No. S153846

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA

PAMELA MEYER and TIMOTHY PHILLIPS, individually and on Behalf of all Others Similarly Situated,

Plaintiffs and Appellants,

v.

SPRINT PCS, a Foreign Corporation, SPRINT SPECTRUM, L.P., a California Limited Partnership; and JOHN DOES 1 through 20, Inclusive,

Defendant and Respondent.

After Decision by the Supreme Court Affirming Decision of the Court of Appeal, Fourth Appellate District, Division Three, Case No. G037375

PETITION FOR REHEARING

J. DAVID FRANKLIN (BAR NO. 41659)
FRANKLIN & FRANKLIN
550 W "C" Street #950
San Diego, CA 92101-8569
Phone: (619) 239-6300
Fax: (619) 239-6369

Attorneys for Plaintiffs and Appellants

SERVICE ON THE ATTORNEY GENERAL AND ORANGE COUNTY DISTRICT ATTORNEY REQUIRED BY SECTION 17209 OF THE BUSINESS AND PROFESSIONS CODE AND CRC 8.29(A)

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INTRODUCTION

Plaintiffs hereby petition the Court for rehearing of the decision issued in this matter on January 29, 2009, because the Opinion erroneously interprets the standing requirements of the Consumer Legal Remedies Act, Code section 1750 et seq. ("CLRA") and sharply limits this Court's prior opinion in *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582

In *Kagan*, a consumer alleged that her lender had made misrepresentations to her, but acknowledged that she had never had any fees deducted from her account and had suffered no economic damages. This Court looked at the plain language of the totality of provisions in the CLRA and squarely and forthrightly held that the consumer had been damaged at the time that her legal rights were infringed.

This Court's Opinion, *Meyer v. Sprint Spectrum L.P.*, narrowed to the vanishing point its prior decision in *Kagan*. It did so by erroneously finding that the *Kagan* Court's conclusion that "the infringement of a legal right" satisfies the statute's "damage" requirement is mere dictum because the previous holding in *Kagan* was limited to the conclusion that the CLRA prohibits a defendant from "picking off plaintiffs." (Slip Op. at 8.) The Court's Opinion states that even if plaintiffs are correct in this case by alleging that defendant Sprint has "inserted" unconscionable provisions into its agreement with Sprint customers such as plaintiffs (a plain violation of section 1770(a)(19) of the CLRA), that plaintiffs have not suffered "any damage" within the meaning of the CLRA's section 1780(a) and cannot bring a "preemptive" challenge to the "insertion."

But the allegations in plaintiffs' complaint challenge defendant's attempt, through its "agreement," to insert provisions foreclosing access to the public justice system and other provisions constituting

"unconscionable" terms under California law already determined under this Court's controlling and consistent jurisprudence. The CLRA reaches precisely this conduct by Sprint and confers standing on plaintiffs to challenge it to protect their legal rights.

This Court's Opinion not only eviscerates its prior, previously unquestioned decision in *Kagan*, but it also tramples the plain language of the statute. First, the CLRA makes actionable the mere "insertion" of an unconscionable term into a contract (Civil Code § 1770(a)(19)), and the stated goal of the CLRA is to "prevent" violations of the Act (not to provide a compensatory remedy for violations, but to *prevent* them). Independently, the CLRA makes unlawful "[u]nfair or deceptive acts or practices undertaken by any person in a transaction *intended to result or which results* in the sale or lease of goods or services to any customer . . . ." Under this Court's reasoning, corporations would be free to insert unconscionable terms into contracts in violation of the CLRA up until the point that some consumer actually lost money as a result of those violations or suffered some other form of tangible economic loss.

Second, the Court agrees with plaintiffs' position that, as used in the CLRA, "damage" is not the equivalent of "damages." (Slip Op. at 5.) Nonetheless, ignoring its prior legislative language-based conclusion in *Kagan* that the "infringement of a legal right" is sufficient "damage" to trigger a challenge to an entity's attempt in a "transaction" to foreclose the public civil justice system, coupled with several provisions already held to be unconscionable under California law, this Court's Opinion requires some form of economic loss to support a finding of damages. (Slip Op. at 14.)

Third, although the CLRA's language – and this Court's rich body of precedent interpreting that Act – establish that the Act is to be liberally

construed, with every effort made to promote its underlying purpose of protecting consumers against violations of the Act, this Court's Opinion will result in narrowed interpretations of the CLRA, resulting in the insulation of corporate violators from actions for injunctive relief until after it seeks to enforce the agreement and an illegal act has cost a consumer money. In short, this Court has substituted its policy judgment – that corporations should not be liable for "inserting" (or attempting to insert) unconscionable terms into contracts unless and until a consumer has suffered actual damage – for the judgment and plain language of the Legislature.

Finally, in addition to ignoring the law established by this Court's decision in *Kagan* and ignoring basic principles of statutory construction, the decision conflicts with a host of other appellate decisions in this state which have interpreted the CLRA as providing a remedy for the sort of illegal conduct at issue here. Without rehearing, this Court's Opinion decision would encourage (rather than deter and prevent) a variety of unlawful acts and practices courts have previously held to be unlawful.

For each and every one of these reasons, this Court should rehear this matter and modify its Opinion to make clear that *Kagan* is still the law in California, and that violations of the CLRA such as inserting unconscionable terms into contracts are actionable under that statute.

ARGUMENT

I. THIS COURT'S OPINION MISCONSTRUED THE WORD "DAMAGE" USED IN THE CLRA IN A MANNER THAT IS INCONSISTENT WITH ITS EXPRESS TERMS AND PURPOSE OF THE STATUTE

A. The Infringement of a Legal Right is Sufficient to

Constitute "Damage" for Purposes of Section 1780(a).

This Court's conclusion that plaintiffs did not have standing to pursue their claims is erroneous. Its error lies within its improper narrowing of the phrase "any damage" in section 1780, its failure to recognize the relationship alleged between plaintiffs and defendant, and its failure to apply the plain language of section 1770(a)(19) prohibiting a business from the "inserting a unconscionable provision in the contract." By ruling as a matter of law on a demurrer that plaintiffs could not state a claim under the CLRA, the Court of Appeal improperly restricted the scope of the CLRA in a manner that – as this Court had already recognized in *Kagan* – was not intended by the Legislature. This Court's Opinion affirming the Court of Appeal offends the very language it considered and construed twenty-five years ago in *Kagan*.

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." (Civ. Code, § 1770(a).) Among these twenty-four enumerated unlawful practices is the one at issue in this case: "Inserting an unconscionable provision in the contract." (Civ. Code, § 1770(a)(19).)

The CLRA also outlines who may bring a claim under its provisions. It states specifically that:

> (a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:
>
> (1) Actual damages, but in no case shall the total award

> of damages in a class action be less than one thousand dollars ($1,000).
>
> (2) An order enjoining the methods, acts, or practices.
>
> (3) Restitution of property.
>
> (4) Punitive damages.
>
> (5) Any other relief that the court deems proper.

(Civ. Code, § 1780(a).) The remedies of the CLRA are expressly "not exclusive" but rather are "in addition to any other procedures or remedies in any other law." (Civ. Code, § 1752.)

As an initial matter, the Court of Appeal made its determination in ruling on a demurrer. As such, it is bound to accept as true all properly pled allegations in the operative complaint. (See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) At the demurrer stage, litigation is not designed to "test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. . . 'the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.'" (*Id*. at 47, quoting *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-14.) The CLRA does not require any heightened specificity in its pleading.

The key allegations in plaintiffs' operative complaint, which includes class allegations, are that (1) plaintiffs and the plaintiff class were forced into contracts of adhesion drafted by defendant that were offered on a take-it-or-leave-it basis by a party with unequal bargaining power; (2) plaintiffs and the plaintiff class remain bound by the terms of the contracts;

(3) several of the terms of the agreement are illegal and unconscionable including the preclusion of the public civil justice system and a prohibition of the right to a jury trial, a ban on class actions, a cost-splitting provision in arbitrations, a 60-day statute of limitations, and an unlawful liquidated damages provision; (4) defendant has enforced and continues to enforce terms of the contracts against plaintiffs and the plaintiff class; and (5) plaintiffs have been damaged from the "insertion" of the unconscionable terms. Plaintiffs alleged that these facts constitute a violation of the CLRA's prohibition against "inserting an unconscionable provision in the contract." (Civ. Code, § 1770(a)(19).)

First, it is axiomatic that courts must look to the plain meaning of a statute in the first instance to determine its applicability to the conduct at issue. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) "It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear there can be no room for interpretation, and effect must be given to its plain meaning." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40; see also *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.)

The Court of Appeal correctly recognized both that the "inclusion of an unconscionable provision in a contract is an unlawful act" under the CLRA and that "plaintiffs do not have to allege a monetary loss to have standing under the CLRA. . . ." (*Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.App.4th 1136, 1139 [59 Cal.Rptr. 3d 309, 312], rev. granted Aug. 15, 2007, S153846.) This Court ignored that conclusion drawn from the complaint's allegations and erroneously concluded instead that plaintiffs lacked standing under the CLRA because they have not "been damaged by

an unlawful practice." (Slip Op. at 1.) There are several reasons found in the plain language of the CLRA why this Court's conclusion is insupportable and rehearing should be granted.

Second, section 1770(a)(19) specifically prohibits a defendant from "*inserting* an unconscionable provision in the contract." (Civ. Code § 1770(a)(19), emphasis added.) The statute does not use the word "enforcing," the word used in this Court's Opinion as the operative act for stating a cause of action. (Slip Op. at 9.) Very significantly, the Legislature chose the term "inserting," not "enforcing," to characterize the unlawful conduct. It did not state "applying" or "enforcing" the unconscionable provision. Unlike the other prohibitions in the CLRA which include specific misrepresentations, section 1770 (a)(19) makes the mere "insertion" of an unconscionable provision unlawful. If a consumer can only challenge the unconscionable provision if and when the defendant decides to enforce it (which will, by definition, be unsuccessful, since it is "unconscionable" and hence unenforceable), then the prohibition on "inserting" the provision would be meaningless. As this Court has repeatedly admonished lower courts, a statute should not be given a construction that results in rendering one of its provisions nugatory. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 592-93; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

This Court's insistence that there is no "damage" in the absence of *enforcement* of unconscionable terms cannot be reconciled with the plain language of the statute. Indeed, contrary to the law of contracts, where unconscionability is traditionally raised as a *defense* to performance of a contract, the CLRA provides an affirmative cause of action for *inserting* an unconscionable provision into a contract. (Compare Civ. Code,

§ 1770(a)(19) with Civ. Code, § 1670.5; see *Ting v. AT&T* (N.D. Cal. 2002) 182 F.Supp.2d 902, 922 (citing *California Growers Assn., Inc. v. Bank of America, N.T. & S.A.* (1994) 22 Cal.App.4th 205, 217.)

Nor can this Court's Opinion be harmonized with the purpose of the CLRA and of section 1770(a)(19). Section 1770(a)(19) was added to the CLRA in 1979, nine years after its enactment. The amendment was part of a series of new laws passed to enhance consumer protection in contracts. Of their passage the Legislature announced: "It is the intent of the Legislature to preserve inviolate the rights of consumers and homeowners *to remain free from unconscionable fraudulent and deceptive sales practices*." (Stats. 1979, c. 819, § 1, p. 2827, emphasis added.) Moreover, because the goal of the CLRA is to *protect* consumers, it specifically authorizes injunctive relief in addition to actual and punitive damages and restitution. It is clear from the language of the *entire* statute that the Legislature did not require consumers to wait until *after* they suffer some quantifiable loss to bring an action for injunctive and declaratory relief. Instead, the CLRA specifically authorizes an individual to file suit preemptively. If that were not the case, the Legislature would not have included language to prohibit the "*insertion* of an unconscionable term" in a contract.

Second, the statute authorizes an award of minimum statutory damages in a class action, regardless of a showing of "actual damages." (Civ. Code, § 1780(a)(1).) Why would the Legislature authorize a threshold amount for damages if consumers must show "actual damages" in order to bring suit? Thus, "any damage" is necessarily broader than "actual damages."

Third, defendant's complaint – and this Court's apparent concern –

that such a reading of the statute would allow anyone in the general public to bring a claim is without merit. The CLRA carefully circumscribes who may state a claim and for what relief. It defines "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." (Civ. Code, § 1761(d).) It defines "transaction" as an "agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes *the making of*, and the performance pursuant to, that agreement." (Civ. Code, § 1761(e).) Thus, the statutory definition of transaction applies to the *creation* of the agreement, independent of any performance. Further, section 1770 defines as unlawful, acts "undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . . ." (Civ. Code, § 1770(a).) Section 1780 then allows any consumer who suffers any damage as a result of any unlawful act proscribed in section 1770 to bring a claim for relief. (Civ. Code, § 1780(a).)

Thus, to state a claim for relief a plaintiff must be a *consumer* who was engaged in a *transaction* that involved a *specific unlawful act* identified in section 1770. The general public does not, therefore, have standing to assert a CLRA claim. Instead, the CLRA creates rights for consumers engaged in commercial transactions with businesses who violate the CLRA's specific prohibitions. As this Court concluded in *Kagan*, a consumer has standing to sue for injunctive relief when she experiences "the infringement of any legal right as defined by section 1770." (*Kagan*, 35 Cal.3d at 593.) It is not possible under this reading of the statute that *any* individual can bring a claim; claims can only be brought by consumers whose rights are implicated by defendant's conduct; that is, a nexus must

exist between the plaintiff and the defendant. As the Court stated in *Kagan*, at 592-93, "[c]onsumers have a . . . legal right not to be subjected [to any of the deceptive practices enumerated in section 1770]."

This conclusion is strengthened, if not dictated by, this Court's very recent construction of the CLRA in *Vasquez v. State of California* (2008) 45 Cal.4th 243. In that case, the Court expressly noted that "[a] plaintiff under the [CLRA] must notify the defendant of the particular violations alleged and demand correction, repair, replacement, or other remedy at least 30 days before commencing an action for damages," citing Civil Code section 1782(a)(1)-(2). (45 Cal.4th at 252.) The opinion was modified to eliminate the original reference in the opinion to the CLRA which did not distinguish between actions for damages and actions for injunctive relief which require no pre-litigation demand for correction according to the language of the statute. Section 1782(d) provides that "an action for injunctive relief brought under the specific provisions of section 1770 may be commenced without compliance with subdivision (a)."[1] This distinction in language to differentiate cases filed for injunctive relief, as opposed to actions for damages under the CLRA, underscores the inescapable conclusion that the Legislature intended to protect individual consumers from the "infringement of their legal rights" as this Court concluded in *Kagan*. Rehearing should be granted and the Opinion should be modified for this additional reason.

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[1] The language of the CLRA is exceptionally comprehensive. Section 1782(d) goes on to provide that an action commenced solely for injunctive relief, may be amended "without leave of court to include a request for damages" if within 30 days after the commencement of an action for injunctive relief the plaintiff satisfies the prerequisites of subsection (a) by notifying the defendant and demanding correction.

This Court has repeatedly and very recently emphasized the proper interpretive guidelines that apply when construing statutory language.

> In construing . . . any statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. We may not rewrite the statute to conform to an assumed intention that does not appear in its language. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545)

(*Vasquez*, 45 Cal.4th at 253 (construing the language of Code of Civil Procedure § 1021.5 with respect to whether a pre-litigation demand was required to recover attorneys' fees after the settlement of an action).) Yet, in concluding that preemptive suits are not allowed under the CLRA to contest the insertion of unconscionable provisions in a "transaction" which infringes well-established legal rights, this Court's Opinion in the instant case undermines the very principle it restated only two months ago in *Vasquez*. (See also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103. It is the statutory language alone that controls, and must control, to determine and effectuate the intent of the Legislature to provide the broadest protection possible under the CLRA.[2]

Fourth, in addition to these specific terms and their application here, the general structure of the CLRA supports the conclusion that plaintiffs have standing to assert a claim. Requiring a concrete showing of harm would deprive consumers of standing under many provisions of section

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[2] Reading the CLRA as a whole, a claim for relief is thus carefully cabined by all of its provisions. (See *People v. Pieters* (1991) 52 Cal.3d 894, 899 ["we do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness"], internal quotation marks, citation omitted.)

1770 – for example, the prohibitions on misrepresenting the reasons for price decreases; misrepresenting the geographic origin of goods; misrepresenting the authority of a salesperson or agent to negotiate the final terms of a transaction with a consumer; and the prohibition on the dissemination of an unsolicited prerecorded message by telephone without first obtaining consent from the consumer. (Civ. Code, § 1770(a)(13), (18), (21), (22).) If consumers were required to show actual damage under these provisions in order to enforce their rights under them, they would very likely be unable to avail themselves of the CLRA's protections. This would violate the basic rule of statutory construction that the different sections of a statute must be read together and be harmonized to retain effectiveness. (*Pieters*, 52 Cal.3d at 898-99; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159 [the court must also consider "the object to be achieved and the evil to be prevented by the legislation"] internal quotation marks, citations omitted.)

This Court should thus grant rehearing to address these issues and modify its Opinion accordingly.[3]

B. That the CLRA Does Not Require Actual Damage or Pecuniary Loss Is Supported by the Breadth of the Statute's Language and the Totality of Its Provisions.

1. This Court Should Rehear This Case Because the CLRA Is Clear on Its Face.

To the extent that there is any ambiguity in the text of the CLRA, the Legislature has explicitly mandated that the Act is to be construed broadly,

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[3] Rehearing and modification of the Opinion with respect to the proper construction of the CLRA's standing provisions makes it unnecessary to address separately the portion of the Opinion concerning declaratory relief.

as this Court recognized. (Slip Op. at 12.)

If an interpreting court should find ambiguity in the plain language of the statute, "[w]ell-established rules of statutory construction require [it] to ascertain the intent of the enacting legislative body so that [it] may adopt the construction that best effectuates the purpose of the law." (*Hassan,* 31 Cal.4th at 715.) Where more than one interpretation of a statute is possible, "the applicable role of statutory construction is that the purpose sought to be achieved and the evils sought to be eliminated have an important place in ascertaining the legislative intent." (*Freedland v. Greco* (1955) 45 Cal.2d 462, 467.) The context of the overall statutory scheme and the Legislature's purpose in enacting the law are the primary factors that provide guidance to the Legislature's intent. (*Id.*; see also *Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 608.) By interpreting the CLRA narrowly rather than liberally, and by precluding any right to injunctive relief for the "insertion" of unconscionable terms in contracts, that directive was violated in this Court's *Meyer* Opinion.

The clear intent of the Legislature in enacting the CLRA lives within the express terms of the statute, which provide that the CLRA "*shall be liberally construed* and applied to promote its underlying purposes, which are *to protect consumers against unfair and deceptive business practices* and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760, emphasis added; see *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077 ["[t]he CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices"].)

In addition to its stated purpose and breadth, the CLRA contains expansive liability provisions which are designed to provide comprehensive

legal and equitable remedies for scores of separate types of unfair and unlawful business practices, relaxed class certification provisions, a special venue provision allowing venue wherever a defendant does business, and a prohibition against summary judgment motions. (See Civ. Code, §§ 1780(c), 1781(b).) Moreover, section 1751 provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." (Civ. Code, § 1751.) The breadth of protection of the CLRA is a large part of the reason courts have recognized that California consumer laws "are among the strongest in the country." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242.)

The purpose of the CLRA is thus to *protect* consumers from enumerated unfair and deceptive practices, not simply to provide monetary compensation to those who have suffered financial loss as a result of such practices. This Court's Opinion precluding a preemptive lawsuit to strike unconscionable terms cannot be squared with the plain language of the statute or the legislative intent in enacting it.

Moreover, since the passage of the CLRA, each time the Legislature has amended its provisions, it has consistently done so to strengthen its protections, rather than to contract its scope. In 1975, the Legislature amended Civil Code section 1770 to add restrictions on the misrepresentations of the nature and price of unassembled furniture to the enumerated list of unlawful business practices. (Stats. 1975, ch. 379, § 1, p. 853.) In 1979, the Legislature extended the CLRA's protections to prohibit the insertion of an unconscionable provision into a contract. (Stats. 1979, ch. 819, § 4, p. 2827.) In 1984, the Legislature added limitations on the method and labeling of advertising price discounts. (Stats. 1984., ch. 1171, § 1.) In 1986, it added limitations on the sale or lease of goods labeled

"Made in the United States." (Stats. 1986, ch. 1497, § 1.) In 1990, it added restrictions on the dissemination of unsolicited phone recording. (Stats. 1990, ch. 1641, § 1.)

In 1988, the Legislature amended Civil Code section 1780 to increase the minimum statutory award for a class action from $300 to $1,000. (Stats. 1988, ch. 1343, § 2.) It also specifically provided for restitution for property within the CLRA's express remedies. (*Id.)* It further added a provision granting statutory damages (up to $5,000) to senior citizens and disabled persons who are harmed by any of the enumerated unlawful practices. (*Id.*) The Legislature also enhanced the protections of the CLRA by adding a provision awarding attorneys' fees to the prevailing party in an action. (*Id.*)

This Court relied on a similar legislative chronology to uphold the broad standing provisions of California's Unfair Competition Law, Business & Professions Code section 17204. (*Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570 ["[W]henever the Legislature has acted to amend the UCL, it has done so only to *expand* it scope, never to narrow it." (Emphasis in original)].) The breadth of the CLRA's express terms coupled with the legislative purpose and the Legislature's continued strengthening of the CLRA's protections demonstrate this Court's error in finding that plaintiffs lacked standing.

Similarly, in its Opinion the Court addressed an issue better left to the Legislature. The Court expressed a concern about the costs associated with litigation. (Slip Op. at 11-12.) There are costs associated with any lawsuit but those are decisions addressed to the Legislature, not the Judiciary, where the language of the statute is clear on its face. Similarly, the invocation of language from the ballot arguments in support of

Proposition 64, which did not affect and has no bearing on the CLRA, is irrelevant to any proper and principled interpretation of the plain language giving rise to standing to invoke its protections. As this Court stated in *Stop Youth Addiction v. Lucky Stores, supra*, 17 Cal.4th at 578, if the Legislature disagrees with this Court's interpretation of the CLRA that standing is authorized to an individual seeking injunctive and declaratory relief to protect her legal rights, "it remains free to provide otherwise." The fact that it has never done so before or after this Court's decision 25 years ago in *Kagan* is significant evidence that it agreed with the construction of the statute in that case.

2. As This Court's Opinion Contradicts Other Case Law, It Should Grant Rehearing of This Matter.

The holding of the Opinion that preemptive challenge under the CLRA are prohibited would vitiate the holdings in two principal cases in which the plaintiffs sought declaratory and injunctive relief under the provisions of both the CLRA and the UCL for attempts by corporate entities to eliminate the public civil justice system and replace it with arbitration. In *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, plaintiffs challenged the bank's attempt to substitute the fundamental and constitutionally-based right to a jury trial under the California Constitution with contractual arbitration through the guise of a bill stuffer included with the monthly deposit account or checking account statement. The Court of Appeal concluded that a contractual modification "that would amount to a waiver of [the] constitutionally based right to a jury trial (Cal. Const., art. I, § 16) would require '[a] waiver in some form that is clear and unmistakable, . . .'" (67 Cal.App.4th at 804, 805.) The Court of Appeal noted that "[a]s even the trial court concluded, the notice contained in the bill stuffer was 'not

designed to achieve "knowing consent"' to the ADR provision. The trial court stated that it could not conclude from the evidence presented at trial that customers had in fact read and understood the ADR clause, ..." (*Id.* at 805, footnote omitted.) The Court of Appeal concluded that the bank's attempts to change material terms of the agreement required proof of notice and consent.

Similarly, in *Ting v. AT&T*, plaintiff challenged AT&T's attempt to prohibit the public civil justice system and to impose mandatory pre-dispute arbitration together with several independent unconscionable provisions. The claims were rooted in the standing provisions of both the CLRA and the UCL. None of the terms of AT&T's customer service agreement had been enforced against the plaintiff but the trial and appellate court held that the plaintiff had standing to challenge the arbitration clause and to seek both declaratory and injunctive relief. (*Ting v. AT&T* 182 F.Supp.2d 902, 922, *aff'd in relevant part*, 319 F.3d 1126 (9th Cir.), cert. den. 540 U.S. 811 (2003).[4]

These two cases hold that consumers whose legal rights are infringed may invoke provisions of the CLRA and the UCL to seek injunctive and declaratory relief to protect themselves and their rights. Similarly, this Court upon rehearing should hold that the "insertion" of an unconscionable provision in a contract constitutes damage sufficient to confer standing under the CLRA.

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[4] Although the Court of Appeals held that the individual plaintiff had standing to seek such relief because of the infringement of the legal right under the CLRA, it held that the CLRA was a statute which applied only to certain contracts involving non-commercial contracts and consumer contracts and its explicit prohibitions were preempted. (319 F.3d at 1147-48.)

II. THIS COURT'S OPINION ERRONEOUSLY HOLDS THAT THE INFRINGEMENT OF A LEGAL RIGHT CONSTITUTES DAMAGE IN *KAGAN v. GIBRALTAR SAVINGS & LOAN ASSOCIATION* IS DICTUM

This Court in *Kagan* interpreted the meaning of the term "suffers any damage" in section 1780 consistent with the text, structure, and purpose of the CLRA. The Court of Appeal below acknowledged the holding of *Kagan* but then chose not to follow it, despite its obvious application to this case.

In *Kagan*, this Court addressed whether a plaintiff could proceed with her CLRA claim on behalf of a proposed class. (*Kagan*, 35 Cal.3d at 589.) Plaintiff's claim arose out of allegations that defendant savings and loan association misrepresented that customers would not be charged management fees in connection with individual retirement accounts (IRA). (*Id*.) Defendant moved for a determination that the action lacked merit, arguing that the plaintiff did not "suffer any damage" under section 1780 as no fees were ever deducted from her account and that she therefore was not a member of the class she purported to represent. (*Id*.) The trial court agreed, concluding that plaintiff "had not suffered any injury or sustained any damage cognizable under the Consumers Legal Remedies Act." (*Id.*, internal quotation marks omitted.)

This Court reversed. It considered whether the plaintiff, who had not been charged a management fee and therefore did not suffer any monetary loss, but who had sent a demand letter pursuant to the CLRA's notice requirements on behalf of herself and the class and who subsequently filed suit seeking injunctive relief and damages, could pursue the action on behalf of herself and the proposed class. The defendant in *Kagan* presented

the same argument as defendant presents here: that the plaintiff did not "suffer any damage" under section 1780 and thus could not maintain an individual or a class action. The Court noted that a class action could only be maintained by someone who met the requirements of section 1780. The Court found, however, that the action could proceed because plaintiff had been damaged as that term was meant in section 1780 even though she did not suffer any monetary loss. Specifically, the Court explained:

> We thus reject Gibraltar's effort to equate pecuniary loss with the standing requirement that a consumer 'suffer[ ] any damage.' As it is unlawful to engage in any of the deceptive business practices enumerated in section 1770, consumers have a corresponding legal right not to be subjected thereto. Accordingly, we interpret broadly the requirement of section 1780 that a consumer 'suffer[ ] any damage' to include the infringement of any legal right as defined by section 1770.

(*Kagan*, 35 Cal.3d at 593.) To reinforce the point that statutory violations do constitute "damage" within the meaning of the CLRA, the Court also noted that "[f]ederal consumer statutes are in accord," citing to provisions of the Truth In Lending Act (TILA) that allow an action to stand on the basis of a violation of a statute, without a showing of actual damage or monetary loss. (*Id.* at 593, fn. 3.)

This Court in *Kagan* ultimately had to address whether the defendant had remedied harm to all class members as required by section 1781(c). This does not alter the fact that the Court *separately* had to decide whether Kagan herself had standing to bring an action, and that this required deciding whether mere violations of section 1770 constitute "damage."

Under section 1781(a), the provision allowing class actions, Kagan was entitled to bring a class action only if she was entitled to bring an

individual action under section 1780, and thus only if she met the "any damage" requirement of section 1780(a). Because this is a standing requirement, it is jurisdictional. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230; *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 438.) The Court was *required* to decide whether *Kagan* satisfied the provision and had standing in her own right; she could not bootstrap other class members' damage onto her claim.[5] Thus when the Court determined *Kagan* did satisfy section 1780, it necessarily concluded that she could do so by alleging a violation of her rights under section 1770, as no other damages were alleged.

The Court in *Kagan* assumed that the plaintiff had not suffered any actual damage. (*Kagan*, 35 Cal.3d at 596 .) Instead, the Court determined that it must interpret section 1780 "broadly" and, accordingly, read the CLRA to provide a "legal right" not to be subjected to the enumerated unlawful practices contained therein. (*Id.* at 593.) The plaintiff in *Kagan* thus had standing not because of any debiting of her account, but because she suffered an infringement of the legal right under the CLRA to be free from misrepresentations in business transactions. (*Id*.) In so concluding, the Court answered the question squarely posed in this case: whether a violation of rights under section 1770 constitutes damage.

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[5] In fact, this Court clearly set out the different questions it faced, determining first that a class action may lie under section 1781(a), then determining that plaintiff had standing to bring the action. (*Kagan*, 35 Cal.3d at 592 ["As Gibraltar did not meet the conditions of section 1782, subdivision (c) in response to notification of its alleged class violations of section 1770, a class action for damages pursuant to section 1781, subdivision (a) may lie. Moreover, as discussed below, plaintiff may properly bring the action on behalf of herself and as a representative of the class."].)

Like the plaintiff in *Kagan*, plaintiffs here have standing because they have alleged that they suffered an infringement of their legal rights under the CLRA. Plaintiffs allege in their complaint that defendant violated the CLRA by "inserting [] unconscionable term[s] in the contract." (Civ. Code, § 1770(a)(19).) *That* is the legal right that has been infringed, and it is for infringement of that legal right that plaintiffs are entitled to recover under the CLRA.

This reasoning has been embraced by other courts applying the CLRA. For example, in *Chamberlan v. Ford Motor Co.* (N.D. Cal.) 369 F.Supp.2d 1138, aff'd. (9th Cir. 2005) 402 F.3d 952, the court addressed whether plaintiffs had standing to sue the defendant for manufacturing and selling automobiles containing a defective engine part (a manifold) even if they had not yet suffered the defect. The court stated:

> The plain language of the CLRA does not require that consumers suffer particular pecuniary losses in order to bring a CLRA claim and recover at least the statutory minimum, nor does Defendant cite any case to the contrary. Plaintiffs can establish some damage by the reasonable inference that the class members' plastic manifolds have suffered more degradation than manifolds made from aluminum or metal composite. This showing is sufficient to meet the requirements for standing under the CLRA.

(369 F.Supp.2d at 1147.)[6]

Moreover, defendant's suggestion that no harm befalls a plaintiff because a defendant can waive an unconscionable provision in a contract at

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[6] See also *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663; *People v. McKale* (1979) 25 Cal.3d 626.

some point in the future has been repeatedly rejected by this Court and others. For example, in *La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 870, 871, 873-74, the plaintiff brought a class action challenging the validity of a "right to accelerate" clause in the defendant's form deeds of trust. The defendant responded that it was waiving all its rights to accelerate as to the two named plaintiffs. The trial court dismissed the case, holding that there was no longer any "justiciable issue" left to decide. This Court reversed, finding that allowing defendants to defeat a class action by remedying the harm by selective non-enforcement would defeat the purposes of the consumer protection statute and the class action device. (*Id.* at 882-84.)

In *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, this Court found an arbitration provision unenforceable despite the defendant's argument that it was waiving some of the provisions:

> Moreover, whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness "can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it."

(*Id.* at 125, quoting *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1535-36, fn. omitted; see also, *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 280 ["MRC's willingness to bear all costs in the arbitration proceeding does not change the fact the arbitration provision is substantively unconscionable"]; *Martinez v. Master Protection Corp*.

(2004) 118 Cal.App.4th 107, 116-17 ["The mere inclusion of the costs provision in the arbitration agreement produces an unacceptable chilling effect, notwithstanding FireMaster's belated willingness to excise that portion of the agreement"].)

Based upon its erroneous interpretation of the plain language of the CLRA, this Court in its Opinion stated that

> We decline to extend *Kagan* to situations in which an allegedly unlawful practice under the CLRA has not resulted in some kind of tangible increased cost or burden to the consumer. [n. 3] We therefore disapprove of *Kagan*'s dictum that 'we interpret broadly the requirement of section 1780 that a consumer suffer [] any damage' to include the infringement of any legal right as defined by section 1770. (*Kagan*, *supra*, 35 Cal.3d at 593.)

(Slip Op. at 9-10 and n. 3.) The statement in *Kagan* concerning "the infringement of any legal right as defined by Section 1770" was not dictum under this Court's established precedents. For example, in *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, this Court identified a statement in an opinion as "dictum" where it "had nothing to do" with the issues before the court. (44 Cal.4th at 561 n. 10.) Clearly, the interpretation of the CLRA as a whole, along with consideration of the language of its discreet provisions, had everything to do with this Court's construction in *Kagan* and its conclusion that the infringement of any legal right as defined by section 1770 confers standing on an individual consumer to seek appropriate injunctive and declaratory relief, even if she has not suffered monetary damages. Disgorgement of that conclusion undermines the very basis of the opinion.

This Court's decision in *Kagan*, and the multitude of other court decisions affirming the harm of the infringement of a legal right that flows

from inclusion of unlawful or unconscionable terms in contracts, demonstrate that plaintiffs here properly alleged an infringement of their legal rights for which they can seek injunctive and declaratory relief under the CLRA. These arguments compel rehearing of this case.

III. THE CLRA'S STATED PURPOSE TO PROTECT CONSUMERS AND THE PLAIN LANGUAGE OF ITS PROVISIONS WILL BE GUTTED IF REHEARING IS NOT GRANTED

This Court in *Kagan* undertook a considered analysis of the text of the CLRA, noting its express purpose to protect consumers and its mandate to construe its terms liberally in favor of that purpose. (*Kagan*, 35 Cal.3d at 592-93.) In granting defendant's demurrer and dismissing plaintiffs' complaint on the basis that plaintiffs did not sufficiently allege that they had suffered actual damage, the Court of Appeal below failed both to apply the express terms of the CLRA and to follow the directive of this Court in *Kagan.* Now, with its Opinion, the holding of this Court stretches beyond even the erroneous conclusion of the Court of Appeal, and incentivize state and federal trial and intermediate appellate courts to ignore the language of the CLRA and this Court's own precedent and embrace a dangerous and unsupportable limitation: that a plaintiff cannot state a claim under the CLRA without demonstrating economic loss.

Such an outcome violates not only the plain language of the CLRA, but the strong public policy that undergirds its enactment and enforcement. The CLRA was designed to protect consumers from twenty-four distinct unlawful business practices. Several of the practices identified and classified as unlawful result in harm that may not be quantifiable as money damages or pecuniary loss. For example, the CLRA prohibits misrepresenting the reasons for price decreases, the geographic origin of

goods, and the authority of a salesperson or agent to negotiate the final terms of a transaction with a consumer. (Civ. Code, § 1770(a)(13), (18), (21).) Any of these acts may not result in a quantifiable loss to a consumer; yet, they are prohibited by the express terms of the CLRA. Likewise, the CLRA's prohibition on the dissemination of an unsolicited prerecorded message by telephone without first talking to the consumer and obtaining consent would have no force and effect whatsoever if a consumer were required to show actual damages in order to enforce it. (Civ. Code, § 1770(a)(22).) If actual damages or pecuniary loss were required in these circumstances, significant harms that the Legislature specifically intended to cure would be left ignored.

Similarly, the Legislature's choice to prohibit a business from "inserting" or simply *attempting to insert* an unconscionable provision in a contract was not accidental. Unenforceable and unlawful provisions in an adhesion contract have a chilling effect on consumers, because many will not be aware that the provisions are unenforceable and hence will be cowed by their impact. Moreover, the added expense and risk of challenging the unlawful provisions will deter many consumers who would otherwise seek to vindicate their rights from doing so.

As in cases such as *Armendariz* and *Martinez*, defendant's maintenance of multiple unconscionable provisions in its consumer contracts – including a class action ban, a waiver of a right to jury trial and a 60-day statute of limitations – imposes an undeniable violation of established California constitutional and statutory rights and remedies. Cell phone customers are overwhelmingly likely to have only small individual claims against defendant, which cannot feasibly be either litigated or arbitrated on an individual basis. A customer faced with the clear statement

in a contractual agreement that no class actions are permitted, for example, must choose whether to undertake the great expense of challenging the provision or to forgo any attempted vindication of rights at all, due to the high cost of individual prosecution in contrast to the amount likely to be at stake. Although this Court has held that such a provision is unconscionable under California law, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, the simple inclusion of this provision thus has a profound chilling effect on the consumer.

Under this Court's Opinion construing the CLRA, businesses would be free to insert unlawful and unconscionable terms in their consumer contracts with impunity, knowing that the consumer would have to await an attempted enforcement of those terms and a specific loss caused by that practice before acquiring standing to sue. This is particularly disturbing where, as here, plaintiffs' allegations of unconscionable and illegal provisions in the agreement are well-established. Such a result is antithetical to the language and purposes of the CLRA.

CONCLUSION

In opinions which provide guidance to lower courts to correctly apply standing requirements, the explicit language, coupled with the protective and deterrent principles underlying the CLRA, must control. The "insertion" of multiple unconscionable provisions in a consumer contract triggers standing to file a lawsuit for both injunctive and declaratory relief.

This Court's contrary conclusion in the Opinion is fundamentally at odds with the plain language of the statute, with its legislative purpose and history, and with *Kagan*. The reasoning and conclusion of that case are directly on point here, remain good law and should be reaffirmed. The

Opinion of this Court to improperly limit the express terms of the CLRA and to ignore its principled conclusion in *Kagan* threatens to thwart the strong public policy codified by this State in the CLRA.

For all of the foregoing reasons, the petition for rehearing should be granted and the Opinion should be modified accordingly.

DATED: February 13, 2008

Respectfully submitted,

FRANKLIN & FRANKLIN

By: _____//s//_____
J. David Franklin
Attorneys for *Plaintiffs and Appellants*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, Amicus Curiae Consumer Attorneys of California hereby certifies that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.520(c)(3) is 7,650.

DATED: February 13, 2008 FRANKLIN & FRANKLIN

By: _____//s//_____
J. David Franklin
Attorneys for *Plaintiffs and Appellant*

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 354 Pine Street, Fourth Floor, San Francisco, California 94104.

On February 13, 2008, I caused the document entitled below to be served on the parties in this action listed below by placing true and correct copies thereof in sealed envelopes and causing them to be served, as stated:

PETITION FOR REHEARING

By U.S. Mail:

I am readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for ***mailing*** with the ***United States Postal Service***, being that the documents are deposited with the United States Postal Service with postage thereon fully prepaid the same day as the day of collection in the ordinary course of business. The parties listed below are being served today by U.S. Mail.

Anthony A. Ferrigno
Attorney at Law
501 North El Camino Real
San Clemente, CA 92674

Counsel for Plaintiffs and Appellants Pamela Meyer and Timothy Phillips

Michele Floyd
Raymond Cardozo
Dennis Peter Maio
Reed Smith LLP
Two Embarcadero Center, Ste. 2000
San Francisco, CA 94111

Attorneys for Defendant and Respondent Sprint Spectrum LP

Donald M. Falk
Mayer Brown LLP
2 Palo Alto Sqaure, Suite 300
3000 El Camino Real
Palo Alto, CA 94306

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington D.C. 20062

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

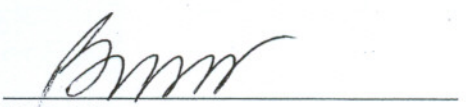
Clerk of the Court of Appeal
Fourth Appellate Dist., Div. 3
925 N. Spurgeon Street
Santa Ana, CA 92701

Attorney General of the State of California
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102

Orange County Superior Court
Central Justice Center
(Attn: Hon. Sheila Fell, Dept. C34)
700 Civic Center Drive West
Santa Ana, CA 92701

Orange County District Attorney's Office
Attn: Consumer Protection
400 Civil Center Drive West
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed on February 13, 2008, at San Francisco, California.



Béla Nuss