* to offer an explanation; and it sheds no light on why Abbott chose to strike the juror.

Rather than fairly characterizing the record and seeking a remand, GSK says Abbott offered an explanation—but one that was "deficient as a matter of law," GSK Br. 41. GSK then turns and argues that Abbott should not be permitted to explain its strike because Abbott "already had an opportunity" to do so. *Id.* at 42. This is nonsensical. The cases GSK cites, in which this Court made a final step

three determination, are all cases in which the trial court reached step two and required the party making the peremptory challenge to explain its reasons, which simply did not occur here. *Id*. at 41-42.

If this Court were to conclude that *Batson* applies to sexual orientation, that GSK made a prima facie showing of discrimination on the basis of sexual orientation, and that the alternative bases for affirmance do not apply, the proper course would be for this Court to remand to permit the district court to complete the *Batson* process.

E. GSK Did Not Make a Prima Facie Showing of Intentional Gender Discrimination

GSK alternatively appears to challenge Abbott's strike of Juror B as impermissible gender discrimination. GSK Br. 29-30. This argument fails for two reasons.

First, GSK waived any *Batson* claim based on gender discrimination because GSK did not make any such claim in the district court. *See United States v. Brown*, 352 F.3d 654, 662-63 (2d Cir. 2003) (defendant's religion-based *Batson* challenge was insufficient to preserve a race-based *Batson* challenge for appeal).[22]

[22] This criminal case, and similar ones, reviewed forfeited *Batson* challenges for plain error under Federal Rule of Criminal Procedure 52(b), but plain error review does not apply in civil cases and thus unpreserved claims are waived. *E.g.*, *Haney v. Adams*, 641 F.3d 1168, 1171 n.5 (9th Cir. 2011).

Second, GSK did not and cannot make a prima facie showing of gender discrimination. All the legitimate reasons for striking Juror B apply regardless of whether the *Batson* claim is based on sexual orientation or gender. Moreover, a comparative juror analysis undermines any claim of discrimination against men.[23] The pool of eligible jurors included ten men and seven women. Abbott used just one of its three peremptory strikes on a man; GSK used all four of its peremptory strikes on men; and the seated jury included five men and five women.

GSK's argument, GSK Br. 29-30, rests on a misreading of *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993). The defendant there made a gender-based *Batson* objection to the government's exclusion of an unmarried woman. *Id.* at 881. This Court recognized that *Batson* permits peremptory challenges based on marital status, but found a *Batson* violation because the prosecutor's explanation "reveal[ed] that the jurors were struck because they were women," not because they were unmarried. *Id.* at 881-82. Nothing like that occurred here. Abbott's strikes do not show a pattern of discrimination against men, and Abbott did not provide any step two explanation at all, let alone one that revealed a discriminatory purpose.

[23] Amici's assertion, LAMBDA Br. 24, that "[h]ad the juror been a woman who formed romantic relationships with men rather than a man who does, the juror would not have been disqualified," is both utter speculation and just a rephrasing of the sexual orientation discrimination argument, not a gender discrimination argument.

II. The District Court's Denial of GSK's *Batson* Claim Should Be Affirmed Because this Case Never Should Have Gone to the Jury

Quite apart from *Batson*'s inapplicability and the three independent grounds for striking Juror B, there is an additional reason why this Court need not order a new trial: None of GSK's claims should have gone to the jury in the first place. Although *Batson* claims are not subject to ordinary harmless-error analysis, *Turner v. Marshall*, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997), affirmance is warranted if a *Batson* violation caused no prejudice, *United States v. Gonzalez-Largo*, 436 F. App'x 819, 821 (9th Cir. 2011) (unpublished) (affirming strike of only African-American alternate juror "because the alternate juror was never called upon to serve as a regular juror"). If *Batson* had been violated, that would be so here.

A. Standard of Review

A district court's decision to grant or deny judgment as a matter of law is reviewed de novo. *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 941 (9th Cir. 2011).

B. GSK's Antitrust Claims Fail as a Matter of Law

Not only were GSK's antitrust claims rejected by the jury, but no other result would have been legally supportable. First, the claims fail as a matter of law under this Court's decision in the related case of *John Doe 1 v. Abbott Laboratories*, 571 F.3d 930 (2009) ("*Doe*"), which rejected an antitrust challenge

to the very same pricing conduct. Second, the evidence showed as a matter of law that Abbott did not have monopoly power in any relevant market.

1. GSK's Theories of Anticompetitive Conduct Fail as a Matter of Law Under this Court's Decision in *Doe v. Abbott Laboratories*

Doe should have ended GSK's antitrust claims. Applying *Pacific Bell Telephone Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), *Doe* rejected the claim that Abbott's repricing Norvir without repricing Kaletra violated the antitrust laws. In *linkLine*, the plaintiffs alleged that AT&T violated the antitrust laws by pricing wholesale DSL transport services too high in relation to its price for retail DSL internet service. AT&T's rivals in the retail DSL market said that the small differential between AT&T's two prices anticompetitively "squeezed" their profit margins

In rejecting this "price squeeze" theory, the Supreme Court held that "[i]f both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because [the] wholesale price happens to be greater than or equal to [the] retail price." *linkLine*, 555 U.S. at 455. The Court then analyzed AT&T's conduct in each market—wholesale and retail. Because the plaintiffs had not alleged either a refusal to deal in the wholesale market or predatory pricing in the retail market, the Court rejected the plaintiffs'

claim as "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452.

Finding that *linkLine* "controls the outcome here," this Court held that the plaintiffs in *Doe* failed to state an antitrust claim based on Abbott's repricing of Norvir. 571 F.3d at 933, 935. "However labeled," the court recognized, "Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*." *Id.* at 935. "[A]nalyz[ing] each market separately," *Doe* found "no independently cognizable harm to competition when the wholesale price and the retail price are independently lawful." *Id.* at 934-35. The Court thus held that the *Doe* plaintiffs' claim "falls short" because "[t]hey allege no refusal to deal at the booster level, and no below cost pricing at the boosted level." *Id.* at 935.

GSK's antitrust claims are based on the very same Norvir price increase, and likewise fail under *linkLine*. GSK showed neither any refusal to deal in Norvir in the booster market, nor predatory pricing of Kaletra in the boosted market.

No Refusal to Deal in the Booster Market. The undisputed evidence was that Abbott never refused to sell Norvir to anyone and that Norvir's sales increased dramatically throughout the relevant period. ASER-193-196, 39-40. As GSK's own expert economist, Roger Noll acknowledged at trial, "Of course [Abbott] didn't make [Norvir] unavailable," and he disclaimed any "opinion in this case that

Abbott's conduct constitute[d] a refusal to deal under the applicable law." ASER-175. The absence of any refusal to deal distinguishes this case from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), upon which GSK had relied.[24]

To overcome its lack of evidence, GSK argued below that by charging a price for Norvir that was too close Kaletra's price, Abbott "effectively" refused to deal in Norvir. That is, the combination of a relatively high price for Norvir and a relatively low price for Kaletra made it harder for competitors to sell their boosted PIs profitably. But as this Court explained in *Doe*, merely relabeling a "price squeeze" as a "refusal to deal" cannot overcome *linkLine*'s holding:

> However labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*. Abbott sells Norvir as a standalone inhibitor and as part of a boosted inhibitor instead of selling Norvir to its competitors at a high price for use with their own protease inhibitors while attributing a lower price to the product when used as part of its own boosted inhibitor. . . . [E]ither way, this puts the squeeze on competing producers of protease inhibitors that depend on Norvir for their boosted effectiveness and consumer acceptance.

Doe, 571 F.3d at 935. This is exactly what GSK did with its refusal-to-deal claim.

[24] In *Aspen*, the defendant Ski Co. stopped selling all-Aspen tickets and then "refus[ed] to accept the Adventure Pack coupons" that the plaintiff competitor resort created for its customers as an alternative, even though accepting them "would have entailed no cost to Ski Co. itself." 472 U.S. at 610.

In any event, *linkLine* explicitly rejected GSK's standard for determining whether Abbott refused to deal. At GSK's request, the district court instructed the jury that, in deciding whether Norvir's price amounted to an "effective" refusal to deal, it should consider "whether Abbott offered to deal with its competitors only *on unreasonable terms and conditions*." ER-109-110 (emphasis added). But the only terms and conditions at issue were Abbott's pricing of Norvir and Kaletra. And *linkLine* explicitly rejected a similar inquiry into "adequate" or "fair" prices, explaining that "this test is nearly impossible for courts to apply without conducting complex proceedings like rate-setting agencies." 555 U.S. at 440.

No predatory pricing in the booster market. As this Court held in *Doe*, proving predatory pricing required GSK to show that (1) Kaletra's price was "below an appropriate measure of [Abbott's] costs"; or that (2) "there was a 'dangerous probability' that [Abbott] [would] be able to recoup [any] 'investment' in below-cost prices." *Doe*, 571 F.3d at 934 (quoting *linkLine*, 555 U.S. at 451). Yet there was no evidence of either. As GSK's own expert economist Keith Leffler conceded, the price of a Kaletra pill was not below the cost of producing it. ASER-143. And the undisputed evidence was that several new boosted PIs entered the market, and that others were scheduled to enter, precluding any finding of a dangerous probability of recoupment. ASER-93-94, 188-189; *see Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) ("It is . . . important to

examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.") (quotation omitted).

Lacking any evidence that Abbott predatorily priced Kaletra, GSK focused instead on the relationship between the prices of Norvir and Kaletra. According to GSK, the pricing of Kaletra constituted "bundled discounting" under *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). But *Doe* expressly held that *Cascade* was "overtaken" by *linkLine*: "Because . . . the outcome here follows from *linkLine*, we need not discuss *Cascade*." 571 F.3d at 933, 935. And *linkLine* made clear that—"[h]owever labeled," *Doe*, 571 F.3d at 935—"there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price." 555 U.S. at 455. Indeed, it was undisputed that Norvir's price was at all times less than Kaletra's price.

GSK's bundled discounting theory was particularly indefensible given that *linkLine* too involved allegations that the relevant retail product was a "bundled package to end use customers." *See* Joint Appendix, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, No. 07-512, 2008 WL 4055222, at *33 (¶ 20) (U.S. Aug. 28,

2008).[25] Moreover, the Supreme Court explicitly rejected use of a "transfer price test" mathematically equivalent to *Cascade*'s "discount attribution test" for bundled discounting, concluding that the test "lacks any grounding in our antitrust jurisprudence." *linkLine*, 555 U.S. at 454. The Supreme Court in *linkLine* explicitly rejected any test that would have required "the defendant [to] leave its rivals a 'fair' or 'adequate' margin between the wholesale price and the retail price." *Id.* The Court held that, rather than imputing certain prices to certain components of a product and then comparing the imputed component prices to the actual product price, as GSK argued that the jury should do in applying *Cascade*'s bundled discount test here, courts should simply ask whether the product's actual price has been set below the cost of production. *Id.* at 454-55. Under *Doe* and *linkLine*, therefore, GSK's antitrust claims are foreclosed.

2. GSK's Evidence Was Insufficient To Support a Finding that Abbott Possessed Monopoly Power

Even apart from *Doe*, GSK's antitrust claims fail as a matter of law because there was insufficient evidence that Abbott had monopoly power in any relevant market. A monopolization claim requires proof of "the possession of monopoly power in the relevant market." *Eastman Kodak Co. v. Image Technical Servs.*,

[25] *Accord linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 879 (9th Cir. 2007) (first amended complaint: a "bundled offering"); *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, CV 03-5265 SVW, 2004 WL 5503772, at *2 (C.D. Cal. Oct. 20, 2004) ("a bundled package").

Inc., 504 U.S. 451, 480 (1992). An attempted monopolization claim requires proof of a "dangerous probability" of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

Monopoly power is the power to "control prices or exclude competition." *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988). The evidence at trial showed that Abbott had no such power in the market in which Kaletra competed. Far from being able to raise prices of boosted PIs to supracompetitive levels, Abbott always priced Kaletra at or below the prices of other boosted PIs. ASER-29; ER-415 (in June 2010, a daily dose of Kaletra was $23.40, a daily dose of the Lexiva component of boosted Lexiva alone was $24.15 (not including the price of the Norvir used for boosting of Lexiva), and a daily dose of boosted Reyataz was roughly $30 (again, not including the price of the Norvir used for boosting Reyataz)).[26] Indeed, GSK's claims are premised on the notion that Abbott priced Kaletra *too low*.

[26] The courts have rejected the suggestion that pricing brand name drugs above marginal costs shows monopoly power. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, 367 F. Supp. 2d 675, 684 (D.N.J. 2005); *accord Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) ("high profits" is insufficient to show monopoly power absent an "accompanying showing of restricted output"). If the law were otherwise, it would lead to the conclusion that it is GSK that has monopoly power, because GSK's pricing for its boosted protease inhibitor Lexiva was higher than Abbott's pricing for Kaletra.

And far from being able to exclude competition, Abbott saw Kaletra's market share continuously decline as the competitors Reyataz, Lexiva, and Prezista entered the market and thrived. ASER-131-135, 186-187. This is the polar opposite of monopoly power.

At trial, GSK admitted that it had not offered direct evidence of monopoly power. ASER-16; ASER-130. Instead, GSK attempted to prove monopoly power through "indirect evidence"—that is, the ability to maintain a dominant market share coupled with barriers to entry and expansion. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("ability to maintain market share" required to find monopoly power). But, on these measures too, the undisputed evidence reinforced Abbott's lack of monopoly power.

Insufficient and Declining Market Share. Courts generally require at least a 65% market share for monopoly power. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924-25 (9th Cir. 1980) ("[M]arket shares on the order of 60 per cent to 70 per cent have supported findings of monopoly power."); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (Hand, J.) ("it is doubtful whether sixty or sixty-four per cent would be enough"). Furthermore, ultimately, "it is not market share that counts, but the ability to maintain market share." *Syufy Enters.*, 903 F.2d at 665-66; *accord Oahu Gas*, 838 F.2d at 366

("market share is just the starting point for assessing market power"). Courts "do better to plot the [market share] points on a graph and observe the pattern they form than to focus narrowly on [defendant's] market share at a particular time." *Syufy*, 903 F.2d at 666.

Even under GSK's too-narrow definition of a market limited to a handful of the "boosted" PIs—which the jury rejected, ER-72—Abbott did not have sufficient market share. In 2004, the first year after Norvir's repricing, Kaletra's share fell below 65%. ASER-133. By 2005, Kaletra's share had dropped to 50%. ASER-133. By 2009, Reyataz surpassed Kaletra as the most prescribed boosted PI. ASER-135-136. In 2006, when Prezista entered, it rapidly gained market share, and by trial, was poised to surpass Kaletra. ASER-186-187; ER-418.

Kaletra's market share was thus in decline throughout the entire period for which GSK claimed Abbott had monopoly power. That decline continued for the more than four additional years until trial, ASER-135, a period during which GSK did not argue that Abbott had monopoly power. As this Court held in *Syufy*, such consistent decline in market share evidences a lack of monopoly power. *Syufy* found a decline from 93% to 75% in about three years evidenced lack of monopoly power. Abbott's decline was even more dramatic. Even assuming GSK's market definition, Kaletra's share dropped 30% from Q2 2003 to Q2 2004, ASER-132, another 20% from Q4 2004 to Q4 2005, ASER-133, and another 11% by Q2 2009,

ASER-135. This evidences a lack not just of monopoly power but also of a dangerous probability of obtaining monopoly power. *See, e.g., Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) ("No reasonable jury could conclude from the rapid and continuous decline of [the defendant's] market share . . . that there was a probability that [the defendant] would monopolize the waffle market, let alone a dangerous probability."), *superseded by statute on other grounds*; *accord Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); *Horst v. Laidlaw Waste Sys.*, 917 F. Supp. 739, 744-45 (D. Colo. 1996) (finding "as a matter of law, that there is no probability of success in monopolizing the relevant market since [defendant's] market share actually decreased during the relevant time period.").

No Barriers to Expansion. Abbott's competitors also faced no barriers to expansion. "Even if [a defendant] has a high market share, neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion." *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997); *see also Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997); *Rebel Oil*, 51 F.3d at 1441 ("[I]f rivals have idle plants and can quickly respond to any predator's attempt to raise prices above

competitive levels, the predator will suffer an immediate loss of market share to competitors. In that instance, the predator does not have market power.").

GSK's economic expert Dr. Noll conceded at trial that Abbott's rivals are not "constrained in any way in [their] ability to expand the output of [their drug] in response to any price increase by an existing competitor," ASER-92-93, and indeed had expanded output substantially during the relevant period, ASER-93; *see also* ASER-33-34.

C. GSK's State-Law Contract and UDTPA Claims Fail as a Matter of Law

GSK's state-law contract and UDTPA claims likewise should not have gone to the jury. As explained below and in Abbott's opening brief, GSK's implied covenant claim fails as a matter of law. *Infra* at 47-66; Abbott Br. 31-46. And without a contract claim, there is no merit to GSK's standalone UDTPA claim. The jury rejected each of the three factual predicates for GSK's UDTPA claim. *Infra* at 53. But even if it had not, none of those acts constitutes a UDTPA violation as a matter of law.

GSK's first alleged unlawful act was that Abbott deliberately withheld plans to use Norvir to limit competition. ER-76. But Abbott had no independent obligation to disclose any pricing or product plans to its competitor. Further, GSK alleged that Abbott withheld the fact that it merely *considered* taking Norvir off the market. Yet, the evidence shows that withdrawing Norvir was rejected months

before the license was signed, and that Abbott never took Norvir off the market. *See, e.g.*, ASER-480-485; ASER-86-89. Merely considering an act that was never taken cannot be illegal.

GSK's second and third theories were that Abbott inequitably asserted market power over Norvir by timing a price increase to disrupt Lexiva's launch. ER-76. But this theory rises or falls with GSK's antitrust claim. It is the declared public policy of North Carolina not to interfere with "the ability of the market [to balance supply and demand or] the function of price in allocating scarce resources." N.C.G.S.A. § 75-37. To apply the UDTPA to pricing conduct that is *lawful* under the Sherman Act would contravene this policy. Thus, as the district court correctly found, "Abbott would face liability under the UDTPA for monopolization *if and only if* GSK prevailed on its Section 2 claim." ER-401 (emphasis added).

Moreover, Abbott would not have violated the UDTPA even if it timed its product announcements so as to obtain a competitive advantage. That is ordinary "business-related conduct" beyond the UDTPA's reach. *Dalton v. Camp*, 548 S.E.2d 704, 711-12 (N.C. 2001). Nor could Abbott violate the Act simply by "disrupting" or "undermining" GSK's business. *See Tar Heel Indus., Inc. v. E.I. duPont de Nemours & Co.*, 370 S.E.2d 449, 451-52 (N.C. Ct. App. 1988) (permitting DuPont to terminate contract with transportation carrier, even though

DuPont was the carrier's only client and termination would ruin the carrier's business).

In short, because GSK's UDTPA claim—like its antitrust and implied covenant claims—never should have gone to the jury, this Court can affirm the judgment below without regard to *Batson*.

III. The District Court Properly Entered Judgment for Abbott on GSK's North Carolina UDTPA Claim

In addition to its *Batson* challenge, GSK also appeals the district court's grant of judgment in Abbott's favor on GSK's North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") claim. At trial, GSK alleged that Abbott committed three acts violating the UDTPA: (1) withholding from GSK that it had considered (but ultimately decided against) a plan for using Norvir to limit competition; (2) "inequitably" asserting power over Norvir by repricing it to disrupt Lexiva's launch; and (3) timing that repricing to do the same. The jury found that Abbott had not committed the second or third act, and that GSK suffered no injury from the first.

GSK now urges a fourth act. Citing the jury's finding in connection with its implied covenant claim that Abbott's breach was "grossly negligent," GSK says such conduct violates the UDTPA. But as the district court found, "GSK committed to rest its UDTPA claim on the [three] acts reflected on the verdict form," ER-21—which at GSK's request, the court incorporated onto the jury

verdict form verbatim. Having urged the court to present those three acts, GSK has waived its new theory based upon a "grossly negligent" breach.

In any event, GSK admits that "a simple breach of contract, even if intentional, will not violate the UDTPA." GSK Br. 45. It follows that a "grossly negligent" breach cannot violate the UDTPA. And the record does not reveal any "egregious or aggravating circumstances" that support UDTPA liability. GSK points to the jury's finding that Abbott withheld having *considered* taking Norvir off the market. But the jury (necessarily) concluded that this did *not* proximately cause injury to GSK. ER-77. GSK's argument is but an improper "attempt to multiply the damages for an ordinary breach of an agreement by re-characterizing the breach as a [UDTPA] violation"—which "North Carolina law forbids." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 224 (4th Cir. 2009).

A. GSK Waived Any UDTPA Claim Based on the Breach of the Implied Covenant Found by the Jury

Throughout trial, GSK based its UDTPA claim on the allegations stated above,[27] proposing a special verdict form asking the jury whether Abbott committed these three acts, and for each act, whether it proximately caused GSK harm. The district court adopted GSK's proposed UDTPA questions verbatim.

[27] GSK originally proposed a fourth question—whether "Abbott maintained, or attempted to maintain, a monopoly in the market in which Kaletra competes, ASER-383-395—but later agreed that this question was superfluous. ER-350.

ER-76; ASER-348. As GSK later confirmed, "[the] jury instructions that your honor passed out are *the right ones*, because *those are the things that we contend violate the North Carolina Unfair Competition Statute*." ASER-367 (emphasis added).

The jury rejected GSK's theory, finding that Abbott did not commit two of the acts and that the third did *not* proximately cause GSK any harm. ER-76-77. Having failed on its chosen UDTPA theory, GSK concocted its "egregious" breach theory, which it first asserted in an "Administrative Motion for Entry Judgment Under Rule 58(b)(2)" and now presses here. As the district court rightly recognized, this theory came too late: "GSK committed to rest its UDTPA claim on the [three] acts reflected on the verdict form"—not on Abbott's alleged breach of the implied covenant. ER-21.

Because GSK raised its new UDTPA theory only after the jury's verdict, the theory is waived. *Pretty On Top v. First Interstate Bank*, 197 F. App'x 540, 542 (9th Cir. 2006) (unpublished) (objection waived by failure to insist that question be included on special verdict form). "When a party does not request either a 'special question' or an instruction submitting a particular theory . . . to the jury, that party makes a choice that has the associated consequence of almost certainly precluding the assertion after verdict of the omitted theory." *Aetna Casualty Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1555 (1st Cir. 1994). Such is the case here.

B. The Jury's Findings Do Not Establish Unfair or Deceptive Acts

GSK's theory also fails on the merits. "[A] mere breach of contract, *even if intentional*, is not sufficiently unfair or deceptive to sustain an action under" the UDTPA, violations of which automatically result in treble damages. *Branch Banking & Trust Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992) (emphasis added). Were the rule otherwise, "awarding . . . treble damages would destroy the parties' bargain," "force the defendant to bear a risk it never took on," and "rewrite[the] contract." *PCS Phosphate*, 559 F.3d at 224 & n.5.

"[C]onduct carried out pursuant to contractual relations rarely violates the UTPA." *S. Atl. Ltd. P'ship of Tennessee, LP v. Riese*, 284 F.3d 518, 536 (4th Cir. 2002). It does so only where "substantial aggravating circumstances," *Bob Timberlake Collection, Inc. v. Edwards*, 626 S.E.2d 315, 323 (N.C. Ct. App. 2006)—*e.g.*, "deception either in the formation of the contract or in the circumstances of its breach," *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citation omitted)—attend the breach. The UDTPA also requires proof of proximate causation. *Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 687 (N.C. 2000). As the district court recognized, neither gross negligence in breaching the implied covenant nor failing to disclose information to GSK during negotiations (without harming GSK) violates the UDTPA.

a. A Grossly Negligent Breach of the Implied Covenant Does Not Support a UDTPA Claim as a Matter of Law

The jury's finding that Abbott's purported breach of the implied covenant was "grossly negligent," ER-75, does not constitute a substantially aggravating circumstance converting the breach into a UDTPA claim—especially given the district court's jury instructions. Adopting GSK's proposal, the court instructed that "grossly negligent conduct" involves either "intentional wrongdoing or a reckless indifference to the rights of others." ER-120. As explained below, the jury necessarily found only reckless indifference. *Infra* at 74-77. Because even an *intentional* breach of contract does not violate the UDTPA, a "less than intentional" breach necessarily falls short. *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (citation omitted).

Further, as the district court recognized, ER-19-21, neither reckless indifference nor "intentional wrongdoing" says anything about "the impact the practice has in the marketplace." *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980). Nor does either show "deception . . . in the circumstances of its breach." *Bartolomeo*, 889 F.2d at 535. Indeed, contrary to GSK's argument that Abbott enticed GSK to enter the license while intending to disrupt Lexiva's launch, the jury found that Abbott's repricing of Norvir *was not* undertaken "to undermine and disrupt Lexiva's launch and future sales," or timed

"to disrupt Lexiva's launch." ER-76.[28] The jury also found that Abbott's failure to tell GSK that Abbott had *considered* taking Norvir off the market was not the proximate cause of any injury. ER-20, 77.

GSK's UDTPA cases, GSK Br. 47, involved deception accompanied by extreme facts not found below and inconsistent with the jury's finding that Abbott did not reprice Norvir to harm GSK. For example, *Mosley & Mosley Builders, Inc. v. Landin Ltd.* involved wrongful eviction of a tenant and removal of its property in a manner the court analogized to trespass and conversion. 389 S.E.2d 576, 580 (N.C. Ct. App. 1990). *Huff v. Autos Unlimited, Inc*. involved deception by a used car salesman who represented that a car known to have been "wrecked" had only been in a "fender-bender" and was "reliable." 477 S.E.2d 86, 88-89 (N.C. Ct. App. 1996). And as GSK concedes, the UDTPA claim in *Riese* was not even premised on a breach, let alone of an *implied* covenant. GSK Br. 45-46 n.19. In fact, *Riese* addressed the opposite issue—when the exercise of a clear contractual *right* (not a breach) may violate the UDTPA.

[28] GSK's other theories for how Abbott might have engaged in intentional wrongdoing, GSK Br. 64-65, are both implausible and were not presented to the jury. *See infra* at 74-77; *Neely v. Club Med Management Servs. Inc.*, 63 F.3d 166, 200 (3d Cir. 1995) ("Having failed to present this issue to the jury, the defendants failed to meet their burden.").

b. Withholding Its Consideration of a Course of Action Abbott Never Took Is Not a Substantially Aggravating Factor Under the UDTPA

Nor is UDTPA liability supported by the jury's finding that Abbott "deliberately withheld" from GSK that it *considered* withdrawing Norvir from the market. ER-76. The notion that one violates the UDTPA by "considering" acts that one does not take is frankly absurd. It is "not unfair or deceptive for [a party] to study and seek alternative[s]" that involve terminating a contract. *Tar Heel Indus.*, 370 S.E.2d at 452.

In any event, the district court rightly recognized that liability is foreclosed by the jury's finding that Abbott's withholding of its internal considerations did not proximately cause any injury. ER-20, 77. The jury had good grounds for this finding: GSK elicited no evidence that it would have acted differently had it known of Abbott's consideration of the plan in question. GSK says proof of actual deception is not required. But proximate causation is "an essential element" of a UDTPA violation, *Old Salem Foreign Car Serv., Inc. v. Webb*, 582 S.E.2d 673, 677 (N.C. Ct. App. 2003), and a plaintiff "must establish *actual injury to himself* or his business, proximately caused *by the unfair or deceptive act or practice.*" *Ausley v. Bishop*, 515 S.E.2d 72, 77 (N.C. Ct. App. 1999) (emphasis added) (citing

authorities). Thus, GSK was required to prove that any deception caused it actual harm—which it failed to do.[29]

CONCLUSION

GSK's *Batson* claim should be rejected because, even if *Batson* applied to sexual orientation, GSK did not make a prima facie showing of discrimination, and, in fact, the record reveals obvious, non-discriminatory reasons for excluding the juror in question. Moreover, if this court were to reach the question whether *Batson* applied to sexual orientation, it would be constrained by existing precedent to hold that *Batson* does not. The Court need not reach any of these *Batson* issues, however, because the Court can affirm on the alternative ground that the case should never have been submitted to the jury because Abbott was entitled to judgment as a matter of law.

[29] GSK also says the jury's finding of no proximate cause is irrelevant because of the harm GSK suffered harm by virtue of Abbott's purported breach. GSK Br. 48. GSK is wrong. "In forging [the UDTPA], the legislature intended for the phrase 'treble the amount fixed by the verdict' to mean that damages *proximately caused* by a violation of [the act] shall be trebled, not that damages on every claim that happens to arise in a case involving a violation of [the act] shall be trebled." *Gray*, 529 S.E.2d at 684-5(discussing private action section of UDTPA, N.C.G.S.A. § 75-16).

REPLY BRIEF IN SUPPORT OF ABBOTT'S APPEAL

I. GSK Cannot Establish a Breach of the Implied Covenant

GSK's opposition to Abbott's appeal confirms that Abbott was entitled to judgment as a matter of law on GSK's implied covenant claim.

There is a glaring gap between the right that GSK says it was granted by its patent license from Abbott and the right that GSK says Abbott violated. Nobody disputes that "*every* contract has an implied covenant of good faith and fair dealing," GSK Br. 50, or that "a party may not assign a right [to a patent], receive consideration for it, and then take steps that would *render the right commercially worthless*." *Id.* at 57 (quoting *Jacobs v. Nintendo of Am., Inc.*, 370 F.3d 1097, 1101 (Fed. Cir. 2004)) (emphasis added). Aware of the governing standard, GSK is compelled to argue that the patent license included an "implied promise that Abbott would not use its control over Norvir to interfere with GSK's *ability* to promote and market boosted Lexiva." GSK Br. 52 (quoting ER-8) (emphasis added, internal quotations omitted). This is the right that GSK says was implied by the license.

But GSK nowhere shows that *this* purported right was violated. GSK does not assert that Abbott's price increase rendered Lexiva "commercially worthless" or deprived GSK of the "ability" to promote and market Lexiva. The most GSK says is that the price increase supposedly "hurt Lexiva," GSK Br. 53, because

"Lexiva's sales never reached expected levels." *Id.* at 6. Thus, GSK's real complaint is that it made less profit than it had hoped; and GSK's real claim is that it had an implied right to prevent Abbott from raising the price of Abbott's own patented product Norvir, so that GSK could make more on Lexiva. But *this* implied right—what GSK earlier called a "right to *enhance* its profits," ER-351—is far beyond what can lawfully be read into a patent license.

A. GSK Does Not Dispute that It Was Able To Promote and Market Lexiva Profitably

Although GSK says the implied covenant prohibited Abbott from rendering GSK's patent license "commercially worthless," GSK Br. 57 (quoting *Jacobs*, 370 F.3d 1097), GSK's account of what the "evidence . . . showed," *id.* at 55, comes nowhere close to meeting that standard. GSK does not dispute that its license fully enabled it to sell Lexiva for use with Norvir, or that it "has used Abbott's boosting invention to try to drive sales for boosted Lexiva continuously since 2002." Abbott Br. 23 (quoting GSK expert). Indeed, GSK admits, GSK Br. 16, that its licensed use of Abbott's patents generated $927 million of Lexiva sales since 2004, and GSK continues to sell boosted Lexiva to this day—presumably at a substantial profit.[30] Moreover, GSK has conceded that the contract here is a "simple patent

[30] Although GSK claims it "invested $750 to $800 million just to develop Lexiva," GSK's admission that it made $927 million in revenue over a six-year period confirms that it more than recouped its investment. GSK Br. 57 n.23. Indeed, while claiming that there are "relatively high costs to manufacture" Lexiva, *id.*,

license," ER-732—which is "nothing more than a promise by the licensor not to sue" for infringement, *Spindelfabrik Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1081 (Fed. Cir. 1987)—and that Abbott stood by that promise. Thus, GSK cannot plausibly maintain that the patent right it licensed from Abbott has been rendered "commercially worthless." GSK Br. 57 (quoting *Jacobs*, 370 F.3d 1097).

Nor can GSK plausibly maintain that Abbott took any action to deprive GSK of the "*ability* to promote and market boosted Lexiva." *Id.* at 52 (emphasis added). Although GSK focuses on Abbott's purported efforts to "constrain the supply" of Norvir, *id.* at 6, GSK admits that Abbott never took Norvir off the market. All GSK can say is that Abbott "discussed th[is] option." *Id.* at 55 (emphasis added); *see also id.* at 6 (Abbott was "looking for ways to constrain the supply"); *id.* at 55 (Abbott "asked a group to think about ways to constrain the supply"); *id.* at 53 (Abbott was "think[ing] about withdrawing" Norvir). But "considering" this option did not deprive GSK of anything. And if the law imposed liability for actions that people merely considered but never took, few would escape the law's reach.

GSK does not specify those costs or deny that it *profited* on its $927 million in sales—which is unsurprising given GSK's own admission that it wished "to *enhance* its profits." ER-351 (emphasis added).

Thus, it is undisputed that, "rather than pulling pill supplies," the only thing Abbott did was raise the price of its own patented Norvir. GSK Br. 55. Any suggestion that this was a covert attempt to "constrain Norvir's supply" by other means is belied by the fact that Norvir prescriptions continued to skyrocket after the price increase. *See* Abbott Br. 21; ASER-175 (GSK's economic expert denying that Abbott ever made Norvir unavailable). GSK does not dispute this. And it admits that it sold nearly $1 billion worth of boosted Lexiva, despite a supposedly "constrained" supply.

Nor can GSK plausibly maintain that Abbott's price increase was somehow intended to be a "weapon" against Lexiva. GSK Br. 56. The jury rejected that theory, *see infra* at 66-80; Abbott Br. 51-52, and the testimony that GSK cites does not support it. For example, GSK cites Heather Mason's reference to a "plan" to make GSK look bad, GSK Br. 56, but fails to mention that this "plan" was Abbott's separate decision to give Norvir away *for free* as part of its "patient assistance program." ASER-103-104; SER-485. GSK similarly cites Bill Dempsey's comment that Kaletra's sales numbers had given GSK a "lump of coal" for the holidays, GSK Br. 56, but this is a reference to sales *before* the price increase. SER-414-15.

To be sure, if Abbott had not raised the price to reflect Norvir's new value as a booster, GSK thinks it could have made even more money on Lexiva—less than

one half of one percent more, according to the jury. Abbott Br. 44. This theory, however, is a far cry from what GSK's own cases say is required to demonstrate a breach of the implied covenant. Depriving GSK of the ability to make even more profit plainly does not "render the right commercially worthless." *Jacobs*, 370 F.3d at 1101.

Thus, despite GSK's attempt to embrace a more plausible theory of the implied covenant's scope, the only theory consistent with the undisputed evidence is the one GSK advanced at trial: a theory that an ordinary patent license somehow guaranteed GSK the "right to *enhance* its profits" by controlling the pricing of Abbott's own competing patented product. ER-351. As shown in the following section, that theory cannot support recovery as a matter of law.

B. The Patent License Did Not Give GSK an Implied Right To Enhance Its Profits by Controlling Abbott's Pricing Decisions

Nothing in GSK's brief undermines Abbott's showing that New York law forecloses its novel theory of liability. GSK does not dispute that the parties' express agreement was just a "simple patent license," which is "nothing more than a promise by the licensor not to sue" for infringement. Abbott Br. 36. GSK never explains how this express promise not to sue for infringement somehow contains an implied promise not to compete by raising the price of Abbott's own patented drug. GSK points to the preamble and license grant, which note that "GSK is interested in obtaining a license from Abbott to promote and market" Lexiva.

GSK Br. 53 (quoting ER-706). True. But this hardly means that Abbott relinquished the right to price its own product, or that it guaranteed a particular level of profits to GSK.

Aware of this problem, GSK says the implied covenant is "not limited" by the contract's express terms. GSK Br. 50. But New York law holds that the implied "covenant does not create duties which are not fairly inferable from the express terms of th[e] contract." *Interallianz Bank AG v. Nycal Corp.*, No. 93 CIV. 5024, 1994 WL 177745, at *8 (S.D.N.Y. May 6, 1994). Although the implied covenant includes promises that a reasonable person "would be justified in understanding were included," GSK Br. 50-51, that understanding must be based on the express contractual language, lest it create "an independent contractual right that was not bargained for." *Madison Apparel Group Ltd. v. Hachette Filipacchi Presse, S.A.*, 861 N.Y.S.2d 296, 297 (App. Div. 2008). Creating an independent contractual right to maximize Lexiva's profits at Abbott's expense is exactly what GSK is trying to do. And it is exactly the kind of abuse of the implied covenant that New York law forbids. Abbott Br. 44-46 (citing decisions vacating similar implied covenant claims).[31]

[31] GSK strains to suggest that these cases are "distinguishable." GSK Br. 51 n.21. One case, the court is told, involved an alleged breach of the implied covenant that arose from a separate transaction. But GSK does not explain why this makes any material difference. *Id.* GSK says another case involved an allegation that the implied covenant imposed a certain requirement that parties had expressly

Nor does GSK explain how it would be commercially reasonable to assume that Abbott would surrender control over Norvir's price to a direct competitor. Abbott Br. 40-43. GSK says the license was worth $59 million to Abbott, but the document GSK cites was a "forecasted and very speculative" attempt to estimate the license's value, which was "very, very difficult to pinpoint." ASER-159-160, 162. That estimate also included purported "concessions" made on a *different* license involving a *different* product. And other evidence GSK fails to mention showed that Abbott expected to generate only $19 million in revenue over the Norvir license's lifespan. ASER-159-160, 163.

In all events, it is implausible that Abbott would give up, for such licensing revenue, the extremely valuable right to price a huge product over which it held a lawful monopoly. GSK suggests that, in pointing out the critical importance to a lawful monopolist of setting prices, Abbott has somehow "conced[ed]" that GSK could expect Abbott "not [to] manipulate the price of Norvir." GSK Br. 55. But it is Abbott—not GSK—that holds patent rights covering Norvir. And setting prices is what patent owners with lawful monopolies are expected to do.

Indeed, GSK's own argument confirms its unreasonableness. GSK says the patent license gave it an implied "right to enhance its profits," ER-351, while

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bargained for in the past. *Id*. But the fact that parties do not routinely bargain for pricing limitations like the one GSK seeks hardly makes it *more* reasonable to imply that limitation here.

simultaneously maintaining that the jury's small award of damages—one-half of one percent of Lexiva's overall sales—is irrelevant to "the propriety of the jury's liability finding." GSK Br. 57. Taken to its logical conclusion, therefore, GSK must deem it a breach of the implied covenant for Abbott to take *any* action that reduces GSK's profits on Lexiva by virtually *any* amount. If, for example, Abbott began a marketing campaign for Kaletra, GSK's theory would deem this a breach of the implied covenant to the extent that Lexiva suffered the loss of sales. Likewise, if Abbott launched a new breakthrough drug that was more desirable to patients than Lexiva, GSK's theory would deem this too a breach of the implied covenant for threatening Lexiva's market share.

Once GSK has abandoned the limiting principle of its own cases—that a licensor's conduct violates the implied covenant only if it renders the patent license "commercially worthless"—GSK's theory knows no bounds. GSK Br. 57. The notion that GSK had an implied right to maximum profits on Lexiva converts what GSK itself has called a "simple patent license," ER-732, into an agreement not to compete. Not only is it inconceivable that a patent owner would license its patent to a direct competitor on such commercially unreasonable terms, but such an interpretation of an ordinary patent license would have a chilling effect on the willingness of companies to license patents to their competitors in the future. And for companies that do license their patents, GSK's theory would dissuade licensors

from engaging in pro-competitive activity, lest they interfere with a competitor's "right to *enhance* its profits." ER-351; *see* Abbott Br. 6.

Finally, GSK's interpretation is all the more unreasonable in light of the parties' expectations during negotiation. GSK cites conclusory testimony of its own employees, who claim they thought it would have been a breach of the license to raise Norvir's price. GSK Br. 53. But what promises are implied by the covenant requires an objective answer based on the contract's terms, and is not a matter for post-hoc speculation by self-interested witnesses. *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 569-70 (N.Y. 1978) (implied covenant encompasses "promises which a reasonable person in the position of the promisee would be justified in understanding were included" as "implicit in the agreement viewed as a whole") (internal quotation omitted).

In any event, GSK does not dispute that all negotiators on both sides *intentionally* avoided the topic of Norvir's price. *See* Abbott Br. 39 (citing GSK's lead negotiator: "we did not introduce a price control in the agreement on Norvir's price"). GSK instead says it is irrelevant "whether Abbott and GSK reached, but failed to memorialize, an agreement concerning the pricing of Norvir"—characterizing that question as relevant only to an implied-in-fact claim. GSK Br. 54. Abbott's point, however, is not that the parties simply "failed to memorialize" (*id.*) a price term; it is that they "*intentionally* left [a price term] out of the

bargaining." Abbott Br. 39-40. And "no reasonable person would be justified in understanding" that the license gave GSK an implied right that it intentionally left out of the bargaining. *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008); *see also Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) (where "the contract is intentionally silent as to [a] subject, the implied duty to perform in good faith does not come into play").

In sum, the evidence does not begin to show that Abbott "assign[ed] a right [to a patent], receive[d] consideration for it, and then t[ook] steps that . . . render[ed] the right commercially worthless." GSK Br. 57 (quoting *Jacobs*, 370 F.3d 1097). Abbott did not interfere with "GSK's ability to promote and market boosted Lexiva." *Id.* at 52 (quoting ER-8:14-17). And the notion that GSK had an implied right to control the timing or amounts of price increases on Abbott's own patented drug—so GSK could "*enhance* its profits"—cannot, as a matter of law, be read into a patent license through the implied covenant of good faith and fair dealing.

II. The Limitation-of-Liability Clause Bars GSK's Contract Claim

Even if the evidence showed that Abbott breached the implied covenant, the license's limitation-of-liability clause would require reversal of the damages award. As explained in Abbott's opening brief, Abbott Br. 47-49, New York law sets a high bar for escaping from agreements to limit liability, holding that there is

"no harm in express agreements limiting the damages to be recovered for breach of contract." *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 436 (1994) (quoting 5 Corbin, Contracts § 1068, at 386). Traditionally, the only exceptions have been for "contracts of adhesion" or for "when the breach is also tortious." *Id*. at 436 n.* (citing 5 Corbin, Contracts § 1068, at 386 n.84.5, 389); *see also id*. at 439 (citing Restatement (Second) of Contracts § 195[1]).

GSK does not dispute that this is how standard treatises and the Restatement have always understood the rule. But GSK asks this Court to adopt a different and unprecedented rule that prevents parties from limiting liability for many garden-variety breaches of contract. GSK says a limitation-of-liability clause can be invalidated based on *any kind* of "grossly negligent conduct"—even if that conduct is not tortious, involves no intent to harm, and is no more than a breach of contract committed with "gross negligence." GSK Br. 59. Yet GSK cites no case—New York or otherwise—holding that a mere breach of contract undertaken with reckless indifference to the contract rights of the non-breaching party can overcome a limitation-of-liability clause. In fact, New York law forecloses this novel interpretation, and given the jury verdict, compels judgment for Abbott.

A. New York Law Forecloses GSK's Theory That a Non-Tortious Breach Without Intent To Harm Invalidates a Limitation-of-Liability Clause

In arguing that neither a separate tort nor intent to harm is required, GSK Br. 58, GSK plucks vague snippets from various New York cases while neglecting their context and actual holdings. Although courts have suggested that "grossly negligent conduct," *id*. at 59, can overcome a limitation-of-liability provision, the "grossly negligent conduct" to which the cases refer is tortious conduct—not a "grossly negligent breach" merely involving indifference to contractual rights. And in the only New York case involving a breach of contract without an independent tort, *Metropolitan Life*, the court held a limitation-of-liability clause enforceable for all breaches except those committed with an intent to harm—a finding the jury here rejected.

1. GSK Misreads *Metropolitan Life*

Most fatal to GSK's theory is *Metropolitan Life*, to which it has no persuasive response. GSK dismisses *Metropolitan Life* as nothing more than a case of contract interpretation, but that decision squarely held that a mere breach of contract cannot void a limitation-of-liability clause unless the breach is committed with intent to harm. 84 N.Y.2d at 438.

To understand that holding, it is necessary to begin with a clear understanding of the court's contract interpretation. The contract there limited

liability for all consequential damages, except for damages due to "intentional misrepresentations, . . . willful acts or gross negligence." 84 N.Y.2d at 433. But the court narrowly construed that exception as applying only to tortious conduct:

> Under the interpretation tool of *ejusdem generis* applicable to contracts as well as statutes, the phrase "willful acts" should be interpreted here as referring to conduct similar in nature to the "intentional misrepresentation" and "gross negligence" with which it was joined … . We, therefore, conclude that the term willful acts as used in this contract was intended by the parties to subsume *conduct which is tortious in nature*, i.e., *wrongful conduct in which defendant willfully intends to inflict harm* on plaintiff at least in part through the means of breaching the contract between the parties.

Id. at 438 (emphasis added).

The court thus construed the exceptions for "intentional misrepresentations," "willful acts," and "gross negligence" as "similar in nature" because they all referred to "conduct which is tortious." And in the context of a breach of contract, the court defined a "willful act" as a breach "willfully intend[ed] to inflict harm." True, the court rejected the lower court's view "that tort law principles apply *in all cases* in which the word willful is at issue." 84 N.Y.2d at 435 (emphasis added). As shown above, however, the court went on to conclude that the parties "intended" for it to have that meaning in this particular case. *Id*. at 438. And so, by construing the exceptions to the limitation-of-liability clause narrowly, the court necessarily broadened the clause so that it limited liability for all breaches of

contract short of those involving intentional misrepresentation, an intent to harm, or tortious gross negligence.

After so construing the limitation-of-liability clause, the court squarely address its enforceability in the very next paragraph: "*As thus defined*, limiting defendant's liability for consequential damages to injuries to plaintiff caused by intentional misrepresentations, willful acts and gross negligence *does not offend public policy*." *Id*. (emphasis added). In other words, a clause that limits liability for all breaches of contract except those involving intentional misrepresentation, intent to harm, or tortious gross negligence does not offend public policy. There is no way to interpret this as anything but a clear holding that limitations of liability are fully enforceable against, at a minimum, breaches of contract that are non-tortious and committed without intent to harm, as the jury found here.

2. Neither *Metropolitan Life*, Nor Any Other Authorities, Allow Invalidation of a Limitation-of-Liability Clause Based on a "Grossly Negligent" Breach that Is Not Tortious

According to GSK, *Metropolitan Life* did not "suggest that New York's public policy would countenance shielding a defendant from liability for its own grossly negligent conduct." GSK Br. 62. But as shown, that is only because *Metropolitan Life* understood "grossly negligent conduct" to mean "conduct which is tortious in nature." 84 N.Y.2d at 438. *Metropolitan Life* could not have understood "grossly negligent conduct" to mean merely a breach committed with

gross negligence, as it held that even an "*intentional*" breach "motivated by financial self-interest" was "a risk which plaintiff assumed under . . . the parties' [a]greement" to limit liability—an agreement that "does not offend public policy." *Id*. at 438, 439 (emphasis added). And because limiting liability for an *intentional* breach is lawful, it follows *a fortiori* that limiting liability for a breach committed with gross *negligence* cannot possibly be unlawful. GSK offers no answer to this logical flaw in its argument.

GSK invokes *Sommer* and *Kalisch-Jarcho*, but those decisions simply confirm the traditional rule that "grossly negligent conduct" must be tortious to void a limitation-of-liability clause. GSK does not dispute that *Sommer* involved claims that "sounded in tort," even if it also involved contract claims. GSK Br. 61 n.24. Thus, regardless of the legal basis for each claim there, GSK cannot deny that the *conduct* that formed the basis of both claims was tortious. That is why the court said the case fell "in the borderland between tort and contract." *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 550 (1992).

Kalisch-Jarcho is no more helpful to GSK. GSK cites dictum from that decision about "grossly negligent acts," GSK Br. 60, but does not dispute that all of the authorities that *Kalisch-Jarcho* cited for that standard involved the traditional tort exception. 58 N.Y.2d at 384-85 (citing Corbin and the Restatement). GSK says the language it quotes was not dictum because the court

"remanded for retrial and was providing guidance" on the appropriate jury instructions. GSK Br. 60. But the portion of the opinion that canvasses the traditional tort exception is not the portion of the opinion that provided such guidance. After discussing the exception in general terms, the court provided specific guidance for the instructions, explaining that the plaintiff would have to show "bad faith" and "deliberate intent" to harm—not merely a breach committed with "gross negligence." 58 N.Y.2d at 386. *Kalisch-Jarcho*'s holding cannot fairly be read more broadly than that.

In any event, GSK's expansive reading of *Sommer* and *Kalisch-Jarcho* conflicts with *Metropolitan Life*, which post-dates those cases and read them to hold that tortious conduct is required to void a limitation of liability. GSK cites *Metropolitan Life*'s reference to language from those cases suggesting that a limitation of liability can be voided by conduct that "smack[s] of intentional wrongdoing." GSK Br. 62-63. And by emphasizing the word "smack[s]," GSK strains to suggest that this means something less than tortious conduct. *Id*. But "smack[s]" is not the word that the court emphasized when it cited this language "with approval." *Id.* at 62. It emphasized the word "wrongdoing," which is italicized in the opinion but not in GSK's brief. And it is clear from the full context that *Metropolitan Life* read this language to mean tortious conduct:

> As we said in *Sommer v. Federal Signal Corp*. (79 NY2d 540) the conduct necessary "to pierce an agreed-upon

> limitation of liability in a commercial contract, must 'smack[ ] of intentional *wrongdoing*'" (*id*. at 554 [quoting *Kalisch-Jarcho, Inc. v. City of New York*, 58 NY2d 377, 385 [emphasis supplied]; *see also*, 5 Corbin, Contracts § 1068, at 389 [contractual exemption from liability for *tortious* conduct may be held against the public interest and illegal]; Restatement [Second] of Contracts § 195 [1] ["A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"]).

84 N.Y.2d at 438-39 (emphasis and brackets in original). As the court's emphasis makes clear, *Metropolitan Life* endorsed—and read *Sommer* and *Kalisch-Jarcho* to endorse—the traditional view that, to void a limitation-of-liability clause, conduct must be tortious.

GSK also asserts (without explanation) that two lower-court decisions, post-*Metropolitan Life*, invalidated limitations of liability based on "gross negligence." GSK Br. 62-63. But both involved tortious conduct and intent to harm. In the first, the claim went forward because the complaint alleged "extortion" that could "reasonably be perceived by a trier of fact as *an intention to inflict monetary harm, which is tortious as a matter of law*, and renders the limitation on recovery contained in the lease unenforceable." *Banc. of Am. Sec., LLC v. Solow Bldg. Co.*, 847 N.Y.S. 2d 49, *3, *9 (App. Div. 2007) (emphasis added, citation omitted). So too in GSK's second case, where the court found "intentional wrongdoing" sufficient to "state a cause of action, sounding in tort, which would preclude enforcement of [the limitation-of-liability]" clause. *Empire One Telecomms., Inc.*

v. Verizon New York, Inc., 888 N.Y.S.2d 714 (Sup. Ct. 2009). Thus, these decisions reinforce Abbott's position.

GSK's citation of the comments to the New York Pattern Jury Instructions is unconvincing. Those comments merely refer to "grossly negligent conduct," with citation to *Sommer;* and to "bad faith, . . . intentional or willful misconduct," with citation to *Banc of America*. N.Y.P.J.I. Civil 4:1, Comment to Contracts—Elements (3d ed. 2011). As explained above, however, those cases confirm that grossly negligent conduct must be tortious and that a mere breach must be committed with intent to harm. The jury found neither here.

B. GSK's Novel Suggestion that the Jury Found an Intent To Harm Is Wholly Implausible

Because New York law requires tortious gross negligence or intent to harm in order to preclude limiting liability, the jury's findings rejecting those theories compel enforcement of the limitation-of-liability clause. Abbott is in no way alleging "error in th[e] [jury] instructions." GSK Br. 64. Nor is Abbott alleging that the verdict is inconsistent. Abbott is not even asking this Court to interpret the jury verdict differently than the district court did. The jury's findings confirm that the jury rejected GSK's theories involving tortious gross negligence and intent to harm, leaving only a theory of non-tortious gross negligence. The district court did not hold otherwise. ER-10-15. Rather, it held that a non-tortious, grossly negligent breach of contract was legally sufficient to void the limitation-of-liability

clause. ER-10-15. Abbott's argument here thus challenges the district court only as to the legal significance of the jury's finding.[32]

In seeking affirmance on an alternative ground, however, GSK now attempts to interpret the verdict in a novel way. GSK does not dispute that the jury rejected its allegations of tortious conduct (*i.e.*, its antitrust and UDTPA claims, which sound in tort). GSK Br. 64-66. Instead, GSK suggests that the jury found intent to harm. GSK focuses on the jury's affirmative answer to question B2, which asked whether Abbott engaged in "grossly negligent conduct," defined as intentional wrongdoing or reckless indifference. ER-75. But the fact that the jury instructions (at GSK's request, ASER-25) defined "gross negligence" as "intentional wrongdoing *or* a reckless indifference to the rights of others" obviously does not mean that the jury found intentional wrongdoing. ER-75 (emphasis added). As explained in Abbott's opening brief, Abbott Br. 50, the jury's answers to other interrogatories confirm that it rejected intentional wrongdoing. ER-72, 76. Accordingly, the jury must have answered question B2 in the affirmative because it found "reckless indifference"—a finding that cannot void a limitation of liability without a tort. *See Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1037-38 (9th Cir. 2003) (judgment must be "conform[ed]" to jury's specific "factual findings").

[32] The jury rendered no verdict on whether the limitation-of-liability clause is valid. Rather, that was a legal judgment made by the court based on its interpretation of the jury's findings and the applicable law. ER-10-15.

GSK says the jury's answers to interrogatories "can be read in light of the evidence" without concluding that the jury rejected GSK's theory of intentional wrongdoing. *Bains LLC v. Arco Prods. Co*., 405 F.3d 764, 771 (9th Cir. 2005). But GSK's two supporting theories are deeply implausible.

First, although the jury found that Abbott did not raise Norvir's price "to undermine and disrupt Lexiva's launch and future sales," ER-76—language that GSK proposed, *see supra* at 50-51)—GSK nevertheless says the jury might have found that "Abbott acted intentionally to harm all of its competitors," GSK Br. 65. But this case is about a contract between Abbott and GSK. And given that GSK's entire theory below was based on Abbott's alleged intent to harm *GSK*, it is implausible that the jury would have found that Abbott intended to harm *everyone else in a class that includes GSK*, but not GSK itself. Moreover, this interpretation of the verdict would require holding that Abbott somehow voided its limitation of liability in a contract with one party by intending to harm nonparties to the contract. GSK cites no authority supporting such a rule.

GSK's other theory is even more implausible. The jury answered "no" when asked whether Abbott "inequitably asserted its power over Norvir by increasing Norvir's price by 400 percent to undermine and disrupt Lexiva's launch and future sales." ER-76. Yet GSK claims that "the jury could have found that Abbott intended to undermine and disrupt Lexiva, but not through an inequitable assertion

of power." GSK Br. 65. This strains credulity. GSK's entire theory was that Abbott intended to harm Lexiva *by inequitably raising Norvir's price*. GSK presented no evidence that Abbott harmed Lexiva in some other way.

In sum, GSK presents this Court with a choice between two different ways of reconciling the verdict.[33] The choice, however, is clear. Under Abbott's interpretation—which is the one relied upon by the district court—it is evident how the jury could have found no intent to undermine Lexiva, while answering question B2 in the affirmative because it found that Abbott breached the license with "reckless indifference." (Question B2, again, asked whether Abbott engaged in "grossly negligent conduct," defined in the jury instructions as intentional wrongdoing *or* reckless indifference. ER-75.) This is far more likely than the implausible verbal gymnastics that GSK now says the jury "could have" undertaken. GSK Br. 65. And because the jury found no intent to harm, finding only a non-tortious grossly negligent breach, the evidence does not support the verdict and the district court's decision to invalidate the limitation-of-liability clause must be reversed.

[33] GSK is wrong to suggest that Abbott's interpretation "bears a heavy burden," as Abbott is not arguing that the verdict is inconsistent. GSK Br. 65. Nor is GSK entitled to any deference as the "party successful at trial." *Id.* The trial resulted in a mixed verdict, and GSK's success on one element of its contract claim hardly entitles it to a presumption of success on another.

C. The District Court Correctly Found that GSK's Lost Profits Are Consequential Damages Barred by the Limitation-of-Liability Clause

In a last-gasp effort to escape from the limitation-of-liability clause, GSK asks this Court to affirm on the alternative ground that its lost profits are not covered by the clause's limitation of liability for "consequential damages." The district court, however, correctly held that "the lost profits GSK seeks are best characterized as consequential, not general, damages." ER-397.

In making that finding, the district court relied on a Second Circuit decision distinguishing between consequential and general damages under New York law. ER-396-97. As the Second Circuit held, lost profits are general damages when they seek "to recover money that the breaching party agreed to pay under the contract," but "are consequential damages when, as a result of the breach, the non-breaching party suffers loss of profits *on collateral business arrangements*." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109, 110 (2d Cir. 2007). Thus, having concluded that GSK's lost profits were not monies that Abbott owed under the contract—but rather were collateral "revenue from third parties" that GSK hoped to make on sales of Lexiva—the district court rightly concluded that GSK's lost profits had to be consequential damages. ER-397.

GSK nowhere mentions this precedent, or the district court's straightforward application thereof. Nor does GSK offer any reason that would warrant

disagreeing with the decision. GSK invokes vague language from Williston noting that general damages "flow naturally from a breach," but that is not inconsistent with the Second Circuit's holding that consequential damages include profit lost from collateral business arrangements such as sales to third parties. In fact, Williston explains that general damages are limited to those that are a "proximate" and "invariable result of every breach"—*e.g.*, "a failure of the promised performance itself." 24 Williston on Contracts § 64:12 (4th ed. 2002). Consequential damages, by contrast, are those that "do not *always* flow from such a breach," even if they "often" do. *Id*. (emphasis added). Because GSK's purported lost sales to third parties would not be an invariable result of the breach, they are consequential damages under this standard.

Nor is there any merit to GSK's complaint that limiting consequential damages "would place GSK at Abbott's mercy." GSK Br. 67. For one thing, there is nothing unfair about a commercial provision limiting the parties' damages. New York law instructs that "courts should honor" such provisions. *Metropolitan Life*, 84 N.Y.2d at 436. Moreover, had Abbott failed to supply Norvir, GSK expressly agreed that the appropriate remedy was not lost profits, but rather for GSK to "be relieved of its obligations to pay royalties." *See* Abbott Br. 48; ER-713-714. It would hardly be an "unreasonable result," GSK Br. 67, to similarly limit the remedies available in the event of a price increase that did not actually limit the

supply. In sum, even if the evidence supported liability for breach of the implied covenant, the contract's limitation-of-liability clause would require reversing the damages award.

CONCLUSION

For the foregoing reasons and the reasons stated in Abbott's opening brief, this Court should reverse the district court's denial of judgment as a matter of law and enter judgment for Abbott on GSK's breach of-contract claim.

Respectfully submitted,

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Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,
PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT/APPELLANT/CROSS-APPELLEE

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 19,704 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

In preparing this certificate, I relied on the word count generated by Microsoft Word 2003.

/s/ Keith R. D. Hamilton
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Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,
PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT/APPELLANT/CROSS-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:07-CV-5702
HON. CLAUDIA WILKEN, PRESIDING

DEFENDANT-APPELLANT and CROSS-APPELLEE ABBOTT LABORATORIES' MOTION FOR PERMISSION TO FILE AN OVERSIZED THIRD BRIEF ON CROSS-APPEAL

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MOTION FOR PERMISSION TO EXCEED THE TYPE-VOLUME LIMITATION ON APPELLANT'S THIRD BRIEF ON CROSS-APPEAL

Pursuant to Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 32-2, and for the reasons set forth below, Defendant-Appellant and Cross-Appellee Abbott Laboratories ("Abbott") respectfully moves this Court for leave to exceed the type-volume limitation on Abbott's Third Brief on Cross Appeal ("Third Brief") and to submit its proposed brief containing 19,704 words. Under Federal Rule of Appellate Procedure 28.1(e)(2)(A)(i), "the appellant's response and reply brief is acceptable if ... it contains no more than 14,000 words." Fed. R. App. P. 28.1. A motion to exceed applicable page or type-volume limitations will be granted upon a showing of "diligence and substantial need." 9th Cir. R. 32-2. "To satisfy this standard, counsel must show that the additional space is justified by something unusual about the issues presented, the record, the applicable caselaw or some other aspect of the brief." *United States v. Molina-Tarazon*, 285 F.3d 807, 808 (9th Cir. 2002). As set forth herein, and in the attached Declaration of Keith R.D. Hamilton ("Hamilton Decl."), this standard is satisfied in this case.[1]

[1] Pursuant to the Ninth Circuit's Advisory Committee Note to Rule 27-1, Abbott contacted counsel for Plaintiff-Appellee and Cross-Appellant GlaxoSmithKline ("GSK") and was informed that GSK opposes Abbott's request to exceed the type-volume limitation for its Third Brief. Hamilton Decl. ¶ 3.

In addition to addressing the application of *Batson v. Kentucky*, 476 U.S. 79 (1986), to claims of sexual orientation discrimination (the principal argument raised by GSK on its cross-appeal) and replying to GSK's arguments regarding its state law contract claim (the subject of Abbott's appeal), Abbott's proposed brief addresses alternative grounds for denying GSK's cross-appeal that would make it unnecessary for the Court to reach the constitutional and other issues raised by GSK's *Batson* argument. Hamilton Decl. ¶ 4. Those alternative grounds are based on facts and law distinct from the facts and law addressed in prior briefing, and it therefore was necessary for Abbott to supplement the statement of facts and legal argument presented in its opening brief. *Id*. The need to address these distinct factual and legal points, for purposes of establishing that this Court need not reach the constitutional and other issues raised by the *Batson* argument that is the subject of GSK's cross-appeal, is precisely the kind of "unusual" circumstance justifying the submission of oversized briefs. *Molina-Tarazon*, 285 F.3d at 808.

Abbott's proposed Third Brief responds *both* to GSK's cross-appeal (16,459 words) *and* to the *amicus* brief (6,971 words) submitted by Lambda Legal and twelve other organizations. Hamilton Decl. ¶ 5. Abbott has diligently focused its arguments on the most critical issues and evidence, but the limitation prescribed by Federal Rule of Appellate Procedure 28.1 is inadequate in this circumstance. *Id*. ¶

6. Abbott therefore respectfully requests the Court to allow Abbott to exceed that limitation and to accept its proposed Third Brief as submitted.

Respectfully submitted,

/s/ *Keith R. D. Hamilton*

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MAY 21, 2012

DECLARATION OF KEITH R.D. HAMILTON

I, Keith R.D. Hamilton, hereby declare as follows:

1. I am an attorney at Munger, Tolles & Olson LLP, counsel of record for Defendant-Appellant and Cross-Appellee Abbott Laboratories ("Abbott") in this action. This declaration is submitted in support of Abbott's Motion for Permission to File an Oversized Brief on Cross-Appeal ("Motion"). I have personal knowledge of the matters set forth herein and could and would testify competently to each of them.

2. Abbott's proposed Third Brief on Cross-Appeal ("Third Brief"), filed concurrently herewith, consists of 19,704 words. I relied on the word count generated by Microsoft Word 2003.

3. Prior to submitting Abbott's Third Brief, I contacted counsel for Plaintiff-Appellee and Cross-Appellant GlaxoSmithKline ("GSK") regarding Abbott's Motion. GSK's counsel informed me that GSK opposes Abbott's request to exceed the type-volume limitation for its Third Brief.

4. Abbott's proposed Third Brief addresses alternative grounds for denying GSK's cross appeal that would make it unnecessary for the Court to reach the constitutional and other issues raised by GSK's argument under *Batson v. Kentucky*, 476 U.S. 79 (1986). Those alternative grounds are based on facts and law distinct from the facts and law addressed in prior briefing, and it therefore was

necessary for Abbott to supplement the statement of facts and legal argument presented in its opening brief.

5. Abbott's proposed Third Brief responds to GSK's brief (Dkt. # 20) and to the *amicus* brief filed by Lambda Legal and twelve other organizations (Dkt. # 24). The Certificate of Compliance filed by GSK brief states that its brief contains 16,459 words. Dkt. # 20 at 84. The Certificate of Compliance filed by the *amici* states that their brief contains 6,971 words. Dkt. # 24 at 42.

6. In preparing its proposed Third Brief, Abbott has diligently focused its arguments on the most critical issues and evidence, but the 14,000 words prescribed by Federal Rule of Appellate Procedure 28.1 are inadequate in this circumstance.

I declare under penalty of perjury that the foregoing is true and correct . This declaration was executed this 21st day of May 2012, in Los Angeles, California.

/s/ *Keith R. D. Hamilton*

9th Circuit Case Number(s) 11-17357, 11-17373

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CERTIFICATE OF SERVICE
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I hereby certify that I electronically filed the foregoing 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 (date) May 21, 2012 .

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****

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I hereby certify that I electronically filed the foregoing 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 (date) .

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