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Case No. S241434

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

EDUARDO DE LA TORRE and LORI SAYSOURIVONG, individually and on behalf of all others similarly situated,
Plaintiffs/Petitioners,

v.

CASHCALL, INC.,
Defendant/Respondent,

On Certified Questions from The United States Court of Appeals for the Ninth Circuit
Pursuant to California Rule of Court 8.548
Ninth Circuit Case Nos. 14-17571, 15-15042

REPLY BRIEF ON THE MERITS

JAMES C. STURDEVANT (SBN 94551)
jsturdevant@sturdevantlaw.com
THE STURDEVANT LAW FIRM
A Professional Corporation
4040 Civic Center Drive, Suite 200
San Rafael, CA 94903
Telephone: (415) 477-2410
Facsimile: (415) 492-2810

STEVEN M. TINDALL (SBN 187862)
smt@classlawgroup.com
ANDRE M. MURA (SBN 298541)
amm@classlawgroup.com
GIBBS LAW GROUP LLP
505 14th Street, Suite 1110
Oakland, CA 94612
Telephone: (510)350-9700
Facsimile: (510) 350-9701

Attorneys for Plaintiffs/ Petitioners
(Additional Counsel for Plaintiffs/Petitioners listed on the following page)

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San Rafael, CA 94903
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Facsimile: (415) 492-2810

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amm@classlawgroup.com
GIBBS LAW GROUP LLP
505 14th Street, Suite 1110
Oakland, CA 94612
Telephone: (510)350-9700
Facsimile: (510) 350-9701

Attorneys for Plaintiffs/ Petitioners

(Additional Counsel for Plaintiffs/Petitioners listed on the following page)

JESSICA RIGGIN (SBN 281712)
jriggin@rukinhyland.com
RUKIN HYLAND LLP
1939 Harrison St., Ste. 290
Oakland, CA 94612
Telephone: (415) 421-1800
Facsimile: (415) 421-1700

DAMON M. CONNOLLY (SBN 139779)
damon@damonconnollylaw.com
LAW OFFICES OF DAMON M. CONNOLLY
1000 4TH Street, #600
San Rafael, CA 94901
Telephone: (415) 256-1200

ARTHUR D. LEVY (SBN 95659)
arthur@yesquire.com
LAW OFFICE OF ARTHUR D. LEVY
1814 Franklin Street, Suite 1040
Oakland, CA 94612
Telephone: (415) 702-4551
Facsimile: (415) 814-4080

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Introduction and Summary of Argument

In its answer brief, CashCall concedes, as it must, that in 1985 the Legislature enacted S.B. 447 against the backdrop of California unconscionability law, Civil Code §1670.5, which applies to all contracts. Thus, when the Legislature decided in 1985 that the "rate ceilings" or "rate caps" on interest rates would apply to loans below $2500 rather than to loans below $5000 (Cal. Fin. Code, § 22303; all undesignated statutory references are to this code), it did so with the clear understanding that California law *already* prohibited unconscionable loan terms.

The Legislature did not stop there. In that same legislation, the Legislature expressly incorporated California unconscionability law into the Financial Lenders Law (FLL), applying it to provisions of a loan subject to the FLL. (§ 22302 (a).) Further, the Legislature deemed unconscionable loan terms to be a violation of the FLL itself—and it authorized administrative and judicial relief in state enforcement actions. (§ 22302 (b).) Taken together, the Legislature's decision to authorize specified interest rates only for loans less than $2,500 and to deem any unconscionable loan term to be in violation of the FLL is fully consistent with all of the express purposes of the FLL, including "to protect borrowers against unfair practices by some lenders." *See* § 22001.

The statutory text supports this understanding. Read together, sections 22302 and 22303 plainly indicate that an unconscionable interest rate on a loan of $2500 or more violates the FLL and Civil Code §1670.5. Whereas Section 22303 "does not apply" to loans of $2500 or more, Section 22302 applies California unconscionability law to all provisions of any loan covered by the FLL. Accordingly, sections 22302 and 22303 can

readily coexist and be effective according to their terms.

The legislative history buttresses this plain reading. Section 22302 was added in direct response to specific objections by the Attorney General that lowering the rate ceiling to loans less than $2500 would deprive borrowers of loans not subject to these rate ceilings of essential consumer protections against "exorbitant rates."[1] The author of S.B. 447 expressly confirmed, "The unconscionability provision in the Civil Code is incorporated by reference in both laws [by section 22302] to provide a remedy for excessive charges."[2]

CashCall nevertheless argues that the Legislature chose in section 22303 "not to apply" fixed interest rate caps to loans of $2500 or more and that this decision means the Legislature intended to allow lenders to charge *any interest whatsoever* on such loans—including interest that is, in fact, unconscionable. Neither the statutory text nor the legislative history supports CashCall's theory that Section 22303, which does not even apply to loans of $2500 or more, impliedly repeals Section 22302's bar on unconscionable loan terms. Courts do not find a repeal by implication unless there is no rational basis on which to harmonize two provisions. Here, these two provisions can—and therefore must—have concurrent operation.

CashCall resists that straightforward conclusion, arguing that the industry would suffer if the Court does not conclude a legislative repeal by implication. CashCall's policy arguments, however, are without support. Ultimately, it is consumers who would suffer if lenders could charge any interest rate they wanted on loans of $2500 or more—including rates that

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[1] Previously filed Petitioners' Request for Judicial Notice, Ex. "D".
[2] *Id.*, Ex. F.

would otherwise—and clearly—be unconscionable. Regardless, statutory construction is not a license to redraft the statutes to strike a compromise that the Legislature did not reach. If CashCall believes that interest rates on FLL loans of $2500 or more should be exempt from judicial scrutiny under the clear statutory language of section 22302, it should present its arguments to the Legislature.

I. Plaintiffs' Response to CashCall's Statement of Facts

In the course of addressing the limited issue of statutory interpretation before the Court, CashCall has inaccurately described its business model. (Answer Brief pp. 11-13; *see* Petitioners' Opening Brief pp. 2-4.) Plaintiffs offer this corrective statement of the facts, which is supported by the record developed in federal court on CashCall's motion for summary judgment.[3]

To begin, CashCall argues, in essence, that it was *forced* to charge excessive interest rates "due to its high costs and the high default rate" that otherwise precluded a profit. (Answer Br. 12 (claiming that it "could not make a profit" at interest rates below 96% and "did not make excessive

[3] Because the certified question arises out of Petitioners' appeal from a grant of summary judgment for CashCall, to the extent the Court considers disputed facts, it is appropriate to draw inferences in Petitioners' favor. *See Ventura Packers, Inc. v. F/V Jeanine Kathleen* (9th Cir. 2002) 305 F.3d 913, 916 (an appellate court reviewing this evidence, like the trial court, views the evidence in the light most favorable to the opposing party to determine whether there are any genuine issues of material fact and whether the trial court correctly applied the relevant substantive law); *Ennabe v. Manosa* (2014) 58 Cal. 4th 697, 705 (same). Indeed, the district court here initially denied CashCall's summary judgment motion, finding genuine disputes of fact. While it ultimately granted CashCall's motion for reconsideration based on "economic policymaking" arguments, the district court did not revisit or retract its initial Order finding numerous triable issues of fact. (ER 1.)

profits" or reach its "targeted profitability" on loans at 96% and 135%).) To the contrary, Petitioners introduced substantial evidence that CashCall's high advertising costs and high rate of default resulted from CashCall's *deliberate* business strategy of aggressive growth and large loan volumes. For instance, Petitioners' economist, Bruce McFarlane, explained how CashCall's advertising and underwriting standards drive its interest rates up, which in turn triggers higher default rates, which in turn drives its interest rates up even higher. (4-SER 1091.) Even CashCall's CFO testified that CashCall builds an "assumed acceptable default rate" of 35-40% into its interest rate determinations in order to figure its profit and set the interest rate. S.E.R. 21, 290-91, 492-493, 2425-2427, 2435-2437, 2443-2445, 2450-2451.

CashCall, then, has no credible basis to disclaim responsibility for its loan practices. CashCall's lending practice at issue in this case takes advantage of vulnerable borrowers and those in financial distress, knowing that nearly half of them will be unable to pay the loans back and will become trapped in CashCall's aggressive collection process, including repeated collection calls, threats, and adverse credit reporting. (*Id.*) As detailed in Petitioners' opposition to CashCall's summary judgment motion, CashCall achieved its profits by consciously and systematically lending, on every ten loans, to four borrowers whom it knew were unable to repay. This "acceptable default rate" was built into its model and deliberately caused financial hardship to tens of thousands of borrowers. (*See* Petitioners' Opening Br. 4.)

Second, consumers had no meaningful alternatives to CashCall's loans. (Answer Br. 13.) CashCall's assertion that "[t]here is no evidence

that there is any current restriction on competition, or that there was at any time during the Class period" is simply false. (*Id.* p. 37.) In opposing CashCall's summary judgment motion in the District Court, Petitioners introduced substantial evidence, including testimony by CashCall's CFO, demonstrating that CashCall occupied a unique product "niche" and faced only minor competition; that other installment lenders did not supply "reasonably available alternatives" during the class period; and that payday loans, tax refund loans, and auto title loans are not "comparable" to CashCall's 42- and 36-month unsecured $2,600 installment loans (1-SER 16-17, 181-184; 10-SER 2505-2506; 2508-2509; 11-SER-2719,[4] 1-SER 19, 119, 149, 177-178 (payday loans materially differ from CashCall's loans because they are for small dollar amounts and are issued for extremely short durations); 1-SER 19, 178-179 (tax refund anticipation loans materially differ because they are one- to two-week loans); 1-SER 20, 150, 178-179 (auto title loans materially differ because they are secured, require an automobile as loan security, and are for a shorter duration than the CashCall loans).

[4] CashCall cites to annual reports of the California Department of Corporations (DOC) that CashCall placed in the record before the district court. (Answer Br. 13-14.) The 2010 report shows 25,215 loans in the $2500-$4000 range in 2010 at 40-100% APR, but it neither identifies who the lenders were nor states the distribution of those loans by interest rate. (3 SER at 641.) Nor does the 2010 report of 35,240 loans in the $2500-$4000 range at 100% or more APR identify the lenders or even how many lenders there were. For all that appears from these reports, most loans in these categories at 90% APR or more were made by CashCall itself. Because the DOC reports do not show the distribution of lenders and their market shares, they do not prove the existence of a competitive market and are entirely consistent with a monopolistic or oligopolistic market. Moreover, the testimony of CashCall's CFO that CashCall faced no significant competitors is directly contrary to CashCall's position. (10 SER at 2508-2509.)

Third, CashCall did not fairly present to borrowers its interest rates and the other financial ramifications of its loans (Answer Br. 14-15). Petitioners demonstrated that there were, at least, triable issues of material fact as to (1) the content of the disclosures; (2) the timing of the disclosures; (3) changes in CashCall's disclosure practices over the class period; and (4) the capacity of class members to understand information provided them in the disclosures. The ability of the typical class member to understand and process loan disclosures is even lower than the already low financial literacy of consumers generally. (1-SER 41-42.) The financial literacy deficits of the typical class member are compounded by anxiety and worry over money; individuals facing financial stress have reduced cognitive capacity overall and tend to make poor financial decisions as a result. (1-SER 42). Class members' misunderstanding of the financial ramifications of the loans was compounded by the fact that CashCall designs its advertising to appeal to the consumer's *immediate* need for money and the *ease* of quickly satisfying that need, while minimizing information about the cost of the loans. (1-SER 42). CashCall's practice of not providing written loan disclosures to applicants until late in the application process capitalized on the psychological bias against losing "sunk costs"; having already invested in the application process and been "approved," and now relying upon getting his/her financial necessity filled, the borrower is predisposed to either ignore the disclosures or discount their significance improperly. (*Id.*)

This testimony and the underlying evidence on which it is based raised a genuine, triable issue of material fact whether CashCall's business model of "increas[ing] loan originations through increased advertising and

marketing activities [to the class of borrowers in this case] and [using] broad underwriting standards to increase the pool of qualified borrowers" justified its 96% and 135% interest rates.[5] (ER 14.)

Argument

I. The Legislature Plainly Intended to Apply the Unconscionability Doctrine to Interest Rates on FLL Loans of $2500 or More

CashCall's interpretation of the statutory text at the heart of this dispute relies heavily on a negative implication argument that is not supported by the language of the statutes. Because Section 22303's interest rate cap does not apply to loans of $2500 or more, CashCall asks the Court to draw a negative inference that *Section 22302* does not apply to interest rates on loans of $2500 or more—despite CashCall's candid admission that Section 22302 applies to "any unconscionable loan terms." (Answer Br. 22.) A plain reading of these provisions refutes CashCall's claim that the Legislature granted FLL lenders an exemption from the application of the unconscionability law.

CashCall's primary argument is that section 22303 is a specific statute addressing interest rate caps, while section 22302 is general because it "applies to the entire FLL and to any unconscionable loan terms." (Answer Br. 22.) CashCall thus argues that section 22303 should be read as implicitly overriding section 22302 as to interest rates.

CashCall is mistaken. When the Court construes two statutes, "they

[5] CashCall's assertion that Mr. McFarlane "agreed that CashCall must charge higher rates" is unfounded. (Answer Br. 12.) As explained above, Mr. McFarlane testified that CashCall's business model to aggressively expand its subprime loan volumes by saturation television advertising and risky underwriting standards drove its high interest rates. (4-SER 1093-1094.) That was a decision made by CashCall, not its borrowers.

'must be read together and so construed as to give effect, when possible, to all the provisions thereof." (*State Dep't of Pub. Health v. Superior Court*, 60 Cal. 4th at 955.) It is only when "there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Id.* at 955-56 (citations omitted)).

CashCall's principle, that "more specific provisions take precedence over more general ones," applies only "[i]f conflicting statutes cannot be reconciled." (*State Dep't of Pub. Health*, at 960.) Here, there is no conflict between Sections 22302 and 22303 insofar as loans for $2500 or more are concerned. Section 22302 applies to provisions of a loan (such as interest rate provisions), including loans of $2500 or more, but Section 22303, by its terms, does not apply to loans of $2500 or more and thus does not authorize any particular interest rate on such loans. That straightforward reading reveals that both laws can—and therefore must—have concurrent operation. Simply put, the Legislature intended not to apply fixed rate caps to loans of $2500 or more, but continued the pre-existing unconscionability doctrine to be applied by courts over interest rates and other loan terms.

Disregarding this plain reading and settled principles of statutory construction, CashCall instead reads Section 22303 as "expressly consider[ing] loans of $2500 or more and declar[ing] that they are not subject to any rate cap." (Answer Br. 22.) Section 22303 declares no such thing. It provides: "This section does not apply to loans of . . . two thousand five hundred dollars ($2500) or more . . . ." By its plain terms, then, Section 22303 "authorize[s]" certain charges on loans for less than $2500. *See* § 22304 ("As an alternative to the charges *authorized* by

Section 22303, . . .") (emphasis added). But Section 22303 "does not apply" to loans of $2500 or more, and hence *does not* authorize lenders to charge the interest rates set forth in this section on loans of $2500 or more. *Id.* Given this plain language, CashCall is wrong to infer in Section 22303 a legislative intent to authorize the charging of "any interest rate" on loans for $2500 or more. (Answer Br. 23.). As this Court long ago made clear, "There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful. For example, Penal Code section 211, which defines robbery, does not make murder unlawful. Most assuredly, however, that section does not also make murder lawful." (*Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 183.) Here, by establishing rate caps for loans under $2500, the Legislature did not, in doing so, make lawful the charging of any interest rate on loans of $2500 or more, no matter how high. The unconscionability law continues to apply.

All section 22303 provides is that the numerical statutory "rate caps" do not apply to loans of $2500 or more. This is not irreconcilable with continuing to apply the unconscionability law to interest rates on such loans. The two statutes can be harmonized simply by recognizing that the Legislature intended the courts to continue to apply unconscionability principles to FLL loans over $2500.

Subdivision (a) of Section 22302 fully supports this interpretation. This subdivision "applies" California unconscionability law, Civ. Code § 1670.5, "to the provisions of a loan contract that is subject to this division." (*Id.*, (a).) CashCall reads this to mean "*any* unconscionable loan terms," (Answer Br. 22) (emphasis added), and rightly so. This section, on its face,

does not except any provision of a loan contract subject to the FLL from unconscionability analysis. Rather, it applies California unconscionability law to provisions in loans governed by the FLL. It thus follows that the rate of interest on a loan subject to the FLL may be deemed unconscionable "in violation of this division and subject to the remedies specified in this division." § 22302, subdivision (b).

Despite acknowledging the breadth of Section 22302, CashCall contends that Section 22302, by *its* terms, does not apply to interest rates. (Answer Br. 22.) CashCall argues, first, that "[n]othing in Section 22302 says or implies that it is designed to address interest rates as opposed to other aspects of a loan." (Answer Br. 23.) But nothing in Section 22302 singles out any particular aspect of a loan. It is of no moment, therefore, that Section 22302 does not explicitly refer to interest rates. It suffices that Section 22302 refers to "the provisions" (plural) "of a loan contract that is subject to this division," and that the interest rate is such a provision. That statutory language is as plain a statement as any that Section 22302 applies to interest rates—just as it does other aspects of a loan.

Notably, subdivision (a) of Section 22302 provides no exemption for interest rates. By contrast, the Legislature provided express statutory exemptions in other provisions of the FLL, and could have done so here. Section 22303, for example, does not apply "[t]his section" to loans of $2500 or more. The Legislature could have written the same exemption into Section 22302 but did not. Nor has it ever amended the general exemption provision of the FLL to exempt any loans from section 22302. (§ 22250.)

Next, CashCall points to subdivision (b) of Section 22302,

remarking that the FLL is not privately enforceable but the regulator can take action either in an administrative proceeding or in court (as could the Attorney General) against a lender for making unconscionable loans in violation of Section 22302.[6] (Answer Br. 23-25.) CashCall's discussion of the regulator's role in enforcing the FLL's bar on unconscionable loan terms lends no support to its argument that Section 22302 does not apply to interest rates. Nothing in subparagraph (b) exempts interest rates or any other aspect of a loan from judicial or administrative scrutiny. *See People v. Guzman* (2005) 35 Cal. 4th 577, 587 ("'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes'") (quoting *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998 (citations omitted).)

In making its argument, CashCall attacks Plaintiffs' interpretation as "pure sophistry" and "illogical." (Answer Br. 22, 25.) But it is CashCall's reading of the FLL that is confused and internally inconsistent. On the one hand, CashCall argues that both Section 22302 and 22303 cover the same ground, but Section 22303 controls because it is more specific. On the other hand, CashCall argues that Section 22302 does not even apply to interest rates, which of course means the two provisions do *not* overlap. Neither understanding of the FLL is correct. There is no irreconcilable conflict between Sections 22302 and 22303 insofar as loans for $2500 or more are concerned because 22303 does not apply to such loans.

This plain reading of Sections 22302 and 22303 is buttressed by the

[6] In the Ninth Circuit, the parties briefed whether a UCL claim may be predicated on Section 22302. (Appellants' Reply Brief 20-25.) This issue is beyond the scope of the certified question.

structure of the FLL. In enacting this law, the Legislature adhered to the hierarchical scheme—division, article, section, subdivision, paragraph, and so forth—that it often uses when drafting statutes. (*Cf. N.L.R.B. v. SW General, Inc.* (2017) 137 S. Ct. 929, 938-39.) It made precise cross-references to related sections when it wanted to. *See, e.g.*, § 22308 ("Notwithstanding Section 22307"). It referred to "this article" or "this division" when intending a broad application. (*See e.g.*, § 22204 ("A consumer loan under this *section* is a loan secured in the manner provided for in this *division* . . .") (emphasis added).) Otherwise, when the Legislature wanted to refer only to a particular section or subparagraph, it said so. (*Compare* § 22102 ("This *section* does not apply to changes in the address or location of a location previously authorized or licensed under this *section*.") (emphasis added).)

Notably, Sections 22302 and 22303 follow that familiar framework. Section 22302 extends California unconscionability law to the provisions of a loan subject to "this division"—meaning, the "entire FLL." (Answer Br. 22.) By contrast, Section 22303 limits the application of "[t]his section" when addressing its application. What's more, Section 22303 is one of several sections in this division that operate as a "regulatory ceiling provision." (*See* §§ 22011, 22251.) In contrast, Section 22302 applies to *all loans* irrespective of amount. *See* § 22302.

CashCall's repeal-by-negative-inference argument disregards these cross references and ultimately gets it exactly backwards. CashCall reads Section 22303 *broadly* to authorize "any interest rate" on all loans of $2500 *or more*—even though this section only authorizes interest on loans of *less than* $2500. It then reads Section 22302 *narrowly* to exclude interest as a

potentially unconscionable loan provision—even though this section applies to provisions in loans subject to this division. These precise legislative references, however, foreclose CashCall's theory that, when it comes to loans of $2500 or more, Section 22303 is the more specific statute that overrides Section 22302.

This is confirmed by CashCall's recognition that the unconscionability law already applied to FLL loans at the time of the 1985 legislation. "In 1985, the law was well established that the doctrine of unconscionability *applied to all contracts*." (Answer Br. 23 (emphasis added), citing *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 484-485 (section 1670.5 "applies to all contracts rather than being limited to those sales transactions governed by the Commercial Code.")) "Section 22302 merely incorporates the even more general Civil Code section 1670.5, which applies to all contracts." (Answer Br. 22; *see also* 31 ("general unconscionability law already applied to loan contracts.")).

In the final analysis, the text of these laws is clear. Insofar as loans of $2500 or more are concerned, the FLL authorizes no specific interest rate but bars unconscionable interest rates. That plain reading resolves this certified question.

II. The Legislative History Establishes that the Legislature Intended the Unconscionability Law to Continue to Apply to Interest Rates on Loans of $2500 or more.

As noted above, CashCall argues that by removing fixed regulatory "rate ceilings" or "rate caps" on interest rates for loans of $2500 or more, the Legislature intended to simultaneously remove *all* regulation on interest rates. (Answer Br. 26-31.) Such an inference, however, is not only unsupported by the statutory text and statutory construction principles, but

also is directly contrary to the relevant legislative history. Even though it lowered the ceiling on fixed interest rate caps from $5000 to loans of $2500 or more, by simultaneously enacting Section 22302 the Legislature ensured that vulnerable low-income consumers would be protected against exorbitant interest rates. It clarified the previously extant plenary power of the *courts* under section 1670.5 "to police explicitly against the contracts or clauses which they find to be unconscionable,"[7] including jurisdiction to regulate loans made under the FLL. Section 22302 provided that this judicial power continued to apply to *all* "provisions of a loan contract" under the FLL, without any exception for interest rates. (Fin. Code, § 22302, subd. (a).)

This dual legislative intent—to lower the rate caps to loans less than $2500 on the one hand, and to explicitly maintain and expand the protections of unconscionability law to protect consumers, on the other—is clear, logical, and consistent with the legislative history. CashCall concedes the Legislature's dual purpose: "In other words, the bill was removing *one consumer protection*—caps on rates of $2500 and above—while keeping in place *other consumer protections*, and indeed was strengthening other consumer protections by including Section 22302." (Answer Br. 31, emphasis in original.)

CashCall nevertheless argues without support that these consumer protections were limited to "other loan terms"—not interest rates. (Answer Br. 30.) CashCall not only fails to explain what "loan terms" it means, but also fails to provide any support for its claim that the unconscionability

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[7] Legislative Committee Comments accompanying the enactment of Civ. Code, § 1670.5 in 1979.

protections did not apply to interest rates. Indeed, the legislative history proves otherwise.

A. When It Removed Interest Rate Caps on Loans Exceeding $2500, the Legislature Continued the Consumer Protections of the Unconscionability Law Intact.

The legislative history demonstrates that the Legislature intended to maintain *all* existing "consumer protections," explicitly including the court's power to adjudicate loans under the FLL pursuant to section 1670.5. As previously noted, CashCall concedes that the unconscionability law already generally applied to all contracts at the time of this legislation. (Answer Br. 23, 31.) There was no pre-existing exemption of FLL loans from Section 1670.5. S.B. 447 was enacted with the unconscionability law in place. The legislation maintained the consumer protections of Section 1670.5.

As initially introduced by Senator Vuich, S.B. 447 lowered the rate cap exemption to loans of $2500 or more. (CashCall RJN Ex. 2 (p. 64 of 90); Petitioners' RJN Ex. "A" at p. 4.) The "Analysis" section in the Senate Committee Report of April 24, 1985 recognized that the only change that the Legislature intended to make to loans above $2500 was to fixed rate interest caps: "This bill would make loans of $2500 or more made by personal property brokers and consumer finance lenders exempt *from the interest rate ceilings* of the Financial Code." (CashCall RJN Ex. 3 (p. 73 of 90) (emphasis added).) The Report did not claim that the bill exempted interest rates from the application of section 1670.5, and the bill did not contain any such exemption.

As Petitioners discussed in their opening brief, after the Senate Report and before final passage of the bill, the Legislature took affirmative steps to reaffirm and extend the protections of Section 1670.5 to loans subject to the FLL. (Opening Br. 14-15.) Before the Assembly vote, the Attorney General's Office objected to the Senate version of the bill, warning that "[c]onsumers who borrow amounts of less than $5,000 frequently must borrow to meet emergency situations, and these borrowers are least able to negotiate favorable finance charges. Moreover, *these borrowers are precisely the persons who need protection against the exorbitant rates that could be charged if S.B. 447 is enacted.*" (Petitioners' RJN Ex. "D" (emphasis added).)

In response to the Attorney General's objections, the Assembly amended the bill to include what is now Section 22302. (Petitioners' RJN Ex. "E" at p. 7.) Further, after the bill passed both the Assembly and Senate but before it was signed into law, Senator Vuich, the bill's author, confirmed the broad intent of the new provision by explaining that "[t]he unconscionability provision in the Civil Code is incorporated by reference in *both* laws *to provide a remedy for excessive charges.*" (Petitioners' Request for Judicial Notice, Ex. F, emphasis added).

CashCall first attempts to dispute the clear and strong connection between the Attorney General's letter and the language of now-Section 22302. (Answer Br. 30.) As an initial matter, the bill was amended in the Assembly to add Section 22302 a mere twelve days after the Attorney General's letter. (Petitioners' RJN Ex. "E."). CashCall cannot deny this temporal proximity so it claims that "the Legislature responded to the Attorney General's concern by tightening consumer protections on *other*

loan terms to balance the fact that the interest rates would be deregulated." (Answer Br. 30 (emphasis in original).) CashCall, however, cannot point to any language in the July 10 amendment that tightened protections solely on non-interest rate loan terms. Instead, the amendment broadly provided—without exception—that "Section 1670.5 of the Civil Code applies to *the provisions of a loan contract* that is subject to this division." (Petitioners' RJN Ex. "E" at p. 7) (emphasis added).)

Section 1670.5 generally applies to both price terms and interest rates. *(Perdue v. Crocker National Bank* (1985) 38 Cal. 3d 913, 926, *appeal dismissed* (1986) 475 U.S. 1001 (amount of non-bank sufficient fund fees was subject to section 1670.5)); *Carboni v. Arrospide* (1991) 2 Cal. App. 4th 76, 82 ("the interest rate is the 'price' of the money lent; at some point the price becomes so extreme that it is unconscionable")). That Section 1670.5 may allow courts to examine the other terms of a loan contract does not provide a basis to assume that interest rates are somehow free from judicial scrutiny.

Senator Vuich's letter confirms not only the direct connection between the Attorney General's concerns and the adoption of Section 22032—but also the Legislature's intent for the unconscionability statute to apply to all loan terms, including interest rates. Senator Vuich reported to the Governor that the unconscionability statute provides a remedy "for excessive charges" – directly reflecting the Attorney General's concerns about "exorbitant rates." Moreover, the *bill itself* defines the term "charges" to include interest. (*See* § 22200 ("Charges" include "aggregate interest") and the rate caps in Section 22203 refer to interest as "charges." (*See* § 22200 ("Every licensee who lends any sum of money may contract

for and receive *charges* at a rate not exceeding the sum of the following …") (emphasis added).)

CashCall concedes, as it must, that Senator Vuich's letter to the Governor is evidence of legislative intent.[8] (Answer Br. 28, n. 5 (noting that "[s]tatements in letters written by the author of legislation can be relevant to ascertaining legislative intent").) The letter refutes CashCall's two core contentions, that eliminating the rate ceilings exempted interest rates from the unconscionability law and that Section 22302 does not apply to interest rates.

Finally, the Enrolled Bill Report documents that the regulatory agency—then the Department of Corporations—understood that S.B. 447 only removed "rate ceilings" as a form of regulation, while leaving all other consumer protection laws intact: "The effect of lowering the interest rate ceiling is to eliminate rate regulation *as a form of regulation of loans* made under these laws." (CashCall RJN Ex. 4 (p. 76 of 90) (emphasis added).) It went on to note that "Senate Bill 447 removes only the rate regulation provision of the laws regulating lenders while preserving the consumer protection provisions of all laws." (*Id.*) "[T]he other consumer protection elements of the consumer finance lending laws remain intact …." (*Id.* (p. 77 of 90).)

CashCall admits that unconscionability law already applied to loan contracts at the time S.B. 447 was proposed. Section 1670.5 provided one of those important "consumer protection[s]" that the Legislature intended to preserve (and expand), via its explicit incorporation into Section

[8] CashCall RJN Ex. 5; Petitioners' RJN Ex. "F".

22302. Indeed, as the Legislative Counsel recognized in the final bill, "*Existing law* [that is, the law before S.B. 447] authorizes the courts to refuse enforcement of unconscionable contracts or contract provisions." (Petitioners' RJN Ex. "G" at p. 1 (emphasis added)).

The amendment adding Section 22302, therefore, confirmed the application of existing law to all loans under the FLL in subsection (a). Further, in subsection (b), section 22302 strengthened consumer protections by making a loan "found to be unconscionable pursuant to Section 1670.5" a "violation of this division and subject to the remedies specified in this division." Subsection (a) was consistent with existing law, and it was a valuable addition by explicitly confirming the Legislature's intention to continue the application of the unconscionability law, while simultaneously lowering the rate ceilings. (*E.g., Western Sec. Bank v. Superior Court* (1997) 15 Cal. 4th 232, 243 (legislation may be intended merely to clarify, and not to change, existing law)).

In summary, the fact that the Legislature chose "not to apply" fixed interest rate caps to loans of $2500 or more did not demonstrate any legislative resolve to exempt FLL interest rates from historical consumer protection under section 1670.5, or to allow regulated lenders to charge any interest rate, no matter how high, entirely free from the judicial scrutiny under law applicable to all contracts. Rather, the fact that the Legislature chose to affirmatively incorporate the protections of Section 1670.5 into the Financial Code after the Attorney General's letter—together with Senator Vuich's confirmatory remarks—demonstrates that Section 22302, and its incorporation of the unconscionability statute, were intended to protect

consumers from "exorbitant rates" and "excessive charges," including interest rates and other terms of loans of $2500 and above.

B. The Legislature Did Not Intend for the Free Market to Be the Only Check on Interest Rates.

CashCall relies heavily on its argument that "[t]he legislative history demonstrates that the Legislature's foremost objective was to allow the free market to set interest rates on loans of $2,500 or more." (Answer Br. 28-29.) CashCall notes that the Enrolled Bill Report states that "[t]he effect of this bill is that interest rates for consumer finance loans above $2,500 will be set by the market place.'" (Answer Br. 29.) As explained above, however, the Enrolled Bill Report was clear that the bill "removes *only* the rate regulation provision of the laws regulating lenders *while preserving the consumer protection provisions of all laws*." (CashCall RJN Ex. 4 (p. 76 of 90) (emphasis added).) "[T]he other consumer protection elements of the consumer finance lending laws remain intact . . . ." (*Id.* (p. 77 of 90).)

CashCall also relies on a statement by the California Financial Services Association, that it believed "that the $5,000 figure *(for the interest rate ceiling exemption)* is too high and it should be significantly lowered because flexible rates would foster competition within the industry. . . ." (Answer Br. 29 (emphasis added).) This statement, by a self-interested industry-backer of the bill, makes no mention of any exemption from the unconscionability law, either. It refers only to lowering "the interest rate ceiling exemption," which, as has been explained and the Enrolled Bill Report specifically recognizes, is fully consistent with the continued application of the unconscionability law. Further, this statement was made in April 1985—two-and-a-half months

before the Assembly amendment of the bill in July to add new Section 22302.

Finally, CashCall references a letter published in the Assembly Journal nine years *after* Section 22302 was passed, when the unconscionability section (§ 22450.5) was renumbered section 22302, and the rate ceiling provision (§ 24451) was renumbered section 22303. (Stats. 1994, ch. 1115, § 1.) This kind of "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC* (2011) 562 U.S. 223, 242. In any event, CashCall fails to show that the letter of Assembly member Caldera (who was not even in the Legislature when the original bill was enacted) expressed anything other than his own personal opinion. (*Cal. Teachers Ass'n v. San Diego Cmty. Coll. Dist.* (1981) 28 Cal. 3d 692, 700.)

The 1994 consolidation legislation did not change the statutory language of these sections, and they have not been amended since. Thus, sections 22302 and 22303 have not been amended since their original enactment, notwithstanding the 1994 consolidation legislation. (Gov't. Code, § 9605 (statutes that are reenacted without change "are to be considered as having been the law from the time when they were enacted").)

In sum, the legislative history of S.B. 447 supports a plain reading of Sections 22302 and 22303. S.B. 447 exempted loans of $2500 or more only from fixed regulatory interest "rate ceilings." It did not authorize lenders to charge unconscionable interest rates, or to impose any other loan terms free of judicial scrutiny under Civil Code section 1670.5.

III. CashCall's "Consequences" Arguments Must be Addressed to The Legislature, Not to this Court.

CashCall argues at length that the Court should consider the policy "consequences" of a ruling that applies Section 22302 to interest rates on loans of $2500 or more. But this Court has said time and again that it has no "license to redraft the statutes to strike a compromise that the Legislature did not reach." (*State Dep't of Pub Health,* 60 Cal. 4th at 956.) Where, as here, the statutory language and legislative history support an interpretation of the law, "it is not necessary to discuss any public policy considerations." *(Goodman v. Lozano* (2010) 47 Cal. 4th 1327, 1338 n.4.).

In any event, CashCall's policy arguments are unsupported and serve as mere scare tactics. For instance, CashCall contends that applying the unconscionability law to interest rates would "interfere with the free market," and "ad hoc judicial unconscionability determinations would be anything but uniform, and would render market forces irrelevant . . . ." (Answer Br. 35-36). But "free market transactions" are already subject to unconscionability law. *(E.g., Perdue,* 38 Cal. 3d at 926 (applying unconscionability doctrine to pricing, holding non-bank sufficient fund fees subject to section 1670.5); *Carboni v. Arrospide,* 2 Cal. App. 4th at 82 (a loan interest rate is a "price" subject to the unconscionability analysis).) And that was the case before the Legislature enacted Section 22302.

CashCall also predicts that if this Court determines that courts are authorized to determine the unconscionability of its $2,600 loan product, borrowers will be denied access to credit. (Answer Br. 34-36.) It goes so far as to assert that allowing courts to apply the unconscionability law to

interest rates will bring "an end to lending to subprime borrowers." (*Id.* 35). CashCall offers no factual support for these broad assertions.

Although Plaintiffs pointed out that in states such as New Mexico, Delaware, and Wisconsin courts have determined that interest rates on loans may be unconscionable, *see* Opening Br. at 11, CashCall nowhere argues that the parade of horribles it envisions for California has materialized in these other states. In fact, the New Mexico Supreme Court held in 2014 that charges such as interest could be deemed unconscionable in violation of the laws of New Mexico, including its Unfair Practice Act, and courts could fashion appropriate equitable remedies. (*State ex rel. King v. B & B Inv. Grp., Inc.* (2014) 329 P.3d 658, 674.) CashCall can point to no negative impact in New Mexico from this ruling, and there is no reason to think the situation would be otherwise in California, were this Court to similarly interpret the FLL.

CashCall's discussion of *B&B* is beside the point. It should hardly matter that in *B&B* the action was brought by the Attorney General, when CashCall's point is that courts are ill-equipped to decide that particular interest rates are unconscionable. Obviously not, given that the New Mexico Supreme Court recognized that courts can so rule and award appropriate relief. CashCall's other bases for distinguishing *B&B*—that there was affirmative deception in that case and a high interest rate to evade statutory limitations—also fail. Whether CashCall's loans are unconscionable is not the issue before this Court. In any event, CashCall is seeking to evade what it (wrongly) believes is the only interest rate regulation—section 22303. For the reasons discussed above, however,

CashCall's loan provisions, including the interest rate, can be unconscionable in violation of section 22302 and section 1670.5.

IV. The Ninth Circuit Has Jurisdiction Over CashCall's "Economic Policymaking" Arguments, Which Are Wholly Without Merit.

CashCall's "economic policymaking" arguments are beyond the scope of the state law certification to this Court. The only issue referred to and certified by this Court is the statutory construction of Sections 22302 and 22303. CashCall's "economic policymaking" arguments were fully briefed to the Ninth Circuit. (*See* Appellants' Opening Brief at 17-42; Appellants' Reply Brief at 4-24.) These arguments have been submitted to the Ninth Circuit, and this Court should not intrude on the continuing jurisdiction of the federal courts to decide them.

In enacting Section 22302, the Legislature confirmed that "Section 1670.5 of the Civil Code applies to the provisions of a loan contract that is subject to this division." (Fin. Code, § 22302, subd. (a).) Section 1670.5 assigns exclusive jurisdiction for making unconscionability determinations to the courts. In *Harris v. Capital Growth Inv.* (1991) 52 Cal. 3d 1142, the Court held that it would not engage in "complex economic regulation" "in the absence of clear legislative direction ..." in the statutory scheme. (52 Cal.3d. at 1168.) *Harris* considered and construed the provisions of the Unruh Act. The Unruh Act contains no legislative direction for courts to consider pricing. *Harris* is distinguishable because here there is clear legislative direction in section 22302(a) for the courts to apply Section 1670.5 to interest rates under the FLL.

Neither *Harris,* nor *Perdue,* nor any of the other cases CashCall cites holds that the 1985 Legislature lacked the power it so clearly exercised

here—authorizing the courts to apply the unconscionability law to interest rates. Petitioners analyzed and distinguished each of CashCall's cases before the Ninth Circuit. (*See* Appellants' Opening Brief at 24-27; Appellants' Reply Brief at 3-10.) These issues can be resolved by the Ninth Circuit on remand.

CONCLUSION

For the reasons stated above, and in Petitioners' opening brief, Petitioners respectfully request that the Court hold that the interest rate on consumer loans of $2,500 or more may render the loans unconscionable under Section 22302.

Dated: November 30, 2017

Respectfully submitted,

By: ______________________

STEVEN M. TINDALL (SBN 187862)
smt@classlawgroup.com
GIBBS LAW GROUP LLP
ANDRE M. MURA (SBN 298541)
amm@classlawgroup.com
505 14th Street, Suite 1110
Oakland, CA 94612
Telephone: (510)350-9700
Facsimile: (510) 350-9701

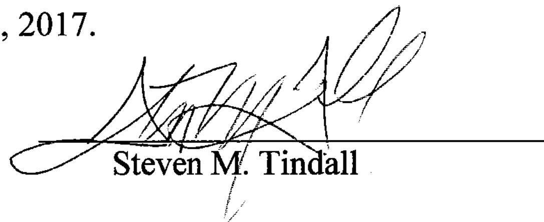
Attorneys for Plaintiffs/ Petitioners

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains **6,836** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on November 30, 2017.



Steven M. Tindall

PROOF OF SERVICE

I am employed in the county of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is: 505 14th Street, Suite 1110, Oakland, California 94612.

On November 30, 2017, I served a copy of the foregoing documents described as follows:

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Clerk Court of Appeals for the Ninth Circuit 95 7th Street San Francisco, CA 94103	Clerk USDC, N.D. of California 450 Golden Gate Avenue San Francisco, CA 94102
Jessica Riggin RUKIN HYLAND LLP 1939 Harrison St., Ste. 290 Oakland, CA 94612	Damon M. Connolly Law Offices of Damon M. Connolly 1000 4th Street, #600 San Rafael, CA 94901
Arthur D. Levy Law Office of Arthur D. Levy 1814 Franklin Street, Ste. 1040 Oakland, CA 94612	Beth E. Terrell Terrell Marshall Law Group LLC 936 North 34th Street, Ste. 300 Seattle, WA 98103
Brad W. Seiling Donald S. Brown Manatt, Phelps & Phillips, LLP 11355 West Olympic Blvd. Los Angeles, CA 90064	Center for Responsible Lending 1970 Broadway, Ste. 350 Oakland, CA 94612
Ted Mermin 3130 Shattuck Ave. Berkeley, CA 94705	Michael J. Quirk Williams Cuker Berezofsky, LLC 1515 Market Street, Suite 1300 Philadelphia, PA 19102
James C. Sturdevant The Sturdevant Law Firm 4040 Civic Center Dr., Ste. 200 San Rafael, CA 94903	

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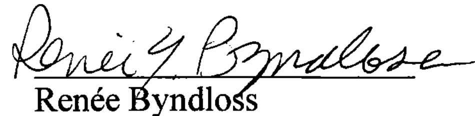

Renée Byndloss