S274625

IN THE SUPREME COURT OF CALIFORNIA

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,

v.

FCA US, LLC,
Defendant and Respondent.

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

ANSWER BRIEF ON THE MERITS

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

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

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

ATTORNEYS FOR DEFENDANT AND RESPONDENT
FCA US, LLC

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

From its inception, the Song-Beverly Consumer Warranty Act (Song-Beverly or the Act) (Civ. Code, § 1790 et seq.),[1] was designed to protect purchasers of *new* warranted products. Plaintiffs ask this Court to extend Song-Beverly's enhanced statutory remedies to *used* vehicle owners who have contractual rights under the balance of the warranty issued to the original purchaser. As the Court of Appeal correctly held, plaintiffs' position runs counter to the statutory scheme established by the Legislature and should be rejected.

Plaintiffs make the bold claim that the opinion reached this commonsense result "for the first time in a California published decision" (OBOM 14), but that is simply not true. A number of cases explain that a manufacturer generally owes used car owners only the duty to perform under the warranty—and not the statutory repurchase-or-replacement remedy. No appellate decision has adopted plaintiffs' position—affording new car remedies to used car owners who had no transactional relationship with the manufacturer, and who contracted with a third party to buy a vehicle with thousands of miles on it, far removed from the condition it was in when it left the factory floor.

The Legislature undoubtedly was attuned to the difference between new and used vehicles. It afforded a particularly

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

generous statutory remedy—the repurchase or "buyback" remedy—only to "new motor vehicle" owners. Plaintiffs argue that used cars are actually new cars so long as their owners enjoy rights under the balance of the original warranty. Their position turns entirely on part of the "new motor vehicle" definition referring to "a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." (§ 1793.22, subd. (e)(2); see OBOM 14.)

As the Court of Appeal explained, Song-Beverly's use of that catchall phrase must be read in the context of the sentence and section in which it appears. The statutory language clarifies that new cars include "new motor vehicles" sold with a *new car* warranty in the initial retail sale—like executive vehicles owned by a bank, leasing company, or the manufacturer—that may not technically be demonstrators or dealer-owned vehicles but that have never previously been sold to a consumer. New cars are *not*, however, those that have changed hands among private owners. Such purchasers inherit only whatever contractual obligations may remain under a warranty issued to the first buyer of the car. If the Legislature *had* intended the catchall phrase to include *any* vehicle sold with a balance of the original warranty, there would have been no need to mention demonstrators at all.

Song-Beverly's legislative history confirms the Court of Appeal got it right. From the time the "lemon law" went into effect in 1982, it has never imposed on nonseller manufacturers any repurchase obligation to used car buyers. With each amendment, the Legislature carried forward the "new motor

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vehicle" limitation on enhanced statutory duties and remedies. The bill's author undertook certain clarifications in 1986, and dealer-owned and demonstrator vehicles were added to the definition of "new motor vehicle" in 1987; contemporaneous reports showed this amendment was considered a "clean-up" change. From that time to the present, no legislative history suggests anyone envisioned the vast expansion of Song-Beverly's reach that plaintiffs' interpretation would effect.

Used car owners are not left without recourse. If a used car has repeat problems while under warranty, the manufacturer must pay for warranted repairs. Moreover, the Legislature crafted a statutory remedy specifically for used cars: a repurchase obligation falls on the used car *dealer* that resold the car, to the extent the dealer breaches a further warranty given in connection with that sale. (See § 1795.5.) At that point, such dealers are in the best position to discover, repair, and disclose any problems in a particular used car before it is sold to a subsequent purchaser. This is a rational approach, and it draws the same line drawn in other states' lemon laws.

An automobile purchase is one of modern life's most highly regulated sales transactions. Like other states, California regulates every aspect of that transaction—from advertising and vehicle disclosure requirements to finance and leasing regulations, license, registration, insurance, warranty, and service obligations. In a variety of contexts within this complex system there are different rules for new and used vehicles. This

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Court should reject plaintiffs' attempt to blur Song-Beverly's important distinction between new and used cars.

STATEMENT OF THE CASE

I. California's complex suite of laws and regulatory provisions governing the sale and warranty of new and used vehicles.

A. New and used products, including new and used vehicles, are traditionally subject to differing rights and obligations.

Sellers' obligations relating to used products are "less stringent" than those applicable to new products "due to the wide variations in the type and condition of used products." (Rest.3d Torts, Products Liability, § 8, com. a, p. 166; see *id.*, com. d, p. 170 [used products have been sold to a buyer outside the chain of distribution].)

For more than a century, this approach has been true regarding motor vehicles. California heavily regulates manufacturers, distributors, and new and used automobile dealers, maintaining a distinction between new and used vehicles consistent with distinctions between new and used products generally. Entire chapters of California codes are devoted to the regulation of "new motor vehicle dealers" and "new" or "used" motor vehicles. (See Veh. Code, § 3000 et seq.; Health & Saf. Code, §§ 43100 et seq., 43600 et seq.; Bus. & Prof. Code, § 472 et seq.) The dividing line between a "new" and "used" vehicle is generally whether it has been sold at retail. (See Veh. Code, §§ 430, 665.)

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Only manufacturers themselves or their franchised "new motor vehicle dealers" may sell new vehicles. (Veh. Code, §§ 426, 11713.1, subd. (f)(1).) Franchised dealers must maintain a line of credit with a bank—a "floor plan"— to buy their inventory of new vehicles from manufacturers. (Billings, Floor Planning, Retail Financing & Leasing in the Automobile Industry (2004) § 1:4 (hereafter Billings, Floor Planning).) Franchised dealers use some of these new vehicles as demonstrators, service loaners, and executive or driver education vehicles (*id.*, §§ 1:7, 1:14), which are subject to distinct registration and taxation rules and can be used only in limited ways (Veh. Code, § 11715, subd. (a) [registration requirements]; Cal. Code Regs., tit. 13, § 201.00 [use of special plates]; Cal. Dept. of Tax and Fee Admin. (CDTFA), Business Taxes Law Guide–Revision 2023, Sales and Use Tax Annotations, § 215.0000 et seq. <https://tinyurl.com/ms8ff9d7> [as of Jan. 31, 2023] (hereafter CDTFA Guide) [discussing use tax regulations]; CDTFA, Motor Vehicle Dealers (Jan. 2023) pp. 26–30 <https://tinyurl.com/2p8sjkfa> [as of Jan. 31, 2023] (hereafter CDTFA, Motor Vehicle Dealers) [same]; Ebin, *Demonstrator FAQs* (Aug. 31, 2020) <https://tinyurl.com/mr46pmdm> [as of Jan. 31, 2023] [the "special DMV forms . . . for demos" include REG 397 (Application for Registration of New Vehicle) and 496 (Used Vehicle Certification)].) New car dealers must "conspicuously" disclose the prior use of these vehicles to the first consumer purchaser. (Veh. Code, § 11713, subd. (t).)

Different rules apply to used vehicle transactions. While transactions between private owners are largely unregulated,

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used car dealers are subject to specific education, inspection, repair, and disclosure requirements and must acquire vehicle history reports and make them available to consumers. (See Civ. Code, § 2986.5; Veh. Code, §§ 11704.5, 11713, subd. (d), 11713.1, subd. (t), 11713.16, subd. (a), 11713.18, 11713.21, 11713.26, 11950, 24007, subd. (a)(1), (c)(2), see also 16 C.F.R. §§ 455.1 et seq. (2022) [since 1985, the Federal Trade Commission's Used Car Rule has required dealers to post a Buyers Guide in every used car offered for sale].)

B. Since 1970, California's Song-Beverly Act has provided enhanced warranty protections whose scope depends on whether the consumer is the purchaser of new or used goods.

Manufacturers generally need not provide express warranties with their products. Under Song-Beverly, however, a manufacturer that sells "consumer goods" accompanied by an express warranty must maintain, authorize, or reimburse local repair facilities "to carry out the terms of those warranties." (§ 1793.2, subd. (a)(1)(A); see § 1793.5.)

In 1970, Song-Beverly defined "consumer goods" as motor vehicles and appliances bought for personal use. (FCA and Plaintiffs' Motions for Judicial Notice (MJN), 1MJN 115 [§ 1791, subd. (a)].)[2] Now, "consumer goods" include "any *new* product"

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[2] To provide full context, FCA has provided an additional 10 volumes of legislative history. To avoid confusion, FCA has numbered these volumes consecutively as volumes 7–16, to follow the 6 volumes filed by plaintiffs (which include the 5 volumes FCA filed in the Court of Appeal). FCA cites to all volumes as "[vol.]MJN [page]."

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bought or leased for personal use, with a narrow exception to include “new *and used* assistive devices,” like wheelchairs. (§ 1791, subd. (a), emphasis added.)

Song-Beverly provides a statutory remedy for breach of warranty in addition to contract breach remedies available under the Commercial Code. The owner must give the manufacturer “a reasonable number of attempts” to conform the new product to the applicable express warranty, but if those attempts are unsuccessful, the manufacturer “shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer.” (§ 1793.2, subd. (d)(1).)

The Act carves out *used* goods for different treatment, imposing obligations only on the seller or distributor rather than the manufacturer. Section 1795.5 provides: “Notwithstanding the provisions of subdivision (a) of [s]ection 1791 defining consumer goods to mean ‘new’ goods, *the obligation of a distributor or retail seller* of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under this chapter.” (Emphasis added.) “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.” (§ 1795.5, subd. (a), emphasis added.)

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Section 1795.5, subdivision (b), confirmed that manufacturers are *not* liable under the Act for the cost of repairing, replacing, or repurchasing used goods. (§ 1795.5, subd. (b) [section 1793.5 does not apply to the sale of used goods]; see § 1793.5 [manufacturers that rely on retail sellers to conform goods to warranty *are* liable for the cost to replace, repair, or repurchase *new* goods].)

Since 1970, Song-Beverly has also provided for *implied* warranties of merchantability and fitness for "consumer goods" (§§ 1791.1, 1792), i.e., *new* products. These implied warranties may not last less than 60 days or more than one year after the sale of the new goods. (§§ 1791.1, subd. (c), 1792.) The Act provides different implied warranties for *used* products, lasting only up to three months. (§ 1795.5, subd. (c).) As with express warranties, liability for breach of implied warranties on used goods lies exclusively with distributors and retailers unless the manufacturer *acts* as the retail seller and issues a new warranty with the used product's sale. (See § 1795.5.)

C. In 1982, California added its vehicle-specific "lemon law" to Song-Beverly and limited the repurchase-or-replacement remedy against auto manufacturers to "new motor vehicles."

The Legislature amended Song-Beverly in 1982 to add special "lemon law" provisions governing new motor vehicles. (See Stats. 1982, ch. 388, § 1, p. 1720 [former § 1793.2, subd. (e)].) The provisions created a rebuttable presumption that certain conditions during the first 12 months after delivery or first 12,000 miles would trigger Song-Beverly's repurchase-or-

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replacement remedy. (*Ibid.*; 5MJN 945 [§ 1793.2, subd. (e)(1)], 952 [same].) The presumption generally arises only if the buyer directly notified the manufacturer (not just the dealer) of an unrepaired malfunction. (*Ibid.*)

The 1982 enactments included a limiting definition of "new motor vehicle," which excluded business-use vehicles and motorcycles, motorhomes, and off-road vehicles. (Stats. 1982, ch. 388, § 1, pp. 1722–1723 [former § 1793.2, subd. (e)(4)(B)]; 5MJN 950 [same].) Over the years, the definition has undergone several revisions both to include and exclude vehicles not obviously or technically satisfying the general definition. (Stats. 1987, ch. 1280, § 2, p. 4561 [including demonstrators]; Stats. 1988, ch. 697, § 1, p. 2319 [excluding certain aspects of motorhomes]; Stats. 1998, ch. 352, § 1, pp. 2777–2778 [§ 1793.22, subd. (e)(2); including certain vehicles used by small businesses]; Stats. 2000, ch. 679, § 1, pp. 4510–4511 [same].)

In 1987, the substance of current section 1793.2, subdivision (d)(2), was added. Subdivision (d)(1) describes the repurchase-or-replacement remedy for any consumer "goods" that a manufacturer does not successfully repair. Subdivision (d)(2), which deals specifically with "new motor vehicles," tracks the general remedy provision but adds vehicle-specific requirements. With replacement, the buyer receives another "substantially identical" "new motor vehicle" under subdivision (d)(2)(A), and with "restitution" under subdivision (d)(2)(B) (i.e., repurchase or buyback), the manufacturer "shall make restitution" that

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includes the "actual price paid or payable" for the new vehicle, with specified adjustments.

In 1992, the Legislature transferred the 1982 "lemon law" provisions *from* former section 1793.2, subdivision (e), *to* section 1793.22, known as the Tanner Consumer Protection Act. As a result, the definition of "new motor vehicle" moved to section 1793.22.

The current definition is limited to new vehicles bought for personal use or for business use by certain small businesses and includes and excludes specified new vehicles. (§ 1793.22, subd. (e)(2).)

> "New motor vehicle" means a new motor vehicle that [is bought for specified uses] . . . [and] includes [the chassis and drive train only of new motorhomes], *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 unregistered off-road vehicle]. A demonstrator is 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.

(*Ibid.*, emphasis added.)

II. This Lawsuit.

A. Plaintiffs purchase a used Dodge truck from Pacific Auto Sales and then sue FCA for a repurchase remedy, claiming attempts to conform the truck to the warranty were unsuccessful.

Plaintiffs bought a used Dodge truck with over 55,000 miles on the odometer from Pacific Auto Center. (*Rodriguez v. FCA*

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US, LLC (2022) 77 Cal.App.5th 209, 215 (*Rodriguez*); AA 146.) Pacific Auto Center is an independent used car dealer unaffiliated with FCA, the truck's manufacturer. (*Rodriguez*, at p. 216.)

When purchased, the truck's basic 3-year/36,000-mile warranty had expired, but FCA's limited powertrain warranty was still in effect. (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 215.) Plaintiffs presented the truck to an FCA-authorized service facility several times when the check engine light illuminated, and plaintiffs claim the problem was not fixed. (*Id.* at pp. 215–216.)

Plaintiffs sued, claiming FCA must repurchase their used truck. (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 215–216.)

B. The trial court grants summary judgment and the Court of Appeal affirms, concluding the statutory remedies for new motor vehicles are not available to owners of a used vehicle.

FCA moved for summary judgment, noting that the repurchase remedy is limited to "new motor vehicles." (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 216.) FCA argued it had no statutory duty to repurchase a used truck that it did not sell to plaintiffs. (*Ibid.*) The trial court agreed and granted summary judgment. (*Ibid.*)

The Court of Appeal affirmed, reaching the straightforward conclusion that a used vehicle purchaser who inherits some remainder of the original warranty did not purchase a "new motor vehicle" within the meaning of the Act. (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 215.) The unanimous court analyzed Song-

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Beverly's statutory text and legislative purpose, and concluded that a used vehicle originally sold to a prior consumer is not a "new motor vehicle." (*Id.* at pp. 219–225.)

The opinion explained the key phrase—" 'a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty' "—must be interpreted based on ordinary principles of grammar and in the context of the overall statutory scheme. (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 214–215, 220–223.) The court concluded that the phrase "or other motor vehicle" is a "catchall" provision covering vehicles similar to "demonstrators" and "dealer-owned" vehicles that have not been previously sold to a consumer and are sold "with new or full warranties." (*Id.* at pp. 219–221.)

The opinion cites the consistent line of cases finding used car purchasers are not entitled to Song-Beverly's special statutory repurchase remedy for new car purchasers. (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 218, 223–224, citing *Ruiz Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 398 (*Nunez*); *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 339–340 (*Kiluk*); *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 923 (*Dagher*); *Johnson v. Nissan North America, Inc.* (N.D.Cal. 2017) 272 F.Supp.3d 1168, 1179 (*Johnson*).)[3]

The opinion distinguishes *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112 (*Jensen*), on which

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[3] After this Court granted review, courts have consistently agreed with the opinion. (See *Barboza v. Mercedes-Benz USA, LLC* (E.D.Cal., Dec. 28, 2022, No. 1:22-CV-0845 AWI CDB) 2022 WL 17978408, at p. *3 [nonpub. opn.] [collecting cases].)

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plaintiffs heavily rely. (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 223–224.) In that case, the Court of Appeal found BMW owed a repurchase remedy where its franchised dealer leased an essentially new car, representing it as a new demonstrator and providing "a *full* manufacturer's warranty issued by the manufacturer's representative." (*Id*. at p. 224.)

Finally, the opinion reaffirmed that used vehicle buyers can still enforce their warranties—albeit without Song-Beverly's enhanced remedies for new motor vehicles—both under the Act's remedies for used vehicles (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 218) and under the Commercial Code (*id*. at p. 225).

LEGAL ARGUMENT

I. The definition of "new motor vehicle" for purposes of Song-Beverly's repurchase-or-replacement remedy against manufacturers excludes plaintiffs' used truck.

A. The term of art "new motor vehicle" is not reasonably susceptible to an interpretation that includes used vehicles previously sold at retail.

The core dispute here is how to interpret section 1793.22, subdivision (e)(2), which begins by stating " 'New motor vehicle' means a new motor vehicle that . . . ." The simplest answer to plaintiffs' contention that their used truck was actually a "new motor vehicle" is that the Legislature would not have continued to use the term "new motor vehicle" if its intent were to sweep in used vehicles such as the one at issue here—a truck purchased

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from a used car dealer after having been driven 55,000 miles by a prior owner.

The Vehicle Code defines a "new vehicle" as one that has never been sold at retail or registered. (Veh. Code, § 430; see *id.*, § 426 ["New motor vehicle dealers" are franchised dealers that sell "new and unregistered motor vehicles"].) The Vehicle Code uses the phrases "new vehicle" and "new motor vehicle" interchangeably. (See, e.g., *id.*, §§ 296, 331, 3064, 28052.)

A "used vehicle" is one that *has* been sold or registered, *or* a vehicle that would *otherwise* be considered new but was *regularly* used by a dealer as a demonstrator or by a manufacturer in sales or distribution work. (Veh. Code, § 665.) The word "sold" expressly refers to sales to consumers and does not include transfers between manufacturers and its dealers or between dealer franchisees. (*Ibid.*.; see Civ. Code, § 1791, subds. (b), (n).)

It is common for a statutory "term of art" to define itself. (See *Gustafson v. Alloyd Co., Inc.* (1995) 513 U.S. 561, 576 [115 S.Ct. 1061, 131 L.Ed.2d 1] (*Gustafson*).) To speak of a "new motor vehicle" in a statute is to use a term of legal art, which courts will construe according to its accepted legal meaning. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19 (*Arnett*).) For example, the Civil Code commonly incorporates the Vehicle Code's definitions. (See Civ. Code, §§ 1795.90, subd. (e), 2981, subd. (*l*), 2985.7, subd. (a).)

Under Song-Beverly, " 'New motor vehicle' means a new motor vehicle [and] includes . . . a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's

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new car warranty." (§ 1793.22, subd. (e)(2).) The repeated use of the phrase "new motor vehicle" shows the Legislature incorporated that term's specialized, legal meaning. (See *Arnett*, *supra*, 14 Cal.4th at pp. 19–21 [lawmakers are presumed to use words in their "legal sense"].)

Read together with the Vehicle Code, section 1793.22's definition of "new motor vehicle" is limited to vehicles not previously sold to and registered for use by a consumer. For purposes of Song-Beverly, a "new motor vehicle" includes cars that may be "used" in the sense of having been *operated*—but only as demonstrators or dealer-owned or manufacturer-owned vehicles never previously sold to a consumer. A vehicle is not necessarily "used" just because it has mileage on the odometer, but it *is* "used" rather than "new" if it was preowned by a consumer.

B. The statutory reference to vehicles "sold with a manufacturer's new car warranty" does not transform previously sold used cars into new ones for purposes of Song-Beverly.

1. The reference to a new car warranty, read in context, merely clarifies that new motor vehicles include those sold with the warranty that accompanies a first-time purchase.

Plaintiffs' argument that their used truck is a "new motor vehicle" hinges on 17 words in the middle of the 183-word definition of that term: "a dealer-owned vehicle and a

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'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." (§ 1793.22, subd. (e)(2).)

The plain language of the disputed clause, read in the context of the entire definition and Song-Beverly as a whole, confirms that buyers who purchase cars previously owned by other consumers are not owners of "new motor vehicles" and are not entitled to repurchase remedies available only to the original purchaser. (See *Golf & Tennis Pro Shop, Inc. v. Superior Court* (2022) 84 Cal.App.5th 127, 134–135 [courts grant words in statutes " 'their usual and ordinary meanings' " and construe them " 'in context' "]; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 858 [finding statutory provision viewed in context was not ambiguous; words added for clarification did not create ambiguity].)

The phrase "or other motor vehicle sold with a manufacturer's new car warranty" logically means a vehicle sold with a "new or full" warranty accompanying the first sale to a consumer. (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 222.) And a car "sold with" that warranty refers to the sale in which that warranty arose. (See Billings, Handling Automobile Warranty and Repossession Cases (2d ed. 2003) § 4:16 (hereafter Billings, Warranty) [lemon laws "frequently" include demonstrators and similar vehicles " 'as long as a manufacturer's warranty was issued as a condition of sale,' " citing Washington and California law].)

Plaintiffs argue any vehicle resold with a transferable balance on a manufacturer's new-car warranty is one "sold with a

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manufacturer's new car warranty." (OBOM 26.) But a transfer of the *remainder* of the original warranty is *not* the sale that comes with a *new car* warranty.

Plaintiffs' interpretation is undercut by Song-Beverly's definition of express warranty: "A written statement *arising out of a sale to the consumer* . . . to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good." (§ 1791.2, emphasis added.) A "new car warranty" arises only upon the sale or lease to the first consumer; no new car warranty "arises out of" the resale of a used car.

Plaintiffs sidestep the Act's definition of express warranty, arguing it "doesn't address purported distinctions between 'sales' and 'transfers.' " (OBOM 40.) Plaintiffs miss the point. The Legislature never discusses "transferred" warranties at all in Song-Beverly, precisely because it never contemplated that used car buyers, to whom *contractual* rights may pass, could assert *extracontractual* statutory remedies provided only to new car buyers.

Other provisions in Song-Beverly confirm the statutory reference to a car "sold with a new car warranty" refers to the original sale from which that warranty arose. For example, the Act's used goods provision overtly distinguishes statutory obligations of used good sellers who provide their own express warranties at the point of sale from obligations of manufacturers who previously provided express warranties "with respect to such goods when new." (§ 1795.5, subd. (a).) As plaintiffs concede,

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section 1795.5's reference to a sale "accompanied by an express warranty" refers only to any *additional* warranty that arose during that used car sale, rather than to any remaining manufacturer's express warranty that may also cover that vehicle. (See OBOM 38–39.) Section 1793.22's reference to "sold with a new car warranty" similarly refers to the warranty that arose during that "new car" sale.

Plaintiffs rely heavily on *Jensen*, *supra*, 35 Cal.App.4th at page 123, but that distinguishable case does not support plaintiffs' expansive interpretation of section 1793.22. *Jensen* held that the plaintiff who leased a car represented to be a demonstrator was entitled to seek the repurchase-or-replacement remedy reserved for new motor vehicles. (*Jensen*, at pp. 119 [dealer wrote "factory demo" on leasing paperwork], 123.)[4]

As the Court of Appeal here noted, the car in *Jensen* came with a *full* manufacturer's new car warranty. (*Jensen*, *supra*, 35 Cal.App.4th at p. 128.) Plaintiffs assert that the *Rodriguez* opinion's characterization of that fact was erroneous. (OBOM 23,

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[4] Nothing suggests the vehicle in *Jensen* had ever been previously sold or leased to another consumer, and the court made no such finding. The car "had been owned by the BMW Leasing Corporation" (*Jensen*, *supra*, 35 Cal.App.4th at p. 120), but had only 7,500 miles on the odometer (*id.* at p. 119). New vehicles are often "sold to a leasing company and leased back" to the dealer and kept in inventory (Billings, Floor Planning, *supra*, § 1:56), especially when they are used as demonstrators, executive vehicles, or service loaners (see CDTFA Guide, *supra*, § 215.0015 [accommodation vehicles, or service loaners, are "purchased by the dealer [and] immediately sold to the finance company which leases the vehicles back to the dealer"]).

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fn. 4.) But the jury's verdict in *Jensen* shows that plaintiffs are wrong. The jury necessarily found that BMW *had* provided Jensen with the warranty the dealer promised her. (See *Jensen*, at p. 128.) It was undisputed that the dealer told Jensen she was receiving a full 36,000-mile warranty; the only issue was whether the dealer was *authorized* to make that representation on BMW's behalf, and the jury implicitly found it was. (*Id.* at pp. 127–128.)

Finally, it appears Jensen's vehicle was leased to her *as a new vehicle*. (See 16MJN 1900–1901 ["The lease itself is entitled 'New Motor Vehicle Lease Agreement' "].) California law *requires* manufacturers to give full-mileage warranties when warranted cars are sold or leased as new vehicles. (Veh. Code, § 28052; see Civ. Code, § 1795.4, subds. (a) & (b).) Thus, *Jensen* "must be read in light of the facts then before the court" and "limited in that respect." (*Dagher*, *supra*, 238 Cal.App.4th at p. 923; accord, *Rodriguez*, *supra*, 77 Cal.App.5th at p. 224.)

2. Basic rules of statutory construction and grammar confirm the correctness of the Court of Appeal's analysis.

The phrase "or other" at the end of a statutory list typically signals a catchall provision that must be interpreted "within its context, and in light of its structure [and] analogous provisions." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 144.) To avoid a reading that renders some words altogether redundant, courts will not "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words." (*Gustafson*, *supra*, 513 U.S. at pp. 574–575; see *International*

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Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 342 ["the principle of *ejusdem generis*" provides that a general category is " 'restricted to those things that are similar to those which are enumerated specifically' "].) Thus, catchall phrases like "or other" must be construed in a limited manner "similar to" the specific items in the list. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1506; see *Estate of Lewy* (1974) 39 Cal.App.3d 729, 733 ["catch-all phrase" "any other" is narrowly construed to refer only to things similar in character to those specifically enumerated].)

If the Legislature had intended the phrase "a dealer-owned vehicle and a 'demonstrator' *or other motor vehicle sold with a manufacturer's new car warranty*" to represent three distinct categories of vehicles, "we would expect to see commas separating the types." (*Rodriguez*, *supra*, 77 Cal.App.5th at p. 220.) The use of "and" and "or" to separate the three items—instead of commas separating all three items—indicates the Legislature structured the provision as listing two categories of vehicles followed by a catchall clause qualifying or describing those two categories. (*Id.* at pp. 220–221; see *United States v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 241 [109 S.Ct. 1026, 103 L.Ed.2d 290] [when a phrase is set off by commas, "that phrase stands independent"].)

Plaintiffs argue the word "or" is disjunctive and cite a series of cases that do not help their cause. (See OBOM 25–26, citing *People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 561

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[rejecting interpretation that confused "*and*" with "or"]; *People v. Loeun* (1997) 17 Cal.4th 1, 9 [phrase using "or" does not mean "both"]; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [rejecting defendants' argument that the "last antecedent rule" did not apply]; *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30 [use of "or" in a list of four items separated by commas meant that finding any *one* applied would be sufficient].)

Here, there is no dispute about the meaning of "or." The issue is whether use of the word "or" in this particular grammatical structure indicates that the phrase "or other motor vehicle" can be read in isolation from the words that precede it. It cannot. "[T]he disjunctive 'or' " signifies separate categories *only* when it appears "without the use of any qualifying or limiting adjective preceding and modifying the latter noun." (*People v. Brunwin* (1934) 2 Cal.App.2d 287, 290–291.) The word "other" is a "limiting adjective" signifying that the latter noun must be interpreted in a manner similar to the specific terms that precede it. (*Ibid.*)

In sum, demonstrators and dealer-owned "new motor vehicles" are always sold to the first consumer "with a manufacturer's new car warranty" (pp. 36–37, *post*) and thus, the catchall phrase covers only "other" *similar* new motor vehicles sold to the first consumer with a new car warranty, such as

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"unregistered vehicles regularly used or operated by a manufacturer." (Veh. Code, § 665.)

3. Plaintiffs' unsupported arguments about demonstrators and leased vehicles do not support expanding special new motor vehicle protections to previously sold used vehicles.

Plaintiffs raise various arguments that fare no better at converting their used truck into a "new motor vehicle," as we now explain.

1. *Demonstrators and dealer-owned vehicles are materially different from used vehicles that are owned and driven for many thousands of miles by other consumers*. Plaintiffs argue demonstrators and dealer-owned vehicles are "just like any other used car" with transferred warranties. (OBOM 14.) Plaintiffs also claim demonstrators are "warranted" before sale, and "[m]anufacturers *don't* restart the warranty for a demonstrator," so the catchall reference to vehicles with a "manufacturer's new car warranty" should not be limited to cars sold with new or full warranties. (OBOM 29.) Plaintiffs are wrong on both counts.

First, demonstrators and dealer-owned vehicles are not "just like" plaintiffs' used truck. They have never been sold to and used (or misused) by another consumer. Demonstrators and similar vehicles used for sales purposes by manufacturers, dealerships and their personnel are carefully maintained in a like-new condition for resale during the limited period of usage before the vehicle is sold. That materially distinguishes demonstrator vehicles from those previously sold to private party

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consumers, which are then traded in or otherwise sold to a dealer for resale. The Legislature could logically have concluded that "new vehicle" status should be preserved for the former while (obviously) not applying to the latter.

Second, demonstrators are not warranted prior to sale. In *every* case, the *first* consumer to purchase or lease a demonstrator or dealer-owned vehicle receives a *new* warranty arising in *that* transaction, directly from the manufacturer (see § 1791.2, subd. (a)(1) [a warranty "aris[es] out of a sale to the consumer"]; Billings, Warranty, *supra*, § 6:1 [warranties are agreements manufacturers make *directly to the consumer*]), and thus that vehicle is sold with a "new or full" warranty (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 222–223). A warranty booklet's start date may control how long the warranty lasts, but it does not control when a warranty *arises* under the Act, and none of plaintiffs' out-of-state cases hold to the contrary. (See OBOM 33–34, fn. 23.)

Not only is the warranty arising from that sale a new (not transferred) warranty; it is also typically coextensive with full warranties issued to new cars that were not demonstrators. (Billings, Warranty, *supra*, § 6:13 ["For a small fee, manufacturers will *reinstate the original warranty period* when the dealer sells the demonstrator" (emphasis added)].) Similarly, service loaners are often sold with the same *full* mileage coverage as new vehicles (at no additional charge) because manufacturers take into account the miles put on the car during its in-service

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use.[5] Thus, whether the manufacturer "reinstates" the original warranty period, "extends" the warranty's mileage, or simply sells the vehicle with a warranty *arising* in that first retail transaction, demonstrators—*unlike preowned cars*—are always sold to the first retail buyer "with a manufacturer's new car warranty."

2. *The listed vehicle types after the word "includes" are not categorically used vehicles, and thus do not negate the statute's focus on "new motor vehicle."* Plaintiffs argue the vehicle types listed after the word "includes" are "vehicles that fall *outside* a literal reading of the first two sentences" and the repeated use of the phrase "new motor vehicle" throughout the section is thus irrelevant. (OBOM 27.) Plaintiffs are wrong again.

Previously never-sold motor homes, dealer-owned vehicles, and demonstrators are "new vehicles" under the Vehicle Code's "new vehicle" definition, as they would be unregistered, unsold vehicles. (Veh. Code, §§ 430, 11715, subd. (a).) But not all parts of a motorhome are considered part of the "vehicle" and, for some purposes (like advertising and sales disclosures), dealer-owned

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[5] For example, Ford Motor Company provides "full" 42-month/42,000-miles coverage on former service vehicles (increased from 3-year/36,000-miles). (See Salinas Valley Ford, *What is a Ford Courtesy Transportation Program Vehicle?* <https://tinyurl.com/46svz7cx> [as of Jan. 31, 2023]; see also Autotrader, *What is the HondaTrue Certified Vehicle Program?* (Apr. 29, 2022) <https://tinyurl.com/5s7srw3c> [as of Jan. 31, 2023] [Honda "covers near-new vehicles less than one year or 12,000 miles beyond their original in-service date," increasing coverage from the 3-year/36,000-miles basic warranty to 4-year/48,000-miles].)

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vehicles are considered "used" if they were "regularly used" as demonstrators. (See Veh. Code, §§ 665, 11713, subd. (t); cf. *ante*, p. 18 [demonstrators are registered as both new and used vehicles]; Cal. Code Regs., tit. 13, § 255.02 ["A vehicle in a dealer's inventory which is only occasionally demonstrated to a prospective purchaser . . . is not a 'demonstrator' "].) The Legislature therefore clarified that the part of a motor home used for human habitation would *not* fall within the protections for new motor vehicles (thus limiting coverage for what would otherwise fall within the definition). (Civ. Code, § 1793.22, subd. (e)(2).) As for the language about demonstrators and dealer-owned vehicles, the Legislature clarified that these unsold vehicles count as new even if they are regularly or occasionally used by dealers before sale. (See *ibid.*) Without the dealer-owned/demonstrator language, manufacturers might have argued that unregistered vehicles "regularly used" by new motor vehicle dealers (as opposed to sporadically used for test drives) were not "new motor vehicles" when sold for the first time to a consumer.

In other words, section 1793.22 clarifies that mileage on the odometer from "regular use" by a new motor vehicle dealer before the first retail purchase does not take the vehicle outside Song-Beverly's definition of "new." It certainly does not go farther to sweep in cars purchased from *used* car dealers for resale.

Finally, virtually all vehicles (new or used) on any dealer lot are owned by the dealer before they are resold to a consumer, so the phrase "dealer-owned" must be defined more narrowly, in light of the definition's earlier limiting phrase, "new motor

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vehicle." (Civ. Code, § 1793.22, subd. (e)(2); see Veh. Code, § 426 ["new motor vehicle dealer" is a franchised dealer].) A broad, isolated reading of "dealer-owned vehicle" that includes *any* vehicle owned by *any* dealer renders much of the definition redundant, *including* its enumeration of specified vehicles, like demonstrators.

3. *Plaintiffs' argument concerning demonstrators used extensively for several years is factually unsupported and irrelevant.* Plaintiffs raise the hypothetical prospect of consumers buying from new car dealers a "demonstrator used for several years" and executive vehicles "used for many years," from which they infer the Legislature must have meant to broadly include in the new motor vehicle definition *used* cars bought from any dealer who acquires title. (OBOM 56.)

The ipse dixit notion that demonstrators may be used "for many years" before being sold for the first time to a consumer is contrary to reality. New motor vehicle dealers have tremendous financial incentives to sell demonstrators and service and executive vehicles quickly. Dealers pay periodic interest and depreciation payments to the financing bank until the vehicles are sold to a consumer (see Billings, Floor Planning, *supra*, §§ 1:7, 1:12 [¶ 6.1], 1:52, 1:55) and pay use taxes for executive vehicles and service loaners (see CDTFA, Motor Vehicle Dealers, *supra*, pp. 26, 29–30; CDTFA Guide, *supra*, § 215.0000 et seq.; see also Dept. Motor Vehicles (DMV), City and County Use Tax Rate Changes (Apr. 21, 2021) <https://tinyurl.com/bdz7pd64> [as of Feb. 1, 2023]). Thus, these vehicles are typically sold after a

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few months of use. (See Billings, Floor Planning, *supra*, §§ 1:52, 1:55; CDTFA Guide, *supra*, § 215.0401; Cooper, *What is a Demo Car and is Buying One a Good Idea?* (Sept. 16, 2022) <https://tinyurl.com/2by2r7ww> [as of Feb. 1, 2023].)[6]

Plaintiffs' sole support for their repeated claim that demonstrators are "driven for years before being sold" (OBOM 29; see OBOM 30, 56, 57) is an article stating a demonstrator "used as a salesperson's personal vehicle . . . can have *hundreds to several thousand* miles" on it (Dempsey, *What is the real deal with buying a demo car?* (Mar. 27, 2009) Consumer Reports <https://tinyurl.com/3hcasf3t> [as of Feb. 1, 2023], emphasis added). But because cars are typically driven about 12,000 miles *per year*,[7] the cited article actually confirms demonstrators are typically used for less than one year before sale.

In any event, even if a demonstrator had a significant number of miles, the Legislature properly could and did distinguish such a vehicle from one sold to a consumer for private use and then resold to another consumer. If such vehicles were entitled to equal treatment, the Legislature need not have

[6] An average new motor vehicle dealership will sell between 500 and 1,000 vehicles a year, with fairly quick turnover. (See Billings, Floor Planning, *supra*, § 1:1.) New vehicles are now selling in less than a month. (See J.D. Power, *Up, Up and Up in December* (Dec. 21, 2022) ["The average number of days a new vehicle is in a dealer's possession before being sold is on pace to be 23 days"] <https://tinyurl.com/46dufdfn> [as of Feb. 1, 2023].)

[7] In California, "the average driver only covers 12,500 miles annually, less than the nationwide average." (Covington, *Average miles driven per year in the U.S. (2022)* (Sept. 21, 2022) The Zebra <https://tinyurl.com/ymjeujrc> [as of Feb. 1, 2023].)

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mentioned demonstrators at all and would simply have said "new motor vehicles" are all vehicles covered under a manufacturer's warranty.

4. *Plaintiffs' argument concerning lessees who exercise a lease option is factually unsupported and irrelevant.* Plaintiffs' vehicle was not leased and reclaimed by a franchised dealer before being sold. Plaintiffs nonetheless draw on the "dealer-owned" clause to posit that the Legislature intended "a leased vehicle returned after multiple years" should be considered a dealer-owned new motor vehicle to which the Act's new car remedies must apply, even though in common parlance such a vehicle is obviously "used." (OBOM 56–57.)

In fact, such a vehicle would have been previously owned by a leasing company and the consumer lessee—*not* the dealer. (See Veh. Code, §§ 286, subd. (i) ["dealer" does not include a "lessor"], 4453.5, subd. (a) [the lessor and lessee are the owners]; Billings, Floor Planning, *supra*, § 1:53 ["The dealer's leasing company purchases lease vehicles from the dealership [and the] vehicle is titled to the company. At the end of the lease the dealer will likely buy the car from the leasing company."].) The Court of Appeal's reading of the statute properly treats any such vehicles—all those previously owned and registered by a consumer but then sold back to a dealer—as falling outside the definition of "new motor vehicle."

Plaintiffs nonetheless argue that the definition of "new motor vehicle" must be stretched to protect original lessee owners who purchase their own vehicle at the end of the lease. (See

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OBOM 57.) But a lessee who is the recipient of a new car warranty that came with the lease of a new car is entitled to seek repurchase/replacement remedies based on unsuccessful repairs. (See § 1793.2, subd. (d)(2)(D) [a "buyer" of a new motor vehicle includes a lessee of a new motor vehicle]; *Crayton v. FCA US LLC* (2021) 62 Cal.App.5th 641, 206–207 (*Crayton*) [addressing original lessee's rights after vehicle is sold].) The precise contours of the remedies in a lease buyout situation need not be decided here, as the point is irrelevant on these facts. One who *buys a used car from a third-party used car dealer* is not in any sense the buyer of a "new motor vehicle," regardless whether an original lessee who exercises the purchase option at lease-end retains new-car-buyer status.

II. Other statutory provisions reinforce that Song-Beverly's new motor vehicle definition does not extend to used vehicles.

A. The Act contains remedies specific to the sale of used goods, which should be governed by those provisions rather than provisions specific to "new motor vehicles."

Song-Beverly is clear when it applies to used products. (*Rodriguez*, *supra*, 77 Cal.App.5th at pp. 221–222.) For example, Song-Beverly references "new or used" products (e.g., §§ 1794.4, subd. (f), 1796.5) and lays out detailed provisions in the limited situations where "used" products (like assistive devices) are

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covered by remedies otherwise provided specifically for new products (e.g., §§ 1793.02, subd. (g), 1795.5).

The absence of similar language in sections 1793.2 or 1793.22 signifies that those provisions do *not* cover used cars with transferred warranties. (See *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825 (*County of San Diego*) ["Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, ' "the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes" ' "].)

Plaintiffs argue Song-Beverly's provisions for used goods are irrelevant, specifically claiming that section 1795.5 "doesn't address a manufacturer's liability for the manufacturer's own express warranty" or "disclaim all manufacturer liability for used goods" under the Act. (OBOM 37–38.) That is plainly wrong. Section 1795.5 states it is "not the original manufacturer" who has any duty to maintain repair facilities for used products (§ 1795.5, subd. (a)) *or* to reimburse dealers for the cost of repairing, replacing, or repurchasing defective used products (§ 1795.5, subd. (b)), including those still covered by the original warranty. (See *Kiluk*, *supra*, 43 Cal.App.5th at pp. 339 [Song-Beverly

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"provides similar remedies in the context of the sale of used goods, except that the manufacturer is generally off the hook"].)

Other provisions in Song-Beverly confirm the manufacturer repurchase-or-replacement remedy is limited to the vehicle's *original* buyer.

First, when selling a repurchased lemon, manufacturers must disclose "the nature of the nonconformity experienced *by the original buyer or lessee*" to subsequent purchasers. (§ 1793.22, subd. (f)(1), emphasis added.) That disclosure requirement confirms manufacturers are expected to repurchase vehicles only from the "original" purchaser.

Second, the damages formula for the "use offset" in the event of a repurchase is calculated by dividing the "number of *miles traveled by the new motor vehicle* prior to the time the buyer first delivered the vehicle to the manufacturer" by 120,000, multiplied by the price of the car. (§ 1793.2, subd. (d)(2)(C), emphasis added; see 3MJN 701 ["120,000 miles is the average life expectancy of an automobile"].) It makes sense to determine the buyer's use based on *all* miles traveled by the new motor vehicle prior to the first repair attempt *only if the buyer was the original owner*. Significantly, both the use-offset and disclosure provisions were added in 1987, *at the same time* the "new motor vehicle" definition was clarified to include demonstrators and other vehicles sold with a new car warranty. (3MJN 543

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[§ 1793.2, subd. (d)(2)(C)], 713 [same]; see 3MJN 571 [§ 1793.2, subd. (e)(5)], 714–715 [same].)

Plaintiffs note that, in 1989, "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*.' " (OBOM 38, quoting former § 1795.8 [current § 1793.23, subd. (a)(1)].) The point nicely shows that, when the Legislature means to refer to "new and used cars," it knows how to distinguish such obligations from those applicable only to "new motor vehicles."

In addition, the language plaintiffs cite refers to Song-Beverly's disclosure provision for repurchased "used lemons." (See 13MJN 1207–1208, 1284; see also 3MJN 571 [in 1987, Assembly Bill (AB) 2057 added the disclosure provision in former section 1793.2, subdivision (e)(5), now section 1793.22, subdivision (f)(1)].) The Legislative Counsel explained that, in 1989, "existing law" required the repurchase of defective "new motor vehicle[s]," which could then be resold as used "motor vehicles," *if* the manufacturer disclosed the vehicle's history. (14MJN 1389.) Song-Beverly draws the same distinction today. (See §§ 1793.22, subd. (f)(1), 1793.23, subd. (c) [vehicle repurchased from the original owner becomes "a motor vehicle," not a "*new* motor vehicle," without regard to whether it is covered by the balance of the original warranty].)

Other statutes that apply to used car purchasers with transferred warranties confirm the limited scope of Song-Beverly's remedies for "new motor vehicle" buyers. For example,

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the Legislature expressly included subsequent purchasers in 1975 when it required manufacturers to provide consumers with express emissions warranties. (See Health & Saf. Code, § 43204, added by Stats. 1975, ch. 957, § 12 p. 2196 [vehicle manufacturers "shall warrant to the ultimate purchaser and each subsequent purchaser"].) This demonstrates how the Legislature could have treated buyers of used vehicles still covered by original warranties, if its intent had been to extend the repurchase-or-replacement remedy to them.

Similarly, the Motor Vehicle Warranty Adjustment Program (MVWAP) defines "consumers" for purposes of that program to include "any person to whom the motor vehicle is transferred during the duration of an express warranty." (§ 1795.90, subd. (a).) That is the kind of language one would expect to see in section 1793.22 if the Legislature intended the result plaintiffs advocate.

Plaintiffs observe that the MVWAP is not technically part of Song-Beverly and was enacted 23 years after the Act. (OBOM 42, citing §§ 1795.90–1795.93.) But the MVWAP was inserted (at Chapter 1.5) to immediately follow the Act in the Civil Code—6 years after the 1987 amendment—because both statutes relate to manufacturer warranty obligations to vehicle buyers. The reference to subsequent purchasers in the MVWAP, but not in Song-Beverly, supports FCA: it reveals "a different legislative intent" regarding which buyers are covered under each legislative enactment. (*County of San Diego*, *supra*, 165 Cal.App.4th at p. 825.)

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Finally, plaintiffs attempt to conflate used car and new car owners by noting that manufacturers have an ongoing duty, under section 1793.2, subdivision (a), to carry out the terms of transferred warranties. (OBOM 72–73, citing *Kiluk*, *supra*, 43 Cal.App.5th at p. 340, fn. 4.) However, that ongoing *contractual* obligation does not expand the enhanced statutory remedies that apply only to breaches of warranties held by buyers of "new motor vehicles." (See *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261–1262 (*Gavaldon*) [repurchase-or-replacement remedy not available for violation of Act's ongoing duties relating to used car service contracts].)

B. Plaintiffs' statutory interpretation conflicts with Song-Beverly's implied warranty provisions and unduly cuts off the rights of and remedies to buyers of demonstrators and other new vehicles.

"Statutory language is not considered in isolation. Rather, we 'instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.' " (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261.) Related provisions of the same statutory scheme " 'should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others.' " (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218.)

Consistent with these principles, Song-Beverly's definition of "new motor vehicle" for purposes of statutory remedies tied to

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express warranties should not be interpreted in a manner that conflicts with Song-Beverly's *implied* warranty provisions.

All new goods sold at retail are accompanied by the manufacturer's implied warranty of merchantability (§ 1792), which "in no event" shall have a duration of more than one year following the sale (§ 1791.1, subd. (c)). If used cars with transferred warranties were "new motor vehicles," as plaintiffs claim, a new one-year implied warranty would attach to the vehicle upon each retail sale within the warranty period, which would conflict with section 1791.1's one-year maximum. (*Kiluk*, *supra*, 43 Cal.App.5th at p. 340, fn. 4.)

Plaintiffs baselessly argue that implied warranty provisions apply only to "consumer goods," not "new motor vehicles." (OBOM 69–70.) But as this Court has explained, a " 'new motor vehicle' is just one type of 'consumer goods' " under Song-Beverly. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 490 (*Cummins*).) Consequently, provisions of Song-Beverly relating to "consumer goods"—including the implied warranty provisions—apply also to "new motor vehicles."

To the extent that provisions specific to new motor vehicles diverge from those related to consumer goods more generally, the specific terms would govern over the general. (See, e.g., OBOM 35.) But that maxim of statutory construction applies only where two provisions cannot be harmonized. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1118.) Because "new motor vehicle" and "consumer good" both refer to the first retail sale, there is no conflict. Song-Beverly's implied

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warranties expire no later than one year after the initial purchase, as contemplated under the Act (§ 1791.1, subd. (c)), rather than arising over and over with each sale of a used car.

In addition, plaintiffs' position that their used truck (or a demonstrator or dealer-owned vehicle) *is* a "new motor vehicle" and yet *is not* a "consumer good" (OBOM 35–36, 69–70) could harm buyers of demonstrators and other dealer-owned new vehicles. Only a "buyer" of a "consumer good" may seek relief under section 1794 of Song-Beverly, which provides the civil penalty and fee-shifting provisions. (See §§ 1791, subds. (a), (b), 1794; see *Dagher*, *supra*, 238 Cal.App.4th at pp. 917–918, 926–927.)[8] Indeed, plaintiffs' attempt to overcome the serial implied warranty conflict has forced them to take a position that, if correct, would mean they cannot obtain a fee award, a result they argue renders their "warranty effectively unenforceable." (OBOM 15; see OBOM 47–51.)

Finally, plaintiffs have no basis to distinguish the persuasive analysis in *Johnson*, *supra*, 272 F.Supp.3d 1168. Plaintiffs argue *Johnson* is irrelevant because it relates to an

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[8] Plaintiffs attempt to minimize *Dagher* by characterizing it as a case addressing "the distinction between *retail sellers* and *individuals*." (OBOM 71, fn. 28.) But *Dagher also* rejected the plaintiff's argument that he could sue the manufacturer simply because the sale resulted in the transfer of the remaining balance of the original warranty (*Dagher*, *supra*, 238 Cal.App.4th at pp. 911–912), explaining the Act treats new and used vehicles differently (*id.* at pp. 920–921).

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implied warranty claim. (OBOM 71.)[9] But the implied warranty claim failed in *Johnson* for the same reason an express warranty claim under Song-Beverly would have failed in that case: "the Song-Beverly Act does not create any obligation on behalf of [the manufacturer]" with respect to used goods purchased at an unfranchised used car dealership. (*Johnson*, at p. 1179.) *Johnson*'s reasoning applies with particular force to the plaintiffs' claims here, as they too purchased their truck at an unfranchised dealership.

III. The legislative history confirms that previously sold used vehicles are not "new motor vehicles."

A. The 1970s amendments clarified Song-Beverly's limited application to used products.

After Song-Beverly's enactment in 1970, confusion immediately arose regarding the duration of implied warranties and whether Song-Beverly applied to used products. (See 1MJN 168, 181.) In response, the Legislature amended Song-Beverly to make clear that implied warranties had "a 1 year maximum" and to "limit[ ] the coverage to new goods." (1MJN 181; see 1MJN 262–263 [§§ 1791, subd. (a), 1791.1, subd. (c)].)

At the same time, the Legislature added section 1795.5, "requiring those who issue new express warranties on used goods to provide service on their warranties." (1MJN 181; see 1MJN 263 [§ 1795.5]; see also *Gavaldon*, *supra*, 32 Cal.4th at p. 1257.)

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[9] Plaintiffs also quibble with *Johnson*'s statement that CarMax was a "third-party" seller (OBOM 71, fn. 28), but that statement is both accurate and immaterial to *Johnson*'s holding.

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The Legislature had used cars in mind: "Section 1795.5 was designed to make it clear that the obligation of a *used car dealer* in any sale in which a *written warranty is given by the seller or any third party* is the same as that imposed on manufacturers in sales in which a written warranty is given." (2MJN 426, emphasis added; see 1MJN 197–198.)

In 1979, the Legislature amended section 1791's definition of "consumer goods" to include "*new and used assistive devices*" such as wheelchairs, but did *not* include used motor vehicles. (7MJN 11–12 [§ 1791, subd. (a)]; see 7MJN 107; *Dagher*, *supra*, 238 Cal.App.4th at p. 917, fn. 6 ["if the Legislature had wanted to add used vehicles to this general definition in section 1791, subdivision (a) (as it did for 'new and used assistive devices sold at retail'), it could have done so"]; see also § 1793.02, subd. (g) [clarifying that section 1795.5's used goods provisions do not apply to used assistive devices; there is no similar provision for used cars].)

B. The 1982 revisions to Song-Beverly were intended to protect new car buyers.

In 1980, Assemblymember Sally Tanner introduced AB-2705, which proposed a new chapter to the Vehicle Code titled "New Motor Vehicle Warranties." (8MJN 260–261, original formatting omitted.) The first draft of this bill defined "new vehicle" as "a new passenger vehicle or motor truck." (8MJN 261–262 [proposed Veh. Code, § 3200].) In 1981, after AB-2705 died in the Senate (5MJN 956, 1124), Tanner introduced AB-

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1787, a "simplified" version of AB-2705 (5MJN 1069) that was "similar in intent" (5MJN 1004).

The 1981 bill initially used the undefined phrase "new motor vehicle" (5MJN 939), which was understood by the Legislature to incorporate the Vehicle Code (see 5MJN 986). There is no indication Song-Beverly's "new motor vehicle" definition was intended to be *broader* than the Vehicle Code definition of "new vehicle."

The Legislature rejected more expansive definitions that included subsequent buyers. The Legislature considered but did not track Connecticut's 1981 lemon law (see 5MJN 1051–1058), which (1) defined "consumer" to include "any person to whom such motor vehicle is transferred during the duration of an express warranty," and (2) used the phrase "motor vehicle" rather than "new motor vehicle" when describing the manufacturer's repurchase obligations (5MJN 1052 [§ (a)(1)]). Nor did the Legislature adopt the more expansive definitions in the Magnuson-Moss Warranty Act, which defines "consumer goods" to include new and used goods (15 U.S.C. § 2301(1); 16 C.F.R. § 703.1(b) (2022)), and "consumer" to include any person to whom the product is transferred during the warranty period (15 U.S.C. § 2301(3); 16 C.F.R. § 703.1(g) (2022)). (See 9MJN 492–511 [history includes detailed summary of Magnuson-Moss]; 13MJN 1329–1330 [history includes references to 16 Code of Federal Regulations part 703.1's definitions].)

The Legislature did not expand Song-Beverly's definition of "consumer goods" to include used vehicles because the purpose of

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the " 'lemon' law" was to protect "new car buyers." (5MJN 1119, capitalization omitted; see 5MJN 1042 [AB-1787 aims to remedy "problems for new car purchasers"], 1132 [the law represents "meaningful protection for new car buyers"].) Tanner's "fact sheet" (13MJN 1214, capitalization omitted) stated the law "applies only to warranted <u>new</u> (not used) motor vehicles" (*ibid.*). Thus, the "lemon law" was designed to clarify how Song-Beverly's *preexisting* scheme applied to new cars, not to expand the Act's remedies against manufacturers to used car buyers.

The "key issue" for the Legislature in 1982 was how many repair attempts were reasonable during a new car's *first year*. (5MJN 975, original formatting omitted.) The Legislature concluded "that during the first year or 12,000 miles after the purchase of a new motor vehicle, either four or more unsuccessful repairs of the same defect or a cumulative total of more than 30 days out of service for repairs of one or more defects will be presumed to . . . trigger the buyer's right to a refund or replacement vehicle." (5MJN 1119, capitalization omitted; see 5MJN 952 [§ 1793.2, subd. (e)(1)], 1094 [the law will "Limit the manufacturer's liability to correcting defects discovered during the first year or 12,000 miles after purchase of the vehicle"].)

The Department of Consumer Affairs made the limited scope of the Act clear to consumers in "Lemon-Aid for New Car Buyers" (11MJN 854): "**Does the Lemon Law apply to used cars?** [¶] . . . No, but if a used car is sold or leased with a written warranty, other provisions of the Song-Beverly Act apply. If your warranty-covered used car isn't repaired after a

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reasonable number of attempts, you may have a right to a refund or replacement from the used car dealer or other warrantor.[10] Even if there is no written warranty, a used car purchaser may be helped by the California Commercial Code and other laws" (11MJN 863). (See 11MJN 855 ["The Lemon Law applies *only* to new cars"].)

Thus, there can be no dispute that the original "lemon law" enacted in 1982 applied to *new* motor vehicles *only*.

C. The 1987 amendment to the "new motor vehicle" definition was a "clean-up" change.

In 1986, Tanner "introduced AB 3611 as a clean-up measure to the lemon law." (3MJN 699.) That bill included the same "new motor vehicle" definition later enacted in 1987 (see 11MJN 745–746 [§ 1793.2, subd. (e)(4)(B)]), described as a "Redefinition to <u>clarify</u> vehicles covered," not to expand coverage to used vehicles with transferred warranties (13MJN 1251).

The administrative agencies and public interest groups who helped draft the "redefinition" also understood it was a "clean-up" change. The California Attorney General's office of the Department of Justice (DOJ), the New Motor Vehicle Board of the DMV (see Veh. Code, § 3050 et seq.), the Department of Consumer Affairs, and CalPIRG (California Public Interest

10 The "other warrantor" referenced by the Department is a "third-party warrantor," not the manufacturer. (See 2MJN 426.)

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Research Group) worked closely with Tanner to draft the original lemon law and the 1986/1987 amendments. (3MJN 548, 699.)

The Department of Consumer Affairs "conducted an extensive investigation" (3MJN 705), and reported with concern that "some [car] buyers have been denied the benefits of the [first year] presumption where the subject of the purchase is a 'demonstrator' sold with a manufacturer's new car warranty" (13MJN 1295). CalPIRG agreed the "New Car Lemon Law" should cover "dealer-owned and demonstrator vehicles" (*ibid.*), and was pleased Tanner introduced another bill "to protect consumers of new automobiles" (13MJN 1205). CalPIRG described the proposed amendments as a "tune-up" (13MJN 1280) of a law that "does not apply to used cars" (13MJN 1282) and identified six problems with the law, none of which referenced used cars with transferred warranties (13MJN 1282–1284).

AB-3611 died in the Senate and was reintroduced by Tanner as AB-2057 in 1987. (3MJN 597, 679.)

The identical revision to the "new motor vehicle" definition was described as a "**<u>Clean-up change</u>**[ ]." (3MJN 701–702.) The DMV and DOJ each prepared detailed analyses of the 1987 amendments and identified no expansion of coverage to an additional class of car buyers, failing even to mention the limited amendment to the definition of "new motor vehicle." (3MJN 562–563, 612–613; see 3MJN 599–600, 682–683, 696.)

The Department of Consumer Affairs again explained the redefinition was necessary because "buyers [were] being denied

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the remedies under the lemon law because their vehicle [was] a 'demonstrator' or 'dealer-owned' car, even though it was sold with a new car warranty." (3MJN 700; see 3MJN 702 [" '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."].)

The Assembly and the Senate committee analyses consistently stated the definition was amended "to include dealer-owned vehicles and demonstrator vehicles." (3MJN 596, 622, 638, 664, 670.)

Plaintiffs assert the Court of Appeal's legislative history analysis "rests on the absence of the term 'used vehicles.' " (OBOM 24.) That is demonstrably false. The opinion cites the Department's bill report, which shows the Legislature simply intended to *clarify* the existing law by adding demonstrators and dealer-owned vehicles, which are sold with new car warranties. (See *Rodriguez*, *supra*, 77 Cal.App.5th at pp. 222–223; see also 3MJN 701–702.) On the very same page—and in numerous reports prepared by the Assembly and the Senate—"used cars" *are* referenced, but only in regard to disclosure requirements relating to the resale of repurchased lemons, rather than with respect to the definition of "new motor vehicle." (See 3MJN 596, 622, 638, 664, 670.)

Both Tanner and the Senate Judiciary Committee described the two purposes of the 1987 amendments: (1) to ensure manufacturers reimburse certain elements of damages

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when they repurchase vehicles from their original owners, and (2) to create a fair third-party arbitration process. (3MJN 598, 684.) The Assembly agreed. (3MJN 678.) Some legislators and auto manufacturers strenuously opposed the 1987 amendments initially, but not on account of any expansion to cover used cars. In fact, they withdrew their oppositions once Tanner amended the bill in response to manufacturers' concerns. (3MJN 675, 685; see 11MJN 874.)

The lack of any history suggesting an intent to expand manufacturers' liability under Song-Beverly to a large class of used vehicles supports the commonsense conclusion that used vehicles with transferred warranties are *not* "new motor vehicles." (See *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 669 ["We do not believe the Legislature . . . would have made such a significant change to the scope of Song-Beverly without clear language in the statutory text and without any discussion of such a change in the legislative history"]; *People v. Raybon* (2021) 11 Cal.5th 1056, 1068 ["if the drafters had intended to so dramatically change the laws . . ., we would expect them to have been more explicit about their goals"].)

D. The 2007 expansion of Song-Beverly to cover out-of-state vehicles purchased by service members is consistent with a statutory scheme that does not require manufacturers to repurchase used cars.

In 2007, the Legislature enacted section 1795.8 to extend Song-Beverly's "new motor vehicle" remedies to out-of-state new vehicles purchased by members of the armed services. That

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provision applies if the new vehicle was purchased "*with a manufacturer's express warranty from a manufacturer* who sells motor vehicles in this state or from an agent or representative of that manufacturer." (§ 1795.8, subd. (a), emphasis added.) Only a franchised dealership (not a third-party seller like the one from whom plaintiffs bought their truck) can conduct a sale "from a manufacturer," which confirms Song-Beverly's remedies against auto manufacturers do not extend to used cars purchased from unfranchised used car dealers.

Plaintiffs cite 2007 Senate reports mentioning *Jensen* as holding " 'that a used motor vehicle sold or leased with a balance of the manufacturer's original warranty is a "new motor vehicle." ' " (OBOM 63–64, emphasis omitted, quoting 6MJN 1366, 1376, 1380.) But coupled with the express language of section 1795.8 that applies only to sales *from* the manufacturer, that isolated Senate reference to *Jensen* does not, as plaintiffs claim, "embrace" the far broader definition of "new motor vehicle" plaintiffs advocate. (See 6MJN 1369, 1372 [Assembly reports do not cite *Jensen* and reference used cars generally in a way consistent with section 1795.5's specific provisions addressing used cars].) A general statements in a committee report that "oversimplifies more nuanced statutory language" does not show legislative intent. (*Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1293.)

Plaintiffs argue the Legislature's *awareness* of *Jensen* coupled with its inaction to modify the definition of "new motor vehicle" signals tacit agreement that Song-Beverly's "new motor

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vehicle" remedies extend to used vehicles sold with any balance remaining on the original warranty. (OBOM 63–65.) But this Court has repeatedly emphasized that "legislative inaction is a 'slim reed upon which to lean.' " (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117; accord, *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1156 [without a "well-developed body of law" interpreting statutory language at issue, legislative amendments *without change to language at issue* do *not* signal legislative agreement with "a single Court of Appeal decision"].) In 2007, the Legislature had no reason to agree or disagree with *Jensen*, *supra*, 35 Cal.App.4th 112, and did not amend the definition of "new motor vehicle"—the Legislature's intent was simply to extend the "same rights" enjoyed by buyers who purchased vehicles in-state to armed service members who purchased vehicles out-of-state. (6MJN 1385–1386 ["Proponents . . . do not intend to extend any protections beyond those currently provided in California's Lemon Law to members of the Armed Forces"].)[11] Section 1795.8 made no change to Song-Beverly's definition of "new motor vehicle," and thus its history is not authoritative as to the definition's meaning.[12]

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[11] By imposing obligations under the Act on manufacturers regarding out-of-state *new* vehicles purchased by service members, section 1795.5 imposes "the same" obligation on retail sellers of *used* out-of-state vehicles purchased by service members, if the seller warranted the vehicle *and* is subject to suit in California.

[12] Similarly, the amendments to the definition in 1998 and 2000—which added certain business-use vehicles to the definition of "new motor vehicle" but made *no changes* to the relevant

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IV. Expanding the scope of Song-Beverly's coverage for used cars would not advance public policy goals and would have adverse effects.

A. Enforcing the Act's "new motor vehicle" limitation neither conflicts with Song-Beverly's remedial purpose nor encourages manufacturers to breach their warranties.

Moving past a textual analysis of the Act, plaintiffs argue that limiting Song-Beverly's repurchase remedy against manufacturers to "new motor vehicles" as written means used car buyers with transferred warranties will "lose their coverage under the Act." (OBOM 56.) But that circular argument presupposes those buyers had a manufacturer repurchase remedy they never had.

Plaintiffs claim any limitation on the repurchase-or-replacement remedy against manufacturers hinders Song-Beverly's *general* remedial purpose. (OBOM 45–47.) But based on that logic every express limitation in the Act—e.g., the personal use limitation, the weight and number limitations for business vehicles, the exclusions of the coach portion of motor homes, motorcycles, off-road vehicles, and private sales (§§ 1791, subd. (a) & (*l*), 1793.22, subd. (e)(2)), and the exclusion of out-of-state sales (*Cummins*, *supra*, 36 Cal.4th at p. 493)—should all be disregarded. Plaintiffs' argument overlooks the careful balance the Legislature struck in creating different remedies for different categories of consumers in a variety of circumstances. (See

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sentence about demonstrators (see 6MJN 1225 [§ 1793.22, subd. (e)(2)], 1256 [same], 1279 [same], 1308 [same])—do not support plaintiffs' interpretation either. (See OBOM 63.)

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

Plaintiffs also paint a false picture of a Legislature focused solely on expanding consumer rights under Song-Beverly. (OBOM 59–63.) Plaintiffs ignore that both the 1982 "lemon law" and the 1987 revisions were the result of compromise with the auto industry. (See, e.g., 3MJN 704–705; 5MJN 1124.) Similarly, plaintiffs' statement that the 1992 revisions "added" presumptions (OBOM 62) is false—that amendment simply moved the original "lemon law" to the Tanner Consumer Protection Act, *without substantive change*, to honor Tanner. (See 14MJN 1421–1433, 1495; Stats. 1992, ch. 1232, §§ 6–7.)

Nor do plaintiffs' cited cases support the expansion of Song-Beverly by courts for policy reasons. (See OBOM 54, citing *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 195; *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244.) That courts have limited affirmative defenses conflicting with Song-Beverly in cases brought by buyers who *are*

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covered by the Act does not mean courts can rewrite Song-Beverly to expand coverage to buyers who are *not* covered by the Act.

Plaintiffs argue that unless *used* cars are included in the definition of "new motor vehicle" manufacturers will breach their obligation to promptly repurchase vehicles that actually are *new* (OBOM 16) in the hope that frustrated new car buyers will not pursue their own statutory remedies (despite the ready availability of lawyers incentivized by fee shifting) and will instead trade in their cars to subsequent buyers who will not have a repurchase remedy (OBOM 51–52). One of the many flaws in plaintiffs' logic is that courts have held manufacturers cannot avoid exposure to the original buyer or lessee for enhanced statutory remedies just because they no longer have the vehicle. (*See Crayton*, *supra*, 62 Cal.App.5th at p. 206.) Moreover, manufacturers' strong interests in maintaining customer satisfaction and avoiding costly litigation also cut against plaintiffs' speculative scenario about purposely breaching obligations to new car owners who *do* have a repurchase remedy.

Plaintiffs finally posit that "the only reason these issues arise is because manufacturers *choose* to make warranties transferrable" (OBOM 46), suggesting that manufacturers should simply change that practice. A ruling from this Court encouraging manufacturers to make warranties nontransferrable, so that subsequent buyers have no remedies at all (even contractual ones), would be far worse for used car buyers than simply enforcing Song-Beverly as written.

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B. The Legislature had good reason to distinguish between manufacturers' duties regarding new cars and used cars that have been sold to one or more consumers.

Plaintiffs argue that enforcing Song-Beverly's "new motor vehicle" limitation as interpreted by the Court of Appeal will create "arbitrary" distinctions between "new" cars that conceivably may have high mileage and previously owned used cars that the owners did not drive much. (OBOM 55–57.) But that myopic focus on mileage alone, in out-of-the-ordinary scenarios, does not make the Legislature's line-drawing "illogical" (OBOM 48) or "arbitrary" (OBOM 55). There is no dispute the Legislature did *not* impose special duties on manufacturers with respect to used cars when it enacted the lemon law in 1982, regardless of potentially low mileage, and good reasons for distinguishing between new and preowned cars continue today.

Plaintiffs concede that more issues may "stem from unauthorized or unreasonable use" by a consumer owner as a car ages, but argue that should be dealt with as a matter of proof when a second or third owner is negotiating or litigating with a manufacturer over what remedy is owed. (OBOM 56, fn. 27.) The Legislature properly could place weight on various transfers of ownership and consequent difficulties of proving what maintenance or misuse a prior owner may or may not be responsible for. By contrast, *new* cars—including demonstrators or dealer-owned vehicles—are maintained professionally with a

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goal of keeping the vehicle in as-new condition in anticipation of a sale to the first consumer owner.

The Legislature also could have reasonably concluded manufacturing defects typically manifest early in a vehicle's life. (See, e.g., *Pryor v. Lee C. Moore Corp.* (10th Cir. 1958) 262 F.2d 673, 675 ["All of the cases agree . . . that proximity of time and events is cogently relevant in the determination of the ultimate factual issue whether the negligent manufacture caused the harm"]; *Fredericks v. American Export Lines* (2d Cir. 1955) 227 F.2d 450, 452 ["The mere passage of time . . . has relevance to the likelihood . . . that deterioration due to use, perhaps accelerated by misuse, will be mistaken by a jury for a defect due to negligent manufacture or fabrication"].) Plaintiffs' *unsupported* assertion that "a vehicle is far more likely to reveal itself as a lemon *as it gets older*" (OBOM 50) thus does not support the notion that the Legislature was illogical in placing greater burdens on manufacturers with respect to problems experienced by original owners.

Moreover, shifting obligations from manufacturers to used car dealers at the second retail sale (§ 1795.5) makes sense. Licensed dealers must inspect, repair, and disclose information about used vehicles to buyers, which in turn allows buyers to make informed decisions. (See, e.g., Veh. Code, §§ 11713.21, 11713.26, 24007, subd. (a)(1), 24011, 24250 et seq.) If the dealer breaches these duties, the *dealer* is then liable. (See, e.g., *Pulliam v. HNL Automotive Inc.* (2022) 13 Cal.5th 127, 132–133 [buyer of used car properly asserted claims against dealer—not

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manufacturer—for breach of implied warranty under Song-Beverly, violation of the Consumers Legal Remedies Act, and numerous other claims].) And, if the used car dealer separately warrants that particular vehicle, then the dealer is subject to the further obligation to repurchase the vehicle under Song-Beverly. (See § 1795.5.) A manufacturer who was not involved in or profiting from that sale is no longer on the hook to repurchase that vehicle. (See *Kiluk*, *supra*, 43 Cal.App.5th at pp. 337, 340.) This statutory line drawing is reasonable, not arbitrary.

Plaintiffs argue that without imposing a manufacturer repurchase remedy for used cars, "unsuspecting" consumers will have no idea about the "egregious repair history" of vehicles that should have been repurchased from the original owner and taken "off the street." (OBOM 52.) Not so. Dealers must obtain and make available vehicle history reports, which include prior repair information (Veh. Code, § 11713.26), *and* to repair any egregious issues prior to resale (*id.*, §§ 24007, subd. (a)(1), 24011, 24250 et seq.) *or* to conspicuously disclose that the car is being sold"as is (see Civ. Code, §§ 1792.3, 1792.5; 16 C.F.R. § 455.2(b)(1) (2022)). Plaintiffs' false description of how the industry operates is *not* a proper basis to reject Song-Beverly's plain meaning.

The Legislature's line drawing also conforms to consumer expectations. "Used vehicles are reasonably expected to require maintenance and repair." (Billings, Warranty, *supra*, § 9:10.) The reasonable assumption is that consumers carefully consider the purchase of a used vehicle, review the disclosures about the vehicle's history made by the dealer, and understand used

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vehicles may require warranty repair. The law requires a manufacturer to repurchase or replace a *new* car that cannot be repaired in a reasonable number of attempts, but does not provide that exceptional remedy for used cars.

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

Petitioners argue the opinion creates a "gap" in consumers' ability to enforce manufacturer warranties that transfer to used vehicles. (OBOM 47–51.) That circular argument assumes *every* vehicle owner must enjoy the right to demand the enhanced statutory repurchase remedy for warranty breaches. In fact, the Legislature not only created statutory remedies specific to used car owners (§ 1795.5), but also left intact used car owners' ability to enforce their warranties against manufacturers under the Commercial Code (Cal. U. Com. Code, §§ 2711–2715).

Plaintiffs argue "the Legislature enacted the Act's enhanced remedies because Commercial Code remedies had not sufficiently protected consumers." (OBOM 24; see OBOM 47, 48, 50–51.) But, by design, Song-Beverly does not provide enhanced remedies to *all* consumers. The Legislature understood sales not covered by the Act " 'will continue to be regulated by the Commercial Code.' " (*Dagher*, *supra*, 238 Cal.App.4th at pp. 913, 924.)

Plaintiffs argue that such remedies provide "hollow" relief to used car purchasers, who will have no rights to refunds or attorney fees. (OBOM 16). That is false. Under the Commercial Code, a buyer who timely revokes acceptance of a defective used

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car (Cal. U. Com. Code, § 2608, subd. (1)) may recover the car's purchase price (*id.*, § 2711, subd. (1)). And the federal Magnuson-Moss Warranty Act provides fee awards for breach of warranty claims under the Commercial Code. (See *Milicevic v. Fletcher Jones Imports, Ltd.* (9th Cir. 2005) 402 F.3d 912, 919–920.)

The Legislature also encourages consumer-friendly alternative dispute resolution mechanisms that work for owners of used cars as well as new cars. Buyers who purchase used cars still under warranty provided by FCA (and most other manufacturers) can arbitrate warranty claims—at no cost—in a program where only decisions in the consumer's favor are binding. (See Civ. Code, § 1793.22, subd. (d)(2); 16 C.F.R. § 703.3(a) (2022).) These programs are certified and promoted by the Department of Consumer Affairs, and thus comply with both federal and California law. (See § 1793.22, subd. (d); Cal. Dept. of Consumer Affairs, State-Certified Arbitration Information <https://www.dca.ca.gov/acp/acpprocess.shtml> [as of Feb. 1, 2023] [most auto manufacturers—including FCA and all other American manufacturers—have certified programs]; see also 13MJN 1153–1171 [FTC opinion letter re AUTO LINE program].)

Thus, used car buyers *can* afford to enforce their warranty rights (see OBOM 50) without stretching the definition of "new motor vehicle" to include used cars.

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D. Plaintiffs are wrong about the meaning of the Department of Consumer Affairs' regulation.

Plaintiffs place great weight on the Department of Consumer Affairs' understanding of the meaning of "new motor vehicle." (OBOM 65–66.) The Department certifies manufacturer arbitration programs. (§ 1793.22, subd. (d)(9).) And, as noted above, it helped to draft the 1987 amendment, which it described as a "clean-up" change to a law it understood "applies only to new cars," *not* to "used cars."

Contrary to plaintiffs' assertions, the Department's definition of "consumer"—" ' "any individual to whom the vehicle is transferred during the duration of a written warranty" ' "—provides no support for expanding the "new motor vehicle" definition to include used cars covered by a transferred warranty. (See OBOM 58–59, emphasis omitted, quoting Cal. Code Regs., tit. 16, § 3396.1, subd. (g).) The cited regulation provides definitions relating to certified arbitration programs, which address consumer warranty claims under *both* Song-Beverly *and* the Commercial Code. (See Cal. Code Regs., tit. 16, § 3396.1, subd. (a) ["applicable law" in arbitration includes Song-Beverly *and* the Commercial Code]; Civ. Code, § 1793.22, subd. (d)(7) [listing various laws the arbitrator must take into account, including the Commercial Code].) Thus, the Department's definition of a "consumer" in the context of these arbitration programs unsurprisingly includes used car owners who can raise Commercial Code breach of warranty claims against manufacturers.

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V. California law is in sync with other state lemon laws, which would not require the repurchase of a used vehicle under the facts of this case.

Many decades of legislative history shows the Legislature's consistent effort to stay "on pace" with lemon laws in other states. (15MJN 1821, 1825; see 6MJN 1186 [in 1988, copying "equivalent provision in New York law"], 1350 [in 2000, comparing Song-Beverly's coverage to Michigan law], 1384 [in 2007, comparing Song-Beverly to the lemon laws of the "majority of the states"]; 15MJN 1701 [in 1998, extending Act because "26 states have lemon laws that cover" cars purchased for business use].) The "Song-Beverly Act, like most lemon laws, applies only to new vehicles." (Barron, *California's Lemon Law—Developments Under the Song-Beverly Consumer Warranty Act* (1990) 2 Loyola Consumer L.Rev. 96, 102, fn. 3.)

In other states, a resold vehicle is not a "new car" simply because it is protected by the balance of a prior owner's warranty—consistent with common parlance. (See, e.g., *In re American Motor Sales Corp. v. Brown* (N.Y.App.Div. 1989) 152 A.D.2d 343, 344, 347–351 [vehicle purchased from dealer with fewer than 5,600 miles, less than two years old, and still covered by manufacturer's new car warranty, was not a "new motor vehicle" under the new car lemon law]; *Schey v. Chrysler Corp.* (Wis.Ct.App. 1999) 597 N.W.2d 457, 458, 460 [Wisconsin appellate court held a "used" car was not a "new" motor vehicle for purposes of the state lemon law, despite the fact it was still covered by the original manufacturer's warranty]; *Wynn Holdings, LLC v. Rolls-Royce Motor Cars NA, LLC* (D.Nev., Mar.

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19, 2019, No. 2:17-CV-00127-RFB-NJK) 2019 WL 1261350, at pp. *1, *3 [nonpub. opn.] [Nevada's lemon law applies to "new motor vehicles," which does not include used vehicles with a balance remaining on the original manufacturer's warranty]; cf. *Meyers v. Volvo Cars of North America, Inc.* (Pa.Super.Ct. 2004) 852 A.2d 1221, 1225 [car was "new motor vehicle" under Pennsylvania lemon law because it was a "demonstrator" first sold and first titled to plaintiff after having previously been used as the personal vehicle of the dealership's owner].)

Because lemon laws "are intended to deal with *new* automobiles," consumers in most states must report the defect within one year from purchase to claim the statutory remedies of repurchase or replacement. (Cuaresma, Consumer Protection and the Law (2022) § 15:9, emphasis added.) Several states have extended this period to two years. (*Ibid.*) Thus, to the extent some other state lemon laws expressly include subsequent used car purchasers (unlike in California), that does *not* mean those laws would grant a repurchase remedy to plaintiffs, who purchased a used 2011 Dodge truck in 2013 and presented it for repairs in 2014. (See *id.*, § 15:8 [states that grant lemon law remedies to subsequent purchasers do so "only during the relevant time period (usually either the warranty period or one year, whichever comes first)"].)

In addition, *as in California*, when other states provide heightened remedies for defective *used cars*, they "place the major responsibility and potential liability on dealers, not

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manufacturers." (See Cuaresma, Consumer Protection and the Law, *supra*, § 16:8; see, e.g., N.Y. Gen. Bus. Law, § 198-b.)

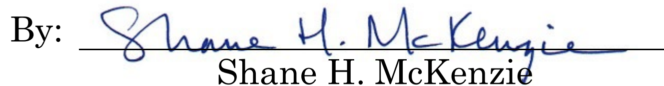
In sum, the legislatures in different states have used different mechanisms—short time limits in some, or ownership history limits as in California—to accomplish the goal of avoiding an open-ended repurchase obligation on manufacturers during the entire duration of an express warranty. Interpreting the Act as plaintiffs do would set California far afield from the majority of other states, which has never been the Legislature's intent.

CONCLUSION

For the foregoing reasons, this Court should affirm the opinion of the Court of Appeal.

February 8, 2023

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

By: 
Shane H. McKenzie

Attorneys for Defendant and Respondent
FCA US, LLC

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

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Shane H. McKenzie

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

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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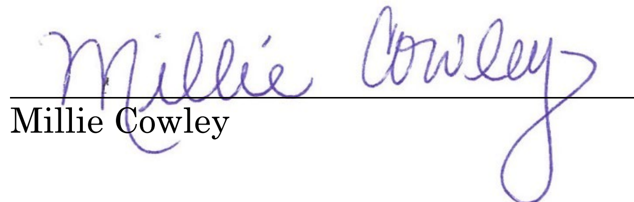

Millie Cowley

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

David L. Brandon
Clark Hill LLP
555 S. Flower, 24th Floor
Los Angeles, CA 90071
(213) 891-9100
Email: dbrandon@clarkhill.com

Co-Counsel for Defendant and Respondent
FCA US LLC

Via TrueFiling

Georges A. Haddad
Clark Hill LLP
One Embarcadero Center, Suite 400
San Francisco, CA 94111
(415) 984-8500
Email: ghaddad@clarkhill.com

Co-Counsel for Defendant and Respondent
FCA US LLC

Via TrueFiling

Hallen D. Rosner
Arlyn L. Escalante
Rosner, Barry & Babbitt LLP
10085 Carroll Canyon Road, Suite 100
San Diego, CA 92131
(858) 348-1005
Email: hal@rbblawgroup.com
Email: arlyn@rbblawgroup.com

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

Via TrueFiling

Roger R. Kirnos
Knight Law Group, LLP
10250 Constellation Blvd., Suite 2500
Los Angeles, CA 90067
(310) 552-2250
Email: rkirnos@knightlaw.com

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

Via TrueFiling

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

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

Via TrueFiling

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

Case No. E073766

Via TrueFiling

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

Case No. RIC1807727

Via U.S. Mail

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