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SUPREME COURT
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S232322

IN THE
SUPREME COURT OF CALIFORNIA

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SAMUEL HECKART,
Individually and on behalf of a Class of all those similarly situated,

Plaintiff and Appellant,

v.

A-1 SELF STORAGE, INC., *et al*

Defendants and Respondents,

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AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D066831

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APPELLANT'S REPLY BRIEF ON THE MERITS

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Service on the Office of the Attorney General and the District Attorney of the County of San Diego pursuant to Bus. & Prof. Code § 17209

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I. INTRODUCTION

In insurance cases, this Court "begin[s] with the plain language of the [Insurance Code] . . . because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) Respondents, however, avoid the Code's language until the back halves of their respective arguments. There is a reason for that.

II. THE CODE

Respondents' have no answer for the statutory analysis in Appellant's Opening Brief ("OBOM"). Specifically, Respondents have no answer for Article 16.3's pivotal "authorized insurer" limitation. (OBOM, 14-17.) And it is a limitation, not a mere invitation; the Legislature did not prohibit unregulated storage facilities from selling "authorized," "incidental" Section 1758.75 contracts only to allow them to sell *and carry* "unauthorized," "incidental" Section 1758.75 contracts. This is also why Respondents can offer no alternative legislative intent for the plain meaning of Section 1758.74(b), which prohibits "any person" from "sell[ing] insurance in connection with, or incidental to, self-storage storage rental agreements." (*Id.*, 11-12.) Respondents offer no possible alternative intent for Section 1758.74(b) because none exists. "Any person" means "any person," including A-1. (*California Fed. Sav. & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 ["We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used."])

In fact, Deans & Homer has only further demonstrated Appellant's point in this regard. Deans & Homer points out that where the Legislature intended to exempt from regulation goods or services providers offering

incidental "insurance" contracts that are otherwise regulated by the Code, *the Legislature expressly provided those exemptions in the Code itself.* (*See* Answer Brief on the Merits by Deans & Homer [hereinafter "DHAB"], pp. 40-41.) There is no such exemption for self-storage facilities in Article 16.3 because no such exemption was intended. (*California Fed. Sav. & Loan Assn.,* 11 Cal.4th at 349 ["We must assume that the Legislature knew how to create an exception if it wished to do so...."].) And of course the Legislature did not intend to regulate storage facilities selling "authorized" renters' insurance, while simultaneously intending *not* to regulate storage facilities who are selling and "writing" the very same renters' insurance. (OBOM, 14-17; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113 [The Court should not interpret a statute in a manner that would "result in absurd consequences which the Legislature did not intend."].)

Moreover, Respondents cannot dispute that—by the Code's plain terms—Section 22 is merely a legislative *tool* of overall Code construction, not some overbroad *standard* for regulation that requires universal revision throughout the whole Code. (§ 5; OBOM, pp. 17-23.) Indeed, the Code's plain text does not even purport to regulate contracts that merely satisfy Section 22, but instead, the Code regulates particularized insurance "*classes*," each of which is so specifically defined that it constitutes "a proper subject of insurance." (*Id.*; §120; *see also* §§ 24-25 [regulating "insurance *business*," not mere "insurance"]; §§ 680, 700(a) [defining "The Business of Insurance" according to the Code's "class" definitions]; §§ 100-124.5 [providing narrow class definitions]; (*Clean Air Constituency v. California State Air Resources Board* (1974) 11 Cal.3d 801, 814 [explaining that a statute must be read "with reference to the entire scheme

of law of which it is part so that the whole may be harmonized and retain effectiveness."].)[1]

Respondents do not and cannot dispute that their storage renters' Protection Plans satisfy several specific definitions of regulated classes of insurance in California. (OBOM, pp. 19-23 & n.11.) And there are only two times ever when this Court or a California Court of Appeal faced potential "insurance" contracts that satisfied specific "class" definitions under the Code. Both times, the principal object test was deemed inapplicable in light of the Code's express terms. (OBOM, pp. 39-42 [reviewing *Sweatman v. Dept. of Veterans Affairs* (2001) 25 Cal.4th 62 and *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466]; *see also Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 683 ["In interpreting this statute, our goal is to determine the intent of the Legislature and thereby effectuate the purpose of the law."].)

Because Respondents have no substantive statutory arguments to offer, they rest on their *ipse dixit* that the Legislature meant to prohibit the *sale* of Section 1758.75 contracts, but at the same time, intended to permit the writing, carrying *and* sale of Section 1758.75 contracts by unregulated self-storage facilities. Not only does this make zero sense, frustrate the purposes of Article 16.3, and contradict the plain language of Section 1758.74(b) (among other provisions), it also turns the entire Code upside down by allowing the question of "insurance" to turn *solely* on the identity of the "insurer." (OBOM, pp. 15-17.)

Perhaps recognizing their own dead end in Article 16.3, Respondents now contend—for the first time ever—that their Protection Plans do not

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[1] References to § __ or §§__ - __ in this Brief refer to Sections of the California Insurance Code.

even satisfy Section 22's general definition of insurance. (*See* A-1 Respondents' Answer Brief on the Merits [hereinafter "A-1 Brief"], pp. 10-15.) Each of Respondents' statutory arguments is nonsensical, implausible or verifiably false.

A. Respondents are abandoning settled Section 22 law.

Respondents argue that their Protection Plans do not satisfy Section 22's general definition of "insurance." (A-1 Brief at 11-15.) Section 22 "insurance" merely consists of: "(1) a risk of loss to which one party is subject, and a shifting of *that* risk of loss to another party; and (2) distribution of risk among similarly situated persons." (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 654; *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 725-26.)

Without a doubt, both elements are satisfied here.[2]

1. *This is Section 22 risk-shifting in its purest form.*

There is only one relevant risk here, the narrow risk specifically defined in Article 16.3: "the loss of, or damage to, [storage renters'] tangible personal property in storage or in transit during the rental period." (§ 1758.75) Who bears *that* risk? Obviously: storage renters, the people who own the "tangible personal property" in question. That risk is assigned to storage renters not by their lease agreements, but by economic reality, by the very nature of what it means to own personal property.

If Betsy Bowler stores one of her bowling bags in a storage unit, and the bag gets lost, stolen or destroyed (for whatever reason), who has suffered "loss" or "damage" within the meaning of Section 22 and Section

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[2] Emphasis is added and internal quotations omitted herein unless otherwise stated.

1758.75? Betsy Bowler: not A-1. What *caused* Betsy to suffer her loss? Was it the *terms* of her real property lease, those purported "risk allocation" provisions therein? No. Betsy and only Betsy suffered a loss because she alone was the owner of that beautiful bowling bag. Learned judges (and most school children) have understood this basic economic concept for more than a century.

> It is faulty logic to say that this is not a loss, damage, or liability of the contract holder, premising that he does not incur it, and concluding that it is the liability of the Defense Company. The loss, damage, or liability follows the suit for malpractice; and, *were it not for the contract of the Defense Company, the holder must bear it. Whose loss, damage, or liability would it then be? That of the person sued, of course.* It is this very burden which the Defense Company agrees to bear in case the contingency of the holder being sued happens, and this is insuring the holder against the risk dependent upon the contingency.

Physicians' Defense Co. v. Cooper (9th Cir. 1912) 199 F. 576, 580-81.

A-1 Respondents have served up the same "faulty logic" throughout this action, and unfortunately, the Court of Appeal bit their bad apple. (*See, e.g.,* Opinion at 10 ["*The Rental Agreement* allocated the risk of property damage and loss to the tenant."]; *ibid.* at 1 ["In this case, we conclude an addendum to a storage unit rental agreement, which modified the *agreement's* allocation of liability for damage or loss to stored property, was not "insurance" . . . .].) The truth is that A-1's standard lease agreement "allocated" no personal property risks at all to Betsy Bowler or any other storage renter. A-1's storage renters *naturally* bear the risk of "loss of, or damage to, tangible personal property" because it is their property, not A-1's. A-1 has no contractual right to even *use* customers' stored property, much less an ownership or other economic interest in stored property. (*But see Truta v. Avis Rent A Car Sys., Inc.* (1987) 193

Cal.App.3d 802 [the alleged insurer agreed to take its own, direct economic loss—not assume mass financial liabilities—because the alleged insurer *owned* the allegedly insured property]); *Automotive Funding Grp., Inc. v. Garamendi* (2003) 114 Cal.App.4th 846, 856-57 [alleged insurer only agreed to take a direct economic loss—a write-down of its own financial assets—not assume mass financial liabilities, because the alleged insurer had *a security interest* in the allegedly insured property].)

Quite the opposite of the alleged insurers in *Truta* and *Automotive Funding Grp.*—but exactly like the stipulated insurer in *Wayne*—A-1 (the alleged insurer here) is converting a host of consumers' risks of *personal economic loss* into A-1's own risks of mass *financial liabilities* (typical insurance), rather than converting a host of *consumers'* risks of financial liabilities into *A-1's* risk of personal economic loss (not how insurance typically works). If too many risks materialize in the latter circumstance, then only the protection seller gets hurt. But that is what the protection seller was paid to do: potentially get hurt all by itself. If too many risks materialize in the former circumstance, then potentially *all* parties—including the protection buyers—get hurt. That is not what protection buyers pay for.

Not all "indemnities" are created equal. (§ 22; § 120 [providing that not all indemnity is "a proper subject of insurance"].) Respondents' Protection Plans exhibit Section 22 risk-shifting in its purest form.[3]

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[3] A-1's contention that its own litigation risk can somehow be lumped in with its renters' risks of direct property loss, and then viewed both legally and economically as one big "shared risk" between the parties, is frivolous. (A-1 Brief at 11-13.) That is like saying that airline passengers "share" their personal risks of *loss of life* with an airline every time they get on a plane. That is like saying that stockbrokers "share in" their clients'

2. *A-1's new concept of "economic viability" has nothing to do with whether risk is actually being distributed.*

Respondents also argue—for the first time ever—that "distribution of risk among similarly situated persons" is insufficient to satisfy Section 22's distribution element. (A-1 Brief at 13-15; *But see Metropolitan Life Ins.*, 32 Cal.3d at 654; *Title Ins. Co.*, 4 Cal.4th at 725-26; *Hertz Corp. v. Home Ins. Co.* (1993) 14 Cal.App.4th 1071, 1077 ["Ordinarily, where there is a risk of loss to which one party is subject based on contingent or future events and a contract which shifts that risk to another, together with a distribution of the risks among similarly situated persons, the contract is one of insurance."].) They say that because their Protection Plans "confer an economic benefit on A-1, no matter how many customers elect it," the Protections Plans do not distribute risk in the "insurance" sense. (A-1 Brief at 13-15.) In other words, A-1 Respondents want the Section 22 "risk distribution" focus to be entirely on A-1, rather than on A-1's customers.

The Code, however, concerns itself with "protect[ing] the insured, or

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(Footnote Continued)

personal risks of investment losses, just because the broker might be sued if he gives bad advice. Such "shared risk" is pure fiction, and it isn't a legal one.

Respondents' "shared risk" invention could have applied with substantially greater force to the "home protection plans" in *Sweatman*. There, if veterans became disabled, they would lose wages when their disabilities rendered them unable to work; in turn, the VA could lose *direct cash flow* when veterans' lost wages rendered them unable to pay the VA for their homes. (*Sweatman*, 25 Cal.4th at 64.) But this Court did not view the VA's disability coverage as allocating some nonsensical "shared risk" between veterans and the VA. Instead, this Court rightly found that "the [tangential] disability coverage at issue [satisfied] the broad definition of insurance" under Section 22. (*Id.* at 73.). A-1 and its renters have no shared risk in any legally cognizable sense.

the public, from the insurer." (*California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 810.) Section 22's distribution element focuses not on what the alleged insurer could have theoretically done, but on what the alleged insurer has actually done: specifically, whether there are similarly situated persons *amongst whom* the relevant risks have been distributed. There is either Section 22 risk distribution as a factual matter or there is not. It is a "yes" or "no" question, not a "what if."

The facts are that A-1 collects monthly payments from many thousands of consumers, and in exchange, assumes a host of contingent cash liabilities to those consumers when Code-specific risks materialize. This is a distribution of risk in California, and Section 22 is not only satisfied, but epitomized.[4]

B. Article 16.3 cannot be dismissed as divorced from Section 22 and the rest of the Code.

"We do not construe statutes in isolation, but rather read 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.'" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) Respondents are not merely asking the Court to construe Article 16.3 in isolation. They are also asking the Court—like the Court of Appeal—to construe the singular word "insurance" in isolation, and then revise its meaning throughout the entire

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[4] Contrary to A-1's clever argument, an insurer who writes only one or two high-value policies for an unwitting buyer would not be a "gambler." (A-1 Brief at 14.) Gamblers actually give up their money *before* the gambled-on risk occurs. "Insurers" merely promise to give up their money, and then *after* the insured-against risk occurs, they hire attorneys to avoid giving up their money. That is called gamesmanship, not "gambling," and the Insurance Code properly deals with it.

Code. (*But see* § 5 ["Unless the context otherwise requires, the general provisions hereinafter set forth shall govern the construction [not the applicability] of this code."].); § 37.)

(["Provisions of this code relating to a particular class of insurance or a particular type of insurer prevail over provisions relating to insurance in general or insurers in general."]) Even assuming that the principal object test is a standalone, dispositive test for limiting Section 22 (it never was), California courts cannot properly use it to hold that specific "insurance" provisions are not satisfied because the *judicially revised* general definition of "insurance" is not satisfied. Doing so runs afoul Section 5 and Section 37.

Respondents' statutory problems only multiply from there.

1. *Article 16.3 directly addresses self-storage leases, as well as what can and cannot be done "incidental to" and "in connection with" self-storage leases.*

A-1 argues through a heading in their Brief that "Article 16.3 does not address self-storage leases." (A-1 Brief at 38; *see also* Deans & Homer Brief at 32 ["[T]he Article does not define 'insurance' in the context of self-storage transactions."].) That is simply untrue, as the Code addresses self-storage "rental agreements" no less than fourteen times. (*See generally* § 1758.7 *et seq.*) Article 16.3 not only "addresses" self-storage leases, it expressly defines them. (§ 1758.791(d).) It further mandates that: "if a [storage] renter elects to purchase the [incidental] coverage, *evidence of coverage is stated on the face of the rental agreement* or is provided to the renter." (§ 1758.76(c).) Article 16.3 further contemplates that "the charges for [storage] insurance coverage [may be] *itemized and incorporated as part of the rental agreement.*" (§1758.77.) Of course Article 16.3 "addresses" self-storage leases, as every storage renters' insurance contract

is connected to and dependent upon the existence of a storage lease.

2. *Article 16.3 means what it says.*

Respondents' entire statutory argument rests on the false premise that Article 16.3 "is not concerned with what constitutes [regulated] insurance." (A-1 Brief, p. 38.) A-1 says that Article 16.3 was enacted *only* to "create a limited class of insurance *agents*." (*Id.* at 39.) That argument is belied by the text of Article 16.3. By its terms, Article 16.3 clearly and specifically defines a "type of insurance" contract that exists and may be offered "incidental to" and "in connection with" self-storage leases. (§ 1758.75; *see also* § 1758.7(b); § 1758.71(a)(2); §1758.72(a)(1).) Equally telling, Article 16.3 repeatedly provides that there are "insurer[s] *authorized to write those types of insurance policies* in this state." (§ 1758.7(b); *see also* §§ 1758.76(d), 1758.791(e).) There is a reason for this. The Code's definition of an insurance "agent"—like the Code's definition of an "insurer"—depends entirely on the existence of an "insurance" contract in the first place. (*See* § 1621 ["An insurance agent is a person who transacts *insurance* . . . ."].) That is why Article 16.3 specifically and narrowly defines a "type of insurance" under the Code that newly licensed storage agents may sell. (§§ 1758.7(a)-(b); 1758.75.) There can be no limited "agent" of an insurer unless there is first an "insurance" contract; the insurer exists because the insurance exists, not the other way around. (§§ 22; 23; 150; 1621.)

Deans & Homer similarly paints Article 16.3's legislative history as aimed at "a situation [the Legislature] viewed as a violation of the Insurance Code—self-storage companies acting as agents for insurers." (DHAB, p. 31.) (*But see* CT at 135, *California Bill Analysis A.B. 2520, Senate Committee on Insurance,* June 16, 2004 ["This bill . . . *Would create a new limited line of insurance category* to regulate the offering for sale of

insurance by self-service storage facilities in California."].) Even assuming, *arguendo*, that the Legislature was primarily concerned with facilities acting as *de facto* "agents" for third party insurers, this does not mean that the Legislature's solution to that problem was to cut those pesky "authorized insurers" completely out of the transaction and allow the same exact transaction to continue unabated. Instead, Article 16.3's text repeatedly demonstrates the Legislature's intent to keep "authorized insurers" both behind and at the forefront of every storage insurance transaction. (*E.g.*, § 1758.7; § 1758.71 [requiring an "authorized insurer" to vouch for the storage facility as "trustworthy and competent"]; § 1758.75; § 1758.78(b) [prohibiting storage facilities from holding themselves out as "authorized insurers"]; § 1758.791(e) [providing that there are insurers "authorized to write the types of insurance specified in Section 1758.75 in this state"; § 1758.76(d) [same].)

That is also why Article 16.3 unambiguously prohibits "any person" from "sell[ing] insurance incidental to, or in connection with, self-service storage rental agreements." (§ 1758.74(b).) Respondents, however, are arguing that it is *legally impossible* for storage facilities to write or carry storage renters' "insurance incidental to, or in connection with, self-service storage rental agreements" in California. (*Id.*) If the Legislature actually believed this was legally impossible (it clearly did not), then it could have and should have said so. In fact, when the Legislature wanted to say so, it said so expressly. (*See* DHAB, pp. 40-41.)[5]

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[5] There would have been no reason for the Legislature to provide such express exemptions for "incidental" (i.e., goods or service-providing) insurers *anywhere* in the Code if the Legislature believed what Respondents purport to believe: that the principal object test exempts from regulation—in every instance—*all* "incidental" insurers writing and carrying standard

3. *A-1 misses Appellant's point about the Code's "class" structure.*

A-1 Respondents say that the Code's "purpose of dividing insurance into classes is not to define what contracts constitute insurance in the first place." (A-1 Brief at 41.) Appellant is not arguing that the Code's class definitions "define what is insurance." Appellant is arguing—and the Code's plain text demonstrates—that the Code's class definitions (not Section 22) delineate what is *regulated* "insurance." (*See* OBOM, pp. 17-23.)

There is the meaning of the *word* "insurance," as *used* throughout the Code; this is provided in Section 22. (§ 22.) And then there is the *business* of "insurance," which is *regulated* by the Code; this is provided elsewhere in the Code. This Court recognized the distinction back in 1946 when it first articulated the principal object test (really, the principal object inquiry)[6], but the Legislature *provided* that very distinction in the Code's text back in 1935. (*See* §§ 24, 25 [regulating "insurance *business*" rather than mere "insurance"]; Ins. Code Division 1, Part 2 [titled "The Business of Insurance"]; §§ 680, 700(a) [regulating "The Business of Insurance" only in terms of specific "class[es]" of insurance]; §§ 100-124.5 [defining those specific classes].)

(Footnote Continued)

form, regulated insurance policies. The Legislature did not believe that because no California court ever said that before this case. (*See generally* OBOM, pp. 28-42.)

[6] (*Jellins v. Transportation Guarantee Co.* (1946) 29 Cal.2d 242, 248 ["We are satisfied that a sound jurisprudence does not suggest the extension . . . of the insurance laws to govern every contract involving an assumption of risk or indemnification of loss."].)

In 1935, the Code's very first provision for regulating "The Business of Insurance" in Division 1, Part 2, was that "[a]n insurer shall not transact any *class* of insurance which is not authorized by its charter." (§ 680.) A few sections later, within a series of sections titled "Certificate of Authority," the Legislature said: "A person shall not transact any *class* of insurance business in this state without first being admitted for that *class*." (§ 700(a).) Nowhere in the Code's text did it purport to prohibit anyone from transacting mere Section 22 "insurance" without the State's blessing. (*Id.*; *accord* § 24 ["'Admitted,' in relation to a person, means entitled to transact insurance *business* in this state, having complied with the laws imposing conditions precedent to transaction of such *business*."]; § 25 ["'Nonadmitted,' in relation to a person, means not entitled to transact insurance *business* in this State, whether by reason of failure to comply with conditions precedent thereto, or by reason of inability to so comply."].) Accordingly, the word "insurance" from Section 22 does not require judicial correction throughout the whole Code because, according to the Code's plain text, Section 22 alone was never intended to trigger statutory regulation. (*Cf. Henning v. Div. of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 760 ["[L]egislation never is . . . read in isolation or applied in a vacuum. Every new act takes its place as a component of an extensive and elaborate system of written laws."])

A-1 further argues that the Code's class definitions "would be fatally circular if [they] purported to define what is insurance." (A-1 Brief 41.) Contrary to A-1's bare assertion, there is nothing "fatally circular" about the Code's class definitions. A-1 uses Section 102 "Fire insurance" as its example, which includes: "Insurance against loss by fire, lightning, windstorm, tornado, or earthquake." (§ 102(a).) Under the Code, then, "Fire insurance" includes "[a contract whereby one undertakes to indemnify

another against] loss by fire, lightning, windstorm, tornado, or earthquake." (§§ 22, 102(a).) Section 102's definition of regulated fire insurance is not "fatally circular," nor does it threaten to "engulf practically all contracts." (*Jellins,* 29 Cal.2d at 249.) The same goes for every other class definition that consistently reuses the word "insurance," but is expressly narrowed by its other terms. (OBOM, pp. 17-23.)

Lastly with respect to the Code's class definitions, A-1 Respondents contend that because the catch-all class of "Miscellaneous insurance" exists, "the Insurance Code's class definitions do nothing to limit which contracts are subject to regulation as insurance." (A-1 Brief, p. 42.) Not true. If a given contract satisfies only Section 22 (not a particularized class definition), then courts or regulators must still find that the contract is "a proper subject of insurance" *in addition to* satisfying Section 22. (§ 120.) That clause has meaning, and it means much more than satisfying Section 22. Sometimes it may mean that the "principal object" of the Section 22 contract is indemnity; therefore, the contract should be regulated. Sometimes it may mean that the contract is directly and specifically defined as a "type of insurance" elsewhere in the Code; thus, the contract probably *is* regulated. Sometimes it may mean that an "unadmitted" person—in exchange for money—is converting a host of individuals' potential *direct losses* into one big mass of contingent *cash liabilities*. Whatever "a proper subject of insurance" may mean in any given context, it means something very substantial in every conceivable context.

4. *There is nothing circular about Appellant's "evils" argument.*

A-1 asserts that "[Appellant's] 'evils' arguments are largely circular." (A-1 Brief at 44.) No, they are not. A-1 is skirting the point of the first "evils" argument in Appellant's Opening Brief. (OBOM, pp. 23-

25.)

The point is that Section 1758.75 defines storage renters' "insurance" as a "typ[e] of insurance" in the State of California. (§ 1758.75.) Furthermore, Article 16.3 repeatedly provides that there are "insurer[s] authorized to *write* the types of insurance specified in Section 1758.75 in this state." (§§ 1758.791(e), 1758.76(d).) Those authorized insurers exist because their contracts are regulated as "insurance" in the first place; the "insurance" contracts do not exist because of who the *insurers* are. (*See generally* §§ 100-120 [limiting "insurance" regulation to particular risks, particular types of insured property, particular types of insured parties, but *never* limiting regulation to particular types of *insurers*]; *see also* § 150 ["Any person capable of making a contract may be an insurer, subject to the restrictions imposed by this code."]; § 23 ["The person who undertakes to indemnify another *by insurance* is the insurer, and the person indemnified is the insured."]; § 22 ["Insurance is a contract where by *one* undertakes to indemnify *another* against loss, damage, or liability arising from a contingent or unknown event."])

Article 16.3 presumes and expressly provides that every Section 1758.75 contract must be written by "an authorized insurer." (*See generally* §§ 1758.7, *et seq.*) It follows that the Legislature intended the writer or carrier of Section 1758.75 contracts to meet the qualifications for "authorized insurers" in California. And what are those qualifications? Basically, everything A-1 is not: confirmed by the DOI as financially stable, well-capitalized, having competent management with integrity, having proper shareholders, having honest and fair business methods, paying claims promptly and fairly, and lacking in hazards to "policy holders or creditors." (*See* § 717.) A-1's complete lack of demonstrated trust, competence and financial fortitude as a seller *and* carrier of renters'

insurance in California is an "evil[] at which the regulatory statutes were aimed." (*Truta*, 193 Cal.App.3d at 812-13.)[7]

A-1 retorts that there is no need to peek at its finances because lots of non-insurance companies "assume long-term obligations the performance of which depends on continued solvency." (A-1 Brief, p. 44.) Yes, and the reason why those companies are not regulated is that they are (probably) not writing expressly regulated "insurance" contracts throughout California. And while most consumer-facing businesses could theoretically suffer "large and uncapped potential liability" if their products or services happen to kill or damage all of their customers, such businesses cannot "cap" their widespread (entirely theoretical) liability by pushing abusive, standard form insurance policies on all of their customers. (A-1 Brief, p. 45.) Instead, non-insurance businesses with liability concerns can use disclaimers of liability, buy their own liability insurance, and/or use arbitration clauses with impenetrable class action waivers. (*Cf. DIRECTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

Writing abusive insurance policies is not the answer.

5. *Respondents' Reinsurance Agreement is an additional evil at which the Code is aimed.*

Code Section 803(a) provides:

> No admitted insurer shall assume or reinsure the liabilities of a nonadmitted insurer upon subject matter located in this state for the purpose of circumventing the rate and form provisions of this code . . . .

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[7] A-1 does not address the remainder of Appellant's "evils" arguments in his Opening Brief, all of which are relevant here. (*See* OBOM, pp. 25-26.)

Respondents' "Protection Plan" and reinsurance scheme presents precisely the evil at which Section 803(a) is aimed. Deans & Homer insurance agents gave plain-vanilla storage insurance policies—just like the ones that Deans & Homer offers to its own customers—to "nonadmitted" A-1 *precisely* so that A-1 could auto-enroll its customers in those policies at higher prices and with less coverage than what regulation would permit. (CT at 205-207 [First Amended Complaint at ¶¶22-31]; *see also* CT at 377-378 [Deans & Homer calculating the financial differences between "Protection Plans" and the same policies if regulated].) Deans & Homer then personally profited from this scheme by entering into its own insurance contract with A-1 to pay A-1 (not renters) for its potential Protection Plan liabilities to renters. (*Id.*)

How does Deans & Homer's conduct *not* offend the spirit—as well as the letter—of Section 803(a)? Is this Court going to hold that Section 803(a) itself can be "circumvented," so long as an admitted insurer solicits *the right kind* of "nonadmitted insurer" with which to "circumven[t] the rate and form provisions of [the] code?" (§ 803(a).) Because that is exactly what the Court will be holding if it decides this case in Respondents' favor.[8]

III. THE CONTRACTS

A. No one is arguing that self-storage leases should be regulated by the Code.

The broken record most frequently spun throughout A-1

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[8] This Court need not interpret the insurance codes or fact-specific jurisprudence of 49 other States to decide whether unregulated self-storage facilities can write and carry storage renters' insurance in California. The law of California is clear and on point.

Respondents' briefing is that Appellant wants to regulate self-storage leases as "insurance." (*E.g.,* A-1 Brief, p. 2 ["[T]he Legislature has never acted to regulate leases . . . ."]; *ibid.* at 4 ["Heckart's main argument is that Article 16.3 . . . explicitly subjects the lease to regulation as insurance."]; *ibid.* at 34 ["[T]he Legislature has not acted to regulate the lease provisions at issue here . . . ."].) Deans & Homer similarly argues that its Protection Plans are "inextricably intertwined" with A-1's storage leases. (DHAB, pp. 5-6.)

Here, Respondents can "untwine" their illegal insurance contract from their otherwise lawful storage lease simply: (1) deleting paragraph 19 from the storage lease; (2) physically removing the staple that fastens the lease agreement to the Protection Plan; (3) throwing the Protection Plan into a recycling bin; (4) stapling the three pages of the lease agreement back together; and (5) resuming storage rental operations. (*See* CT at 258-262.) This same five-step process will solve Respondents' other feigned problems as well.

B. A-1 is actually creating its own litigation risk by writing renters' insurance.

A-1 Respondents' other main contention is that their Protection Plans are actually settlement agreements that somehow prevent costly litigation. (*E.g.,* A-1 Brief at 2-3, 27; *ibid.* at 13 ["As with any settlement, each party accepts less than his or her best day in court."].) First of all, Respondents' standard lease agreements already contain unqualified disclaimers of A-1's liability. (CT at 259.) Second, their standard lease agreements already require A-1's tenants to prove or purchase qualifying insurance. (*Id.*) Consequently, under Respondents' standard lease agreements, damaged consumers have neither the right nor the incentive to sue A-1 because they have agreed to hold A-1 harmless no matter what, and are will be compensated by properly regulated insurance carriers. (CT at

259-60.)

But now that A-1 Respondents have *obligated themselves* to pay Protection Plan claims, they are actually exposed to meritorious lawsuits every single time they do what they do, which is seek to avoid paying claims to customers who lack third-party coverage. (*See* C.T. at 119-20 [A-1 emailing Deans & Homer for advice on how best to avoid paying claims].) In truth, Respondents' Protection Plans—far from mitigating litigation risk—actually *create* litigation risk where it otherwise would not exist. Respondents' litigation risk arises predominantly from their own fraudulent Protection Plans, not from their standard leases.[9]

C. Forcing consumers to choose between lawful and unlawful insurance carriers is not the "optional" business model that this Court referenced in *Sweatman*.

A-1 Respondents argue that the "optional" nature of their Protection Plans suggests that their Protection Plans are not storage renters' insurance under Article 16.3. (A-1 Brief, p. 29.) That argument is as flawed as A-1's argument that risk is not distributed because Respondents had the option *not* to distribute risk. Risk is either distributed or it isn't. An offered contract is either insurance or it isn't; how it is *offered* says little or nothing about what it *is*. In fact, common experience teaches that most regulated insurance policies in the broader marketplace are entirely "optional" for

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[9] The face of Respondents' Protection Plan addendum belies their scheme. Each Protection Plan is misleadingly subtitled as "A Limited *Retention* of Liability for Property Damage." In order to "retain" something, one must have it to begin with. (*Cf. Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 663–64, *as modified on denial of reh'g* (Aug. 31, 1995) [explaining the difference between first party property insurance policies and insurance policies based solely on liability].)

consumers, as they should be.

Nevertheless, in *Sweatman*, this Court mentioned the "optional" nature of *Truta*'s Collision Damage Waivers ("CDWs") in its effort to distinguish them from the "home protection plans" at issue in *Sweatman*. (*Sweatman*, 25 Cal.4th at 73-74.) The purpose of the Court's discussion was not to establish "optionality" as a test for all insurance contracts, but merely to distinguish *Truta* in route to interpreting statutes. (*Id.*) Nothing that *Sweatman* said suggested the "optional" nature of *Truta*'s CDWs was the main reason why the CDWs were not insurance. The Court instead stated its main distinguishing point as follows: "Nor does the Cal-Vet home protection plan involve a merely 'tangential risk allocation' as in *Truta*; it is, instead, *a [tangential] spreading of risk within insurance concepts*." (*Id.* at 74.)

And even if a lack of "optionality" was a fundamental characteristic of all regulated insurance (it isn't), Respondents' Protection Plans are not "optional" in the sense that *Truta*'s CDWs were. In *Truta*, consumers maintained the right to bear their own risks. (*Truta*, 193 Cal.App.3d at 807.) Consumers faced risks of liability if: (1) they were in a car crash; and (2) Avis decided to go after them for it. (*Id.*) Avis was merely offering its customers freedom from—not compensation for—those liability risks. Consumers therefore had the option to buy or not buy Avis's "promise[] to do nothing." (*Cf. Automotive Funding Grp., Inc.*, 114 Cal.App.4th at 856.)[10]

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[10] Clearly, a promise to do nothing is not insurance. Insurers promise to *do things* when risks materialize: typically, to compensate the insured or someone the insured owes. But insurers always promise to do *something* for *someone*. Avis—by stark contrast—promised to sit on its hands. There was no need for Avis to maintain reserves or endure "risk-based capital" assessments by the DOI to ensure that Avis would sit on its

By contrast, A-1's customers have no option to bear their own personal property risks. A-1 is instead forcing its customers to pay to shift *their* risks of direct economic loss to "an authorized insurer" or to A-1. (*But see Automotive Funding Grp.*, 114 Cal.App.4th at 856-57 ["Instead of requiring the buyer to protect *AFG's* risk of loss by shifting *that* risk to the buyer's auto insurer, AFG agrees to *retain its own risk of loss* for a fee pursuant to the LDW. Under Section 22, this arrangement cannot be insurance for the simple reason that AFG has not agreed to shift one party's risk—presumably the buyer's—to itself or anyone else."])

Offering consumers the option of illegal "Protection" as their lone alternative to an authorized insurer is not the "optional" business model that this Court mentioned in *Sweatman*. All of A-1's customers must pay to transfer their own personal risks of direct loss to someone else (who promises to pay claims in cash) for widespread distribution. That is insurance.

D. A-1 is not "standing behind the quality of its facilities."

A-1 Respondents also say that "it is appropriate and pro-consumer for A-1 to stand behind the quality of its facilities by accepting responsibility for damage." (A-1 Brief at 29.) Deans & Homer asserts the

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(Footnote Continued)

hands in the event of a rental car collision. If, in some cataclysmic fiscal year for Avis, every car renter bought the CDW and crashed their rental cars, Avis might very well go out of business. But for "insurance" purposes, that is no problem. The protection *buyers* got what they paid for (freedom from liability) and the protection *seller* paid the price for *its own risk-taking*, rather than having protection *buyers* pay the price for a protection *seller's* risk-taking. Consumers do not buy insurance to exchange their Section 22 risks for counterparty risk; they buy insurance to eliminate risk.

same without any authority. (DHAB, p. 37 ["If a vendor stands behind its own service or product . . . , such a risk-transfer is not considered insurance."]) While charming, that argument falls flat on the record before this Court. First, Respondents' "Protection Plan" program was not A-1's idea for serving its own customers; it was Deans & Homer's idea for better lining corporate pockets at the expense of those 98% of storage renters *who do not want or need to buy insurance for their stored property.* (*See* CT at 270 [Deans & Homer's lawyer arguing to the DOI that "only 2% of California customer storage facility tenants insure their goods"].) *But see California Physicians' Service,* 28 Cal.2d at 809 [finding service rather than indemnity to be the alleged insurer's purpose because "there [was] no more impelling need than that of adequate medical care on a voluntary, low-cost basis for persons of small income"].)

Second, the alleged facts—presumed true here—are that Deans & Homer's (among other insurance companies') lawful storage insurance policies offer *more* coverage for *lower* prices than A-1's Protection Plans. (CT at 222, ¶77 ["Plaintiff and members of the Class suffered injury in fact and were deprived of money and property by [*inter alia*] being forced to pay for Defendant[s'] Protection Plan, which has less coverage and is more expensive than other commercially available policies . . . ."].) Deans & Homer's and other insurance companies' premiums, coverage amounts, and covered risks are (of course) determined using actuarial methods that account for the perceived risk levels: namely, the risk that stored goods will actually be lost or damaged at a self-storage facility. (*Accord* CT at 378 ["Deans & Homer projects losses at 1% of the 15,000 [storage] customers [times] the [coverage] limit."].)

By demanding *higher* prices, for *lower* policy values, while covering *fewer* risks, A-1 is not "standing behind the quality of its facilities" at all.

Instead, A-1 is either: (1) ripping off its customers; or (2) assuming that the risks to stored property are higher at its own facilities than what for-profit insurance companies believe. The former is something to be frowned upon and remedied in this case; the latter is no ringing endorsement of A-1's landlording prowess. Respondents are not "standing by the quality" of their services. They are ripping people off. (CT at 199, ¶2 ["The Protection Plan is created to be a pure profit center."])

IV. THE PRINCIPAL OBJECT TEST

A. There has never been a "bright line test" for all "insurance," and there never should be.

Deans & Homer advances a series of troubling arguments related to the principal object test. First, through a heading, Deans & Homer argues that "There is No So-Called 'Evils' Prong Considered in Conjunction with the Principal Object Test." (DHAB, p. 25.) That argument is troubling because the "evils" prong of California "insurance" law was not Appellant's novel invention. This Court expressly held less than a year ago that evaluating "the evils to be remedied" by the Code will often be a key factor in interpreting the Code. (*Fluor*, 61 Cal.4th at 1198.) Deans & Homer seems to believe that insurance inquiries in California have nothing at all to do with the Insurance Code.[11]

Second, Deans & Homer actually criticizes Appellant for not offering a "bright line test" to govern every conceivable insurance inquiry. (DHAB, pp. 1, 43.) But the Court is not here to decide every imaginable

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[11] This is because Respondents believe that Section 22 is fatally flawed, and they believe Section 22 is flawed because they presume it was intended as a standalone trigger of DOI regulation. Respondents are wrong. (OBOM, pp. 17-23.)

"insurance" case. The Court is here to decide this case; the questions presented are narrow, not broad. (OBOM, at p. 1.) And the absence of a bright line test was not Appellant's fresh idea. It has been this Court's consistent position for the better part of a century. (*Jellins*, 29 Cal.2d at 248 ["[W]hen the question arises each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved."]; *see also Truta*, 193 Cal.App.3d at 813-14 [same]; *Automotive Funding Grp.*, 114 Cal.App.4th at 852-53 [same].)

The wisdom of California courts' consistent refusal to adopt any "bright line test" is well illustrated by the folly of Deans & Homer's proposals here. Deans & Homer's "self-provider" test makes a mockery of the entire Code by allowing standard form insurance policies—of many types—to be deregulated overnight. (DHAB, p. 39-41.) The "self-provider test" allows for exactly the type of illegal insurance/reinsurance scheme presented here, which squarely violates Section 803(a), to be extended from the self-storage context to the rest of California's economy. Residential apartment landlords can write unchecked renters' insurance. Airlines can write unchecked 10-hour term life insurance. Homebuilders can write unchecked homeowners' insurance. In fact, currently regulated insurance companies seeking freedom from the Code would not need California's landlords, manufacturers, or services providers at all. Deans & Homer could just let its insurance license expire, execute a leveraged buyout of A-1, and suddenly: Deans & Homer *itself* would be an unregulated "self-provider" with multiple income streams. If this seems like a horrendous idea, it is, and the Code would never allow it. But a made-up "self-provider" test would.

Deans & Homer's 50%-of-revenues test is not a serious proposal

either. The arbitrary nature of that percentage is offensive on its face. But more importantly, the public need for insurance regulation has nothing to do with the amounts or sources of an insurer's revenues. Rather, it is about what the insurer is *doing* with its revenues and assets. (*See, e.g.*, § 717.) A-1 can burn through and mal-invest its rental revenues as quickly as Allstate can burn through and mal-invest its premium revenues. It makes no difference whether A-1 makes a lot of non-insurance money, if A-1 is paying out all of its excess cash (from whatever source) as dividends to its mystery shareholders in real time. (*Id.*) Likewise, it makes no difference that A-1 "owns" a bunch of commercial real estate if A-1 is levered to the heavens on all of its properties. (*Id.*) Revenues alone—from any source—offer an insured public no protection. That is why the Code concerns itself with an insurer's "capital" and "investments" (among many other things), not simply with revenues in a vacuum. (*Id.*)

Deans & Homer's arguments for an "easy-to-administer" bright line test are meritless, as would be any bright line test that supplants the entire California Insurance Code in an effort to correct a non-existent flaw in Section 22. (DHAB, pp. 39, 43.)

B. Respondents are abandoning the Court of Appeal's dispositive principal object test even as they purport to defend it.

The principal object test upon which the Court of Appeal relied is simple. Examining the overall transaction(s) between the alleged insurer and insured, the question is whether indemnity is the primary purpose, or "principal object," of the transaction as a whole. (Opinion at 9 ["Thus, we consider whether the Protection Plan's principal object was risk shifting and distribution."]) If not, then—in the Court of Appeal's view—the arrangement is not "insurance" under the Code. (Opinion at 10.) Stated in

logical terms, the Court of Appeal's dispositive (and erroneous) principal object test holds that a contract constitutes regulated "insurance" *only if* indemnity is the transaction's "principal object." (*Id.*) That is the test that Respondents have been consistently asserting to every authority ever since they hoodwinked the DOI back in 2003. (CT at 269; CT at 336; Opinion, pp. 9-10.)

In fact, that is the test Respondents are still *purporting* to assert in this Court: "insurance" only if "principal object." (*See, e.g.*, A-1 Brief at 3 ["[A] contract is not subject to regulation as insurance . . . *unless* risk shifting and risk distribution is the parties' principal object."]; *ibid.* at 16 ["Under this test, a contract is subject to regulation by the DOI *only if* risk shifting and risk distribution is the principal object and purpose of the transaction."]) The contrapositive, the logical equivalent, of that test is this: *if* the principal object or primary purpose of a transaction is *not* indemnity, *then* the transaction is *not* insurance. (*Accord* A-1 Brief at 15 ["Under 70 years of California law, an agreement is not subject to regulation as insurance . . . *if* the indemnity provisions are subsidiary to a non-insurance principal object."]) Yet in the same brief, A-1 is actually abandoning the "70 years of [(non-existent)] California law" that A-1 purports to defend, and instead asking this Court to announce a *new* test that has nothing to do with the Code or California precedent.

Indeed, in Appellant's Opening Brief, he pointed out that under the Court of Appeal's standalone, dispositive principal object test, PetSmart could attach unregulated "pet insurance" to its pet sale contracts.[12]

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[12] After all, PetSmart could theoretically be sued for misrepresenting Fido's immunization history, or for selling bad pet food that makes Fido sick.

(OBOM, pp. 26-27.) Appellant also mentioned that "[h]omebuilders or even realtors could provide abusive homeowners' insurance to buyers in connection with every housing sale."[13] (*Id.*) Under Respondents' *own version* of "70 years of California law," none of those tangential insurance policies—among others—could be regulated by the DOI. But such "Pet Protection Plans" and "Home Protection Plans" are obviously pet insurance and homeowners' insurance, respectively, under the Code and as a matter of common sense. (§§ 124.5, 675(a), 12880(d).) This is a big problem for Respondents' version of California jurisprudence, the version that never really existed.

So Respondents are now trying to *alter* the principal object test to make it workable as a standalone, bright line test for every "insurance" case. They are asking this Court to articulate two *new* "non-insurance" elements to be required (or at least considered) in conjunction with *not* satisfying the principal object test. Respondents' new "non-insurance" elements are: (1) "an ongoing relationship" between the alleged insurer and the insured; and (2) "control" by the alleged insurer over the covered risks. (A-1 Brief, p. 48.) But Respondents' "control-plus-ongoing relationship" test is just as unsuitable as a standalone, across-the-board test as the principal object test would be.

Commercial airlines have "control" and could be "plausibly blamed" when their planes go down due to mechanical failure, pilot error, or something else. (*Id.*) That does not mean that airlines get to: (1) scribble their names into standard form life insurance policies; (2) rename them "Passenger Protection Plans" and attach them to airline tickets; (3) change

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[13] After all, if the house collapses due to shoddy workmanship, the homebuilder could be "plausibly blamed."

the terms of the life policies from 10 years to 10 hours; (4) raise the relative price and reduce the covered risks; and then (5) force all airline passengers—including children—to prove life insurance or purchase abusive life insurance directly from the airline before each flight: all under the guise of "shared risk allocation" and preemptive "settlement," and all without DOI scrutiny.

In any event, Appellant doubts that A-1's operative or "inoperative sprinklers"[14] can control California wildfires, violent windstorms, or all possible theft risks, but those uncontrollable risks are covered by Respondents' Protection Plans anyway. (*Accord* CT 269 [Deans & Homer's 2003 lobby-letter to the DOI, stating, "Other [Protection Plan] *claims might not so clearly involve the owner's duty to deliver what it has sold the tenant.*"]) Respondents' Protection Plans do not even satisfy their own error-laden "insurance" tests, which have no foundation in the Code.

Despite Respondents' incessant platitudes about the principal object test, they are evidently not here to defend the "70 years of California law" that they themselves have been preaching to authorities for the last 13 years: because it is indefensible. Respondents are instead here to ask the Court to *alter* the principal object test even as they purport to *defend* it as a dispositive test. But the principal object test need not and should not be altered because it was never a dispositive test anyway, and therefore never problematic. The principal object test remains, as it always was, an appropriate inquiry to be made in *many* "insurance" cases; but it is "particularly inappropriate" as the only bright line test for *every* case. (*Wayne*, 135 Cal.App.4th at 476-77; *accord Jellins*, 29 Cal.2d at 248

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[14] A-1 Brief at 2.

["[E]ach contract must be tested by its own terms as they are written . . . and as they are applied under the particular circumstances involved."])

The principal object test should remain what it has been for the last seven decades: a fact-specific and Code-dependent inquiry that informs many—but does not decide all—"insurance" questions.

C. The Legislature cannot implicitly adopt judicial decisions that do not exist.

As Appellant showed in his Opening Brief, no appellate court in California has ever treated the principal object test as a standalone, dispositive test: not even for contracts that only satisfied the Code's general "insurance" definition. (OBOM, pp. 27-42.) Instead, courts that relied upon the principal object test to make non-insurance findings under Section 22 also considered, *inter alia*: whether the alleged insurer actually assumed or shifted any risk;[15] the alleged insurer's need (if any) for reserves;[16] whether *the Legislature* intended that the alleged insurer be regulated by the DOI;[17] whether the alleged insurer had promised to compensate the insured or "promised to do nothing" in the event of risk materialization;[18]

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[15] (*California Physicians' Service*, 28 Cal.2d at 804-05; *Automotive Funding Grp.*, Cal.App.4th at 856-57 ["AFG agrees to *retain its own risk of loss* for a fee pursuant to the LDW. Under Section 22, this arrangement cannot be insurance for the simple reason that AFG has not agreed to shift one party's risk—presumably the buyer's—to itself or anyone else."])

[16] (*California Physicians' Service*, 28 Cal.2d at 804-05; *Truta*, 193 Cal.App.3d at 815 ["Since [Avis] is not agreeing to pay anybody anything, but [was] simply agreeing not to hold the [customer] liable, there is no need for accumulating reserves."]; *Automotive Funding Grp.*, Cal.App.4th at 856, fn.7.)

[17] (*Sweatman*, 25 Cal.4th at 72, 74; *California Physicians' Service*, 28 Cal.2d at 810.)

[18] (*Automotive Funding Grp.*, 114 Cal.App.4th at 856 & fn.7.)

whether the contracts presented any of the "evils" at which the Code is aimed;[19] whether the allegedly insured parties continued to hold their rights to recover from a regulated insurer;[20] and whether the alleged insurer was actually "carrying as an insurer" the shifted and distributed risks in question.[21] Those are all fact-specific, Code-dependent considerations, and the principal object test was just one inquiry among them in each case.

Here, however, every factor outside of the principal object test shows that Respondents' Protection Plans are regulated insurance. A-1 shifts, distributes and assumes risks and contingent cash liabilities *exactly* like an authorized insurance carrier would. A-1 therefore has a need for reserves. Also, the Legislature expressly intended to regulate self-storage facilities providing renters' insurance "incidental to, and in connection

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[19] (*Truta*, 193 Cal.App.3d at 812-13; *Automotive Funding Grp.*, 114 Cal.App.4th at 851-52; *Wayne*, 135 Cal.App.4th at 476-77.)

[20] (*Title Ins. Co. v. State Bd. Of Equalization* (1992) 4 Cal.4th 715, 725 ["[The regulated title] insurer remains liable to the insured and must pay the full amount of claims [even] if the underwritten title company fails to perform in accordance with its obligation."])

[21] (*Jellins*, 29 Cal.2d at 248 ["The agreement by plaintiff to 'insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows,' . . . is not on its face an unlawful undertaking as an incident of the maintenance contract; *it at least admits of an interpretation inconsistent with the theory of defendant that plaintiff himself was to act as the insurer.*"]; *id.* at 253 ["Even if we assume (we do not so decide) that plaintiff's obligation to make repairs was unlimited . . . , that obligation would not necessarily void the contract [as illegal insurance]. [Plaintiff's] obligation and right to make [repairs] would be entirely compatible with the carrying of insurance *with an authorized carrier* to cover the cost of such repairs when the same were necessitated by some casualty such as collision or fire or flood."]; *id.* at 254 ["[It is] not true that . . . plaintiff agreed to *carry as an insurer* any collision or other insurance on either of [the] motor vehicles" in question."])

with" storage leases. (*See generally* § 1758.7, *et seq.*) A-1 has promised *cash compensation* to all of its Protection Plan policyholders who suffer losses of their own personal property; A-1 has not simply promised to hold renters harmless for direct, personal damage *to A-1 alone*. In addition, Respondents' Protection Plans present numerous evils (practically every evil) at which the Code is aimed. (*See, e.g.,* OBOM, pp. 25-26.) One such evil is that Protection Plan customers have no rights against regulated Deans & Homer, even as Deans & Homer seizes the right (through its Reinsurance Agreement) to directly adjust and settle customer claims at minimal values for its own benefit. (OBOM, pp. 6-7.)

Finally, there were only two California appellate cases where an alleged "insurance" policy clearly satisfied a regulated "class" definition under the Code, and both times, the principal object test was deemed inapposite. The facts of *Wayne v. Staples, Inc.* included a third-party insurer. (135 Cal.App.4th 466.) But the *Wayne* court demonstrably relied upon the Code—not the identity of the insurer—to deem Staples' declared value coverage regulated insurance notwithstanding the principal object test. The *Wayne* court did *not* find the principal object test to be unnecessary as A-1 contends; the court instead found application of the principal object test to be "particularly inappropriate." (*Id.* at 476-77.)

Wayne's "particularly inappropriate" language directly contradicts Respondents' and the Court of Appeal's view of the principal object test. Respondents' and the Court of Appeal's view would be that California's principal object test *further* shows—consistent with the Code—that Staples' declared value coverage was regulated "insurance." This is because Respondents' test would have simply isolated the "declared value" transaction between National Union and Staples' customers (to which Staples was not a party), and then found *that* transaction to be insurance

because the principal object of the agreement between Staples' customers and *National Union* was insurance. (DHAB, p. 28; A-1 Brief, p. 53.) Thus, under Respondents' erroneous view, there could be nothing "particularly inappropriate" about applying the principal object test to Staples' declared value coverage, because Respondents' test would have appropriately found exactly what the Code says: inland marine "insurance."

The *Wayne* court, however, found something very different. *Wayne* rightly viewed Staples' incidental and connected marine insurance policies *not* as a problem with who the insurer was, but as an irreconcilable problem between the principal object test and Section 103 itself. This is why the *Wayne* court stated:

> Use of the principal-object-and-purpose test to exempt a contract of inland marine insurance from statutory regulation is particularly inappropriate because this *class* of coverage, *expressly regulated by the Insurance Code* (*see* Ins. Code, §§ 100, subd. (3), 103), is intended to protect against loss or damage to goods in transit . . . . *As a result, this insurance coverage will most often be offered, as it was in this case, in connection with, and incidental to, the customer's primary purpose of shipping his or her goods.*

(*Wayne,* 135 Cal.App.4th at 477.) The *Wayne* court did not concern itself with who the insurer was because the Code does not concern itself with who the insurer is when defining regulated *classes* of "insurance." (OBOM, pp. 15-16 & fn. 6; *ibid. at* 20-21.) The Code regulates *contracts* first; only after the right type of contract exists does the Code identify and deal with the insurer-party thereto. (*Id.*) *Wayne* was right. Respondents are wrong.

Similarly, the Court of Appeal in *Sweatman* had done exactly what the Court of Appeal did here, which is misuse the principal object test to make a non-"insurance" determination even though the incidental

"protection plans" in question constituted specifically defined classes of insurance under the Code. (*Sweatman*, 25 Cal.4th at 73 ["[The disability coverage at issue] would also appear to fall within the general category of [Section 106 disability insurance]."]) And importantly, *there was no third-party insurer at issue* in *Sweatman*; the VA was entering into installment contracts with veterans to sell them homes at low prices, and the VA was *also* the party providing the incidental disability coverage. (*Id.* at 71 ["[T]he coverage at issue herein is provided by the Department itself, *not by an independent insurance company.*"]) Nevertheless, this Court found "a spreading of risk within insurance concepts," despite the fact that the principal object test was *not* satisfied. (*Id.* at 74.)

Indeed, this Court rightly rejected the Court of Appeal's reliance on *Truta*'s principal object test and then got back to the business of interpreting statutes. (*Id.*) The Court did not particularly care who the incidental disability insurer was. The Court cared about what the Legislature had to say about the particular contracts in question, and secondarily, whether those contracts looked like standard form insurance policies as a matter of common law. (*Jellins*, 29 Cal.2d at 248.)[22]

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[22] One last word on *Truta*: the quoted "monies to third parties" language in *Truta* had nothing to do with the law of *Truta*, but instead reflected the facts of *Truta*. (*Truta*, 193 Cal.App.3d at 815.) Since Avis—not the car renters—owned the cars, there was no scenario in which damage to Avis's cars or other drivers' cars would result in Avis compensating its customers. Avis's cars might get damaged (necessitating the CDW) or other drivers' cars might get damaged (necessitating payment "to third parties"), but Avis's customers themselves faced no collision damage risks at all because they had no economic interest in the insured property. *Truta*'s "third parties" language reflected a factual reality, not a legal limitation.

V. THE STAFF LETTERS

A. The DOI's Staff Letters are unworthy of deference.

A-1 argues that the DOI's Staff Letters are "entitled to some deference" because they "assist in statutory interpretation," and the DOI has "experience and expertise" in the insurance realm. (A-1 Brief, p. 31.) First, an agency's informal statement can hardly assist in statutory interpretation without mentioning any statutes. Second, the DOI manifestly did *not* rely on its own "experience and expertise" in authoring their Staff Letters for Deans & Homer. Instead, the DOI relied entirely on *Truta*. (CT at 326, 328.) This Court cannot properly defer to an agency's mere reading of a Court of Appeal opinion.

Regardless, even if the DOI's Staff Letters were better supported, the Court should not defer to such an informal agency statement. "[I]t is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326; *accord Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) Also, "a cardinal principle holds that administrative regulations must conform to the enabling law." (*California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) Accordingly, "[a]n agency may not adopt a rule which diminishes its own statutory authority." (*Henning v. Div. of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 762.)

Yet, that is essentially what the Staff Letters purported to do: diminish the DOI's statutory authority to regulate self-storage facilities offering renters' insurance incidental to, and in connection with, storage rental agreements. (§ 1758.7, *et seq.*) The DOI simply cannot assign an

interpretation to the Code which would exempt entities from statutorily mandated regulation. (*See Henning,* 219 Cal.App.3d at 760-62 [holding that the Division of Occupational Safety and Health could not adopt an interpretation of a statute impliedly repealing a requirement that asbestos contractors register with the Division].)

VI. THE INJURIES

A. Appellant has standing.

"Proposition 64 should be read in light of its apparent purposes, i.e., to eliminate standing for those *who have not engaged in any dealings with would-be defendants* and thereby strip such unaffected parties of the ability to file 'shakedown lawsuits,' while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 317.) "Accordingly, plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue." (*Id.*)

Here, Appellant alleges that he was deceived by "[Respondents'] failure to disclose that [his] Protection Plan is unlicensed and illegal insurance." (CT at 220, ¶68.) Appellant further alleges that he was damaged by Respondents' "automatic enrollment" of him and other Class members into Respondents' illegal Protection Plan scheme. (CT at 221.) Importantly under *Kwikset*, Appellant alleges that:

> Had [Respondents'] not engaged in the actions and omissions complained of herein, *[he would] have never agreed to purchase, or allowed himself to be forced into [Respondents'] illegal insurance scheme, or paid fees or premiums for the Protection Plan.*

(CT at 222.) These allegations suffice to establish Appellant's standing under *Kwikset*.

What Respondents are really getting at with their "standing" argument is Appellant's ultimate ability to "demonstrate [his] compensable losses or entitlement to restitution under [UCL] section 17203." (*Kwikset*, 51 Cal.4th at 336.) But Respondents' argument "conflates the issue of standing with the issue of the remedies to which a party may be entitled. That a party may ultimately be unable to *prove* a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them." (*Id.*) Appellant has UCL standing under *Kwikset*, regardless of *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1590-93.[23]

VII. THE EXCUSES

A. The Rule of Lenity has no place here.

"The rule of lenity has no application where, as here, a court can fairly discern a contrary legislative intent." (*In re M.M* (2012) 54 Cal.4th 530, 545.) Here, not only can the Court "fairly discern" a legislative intent "contrary" to Respondents' interpretation of Article 16.3 and the rest of the

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[23] The First Amended Complaint also establishes Appellant's standing because he alleges that the Protection Plans cost more and provide less coverage—both in terms of dollar amount *and* the risks covered—than regulated storage insurance. (CT at 201, ¶7; CT at 220, ¶68.) This too is sufficient for UCL standing purposes. (*See Kwikset* 51 Cal.4th at 323 ["A plaintiff may [show economic injury by] surrender[ing] in a transaction more, or acquir[ing] in a transaction less, than he or she otherwise would have."].) The Court should decline to engage in the actuarial gymnastics asserted by A-1 to challenge Appellant's standing; A-1 ignores the economic value of differences in covered *risks*, among other material considerations. (A-1 Brief, p. 55.)

Code, that contrary interpretation is the only reasonable one. The rule of lenity does not apply. (*See, e.g., Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1329-30 [rejecting application of the rule of lenity because competing interpretations of the Code did not "stand in relative equipoise"]; *Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 895 [The "rule of lenity" does not apply licensing laws "[b]ecause regulatory statutes like the License Law are intended to protect the public, it is the public, not the licensee, that deserves the benefit of any doubt."].)

Moreover, given that Respondents actually procured the DOI's passing blessing of their scheme, and that two California courts originally ruled in Respondents' favor, there is no realistic chance of prosecution and thus no reason for lenity as a practical matter.

B. There is no reason for the Court to limit its decision prospectively.

Deans & Homer argues that an insurance finding by this Court should not apply "retroactively" because Deans & Homer obtained a private no-action letter from the DOI. Deans & Homer cites no apposite authority for its proposition because there is none. Prospective applicability of a decision by this Court is appropriate *only* where the decision constitutes an actual change in controlling law; even then, prospective applicability is rarely proper. (*McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 474 ["A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."]; *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 982 ["[D]issent cites not a single case other than *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 in which this analysis has led to less than full

retroactive application..."].)

An "insurance" decision here does not constitute a change in the law for purposes of retroactivity. Article 16.3 is unambiguous and was enacted in 2004. Respondents' DOI Staff Letters do not even *mention* Article 16.3, and corporate defendants cannot use informal, privately procured no-action letters to deprive aggrieved plaintiffs of their day in court. (*See McClung,* 34 Cal. 4th 467, 474.)

Moreover, no prior "insurance" decision by this Court or a California appellate court (other than the Opinion) should be overruled by the Court's decision here; no California court *ever* said that specifically regulated, standard form insurance policies could be deregulated by attaching them to related consumer contracts. In fact, *Wayne* expressly held the opposite long before Respondents' procured their two-sentence Staff Letter in 2008. If anything would "raise serious [constitutional] questions" here, it would be granting Deans & Homer's groundless plea for a free pass out of this action. (DHAB, p. 2; *cf. People v. Guerra* (1984) 37 Cal.3d 385, 411 ["because there was no "old rule" to the contrary in California, *Shirley* did not constitute a clear break with the past and hence must be given normal application to all cases not yet final."].)

VIII. CONCLUSION

For all of the foregoing reasons, the Court should reverse the Court of Appeal's Opinion.

Respectfully submitted,

Dated: August 19, 2016

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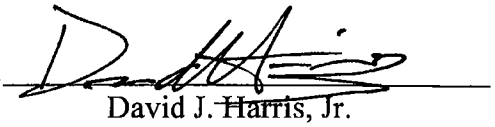
By: 
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CERTIFICATE OF WORD COUNT (Rule 8.204)

I, David J. Harris, Jr., counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 11,204 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(c). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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

Executed, at San Diego, California, on August 19, 2016.

Dated: August 19, 2016

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PROOF OF SERVICE

I, the undersigned, declare that I am over the age of eighteen (18) years and not a party to the within action. I am employed in the County of San Diego, State of California. My business address is 550 W. C Street, Suite 1760, San Diego, California 92101.

I served the following document(s) on August 19, 2016:

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By the following means:

☒ **VIA U.S. MAIL**: I enclosed the documents in a sealed envelope or package addressed to the person(s) at the addressees) listed above. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is place 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.

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court, at whose direction the within service was made.

Executed: August 19, 2016, at San Diego, California.

Siobhan Murillo