NO. S241434

IN THE
SUPREME COURT OF CALIFORNIA

EDUARDO DE LA TORRE, *et al.*,
Plaintiff/Appellants,

v.

CASHCALL, INC.,
Defendant/Appellee.

Question Certified from the United States
Court of Appeals for the Ninth Circuit,
Case Nos. 14-17571, 15-15042

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE, CENTER FOR RESPONSIBLE LENDING, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, PUBLIC CITIZEN, INC., AND PUBLIC GOOD LAW CENTER IN SUPPORT OF APPELLANTS

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to the 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 Appellants Eduardo de la Torre et al.

This application is timely made within the period of the extension granted by this Court on January 4, 2018. 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 other 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. INTERESTS OF AMICI CURIAE

Amicus curiae the Center for Responsible Lending (CRL) is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices pertaining to home mortgages, payday loans and other consumer loans. Since its founding in 2002, CRL has sought to focus public and policymakers' attention on abusive practices in lending, including the charging of excessive interest and fees that strip significant wealth from consumers of modest means. CRL opened a California office in 2006, and since that time has worked for responsible and fair lending practices in California, including with respect to installment loans under the

California Finance Lenders Law. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union) and a federally-chartered credit union (Self-Help Federal Credit Union) with a statewide network of branches in California that serve working families and underserved communities. Over 30 years, Self-Help has provided over $6 billion in financing to help nearly 90,000 low-wealth borrowers buy homes, start and build businesses, and strengthen community resources.

Amicus curiae the National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students whose primary practices or interests involve consumer rights and protection. NACA is dedicated to promoting justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States.

Amicus curiae Public Citizen, Inc., is a non-profit consumer advocacy organization founded in 1971. Public Citizen has members and supporters nationwide, including many in California. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and

works for enactment and enforcement of laws protecting consumers, workers, and the public. Among Public Citizen's concerns are protection of consumers against predatory lending, and preservation of judicial remedies for consumers victimized by unconscionable loan terms. Public Citizen regularly participates as *amicus curiae* in cases in federal and state courts, including this Court, in cases involving consumer issues. Among the recent cases in which Public Citizen has submitted *amicus* briefs supporting consumer interests in this Court are *McGill v. Citibank, N.A.* (2017) 2 Cal. 5th 945, and *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal. 5th 145.

*Amicus curia*e Public Good Law Center is a public interest organization dedicated to fairness and justice in the courts and in the marketplace. Through cases of particular significance for the protection of consumers—especially low-income consumers—Public Good seeks to ensure that legal protections and the system of justice remain available to everyone. Public Good has participated in consumer protection cases around the state and the nation, including numerous matters before this Court and the United States Supreme Court, on subjects where, like this one, consumers' fundamental rights and financial well-being are at stake.

II. NEED FOR FURTHER BRIEFING

The proposed *amici curiae* believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, particularly the historical and empirical scholarly literature addressing the issues presented

in this case. *Amici* believe that organizations with a proven history of working for and on behalf of consumers can add substantially to the Court's analysis. The proposed *amici curiae* wish to emphasize the historical and philosophical underpinnings of the doctrine of unconscionability, which demonstrate the doctrine's important role as a "social safety net" offering protection against the excess of rigid, formalistic contract enforcement. *Amici* are concerned that the doctrine of unconscionability, which applies to all commercial transactions and contracts generally, would be significantly and dangerously weakened if Defendant CashCall's statutory interpretation were adopted. *Amici* wish to demonstrate that the unconscionability standard is a workable standard as applied to interest rates and that it may and should be applied in this case.

III. CONCLUSION

For the foregoing reasons, the proposed *amici curiae* respectfully

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request that the Court accept the accompanying brief for filing in this case.

Dated: February 5, 2018

Respectfully submitted,

By: _____
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CORPORATE DISCLOSURE STATEMENT

Amici curiae have no parent corporations, and because they issue no stock, there are no publicly-held corporations that own 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices pertaining to home mortgages, payday loans and other consumer loans. Since its founding in 2002, CRL has sought to focus public and policymakers' attention on abusive practices in lending, including the charging of excessive interest and fees that strip significant wealth from consumers of modest means. CRL opened a California office in 2006, and since that time, has worked for responsible and fair lending practices in California, including as it relates to installment loans under the California Finance Lenders Law. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union) and a federally-chartered credit union (Self-Help Federal Credit Union) with a statewide network of branches in California that serve working families and underserved communities. Over 30 years, Self-Help has provided over $6 billion in financing to help nearly 90,000 low-wealth borrowers buy homes, start and build businesses, and strengthen community resources.

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[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of all parties.

members are private, public sector, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised third edition of which is published at 299 F.R.D. 160 (2014). NACA is dedicated to promoting justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as amicus curiae in support of consumer interests in federal and state courts throughout the United States.

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Amici curiae are concerned that the District Court's decision in this case could undo longstanding law applying the doctrine of unconscionability to all contracts and could eviscerate the unconscionability doctrine as it applies to interest rates or pricing. *Amici* wish to emphasize the historical and philosophical underpinnings of the doctrine of unconscionability, which demonstrate the doctrine's important role as a "social safety net" offering protection against the excess of rigid, formalistic contract enforcement. *Amici* are concerned that the doctrine of unconscionability, which applies to

all commercial transactions and contracts generally, would be weakened significantly if Defendant CashCall's statutory interpretation were adopted. *Amici* wish to demonstrate that the unconscionability standard is a workable and time-tested standard as applied to interest rates, and that it may and should be applied in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit has asked this Court whether the interest rate on consumer loans of $2,500 or more can render the loans unconscionable under section 22302 of the California Financial Code. The answer – with the proviso that any unconscionability determination must be made in the context of the terms and circumstances of the loans in question – is yes.

The Ninth Circuit's question should not, however, be read oversimplistically. As this Court has determined, "an evaluation of unconscionability is highly dependent on context." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.) Thus, it may be that there are interest rates so high – like the 11,000,000% rate posited by the New Mexico Supreme Court in *State ex. rel. King v. B&B Inv. Grp.* (N.M. 2014) 329 P.3d 658, 675 – that they render loans substantively unconscionable in essentially all circumstances. But in most cases an interest rate can be adjudged only in context.

Certainly, a very high interest rate is an indicator of unconscionability, and can be a determinative factor in a given case and with a given set of

loans. (See *Carboni v. Arrospide* (1991) 2 Cal. App. 4th 76, 82 ["In essence, the interest rate is the 'price' of the money lent; at some point the price becomes so extreme that it is unconscionable."])

That the determination of unconscionability is not automatic – that there is no universal interest rate above which *all* loans become unconscionable – follows from the flexible and contextual nature of the unconscionability doctrine itself. Unconscionability operates – as its philosophical antecedents have for thousands of years (Amy Schmitz, *Embracing Unconscionability's Safety Net Function* (2006) 58 Ala. L. Rev. 1, at p. 82) – with flexibility and discretion. That courts have discretion in an unconscionability inquiry is not a reason for concern; indeed, it is precisely that flexibility that is the doctrine's hallmark. As Justice Cardozo observed, "The judge, even when . . . free, is still not wholly free…. [The judge] is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life." (Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) at p. 141.)

The longevity and ubiquity of the unconscionability doctrine make its adoption in section 22302 both practical and unremarkable. There is certainly no reason to believe that the legislature intended to limit or eliminate unconscionability review in cases assessing consumer loans of $2500 and above. To the contrary: the long history of unconscionability's use to assess

interest rates and other loan features, and the legislature's explicit adoption of the standard in section 22302, underscore the doctrine's relevance to this case.

When the legislature removed the interest rate cap on loans above $2,500, it did not impliedly repeal the historic principle that courts may intervene where a contract or provision is unduly oppressive or unconscionable. Rather, the legislature recognized that the statute's unconscionability provision would remain a safeguard against the excesses of an unfettered free market. The doctrine of unconscionability, a "principle of equity applicable to all contracts generally," applies to *all* provisions of *all* contracts. (See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820.) A loan's interest rate, whether governed by a statutory rate cap or not, is no exception. The incorporation of Civil Code section 1670.5 into Financial Code section 22302 evinces a clear legislative intent that courts should police the consumer credit market for unduly oppressive contract terms. The legislative mandate of Finance Code section 22302 is clear: where the market for consumer loans fails to produce socially tolerable terms, the courts may step in.

The attributes of the loans at issue in this case – their relatively large size, the length of the repayment period and, notably, their high interest rates – provide ample foundation for a finding that the loans are in fact unconscionable. For the current proceeding, however, it is enough to say this:

The interest rate on consumer loans of $2,500 or more can – in the context of the other terms and circumstances of the loans – render the loans unconscionable under section 22302 of the California Financial Code.

ARGUMENT

I. A CONSUMER LOAN'S INTEREST RATE IS GENERALLY SUBJECT TO REVIEW FOR UNCONSCIONABILITY.

"The main doctrinal vehicle for policing" consumer credit transactions "is the unconscionability doctrine." (Elizabeth Warren and Oren Bar-Gill, *Making Credit Safer* (2008) 157 U. Pa. L. Rev. 1, 71.)[2] This Court has long held that excessively high prices can be unconscionable. (See *Perdue v. Crocker Nat'l Bank* (1985) 38 Cal. 3d 913, 926 ["it is clear that the price term, like any other term in a contract, may be unconscionable"]; *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1245 [noting that courts assessing unconscionability should consider "unreasonably and

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[2] See *id*. at p. 71:

> Consumer credit transactions are regulated by the general law of contracts. The main doctrinal vehicle for policing these transactions is the unconscionability doctrine . . . . Unconscionability review is most commonly applied to contracts between consumers and sophisticated corporations, and it has been used to police credit contracts.

See also Nathalie Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap* (2014) 34 N. Ill. U. L. Rev. 259 ["Scholars have clearly articulated that it is the place of courts to police these transactions and that courts unquestionably have that right if there is no law on the books to the contrary. This understanding is completely consistent with the history, development, and policies behind the doctrine of unconscionability"].

unexpectedly harsh terms having to do with price or other central aspects of the transaction."].) Because a loan's interest rate is its price term, a court may find a loan's interest rate substantively unconscionable just as it would any other price term, even without determining the precise point at which the rate becomes unconscionable. (See, e.g., *B&B*, *supra*, 329 P.3d at p. 675 ["We hold … that the quadruple-digit interest rate, a substantively unconscionable term, shall be stricken from the contracts of all borrowers. We then enforce the remainder of the contract without the unconscionable term."].)[3]

For example, although the court in *Carboni v. Arrospide* acknowledged that it may be "difficult to determine when that point [of unconscionability] is reached," it nonetheless found an interest rate of 200% to be unconscionable. (*Carboni*, *supra*, 2 Cal. App. 4th at p. 82; see also Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard* (1994) 31 Hous. L. Rev. 721, 736; Harry G. Prince, *Unconscionability in California: A*

[3] See also *Greene v. Gibraltar Mortgage Inv. Corp*. (D.D.C. 1980) 488 F. Supp. 177 [finding a contract unconscionable where the lender was to be repaid $7,000 for a $2,700 loan]; *Burnett v. Ala Moana Pawn Shop* (D. Haw. Mar. 3, 1992, No. 90-267), 1991 WL 11986116 [finding a pawn shop's interest rate of 20% per month to be "oppressive" to consumers and in violation of Hawaii's unfair trade practices statutes], *aff'd* (9th Cir. 1993) 3 F.3d 1261); *In re Chicago Reed & Furniture Co*. (7th Cir. 1925) 7 F.2d 885, 886 [refusing to enforce an interest rate in excess of 40% because it was on its face "glaringly and obviously harsh."].)

Need for Restraint and Consistency (1995) 46 Hastings L.J. 459, 484 ["[c]ourts have exercised the power to remake bargains by . . . reducing an interest rate."][4]; Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract* (1995) 24 J. Legal Stud. at pp. 304-305 [discussing how courts have applied the doctrine of unconscionability in cases where lenders charge exorbitantly high credit prices].)

Unconscionability is generally dependent on context. "As with any contract, the unconscionability inquiry requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1146.)[5] As this Court has held, "the substantive unfairness of the terms must be considered in light of any procedural unconscionability." (*Sanchez, supra,* 61 Cal.4th at p. 912). Of course even if an interest rate standing alone is insufficient, strictly speaking, to render a loan unconscionable, it can indicate the need for further scrutiny. Indeed, the interest rate may decide the outcome

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[4] See Prince, *supra,* 46 Hastings L.J. at p. 484.

[5] See *Restatement (Second) of Contracts, comment (c),* ["Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance. . . . Ordinarily, however, an unconscionable contract involves other factors as well as overall imbalance."].

once the court has considered factors like the period of the loan, the sophistication and financial circumstances of the borrowers,[6] the prevailing interest rate, and whether the contract was one of adhesion. (See *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926 ["a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect."].)[7] "The ultimate issue in every case is whether the terms of the

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[6] See *U.S. v. Bethlehem Steel Corp.* (1942) 315 US 289, 326-337 (dis. opn. of Frankfurter, J.):

> [I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? These principles are not foreign to the law of contracts.… More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of the other. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them. . . .

[7] See National Consumer Law Center, *Installment Loans: Will States Protect Borrowers From A New Wave of Predatory Lending?* (2015) at p. 12:

> A high APR is a key factor cited by courts in determining whether a consumer credit transaction is unconscionable. Other factors include: any disparity in bargaining power between the parties; inclusion of onerous terms in fine print or in unusually complex clauses; whether the terms were excessively one-sided; whether the consumer had the reasonable ability to repay the obligation; whether the transaction was likely to benefit the consumer; and whether the price was grossly excessive.

contract are sufficiently unfair, *in view of all relevant circumstances*, that a court should withhold enforcement." (*Sanchez, supra,* 61 Cal.4th at pp. 911–912 (emphasis added).)

Because unconscionability is an inherently contextual and fact-specific standard, finding that the interest rate on a set of loans, together with the remaining terms, makes the overall bargain unconscionable would not create a generally applicable, market-wide interest rate cap. CashCall's fear of "court-imposed interest rate caps" is unfounded. Rate caps function as a prima facie *rule*, while the doctrine of unconscionability is a fact-specific *standard*.[8] The threshold of unconscionability varies in each case depending on contextual factors such as a lack of meaningful choice, a borrower's

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[8] See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited* (2000) 79 Or. L. Rev. 23, 60 ["Rules state a determinate legal result that follows from one or more triggering facts. . . . Standards, in contrast, require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion."].) For an informative discussion of unconscionability's unique role as a *standard* as opposed to a *rule*, see M.P. Ellinghaus, *In Defense of Unconscionability* (1969) 78 Yale L.J. 757 [noting that as a "standard," unconscionability "constitutes an invitation to judicial creativity" and "awaits, and is designed to encourage, organic development by the courts."]; see also Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine* (2015) 66 Hastings L.J. 1011, at p. 1039 ["unconscionability is not a rigid rule-based doctrine but a standards-based doctrine vested in the discretion of the court. Rather than evoking fear of unconscionability as a rule devoid of principle, judges should embrace unconscionability's flexibility as a necessary counterweight to mindless formalism and rigidity."].

sophistication,[9] and whether the contract was adhesive.[10] (See generally Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context* (2006) Mich. St. L. Rev. 925.)

Cases in which demonstrably financially sophisticated borrowers actually bargained for the terms of the lending agreement,[11] for example, would require a higher degree of substantive unconscionability than is

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[9] See, e.g., *Quicken Loans, Inc. v. Brown* (2014) 236 W. Va. 12 [finding a loan to be unconscionable based in part on its exorbitant interest rates and the borrower's lack of sophistication: "This is not a close case. Plaintiff was a single mother to three children who earned $14.36 an hour and who had a well-documented poor credit history. She was not a sophisticated borrower."].

[10] See, e.g., *Muhammad v. County Bank of Rehoboth Beach* (N.J. 2006) 912 A.2d 88 [finding loan agreements with a 600% interest rate unconscionable based in part on concerns that the borrowers were operating under economic duress]; *Drogorub v. Payday Loan Store of WI, Inc.* (Ct. App. Wis. 2012), 345 Wis. 2d 847, at pp. *9-*11 [finding that the interest rate was "part of an unconscionable course of conduct, in which [the lender] preyed on a desperate borrower who had no other means of obtaining funds and rushed him into signing a contract without giving him the chance to ask questions or negotiate."].)

[11] See, e.g., *Barnes v. Helfenbein, Okla.* (Okla. 1976) 548 P.2d 1014, 1021 [rejecting borrower's claim of unconscionability on the basis that the borrower was an astute businesswoman with significant experience, sought out the loan herself, retained an attorney to explain the agreement, voluntarily signed it without any pressure or undue influence, and had plentiful viable alternatives to the loan]; *Bekins Bar V Ranch v. Huth* (Utah 1983) 664 P.2d 455, 463-464 [finding borrower to be an experienced and sophisticated businessperson, and thus holding the contract not unconscionable]; *Comdisco Disaster Recovery Serv., Inc. v. Money Management Sys., Inc.* (D. Mass. 1992) 789 F. Supp. 48, at p. 55 [holding rate of 18% not unconscionable when negotiated at arms-length by a sophisticated corporate borrower].

required of the Plaintiffs in this case, where unequal bargaining power produced a higher degree of procedural unconscionability. Conversely, in cases involving less experienced and sophisticated consumers, the threshold of unconscionability is lower.[12] Similarly, today a 20% APR for a $2,000 consumer loan is unlikely to cause the loan to be found unconscionable absent other, oppressive terms or circumstances. Yet that same 20% APR would very likely create a presumption of unconscionability in a $250,000 30-year residential mortgage loan.

II. SECTION 22303 DOES NOT PRECLUDE COURTS FROM CONSIDERING A LOAN'S INTEREST RATE WHEN ASSESSING WHETHER THE LOAN IS UNCONSCIONABLE.

"There is little question that courts have the authority to apply the

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[12] See, e.g., *Drogorub*, *supra*, 345 Wis. 2d 847 at p. *11 [finding loan unconscionable because the borrower was acting under economic duress, "needed money to purchase food and pay rent," and had minimal education or experience in taking out loans]; *Kelker v. Geneva-Roth Ventures* (Mont. 2013) 303 P.3d 777 [finding a loan agreement bearing a triple-digit interest rate unconscionable where the borrower was found to be an unsophisticated consumer acting under economic duress]; *Jones v Star Credit* (N.Y. Sup. Ct. 1969) 59 Misc. 2d 189 [expressing concern for the protection of the "uneducated and often illiterate individual ... against overreaching by the small but hardy breed of merchants who would prey on them"]; *Maxwell v. Fidelity Fin. Servs.* (1995) 184 Ariz. 82, 90 [finding that "[t]he apparent injustice and oppression" of a loan sold to an unsophisticated borrower at a "grossly-excessive price" presented a triable issue of unconscionability]; *Quicken Loans, Inc. v. Brown* (2014) 236 W. Va. 12 [finding a loan unconscionable based on its interest rate and the borrower's lack of sophistication]; *Muhammad*, *supra*, 912 A.2d at p. 98, fn. 4 [finding that because a "high degree of economic compulsion" "compel[led] [plaintiffs'] acquiescence to loans bearing exorbitant interest rates," the loans were unconscionable.]

unconscionability standard to interest rates." (Bender, *supra*, 31 Hous. L. Rev. at p. 736.) That is true even when, as here, the California Finance Lenders Law[13] sets no maximum interest rate on loans above $2,500. (Calif. Fin. Code, § 22303.) Jurists and scholars have long considered the question whether the lack of a usury cap precludes the application of the unconscionability doctrine – and the consensus answer is a resounding no.

By long-established principle, courts are not prohibited from weighing the interest rate in determining whether a loan is unconscionable, even when no usury statute applies. (See Arthur Corbin, *Corbin on Contracts* (1995) § 5.16 ["in the absence of a usury statute, a contract that requires the payment of a very high rate of interest will be enforced, up to the point at which 'unconscionability' becomes an operative factor."]; Bender, *supra*, 31 Hous. L. Rev. at p. 736 [expressing skepticism that the removal of usury caps barred unconscionability review][14]; Adriel D. Orozco, *The Judicial*

[13] On October 4, 2017, the California Finance Lenders Law was renamed the California Financing Law. See http://www.dbo.ca.gov/Licensees/Finance_Lenders/About.asp. In light of the timeframe at issue here, this brief uses the former name.

[14] Courts have long applied the unconscionability standard in cases involving business borrowers subject to the "corporate exemption" from usury laws. See Bender, *u*, 31 Hous. L. Rev. at p. 736 [citing "*Levin v. Johnson* (*In re Chicago Reed & Furniture Co.*) (7th Cir. 1925) 7 F.2d 885, 885 (holding that a court of equity would not enforce a harsh and oppressive contract despite a statute exempting corporations from state usury laws); *Metal-Built Prods., Inc. v. Bornstein* (*In re Metal-Built Prods., Inc*.) (Bankr. E.D. Pa. 1980) 3 B.R. 176, 178-179 (noting that the usury defense was not available to a corporate borrower, but concluding that the bankruptcy court can determine

Expansion of an Old Tool to Combat Predatory Lending in New Mexico (2016) 46 N.M. L. Rev. 191 [noting that "[c]ourts have the authority to apply the unconscionability doctrine to excessive interest rates . . . even if a legislatively mandated cap is not in place."]; National Consumer Law Center, *Consumer Credit Regulation* (2015) § 10.2.6.2, *Unconscionability* ["The fact that a state does not cap interest rates and charges does not mean that those charges cannot be found unconscionable. Indeed, the purpose of the unconscionability standard is to act as a check on practices that are not specifically prohibited by other law; otherwise, the unconscionability standard would have no role to play"]; *id.* at § 2.4.8.3, *Unconscionability As Outer Limit On Price of Credit* ["In the absence of legislatively prescribed usury ceilings, unconscionability can serve as an outer limit on the price of credit"].)[15]

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the conscionability of claims before it because equitable considerations are invoked when a creditor seeks a preferred position in bankruptcy); *First Mut. Corp. v. Grammercy & Maine, Inc.* (N.J. Super. Ct. Law Div. 1980) 423 A.2d 680, 687 (noting that courts have refused to enforce interest rates on grounds of unconscionability even though the borrowers were corporations not entitled to the usury defense)."]

[15] See also Raymond B. McConlogue, *Usury* (1928) 1 S. Cal. L. Rev. 253, at 255 ["Our early courts held that in the absence of statutory enactments no rate of interest was illegal unless so great as to be unconscionable."]; Garrard Glenn, *Oppressive Bargains: Equity and the Credit Market* (1933) 19 Virg. L. Rev. 6, 594, 598-599 ["the English Court of Chancery extended aid regardless of usury laws. The loan might not be within the usury statute at all, because the lender 'took a chance' as above explained, and still it could be set aside as oppressive; and the doctrine, as enforced in England, survived . . . the general repeal of the usury laws which took place in 1854."]; Marion Benfield, *Money, Mortgages, and Migraine – The Usury Headache* (1968)

Many courts of last resort, including state and international[16] supreme courts, have ruled on this issue, holding that the absence or removal of

19 Cas. W. Res. L. Rev. 819, at p. 883 [arguing that where no statutory rate cap governs, "this is not to say that there will be absolutely no control upon oppressive and overreaching lenders. It is most likely that courts will apply unconscionability concepts to set aside or scale down interest payments in the unusual case in which the lender has unjustifiably overcharged."]; Tracy A. Westen, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris* (1967) 55 Cal. L. Rev. 123, at p. 225 [noting that although certain states impose no maximum usury rate, "[c]ourts of equity still have the power to declare rates 'unconscionable' and reform the contract."]; Jarret C. Oeltjen, *Usury: Utilitarian or Useless?* (1975) 3 Fla. St. U. L. Rev. 167, at p. 175 ["After independence [from England], the courts found that where there were no statutory prohibitions, no interest was illegal *unless it was unconscionable and oppressive*."] (emphasis added); Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury* (1988) 15 Pepp. L. Rev. 2, at pp. 153-154 ["In the absence of an applicable legal standard, the common law of unconscionability forbade interest rates that shocked the conscience."]

[16] For an international comparison, consider the decision by the Supreme Court of the Philippines in the factually analogous case of *Trade & Investment Development Corporation of the Philippines v. Roblett Industrial Construction Corp*. The Central Bank of the Philippines suspended the statutory usury ceiling in 1983. However, the Philippines Supreme Court held in 2006 that despite the absence of a rate ceiling, courts could still find interest rates illegal if they were unconscionable:

> While the Court recognizes the right of the parties to enter into contracts and who are expected to comply with their terms and obligations, this rule is not absolute. Stipulated interest rates are illegal if they are unconscionable and the Court is allowed to temper interest rates when necessary. In exercising this vested power to determine what is iniquitous and unconscionable, the Court must consider the circumstances of each case.

Trade & Investment Development Corporation of the Philippines v. Roblett Industrial Construction Corporation, (G.R. No. 139290, 9 May 2006), text at fn. 10, http://sc.judiciary.gov.ph/jurisprudence/2006/may2006/G.R.%20No.%20139290.htm. (Permanent URL at https://perma.cc/ET9V-FWSV.)

interest rate caps does not preclude interest rates from being found unconscionable.[17] The New Mexico Supreme Court, for example, has concluded that despite the state legislature's removal of a maximum rate cap, a lender's interest rates may nonetheless be unconscionable. (*B&B, supra*, 329 P.3d at p. 670 ["Courts are not prohibited from deciding whether a contract is grossly unreasonable or against public policy simply because there is not a statute that specifically limits contract terms"].)[18] In so holding, the state's high court rejected the lender's "implicit assertion that by removing the interest rate cap, the Legislature was stating that there is no interest rate that would violate public policy." (*Id*. at p. 672.) Emphasizing that the lender's expert had conceded that this argument implied that "interest rates of 11,000 percent or even 11,000,000 percent would be acceptable under our statutory scheme," the court refused to "hold that the doctrine of

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[17] See, e.g., *Houghton v. Page* (1819) 2 N.H. 42, 44 [holding courts may strike unduly high interest rates even in the absence of any governing statutory authority, and observing "[c]ontracts . . . may be void at common law, because unconscionable and oppressive; and there seems to be nothing in the principles of this rule undeserving adoption."]; *Thomas v. Clarkson* (1906) 125 Ga. 72, 80-81 [finding "the common law . . . does not prohibit contracts for the payment of interest *where the sum agreed upon is not unconscionable*."] (emphasis added); *Bekins Bar V Ranch v. Huth* (Utah 1985) 664 P.2d at pp. 463-464 [holding that "[a]lthough the unconscionability provisions of neither the U.C.C. nor the [state statute] are applicable to the transactions at issue, a defense of unconscionability is nevertheless recognizable at common law"].

[18] For an extensive analysis of the New Mexico Supreme Court's opinion in *B&B*, see Orozco, *supra*, 46 N.M. L. Rev. 191.

unconscionability as it exists at common law and in [statute] does not apply to the extension of credit." (*Ibid.*) Adopting that rule, the court held, "would thwart New Mexico public policy." (*Ibid.*) The New Mexico Supreme Court in *B&B* joined a broad and diverse range of courts that have similarly found that even where no statutory maximum rate of interest applies, courts may nonetheless rule on an interest rate's unconscionability.[19]

Despite CashCall's considerable efforts to distinguish *B&B*, the New Mexico Supreme Court's reasoning neatly fits the instant case. First, that *B&B* was brought by the state Attorney General rather than private plaintiffs is irrelevant because the New Mexico statute under which the Attorney General brought the claim also explicitly provides private

[19] See, e.g., *Westchester Mortg. Co. v. Grand R. & I. R. Co.* (1927) 246 N.Y. 194, at p. 200 ["under the laws … parties may by agreement fix any rate of interest, but [] a court of equity will give relief against a contract which fixes a rate of interest which is unconscionable."]; *Drogorub, supra,* 345 Wis. 2d 847, at p. *5 [finding interest rate unconscionable even though under state law consumer credit transactions were "not subject to any maximum limit on finance charges"]; *Johnson v. Tele-Cash, Inc.* (D. Del. 1999) 82 F.Supp.2d 264, 278-279 [allowing borrower's claim alleging unconscionable interest rates to proceed "even though the State of Delaware d[id] not place a limit on the amount of interest or other charges a bank may charge"], *rev'd in part on other grounds by Johnson v. West Suburban Bank* (3d Cir. 2000) 225 F.3d 366; *Davis v. Cash for Payday, Inc*. (N.D. Ill. 2000) 193 F.R.D. 518, 521 [upholding claim of interest rate unconscionability even though Illinois state law had no applicable usury cap]; *James v. Nat'l Fin., L.L.C.* (Del. Ch. 2016) 132 A.3d 799 [finding a consumer loan bearing a triple-digit interest rate unconscionable despite the state's absence of a statutory usury cap]. Note that courts refer, essentially interchangeably, to the unconscionability of the contract or of the interest rate.

plaintiffs with a right of action against unconscionable trade practices.[20] Indeed, the court in *B&B* expressly stated that the state's incorporation of the UCC's unconscionability doctrine[21] "empowered the Attorney General *and private citizens* to fight unconscionable practices through the [statute]," and "ratified the court's inherent equitable power to invalidate a contract on unconscionability grounds under the UCC."[22] (*B&B, supra*, 329 P.3d at p. 674 (emphasis added).)

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[20] N.M. Stat. Ann. § 57-12-10 ["A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable"; "[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages."]; see also N.M. Stat. Ann. § 57-12-3 ["Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful."].

[21] The reasoning of *B&B* is all the more persuasive because New Mexico and California's unconscionability statutes contain precisely the same language. Both states incorporated Section 2-302 of the Uniform Commercial Code verbatim.

[22] Just as the Court *in B&B* found that the state's incorporation of the unconscionability doctrine "ratified the court's inherent equitable power to invalidate a contract on unconscionability grounds under the UCC," so too does the legislative history behind California's own incorporation of the doctrine demonstrate that Civil Code Section 1670.5 is merely "a restatement of the broad equity powers which the California courts have always assumed they held." *California Annotations to the Proposed Uniform Commercial Code*, submitted by the California Commission on Uniform State Laws, reprinted in Senate Fact Finding Committee on Judiciary, *Sixth Progress Report to The Legislature on The Uniform Commercial Code* (1961) pp. 41-42; see also *Perdue, supra*, 38 Cal.3d at p. 925 [explaining that Civil Code § 1670.5 "codified the established doctrine that a court can refuse to enforce an unconscionable provision in a contract."].

CashCall further attempts to distinguish *B&B* by pointing out that the lender's interest rates in *B&B* were considerably higher than CashCall's. But this point is similarly irrelevant, since the question before this Court is not whether CashCall's interest rates *in particular* are unconscionable, but rather whether interest rates *can* render a loan unconscionable under the FLL. For the purposes of answering the question certified to this Court, it makes no difference whether CashCall's interest rates are 95%, 135%, or even 1,500%, such as the loans in *B&B*. What *B&B* held – and what is at issue here – is that an interest rate (in the context of the remainder of the terms) can render a loan unconscionable. Put another way, the certified question asks the Court to determine whether there is *any* set of circumstances in which an interest rate may render a loan unconscionable. If the Plaintiffs had brought before this Court loans bearing an interest rate of "11,000 percent or even 11,000,000 percent,"[23] would the Court consider those rates a relevant factor in deciding whether the loans were unconscionable? If the answer is yes, then the answer to the question certified to this Court must also be yes.

Holding otherwise would contravene both statutory and common law. As the New Mexico Supreme Court found in *B&B*, "[c]ontrary to Defendants' contention that the repeal of the interest rate cap demonstrates a

[23] See *B&B*, *supra*, 329 P.3d at p. 672. Using the same legal theory advanced by CashCall here, the lender in *B&B* argued that rates that high would be acceptable under the State's statutory regime. CashCall cannot refute that its interpretation would lead to the same absurd result.

public policy in favor of unlimited interest rates, the statutes when viewed as a whole demonstrate a public policy that is consumer-protective and anti-usurious as it always has been. A contrary public policy that permitted excessive charges, usurious interest rates, or exploitation of naive borrowers would be inequitable." (*B&B*, *supra*, 329 P.3d at p. 674). It is similarly unlikely that the California legislature's removal of uniform and specific interest rate caps established a public policy in favor of unlimited interest rates. (See Bender, *supra*, 31 Hous. L. Rev. at p. 736.) It is much more consistent with the overall consumer-protective statutory framework of California law (see Calif. Dept. of Consumer Affairs, *Checklist of Significant California and Federal Consumer Laws* (2012), http://www.dca.ca.gov/publications/legal_guides/m-1.shtml) to interpret the Finance Lenders Law as allowing the terms of loans over $2,500 to be set in the first instance by market forces, while nonetheless equipping courts with the equitable safeguard of unconscionability to intervene *post hoc* in extraordinary circumstances[24] where the market fails to effectively regulate itself.[25] To rule

[24] See Susan McAllister, *Judicially Imposed Usury Penalties in the Absence of Statutory Penalties* (1990) 68 N.C. L. Rev. 1021, 1034 ["A judicial determination of unconscionability, as evidenced by the parties' unequal bargaining power, the nature and amount of the loan, and the interest rate itself . . . would allow [] courts the flexibility to provide judicial relief when necessary to protect vulnerable borrowers, thus effectuating the public policy against usury, while promoting the economic development and freedom of contract essential to a free market system."]

[25] See, e.g., Timothy Goldsmith and Nathalie Martin, *Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public's*

otherwise would be to grant the Defendant "a market free of those restraints against oppression and overreaching applicable to all other commercial operations" as "part of the common law governing all commercial transactions." (*Perdue, supra,* 38 Cal.3d at p. 943.) Such a radical interpretation would betray the historical function that the doctrine of unconscionability has played as an equitable safeguard and "social safety net to catch cases of contractual injustice that slip by formulaic contract defenses." (Schmitz, *supra,* 58 Ala. L. Rev. at p. 76.)

Nor does the fact that the California Department of Business Oversight never directly challenged CashCall's interest rates as illegal provide CashCall with a defense against claims that its loans are unconscionable. (See *Johnson v. Cash Store* (2003) 116 Wash. App. 833,

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Desires? (2014) 89 Chi. K.L. Rev. 1, 118 ["Thus far, market forces have had little to no effect on interest rates for most high-cost loans"]; Melissa Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability* (2012) 44 Loyola-Chi. L.J. 1, 36-37 ["[R]ecent contributions to economic theory suggest that the model of the self-regulating market is false.… Because standardized terms do not influence consumer behavior, drafters have little incentive to compete on the basis of those provisions."]; Steven Mercatane, *The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt* (2008) 53 S.D. L. Rev. 37, 48 ["Economic experts have increasingly realized that irrational consumer behavior invalidates rational economic models that are often used to explain market forces and strategies benefiting specialized interest groups over society as a whole"]; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability* (2003) 70 U. Chi. L. Rev. 1203, 1208 [arguing that the doctrine of unconscionability may be used as a balanced "market and government institutions" approach to correcting market failures].

846 [rejecting lender's claim that a finding of statutory compliance by the State's top lending regulator provides a *prima facie* defense against the debtor's claim of unconscionability].) In *Johnson v. Cash Store*, for example, the lender argued that its high-interest loans could not be unconscionable because the relevant state regulator had found that the loans "compl[ied] with the relevant statutes and were approved." (*Ibid*.) The court rejected this argument, however, and held that statutory compliance does not provide a *prima facie* defense to unconscionability, reasoning that the borrower "lacked a meaningful choice in the terms of the contract" and "did not understand the true ramification of entering into [the] agreement." (*Ibid*.)

Other courts considering the same issue in analogous circumstances have reached the same conclusion, rejecting the lender's claim that statutory and regulatory compliance provided a defense against the plaintiff's claim of unconscionable interest rates. (See, e.g., *Johnson v. Tele-Cash* (D. Del. 1999) 82 F.Supp.2d 264, 278-279 [holding that although "the State of Delaware does not place a limit on the amount of interest or other charges a bank may charge," the borrower's claim could proceed because he "alleged that he was charged a rather exorbitant rate of interest," and "the court cannot conclude (given the present record) that (1) the defendants did not abuse their superior bargaining power by (2) drafting terms which were so one-sided as to be oppressive."], *rev'd in part on other grounds by Johnson v. West Suburban Bank* (3d Cir. 2000) 225 F.3d 366.)

In the present case, too, Plaintiffs lacked a meaningful choice[26] in the terms of their contract with CashCall, and CashCall used its bargaining position to impose severely one-sided terms. Thus, the Department of Business Oversight's statements and inaction do not provide CashCall a defense against Plaintiffs' unconscionability claim.

III. CASHCALL'S INTERPRETATION OF SECTION 22302 WOULD PRODUCE ABSURD RESULTS AND CONTRAVENE THE HISTORICAL FUNCTION OF THE UNCONSCIONABILITY DOCTRINE.

Excluding CashCall's interest rates from judicial scrutiny under the unconscionability doctrine would produce unfair and absurd results in direct contravention of the legislative intent expressly stated in Civil Code section 1670.5 and Financial Code section 22302. Furthermore, unconscionability's historical roots as an equitable doctrine, as well as its explicit incorporation into California statute, demonstrate that the doctrine is not excessively malleable and that its application to CashCall's interest rates would not unduly intrude upon legislative policymaking, freedom of contract, or the free market.

A. The Equitable Doctrine of Unconscionability Has Historically Been Used As A Flexible Tool To Strike Unfair Contract Terms.

Legal scholars and philosophers have for millennia noted the critical

[26] See Geoffrey Giles, *The Effect of Usury Law on the Credit Marketplace* (1978) 95 Banking LJ. 527, 529 [explaining how the interest rates of small-dollar loans are inelastic because low-income consumers desperate for cash will enter into the loans regardless of the costs].

discretionary role that equity plays in the pursuit of justice.[27] The Aristotelian and Thomistic notion of equity informed the early development of western philosophy and legal history and ultimately came to be manifested in the English Courts of Chancery, which acted "only when justice cried out for a solution that was not available within the procedural strictures of law."[28] Chancellors presiding over courts of equity historically provided flexible remedies to build "a protective jurisdiction of *conscience* as a refuge for those unfitted to a world of hard bargaining."[29] Equity has therefore been said to "operate on a higher moral plane than law,"[30] precisely because of its flexibility.[31]

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[27] See, e.g., Aristotle, *Nicomachean Ethics* (c. 350 B.C.E.), trans. W.D. Ross (1908), Bk. V, Ch. 10 [describing the flexible nature of equity as "a correction of law where it is defective owing to its universality"], http:/classics.mit.edu/Aristotle/nicomachaen.html; Thomas Aquinas, *Summa Theologica* (c. 1265-1274), Benziger Bros. ed. (1917), Part II, Q. 120, *Of "Epikeia" or Equity* ["if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good…. In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of 'epikeia' which we call equity."], https://en.wikisource.org/wiki/Summa_Theologiae/Second_Part_of_the_Second_Part/Question_120; see also Dando Cellini and Barry Wertz, *Unconscionable Contract Provisions: A History of Unenforceability From Roman Law To The UCC* (1968) 42 Tul. L. Rev. [detailing the historical roots of the doctrine of unconscionability].

[28] Emily Sherwin, *Law and Equity in Contract Enforcement* (1991) 50 Md. L. Rev. 253, 265.

[29] Schmitz, *supra*, 58 Ala. L. Rev. at 81.

[30] Sherwin, *supra*, 50 Md. L. Rev. at 254.

[31] Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law* (1996) 59

Before its explicit incorporation into law through adoption of the UCC, the doctrine of unconscionability had historically resided in the realm of equity,[32] and had thus enjoyed the flexible application to which equitable remedies are entitled.[33] Indeed, Justice Harlan Fiske Stone once noted that the concept of unconscionability forms the foundation for "practically the whole content of the law of equity."[34] The philosophical underpinnings of the unconscionability doctrine date at least "back to the Roman doctrine of *laesio enormis*, also called the fair exchange doctrine, which invalidated grossly unfair contracts. Some have suggested unconscionability may have been imported into the common law tradition specifically as a response to high interest rates."[35] Ultimately, the inherent flexibility of unconscionability

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Law and Contemporary Problems 263, 264 ["A full explanation of Aristotle's . . . writings demonstrates that a judge's use of equity is a necessary and stabilizing feature of the application of universal laws to particular cases. As such, equity does not invoke the mere vicissitudes of a judge's conscience; rather, equity accounts for the particular facts of any given situation and applies general laws to a specific case."]; *see also Missouri v. Jenkins* (1990) 495 U.S. 33, 78 ["equity has been characterized by a practical flexibility in shaping its remedies"].

[32] Corbin, *supra*, at § 5.15 ["In the last part of the 20th century the doctrine of unconscionability has been borrowed from equity by law."]

[33] *See* Schmitz, *supra*, 58 Ala. L. Rev. at pp. 79-84.

[34] Corbin, *supra*, at § 5.15 n. I [quoting Harlan Fiske Stone, Book Review, 12 Colum. L. Rev. 756, 756 (1912)].

[35] Christopher Peterson, *Federalism and Predatory Lending: Unmasking the De- regulatory Agenda,* 78 Temp. L. Rev. 1, 37-38 (2005); see also K.L. Fletcher, *Review of Unconscionable Transactions* (1973) 8 U. Queensland L.J. 45, 48 [noting that the English Court of Chancery developed the

was reaffirmed when it was incorporated in Section 2-302 of the UCC. In fact, "unconscionability's incorporation of flexible fairness norms is what led Professor Karl Llewellyn, the Chief Reporter and architect of Article 2, to describe this section as 'perhaps the most valuable section in the entire Code.'" (Schmitz, *supra*, 58 Ala. L. Rev. at p. 85).[36]

CashCall criticizes the doctrine of unconscionability as too uncertain, but it is precisely the doctrine's flexibility that provides its value.[37] (See Richard A. Epstein, *Unconscionability: A Critical Reappraisal* (1975) 18 J.L. & Econ. 293, 304 ["One of the strengths of the unconscionability doctrine is its flexibility, an attribute much needed because it is difficult to identify in advance all of the kinds of situations to which it might in principle apply"].) CashCall's overly rigid and formalistic interpretation of unconscionability runs afoul of the doctrine's extensive historical treatment

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unconscionability doctrine to police transactions that eluded usury regulation].

[36] Quoting *Memorandum by K.N. Llewellyn replying to the Report and Memorandum of Task Group 1 of the Special Comm. of the Commerce and Indus. Ass'n of N.Y., Inc., on the Uniform Commercial Code* (Aug. 16, 1954), in 1 State of N.Y., Report of the Law Revision Commission 1954 and Record of Hearing on the Uniform Commercial Code (1954) 106, at p. 121.

[37] See *Ellinghaus, supra,* 78 Yale L.J. at pp. 814-815 [recognizing that while the unconscionability doctrine is admittedly vague, "we cannot do without such regrettable vague standards."]; see also Gerald T. McLaughlin, *Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles* (1992) 14 Loy. L.A. Int'l & Comp. L.J. 439, 444, fn.26 [noting that the drafters of UCC Section 2-302 never intended to define unconscionability and purposefully left the term indeterminate].

as a flexible "vehicle for protecting fairness and justice." (Schmitz, *supra*, 58 Ala. L. Rev. at p. 74.) As Professor Amy Schmitz has explained:

> The problem with this increasing rigidity is that it ignores the history and philosophy of unconscionability. Unconscionability's value derives from its appropriately contextual concern for societal fairness norms. Its story of evolutionary survival from Aristotelian ideals and natural law norms to codification in the Uniform Commercial Code (U.C.C.) reveals the doctrine's continual recognition as a "safety net" for flexibly protecting societal values and norms of morality, fairness, and equality that cannot be intellectualized. These values and norms are not mathematical. Instead, they rely on context, common sense, and conscience.

(*Id.* at p. 75.)

CashCall's assertion that unconscionability is an unworkable standard as applied to interest rates is belied by the doctrine's widespread application to consumer lending both within the United States and internationally.[38] Many states besides California apply a statutory unconscionability standard to consumer lending.[39] Numerous other countries do as well. (See Bender,

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[38] The United Nations *Guidelines for Consumer Protection*, to which the United States is a signatory, provides that member states should protect consumers "from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts *and unconscionable conditions of credit* by sellers." (United Nations Guidelines for Consumer Protection, Guideline #26 (2016) (emphasis added), http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf. (Permanent URL at https://perma.cc/FXN3-FCBY.)

[39] Those states include Alabama (Ala. Code, § 5-19-16); Colorado (Colo. Rev. Stat. Ann., §5-5-109(1),); Idaho [Idaho Code, § 28-45-106(1), (3)]; Indiana [Ind. Code, § 24-4.5-5-108]; Iowa [Iowa Code, § 537.5108 (1), (4), (8)]; Kansas [Kan. Stat. Ann., § 16a-5-108(1), (3)]; Louisiana [La. Stat. Ann., § 9:3551]; Maine [Me. Rev. Stat. Ann., tit. 9-A, § 5-108(1), (3)]; Oklahoma [Okla. Stat. Ann., tit. 14A, § 5-108(1), (3)]; South Carolina [S.C. Code, § 37-

supra, 31 Hous. L. Rev. at p. 781 ["Australia, the Bahamas, Belgium, Canada, England, Germany, Mexico, New Zealand, and Switzerland are among the jurisdictions that regulate interest rates using an unconscionability standard."]; see also Comment, *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform for Usury Laws* (1955) 65 Yale L.J. 1, 105-110 ["The English Moneylenders Act of 1900 provides that the courts may reopen any loan made by a professional moneylender and reduce the interest rate to what it considers a reasonable rate if, in view of all the circumstances, the court finds the interest and all other charges 'excessive' and the terms of the loan 'harsh and unconscionable.' The English experience indicates that such a standard is a workable one which need not create undesirable uncertainty in loan transactions."].)

In California and elsewhere, the doctrine of unconscionability has maintained its flexibility as an equitable principle despite repeated attempts to reform the doctrine in a more formalist way.[40] Indeed, when the drafters

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5-108(1), (4), (8), (9)]; Utah [Utah Code Ann., § 70C-7-106(1), (3)]; West Virginia [W. Va. Code, § 46A-2-121(1), (3)]; Wisconsin [Wis. Stat. Ann., § 425.107 (1)-(4)]; and Wyoming [Wyo. Stat. Ann., § 40-14-508]. Despite the application of the unconscionability doctrine to interest rates in these states, the consumer lending industry apparently remains sufficiently profitable to continue operating in each of them.

[40] See Schmitz, *supra*, 58 Ala. L. Rev. at p. 84 ["This flexible doctrine has survived despite dominance of formalism and dogma denouncing inquiry into the fairness of exchange. It also has remained flexible in the Uniform Commercial Code (U.C.C.), despite proposals for its containment. Indeed, it continues to allow courts to grant relief from contracts that appear consensual but are not in fact the products of real choice."]; *id.* at p. 115 ["Efficiency

of the UCC chose to reassess and revise the provisions of Article 2, they did not reject the doctrine as an affront to freedom of contract, but rather chose to affirm the "generality, flexibility, and safety net quality of unconscionability, despite proposals for containment."[41] The drafters revising Article 2 were fully aware that for decades courts had been using the doctrine to strike or reduce unfair price terms. However, rather than let this judicial intervention dissuade them, the drafters instead chose to emphatically embrace the doctrine based on their findings that the doctrine "had not proven to be the unruly and fearsome creature that critics first anticipated."[42] Indeed, the ABA group tasked with studying unconscionability ultimately reported that "[t]here is little evidence that these policies have interfered with commerce by creating an unacceptable level of uncertainty for the parties or administrative costs for the courts. Rather, the policies appear to establish a commendable balance between facilitation (efficiency) and regulation (fairness) in contracts."[43] Those findings

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must be balanced with fairness in contract law. Unconscionability has survived because it boosts the legitimacy of contract law by protecting philosophical and historical virtues of justice and fairness."]

[41] Schmitz, *supra*, 58 Ala. L. Rev. at p. 84.

[42] Prince, *supra*, 46 Hastings L.J. at p. 464.

[43] Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, *Committee on the Uniform Commercial Code, An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group* (1991) 16 Del. J. Corp. L. 981, 994. The task force also found that "despite early criticism of § 2-302, the courts have exercised restraint in identifying" procedural and

confirmed the sentiments of earlier scholars like Roscoe Pound,[44] Karl Llewellyn,[45] and Justice Benjamin Cardozo, whose writings argued that the exercise of judicial discretion is something to be embraced rather than feared:

> The judge … is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

(Cardozo, *supra*, *Nature of the Judicial Process*, at p. 141.)

B. California's Incorporation Of The Unconscionability Doctrine Into Statute Evinces A Clear Policy Preference In Favor Of Judicial Reformation Of Contracts Bearing Oppressive Terms.

The history of California's own embrace and codification of the unconscionability doctrine into law further demonstrates that the doctrine was intended to be used as a flexible tool to ensure contractual fairness.[46] When the California Legislature enacted Article 2 of the Uniform Commercial Code in 1962, it initially chose to omit Section 2-302 of the Code "because of concerns that it would give the courts too much power to second-guess the parties under the guise of policing against 'unfair' bargains." (Prince, *supra*, 46 Hastings L.J. at 490; accord, *California State*

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substantive unconscionability. *Id.* at p. 993.

[44] See generally Roscoe Pound, *The Decadence of Equity* (1905) 5 Colum. L. Rev. 1, pp. 20-35.

[45] See generally Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 Colum. L. Rev.

[46] See *Perdue*, *supra*, 38 Cal. 3d at pp. 925-927.

Bar Committee on the Uniform Commercial Code, The Uniform Commercial Code (1962) 37 Cal. St. B.J. 117, 135-136.) However, after seventeen years of continued debate[47] and observing how the doctrine was applied in other states, the California legislature ultimately overcame these concerns in 1979 when it incorporated the language of Section 2-302 of the UCC verbatim into section 1670.5 of the Civil Code.[48] The legislature subsequently adopted the UCC's Official Comments to Section 2-302 to aid in interpreting the unconscionability statute.[49]

CashCall's contention that subjecting its loans' price terms (i.e.,

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[47] See generally Comments, *A Reevaluation of the Decision Not to Adopt the Unconscionability Provision of The Uniform Commercial Code in California* (1970) 7 UCLA L. Rev. 623; Peter D. Roos, *The Doctrine of Unconscionability: Alive and Well in California* (1972) 9 Cal. W.L. Rev. 100 [detailing "the early [unconscionability] case law and the legislative history behind the initial failures to adopt Section 2-302"]; Charles H. Hurd and Phillip L. Bush, *Unconscionability in California: A Matter of Conscience for California Consumers* (1973) 25 Hastings L.J. 1, 2, fn.5 [discussing repeated, failed legislative attempts to incorporate unconscionability into California statute in the early 1970s]; Prince, *supra*, 46 Hastings L.J. at pp. 491-492 [discussing the history of California's ultimate adoption of the unconscionability doctrine into statute].

[48] *Prince*, *supra*, 46 Hastings L.J. at 464-465; see also Letter from Assemblyman Jack R. Fenton, Chairman, Assembly Judiciary Committee, to Edmund G. Brown, Jr., Governor of California (Sept. 13, 1979) [explaining that the bill would make "all unconscionable contracts voidable and also provides that unconscionable provisions in a consumer contract are unlawful. This is designed to protect the uninformed consumer who enters into a patently unreasonable contract with an opportunity to void the agreement and seek legal remedies against the unscrupulous seller"].

[49] See Cal. Civ. Code Section 1670.5; Prince, *supra*, 46 Hastings L.J. at p. 492.

interest rates and repayment terms) to unconscionability review would unduly interfere in legislative and economic policy-making is belied by Civil Code section 1670.5's express language and legislative history. That provision unambiguously provides courts the authority to police contracts for unfairness. The legislative committee analysis states that the unconscionability provision "is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable." (Cal. Civ. Code Section 1670.5 (1979) (West Ann. 2014).). The committee analysis provides further that "the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." (*Ibid*.) If the legislature truly believed that courts striking down certain types of price terms as unconscionable amounted to improper economic policy-making, then it could and would have stated as much when it adopted section 1670.5. Instead, the legislature explicitly granted courts the broad remedial power to strike or limit "any" clause of a contract it finds unconscionable, which necessarily includes interest rates.

Similarly, it would be improper to infer, without any express statutory affirmation, that the legislature's removal of interest rate caps on loans above $2,500 was intended to render the doctrine of unconscionability inapplicable

to interest rates. (See Bender, *supra,* 31 Hous. L. Rev. at p. 736 ["It is unlikely that legislatures repealing usury intended interest pricing to be free from the now established unconscionability standard of fairness review, at least without an express statement to that effect"].) If the legislature had intended section 22303 of the Finance Lenders Law to render interest rates irrelevant in determining a loan's unconscionability, it had the opportunity to say so. As the court found in *B&B*:

> Although there is not a specific statute specifying a limit on acceptable interest rates for the types of signature loans in this case, in addition to our caselaw addressing unconscionability, the Legislature has empowered courts to adjudicate cases involving claims of unconscionable trade practices.

(*B&B, supra,* 329 P.3d at p. 671].)

Likewise, in California the legislature has expressly provided courts with the power to weigh the unconscionability of any contract term, including interest rates. (See Civ. Code, § 1670.5 [explaining that courts may "strike" or "limit" "any single clause or group of clauses" "so as to avoid unconscionable results"]; see also Fin. Code, § 22303 ["Unconscionable Contracts"] ["Section 1670.5 of the Civil Code applies to the provisions of a loan contract that is subject to this division"].)

Furthermore, the unconscionability doctrine's history and incorporation into California statute evinces the legislative recognition that there is nothing inconsistent with allowing interest rates to be set by the free market, while nonetheless equipping courts with the equitable power to

intervene in cases of market failure.[50] Inherent in Section 1670.5 is the historical[51] understanding that freedom of contract is not absolute, but rather must be tempered by equitable concerns of fairness.[52] When the legislature removed the interest rate cap on loans above $2,500, surely it did not "impliedly repeal historical legal principles and prohibit this Court from exercising its duty to withhold relief when the particular circumstances disclose an unconscionable arrangement." (*U.S. v. Bethlehem Steel, supra,* 315 U.S. at pp. 334-335 (dis. opn. of Frankfurter, J.).) Rather, the legislature removed the cap recognizing that the statute's unconscionability provision

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[50] Posner, *supra*, 24 J. Legal Stud. at p. 318.

[51] Roscoe Pound, *Liberty of Contract* (1909) 18 Yale L.J. 454, 482 ["From the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors."]

[52] Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law* (1999) 33 New Eng. L. Rev. 265, 304 ["Freedom of contract's reign during the early part of the twentieth century was never without limits. Justice Cardozo recognized freedom of contract as just one of many competing values that contract law attempts to appease"]; Epstein, *supra*, 18 J.L. & Econ. at p. 315 [freedom of contract, if "properly understood," does not require a court to enforce every contract brought before it]; see also Morris R. Cohen, *The Basis of Contract* (1933) 46 Harv. L. Rev. 553, 587:

> Usury laws have recognized that he who is under economic necessity is not really free. To put no restrictions on the freedom to contract would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will "voluntarily" enter under economic pressure…. Regulations, therefore, involving some restrictions on the freedom to contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.

would remain as an equitable safeguard against the excesses of an unfettered free market.[53] To infer otherwise, absent express statutory authorization, would be to hold that the legislature's removal of interest rate caps "envisioned not only a free and competitive market, but one freer than any other market." (*Perdue*, *supra*, 38 Cal.3d at p. 943.) As this Court held in *Perdue*:

> [P]rotection against unconscionable contracts, has never been thought incompatible with a free and competitive market. Defendant is really asking for a market free of those restraints against oppression and overreaching applicable to all other commercial operations.

(*Ibid*.) Similarly, as the court explained in *B&B*:

> The legislature's incorporation of the UCC's unconscionability provision evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits.

(*B&B*, *supra*, 329 P.3d at p. 672.) Here, too, California's incorporation of Section 2-302 and the provision's subsequent application to the Finance Lenders Law evinces a legislative understanding that it is properly the role of courts to intervene in lending contracts where the consumer credit market

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[53] See, e.g. Oeltjen, *supra*, 3 Fla. St. U. L. Rev. at p. 233 ["The policy of adopting unconscionability or a sliding scale as our norm is to prevent those few transactions in which we believe the rate charged is so far beyond what we deem reasonable that it cannot be sanctioned, while permitting the market to operate in a relatively unfettered fashion. Unconscionability offers additional flexibility over the other alternatives."]

is found not to be truly free.

Regulating consumer credit pricing with an unconscionability standard is an important complement to a fixed statutory rate cap, in part because it provides a final guard against evasion[54]—particularly with a statutory construct like California's that regulates $2,499 loans differently from $2,500 loans. As Professor Stephen Bender wrote in his extensive article on the topic, "Because usury regulation typically recognizes a violation only when certain discrete elements are present, lenders can skirt usury by structuring transactions so as to avoid one or more of these elements. Evasion devices cannot elude the unconscionability standard, which operates in the law of contracts generally." (Bender, *supra*, 31 Hous. L. Rev. at pp. 739-740.)

Contrary to the specter of market inefficiency suggested by CashCall, applying the doctrine of unconscionability to interest rates not governed by a statutory rate cap serves as a correction of the market failures that plague certain consumer credit markets. As Professor Schmitz has observed:

> [E]xcessively high prices relative to goods or services purchased often indicate market failures. Courts, therefore, may apply unconscionability as a substitute for market correction prevented by sellers' monopoly power and purchasers' high information costs. In this way,

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[54] Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302* (1981) 67 Cornell L. Rev. 1, at p. 28 [praising the discretionary nature of the unconscionability standard, since "legislators cannot successfully draft legislation to encompass unforeseen circumstances"].

> unconscionability provides courts with means for checking whether contracts are truly products of contractual liberty. It also allows courts to ensure that efficient exchanges are sufficiently equal in value to prevent parties from being unjustly enriched at the others' expense.

(Schmitz, *supra*, 58 Ala. L. Rev. 105-106.) When standard-form, boilerplate contracts of adhesion[55] raise pervasive questions of lack of mutual assent, asymmetrical access to information, and an absence of meaningful choice,[56] market forces may fail to produce a socially desirable result.[57] The doctrine

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[55] See James Stedronsky, *Unconscionability and Standardized Contracts* (1975) 5 N.Y.U. Rev. L. & Soc. Change 66, 67 [contending that unconscionability "provides courts with a framework which allows them to examine standardized contracts as public instruments and deal with them accordingly. Properly applying § 2-302, courts need not be afraid to use broadly the powers recently granted them by many state legislatures in consumer protection acts."]; see also Morris, *supra*, 46 Harv. L. Rev. at p. 589 ["Naturally, standardized contracts, like other laws, serve the interests of some better than those of others; and the question of justice thus raised demands the attention not only of legislatures but also of courts that have to interpret these standard forms . . . ."]

[56] See, e.g., *Williams v. Walker-Thomas Furniture Co.* (D.C. Cir. 1965) 350 F.2d 445, 449 ["In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power"].

[57] See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending* (2002) 80 Tex. L. Rev. 1255, at pp. 1297-1298:

> One also would expect that competition among predatory lenders would drive down the price of loans. Again, information asymmetries prevent this from occurring. The typical borrowers who commit to predatory loans often believe that they are ineligible for any credit. Frequently, they are not actively looking for loans even though they have pressing financial needs. These borrowers have little or no experience with lenders and loan terms, and do not know how to shop for credit. The arrival of a lender on their doorstep just when they are facing a daunting financial obligation is a "dream come

of unconscionability is designed to respond precisely to market failures such as these, where unequal bargaining power produces oppressive results. (See generally Frank Darr, *Unconscionability and Price Fairness* (1994) 30 Hous. L. Rev. 1819, 1833 [describing how unconscionability doctrine serves to rectify unfairness and inefficiency caused by market failures]; Prince, *supra*, 46 Hastings L.J. at p. 480 ["The equitable roots of unconscionability reflect a traditional concern for relatively weaker parties that are more likely to be taken advantage of in the bargaining process."].)

C. CashCall's Interpretation Of The Finance Lenders Law Contravenes The Historical Purpose Of Unconscionability And Would Force Courts To Enforce Inequitable Contract Terms.

A ruling in favor of CashCall would depart from the historical jurisprudence of unconscionability by leaving courts powerless to remedy contracts brought before them that bear grossly unfair terms. Although the

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> true." They leap at the chance to obtain the money and look no further, fearful that the opportunity to borrow is fleeting. As a result, they do not look beyond the lenders who approach them first.

See also Jeannie Patterson & Gerard Brody, *"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models* (2015) J. Consumer Policy 331, at p. 338 ["Where consumers are acting under constraints of reduced choice or are dealing with products that fall well outside their personal experience or expertise, the inevitable information asymmetry between businesses and consumers may be exponentially increased. Consumers in these circumstances may be in a position of relative vulnerability because they do not have access to information relevant to the transaction or because they are unable to use or act on that information."].

governing statutes provide clear authority for a court to treat interest rates just as it would any other price term in determining unconscionability, to the extent that this Court may consider the statutes ambiguous, "consideration should be given to the consequences that will flow from a particular interpretation." (*People v. Valencia* (2017) 3 Cal.5th 347, 358.)

Taken to its logical end, CashCall's interpretation would require courts to enforce any and all interest rates on loans above $2,500, no matter how extreme. (See *B&B*, 329 P.3d at p. 672.) As noted, using the same legal theory advanced by CashCall here, the lender in *B&B* argued that even rates as high as 11,000 and 11,000,000 percent would be acceptable under the State's statutory regime. CashCall's interpretation would lead to the same absurd result. Adopting that interpretation would signal to lenders that they may charge whatever obscenely high interest rates they can manage to convince borrowers to agree to, and courts will be powerless to provide any remedy. This grossly inequitable interpretation not only ignores unconscionability's historical role of protecting vulnerable consumers against excessively rigid and formalistic contract enforcement,[58] but also

[58] Schmitz, *supra*, 58 Ala. L. Rev. at p. 90; see also Carol B. Swanson, *Unconscionability Quandary: UCC Article 2 and the Unconscionability Doctrine* (2001) 31 N.M. L. Rev. 359, at pp. 386-388 ["In essence, the unconscionability doctrine provides a safety net, one that voids contracts not quite meeting the more rigid requirements of other policing devices such as duress and misrepresentation."]

plainly contradicts the California legislature's express intent that courts "police explicitly against the contracts or clauses which they find to be unconscionable." (Cal. Civ. Code § 1670.5; accord, Fin. Code § 22302.)

Just as the New Mexico Supreme Court in *B&B* rejected the lender's contention "that the repeal of the interest rate cap demonstrates a public policy in favor of unlimited interest rates," so this Court should reject CashCall's assertion that the absence of a specified interest rate cap under section 22303 precludes courts from considering an interest rate's conscionability under section 22302.

IV. THE LOANS MADE BY CASHCALL BEAR THE HALLMARKS OF UNCONSCIONABILITY.

The availability of the unconscionability standard in this case is far from hypothetical. The loans at issue bear interest rates that, considered in context, could lead a court to reasonably determine that they are unconscionable.

A. Excessive Interest Rates Charged Over An Extended Term Disrupt The Usual Alignment Of Interests Between Lender And Borrower, Unduly Harming Unsophisticated Consumers.

Responsible lenders seek to make loans their customers can afford to repay in accordance with the loan terms. Of course, responsible lenders also set their interest rates at a level that allows them to absorb losses in case this assessment proves wrong. In a properly functioning market, the lender is incentivized to make the assessment and get it right. This process aligns the

interests of lender and borrower in the borrower's success in repaying the loan; the lender succeeds when its borrowers succeed. (See National Consumer Law Center, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016) at pp. 5-6.)[59] CashCall's approach was different; it anticipated that a large proportion of its borrowers would default and set its rates at a level that will enable the company to profit anyway.

Interest rates as high as CashCall's here, charged over a period of years, turn the incentives that typically align the lender's interests with the borrowers' on their head, generating profits even on defaulted loans. CashCall aimed to sign up large numbers of borrowers—using aggressive direct-response television advertising to encourage viewers to call for a loan (Plaintiffs' Opening Brief on the Merits at p. 3)—knowing that a large proportion would be unable to make all of the loan payments over the life of the loan. CashCall fully admits to a business model that assumed that four in ten customers would default. (Answer Brief on the Merits at p. 12.)

The interests of CashCall and its borrowers were misaligned. For example, CashCall's loan of $2,600 at 96% for a 42-month loan yielded total loan payments of $9,150 over the life of the loan. (*De la Torre v. CashCall* (N.D. Cal. 2014) 56 F.Supp.3d 1073, 1085.) CashCall earned a profit on such

[59] At https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans /report-misaligned-incentives.pdf

a loan as long as the borrower did not default until sometime after 19 months of payments—less than halfway through the loan term. (*Ibid*.) A borrower who defaulted after 36 payments paid $7,796—three times the amount borrowed—yet still owed more than $1,000, and could be sued for that amount, plus interest, late fees and other costs. (See NCLC, *Misaligned Incentives, supra*, at pp. 10, 40-41; see also National Consumer Law Center, *Installment Loans: Will States Protect Borrowers From A New Wave of Predatory Lending?* (2015).[60]) This distorted outcome is the consequence of the loan's design. As the Consumer Financial Protection Bureau (CFPB) has observed:

> The high-cost feature of covered longer-term loans also greatly reduces the lender's incentive to determine whether a loan payment is within the consumer's ability to repay. When a loan has a high total cost of credit, the total revenue to the lender, relative to the loan principal, enables the lender to profit from a loan, even if the consumer ultimately defaults on the loan.

(*Payday, Vehicle Title, and Certain High-Cost Installment Loans, A Proposed Rule by the Consumer Financial Protection Bureau* (July 22, 2016) 81 FR 47863, 47989.)

Interest rates of over 90% over an extended loan term enabled CashCall to knowingly make loans a large proportion of its borrowers could not afford to repay. The lender succeeded when a large proportion of its borrowers failed. This skewed outcome would not have been possible absent

[60] At https://www.nclc.org/issues/installment-loans.html

very high interest rates charged on relatively large loans over a period of several years.

B. The Interest Rates On Cashcall's Loans, Considered In Context, May Render Those Loans Unconscionable.

Just as this Court in Perdue held that the bank's profit margins on NSF check fees "may not be automatically unconscionable, but [] indicate the need for further inquiry," so too CashCall's high interest rates here indicate the need for further examination as to unconscionability. (Perdue, supra, 38 Cal.3d at p. 928; see also Drogorub, supra, 347 Wis. 2d 847 at *11 [holding that while the "interest rate [was] not per se unconscionable, it [was] unconscionable under the facts of this case."].)

Consideration of the interest rates in this case, in context, could lead a court to find the loans at issue unconscionable under section 22302. The annual percentage rates CashCall charged on the $2,600 loans at issue here exceed by approximately four times the annual percentage rates allowed by the Finance Lenders Law for $2,499 loans. (See Fin. Code, § 22303.) These were not loans made for short periods of time, where the total cost burden on the borrower would be less severe, or loans made to sophisticated borrowers who would carefully have weighed the risks and rewards of other options before going forward. Instead, these were loans made to generally unsophisticated consumers in financial distress, forty percent of whom were expected to default. Those who managed not to default "paid back" up to

four times the amount originally borrowed. And in order to attract these customers, CashCall employed a bait-and-switch: it advertised loans "up to" $2600 but then steered consumers who sought loans of less than $2,500 into borrowing amounts over that line in order to avoid interest rate limits. And it did not tell borrowers why it was doing so. (See Calif. Dept. Bus. Oversight, CashCall Pays Nearly $1 Million of Restitution to California Customers Under DBO Settlement: Firm Misled and Overcharged Customers (Nov. 18, 2015) [noting that under "alleged scheme," "CashCall used deceptive sales pitches and marketing practices to dupe consumers into taking out personal loans of $2,500 or more even though the customers didn't need or want to borrow that much money."].)[61]

A court might well find those practices contrary to the dictates of conscience.[62]

CONCLUSION

The interest rate on consumer loans of $2,500 or more can, in the context of the other terms and circumstances of the loans, render the loans

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[61] At http://www.dbo.ca.gov/Press/press_releases/2015/CashCall%20 Restitution% 20Announcement%2011-18-15.pdf

[62] Such a finding would be in line with the conscience of the nation: every time that voters have been given the opportunity, they have voted to set or keep interest rates on personal loans at 36% per year or less. (See NCLC, *Why 36%*, *supra*, at p. 4; Center for Responsible Lending, *Shark-Free Waters* (Aug. 2016 [updated Sept. 2017]) at p. 2 [noting referendum victories in South Dakota, Arizona, Montana and Ohio]), http://www.responsible lending.org/sites/default/files/nodes/files/research-publication/crl-shark-free-waters-aug2016.pdf.)

unconscionable under section 22302 of the California Financial Code. Indeed, here it likely does. This Court should, therefore, answer the Ninth Circuit's certified question in the affirmative.

Dated: February 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief has been prepared in 13-point Times New Roman font, and the word count is 12,676 words.

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in San Francisco, California, and not a party to the within action. By business address is 125 Cambon Drive, San Francisco, CA 94132.

On the date set forth below, I caused a copy of the following to be served:

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE PUBLIC GOOD LAW CENTER, THE CENTER FOR RESPONSIBLE LENDING, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND PUBLIC CITIZEN, INC. IN SUPPORT OF APPELLANTS

On the following interested parties in this action by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, for deposit with the United States Postal Service at San Francisco, California, addressed as set forth below:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 5th day of February, 2018 at San Francisco, California.

By: _____
Vanessa Buffington