No. S274625

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

EVERARDO RODRIGUEZ and
JUDITH V. ARELLANO,

Plaintiffs and Appellants,

v.

FCA US, LLC,

Defendant and Respondent.

California Court of Appeal, Fourth District, Division Two, Civil No. E073766
Appeal from Riverside County Superior Court, Case No. RIC1807727
Honorable Jackson Lucky, Judge Presiding

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO SUBMIT AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFONRIA IN SUPPORT OF PLAINTIFFS AND APPELLANTS

SHARON J. ARKIN
STATE BAR NO. 154858
THE ARKIN LAW FIRM
1720 Winchuck River Road
Brookings, OR 97415
T: 541-469-2892, F: 866-571-5676
Attorney for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: June 12, 2023

Sharon J. Arkin
SHARON J. ARKIN

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APPLICATION TO SUBMIT AMICUS BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS

Consumer Attorneys of California ("CAOC") hereby applies for an order permitting the filing of its attached amicus brief in support of plaintiffs and appellants.

INTEREST OF THE *AMICUS*

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff trial bar throughout California, Consumer Attorneys has a very extensive interest in the significant issues related to the application of the Song-Beverly Consumer Warranty Act.

ISSUES TO BE ADDRESSED IN THE *AMICUS* BRIEF

CAOC believes that its *amicus* brief can offer this Court useful insights regarding the issues presented. The brief addresses a limited number of issues that have not been otherwise fully discussed in the parties' briefing. CAOC's interest in the issues in this case concern the potential consequences to used vehicle purchasers. California has an interest in removing unsafe vehicles from the stream of commerce and ensuring proper repair and disclosure of vehicle safety defects. Used car purchasers are among the most vulnerable in the universe of vehicle consumers – the *Rodriguez* Opinion effectively removes used vehicles from the protection of the Song-Beverly Consumer Warranty Act (hereinafter, "the Act").

Because these issues are so important to consumers throughout the State, CAOC respectfully requests that its attached amicus brief be accepted for filing.

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.200(c)(3)(A), no party authored the proposed amicus brief in whole or in part and no party made a monetary contribution intended to fund the preparation or submission of the brief.

Dated: June 12, 2023

By: *Sharon J. Arkin*
SHARON J. ARKIN
Attorney for Consumer Attorneys
Of California

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SHARON J. ARKIN
STATE BAR NO. 154858
THE ARKIN LAW FIRM
1720 Winchuck River Road
Brookings, OR 97415
T: 541-469-2892, F: 866-571-5676
Attorney for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

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INTRODUCTION

Although the briefs of Plaintiffs and Appellants do a comprehensive and excellent job of addressing the legal issues presented, CAOC seeks to bring to this Court's attention the negative impact adoption of the appellate court's reasoning will have on California's consumers..

CAOC's interest in the issues in this case concern the potential consequences to used vehicle purchasers. California has an interest in removing unsafe vehicles from the stream of commerce and ensuring proper repair and disclosure of vehicle safety defects. Used car purchasers are among the most vulnerable in the universe of vehicle consumers. The appellate court's opinion effectively removed used vehicles from the protection of the Song-Beverly Consumer Warranty Act (hereinafter, "the Act").

That decision held—contrary to the plain language of the Act and its consumer-protection purpose—that the words "other motor vehicle sold with a manufacturer's new car warranty" (Civ. Code, § 1793.22, subd. (e)(2)) do not include used vehicles that were sold with a remaining balance on the manufacturer's new car warranty.

The rule that the appellate decision declared is broad, effectively sweeping into it all used vehicles with still-pending manufacturer new car warranties. The result will be that many thousands of consumers will find themselves with no lemon-law remedies. Many used car purchases involve vehicles with only a few hundred or a few thousand miles on them and with several years of the manufacturer's new-car warranty still in place. The appellate court's decision was a sea change that subverted years of

settled law. (See *Jensen v. BMW of N. Am.* (1995) 35 Cal.App.4th 112.) This Court should set a course correcting that error.

DISCUSSION

A. The inherent purpose of the Act was undermined by the appellate court's analysis.

The appellate court's decision undermines the very purpose of the Act and if it is not reversed, the resulting damage to consumers is incalculable.

The Act is supposed to be a robust consumer-protection statute that ensures that where a consumer is sold a "lemon" because the manufacturer could not repair the vehicle during the warranty period, the consumer can obtain a prompt buy back or a replacement of that vehicle. (Civ. Code § 1793.2, subd. (d).)

California's lemon law serves consumers (1) by compelling manufacturers to make things right when they've sold a vehicle that cannot be repaired after a reasonable number of repair attempts, and (2) creating an incentive for manufacturers to do so promptly, since a jury finding of willful failure to provide a statutory buyback or replacement subjects the manufacturer to civil penalties. (Civ. Code § 1794, subd. (c).) These important consumer protections were disrupted by the appellate court's decision for thousands of current and future used car purchasers.

B. The loss of lemon law protection in used car sales will create a "bait-and-switch" scenario that harms California's consumers.

Manufacturers regularly market their vehicles based on the lengthy duration of their warranties and its contractual transferability to subsequent owners. The transferability of the warranty increases the used vehicle price (because the vehicle holds its value longer) and permits the resale of vehicles at a premium because the vehicle has a remaining balance on the coveted manufacturers new motor vehicle warranty.

Unknown to the thousands of consumers who already paid that premium in reliance on their ability to enforce the warranty provisions in California, the bargain they made when they purchased their vehicles would be wiped away by a decision exempting all used vehicles with still-pending new car warranties from the Act.

That, in turn, would leave thousands of consumers who paid a premium for a vehicle with an outstanding manufacturer's warranty without the benefit of their bargain while, at the same time, letting manufacturers off the hook for selling irreparably defective vehicles without any notice to an unwitting consumer.

Such a decision would also give an unjustifiable advantage to dealers that had touted the "value" of the remaining warranty on the used vehicles in their marketing.

C. Destruction of "lemon" vehicle title branding requirements will undermine public safety.

The lemon law requires that "lemons" must be made publicly known by branding the title of the vehicle as "Lemon Law Buyback," and the resale of the vehicle being accompanied by conspicuous disclosures of the prior repairs performed on the vehicle. (Civ. Code § 1793.23.)

The Legislature expressly identified the concerns that drove its decision to enact this requirement. First, in subdivision (a)(1), the Legislature specifically included used cars in its acknowledgment that warranties give "important and valuable protection to consumers.

In subdivision (a)(4) the Legislature also confirmed that "these notices serve the interests of consumers who have a right to information relevant to their buying decisions."

The Legislature also expressed its concern in subdivision (a)(5) that "the disappearance of these notices upon the transfer of title from another state to this state encourages the transport of 'lemons' to this state for sale to the drivers of this state," again acknowledging its interest in protecting California consumers – even consumers of *used* cars.

Because defective vehicles that were purchased used from a retailer with an existing car warranty would not be branded if the appellate court's analysis is adopted, all these unsafe cars will remain on the roads and in the stream of commerce creating potentially dangerous conditions for scores of others. Rather than being required to brand a lemon, manufacturers cannot be

allowed to avoid warning consumers before they purchase irreparably defective vehicles.

The simple reality is that the Legislature's underlying purpose in enacting this statute was to protect purchasers of both new *and* used cars. That purpose will be wholly undermined if the appellate court's analysis is adopted by this Court.

D. The appellate court's analysis promotes "lemon laundering."

There is another danger to consumers if the appellate court's analysis is adopted – it would further incentivize manufacturers and their authorized dealerships to persuade consumers to trade in their defective vehicle (while selling the consumer a newer, more expensive vehicle) early in the repair process. By doing so, the manufacturer would forever be off the hook for Song-Beverly damages for that defective vehicle because it would be permitted to remain in the stream of commerce with no further disclosures of the safety defects. This, in turn, creates a perverse incentive to "launder" lemons by simply offering consumers discounts for trading in their vehicles (rather than repurchasing them under the Act). Once that vehicle is resold, that new purchaser gets no protection for a breach of warranty.

By this means, manufacturers are encouraged to stonewall the original owner of a vehicle in the owner's attempt to have their vehicle repurchased. By stonewalling, the manufacturer can drive the consumer into giving up, trading in the vehicle, and forever eliminating the branding requirement under the Act. This

has been a fraudulent scheme that manufacturers have been known to engage in for many years. (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1197.) It is now up to this Court to assure that this practice is no longer profitable for manufacturers because thee used car purchaser can enforce the Act's provisions.

E. The appellate court's analysis destroys manufacturers' incentive to self-regulate.

While a used car owner may still have some limited rights under the Commercial Code, the rights they would lose if the appellate court were not reversed are significant – to the consumer *and* to the State's public policy interests. One of the key components of the Act the is the imposition of civil penalties against a manufacturer for failure to comply. (Civ. Code, § 1794.) This important component is the only thing that incentivizes a manufacturer to self-regulate. A failure to proactively comply *promptly* results in penalties intended to deter the manufacturer's continued wrongful behavior. (Civ. Code § 1793.2, subd. (d)(2); *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 347; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 301-302.) Such incentives do not exist in the Commercial Code. Accordingly, the appellate court's analysis results in leaving significantly unsafe vehicles on the road, as it removes the *only* motivator for manufacturers to proactively act in repurchasing and branding defective used vehicles. Under the Commercial Code, the manufacturer has no incentive to act proactively, respond to consumers promptly, or comply with legal

obligations – a prolonged lawsuit will simply result in the same damage with delayed payment.

F. Finally, the appellate court's analysis makes it impossible for consumers to find competent representation to bring actions against global car manufacturers.

One of the primary benefits of the Act is that it ensures that consumers will be able to find attorneys to represent them if a manufacturer sells them a lemon. (Civ. Code § 1794 subd. (d); *Murillo v. Fleetwood Enterprises, Inc* (1998) 17 Cal.4th 985, 994.) By pushing used-car purchasers outside of the Act's ambit, the appellate court's analysis deprives them of the chance to obtain representation. And this, in turn, undermines the incentive structure intended by the Legislature. As this Court recognized in *Murillo*, "the primary financial benefit the Song–Beverly Act offers to consumers who sue thereunder to enforce their rights: their ability, if successful, to recover their 'attorney's fees based on actual time expended.' " (*Id.*) Absent the provision allowing a prevailing buyer to recover their attorney's fees, consumers of used vehicles with existing warranties find no refuge in suing under the Commercial Code, and thus, will have no realistic means of attempting to seek recourse if their vehicle's new car warranty is breached.

CONCLUSION

Because of the massive—and adverse—impact the appellate court's analysis w has on consumer rights in California, this Court should reject that analysis and reverse the Court of Appeal's decision.

Dated: June 12, 2023

By: *Sharon J. Arkin*
SHARON J. ARKIN
Attorney for Consumer Attorneys
Of California

CERTIFICATE OF BRIEF LENGTH

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 2508 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: June 12, 2023

Sharon J. Arkin
SHARON J. ARKIN

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I am over the age of 18 and not a party to the within action; my business address is 1720 Winchuck River Road, Brookings, OR. 97415

On **June 12, 2023**, I served the within document described as:

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO SUBMIT AN AMICUS BRIEF AND AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANTS

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached mailing list.

Riverside County Superior Court
Hall of Justice
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Riverside, CA 92501

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

Executed on June 12, 2023 at Brookings, Oregon.

Sharon J. Arkin
SHARON J. ARKIN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. FCA US**
Case Number: **S274625**
Lower Court Case Number: **E073766**

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Joseph Bui Greines, Martin, Stein & Richland LLP 293256	jbui@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
Mark Skanes RoseWaldorf LLP 322072	mskanes@rosewaldorf.com	e-Serve	6/12/2023 3:38:50 PM
Sharon Arkin The Arkin Law Firm 154858	sarkin@arkinlawfirm.com	e-Serve	6/12/2023 3:38:50 PM
Cynthia Tobisman Greines Martin Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
Payam Shahian Strategic Legal Practices, A Professional Corporation 228406	lwageman@slpattorney.com	e-Serve	6/12/2023 3:38:50 PM
Alana Rotter Greines, Martin, Stein & Richland LLP 236666	arotter@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
David Brandon Clark Hill LLP 105505	dbrandon@clarkhill.com	e-Serve	6/12/2023 3:38:50 PM
Radomir Kirnos Knight Law Group, LLP 283163	rogerk@knightlaw.com	e-Serve	6/12/2023 3:38:50 PM
Joseph Kaufman	joe@lemonlawaid.com	e-	6/12/2023

Joseph A. Kaufman & Associates, Inc. 228319		Serve	3:38:50 PM
Pro Per Attorney Nationwide Legal, LLC 162637	sfcourt@nationwideasap.com	e-Serve	6/12/2023 3:38:50 PM
Martin Anderson Anderson Law Firm 178422	firm@andersonlaw.net	e-Serve	6/12/2023 3:38:50 PM
Maureen Allen Greines, Martin, Stein & Richland LLP	mallen@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
Arlyn Escalante Rosner, Barry & Babbitt, LLP 272645	arlyn@rbblawgroup.com	e-Serve	6/12/2023 3:38:50 PM
Shane Mckenzie Horvitz & Levy, LLP 228978	smckenzie@horvitzlevy.com	e-Serve	6/12/2023 3:38:50 PM
Hallen Rosner Rosner, Barry & Babbitt, LLP 109740	hal@rbblawgroup.com	e-Serve	6/12/2023 3:38:50 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	6/12/2023 3:38:50 PM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	6/12/2023 3:38:50 PM
Rebecca Nieto Greines Martin Stein & Richland LLP	rnieto@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
Richard Wirtz Wirtz Law APC 137812	rwirtz@wirtzlaw.com	e-Serve	6/12/2023 3:38:50 PM
Daniel Lebel Consumer Law Practice of Daniel T. LeBel 246169	danlebel@consumerlawpractice.com	e-Serve	6/12/2023 3:38:50 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	6/12/2023 3:38:50 PM
Martin Anderson Anderson Law APC	martin@andersonlaw.net	e-Serve	6/12/2023 3:38:50 PM
Katherine Kopp Orrick, Herrington & Sutcliffe LLP	kkopp@orrick.com	e-Serve	6/12/2023 3:38:50 PM
Max Carter-Oberstone Orrick, Herrington & Sutcliffe LLP 304752	mcarter-oberstone@orrick.com	e-Serve	6/12/2023 3:38:50 PM
Payam Shahian Strategic Legal Practices, APC 228406	pshahian@slpattorney.com	e-Serve	6/12/2023 3:38:50 PM
Joseph Kaufman Lemon Law Aid, Inc.	dulce@lemonlawaid.com	e-Serve	6/12/2023 3:38:50 PM
John Taylor Horvitz & Levy LLP 129333	jtaylor@horvitzlevy.com	e-Serve	6/12/2023 3:38:50 PM

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

6/12/2023

Date

/s/Sharon Arkin

Signature

Arkin, Sharon (154858)

Last Name, First Name (PNum)

The Arkin Law Firm

Law Firm