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

PETITIONERS' ANSWER TO AMICUS BRIEFS FILED IN SUPPORT OF RESPONDENT FCA

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INTRODUCTION

The Court should look askance at the amici supporting FCA US, LLC's efforts to strip used car buyers of rights they have enjoyed for decades.

The United States Chamber of Commerce and the Civil Justice Association are "primarily" "big business lobbying group[s]." (Evers-Hillstrom, US Chamber Mostly Funded By Small Pool Of Big Donors: Study (April 26, 2023)[1] [as of August 22, 2023] [discussing U.S. Chamber of Commerce]; Herrell, California Consumers: Beware Shadowy Corporate Attacks (Nov. 26, 2021)[2] [as of August 22, 2023].) The Alliance for Automotive Innovation, meanwhile, is the automobile manufacturing industry's lobbying arm. (Alliance-5.) These groups collectively spend millions each year seeking to kill or weaken consumer protections in California and the rest of the United States. (Open Secrets: United States Chamber of Commerce[3] [as of August 22, 2023] [spending $81 million in 2022]; Open Secrets: Alliance for Automotive Innovation[4] [as of August 22, 2023] [spending $4.6

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[1] https://thehill.com/lobbying/3973039-us-chamber-mostly-funded-by-small-pool-of-big-donors-study/

[2] https://www.sactopolitico.com/post/california-consumers-beware-shadowy-corporate-attacks

[3] https://www.opensecrets.org/orgs/us-chamber-of-commerce/summary?id=D000019798

[4] https://www.opensecrets.org/orgs/alliance-for-automotive-innovation/summary?id=D000072796

million in 2022].)[5] The Court should reject their skewed efforts to further limit consumer protections here.

"The Song-Beverly Consumer Warranty Act was enacted to address the difficulties faced by consumers in enforcing any express warranties" (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 484), "whatever the duration of coverage" (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 127).

Consistent with the Act's remedial purpose, *Jensen, supra,* 35 Cal.App.4th at pp. 121-127, held that consumers who purchase used vehicles "sold with a balance remaining on the manufacturer's new motor vehicle warranty" can invoke the Act's refund-or-replace provisions to enforce their still-in-force new-car warranties.

Petitioners have demonstrated that the Act's plain text, legislative history, public policy goals, and every other tool of statutory interpretation all confirm that *Jensen* is correctly decided—and that the Court of Appeal was wrong to deprive those who purchase used cars of the Act's remedies.

Neither the United States Chamber of Commerce,[6] nor the Alliance for Automotive Innovation refute that showing.

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[5] This is true even *without* accounting for the amounts that the Civil Justice Association spends.

[6] The United States Chamber of Commerce filed its amicus brief with the Civil Justice Association. For purpose of brevity, we use "the Chamber" to refer to both parties.

Statutory Construction of the Plain Text. Civil Code section 1793.22, subdivision (e)[7] defines a new motor vehicle to include "a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." The Chamber argues that two cannons of construction—*noscitur a sociis* and *ejusdem generis*—dictate that "other motor vehicles" must share some common characteristic with dealer-owned vehicles and demonstrators. The Chamber then speculates that their shared characteristic is that each has never been previously sold or leased at retail.

But there's no need to guess at what the Legislature thought these vehicles have in common. The Act tells us: each is "sold with a new car warranty." (See § 1793.22, subd. (e) [A "'new motor vehicle' includes . . . a dealer-owned vehicle and a 'demonstrator' **or** *other* motor vehicle *sold with a manufacturer's new car warranty*," italics added].)

The sole question is thus whether a motor vehicle sold with a new car warranty includes vehicles that are sold with a balance remaining on those warranties. And the canons of construction that the Chamber cites confirms that it surely does. After all, in arguing that cannons of construction require that all three categories are intended to be alike, the Chamber concedes that dealer-owned vehicles and demonstrators are supposed to be examples of the third category: "other vehicles sold with a new

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[7] All statutory references are to the Civil Code unless stated otherwise.

car warranty." And the Chamber never refutes our extensive showing that dealer-owned vehicles and demonstrators *do not* come with a new, untouched warranty, but rather are sold to a consumer with a remaining balance of the warranty. (See Opening Brief on the Merits ("OBM")-28-35, citing dozens of major manufacturer warranties.) It follows that *all used vehicles* that sold with a balance remaining on a new car warranty count as vehicles "sold with a new car warranty" too.

The Chamber's complaints that the Act requires manufacturers to comply with a new car warranty for its entire duration and not just until the first buyer gets rid of it—which can occur after just a few months and a few hundred miles—makes no difference.[8]

The Legislative History. The Chamber all but admits that it hasn't identified any legislative materials indicating that the Legislature sought to exclude used vehicles sold with a balance remaining on a new-car warranty from its protections. After all, the Chamber argues that the legislative materials do not say anything on this issue, and that the *absence* of legislative history somehow supports their restrictive reading.

But this makes no sense. This Court has long recognized that the Act is a manifestly remedial measure. (E.g., *Cummins, supra,* 36 Cal.4th at p. 484.) Legislative materials reflect just

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[8] The Chamber's suggestion that the Opinion's broad reasoning would only effect vehicles at the tail-end of a warranty term *that the manufacturer sets* is ludicrous. (See Chamber-10.)

that—revealing that the Legislature has repeatedly strengthened the Act's protections in the face of persistent manufacturer defiance. Snippets from the legislative history showing that manufacturers secured irrelevant "clarifications" to the Act do not suggest otherwise. Accordingly, to the extent legislative materials are truly silent on the issue, that would only cut in favor of consumers. It is misleading for the Chamber to suggest otherwise.

And regardless, the Chamber is wrong about the legislative history. Legislative materials confirm that the Legislature sought to protect used vehicles sold with a new car warranty. Materials from the 1987 amendment make clear that the common characteristic that all "new motor vehicles" under section 1793.22 share is that they are sold with a balance remaining on a new car warranty—not that they were never previously sold or leased at retail. And *subsequent* legislative materials show that the Legislature *endorsed Jensen's* holding that the Act's new motor vehicle definition includes used cars sold with a balance of a new-car warranty, and then *extended* those protections to military service members based in California. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54, fn. 17 [finding subsequent legislative materials persuasive where, as here, they opine on an "intervening court decision[]" and "reflects the [Legislature's] intent that the existing statutory construction be maintained in a new legislative context"].)

The Act's Policy Goals. It is well established that the Act's remedial purpose requires construing doubts in favor of the

consumer. Undeterred, the Alliance raises a laundry list of undeveloped, potential public policy concerns that it says support its restrictive reading. Each is baseless.

The Alliance argues that lesser remedies are adequate to induce manufacturers to comply with their warranties. But the Legislature passed the Act precisely to *improve on* the other, lesser remedies that had failed to induce manufacturers to comply with their new car warranties. Those lesser remedies would thus leave a new motor vehicle warranty's *most vulnerable* consumer—those who purchase used cars—with little, if any, relief at all. That manufacturers would have preferred to relegate used car buyers (and all car buyers for that matter) to remedies that don't work makes no difference.

The Alliance argues that Petitioners' reading would somehow deprive manufacturers and their repair facilities of the ability to control which repairs are made. That's absurd. Like any other consumer, a used-car buyer can only bring a Song-Beverly claim if she provides the manufacturer or its repair facility with a reasonable number of chances to repair the vehicle. And contrary to the Alliance's concerning claims otherwise, manufacturers would have an obligation to repair all such cars presented to them if they're still under warranty—whether that car is sold new or used. Reaffirming the rule in *Jensen* wouldn't change either of these mandates.

The Alliance's argument that Petitioners' reading would increase Song-Beverly litigation is wrong, too—as are its other policy arguments. (See § IV, *post* [discussing all policy

arguments].) Confirming that *Jensen* was correctly decided *three decades ago* plainly would not cause any sudden increase in Song-Beverly cases now. Indeed, other amici have already shown that it is common to litigate, arbitrate, and settle cases with used vehicles under the Act.

Nor would any increase in Song Beverly litigation matter in any case. That's because the Legislature sought to balance the burden on the courts with the Act's consumer warranty protections—not by discouraging consumers from bringing suit—but by making litigation *expensive for manufacturers* who needlessly defend against meritorious claims, rather than complying with their affirmative duty to promptly buy back defective vehicles. This is why the Act includes a civil penalty for willful Act violations and a fee-shifting provision that kicks in if the consumer prevails. It makes no difference that the Alliance would have categorically barred the most vulnerable consumers from the Act's remedies—rather than posing financial penalties on its members who aggressively litigate meritorious claims just to discourage other consumers from enforcing their rights.

The Disruption of the Status Quo/ The Case Law. The Alliance insists that *Jensen* never considered the issue here and that, "[i]n fact, the case law uniformly came to the exact opposite conclusion: used cars sold with existing, unexpired warranties do not qualify as 'new motor vehicles' under the Act." (Alliance for Automotive Innovation's Amicus Brief ("Alliance")-11.) This claim is facially wrong.

Jensen, supra, 35 Cal.App.4th at pp. 121-127 spent *several pages* discussing the Act's text, legislative history, and public-policy purposes to reach its *express* holding: "[C]ars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'" The courts, the Department of Consumer Affairs, the California Department of Justice, and the Legislature quickly adopted *Jensen* as established law. And until the Court of Appeal decision in this case, used-car buyers had been able to invoke the Act to enforce the balance remaining on their new-car warranties without issue.

The Alliance's misleading soundbites from demonstrably inapposite cases do not suggest otherwise, as is apparent from even a cursory review of those cases. (See § IV.C.2, *post* [discussing these cases].) The Alliance's overreach only confirms how weak its merits position truly is.

The Alliance cites to recent unpublished, federal district court cases that deprived used car buyers of a remedy by blindly following the Opinion over *Jensen*. But those cases did so without any meaningful analysis or, apparently, any recognition that the Opinion diverged from *Jensen* only by wrongly assuming that dealer-owned vehicles and demonstrators are sold with full, never-used warranties. Those cases thus have little or no persuasive value because, like the Court of Appeal, the foundational premise of their position is false. If anything, these cases only confirm that the Opinion's erroneous reasoning

threatens rights that used-car buyers had previously relied on for decades.

The Court should reverse and hold that vehicles sold with a balance remaining on the manufacturer's new-car warranty fall within section 1793.22's "new motor vehicle" definition.

DISCUSSION

The Act's plain text, legislative history, public policy goals, and the deference afforded to the Department of Consumer Affairs' interpretation are strikingly consistent. Each confirms that section 1793.22's new motor vehicle definition encompasses used vehicles that, like dealer-owned vehicles and demonstrators, are sold with a balance remaining on a new car warranty. (See generally OBM; Reply Brief ("Reply").) Neither the Chamber's discussion of the text and legislative history, nor the Alliance's discussion of public policy shows otherwise.

I. The Chamber's Statutory Interpretation Arguments Fail: Section 1793.22's "New Motor Vehicle" Definition Plainly Includes All Vehicles Sold With A Balance Remaining On A Manufacturer's New-Car Warranty.

A. Section 1793.22's new motor vehicle definition plainly does not mirror the Vehicle's Code definition, which treats *demonstrators* as *used vehicles*.

The Chamber observes that the Vehicle Code defines new motor vehicles to include vehicles that "'ha[ve] never been the subject of a retail sale.'" (United States Chamber of Commerce's Amicus Brief ("Chamber")-14, quoting Veh. Code, § 430.) From this, the Chamber concludes that section 1793.22, subdivision (e) ("section 1793.22(e)") must have the same meaning. (See *id.*)

But such a reading is contrary to the Act's text. Indeed, section 1793.22(e) does not borrow the Vehicle Code's "new motor vehicle" definition. The Act has its own, distinct definition for the term: A "'new motor vehicle' includes . . . a dealer-owned vehicle and *a 'demonstrator'* or other motor vehicle sold with a manufacturer's new car warranty." (Italics added.)

On its face, this definition includes vehicles that would *not* be considered "new" under the Vehicle Code—such as the demonstrators that the Vehicle Code treats as "used." (§ 1793.22, subd. (e)(2) [Song-Beverly Act new motor vehicle definition]; Veh. Code, § 665 [defining a "used vehicle" to include cars that have been registered "*or unregistered vehicles regularly used as a demonstrator*," italics added].)

The Act's new motor vehicle definition thus couldn't have been intended to mirror the Vehicle Code's definition. (See *Jensen, supra,* 35 Cal.App.4th at p. 126 [Vehicle Code and section 1793.22(e) define new motor vehicle differently to serve their distinct purposes].)

Petitioners' briefing made this point. (Reply 9-10.) The Chamber never responds. (See Chamber-13-18.)

B. The Chamber's *noscitur a socciis* and *ejusdem generis* arguments fail too. There's no need to guess when section 1793.22 *already says* what all new motor vehicles are to have in common: each is sold with at least a balance remaining on a new-car warranty.

The Chamber next argues that the Act's new motor vehicle definition must refer only to cars that have never been previously sold, nevertheless. It argues that:

- The Act defines new motor vehicles to include "dealer-owned vehicles, demonstrators and other motor vehicles sold with a manufacturer's new car warranty;"
- Two cannons of construction (*noscitur a socciis* and *ejusdem generis*) indicate that the third category—"other motor vehicles sold with a manufacturer's new car warranty"—must share some characteristic with "demonstrators and other motor vehicles;"[9]
- Demonstrators and dealer-owned vehicles have (supposedly) never been previously sold or leased at retail and—for reasons that neither the Chamber nor FCA nor

[9] The Chamber invokes (1) *noscitur a sociis* for the proposition that "'the meaning of a word may be ascertained by reference to the meaning of other terms'" and (2) *ejusdem generis* for the proposition that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar to nature to those objects enumerated by the preceding specific words.'" (Chamber-14-18.)

> the Court of Appeal have ever explained—this therefore must be the characteristic that each of these three categories share.

(See Chamber-14-22.)[10]

The Chambers' *noscitur a socciis* and *ejusdem generis* arguments fail for two, independent reasons.

First, dealer-owned vehicles or demonstrators may very well have been previously sold or leased at retail. After all, the Act leaves dealer-owned vehicle undefined, and the Act defines a "demonstrator" as a "vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type," with no such limitation. (§ 1793.22, subd. (e).) It follows that vehicles that have been *previously* sold or leased at retail can *later* be used as

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[10] The *bulk* of the Chamber's analysis and discussion of the case law focuses on an *undisputed point*: that dealer-owned vehicles, demonstrators, and other motor vehicles sold with a new car warranty must share *some* characteristic in common. (See Chamber-14-22, discussing *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *Busker v. Wabtec Corp.* (2021) 492 P.3d 963; and *People v. Prunty* (2015) 62 Cal.4th 59 for this unremarkable proposition].) As shown herein, these canons of construction only confirms our point: that because demonstrators and dealer-owned vehicles are sold with a balance remaining on a new car warranty, the third category of "other motor vehicles sold with a new car warranty" must include vehicles sold with a balance on those warranties too. The Court of Appeal's interpretation violates theses cannons since it requires *only the third category* ("other motor vehicles sold with a new car warranty") to be sold with a full, never-used warranty.

dealer-owned vehicles and demonstrators too. (See Martin Anderson's Amicus Brief ("Anderson")-13-14; *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 ["We must assume that the Legislature knew how to create an exception if it wished to do so," brackets and internal quotation marks omitted].)

Second, as the Chamber's key authority shows, there is no need to speculate as to what all new motor vehicles must have in common because the Legislature has *already told us*. (See *Busker v. Wabtec Corp.* (2021) 492 P.3d 963, 972 ["[T]here is no indication that the *moveable* aspect of modular office systems motivated the amendment to section 1720(a)(1). The Legislature's focus was on the nature of the work that takes place in that structure, not on the fact the office systems could be easily moved"]; Chamber-16-17 [discussing *Busker* for the *undisputed* proposition that items of a list typically share a common characteristic, fn. 10, *ante*].) Section 1793.22 is clear: The salient feature of all new motor vehicles is that each is "sold with a new car warranty."

After all, section 1793.22(e) defines a new motor vehicle to include "a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." "The most natural way to define 'new motor vehicle' is to consider each of the three types of vehicles as one in a list of items sold with manufacturers' warranties." (Berkeley Center for Consumer

Law & Economic Justice's Amicus Brief ("Berkeley")-23;[11] see *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1506 ["The words 'other' or 'any other' following an enumeration of particular classes should be read . . . to include only others of like kind or character"].)

Neither *ejusdem generis* nor any other canon of construction would require that a "new motor vehicle" must *also* meet a separate requirement of never having been previously sold or leased at retail. (See *Wishnev v. The Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199, 214 [*Ejusdem generis* does not "warrant confining the operations of a statute within narrower limits than were intended"].)

Nor does the text. To the contrary, section 1793.22 lists the vehicles that may be sold with a new-car warranty but that still fall *outside* its definition—and that list *does not mention* vehicles previously leased or sold at retail. (See § 1793.22, subd. (e)(2) ["'New motor vehicle' includes . . . a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty but *does not include a motorcycle or a motor vehicle which is not registered* under the Vehicle Code because it

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[11] The Berkeley Center for Consumer Law & Economic Justice filed its amicus brief with several non-profits: The Consumers for Auto Reliability and Safety, the Center for Auto Safety, Community Legal Services in East Palo Alto, Consumer Federation of America, National Consumer Law Center, National Consumers League, Open Door Legal, Public Counsel, and Public Law Center. For purposes of brevity, we collectively refer to them as "Berkeley."

is to be operated or used exclusively off the highways," italics added].)

There is thus no such exclusion. (See *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1243-1244 ["This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude such offers"]; *Dyna–Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1391, fn. 13 [under maxim *expressio unius est exclusio alterius*, "'the expression of certain things in a statute necessarily involves exclusion of other things not expressed'"].)

The Chamber never responds to this argument—it avoids the point by omitting section 1793.22(e)'s express exclusions when quoting its new motor vehicle definition. (Chamber-13.)

The only question, then, is whether a used vehicle sold with a balance remaining on a new-car warranty counts as a "vehicle sold with a new car warranty." It plainly does.

The Act cites dealer-owned vehicles and demonstrators as examples of cars that are sold with a new car warranty. (§ 1793.22, subd. (e).) Because dealer-owned vehicles and demonstrators are previously-driven vehicles that are sold with whatever balance remains on their new car warranty, all other used vehicles sold with a balance remaining must count as vehicles "sold with a new car warranty" too. (OBM-29-35 & fns. 5-24, citing articles, major manufacturer warranties, and case law.) In fact, the Opinion only reaches the opposite conclusion by

mistakenly assuming dealer-owned vehicles and demonstrators are sold with full, never-used warranties. (See OBM-28-35.)

The Chamber argues that if a new motor vehicle "referred to any car with anything left on a warranty, there would be no need to specifically enumerate . . . 'dealer-owned vehicles' and 'demonstrators" in section 1793.22's new motor vehicle definition. (Chamber-17-18.) But, in fact, the opposite is true. Before the Act listed those vehicles as examples, it was not immediately clear whether a car "sold with a new car warranty" refers only to those sold with a full-never used warranty or also to those sold with a balance remaining on that warranty—at least according to manufacturers. (See pp. 34-35, *post* [amending section 1793.22's new motor vehicle definition because some manufacturers refused to provide the Act's remedies to dealer-owned vehicles and demonstrators even though the Legislature considered them to be vehicles "sold with a new car warranty"].)

Inclusion of those vehicles removed all doubt: A new motor vehicle includes all vehicles that, like dealer-owned vehicles and demonstrators, are sold with at least a *balance remaining* on a new-car warranty, period.

II. Contrary To The Chamber's Argument, Other Provisions Of The Act Only Reinforce That Section 1793.22's "New Motor Vehicle" Definition Includes Used Vehicles Sold With A Balance Remaining On A Manufacturer's New Car Warranty.

The Chamber argues that other statutory provisions support its bid to cut off the Act's remedies when a car is resold. (Chamber-22-25.) Not so.

A. Petitioner's reading of Section 1793.22 is consistent with other provisions that reference "used" goods or vehicles.

The Chamber argues that various provisions expressly reference "used" goods or vehicles—and that section 1793.22 would have too if its new motor vehicle definition applied to used vehicles sold with a balance remaining on the new-car warranty. (Chamber-22-23.)

But references to used goods or vehicles in other, unrelated provisions say nothing about section 1793.22's scope. (See *Jensen, supra,* 35 Cal.App.4th at p. 126 [statutes are worded differently to serve their different purposes].) Those provisions reference "used goods" or vehicles only to illustrate that, although the Act typically enforces warranties that start when a good or vehicle is brand-new, certain protections apply equally to warranties that start after the good or vehicle becomes "used." (E.g., § 1795.5(a) ["[T]he obligation of the distributor or retail seller making express warranties with respect to used consumer

goods" the same as that imposed on manufacturers whose warranties start when the product is new].)[12]

The Legislature had no reason to do the same when drafting section 1793.22 (e). (See Reply-20-22.) Section 1793.22 (e) doesn't categorically extend an existing remedy to vehicles that may start to run only after the vehicle has become used. It instead identifies the vehicles to which the Act's refund-or-replace remedy applies based on whether, at the same of sale, they're still new enough to be covered by the manufacturer's *new motor vehicle warranty*. On its face, this definition already

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[12] The Chamber's other cited provisions largely do the same thing:

- Section 1795.5 makes "the obligation of the distributor or retail seller making express warranties with respect to used consumer goods" the same as that imposed on manufacturers whose warranty starts when the product is new;

- Section 1793.02, subdivision (g) provides that, although Section 1795.5 shall not apply to a sale of used assistive devices, . . . the buyer of a used assistive device shall have the same rights and remedies as the buyer of a new assistive device;"

- Section 1794.4 subdivision (f) provides that certain obligations the Act imposes pertaining to service contracts "are applicable to service contracts on new or used home appliances and . . . all other new or used products;" and

- Section 1796.5 states that those who engage in "providing service or repair to new or used consumer goods ha[ve] a duty to the purchaser to perform those services in a good and workmanlike manner."

includes used cars that, like dealer-owned vehicles and demonstrators, are sold with only a balance remaining on their new car warranties. (See § I, *ante*.) Expressly stating that section 1793.22's new motor vehicle definition includes certain used vehicles would result in redundancy that the Legislature presumptively avoids. (See *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 385-386 ["Interpretations that render statutory language meaningless are to be avoided"].)

In fact, the Chamber's cited provisions only reinforce that section 1793.22 (e)'s new motor vehicle definition applies to all used vehicles sold with a balance remaining on a new car warranty. These provisions show that the Legislature knew how to exclude used products from protections that might seemingly apply to them otherwise—and how to require that a warranty arise from the sale of the used product. (See §§ 1793.02 ["Section 1795.5 shall not apply to a sale of used assistive devices"], 1795.5 [referencing a sale "in which an express warranty is given"].)

The Vehicle Code similarly shows that the Legislature knew how to define a new motor vehicle based on whether it had been previously "'the subject of a retail sale.'" (Chamber-14, quoting Veh. Code, § 430.) Yet the Legislature did not mirror that language when drafting section 1793.22. This indicates that the Legislature chose *not* to make section 1793.22's new motor vehicle's definition contingent either on whether a vehicle has been previously sold—or on whether the warranty first arose from the sale, or to otherwise include such an exclusion.

And unlike Petitioners, who have explained why the Legislature references "used" cars in places other than section 1793.22 (§ II.A, *ante*), the Chamber cannot explain why the Legislature didn't copy one of these other provisions when drafting section 1793.22 if it meant for section 1793.22 to apply the same way.

Section 1793.22's distinct new motor vehicle definition is plain: It includes dealer-owned vehicles, demonstrators, and—as the Chamber's canons of constructions require—any other motor vehicle *also* sold with at least a balance of a new-car warranty. (See § II.A, *ante*.)

B. Petitioners' reading of Section 1793.22 is consistent with any other provisions too.

Other Song-Beverly provisions that the Chamber cites do not establish that section 1793.22 (e)'s new motor definition excludes used vehicles sold with a balance of a new-car warranty, either.

1. Section 1793.22, subdivision (f)(1).

The Chamber argues that section 1793.22, subdivision (f)'s requirement that manufacturers disclose the nonconformities experienced by the "original buyer or lessee" indicates that that section 1793.2's buyback remedies (available to "[n]ew motor vehicles" as defined in section 1793.22(e)) must therefore apply only to the "original buyer." (Chambers-24.) Not so.

When read in context, "original buyer or lessee" is used to distinguish between the buyer who brought the car in for repair

and the "new buyer" to whom that repurchased car is being sold. (Reply-22.) It's not a signal that section 1793.2's remedies for "new motor vehicles" only apply to the car's very first buyer or lessor. This is why section 1793.22, subdivision (f)(1) anticipates that manufacturers may repurchase vehicles from *any* "buyer or lessee," *before* it distinguishes between different types of buyers for the disclosure requirements. (See § 1793.2, subd. (f)(1) [imposing requirements for resale of a "vehicle [previously] transferred *by a buyer or lessee* to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2," italics added].)

Here too, the Chamber has no response.

2. Section 1793.2, subdivision (d)(2)(C).

The Chamber rehashes FCA's argument that the Act's "use offset" accounts for the total "number of miles traveled" by the motor vehicle, and that this only makes sense if the buyer is also the first and only party to drive the vehicle. (Chamber-24-25.)

But as explained in Petitioners' reply brief: Any such "disconnect applies equally to [the] demonstrators and dealer-owned vehicles" (Reply-22-23), which are regularly driven before sale, sometimes for thousands of miles (OBM-28-35).

The mileage offset thus cannot be a basis for limiting section 1793.22 (e)'s new motor vehicle definition to cars that have never been previously sold or leased at retail.

Again, the Chamber offers no response.[13]

III. Contrary To The Chamber's Argument, The Legislative History Supports Petitioner's Interpretation, Not FCA's.

The Chamber cites snippets from legislative materials to argue that the Act is the product of efforts to accommodate car manufacturers' preferences—and that the Court should adopt its "restrictive" reading of section 1793.22 as a result. (See Chamber-25-29.) Nonsense.

A. The Legislature has only sought to expand the Act, not to deprive the most vulnerable consumers of its protections.

The Act's remedial purpose is apparent from any fair reading of the legislative history. This history shows that, in response to persistent manufacturer refusals to comply with their obligations to consumers, the Legislature has repeatedly strengthened the Act's protections of new and used vehicles that are still covered by a new car warranty. (See OBM-59-69; *Jensen, supra,* 37 Cal.App.4th at pp. 123-124.)

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[13] Indeed, as the Reply explains in another point to which the Chamber has no response, "[i]n the 30 years since *Jensen* was decided, courts have had no problem calculating mileage offsets based on the miles the consumer drove the car" in cases concerning demonstrators, dealer-owned vehicles, or other used cars also sold with a balance remaining on their new car warranties. (Reply-23, fn. 7.)

This includes broadening the new motor vehicle definition in **1987**, adding requirements that manufacturers notify prospective buyers of the vehicles they buy back *including* "new and used cars" in **1989**, adding additional dispute resolution processes in **1991**, adding a requirement that manufacturers reacquire vehicles under the replace-or-refund requirement and brand them as lemon law buybacks, thereby expanding "state warranty laws covering new *and used cars*" in **1995**, and extending the Act's protections to Armed Service members based in California in **2007**, among other consumer-friendly amendments. (See OBM-59-63 [discussing legislative history from 1982 to 2007]; *Jensen, supra,* 37 Cal.App.4th at pp. 123-124 [discussing amendments from 1982 to 1991].)

That over the years, manufacturers were able to secure certain, unrelated "clarifications" does not allow the Chamber to escape this foundational rule of statutory construction. (See Chambers-27-29.) The clarifications do not change the Act's overarching, remedial purpose: "to ensure that manufacturers live up to the terms of *any* express warranty." (*Cummins, supra,* 36 Cal.4th at p. 484, italics added; Comment, Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work (1974) 14 Santa Clara Law. 575, 590, fn. 88 ["[T]he *main thrust of the Act* [is] to insure the effectiveness of express warranties"].) Nor do those "clarifications" suggest anything about section 1793.22's scope—aside from the fact that manufacturers never secured language excluding vehicles sold

with a balance of a new-car warranty from section 1793.22's new motor vehicle definition.

That legislative materials indicate that the 1982 law applied to "new motor vehicles" (Chamber-28) is irrelevant, too. This is both because these references occurred *before* the Legislature expanded the new motor vehicle definition in 1987 to include "dealer-owned vehicles, demonstrators and other motor vehicles sold with a new car warranty" and because the Legislature use of "new" may have *always* been intended to apply to vehicles "still covered by a manufacturer's new car warranty" (Reply-27-28), as subsequent legislative materials confirm. (See pp. 34-35, *post* [discussing materials to the 1987 amendment indicating that some buyers of "dealer-owned vehicles and demonstrators"—who necessarily purchased their cars with whatever balance remains on their new car warranties (OBM-28-35—were deprived of the Act's protections even though the Legislature considered dealer-owned vehicles and demonstrators as vehicles "sold with a new car warranty"].)

The Chamber has not cited *any* legislative materials indicating otherwise.

B. The Legislature endorsed and extended *Jensen's* holding to armed service members.

Without any legislative materials that meaningfully support its readings, the Chamber tries an argument based on the *absence* of legislative material: It argues that (1) manufacturers would have objected to any amendment that

extended the Act's protections to used vehicles sold with a balance remaining on a new car warranty, (2) the legislative materials do not include any such objections, and (3) the *absence* of legislative materials therefore supports the Chamber's restrictive interpretation. (Chamber-29-32.)

These lofty assumptions cannot be right. It's well-settled that where there is any ambiguity, the Act "should be interpreted broadly" in favor of the *consumer*, not restrictively in favor of the manufacturer. (*Cummins,* 36 Cal.4th at p. 493; § IV, *post*.) And even apart from that mandate, the absence of legislative history is too thin a reed to support the Chamber's position, since legislative materials may have simply not captured any objections by the manufacturers. (See *Jensen, supra,* 35 Cal.App.4th at p. 125 [rejecting this exact argument on the basis that legislative materials routinely do not capture all objections].) Alternatively, manufacturers may have simply thought that their time was better spent on the unrelated "clarifications" and "amendments" that the Chamber references. (Chamber-28-29.) After all, asking to avoid accountability for the warranties that the manufacturers *choose to provide* is not a particularly sympathetic request—certainly not with a legislative body that was actively seeking to *strengthen* the Act to curb the latest round of manufacturer abuses. (See OBM-46, 59-63 [discussing manufacturers' choice to make warranties transferrable and various amendments strengthening the Act].)

More importantly, the legislative materials *do* reflect an intent for the Act to protect *all used vehicles* sold with a balance

remaining on a new car warranty. (See OBM-66.) Legislative materials from the 1987 amendment show that the Legislature sought to add "'dealer-owned vehicles and demonstrators'" to the Act's new motor vehicle protections for reasons that apply just as much to other used vehicles with a balance remaining on their new car warranties: that "[s]ome buyers [were] being denied the remedies under the lemon law . . . even though [their vehicles] w[ere] sold with a new car warranty." (E.g., 3MJN/700; 3MJN/702 ["The bill includes within the protection of the lemon law dealer-owned vehicles and 'demonstrator' vehicles *sold with a manufacturer's new car warranty*," italics added].)

Plus, the Act's *enacted* version makes clear that the amendments didn't just seek to protect dealer-owned vehicles or demonstrators *but also* "other motor vehicles" that—like dealer-owned vehicles and demonstrators—can be said to have been sold with a new car warranty. (§ 1793.22, subd. (e).)

Subsequent legislative materials confirm this reading. (See OBM-63-65.) Legislative materials from the 2007 amendment, for instance, recognize that *Jensen* held "that a used motor vehicle sold or leased *with a balance of the manufacturer's original warranty* is a 'new motor vehicle' for purposes of California's lemon law" and repeatedly affirmed its holding. (6MJN/1366, 1376, 1380, citing *Jensen, supra,* 35 Cal.App.4th at p. 123.)

These materials are especially persuasive because they derive from a subsequent amendment that sought to expand the "existing law"—as the Legislature understood it *post-Jensen*—to

California-based armed service members who "purchased the motor vehicle, *as defined*, from a manufacturer." (See 6-MJN/1376 [discussing *Jensen* as existing law before expanding Act's protections to armed service members]; *Barrett, supra,* 40 Cal.4th at p. 54, fn. 17; *Madrigal v. Hyundai Motor America* (2023) 90 Cal.App.5th 385, 416-417 (conc. & dis. opn. of Robie, Acting P.J. [subsequent legislative history "can be persuasive when a subsequent amendment directly bears on the Legislature's understanding regarding the future application of the statute"].)

In other words, the Legislature *knew* about *Jensen* and chose to confirm that *Jensen* was correct—and to *extend* its interpretation to armed service members. (See *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219 ["'[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction'"].) This is especially telling because, when it disagrees with a court ruling, the Legislature has abrogated that holding. (E.g., Code of Civ. Proc., § 998, subd. (c)(2)(B) ["It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in *Encinitas Plaza Real v. Knight* [(1989)] 209 Cal.App.3d 996"].)

A fair reading of the legislative history thus only confirms what's apparent from the plain text: The Act's new motor vehicle protections apply to "new *and used* motor vehicles covered by a

manufacturer's express warranty." (6MJN/1366, 1369, 1372, 1375, 1380.)

IV. Even If Section 1793.22's New Motor Vehicle Definition Was Ambiguous, Petitioners' Interpretation Would Win Out Because It Is More Consistent With History And Public Policy.

A. The Alliance's arguments fare no better than the Chamber's arguments. The Alliance's narrow interpretation undermines the Act's remedial purposes.

It is well-established that "wherever the meaning [of a remedial statute] is doubtful, it must be so construed as to extend the remedy." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269.) This is no less true when interpreting the Act. (*Cummins, supra,* 36 Cal.4th at p. 493.)

The Alliance argues that it doesn't matter whether used car buyers have access to the Act's remedies because the used-car market is more favorable to consumers today than it was historically and because used-car buyers still have other remedies. (See Alliance-19-20.) This is a *non sequitur*.

The Alliance's views cannot supplant the *legislative determination* that non-Act remedies are inadequate, nor are there policy grounds to do so in any case.

1. The Legislature has already found other remedies to be inadequate. The Alliance's disagreement is meaningless.

The *Alliance's* belief that other remedies are good enough is meaningless because *the Legislature* has already determined otherwise. Although the Alliance may want to turn back the clock, the Legislature passed the Act precisely because those other, lesser remedies had failed to induce manufacturers to live up to their new car warranties. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 213; *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 198-199.) This is why "the Act is designed to give broader protection to consumers than the common law or UCC provide." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1241.)

The Alliance cites nothing suggesting that the Legislature sought to deprive used car buyers of the Act-mechanism that the *Legislature* found necessary to prompt "manufacturers to proactively act in repurchasing and branding defective used vehicles." (Consumer Attorneys Of California's Amicus Brief ("CAOC")-15-16.) Nor is there any support for such a conclusion. To the contrary, the Legislature passed the Act specifically to protect "'[i]ndigent consumers"—who are far more likely to purchase used vehicles than other consumers. (See *Jensen, supra,* 35 Cal.App.4th at p. 138 [Legislature provided prevailing Song-Beverly plaintiffs with fees because "'[i]ndigent consumers are often discouraged from seeking legal redress due to court costs,'" quoting Assem. Com. on Labor, Employment & Consumer

Affairs, Analysis of Assem. Bill No. 3374 (May 24, 1978) p. 2]; Berkeley-40-41 ["One recent survey of low- and moderate-income Californians found that 61 percent of households were more likely to purchase used vehicles than new vehicles"].)

The Alliance's narrow interpretation would deprive the most vulnerable consumers that the Legislature sought to protect of the enhanced remedies the Legislature determined were necessary to induce manufacturer compliance.

2. The Opinion senselessly discriminates against used car buyers by depriving them of the Act's enhanced remedies.

Even if the Alliance's policy concerns could override a contrary legislative determination, the Alliance's policy view that lesser remedies sufficiently protect California's most vulnerable consumers is still misguided.

The Consumer Legal Remedies Act is a general consumer protection statute that, unlike the Act, isn't specifically written to solve the unique issues faced by consumers seeking to enforce their new car warranties. (See Civ. Code, § 1770, subd. (a) [targeting "unfair methods of competition and unfair or deceptive acts or practices" *generally*].) And while the Commercial Code and the Magnuson-Moss Warranty Act cover warranty issues, those provisions are sorely lacking. (See *Krieger, supra,* 234 Cal.App.3d at p. 213 [discussing the Act's improvements over the Commercial Code]; Comment, *supra,* 14 Santa Clara L. Rev. at p. 608, fn. 185 [discussing Act's improvements over Magnuson-

Moss even before several amendments strengthened the Act's protections, see § III.A, *ante*].)

Relegating used car buyers to lesser remedies would thus deprive them of the Act's unique, fulsome protections for those stuck in defective vehicles that the manufacturer cannot fix. This includes:

- The requirements that manufacturers *promptly* buy back or replace defective vehicles—that is, that manufacturers make things right without a consumer needing to ask, let alone sue. (OBM-51-54, discussing Civ. Code, § 1793.2, subd. (d)); Reply-36, citing *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302.)
- The requirement that, before reselling them, manufacturers brand the title of any defective vehicle they repurchase as lemons (OBM-51-54; § 1793.23, subd. (c).)
- The civil penalty for willful Act violations that induces manufacturers to *voluntarily comply* with these provisions (OBM-53; *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 [Absent the civil penalty, a "manufacturer who knew the consumer was entitled to a refund or replacement might nevertheless be tempted to refuse compliance in the hope the consumer would not persist, secure in the knowledge its liability was limited to refund or replacement"]; CAOC-15-16); and
- The requirement that losing manufacturers cover a prevailing consumer's costs, expenses, and fees—which this

> this Court has described as the "'primary financial benefit of the Song-Beverly Act'" because it empowers consumers with meritorious claims to enforce their rights in these relatively low value cases the first place. (OBM-50, quoting *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 994; CAOC-16.)

The lesser remedies thus provide little meaningful recourse for used car buyers—which is exactly why the Legislature passed the Act in the first place. (See § IV.A.1, *ante*.)

The Alliance's unsubstantiated claim that "the used-car market is far more favorable to consumers today than it was 30 years ago" makes no difference. (Alliance-19 [claiming, without citation, that used cars are more reliable, that more information is available, that some used cars are certified, pre-owned, and warranted by used car dealers, and that there are more places to buy used cars].) The Alliance doesn't identify a single improvement that would ameliorate the harm that the Act's enhanced remedies resolve: "the difficulties faced by consumers in enforcing express warranties." (*Cummins, supra,* 36 Cal.4th at p. 494.) This is presumably why, despite any of these supposed improvements, the Legislature *endorsed Jensen's* holding that section 1793.22's new motor vehicle definition includes used vehicles sold with a balance remaining on a new car warranty. (See § III.B, *ante*.)

There's simply no policy reason to interpret a *remedial* statute in a way that deprives vulnerable consumers *that the Legislature sought to protect* of the Act's remedies. (See OBM-51.)

3. The Opinion provides an incentive for non-compliance and lemon-laundering.

The Opinion's reading doesn't solely harm used-car buyers, though. It also harms all others who purchase vehicles with new-car warranties by providing an incentive for manufacturers to defy their prompt buy-back obligations.

After all, under the Opinion's reading, a manufacturer can evade the Act's provisions if it stonewalls a consumer's warranty problems for long enough that the consumer gives up and trades in or sells her vehicle rather than expending the time and energy necessary to pursue a case against a global car manufacturer that may aggressively defend against even the most meritorious cases. (See CARS-14-15.) Worse, manufacturers may then actively encourage consumers to accept inadequate trade-in amounts so that they can avoid Song-Beverly liability, bypass the Act's labelling requirements, and resell the defective vehicle for far more than it'd be worth if it was properly branded as a lemon.

These are not speculative concerns. Manufacturers *already* stonewall warranty problems for this reason. (E.g., *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1199 ["By these narrow constructions, Ford allowed itself to issue OAC's for dealer trade-in of vehicles that arguably should have been reacquired as lemons, thereby avoiding the title branding and additional notice requirements involved in reselling a lemon"]; Burdine, *Consumer Protection; "Lemon Law Buyback"—Requirements Regarding the Return and Resale of Vehicles* (1996) 27 Pacific L.J. 508, 517-518 [discussing legislative findings that manufacturers often "claim[]

that [lemon] vehicles were bought back for goodwill purposes" to "escape[] being officially designated as 'lemons'"—and either "resell the vehicles at prices higher than would have been possible if the vehicles were stamped as lemons" or "launder[] lemon vehicles" through "auctions to wholesalers or dealers, who, in turn, sold them to other dealers and to consumers"]; OBM-62.)

In fact, one appellate court recently observed that "FCA operates in open defiance of the Song-Beverly Act" because "[i]t considers promptly repurchasing, repairing, labeling as a lemon and selling the vehicle at a deep discount with a one-year warranty, a losing proposition" and "would much rather force the owner of a defective vehicle to sell it on the open market, or trade it in *without a label or warning*."[14] (*Figueroa v. FCA US, LLC* (2022) 84 Cal.App.5th 708, 714, review granted and briefing deferred, S277547, cited at Reply-33.)

The Opinion's reading undermines the Act's purposes by allowing manufacturers to refuse to promptly buy back lemons, without consequence. (See *Kwan, supra,* 23 Cal.App.4th at p. 184 ["Any interpretation that would significantly vitiate the incentive to comply [with its prompt buyback obligations] should be avoided"].)

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[14] As explained in more detail below, it is the refusal of manufacturers to simply comply with their statutory buy back duties that causes any proliferation of Song-Beverly cases—not the consumers who bring meritorious claims thereafter. (See pp. 50-51, *post*.)

Under the Opinion and Alliance's position, used-car buyers will not be able to invoke the Act's remedies. (See § IV.A.2.) And as for consumers who purchase brand-new vehicles (and demonstrators and dealer-owned vehicles), manufacturers will have every reason to drag their feet in hopes that the consumer gives up, because once the car is resold, the manufacturer will no longer have to buy back the vehicle or brand it as a lemon. (See § IV.A.3, *ante*.) This will result in thousands of lemon vehicles going unbranded (OBM-54) when consumers are pushed to either continue driving their defective vehicles or to trade them in or resell them. (Stephen G. Barnes' Amicus Brief ("Barnes")-13-14).

The Opinion thus endangers used-car consumers and those who share the road with them. (See Berkeley-38-39 [discussing the "significant safety hazards" that lemons pose "to drivers, their passengers, and other drivers"]; CAOC-13.)

The Alliance has no response to these arguments—other than to state that Petitioners never raised them, which is simply false. (Compare OBM-51-54 and Reply-32-33 with Alliance-19 ["Plaintiffs do not at all explain what parade of horribles may be inflicted on the used-car market should the Opinion below be affirmed"].)

B. The Alliances' remaining professed concerns are baseless and contrary to how the Legislature sought to balance the interests of manufacturers, courts, and consumers.

The Alliance claims that interpreting section 1793.22 to include used cars sold with a balance remaining on a new car warranty would be "unworkable and []further burden the courts." (Alliance-21-22.) It then sets forth a laundry list of concerns without any meaningful analysis. None of these concerns are warranted.

The Manufacturer's Opportunity To Repair The Vehicle. The Alliance argues that (1) section 1795.5 requires the used-car distributor or its retail sellers "to maintain sufficient service and repair facilities within this state" to repair used vehicles; (2) "[w]ith used cars, the owner may not take [the] car to a dealership for repairs;" and (3) as a result a "manufacturer would have little or no say in how a repair presentation is addressed" if a used car buyer were to bring a section 1793.2 claim against it. (Alliance-21.) This is all wrong.

Like any other consumer, a used-car buyer can bring a section 1793.2 claim against a manufacturer for failing to honor the replace-or-refund obligation *only after* giving the manufacturer "a reasonable number of attempts" to repair the vehicle. (Civ. Code § 1793.2, subd. (d)(1).) This means that if a used car buyer (or any other buyer) sought repairs from an unauthorized repair facility (not connected to the manufacturer), those repairs would not count toward a manufacturer's

opportunity to repair the vehicle. The Act thus already ensures that manufacturers and their agents will always have a say in how repairs are performed in any Song-Beverly case, either by a used-car buyer or a new-car buyer.

Nothing in section 1795.5 suggests otherwise. Section 1795.5 only requires the distributor or retail seller of a used vehicle to maintain service/repair facilities in the state as necessary to enforce the warranties *those distributors/retail sellers provide*. It does not absolve manufacturers from their obligation to maintain repair facilities as necessary to enforce the new-car warranties that *they provide*. (See OBM-38-40; Civ. Code, § 1795.5, subd. (a) ["It shall be the obligation of the distributor or retail *seller making express warranties with respect to used consumer goods* (and *not the original manufacturer*, distributor, or retail seller *making express warranties with respect to such goods when new*) to maintain sufficient service and repair facilities within this state to carry out the terms of such express warranties," italics added].)

If anything, the Alliance's apparent belief that the manufacturers it represents can refuse to service used cars *that are still under warranty* is only further proof that used-car buyers clearly need the Act's enforcement remedies.

A Manufacturer's Ability To Show Prior Misuse. The Alliance argues that manufacturers would have difficulty proving an affirmative defense for "product misuse where it could not be discerned how one or more prior owners may have treated the car." (Alliance-22.)

But there's no reason why manufacturers would have any unique difficulty in securing this information. The previous owner presumably sought repairs at one of the manufacturer's service facilities, which must track information about misuse to determine warranty coverage. The information concerning a vehicle's warranted repair history is then stored in a manufacturer's warranty database.

And to the extent necessary, manufacturers can always subpoena the vehicle's first buyer—who should be easily identifiable through the DMV's vehicle registration records. (See Code Civ. Proc., § 2020.010 [setting forth the several ways to seek discovery from nonparties].)

Indeed, manufacturers would have to go through similar measures to locate evidence of prior misuse in cases concerning dealer-owned vehicles and demonstrators—which may have been subject to just as much misuse as any other used car, previously sold or leased at retail or not. (See OBM-29; Dempsey, *What is the real deal with buying a demo car?* (Mar. 27, 2009) Consumer Reports News[15] [as of August 22, 2023] ["[I]t is not unusual for a demo to be driven 'hard'" and for "several thousand miles" and may "have some wear and tear that may not be noticeable at first glance"].)

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[15] https://www.consumerreports.org/cro/news/2009/03/what-is-the-real-deal-with-buying-a-demo-car/index.htm

There is thus no manufacturer inconvenience that justifies excluding used vehicles sold with a balance of a new-car warranty from the Act's protections.

The Prospect of Multiple Suits And Inconsistent Rulings. The Alliance speculates that manufacturers "might be subject to multiple requests for repurchase (and multiple lawsuits) from two or more persons who purchased the car within the warranty period." But so what? The point of the Act is to induce manufacturers to promptly comply with their affirmative duty to buy back defective vehicles. The consumer isn't supposed to have to ask for that relief. (See *Krotin, supra,* 38 Cal.App.4th at p. 302.) Accordingly, to the extent a subsequent buyer *continues having problems* with a defective vehicle that the manufacturer *likely should have bought back from the first buyer*, that subsequent purchaser has every right to bring a claim—just as the first buyer would if *subsequent events* established liability. (See *Best v. Ocwen Loan Servicing, LLC* (2021) 64 Cal.App.5th 568 ["'[A] course of conduct ... may frequently give rise to more than a single cause of action…. While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist,'" alterations in original, quoting *Lawlor v. National Screen Service Corp.* (1955) 349 U.S. 322, 327-328].)

The Disproven Serial Warranty Issue. The Alliance speculates that if used cars sold with a balance remaining on a new-car warranty count as new motor vehicles, then the manufacturer would have to provide a one-year, implied

warranty each time a vehicle is sold during the life of the warranty. (Alliance-22.)

Petitioners have already addressed this point: Section 1793.22(e)'s definition specifically states that it only applies to sections 1793.2(d) and 1793.22, neither of which reference implied warranties. (Reply-24-25; see also *Victorino v. FCA US LLC* (S.D.Cal. 2018) 326 F.R.D. 282, 301 (same).)

Plus, any such concern was resolved by the very court that posed the hypothetical (and non-existent) serial warranty problem. (See Reply-25, fn. 8; *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 340, fn. 4 [explaining that any implied serial warranty problem is solved by holding that, where the manufacturer's warranties apply after the vehicle's transfer, "then the manufacturer's duties under the Song-Beverly Act continue posttransfer"].)

The Alliance has no response.

The Baseless, Concern That Manufacturers May Not Make Warranties Transferrable. Despite insisting that its member manufacturers can be trusted to comply with their new car warranties—the Alliance threatens that its members may make their warranties non-transferrable if forced to be held accountable to used-car buyers with cars still under warranty. (Alliance-22-23.)

This threat is contrary to the Alliance's claims that they and their members are champions of "improve[d]" motor vehicle safety." (Alliance-5.)

It is also a threat that has no teeth. As Petitioners have already pointed out, manufacturers continue to make new- car warranties transferrable, three decades after *Jensen* was decided. (See OBM-31-35; Reply-35.)

Nor would that result be contrary to public policy in any case. Manufacturers provide transferrable warranties so that they can charge higher prices for those vehicles, which can be sold (and re-sold) at a higher price than they would garner otherwise. A manufacturer who chooses to shorten its warranties or make them non-transferrable can no longer mislead consumers as to the reliability of its vehicles or reap the inflated prices on those vehicles as a result. (See Reply-35.) This only serves the Act's purpose: ensuring that the warranties that manufacturers *opt to provide* aren't an "empty 'sales gimmick.'" (Berkeley-37, quoting *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 754.)

The Non-Existent Burden On Courts. The Alliance faults consumers and their attorneys for what one lemon law defense firm reports to be an uptick in Song-Beverly cases. It then speculates that Song-Beverly cases will increase if the Court holds that the Act's new motor vehicle protections apply to used cars sold with a new-car warranty. (Alliance-23-24.) This is wrong, too.

First, it is *manufacturers* who are responsible for the proliferation of such cases—both by their refusal to simply comply with the Act (§ IV.A.3, *ante*) and by their insistence on aggressively litigating even the most meritorious Song-Beverly cases. (See Consumers for Auto Reliability and Safety's Amicus

Brief in Support of Petitioner in *Niedermeier v. FCA US LLC*, review granted Feb. 10, 2021, S266034 ("CARS's Amicus Brief in *Niedermeier*"), 2021 WL 6423932 at pp. 11-12 ["Some [manufacturers] take the view that it is better to vigorously contest each case regardless of its merits, hoping to force lemon owners to trade in their defective vehicles at a substantial loss and up-sell them into an even more expensive transaction (perversely making an additional profit by producing and failing to fix a lemon) and dissuade future litigation"].)[16] After all, the Act only provides consumers with the attorney's fees that make a suit possible *if they prevail*. (§ 1794, subd. (d).) Consumers and their counsel thus have an incentive to only bring *meritorious* cases.

Second, petitioners' position has *already been the law for three decades*—i.e., since *Jensen* was decided. And amicus letters confirm that parties have been seeking relief under the Act for used vehicles even *before* that ruling. (See Barnes-4.) Used cars could not be responsible for any uptick in cases, nor would affirming *Jensen* open any floodgate. It would only deprive used-car buyers of rights that they have long been able to enforce in courts. (See IV.C, *post*.)

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[16] FCA is almost certainly among those manufacturers as it is among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon-law cases filed against it. (CARS's Amicus Brief in *Niedermeier*, *supra,* 2021 WL 6423932 at pp. 11-12.)

Third, the Legislature already created a mechanism to balance the burden on courts against the interest in protecting ordinary consumers. It specifically sought to make litigation *expensive for manufacturers* and *accessible* for consumers. The Act's civil penalty and the fee-shifting provisions that apply when the consumer prevails are meant to induce manufacturers to voluntarily comply with their *affirmative* obligation to promptly buy back vehicles—and to empower consumers to sue to enforce those rights if a manufacturer shirks its prompt-buyback obligations anyway. (See *Murillo, supra,* 17 Cal.4th at p. 994 ["By permitting prevailing buyers to recover their attorney fees in addition to costs and expenses, our Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible"]; § IV.A.2, *ante*.) It's irrelevant that the Alliance would have preferred for the Legislature to minimize the use of court resources by depriving a new-car warranty's most vulnerable consumer of the Act's protections. That's not how the Act was written or intended to be construed.

C. The Opinion strips used car buyers of statutory rights they have enjoyed for decades.

The Alliance asserts that adopting Petitioners' reading would disturb manufacturers' settled expectations. (Alliance-4, 7-8, 10-18.) The Alliance has it backward: It is the *Alliance*'s reading that would upend settled expectations—it would rock the used car market by depriving consumers of statutory rights that they've enjoyed for three decades.

1. Contrary to the Alliance's contention, *Jensen* directly addressed the issue here, and its answer has been established law for 30 years.

As the *eighteen* depublication letters show, used-car buyers have long relied on *Jensen's* holding that "cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within [section 1793.22's] definition of 'new motor vehicle" to enforce their vehicles. (E.g., KLG Depub. Letter at p. 2 [citing the *eighty-three* pending cases this *one firm* has "that involve used vehicles sold with a remaining balance on the lease"].) The Alliance has not put forth a single citation refuting that showing.

Undeterred, the Alliance insists that (1) "the '*Jensen* court ***was not asked*** to decide whether a used car with an unexpired warranty sold by a third-party reseller qualifies as 'a new motor vehicle,'" (2) *Jensen* actually only "involved a lease by a manufacturer-affiliated dealer who issued a full new car warranty along with the lease,'" (3) consumers didn't start to bring Song-Beverly Act claims against manufacturers until the Court's 2015 decision in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 made it harder to sue car dealers in court (rather than arbitrations), and (4) the Opinion's ruling thus did not conflict with *Jensen* or disrupt some long-standing, well established rule. (Alliance-10-18.)

Each step of the Alliance's reasoning is wrong.

First, Petitioners have already demonstrated that *Jensen* concerned a previously-owned and previously-driven vehicle: it was first sold to the dealer at a *used car auction* before it was resold to the consumer. (Reply-12-15.) We have also demonstrated that the issue teed up there was identical to the one presented here. (Reply-12-15.)[17] Claims to the contrary are not credible.

Second, *Jensen's* very existence disproves the Alliance's unsubstantiated claim that used-car buyers only started suing manufacturers under the Act in 2015—as do the amicus briefs from consumer rights attorneys who have been successfully representing used car consumers for *over thirty years*. (E.g., Barnes-4.) Common sense does, too. There's no reason why a consumer would only bring a non-Song Beverly claim against a dealer, both because dealer contracts often disclaim express warranties—and because, without *also suing* the manufacturer under the Act, a suit likely wouldn't be possible. The non-Song-Beverly claim would not provide the consumer with the Act's civil penalty or the attorney's fees it provides to prevailing consumers that make a suit economically feasible in the first place. (See § IV.A.1, *ante*.)

Third, there is no question that *Jensen*'s holding had been adopted as "the consensus approach"—or that in diverging from

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[17] Because new car warranties start as soon as they're used—and not when sold—Ms. Jensen's vehicle *had* to come only with a balance remaining on a new car warranty. (See OBM-30-35.)

Jensen, the Opinion disrupted the protections *Jensen* provided to those who purchased used cars that were still under warranty.

After all, "manufacturers have long agreed to—and paid to—resolve disputes informally through arbitration mechanisms that have adopted [*Jensen's*] broader reading of the Act." (Berkeley-25.) "[T]he Department of Consumer Affairs' Arbitration Certification Program, which regulates the three independent lemon law dispute resolution programs in this state, [] has provided for decades that '[t]he California Lemon law protects consumers that buy or lease a *new or used vehicle* that comes with the manufacturer's original warranty," italics added. (Berkeley-25-26; see OBM-58-59 [Department's reading is entitled to deference, citing *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921].)

A myriad of other organizations have interpreted the Act in the same way—among them, The Better Business Bureau's Auto Line, the Kelley Blue Book, the National Consumer Law Center, the California Department of Justice, and the Los Angeles County Department of Consumer & Business Affairs. (Berkeley-24-27.) The Legislature did, too, when it recognized in 2007 that *Jensen* reflects "existing law" in holding that "a used motor vehicle sold or leased *with a balance of the manufacturer's original warranty* is a 'new motor vehicle' for purposes of California's lemon law." (6MJN/1366, 1376, 1380.)

The Alliance does not explain how third-party automobile analytic businesses, state and local consumer protection agencies, and the Legislature itself could *all* conclude that "the Song-

Beverly Act applies to used cars covered by manufacturers' warranties" if *Jensen* was not established law.

2. *Dagher* did not adopt the position the Alliance urges here, nor did any other decision before the Opinion.

The Alliance insists that case law before the Opinion uniformly held that used cars sold with unexpired warranties do not qualify as new motor vehicles under the Act." (See Alliance-11-14, citing *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905.) Wrong again.

State and federal courts have long recognized that the Act's new motor vehicle protections apply to "'cars sold with a balance remaining on the manufacturer's new motor vehicle warranty.'" (E.g., *Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 408-409; *R&B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 335; *Victorino, supra,* 326 F.R.D. at p. 301; *Arutunian v. Mercedes-Benz USA, LLC* (C.D. Cal., December 17, 2018, No. CV 18-6806-DMG (RAOx)) [2018 WL 6617636, at *2, fn. 3].) This is even more true in state trial courts, where the bulk of Song-Beverly litigation takes place. FCA has admitted as much—it previously argued that the Opinion allowed it to "renew" previous, *unsuccessful* arguments that the Act's new motor vehicle protections do not apply to used cars sold with a balance remaining on a new-car warranty. (Answer to POR-21-22.)

In reality, the Alliance has it exactly backward. Until the Opinion, no case had held that the Act stops enforcing *active* new-car warranties merely because the vehicle has changed hands. This question wasn't presented in any of the cases the Alliance cites—and cases, of course, are not authority for positions not considered. (*People v. Parnell* (1993) 16 Cal.App.4th 862, 872 ["It is well settled a case is not authority for an issue not decided"].)

Dagher, supra, 238 Cal.App.4th at pp. 917-924, considered only whether an individual can be a "retail seller" under section 1791.1. It says nothing on how to define section 1793.22's new motor vehicle definition. (See Reply-39 & fn. 10.)

Johnson v. Nissan North America, Inc. (N.D. Cal. 2017) 272 F.Supp.3d 1168, 1178-1179 and *Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 398-400, meanwhile, only concern whether a plaintiff who purchased a used car from a retail seller could assert an *implied* warranty claim against the manufacturer under Civil Code section 1795.5. (See OBM-70-71.)

And although *Kiluk, supra,* 43 Cal.App.5th at p. 340, fn. 4 mused in dicta that treating vehicles with balances remaining on original warranties as "new motor vehicles" might mean that a new implied warranty (that comes with every new consumer product) arises every time a car with a balance of a new-car warranty is resold, any such concern is misguided. Section 1793.22's new motor vehicle definition applies *only* to sections 1793.2 and 1793.22—and thus has no bearing on what constitutes a "new [consumer] product" under the *implied warranty provisions.* (§§ 1792 [providing an implied warranty

with "every sale of consumer goods"], 1791 [defining "consumer goods" as "new [consumer] products"]; OBM-72.)

Plus, as *Kiluk* itself acknowledged, any such concern would be solved by "hold[ing] that purchasers of used vehicles during the period of a transferable new motor vehicle warranty have standing under the Song-Beverly Act because the *original* sale was of a new motor vehicle.'" (43 Cal.App.5th at p. 340, fn. 4, original italics; OBM-72-73.)

There are simply no cases that diverged from *Jensen* before the Opinion—let alone the mass of them that the Alliance claims to exist.

3. It's immaterial that unpublished, federal district court cases have since blindly adopted the Opinion's faulty reasoning.

The Alliance's reliance on unpublished federal district court cases adopting the Opinion's misguided reasoning is no help to it either. (Alliance-16-18.)

Each of these cases blindly follows the Opinion over *Jensen* without meaningful explanation—or, apparently, any realization that the Opinion's foundational premise is false. (E.g., *Barboza v. Mercedes-Benz USA, LLC* (E.D. Cal., Dec. 28, 2022, No. 1-22-CV-0845 AWI CDB) 2022 WL 17978408, at *3 [nonpub. opn.]; *Edwards v. Mercedes-Benz USA, L.L.C.* (C.D. Cal. Oct. 5, 2022, No. CV 21-2671-RSWL-JCK) 2022 WL 5176869, at *2-*3 [nonpub. opn.], among other cases.) Although the Opinion assumed otherwise, the truth is that dealer-owned vehicles and

demonstrators are sold with only a *balance* of a new-car warranty—and that other used cars sold with a balance of a new-car warranty must therefore qualify as vehicles "sold with a new car warranty" too. (See § I, *ante*; see also Anderson-11-20 [discussing the Opinion's several other errors].)

The federal district courts' failure to reckon with the Opinion's faulty premise—or to conduct any meaningful analysis for that matter—renders them meaningless. (See *People v. Banks* (1959) 53 Cal.2d 370, 389 [prior decision "cannot be considered as either authority for or persuasive toward the position of the present defendant, for that decision apparently overlooked certain pertinent matters of fact and law"]; *In re J.W.* (2020) 53 Cal.App.5th 347, 365 [finding no conflict in prior decisions, where decisions adopting one position relied on a presumption "without extended analysis"].) The most they show is that the Opinion might *sound* convincing to a busy trial court that does not independently evaluate the false factual assumptions it is based on.

These unpublished cases are thus only evidence that—if the Opinion and its erroneous reasoning are allowed to stand—used car buyers will continue to be wrongfully deprived of rights that *Jensen* properly recognized over three decades ago.

CONCLUSION

By invoking dealer-owned vehicles and demonstrators as examples of vehicles "sold with a new car warranty," section 1793.22 makes clear that other used vehicles that are also sold

with a balance remaining on a new car warranty qualify for the Act's prompt buyback remedies, too. The Legislature's endorsement of *Jensen*, the Act's remedial purposes, the deference afforded to the Department of Consumer Affairs, and all other statutory tools of interpretation compel the same result.

Neither of the amicus briefs filed by auto industry's lobbying arms have shown otherwise.

The Court should reverse and hold that vehicles sold with a balance remaining on the manufacturer's new-car warranty fall within section 1793.22's "new motor vehicle" definition.

August 23, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504 (d)(1), (d)(3), I certify that **PETITIONERS' ANSWER TO AMICUS BRIEFS FILED IN SUPPORT OF RESPONDENT FCA** contains 11,409 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: August 23, 2023

/s/ Joseph V. Bui
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048; my e-mail address is gwest@gmsr.com.

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Executed on August 23, 2023, at Los Angeles, California.

/s/ Gwendolyn West
Gwendolyn West

STATE OF CALIFORNIA
Supreme Court of California

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