No. S287893

IN THE
SUPREME COURT OF CALIFORNIA

KENNETH W. LATHROP et al.
Petitioners, v.

THOR MOTOR COACH, INC.,
et al.,
Respondents,

Court of Appeal, Second Appellate District,
Division 7 Case No. B331970

Los Angeles County Superior Court
Case No. 22NWCV01494, Hon. John A. Torribio

APPLICATION TO FILE BRIEF OF AMICI CURIAE ALEXANDER COMMUNITY LAW CENTER, CALIFORNIA ASSOCIATION FOR MICROENTERPRISE OPPORTUNITY, CONSUMER WATCHDOG, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, CONSUMER FEDERATION OF CALIFORNIA, HOUSING AND ECONOMIC RIGHTS ADVOCATES, PUBLIC COUNSEL, AND PUBLIC LAW CENTER IN SUPPORT OF PLAINTIFF/REAL PARTY IN INTEREST AND AFFIRMANCE

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as amici curiae in support of Plaintiff/Real Party in Interest Kenneth W. Lathrop and Affirmance.

This application is timely made within 30 days of the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the amici curiae, their members, or their counsel in the pending appeal.

I. INTEREST OF AMICI CURIAE

Amici curiae are nonprofit organizations that represent and advocate for economic justice on behalf of consumers, workers, and vulnerable communities, and small businesses in California and nationwide. The people that amici represent regularly seek to enforce rights provided under California's consumer protection, employment, and warranty laws, some of which expressly prohibit waiver by contract. These individuals and entities risk losing their ability to exercise key legislatively guaranteed rights if courts in California routinely enforce forum selection and choice of law clauses that effectively operate to waive those rights. Unless a contract contains a provision that on its face guarantees the application of unwaivable rights, Californians who read their contracts will not know to assert those rights and Californians who initially sue in their home state will not be sure that those rights will be recognized—even if the defendant business "stipulates" to apply California law as to those provisions. Amici curiae have a significant interest in ensuring that expressions of deeply held California public policy enacted by the Legislature remain available to the people they are designed to protect.

The **Katharine & George Alexander Community Law Center**, supported by the Santa Clara University School of Law, educates law students in accordance with the highest professional and ethical standards by serving individuals and communities in need. The Alexander Community Law Center provides pro bono legal representation to low-income individuals in consumer law cases, and works to increase community awareness about consumer law. It has a strong interest in ensuring that individuals without bargaining power are not trapped in contracts which force them to waive their fundamental California rights.

California Association for Microenterprise Opportunity (CAMEO) California Association for Microenterprise Opportunity) is a California- headquartered network of more than 400 business service providers which include organizations, agencies, and individuals dedicated to furthering micro-business development with small and micro-business financing such as loans and credit, technical assistance, and business management training. Annually, CAMEO Network members serve about 200,000 very small businesses with training, business and credit assistance and loans. These firms – largely start-ups with less than six employees – support or create 300,000 new jobs and generate a total of $15 billion in economic activity. CAMEO has a strong interest in ensuring that forum selection and choice of law clauses do not deprive California's small businesses of important protections available under California law.

Community Legal Services in East Palo Alto (CLSEPA) is a nonprofit organization that offers legal services that improve the lives of low-income families throughout the Bay Area region. CLSEPA is committed to pursuing multiple, innovative strategies, including community education, individual legal advice and representation, legal assistance to community groups, policy advocacy, and impact litigation.

Consumer Watchdog is a nonpartisan, nonprofit public-interest organization that has advocated for California consumers for four decades through litigation, legislative and administrative advocacy, and public education. It has a strong interest in ensuring that businesses cannot use nonnegotiable forum-selection or choice-of-law provisions to impair rights and remedies that California law expressly makes nonwaivable. Consumer Watchdog therefore urges courts to consider the practical effect of such provisions on consumers' ability to enforce California law, particularly where consumers lack meaningful bargaining power or the resources to litigate in a distant forum.

Consumer Federation of California (CFC) is a nonprofit consumer advocacy organization based in California. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit and ensure strong consumer regulations. Each year, CFC testifies before the California legislature on dozens of bills that affect millions of the state's consumers to combat predatory lending, expand health care safety net programs, strengthen food and drug safety, eliminate fraudulent sale practices, and many more. For decades, CFC has worked to defend consumers' access to justice in open, public courts of law, including supporting passage of legislation enacted in California to allow wronged consumers to afford to hold businesses accountable. For these reasons, CFC joins the amicus brief to ensure that consumers are not bound by unjust contracts that seek to deny them access to the consumer protections guaranteed under California law.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization dedicated to helping Californians — particularly those most vulnerable — build a safe, sound financial future, free of discrimination and economic abuses, in all aspects of household financial concerns.

HERA provides free legal services, consumer workshops, training for professionals and community organizing support, create innovative solutions and engage in policy work locally, statewide and nationally. HERA serves vulnerable residents California statewide who are of modest means and do not have the capacity to nor should they be forced to attempt to enforce their consumer legal rights in a location, possibly out of state simply because of abusive language that residents are unaware of that has been included in a sales contract or warranty that they be impacted by. This is a concern impacting the residents HERA serves every day.

Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice through comprehensive legal advocacy. Through its Consumer Rights & Economic Justice team, Public Counsel represents low-income consumers in litigation involving predatory lending, debt collection, unfair business practices, and other forms of economic exploitation, while also pursuing impact litigation and policy reforms to strengthen consumer protections. Public Counsel has a strong interest in ensuring that California's low-income consumers are protected from predatory contracts that waive California's superior consumer protection laws.

Public Law Center empowers low-income and vulnerable communities in Orange County, CA, through our free legal services, including representation, strategic litigation, and advocacy, to challenge injustices impacting these communities. Since 1981, PLC's staff have worked with thousands of volunteers annually to provide free civil legal services in the areas of highest need, including consumer law, family law, health, housing, immigration, veterans' benefits, federal tax disputes, and assistance for emerging small businesses and nonprofits. PLC's range of services includes counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. PLC is active in legislative advocacy and work diligently to prevent erosion of laws meant to protect California's consumers. For these reasons, PLC enthusiastically joins the amicus brief which seeks to protect California's commitment to consumer protection.

II. NEED FOR FURTHER BRIEFING

The proposed amici curiae believe that further briefing will assist the Court by situating this case—premised on provisions in a unilaterally drafted contract and a unilateral proposed stipulation—within the broader panoply of private contracts that contain forum selection and choice of law clauses that, if enforced, would implicate public rights. The brief will also benefit the Court by detailing the many statutory protections that the Legislature has enacted to benefit Californians and made unwaivable in order that they not be stripped away by clauses in private contracts. The brief offers an overview of empirical research on consumer responses to unlawful contract provisions, as well as a summary of choice of law provisions in other parts of the nation.

Finally, the brief explains and recommends a useful framework, adopted by courts of appeal including the court below, to assess whether enforcement of a unilateral stipulation and transfer to a contractually designated forum would in fact violate the state's public policy and deny Californians their legislatively granted rights.

III. CONCLUSION

For the foregoing reasons, the proposed amici curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: July 27, 2026 Respectfully submitted,

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IN SUPPORT OF PLAINTIFFS-APPELLANTS
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After a Published Decision by the Court of Appeal, Second Appellate District, Division Seven, Case No. B331970

Appeal from Los Angeles County Superior Court, Case No. 22NWCV01494
Honorable John A. Torribio, Presiding

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INTEREST OF AMICI CURIAE

Amici curiae are nonprofit organizations that represent and advocate for economic justice on behalf of consumers, workers, vulnerable communities, and small businesses in California and nationwide. Many of the individuals amici represent are subject to forum selection and choice-of-law clauses in contracts with merchants and employers that ostensibly require them to litigate disputes in states whose laws do not provide the same protections as California law. Enforcement of these clauses, especially those that were not freely or voluntarily negotiated, could strip individuals of critical protections enacted and guaranteed by the California legislature. Many of these rights are established in important consumer protection, employment, and public interest statutes that expressly may not be waived, including by private contract. Amici curiae—which regularly invoke these laws in their advocacy before this Court and other California courts—have an interest in ensuring that these expressions of deeply held California public policy remain available to the people they are intended to protect.

Statements of interest of individual amici curiae are available in the accompanying application. (Cal. Rules of Court, rule 8.520(f).)

INTRODUCTION AND SUMMARY OF ARGUMENT

California's consumers and workers live under the aegis of some of the most protective laws in the nation. They have chosen (and pay extra for) cleaner air (13 Cal. Code. Reg. § 2262 [specially formulated gasoline]), more humanely produced agricultural products (Proposition 12 (2018); Health & Safety Code §§ 25990-25993 [conditions for laying hens and breeding pigs], and safer cosmetics (Health & Safety Code § 108981 [ban on certain chemicals]).

In addition—and central to this case—the products that Californians purchase carry an implied warranty that overrides any less generous terms in the sales contract and provides for a right of return if repair attempts fail (Song-Beverly Consumer Warranty Act, Civ. Code §§ 1790-1795.8). Consumers in California are also protected by a robust law that prohibits specific business practices and provides for attorneys' fees, damages, and injunctive relief. (Consumer Legal Remedies Act, Civ. Code §§ 1750-1784.) Both laws are to be liberally construed in favor of consumers. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801 ["the Song-Beverly Act is a remedial measure intended for protection of consumers and should be given a construction consistent with that purpose"]; Civ. Code § 1760 ["This title shall be liberally construed and applied to promote its underlying purposes"].)

Finally, and crucially, both of these laws are so important that the California legislature has explicitly provided that the rights and remedies they confer may not be waived by contract – any attempt to do so is "contrary to public policy and shall be unenforceable and void." (Civ. Code §1790.1[1]; §1751.)

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[1] The Song-Beverly Act provides only for narrow exceptions "expressly provided in this chapter" (Civ. Code § 1790.1) – none of which is relevant to this case. Unlike in *EpicentRx, Inc. v.*

That is the backdrop against which the present case must be decided. The California legislature has spoken unequivocally. To give effect to its mandate, consumers must be provided the protections of these laws notwithstanding any purported waiver—direct or indirect—in the sales contracts they sign.

The clarity of the legislature's mandate provides answers to the three questions on which this Court ordered briefing. In order to give effect to that mandate, the rights that the legislature has created and deemed unwaivable must be just that—*unwaivable*, in practice as well as principle.

In answer to the Court's first question: Where a party alleges that enforcement of a forum selection clause would result in a waiver of the party's unwaivable statutory rights, the burden rests on the party seeking transfer to another jurisdiction to establish that a Californian's legislatively bestowed rights will not be waived, in principle or in effect, by reason of the transfer. At a bare minimum, the party seeking transfer must establish that the consumer's unwaivable statutory rights will be given effect in the transferee court. That party must be able to show not just that the transferee court will acknowledge those rights but that it will actually give them effect, as would a court in California. If the party seeking transfer cannot make this showing, then the case should not be transferred.

Superior Court (2025) 18 Cal.5th 58, the rights guaranteed by Song-Beverly are not procedural rights which do not travel to other fora, but substantive rights which, by statute, cannot be waived.

In answer to the Court's second question: Unilateral "stipulations" like the one Thor offers here should be treated with skepticism and cannot automatically "rebut" a concern that Californians' unwaivable rights may be diminished in the next court. Such post-litigation, voluntary stratagems can as easily be withdrawn as offered. Private ordering of public rights is disfavored. (See Civ. Code § 3513 ["Any one may waive the advantage of a law intended solely for their benefit. But a law established for a public reason cannot be contravened by a private agreement."]; see also *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 961 [applying § 3513]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100 [applying § 3513].) There is no obligation on Thor or any other defendant to provide such a stipulation, nor on any court to enforce it. Notably, only those consumers who file their case in California are likely to receive the offer. What happens to those scrupulous consumers who read their warranty and see the designation of Indiana as forum—and so file initially there? Or the consumers who are deterred from pursuing their claims at all because of an out-of-state forum selection clause (even though no *court* would enforce that clause as drafted)? Under a voluntary, stipulation-based regime they will not receive the benefit of Song-Beverly or the CLRA. Their unwaivable rights will, in effect, be waived.

In answer to the Court's third question: If a choice-of-law clause was unenforceable when drafted, the Court should not sever that clause in order to remediate an otherwise unenforceable forum selection clause. Allowing manufacturers to sever an unenforceable choice-of-law clause would promote a pernicious regime: manufacturers include unlawful provisions knowing they will only infrequently be challenged, then in the rare instance where a consumer *does* bring such a challenge, fall back on severance to save the rest of the provision. To permit such a practice incentivizes artful contract drafting aimed at evading the legislature's intent that certain statutory rights be unwaivable.

Each of these answers follows from a basic principle: When the legislature has determined that a right is unwaivable, courts cannot give effect to a transfer that would essentially waive the right. Where there is a question, the default must be that the case remains in California.

This principle applies even when an agreement—a contract, a waiver, a stipulation—has been reached by an arms-length negotiation between sophisticated parties. (See *EpicentRx, Inc. v. Superior Court* (2025). 18 Cal.5th 58, 67 [discussing "arms-length commercial transactions between sophisticated parties" and noting that right to a jury trial is procedural and waivable]. In such cases, this Court has reiterated that courts should refuse to enforce a forum selection clause "if its enforcement would be contrary to a strong or fundamental public policy of this state." (*Id.* at p. 74.) Even the Court's generally favorable treatment of forum selection clauses has a public policy exception: "California courts have held that 'a forum selection clause will not be enforced if to do so would bring about a result contrary to the public policy of this state.'" (*Ibid.*, citing *Intershop Comm's. AG v. Superior Court* (2002) 104 Cal.App.4th 191, 200; cf. *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466.)

It is especially critical that courts look carefully at the laws and practices of the transferee forum when one party to the "agreement" had no choice in the matter. When a consumer would be compelled, as a condition of purchase, into waiving rights that the California legislature has deemed unwaivable, courts have a particular duty to scrutinize what will happen to those rights when the less sophisticated party tries to exercise them in the transferee court.

And that is why the outcome of this case is so significant. This is not a rule that will only set the forum for one plaintiff who purchased a motor home. It will set the standard for cases affecting many other laws, many other products, and the ability of tens of millions of Californians to count dearly-won rights secured by their legislature as something other than illusory.

ARGUMENT

I. When A Party Seeks To Enforce A Forum Selection Clause Which May Result In Waiver Of Rights That The Legislature Has Deemed Unwaivable, It Must Establish That Those Rights Will Be Given Effect In The Transferee Court.

The California legislature included express anti-waiver provisions when it enacted the Song-Beverly Act and the CLRA. (See Civ. Code, §§ 1790.1, 1751.) These provisions were not included as window dressing—any purported waiver is deemed "unenforceable and void." (*Ibid.*) The legislature clearly meant that these rights were not to be altered by contract. And certainly it would not countenance a scheme under which a company deploys a choice-of-law and forum selection clause that effectively deprive Californians of unwaivable rights—and only jettisons the choice-of-law clause when forced to do so by being sued in California.

A. The Song-Beverly Act prioritizes effective and convenient repair and remedies, which cannot readily be provided in a distant forum.

"[T]he Legislature enacted the Song-Beverly Act . . . [i]n order to provide greater protections and remedies for consumers." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1303.) The act is "strongly pro-consumer" and memorializes the common law protections of the implied warranty of merchantability while setting additional requirements on the express promises that manufacturers voluntarily make to consumers. (*Id.* at p. 1303-04.)

At the time Song-Beverly was enacted, the bill's sponsor emphasized that manufacturers "have the option of either providing an express warranty or not[.]" (*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1330–1331 [collecting citations], as modified on denial of reh'g [May 20, 2014].) If the manufacturer affirmatively decides to issue an express warranty, then Song-Beverly imposes additional safeguards for consumers with respect to the terms and conditions that the manufacturer may impose. (*Ibid.*) So if a manufacturer seeks "the advertising benefits of warranties[,]" it must take the bitter with the sweet and pay "the costs of promised repairs" instead of pushing them off on the Californians who buy its products. (*Niedermeier v. FCA US LLC* (2024) 15 Cal.5th 792, 814 [citing Stats. 1970, ch. 1333, § 1, p. 2478 et seq.].)

From the outset, Song-Beverly has focused on making repairs or replacements of nonconforming goods practicable for Californians *where they live*. The plain text of the statute requires every manufacturer selling consumer goods in California to maintain "*in this state* sufficient service and repair facilities reasonably close to all areas where its goods are sold*."* (Civ. Code, § 1793.2(a)(1)(A) [emphasis added].) If purchasers cannot reasonably deliver the nonconforming item for repair, the legislature placed the burden on the manufacturer to either pick up the item or arrange for its transport—including covering that expense. (*Id.*, § 1793.2(c).) By including such requirements, "it is clear the legislature did not intend to permit escape routes by which manufacturers or dealers could avoid their duties to consumers." (See Ralph J. Swanson, Comment, *Toward an End to Consumer Frustration—Making the Song–Beverly Consumer Warranty Act Work* (1974) 14 Santa Clara L.Rev. 575, 603-04.) Specifically, the bill evolved to address consumer frustration with "products that do not work and warranties that promise much but deliver little." (*Id.* at p. 603.)

B. The broad applicability of Song-Beverly and the CLRA militate for a decision that takes into account small-dollar purchases and the realities of attempting to litigate in a different state.

Although the case now before the Court involves an expensive motor home, the statute applies broadly to "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes." (Civ. Code § 1791(a).) Accordingly, the rule the Court issues will apply to *all* consumer goods, be they rice cookers, microwaves, motorized wheelchairs, vacuum cleaners, alarm clocks, or mobile phones. The CLRA applies to an even greater range of goods and services. (See Civ. Code, § 1770(a) [applying to "unfair methods of competition and unfair or deceptive acts or practices listed in this subdivision undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer"].) In other words, this Court's ruling could impact an enormously broad range of goods used by the full spectrum of California residents.

As this Court recognized just last year, the existence of an "arms-length commercial transaction[] between sophisticated parties" (*EpicentRx, supra,* 18 Cal.5th at p. 67) has been and remains central to the Court's endorsement of forum selection clauses. (See *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-96 [upholding forum selection clause between "parties who have negotiated at arm's length"]; *Nedlloyd Lines*, *supra*, 3 Cal.4th at pp. 464-65 [evaluating "arm's length" forum selection clauses].)

But Song-Beverly plaintiffs are generally not sophisticated parties, and they certainly have not negotiated at arm's length with the manufacturers. Legislators at the time of Song-Beverly's passage recognized the "superior bargaining power of manufacturers and sellers of consumer goods" over consumers. (See *Toward an End to Consumer Frustration*, *supra*, 14 Santa Clara L.Rev. at p. 577.) That is why they made the rights unwaivable.

Even assuming that consumers are actually considering the implications of their contracts' choice of law and forum, they cannot meaningfully negotiate those terms. Consumers today are almost always—perhaps even universally—subject to terms drafted by the manufacturer of the good they are purchasing. They have no say in selecting or bargaining for the forum or the law selected in mass-produced warranties. They were not advised by counsel at the formation of the agreement about which law would be most advantageous to their interests. There is no negotiation at all, much less one—the foundation of this Court's decision in *EpicentRx*— "entered into freely and voluntarily by parties who have negotiated at arm's length." (*EpicentRx, supra*, 18 Cal.5th at p. 75.)

C. If a defendant cannot establish that the plaintiffs' unwaivable California statutory rights will be given effect in the transferee court, the court may not transfer the case.

Thor claims that doing what the law requires—establishing that Californians' unwaivable rights would be given effect in another forum—is an "impossible burden." (Reply Brief at p. 17.) If so, the answer should then be simple: a court should refuse to enforce the forum selection clause.

That is how California courts have responded when it is not possible to ensure substantive rights in another forum. (See, e.g., *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12-18 [refusing to give effect to contractual choice-of-law and forum selection clauses when doing so would effectively strip plaintiffs of unwaivable rights under the CLRA].) If there is no threat to the effective exercise of Californians' substantive unwaivable rights, then the case may be transferred. But a court may not enforce a choice-of-law and forum selection scheme, like the one at issue here, that runs directly counter to the legislature's express mandate that the provisions of Song-Beverly and the CLRA cannot be waived by contract.

II. The Burden Of Establishing That Consumers' Unwaivable Rights Will Be Given Effect Rests On The Party Proposing The Transfer, And A Unilateral "Stipulation" Does Not Satisfy That Burden.

Thor's contract purports to expressly waive California law. And its forum-selection clause serves to ensure that waiver will be enforced. No party disputes that these provisions were plainly unenforceable when drafted—to say nothing of the numerous provisions the Lathrops point out are contrary to Song-Beverly and the CLRA. (See Answering Brief, pp. 19-22.) Thor asks the Court to bless its imposition of unlawful waivers of statutory rights, as long as—if a consumer manages to raise a challenge—the company agrees not to oppose the application of Song-Beverly and the CLRA in *that* case.

Given the explicit directive of the legislature that rights under Song-Beverly and the CLRA cannot be waived, the onus rests squarely on Thor to demonstrate that transfer will not result in a de facto waiver of those rights. Thor's proffered "stipulation" does not meet that standard.

This case is not, as Thor suggests (Reply Brief at p. 19), a matter of comity. There is no "hostility" to foreign courts evident in the court of appeal's decision, and no suggestion that Indiana courts would be unable to faithfully apply California law. Rather, as the court of appeal pointed out, there is considerable "mischief" that can arise from a proffer to "not oppose" the application of a particular statute. (*Lathrop v. Thor Motor Coach, Inc.* (2024) 105 Cal. App. 5th 808, 824-26.) Indeed, to credit such a unilateral, post hoc "stipulation"[2] would be to encourage the type of rights-stripping scheme that Thor has implemented through the choice-of-law and forum selection clauses in its non-negotiable form contracts.

Thor's proposed stipulation scheme would severely disadvantage all consumers who scrupulously read their contract and believe what it says, resulting in a sizeable portion of those consumers losing their guaranteed rights.

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[2] A "stipulation" is "[a] voluntary *agreement* between opposing parties concerning some relevant point." (Black's Law Dictionary, 12th ed. 2024) (emph. added).) The unilateral stipulation proposed by Thor, and unaccepted by the plaintiffs, does not meet that definition. (See *Diaz v. Thor Motor Coach, Inc.* (2026) 118 Cal.App.5th 589, 598 ["Thor's willingness to waive application of its choice of law provision is, in essence, '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.'" (quoting *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 125)].)

Not only would a fine-print scheme like Thor's result in loss of guaranteed rights for consumers, but it also would lead to inefficient litigation. Such a rule would incentivize all consumers to file in California first to test provisions of law, effectively forcing a negotiation of the contract on the back end, only for manufacturers to offer to stipulate to apply California law—i.e., what they should have done in the contract itself, without requiring a court's intervention.

Further, Thor did not straightforwardly offer to "apply California law," as this Court's second Issue Presented suggests. Instead, it offered only *not to oppose* the application of certain California statutes while leaving intact the application of Indiana procedural law *and* Indiana substantive law in all other circumstances. The court of appeal rightly considered the ways in which that could result in the waiver of guaranteed statutory rights even if Indiana courts correctly and faithfully applied California law, and found that the case should not be transferred.

The better rule—and the one that comports with California law (see Cal. Civ. Code § 3513 ["a law established for a public reason cannot be contravened by a private agreement"])—is to require the party with exclusive drafting power to put forward a warranty agreement that by its own terms, and in its own text, ensures Californians will have access to their full Song-Beverly and CLRA rights in the first instance.

A. Thor's proposed scheme will result in consumers waiving unwaivable rights.

The practical effects of Thor's proposal would be to increase the likelihood of de facto waiver of California statutory rights.

Conscientious consumers (who cannot be presumed to know the intricacies of California law and their unwaivable rights) would read that under the contract they must bring their case in Indiana. Despite the fact that, as written, the combined forum selection clause and choice-of-law provisions are not enforceable—which no party disputes—consumers have no reason to know that.[3]

Empirical research demonstrates that requiring a consumer to bring their claim in another state itself frequently results in the consumer being unable to bring the claim. It is inevitable, and borne out by studies, that some consumers will decide that the inconvenience and cost of litigating halfway across the country is too great and will abandon otherwise valid claims. (*Consumer Psychology*, *supra*, 72 Stan. L. Rev. at p. 510

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[3] Research bears out these conclusions. Professors Meirav Furth-Matzkin & Roseanna Sommers, employing empirical rather than theoretical techniques, have determined that non-lawyers are guided by the "formalistic intuition that whatever the contract says is enforceable" and likely to follow what is written there. (See *Consumer Psychology and the Problem of Fine-Print Fraud* (2020) 72 Stan. L. Rev. 503, 509 [finding consumers, unlike lawyers, believe that even unlawful terms in a contract will be enforced as written].) Indeed, consumers are "likely to blame *themselves* for failing to read at the time of signing" and therefore to "absorb the loss . . . rather than take action against deceptive sellers." (*Id*. at p. 510.) The authors call into question "consumer protection regimes that put the onus on victims of fraud to challenge the enforceability of their standard form contracts." (*Id*. at p. 511; see also Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence* (2019) 70 U. Ala. L. Rev. 1031 (showing tenants are significantly less likely to complain or take action against a defiant landlord after reading a contract containing unenforceable terms).)

[consumers are likely to "absorb the loss" in such a case]; cf. *Harmful Effects*, *supra*, 70 U. Ala. L. Rev. at p. 1055 [the inclusion of an unenforceable term significantly increases the probability that consumers will not pursue a claim].) Not every purchase protected by these statutes will be a $200,000 motor home; instead, Californians who have purchased, for example, small household appliances will be forced by this scheme to front costs or even replace items in direct contravention of the rights ensured by Song-Beverly. Although California courts have, in the past, determined that cost is not per se a reason to reject enforcement of an otherwise valid forum selection clause (see *America Online*, *supra*, 90 Cal.App.4th at pp. 18-19), here the prohibitive cost directly contributes to the waiver of statutorily unwaivable rights. In other words, the forum selection clause should *not* otherwise be presumed valid.

This conclusion is consistent with the Court's reasoning in *EpicentRx*. There, the Court noted the value of giving effect to provisions "entered into freely and voluntarily by parties who have negotiated at arm's length. [Citation.]" (*EpicentRx, Inc.*, *supra*, 18 Cal.5th at p. 73.) But California courts have long recognized that consumer warranties are (usually) not such arms-length agreements, but instead may be "imposed upon the [] consumer" who must "take[] it or leave[] it" with "[n]o bargaining" to be found. (E.g., *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 102, reh'g denied and opinion modified (Apr. 26, 1990).) And while an accepted "public policy" favors enforcement of such clauses, a competing public policy clearly states that Californians' Song-Beverly and CLRA rights should not be waived by any operation of a manufacturer's artful warranty drafting. (See Civ. Code §1790.1 [CLRA]; § 1751 [Song-Beverly].) That is, perhaps, why no party disputes that the *combined* forum selection clause and choice-of-law provision in the warranty agreement are not enforceable under California law—because they result in a waiver of statutory rights.

Consumers who do decide to proceed with their case in Indiana rather than giving up (the latter, as noted above, is the empirically more likely outcome, *Consumer Psychology*, *supra*, 72 Stan. L. Rev. at p. 510) will still need somehow to find a consumer lawyer in Indiana and convince that lawyer to take their case – despite the fact that Indiana's lemon law (the Motor Vehicle Protection Act) does not cover RVs. (See Ind. Code, § 24-5-13-5.) If they somehow manage to file the case despite these obstacles, they will still likely fail to maintain and assert their (unwaivable) California statutory rights by operation of Indiana law or through stipulation because neither they nor their Indiana lawyer will know California law well enough to think to ask. In doing so, they will forfeit their rights under Song-Beverly and the Consumers Legal Remedies Act: no defendant will offer a unilateral stipulation to apply California law if the plaintiff has not raised the issue.

Under the scheme proposed by Thor, therefore, only consumers who *ignore* the text of their warranty agreement and seek California representation will even be offered the stipulation, despite the fact that in *every* case in which consumers seek to enforce their warranty claims, California courts would rule that those rights are unwaivable. This is precisely the outcome that the Court of Appeal found offensive to California public policy:

> Even if Thor's stipulation protects the rights of the plaintiffs who are savvy enough to obtain experienced legal representation, file in California, and argue the forum selection clause implicates their unwaivable statutory rights, other California consumers, compelled by the forum selection clause, may file suit in Indiana and only later discover that Indiana's lemon law does not cover motorhomes and that they have given up unwaivable California statutory rights.

(*Lathrop v. Thor Motor Coach, Inc.* (2024) 105 Cal.App.5th 808, 821.)

Thor's proposed scheme is a way to ensure that most California consumers will fail to enforce their rights under Song-Beverly and the CLRA.

B. Thor's "stipulation" is a unilateral attempt to rewrite a consumer contract of adhesion to the drafter's benefit.

Although the Court asks the parties about the effect of a "stipulation to apply California law in the selected forum," what Thor offers here is no such thing. First, Plaintiffs here have objected to the proffered stipulation and have not signed it. As a result of this unaccepted offer, the operative (if unenforceable) agreement is the warranty contract, which selects Indiana law.

Second, the proposed stipulation does not even select California substantive law as a whole—it provides only that Thor will not object to the application of the Song-Beverly Act and

Consumers Legal Remedies Act. This is a meaningful distinction. In other cases where Thor has employed this same tactic, it has actively objected to applying California substantive law *beyond* the Song-Beverly Act and CLRA. (See, e.g., *Zastawnik v. Thor Motor Coach Inc.* (N.D. Ind. Sept. 20, 2024) No. 3:23-cv-577-CCB, 2024 WL 4252651, at *1-2.) *Zastawnik* illustrates the dissuasive burden and inefficiency of Thor's proposed approach. Resolving the question of which state's law should apply to the plaintiff's breach of warranty claims took almost two full years to resolve across three different courts: Plaintiffs filed in Los Angeles Superior Court in October 2022, at which point Thor removed to the Central District of California and moved to transfer to the Northern District of Indiana. The case was transferred eight months later, in June 2023, and the plaintiff moved for a ruling that California substantive law applied, which Thor opposed. The Court ultimately ruled in the plaintiff's favor—just on the issue of which law should apply—in September 2024, some *two years* after the case was first filed.

Third, the substantive protections of California's "discovery rule" in determining the date of breach would still be omitted. Federal courts in Indiana have interpreted Song-Beverly claims proceeding in the state as subject to the limitations period and method of determining the date of breach of the selected forum, not California. (See *Merchain v. Thor Motor Coach Inc.* (N.D. Ind. 2021) 577 F. Supp. 3d 886, 890-92 [construing, under Indiana law, whether Indiana procedural law applied to the Song-Beverly Act].)

Fourth, whatever viability Thor's scheme possesses depends entirely on the transferee (or second-filed) court agreeing to be bound by the stipulation in the first place. Imagine that there *were* a formal stipulation or agreement between the parties (here there is none), and that the parties affirmatively agreed that a particular state's law should apply (here and in other cases, Thor has agreed only not to object). Still, many courts would not consider themselves bound by such a post-dispute agreement, and would distinguish it from choice-of-law provisions in parties' contracts.[4] Whether courts accept parties' agreements

[4] Federal courts in the Third Circuit, for example, do not give weight to such agreements. (See *Consolidated Water Power & Paper Co. v. Spartan Aircraft Co.* (3d Cir. 1950) 185 F.2d 947, 949 [distinguishing between "the stipulations of parties in the contract as to choice of law governing a contract," which are sometimes given effect, and a "stipulation made after litigation has begun as to the law which is to determine it," which the court would disregard]; accord *Shannon v. B.L. England Generating Station* (D.N.J. Nov. 27, 2013) No. 10-04524, 2013 WL 6199173, at *4 [noting that "several courts of appeals have decided that it is unnecessary to be concerned about conflict of laws if all parties stipulate during the litigation as to applicable law" but that "the Third Circuit maintains a contrasting viewpoint"].)

The same is true in the Fifth Circuit. (See *Ezell v. Hayes Oilfield Construction Co., Inc.* (5th Cir. 1982) 693 F.2d 489, 492 n. 2 ["The pretrial stipulation in this case that Mississippi law would apply . . . is no more binding on us than any pretrial stipulation as to the content of Louisiana law"]; *Davila v. Golden Nugget Lake Charles, LLC* (E.D. Tex. July 11, 2022) No. 1:21-cv-00552, 2022 WL 3448052, at *3 ["The Fifth Circuit has long held that federal courts have an obligation to apply the forum state's choice-of-law rules *even if* the parties are in agreement as to the controlling law" [cleaned up]; *Kreger v. General Steel Corp.* (E.D. La. 2010) No. 07-575, 2010 WL 2902773 ["the Court has an about what law can or should apply depends largely on the sitting court's interpretation of its state's choice-of-law rules, which may—or may not—honor those agreements. Thor implicitly acknowledges this fact when it argues that "Indiana federal courts accept agreements that California law applies" because, sitting in diversity, federal courts must look to the choice-of-law rules of their forum state. (See Reply Brief, at p. 24 & n.2.) Looking beyond the instant case (see, e,g., fn. 4, *supra*), the disparities in other courts' willingness to defer to such agreements will jeopardize the protection of unwaivable statutory rights. The "stipulation" is far from a cure-all; in some instances, it will have no effect at all.

In sum, Thor's proffered "stipulation" simply does not effectively preserve and make effective the protections that the California legislature has determined must be unwaivable.

C. Thor's forum selection clause must still comply with the legislature's mandate that certain rights are unwaivable.

The Court should reject Thor's "stipulation" scheme because of the myriad problems associated with using after-the-fact choice-of-law revisions to cure a defective contract provision. Such a ruling would provide Thor and other manufacturers who sell consumer goods in California with clear directions for how to proceed: if they want to select an out-of-state forum to govern disputes over express warranty provisions, they must make sure

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obligation to apply Louisiana choice-of-law rules, regardless of whether the parties are or were in agreement"].)

that Californians' unwaivable statutory rights will be protected throughout the process.

That standard is straightforward and workable for manufacturers and other businesses, while better securing Californians' unwaivable rights. As set out above, if the forum selection clause *acts* to effectively waive Californians' unwaivable rights, the Court should decline to enforce it. (See §§ I; II.A, *supra*.) If a manufacturer electing to enter the California market prefers a different forum to resolve warranty disputes, it must, at the very least, select California law to govern California purchases so as to protect those consumers' legislatively mandated rights. That would ensure that California consumers retain the protection of their unwaivable rights in any forum that respects contractual choice-of-law provisions. And it would *also* prevent manufacturers from strategically designating unfavorable fora to evade California's statutory mandates.

Under existing California law, if a defendant cannot show that another forum would provide the same substantive protections, California courts reject the transfer. (See *America Online*, *supra*, 90 Cal.App.4th at p. 12-13 ["California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy."].) Thor offers no reason to create an end-run around that basic principle.

Thor and other manufacturers taking advantage of California's vast marketplace should be required to rewrite their warranty agreements so that, from the outset, it is clear to courts and consumers alike that certain unwaivable rights apply to those agreements. This Court should not encourage manufacturers to do any less, especially when doing so can and will result in waiver of those rights. But at the very minimum, no rule should be endorsed unless it requires the defendant to establish that Californians' unwaivable rights will actually be given effect in the selected forum.

III. If Enforcement Of A Choice-Of-Law Clause Would Result In Waiver Of A Party's Unwaivable Statutory Rights, The Clause May Not Be Severed From The Remainder Of The Agreement.

If a defendant has drafted a warranty agreement with an unenforceable choice-of-law provision, the Court should not sever it to effect a workaround after the fact.

California courts have rightly declined to enforce forum selection clauses when doing so would jeopardize substantive statutory rights. Courts in this state have recognized that forum selection clauses and choice-of-law clauses are "'inextricably bound up' in one another," especially where unwaivable statutory rights are at issue. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 13 [quoting *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, 416]; see also *Hall*, *supra*, 150 Cal.App.3d at p. 416 ["[A] determination as to the validity of the choice-of-law provision is a prerequisite to a determination of whether the forum selection clause should be enforced."].) The entire purpose of considering the two together is to ensure that the substantive rights of Californians are given effect; and "where the effect of the transfer would be otherwise, the forum selection clause would not be enforced." (*America Online*, *supra*, 90 Cal.App.4th at p. 13.)

Because severing the offending choice-of-law clause would allow the selected forum to conduct its own choice-of-law analysis, this approach risks de facto waiver of rights that the legislature has deemed unwaivable. California has long allowed courts to decline severance in circumstances like this, to avoid incentivizing "routinely inserting [] a deliberately illegal clause" because a manufacturer "knows that the worst penalty for such illegality is the severance of the clause after the [consumer] has litigated the matter." (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 n.13.) Should the Court choose nonetheless to countenance it here, at a minimum, the defendant must be required to establish that the forum selected by the contract will actually give effect to Californians' unwaivable statutory rights. If the defendant cannot establish as much, the better course is to follow what California courts have done for decades and find that neither the forum selection clause nor the choice-of-law clause is enforceable.

The legislature intended to block manufacturers and other businesses from contracting around consumers' unwaivable rights, and to prevent unwary consumers from unknowingly waiving them. And California courts have long held that the parties' choice of law or forum should not "result in an evasion of the settled public policy or a statute of the forum protecting its citizens." (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal.App.3d 668, 673 [quoting 11 Cal.Jur.2d § 55, p.

138]; see also *America Online*, *supra*, 90 Cal.App.4th at p. 709 [same].) The best way give that policy teeth is to hold that contractual attempts to prevent Californians from suing to enforce their unwaivable California rights in California courts render such clauses unenforceable. But here, the Court need not go so far as that. In a case like this, where a forum selection clause *and* a choice of law clause work together to indisputably waive Californians' unwaivable rights, it is clear the terms are unenforceable. All this Court need decide, therefore, is whether a company can save these illegal terms by offering not to enforce the choice-of-law provision in the rare case where a consumer manages to raise a challenge, while sending that consumer to a distant forum anyway. The answer to that question must be no; any other would only reward companies for inserting knowingly unlawful provisions. (See *Armendariz*, *supra*, 24 Cal.4th at p. 124 n.13.)

To resolve the present case, this Court may ask a version of the same question: Will the proposed rule result in unwaivable statutory rights being given effect? The answer to each of the Court's three questions presented lies in making sure that the answer to *this* question is Yes.

CONCLUSION

Amici curiae respectfully urge this Court to affirm the judgment of the Court of Appeal.

Dated: July 27, 2026 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in California Rule of Court 8.204(c)(1). The brief is set in 13-point Century Schoolbook font. The word count is 6,159 exclusive of material identified in Rule 8.204(c)(3).

Dated: July 27, 2026

By: *__/s/ Hanne L. Jensen__*
Hanne L. Jensen

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2026, I caused the foregoing to be filed with the Clerk of the Supreme Court using the TrueFiling System, which will serve notice of electronic filing on all registered users, including counsel for the parties and the Clerk of the Court of Appeal. I further hereby certify that on this 27th day of July, 2026, I caused the foregoing to be electronically served on the trial court via the Case Anywhere system.

Executed on July 27, 2026 in Oakland, California.

By: *<u>/s/ Hanne L. Jensen</u>*
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