CASE NO. 13-16476

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGIE DANIEL, et al.,

Plaintiffs-Appellants,

v.
FORD MOTOR COMPANY

Defendant-Appellee.

APPELLEE'S PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC

On Appeal from the United States District Court
For The Eastern District of California
District Court Case No. 2:11-02890 WBS EFB

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RULE 35 STATEMENT

This appeal presents a question of exceptional importance relating to the duration of the implied warranty that accompanies virtually every retail sale of new consumer goods in California. The question is this: Whether the California Supreme Court would adopt a judicial interpretation of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code. § 1790 et. seq., that effectively repeals that Act's express one-year limitation on implied warranties.

Unlike the Panel that initially heard this case, Ford believes that the answer to this question must be "No," because the California Supreme Court has repeatedly rejected interpretations that render statutory provisions meaningless. But if this Court nevertheless believes the Act is fairly susceptible to such an interpretation, it should certify the issue to the California Supreme Court for resolution, rather than publishing a decision that binds all federal courts in California to an interpretation of a state statute that nullifies one of its major provisions.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Glass, Hauser, and Duarte ("Plaintiffs") purchased 2005, 2007, and 2009 model year Focus vehicles, respectively.[1] Plaintiffs experienced no relevant

[1] Plaintiffs' appeal raised numerous issues relating to several claims of four Plaintiffs, but this petition involves only the implied warranty claims of Plaintiffs Hauser, Glass, and Duarte. As used in the remainder of this Petition, "Plaintiffs" refers only to these three Plaintiffs.

problems with their vehicles or their tires within one year of purchase. However, Plaintiffs claim that, as a result of an alleged suspension defect, they had to replace their tires prematurely more than one year after they purchased their vehicles.

Plaintiffs brought this class action against Ford alleging, among other things, breach of the implied warranty of merchantability created by the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1792. That Act expressly limits the duration of this implied warranty to no more than one year:

> The duration of the implied warranty of merchantability … shall be coextensive in duration with an express warranty which accompanies the consumer goods …; but *in no event* shall such implied warranty have a duration of less than 60 days nor *more than one year* following the sale of new consumer goods to a retail buyer.

Cal. Civ. Code § 1791.1(c) (emphasis added).

Relying on this provision, Ford moved for summary judgment on Plaintiffs' implied warranty claims. The district court granted Ford's motion because Plaintiffs did not have to replace their tires until after the one-year implied warranty period had expired. (Excerpts of Record ("ER") at 15-18.) In so ruling, the district court considered but declined to follow the decision of the California Court of Appeal in *Mexia v. Rinker Boat Co*, 174 Cal. App. 4th 1297 (2009), relied on by Plaintiffs. (ER at 15-17.)

In *Mexia*, the owner of a boat failed to seek repairs of alleged defects until more than two years after he purchased the boat. The trial court dismissed the

implied warranty claim based upon § 1791.1(c), but the California Court of Appeal reversed, reasoning that "nothing [in the statute] suggests a requirement that the purchaser discover and report to the seller a latent defect within that [one-year] time period." 174 Cal. App. 4th at 1310. Here, the district court was concerned that allowing Plaintiffs' claim to proceed based on *Mexia* would "'render[] meaningless any durational limits on implied warranties,' as '[e]very defect that arises could conceivably be tied to an imperfection existing during the warranty period.'" (ER at 17.)

Plaintiffs appealed, arguing that the district court erred in failing to follow *Mexia*. (Appellants' Opening Brief ("AOB") at 31-40.) In response, Ford argued that if *Mexia* were interpreted to allow an implied warranty claim based solely on the existence of a latent defect during the one-year warranty period, the durational limit would indeed become meaningless, as the district court recognized. This, Ford argued, was persuasive data that the California Supreme Court would not adopt such an interpretation. (Appellee's Brief on Appeal ("ABA") at 49-51.) Ford also noted that courts had rejected similar arguments in the context of other time-limited warranties. (ABA at 51.)

Ford further argued that *Mexia*, as interpreted by Plaintiffs, was inconsistent with the earlier decision of the California Court of Appeal in *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212 (2006). (ABA at 53.) There, the plaintiff

purchased allegedly defective roofing shingles which began to crack several years after sale. The Court of Appeal affirmed the dismissal of the implied warranty claim because "the breach [i.e., the cracking] occurred after the expiration of the one year implied warranty period governed by [§ 1791.1(c)]." 142 Cal. App. 4th at 226-227.

In reply, Plaintiffs did not respond to Ford's argument that their interpretation of *Mexia* would render the one-year limitation period meaningless, implicitly conceding the point. Nor did Plaintiffs try to reconcile their interpretation of the time-limited implied warranty created by § 1791.1 with judicial interpretations of other time-limited express warranties. Instead, Plaintiffs argued that there was no persuasive evidence that the California Supreme Court would decline to follow *Mexia* because there was no California Supreme Court decision to the contrary, and because the California Supreme Court denied review of *Mexia* and also denied a request to depublish the opinion. (Appellants' Reply Brief ("ARB") at 15-16.)

Ford repeated its arguments orally before a panel of this Court consisting of Circuit Judges Reinhardt and Hawkins and District Judge Molloy. (https://www.youtube.com/watch?v=6SyUKpr6_TE ("OA") at 20:20-27:32.) Once again, Plaintiffs made no attempt to deny that their interpretation of *Mexia* and the Act would render the one-year limitation meaningless. In response to a

question from the Panel, Ford agreed that if there were any serious doubt about the proper interpretation of § 1791.1(c), certification of the question to the California Supreme Court would be appropriate. (OA at 22:38-23:28.)

The Panel nevertheless held in favor of Plaintiffs and reversed the district court. (Slip Opinion ("Op.") at 7-11.) The Panel agreed with Plaintiffs that *Atkinson* did not address the "precise issue" addressed in *Mexia*, which the Panel identified as "whether § 1791.1 'create[s] a deadline for discovering latent defects.'" (Op. at 10.) The Panel also relied on the fact that "the *Mexia* court relied on *Atkinson* approvingly without noting any inconsistency." (Op. at 10.) The Panel observed that it was obligated to follow *Mexia* "unless there is convincing evidence that the highest court of the state would decide differently." (Op. at 8, internal quotation marks omitted.) The Panel found that there was no convincing evidence that the California Supreme Court would decide differently because (1) the California Supreme Court denied review and also denied a request for depublication in *Mexia*, (2) no published decision of the California Court of Appeal has addressed *Mexia's* holding (and thus has neither accepted nor rejected it); and (3) unpublished decisions of the California Court of Appeal either do not mention *Mexia* or cite *Mexia* without disapproval. (Op. at 8-10.) The Panel also relied upon "the policy repeatedly expressed by California courts of the need to

construe the legislative intent to *expand* consumer protection and remedies." (Op. at 10, internal quotation marks omitted.)

The Panel never mentioned Ford's argument that Plaintiff's interpretation of *Mexia* and § 1791.1(c) would render the Song-Beverly Act's one-year limitation meaningless.

ARGUMENT

I. THERE IS PERSUASIVE DATA THAT THE CALIFORNIA SUPREME COURT WOULD NOT FOLLOW PLAINTIFFS' INTERPRETATION OF *MEXIA* AND § 1791.1(C)

As Plaintiffs interpret *Mexia*, it is impossible to reconcile with *Atkinson*, where an implied warranty claim based on a latent defect was dismissed precisely because the failure did not occur within the one-year period. *Atkinson*, 142 Cal. App. 4th at 226-227. But there is no need to dwell on this point. Assuming, as the Panel found, that *Mexia* does not conflict with *Atkinson*, this Court should follow *Mexia* "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183 (1940). Such data plainly exists in this case, but it was ignored entirely both by Plaintiffs and by the Panel.

A. Plaintiffs' and the Panel's Interpretation of § 1791.1(c) Renders the One-Year Time Limitation Meaningless.

As Plaintiffs (and the Panel) interpret *Mexia*, a consumer who does not experience a latent defect until many years after sale—or, indeed who has never

experienced the alleged defect—can still recover for breach of the Song-Beverly implied warranty by proving only that a latent defect existed at the time of sale (i.e., during the one-year period). This interpretation of *Mexia* has been adopted by some district courts. *See, e.g.*, *Parenteau v. GM, LLC*, 2015 U.S. Dist. LEXIS 31184, *29 (C.D. Cal. Mar. 5, 2015).

But so interpreted, "[t]he flaw in *Mexia's* reasoning is readily apparent: its holding 'renders meaningless any durational limits on implied warranties'…." *Grodzitsky v. Am. Honda Motor Co.*, 2013 U.S. Dist. LEXIS 82746, *33-34 (C.D. Cal. June 10, 2013). Under this interpretation of *Mexia* and the Act, if a consumer can prove that a latent defect making the product unmerchantable existed at the time of sale, the consumer can prevail. If the consumer cannot prove that a defect making the product unmerchantable existed at the time of sale, the consumer's claim would be barred for that reason. *In either case, the one-year limitation on the duration of the warranty would have no bearing on the substantive rights of either party and would be meaningless.*

A veritable mountain of authority from the California Supreme Court rejects "interpretations that render statutory terms meaningless as surplusage." *People v. Hudson*, 38 Cal. 4th 1002, 1010 (2006); *accord, e.g.*, *People v. Sanders*, 55 Cal. 4th 731, 739 (2012) ("Defendant's contrary interpretation of the statute renders the Legislature's use of the word 'notwithstanding' meaningless, and violates the

principle that when interpreting a statute, significance should be given to every word, phrase, and sentence where possible."); *People v. Arias*, 45 Cal. 4th 169, 180 (2008) ("First, in reviewing the text of a statute, we must follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary."); *Metcalf v. City of San Joaquin*, 42 Cal. 4th 1121, 1135 (2008) ("Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage."); *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1285 (2006) ("'Well-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative.'"); *People v. Hudson*, 38 Cal. 4th 1002, 1010 (2006) ("As we have stressed in the past, interpretations that render statutory terms meaningless as surplusage are to be avoided."); *Hassan v. Mercy Am. River Hosp.*, 31 Cal. 4th 709, 715-16 (2003) ("These canons [of statutory construction] generally preclude judicial construction that renders part of the statute 'meaningless or inoperative.'").

This unquestionably constitutes persuasive data that the California Supreme Court would not adopt Plaintiffs' interpretation of *Mexia* and § 1791.1(c), because that interpretation would effectively repeal an important provision of the Song-

Beverly Act. Indeed, this Court has refused to follow decisions of the California Court of Appeal when those decisions "violate[] the 'fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage.'" *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1048 (9th Cir. 2014); *accord Estrella v. Brandt*, 682 F.2d 814, 818 (9th Cir. 1982) (declining to follow two decisions of the California Court of Appeal because "[w]e are not persuaded that the California Supreme Court would adopt a construction of these statutes that renders one of them meaningless").

This was the one of the principal bases for the district court's decision in this case. (ER at 17 ["[T]his court is concerned that the holding of *Mexia* 'renders meaningless any durational limits on implied warranties'"].) It was also the principal basis for numerous decisions of other district courts that have rejected the interpretation of *Mexia* advanced by Plaintiffs. *See, e.g.*, *Valencia v. Volkswagen Grp. of Am. Inc.*, 2015 U.S. Dist. LEXIS 105555, *18 (N.D. Cal. Aug. 11, 2015) ("*Mexia's* broader holding 'renders meaningless any durational limits on implied warranties'"); *Peterson v. Mazda Motor of Am., Inc.*, 44 F. Supp. 3d 965, 971-72 (C.D. Cal. 2014) ("[R]unning through the cases cited by Mazda is the concern that if *Mexia* were not limited, *Mexia* would render the duration provision of the Song-Beverly Act meaningless."); *Grodzitsky v. Am. Honda Motor Co.*, 2013 U.S. Dist. LEXIS 82746, *33-34 (C.D. Cal. June 10, 2013) (*Mexia's* holding "'renders

meaningless any durational limits on implied warranties'…."); *Marchante v. Sony Corp. of America, Inc.*, 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011); *Hovsepian v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 80868, *24 (N.D. Cal. Aug. 21, 2009) ("[A]ny component failure could be characterized as having been caused by a latent defect, and thus if *Mexia* were read broadly the time limitation imposed by § 1791.1(c) would be meaningless."). This was also Ford's principal argument on appeal with respect to this issue.

And yet, the Panel in this case never addressed it.

B. Plaintiffs' And the Panel's Interpretation of § 1791.1(c) Is Contrary to the Uniform Interpretation Given To Other Time-Limited Express and Implied Warranties.

There is even more persuasive data that the Panel left unaddressed. With virtual unanimity, courts—including this Court and the California Court of Appeal—hold that time-limited express warranties "do[] not cover repairs made after the applicable time . . . has elapsed." *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 616 (3rd Cir. 1995); *accord, e.g., Davisson v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 122673, *24 (S.D. Ohio Sept. 3, 2014) ("But this theory of liability [that a time/mileage-limited express warranty is breached by the mere existence of a defect at the time of sale] has been roundly rejected by courts that have considered it …."); *Karpowicz v. GMC*, 1998 U.S. Dist. LEXIS 3829, *11 (N.D. Ill. Mar. 25, 1998) ("Case law uniformly holds that time-limited

warranties do not protect buyers against defects that existed before but are not discovered until after the expiration of the warranty period."); *see also Brisson v. Ford Motor Co.*, 349 F. App'x 433, 434 (11th Cir. 2009); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022-1023 (9th Cir. 2008); *Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988, 993 (1st Cir. 1992); *PPG Industries v. JMB/Houston Centers Partners Limited Partnership*, 146 S.W.3d 79, 100 (Tex. 2004); *Kodiak Elec. Ass'n, Inc. v. Delaval Turbine, Inc.*, 694 P.2d 150, 156-57 (Alaska 1984); *Taterka v. Ford Motor Co.*, 271 N.W.2d 653, 657 (Wis. 1978); *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 830-832 (2006).

Even further, federal and state law permit manufacturers to limit the implied warranty that arises under the UCC to the period of the express warranty. *See generally In re Ford Tailgate Litig.*, 2014 U.S. Dist. LEXIS 32287, *15-16 (N.D. Cal. 2014). Again, courts with virtual unanimity hold that under these circumstances the implied warranty does not cover repairs made after the warranty period has elapsed. *See, e.g., Id.; Chiarelli v. Nissan North Am., Inc.*, 2015 U.S. Dist. LEXIS 129416, *25 (E.D.N.Y. Sept. 25, 2015)*; McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1361 (N.D. Ga. 2013); *Deburro v. Apple, Inc.*, 2013 U.S. Dist. LEXIS 156565, *20 (W.D. Tex. Oct. 30, 2013); *McQueen v. BMW of North Am., LLC*, 2013 U.S. Dist. LEXIS 123232, *20-25 (D.N.J. Aug. 29, 2013); *Perez v. Volkswagen Group of Am.*, 2013 U.S. Dist. LEXIS 54845, *17-18 (W.D. Ark. Apr.

17, 2013); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 2007 U.S. Dist. LEXIS 62483, *17-20 (E.D. Mich. Aug. 24, 2007); *Alban v. BMW of N. Am., LLC*, 2010 U.S. Dist. LEXIS 94038, *29-30 (D.N.J. Sept. 8, 2010); *Henderson v. Gen. Motors Corp.*, 262 S.E.2d 238, 239 (Ga. App. 1979).

Courts uniformly and routinely reach these conclusions because they recognize that any other result would render the time limitations meaningless. *See, e.g., Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986); *Daigle v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 106172, *20 (D. Minn. July 31, 2012) ("To accept such an argument, however, would render any warranty limited in time/mileage meaningless."); *Daugherty*, 144 Cal. App. 4th at 830-832. Indeed, some courts have characterized the argument to the contrary as "non-sensical." *Cannon Technologies, Inc. v. Sensus Metering Systems, Inc.*, 734 F. Supp. 2d 753, 762-763 (D. Minn. 2010); *Daigle*, 2012 U.S. Dist. LEXIS 106172 at*20.

Thus, if Ford had provided an express warranty on the tires with a specified duration of one year, there could be no serious question that that the warranty would not cover tires that did not need to be replaced until after the one-year period had expired. Similarly, if Ford had limited the implied warranty on the tires to this same one-year period, there could be no serious question that the implied warranty would not cover tires that did not need to be replaced until after the one-year period had expired. There is no reason to believe that the California Supreme

Court would attribute some different, unusual interpretation to the substantially identical time-limited implied warranty established by the legislature when it enacted § 1791.1(c).

C. The "Evidence" Considered By The Panel Was Irrelevant.

In concluding that the California Supreme Court would follow Plaintiffs' interpretation of *Mexia* and § 1791.1(c), the Panel did not consider any of this overwhelming data. Instead, the Panel concluded that "there is not convincing evidence" that the California Supreme Court would decide the issue differently from *Mexia* based on "evidence" with little or no bearing on the issue.

For example, the Panel relied on the fact that "[t]he California Supreme Court denied the *Mexia* defendants' petition for review and denied a non-party's request for 'depublication' of the opinion." (Op. at 8.) But the "well-established" rule in California is that "a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case." *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal. 4th 679, 689 n.8 (1992). There is no reason to believe that a denial of a depublication request has any greater significance. The Panel also relied on the fact that no published opinion of the California Court of Appeal has rejected *Mexia*. But neither has any published opinion of the Court of Appeal accepted Plaintiffs' interpretation of *Mexia*; the issue simply has not arisen in any case resulting in a published state court decision.

The Panel also noted that two unpublished decisions of the California Court of Appeal "referenced the *Mexia* rule … without disapproval." But one of those opinions referenced only an irrelevant discussion in *Mexia* regarding the statute of limitations, which is not at issue here. *Lugo v. Good Guys Auto Sales*, 2013 Cal. App. Unpub. LEXIS 6965, *22 (Cal. App. 4th Dist. Sept. 27, 2013). The other unpublished decision upheld a directed verdict in favor of a manufacturer, in part because the alleged failure occurred "well after the one-year period of the implied warranty of merchantability." *Clark v. BMW of N. Am.*, 2014 Cal. App. Unpub. LEXIS 5661, *19-20 (Cal. App. 2d Dist. Aug. 12, 2014). That court's reliance on the expiration of the one-year period is, if anything, contrary to Plaintiffs' (and the Panel's) interpretation of *Mexia*. In any event, California rules would prohibit the California Supreme Court from relying on unpublished decisions of the Court of Appeal. Cal. Rule of Court 8.1115(a) (unpublished opinions "must not be cited *or relied on* by a court or party") (emphasis added).

Finally, the Panel relied on "the need to construe the Song-Beverly Act so as to implement the legislative intent to *expand* consumer protection and remedies." (Op. at 10.) But the California Court of Appeal itself has recognized that entitlement to recovery under the Song-Beverly Act "cannot depend solely on lip service to the overall consumer protection policy of the Act." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 924 (2015). Specifically, the overall consumer

protection policy of the Act cannot justify judicial repeal of a statutory provision included by the legislature for the specific purpose of *limiting* the expansion of consumer rights.

II. ANY DOUBT REGARDING THE MEANING OF § 1791.1(c) SHOULD BE CERTIFIED TO THE CALIFORNIA SUPREME COURT.

The Panel's decision in this case has been designated for publication and will therefore bind future panels of this Court and all federal district courts within this circuit, absent a controlling decision to the contrary from the California Supreme Court. *See, e.g.*, *FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992). Future Court of Appeals decisions will either be consistent with the Panel's decision, in which case they will not alter the binding effect of the decision, or they will be inconsistent with the Panel's decision, in which case they will be inconsistent with *Mexia* and not controlling, leaving the precedential effect of the Panel's decision intact. Thus, as a practical matter, the Panel's decision will bind federal courts unless and until the California Supreme Court decides the issue.

The implied warranty created by the Song-Beverly Act arises with respect to "*every* sale of consumer goods that are sold at retail in this state." Cal. Civ. Code § 1792 (emphasis added). As discussed above, the effect of the Panel's published decision is to judicially repeal the one-year limit on the duration of the implied warranty *with respect to every one of these sales.* Thus, the Panel's decision

exposes every manufacturer and every retail seller in California to liability in class action litigation filed in federal court for failures that never occur or that occur well beyond the one-year period contemplated by the California legislature.

If federal courts are to be required to disregard a pronouncement of the California legislature with such far-reaching consequences, that obligation should be imposed by the California Supreme Court, not by a Panel of this Court. California Rule of Court 8.548 permits this Court to certify such an important question to the California Supreme Court if it may determine the outcome of a matter and there is no controlling precedent. Here, the question could determine the outcome of Plaintiffs' implied warranty claims asserted by Plaintiffs Glass, Duarte, and Hauser. *See Klein v. United States*, 537 F.3d 1027, 1030 (9th Cir. 2008) (certifying question that will "determine the outcome of one of the issues in this appeal"). Further, for the reasons discussed above the decision in *Mexia* is not controlling.[2] This Court should take advantage of Rule 8.548 and certify this important question of California law to the California Supreme Court. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save time, energy, and resources and help build a cooperative judicial federalism.").

[2] As interpreted by the Panel, *Mexia* is also inconsistent with *Atkinson* and is not controlling for that reason as well.

CONCLUSION

Rehearing or rehearing en banc should be granted. If on rehearing this Court concludes that § 1791.1(c) is fairly susceptible to the interpretation advanced by the Panel, the issue should be certified to the California Supreme Court.

Dated: December 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Circuit Rules 35-4 and 40-1(a) because this brief contains 3,924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Dated: December 16, 2015

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