S274625

IN THE SUPREME COURT OF CALIFORNIA

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,

v.

FCA US, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E073766

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Regulations

ANSWER TO PETITION FOR REVIEW

INTRODUCTION

There is a fundamental difference between new cars and used cars. Consumers understand that used cars are not the same as new cars just off the assembly line. The California Legislature understands that too. Thus, the Song-Beverly Consumer Warranty Act (the Act) (Civ. Code, § 1790 et seq.) provides different remedies for consumers of new and used vehicles: consumers of defective *new* cars may obtain full refunds or replacement cars from manufacturers, while consumers of defective *used* cars may obtain full refunds or replacement cars from retail sellers who warrant those cars.

The Court of Appeal in this case also understands the difference between new and used cars and thus correctly *re*affirmed that vehicles sold as used cars are not "new motor vehicles" under the Act. The petition challenging that decision should be denied for three reasons.

First, the petition involves no conflict in the law requiring this Court's resolution. The Court of Appeal's decision—consistent with the plain terms of the Act, the Legislature's intent, and common sense—holds that a used vehicle *sold as a used car* is not a "new motor vehicle" under the Act. That conclusion is correct and does not conflict with any other decision. Indeed, prior cases have consistently held that used cars with a remaining balance on their original warranties are not subject to the Act's new car protections. The opinion here merely extends this uniform line of authority to a set of new facts.

Second, the petition is based on the false premise that the opinion is a sea change in the law that will strip thousands of used car purchasers from lemon law remedies they have enjoyed for decades. Consumers know the difference between new and used cars—and that information is prominently displayed on every sales contract. In addition, as the opinion makes clear, purchasers of used vehicles can enforce their warranties without the enhanced remedies the Act provides to new car purchasers—under the Act's remedies for used vehicles *and* under the California Uniform Commercial Code. Consumers who purchase used cars still under warranties provided by FCA (and other manufacturers who participate in certified arbitration programs) can *also* pursue warranty claims—at no cost—in proceedings where only decisions in their favor are binding. Thus, used car purchasers will continue to have multiple ways to enforce their warranties.

Third, this case does not present an issue of importance for resolution by this Court. If petitioners' arguments withstood analysis (they do not), there would soon enough be another appellate opinion disagreeing with the one in this case, and this Court could address any such conflict if and when it arises. The petition posits a variety of scenarios beyond the fact pattern of this case to argue that confusion abounds. But FCA anticipates that further percolation in the appellate courts will reveal a consensus that the opinion was correctly decided. Simply put, a used truck sold at a used car dealership is not a "new motor vehicle" under the Act, so petitioners could not claim a full refund

or a brand new truck *from the truck's manufacturer*. The Legislature used clear, unambiguous language to set up a common-sense system in which used car purchasers have remedies against used car dealers, not against manufacturers. As the opinion recognizes, crafting that balance was a job for the Legislature, not the courts. And, the same sensible distinction reached by the California Legislature (and the opinion) is embraced in nearly every state that has considered the issue.

Thus, the petition should be denied.

STATEMENT OF THE CASE

Plaintiffs and petitioners Rodriguez and Arellano purchased a two-year-old Dodge truck from Pacific Auto Center, a used car dealership. (Typed opn. 2, 16.) The used truck had been driven over 55,000 miles, and thus the manufacturer's basic warranty had expired, but the limited powertrain warranty had not. (Typed opn. 2–3.) After experiencing problems with the truck, petitioners sued FCA for violating Civil Code section 1793.2, subdivision (d)(2),[1] the refund-or-replace provision for "new motor vehicles." (Typed opn. 3.)

FCA moved for summary judgment, arguing that the truck was not a "new motor vehicle" under the Act. (Typed opn. 4.) There was no dispute that the used truck was sold from an unaffiliated, third-party-used-vehicle reseller who was not one of

[1] Further statutory references are to the Civil Code unless indicated.

FCA's representatives authorized to sell new vehicles, and no warranties were issued at the time of sale. (*Ibid.*) The trial judge granted summary judgment, agreeing with FCA that petitioners' truck was not a "new motor vehicle" under the Act. (*Ibid.*)

On appeal, petitioners argued that the trial court had misconstrued the term "new motor vehicle." Petitioners singled out the phrase "other motor vehicle sold with a manufacturer's new car warranty" and argued that phrase includes a used car sold with some balance remaining on an express warranty from the manufacturer. (Typed opn. 10.)

The Court of Appeal rejected petitioners' argument and affirmed. (Typed opn. 3.) Based on the placement and grammatical structure of the phrase "other motor vehicle sold with a manufacturer's new car warranty" *and* the "broader context of the Act as a whole" (typed opn. 10–13), the Court of Appeal concluded that the phrase "unambiguously refers to cars that come with a new or full express warranty" (typed opn. 15). As the court explained, the phrase "function[s] as a catchall to ensure that manufacturers cannot evade liability under the Act by claiming a vehicle doesn't qualify as new because the dealership hadn't actually used it as a demonstrator," such as a basically new car previously used by the manufacturer as a service loaner (typed opn. 12) or a car *sold as a new car* with a full new car warranty that the manufacturer later claimed had been previously sold (typed opn. 18).

The Court of Appeal further reasoned that, even if there were any ambiguity, "the Act's legislative history would convince us the phrase refers to vehicles sold with full warranties" because the phrase was added to cover " 'dealer-owned vehicles and "*demonstrator*" *vehicles sold with a manufacturer's new car warranty*,' " not "used" vehicles. (Typed opn. 15.)

The Court of Appeals also considered a long line of authority addressing the issue. (See, e.g., typed opn. 16–17.) In particular, the Court of Appeal found *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112 (*Jensen*), "easily distinguishable" because in that case, the BMW-affiliated dealer told Ms. Jensen the car had only been used as a demonstrator and leased it *as a new car with a full new car warranty*. (Typed opn. 16–17.)[2] Though the Court of Appeal cautioned that *Jensen* "must be read in light of the facts then before the court," it concluded that "*Jensen* was correctly decided." (Typed opn. 17.)

Finally, the Court of Appeal emphasized that its opinion did not mean that buyers of used vehicles have no legal recourse, because they have refund-or-replace remedies under the Act

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[2] The Court of Appeal's opinion refers to the "*full* manufacturer's warranty" that Ms. Jensen received (typed opn. 18), referencing the full duration of the warranty, i.e., 36,000 miles starting from the point of sale "on top of" the miles driven prior to the sale (*Jensen*, *supra*, 35 Cal.App.4th at p. 119). This should not be confused with the distinction drawn in other contexts between "full" and "limited" warranties in terms of the *scope of coverage* those warranties provide. (E.g., 15 U.S.C. § 2304 [Magnuson Moss Act, discussed in the 5/25/2022 Letter by Anderson Law Requesting Depublication and 6/3/2022 Letter by Wirtz Law Requesting Depublication].)

against sellers and distributors who breach warranties on used products (typed opn. 7–8, 13–14) *and* Commercial Code remedies against manufacturers (typed opn. 19).

Petitioners did not file a rehearing petition.

LEGAL ARGUMENT

I. There is no conflict of authority requiring resolution by this Court. *Rodriguez* agrees with *Jensen* and other cases holding that used cars are not subject to the Act's protections for new cars.

The petition argues that review is warranted in order "to secure uniformity of decision." (PFR 22.) Not so.

Specifically, petitioners argue that the opinion "breaks with" *Jensen*, *supra*, 35 Cal.App.4th 112. (PFR 10.) But the opinion *agrees* with *Jensen* that buyers like Ms. Jensen—who received a full new car warranty direct from the manufacturer—can demand that the manufacturer buy back that vehicle in the event it cannot be repaired under warranty. (Typed opn. 16–18.)

Distinguishing *Jensen,* the Court of Appeal explained that the Legislature set up a system in which *manufacturers* are responsible for replacing or repurchasing defective *new* consumer products (including "new motor vehicles"), while *retail sellers and distributors* who warrant used products are responsible for replacing or repurchasing *used* products that do not conform to those warranties. (See typed opn. 6–8; see also §§ 1791, subd. (a), 1793.2, subd. (d), 1795.5.) The decision below leaves this well-settled framework in place, allowing consumers of *new* vehicles like Jensen and *used* vehicles like Rodriguez to pursue Song-

Beverly claims against the parties who warranted and sold them defective vehicles.

Against this backdrop, it becomes clear why the Court of Appeal in *Jensen* held that the defendant manufacturer owed a repurchase obligation on the unusual facts before the court. The manufacturer's dealer told Ms. Jensen that the car she was leasing was essentially a new car, having been driven only as a dealer demonstrator, and the dealer leased the car "with a *full* manufacturer's warranty issued by the manufacturer's representative." (Typed opn. 18.) Far from creating a split with *Jensen,* the opinion in this case *expressly* agrees with *Jensen* given the distinguishable facts in that case. (Typed opn. 17 ["we think *Jensen* was correctly decided"].) By contrast, petitioners were under no misimpression that the two-year-old car they bought with over 55,000 miles, and with no additional warranty issued specifically to them in connection with the sale, was "new."

Petitioners assert that FCA argued there was a split of authority. (PFR 27.) But as the opinion makes clear, there is no split of authority. FCA argued below that *Jensen*'s legal reasoning relating to the balance of the original warranty was unpersuasive dicta that should not be applied on the facts here. (RB 15.) In the alternative, FCA also argued that, if that reasoning was somehow essential to the outcome in *Jensen* (it was not), there was at least a "split of authority" on the issue. (See FCA's Motion for Judicial Notice 7–8, filed 3/26/2021 in E073766.) The Court of Appeal agreed that one aspect of *Jensen*'s legal reasoning was unpersuasive (typed opn. 18), but

did not conclude there was an irreconcilable conflict (typed opn. 16–18). Mere disagreement over legal reasoning does not create a conflict this Court must resolve "to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1); see *Morgan v. Mutual Ben. Life Ins. Co.* (1911) 16 Cal.App. 85, 95 [where appellate court decision was correct for one valid reason, error of another reason did not justify Supreme Court review].)

The Court of Appeal's opinion does not stand alone. It is telling that, in 27 years, no subsequent appellate decision has extended *Jensen*'s legal reasoning to cover facts like those in the present case. To the contrary, there is a consistent line of cases finding that used car purchasers—who have a number of statutory, contractual, and common law remedies at their disposal—are not entitled to the special statutory repurchase remedy that manufacturers owe under the Act to purchasers of new motor vehicles.

In *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 912 (*Dagher*), the plaintiff purchased a used truck still under the original warranty from a private party. *Dagher* held the plaintiff had no claim against the manufacturer under the Act, which requires the purchase of a *new* product from a retail seller, because he was not a statutorily defined "buyer" from a statutorily defined "seller." (*Id.* at p. 924.) Petitioners misconstrue *Dagher* as holding *only* that the Act's refund-or-replace provision against manufacturers does not apply to private-party sales. (PFR 30.) But *Dagher also* rejected the plaintiff's argument that he could sue the manufacturer simply

because the sale resulted in the transfer of remaining balance of the original warranty (see *Dagher*, at pp. 911–912), explaining that the Act treats new and used vehicles differently (*id.* at p. 921). *Dagher* further emphasized that *Jensen* "must be read in light of the facts then before the court." (Typed opn. 17.)[3]

Kiluk v. Mercedes-Benz USA, LLC (2019) 43 Cal.App.5th 334, 340 & fn. 4 (*Kiluk*) similarly expressed reservations about *Jensen*'s reasoning on the "new motor vehicle" issue but also agreed with *Jensen*'s outcome. (See typed opn. 18.) In *Kiluk*, the manufacturer had "stepped into the role of a retailer" by "partnering with the dealership" "to sell used vehicles directly to the public by offering an express warranty as part of the sales package," and thus could be sued under the Act's provision for *used* vehicles, section 1795.5. (*Kiluk*, at p. 340.)[4] Evidence of the

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[3] The additional cases cited by petitioners must also be considered based on their facts, and thus are unhelpful to their petition. (See PFR 11, fn. 3, citing *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 335, fn. 4, 347 [in insurance coverage case relating to "lemon law coverage," *Jensen* was irrelevant because record did not indicate whether the vehicle had a remaining balance on the warranty when purchased]; *Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 408–409 [explaining that definition of "new motor vehicle" was "inapplicable" to claims against retail sellers]; PFR 11, fn. 4, citing *Harrison v. Rexhall Industries, Inc.* (Feb. 14, 2006, B175984) 2006 WL 330547, at pp. *7–*9 [nonpub. opn.] ["new motor vehicle" issue was irrelevant because "coach portion of a motor home is expressly excluded from the definition"].)

[4] One of the nonpublished decisions cited in the petition presents facts nearly identical to those in *Kiluk*, which likely explains why the "new motor vehicle" issue was neither raised nor decided. (See PFR 11, fn. 4, citing *Petrosian v. Mercedes-Benz*

partnership and the terms of section 1795.5 would have been irrelevant under petitioners' construction of the Act.

Petitioners focus on two sentences in *Kiluk* to advance the theory that there is some conflict with *Rodriguez*. (PFR 21.) But *Kiluk*, like the *Rodriguez* opinion, concludes that used vehicles with balances remaining on original warranties *cannot be* "new" vehicles under the Act because such an interpretation would create serial implied warranty obligations, which the Act expressly prohibits. (*Kiluk*, *supra*, 43 Cal.App.5th at 340, fn. 4.) *Kiluk* also states that *some* manufacturer duties under the Act continue posttransfer to a new owner (*ibid.*)—e.g., the 30-day repair obligation under section 1793.2, subdivision (b)—but that does not transform used cars into "new motor vehicles" as to which a special repurchase remedy applies.

Petitioners dismiss the analysis in *Dagher* and *Kiluk* as "dicta" (PFR 27–28), arguing that the remainder of the original warranty in those cases was "*not alone dispositive*" (PFR 30; see PFR 28). But the same is true in *Jensen*: the fact that Ms. Jensen's car had a balance remaining on its warranty was not dispositive under the Act. The fact that the car was sold *as a new car with a new car warranty* was dispositive. (Typed opn. 16–18.)

In any event, petitioners agree there is no conflict between *Jensen*, *Dagher*, and *Kiluk*, because "[n]either *Kiluk* nor *Dagher* holds that *Jensen* was incorrectly decided." (PFR 28.) The same

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USA, LLC (Apr. 30, 2021, B299629) 2021 WL 1712641, at p. *1 [nonpub. opn.] [manufacturer provided second express warranty upon sale of the certified preowned vehicle from affiliated dealership].)

logic applies to the *Rodriguez* opinion, which goes one step further and expressly concludes *Jensen* was *correctly* decided.

Nunez v. FCA US LLC (2021) 61 Cal.App.5th 385, 389 (*Nunez*), is yet another decision consistent with the opinion's description of the basic framework of the Act: "Under the lemon law, only distributors and retail sellers, not manufacturers, are liable for breach of implied warranties in the sale of a used car where, as here, the manufacturer did not offer the used car for sale to the public."

Federal district court cases have reached the same conclusion. In *Johnson v. Nissan North America, Inc.* (N.D.Cal. 2017) 272 F.Supp.3d 1168, 1179 (*Johnson*), the court ruled that "[b]ecause the Song-Beverly Act does not create any obligation on behalf of Nissan, the original car manufacturer, with respect to used goods," plaintiffs who purchased used vehicles sold by CarMax could not sue manufacturers under the Act. *In re MyFord Touch Consumer Litigation* (N.D.Cal. 2018) 291 F.Supp.3d 936, 949–950 agreed with the manufacturer that "used car purchasers do not have a claim under the Song-Beverly Act" to the specific remedies imposed on manufacturers in connection with "new motor vehicle" sales; such purchasers can assert claims against *the retail seller or distributor,* but not the manufacturer, unless the manufacturer was functionally the seller or distributor in the used car transaction. In *Victorino v. FCA US LLC* (S.D.Cal. 2018) 326 F.R.D. 282, 300–301, the customer who bought a used car from a manufacturer's "authorized dealership" could not pursue remedies against the manufacturer and was

limited to remedies against the seller, as there was no evidence the manufacturer partnered with the dealer in the used car sale so as to become the retail seller or distributor.

Petitioners argue that cases consistent with the *Rodriguez* opinion regarding a manufacturer's *implied* warranty obligations as to used vehicles under the Act—like *Johnson* and *Nunez*—are irrelevant. (See PFR 29–32.) They are highly relevant because the reason the plaintiffs in *Johnson* and *Nunez* could not pursue implied warranty claims against Nissan and FCA was that they had bought their cars used (albeit still under warranty), and their claims were thus subject to section 1795.5. (See *Nunez*, *supra*, 61 Cal.App.5th at p. 390, 399; *Johnson*, *supra*, 272 F.Supp.3d at pp. 1172, 1178–1179.) That section conditions a manufacturer's (express *and* implied) statutory obligations on "used" vehicles on facts not present in *Rodriguez:* the manufacturer owes a repurchase or replacement remedy only if it effectively acts as the seller in the used car purchase transaction. (See § 1795.5, subd. (a).) The cases' analysis of the provision specifically addressing used cars confirms that the provision addressing "new motor vehicles" does not apply to used cars.

Petitioners attempt to manufacture a distinction to explain away the fact that their interpretation of "new motor vehicle" creates serial implied warranties, a result inherently in conflict with the Act's one-year limitation on such warranties. (See *Kiluk*, *supra*, 43 Cal.App.5th at 340, fn. 4; § 1791.1, subd. (c).) Petitioners argue that the definition of "new motor vehicle" applies only to a manufacturer's *express* warranty obligations

under sections 1793.22 and 1793.2, not to its *implied* warranty obligations under other provisions of the Act that use the term "consumer goods," not "new motor vehicle." (PFR 28–29; see § 1792 ["every sale of consumer goods . . . shall be accompanied by the manufacturer's and the retail seller's implied warranty"].) It would appear petitioners are thus conceding that the new motor vehicle repurchase remedy is unavailable for breach of implied warranties. But whether they agree with that or not, they do not explain how a used car that fits within their definition of a "new motor vehicle" is not a "consumer good" under the Act. (See § 1791, subd. (a) [" 'Consumer goods' means any new product"].) If petitioners were correct that used cars purchased with the remainder of the original owner's warranty are "new motor vehicles" but not "consumer goods" under the Act, then purchasers of those "new motor vehicles" could not recover damages at all. (See § 1794, subd. (a) [only buyers of "consumer goods" may sue under the Act].) This result provides further evidence that petitioners' interpretation collapses under serious scrutiny.

In short, the Court of Appeal's decision merely confirms a consistent line of authority holding that vehicles sold as used cars should be treated as such under the Act.

II. The opinion is not a sea change in the law that strips used car purchasers of breach of warranty remedies.

A. Despite petitioners' unsupported assertions, used cars have not been considered "new motor vehicles" for decades.

Petitioners argue that the opinion "materially *narrows* the Act's existing scope" (PFR 34), but that argument is premised on the assumption that everybody has understood for decades that *all* used cars with some balance remaining on their existing warranties are "new motor vehicles" under the Act. That is false.

There is no evidence that *consumers* have *ever* understood used vehicles were subject to Song-Beverly's special repurchase and replacement remedies for "new motor vehicles." The top left corner of every automobile sales contract clearly states whether the vehicle is "new" or "used." (See, e.g., AA 114.) And, as petitioners admit, "used vehicles already come with the implication that they are less reliable than brand-new vehicles." (PFR 42.) The reasonable assumption is that consumers would *not* believe their *used* cars are considered *new* cars under California's lemon law.[5]

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[5] Petitioners claim that some unspecified number of consumers "bought used cars believing they had the Act's protections," citing the 5/17/2022 Letter by Knight Law Group (KLG) Requesting Depublication. (PFR 43.) However, it is inappropriate to incorporate this letter by reference. (See California Rules of Court, rule 8.504(e)(3).) In any event, KLG's letter does *not* provide any evidence (or even unfounded speculation) regarding KLG's clients' supposed understanding of the Act's protections when *any* of them purchased their vehicles.

Petitioners' counsel concedes that at least "one member of the [appellate] panel demonstrated surprise to Plaintiff/Appellant's counsel's assurances that used vehicle cases were commonly prosecuted under the Song-Beverly Act." (KLG depub. req. 2.) That alone belies petitioners' claim that legal professionals have uniformly agreed used vehicles are commonly treated as "new motor vehicles" under the Act. And if there were any such consensus, FCA obviously would not have raised the argument that prevailed in this case.

Plaintiffs' attorneys have on occasion sought to stretch the definition of "new motor vehicle," but the line of authority from *Dagher* to *Nunez* discussed above demonstrates that there has been no consensus among manufacturers, their counsel, and even the lemon law plaintiffs' bar that manufacturers owe used car owners the repurchase remedy reserved for "new motor vehicles" under sections 1793.2, subdivision (d), and 1793.22. If there were such a consensus, the analysis in those cases about the scope of manufacturers' liability *as retail sellers of used cars* under section 1795.5 would have been irrelevant.

Petitioners assert that the opinion has "created a deluge" of requests for dismissal of pending used car cases, citing counsel's request for depublication. (PFR 10, fn. 10.) This Court should disregard petitioners' counsel's ipse dixit claims about a handful of pending cases (see *ante*, p. 20, fn. 5), but if the Court is inclined to consider those anecdotal examples, this Court should be aware that petitioners' counsel has misrepresented the procedural history in those cases. (See, e.g., 6/3/2022 Letter by M. Skanes

and 6/3/2022 Letter by M. Lee, Letters Opposing Petition for Review.) In fact, these cases prove that manufacturers did *not* ascribe to petitioners' view well before the Court of Appeal's decision. (*Ibid.*; see 5/27/2022 FCA opp. to depub. req.)[6] In most of the cases referenced by petitioners, manufacturers have simply renewed prior defenses based on the new authority and guidance that the opinion provides. (*Ibid.*)

B. Used car purchasers will continue to have multiple avenues to enforce their warranties.

Petitioners argue that the opinion "creates a gap" in consumers' ability to enforce manufacturer warranties that transfer to used vehicles. (PFR 36.) There will be no gap in protection. As the opinion notes, all purchasers of used vehicles can enforce their warranties under the California Uniform Commercial Code. (Typed opn. 19.) Granting them more would create a windfall that the Legislature did not see fit to provide.

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[6] Specifically, petitioners have misrepresented that the issue "is so well-accepted" that manufacturers admit in discovery that used cars are "new motor vehicles" under the Act. (PFR 11–12.) KLG dug through decades of case records and found only *two* examples of manufacturers admitting that a *supposedly* used car was a new motor vehicle and yet also claimed to have settled 113 such cases since 2020. (See FCA opp. to depub. req. 7.) That must mean that in over 100 cases manufacturers did *not* make any such admission. As explained in more detail in the letter opposing depublication and the amicus letters concurrently filed, the two examples cited by KLG are explained by the unique factual and procedural posture of those cases, *not* by any imagined agreement with petitioners' interpretation of the Act by Hyundai and Honda. (See FCA opp. to depub. req. 7–8; 6/3/2022 Letters Opposing Petition for Review.)

Petitioners argue that the California Uniform Commercial Code is insufficient because it does not allow for the recovery of attorney fees. (PFR 37.) That argument expresses dissatisfaction with the American Rule's default assumption that parties are responsible for their own attorneys' fees, and is an argument best made to the Legislature.

In addition, consumers of used vehicles can continue bringing claims under the Act—complete with statutory fee shifting—against retail sellers and distributors who warrant used cars. (Typed opn. 7–8.) Consumers who purchase used cars still under warranty provided by FCA (and other manufacturers who participate in certified arbitration programs) can also pursue warranty claims—at no cost—in arbitrations where only decisions in the consumer's favor are binding. (See Civ. Code, § 1793.22, subds. (c), (d).) Thus, it is simply not true that consumers of used vehicles "cannot afford prosecuting a breach-of-warranty under the [California Uniform] Commercial Code" (PFR 37) without the enhanced remedies reserved for "new motor vehicles."

III. Given petitioners' arguments about the recurring nature of the issue on which they seek review, this Court should allow the issue to percolate to see whether a conflict arises.

A. The Court of Appeal's opinion is correct.

Petitioners do not dispute that the Court of Appeal's interpretation is the *only* interpretation that is grammatically correct, nor do they dispute that, when read *in context* with the other provisions of the Act, there is no ambiguity.

Petitioners isolate the phrase "other motor vehicle sold with a manufacturer's new car warranty" and argue that it cannot be a catchall provision for basically new vehicles because "such a car would already fall within the reference to a 'dealer-owned vehicle,' making the so-called catchall superfluous." (PFR 20.) But the opinion expressly refutes that argument, pointing out that manufacturer-owned cars (such as program cars and service loaners)—and even the car in *Jensen*—are all examples of the *need* for the catchall provision. (Typed opn. 12, 18.)

Only petitioners' interpretation makes key statutory language superfluous. The Legislature used the word "new" repeatedly in the definition, expressly stating that " '*New* motor vehicle' means a *new* motor vehicle," including "a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's *new car* warranty." (§ 1793.22, subd. (e)(2), emphasis added.) Petitioners ignore the *entire* definition and argue their used truck should be considered "new" because all "vehicles *originally* were new products" (PFR 40), rendering the word "new" both superfluous and meaningless.

In addition, as the opinion notes, "the Act makes it clear when a provision applies to used or previously owned products by including the term 'used' in the provision." (Typed opn. 13.) For example, the Act references "new or used" products (e.g., § 1794.4, subd. (f); see § 1796.5) and lays out detailed provisions in the limited situations where "used" products are covered (e.g., §§ 1793.02, subd. (g), 1795.5). Other provisions expressly define "consumers" to include "any person to whom the motor vehicle is

transferred during the duration of an express warranty" (§ 1795.90, subd. (a)), demonstrating *how* the Legislature *would have* included used vehicles still covered by original warranties in the definition of new motor vehicle, if that had been the intent.

Petitioners assert that "[a]s a matter of policy," courts should interpret the Act "in favor of consumers," and fault the opinion for "never even acknowledg[ing] that the Act is supposed to be liberally interpreted in favor of consumers." (PFR 38.) However, a liberal reading of the statue is appropriate only if there is an ambiguity (see typed opn. 5), and as explained in the opinion, when considered in light of the *entire* statutory definition, rules of grammar, and numerous other provisions in the Act, there is no ambiguity because there is only *one* reasonable interpretation (typed opn. 8–15).

Petitioners act as though any rule favorable to consumers can be applied without regard to the careful balance that the Legislature struck in creating different remedies for different categories of consumers in a variety of circumstances. That is wrong. (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993 (*Murillo*) ["We could not, of course, ignore the actual words of the statute in an attempt to vindicate our perception of the Legislature's purpose in enacting the law"]; accord, *Nunez*, *supra*, 61 Cal.App.5th at p. 397 [Song-Beverly is "intended for the protection of the consumer," but that does not mean a court may "disregard the actual words of the statute, or fail to give them a plain and commonsense meaning" (internal quotation marks omitted)]; *Dagher*, *supra*, 238 Cal.App.4th at pp. 924 [rejecting

statutory construction that depended on "lip service to the overall consumer protection policy of the Act"], 927 [declining to depart from Song-Beverly's text " ' "to conform to an assumed intention that does not appear in its language" ' "].)[7]

Petitioners also argue that the Department of Consumer Affairs interprets the Act's definition of "new motor vehicle" to include used motor vehicles still under warranty and criticizes the opinion for not addressing the issue. (PFR 26, citing Cal. Code Regs., tit. 16, § 3396.1, subd. (g).) Petitioners are wrong again. The Department's regulations do *not* define "new motor vehicle" to include used cars still under warranty. The cited regulation provides definitions relating to certified arbitration programs that manufacturers voluntarily establish to address consumer warranty claims under *both* the Act *and* the California Uniform Commercial Code. (See Cal. Code Regs., tit. 16, § 3396.1, subd. (a) ["applicable law" in arbitration includes the Act *and* the California Uniform Commercial Code]; Civ. Code, §

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[7] The Legislature draws boundaries to avoid both unintended consequences and unduly furthering one legitimate interest at the expense of another. (E.g., *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1117 [discussing "[t]he relative bustle of legislative action" that "showcases an evolving story of balancing competing considerations"]; *Klein v. United States of America* (2010) 50 Cal.4th 68, 82 [discussing "legislative objective of balancing the respective interests"]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 241 [discussing the Legislature's "comprehensive process that balances" dual interests]; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66–67 [discussing "the Legislature's carefully crafted scheme" to balance competing interests in application of anti-SLAPP statutes].)

1793.22, subd. (d)(7) [listing various laws the arbitrator must take into account, including the California Uniform Commercial Code].)[8] Thus, the Department's definition of a "consumer" in the context of these arbitration programs unsurprisingly includes consumers of used cars who can raise breach of warranty claims against manufacturers under the Commercial Code.

Petitioners further argue that "the Opinion treats the absence of legislative history . . . as dispositive." (PFR 25.) Wrong again. Though the Court of Appeal did a deeper dive into the context of the broader statutory scheme and the legislative history than any other court considering the issue, the opinion *relies on* the "plain and commonsense meaning" of the Act's words "within the context in which they appear." (Typed opn. 5; see *ante*, pp. 23–25.) Moreover, the opinion quotes the bill analysis explaining that the reason for the 1987 amendment (which added the phrase relating to dealer-owned and demonstrator vehicles) was that "[s]ome buyers [were] being denied the remedies under the lemon law because their vehicle is a 'demonstrator' or 'dealer-owned' car, *even though it was sold with a new car warranty*." (Typed opn. 15.) That is not a *lack* of legislative history; it is direct evidence explaining *why* the Legislature included the "catchall" provision: to expand the "demonstrator" category to include other "basically new" vehicles sold with a full new car warranty. (*Ibid.*) And, the lack of *additional* evidence supporting the Legislature's supposed counterintuitive intent to

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[8] Several manufacturers subscribe to these certified arbitration programs, including FCA and Ford Motor Company.

define used cars as new cars *is* significant. The Court of Appeal is correct that it would be surprising (to say the least) if no legislator, staff member, bill analyst, or manufacturer had even *mentioned* that the Legislature's amendment would dramatically expand manufacturers' liability to cover a huge category of *used* cars, if anyone had understood that was actually the intent.

With this context in mind, it is clear why the Court of Appeal correctly concluded there is no ambiguity. Petitioners' interpretation is obviously wrong. It makes no sense to conclude that the Legislature dramatically expanded the Act by "tucking it into a reference to demonstrators and dealer-owned vehicles" (typed opn. 12), unlike every other situation in which the Act applies to used products (see, e.g., §§ 1793.02, subd. (g), 1794.4, subd. (f), 1795.5; see also §§ 1795.90, subd. (a), 1796.5). Because the opinion provides clear analysis regarding the unambiguous definition of "new motor vehicle," there is no need to "grant review to resolve . . . the Act's scope." (PFR 32.)

B. Policy issues should be decided by the Legislature, and petitioners' hypotheticals should be decided in cases with those facts.

Petitioners ask whether consumers who purchase used vehicles with still-pending new-car express warranties *should* be given protections like other consumers who purchase new vehicles. (PFR 8.) But that *policy issue* was a question for the Legislature, which decided to "treat[ ] new motor vehicles somewhat differently from used motor vehicles." (*Dagher*, *supra*, 238 Cal.App.4th at p. 921; see *id.* at p. 926 [the Act "restrict[s]

the types of sellers and goods, as well as buyers, that qualify for its protection"].)[9]

Petitioners argue that any limitation on the refund-or-replace remedy against manufacturers hinders the remedial purpose of the Act. (PFR 25–26.) But based on that logic every express limitation in the Act—e.g., the personal use limitation, the weight and number limitations for business vehicles, the exclusions of the coach portion of motor homes, unregistered off-road vehicles, and private sales (§§ 1791, subd. (a), (*l*), 1793.22, subd. (e)(2)), and the exclusion of out-of-state sales (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 493)—all supposedly *encourage* manufacturers to breach their warranties on such vehicles, and thus should be discarded by the courts. That is not the role of the courts. (*Murillo*, *supra*, 17 Cal.4th at p. 993 [" ' "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed" ' "].)

As the Court of Appeal explained, there are good reasons for the Legislature's decision *not* to treat used cars the same as new cars merely because there is a balance remaining on the original warranty—that would be unworkable and sow confusion. (See typed. opn. 13.) Further, petitioners concede that issues of

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[9] Petitioners also argue that all that *should* matter is whether the car "proves defective, not whether the car might be considered 'old' or 'new.' " (PFR 36; see PFR 39.) But limits on age and mileage are not how the Legislature defined "new motor vehicle." Thus, the Court of Appeal's opinion has nothing to do with the *age* or *mileage* of the vehicle; it is entirely based on the fact that it was sold as a "used" vehicle and thus is not a "new motor vehicle" under the Act. (Typed opn. 10–15.)

proof become more difficult as a car ages (PFR 40), which is exacerbated by the transfer of ownership. Petitioners' interpretation would negatively affect a manufacturer's ability to prove affirmative defenses based on a prior owner's unreasonable use of that vehicle. (See § 1794.3.)

On the other hand, petitioners' policy arguments in favor of treating used cars as new cars are unpersuasive, which further supports the balance reached by the Legislature and the opinion. For example, petitioners argue that the Court of Appeal's opinion "incentivizes manufacturers to forgo or delay buy-backs" (PFR 38), in the hope that "unwitting consumers [will] trade in their defective vehicles" instead of requesting a buyback (PFR 12). But that makes no sense. Under *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 190–191 (*Martinez*), a manufacturer may be liable to the original buyer even if the vehicle is sold,[10] which can result in a civil penalty and fee award that dwarfs the purchase price of the vehicle by *hundreds* of thousands of dollars. (See Civ. Code, § 1794, subds. (c) [civil penalties], (d) [attorneys fees].) And, if the manufacturer resells the vehicle but has not fixed it, subsequent buyers may *also* have claims under the Act (see Civ. Code, § 1795.5) or the California Uniform Commercial Code, which they can bring in court *or* in binding arbitration. Thus, willful delay of Song-Beverly

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[10] This outcome makes sense only if manufacturers are credited with the amount that plaintiffs recover when they sell the vehicle, as explained in detail by the Court of Appeal in *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052, 1070–1077, review granted Feb. 10, 2021, S266034.

obligations would subject manufacturers to *multiple* lawsuits *and* an increased number of dissatisfied customers. No rational manufacturer would risk incurring civil penalties and attorneys' fees—and alienating its customers—on the off-chance a buyer may resell her vehicle, which would do nothing to protect the manufacturer from suit anyway.

Petitioners also argue that the opinion's interpretation results in "arbitrary distinctions" (PFR 39), positing that vehicles leased for several years could be sold as "new" (PFR 41), cars would become "used" when purchased by original lessees at the end of the lease period (PFR 36, fn. 8), and manufacturers could "avoid liability for dealer-owner vehicles . . . merely by selling or transferring the defective vehicle to another car dealer" (PFR 20). But petitioners' analysis is all wrong. First, the Act treats leases the same as purchases (§§ 1793.2, subd. (d)(2)(D), 1795.4, subd. (b)), which means a car is no longer "new" when it is sold after the initial lease, because it would not be "sold with" a new car warranty. Second, *Martinez*, *supra*, 193 Cal.App.4th at pages 190–191, suggests that an original lessee may have rights under the Act even after the vehicle is sold (even if sold to that lessee).[11]

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[11] However, a lessee who *chooses* to exercise purchase rights on a vehicle he later claims is a lemon may well have forfeited certain protections. (See, e.g., *Varda v. General Motors Corp.* (Wis.Ct.App. 2001) 626 N.W.2d 346, 355 [consumer who leased new vehicle that met requirements of "lemon" during first year of lease term, but did not demand relief from manufacturer until after lease term expired and he had purchased vehicle, was barred from lemon law relief since, as purchaser of used car, he was no longer "consumer" under statutory definition].)

Third, the hypothetical serial sale scheme between dealers for the purpose of avoiding Song-Beverly liability presents yet *another* example (like the facts in *Jensen*) of the need for a "catchall" provision in the definition of "new motor vehicle." And, even if these hypotheticals did raise questions about how to define "new motor vehicles," *this is not the case to decide those issues.* Those issues will have to be adjudicated in cases presenting those facts.

C. Out-of-state cases *support* the opinion *and* the Legislature's decision to treat new and used cars differently.

Petitioners cherry pick cases from three other states—Virgina, Wyoming, and Washington—to argue that "[o]ther state supreme courts have intervened to clarify under their own state's particular lemon law" that "a manufacturer remains subject to lemon law liability when a vehicle is sold with an unexpired manufacturer's new car warranty." (PFR 43.)

However, the Virginia and Wyoming lemon laws use different statutory language, which explains the different outcomes. The Virginia lemon law applies to *both* new and used vehicles. (See *Subaru of America, Inc. v. Peters* (Va. 1998) 500 S.E.2d 803, 805 [law applies to "motor vehicles" not "new motor vehicles"]; see also Va. Code Ann. § 59.1-207.11.) The Wyoming lemon law expressly applies to "consumers," defined as any person "[t]o whom a motor vehicle is transferred during the term of an express warranty applicable to the motor vehicle." (Wyo. Stat. Ann. § 40-17-101(a)(1)(B), (C); see *Britton v. Bill Anselmi Pontiac-Buick-GMC, Inc.* (Wyo. 1990) 786 P.2d 855, 864

(*Britton*).) Thus, *Subaru* and *Britton* support the *Rodriguez* opinion because all three cases conclude that legislators understand the difference between "new" and "used" vehicles *and* know how to extend repurchase remedies to used vehicles with transferred warranties—*if* they decide to do so.

In contrast to the legislatures in Virginia and Wyoming, California's Legislature chose to limit the replace-or-repurchase remedy for used cars to the sellers of those cars. The remedy exists against manufacturers only for "new motor vehicles," which the Legislature chose not to define to include used cars with "transferred" warranties. (See typed opn. 6–11, 14–15.)

The petition's characterization of Washington law is particularly misleading. In *Chrysler Motors Corp. v. Flowers* (Wash. 1991) 803 P.2d 314, 317–318, the Washington Supreme Court did *not* hold that the truck was new because " 'remedial legislation such as the lemon law should be construed broadly.' " (PFR 44, fn. 10 [quoting an argument made by the plaintiff in that case].) *Flowers* held that, under Washington's lemon law, the plaintiff was a statutorily defined "consumer" entitled to replacement or repurchase from the manufacturer because she was "the first party to take title" (*Flowers*, at p. 318) *and* the truck was "new" because it was a demonstrator that "had been used only by the manufacturer, had never been titled, and was being sold at retail to the public for the first time" (*id.* at pp. 318–319). Thus, *Flowers* defines "new motor vehicle" in the same way as the opinion here (as does *Britton*), and supports the opinion's conclusion that a "catchall provision" was needed in the Act to

include "basically new (i.e., not previously sold)" *manufacturer-owned* vehicles. (Typed opn. 12; see *Britton*, *supra*, 786 P.2d at pp. 856–857 [car was previously used by GM executives as a company car].)

Petitioners also fail to mention that numerous *other* out-of-state cases show that the Court of Appeal's opinion is in accord with cases interpreting similar lemon laws around the country. (See, e.g., *American Motors Sales Corp. v. Brown* (N.Y.App.Div. 1989) 548 N.Y.S.2d 791, 795–797 [New York appellate court did not apply the new car lemon law to a car labeled as "used" on the bill of sale, even though the car was still covered by a manufacturer's warranty]; *Schey v. Chrysler Corp.* (Wis.Ct.App. 1999) 597 N.W.2d 457, 460 [Wisconsin appellate court held that a "used" car was not a "new" motor vehicle for purposes of the state lemon law, despite the fact it was still covered by the original manufacturer's warranty]; *Wynn Holdings, LLC v. Rolls-Royce Motor Cars NA, LLC* (D.Nev., Mar. 19, 2019, No. 2:17-CV-00127-RFB-NJK) 2019 WL 1261350, at p. *3 [nonpub. opn.] [Nevada's lemon law applies to "new motor vehicles," which does not include used vehicles with a balance remaining on the original manufacturer's warranty]; cf. *Meyers v. Volvo Cars of North America, Inc.* (Pa.Super.Ct. 2004) 852 A.2d 1221, 1225 [car was "new motor vehicle" under Pennsylvania lemon law because it was a "demonstrator" first sold and first titled to plaintiff after having previously been used as the personal vehicle of the dealership's owner].)

Accordingly, the opinion is neither a sea change in state law nor out of step with lemon laws across the country.

CONCLUSION

For the reasons explained above, this Court should deny the petition for review.

June 6, 2022

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CERTIFICATE OF WORD COUNT

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

The text of this petition consists of 7,377 words as counted by the program used to generate the petition.

Dated: June 6, 2022

Shane H. McKenzie

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Rodriguez et al. v. FCA US, LLC
Case No. E073766

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STATE OF CALIFORNIA
Supreme Court of California

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