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December 19, 2022

The Honorable Chief Justice Tani Cantil-Sakauye,
and Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: *Amici* Letter Urging the Court to Grant Review,
***Limon v. Circle K Stores, Inc.*, S277435**
(Decision published at (2022) 84 Cal.App.5th 671.)

Dear Chief Justice Cantil-Sakauye, and Associate Justices:

Consumer Attorneys of California ("CAOC") is a voluntary nonprofit membership organization of over 3,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominantly represent individuals subjected in a variety of ways to personal injuries, consumer fraud, insurance bad faith, antitrust violations, business-related torts, and employee, wage, and hour violations. CAOC has taken a leading role in advancing and protecting the rights of consumers and injured victims in both the courts and in the Legislature.

The California Employment Lawyers Association ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies

embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting briefs and letters before the California Supreme Court (and the Ninth Circuit) in employment rights cases, including: *Dynamex Operations W. v. Superior Court* (2018) 4 Cal. 5th 903; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348; and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members practice law in every state in the United States and primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. AAJ has served as a leading advocate for the rights of all Americans to seek legal recourse for wrongful conduct. Victims of wrongful privacy intrusions that are at issue in this case are frequently represented by AAJ members in their civil suits.

The National Association of Consumer Advocates ("NACA") is a national nonprofit association of hundreds of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers. In pursuit of this mission, making certain that corporations comply with state and federal consumer protection laws in general and the FCRA in particular, has been a continuing and significant concern of NACA since its inception. In furtherance of that mission, NACA has participated as an amicus in hundreds of appeals, including in the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681a issues raised in *McCalmont v. Federal National Mortgage Association* (9th Cir. 2017) 677 F. App'x 331.

Amici here join together to urge the Court to grant review in this matter. In the alternative, *amici* respectfully urge the Court at minimum to de-publish the decision as this decision s is entirely inconsistent with the Fourth District's now unpublished holding in *Hebert v. Barnes & Noble, Inc.*

(Cal. App. 4th Dist. 2022) 293 Cal.Rptr.3d 528, review denied though ordered not to be published in the Official Appellate Reports on August 10, 2022, S274725 ("*Hebert*").

First, *amici* believe that review "is necessary … to settle an important question of law." (*Cal.* Rules of Court, rule 8.500(b)(1)). There is no other question more important for this Court to decide than standing to seek a remedy for a statutorily defined wrong. Without standing there can be no right to seek a remedy for the defined wrong this case presents – privacy invasion – and thus, without standing to seek statutory damages, access to the civil justice system in California would be denied for these victims of statutorily defined wrongful conduct.

Regardless of how the Court may ultimately resolve this issue, the question presented requires the Court's intervention. Perhaps the Court will agree with the Fifth Appellate District's bewildering stitching of a patchwork of judicial decisions to achieve ostensible parity with its strained construction of the Federal Constitution's Article III "case or controversy" requirement, as interpreted by *Spokeo, Inc. v. Robbins* (2016) 578 U.S. 330 (*Limon*, supra, 84 Cal.App.5th at 598). On the other hand, this Court may well agree with the now de-published, and opposite, decision in *Hebert* by the Fourth Appellate District. The Fourth Appellate District held, in a nearly identical action for willful violation of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.

hereafter, the "FCRA"), that the plaintiff presented a triable issue of material fact which precluded summary judgment. (*Hebert*, supra, 293 Cal.Rptr.3d at 540.)

The need for clarity from the Court cannot be understated. *Limon* now presents the Court with the perfect vehicle to finally resolve the issue of standing in California to seek redress for statutorily defined wrongs, as well as their ascribed statutory damages.[1]

Second, as has been indicated above, review is "necessary to secure uniformity of decision" on this reoccurring question of standing regarding relief for the contravention of statutory rights that has, until now, escaped the Court's review. (Cal. Rules of Court, rule 8.500(b)(1).) Specifically, the Fifth Appellate District's decision in *Limon* is directly at odds with the First Appellate District's decision in *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, which held that a violation of a statutory right can serve as a "sufficient [basis] to confer standing." (*Id.* at 315.) On this important issue, a direct conflict in court of appeal authority now exists. The issue is therefore ripe for the Court to resolve this tension.

[1] As a note, *amici* herein do not take issue with the Court's decision to de-publish *Hebert*.

Indeed, rigid, broad adherence to the Fifth Appellate District's decision in *Limon* might impact many other areas where California courts clearly permit statutory damages. For instance, consider the employment wage & hour context. (See, e.g., *Naranjo v. Spectrum Security Service, Inc.* (2022) 13 Cal. 5th 93 [premium pay for violating Labor Code's meal and rest break provisions constitutes "wages" for purposes of waiting time penalties]; *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 745 [recognizing Labor Code section 226's authorization of statutory damages for wage statement violations]; and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 [statutory penalties for missed meal and rest periods].) Numerous other areas may also be thrown into turmoil if the Fifth District's holding is followed.

If *Limon* is left to stand, California's numerous statutory damage statues will be routinely challenged, with the judicial branch being asked to erect a rigid boundary on territory previously shared with our Legislature. Regardless of how this Court resolves the tension created by the Fifth District's decision in *Limon*, without review, a flood of litigation will likely follow challenging previously well-settled law.

Third, review is "necessary to secure uniformity of decision" and "settle an important question of law" on the difference in standing between California and Federal law. (Cal. Rules of Court, rule 8.500(b)(1).) Without review, confusion and disharmony will follow. For example, the remedy clause in the FCRA provides: "Any person who willfully fails to comply with any requirement imposed under the subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—[¶] (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 ...." (§ 1681n, subd. (a)(1)(A).) Under the Federal Article III standard adopted by *Spokeo*, and now the Fifth District in *Limon*, the law is now a nullity. A California victim of the defined wrong is denied a recovery in direct contravention of the maxim, "For every wrong there is a remedy." (Civil Code § 3523.)

Significantly, the *Limon* court failed to consider that Federal law and California law on standing are significantly different. The Federal Constitution's Article III "case or controversy" requirement, as has been interpreted by *Spokeo, Inc. v. Robbins* (2016) 578 U.S. 330 and relied upon by the *Limon* court, confers standing—that is, a legal right to sue—when a plaintiff shows an injury that is both concrete and particularized, even if it is not necessarily a tangible one. (*Id*. at 342 [a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation."].) The *Spokeo*

Court held that it is not enough to simply allege that the FRCA has been violated. (*Spokeo, Inc. v. Robbins,* supra, 578 U.S. at 340.)

But at the same time the United States Supreme Court in *ASARCO Inc. v. Kadish* (1989) 490 U.S. 605, also has specifically acknowledged that its standing holdings do not apply in state court: "We have recognized often that *the constraints of Article III do not apply to state courts*, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." (*Id*. at 617; Emphasis added.)

As such, the Fifth District's obeisance to *Spokeo* requires necessary review. The California Constitution, amended and ratified in 1879, unlike Article III of the Federal Constitution contains no "case-or-controversy requirement" clause which is the textual basis for federal standing doctrine. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248 ["Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine."].) Rather than the rigid formalization drawn by Article III, as interpreted by *Spokeo,* the role of our state courts has long shared territory with our Legislature. (*People v. Bunn* (2002) 27 Cal.4th 1, 14.)

An additional explanation as to why our Constitution does not contain a rigid formulation is that in 1872, before the California Constitution was ratified, California enacted Civil Code § 3523, which contains the maxim—traditional legal principle that has been frozen into a concise expression,[2] a general truth or rule of conduct: "For every wrong there is a remedy." Also in 1872, before the California Constitution was ratified, California enacted Code of Civil Procedure § 526 where our Legislature specifically permits standing to obtain injunctive relief when "pecuniary compensation would not afford adequate relief," or "Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (Code Civ. Proc. § 526(a)(4), and (5).) While numerous cases have analyzed and discussed the minutia of Section 526, the overarching general truth is that the textual history of standing in California is vastly different than standing under Article III in federal courts.

For example, unique to California is Business & Professions Code § 17200, where, under its "unlawful" prong, the statute makes a violation of virtually any law or regulation—federal or state, statutory or common law a violation of the underlying law a per se violation of § 17200. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 383 [§ 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under § 17200.].) Proposition

[2] Black's Law Dictionary (11th ed. 2019)

64 changed the specific standing requirements for redressing "unlawful" acts under 17200. However, the ensconced tradition of borrowing Congressionally defined wrongs and their private civil prosecution in our state courts by private parties demonstrates the well-established tradition of providing litigants a forum. Until *Limon*, California courts have not sought to borrow federal limited jurisdiction standing doctrine for California's general jurisdiction standard. Resolution of this issue cries out for this Court's broad institutional guidance.

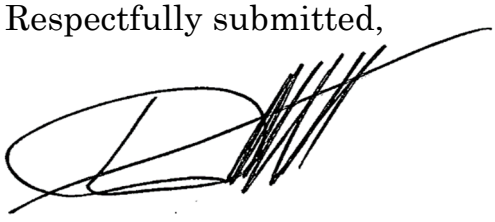
Similarly, the California Consumer Privacy Act of 2018 ("CCPA"), California Civil Code §§ 1798.100 et seq., grants data breach victims the right to file individual or class action lawsuits against businesses that allow unauthorized access to their non-encrypted or unredacted personal information because of a failure to implement appropriate security practices. (Civ. Code § 1798.150(a)(1).) Under the CCPA, companies that handle individuals' personal data face statutory damages of between $100 to $750 per consumer, per incident or actual damages, whichever are greater. (Civ. Code § 1798.150(a)(1)(A).) However, under the rigid Federal Article III standing requirement, the CCPA's provision for statutory damages would be rendered a nullity. (*TransUnion LLC v. Ramirez* (2021) 141 S. Ct. 2190, 2197 ["the mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages."].) Only in state courts can redress for a violation of this clearly defined wrong be sought.

Review of this case is thus required to remedy the confusion created by the Fifth Appellate District in *Limon* and its mistaken use of Federal law on "standing." Without review, confusion and disharmony will follow, with the very real possibility that courts will interpret *Limon* as a wholesale adoption in California of Article III's rigid "case or controversy" requirement which is really only applicable in federal courts. This risks undermining a host of remedies long relied upon by Californians. Broad institutional guidance is desperately needed.

CAOC, CELA. AAJ, and NACA therefore voice strong support as *amici* for granting the petition for review in the above-referenced matter. The issues presented are of great significance to *amici*. The members of CAOC, CELA, AAJ, and NACA routinely represent the interests of an exceptionally large number of California citizens who have been injured as the result of the violations of their privacy rights that the FCRA was enacted to prevent, as well as a plethora of other statutorily defined wrongs which provide statutory damages upon proof of their violation now at risk due to the Fifth District's decision. Broad institutional guidance is desperately needed to resolve this extremely important question of law. This issue has percolated long enough. Without review, confusion and disharmony will follow. Accordingly, *amici* strongly urge the Court to grant review and resolve this issue of widespread importance to California legal jurisprudence.

In the alternative, the decision should at minimum be de-published as the Court did in the case of *Hebert*. While *amici* herein believe the issue has percolated long enough and this case presents the perfect vehicle to resolve the confusion created by the Fifth Appellate District in *Limon*, at minimum, we believe the Court should order the decision not to be published in the Official Appellate Reports. (Cal. Rules of Court, rule 8.1125(c)(1).)

Respectfully submitted,



David M. Arbogast

Attorneys for Amicus Curiae,
CAOC, CELA, AAJ, and *NACA*

PROOF OF SERVICE

I, David M. Arbogast, declares under penalty of perjury as follows:

I am over the age of eighteen years and am not a party to the within action. My business address is 1800 E. Garry Ave., Suite 116, Santa Ana, CA 92705-5803.

On the date set forth below, I served the foregoing ***Amici* Letter Urging the Court to Grant Review in the matter: *Limon v. Circle K Stores, Inc.*, S277435**, via electronic service via Truefiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 19, 2022 within the United States.

David M. Arbogast