No. S153846

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PAMELA MEYER and TIMOTHY PHILLIPS, Individually, and on Behalf of all Other 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 Court of Appeal, Fourth Appellate District, Division Three, Case No. GO37375
On Appeal from the Superior Court of the State of California for the County of Orange
Honorable Sheila Fell, Judge Presiding
Superior Court Case No. 04CC06254
Service on the Attorney General and Orange Count District Attorney required by Section 17209 of the Business and Professions Code and CRC 8.29(a)

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS AND APPELLANTS

JAMES C. STURDEVANT (SBN 94551)
MONIQUE OLIVIER (SBN 190385)
THE STURDEVANT LAW FIRM
A Professional Corporation
354 Pine Street, Fourth Floor
San Francisco, California 94104
Telephone: (415) 477-2410

Attorneys for *Amicus Curiae*
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

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INTRODUCTION

In *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 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. Nonetheless, in interpreting the broad language of the Consumer Legal Remedies Act, Civil Code section 1750 et seq. ("CLRA"), this Court had no trouble recognizing and holding that the consumer had been damaged at the time that her legal rights were infringed.

In this case, the Court of Appeal has simply ignored, or at a minimum sharply narrowed to the vanishing point, this Court's decision in *Kagan*. The Court of Appeal has held that even if plaintiffs are correct that defendant Sprint has "inserted" unconscionable provisions into its contract 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). The Court of Appeal below remarked, for example, that the plaintiff in *Kagan* had "been told" that her account would be debited as a result of the misrepresentation at issue there (and thus she would have suffered an economic harm), without noting that the debiting had not actually happened to that plaintiff. Similarly, the Court of Appeal below remarked that the plaintiff here received no misrepresentation, ignoring that the CLRA makes illegal not only misrepresentations but also the insertion of unconscionable provisions into the contract. Simply put, the Court of Appeal's distinctions of *Kagan* amount to a defiance of this Court's decision.

The Court of Appeal's decision not only ignores this Court's decision in *Kagan*, it also ignores the plain language of the statute. First,

the CLRA makes actionable the "insertion" of an unconscionable term into a contract, 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). Under the Court of Appeal's logic, 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.

Second, the Court of Appeal's decision interprets the sweeping phrase of the CLRA – "any damage" – as meaning something much more narrow: actual damages. The Legislature *did* use the phrase "actual damages" in a different part of the CLRA, the part, however, that provides that "actual damages" are *one* of a number of remedies for violations of the Act. (Civ. Code § 1780(a).) The Legislature's distinction between actual damages as one of the remedies for the "any damage" that gives rise to violations of the Act demonstrates that the Court of Appeal erred in reading "any damage" so narrowly.

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, the Court of Appeal has chosen to interpret the CLRA narrowly, with a goal of insulating corporate violators from actions for injunctive relief until after an illegal act has cost a consumer money. In short, the Court of Appeal has substituted its policy judgment – that corporations should not be liable for actions such as "inserting" unconscionable terms into contracts unless and until a consumer has suffered actual damages – for the judgment of the Legislature.

Finally, in addition to ignoring the law established by this Court's

clear decision in *Kagan* and ignoring basic principles of statutory construction, the Court of Appeal's 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. The Court of Appeal's decision would encourage (rather than deter and prevent) a variety of serious types of illegal conduct courts have previously held to be unlawful.

For each and every one of these reasons, this Court should reverse the Court of Appeal's decision, and 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. THE COURT OF APPEAL NARROWLY CONSTRUED STANDING UNDER THE CLRA IN A MANNER THAT IS INCONSISTENT WITH ITS EXPRESS TERMS AND PURPOSE.

A. A Violation of Rights Granted by Section 1770 Constitutes "Damage" for Purposes of Section 1780(a).

The Court of Appeal's conclusion that plaintiffs did not have standing to pursue their claims is erroneous. The Court of Appeal's 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 has already

recognized in *Kagan* – was not intended by the Legislature.

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 was 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 entered into contracts of adhesion with 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 contracts are illegal and unconscionable including a ban on class actions, a waiver of the right to a jury trial, 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 inclusion and enforcement of the unconscionable terms. (AA 018-043.) 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).)

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.) Incongruously, however, it then summarily concluded that plaintiffs lacked standing under the CLRA "because plaintiffs have not suffered any damage as a result of Sprint's inclusion of one or more allegedly illegal and/or unconscionable provisions in the customer service agreement." (*Id.* at 320.)[1] There are several reasons in the text of the CLRA alone why the Court of Appeal's conclusion is insupportable.

First, section 1770(a)(19) specifically prohibits a defendant from "*inserting* an unconscionable provision in the contract." (Civ. Code § 1770(a)(19), emphasis added.) Very significantly, the Legislature chose the term "inserting" to characterize the unlawful behavior. It did not state

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[1] Its conclusion with respect to plaintiffs' CLRA claim followed on the heels of its conclusion that plaintiffs failed to state a claim under the Unfair Competition Law, Business & Professions Code section 17200 et seq. ("UCL"), under which -- unlike in the CLRA – a plaintiff must demonstrate both "injury in fact" *and* "loss of money or property." (See Bus. & Prof. Code, § 17204.)

"applying" or "enforcing" the unconscionable provision. Unlike the other prohibitions in the CLRA which include specific misrepresentations, section 1770 (a)(19) makes the "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. A statute should not be given a construction that results in rendering one of its provisions nugatory. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

The Court of Appeal'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, § 1670.5 with Civ. Code, § 1770(a)(19); see *California Growers Assn., Inc. v. Bank of America, N.T. & S.A.* (1994) 22 Cal.App.4th 205, 217.)

Nor can the Court of Appeal's reading 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, as the goal of the CLRA is to *protect* consumers, and as it allows for injunctive relief in addition to actual and punitive damages and

restitution, it is plain that the Legislature did not intend to require consumers to wait until *after* they suffer some quantifiable loss to bring an action. Instead, the CLRA specifically contemplates allowing plaintiffs to prevent harms preemptively. If that were not the case, why would the Legislature prohibit the "*insertion* of an unconscionable term" in a contract, rather than just the enforcement of that term?

Second, although the Court of Appeal recognized that monetary loss is not required to state a claim under the CLRA, it appeared to equate "any damage" with, at a minimum, "actual damages." For example, it acknowledged that plaintiffs alleged that they were "damaged" as a result of the inclusion of illegal and/or unconscionable terms in the contracts, but found that plaintiffs "did not allege that they had to pay any more than they would have in the absence of the offending provisions" or that their cellular telephone service was "defective." (*Meyer*, 59 Cal.Rptr.3d at 315.)[2] It also rejected plaintiffs' reliance on two cases, stating that they do not stand for the proposition that plaintiffs can state a claim under section 1770 "without any actual damage." (*Id.* at 319.) The court thus failed to recognize the intended breadth of the CLRA in allowing "any consumer who suffers *any damage* as a result of the use or employment of" any unlawful act or

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[2] Within its analysis of plaintiffs' UCL claim, the court stated that "Plaintiffs did not claim any of the allegedly illegal and/or unconscionable contract provisions were ever asserted against them, or prevented them from asserting their rights," and that "plaintiffs were not injured in fact because of the inclusion of contractual provisions that have not been enforced, or threatened to be enforced against them." (*Id.* at 315.) These conclusions are contrary to the *actual* allegations contained in the complaint, which included multiple specific allegations that defendant had enforced the contract terms against plaintiffs and the plaintiff class. (See Appellant's Opening Brief ("AOB") at 8-9; AA 0018-0043.)

practice identified in section 1770 to bring an action. (Civ. Code, § 1780(a), emphasis added.)[3]

That "any damage" does not mean "actual damages" is evident from the text. First of all, the inclusion of "any" to modify "damage" reflects a sweeping breadth of coverage. If the Legislature meant to embrace only a narrow measure of "damage," it would have used that term alone. Instead, it said "any" damage, signaling a broader definition.[4] In addition, "any damage" is separate and distinct from what follows in the same section, which is a list of remedies including "actual damages," as well as injunctive relief, restitution and punitive damages, all of which can be sought and recovered by "any consumer who suffers any damage" as a result of violations of section 1770. (Civ. Code, § 1780(a).) "Any damage" thus refers to the *entirety* of the harm which the CLRA is intended to prevent while "actual damages" refers to *one of the remedies* for that harm.

Further, the statute also provides for minimum statutory damages for

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[3] The court also, however, implicitly recognized a harm alleged by plaintiffs, noting that if the challenged provisions of the contract were illegal or unconscionable, "the appropriate remedy (if any) would be to sever the offending provisions, not to void the entire contract, because the contract had been performed." (*Id.* at 316.)

[4] In light of this express statutory language, defendant's argument before this Court that "'damage' is not reasonably taken to mean '*any* loss' but instead '*economic* loss'" is baffling. (Respondent's Answer Brief on the Merits ("RAB") at 15, citing *Aron v. U-Haul Co. of Cal.* (2006) 143 Cal.App.4th 796, 803.) We presume the Legislature means what it says, and in so saying, uses the ordinary meaning of terms. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103; *People v. Snook* (1997) 16 Cal.4th 1210, 1215 ["When looking to the words of the statute, a court gives the language its usual, ordinary meaning."]; *People v. Trevino* (2001) 26 Cal.4th 237, 241.)

class action, regardless of a showing of "actual damages." (Civ. Code, § 1780(a)(1).) Why should the statute provide statutory damages if consumers must show "actual damages" in order to bring suit? Thus, "any damage" is necessarily broader than "actual damages." To read the two terms as synonymous would be to render the term "any damage." (See *Shoemaker v. Meyers* (1990) 52 Cal.3d 1, 22 ["We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."].)

Third, defendant's complaint – and the Court of Appeal'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. 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).) 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 unlawful acts in violation of 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 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. 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.)

The CLRA does not allow, and never has allowed, lawsuits to be brought by unaffected parties. Plaintiffs, who have alleged that they are consumers who engaged in a transaction with defendant and became parties to adhesion contracts with defendant that contain unconscionable provisions in violation of section 1770, thus have standing to pursue their CLRA claim.

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 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 damages under these provisions in order to enforce them, they would very likely be unable to avail themselves of the CLRA's intended 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.)

B. That the CLRA Does Not Require Actual Damages or Pecuniary Loss Is Supported by Its Broad Liability and Remedial Language and Purpose to Protect Consumers.

To the extent that there is any ambiguity in the text of the CLRA, the Legislature has mandated that the Act is to be construed broadly. The Court of Appeal failed to do so here.

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.)

To the extent that the Court of Appeal had questions about the meaning of words in the statute, it was obligated to turn toward the legislative intent – not Webster's dictionary – for answers. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124 ["When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear . . . . Conduct that is legal in one statutory context thus may be actionable under separate statutes created for different legislative purposes."] (internal quotation marks, citations omitted).)[5] Had it done so, the aim of the CLRA, and the meaning of the phrases contained therein, would have been easily ascertained.

Indeed, in this case there was no need to comb through extensive legislative history. 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

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[5] This Court has determined that an "examination of various dictionary definitions of a word will no doubt be useful" in determining its ordinary meaning, but only if the court undertakes that examination from the viewpoint of the electorate in enacting a statute that contains the word. *(MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 649.) By interpreting the CLRA narrowly rather than liberally, and by eliminating any remedy for the "insertion" of unconscionable terms in contracts, that directive was violated here.

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. (See, e.g., *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 14-15 ["the CLRA is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of this state"].) The Court of Appeal's narrow and cramped reading of the term "damage" in the CLRA improperly limits the scope of the CLRA and thwarts, rather than furthers, the broad consumer protection purposes of the law.

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.*)

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 the Court of Appeal's error in finding that plaintiffs lacked standing.

II. THE COURT OF APPEAL'S NARROW CONSTRUCTION OF STANDING DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *KAGAN v. GIBRALTAR SAVINGS & LOAN ASSN.*

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. The Court of Appeal attempted to limit *Kagan's* holding to a narrow reading of the facts at issues there. In light of the broad language this Court used to reach its reading of the CLRA, the crabbed approach of the court below was improper. Both the express terms of the CLRA and this Court's reading of those terms in *Kagan* require reversal of the Court of Appeal's decision.

In *Kagan*, this Court addressed whether a plaintiff could proceed with her CLRA claim on behalf of a proposed class. 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). 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. (*Kagan,* 35 Cal.3d at 589.) 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 damages or monetary loss. (*Id.* at 593, fn. 3.)

The decision in *Kagan* is directly applicable to the allegations in the

complaint now before this Court. The Court of Appeal, however, disregarded this binding -- and correct -- holding. None of its reasons for doing so is supportable.

First, the court attempted to distinguish *Kagan* by concluding that it primarily concerned the requirements of remedying harm in class actions versus individual actions and the dangers of a defendant "picking off" a representative plaintiff by remedying the individual, but not the class, harm. Although the court is correct that 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. (See *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.[6] Thus when the

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[6] 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

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.

Second, the Court of Appeal in this case also concluded that the plaintiff in *Kagan* was damaged "because she opened an account at Gibraltar rather than some other bank as a result of material written and oral misrepresentations, she was told by Gibraltar that her account would be debited, and her husband's account had been debited." (*Meyer,* 59 Cal.Rptr.3d at 319, with no citation to *Kagan.*) But the Court in *Kagan* did not rest its conclusion on these facts. Indeed, it assumed that the plaintiff had not suffered any actual damage. (*Id.*, citing *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.*, citing *Kagan,* 35 Cal.3d 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. (*Kagan,* 35 Cal.3d at 593.) In so concluding, the Court answered the question squarely posed in this case: whether a violation of rights under section 1770 constitutes damage.[7]

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properly bring the action on behalf of herself and as a representative of the class."].)

[7] Defendant's reliance on *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754-55 is misplaced. The issue in *Wilens* was not what *Kagan* stated about the requirement for "any damage" in order for an individual to have standing, but whether *Kagan* stated that each member of a purported class need not have suffered actual damages. (*Id.*) *Wilens* was simply not a standing case and did not distinguish the statement in

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. The Court of Appeal's conclusion that this case is "in contrast" to *Kagan* because plaintiffs did not allege "any misrepresentations regarding any of the allegedly illegal and/or unconscionable terms in the customer service agreement" betrays a critical misunderstanding of the protections of the CLRA. (*Meyer*, 59 Cal.Rptr. at 319.) Plaintiffs allege 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 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. 2005) 369 F.Supp.2d 1138, 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

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Kagan that "the requirement of section 1780 that a consumer 'suffer[ ] any damage' ... include[s] the infringement of any legal right as defined by section 1770." (*Kagan*, 35 Cal.3d at 593; *Wilens*, 120 Cal.App.4th at 750.) *Kagan's* language is not just on point and an actual holding; it is the *correct* interpretation of the CLRA's standing provision.

> degradation than manifolds made from aluminum or metal composite. This showing is sufficient to meet the requirements for standing under the CLRA.

(*Id.* at 1147.)

Similarly, in *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, the court found that defendant's labeling and advertising products as "Made in U.S.A." when parts of the products were manufactured outside of the U.S. constituted injury. Again, the "actual damages" were difficult to quantify, but this did not eliminate plaintiffs' standing, because they suffered the infringement of a legal right protected by the CLRA: the right to be free of deceptive advertising. (*Id.* at 675-76; 680, 704; Civ. Code, § 1770(a); see also *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254 [violation of the CLRA where "Made in USA" label was falsely used on products because for some consumers this geographic origin is an important part of their buying decision].) Under the rule of law proposed by defendant here, its unlikely that false claims that a product was "made in U.S.A." would ever be remedied. (See also *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292-94 [the CLRA class action properly certified where an insurance company failed to disclose its own concerns about the premiums it was paying on a product and court found that to be a material misrepresentation].)

In *People v. McKale* (1979) 25 Cal.3d 626, this Court recognized the harm that flows from defendant's misrepresentations to consumers in agreement containing unlawful terms. There, the Court rejected defendants' argument that inclusion of unlawful provisions in a park's rules and regulations did not constitute an unlawful or unfair business practice

under the UCL because defendants had not attempted to enforce their rules and regulations. The Court found that "while the pertinent statutory provisions do not expressly prohibit requiring tenants to sign copies of rules and regulations containing unlawful provisions, defendants' requirement constitutes an unfair and deceptive business practice. *Tenants are likely to believe a park has authority to enforce rules it requires its tenants to acknowledge.*" (*Id.* at 635, emphasis added.) The Court then stated that under the test of the UCL, i.e., whether the public is likely to be deceived, the allegations were sufficient. "When a mobilehome park operator requires tenants to sign park rules and regulations which the park is prohibited by law from enforcing, those tenants are likely to be deceived, and allegations of unfair competition based thereon are sufficient to withstand demurrer." (*Id.*)

Other statutory schemes are in accord. For example, as this Court noted in *Kagan*, in order to violate the Truth in Lending Act, plaintiffs do not need to show that they were injured, that they suffered financial or actual injury, or that they acted in reliance on a misrepresentation. If a plaintiff can show that a disclosure was improperly made, they have standing to sue. (See *Schnall v. Amboy Nat. Bank* (3rd Cir. 2002) 279 F.3d 205, 218 ["those Courts of Appeals that have considered the issue are nearly unanimous that to recover statutory damages under TILA, plaintiffs need not show that they would not have agreed to the transaction had the lender's disclosure complied with TILA or that they were otherwise misled or suffered financial injury as a result of the TILA violation."]; see also *Mars v. Spartanburg Chrysler Plymouth, Inc.* (4th Cir. 1983) 713 F.2d 65, 66 ["The district court held that these violations were only technical and because [plaintiff] sustained no actual injury as a result of them, no liability

on the part of the creditors arose. We disagree and reverse the judgment of the lower court."]; *Brown v. Marquette Savings & Loan Assn.* (7th Cir. 1982) 686 F.2d 608, 614 ["As an initial matter we note that the violation before us is a purely technical one, and that the plaintiffs do not claim that they were misled or suffered any actual damages as a result of the statutory violation. It is well settled, however, that a borrower need not have been so deceived to recover the statutory penalty."]; *Dzadovsky v. Lyons Ford Sales, Inc.* (3rd Cir. 1979) 593 F.2d 538 [violation of TILA's disclosure requirements is presumed to injure borrower by frustrating the purpose of permitting consumers to compare various available credit terms, and action may therefore be brought without a showing of financial loss]; *Redhouse v. Quality Ford Sales, Inc.* (10th Cir. 1975) 511 F.2d 230 [damages assessed under TILA are not compensatory in nature but are a civil penalty for which harm need not be shown].) This is the case because TILA, like the CLRA recognizes the right of consumers to be protected from unfair and unlawful business practices that may not result in specific peaniary loss.

Moreover, defendant's suggestion that no harm befalls a plaintiff because a defendant can waive an unconscionable provision in a contract at some point in the future has been repeatedly rejected by the courts. 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"].)

This Court's decision in *Kagan*, and the multitude of other court decisions affirming the harm that flows from inclusion of unlawful or unconscionable terms in contracts, demonstrates that plaintiffs here properly alleged an infringement of their legal rights for which they can seek recovery under the CLRA.

III. THE CLRA'S STATED PURPOSE TO PROTECT CONSUMERS WOULD BE SEVERELY UNDERMINED BY IMPOSING A HEIGHTENED STANDING REQUIREMENT THAT DOES NOT EXIST IN THE ACT.

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 damages, 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*. The position defendant now advocates stretches beyond even the erroneous conclusion of the Court of Appeal, and urges this Court to ignore the language of the CLRA and its 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 would violate not only the actual terms of the CLRA, but the strong public policy that surrounds its enactment and enforcement.[8] The CLRA was designed to protect consumers from twenty-

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[8] Several unpublished cases have followed in the *Meyer* court's footsteps. Virtually all of the cases arise in the context of a standing challenge under the UCL. But it is the UCL – not the CLRA – that was amended by the voters through the passage of Proposition 64 and requires "injury in fact" and "loss of money." Defendant now asserts that Proposition 64 should affect, if not control, the outcome here. Its sheer speculation as to how the voters might have considered an amendment to the CLRA had it been before them is utterly irrelevant. (See RAB at 15-16.) Defendant's attempt to stretch the amendments to the UCL in the passage of Proposition 64 to a limitation on the standing of a consumer to bring a CLRA claim is unprincipled and unavailing.

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 remedy would go unanswered.

Similarly, the Legislature's choice to prohibit a business from "inserting" 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 unacceptable chilling effect on

future litigants. 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 contract 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.

Under the Court of Appeal's construction of the CLRA, businesses would be free to insert unlawful and unconscionable terms in their consumer contracts with impunity, knowing that the consumer would have the burden to establish an attempted enforcement of those terms and a specific loss caused by that practice before plaintiffs have standing. This is a particularly troubling result where, as here, the contract provisions plaintiffs allege are unconscionable and illegal are the very provisions this Court and Courts of Appeal have held to be unlawful over the last several years. Given that defendant controls the contracts and enters into new contracts with consumers on a daily basis, it is actively choosing to keep these provisions in its form agreements, despite clear notice of their illegality. The effect, if not the aim, is obvious: consumers are deceived into believing that their rights are more limited than they are. Such a result is antithetical to the purposes of the CLRA.

CONCLUSION

In guiding lower courts to correctly apply standing requirements, the protective and deterrent principles underlying the Consumer Legal Remedies Act should predominate. The insertion of multiple unconscionable provisions in a consumer contract has nothing to commend

it – and deserves no protection.

The Court of Appeal's conclusion is fundamentally at odds with the plain language of the statute and with its legislative purpose and history. This Court has already decided this issue in *Kagan*. The reasoning and conclusion of that case are directly on point here, remain good law and should be reaffirmed. The decision of the Court of Appeal to improperly limit the express terms of the CLRA and to ignore directive in *Kagan* threatens to thwart the strong public policy codified by this State in the CLRA. For all of the foregoing reasons, the decision of the Court of Appeal should be reversed.

DATED: February 4, 2008

THE STURDEVANT LAW FIRM
A Professional Corporation

By: _____
Monique Olivier
Attorney for *Amicus Curiae*
National Association of
Consumer Advocates

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 8122.

DATED: February 4, 2008

THE STURDEVANT LAW FIRM
A Professional Corporation

By: _____

Monique Olivier
Attorney for *Amicus Curiae*
Consumer Attorneys of California

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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 4, 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:

***AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS AND APPELLANTS**

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.

J. David Franklin
Franklin & Franklin
550 W. "C" St. #950
San Diego, CA 92101

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

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

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

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

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

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 4, 2008, at San Francisco, California.

Amber Rocha

Amber Rocha

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