S274625

IN THE SUPREME COURT OF CALIFORNIA

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,

v.

FCA US, LLC,
Defendant and Respondent.

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

FCA US, LLC'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
JOHN A. TAYLOR, JR. (BAR NO. 129333)
*SHANE H. MCKENZIE (BAR NO. 228978)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
lperrochet@horvitzlevy.com
jtaylor@horvitzlevy.com
smckenzie@horvitzlevy.com

CLARK HILL LLP
DAVID L. BRANDON (BAR NO. 105505)
555 SOUTH FLOWER STREET, 24TH FLOOR
LOS ANGELES, CALIFORNIA 90071-2305
(213) 891-9100 • FAX: (213) 488-1178
dbrandon@clarkhill.com

CLARK HILL LLP
GEORGES A. HADDAD (BAR NO. 241785)
505 MONTGOMERY STREET, 13TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-2551
(415) 984-8500 • FAX: (415) 984-8599
ghaddad@clarkhill.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
FCA US, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Miscellaneous

Genesove, *Adverse Selection in the Wholesale Used Car Market* (1993) 101 J. of Pol. Econ. 644 ..... 57, 60

Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality* (1981) 24 J.L. & Econ. 461 57

Hawley, *Used Car Lemon Laws* (May 24, 2023) J.D. Power <https://tinyurl.com/2dv9w37z> 42

Jackson, *When Can You Use California's 'Lemon Law' for a Car Problem* (Nov. 25, 2019) NBC Bay Area <https://perma.cc/NR8Z-4E5F> 44

Klein et al., *In the Driver's Seat: Pathways to Automobile Ownership for Lower-Income Households in the United States* (2023) 18 Transp. Rsch. Interdisc. Persp. 1 ..... 59, 60

LACDCBA, *The Lemon Law* (Apr. 14, 2011) <https://perma.cc/PM4A-XFRS> 40

Lang, *Should You Buy A Car With Lemon Law Buyback History?* (Mar. 9, 2023) motor1.com <https://tinyurl.com/yckry2m4> 53

Lazarus et al.*Recent Developments in Products, General Liability, and Consumer Law* (1997) 32 Tort & Ins. L.J. 499 44

Lemon Law and Warranties, Dealer101 <https://perma.cc/NW5C-LCUT> 43

NCLC, Consumer Warranty Law (6th ed. 2021), Demonstrators and Low Mileage Used Cars § 14.2.3.3, fn. 51, pp. 593–594 ..... 44, 45

NCLC, Consumer Warranty Law (6th ed. 2021) Used Car Lemon Laws, Introduction, § 15.5.2.1 ..... 43, 45

NCLC Consumer Warranty Law (6th ed. 2021), Appendix F, State-by-State analysis of New Car Lemon Laws, California 43, 45

New Motor Vehicle Bd., *Consumer Mediation Services* (2023) <https://perma.cc/S3RJ-US4J> 42

Pierce & Connolly, *Disparities in the "Who" and "Where" of the Vehicle Purchase Decision-Making Process for Lower-Income Households* (2023) 31 Travel Behav. & Soc'y 363 59

Priest, *A Theory of the Consumer Product Warranty* (1981) 90 Yale L.J. 1297 56

Rivelli, *How Many Miles Should a New Car Have?* (Feb. 21, 2023) Car and Driver <https://tinyurl.com/36dz6p7d> 27

Schwarz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis* (1979) 127 U.Pa. L.Rev. 630 ..... 57, 58

Swanson, *Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work* (1974) 14 Santa Clara Law. 575 51

Tretina, *What Is a Branded Title? What It Means, Types, and Risks* (Aug. 11, 2022) Investopedia <https://tinyurl.com/3uh7ce6p> 53

Vollmar, *Lemon Laws Putting the Squeeze on Automobile Manufacturers* (1984) 61 Wash. U. L.Q. 1125 ..... 18, 46

Wakefield, *Car Lemon Laws: What to Know by State* (Sept. 9, 2022) Kelley Blue Book <https://perma.cc/9N8R-7H7B> 43

Wiener, *Are Warranties Accurate Signals of Product Reliability?*, 12 J. of Consumer Rsch. 245 52

Wolf, *Samsung Doubles Washer Motor Coverage to 20 Years* (June 20, 2022) YourSource News <https://tinyurl.com/2kze5cy6> 56

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

INTRODUCTION

The five amicus briefs supporting plaintiffs,[1] considered together, confirm two fundamental points:

First, the Song-Beverly Act's repurchase remedy against manufacturers protects only new car buyers. Plaintiffs' amici commit the same error as plaintiffs: ignoring the plain language of the first sentence of the definition of " 'new motor vehicle,' " which limits the entire definition to a "new motor vehicle." (Civ. Code, § 1793.22, subd. (e)(2).)[2] The interpretation embraced by the plaintiffs and their amici negates the first two sentences of the definition, renders the explanatory reference to specifically enumerated vehicles (like demonstrators) superfluous, and conflicts with numerous provisions of the Act, including the Act's implied warranty, retail sale limitation, warranty start date, and remedy provisions. In contrast, the Court of Appeal opinion here (the Opinion) properly harmonized all of these provisions,

---

[1] Amicus briefs in support of the plaintiffs were submitted by: (a) Martin W. Anderson; (b) Consumer Attorneys of California (CAOC); (c) Stephen G. Barnes; (d) Consumer Law Experts, P.C. (CLE); and (e) UC Berkeley Center for Consumer Law & Economic Justice, Consumers for Auto Reliability and Safety, the Center for Auto Safety, Community Legal Services in East Palo Alto, Consumer Federation of America, the National Consumer Law Center, the National Consumers League, Open Door Legal, Public Counsel, and the Public Law Center (collectively, the Center for Consumer Law or CCL).

[2] All statutory citations are to the Civil Code unless otherwise indicated.

consistent with the definition's plain terms, the broader statutory scheme, and the legislative history.

Second, the public policy arguments advanced in support of plaintiffs are exceptionally speculative and misguided, providing no basis for departing from the Act's language as drafted by the Legislature. Like plaintiffs, amici have no evidence to support their assertions that enforcing the Act as written will encourage manufacturers to breach their warranties or force used car buyers to drive unsafe cars that otherwise would have been repurchased. Moreover, if a manufacturer failed to honor a used car buyer's transferred warranty, those buyers have various no-cost remedies at their disposal. The academic literature cited by amici reinforces the logical distinctions the Act draws between new and used goods, confirms that other states' lemon laws draw similar lines, and supports the Legislature's decision to place primary responsibility for defective used cars on used car dealers instead of manufacturers.

In sum, amici's interpretation is unworkable and their concerns are unfounded. The Opinion should be affirmed.

LEGAL ARGUMENT

I. Amici advance an interpretation of "new motor vehicle" that cannot be squared with the statutory definition as a whole.

A. The amici's expansive interpretation of the "new motor vehicle" definition improperly negates the definition's first two sentences.

The first two sentences of the definition set out what " 'new motor vehicle' " "means"—a "new motor vehicle" with specified personal and business limitations. (§ 1793.22, subd. (e)(2).) As explained in FCA's merits brief, the repeated use of the limiting phrase "new motor vehicle" incorporates the legal definition of a "new vehicle" from the Vehicle Code as well as common sense. (ABOM 26–28.)

Like plaintiffs, amici rely heavily on the definition's third and fourth sentences referring to demonstrators and other vehicles sold with a new car warranty, but those sentences merely clarify which, among a class of specified vehicles *that meet the initial definition*, will be included or excluded under sections 1793.2 and 1793.22. (§ 1793.22, subd. (e)(2).)

There is a fundamental difference between the verbs used in each sentence of the definition. The first two sentences use the verb "means," while the third sentence uses the verb "includes." The Legislature's use of "means" in the first two sentence, when compared to the use of "includes" in the third sentence, signifies that the first two sentences are the foundation of the definition. The clause limiting the Act's reach to "new motor vehicles" sold for personal use and certain business uses is an overlay that

applies to the specifically enumerated vehicles in the third sentence. The specifically enumerated vehicles in the third sentence, including demonstrator and dealer-owned vehicles, cannot be read in isolation.

Like plaintiffs, most amici bypass the definition's use of the phrase "new motor vehicle" in the first sentence. (See, e.g., CCL Brief 18 [construing third sentence in isolation]; CLE Brief 8 [same], 18 [same]; Barnes Brief 9–10 [same]; CAOC Brief 10 [not referring to the content of the definition at all].) This undercuts their entire analysis of the later text in the definition.

Anderson concedes that "the very first sentence in the definition of 'new motor vehicle' " covers vehicles "that have never been sold to a consumer." (Anderson Brief 14.) But like the other amici, he then isolates the specific categories of vehicles in the definition's third sentence from the definition's initial limiting sentences (Anderson Brief 10–11 [arguing that the definition includes six independent categories of vehicles]; see Barnes Brief 8–9; CCL Brief 18–19.)

Amici's approach is wrong. It would negate the definition's first two sentences (what the term actually "means"). Amici effectively concede this by arguing that the definition "covers *any* vehicle 'sold with a manufacturer's new car warranty,' . . . *without any limitations*." (E.g., CCL Brief 14, emphasis added; Anderson Brief 14 ["If the Legislature wanted to limit the definition of 'new motor vehicle' . . . it could easily have used language to that effect"].) But as explained in FCA's merits brief, if that were true, the phrase "other motor vehicle" would include

a business vehicle that exceeds the definition's weight and numerical limits, nullifying the definition's personal and business use limits. (See ABOM 38–39.)

Based on their isolated reading of "other motor vehicle sold with a manufacturer's new car warranty," amici argue that "new motor vehicles" include used vehicles sold by unaffiliated used car dealers and nonretail sellers. (See Anderson Brief 20 [arguing the seller's status as an affiliated dealer is unnecessary for coverage under the Act]; CCL Brief 14, fn. 2 [arguing the Act's manufacturer repurchase remedy is not limited "to transactions involving car dealers rather than other sellers," and thus includes private sales]; see also Veh. Code, § 285, subd. (b) [a dealer is any person "engaged wholly or in part in the business of selling vehicles"].) But that conflicts with the definition's first sentence, which limits covered vehicles to "new motor vehicles," which by definition can only be sold by affiliated new car dealers. (See ABOM 17–18, 26–28; Veh. Code, §§ 426, 430, 11713.1, subd. (f)(1).) This interpretation also conflicts with the Act's general limitation to "retail buyers" of "consumer goods," which excludes vehicles purchased in nonretail sales. (Civ. Code, § 1791, subds. (a), (b) [a "retail buyer" is any person who buys new products from a person engaged in the business of selling goods at retail].)

The Opinion correctly avoids an internally inconsistent reading of the definition by interpreting "other motor vehicles sold with a new car warranty" in the context of the definition and the Act as a whole, finding that all the words read together limit

the Act's manufacturer repurchase remedy to *new* cars sold to a consumer for the first time, if that car comes with a "new car warranty." (See *Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84 Cal.App.5th 127, 134–135 [courts construe statutory terms " 'in context' "].)

Somewhat ironically, Anderson argues that the Opinion's approach—limiting the definition's specifically enumerated vehicles (dealer-owned vehicle, demonstrators, and other vehicles sold with a manufacturer's new car warranty) to the first sale to a consumer—makes the first sentence superfluous. (Anderson Brief 14.) Not so. Because unregistered, unsold dealer-owned vehicles, demonstrators, and similar vehicles are *both* new and used vehicles under the Vehicle Code (see pp. 21–22, *post*), these vehicles were specified to *clarify* that such vehicles were considered new under the Act, which does not render the original definition superfluous. (See *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 858 [third clause added for clarification did not render first clause superfluous].)

The Opinion is consistent with the Legislature's purpose in specifying dealer-owned vehicles, demonstrators, and "other motor vehicles" sold with a manufacturer's new car warranty to "clean-up" the original definition. (ABOM 54–55.) The idea was to *clarify* that such "new motor vehicles" are new under the Act upon the first sale to a consumer notwithstanding their sale as "used" based on a dealer's presale use, if those cars are sold with a "new car warranty" and not sold "as is." (See Vollmar, *Lemon Laws: Putting the Squeeze on Automobile Manufacturers* (1984)

61 Wash. U. L.Q. 1125, 1151–1152 [“Legislatures did not intend, however, to force manufacturers to provide replacements or refunds for automobiles” that are sold “ ‘as is’ ”].) Any other interpretation of the definition’s third sentence that negates rather than clarifies the original definition of “new motor vehicle” must be rejected.

B. Vehicles “sold with a manufacturer’s new car warranty” include only those sold with the full warranty that arises in a first-time retail purchase.

Amici argue that the new motor vehicle definition does not say “ ‘sold for the first time’ ” and thus the phrase “ ‘sold with a manufacturer’s new car warranty’ ” must include cars sold to subsequent consumer owners, along with the *balance* of “existing” manufacturer warranties. (CLE Brief 18.) But a “new car warranty” is a term of art that applies only to the warranty that arises in the first retail sale. (ABOM 30.) For example, the Federal Trade Commission’s (FTC) Buyer’s Guide uses the term “MANUFACTURER’S WARRANTY”—*not* “manufacturer’s new car warranty”— to describe the warranty that transfers when a used car buyer receives the balance of the original owner’s warranty. (See *Buyers Guide*, FTC <https://tinyurl.com/2uvxpzcy> [as of Aug. 18, 2023].) Thus, the Legislature’s choice of the phrase “new car warranty” (along with its repetition of the phrase “new motor vehicle”) meant there was no need to repeat the concept “sold for the first time.”

As the Opinion explains, cars “sold with a manufacturer’s new car warranty” logically means cars sold with a “new or full”

warranty accompanying the first sale to a consumer, as distinct from cars sold with the part of the express limited warranty that remains when a second consumer buys the vehicle. (See ABOM 29–31, citing *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, 222 (*Rodriguez*), review granted July 13, 2022, S274625.)

Amici object to the Opinion's use of the term "full warranty," claiming "that is a concept that exists only in the federal Magnuson-Moss Warranty Act" (Magnuson-Moss) (15 U.S.C. § 2301 et seq.). (Anderson Brief 16; see CCL Brief 20, fn. 7.) Magnuson-Moss references the phrase "full warranty" only in the context of distinguishing that from a "limited warranty" when referring to the scope of a warranty's coverage and remedies. (15 U.S.C. §§ 2303(a), 2304(a).) There is no dispute that the warranty at issue in this case is a "limited" warranty rather than a "full" warranty for purposes of Magnuson-Moss. The Opinion, however, is not construing Magnuson-Moss. It uses the phrase "full warranty" to refer instead to the duration of a new warranty, to distinguish it from the "balance" or "remainder" of a warranty inherited from the original owner by a subsequent owner. The Magnuson-Moss provisions relating to full and limited warranties have no bearing here. (See *Rodriguez*, *supra*, 77 Cal.App.5th at p. 222.)

As explained in the merits briefing, the Court of Appeal here correctly understood that the first purchaser of a demonstrator or dealer-owned executive vehicle receives that vehicle's *full* warranty. (ABOM 36–37.) In addition, as of July 1, 2023, the Act *requires* the express warranty on any "consumer

good" to start on the date of delivery, and thus buyers of demonstrators and dealer-owned executive vehicles receive the exact same warranties that all other new car buyers receive. (See Civ. Code, § 1793.01; see also CLE Brief 20.)

Amici also argue, as have plaintiffs, that the Opinion misconstrued *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112 (*Jensen*), asserting that the plaintiff in that case did not receive a full warranty. (Anderson Brief 21; Barnes Brief 12.) On the contrary, in *Jensen* the jury necessarily found that plaintiff received the full manufacturer warranty she was promised. (ABOM 31–32.)

C. The Opinion's interpretation of the definition comports with principles of *ejusdem generis*, while amici's interpretation renders the reference to "demonstrator" superfluous.

The principle of *ejusdem generis* holds that the general phrase "or other motor vehicle" must be interpreted in a manner similar to the " 'accompanying words' " dealer-owned vehicle and demonstrator. (ABOM 32–34.)

Amici concede that the doctrine of *ejusdem generis* applies, but argue that it supports their interpretation, claiming that demonstrators and dealer-owned executive vehicles are "used" cars, so "other motor vehicle" may also include used cars. (See CCL Brief 18–19, 23, fn. 8.) This argument ignores the common characteristic of demonstrators and dealer-owned vehicles—they are unregistered, unsold, vehicles "used" only in the business of selling cars prior to the first consumer sale and thus are both "new" and "used" under the Vehicle Code. (See Veh. Code,

§§ 430, 665.) Demonstrators and dealer-owned vehicles thus belong to a small category of vehicles *registered* as both "new" and "used." (See Veh. Code, § 11715, subd. (a) [demonstrators and executive vehicles have "specialty plates" and are unregistered prior to the first consumer sale]; Ebin, *Demonstrator FAQs* (Aug. 31, 2020) KPA <https://tinyurl.com/mr46pmdm> [as of Aug. 18, 2023] [the "special DMV forms . . . for demos" include REG 397 (Application for Registration of New Vehicle) and 496 (Used Vehicle Certification)].) Because the specific terms "demonstrator" and "dealer-owned vehicle" "comprise a specific and narrow class of vehicles" (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 220), the phrase "or other motor vehicle" must be limited to *similar* vehicles.

Amici argue that the Opinion "improperly added words like 'basically new,' [and] 'aren't technically new,' " to characterize dealer owned vehicles and demonstrators. (CCL Brief 20.) Amici are wrong. The Opinion simply applied the cannon of *ejusdem generis*, using these phrases to capture the essential nature of the statutory terms grouped together, to confirm the meaning of the general "or other motor vehicle" phrase. (See *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202 [*ejusdem generis* requires courts to describe " 'like kind and character' " of specific terms in a list].)

Amici further argue that "in accordance with the 'the nearest reasonable referent' canon, the phrase 'sold with the manufacturer's new car warranty' applies to 'other vehicle' and not to 'dealer-owned vehicle and demonstrator.' " (CCL Brief 21.)

They also say, however, that "all three items . . . are sold with the manufacturer's new car warranty." (CCL Brief 23–24, fn. 9.) Whatever they are getting at, FCA agrees that the "sold with" phrase modifies "other vehicle." The key point, however, is that the "other motor vehicle" phrase must be construed in light of the first two items in the list, consistent with *ejusdem generis* principles. Construed in that light, the catchall phrase *both* captures similar vehicles (like the manufacturer-owned vehicles referenced in Vehicle Code section 665) *and* excludes demonstrators or dealer-owned vehicles sold "as is" to the first consumer (as expressly allowed under Civil Code section 1792.3).

Finally, amici's broad reading of the "or other" phrase that includes all used vehicles with any remaining original warranty must be rejected for the simple reason that it would make the reference to dealer-owned vehicles and demonstrators superfluous. (See *Gustafson v. Alloyd Co., Inc.* (1995) 513 U.S. 561, 574–575 [115 S.Ct. 1061, 131 L.Ed.2d 1]; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342.)

D. Amici draw a false equivalency between covered "demonstrators" sold for the first time at retail and used cars sold with some balance of the original warranty.

This is not a case about a demonstrator. But amici rely heavily on the Act's reference to demonstrators as "the same" as used cars sold with a balance of the original warranty. (CCL Brief 23; see Anderson Brief 13.) For this conclusion, they rely on the premise that demonstrators "are not sold with a brand-new or

'full' warranty." (CCL Brief 23.) Wrong. A demonstrator's warranty arising from that first sale to a consumer is a new (not transferred) warranty. (ABOM 36.) Even before the Act was amended to require that demonstrators come with a "full" warranty with the same duration as other new cars (see § 1793.01), that was a common practice, as the Legislature is presumed to know (see Billings, Handling Automotive Warranty and Repossession Cases (2d ed. 2003) § 6:13 ["for a small fee, manufacturers [would often] *reinstate the original warranty period* when the dealer sells the demonstrator" (emphasis added)].) As the Opinion points out, *Jensen* confirms that dealers commonly provided the full duration of the manufacturer's new car warranty when selling or leasing demonstrators. (See *Rodriguez*, *supra*, 77 Cal.App.5th at pp. 223–224; *Jensen*, *supra*, 35 Cal.App.4th at p. 119.)

II. Amici advance an interpretation that ignores and conflicts with other provisions of the Act.

A. Amici's arguments to extend "new motor vehicle" to used cars fail to account for the Act's provisions expressly relating to used goods.

Most of the amici do not address the Act's used goods provision, section 1795.5 (see CAOC Brief 9; Barnes Brief 6; CCL Brief 5 [pdf page 14]), which expressly states that the Act does not impose duties relating to used goods on manufacturers who made "express warranties with respect to such goods when new" (§ 1795.5, subd. (a)). And, *none* of the amici address section 1795.5, subdivision (b), which confirms that manufacturers are

not liable under the Act for the cost of repairing, replacing, or repurchasing used goods. Nor do they consider that, when section 1795.5 was enacted in 1971, the Act's definition of "consumer goods" (and thus "used" consumer goods under section 1795.5) expressly included—and focused on—motor vehicles. (1MJN 262–263 [§ 1791, subd. (a)]; see ABOM 19, 50.)

In conflict with these provisions, amici make demonstrably false proclamations that the Act "contains no exception for express warranties covering used cars." (CCL Brief 13–14.) The amici's failure to discuss the "new motor vehicle" definition within the greater statutory scheme disqualifies their arguments about how the Act applies to used cars.

The few amici that do discuss the Act's used vehicle provision get it wrong. For example, Barnes argues that the Opinion "seeks to explain why *some* used consumer goods are covered by the Act but *not* 'used' motor vehicles." (Barnes Brief 11, emphasis added.) But Barnes's premise is false—the Opinion explains that used cars *are* in fact covered under the Act—under the Act's used goods provision, section 1795.5. (See *Rodriguez*, *supra*, 77 Cal.App.5th at p. 222.)

Instead of grappling with the used goods provision, amici point to a manufacturer's ongoing duty to maintain repair facilities to address warranty claims on "consumer goods" under section 1793.2, subdivision (a). (See, e.g., Barnes Brief 11–12.) But this argument conflicts with plaintiffs' and amici's *other* argument that the Act's "consumer goods" provisions do not apply to their used truck. (See pp. 29–30, *post*.) And, even if the Act

imposed a *duty* on manufacturers to maintain repair facilities to service warranted used vehicles, it would have nothing to do with the scope of the extra-contractual statutory *remedy* that the Act affords only to owners of *new* cars (§ 1793.2, subd. (d)(2)) and the different statutory remedies available to owners of *used* cars (§ 1795.5). For example, the Act imposes certain "ongoing" duties on manufacturers relating to used car service agreements. (See, e.g., §§ 1794.4, 1796.5.) But as explained in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261–1263, that does *not* mean the Legislature provided the manufacturer repurchase remedy for the breach of those obligations. "[T]he replacement/restitution remedy applies only if the conditions of section 1793.2[, subdivision] (d) are met," including the "new motor vehicle" condition. (*Id.*, at p. 1262.)

None of the amici address other provisions of the Act expressly referring to "used" goods or otherwise making clear that the manufacturer repurchase remedy is limited to the first buyer of a new car. For example, the Legislature:

- expressly included "used" assistive devices as "consumer goods" subject to the manufacturer repurchase remedy and added detailed provisions regarding how this would impact the implied warranties and remedies for such goods, but did not do this for used cars (see §§ 1791.1, 1793.02);
- referenced "new and used" goods when it intended to place used goods obligations on manufacturers based on the sale of service contracts (see §§ 1794.4, 1796.5);

- required manufacturers repurchasing defective new cars to disclose "the nature of the nonconformity experienced by the *original* buyer or lessee" (§ 1793.22, subd. (f)(1), emphasis added), which would make no sense if the nonconformity giving rise to a repurchase obligation occurred during ownership by a subsequent used car buyer such as plaintiffs here; and
- granted a use offset (in the event of a repurchase) based on the "number of miles traveled by the new motor vehicle" (§ 1793.2, subd. (d)(2)(C)), which makes no sense unless the Legislature assumed the consumer obtaining the repurchase subject to the use offset is the one who—unlike a later owner—enjoyed nearly all of the car's use.[3]

Because amici fail to consider the entire statutory scheme, they misconstrue the long line of cases that support the Opinion, which rely on the Act's provisions that draw a clear distinction between new and used products. For example, amici point out that, in *Dagher v. Ford Motor Co.* (2004) 238 Cal.App.4th 905 (*Dagher*), the plaintiff purchased his car from a private seller, suggesting that this fact—and not the status of the vehicle as used—was the only basis for the court's conclusion that Song-

---

[3] All new cars (including demonstrators) have mileage on their odometers prior to sale. (See Rivelli, *How Many Miles Should a New Car Have?* (Feb. 21, 2023) Car and Driver <https://tinyurl.com/36dz6p7d> [as of Aug. 18, 2023] ["every new car will have at least a few miles on the odometer"].) The Legislature likely expected mileage on new cars, including demonstrators, would be low enough that the buyer's use value should include *all* miles prior to the first repair attempt.

Beverly did not apply. (CLE Brief 10–11.) But amici ignore *Dagher*'s reasoning, which rejected plaintiff's claim *both* because the car was purchased in a private sale *and* because it was a used car, relying on section 1795.5 and the Act's definition of "buyer" and "seller" under section 1791. (See ABOM 49, fn. 8 [analyzing *Dagher*].) Considering the Act as a whole, *Dagher* states: "if the Legislature had wanted to add used vehicles to this general definition in section 1791, subdivision (a) (as it did for 'new and used assistive devices sold at retail'), it could have done so." (*Dagher*, at p. 917, fn. 6.)

Amici next argue that *Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385 (*Nunez*) and *Johnson v. Nissan North America, Inc.* (N.D.Cal. 2017) 272 F.Supp.3d 1168 (*Johnson*) are irrelevant despite those cases' holdings that used car buyers are not entitled to the implied warranty protections afforded to new car buyers. (See Barnes Brief 12; CLE Brief 10–12.) Contrary to amici's argument, the reasoning in both cases applies equally to the Act's remedies for breach of express warranties, recognizing the fundamental distinction between new and used products. *Nunez* reaffirmed the basic framework of the Act, noting that section 1795.5 places responsibility for used car deficiencies on distributors and retail sellers, not manufacturers, where the manufacturer did not offer the used car for sale to the public. (*Nunez*, at pp. 389, 399.)

Similarly, in *Johnson*, *supra*, 272 F.Supp.3d at p. 1179, the court ruled that plaintiffs who purchased a used car sold by CarMax could not sue the car's manufacturer under the Act

"[b]ecause the Song-Beverly Act does not create *any* obligation on behalf of Nissan, the original car manufacturer, with respect to *used* goods." (Emphasis added.) Again, the court's reasoning was based on the plain meaning of section 1795.5, and was not specific to any characteristics of implied warranty claim as distinct from express warranty claims. (*Johnson*, at p. 1179; see *In re MyFord Touch Consumer Litigation* (N.D.Cal. 2018) 291 F.Supp.3d 936, 949–950 ["used car purchasers do not have a claim under the Song-Beverly Act"].)

B. Amici's interpretation of "new motor vehicle" conflicts with and undermines the pro-consumer purpose of the Act's implied warranty, penalty, fee-shifting, and warranty start date provisions.

FCA has explained that, if a used vehicle like plaintiffs' truck is a "new motor vehicle" under the Act, that would create a conflict with the Act's implied warranty provisions, which state that an implied warranty arises in every new vehicle sale but "in no event" will the Act's implied warranty last more than one year following the initial retail sale. (ABOM 47–50.) Most of the amici do not address this conflict. (See CAOC Brief 9; Barnes Brief 6; CCL Brief 5; see also ABOM 47–50; *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 340, fn. 4 (*Kiluk*) [recognizing that *Jensen*'s approach conflicts with the Act's implied warranty provisions].)

Like plaintiffs, CLE attempts to dodge the problem by arguing that treating used cars sold with a remaining original warranty as "new motor vehicles" (under section 1793.2) does not

require that they also be treated as "consumer goods" (under section 1791). (See CLE Brief 11.) That would indeed avoid the problem of granting serial implied warranty rights to successive buyers. But as FCA explained when responding to the same argument by plaintiffs (ABOM 48–49), that would mean the owners of indisputably new cars—the first retail buyers of vehicles including demonstrators and executive vehicles—would *lose* their implied warranty protections as "consumer goods," including the power to immediately revoke acceptance if the car has a fundamental defect. (See *Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545.) Under amici's and plaintiffs' analysis, those consumers would also lose the ability to claim civil penalties and fee-shifting—remedies provided only to buyers of "consumer goods." (§ 1794.) And they would lose the benefit of the warranty start date provision applicable only to consumer goods. (See § 1793.01.)

The simple answer to these conundrums is that *all* "new motor vehicles" are in fact "consumer goods," as this Court has explained. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490.) And contrary to plaintiffs' and amici's contention, used vehicles previously sold to another consumer are neither consumer goods nor new motor vehicles. This is the only interpretation that harmonizes the "new motor vehicle" definition with the intended operation of the Act's "consumer goods" provisions. (See ABOM 48–49.)

III. Amici advance fact-based arguments about "longstanding practice" and "expert" opinions that are wrong and irrelevant.

A. There has never been agreement that buyers of used cars with transferred warranties are entitled to the Act's remedies for new car buyers.

This Court need not indulge in speculation about what various stakeholders have believed the law to be over the years. Even by stipulation, parties cannot agree that the law means something other than what a court finds it to mean. (See *Desny v. Wilder* (1956) 46 Cal.2d 715, 729 [Supreme Court "is not bound by the parties' concessions on issues of law"]; *San Francisco Lumber Co. v. Bibb* (1903) 139 Cal. 325, 326 [counsel "may agree as to the facts, but they cannot control this court by stipulation as to the sole, or any, question of law to be determined under them"].)

FCA nonetheless must respond to amici's assertion that "For at least thirty years, consumers, manufacturers, and the State of California agreed on, relied on, and acted on the commonsense application of Song-Beverly to factory-warrantied used vehicles." (CCL Brief 12; see Anderson Brief 8.) That is simply not true.

First, there is no evidence that consumers themselves have *ever* understood that their used cars are subject to Song-Beverly's special repurchase and replacement remedies for new cars. The Act's express warranty protections for "new motor vehicles" are commonly referred to as the "New Car Lemon Law." (ABOM 55.) And, the top left corner of every automobile sales contract clearly

states whether the vehicle is "new" or "used." It is reasonable to assume that consumers would *not* believe their *used* cars are considered *new* cars under California's lemon law unless and until a creative lemon law lawyer tells them otherwise.

Second, amici assert that "the automotive industry" has implicitly accepted that used vehicles are subject to the Act's repurchase remedy when manufacturers have "agreed to—and paid to—resolve disputes informally through arbitration mechanisms." (CCL Brief 25.) Not so. Certified arbitration programs must comply with *federal* standards, which require the programs to cover all "consumers," including owners of used products with transferred warranties. (See § 1793.22, subd. (d)(1); 16 C.F.R. §§ 703.1(b), (g), 703.2(d), 703.3(a) (2015).) The legislative history and amici's own sources make clear that arbitration programs provide *far greater* relief than the Act requires. (See p. 62, *post*.) Manufacturers also have strong reasons to pay more than the law may require—consistent with business interests in advancing brand loyalty through customer satisfaction, and consistent with the practical understanding that fighting an apparently unmeritorious claim raises the specter of enormous exposure to civil penalties and attorney fee shifting. Thus, a manufacturer's payment of a binding arbitration award—or even a voluntary settlement paying the used car's full purchase price—is no concession that the Act *requires* that result.

In court, manufacturers have *rejected* the idea that they are required to repurchase defective used cars. The line of authority from *Dagher* to *Nunez* discussed above (*ante*, pp. 27–29)

demonstrates that there has been no consensus among manufacturers, their counsel, and the lemon law plaintiffs' bar that manufacturers owe used car owners the repurchase remedy reserved for "new motor vehicles" under section 1793.2, subdivision (d), and section 1793.22.

Before 2015, if there *were* any consensus it was that a buyer who purchased a defective used car should sue the *dealer*, as contemplated by section 1795.5 (See Alliance for Automotive Innovation (Alliance) Brief 11; p. 39, *post* [2015 California Department of Justice (DOJ) website].) That changed in 2015, after *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 921–924, held that used car buyers could be compelled to arbitrate claims against used car dealers. That was when plaintiffs' counsel turned to law suits against manufacturers to avoid arbitration, building on a misreading of the 1995 decision in *Jensen* to develop the theory that used cars are actually "new motor vehicles" entitled to the Act's manufacturer repurchase remedy. (See Alliance Brief 7–8, 13–14.) This chronology—and not acquiescence in plaintiffs' position here—explains why, until *Dagher* was decided in 2015, no published decision addressed the issue presented 20 years earlier in *Jensen*. Since then, every published decision considering the issue has rejected plaintiffs' reliance on the reasoning in *Jensen*, just like *Dagher* and the Opinion here. (See *ante*, pp. 27–29.)

B. The legislative history confirms that the Opinion properly interpreted the definition of "new motor vehicle." Ambiguous statements made by state agencies in recent years are irrelevant.

Only one of the five amicus briefs supporting plaintiffs mentions the Act's legislative history. That brief refers to the 1970 enactment of Song-Beverly and the 1982 enactment of the lemon law to show that the Act was generally intended to help consumers. (See CCL Brief 36, fns. 37, 38.) While that is true, that does not mean the Act was intended to require manufacturers to replace or repurchase defective used cars with any balance remaining on their original warranties. In fact, there is no dispute that, in both 1970 and 1982, the manufacturer repurchase remedy did *not* apply to used cars. The issue here is whether that intent *changed* when the Act was amended to include demonstrators in 1987.

Significantly, one of the amici (Consumers for Auto Reliability and Safety or CARS) authored "The Auto Lemon Index," which lays out a "detailed description of the legislative history of the Lemon Law." (Dutzick (Frontier Group), Shahan (CARS), and Engstrom (California Public Interest Research Group (CalPIRG)), The Auto Lemon Index (May 2022), p. 9 (hereafter Dutzick); see *id.*, Appendix A; see also CCL Brief 38, fn. 39, citing Dutzick.) This "detailed" history touts efforts to "expand" the lemon law, including the 1998 and 2007 amendments that expanded the law's coverage to small businesses and active duty U.S. military service members who purchase new cars out-of-state. (See Dutzick, at pp. 9, 25–27.)

Conspicuously absent from this history is any mention of an intent in 1987 to expand the lemon law to cover millions of used cars still covered by original warranties.

Finding no support for their position in the legislative history for the 1987 amendment that added the key definitional language at issue here, amici fall back on the supposed "expert" opinions of various government agencies and industry organizations to support their statutory interpretation. (CCL Brief 24–28.) But in light of the statute's plain meaning and legislative history, even clear and consistent agency opinions would be entitled to little weight. (See *DiCarlo v. County of Monterey* (2017) 12 Cal.App.5th 468, 487 [" '[A]dministrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent' "]; see also *Issakhani v. Shadow Glen Homeowners Assn., Inc.* (2021) 63 Cal.App.5th 917, 934 ["the meaning and purpose of a legislative enactment is a question of law for the court"; an expert's opinion on such matters is irrelevant].)

In addition, unlike the deference that is sometimes afforded to agency constructions contemporaneous with an enactment (see *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309), such deference is *not* given to interpretations developed *years later* (see *Mundy v. Superior Court* (1995) 31 Cal.App.4th 1396, 1404 ["Having been written closer in time to [the law's] passage than the Legislative Counsel opinion, we may presume the Digest analysis more fully comports with the legislative intent"]; *Bravo Vending v. City of Rancho Mirage* (1993) 16

Cal.App.4th 383, 399, fn. 9 [opinion letter two years after subject amendment "provide[d] no indication of how [the amendment] was understood at the time it was enacted by those who voted to enact it"]).

Moreover, where an agency's interpretation has changed without explanation, it should be given no weight at all. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11–13 (*Yamaha*) ["Because an interpretation is an agency's legal opinion . . . it commands a commensurably lesser degree of judicial deference"; " '[a] vacillating position . . . is entitled to no deference' "]; see also *Northpoint Tech., Ltd. v. F.C.C.* (D.C. Cir. 2005) 412 F.3d 145, 156 ["A statutory interpretation . . . that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one"].)

Here, amici rely on statements from agency publications created decades after the relevant 1987 amendment was enacted, containing material that is ambiguous, contradictory, or both. None of these statements should be given any weight.

For example, amici argue that the Department of Consumer Affairs (DCA) has provided "for decades" that Song-Beverly protects used car consumers. (CCL Brief 25.) Amici also assert that the DOJ and the Los Angeles County Department of Consumer & Business Affairs (LACDCBA) "have both long maintained that Song-Beverly applies to used cars covered by manufacturers' warranties." (CCL Brief 28.) But nobody disputes that Song-Beverly *does* protect used car buyers (see § 1795.5). The issue here is whether used car buyers are entitled

to the *manufacturer repurchase remedy specifically applicable to new motor vehicles*, an entirely different question.

Even more significantly, amici do not dispute that, in the 1980's and 1990's, the DCA did *not* believe the manufacturer repurchase remedy of the "New Car Lemon Law" covered used cars. In the 1980's, the DCA's consumer education booklet titled "Lemon-Aid for New Car Buyers" stated, "The Lemon Law applies *only* to new cars." (11MJN 854–855.) The DCA, which helped draft the 1982 lemon law (3MJN 548, 699), "conducted an extensive investigation" in 1985 into how the law was working (3MJN 705; 13MJN 1285). Among other things, the DCA suggested that the definition of "new motor vehicle" be amended to add demonstrators because some consumers who bought demonstrators were being denied remedies granted to other new car purchasers. (13MJN 1299). The DCA's enrolled bill report relating to the resulting 1987 clarification to the definition of "new motor vehicle" described the amendment as merely a "clean-up change[ ]" that added "dealer-owned vehicles and 'demonstrator' vehicles sold with a manufacturer's new car warranty." (3MJN 701–702). In 1994, the DCA's "Lemon-Aid for New Car Buyers," stated that "Under California's Lemon Law, *a new car* . . . may be returned to the manufacturer for a refund or a replacement if it cannot be repaired." (See Supp. MJN, exh. 2, p. 35, emphasis added.)

In 2002, fifteen years after the 1987 amendment, the DCA had changed the title of its annual publication to "Lemon-Aid for Consumers," which then stated: "The Lemon Law covers *the*

following new and used vehicles that come with the manufacturer's new vehicle warranty," including "Dealer-owned vehicles and demonstrators." (See Cal. Dept. Consumer Affairs, Lemon-Aid for Consumers (2002) p. 7, <https://perma.cc/3KWS-X9BD> [as of Aug. 19, 2023], emphasis added.) But the Act does "cover" used dealer-owned vehicles and demonstrators (§ 1793.22, subd. (e)(2)), so it is unclear if the DCA's 2002 statement should be read as a retraction of its earlier construction of the law.

The current DCA appears to have reversed course from the Department's position in the 1980's and 1990's. (Compare 11MJN 863 [DCA, Lemon-Aid for New Car Buyers (1985), p. 10: "The Lemon Law Questions and Answers . . . Q[:] Does the Lemon Law apply to used cars? [¶] A[:] No, but if a used car is sold or leased with a written warranty, other provisions of the Song-Beverly Act apply"] with Cal. Dept. Consumer Affairs, Frequently Asked Questions (FAQ) (2023) <https://tinyurl.com/3e7yu6pr> [as of Aug. 19, 2023] [" '[Q:] Does the California Lemon Law cover used vehicles? [A:] If the used vehicle is covered by the manufacturer's original warranty, yes.' "].) It is unclear who at the Department prepared the FAQ page of the DCA's website, and what prompted it. In any event, to the extent the DCA's publications are evidence of a "vacillating position" over the years, they should be given no weight. (See *Yamaha*, *supra*, 19 Cal.4th at pp. 11–12.)

Like the DCA, the DOJ was actively involved in drafting the 1987 amendment (ABOM 54–55), and over a decade later confirmed, in language readily understood by consumers: "The

Lemon Law applies only to new cars." (California Attorney General's Office Public Inquiry Unit, *Lemon Law* (1998) <https://tinyurl.com/mpckw2sx> [as of Aug. 19, 2023].) Similarly, the legislative history of the 1982 Lemon Law includes testimony from the Director of the Los Angeles County Department of Consumer Affairs (LACDCBA's predecessor), who stated that as to "used cars," "our department favors the concept of defect *disclosure*. It is our contention that responsibility for the condition of consumer goods rests with the *retailer* of those goods." (9MJN 419, emphasis added.) There is no indication from the history that either agency contemplated a manufacturer repurchase remedy for used cars with some balance remaining on the original warranty, or that either thought the 1987 amendment accomplished that end.

For the next three decades, it appears the DOJ continued to understand that the Act's remedies against manufacturers applied only to new cars *and* that the Act's used goods provision applied to used cars. In 2015, the DOJ website told consumers (consistent with section 1795.5): "The Song-Beverly Consumer Warranty Act provides protection for consumers who lease or buy *new* motor vehicles" and "Coverage For Vehicles That Are Not 'New' [includes] . . . . used vehicles sold with a *dealer's* express written warranty." (California Department of Justice, *Buying and Maintaining a Car* (2015), <https://tinyurl.com/2s2vsv46> [as of Aug. 19, 2023], emphasis altered.) Thus, at least until 2015, the DOJ seemed to understand the careful balance struck by the Legislature between the manufacturer repurchase remedy for

new cars under section 1793.2, and the dealer repurchase remedy for used cars under section 1795.5.

The DOJ's website now states that the "Lemon Law also applies to used vehicles when they are still under a manufacturer's new car warranty," positing that "the manufacturer *may* be required to buy back or replace your vehicle." (California Department of Justice, *Buying and Maintaining a Car* (2023) <https://tinyurl.com/3pw5f24b> [as of Aug. 19, 2023] (hereafter DOJ website).) The LACDCBA website has made similar statements. (See LACDCBA, *The Lemon Law* (Apr. 14, 2011) <https://perma.cc/PM4A-XFRS> [as of Aug. 19, 2023] [the "Lemon Law covers . . . used cars too if there is still time remaining on the manufacturer's warranty"].)

It is unclear whether the DOJ and the LACDCBA mean that used cars may be "cover[ed]" by the repurchase remedy for new motor vehicles under section 1793.2, or only section 1795.5, which also could apply to used cars sold and warranted by a manufacturer, perhaps under a certified pre-owned program. (See *Kiluk*, *supra*, 43 Cal.App.5th at p. 340.) But again, even if the agencies' interpretations of the Act have changed without explanation, these "vacillating position[s]" should be given no weight. (See *Yamaha*, *supra*, 19 Cal.4th at p. 12.)

Finally, vague statements on agency websites are not a good basis on which to interpret the law. The agencies' simplified summaries of complicated laws are *not intended* to offer legal opinions on the question at issue here. (See, e.g., DOJ website ["Because warranty law is complex, you should consult with a

lawyer or other expert who can best advise you of your rights"].) Thus, these general website statements should not be afforded any deference. (See, e.g., *BP America Production Company v. Colorado Department of Revenue* (Colo. 2016) 369 P.3d 281, 285, fn. 5 [agency interpretation should receive no deference if its construction has not been uniform; courts are reluctant to defer to agency interpretation not promulgated through rulemaking; declining to defer to FAQ section of agency website].)

C. The opinions of private organizations that misconstrue the Act should be disregarded. If considered, they show only that an unlimited definition of "new motor vehicle" is far out of step with other state lemon laws.

Amici point to the Better Business Bureau (BBB) Auto Line website (CCL Brief 26, fn. 15), which states that the "California lemon law covers a 'consumer' defined as: [¶]. . .[¶] Any individual to whom the vehicle is transferred during the duration of a written warranty" (Better Business Bureau, *The California Lemon Law* (2023) <https://perma.cc/L7UJ-ELHE> [as of August 18, 2023]). But Song-Beverly does not use the term "consumer." (See § 1791, subd. (b).)

The BBB is referring to the definition of "consumer" under regulations regarding who can participate in the BBB's certified Autoline arbitration program. (See Cal. Code Regs., tit. 16, § 3396.1, subd. (g) [" 'Consumer' . . . includes any individual to whom the vehicle is transferred during the duration of a written warranty"].) As explained above, these programs address consumer warranty claims under both Song-Beverly and the

Commercial Code and are certified to comply with federal requirements; as a result, these programs include used car buyers with transferred warranties. (*Ante*, p. 32; ABOM 68; see 15 U.S.C. § 2301(3) [Magnuson-Moss defines "consumer" as "any person to whom such product is transferred during the duration of an implied or written warranty"].) The BBB's website thus has no bearing on the question of statutory construction before this Court.

Amici next characterize the California New Motor Vehicle Board (NMVB) as a forum for mediating disputes with vehicle manufacturers involving " '[u]sed vehicles with remaining original warranties.' " (CCL Brief 26, fn. 15.) In fact, the NMVB program mediates "[w]arranty/repair disputes" between consumers, dealerships, and manufacturers, but "lemon law" claims are "*not* within [its] Jurisdiction." (New Motor Vehicle Bd., *Consumer Mediation Services* (2023) <https://perma.cc/S3RJ-US4J> [as of June 8, 2023].) The NMVB's mediation program is completely irrelevant.

Amici also rely on legally incorrect statements from Kelley Blue Book, J.D. Power, and Dealer 101. (CCL Brief 27, fn. 16.) For example, amici quote J.D. Power, which states that "only seven states have used car lemon laws," including California. (See Hawley, *Used Car Lemon Laws* (May 24, 2023) J.D. Power <https://tinyurl.com/2dv9w37z> [as of Aug. 19, 2023].) But J.D. Power is wrong, and the amici should know that. According to the National Consumer Law Center (NCLC), which signed on to the CCL Brief, California does *not* have a used car lemon law.

(NCLC, Consumer Warranty Law (6th ed. 2021) Used Car Lemon Laws, Introduction, § 15.5.2.1 (hereafter NCLC Consumer Warranty Law) ["Hawaii, Massachusetts, Minnesota, New Jersey, New York, Rhode Island, and the Virgin Islands have enacted used car lemon laws"].) Song-Beverly's provisions specific to cars have long been known as the "New Car Lemon Law" (ABOM 55), and NCLC categorizes it accordingly (see NCLC Consumer Warranty Law, Appendix F, State-by-State Analysis of New Car Lemon Laws, California [discussing §§ 1793.1 to 1795.8, 1793.22 to 1793.26]).

The Kelly Blue Book advice columnist, Dealer 101, and an NBC journalist cited by amici do not understand the law. They all state that the Act's repurchase remedy is limited to the first 18,000 miles or 18 months after purchase, apparently believing (incorrectly) that the Act's presumption period places a limitation on the manufacturer repurchase remedy. (See Wakefield, *Car Lemon Laws: What to Know by State* (Sept. 9, 2022) Kelley Blue Book <https://perma.cc/9N8R-7H7B> [as of June 8, 2023] ["If a car gets deemed a lemon, California consumers have 18,000 miles or 18 months from the date of purchase to return it"]; *Lemon Law and Warranties*, Dealer101 <https://perma.cc/NW5C-LCUT> [as of June 8, 2023] [unknown author erroneously states that the "Federal Lemon Law requires manufacturers to replace a new vehicle" (no), and that the California lemon law applies "18 months or 18,00 [*sic*] miles after delivery to the Buyer" (also

no)][4]; Jackson, *When Can You Use California's 'Lemon Law' for a Car Problem* (Nov. 25, 2019) NBC Bay Area <https://perma.cc/NR8Z-4E5F> [as of June 8, 2023] [the Lemon Law "covers vehicles for the first 18 months after purchase / lease, OR with less than 18,000 miles driven [¶] . . . [¶] So, if you buy a used vehicle with more than 18,000 miles or that is more than 18 months old and no longer under the new vehicle warranty, it wouldn't be covered."].)

Finally, amici identify NCLC as an expert that agrees with their interpretation. (CCL Brief 27, fn. 17.) As support, amici cite NCLC's treatise, but the treatise also cites *Dagher*, which disagreed with *Jensen*. (See NCLC, Consumer Warranty Law, Demonstrators and Low-Mileage Used Cars, § 14.2.3.3, fn. 51, pp. 593–594.)[5] In the same section, "Demonstrators and Low-Mileage Used Cars," NCLC states: "With some exceptions, lemon

---

[4] The number of legal errors and typos on this Dealer 101 page raises questions about whether this unauthenticated website page is actually part of Dealer 101's continuing education program for dealers.

[5] Amici mention additional sources that similarly cite *Jensen* (see, e.g., CCL Brief 24–25, fn. 10), but those sources recognize that *Jensen*'s reasoning was debatable and they thus narrow the case to its facts, just like the Court of Appeal's opinion did here. (See, e.g., Lazarus et al., *Recent Developments in Products, General Liability, and Consumer Law* (1997) 32 Tort & Ins. L.J. 499, 522 [describing *Jensen* as one case "entering the debate over coverage of used cars"]; Burdine, *Consumer Protection; "Lemon Law Buyback"—Requirements Regarding the Return and Resale of Vehicles* (1996) 27 Pacific L.J. 508, 509, fn. 5 [emphasizing that, in *Jensen*, the car was a "new motor vehicle" because it was "leased to a customer with a new car warranty"].)

laws apply only to new motor vehicles," explaining that states typically define "new" as a car that "has not previously been subject to a retail sale or has not yet had a certificate of title issued." (*Id.*, § 14.2.3.3, at p. 593.)

Like others mentioned above, the NCLC misconstrues the law by concluding that the Act's manufacturer repurchase remedy is limited to the car's first 18 months or 18,000 miles. (See NCLC Consumer Warranty Law, Appendix F: State-by-State Analysis of New Car Lemon Laws, California ["*Vehicles covered*: . . . 'New vehicle' includes demonstrator or other motor vehicle sold with new car warranty. [¶] . . . [¶] *Period covered*: Whichever comes first: 18,000 miles or 18 months (§ 1793.22[, subdivision](b))."].) As the self-described "leading national authority on consumer law" (CCL Brief 27), NCLC's confusion is significant because it reveals an assumption that California does not require manufacturers to repurchase vehicles even from original owners after 18,000 miles, which would obviously bar any claim by the plaintiffs here, who purchased their truck with over 55,000 miles. If the law were as NCLC states, extending a repurchase right to used car buyers, as amici urge, would be far less burdensome than what plaintiffs propose.

As the NCLC treatise makes clear, California's lemon law would be an extreme outlier among state lemon laws if it actually did grant a manufacturer repurchase remedy to used car purchasers, given that nothing limits that remedy to the first year or two after the original sale. As explained in FCA's merits brief, state lemon laws expressly extending new vehicle lemon

law remedies to used vehicles *are* typically limited to the vehicle's first year, and *used* car lemon laws typically require the dealer—not the manufacturer—to replace or repurchase defective used vehicles. (ABOM 70–71.) The academics cited by amici agree this is significant because "[g]iven the similarity among lemon laws and the timing of their passage, it is reasonable to impute similar legislative goals to all legislatures passing lemon laws." (Vollmar, *supra*, 61 Wash. U. L.Q. at p. 1147, fn. 119; see CCL Brief 35, fn. 36 [citing Vollmar].)

IV. Amici advance public policy arguments that do not justify rewriting the Act.

A. Amici use circular logic, asserting the Act must protect used car buyers because they assume wrongly that it was *intended* to protect used car buyers.

Most of the amici are self-described policy advocates focused on *expanding* the Act's coverage rather than preserving the balance evident in the statutory scheme. (See, e.g., CCL Brief 3 [Consumers for Auto Reliability and Safety (CARS) is an "advocacy organization" that works to "expand[ ] California's auto lemon law"].) The other amici are lawyers who represent lemon law plaintiffs, and who have a clear financial interest in expanding the Act's coverage. (See Anderson Brief 5; CAOC Brief 4; Barnes Brief 4; CLE Brief 7–8; see also Alliance Brief 23–24.) As policy advocates, the amici describe the Act as they *want* it to be and then use that unsupported description of the Act's supposed intent to argue their interpretation is correct. (See, e.g., CAOC Brief 11 ["The Act is supposed to be a robust

consumer-protection statute that ensures that where [a used car] consumer is sold a 'lemon' . . . the consumer can obtain a prompt buy back"].)

But this Court must interpret the Act as written, not based on amici's circular logic. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993 ["We could not, of course, ignore the actual words of the statute in an attempt to vindicate our perception of the Legislature's purpose in enacting the law"]; accord, *Nunez*, *supra*, 61 Cal.App.5th at p. 397 [Song-Beverly is "intended for the protection of the consumer," but that does not mean a court may "disregard ' " 'the actual words of the statute,' " ' or fail to give them ' " 'a plain and commonsense meaning' " ' "]; *Dagher*, *supra*, 238 Cal.App.4th at p. 924 [rejecting statutory construction dependent on "lip service to the overall consumer protection policy of the Act"].)

Amici are objectively wrong about the Act's intent. Like plaintiffs, amici assert that the intent of the Act was to force manufacturers to "live up" to warranties on used cars, whatever their duration. (CLE Brief 10; see Anderson Brief 12.) But that's indisputably *not* the Act's intent. First, the Act has never applied to private sales (§ 1791, subd. (b)), which shows that the Legislature's primary purpose was *not* to force manufacturers to "live up to their warranties" on used products. Second, the Legislature made clear that the Act's replace-or-repurchase remedies against manufacturers do *not* apply to used goods (§ 1795.5), with a clear, limited exception for used assistive devices for the disabled (§§ 1791, subd. (a), 1793.02). These provisions

confirm that the Act's remedies against manufacturers are intended to protect buyers of *brand new products*, with only limited application to used products, which is why the Act provides different remedies against different parties, depending on the sales transaction at issue.

Amici argues that the Opinion will "nullify" the Act (CLE Brief 17), which is " 'strongly pro-consumer' " and does not permit any waiver of its provisions (CLE Brief 15–16). But that argument presupposes used car buyers have a right to demand repurchase from manufacturers. (See ABOM 60.) There can be no nullification or waiver of a remedy used car buyers never had.

The cases amici cite do not support their assertions that the Act was intended to protect any consumer that purchases a warranted product. For example, amici cite *Dagher*, *supra*, 238 Cal.App.4th 905, claiming that case stands for the proposition that the Act's intent is to force manufacturers "to stand by the promises of quality, reliability, and safety" by covering all used cars with remaining original warranties. (CCL Brief 16–17, 37.) But the plaintiff in *Dagher* purchased a used car *covered by the original warranty* and yet he had no claim against the manufacturer under the Act, as intended. (See *Dagher*, at p. 923.)

The Center for Consumer Law quotes a passage from *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 754: " '[T]he Legislature's intent [behind the Act] was to eliminate misleading "sales gimmicks," ' " arguing "that characterized many warranties at the time." (CCL Brief 16.) That passage appears

in the court's description of the plaintiff's argument, *which the court rejected*: "We agree that Song-Beverly 'should be given a construction calculated to bring its benefits into action.' [Citation.] However, we are mindful that we do not construe statutes in isolation. Rather, we 'should construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' " (*Atkinson*, at pp. 754–755.) Thus, *Atkinson* concluded the Legislature did *not* intend the Act to cover all warranted products. (*Id.*, at p. 755 [warranted roofing shingles "simply do not fit into the scheme contemplated by the legislature"].)

Amici also rely on *Brown v. West Covina Toyota* (1994) 26 Cal.App.4th 555. (CLE Brief 17.) In *Brown*, a used car dealer prevailed on the plaintiff's Song-Beverly claim and then, despite Song-Beverly's one-way fee-shifting provision, successfully moved for fees under the Rees-Levering Automobile Sales Finance Act (§ 2981 et seq.), which allows either the prevailing seller or buyer to recover its costs and fees on any issue "upon the contract." (*Brown*, at pp. 559, 563–564.) The *Brown* court reversed, holding that a prevailing defendant could not invoke the Rees-Levering Act's fee-shifting provisions because that "would effectively nullify the one-sided fee-shifting under Song-Beverly" in cases involving a conditional sale contract. (*Id.*, at p. 565.) Unlike *Brown,* this case does not involve two distinct statutes that each apply to a single factual scenario, but require different results. FCA is not invoking a statute outside of the Act to evade the plain effect of a provision of the Act.

Amici further cite cases stating that the Act is *generally* designed to protect consumers, but none of these cases involved used cars, stated that the Act was designed to protect used car buyers, or stated generally that courts should disregard limiting language in the Act. (See CAOC Brief 15–16, citing *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 347 [p. 339: explaining that "Santana purchased a 2012 Dodge Durango in November 2011"] and *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 301–302 [at p. 298: explaining that the Krotins leased "a new 1987 Porsche 944"]; see also CLE Brief 15–16, citing *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966 [p. 970: explaining that "Kirzhner leased a new vehicle from Mercedes"], *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1049 [p. 1043: explaining that Lukather leased "a new 2005 Cadillac" in 2005], *Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal.App.4th 53 [p. 55: explaining that "Dominguez purchased a new 2004 Suzuki" motorcycle in 2004], *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801 [p. 792: explaining that the Robertsons purchased a "new" travel trailer], and *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 [p. 177: explaining that "Kwan bought a 1989 300E series Mercedes-Benz" in 1989].)

Amici also cite a 1974 journal article that preceded the lemon law by nearly a decade, and thus does not support amici's assertion that it reveals a legislative intent to sweep used cars into the definition of "new motor vehicle." (See CCL Brief 15,

fn. 3, citing Swanson, *Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work* (1974) 14 Santa Clara Law. 575, 590, fn. 88.) Swanson in fact states, "There are some noteworthy limitations on the scope of the Song-Beverly Act," including (consistent with section 1795.5) that "the Act distinguishes between new and used goods" and "the applicability to used goods of any of the Act's Provisions . . . is predicated upon the existence of an express warranty, made by a distributor or retailer." (Swanson, at pp. 578–579.) The article concludes that such limitations mean the Act was not designed as "a complete cure" for every breach of warranty. (*Id.*, at p. 579.)

The additional journal articles and other materials amici cite from the 1960's and 1970's are similarly unhelpful in determining what the Legislature meant by the phrase "new motor vehicle" in the 1980's. (See CCL Brief 16, fn. 4.)

B. Enforcing the Act's "new motor vehicle" definition as written will neither encourage manufacturers to breach their warranties nor will it lead to more unsafe cars on the road.

Amici assert that without a manufacturer repurchase remedy for used cars, manufacturers will have no "incentive to properly repair" used cars because "[n]o longer is there a concern by the manufacturer that if they do not repair the vehicle, they might have to repurchase it and brand title." (Barnes Brief 13.)

But there is no evidence that manufacturers would breach their warranties that transfer to used car buyers simply because the Act's repurchase remedy does not apply. In fact, the journal articles cited by amici explain that auto manufacturers are not

defrauding consumers; they satisfy their warranty obligations because they understand it is in their business interest to keep customers coming back. (See, e.g., Wiener, *Are Warranties Accurate Signals of Product Reliability?*, 12 J. of Consumer Rsch. 245, 249 ["a warranty is an accurate signal of a motor vehicle's reliability" and auto manufacturers are "too large to benefit from a 'sell now-go out of business later' strategy," which means "it [is] in their interest to meet the warranty claims"]; see also Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism* (1970) 84 Q.J. of Econ. 488, 499–500 [brand names "not only indicate quality but also give the consumer a means of retaliation if the quality does not meet expectations. For the consumer will then curtail future purchases."].)

Amici further argue that "carving out manufacturer-warrantied used vehicles" "could undermine motor vehicle safety" (CCL Brief 37–38), arguing that "all these unsafe cars will remain on the roads and in the stream of commerce creating potentially dangerous conditions for scores of others" (CAOC Brief 13). Like plaintiffs, amici cynically posit that, without granting repurchase rights to disaffected used car owners, manufacturers and their authorized dealerships will "persuade consumers to trade in their defective vehicle" "with no further disclosures of the safety defects." (CAOC Brief 14.)

One faulty assumption here is that cars repurchased by manufacturers are taken off the roads—in fact, they are repaired, rebranded, and resold. (See Tretina, *What Is a Branded Title? What It Means, Types, and Risks* (Aug. 11, 2022) Investopedia

<https://tinyurl.com/3uh7ce6p> [as of Aug. 19, 2023] [manufacturers can and do lawfully sell repurchased vehicles, usually at a discount]; Lang, *Should You Buy A Car With Lemon Law Buyback History?* (Mar. 9, 2023) motor1.com <https://tinyurl.com/yckry2m4> [as of Aug. 19, 2023] ["Lemon law vehicles are everywhere . . . . In fact, they are so common that as a car dealer I always ask for the Carfax history."].)

Another faulty assumption is that consumers are safer if trade-ins are discouraged. There's no evidence why that would be so. If a defective used car is traded in, the dealer is required to repair it prior to resale (Veh. Code, §§ 24007, subd. (a)(1), 24011; see *id.*, § 24000 et seq.) and disclose the vehicle's history to subsequent buyers (*id.*, § 11713.26). Thus, as with repurchased and rebranded vehicles, the law imposes safety and disclosure standards for trade-ins that are resold. (See ABOM 65.)

Amici also argue that *manufacturers* should be required to repurchase and rebrand defective used vehicles because used car *dealers* might not comply with their disclosure duties, which "could result in additional litigation." (Barnes Brief 13.) But it would not be "additional" litigation to bring the correct legal claims against the correct defendants. And, there is also no evidence that dealers will fail to comply with their obligations. The Act is clear that its repurchase and notice obligations on manufacturers "do not relieve any person, including any dealer . . . from complying with any other applicable law," including used car dealer inspection, repair, and notice requirements. (§ 1793.23, subd. (g).)

Amici cite *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1197 (*Johnson v. Ford*) to support the assertion that manufacturers will "launder" defective new cars by conspiring with their franchised dealers to offer good deals on trade-ins rather than repurchasing and rebranding these cars. (CAOC Brief 14–15.) But in *Johnson v. Ford*, this Court expressly found there was no evidence of any unsavory scheme or that the dealers failed to live up to their disclosure obligations to used car buyers. (See *Johnson v. Ford*, at p. 1212 [plaintiffs' theory "depends on assumptions that each such transaction was for a vehicle that should have been reacquired as a lemon and thus should have carried with it a statutory notice, and that each subsequent buyer of [a traded-in] vehicle was defrauded, predicates plaintiffs failed to prove"]; *ibid.* ["Nor can we assume that in every other case in which a vehicle traded in with [a goodwill credit] was resold, the new buyer was kept entirely in the dark regarding previous repairs and repair attempts. . . . [P]laintiffs did not show that California Ford dealers always, or generally, conceal and lie about the repair history of used cars they sell."].)

What *Johnson v. Ford* does show is that used car buyers are *not* entitled to the manufacturer repurchase remedy for new cars but *are* entitled to the Act's protections for used car buyers. The jury found Ford had violated section 1793.2 based on its failure to repurchase the car *from the original owners* (the McGills), and thus violated section 1793.24 when it failed to provide the Act's required disclosures *to the plaintiffs*, the used car purchasers (the Johnsons). (*Johnson v. Ford*, *supra*, 35

Cal.4th at p. 1200.)[6] The jury then awarded the Johnsons compensatory and punitive damages greater than $10 million "on all causes of action" against Ford, including claims for fraud and violation of the Consumers Legal Remedies Act (CLRA) (§ 1750 et seq.). (*Johnson v. Ford*, at p. 1200.) The plaintiffs were also awarded nearly $400,000 in fees under both the Act and the CLRA. (*Ibid.*) This result shows there are tremendous incentives motivating manufacturers to repurchase and title brand defective new cars without erroneously redefining "new motor vehicle" to include used cars.

C. Economic policy considerations must be left to the Legislature. In addition, the careful balance of interests reached by the Legislature is supported by fundamental economic principles and by the academics cited by amici.

Amici argue that "the law must apply to purchasers of warrantied used cars and new cars alike" (CCL Brief 36) because that "accords with the foundational economic theory underlying the provision of warranties" (CCL Brief 29). But these economic policy arguments are for determination by the Legislature, not the courts. (*Ante*, p. 47.)

The Legislature decided that Song-Beverly does *not* apply to used goods, with narrow exceptions. (ABOM 50, citing 1MJN 181; see §§ 1791, subd. (a), 1795.5.) There is no dispute that from

---

[6] The Johnsons had "standing under the Song-Beverly Act" to assert violations of the Act that apply to used car buyers (see *Kiluk*, *supra*, 43 Cal.App.5th at p. 340, fn. 4), but not to assert the manufacturer buyback remedy, a claim only the McGills could bring.

at least 1970 through 1987 the Act did *not* provide a manufacturer repurchase remedy to buyers of used cars or used appliances.

There is also no dispute that, to this day, section 1793.2, subdivision (d)(1) (the Act's express warranty provision for *other* new products), does not require manufacturers to repurchase defective used refrigerators, washing machines, or other appliances, despite their decades-long transferrable warranties. (See Garcia, *Best Refrigerator Warranties for Peace of Mind | Expert Reviewed* (June 20, 2023) Architectural Digest <https://tinyurl.com/563vhhd9> [as of Aug. 19, 2023] [Sub-Zero offers a 12-year warranty; Frigidaire has a 10-year warranty]; Wolf, *Samsung Doubles Washer Motor Coverage to 20 Years* (June 20, 2022) YourSource News <https://tinyurl.com/2kze5cy6> [as of Aug. 19, 2023]; see also Priest, *A Theory of the Consumer Product Warranty* (1981) 90 Yale L.J. 1297, 1322 ["General Electric, the largest manufacturer of air conditioners—offers ten-year extended coverage" and limitations of coverage to the original purchaser are rare]; *id.*, at pp. 1337–1338 [chart showing most appliance warranties are transferrable].)

The *intent* underlying Song-Beverly was to grant a right of replacement or repurchase relating to defective *new products*, not to force manufacturers to repurchase defective *used* products. That line drawing is reasonable and does not need to be justified here. However, the arguments raised by amici also fail to show that the Act's treatment of used cars undermines fundamental economic principles or the state's economic policy interests.

Amici raise an alarm about information asymmetry and adverse selection, claiming that "sellers of used cars have far better information about the quality of the vehicle than buyers." (CCL Brief 30.) They prove FCA's point: the seller is the used car dealer, not the manufacturer. In any event, amici misrepresent the article from which they quote, which discusses information asymmetry *between used car dealers* in the used car *auction* market. (See CCL Brief 30, fn. 22, quoting Genesove, *Adverse Selection in the Wholesale Used Car Market* (1993) 101 J. of Pol. Econ. 644, 647 (hereafter Genesove).)

The other sources cited by amici note that "consumer information is often quite poor about those products which are *new*." (Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality* (1981) 24 J.L. & Econ. 461, 462, emphasis added).) Consumers have much better information about used cars. (See Chau & Choy, *Let the Buyer or Seller Beware: Measuring Lemons in the Housing Market Under Different Doctrines of Law Governing Transactions and Information* (2011) 54 J.L. & Econ. S347, S362 ["Carfax.com provide useful historical information about used cars"].) At least one academic cited by amici argues there is no "serious problem" with information asymmetry in either the new or used car markets. (See Schwarz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis* (1979) 127 U.Pa. L.Rev. 630, 665.) "[P]eriodicals devoted exclusively or partially to rating cars . . . are quite common"; the "large amount of available information in these markets, in

comparison to many other markets, suggests that the ratio of knowledgeable consumers to total consumers of cars and stereos may be high enough so that discrimination is not a serious problem." (*Id.*, at pp. 665–666.)

Even if used car dealers have better information than consumers, who have access to Carfax, Consumer Reports, and the like, that is why the sources cited by amici advocate imposing repair and disclosure duties *on used car dealers*, not repurchase obligations on manufacturers. For example, Professor Burnham recommended the following approach to protect used car buyers:

> The burden should be placed on the seller to correct the defects before they result in a loss [¶] . . . [¶] [and] to disclose known defects [¶] . . . [so] informed consumers can make choices. This results in a closer approach to free market conditions rather than an overly regulated economy.

(Burnham, *Remedies Available to the Purchaser of a Defective Used Car* (1986) 47 Mont. L.Rev. 273, 333–334, fns. omitted.) That is exactly what California has done. (See ABOM 18–19, 64–65.)

Amici also argue that the Opinion will harm "thousands" of California used car buyers, who "already paid [a] premium in reliance on their ability to enforce the warranty provisions in California." (CAOC Brief 12.) But used car owners *will* be able to enforce their warranties. (See pp. 60–63, *post*.) To the extent amici suggest used car buyers select their cars understanding they will *also* be entitled to the Act's manufacturer repurchase remedy, amici provide no evidence to support this fanciful

reliance claim, which would assume consumers are aware of the argument plaintiffs' counsel are making in this case and are making financial decisions on the belief that the position will prevail.

Finally, amici argue that the Opinion's holding "would hit moderate and low-income consumers especially hard." (CCL Brief 40.) Amici further assert that "Low-income households are also more likely to purchase their cars from a used car dealer." (CCL Brief 41.) But the evidence does not support amici.

First, *most* used cars owned by this group are obtained in private transactions that are not subject to the Act's protections anyway. (See Klein et al., *In the Driver's Seat: Pathways to Automobile Ownership for Lower-Income Households in the United States* (2023) 18 Transp. Rsch. Interdisc. Persp. 1, 3–4, 11 (hereafter Klein) [only 38% of lower-income buyers purchased a used car from a dealership; "(informal) purchases from private sellers also represent an overwhelmingly high (78 %) share of purchases" from the lowest income households]; Pierce & Connolly, *Disparities in the "Who" and "Where" of the Vehicle Purchase Decision-Making Process for Lower-Income Households* (2023) 31 Travel Behav. & Soc'y 363, 367, § 4.3.2 ["over 50% of used vehicles were purchased from other sellers," i.e., not from a dealer].)

Second, most of the used cars that low-income individuals purchase from dealerships typically have no remaining balance on the manufacturers' warranties anyway. One study showed most used vehicles purchased at dealerships by lower-income

individuals were more than six years old. (Klein, *supra*, at p. 5 [Table 2. "Acquisition details by pathway"].) Another showed that used cars that low-income individuals purchase from unaffiliated used car dealers are typically older model vehicles. (See Genesove, *supra*, 101 J. of Pol. Econ. at p. 650 [only 30% of an unaffiliated used car dealer's inventory is less than 4 years old].) And, the "high prices and consistently high demand for used vehicles" in recent years (CCL Brief 41–42) have made it even less likely that the used cars lower-income individuals can afford are still covered by the original manufacturer warranties.

Third, many low-income individuals purchase used cars from a "Buy Here Pay Here" dealer. (Klein, *supra*, at pp. 2, 5.) In those sales, the dealer *must* provide a warranty (§ 1795.51, subds. (a), (e)), which subjects that used car to the Act's dealer repurchase remedy (§ 1795.5).

Thus, it is far from clear that the great majority of low-income used car purchasers would benefit from an expansion of the manufacturer repurchase remedy to retail sales of used cars with remaining balances of original manufacturer warranties. Further study of that issue is a matter for the Legislature, not this Court.

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

FCA has explained the remedies that used car owners can pursue. (ABOM 66–67.) Amici puzzlingly argue that if used car buyers have to pursue Commercial Code remedies, those buyers will be "responsible for their attorney's fees and costs in pursuing

the action, as well as potentially the defendant's attorney's fees." (CLE Brief 16.) It's unclear why amici believe court litigation with an attorney is the only option given the alternate remedies available; why amici believe contingency fee counsel will be unavailable; or what law would shift defense fees to plaintiffs.

Amici also reiterate the assertion advanced by plaintiffs that, if a used car buyer is excluded from the manufacturer repurchase remedy, he or she "gets no protection for a breach of warranty." (CAOC Brief 14; see CLE Brief 14 ["the subsequent consumer is left with no recourse"]; CCL Brief 3 ["warranties . . . issued with used vehicles . . . are illusory if they are deemed unenforceable under the Song-Beverly Act"].)

Amici are wrong. As explained in the Opinion and in *Dagher*, consumers can sue manufacturers for breach of warranty under the Commercial Code and the federal Magnuson-Moss law, which has its own fee-shifting provision. (See *Rodriguez*, *supra*, 77 Cal.App.5th at p. 222; *Dagher*, *supra*, 238 Cal.App.4th at pp. 928–929; see also ABOM 67; Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts* (1979) 26 UCLA L.Rev. 583, 667 [explaining that "the buyer may also rely on the U.C.C. to assert a 'failure of essential purpose' [which] would permit him to revoke acceptance for substantial defects and receive a full refund and, possibly, consequential damages"].)

In addition, used car buyers can quickly resolve their warranty disputes in arbitration, where decisions in their favor are binding on the manufacturer. (ABOM 67.) As one of the

authorities cited by amici points out, "Most manufacturer's dispute resolution mechanisms go well beyond the requirements of the Lemon Law. Many manufacturers voluntarily agree to submit to mediation and arbitration disputes involving cars that are out of warranty." (Burnham, *supra*, 47 Mont. L.Rev. at p. 323.) And, these programs often provide *greater* remedies than the Act. (11MJN 911 ["The BBB AUTO LINE Program provides California consumers with broader coverage and greater remedies than those provided by the California Lemon Law. In fact, the manufacturers' voluntary exposure to replacement-repurchase in AUTO LINE exceeds that of any repair/replace legislation in the country."].)

Arbitration should be encouraged. As the Legislature, consumer groups, and government agencies have long understood, arbitration is an efficient and cost-effective alternative to litigation. (9MJN 526 [amicus Consumer Federation of America has stated that manufacturer arbitration programs "provide a welcome alternative to lawsuits and our overloaded courts"]; 11MJN 859 [DCA: certified arbitration programs were designed to "avoid lawsuits"], 914 [California Attorney General: arbitration programs "avoid court battles for most consumers in lemon law cases"]; see 5MJN 951 [since 1982, the lemon law presumptions do not apply until the buyer first participates in a qualified arbitration program], 952 [§ 1793.2, subd. (e)(2) (currently § 1793.22, subd. (c))]; see also 3MJN 665 [in 1987, the Legislature continued to encourage arbitration by excluding manufacturers with qualified arbitration programs

from civil penalty awards for nonwillful violations], 715 [§ 1794, subd. (e)(2) (currently same)].) Arbitration benefits everyone (consumers, dealers, manufacturers, and the courts), except perhaps for attorneys who systematically drag out simple lemon law disputes for years to maximize fee awards. (See Alliance Brief 23–24.)

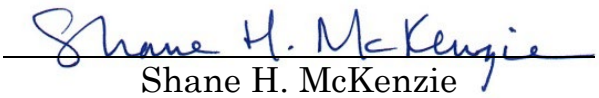
As one amicus (CARS) concedes, "[n]early all complaints about defective or dangerous vehicles are handled outside of the court system," because "automakers and dealers make repairs, issue refunds, or provide replacement vehicles without being taken to court." (Dutzick, *supra*, at p. 1.) In particular, "many Lemon Law cases are resolved through arbitration." (*Id.*, at p. 12.) Such a result is exactly what the Legislature intended to encourage when they enacted the lemon law in 1982. (See ABOM 56–57, 67.)

CONCLUSION

This Court should affirm the Court of Appeal and uphold the trial court's judgment.

August 23, 2023

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN A. TAYLOR, JR.
SHANE H. MCKENZIE
CLARK HILL LLP
DAVID L. BRANDON
CLARK HILL LLP
GEORGES A. HADDAD

By: 
Shane H. McKenzie

Attorneys for Defendant and Respondent
FCA US, LLC

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.520(c).)

The text of this brief consists of 12,789 as counted by the program used to generate the brief.

Dated: August 23, 2023

Shane H. McKenzie

PROOF OF SERVICE

Rodriguez et al. v. FCA US, LLC
Case No. S274625

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On August 23, 2023, I served true copies of the following document(s) described as **FCA US, LLC'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 23, 2023, at Burbank, California.

Millie Cowley

Millie Cowley

SERVICE LIST
Rodriguez et al. v. FCA US, LLC
Case No. S274625

David L. Brandon Clark Hill LLP 555 S. Flower, 24th Floor Los Angeles, CA 90071 (213) 891-9100 Email: dbrandon@clarkhill.com	Co-Counsel for Defendant and Respondent **FCA US LLC**
Georges A. Haddad Clark Hill LLP One Embarcadero Center, Suite 400 San Francisco, CA 94111 (415) 984-8500 Email: ghaddad@clarkhill.com	Co-Counsel for Defendant and Respondent **FCA US LLC**
Hallen D. Rosner Arlyn L. Escalante Rosner, Barry & Babbitt LLP 10085 Carroll Canyon Road, Suite 100 San Diego, CA 92131 (858) 348-1005 Email: hal@rbblawgroup.com Email: arlyn@rbblawgroup.com	Attorneys for Plaintiffs and Appellants **EVERARDO RODRIGUEZ and JUDITH V. ARELLANO**
Steve Mikhov Roger R. Kirnos Knight Law Group, LLP 10250 Constellation Blvd., Suite 2500 Los Angeles, CA 90067 (310) 552-2250 Email: stevem@knightlaw.com Email: rkirnos@knightlaw.com	Attorneys for Plaintiffs and Appellants **EVERARDO RODRIGUEZ and JUDITH V. ARELLANO**

Cynthia E. Tobisman
Joseph V. Bui
Greines, Martin, Stein & Richland LLP
6420 Wilshire Blvd., Suite 1100
Los Angeles, CA 90048
(310) 859-7811
Email: ctobisman@gmsr.com
Email: jbui@gmsr.com

Attorneys for Plaintiffs and Appellants
EVERARDO RODRIGUEZ and JUDITH V. ARELLANO

Seth Mermin
David S. Nahmias
Leila Nawsrolahi
UC Berkeley Center for Consumer Law & Economic Justice
UC Berkeley School of Law, Suite 308
Berkeley, CA 94720-7200
dnahmias@law.berkeley.edu

Attorneys for Amici Curiae
UC BERKELEY CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, 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

Sharon J. Arkin
The Arkin Law Firm
1720 Winchuck River Road
Brookings, OR 97415

Attorneys for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

Erik Whitman
Alessandro G. Manno
Lara F. Rogers
800 Parkview Dr. N
El Segundo, CA 90245

Attorneys for Amicus Curiae
CONSUMER LAW EXPERTS, P.C.

Patrick J. Gregory
Shook Hardy & Bacon LLP
555 Mission Street, Suite 2300
San Francisco, CA 94105

Attorneys for Amicus Curiae
ALLIANCE FOR AUTOMOTIVE INNOVATION

Stephen G. Barnes
Barnes Law Firm
23046 Avenida De La Carlota
Suite 600
Laguna Hills, CA 92653
sbarnes@lemonlaw4california.com

Attorneys for Amicus Curiae
STEPHEN G. BARNES

Max Carter-Oberstone
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105
Mcarter-oberstone@orrick.com

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE U.S. OF AMERICA and CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

Christopher J. Cariello
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
ccariello@orrick.com

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE U.S. OF AMERICA and CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

Katherine M. Kopp
Orrick, Herrington & Sutcliffe LLP
1152 15th Street NW
Washington, DC 20005
kkopp@orrick.com

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE U.S. OF AMERICA and CIVIL JUSTICE ASSOCIATION OF CALIFORNIA

Martin W. Anderson
Anderson Law, APC
2070 N. Tustin Ave.
Santa Ana, CA 92705
firm@andersonlaw.net

Attorneys for Amicus Curiae
MARTIN W. ANDERSON

California Court of Appeal
Fourth Appellate District, Div. Two
3389 12th Street
Riverside, CA 92501

Case No. E073766

Via TrueFiling

Hon. Jackson Lucky
Riverside County Superior Court
Historic Courthouse
4050 Main Street, Dept. 10
Riverside, CA 92501

Case No. RIC1807727

Via U.S. Mail

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **smckenzie@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
REQUEST FOR JUDICIAL NOTICE	Supplemental Motion for Judicial Notice
BRIEF	FCA's Consolidated Answer to Amicus Curiae Briefs

Service Recipients:

Person Served	Email Address	Type	Date / Time
Stephen Barnes Barnes & Farrell 149931	sbarnes@lemonlaw4california.com	e-Serve	8/23/2023 9:18:10 PM
Georges Haddad Clark Hill LLP	ghaddad@clarkhill.com	e-Serve	8/23/2023 9:18:10 PM
Joseph Bui Greines, Martin, Stein & Richland LLP 293256	jbui@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Mark Skanes RoseWaldorf LLP 322072	mskanes@rosewaldorf.com	e-Serve	8/23/2023 9:18:10 PM
Sharon Arkin The Arkin Law Firm 154858	sarkin@arkinlawfirm.com	e-Serve	8/23/2023 9:18:10 PM
Cynthia Tobisman Greines, Martin, Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Patrick Gregory Shook Hardy & Bacon, LLP 206121	pgregory@shb.com	e-Serve	8/23/2023 9:18:10 PM
Payam Shahian Strategic Legal Practices, A Professional Corporation 228406	lwageman@slpattorney.com	e-Serve	8/23/2023 9:18:10 PM
Alana Rotter Greines Martin Stein & Richland LLP	arotter@gmsr.com	e-Serve	8/23/2023 9:18:10

236666			PM
David Nahmias Berkeley Center for Consumer Law & Economic Justice 324097	dnahmias@law.berkeley.edu	e-Serve	8/23/2023 9:18:10 PM
David Brandon Clark Hill LLP 105505	dbrandon@clarkhill.com	e-Serve	8/23/2023 9:18:10 PM
David Nahmias Impact Fund 324097	dnahmias@impactfund.org	e-Serve	8/23/2023 9:18:10 PM
Radomir Kirnos Knight Law Group, LLP 283163	rogerk@knightlaw.com	e-Serve	8/23/2023 9:18:10 PM
Joseph Kaufman Joseph A. Kaufman & Associates, Inc. 228319	joe@lemonlawaid.com	e-Serve	8/23/2023 9:18:10 PM
Pro Per Attorney Nationwide Legal, LLC 63117	sfcourt@nationwideasap.com	e-Serve	8/23/2023 9:18:10 PM
Robert Aguilar Consumer Law Experts, PC	robert@nolemon.com	e-Serve	8/23/2023 9:18:10 PM
Martin Anderson Anderson Law Firm 178422	firm@andersonlaw.net	e-Serve	8/23/2023 9:18:10 PM
Maureen Allen Greines, Martin, Stein & Richland LLP	mallen@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Arlyn Escalante Rosner, Barry & Babbitt, LLP 272645	arlyn@rbblawgroup.com	e-Serve	8/23/2023 9:18:10 PM
Shane Mckenzie Horvitz & Levy, LLP 228978	smckenzie@horvitzlevy.com	e-Serve	8/23/2023 9:18:10 PM
Seth Mermin Atttorney at Law 189194	TMermin@publicgoodlaw.org	e-Serve	8/23/2023 9:18:10 PM
Hallen Rosner Rosner, Barry & Babbitt, LLP 109740	hal@rbblawgroup.com	e-Serve	8/23/2023 9:18:10 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	8/23/2023 9:18:10 PM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	8/23/2023 9:18:10 PM
Rebecca Nieto Greines Martin Stein & Richland LLP	rnieto@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Erik Whitman Attorney at Law	whitman@nolemon.com	e-Serve	8/23/2023 9:18:10

			PM
Richard Wirtz Wirtz Law, APC 137812	rwirtz@wirtzlaw.com	e-Serve	8/23/2023 9:18:10 PM
Gwendolyn West Greines, Martin, Stein & Richland LLP	Gwest@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Daniel Lebel Consumer Law Practice of Daniel T. LeBel 246169	danlebel@consumerlawpractice.com	e-Serve	8/23/2023 9:18:10 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	8/23/2023 9:18:10 PM
Martin Anderson Court Added	martin@andersonlaw.net	e-Serve	8/23/2023 9:18:10 PM
Katherine Kopp Orrick, Herrington & Sutcliffe LLP	kkopp@orrick.com	e-Serve	8/23/2023 9:18:10 PM
Max Carter-Oberstone Orrick, Herrington & Sutcliffe LLP 304752	mcarter-oberstone@orrick.com	e-Serve	8/23/2023 9:18:10 PM
Payam Shahian Strategic Legal Practices, APC 228406	pshahian@slpattorney.com	e-Serve	8/23/2023 9:18:10 PM
Joseph Kaufman Lemon Law Aid, Inc.	dulce@lemonlawaid.com	e-Serve	8/23/2023 9:18:10 PM
John Taylor Horvitz & Levy LLP 129333	jtaylor@horvitzlevy.com	e-Serve	8/23/2023 9:18:10 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/23/2023

Date

/s/Shane McKenzie

Signature

McKenzie, Shane (228978)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm