No. S274625

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

EVERARDO RODRIGUEZ and JUDITH V. ARELLANO,

Plaintiffs and Appellants,

v.

FCA US, LLC,

Defendant and Respondent.

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

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ISSUE PRESENTED

Should consumers who purchase used vehicles with still-pending new-car express warranties be given protections like other consumers who purchase new vehicles with new-car express warranties? Specifically: Does the phrase "or other motor vehicle sold with a manufacturer's new car warranty" in Civil Code section 1793.22's definition of a "new motor vehicle" cover sales of used vehicles still covered by the manufacturer's express new-car warranty, or are such used vehicles instead outside the protections of the Song-Beverly Act?

INTRODUCTION

The Legislature enacted the Song-Beverly Consumer Warranty Act, Civil Code section 1790 et seq. ("Act"), to provide enhanced breach-of-express-warranty remedies against consumer-product manufacturers because common law and Commercial Code remedies had not protected buyers adequately.[1] The Court of Appeal's opinion ("Opinion") scuttles that goal. If affirmed, it will eliminate protections that buyers of used cars with transferable balances on manufacturer new-car warranties have had under the Act for almost three decades. The Opinion will relegate those consumers to the exact Commercial Code remedies the Legislature has already deemed to be inadequate.

Indeed, over the years, the Legislature has added comprehensive provisions to the Act specifically to protect buyers of motor vehicles—including the refund-or-replace remedy in section 1793.2, subdivision (d)(2). When manufacturers fail to repair vehicles after a reasonable number of repair attempts during an express-warranty period, they are required to "promptly replace" vehicles or "promptly make restitution to the buyer" for the purchase price. (§ 1793.2, subd. (d)(2).) This obligation applies to "a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22" (*ibid.*), which is defined in part as "a dealer-owned vehicle and a 'demonstrator' *or other motor vehicle sold with a manufacturer's new car warranty*…." (§ 1793.22, subd. (e)(2), italics added).

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[1] Statutory references are to the Civil Code unless indicated.

Almost three decades ago, *Jensen v. BMW of North America, Inc* (1995) 35 Cal.App.4th 112 (*Jensen*) held that "the words of section 1793.22 are reasonably free from ambiguity and cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'" (*Id.* at p. 123.) *Jensen* held the Legislature intended "to make car manufacturers live up to their express warranties, whatever the duration of coverage." (*Id.* at p. 127.)

Petitioners relied on *Jensen* in suing manufacturer FCA USA LLC ("FCA") after FCA failed to repair the car petitioners had purchased from a used-car dealer. The car was two years old when purchased and had a balance remaining on a transferable FCA new-car warranty. The Court of Appeal, however, rejected *Jensen*'s interpretation. It instead held, for the first time in a California published decision, that section 1793.22's "new motor vehicle" definition "unambiguously refers to cars that come with a new or full express warranty," and not to used cars with an unexpired manufacturer new-car warranty. (Opn:12, 15.)

The Opinion is wrong. *Jensen* got it right.

Dealer-owned vehicles and demonstrators *are used vehicles* that, when sold to consumers, can have the same mileage and age as vehicles that are originally purchased by consumers and later re-sold by used-car retailers. And, because a manufacturer new-car warranty starts running when the vehicle is first put into use, dealer-owned vehicles and demonstrators are sold with a *balance* remaining on that warranty—just like any other used car sold with a transferable, unexpired new-car warranty.

The Opinion mistakenly assumes without basis that dealer-owned vehicles and demonstrators always come with brand-new, *full* manufacturer warranties and are always "basically" or "essentially" new when sold. (Opn: 3, 11-12.) This mistake negates the Opinion's entire textual analysis.

The Legislature's decision to expand the "new motor vehicle" definition to include dealer-owned vehicles, demonstrators, and "other" vehicles "sold with a manufacturer's new car warranty" plainly signals an intent to include at least some used vehicles—namely, those with a balance remaining on a manufacturer's new-car warranty, exactly as *Jensen* held. Any other interpretation renders a still-pending express warranty effectively unenforceable if the manufacturer breaches it by failing to repair a vehicle within a reasonable number of repair attempts.

Even looking beyond the Act's plain language, extrinsic interpretative aids equally compel *Jensen*'s interpretation:

The Act is "'manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.'" (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972 (*Kirzhner*).) *Jensen*'s interpretation is the *only* interpretation that fulfills the Act's remedial purposes of (a) providing enhanced remedies to protect buyers of warranted vehicles against manufacturers failing to honor express warranties; and (b) inducing manufacturers to promptly buy back lemon vehicles and brand them as lemons to protect the general public.

The Opinion's interpretation eliminates the Act's breach-of-express-warranty protections for almost all used cars even though such vehicles are still covered by a manufacturer's new-car warranty at the time of sale, and even though such an interpretation would incentivize manufacturers to breach their obligation to promptly buy back lemons in the hopes that the vehicles will end up in the hands of used-car retailers and then sold to someone without any recourse under the Act.

The Opinion's relegation of used-car buyers to suing manufacturers under the Commercial Code for breach of express warranty is a hollow remedy. Not only does the Code lack the Act's buy-back and branding obligations for lemon vehicles, it lacks the Act's "primary financial benefit"—the ability for vehicle buyers to recover attorney's fees so they can pursue lawsuits that "might not otherwise have been economically feasible." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 994 (*Murillo*).) Consumers who can only afford used cars typically can't afford to sue.

Other interpretive aids confirm that *Jensen* was right:

- The Opinion creates a host of arbitrary, unsupported distinctions between car buyers, and, if affirmed, will cause shockwaves in the used-car market that public policy militates against.
- *Jensen*'s interpretation comports with the view of the Department of Consumer Affairs, the agency

> entrusted with enforcing the very statute in which the "new motor vehicle" definition appears.

The Opinion addresses *none* of the relevant interpretive aids, not even the statute's remedial purpose. Instead, after erroneously claiming that the Act's language unambiguously supports its interpretation, the Opinion leapfrogs over all other extrinsic aids to conclude that the legislative history supports a conclusion that the Act doesn't reach used vehicles with still-remaining new-car warranties. (Opn:15.) But even the legislative history does nothing of the sort. As *Jensen* recognizes, its interpretation that the Act encompasses used vehicles comports with the Legislature's systematic attempt in the Act "to address warranty problems unique to motor vehicles, including transferability and mobility." (35 Cal.App.4th at p. 124.) Indeed, post-*Jensen* legislative history strongly shows that the Legislature agrees with *Jensen*. Although the legislative history for the amendment that added demonstrators, dealer-owned vehicles, and all "other" vehicles "sold with a manufacturer's new car warranty" doesn't explain why the Legislature included those used vehicles, "no inference of legislative intent may be drawn from *the lack* of legislative history on this particular statutory provision." (*Id.* at p. 125, italics added.)

The Opinion must be reversed. This Court should hold, consistent with the way it's been for nearly thirty years, that the phrase "or other motor vehicle sold with a manufacturer's new car warranty" in section 1793.22's "new motor vehicle" definition

intends to protect buyers of used vehicles still covered by the manufacturer's new-car warranty.

STATEMENT OF THE CASE

A. Statutory Background.

The Act's provision for breach of express warranty[2] at section 1793.2, subdivision (d)(2), specifies that if a vehicle's manufacturer or its representative "is unable to service or repair a new motor vehicle, *as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22*, to conform to the applicable *express* warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B)." (§ 1793.2, subd. (d)(2), italics added).

We refer to this obligation as the refund-or-replace requirement. It is "'[o]ne of the [Act's] most significant protections'" for car buyers. (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 (*Martinez*).)

The Act was later amended to provide a definition for a "new motor vehicle." Paragraph (2) of subdivision (e) of section 1793.22, which governs the refund-or-replace requirement,

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[2] Petitioners anticipate FCA may attempt to cite inapposite authorities dealing with the *implied* warranty, which arises by operation of law. (§ 1792.) Express warranty elements and damages are wholly distinct from those for the implied warranty. (See § 1793.2(d).)

provides that a "'[n]ew motor vehicle' *includes* the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation*, a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty* but does not include a motorcycle or a motor vehicle which is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways." (§ 1793.22, subd. (e)(2), italics added.)

The statute defines a "demonstrator" as "a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type." (§ 1793.22, subd. (e)(2).)[3]

[3] The statute also provides that a "new motor vehicle" generally means "a new motor vehicle that is bought or used primarily for personal, family, or household purposes" but also includes "a new motor vehicle with a gross vehicle weight under 10,000 pounds bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in this state." (§ 1793.22, subd. (e)(2).)

B. Factual Background.

1. Petitioners purchase a two-year-old vehicle from a used-car dealer that remains covered by a manufacturer's new-car warranty.

Everardo Rodriguez and Judith Arellano (petitioners) purchased a two-year-old Dodge Truck from a used-car dealer. (Opn:2-3.) At purchase, the truck remained subject to a five-year/100,000-mile powertrain warranty that was voluntarily issued by the vehicle's manufacturer, FCA. (Opn:3.) FCA is the parent company that oversees the Chrysler and Dodge brands. (Opn:2, fn. 2)

Because the truck had 55,000 miles on it at purchase, FCA's three-year/36,000-mile bumper-to-bumper warranty had expired. (Opn:3.) But FCA's powertrain warranty remained in effect, and it covered the truck's engine, transmission, and drive system—the components involved in petitioners' breach-of-warranty claim. (*Ibid.*)

2. While the manufacturer warranty remains in effect, the vehicle experiences covered defects that the manufacturer cannot fix.

While FCA's powertrain warranty was still in effect, the truck began experiencing repeated engine issues. (Opn:3.) Petitioners took the vehicle six times to an authorized FCA dealer for repair. (Opn:3.)

The truck had a defect in an engine component that regulates electrical power to all systems. (Opn:4.)

FCA attempted repairs under its express warranty at no charge. (Appellant's Appendix for E073766, pp. 174-175, 180-192.) But FCA could not repair the defects. (Opn:3-4.)

C. This Lawsuit.

1. After the manufacturer refuses to comply with the Song-Beverly Act's refund-or-replace requirement, petitioners sue the manufacturer under the Act.

After FCA had been unable to repair the engine yet refused to repurchase the vehicle, petitioners sued FCA under the Act for violating the refund-or-replace requirement. (Opn:4.)

2. The trial court enters summary judgment for the manufacturer, concluding the vehicle was not a "new motor vehicle" as defined by Civil Code section 1793.22.

Presenting the same argument that *Jensen* rejected decades ago, FCA moved for summary judgment on the ground that "the manufacturer's refund-or-replace provision applies to new vehicles only, and it was undisputed [petitioners] purchased the truck used." (Opn:2, 4.)

The trial court granted the motion. (Opn:4.) It ruled that "a previously owned vehicle sold with a balance remaining on one

of the manufacturer's express warranties does not qualify as a 'new motor vehicle' under the Act." (*Ibid.*)

D. The Court Of Appeal Affirms.

Parting company with *Jensen*, *supra*, 35 Cal.App.4th 112, the Court of Appeal's opinion affirmed the trial court, concluding that the phrase "other motor vehicle sold with a manufacturer's new car warranty" does not cover sales of previously-owned vehicles with an existing, unexpired manufacturer's new-car warranty but, instead, only covers "sales of essentially new vehicles where the applicable warranty was *issued with* the sale." (Opn:3, original italics.) The Opinion determines that "*in isolation* the phrase 'other motor vehicle sold with a manufacturer's new car warranty' could arguably refer to any car sold with a manufacturer's warranty still in force" but instead "agree[s] with FCA that context requires a more narrow interpretation." (Opn:10, original italics.)

The Opinion emphasizes that "the phrase is preceded by 'a dealer-owned vehicle and demonstrator,'" which, according to the Opinion, "comprise a specific and narrow class of vehicles" that are used but "have never been previously sold to a consumer and … come with full express warranties." (Opn:10-11.) In direct contrast to *Jensen*'s reading of the same phrase, the Opinion concludes that the text "indicates the Legislature structured the provision as a list of two vehicles (dealer-owned vehicles 'and' demonstrators) followed by an adjectival clause qualifying or describing those vehicles" intended as "a catchall provision to

cover a narrow class vehicle—the previously driven, but basically new (i.e., not previously sold) car." (Opn:11-12.)[4]

Based on this "textual" analysis, the Opinion concludes: "[T]he phrase 'other motor vehicle sold with a manufacturer's new car warranty' *unambiguously* refers to cars that come with a

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[4] As discussed below, the Opinion fatally misreads *Jensen*. The Opinion says the *Jensen* dealer "issued a *full new car warranty* along with the lease" because it "gave her BMW's 36,000-mile warranty 'on top' of the miles already on the odometer." (Opn:16-17, original italics.) The Opinion says *Jensen* "concluded the car qualified as a new vehicle because BMW's representative issued a new car warranty with the lease." (Opn:17.) But that's not what *Jensen* says, nor is it even what BMW argued. *Jensen* merely referenced in the "factual background" that a salesman "told" plaintiff the car was a demonstrator and that he would get the 36,000-mile warranty on top of the prior miles—representations that apparently were false. (See 35 Cal.App.4th at p. 119.) But the Opinion treats the salesman's statement as true. Neither the *Jensen* court nor BMW ever assumed that a full, new warranty actually existed. Rather, BMW argued that the Legislature could not have intended for the new motor vehicle definition to include every vehicle sold with "'any *remainder* of the manufacturer's new car warranty,'" and the *Jensen* court rejected that argument by holding that "cars sold *with a balance* remaining on the manufacturer's new motor vehicle warranty are included within [section 1793.22's] definition of 'new motor vehicle." (*Id.* at pp. 122-123, italics added.)

The Opinion erroneously assumes the *Jensen* plaintiff had a new full warranty, and then compounds that mistake by erroneously assuming this means sales of demonstrators and dealer-owned vehicles purportedly come with full new warranties. Both assumptions are false. As we will show (§ I.B, *post*), BMW's argument in *Jensen* and the Court of Appeal's holding in *Jensen* track the reality that demonstrators and dealer-owned vehicles actually come with only a *balance* remaining on the manufacturer's new-car warranty.

new or full express warranty." (Opn:15, italics added.) The Opinion states, "even if this meaning weren't readily apparent from the statute, the Act's legislative history" supports the same conclusion. (*Ibid.*) The Opinion's legislative-history analysis, however, only rests on the absence of the term "used vehicles," rather than on any express legislative commentary on the issue. (*Ibid.*) The Opinion ignores the legislative history supporting *Jensen*'s interpretation, as well as clear legislative pronouncements that the Act be read broadly to give effect to its remedial purpose.

The Opinion concludes that although its interpretation denies "the Act's refund-or replace remedy" to used-car buyers like petitioners, used-car buyers—as "the beneficiary of a transferrable express warranty"—can still "sue a manufacturer for breach of an express warranty to repair defects under the California Uniform Commercial Code." (Opn:19.)

The Opinion ignores that the Legislature enacted the Act's enhanced remedies because Commercial Code remedies had not sufficiently protected consumers.

STANDARD OF REVIEW

This Court determines de novo the meaning of the Act's statutes. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.)

LEGAL DISCUSSION

I. The Plain Meaning Of Section 1793.22's "New Motor Vehicle" Definition Includes Used Vehicles Sold With A Balance Remaining On A Manufacturer's New-Car Warranty.

In determining legislative intent, this Court "begin[s] by examining the statute's words 'because they generally provide the most reliable indicator of legislative intent.'" (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634 (*Lopez*).) The inquiry ends if the language is unambiguous. (*Ibid.*) Here, section 1793.22's "new motor vehicle" definition, read in proper context, unambiguously includes used vehicles sold with a balance remaining on a manufacturer's new-car warranty.

A. The definition unambiguously includes any vehicle sold with a manufacturer's new-car warranty, which includes used cars sold with a balance remaining on a new-car warranty.

The plain language of the "new motor vehicle" definition includes vehicles that are *not* strictly brand-new—specifically "a dealer-owned vehicle and a 'demonstrator' *or* other motor vehicle sold with a manufacturer's new car warranty." (§ 1793.22, subd. (e)(2), italics added.)

Under settled statutory construction rules, "'[u]se of the word "or" in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories.'" (*People ex rel. Green v. Grewal* (2015) 61 Cal.4th

544, 561, quoting *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 (*White*); accord, *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30 ["The plain and ordinary meaning of the word 'or' is well established. When used in a statute, the word 'or' indicates an intention to designate separate, disjunctive categories"].) "The Legislature's use of the disjunctive 'or' ... indicates an intent to designate *alternative* ways of satisfying the statutory requirements." (*People v. Loeun* (1997) 17 Cal.4th 1, 9, italics added.)

Thus, "[t]he use of the word 'or' in [section 1793.22, subdivision (e)(2)] indicates 'demonstrator' and 'other motor vehicle' are intended as alternative or separate categories of 'new motor vehicle' if they are 'sold with a manufacturer's new car warranty.'" (*Jensen*, *supra*, 35 Cal.App.4th at p. 123, citing *White*, *supra*, 31 Cal.3d at p. 680.) Indeed, the plain language unambiguously refers to three separate categories: (1) dealer-owned vehicles; (2) demonstrators; and (3) any other vehicles "sold with a manufacturer's new car warranty." The Opinion's conclusion that "the provision's grammatical structure signals the list contains two types of vehicles, not three" (Opn:11), ignores the disjunctive meaning of "or."

Applying the plain language, a vehicle sold with a transferable balance on a manufacturer's new-car warranty is a vehicle "sold with a manufacturer's new car warranty." The buyer has the right to enforce the manufacturer's new-car warranty for the remainder of the warranty period—no different from the buyer of a brand-new car. *Jensen* therefore got it right

in holding that "the words of section 1793.22 are reasonably free from ambiguity and cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'" (*Jensen*, *supra*, 35 Cal.App.4th at p. 122.) The Legislature chose not to impose any age or mileage restrictions in its "new motor vehicle" definition.

FCA has argued that the definition's repeated use of the word "new" reflects a legislative intent to limit the definition to brand-new vehicles, such as the definition's statement that "'[n]ew motor vehicle' means a *new* motor vehicle that is bought or used primarily for personal family or household purposes." (§ 1793.22, subd. (e)(2), italics added.) But when read in full, the definition's text plainly shows the opposite because the definition's text expressly *includes* dealer-owned vehicles and demonstrators, which are *used* (i.e., *not new*) vehicles.

The "new motor vehicle" definition is a *statutory* definition, not one based on common parlance or a Webster's Dictionary definition. Although the definition's first sentence states that "new motor vehicle" "means" one bought "primarily for *personal* family or household purposes," the next sentence provides that "new motor vehicle" "also means" certain vehicles "bought or used primarily for *business* purposes." (§ 1793.22, subd. (e)(2), italics added; see fn. 3, *ante*.) And the sentence after that states that the "new motor vehicle" definition (1) "includes" dealer-owned vehicles and demonstrators, even though they are used vehicles that fall *outside* a literal reading of the first two sentences, and (2) "does not include" certain vehicles such as non-registered

vehicles exclusively used off highways, even though they would fall *within* a literal reading of the first two sentences (if read in isolation). (See § 1793.22, subd. (e)(2).)

The statutory definition must be read in full, rather than isolating words as FCA does. The definition cannot be limited to "new" vehicles in a literal sense, as that would exclude dealer-owned vehicles and demonstrators, which are expressly included.

B. The Opinion's interpretation rests on the false premise that demonstrators and dealer-owned vehicles are always sold with full, never-used express manufacturer warranties.

Jensen's plain-meaning analysis is correct for another reason: It tracks the reality that dealer-owned vehicles and demonstrators are generally sold with a *balance* remaining on the manufacturer's new-car warranty, not with a full new-car warranty. The Opinion erroneously assumes the opposite. Thus, the entire predicate for the Opinion's textual analysis fails.

The Opinion's textual analysis hinges on the premise that dealer-owned vehicles and demonstrators always "come with full express warranties." (Opn:11; see also *ibid.* ["What makes these vehicles unique is that even though they aren't technically new, manufacturers (or their dealer-representatives) treat them as such upon sale *by providing the same type of manufacturer's warranty that accompany new cars*," italics added].) The Opinion reasons that "'*[g]iven this context,* we think the most natural interpretation of the phrase 'other motor vehicles sold with a

manufacturer's new car warranty' is that it, too, refers to vehicles that have never previously been sold to a consumer and that come with full express warranties." (Opn:11, italics added.) From this, the Opinion concludes: "other motor vehicle" "unambiguously refers to cars that come with a new or full express warranty"—vehicles that the Opinion describes as "basically new" or "essentially new." (Opn:3, 11, 15, italics omitted.)

But the Opinion's central premise is wrong. Dealer-owned vehicles and demonstrators *don't* necessarily come with a full manufacturer's new-car warranty. Manufacturers *don't* restart the warranty for a demonstrator or dealer-owned vehicle. Rather, dealer-owned vehicles and demonstrators usually come with only a *balance* remaining on the manufacturer's new-car warranty. Nor are they necessarily "basically" or "essentially" new—they can be driven for years before being sold.

Demonstrators are driven before sale—sometimes for thousands of miles. (§ 1793.22, subd. (e)(2) ["demonstrator" is a vehicle that a dealer uses to "demonstrat[e] qualities and characteristics common to [similar] vehicles"]; Dempsey, *What is the real deal with buying a demo car?* (Mar. 27, 2009) Consumer Reports News[5] [demonstrators can have "several thousand miles on them"].) While they're driven, they're warranted. Those warranties do not restart when the demonstrators are ultimately

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

sold to a consumer. This is presumably why Vehicle Code section 665 treats "vehicles regularly used or operated as demonstrators" as "used vehicle[s]."

Dealer-owned vehicles likewise don't just sit on the lot. They are driven by dealer-employees or by customers who are having their cars serviced, or they are leased by the dealer to individuals who don't want to buy (with the dealer, as lessor, remaining the owner). Dealer-owned vehicles often are put up for sale after *years of use* and with mileage or age no different than petitioners' car here. Again, dealer-owned vehicles are warranted over these years, and the manufacturer does not restart the warranty. Thus, dealer-owned vehicles are often far from "essentially" or "basically" new.

Like petitioners' vehicle here, dealer-owned vehicles and demonstrators are necessarily sold with only a balance of the manufacturer's new-car warranty remaining: "The time and mileage limits in manufacturers' warranties begin on the date that a vehicle is first 'put into use, regardless of whether it is used by a consumer or as a dealer or a demonstrator vehicle." (6/06/2022 Vachon Law Firm Depub. Letter at p. 3; see also 6/06/2022 Barnes Law Firm Depub. Letter, p. 3 [consumers buying demonstrators "receive the remainder of the limited warranty just as any purchaser of a 'used' vehicle"].)

Consumers who buy or lease a dealer-owned vehicle or a demonstrator and who want the same warranty protections that come with a brand-new car must pay to *add* to the balance remaining on the original warranty. (Dempsey, *supra* ["despite

the mileage that is already on the vehicle, there is no free extension to the manufacturer's warranty"].)

Thus, the central predicate to the Opinion's textual analysis—that dealer-owned vehicles and demonstrators come with full new-car warranties—is not grounded in reality.

What's troubling is that FCA *knows* this.

Warranty manuals issued by FCA US LLC,[6] and FCA International Operations LLC[7] confirm it. Both advise consumers who have purchased a warranted car that: "The Basic Limited Warranty begins on either of the following dates, whichever is earlier… [1] The date you take delivery of the vehicle. [2] *The date when the vehicle was first put into use, for example as a dealer 'demo' or as a FCA US LLC company vehicle.*" (Italics added.)

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[6]https://manuals.plus/m/81a15604346b66919e840b92393cde04b98b559c869ef1de82b0ae265c87cbab.pdf#page=8 (p. 6)

https://www.dodge.com/crossbrand/warranty/pdf/2016-Dodge-Generic_Warranty-3rd.pdf#page=8 (p. 6)

[7]https://ram-jordan.com/en/advance-automotive-trading-co/warranty/

Other major manufacturers—including Acura,[8] BMW,[9] Chrysler Motor,[10] Ford,[11] Kia,[12] Honda,[13] Lexus,[14] Mazda,[15]

[8]https://owners.acura.com/Documentum/Warranty/Handbooks/2023_Acura_Warranty_Basebook.pdf#page=9 (p. 8.)

[9]https://manuals.plus/m/c030b2c02290cda10877b13cac71844c7c80d2e46eeb9523241e5ee69def53ec.pdf#page=6 (p. 2.)

[10]https://www.jeep.com/crossbrand/warranty/pdf/09_Commander_LPLW_2nd_Ed.pdf#page=8 (p. 6.)

[11] https://www.ford.com/cmibs/content/dam/brand_ford/en_us/brand/resources/general/pdf/warranty/2022-Ford-Car-Lt-Truck-Hybrid-Warranty-version-2_frdwa_EN-US_12_2020.pdf#page=7 (p. 2.)

[12]https://www.kia.com/us/content/dam/kia/us/en/images/warranty/manual/general-warranty-and-consumer-info/2020_warranty.pdf#page=6 (pp. 4-5.)

[13]https://www.capitalone.com/cars/learn/getting-a-good-deal/when-does-my-car-warranty-start/1365

[14]https://assets.sia.toyota.com/publications/en/omms-s/L-MMS-22RX350/pdf/L-MMS-22RX350.pdf#page=18 (p. 16.)

[15]https://www.mazdausa.com/siteassets/pdf/owners-optimized/optimized-warranty-booklet/2021-warranty-booklet.pdf#page=12 (p. 12.)

Mercedes Benz,[16] Porsche,[17] Subaru,[18] Tesla,[19] Toyota,[20] and Volkswagon[21]—"all sa[y] pretty much the same thing: [the] new car warranty begins on the day the vehicle is delivered to [the consumer], or when it is first put into service (say, as a dealer demonstrator" or company car. (Golson, When Does My Car Warranty Start?, CapitalOne Auto Navigator (Apr. 1, 2022)[22]; accord 6/06/2022 Vachon Law Firm Depub. Letter, pp. 3-6.)[23]

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[16]https://www.mbvans.com/content/dam/mb-vans/us/brochures/MY22-MB-Warranty.pdf#page=10 (p. 8.)

[17]https://www.porsche.com/usa/accessoriesandservices/porscheservice/vehicleinformation/warranty/

[18]https://www.subaru.com/content/subaru/en/owners/vehicle-resources/warranties-2022.html

[19]https://www.tesla.com/sites/default/files/blog_attachments/ms_vehicle_warranty.pdf#page=3 (p. 3.)

[20]https://www.capitalone.com/cars/learn/getting-a-good-deal/when-does-my-car-warranty-start/1365

[21]https://static.nhtsa.gov/odi/tsbs/2015/MC-10123086-9999.pdf#page=34 (p. 34.)

[22]https://www.capitalone.com/cars/learn/getting-a-good-deal/when-does-my-car-warranty-start/1365

[23] Case law recognizes this, too. (E.g., *O'Connor v. BMW of North America, LLC* (Fla.Dist.Ct.App. 2005) 905 So.2d 235, 240 [BMW warranty begins "on the date of first retail sale, or the date the vehicle is first placed in service as a demonstrator or company vehicle, whichever is earlier"]; *Schmidt v. Ford Motor Co.* (E.D.Pa. 2016) 198 F.Supp.3d 511, 522 [Ford warranty starts "the day you take delivery of your new vehicle or the day it is first put into service (for example, as a dealer demonstrator), whichever occurs first"]; *Grosse Pointe Law Firm, PC v. Jaguar Land Rover North America, LLC* (2016) 317 Mich.App. 395, 398 [Land Rover

Other manufacturers likewise tell consumers that the manufacturer's new-car warranty starts when the vehicle is first "put into service" or "put in use" without specifically mentioning examples, such as demonstrators or company cars.[24]

Because dealer-owned vehicles and demonstrators are sold with only a balance of a new-car warranty remaining, the Act's use of dealer-owned vehicles and demonstrators as examples of a vehicle "sold with a new express warranty" *confirms* that *any other* vehicle sold with a balance of the original manufacturer warranty has been sold, for the Act's purposes, "with a new express warranty," too. (§ 1793.22, subd. (e)(2).) To the extent the Opinion assumes the opposite, it's fundamentally flawed. If, as the Opinion posits, the phrase "sold with a manufacturer's new car warranty" was intended as a catch-all provision, then it

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warranty]; *Temple v. Fleetwood Enters.* (6th Cir. 2005) 133 F. App'x 254, 256 [Fleetwood motorhome warranty]; *Alvine v. Mercedes-Benz of North America* (S.D. 2001) 620 N.W.2d 608, 610 [Mercedes Benz warranty]; *Voelker v. Porsche Cars N. Am., Inc.* (7th Cir. 2003) 353 F.3d 516, 520 [Porsche warranty]; *Kure v. Chevrolet Motor Division* (Wyo. 1978) 581 P.2d 603, 608 fn.4 [Chevrolet warranty]; *Stuart Becker & Co., P.C. v. Steven Kessler Motor Cars, Inc.* (1987) 517 N.Y.S.2d 692, 694 [Maserati warranty].)

[24] See, e.g., General Motors: https://www.gmc.com/content/dam/gmc/na/us/english/index/owners/warranty-protection/2017/warranty-details/02-pdfs/20_GMC_WM_en_US_U_84186899B_2019AUG05_2P_.pdf#page=9 (p. 4)); Nissan: https://www.nissanusa.com/content /dam/Nissan/us/manuals-and-guides/shared/2020/2020-nissan-warranty-booklet.pdf #page=10 (p. 6); Volvo: https://personalizeyourvolvo.com/ PDF_Brochures/2020%20Volvo%20Warranty%20Manual.pdf#page=34 (p. 32).

is a catch-all for used vehicles sold with a *remaining balance* on the manufacturer's warranty, just like demonstrators and dealer-owned vehicles are sold.

C. Section 1793.22's "new motor vehicle" definition trumps section 1791's general definitions.

The Opinion errs when it states: "Importantly, 'consumer goods' are defined as 'any *new* product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables.'" (Opn:6, quoting § 1791, subd. (a), italics added in Opinion.)

Section 1791's "consumer goods" definition dates back to the Act's original enactment. In contrast, the Legislature subsequently enacted certain statutory provisions *specifically for motor vehicles*, as opposed to other consumer products. (See § II.D.1, *post*.) This subsequent enactment includes section 1793.22's more specific "new motor vehicle" definition, which applies only to section 1793.22 itself and to 1793.2, subdivision (d)(2). Under settled rules of statutory construction, "later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation]." (*Lopez*, *supra*, 5 Cal.5th at p. 634; accord, *Placer County v. Aetna Cas. & Sur. Co.* (1958) 50 Cal.2d 182, 189 ["[w]here the terms of a later specific statute apply to a situation covered by an earlier general one, the later specific statute controls"].)

Section 1793.22's "new motor vehicle" definition thus trumps section 1791's earlier and more general provisions, as it

was intended by the Legislature to do. (See *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490 (*Cummins*) ["A 'new motor vehicle' is just one type of 'consumer good[].' [Section 1793.2] treats the special provisions applicable to new motor vehicles in subdivision (d)(2) as an exception to the general provision applicable to all consumer goods in subdivision (d)(1)"]; *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 920 (*Dagher*) ["[w]ith regard to the basic 'goods' definition under section 1791, subdivision (a), the Act has been amended since its enactment in 1970 to treat motor vehicles somewhat differently from other types of consumer goods"].)

Here, too, *Jensen* got it right. The manufacturer in *Jensen* argued (as FCA does here) that construing "section 1793.22['s] definition of 'new motor vehicles' to include used cars conflicts with the definition of 'consumer goods' found in section 1791, subdivision (a)," which defines consumer goods as "new" products. (35 Cal.App.4th at p. 126.) *Jensen* disagreed, recognizing that "[u]nder well-recognized rules of statutory construction, the more specific definition found in current section 1793.22 governs the more general definition found in section 1791." (*Ibid.*)

Section 1793.22's more specific "new motor vehicle" definition controls over section 1791's general terms.

D. The Opinion misreads other statutes in erroneously concluding the Act unambiguously excludes used vehicles with transferable new-car warranties.

In addition to the "new motor vehicle" definition itself, the Opinion touts other "textual reasons" as supporting a conclusion that "the phrase 'other motor vehicle sold with a manufacturer's new car warranty' *unambiguously* refers to cars that come with a new or full express warranty." (Opn:15, italics added). But those "reasons" likewise rest on the mistaken premise that dealer-owned vehicles and demonstrators are necessarily sold with new, full express warranties. Those "reasons" also rest on incomplete and incorrect readings of the Act's provisions.

1. Use or non-use of "used."

The Opinion states that "the Act makes it clear when a provision applies to used or previously owned products by including the term 'used' in the provision." (Opn:13.) Not so.

Section 1793.22's "new motor vehicle" definition undeniably includes used cars, because dealer-owed vehicles and demonstrators *are used cars*—yet the statutory definition doesn't use the term "used." And in emphasizing that the refund-or-replace requirement doesn't use the term "used" (Opn:13), the Opinion ignores that the provision only applies to "a new motor vehicle, *as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22,*" and that incorporated definition includes

used cars. (§ 1793.2, subd. (d)(2), italics added; § 1793.22, subd (e)(2).)

Plus, although the motor vehicle statutes don't expressly say "used," only two years after adopting the subject language, the Legislature expressly "declare[d] that the *expansion* of state warranty laws covering new *and used cars* has given important and valuable protection *to consumers*…." (Former Civil Code § 1795.8, Stats. 1989 ch. 862, § 1, p. 2831, italics added; see § II.D.1, *post*.)

The Legislature still recognizes the same today. (See § 1793.23, subd. (a)(1).) So, not only has the Legislature declared that it has expanded warranty protection specifically for used cars, the Legislature also has expressly confirmed that the Act's protection for "consumers" extends *beyond* only "new" cars.

2. Section 1795.5.

After noting that section 1795.5 contains "protections for used goods," the Opinion says *the Act's* "protections are limited and bind the seller or distributor of the used product" only. (Opn:7.) The Opinion says that "[t]he fact [section 1795.5] places liability on the party who issues the warranty along with the sale (the seller) and explicitly disclaims any liability on the part of the manufacturer" supports the Opinion's interpretation of the "new motor vehicle" definition. (Opn:14.)

That misreads section 1795.5. Section 1795.5 applies to distributors or retail sellers of used consumer goods who make *their own* express warranties when selling those goods.

(§ 1795.5.) It doesn't address a manufacturer's liability for the manufacturer's own express warranty, let alone address a *vehicle* manufacturer's obligations under section 1793.2, subdivision (d)(2), to which section 1793.22's "new motor vehicle" definition applies. Instead, section 1795.5 provides that when distributors or retail sellers of used consumer products issue their own express warranties (they often don't), they become subject—with only limited exceptions—to the same express warranty obligations that the Act imposes on manufacturers who issue warranties, including the duty to maintain service and repair facilities. (See § 1795.5, first ¶ & subd. (a)-(d).)

Section 1795.5 reflects an intent to extend the Act's protections to the sale of used goods accompanied by an express warranty. Section 1795.5 doesn't disclaim all manufacturer liability for used goods. It merely bars the original manufacturer (and original distributor/retail seller) from being liable for the *used-good seller's* obligations under the Act regarding *that* seller's express warranty. (See § 1795.5, subd. (a) ["It shall be the obligation of the distributor or retail seller *making* express warranties with respect to used consumer goods (*and not the original manufacturer, distributor, or retail seller making express warranties with respect to such goods when new*) to maintain sufficient service and repair facilities within this state to carry out the terms of such express warranties," italics added].) This just means that the manufacturer is off the hook for *others'* warranties. That language does not exempt the manufacturer from liability under the Act for failing to have *its own* repair

facilities, nor does it exempt the manufacturer from breaching *its own* transferable warranty that still applies to the vehicle.

Under section 1795.5, retail sellers of used goods must stand by *their own* express warranties if provided, but manufacturers will not be liable for those warranties. A manufacturer's obligations under the Act for its own still-operative express warranty do not magically disappear once a used-car retailer obtains the vehicle. Such a reading would be particularly nonsensical in the common scenario presented here, where the used-car retailer makes *no* express warranty, and the used-car buyer relies entirely on the *manufacturer's* unexpired new-car warranty in purchasing the vehicle.

3. Section 1791.2.

The Opinion notes that section 1791.2 "defines 'express warranty' as any 'written statement *arising out of a sale* to the consumer of a consumer good pursuant to which the manufacturer ... undertakes to preserve or maintain the utility or performance of the consumer good....'" (Opn:14, italics in Opinion, quoting § 1791.2, subd. (a)(1).) The Opinion then reasons that the warranty here "did not 'aris[e] out of' the sale" but instead "transferred to plaintiffs by operation of law along with title to the truck." (Opn:14.)

But section 1791.2 doesn't address purported distinctions between "sales" and "transfers." It simply explains what an express warranty is—that is, a written statement "to preserve or maintain the utility or performance of the consumer good or

provide compensation if there is a failure in utility or performance," as distinguished from "[a]n affirmation merely of the value of the goods," "a statement purporting to be merely an opinion or commendation of the goods," or an "expression[] of general policy concerning consumer satisfaction." (§ 1791.2, subds. (a)(1), (b), (c) ; see *Dagher*, *supra*, 238 Cal.App.4th at p. 911-911, 921 fn. 9 [construing section 1791.2's express-warranty definition as "relevant" to a new-car warranty transferred to a *used* car].) Here, it is undisputed that this case involves an express warranty, versus no warranty, an implied warranty (§ 1791.1), or an "as is" warranty (§ 1791.3).

In any event, if the transferred balance on a new-car warranty "arises out of a sale" when a demonstrator or company-owned vehicle is sold, the same is equally true for the balance on any other used car being sold. Petitioners obtained the warranty in a sale, no different than if they bought a demonstrator or company-owned vehicle. Section 1791.2 states a warranty arises out of "a" sale," not "the" sale.

4. Sections 1795.90-1795.93.

The Opinion claims that sections 1795.90-1795.93 support its narrow "new motor vehicle" construction because they require "manufacturers to notify all 'consumers' of any warranty adjustments regarding safety or emissions-related recalls, and define[] 'consumer' as 'any person to whom the motor vehicle is *transferred* during the duration of an express warranty." (Opn:14, quoting § 1795.90, subd. (a), italics in Opinion). From this, the Opinion concludes that the Legislature "is aware of the

distinction between warranties that arise out of a sale and those that transfer to subsequent purchasers as a result of a sale," and then reasons that the "lack of reference to transferred warranties in the definition of 'new motor vehicle' suggests the Legislature made a deliberate choice not to include sales of used vehicles accompanied by unexpired express warranties." (Opn:14-15.)

This reasoning is wrong for two reasons.

First, it erroneously treats sections 1795.90-1795.93 as part of the Act. (See Opn:14 [discussing these statutes as part of "[o]ur examination of the entire Act" and describing section 1795.90 as part of "the Act"].) Those statutes are actually *not* part of the Act. They were adopted in 1993, twenty-three years after the Act's enactment, as part of a different Civil Code chapter—Title 1.7, Chapter 1.5—which addresses Motor Vehicle Warranty Adjustment Programs. (See § 1790 [defining Chapter 1 of Title 1.7 as the Song-Beverly Act]; § 1795.90 [providing definitions for "this chapter"—Chapter 1.5 of Title 1.7].) They are in a *different* chapter that addresses a *different* topic than the Act—efforts to prevent the practice of "secret warranties" or "secret recalls" where manufacturers would instruct repair facilities to secretly repair defects in vehicles brought in for service on other issues. (See §§ 1795.90-1795.93; *Cholakyan v. Mercedes-Benz USA, LLC* (C.D.Cal. 2011) 796 F.Supp.2d 1220, 1239-1241.)

Second, the Opinion's reasoning is exactly backwards. The Legislature's awareness that vehicles may be transferred during an express warranty's duration indicates the Legislature

made a deliberate choice in its "new motor vehicle" definition to *include* sales of used vehicles with unexpired manufacturer new-car warranties. The Legislature did not expressly limit the "new motor vehicle" definition to "warranties that arise out of a sale" (whatever that may mean) nor exclude "transferred warranties." Instead, it referenced dealer-owned vehicles and demonstrators—vehicles that, as shown, *are used vehicles accompanied by balances remaining on unexpired manufacturer new-car warranties*. (See § I.B, *ante*.) Once again, the Opinion's textual analysis rests on the mistaken premise that dealer-owned vehicles and demonstrators always come with brand-new, full manufacturer warranties. That mistake taints the Opinion's entire textual analysis.

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When section 1793.22's "new motor vehicle" definition is viewed in light of the fact that dealer-owned vehicles and demonstrators typically come with only the transferable balance remaining on the manufacturer's new-car warranty, the statute's words are—as *Jensen* put it—"reasonably free from ambiguity and cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'" (35 Cal.App.4th at p. 123.)

The Court should thus find that the plain language unambiguously supports *Jensen*'s interpretation. But even if the Court disagrees, the language irrefutably does not unambiguously support *the Opinion's* interpretation, which rests on false assumptions. At the very least, an ambiguity would exist

requiring the Court to consider other interpretative aids. As we now show, such aids equally compel *Jensen*'s interpretation.

II. Interpretive Aids Equally Compel The Conclusion That A Used Vehicle With An Unexpired Manufacturer's New-Car Warranty Is A "New Motor Vehicle" Under Section 1793.22.

Courts may consider other interpretive aids, such as a statute's purpose, public policy and legislative history, *only* when a statute is ambiguous. (*Lopez*, *supra*, 5 Cal.5th at p. 634.) Because the plain language supports *Jensen's* interpretation, this Court need look no further. But if the Court considers other interpretive aids, the end result is the same: A vehicle sold with a remaining balance on the manufacturer's new-car warranty is a "new motor vehicle" under section 1793.22.

A. *Jensen*'s interpretation is the only construction that fulfills the Act's remedial purpose to protect vehicle buyers.

"If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose...." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Although the Opinion mentions the Act's remedial purpose, it makes no attempt to reconcile its statutory interpretation with that remedial purpose. Instead, the Opinion holds that the statutory text "unambiguously refers to cars that come with a new or full express warranty" and then leaps to the conclusion

that "even if this meaning weren't readily apparent from the statute, the Act's legislative history would convince us the phrase refers to vehicles sold with full warranties." (Opn:15.)

But the Act's purpose cannot be ignored. Indeed, it's the most important interpretative aid, as the Act is *not* neutral. It is "'manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.'" (*Kirzhner, supra,* 9 Cal.5th at p. 972, quoting *Murillo, supra,* 17 Cal.4th at p. 990; see also *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 (*Jiagbogu*) ["The Act is intended to protect consumers and should be construed in keeping with that goal"]; *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 36 ["[T]he act is remedial legislation intended to protect consumers and should be interpreted to implement its beneficial provisions"].)

"'[W]herever the meaning [of a remedial statute] is doubtful, it must be so construed as to extend the remedy'" to the protected plaintiff. (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269 (*Muller*), citations omitted.)

For multiple reasons, the Act's remedial purpose compels *Jensen's* interpretation.

1. *Jensen*'s interpretation forces vehicle manufacturers to live up to their express new-car warranties, one of the Act's core purposes.

Unlike the Opinion, which makes no attempt to reconcile its interpretation with the Act's remedial purpose, *Jensen* holds—correctly—that "section 1793.22 includes cars sold with a balance remaining on the new motor vehicle warranty is consistent with the Act's purpose as a remedial measure." (35 Cal.App.4th at p. 126, citations omitted.)

The Act "was enacted to address the difficulties faced by consumers in enforcing express warranties." (*Cummins*, *supra*, 36 Cal.4th at p. 484.) It "provid[es] mechanisms to ensure that manufacturers live up to the terms of *any* express warranty." (*Ibid.*, italics added.) As *Jensen* recognizes, the Act "reflects the Legislature's intent to make car manufacturers live up to their express warranties, *whatever the duration of coverage*." (*Jensen*, *supra*, 35 Cal.4th at p. 127, italics added.) The Act "applies to new motor vehicle manufacturers who make express warranties. (§§ 1791.2 and 1793.2.) There is no privity requirement." (*Id.* at p. 128.) If manufacturers have concerns about living up to those warranties under the Act, they "are free to change the terms of express warranties they offer." (*Id.* at p. 127.)

Indeed, the only reason these issues arise is because manufacturers *choose* to make warranties transferrable to increase vehicle value and induce people to buy their cars. (Vincent, Used Car Warranties: What You Need To Know (March

2, 2022) U.S. News[25] [the "original warranty" dictates if "it's transferrable to… subsequent owner[s]"].) Manufacturers can't have it both ways. They can't choose to make warranties transferable but then strip that warranty of the Act's protections.

The Opinion's restrictive interpretation thus "conflicts with the policy repeatedly expressed by California courts of the need to construe the Song-Beverly Act so as to implement the legislative intent to *expand* consumer protection and remedies." (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1311, original italics.)

2. The Opinion's interpretation creates an illogical protection gap, which is contrary to the purpose of providing enhanced breach-of-express-warranty remedies beyond Commercial Code remedies.

The Legislature enacted the Act's enhanced remedies because common-law and Commercial Code remedies had not sufficiently protected consumers from manufacturers that failed to honor express warranties. (*Cummins, supra,* 36 Cal.4th at p. 484 [Act "address[es] the difficulties faced by consumers in enforcing express warranties"]; *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 213 [Commercial Code provisions "are limited in providing effective recourse to a consumer dissatisfied with a purchase"; the Act "broadens

[25] https://cars.usnews.com/cars-trucks/used-car-warranty

a buyer's remedies"]; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 301 [same].)

The Act is thus "designed to give broader protection to consumers than the common law or UCC provide." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1241.) "The pro-consumer remedies in the Act are in addition to those available under the Commercial Code." (*Dagher*, *supra*, 238 Cal.App.4th at p. 916, fn. 5.) The Act "'does not parallel the [Uniform] Commercial Code; it provides different and more extensive consumer protections.'" (*Martinez*, *supra*, 193 Cal.App.4th at p. 198, original brackets.)

Jensen's interpretation serves this goal because the manufacturer remains liable under the Act's enhanced protections so long as the manufacturer's new-car warranty remains operative. Under *Jensen*'s interpretation, the focus is on whether a manufacturer's new-car warranty remains in effect when a car purchased in a retail sale proves defective, not on whether the car might be considered "old" or "new" when a warranty breach occurs. If the manufacturer's express warranty transfers to a new owner as part of a retail sale, then the Act's protections transfer, too. "If a term of the warranty is that it is transferrable, then the manufacturer's duties under the Song-Beverly Act continue post[-]transfer." (*Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 340, fn. 4 (*Kiluk*).)

The Opinion, in contrast, creates an illogical gap in the Act's express-warranty protections that undermines the goal of providing enhanced remedies beyond the Commercial Code:

(1) If a manufacturer issues an express new-car warranty when a car is brand-new or "essentially new," the manufacturer's refund-or-replace obligation under section 1793.2, subdivision (d)(2), applies so long as the purchaser does not part with the vehicle.

(2) If a used-car retail seller issues its own express warranty when selling a used car, under section 1795.5 that seller's obligations are generally "the same as that imposed on manufacturers" under the Act, including the refund-or-replace requirement for defective vehicles.

(3) *But*, if the purchaser of a new or "essentially new" vehicle parts with the vehicle (by sale, trade-in or repossession) and it ends up in the hands of a used-car retail seller, the manufacturer no longer has liability under the Act even if the original new-car warranty remains in force. And if the used-car retail seller does not offer its own express warranty (as is often the case), and the buyer opts to rely on the balance remaining on the manufacturer's new-car warranty (as is often the case), *the buyer is left out of the Act's protections.*[26] There is no logic in concluding that the breach of a transferrable express warranty cannot be enforced with transferrable statutory protections intended for that warranty.

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[26] Some of those buyers may decide to purchase an extended service contract, but that's *not* an express warranty, as this Court has held. (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1258-1259.)

The Opinion downplays this gap by noting that the used-car buyer could still sue the manufacturer under the Commercial Code for failing to repair the vehicle in breach of the transferred express warranty. (Opn:19.) But that flouts the Act's raison d'être: that the Legislature enacted the enhanced remedies because Commercial Code remedies do not adequately protect consumers.

The Opinion also ignores the reality that a vehicle is far more likely to reveal itself as a lemon *as it gets older*. In many cases, only the *subsequent* buyer will think to pursue the Act's enhanced remedies—only that buyer's experience with the car (not the prior repairs) gives rise to her claim. Yet under the Opinion, the buyers who may most need to enforce the manufacturer warranty would be left with only the lesser Commercial Code remedies that the Legislature deemed inadequate.

A Commercial Code remedy is no consolation for consumers who cannot afford to prosecute a breach-of-warranty claim under the Code. *Jensen*'s interpretation, unlike the Opinion's construction, "retains the *primary financial benefit* the Song-Beverly Act offers to consumers who sue thereunder to enforce their rights: their ability, if successful, to recover their 'attorney's fees based on actual time expended.'... *[T]he prospect of having to pay attorney fees even if one wins a lawsuit can serve as a powerful disincentive to the unfortunate purchaser of a malfunctioning automobile*. By permitting prevailing buyers to recover their attorney fees in addition to costs and expenses, our

Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit *might not otherwise have been economically feasible*." (*Murillo*, *supra*, 17 Cal.4th at p. 994, italics added.)

The Opinion's construction strips this primary benefit from the most vulnerable consumers—those who can only afford a previously-owned car with an unexpired manufacturer warranty. Indeed, conventional wisdom dictates that buyers typically pay more for a used car still under warranty than a used car without a warranty *because of the protections a warranty provides* in the event of unanticipated problems. Relegating such buyers to economically infeasible Commercial Code claims if that warranty is breached is no remedy at all. The Opinion's interpretation illogically assumes that consumers who can only afford a used car with a still-active manufacturer's new-car warranty deserve less protection than someone who bought that same car a couple years earlier as a new car.

For these reasons, too, *Jensen*'s interpretation prevails.

3. The Opinion's interpretation vitiates the Act's goal of ensuring manufacturers promptly buy back irreparable vehicles and brand them as lemons.

The Opinion's interpretation contravenes the Act's purpose in another core respect: It undermines the goal of having irreparable vehicles branded as lemons. Indeed, it incentivizes manufacturers to breach their affirmative obligation to promptly

buy back irreparable vehicles and label them as lemons by encouraging them to refuse buy-back requests in the hopes that the vehicle will end up in the hands of a used-car dealer, thereby washing away any potential statutory obligations.

The Act is about more than inducing manufacturers to promptly honor express warranties. (§ 1793.2, subd. (d)(2).) It also protects the public by encouraging removal of irreparable vehicles from the road and by giving notice on the vehicle's title to prospective used-car buyers that a vehicle is a lemon. The Act requires manufacturers to take lemons off the street, and it contains comprehensive provisions for branding the returned vehicle as a "Lemon Law Buyback" and disclosing the repair history to prospective buyers (§§ 1793.22, subd. (f), 1793.23, subds. (c)-(e), 1793.24).

Under the Opinion's interpretation, even if a vehicle should be branded a lemon due to its egregious repair history, the manufacturer's obligation to buy-back that vehicle and brand it a lemon *disappears* once it reaches the hands of a used-car retailer and is re-sold to an unsuspecting consumer.

Under the Opinion's interpretation, thousands of vehicles will no longer be subject to the buy-back and branding requirement even though the manufacturer's original warranty remains in effect and even though the vehicles are irreparable and unsafe lemons. The public threat is manifest. A used-car lemon is no less a threat to public safety than a brand-new one.

The potential for used-car buyers to seek recourse under the Commercial Code is no solution. The Code has no buy-back, branding, or disclosure requirements. The Code's remedies don't take lemons off the road and don't protect prospective future buyers. Nor does the Code contain an attorney-fees provision—thus, discouraging many buyers from suing. Plus, removing the specter of civil penalties in cases of a manufacturer's willful violations has the effect of undercutting the incentives for manufacturers to honor their warranty obligations—indeed, it encourages manufacturers to *disregard* their responsibilities.

Under the Opinion's interpretation, if a vehicle's lemon status only becomes apparent *after* the vehicle is re-sold, the Act won't apply despite the public threat and the manufacturer's continuing warranty obligations. And if the lemon status becomes apparent *before* then, manufacturers are incentivized to refuse to promptly buy back the vehicle to increase the chances of the vehicle ending up with a used-car dealer and sold to someone with no recourse under the Act.

When manufacturers stonewall buy-back requests, they force consumers to allow the repossession of lemons to stop costly financial payments, or they force consumers to trade them in to buy a safe vehicle, or to sell them to generate cash to buy a safe vehicle. Manufacturer breaches of their affirmative buy-back and branding obligations are what often cause lemons to end up in the hands of used-car dealers and sold to unsuspecting used-car buyers. The Opinion's interpretation will result in more unbranded lemons on the road and in the used-car market.

That in itself compels rejection of the Opinion's interpretation. As a matter of policy, "'[i]nterpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided.'" (*Martinez*, *supra*, 193 Cal.App.4th at p. 195.) This includes interpretations that "would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement" in the hopes that the vehicle will end up being transferred or sold to a third party. (*Ibid.* [rejecting interpretation that would let manufacturers avoid refund-or-replace liability if a lienholder repossessed the buyer's vehicle]; see *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244 [rejecting a manufacturer offset for a buyer's total use of vehicle, because it "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay"].)

Jensen's interpretation discourages such shenanigans. It prevents manufacturers from trying to evade the Act's protections and protects used-car buyers by promoting the branding of lemons. The Opinion's interpretation does the opposite. It would result in thousands of lemon vehicles—that have been protected by the Act for nearly 30 years—going unbranded and "'would significantly vitiate a manufacturer's incentive to comply with the Act.'" (*Martinez*, *supra*, 193 Cal.App.4th at p. 195.) It therefore "'should be avoided.'" (*Ibid.*)

B. The Opinion creates arbitrary, unsupported distinctions between vehicle buyers.

The Opinion's interpretation also contravenes the rule that courts should avoid statutory constructions that yield "arbitrary distinctions." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 84; accord, *People v. Vidana* (2016) 1 Cal.5th 632, 638 [even "'a statute's literal terms will not be given effect if to do so would yield an unreasonable or mischievous result'"].) The Opinion's interpretation, if upheld, would create a host of arbitrary distinctions between various vehicle buyers.

- Even under the Opinion's interpretation, buyers of brand-new vehicles can sue under the Act even if they sue years later—after most of the manufacturer's express new-car warranty has run and even though the vehicle would no longer be considered "new" or "essentially new" under common parlance. (See *Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1238-1239 [Act applied even though plaintiff requested manufacturer buy back the vehicle at 40,000 miles and sued the manufacturer three years after the purchase when the odometer had 50,000 miles]; *Martinez*, *supra*, 193 Cal.App.4th at pp. 190-191 [Act applied even though the vehicle had been driven for 3½ years and had almost 40,000 miles when repossessed.) Even though such vehicles are no longer "new," they remain subject to the Act's express warranty protections because the vehicles *originally* were new products issued with a manufacturer's express new-car warranty that remains in effect.

Yet under the Opinion, vehicles of the exact same age and mileage as those in *Jiagbogu* and *Martinez*, and with the exact same balance remaining on the manufacturer's warranty, would lose their coverage under the Act if purchased from a used-car retailer.

There's no legitimate basis for these distinctions. The Act's remedies don't depend on whether a vehicle might be considered new or old when the right to sue arises. The Legislature chose to merely create "a rebuttable presumption that a reasonable number of attempts have been made to repair the vehicle if, within 18 months or 18,000 miles, whichever comes first," certain conditions are met. (*Cummins, supra,* 36 Cal.4th at p. 485; § 1793.22, subd. (b).) It did *not* bar consumers from suing under the Act when defects arise when a vehicle is much older and/or has substantially more mileage.[27]

■ The Opinion's interpretation provides standing under the Act to the buyer of a dealer-owned vehicle or demonstrator with substantial age and mileage when sold—such as a car that a dealership used for many years, a leased vehicle returned after multiple years, or a demonstrator used for several years. Yet, it *denies* standing to buyers of other used cars with much *lower*

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[27] Admittedly, it is more difficult to *prove* liability under the Act for older vehicles with more mileage that fall outside the statutory presumption. Manufacturers may have stronger arguments in such circumstances that the car's issues stem from unauthorized or unreasonable use (see § 1794.3), instead of an irreparable manufacturing defect covered by the express warranty. But the issue here is *standing* to sue.

mileage and with *most* of the balance remaining on the manufacturer's new-car warranty if the buyer happened to purchase the vehicle from a used-car retailer. No legitimate basis exists for such distinctions.

- The Opinion's interpretation distinguishes between a used but "essentially new" dealer-owned vehicle or demonstrator with low age and mileage, and a used vehicle with comparable age and mileage but purchased from a used-car retailer. Again, there's no basis for that distinction.

- The Opinion says that the "new motor vehicle" definition extends beyond dealer-owned vehicles and demonstrators to vehicles that are used but "essentially" or "basically" new. But what does that mean? Is a car driven for three years but with only 5,000 miles "essentially" new? Is a car driven for only one year with 15,000 miles "essentially" new? Why should these distinctions matter in a used car versus a demonstrator or dealer-owned vehicle where none comes with any distinguishable warranty terms?

- What about leased vehicles that lessees decide to purchase when the lease ends? The original new-car warranty continues to exist, but that purchase doesn't come with a new warranty. Yet the Opinion's interpretation would *exclude* that consumer's own car because it was newly purchased without a brand-new warranty in place. In other words, the buyer loses his own statutory protections when he buys *his own car* from the lease.

In sum: The Opinion's interpretation yields arbitrary distinctions between vehicles. It is doubtful the Legislature intended these results. Courts should presume it didn't. (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 581 [rejecting interpretation that "would lead to arbitrary distinctions"].)

C. *Jensen*'s interpretation comports with the Department of Consumer Affairs' view.

As *Jensen* recognized, construing the "new motor vehicle" definition as applying to any vehicle sold with a balance remaining on the manufacturer's new-car warranty is "consistent with the Department of Consumer Affairs' regulations which interpret the Act to protect '*any* individual to whom the vehicle is transferred *during the duration* of a written warranty.' (Cal. Code Regs., tit. 16, § 3396.1, subd. (g).)." (*Jensen*, *supra*, 35 Cal.App.4th at p. 126, italics added.)

The Department of Consumer Affairs' view should receive deference because that agency implements and enforces the Act's alternative dispute resolution requirements under section 1793.22, the statute containing the "new motor vehicle" definition. (See § 1793.22, subd. (d); Bus. & Prof. Code, § 472.4.) "[T]he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921; accord *Judson Steel*

Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 668 ["when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous'"].).

Jensen's interpretation should prevail for this reason, too.

D. The Act's legislative history supports *Jensen*'s interpretation.

1. The Act systematically attempts to protect vehicle buyers in retail sales.

As *Jensen* itself recognized, the Act's overall legislative history supports the Act's application to used vehicles, because "the Legislature has systematically attempted to address warranty problems unique to motor vehicles, including transferability and mobility," and a "national wholesale market for previously owned cars, including those under manufacturers' warranty" has long existed. (35 Cal.App.4th at pp. 123-124.)

The Act's initial version had no "new motor vehicle" definition; it only had general repair, replace or refund provisions for consumer goods. (See Former § 1793.2, Stats. 1971, ch. 1523, pp. 3004-3005.) Over time, the Legislature began adopting specific, comprehensive protections just for motor-vehicle buyers, in response to vehicle manufacturers shirking express-warranty obligations despite the Act's general provisions.

In 1982, the Legislature added motor-vehicle-specific provisions that became known as the Lemon Law and which

contained the first "new motor vehicle" definition. (Former § 1793.2, subd. (e)(4)(B), Stats. 1982, ch. 388, § 1, p. 1723.) The amendments defined a "new motor vehicle" as "a new motor vehicle which is used or bought primarily for personal, family, or household purposes, but does not include motorcycles, motorhomes, or off-road vehicles," even though the latter technically are consumer goods as defined by other Act provisions. (See *ibid.*) The 1982 amendments created a presumption that a "reasonable" number of repair attempts for a new motor vehicle is four, or 30 cumulative days out of service, during a specific period; they also added third-party dispute resolution provisions. (See Former § 1793.2, subd. (e)(1)-(4), Stats. 1982, ch. 388, § 1, pp. 1721-1722.)

In 1987, in response to vehicle manufacturers taking advantage of ambiguities, the Legislature revamped section 1793.2 to specify detailed, comprehensive replacement and reimbursement provisions just for "new motor vehicles"—the provisions in subdivision (d)(2). (See Former § 1793.2, subd. (d)(2), Stats. 1987, ch. 1280, § 2, pp. 4558-4559.) The Legislature also expanded the "new motor vehicle" definition to include the language at issue here—a "dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty"—but still excluded motorcycles, motorhomes, and off-road vehicles. (See Former § 1793.2, subd. (e)(4)(B), Stats. 1987, ch. 1280, § 2, p. 4561.)

The 1987 amendments also protected used-car buyers by adding requirements that no person may subsequently sell or

lease a vehicle that was returned to a manufacturer pursuant to section 1793.2's replace-or-refund requirement unless the original nonconformity "is corrected" and "clearly and conspicuously disclosed" and the manufacturer provides a one-year warranty. (See Former § 1793.2, subd. (e)(5), Stats. 1987, ch. 1280, § 2, pp. 4561-4562.) It also established provisions for certifying third-party dispute resolution processes. (See Former § 1793.2, subd. (e)(2)-(3), Stats. 1987, ch. 1280, § 2, pp. 4560-4561.)

In 1988, the Legislature expanded the "new motor vehicle" definition to include certain portions of motorhomes. (Stats. 1988, ch. 697, § 1, p. 2319.)

In 1989, the Legislature added requirements that manufacturers or dealers selling vehicles that are "known or should be known to have been required by law to be replaced or ... accepted for restitution by a manufacturer" must notify prospective buyers, through title documents, that the vehicle was returned due to a defect. (Former Civil Code § 1795.8, Stats. 1989 ch. 862, § 1, pp. 2831-2832.) The new statute, adopted before *Jensen* was decided, stated that "the Legislature finds and declares that the *expansion* of state warranty laws covering new *and used cars* has given important and valuable protection *to consumers*…." (*Id.* at p. 2831, italics added.)

In 1991, the Legislature expanded the disclosure requirements for returned lemons to include vehicles returned under other states' laws. (Former § 1793.2, subd. (e)(5)(A), Stats. 1991, ch. 689, § 10, p. 3106.)

In 1993, the Legislature moved the "new motor vehicle" definition without change to section 1793.22, subdivision (e)(2), of the Tanner Consumer Protection Act, which added certain presumptions regarding a reasonable number of attempts to repair a vehicle and additional dispute resolution processes. (Stats. 1992, ch. 1232, §§ 6-7, pp. 5789-5793.)

In 1995, to further combat "lemon laundering" and protect used-car buyers, the Legislature enacted sections 1793.23 and 1793.24, which require manufacturers re-acquiring vehicles under the replace-or-refund requirement to brand them as "Lemon Law Buybacks" and provide specific notice of the vehicle's repair history to prospective buyers/lessees. (See Stats. 1995, ch. 503, §§ 1-2, pp. 3886-3889.) The Legislature reiterated that "the expansion of state warranty laws covering new *and used* cars has given important and valuable protection to consumers." (*Id*. at p. 3886; § 1793.23, subd. (a)(1), italics added.)

In 1998, the Legislature expanded the "new motor vehicle" definition to include certain business vehicles. (Stats. 1998, ch. 352, § 1, pp. 2777-2778.)

In 2000, the Legislature modified the business-vehicle language to its current version. (Stats. 2000, ch. 679, § 1, p. 4510.)

In 2007, the Legislature added section 1795.8 to extend the Act's protections to any Armed Service members stationed in California who purchase vehicles with a manufacturer express

warranty, even if purchased in another state. (Stats. 2007, ch. 151, § 2, p. 1084.)

The Act's legislative history thus shows a consistent effort to *expand* the "new motor vehicle" definition and to protect *all* buyers in retail sales, whether the vehicle is brand-new or used, against the risk of purchasing an irreparable defective vehicle. The Opinion's narrow interpretation swims against this tide.

2. Post-*Jensen* legislative history confirms *Jensen*'s interpretation.

Jensen is a 1995 decision. If the Legislature ever disagreed with *Jensen*'s interpretation, it has had ample opportunity over three decades to abrogate the decision. Instead, the Legislature has confirmed *Jensen* is correct. After *Jensen* was decided, the Legislature twice amended section 1793.22's "motor vehicle definition" without modifying the language addressed in *Jensen*. (See § II.D.1, *ante*.) "'[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction.'" (*Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219.)

Moreover, the Legislature is not just presumably aware of *Jensen*'s interpretation, it is *actually* aware. The legislative history for the 2007 addition of section 1795.8 (see § II.D.1, *ante*) embraces *Jensen*'s interpretation *as correct*, by stating:

- The Act "provides consumers certain rights and remedies when they find that a new *or used vehicle* with a manufacturer's express warranty they have purchased does not conform to the applicable express warranties despite a reasonable number of repair attempts." (Vol. 6, Exhibits in Support of Petitioners' Motion for Judicial Notice, p. 1379 (hereinafter, "[vol]MJN/[page]"), italics added; accord, 6MJN/1370, 1373.)
- The Act establishes "a number of protections for new *and used* motor vehicles covered by a manufacturer's express warranty." (6MJN/1366, 1369, 1372, 1375, 1380, italics added.)
- Existing law, citing *Jensen*, "holds that a used motor vehicle sold or leased *with a balance of the manufacturer's original warranty* is a 'new motor vehicle' for purposes of California's Lemon Law." (6MJN/1366, 1376, 1380, italics added.)

Thus, not only has the Legislature implicitly embraced *Jensen*'s interpretation by not disagreeing with it for three decades, the Legislature also has *expressly* interpreted the Act the same way as *Jensen*. That, too, supports *Jensen*'s interpretation. After all: "A postenactment legislative statement, though not binding, is a secondarily authoritative expression of expert opinion on legislative intent. While subsequent legislation interpreting [a] statute … [cannot] change the meaning [of the earlier enactment,] it [does] suppl[y] an indication of the legislative intent which may be considered

together with other factors in arriving at the true intent existing at the time the legislation was enacted." (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1133, original brackets, internal quotation marks and citations omitted; accord, *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 589 ["our view [of the Legislature's intent] is reinforced by the legislative history of later amendments," including explanations about "'existing law'"].)

3. The legislative history for the 1987 amendment supports *Jensen*'s interpretation.

The Legislature added the language at issue here in 1987, as part of new comprehensive protections for vehicle buyers that included revamping section 1793.2's refund-or-replace requirement. (See 3MJN/536-719.) That bill's legislative history mostly discusses those other protections. It says little about the "new motor vehicle" definition. (See *ibid.*)

Some committee and agency reports cursorily state that the bill amends the "new motor vehicle" definition to include "dealer-owned vehicles" and "demonstrators," but none discusses or explains *why* the language was added. (See 3MJN/596, 622, 638, 664, 670, 700, 702.) Nor do they explain why the Legislature also included "or other vehicle sold with a manufacturer's new car warranty." (*Ibid.*)

A Department of Consumers Affairs' enrolled bill report provides the most comprehensive discussion of the 1987 bill. (See

3MJN/698-707.) It is the only legislative history the Opinion cites. (Opn:15.) Yet the report's entire discussion of the "new motor vehicle" definition is as follows:

- "Some buyers are being denied the remedies under the lemon law because their vehicle is a 'demonstrator' or 'dealer-owned' car, *even though it was sold with a new car warranty*." (3MJN/700, italics added.)
- "'Demonstrator' Vehicles. The bill includes within the protection of the lemon law dealer-owned vehicles and 'demonstrator' vehicles *sold with a manufacturer's new car warranty*." (3MJN/702, italics added.)

This report's author is, as previously noted, the agency entrusted with implementing section 1793.22 and it views the Act as protecting "any individual to whom the vehicle is transferred during the duration of a written warranty." (Cal. Code Regs., tit. 16, § 3396.1, subd. (g); see § II.C, *ante*.) The report, viewed with the reality that dealer-owned vehicles and demonstrators are sold with *transferred* balances on the manufacturer's warranty, supports *Jensen*'s interpretation. As *Jensen* concluded, its interpretation and the Act's legislative history are "one and the same." (25 Cal.App.4th at p. 123.)

The Opinion's contrary analysis of the enrolled bill report rests on the same misperceptions about dealer-owned vehicles and demonstrators that negate the Opinion's textual analysis. The Opinion construes the report's "discussion" as "indicat[ing] the amendment was intended to provide relief to a narrow class

of consumers by targeting a specific type of vehicle—the basically new car. Notably absent from the discussion is any mention of used vehicles." (Opn:15.) But the Opinion again ignores that dealer-owned cars and demonstrators are *used* vehicles that can have the same mileage and age as any other used car sold with balances remaining on the manufacturer's new-car warranty. Nor does the report refer to "basically new" vehicles, distinguish between "new" or "used" vehicles, or even discuss vehicle age or mileage.

The Opinion construes the report's references to "sold with a new car warranty" and "sold with a manufacturer's new car warranty" as meaning sold with a brand-new, full warranty—the same misunderstanding that infects the Opinion's analysis of the "new motor vehicle" definition's plain language. Those references mean the opposite when viewed with the correct understanding that a manufacturer's new-car warranty starts running when a vehicle is first put in use and thus dealer-owned vehicles and demonstrators are sold with transferable *balances* remaining on those warranties. (See § I.B, *ante*.) By including "other" motor vehicles "sold with a manufacturer's new car warranty," presumably the Legislature intend to include all other used vehicles that, like demonstrators or dealer-owned vehicle, come with transferable balances on the manufacturer's new-car warranty.

In any event, if the reference to "manufacturer's new car warranty" in section 1793.22's "new motor vehicle" definition is ambiguous and warrants examining legislative history, then the

enrolled bill report's use of *that same phrase* is equally ambiguous and sheds no light. And if the Court finds the statutory language and legislative history inconclusive, then the Court must adopt a reasonable interpretation that promotes the Act's remedial purpose—which supports *Jensen*'s interpretation and requires rejecting the Opinion's interpretation.

The Opinion tries to sidestep this problem by commenting that it "found no reference to used vehicles in any of the legislative history materials regarding Assembly Bill Number 1027" and "[o]ne would assume" an expansion of liability to include used vehicles "would warrant mention if not discussion." (Opn:15.) Yet again, the Opinion fails to recognize that dealer-owned vehicles and demonstrators are *used* vehicles, as are many "other" vehicles "sold with a manufacturer's new car warranty."

Given the Act's remedial purpose, one could just as easily assume that a decision by the Legislature to *exclude* a subset of used-car buyers from the Act's express-warranty protections "would warrant mention if not discussion." Indeed, the enrolled bill report recognizes "that very few consumers have the capacity or desire to be involved in legal action with a manufacturer" and "[l]egal recourse is an undesirable option for a consumer because the costs, frustration, delays and legal action are much more of a burden on the consumer than on the manufacturer." (3MJN/707.) If the Legislature had intended, contrary to this fact, to relegate a subset of used-car buyers to the economically infeasible option of suing manufacturers under the Commercial

Code (as the Opinion concludes) wouldn't that "warrant mention if not discussion"?

Courts should not make speculative assumptions based on the *absence* of legislative history. As *Jensen* recognized in rejecting the manufacturer's argument that "the *absence* of legislative history means the Legislature did not intend to enact so sweeping an expansion in the warranty protection available under the Act," "[i]t is difficult enough to derive legislative intent from statements *actually made* in documents associated with the legislative process." (35 Cal.App.4th at pp 124-125, original italics.) "Given the nature of the [legislative] process, ... no inference of legislative intent may be drawn from the lack of legislative history on this particular statutory provision." (*Id.* at p. 125.)

And, as noted, other legislative history confirms that *Jensen* got it right. (See §§ II.D.1, II.D.2, *ante*.)

E. Implied warranties are irrelevant.

The Opinion improperly conflates the express- and implied-warranty statutes. Section 1793.22's "new motor vehicle" definition *doesn't apply* to implied warranties. The definition is unique to section 1793.22 itself and to section 1793.2, subsection (d)(2)'s refund-or-replace requirement. (See §§ 1793.22, subd. (e) ["For the purposes of subdivision (d) of Section 1793.2 and this section, the following terms have the following meanings...."], 1793.2, subd. (d)(2) [addressing manufacturer's inability to repair "a new motor vehicle as … defined in paragraph (2) of subdivision

(e) of Section 1793.22"]; see *Dagher*, *supra*, 238 Cal.App.4th at p. 920 [section 1793.22's "new motor vehicle" definition applies only to sections 1793.2(d) and 1793.22].)

Those two statutes only concern *express* manufacturer warranties, not implied warranties: "[T]he definition of 'new motor vehicle' under section 1793.22(e) specifically states it only applies to section 1793.2(d), which ... only applies to express warranties, and section 1793.22, ... which does not reference implied warranties." (*Victorino v. FCA U.S. LLC* (S.D.Cal. 2018) 326 F.R.D. 282, 301; see §§ 1793.2, 1793.22.) "If the Legislature had intended the definition of 'new' vehicle in section 1793.22, subdivision (e) to apply throughout the Act, it would not have explicitly limited its applicability...." (*Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 409.)

The Act's implied-warranty provisions are in sections 1791.1, 1792-1792.3, and 1795.5. Sections 1791.1 and 1792-1792.3 impose implied warranties on manufacturers and retail sellers for sales of "consumer goods," which section 1791, subdivision (a), defines as "any new product…." Section 1795.5 imposes implied warranties on distributors and retail sellers of used goods (not the original manufacturers, distributors, and sellers when the goods were new), and those implied warranties can never exceed three months. (See § 1795.5, subd. (c); *Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 399 ["only distributors or sellers of *used goods*—not manufacturers of *new* goods—have implied warranty obligations in the sale of *used goods*"].)

The Opinion, however, erroneously conflates express and implied warranties. It describes *Johnson v. Nissan North America, Inc.* (N.D. Cal. 2017) 272 F.Supp.3d 1168, 1179 (*Johnson*) as dismissing plaintiff's "claim on the ground her car was not a 'new motor vehicle,'" and being "directly on point" and "reach[ing] the same conclusion we do." (Opn:16.) But the district court in *Johnson* didn't even mention, let alone analyze, section 1793.22's "new motor vehicle" definition. The portion of *Johnson* that the Opinion cites solely concerns whether a plaintiff who purchased a used car from a retail seller could assert an *implied*-warranty claim against the manufacturer. (*Ibid.*, citing 272 F. Supp.3d at pp. 1178-1179.) That issue has nothing to do with the statutory-interpretation question before this Court.[28]

The Opinion further strays into the implied-warranty realm by emphasizing that *Kiluk, supra,* 43 Cal.App.5th 334, "expressed 'reservations'" about *Jensen*. (Opn:18.) But the *Kiluk*

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[28] *Johnson* correctly recognized that the manufacturer owed no implied warranty under section 1795.5, but *Johnson*'s reasoning is flawed. *Johnson* describes *Dagher* as holding that the Act doesn't apply to a plaintiff "who purchased a used car from *a private party*," and then concludes: "Ms. Johnson *similarly* purchased a used car from a third-party, CarMax." (272 F.Supp.3d at p. 1179, italics added.) *Dagher*, however, addressed the distinction between *retail sellers* and *individuals*. *Dagher* holds that "the Act contemplates coverage" where "the seller is a retail seller engaged in the business of vehicle selling" (as was true of CarMax in *Johnson* and the seller here) but not a sale between two individuals "not routinely engaged" in the business of selling cars (as was true in *Dagher*, but not in *Johnson* and here). (See *Dagher*, *supra*, 238 Cal.App.4th at p. 923.)

court ruled it "need not decide whether *Jensen* was correctly decided" because the manufacturer would be liable under section 1795.5 regardless. (*Kiluk*, *supra*, 43 Cal.App.5th at pp. 339-340.) It was only in footnoted dicta that *Kiluk* voiced concerns about the "*Jensen* court's approach creat[ing] a potential problem with the implied warranty of merchantability" because section 1792's "one-year implied warranty automatically attaches to any new consumer good sold in this state" and therefore "if a used vehicle is a 'new motor vehicle,' then the one-year implied warranty attaches to every subsequent sale during the warranty period, even if the manufacturer has no knowledge of the sale…." (43 Cal.App.5th at p. 340, fn. 4.)

Kiluk failed to recognize that section 1793.22's "new motor vehicle" definition only governs sections 1793.22 and 1793.2, subsection (d). *Jensen*'s interpretation doesn't create a manufacturer implied warranty each time a vehicle is sold. The "new motor vehicle" definition has no bearing on implied warranties for new products under sections 1791.1-1792.3 or implied warranties for used products under section 1795.5.

Regardless, even *Kiluk* recognized that manufacturers should be liable under the Act when their warranties transfer to new owners in retail sales. *Kiluk* concluded that courts can "enforce[] the warranty while avoiding the [purported, actually non-existent] problem of serial implied warranties" by holding that "purchasers of used vehicles during the period of a transferable new motor vehicle warranty" can sue under the Act "because the *original* sale was of a new motor vehicle, and

manufacturers have an ongoing duty under the Song-Beverly Act to 'carry out the terms of those warranties.' (§ 1793.2, subd. (a)(1).)" (43 Cal.App.5th at p. 340, fn. 4, original italics.) As *Kulik* put it, "[i]f a term of the warranty is that it is transferrable, then the manufacturer's duties under the Song-Beverly Act continue post[-]transfer." (*Ibid.*)

In other words, in expressing reservations about imposing serial implied warranties on manufacturers, the *Kiluk* court simply failed to recognize that *Jensen*'s interpretation of section 1793.22's plain language achieves the same result that the *Kiluk* footnote embraced as reasonable *while avoiding* serial implied warranties.

F. The Court should avoid causing shockwaves in the used-car market.

If this Court has doubts regarding the "new motor vehicle" definition, it should decide them in favor of "extend[ing] the remedy" to foster the Act's remedial purpose. (*Muller*, *supra*, 36 Cal.3d at p. 269.) The Court also should construe doubts in favor of preserving the status quo and avoiding shockwaves in the used-car market. (*Kirzhner, supra,* 9 Cal.5th at p. 972 [court may consider public policy where statute ambiguous].)

Here, *Jensen*'s interpretation advances the Act's remedial purposes while *also* preserving the status quo. As the eighteen depublication letters submitted in this case confirm, over the nearly three decades since *Jensen* was decided, used-car buyers have relied on *Jensen* to bring, settle, and prevail in countless

Song-Beverly cases involving used cars purchased with balances remaining on the manufacturer's new-car warranty. (See, e.g., 5/20/2022 Knight Law Group Depub. Letter, pp. 2-5; 6/07/2022 Consumer Law Experts Depub. Letter, pp. 1-3; 6/06/2022 Hendrickson Law Group Depub. Letter, pp. 1-3; 6/06/2022 Auto Fraud Legal Center Depub. Letter, pp. 2-3; 6/06/2022 Strategic Legal Practices Depub. Letter, pp. 1, 11; 6/06/2022 Consumer Law Practice Depub. Letter, pp. 1-2; 5/25/2022 Anderson Law Depub. Letter, pp. 3, 8; 6/06/2022 Joseph Kaufman & Associates Depub. Letter, p. 2.)

Replacing *Jensen*'s interpretation with the Opinion's interpretation would rock the used-car market. It is common sense that used-car purchasers place great importance on whether a vehicle remains under a new-car warranty. Used vehicles already come with implications of being less reliable than brand-new vehicles. Used-car buyers therefore want to know whether the manufacturer's new-car warranty remains in effect, so they can address problems without substantial out-of-pocket risk. They pay a premium for a vehicle if the manufacturer's warranty remains operative.

Under the Opinion's interpretation, however, even though a still-pending warranty may compel the vehicle manufacturer to cover the repairs, the used-car buyer has no real path to genuine relief if the vehicle is a lemon and the manufacturer shirks its obligations (as occurred here). Without the Act's remedial measures, buyers of used cars with balances remaining on manufacturer new-car warranties are left out to dry when stuck

with lemons. The ability to sue manufacturers for breach of warranty is virtually meaningless without the Act's enhanced protections, including the refund-or-replace requirement, the branding requirement, the right to recover attorney's fees, and the potential for civil penalties.

The Opinion's interpretation would harm the thousands of consumers who've already paid premiums for used vehicles in reliance on the balance remaining on the manufacturer's new-car warranty. Those transactions can't be undone.

Accordingly, if the Court has doubts about the meaning of the "new motor vehicle" definition, it should err on the side of preserving the prior status quo under *Jensen*. If the Legislature later decides that the Court made the wrong call, it can enact new legislation limiting the Act's reach. But from a public-policy standpoint, the onus should be on manufacturers to solicit the Legislature to strip certain vehicle buyers of the Act's protections, rather than force consumers to seek legislative assistance to restore the decades-long status quo under *Jensen*.

CONCLUSION

The Court should reverse and hold, as *Jensen* did three decades ago, that vehicles sold with a balance remaining on the manufacturer's new-car warranty fall within section 1793.22's "new motor vehicle" definition.

October 11, 2022

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504 (d)(1), (d)(3), I certify that this **PETITIONERS' OPENING BRIEF ON THE MERITS** contains 13,992 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: October 11, 2022 */s/ Cynthia E. Tobisman*

Cynthia E. Tobisman

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036; my e-mails address is chsu@gmsr.com.

On October 11, 2022, I served the foregoing document described as: **PETITIONERS' OPENING BRIEF ON THE MERITS** on the parties in this action by serving:

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Executed on October 11, 2022, at Los Angeles, California.

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

Chris Hsu

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California Court of Appeal
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8.78(g)(2) and 8.500(f)(1)]

Via U.S. Mail

Hon. Jackson Lucky
Attn: Appeals Department
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Riverside, California 92501
Case No. RIC1807727