No. S241434

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

EDUARDO DE LA TORRE *et al.*,

Plaintiffs, Appellants, and Cross-Appellees,

vs.

CASHCALL, INC.,

Defendant, Appellee, and Cross-Appellant.

CASHCALL, INC.'S ANSWER TO BRIEFS OF *AMICI CURIAE* ATTORNEY GENERAL AND CENTER FOR RESPONSIBLE LENDING *ET AL.*

On a Certified Question from the United States Court of Appeals for the Ninth Circuit, Case No. 14-17571
[Cal. Rules of Court, rule 8.548]

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I. INTRODUCTION

The amicus curiae briefs filed in support of Plaintiffs focus on the history of the unconscionability doctrine and its application to contract terms over "thousands of years" around the world.[1] (CRL Br., p. 5.) CashCall does not take issue with most of the general principles discussed in the briefs and in the cited authorities, including the ancient and biblical ones.

The underlying premise of amici's briefs is that use of the unconscionability doctrine to regulate interest rates is commonplace and routine. That has not been the experience of California courts. As the Court of Appeal observed in *Carboni v. Arrospide*, "[s]urprisingly, the parties have not cited, and we have not discovered, any case which applies the doctrine of unconscionability to specifically annul or reform a loan which bears a shockingly high rate of interest."[2] That was 27 years ago. Since then, California courts have not rushed to use the unconscionability doctrine to regulate interest rates.

This case, however, is not about general principles of unconscionability, even if those principles did apply routinely to interest rates. The question the Ninth Circuit asked this Court to resolve concerns how two California statutes operate in tandem to regulate the interest rates charged on consumer loans of $2,500 or more. What is relevant here is the statutory language, the legislative history, and the consequences of the

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[1] The briefs were filed by (1) the Attorney General and (2) Center for Responsible Lending, National Association of Consumer Advocates, Public Citizen, Inc., and Public Good Law Center (collectively referred to herein as CRL).

[2] *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 81.

competing statutory interpretations. The authorities cited by amici, including the handful of California cases, do not involve these or analogous statutory provisions.

Nor is this case about whether an individual loan can be unconscionable in the context of a particular borrower's circumstances. Individual borrowers' circumstances are not at issue in this class action, which alleges only that CashCall's standard interest rates are *alone* unconscionable. The federal district court has made clear that this case concerns the questions of whether CashCall's rates are too high, and, if so, what rate CashCall could permissibly charge. Amici are answering the wrong questions.

When amici stray from their analysis of general principles of law and try to answer the narrow question presented, they consistently get it wrong. Amici do not meaningfully address the fact that the language of the statutes bars their interpretation. The Legislature was not writing on a clean slate when it declared in Financial Code section 22303 that interest rate limits "*do[] not apply*" to loans of $2,500 or more.[3] Prior California decisions, including from this Court, have interpreted similar language in similar Financial Code provisions to mean that the loans are not subject to any rate maximum, including under common-law principles. When the Legislature states that no maximum interest rate applies, a court cannot override that decision by applying common-law doctrines to impose its own view of an appropriate maximum rate.[4]

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[3] All statutory references are to the Financial Code unless otherwise stated.

[4] See *Peoples Finance & Thrift Co. v. Mike-Ron Corp.* (1965) 236 Cal.App.2d 897, 903 (*Peoples Finance*) (holding that no maximum rate applied to a loan subject to a similar statute, "even though we believe the total interest charged is unconscionable"); *West Pico Furniture Co. v.*

Amici's interpretation of Section 22302 also misses the mark. Under amici's interpretation, Section 22302, which states that Civil Code section 1670.5 applies to loans under the Finance Lenders Law (FLL), was an idle legislative act that accomplished nothing other than restating existing law.

Amici do not mention, let alone rebut, CashCall's explanation that Section 22302 is not intended to regulate interest rates, but instead creates the authority for the Department of Business Operations (DBO) to take administrative action against a lender for unconscionable conduct. Without Section 22302, the unconscionability doctrine could be used only defensively by individual borrowers. Section 22302 created a new violation of the FLL that the DBO could enforce. Nothing in Section 22302 allows the unconscionability doctrine to be used to affirmatively void an entire category of loans on a classwide basis and to impose a new interest rate.

Moreover, Section 22302 cannot apply to interest rates, because in the more specific companion statute, the Legislature set the maximum rates for loans under $2,500 and decreed that loans of $2,500 and over are not subject to any maximum rate. A court "cannot ascribe an intent on the part of the Legislature on the one hand to provide for an exemption from the [statutory] prohibition and, on the other hand, to nullify that exemption by application of a different provision of the code." (*Raysinger v. Peoples Inv. & Loan Ass'n* (1973) 36 Cal.App.3d 248, 254 (*Raysinger*); see also

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Pacific Finance Loans (1970) 2 Cal.3d 594, 614 (*West Pico*) ("Since the loan transactions here involved were exempt by virtue of [a similar statute] from the restrictions on interest imposed by the Act, West Pico is not entitled to damages for usury, either by invoking common law remedies or statutory penalties.").

Carmack v. Reynolds (2017) 2 Cal.5th 844, 854-855 [declining to adopt an interpretation of a statutory provision that would mean that the Legislature had "undo[ne]" in one provision the "specific and carefully calibrated" limitations imposed in an adjacent provision].) Amici ignore this established principle of statutory interpretation.

Amici also do not meaningfully discuss the legislative history of the Financial Code statutes, which shows the legislative intent that the rates on loans of $2,500 and over be regulated by market forces, not courts. The Legislature said that consumer finance lenders like CashCall "can charge whatever interest rate they want" on these loans.[5] There is no reason to assume, as amici do, that market forces do not or will not function to regulate interest rates as the Legislature intended. All of the evidence is to the contrary. The market for these loans is highly competitive, as shown by the DBO reports, the brief of amici California Financial Service Providers et al. (CFSP), and Plaintiffs' own testimony.

Amici also ignore the detrimental consequences of interpreting Section 22302 to allow individual courts to impose their own notions of fairness on interest rates that the Legislature chose not to regulate. The uncertainty created by ad hoc judicial regulation of interest rates would decrease the availability of such loans, contrary to the stated purpose of the FLL to *increase availability* of consumer credit. Lenders in this market likely would cease offering such products to high-risk borrowers, as the uncertainty surrounding the legality of interest rates commensurate with the risk would make it impossible to operate. This would be contrary to another stated purpose of the FLL, to *increase competition* in this market.

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[5] Motion for Judicial Notice (MJN) Ex. 2.

The Legislature expressly stated its intent that the interest rates on consumer loans of $2,500 or more are not subject to a maximum rate. Amici offer no support for ascribing to the Legislature an intent that the general unconscionability statute would nonetheless impose a maximum rate.

II. ARGUMENT

A. Amici's "Context" Arguments Show That They Misunderstand This Case.

CRL emphasizes the importance of *context* in an unconscionability analysis. (CRL Br., p. 4.) It is clear from CRL's brief that "context" means the particular circumstances of individual borrowers. CRL even qualifies its answer to the Ninth Circuit's question as depending on the context of particular loans. (*Ibid.*)

CRL misunderstands what this case is about. CRL argues that "there is no universal interest rate above which *all* loans become unconscionable." (CRL Br., p. 5 [emphasis in original].)[6] But a universal rate cap is exactly what Plaintiffs are asking the court to declare, as they told the district court in this case: "Plaintiffs allege that CashCall makes loans with unconscionable annual percentage rates of 90% or higher, in violation of California Financial Code § 22302, California Civil Code § 1670.5, and the UCL. . . . It is CashCall's conduct in making loans *at these unconscionable interest rates—not the individual conduct or situation of each class member who borrowed from CashCall—that will be the focus* of the Court's inquiry

[6] CRL asserts that only in rare cases of extraordinarily high rates "like the 11,000,000% rate posited by the New Mexico Supreme Court" will the rate be "substantively unconscionable in essentially all circumstances." (CRL Br., p. 4.)

in determining the legality of this practice." (Plaintiffs' Supplemental Excerpts, Vol. IV, Dkt. No. 60, p. 18:15-22 [emphasis added; footnote omitted].)

Moreover, in declining to certify Plaintiffs' separate claim that CashCall's loans were "unfair" under the UCL, the district court found that individual borrowers' circumstances would create predominant *individual* issues. (See *O'Donovan v. CashCall* (N.D. Cal. 2011) 278 F.R.D. 479, 503 (*O'Donovan*) [denying class certification as to loan aspects other than the interest rate; "To determine whether the terms of CashCall's loan agreements are [unfair] under the UCL, the Court must examine the utility of CashCall's practices in including each provision and the affect [sic] on borrowers. Thus, the circumstances surrounding each loan agreement, including each borrower's financial circumstances, would come into play, requiring individualized examinations."].) Thus, amici confuse the issue before this Court by referring to other aspects of a loan transaction as relevant to the unconscionability of the interest rate. (See CRL Br., p. 11 ["the interest rate on a set of loans, *together with the remaining terms*, makes the overall bargain unconscionable"] [emphasis added].)

B. Principles of Statutory Interpretation Negate Amici's Arguments.

1. The Language of the Statutes Demonstrates That Amici's Interpretation Is Wrong.

a. Section 22303: maximum rates "do[] not apply."

Under the plain language of Section 22303, loans of $2,500 or more are not subject to any rate cap. Section 22303 establishes rate caps on consumer loans of less than $2,500 and states that those caps "do[] not

apply" to loans of a higher amount. Amici argue that "does not apply" means that Section 22303 is entirely irrelevant to loans of $2,500 or more. As explained in CashCall's Answer Brief on the Merits (ABOM), this interpretation makes no sense. (ABOM, p. 22.) The Legislature affirmatively expressed that the loans are subject to no rate cap.

CashCall's interpretation of this critical language is consistent with courts' interpretation of identical "do not apply" language in other sections of the Financial Code. The Legislature has consistently used the same or similar "do not apply" language to provide that a particular category of loans is not subject to any maximum interest rate. The decisions of California courts—including this Court—have consistently interpreted that language to mean that (1) no rate caps apply and (2) common-law doctrines cannot be used to regulate rates that the Legislature chose not to cap.

"'It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.' . . . [T]he Legislature is presumed to have been aware of and to have concurred in the judicial construction." (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1424 [citations omitted].) Thus, when the Legislature used the "do not apply" language in Section 22303, it intended it to have the same meaning ascribed to that phrase by the courts—that no rate caps applied.

In *Peoples Finance*, *supra*, 236 Cal.App.2d 897, the court examined whether industrial loan companies were subject to any maximum interest

rate.[7] In defense to a lender's complaint in foreclosure, the borrower in *Peoples' Finance* argued that an 80-percent interest rate violated Financial Code section 18655, which imposed rate caps on loans under certain dollar amounts (just like subdivisions (a) through (d) of Section 22303).[8]

Like the last sentence of Section 22303, section 18649 exempted certain loans from the rate caps of section 18655:

> The following sections of this division do not apply to any bona fide loan of a principal amount of ten thousand dollars ($10,000) or more or to an industrial loan company in connection with any such loan if the provisions of this section are not used for the purpose of evading this division. Sections . . . 18655 . . . .

(*Peoples Finance*, *supra*, 236 Cal.App.2d at p. 900 [quoting Fin. Code, § 18649]; cf. Fin. Code, § 22303 ["This section does not apply to any loan of

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[7] Like consumer lenders regulated under the FLL, the Constitution exempts industrial loan companies and certain other types of lenders from the usury laws and expressly places interest rate regulation in the hands of the Legislature. (Cal. Const., art. XV, § 1; Fin. Code, § 22002.) These exempt lenders are not subject to a maximum rate unless and until the Legislature imposes one. (See *West Pico*, *supra*, 2 Cal.3d at p. 615 ["As to these exempt classes [under the Constitution], there are *no restrictions* on the rates of interest charged unless the Legislature so provides."] [emphasis added]; *Carter v. Seaboard Finance Company* (1949) 33 Cal.2d 564, 582 (*Carter*) ["until the Legislature exercises the power granted to it by the [Constitution] to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to *no restriction* on interest rates or charges"] [emphasis added]; *Matulich v. Marlo Investment Co.* (1936) 7 Cal.2d 374, 376 ["there is . . . *no law of this state* which limits the rate of interest which may be charged by personal property brokers"] [emphasis added]; *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184 ["*no provision of law, either statutory or constitutional*, limit[s] the amount of interest or profit which a personal property broker may exact for a loan made by him"] [emphasis added].)

[8] The statutes discussed in *Peoples Finance* no longer appear in the Financial Code under these numbers.

a bona fide principal amount of two thousand five hundred dollars ($2,500) or more as determined in accordance with Section 22251."].)[9]

The loan in question had a principal amount of $30,000, and the trial court found that the lender was not using section 18649 to evade the industrial loan company laws. Thus, the trial court entered judgment for the plaintiff lender, finding that "the plaintiff was exempted from the charge limitation provisions of Financial Code section 18655 as to loans in excess of $10,000 which are specifically exempted from the provisions of the Financial Code of the State of California." (*Peoples Finance*, *supra*, 236 Cal.App.2d at p. 899.)

The trial court did not interpret the statutory phrase "[t]he following sections of this division do not apply" to mean that the interest rate statute was simply irrelevant to certain loans, as amici and Plaintiffs have argued here about Section 22303. Rather, the court understood that this language meant that because the rate caps imposed by section 18655 do "not apply," the loan was exempt from rate regulation.

This Court reached the same conclusion when interpreting the identical "do not apply" language in another provision of the Financial Code. (See *West Pico*, *supra*, 2 Cal.3d 594.) At the time, Financial Code section 22451 capped interest rates on loans by personal property brokers, and section 22053 provided that "'[t]he following sections of this division [including section 22451] *do not apply* to any bona fide loan of a principal amount of five thousand dollars ($5,000) or more or to a duly licensed personal property broker in connection with any such loan, if the provisions

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[9] Like section 18649, section 22251 provides that rate cap statutes' exemptions require that loans be bona fide and not used for the purpose of evading the division.

of this section are not used for the purpose of evading this division . . . .'"[10] (*West Pico*, *supra*, 2 Cal.3d at pp. 606-607 [quoting Fin. Code, § 22053; emphasis added].) The Court held that as long as the loan met the conditions set forth in section 22053—that it was bona fide and not for evasion—the lender was "completely exempted from any limitation on rates of interest." (*West Pico*, *supra*, 2 Cal.3d at p. 606 [agreeing with the lender's argument]; see also *ibid.* ["Pacific is correct in asserting that the instant loans were subject to no restrictions"].)

Other cases involving the Financial Code have also interpreted "do not apply" language to mean that loans that meet the criteria of the statute are not subject to other statutory restrictions. (See, e.g., *Raysinger*, *supra*, 36 Cal.App.3d at p. 252 ["the loan qualified under section 22053, and the exemptions therein set forth were fully applicable to this transaction, including the exemption from the maximum rate of charges allowable under the Personal Property Brokers Law . . ."]; *Riebe v. Budget Fin. Corp.* (1968) 264 Cal.App.2d 576, 584 ["the restrictive provisions of the Personal Property Brokers Law made inapplicable to loans of $5,000 or more by section 22053 are inapplicable to the loan here considered"]; see also *Peoples Finance*, *supra*, 236 Cal.App.2d at p. 902 [citing an Attorney General opinion regarding whether interest rates charged by personal property brokers on loans over $5,000 were limited by section 22053, finding "[t]here is no maximum limit on the rate of charge which may be collected on bona fide loans of a principal amount of $5,000.00 or more"].)

The cases also show that a court will not apply common-law doctrines to restrict interest rates when the Legislature has chosen not to

[10] The statutes discussed in *West Pico* no longer appear in the Financial Code under these numbers.

limit rates. In *Peoples Finance*, the court, having found that the loan was exempt from rate caps under a statute that, like Section 22303, did "not apply" to certain loans, went on to consider the borrower's argument "that the court, sitting in equity, may avoid the enforcement of an obligation otherwise valid on the grounds that the interest charged constitutes an unconscionable bargain." (*Peoples Finance*, *supra*, 236 Cal.App.2d at p. 902.) The court held that such equitable considerations *did not overcome* the express laws regarding interest rates. (See *id.* at p. 903 ["a court of equity would not interfere with the contract of the parties for the reason that courts of equity are as much bound by the laws of the land as courts of law," "even though the [parties'] bargain was hard and unreasonable"] [citing *Boyce v. Fisk* (1895) 110 Cal. 107, 112, 116].) The court concluded that the constitutional exemption from interest rate limits and the statutory exemption from limits imposed by the Legislature "cover[] the law of the land and that [usury statutes are] not applicable, *even though we believe the total interest charged is unconscionable.*" (*Peoples Finance*, *supra*, 236 Cal.App.2d at p. 903 [emphasis added].)[11]

Similarly, this Court has explained that:

> It must necessarily follow that the exemption of the enumerated classes from the restrictions of the Usury Law has at the same time made them *immune to actions grounded upon common law remedies existing prior to the Usury Law.*

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[11] In *Carboni v. Arrospide*, the court refused to follow *Peoples Finance*, concluding it was wrongly decided because it held that interest rates were exempt from the unconscionability doctrine. (*Carboni v. Arrospide*, *supra*, 2 Cal.App.4th at p. 81, fn. 5.) But *Peoples Finance* held only that the interest rates at issue under the particular statutory scheme applicable to lenders exempt from the constitutional usury provision were exempt from the unconscionability doctrine. At any rate, *Carboni* did not involve a regulated lender, and it did not involve the FLL.

> Any other result would frustrate the constitutional amendment which was designed to place *in the hands of the Legislature* the control of the charges to be made by the exempted groups.

(*West Pico*, *supra*, 2 Cal.3d at p. 615 [emphasis added]; see also *id.* at p. 614 [where loans are exempt from the constitutional usury provisions, a borrower "is not entitled to damages for usury, *either by invoking common law remedies or statutory penalties*"] [emphasis added].)

This Court also has confirmed that no agency may impose its view of appropriate interest rates when the Legislature has not done so. In *Carter*, *supra*, the Court declared that "[t]he commissioner [of Corporations], under his rule-making power or otherwise, has no authority to declare what interest rates and charges are unlawful or exorbitant. This may be done *only by the Constitution or by legislative enactment* consistent with the Constitution." (*Carter*, *supra*, 33 Cal.2d at p. 585 [emphasis added].)

b. Section 22302: unconscionability is "a violation of this division."

It is no answer to the above analysis that the Legislature in Section 22302 allegedly intended to allow courts to find interest rates unconscionable at the behest of a borrower.

First, amici ignore the maxim of statutory interpretation that a specific statute governs over a general one. Section 22303 specifically sets maximum rates on certain loans and provides that loans of $2,500 and over are not subject to a maximum. Section 22302 applies to FLL loans in general. Any conflict must be resolved by giving precedence to Section 22303. "A specific [statutory] provision relating to a particular subject will govern in respect to that subject, as against a general provision,

although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*Carmack v. Reynolds*, *supra*, 2 Cal.5th at p. 856 [citation and internal quotation marks omitted].) This Court has recognized that:

> The rules we must apply when faced with two irreconcilable statutes are well established. If conflicting statutes cannot be reconciled, . . . more specific provisions take precedence over more general ones. . . . It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.

(*State Dep't of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961 [citations and internal quotation marks omitted]; see also Code Civ. Proc., § 1859 ["In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."].)

Section 22303's provisions governing interest rates on particular categories of loans are more specific than, and govern over, Section 22302's general incorporation of the doctrine of unconscionability to FLL loan provisions in general. Amici do not mention this dispositive maxim of interpretation, and their interpretation of Section 22302 violates it.[12]

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[12] Ironically, Plaintiffs' amici do not even agree with Plaintiffs on how to interpret the statutes. Plaintiffs acknowledged that Section 22303 is the more specific statute to the extent it imposes specific numerical rate caps on particular categories of loans—*i.e.*, that an unconscionability analysis would not apply to rates on loans of $2,500 or less. Plaintiffs seek to avoid the maxim by arguing that Section 22303 is irrelevant to loans of more than $2,500—an interpretation that is contrary to common sense and decisions

Second, amici's interpretation of Section 22302, that the Legislature intended that courts would apply the doctrine of unconscionability to find interest rates too high despite the specific legislative exemption from any rate restrictions, is unsupported. It makes no sense for the Legislature to impose specified rate caps on some loans, lift the rate caps on others, but then generally leave the entire subject of interest rate regulation for all loans up to the courts, even when the regulators do not see any problem.

In *Raysinger*, *supra*, 36 Cal.App.3d 248, the court rejected a borrower's argument that one provision of the Financial Code, restricting the security that could be taken by personal property brokers, governed a loan despite another provision that exempted the loan from the security restrictions. The court explained: "Were we to accept plaintiffs' contention that [the restriction on security] *affirmatively* proscribes the use of real property as security in all situations under the Personal Property Brokers Law, we would in effect *nullify the section 22053 exemption* which allows a licensee to take a lien upon real property as security for a loan. *We cannot ascribe an intent on the part of the Legislature on the one hand to provide for an exemption from the [statutory] prohibition and, on the other hand, to nullify that exemption by application of a different provision of the code.*" (*Id.*, pp. 252-253 [first emphasis original; second emphasis added].)

Third, amici do not acknowledge that the plain language of Section 22302 states that a loan found to be unconscionable is "in violation of this division and subject to the remedies of this division." (Fin. Code, § 22302,

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interpreting the "do not apply" language in the Financial Code. Both amici, in contrast, assert that an unconscionability analysis applies to all terms of all loans, even as to the lower-principal loans that are subject to particular rate caps. (CRL Br., pp. 6, 34; Attorney General Br., p. 16, fn. 4.)

subd. (b).) "[T]his division" is Division 9 of the Financial Code, which is entitled "California Financing Law" and includes sections 22000-22780. Indeed, neither Plaintiffs nor their amici say much at all about subdivision (b) of Section 22302.

This language is important. Without Section 22302, unconscionability could only be a defense to enforcement that could be asserted by an individual borrower. As emphasized in amici's briefs, the doctrine of unconscionability has existed for hundreds, if not thousands, of years and is applicable to contracts generally. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 484-485.) Amici's interpretation of Section 22302 means that the Legislature's incorporation of Civil Code section 1670.5 was an idle act. But "the Legislature does not engage in idle acts, and no part of its enactments should be rendered surplusage if a construction is available that avoids doing so." (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087.)

The Legislature must have intended Section 22302 to accomplish something more than merely incorporating unconscionability to FLL loans. That different objective is apparent from the face of the statute: the Legislature made unconscionability a violation of the license requirements of the FLL and subject to the remedies of the FLL, meaning that the DBO can take enforcement action based on loans with unconscionable terms, including license restriction and revocation. (See 3-SER-800 [Legislative Counsel's Digest stating "[t]his bill would make unconscionable loan contracts of . . . consumer finance lenders a violation of their respective licensure laws"].)

Thus, Section 22302 does not mean that a court can invalidate interest rates as unconscionable. It means that the DBO can take

enforcement action under "this division" (sections 22700-22758) if it concludes that a term of the loan is unconscionable (other than the interest rates). Section 22302 is available for the DBO to address allegedly unconscionable terms, such as arbitration clauses, other types of charges, acceleration clauses, prepayment penalties, or onerous restrictions on timing or method of payment. Amici do not address this logical, plain language interpretation of the statute.

2. The Legislative History Does Not Support Amici's Interpretation.

Neither amici mentions any of the numerous excerpts of legislative history, discussed in the ABOM, of the legislation imposing and removing rate caps and enacting the unconscionability provision. That legislative history repeatedly shows the Legislature's intent that interest rates on loans of $2,500 or more will *not* be regulated—and that lenders "*can charge whatever interest rate they want.*" (MJN Ex. 2 [emphasis added].) The Legislature intended that free market forces would determine interest rates on these loans.

Amici argue that the free market and the unconscionability doctrine can co-exist, with unconscionability operating as a backstop if the market fails to function properly. CRL asserts that "the legislature recognized that [Section 22302's] unconscionability provision would remain a safeguard against the excesses of a free market" and that "[t]he incorporation of Civil Code section 1670.5 into Financial Code section 22302 evinces a clear legislative intent that courts should police the consumer credit market for unduly oppressive contract terms. The legislative mandate of Finance [sic] Code section 22302 is clear: where the market for consumer loans fails to produce socially tolerable terms, the courts may step in." (CRL Br., p. 6.)

But amici do not cite a single piece of legislative language or legislative history to support this "clear legislative intent." To the contrary, the legislative history shows a very different intent: "[I]t is the intent of the Legislature to let the rates charged generally to be set by free market competition, subject to rate limitations deemed necessary by the Legislature." (MJN Ex. 8.)

Nothing in the legislative history indicates that the Legislature wanted courts to determine, through application of the unconscionability doctrine, whether the market was operating efficiently. And contrary to amici's alarmist views, there is no indication that the market in fact is not functioning well. In fact, the rates and exemptions set forth in Section 22303 have existed since long before Section 22302 was enacted, with the exemption applying to loans with higher dollar amounts. Prior to 1984, Section 22303 set rate caps for loans up to $10,000; in 1984, the Legislature deregulated rates on loans above $5,000; and in 1985, the Legislature extended rate deregulation to loans of $2,500 or more. The legislative history shows that the prior reductions were intended to, and successfully did, encourage competition and increase access to credit. (MJN Ex. 3, 4, 5.)

Further, the Legislature contemplated that the DBO, not courts, would oversee the proper functioning of the market. (MJN Ex. 4 ["The Department of Corporations will monitor the interest rates on loans above $2,500 to determine whether these rates are 'competitive' through the mechanism of the annual report required to be filed by licensed lenders."].)

As shown by the DBO reports and as discussed in CFSP's amicus brief, there is a robust market for these loans. (See ABOM, pp. 13-14 [discussing comparable loan options, higher-priced alternative subprime

products, and DBO reports showing hundreds of thousands of small, high-rate, unsecured loans made annually at rates comparable to CashCall's rates]; see also CFSP Br., pp. 11-13.) A prospective borrower only need look on-line to see a range of available credit options and their rates.

CRL cites an extreme hypothetical example of a loan bearing an 11 million percentage rate, as hypothesized by an expert in *State ex rel. King v. B&B Investment Group, Inc.* (N.M. 2014) 329 P.3d 658, 672 (*B&B*), to try to demonstrate that the market cannot rein in such rates and that the doctrine of unconscionability is needed to prevent such hypothetical excesses.[13]

But extreme hypotheticals do not undermine the Legislature's intent to leave regulation of these loans to the market. The market would not allow a lender to charge an astronomical hypothetical rate. A lender who complied with its numerous statutory obligations and accurately disclosed the cost of credit (as CashCall did here) and tried to charge such a rate would promptly go out of business: borrowers would simply choose loans from competitors with lower advertised rates. Only a lender engaging in major deception—as happened in *B&B*, where the lender instructed its loan officers to hide the cost of credit—could possibly lure a borrower into paying such a rate. An unscrupulous lender who duped borrowers into

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[13] Despite amici's heavy reliance on *B&B*, that case sheds no light on how the California statutes work or were intended by the California Legislature to work. There was no statute in *B&B* analogous to the last sentence of Section 22303. Moreover, as discussed in the ABOM, the lender in *B&B* engaged in deliberate and widespread deception of its borrowers. (ABOM, pp. 43-44.) No deception is at issue here. And while a private plaintiff may have been authorized by the statute in *B&B* to bring a lawsuit for unfair practices, the fact is that the decision was rendered in a case brought by the Attorney General.

taking such loans by failing to disclose the cost of credit would violate numerous provisions of TILA, Regulation Z, and the FLL, and possibly other statutes, depending on the nature and extent of the deception.[14] (See, e.g., 15 U.S.C. § 1631; 12 C.F.R. pt. 1026; Fin. Code, §§ 22332, 22337.) And any lender who makes loans exceeding borrowers' ability to pay (another concern raised by amici) may violate separate provisions of the FLL. (See Cal. Code Regs., tit. 10, § 1452; see also *O'Donovan*, *supra*, 278 F.R.D. at p. 502 [declining to certify class as to claim for violation of this regulation because individual issues predominated].)

CRL speculates about various reasons why the market for consumer loans might not function efficiently, such as that borrowers may need the money and that the standard contract allows for no rate negotiation.[15] (CRL Br., p. 38.) That assumes a market functioning without regulatory or legislative oversight. The DBO prepares annual reports regarding market conditions and, where appropriate, takes action against lenders that violate the FLL or other laws in their dealings with borrowers. The Legislature too has not been idle in this field—it has taken steps to relax rate regulation on

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[14] For instance, a lender's efforts to collect on loans may violate provisions of the Rosenthal Fair Debt Collection Practices Act, Civ. Code, § 1788 et seq. See also CFSP Br., pp. 14-16.

[15] The mere fact that the interest rates on CashCall's loans were non-negotiable is irrelevant. This case presents no more, or less, "unequal bargaining power" than *any* standardized loan product or uniformly priced product or service. (CRL Br., p. 13.) A borrower's inability to individually negotiate price is not sufficient to constitute oppression; if it were, then "*every* form contract not subject to negotiation between the parties would be deemed oppressive, totally disregarding the undisputed ability of a contracting party to choose to obtain that for which he bargained from other sources." (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 769 [emphasis in original]; see also *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 346-347 ["[T]he times in which consumer contracts were anything other than adhesive are long past."].)

some loans to increase access to credit. The Legislature has chosen not to cap interest rates and has seen no need to intervene to control the freely functioning market for consumer loans of $2,500 or more.

Ignoring the vast majority of the legislative history, amici repeat Plaintiffs' argument that Section 22302 must have been enacted in response to a letter from the Attorney General expressing concern about consumer protection if rates were deregulated. CashCall's ABOM addressed this speculation, and explained that it was at least as likely that Section 22302 was added to tighten consumer protections as to *other* loan terms. (ABOM, pp. 30-31 [citing MJN Ex. 3 ["[t]he Department will be neutral if the noninterest rate provisions (consumers protection)—which currently apply to loans up to $5,000—continue to apply to loans up to $5,000. Hence, the interest rate provision can be deregulated, but various consumer protection sections would have to be in the bill."] [emphasis in original]; MJN Ex. 4 [noting in response to concern of lessened consumer protection if rates were deregulated, "other consumer protection elements of the consumer finance lending laws remain intact as well as a new provision added by this bill which would provide that if a loan made under these laws is found to be unconscionable pursuant to Section 1670.5 of the Civil Code, it shall be deemed to be a violation of the consumer finance lender laws and thereby subject to the remedies of these laws."]].)

Amici also cite another isolated piece of legislative history, a letter from the bill's author stating that the unconscionability provision would provide a remedy for "excessive charges." (Attorney General Br., p. 17 [citing Plaintiffs' MJN Ex. F].) But "charges" is a defined term in the FLL, and includes far more than just interest rates, which are the subject of a specific, separate statute. (See Fin. Code, § 22200 ["'Charges' include the

aggregate interest, fees, bonuses, commissions, brokerage, discounts, expenses, and other forms of costs charged, contracted for, or received by a licensee or any other person in connection with the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of a loan or forbearance of money, credit, goods, or things in action, or any other service rendered."]; *id.* § 22201 ["'Charges' include any profit or advantage of any kind that a licensee may contract for, collect, receive, or obtain by a collateral sale, purchase, or agreement, in connection with negotiating, arranging, making, or otherwise in connection with any loan."].)

Finding little of support in the legislative history of the statutes at issue, amici instead rely on legislative history of two other statutes. Amici argue (citing and quoting legislative history that they do not provide to the Court) that Civil Code section 1670.5 was intended to combat unfair contracts with home improvement contractors, including "hidden finance charges." (Attorney General Br., p. 14.) The interest rates at issue here are not hidden, but are well-disclosed in accordance with state and federal law. (See ABOM, pp. 14-15.) If amici's interpretation of Civil Code section 1670.5's legislative history were correct, one would expect to see many more courts applying that doctrine to invalidate interest rates, not just a single reported appellate case in 1991.

Amici also cite the legislative history of the Consumer Legal Remedies Act (CLRA), Civ. Code, § 1750 et seq. However, the CLRA is inapplicable to consumer credit transactions. (See *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 227 [affirming dismissal of complaint alleging that credit card agreement provision was unconscionable under the CLRA; holding that the extension of credit does

not fall within the scope of the CLRA].) The Legislature could have made the CLRA, including its unconscionability provision, apply to loans and interest rates; it chose instead to exclude credit transactions. Thus, the CLRA is not evidence that unconscionability principles apply to lenders' interest rates. In fact, the Legislature's decision to exempt credit transactions from the CLRA shows a contrary intent to exempt rates from unconscionability analysis.

3. Amici Do Not Acknowledge the Adverse Consequences of Their Interpretation.

CashCall's ABOM discussed several "significant adverse consequences" likely to flow from an interpretation holding that interest rates exempt from limits under Section 22303 may be unconscionable under Section 22302. Consideration of the consequences is a critical part of statutory interpretation. (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583.) The consequences, which amici mainly do not dispute, weigh heavily against the interpretation they urge. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142,1165-1166.)

a. Amici disregard the legislative policies to increase access to credit and to promote competition in the lending market.

The Legislature's *primary* purpose in enacting the statutes at issue and leaving rates to the market was to foster competition and increase consumers' access to credit. (ABOM, pp. 19, 28-29.) As discussed, the FLL is designed to increase access to credit. The Legislature's recent adoption of the Pilot Program reiterates its commitment to increasing access to credit and its acknowledgement that existing rate caps restricted

access to credit. The Legislature's reaction to that market imbalance was not to tighten the rate caps. The Pilot Program allows lenders to charge higher rates than are permitted under Section 22303 on loans under $2,500.

CashCall explained how application of Section 22302 to find deregulated interest rates to be unconscionable would reduce access and limit competition, as lenders will not be able to cover their costs and will not be able to rely on a clear set of rules by which to operate their businesses. (ABOM, pp. 34-38.)

Amici ignore these inevitable consequences. Instead, they argue that the interpretation of the statutes should be guided by the policy of consumer protection. Protecting borrowers "against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders" is one of the six stated goals of the FLL. (Fin. Code, § 22001, subd. (a).) Thus, the FLL contemplates a balancing of interests, and the Legislature resolved that balance in favor of allowing market regulation of interest rates.

As discussed in Part II.B.2, *supra*, the legislative history repeatedly demonstrates that interest rates were being deregulated even while *other consumer protections* were strengthened or remained in place. (MJN Ex. 4 ["Senate Bill 447 removes only the rate regulation provision of the laws regulating lenders while preserving the consumer protection provisions of all laws."].)

Moreover, when it comes to interest rates, consumers are protected by federal and state disclosure laws as well as other consumer protection provisions of the FLL and other laws. As CFSP's brief demonstrates, the market for these loans is robust and competitive, and consumers can

compare prices among products by referring to the mandated, consumer-protective rate disclosures.

b. Application of Section 22302 to interest rates would re-impose by judicial fiat the limits that the Legislature chose to remove and would constitute disfavored economic regulation.

Allowing courts to impose their own subjective views of what rates are too high would transfer regulation of rates from the Legislature—where it is placed by the Constitution—to the courts. The Legislature has not refused to act or abdicated its responsibility—it has acted, it has decided that interest rates on FLL loans of $2,500 or more should be subject only to market forces, and it has decreed that interest rates on such loans are subject to no rate limit. Using Section 22302 as a vehicle for courts to override the legislative decision means that courts would engage in economic regulation, imposing their own subjective views of fairness.

Amici argue that a court could avoid engaging in economic regulation by simply declaring that a rate is unconscionable and leaving it at that, without specifying a particular cap. That approach is contrary to the thousands of years of unconscionability law amici summarize. The numerous price unconscionability cases amici cite demonstrate that a court must pick a price that it believes is not unconscionable. For example, the *B&B* court observed that striking the interest term entirely would grant a windfall to the borrowers, and it instead reformed the loans to apply the statutory default rate. (*B&B*, *supra*, 329 P.3d at pp. 675-676.) Similarly, the *Carboni* court did not simply declare a 200-percent rate to be unconscionable; it affirmed the trial court's reduction of the interest rate to

an approximated market rate of 24 percent. (*Carboni v. Arrospide*, *supra*, 2 Cal.App.4th at pp. 80-82.)

In order to award Plaintiffs the relief they seek—restitution and an injunction—the court would be required to determine the rate that it deems not unconscionable. (ABOM, pp. 33-34.) Restitution—which measures the difference between an unlawful charge and a lawful charge—could not be calculated without that determination. And a court could not issue a clear and certain injunction telling CashCall (or any other lender) what rates it could lawfully charge without specifying such a rate. There is no way to implement amici's interpretation of the statutes without selecting and imposing a rate cap—the precise act that the Legislature decided not to take.

Contrary to CRL's argument that "a finding that the interest rate on a set of loans, together with the remaining terms, makes the overall bargain unconscionable would not create a generally applicable, market-wide interest rate cap" (CRL Br., p. 11), it would do just that.[16] Allowing courts to adjudicate appropriate interest rates retroactively would create extreme uncertainty for lenders, which must price their loans prospectively based on anticipated risk. As discussed, this case asks the court to declare a particular uniform interest rate invalid across the board as to all loans, regardless of context. Thus, a finding of unconscionability would function as an economic "rule," not a malleable, case-by-case "standard." (CRL Br., p. 11.) While the cap nominally would apply only to CashCall, the defendant in this suit, every other similar lender could be sued for exactly the same "unconscionable" conduct. Lenders will exceed that rate at their

[16] It bears repeating that this case does not challenge other terms of the loans, only the interest rate.

peril, not being able to anticipate what rate a court will declare unconscionable if litigation ensues. Moreover, different courts may set different maximum rates in different lawsuits, depending on each court's subjective views—which could be higher or lower than the maximum rate imposed on CashCall.

Amici argue that it is not economic regulation for a court to apply the established factors relevant to the unconscionability analysis. (Attorney General Br., p. 25.) But the point is not that courts are incapable of applying the unconscionability factors to a particular loan. Rather, the point is that the analysis required here forces the court to engage in industry-wide economic regulation. None of the numerous cases amici cite involved such a broad application of unconscionability to an entire class of loans (or other contracts).

Amici also suggest that there is nothing wrong with a court engaging in economic regulation, arguing that this Court has not adopted an "abstention" doctrine. But this Court has repeatedly said that courts are loath to engage in ad hoc judicial regulation where the industry is well regulated or the decision would involve a complex analysis of data and balancing of policies. (See *Harris*, *supra*, 52 Cal.3d at p. 1167, fn.13 ["'In subjecting the price structure of an industry to control, the division of labor between the legislature and the court seems clearly marked. The discretion must belong to the law-making body, a restrained power of review to the judiciary. To the primary question of the necessity for regulation, the courts cannot easily give a right answer'"] [citation omitted]; *id.* at p. 1167 ["For these reasons, the economics of credit practices . . . have traditionally been left to the guidance of market forces or to specific legislative and

administrative action designed to address particular grievances."].)[17] *Harris* is applicable here. Contrary to amici's argument, there is "clear legislative direction" (*id.*, p. 1167-1168) supporting a court's non-involvement: Section 22303.

C. CashCall's Rates Are Set to Reflect the Risk of Lending to Subprime Borrowers.

Amici disparage CashCall as acting out of an improper profit motive that misaligns the interests of lender and borrower. (CRL Br., pp. 41-43.) But there is nothing nefarious or improper about trying to make a profit. (See *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 483 ["[C]ase law supports the general proposition . . . that a 100 percent markup or profit margin 'is wholly within the range of commonly accepted notions of fair profitability.'"] [citation omitted].) The price of CashCall's loans is based on the risk that CashCall assumes in making unsecured loans to borrowers with poor credit (ABOM, pp. 11-13), and CashCall did not even reach its targeted profitability of 15-20 percent. (7-SER-1499 ¶ 34.) Amici never acknowledge the impact of the borrowers' creditworthiness on interest rates.

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[17] See also *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 454-456 ("this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. . . . In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of [the statute], but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy."); *Wholesale Tobacco Dealers Bureau of S. Cal. v. National Candy & Tobacco Co.* (1938) 11 Cal.2d 634, 646 ("It is not for the courts . . . to determine whether or not the policy of a statute is economically sound or beneficial. That is a matter solely for the legislature.").

Contrary to amici's musings, CashCall has no motivation to have its borrowers default. In lending to subprime borrowers with poor credit history, defaults are inevitable. CashCall's loans properly are, and must be, priced to reflect that risk.

If CashCall is not allowed to price to cover its risk—or must do so at its peril, subject to random adjudications of unconscionability—CashCall and similar lenders would withdraw from this risky market altogether, thus restricting access to credit and the options available to this class of borrowers. This consequence would be directly contrary to the purpose of the FLL to increase consumer access to credit.

D. The Agencies Charged With Enforcing the FLL Have Never Acted to Enforce Section 22302 Against CashCall's Interest Rates.

The Attorney General, who supports Plaintiffs' interpretation of the FLL and proclaims a "strong interest in ensuring that the [FLL] is properly construed" (Attorney General Br., pp. 7-8), has never enforced the statutes in the way he urges the Court to construe them. In the 30+ years that Section 22302 has been on the books, the Attorney General has never sued a lender for violating Section 22302 by charging interest rates that allegedly were too high. In fact, the Attorney General sued CashCall in 2009 (in the middle of the class period at issue here). The Attorney General in that enforcement action alleged that "Defendant CashCall, Inc. is a lender that makes small, unsecured cash loans to consumers at very high interest rates. CashCall's typical loan products offered to California consumers have included a $2,600 loan with an annual percentage rate of 99.25%."[18] The

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18 https://www.oag.ca.gov/system/files/attachments/press_releases/n1788_cas

Attorney General clearly knew CashCall charged interest rates in excess of 90 percent, yet he took no action against CashCall based on its interest rates. So the Attorney General is urging the Court to do as he says, not as he does.

The DBO, which has repeatedly and consistently said that an "[]FLL licensed lender can charge whatever interest rate it chooses on loans of bona fide principal amounts of $2,500 or more," has audited CashCall numerous times and has even taken enforcement action against it.[19] But it has never challenged CashCall's rates. (ABOM, p. 13.)

The DBO is well aware of the rates charged by CashCall and in the market. As part of its regulatory oversight responsibility, the DBO is tasked with gathering and reporting information, including interest rate information, on FLL lenders. (Fin. Code, §§ 22159, 22715.) The purpose of these requirements is to ensure that the DBO is policing the interest rates on these loans. (See MJN Ex. 4 [Enrolled Bill Report explaining that "[t]he [DBO] will monitor the interest rates on loans above $2,500 to determine whether these rates are 'competitive' through the mechanism of the annual report required to be filed by licensed lenders."].) Thousands of loans are made by many lenders at rates that exceed the allegedly unconscionable rates here. (ABOM, pp. 13-14.) The DBO is fully aware of the rates CashCall charges and has chosen not to take enforcement action, signaling its conclusion that the rates are not unconscionable.

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hcallcomplaint.pdf ¶ 1; https://oag.ca.gov/system/files/attachments/press_releases/n1788_cashcallfinaljudgment.pdf.

[19]http://www.dbo.ca.gov/ENF/pdf/2014/CFL-CashCall_accusationrev_redacted.pdf ¶ 2.

III. CONCLUSION

For the reasons discussed in the ABOM and herein, CashCall's interest rates cannot be unconscionable under Section 22302. Amici's arguments do not change that conclusion.

Dated: March 16, 2018 MANATT, PHELPS & PHILLIPS, LLP

By: _____
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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, rule 8.520(c), I certify that this CASHCALL, INC.'S ANSWER TO BRIEFS OF *AMICI CURIAE* ATTORNEY GENERAL AND CENTER FOR RESPONSIBLE LENDING *ET AL.* contains 8,565 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: March 16, 2018 MANATT, PHELPS & PHILLIPS, LLP

By: _____
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PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **March 16, 2018**, I served the within:

CASHCALL, INC.'S ANSWER TO BRIEFS OF AMICI CURIAE ATTORNEY GENERAL AND CENTER FOR RESPONSIBLE LENDING ET AL.

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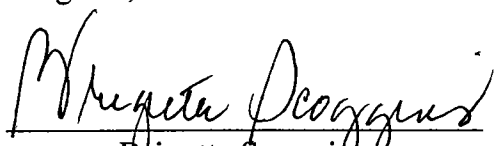
☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **March 16, 2018**, at Los Angeles, California.



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