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IN THE SUPREME COURT OF CALIFORNIA

BBBB BONDING CORPORATION,
Plaintiff, Cross-defendant, Appellant and Petitioner,

v.

KIARA CALDWELL,
Defendant, Cross-complainant (as putative Class representative), and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE
CASE NO. A162453

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

Under California's notice-to-consumer law (Civ. Code, § 1799.90 et seq.), creditors must make special disclosures to persons who are not the borrowers obtaining a loan or extension of credit, but who guarantee the borrower's debt. Persons who are merely "cosigners," receiving none of the products or services that are the subject matter of the contract, are entitled to written notice that they will be held responsible if the borrower does not pay the debt. In the 50 years since that law was passed, the notice-to-cosigner law has never been applied to bail transactions, which are subject to a separate regulatory scheme specific to those unique transactions.

1. Did the Legislature intend the notice-to-cosigner law to require statutory notice to an arrestee's friends, family or employers who purchase a bail bond, where the purchaser transacts directly with the bail bond agent, signs the contract to indemnify the surety, negotiates the terms for paying the bond premium, and pays the down payment for the premium, all before the arrestee is released from jail, and often without the arrestee necessarily signing anything?

2. If notice is now required under Civil Code section 1799.91 (section 1799.91), should that ruling, which the Court of Appeal characterized as "novel," apply retroactively to preclude enforcement of existing contracts and final judgments on contracts in default?

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

Section 1799.91 requires creditors to convey specific statutory language to "cosigners," alerting them that, "If the borrower doesn't pay the debt, you will have to." The Court of Appeal's published opinion presents an important and novel question of statutory construction: when, if ever, does that statute—routinely applied to auto loans and other extensions of consumer credit for the purchase of goods and services—apply to bail agents?

Bail bond transactions are unlike ordinary consumer transactions. They are governed by tailored statutory provisions contained in the Bail Bond Regulatory Act of 1937 (Ins. Code, § 1800 et seq.) and corresponding regulations promulgated by the Department of Insurance. A court implementing a county-set schedule, not a merchant or service provider, sets the price of bail. If anyone wishes to post a *bond* rather than cash bail, the surety who writes the bond must do so on terms approved by the Department of Insurance. And the surety is not allowed to engage in the transaction directly, but must act through a bail agent. The bail agent can collect premiums in a lump sum or in serial payments, but its contracts, including disclosures, must likewise be approved by the Department of Insurance. None of this resembles an ordinary consumer transaction for credit to finance the purchase of goods or services.

On the consumers' side, a bail transaction likewise does not resemble the situation where a primary obligor seeks, for example, to buy a car, negotiates the purchase, negotiates credit

to finance the purchase price, and, if she cannot qualify herself to buy the car on credit, obtains the agreement of a third party "cosigner" to guarantee payment if the primary obligor defaults. In the bail context, arrestees occasionally post their own cash bail, but usually someone else posts bail to secure the arrestee's release. And, rather than paying cash, a *bond* is often posted through the auspices of a bail agent. The arrestee may never sign anything in these transactions—a friend, family member or other bond purchaser, as the bail agent's client, is often the *only* obligor who must indemnify the surety if the bond comes due, and the *only* obligor who must pay premiums to the bail agent who issues and posts the bond (at the bail agent's financial peril). In other situations—as here—the arrestee, after being released, joins the bond purchaser as a *second primary obligor* on the indemnity contract and on the premium contract.

In the nearly five decades since section 1799.91 was enacted, no authority has treated the client of a bail bond agent as a "cosigner" within the meaning of that statute requiring specific disclosure language. And no authority has treated the *arrestee* as the primary "borrower" on a bail bond premium contract negotiated and signed by someone else—the bond agent's client—who pays the initial down payment and agrees to pay all subsequent premiums due. "Practically speaking, third parties such as family and friends are the true 'customer' of the surety, as opposed to the defendant himself." (Labe & Watson, "Commercial Bail Bonds,"

<https://www.courts.ca.gov/partners/documents/pdr-nat-bail-abc-commercial_bail_bonds.pdf>, p. 6 (hereafter Labe)].)

Nothing in the plain language of section 1799.91, the common understanding of the nature of bail bond agreements, the statutes and regulations that apply to the bail industry, the established practice of the bail industry, or the contracts between the parties lend themselves to such an interpretation applying section 1799.91 to bail agent customers. Indeed, Department of Insurance regulations and other authorities discussed below provide to the contrary. (E.g., Cal. Code Regs., tit. 10, § 2083 [only the "principal person" who negotiates the prerelease bail agreement, not the arrestee, is the *primary* customer to whom disclosures, accounting statements and receipts must be conveyed].)

Nevertheless, in its opinion affirming a preliminary injunction in a putative class action, the Court of Appeal reasoned that the primary customers of the bail agent BBBB Bonding Corporation's ("BBBB") are actually just secondary "cosigners." And, as to those who did not receive the statutory notice set forth in section 1799.91, the opinion prohibits BBBB from collecting financed premium payments—even where judgments have already been entered requiring payment on the customers' contracts. The published opinion likewise effectively prohibits all other California bail bond agents in the same position as BBBB from enforcing their customers' promises.

The Court of Appeal acknowledges that its "novel" application of section 1799.91 will "upend business expectations

for bail bond agents" throughout the state. (Typed opn. 1-2.) Since 2017, BBBB has assisted clients in procuring bail bonds for approximately 18,000 arrestees. (3 JA 592.) As of March 2021, BBBB had around 500 civil actions in California courts that had already gone to judgment against defaulting clients, and dozens more in active litigation that would be affected by the injunction. (3 JA 592-593.) The injunction calls into question whether BBBB will ever be able to collect the tens of millions of dollars in bail premiums (and defaulted bonds) that are outstanding. (*Ibid*.) And BBBB is just one of several bond agents in the state affected by the sweep of the Court of Appeal's opinion.

This case is not a referendum on California's cash bail system or the bail bond industry. The bail system and the bail industry itself have been under intense and continuing scrutiny from legislators and voters in recent years. If changes are to be made, they should be based on a thoughtful analysis of pros, cons, and alternatives, taking into account all stakeholders and the interests of justice. But in the meantime, a novel approach by one appellate panel applying a statute that has never had anything to do with bail or surety transactions should not stand as the singular mechanism for crippling bail agents statewide by imposing unforeseeable liabilities and losses. As long as judges still impose cash bail, putting bail agents out of business does nothing to benefit those incarcerated before trial, and will serve only to eliminate the most viable means (if not the only means) to secure an arrestee's Constitutionally assured release pending trial.

This Court should grant review to decide de novo a pure question of statutory interpretation: whether section 1799.91—a statute never construed by any prior appellate court—should be applied for the first time to bail agreements, and if so, whether any holding to that effect should apply prospectively only.

STATEMENT OF THE CASE

A. BBBB is a bail bond agent licensed and regulated by the State of California.

BBBB is a bail bond agency with offices throughout California. (1 JA 21-22.) Bail bond agents facilitate an arrestee's release from jail by securing a bail bond from a surety. (Typed opn. 8.) Only a licensed bail agent, not a surety, has authority to execute a bail bond. (Ins. Code, §§ 1800, 1800.4.) "The client (the arrestee and/or a friend or family member) utilizes the services of the bail agent to secure the undertaking of bail and the arrestee's release from detention." (Typed opn. 9.) Because the arrestee is in jail, the typical client of the bail agent is a friend or family member, who executes the contracts *before* the arrestee is released from jail. (3 JA 584-585; see typed opn. 19, fn. 6.)

To obtain the release of the jailed friend or family member, the client signs an indemnity agreement promising to pay the full amount of the premium to secure a bail bond *and* potentially the full amount of that bond if the arrestee does not appear for trial, requiring the surety to pay the bond amount to the court. (1 JA 10; typed opn. 2-3.) The surety, the bail agent, and the client of the bail agent are all bound by the indemnity agreement. (See 1 JA 10 [specifying that " 'First Party' " is the client who signs the

agreement and " 'Second Party' " is the bail agent, who in turn binds the surety that executes the bail bond].)

The bail agent reviews the agreement with the client, who thereafter signs and initials an "Indemnitor/ Guarantor Check List," which contains a series of disclosures and acknowledgements, including an acknowledgment that she is responsible for making payments on the *premium* (typically set at 10 percent of the cash bail amount), and that she may be held "solely and individually liable for up to the full amount owed for any and all charges" even if other people sign the indemnity agreement. (1 JA 10-11; typed opn. 3.) The premium is "fully earned" upon the arrestee's release from jail. (*Ibid*.) The client's responsibility to pay the full premium is not conditioned on whether the arrestee has also agreed to do so, or has defaulted on any contractual obligation to pay the premium.

If the client cannot afford to pay the full bail premium amount stated in the indemnity agreement, the bail agent and the client may arrange for installment payments to be made over time until the debt is paid off. (Typed opn. 9.) That separate agreement is solely between the bail bond agent and its client, and is titled an "Unpaid Premium Agreement." (Typed opn. 2.)

Bail agents and sureties are highly regulated by a series of detailed statutes in the California Insurance Code, and by regulations promulgated by the California Department of Insurance. (Typed opn. 9-10; Cal. Code Regs., tit. 10, § 2053 et seq.) These regulations require that bail agents provide detailed disclosures, including the accounting statements and receipts, to

the clients who contract for a bail bond. (Cal. Code Regs., tit. 10, §§ 2083, 2084; typed opn. 9-10.) The forms that contain these disclosures and memorialize the bail transaction must be submitted for approval to the Department of Insurance. (Typed opn. 9-10; 3 JA 562-563, 584-585; Cal. Code Regs., tit. 10, §§ 2095 [bail licensees must file with the Department of Insurance "all forms or documents which the licensee intends to use regularly or frequently in connection with the bail licensee's bail transactions"], 2096 [if the commissioner finds any form to be "misleading or contrary to any provision of this article or any law relating to bail" the licensee will be notified and "may not use such form or document"].) The regulations direct that the disclosures be delivered to the arrestee "or, if the negotiations concerning the bail were not with the arrestee, to the principal person with whom such negotiations were had." (Cal. Code Regs., tit. 10, § 2083.)

B. Kiara Caldwell contracts with BBBB to obtain a bail bond for the release of Dareauna Chambers from jail.

In June 2018, Chambers was arrested at a Macy's for armed robbery and petty theft. (3 JA 407, 476.) That same day, Chambers' friend Kiara Caldwell contracted with BBBB to facilitate Chambers' release. (Typed opn. 2.) To secure the $50,000 bail, Caldwell agreed to pay a premium of $5,000, and arranged with BBBB to pay that amount with a $500 down payment and 10 additional monthly payments of $450. (Typed opn. 2-3; 3 JA 324-325.) All negotiations for how the premium

would be paid were between Caldwell and BBBB. (See *ibid*.) Caldwell alone made the down payment and signed the indemnity agreement, checklist and Unpaid Premium Agreement described above. (*Ibid*.) As the principal person with whom the bail negotiations were made, Caldwell received the accounting statements and receipts. (See Cal. Code Regs., tit. 10, § 2083.) Only after Chambers was released from jail and the premium was fully earned, did Chambers sign a separate set of agreements, making her a co-obligor who promised to make premium payments as Caldwell had promised and also promising personally to appear in court to avoid revocation of the bond. (1 JA 10-11; 3 JA 584-585; typed opn. 3, 19, fn. 6.)

C. BBBB sues Caldwell to recover the bond premium she never paid, and Caldwell files a class action cross-complaint asserting BBBB cannot enforce Unpaid Premium Agreements without providing statutory notice under Civil Code section 1799.91.

Caldwell made none of the installment payments beyond the initial $500 down payment. (Typed opn. 3.) After BBBB tried to collect the payments, it filed a collection action against Caldwell. (Typed opn. 3-4; 1 JA 4-7.) Caldwell then filed a class action cross-complaint against BBBB alleging causes of action for declaratory relief and unfair competition, and seeking restitution and injunctive relief. (Typed opn. 4; 1 JA 20-40.)

Caldwell alleged that BBBB had unlawfully failed to provide her with statutory notice under Civil Code sections 1799.91, 1799.92, 1799.93, and 1799.95. (Typed opn. 4; 1 JA 36.)

Under those statues, "*cosigners*" of *consumer credit contracts* who do not receive any of the money, property or services provided under the contracts must receive specific statutory language explaining that they are responsible for paying the full amount of the debt owed by the borrower. (Typed opn. 6-7; § 1799.91.) If such notice is not given, the creditor may not enforce the contract. (Typed opn. 7; Civ. Code, § 1799.95.)

Caldwell then moved for a preliminary injunction to enjoin BBBB from enforcing bail agreements where notice was not provided precisely as required under section 1799.91. (Typed opn. 4.) Although Caldwell acknowledged in writing in the form approved for BBBB's use by the Department of Insurance that she was responsible for the full amount of the bail bond premium and potentially responsible for the entire amount of the bail bond if necessary, even if others signed the contract (typed opn. 3; 1 JA 11), she supported her request for a preliminary injunction with a declaration stating that she had never been told she would be responsible "for the full amount of [Chamber's] bail bond or bail bond premium" (3 JA 324). She claimed that if she had been warned of the risks of obtaining a bail bond in the language of section 1799.91, she would not have signed the agreement. (Typed opn. 28; 3 JA 325 [If BBBB "had accurately warned me of the risks and consequences of cosigning for [Chamber's] bail bond and bail bond premium, I would not have cosigned."].) She supported her motion with signed agreements and declarations from others who contracted to obtain bail for arrestees, and who

similarly stated they would not have done so had they received the statutory warning. (Typed opn. 4, 28.)

D. The trial court grants the motion for preliminary injunction. The Court of Appeal affirms in a published decision.

The trial court granted Caldwell's motion for a preliminary injunction. (Typed opn. 4-5.) The court enjoined BBBB from initiating actions to enforce bail bond agreements signed by both the original contracting parties and by arrestees, where there was no section 1799.91 notice. (Typed opn. 5; 6 JA 1079.) BBBB was also enjoined from otherwise attempting to collect on such agreements, including with regard to pending actions and even final judgments already entered. (*Ibid.*) BBBB appealed. (6 JA 1083.)

The Court of Appeal acknowledged, with considerable understatement, that Caldwell's position regarding section 1799.91 was "novel" and would "upend business expectations for bail bond agents." (Typed opn. 1-2.) The court nonetheless construed the statute to encompass bail transactions, concluding that the premium *installment* agreement Caldwell entered into with the bail agent (but not the contemporaneously-signed *indemnity* agreement with the surety) is a consumer credit contract under Civil Code section 1799.90. (Typed opn. 11-17.)

The Court of Appeal further concluded Caldwell and those similarly situated are "cosigners" on consumer credit contracts within the meaning of the section 1799.91's disclosure requirement, rather than primary obligors, even though they are

the only people who enter, unconditionally, into the contract to purchase the bond. (Typed opn. 18-21; see Civ. Code, § 1799.101, subds. (a)(3) and (a)(8) [defining the difference between a "cosigner" and a "primary obligor"].) The arrestee (on some occasions) after being released from jail signs a parallel agreement promising—as an additional obligor—to indemnify the surety and pay the bond premium. (1 JA 10-11; 3 JA 584-585; typed opn. 3, 19, fn. 6.) Only by reading Caldwell's and Chambers' contracts as one was the Court of Appeal able to conclude that Caldwell was a "cosigner" covered by the statute. (Typed opn. 20.)

The court also held that a "cosigner" friend or family member who purchases the bond receives only an "intangible" benefit, so such a person is one " 'who does not in fact receive any of the money, property, or services which are the subject matter of the consumer credit contract,' " thus triggering application of section 1799.91. (Typed opn. 18-21.)

The court rejected several arguments made by BBBB to the contrary, including that the comprehensive regulatory scheme applying to bail agents and bail agreements barred application of the generally applicable notice-to-cosigner law, and that any novel interpretation of section 1799.91 as advocated by Caldwell should not be applied to invalidate existing agreements. (Typed opn. 21-32).

LEGAL ARGUMENT

I. The opinion raises several questions about the proper interpretation of California's notice-to-cosigner law (section 1799.91) as applied to bail agreements.

A. What in the statutes, regulations or cases suggests the Legislature intended section 1799.91 to apply to highly regulated bail transactions?

The Court of Appeal said, "At the center of this appeal are two statutory schemes: consumer credit protections under the Civil Code (§ 1799.90 et seq.), and the Bail Bond Regulatory Act (Ins. Code, § 1800 et seq.)." (Typed opn. 6.) BBBB agrees.

The Court of Appeal concluded that the more specific bond regulatory statutes do not "categorically exempt" the bail industry from the more general consumer protection statutes. (Typed opn. 11-12.) By framing the question that way, the Court of Appeal obscured the important question of *whether the Legislature actually intended section 1799.91 to apply to bail transactions*. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978 [a court " 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences' "].) The statutory scheme, regulatory scheme, common law background, and common practice in the industry all cast serious doubt on the Court of Appeal holding, warranting de novo review by this Court of the lower court's statutory construction.

First, one indication the Legislature did not enact section 1799.91 with bail bond transactions in mind is that the Bail Bond Regulatory Act was enacted in 1937, predating the notice-to-cosigner law by almost four decades. The Act sets forth a complete statutory scheme for regulating bail agents. (*McDonough v. Goodcell* (1939) 13 Cal.2d 741, 743-744; *McDonough v. Garrison* (1945) 68 Cal.App.2d 318, 320-321, 330.) In addition to requiring agents to be licensed, Insurance Code section 1812 authorizes the Department of Insurance to issue regulations that govern all stages of the bail transaction. (See Cal. Code Regs., tit. 10, §§ 2053-2105.) Each of the forms and disclosures provided to the customers of bail agents, including the detailed disclosures that BBBB and others use, must be provided to and approved by the Department of Insurance. (*Id*., §§ 2095, 2096.) There is no indication anywhere in the Act that the Legislature contemplated additional disclosures would be required by other statutory schemes.

The more general purpose of section 1799.91 enacted in 1975 was to ensure proper disclosure "to cosigners of consumer credit contracts that they may be liable on the contract," which was needed because the Legislature found that "retailers of consumer goods [would] frequently persuade friends of purchasers to cosign consumer credit contracts on the representation that the cosigner is merely vouching for his friend's character and reliability." (4 JA 653-654 [Senate Committee on Judiciary report].) Such a law was necessary to "reduce the number of persons who unwittingly bind themselves

to pay their friends' obligations." (*Ibid.*) That concern is reflected in the language of the statute, which requires disclosure only where there are multiple signatures on a consumer credit contract (unless the persons are married) *and* one of those people is not obtaining any of the services or goods provided under the contract. (§ 1799.91, subd. (a).)

Neither at the time of the Act's adoption, nor in the intervening 50 years, has the Legislature made any such finding as to customers of bail bond agents. The Legislature has heard no evidence of confusion on the part of those negotiating directly with a bail agent for the purchase of a bond, paying the down payment on the bond premium, and receiving the approved disclosures (overseen by the legislatively selected agency) about their obligations to pay indemnity to the surety on the bond and/or to pay the premium to the agent in full or in installments for the premiums. There is thus no reason to believe the Legislature intended section 1799.91 to apply to bail transactions.

Second, the statutory disclosure language itself is a strong indication that bail transactions are not what the Legislature had in mind when crafting section 1799.91. The language tells the consumer involved in the transaction that they are a "cosigner" who is being asked to "guarantee" a debt "[i]f the borrower doesn't pay." (§ 1799.91, subd. (a).) But that simply is not what occurs when a family member or friend purchases a bond to obtain the release of an arrestee. Bond purchasers undertake their own debt, for their own reasons. The statutory language

stating, "You may have to pay up to the full amount of the debt if the borrower does not pay" is inapt and could actually mislead the purchaser into believing there is another "borrower" (the arrestee who has not yet signed any agreements) from whom the bail agent will first attempt to collect bond premiums. (*Ibid.*) That is not how bail bonds work.

As noted above, "family and friends are the true 'customer' of the" bail agents and the sureties who write the bonds. (See Labe, *supra*, at p. 6.) The Court of Appeal opinion acknowledges as much, noting that, if the arrestee is not personally arranging for the bond, the "client" of the bail agent is the friend or family member who secures the bond. (Typed opn. 9 ["The client (the arrestee and/*or* a friend or family member) utilizes the services of the bail agent to secure the undertaking of bail and the arrestee's release from detention."].) The Court of Appeal, however, never explains how a law requiring disclosure to unwitting cosigners applies to the primary (and often the only) obligors—the very people it describes as the "client." There is no "guarantee" of a debt of another, only its assumption.

Third, regulations promulgated by the Department of Insurance indicate that the person negotiating the bond, and not the person arrested for a crime, is the primary customer of the bail agent to whom documents must be provided. That characterization cannot be reconciled with treating that person as a cosigner to whom section 1799.91 disclosures must be made. Specifically, section 2083 in title 10 of the California Code of Regulations is titled: "Written Statements of Bail Transactions;

Contents; Delivery," and it provides a detailed list of the disclosures that a bail agent must make to persons like Caldwell in connection with the bail transaction. That regulation requires that all documentation of the bail transaction be provided "at the time of obtaining the release of an arrestee on bail or immediately thereafter," and that they be delivered to "such arrestee *or, if the negotiations concerning the bail were not with the arrestee, to the principal person with whom such negotiations were had*." (Cal. Code Regs., tit. 10, § 2083, emphasis added.)

In using the disjunctive, the Department of Insurance expressly recognized that the person initiating and negotiating the bail transaction (when not the arrestee, as here) is the person responsible for performing the obligations under the bail contract. Where the bond is negotiated by a friend or family member like Caldwell, the bail agent is *required* to provide all accounting statements, receipts, and the bond itself *not to the arrestee*, but to the primary-obligor friend or family member. Based on the contracts they sign, such persons can have no reasonable doubt about the responsibilities they are undertaking.

The Legislature has had no reason to question the sufficiency of agency-approved indemnity agreements, which are accompanied by a check list that bond purchasers initial to acknowledge they are responsible for paying not only the entire amount of the bond and all expenses if the defendant does not appear at trial, but also the full amount of the bond premium. (See typed opn. 3; 1 JA 11.) Purchasers specifically promise to

make those payments even if other people sign the agreement. (*Ibid*.) The Legislature, has not seen fit to amend either the Insurance Code or the Civil Code to require additional disclosures as set forth in section 1799.91 to the already exacting requirements under the bail bond statutes and regulations.[1]

Fourth, it is telling that, in the 50 years since section 1799.91 was enacted, only a single published opinion has even mentioned the statutory scheme, and it construed provisions that have no application here. (See *Engstrom v. Kallins* (1996) 49 Cal.App.4th 773, 778 [construing Civil Code section 1799.90, subdivision (a)(5), which does not apply to any transaction in this case].) This suggests that application of section 1799.91, has been uniformly understood by those engaged in such transactions, which to date has not included bail bond agents and their clients.

In sum, the Court of Appeal's admittedly novel application reading applying Civil Code section 1799.90 et seq. to bail bond transactions is contrary to the purpose and intent of the consumer credit statutes and regulations when viewed in conjunction with those that apply to bail bond agents (see Ins. Code, § 1800 et seq. [Bail Bond Regulatory Act of 1937]; Cal. Code Regs., tit. 10, § 2053 et seq.), and to the plain language of

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[1] Indeed, the Legislature expressly declined to adopt proposed amendments that would have expanded the definition of "consumer credit contract" in section 1799.91 (and three other consumer credit protection statutes) to expressly apply to bail agreements. (See Sen. Bill No. 318 (2019-2020 Reg. Sess.) § 5; 4 JA 770-811.)

those provisions. This Court's review is required to resolve the interplay of the existing regulation of consumer credit transaction and the separate regulation of bail bond transactions.

B. What unintended consequences will derive from the internal inconsistency in the Court of Appeal's conclusion that premium finance agreements are a standalone consumer credit transaction that may be voided for lack of notice, even though the accompanying indemnity agreements requiring payment of premiums are not?

One aspect in particular of the Court of Appeal's interpretation of section 1799.91 warrants especially close scrutiny. That statute applies only to consumer credit transactions as defined in Civil Code section 1799.90, subdivision (a)(4)—that is, "extensions of credit" that are unsecured or secured by other than real property. The opinion raises the question whether a bail agent really extends "credit" within the customary meaning of that term.

Plainly, the indemnity agreement that effects the purchase of a bail bond in itself, which may be procured through cash payments, is not a credit transaction. Implicitly acknowledging as much, the Court of Appeal here treated Caldwell's Unpaid Premium Agreement—by which she agreed to pay the premium on a monthly basis—wholly separately from the indemnity agreement in which she promised both to indemnify the surety should it have to pay the bond amount to court, and also to pay the full premium for the bond. (Typed opn. 13-18.)

The differences between an agreement to furnish a bail bond and a standard credit transaction, make it unsurprising that no decision has ever previously applied section 1799.91 to bail agents. The Court of Appeal here failed to explore these distinctions adequately or consistently with the statutory schemes. The agent does not pay money to the court that imposed the bond (unlike a lender who pays money to a seller on behalf of a borrower). Rather, the agent collects (and keeps most of) the premium in return for binding a surety to conditionally pay the bail amount *in the future* if an identifiable event (nonappearance in court) occurs. The insurance-like transaction is thus not the type of good or service contemplated under standard consumer protection statutes. (See *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 61; *Broberg v. The Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 924-925 [insurance is neither a good nor a service, as it is simply an agreement to pay if and when an identifiable event occurs]; see also Ins. Code, §§ 1800-1823 [provisions governing licensed bail agents make *no reference* to credit, debt, or borrowers].)

As the Eleventh Circuit held in *Buckman v. American Bankers Ins. Co. of Florida* (11th Cir. 1997) 115 F.3d 892, 894, agreeing "to indemnify a bail bond surety" is not an "'extension of credit' as that phrase is commonly understood or . . . used": "[I]t strains credibility to say than an indemnitor on a bail bond agreement is 'shopping for credit' when she agrees to the terms of a bail bond agreement. Instead, she is engaging in a standard

bail bond transaction: she agrees to be obligated to the surety should the accused fail to appear in court at the scheduled time."

Sidestepping the part of Caldwell's agreement that plainly is *not* a credit transaction, the Court of Appeal limited its credit contract analysis to the Unpaid Premium Agreement: "BBBB's arguments confuse the contract at issue in this appeal. While an arrestee or indemnitor may contract with the surety to guarantee the full amount of the bail if the defendant fails to appear in court as ordered [citation], the contract we are concerned with here is a different one. *A bail premium financing agreement extends credit to cosigners who are unable to afford the bail bond premium by accepting an initial downpayment and allowing them to pay the balance of the premium in monthly installments*. This financing agreement is ancillary to the bail bond transaction." (Typed opn. 16, emphasis added.)

The court noted that sometimes an Unpaid Premium Agreement will not be necessary ("[d]efendants who have financial means will have no occasion to execute such an agreement when obtaining a bail bond because they can pay the full premium outright"), and that different parties were involved in different aspects of the transaction ("unlike the indemnity agreement between a defendant and the surety company (here North River), the premium financing agreement is between the arrestee (or cosigner) and the bail bond *agent*, here BBBB"). (Typed opn. 16-17.)

This analysis raises the question of how an Unpaid Premium Agreement defining only the timing and manner of the

premium payment operates if it is separated from the agreement that sets forth the fact and amount of the obligation to pay the total premium. The Unpaid Premium Agreement does nothing more than permit the client to pay in installments the premium separately agreed to in the indemnity agreement (signed by Caldwell), which defines the services provided by the bail agent and surety.

If only the Unpaid Premium Agreement is a credit transaction and is unenforceable for lack of notice under section 1799.91, then people like Caldwell are still bound to pay the full premium without the benefit of the installment plan they agree to, just as the surety is bound to honor the bond whether or not the purchaser has defaulted. And if the premium is not promptly paid in full, the bond agent has both the right (1 JA 10) and financial incentive to immediately return the bailed-out arrestee to jail, while retaining the right to seek payment of the already earned premium.

In sum, the Court of Appeal oversimplified the transactions at issue here, obscuring the tremendous functional differences between a bail bond transaction and a consumer credit transaction for goods or services. This Court should grant review to examine not only whether section 1799.91 applies at all, but also to provide clear guidance on to *how* courts should apply Civil Code section 1799.91 and 1799.95—the foundation for the preliminary in junction in this case—to the instruments executed in the course of bail bond transactions.

C. How can the Court of Appeal's construction of multiple contracts as one, and of primary obligors as "cosigners" who received no contractual benefit, be reconciled with the actual agreements Caldwell and others similarly situated execute?

As explained above, several aspects of the statutory and regulatory schemes governing bail bond transactions and ordinary consumer credit transactions raise serious questions as to whether the Legislature intended all along that the cosigner disclosure law applies in the bail context. In addition, however, the *contractual* history in this case—which mirrors that of most bail transactions—confirms that: (1) no contract exists on which Caldwell cosigned with any other person; (2) Caldwell was by definition a "primary obligor" and could not be a "cosigner" within the meaning of the applicable statutes so as to trigger a notice obligation; (3) she received a benefit from her contract and thus is not owed statutory notice; and (4) she received adequate disclosures of her payment obligations. Was the Court of Appeal correct to nonetheless approve denying enforcement of the contract for lack of "cosigner" notice under section 1799.91?

1. *Only Caldwell signed the contract at issue here, so the disclosure requirement has no application.* The reason for requiring a special statutory disclosure in some circumstances *involving multiple signatories* to a contract is obvious: if only one person signs an agreement, there can be no confusion about whether that is the one responsible for the obligations defined in the agreement. By contrast, in true credit transactions where

two or more people sign, those who receive no benefit from the transaction might fail to appreciate what they are signing up for.

Here, Caldwell is the only person who signed the Unpaid Premium Agreement before BBBB fulfilled its side of the bargain by obtaining Chamber's release from jail. (1 JA 10; 3 JA 584-585.) The plain language of the statute thus dictates that there is no cosigner that is required to receive notice. The trial court and Court of Appeal, however, concluded that it doesn't matter that Caldwell alone signed the agreement because the arrestee *later* signed a parallel agreement, which those courts said must be part of a single agreement with two signatures. (Typed opn. 19-20.)

The reasoning of the Court of Appeal finds no support in contract law. This is not a situation where a single agreement has signatures in counterpart. These are separate agreements signed at different times by different people. (1 JA 10; 3 JA 584-585; typed opn. 19, fn. 6.) Indeed, the agreement Caldwell signed was fully executed and *performed* by BBBB and the surety before Chambers was even released from jail. (3 JA 584-585; typed opn. 19, fn. 6.) The surety and BBBB obligated themselves to the court to pay on the bond, *and could not back out of that agreement even if Chambers never signed her own contract.* Caldwell thus received the consideration that she contracted for, unconditioned by any conduct of Chambers. The fact that Chambers later signed an agreement making her *also* responsible does not change the fact that there was only a single signature on the agreement Caldwell signed, and that alone was enough for

BBBB to post the $50,000 bond without any further obligation from Chambers herself, thus clearly making Caldwell the primary obligor. Obviously, the later signature of Chambers could not retroactively convert Caldwell into a cosigner entitled to notice, where the statute requires that notice be provided "*prior* to that person's becoming obligated on the consumer credit contract." (Civ. Code, § 1799.91, emphasis added.)

The Court of Appeal posits that applying the statute's plain meaning would allow creditors to circumvent the disclosure law by arranging for separate signatures on multiple agreements. (Typed opn. 20.) In a true cosigner situation, however, that would never work—the whole purpose of engaging a cosigner is to *avoid* entering into a standalone contract with a borrower who is deemed a bad risk. If a creditor does not get the cosigner's *concurrent* agreement to guarantee the borrower's debt, the creditor would be left holding the bag.

Certainly, if a creditor drafted two identical contracts, and each was *conditioned* on both being signed, and the creditor was not required to provide the goods or services until both were signed, that situation might represent either promises by co-primary obligors or a primary obligor and a cosigner. But here, Caldwell obtained the bond she was purchasing without any agreement from Chambers having been executed.

BBBB provided Caldwell with all the notices required and approved by the Department of Insurance, based on regulations that specifically take into account that multiple people *independently* guaranteeing both the bond and payment of the

premium may independently sign indemnity agreements at different times—regulations specifying that the one who initiates and negotiates the bail transaction is the one entitled to receive the required disclosures and accounting. (Cal. Code Regs., tit. 10, §§ 2083, 2084.) And BBBB provided Caldwell with a checklist containing substantially the same information required under section 1799.91, which would be a strange thing to do if one were trying to circumvent the purpose of the statute. (See typed opn. 3; 1 JA 11.)

This Court should grant review to decide whether the plain language of section 1799.91 should be applied as BBBB contends, or should be expanded as the Court of Appeal did to cover separate agreements signed by different people at different times, creating independent obligations as to each person.

2. *Caldwell is a "primary obligor" as defined by the statute and is thus not a cosigner as a matter of law.* Even accepting the appellate court's conclusion that there was one single agreement with multiple signatures, Caldwell and others similarly situated to her are co-primary obligors, rather than cosigners, under that agreement as a matter of law. The Court of Appeal's opinion sidesteps this important issue by never defining who was the primary obligor under the contract signed by Caldwell. (See PFRH 5-7.) As defined by the Civil Code, a " 'primary obligor' " is "one or more persons, other than a cosigner, who sign a consumer credit contract and assume an obligation as debtor under that contract." (Civ. Code, § 1799.101, subd. (a)(8).) In contrast, a " 'cosigner' " is defined as "a natural person" who is not "the

primary obligor." (Civ. Code, § 1799.101, subd. (a)(3).) These terms are mutually exclusive. No person can be both a primary obligor and a cosigner, and there necessarily must be at least one primary obligor who assumes the obligations of the contract.

Again, Caldwell alone negotiated the contract terms; she was the first to sign a contract with BBBB; only Caldwell's signature—not the arrestee's—was necessary to form a contract; she alone made the down payment; and the surety was fully bound to that agreement upon Chambers' release from jail. (See typed opn. 3-4, 19, fn. 6; 1 JA 10.) That the arrestee later signed a parallel contract *also* promising to pay the premium and bail bond amount *after* she was released from jail does nothing to change the fact that Caldwell was the "primary obligor" and thus could not be deemed to be a "cosigner." (See Cal. Code Regs., tit. 10, § 2083 ["if the negotiations concerning the bail were not with the arrestee" then "the principal person with whom such negotiations were had" is the client who receives the required accounting statements and disclosures].)

Any other result would require an absurd interpretation of the statute under which Caldwell was temporarily a primary obligor to whom no disclosure was required, but then transformed into a cosigner when the arrestee *later* signed a parallel agreement at which time it would be literally impossible to turn the clock back to provide a disclosure when Caldwell signed the fully binding contract. This Court should grant review to decide whether this illogical result is what the Legislature intended. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th

12, 27 [courts should reject a construction that would lead to "absurd results"]; *In re J.W.* (2002) 29 Cal.4th 200, 210 [courts should avoid a statutory interpretation that "would result in absurd consequences that the Legislature could not have intended"].)

3. *Caldwell received the service provided under the contracts she signed.* Another reason Caldwell should be considered a primary obligor is that she received at least some consideration under the contracts she entered into, and thus was not subject to the law requiring a disclosure only to one who did "not in fact receive *any* of the money, property, or services which are the subject matter of the consumer credit contract." (§ 1799.91, subd. (a), emphasis added.)

A number of courts have found that purchasing a bond to obtain the release of another does confer a benefit on the purchaser. (See, e.g., *Monroe v. Frank* (Tex.App. 1996) 936 S.W.2d 654, 660 ["Frank obtained the bail bond (debt) to help get a family friend out of jail," and "derived benefit for himself from the transaction"]; accord, *Lilly v. Tolar* (Tex.App., Aug. 22, 2002, No. 06-01-00163-CV) 2002 WL 1926527, at p. *8 [nonpub. opn.] [a father who obtained bail bond to get his son out of jail could be found to have derived benefit for himself from the transaction]; see also *Nashville Community Bail Fund v. Gentry* (M.D.Tenn.) 496 F.Supp.3d 1112, 1127-1128 [charitable organization that provides bail bonds for defendants has standing in its own right to assert rights regarding bail conditions].)

But even putting aside whatever personal purpose one might seek to accomplish by bailing another person out of jail, Caldwell unquestionably obtained the service provided by the Unpaid Premium Agreement that was the focus of the Court of Appeal's attention as a consumer credit transaction. Caldwell received the direct benefit of paying her premium obligation (undertaken in the separate indemnity contract with the surety) in installments, and thus was not owed any special notice under the plain language of section 1799.91.

The Court of Appeal posits that the ability to make payments in installments cannot be considered a service because, if that were the case, every cosigner would receive a service, rendering the disclosure requirement meaningless. (Typed opn. 21.) Not so. In the typical installment payment agreement, the "cosigner" has no obligation to pay for the product or service being provided to a different person. If a mother cosigns a loan for her son to purchase a car, she receives no service because she had no obligation to purchase the car, and if the son paid cash, there would be no need to cosign the loan. Here, in contrast, Caldwell took on the indemnity obligation to secure Camber's release, which required her to agree to pay the premium and guarantee the full amount of the bond *in the first instance*. With the Unpaid Premium Agreement, she thus received the benefits of being able to make those promised payments in installments, as well as all the other services of the agent who arranged for the posting of the $50,000 bond.

4. *The disclosures provided to Caldwell are targeted to bail bond customers and are consistent with those required by the notice-to-cosigner law.* As previously explained, the bond transaction, which includes documentation from bail agents and bail sureties in a form approved by the Department of Insurance, already provides information to the bond purchaser that section 1799.91 intends to convey. This case therefore presents the question whether a preliminary injunction invalidating innumerable contracts throughout the state is appropriate when the purpose of the statute has already been met by disclosures approved by the Department of Insurance for the context in which they are made.

The salient parts of the consumer credit cosigner provisions require a disclosure that (1) the cosigner is guaranteeing the full amount of debt if the contracting party is unable to pay, (2) that the contract payments can be collected without first trying to obtain them from the borrower, and (3) the enforcement methods available against the contracting party can also be used against the cosigner. (§ 1799.91, subd. (a).)

Here, Caldwell received a checklist requiring her to acknowledge several disclosures involving the bail transaction. (1 JA 11.) On that checklist Caldwell initialed disclosures acknowledging she was responsible for making the payments on the Unpaid Premium Agreement and that she would be held "solely and individually liable for up to the *full amount owed* for any and all charges" *even if others were to sign the document*. (1 JA 11 [nos. 3, 14], emphasis added; see typed opn. 3.) Caldwell

thus received the substance of the disclosures required under section 1799.91, which reinforced what would already have been clear from the circumstances of her bail bond purchase decision. Can the Legislature have intended that Civil Code section 1799.95 would effect a "gotcha," prohibiting enforcement of otherwise entirely valid bail bond transactions, despite such disclosures?

II. The opinion raises the question whether the Court of Appeal's novel interpretation should be applied only prospectively, particularly where the injunction applies to judgments already entered.

Considerations of "fairness and public policy" may require that a decision be given only prospective application. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 379.) Indeed, application of a judicial decision that unsettles reasonable expectations has a constitutional dimension, as it may deny due process. (See *Moss v. Superior Court* (1998) 17 Cal.4th 396, 429; see also *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282-1283 [whether to limit retroactive reach of a new rule includes an analysis of the purposes to be served by the new rule, and whether applying a new rule to past conduct might deprive litigants of expected remedies or defenses].)

As explained above, there are many reasons that it is unfair to apply the Court of Appeal's ruling to completed transactions. The Court of Appeal acknowledges that its interpretation is "novel" and will upend long-standing business expectations. (Typed opn. 1-2.) BBBB and other bail agents were entitled to rely on the bail bond statutes and Department of

Insurance oversight to define the universe of disclosures required, and to define who is their client for purposes of providing those disclosures and regulations. They had every reason to believe that Caldwell and those similarly situated were their primary clients and not considered "cosigners" as defined under section 1799.91.

The opinion, moreover, leaves many unanswered questions that make it impossible for bail agents to do business in a way that complies with the law. This preliminary injunction was decided on an incomplete record but—as approved by the Court of Appeal—effectively declares the standard business practices of bail agents to be illegal.

If this Court were to find that the cosigner disclosure law does, indeed, apply to BBBB's transaction with Caldwell, this Court should still address whether that statutory interpretation should have prospective only effect rather than rendering unenforceable all the contractual obligations that were entered into (and judgments on those contracts) with no prior judicial decision even intimating that section 1799.91 might apply as the Court of Appeal held here. Indeed, several legislators raised this very question in objecting to proposed legislation seeking to expressly construe section 1799.90's definition of consumer credit contracts to include bail agreements. (4 JA 802 [Assembly Committee on Insurance report on proposed SB 318: "Remove the provisions indicating that the changes made are 'declaratory of existing law.' This language is an attempt to retroactively apply, by legislative enactment."].)

A subsidiary issue also ripe for this Court's consideration is whether the trial court had authority to enter such a broad injunction, nullifying judgments rendered in other courts. "A judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned. [Citation] Appellate jurisdiction to review, revise, or reverse decisions of the superior courts is vested by our Constitution only in the Supreme Court and the Courts of Appeal." (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742.) Granting only prospective application to the Court of Appeal decision would avoid this jurisdictional problem.

The appellate court cites none of the foregoing authority related to final judgments, and in conclusory fashion holds that prospective application would unfairly require purported "cosigners" such as Caldwell to pay bond premiums where "Caldwell and other putative class members contend they would not have agreed to cosign bail bond premium financing agreements had they be given proper warning of the consequences of their decision." (Typed opn. 27-28.) But Caldwell's claims that she would not have signed the contract if she had been given additional disclosures are irreconcilable with her acts in signing the contract and initialing the provisions of the check list that effectively provides the disclosures required to cosigners. (See 1 JA 11.)

Even if this Court ultimately concludes the Court of Appeal was correct in its interpretation of section 1799.91—it

shouldn't—it will avoid a number of practical problems by applying this novel ruling only prospectively.

CONCLUSION

For the foregoing reasons, this Court should grant BBBB's petition for review.

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