No. S199384

IN THE SUPREME COURT OF CALIFORNIA

APPLE INC., a California corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent;

DAVID KRESCENT,

individually and on behalf of a class of persons similarly situated,

Real Party in Interest.

Court of Appeal Case No. B238097
Los Angeles Superior Court Civil Case No. BC463305
The Honorable Carl J. West, Presiding

APPLE INC.'S OPENING BRIEF ON THE MERITS

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I. ISSUE PRESENTED FOR REVIEW

Does Civil Code section 1747.08 of the Song-Beverly Credit Card Act of 1971, which prohibits retailers from recording a customer's personal identification information as a condition of accepting a credit card payment, apply to online commercial transactions?

II. INTRODUCTION

This action raises a fundamental question of statutory construction: Whether the courts should apply a carefully balanced legislative policy embodied in a statute to a type of transaction that neither existed nor was contemplated by the Legislature at the time of the statute's enactment, *where that transaction raises significantly different policy judgments than those considered by the Legislature*. Logically, application of the statute to such an unanticipated transaction of an inherently different nature could not possibly effectuate the Legislature's intent. And in this case, because the delicate policy balance embodied in the statute is *incapable* of being applied to the unanticipated transactions and because the statutory language is *incompatible* with such transactions, Petitioner Apple Inc. submits that the Legislature, not the courts, should determine the proper policy to apply to such transactions in the first instance.

Civil Code section 1747.08[1] of the Song-Beverly Credit Card Act (the "Song-Beverly Act") (§ 1747 et seq.) prohibits merchants from requesting and recording credit cardholders' "personal identification information," including their addresses, in order to complete credit card transactions.

Recently, in *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 531 (*Pineda*), this Court ruled that "personal identification information" includes "not only a complete address, but also its components," including a ZIP code.

In the wake of *Pineda*, more than 150 class action lawsuits were filed in California against retailers that collected ZIP codes and other personal identification information. (Assem. Com. on Banking and Finance, Analysis of Assem. Bill No. 1219 (2011-2012 Reg. Sess.) as amended Apr. 25, 2011, p. 3.)[2] However, the vast majority of those cases, like *Pineda*, deal with brick-and-mortar retailers, which have the right and ability to require that the customer present "reasonable forms of positive identification," such as a driver's license, as a condition to accepting the credit card payment, and thereby verify the cardholder's identity. (§ 1747.08, subd. (d).)

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[1] Unless specified otherwise, all further statutory references are to the Civil Code.

[2] All citations to relevant legislative history in this brief are attached to Apple's accompanying Request for Judicial Notice.

In this case, however, plaintiff is attempting to stretch the Song-Beverly Act to cover transactions that were never contemplated and did not exist when the Act or section 1747.08 was enacted—online commercial transactions over the Internet.

Because the statute's text, legislative history, and purpose reflect that the Legislature did not intend to apply the Act to online transactions—where an e-retailer does *not* have the ability to exercise its right to inspect a credit card or photo identification as a condition to accepting the credit card—plaintiff's section 1747.08 claim must fail as a matter of law, and the trial court should have dismissed it at the pleading stage.

The trial court, however, indicated that it was unwilling "at the pleading stage, to read the Act as completely exempting online credit transactions from its reach" and overruled Apple's demurrer. (Exh. 30 at p. 579 in Pet.'s Exhibits in Support of Writ Petition (hereinafter referred to as "Exhs.").)

The court's decision stands in sharp conflict with the rest of the courts that have considered this issue, all of which correctly found that section 1747.08's plain language points to one inescapable conclusion: the Act does not apply to online transactions. (*Mehrens v. Redbox Automated Retail LLC* (C.D.Cal. Jan. 6, 2012, No. 11-2936) 2012 WL 77220 (*Mehrens*) [holding online transactions are not covered under the Act]; *Saulic v. Symantec Corp.* (C.D.Cal. 2009) 596 F.Supp.2d 1323 (*Saulic*)

[same]; *Salmonson v. Microsoft Corp.* (C.D.Cal. Jan. 6, 2012, No. 11-5449) 2012 WL 77217 [same, opinion vacated due to judge's subsequent recusal determination].)

The trial court's decision should be reversed for the following reasons:

First, the text of section 1747.08 demonstrates that the Legislature intended to regulate only in-person transactions when it drafted that statute in 1990-1991: While prohibiting the recordation of personal identification information, the statutory language specifically permits a retailer to inspect a customer's credit card and require photo identification, even allowing the retailer to record the cardholder's driver's license number or identification card number if the cardholder "does not make the credit card available upon request to verify the number . . . ." (§ 1747.08, subd. (d).) By contrast, the language of section 1747.08 is not compatible with online transactions, where there is no opportunity to inspect photo identification or to "request" the credit card. The Act's plain language has led every court—with the lone exception of the trial court here—to conclude that the Act does not apply to online transactions over the Internet.

Second, section 1747.08 establishes a delicate policy balance between privacy (i.e., the prohibition against the retailer's recordation of the customer's personal identification information where a credit card is physically presented upon request) and fraud prevention (e.g., the retailer's

authorization to require "reasonable forms of positive identification, which may include a driver's license," as long as "none of the information contained thereon is written or recorded"). (§ 1747.08, subd. (d).) This policy balance cannot be applied to online transactions: An online merchant not only cannot check a form of positive identification but cannot even inspect the credit card, including the name, signature or other information set forth thereon.

Third, rules of statutory construction argue against the application of section 1747.08 to online transactions because "'[a] statute open to more than one interpretation should be interpreted so as to "'avoid anomalous or absurd results.'"[Citations.]'" (*Pineda*, *supra*, 51 Cal.4th at p. 533.) Here, applying section 1747.08 to online transactions would lead to the absurd result that e-retailers, which operate nationwide (if not international) websites, would have to violate the Act—that is, ask the customer to specify his or her address, in whole or in part—in order to even determine whether California law applies to the particular transaction in the first place. (See *Pineda*, 51 Cal.4th at p. 531 [holding that a component of an address, including a ZIP code, is personal identification information under the Act].) The Legislature never could have intended to force e-retailers into this Catch-22 scenario when it passed the Act.

Moreover, applying the Act to online transactions would prohibit the merchant from requiring the online customer to provide *any* personal

identification information in order to verify the purported cardholder's identity, which would greatly facilitate online fraud, resulting in harm to the very consumers whom section 1747.08 is intended to protect. The Legislature, which expressly granted brick-and-mortar merchants the right to require positive forms of identification to verify the cardholder's identity, clearly did not intend to strip retailers of *any right* to verification in online transactions.

Fourth, the legislative history of the Song-Beverly Act further confirms that the Legislature did not intend it to govern online transactions. The Act was enacted in 1971, at a time when the idea of the Internet, much less purchasing music from the cloud on iTunes, would have seemed like the whimsy of a science fiction novelist. When section 1747.08 was added in 1990, internet commerce did not even exist. Instead, the legislative history of section 1747.08 reveals that the Legislature was exclusively focused on the collection of personal identification information in in-person transactions in the brick-and-mortar retail context. The statutory language reflects this intent.

Fifth, the rule of statutory construction of pari materia, by which statutes relating to the same subject matter should be construed together, supports the conclusion that the Legislature did not intend section 1747.08 to apply to online transactions. California has a separate statutory scheme that governs the collection of personal identification information in online

commercial transactions. Under the California Online Privacy Protection Act, the Legislature required commercial websites that collect personally identifiable information from California consumers (defined as those who seek or acquire goods, services, money, or credit) to post on their website their privacy policy concerning their practice of collecting personal information. (Bus. & Prof. Code, § 22575 et seq.) The Legislature enacted the law during its 2003-2004 session because "[e]xisting law does not directly regulate the privacy practice[s] of online business entities." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 68 (2003-2004 Reg. Sess.) as amended Sept. 3, 2003, p. 1.) Construed together, this statutory scheme and section 1747.08 reflect the legislative intent to apply the broader and more flexible provisions of the California Online Privacy Protection Act, not the Song-Beverly Act, to online commercial transactions.

Finally, applying the Song-Beverly Act to online transactions with merchants which conduct interstate business creates a significant risk of violating both the due process clause and commerce clause of the United States Constitution. It is a well-settled principle of statutory construction that "a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*People v. Engram* (2010) 50 Cal.4th 1131, 1161.) But if section 1747.08 is applied to online transactions, an out-of-state merchant must violate the Act by asking the customer to specify his or her address in whole or in part in order to receive

notice that California law applies. This is the converse of due process: violation first; notice (and lawsuits) second. Moreover, if the Act applies to online transactions, it may apply to e-retailers throughout the United States and the world who transact business with California residents. Since the residence of any customer will be unknown until he or she provides personal identification information, in order to comply with the Song-Beverly Act, those e-retailers must either refrain from recording any such information from any customer, thereby making California's standard the national standard, or refrain from engaging in interstate commerce with California residents, who in any event cannot be identified without first violating the Act. Either way, the Act "imposes a substantial burden on interstate commerce which outweighs its putative local benefits" in violation of the commerce clause. (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 643.)

In short, the trial court's decision to apply section 1747.08 to online transactions (1) conflicts with the statutory language and the carefully balanced legislative policy embodied in section 1747.08's text, (2) threatens to produce unintended and absurd results, (3) cannot be reconciled with the statute's legislative history (since online transactions did not exist at the time of its enactment and involve policy considerations never contemplated), (4) construes the statute in a manner which raises serious questions regarding its constitutionality under the due process and

commerce clauses, and (5) conflicts with all of the other decisions on this issue. Accordingly, Apple respectfully requests that this Court reverse the trial court's decision overruling its demurrer.

III. PROCEDURAL AND FACTUAL BACKGROUND

Apple is the defendant in *Krescent v. Apple Inc.*, Los Angeles Superior Court Case BC 463305 (the "Apple Action"). Ticketmaster LLC is the defendant in *Luko v. Ticketmaster, Inc.*, Los Angeles Superior Court Case BC 462492 (the "Ticketmaster Action"). eHarmony, Inc. is the defendant in *Luko v. eHarmony, Inc.*, Los Angeles Superior Court Case BC 462494 (the "eHarmony Action"). All three cases allege a sole cause of action for violation of section 1747.08.

The complaint against Apple alleges that the plaintiff, David Krescent, purchased media downloads from Apple. (Exh. 3 at p. 26.) All elements of the transaction, including the delivery of media to the plaintiff, were accomplished over the Internet. (*Id.* at p. 27.) Plaintiff alleges that as a condition of receiving those downloads and "in order to complete his credit card purchase" using Apple's "pre-printed form" (i.e. its iTunes website interface), he was required to provide his address and telephone number, and that Apple records such "personal identification information." (*Id.* at pp. 26–27.) The complaint further speculates that Apple is not contractually obligated to provide an address or telephone number in order to complete a credit card transaction. (*Id.* at p. 27.) Based on these

allegations—which would apply to most, if not all, credit card transactions on the Internet—plaintiff, individually and on behalf of a class of similarly situated individuals, claims that Apple has violated section 1747.08 and seeks statutory damages of $250 for each primary violation and $1,000 for each subsequent violation. (*Id*, at p. 29.)

On June 30, 2011, the trial court related the Apple, Ticketmaster, and eHarmony Actions. On September 9, 2011, Apple, Ticketmaster, and eHarmony separately demurred to their respective complaints. Apple argued that plaintiff's claim failed as a matter of law because the Song-Beverly Act does not regulate online transactions. (Exh. 15 at p. 268.)[3]

On December 7, 2011, the court issued an omnibus order overruling the three demurrers. The court stated that while Apple's arguments "have definite appeal," it was "not prepared, at the pleading stage, to read the Act as completely exempting online credit transactions" because "the Act itself is silent" on that point, and the Court's decision in *Pineda* did not distinguish between online transactions and "brick and mortar" ones. (Exh. 30 at pp. 579–81.) The trial court concluded that "until the legislature specifically exempts online credit card transactions from the purview of the Act, the Court will not (and cannot) read such a provision into the statute." (*Id.* at p. 581.) The trial court certified the matter for interlocutory review under Code of Civil Procedure section 166.1.

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[3] The defendants in the related cases made similar arguments.

On January 5, 2012, the Court of Appeal summarily denied Apple's, Ticketmaster's, and eHarmony's petitions for interlocutory review of the trial court's order.

On March 14, 2012, this Court granted Apple's, Ticketmaster's, and eHarmony's petitions for review. On March 28, 2012, this Court designated Apple as the lead case and deferred further action on the Ticketmaster and eHarmony cases.

IV. ARGUMENT

A. Section 1747.08's Text Indicates That The Legislature Did Not Intend To Apply It To Online Transactions.

"The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, [the courts] begin by examining the language of the statute.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 774–775.) "[A] court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.)

"But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in

context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*).)

Finally, "if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren, supra*, 45 Cal.3d at p. 735.)

The plain language of section 1747.08, read as a whole, shows that the Legislature never intended it to apply to online transactions. Section 1747.08 provides in relevant part:

> (a) Except as provided in subdivision (c), no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following:
>
> (1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, *the cardholder to write any personal identification information upon the credit card transaction form* or otherwise.
>
> (2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card *writes, causes to be written, or otherwise records upon the credit card transaction form* or otherwise.

(3) Utilize, in any credit card transaction, a credit card *form which contains preprinted spaces* specifically designated for filling in any personal identification information of the cardholder.

(b) For purposes of this section "personal identification information," means information concerning the cardholder, *other than information set forth on the credit card*, and including, but not limited to, the cardholder's address and telephone number.

(c) [omitted]

(d) This section does not prohibit any person, firm partnership, association, or corporation from *requiring the cardholder*, as a condition to accepting the credit card as payment in full or in part for goods or services, *to provide reasonable forms of positive identification*, which may include a driver's license or a California state identification card, or where one of these is not available, *another form of photo identification*, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise. *If the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number*, the cardholder's driver's license number or identification card number may be *recorded on the credit card transaction form* or otherwise.

(§ 1747.08, subds. (a)–(d); italics added.)

First, the overall structure of section 1747.08, read as a whole, reflects a legislative intent to effectuate a delicate policy balance between privacy protections and fraud prevention. On the one hand, the statute prohibits merchants' collection of "information unnecessary to the sales transaction" (*Pineda*, *supra*, 51 Cal.4th at p. 532), but on the other, authorizes the retailer to require the customer to "provide reasonable forms of positive identification, which may include a driver's license," as "a

condition to accepting the credit card as payment" as long as the information is not recorded (§ 1747.08, subd. (d)). Moreover, where the cardholder "does not make the credit card available upon request to verify the number," the retailer has the right to *request* and *record* the cardholder's driver's license number or identification card number. (*Ibid.*) Moreover, *in all cases*, the retailer is permitted to *record* any "information set forth on the credit card," which is excluded from the scope of "personal identification information." (*Id.*, subd. (b).)

This legislative balance between privacy protection and fraud prevention expressed in the statute cannot be effectuated in the case of online transactions because the retailer cannot ask the online customer to show it reasonable forms of positive identification. Nor can the online merchant even see the credit card, including the name, signature or other information set forth thereon. Instead, any effort to verify cardholder identity in online transactions necessarily requires the purported cardholder to provide and transmit such information electronically, which section 1747.08 (if applicable) would presumably prohibit. Accordingly, application of section 1747.08 to online transactions "is contrary to the legislative intent apparent in the statute" and instead "the letter [of the statute should], if possible, be so read as to conform to the spirit of the act." (*Lungren, supra*, 45 Cal.3d at p. 735.)

Second, the words used in the statute show that the Legislature never intended section 1747.08 to apply to online transactions. Instead, the statute's language reflects an intent to apply the statute to person-to-person transactions or those in which the card is physically presented.

The prohibition in subdivision (a)(1) against requiring the cardholder "to write any personal identification information upon the credit card transaction form or otherwise" denotes an in-person transaction. (§ 1747.08, subd. (a)(1).) Cardholders do not "write" personal identification information when they make an online purchase; they type the information into various text fields that appear digitized on the screen.

The prohibition against "writing" the information "upon the credit card transaction form or otherwise" does not suggest that the prohibited form could include a computer screen. The prohibited action is "to write." The reference to "otherwise" is to a form other than the "credit card transaction form" on which one could "write" the prohibited information. One can no more "write" on a computer screen than one can "write" on a typewriter. Accordingly, the prohibition against "writing" the information "upon the credit card transaction form or otherwise" cannot refer to "writing" the information on a computer screen. In interpreting statutes, "[w]ords that can have more than one meaning are given content . . . by their surroundings." (*Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 466.) Thus, the plaintiff's claim here that he was unlawfully

required to provide his addresses and telephone numbers in an online transaction is not covered by the plain language of subdivision (a)(1), which prohibits requiring the cardholder to "write any personal identification information . . . ." (§ 1747.08, subd. (a)(1).)

The prohibition in subdivision (a)(2) is analogous to the prohibition in subdivision (a)(1), but instead prohibits a *retailer* from requesting or requiring the information and *itself* "writ[ing], caus[ing] to be written, or otherwise record[ing]" that information on a "credit card transaction form or otherwise." Thus, subdivision (a)(2) contemplates a two-step process: *after* the retailer "[r]equest[s], or require[s] . . . the cardholder to provide personal identification information" (which expressly is permitted under subdivision (d)), the *retailer* may not *then* "write[], cause[] to be written, or otherwise record[]" that information. The prohibited conduct under subdivision (a)(2) also denotes a person-to-person transaction in which the *retailer* takes steps to record information it first requests from the customer, not an *online customer's* transmission of the information.

Likewise, subdivision (a)(3) refers to "utiliz[ation]" of "a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information . . . ." (§ 1747.08, subd. (a)(3).) A website page is a digitized display, not a "credit card form" with "preprinted spaces." (See *Simonoff v. Expedia, Inc.* (9th Cir. 2011) 643 F.3d 1202, 1207–1208 [*e-mailed receipts* are not "electronically printed"

receipts covered by the Fair and Accurate Credit Transactions Act, because "printing involves a physical imprint onto paper or another tangible medium"].)

Indeed, the legislative history reflects that the "credit card form which contains preprinted spaces" specified in subdivision (a)(3) refers to the fact that "a number of retailers ha[d] begun to use credit card transaction forms with a designated space for addresses and telephone numbers printed right on them." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2920 (1989-1990 Reg. Sess.) as amended June 27, 1990, p. 3.)

Accordingly, "[t]his language suggests that 'pen and paper' transactions are contemplated, rather than electronic entry of numbers on a keypad or touchscreen . . . ." (*Mehrens*, *supra*, 2012 WL 77220.) In short, there is a misfit between the language of section 1747.08 and the reality of online transactions. (Cf. *Ewert v. eBay, Inc.* (N.D. Cal. Mar. 21, 2008, No. 07-2198) 2008 WL 906162 [holding that California Auction Act (§ 1812.601 et seq.) did not apply to online auctions because applying a statute written for in-person auctions to online transactions "is like trying to put a round peg in a square hole"].)

Subdivision (b), which defines "personal identification information"—which the retailer is prohibited from recording—also contemplates a transaction involving a credit card that is physically

presented to a retailer. Subdivision (b) excludes from the definition of "personal identification information" any "information *set forth on the credit card.*" (§ 1747.08, subd. (b).) Thus, a brick-and-mortar retailer is authorized to make a physical impression or copy of the credit card or record the name or other information that appears on the face of the card (which may not be the same as the name of the customer, as when the customer uses a spouse's or parent's credit card, for example). Because an online retailer lacks the ability to see what information may be "set forth on the credit card," however, it cannot record this information and also has no way of knowing what information is "set forth" on the face of the card.

The statutory language in the definitions set forth in section 1747.02 also reflects that the Legislature contemplated in-person transactions when it enacted the statute. Under the Act, "credit card" means "any card, plate, coupon book, or other single credit device existing for the purpose of being used from time to time *upon presentation* to obtain money, property, labor, or services on credit." (§ 1747.02, subd. (a); italics added.) Likewise, "Retailer" is defined to mean "every person . . . who furnishes money, goods, services, or anything else of value *upon presentation* of a credit card by a cardholder." (*Id.*, subd. (e); italics added.) As relevant here, "presentation" is "[a]n act of presenting or the state of being presented." (Webster's II New College Dict. (2001), p. 874.) In turn, "present" is "[t]o offer to view: display <*present* one's diplomatic credentials>." (*Ibid.*; see

also *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16 (2000) ["Courts frequently consult dictionaries to determine the usual meaning of words"].) Unlike a transaction at a traditional brick-and-mortar location, a customer does not "present" a credit card to an online e-retailer. To the contrary, the e-retailer has no ability to examine the credit card or even to determine whether the customer is in possession of the card.

The text of subdivision (d) of section 1747.08 further reflects that online transactions were not contemplated *and* expresses a policy judgment that would be frustrated if the statute were applied to online transactions. Subdivision (d) permits retailers to "requir[e] the cardholder, as a condition to accepting the credit card . . . , to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, or where one of these is not available, another form of photo identification, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise." (§ 1747.08, subd. (d).)

Thus, subdivision (d) allows the retailer to examine the customer's credit card and his or her photo identification in order to verify that the customer is authorized to use the credit card. But this right to verify is not available to the online retailer. Instead, the only means for an online retailer to verify identity is by requesting personal identification information from the customer, which necessarily is recorded by virtue of

the electronic medium through which the communication is made. As the Central District of California noted in *Saulic, supra,* 596 F.Supp.2d 1323, which found that section 1747.08 did not apply to online transactions:

> [T]here are numerous differences between a "brick and mortar" purchase and an online purchase and the merchant's ability to ensure the cardholder is who she claims to be. For example, an in-person transaction provides the merchant with the opportunity to check the customer's signature on her credit card against the signature on the credit card slip. Additionally, the merchant can ask for picture identification to compare the person in front of them to the name on the credit card. Certain credit cards even include the customer's picture imprinted on the card, allowing the merchant to confirm that the cardholder is who she claims to be. In an online transaction, without a request for PII, online merchants must ultimately accept payment with nothing more than a name and credit card number—there is no "verification."

(*Id.* at p. 1335; citations omitted.)

Subdivision (d) concludes, "If the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number, the cardholder's driver's license number or identification card number may be recorded on the credit card transaction form or otherwise." (§ 1747.08, subd. (d).) This exception to the prohibition against recording personal identification information also denotes an in-person transaction because it depends upon the cardholder not making the card available "upon request," in which case the driver's license may be *requested* and recorded *on the transaction form.* In contrast, the online merchant never sees the credit card and cannot "request" it be made

available so as to trigger the right to get the driver's license and record the information. Moreover, this exception reflects the Legislature's judgment that the privacy concerns reflected in the prohibitions in the statute must yield to the retailer's need to prevent fraud where the credit card is not physically presented to the retailer, in light of the heightened risk that the customer's use of the credit card number may be unauthorized.

In sum, the plain language of section 1747.08 suggests that it was designed to address in-person transactions where a credit card could be physically presented, not online transactions. It also reflects a balanced legislative judgment which protects privacy by prohibiting the recordation of personal identification information that is not "set forth" on the card as long as the credit card is physically presented upon request, while preventing fraud (by allowing review of the credit card and reasonable forms of positive identification to verify the cardholder). In contrast, applying section 1747.08 to online transactions would impose all of the prohibitions in section 1747.08 without the benefit of *any* of its protections against fraud. A court's application of that section to online transactions therefore results in a very different policy judgment than determined appropriate by the Legislature in section 1747.08. If section 1747.08 is to be applied to online transactions, the Legislature should determine the proper policy balance in the first instance.

For example, the Legislature engaged in such a policy balancing exercise in 2011, when subdivision (c)(3)(B) was added to section 1747.08, which created an additional exception to the prohibition against recording personal identification information. (Stats. 2011, ch. 690, § 2.) The Legislature exempted from the prohibitions in subdivision (a) those cases where "a retail motor fuel dispenser or retail motor fuel payment island automated cashier uses the Zip Code information solely for prevention of fraud, theft, or identity theft." (§ 1747.08, subd. (c)(3)(B).) While this, too, is a transaction in which a credit card is physically presented to a brick-and-mortar retailer (*Mehrens*, *supra*, 2012 WL 77220 fn. 3), the exception expresses a legislative intent to authorize the collection of personal identification information in a case where a merchant is not necessarily present to ask for reasonable forms of personal identification under subdivision (d) before the transaction is completed. This further reflects a legislative intent not to apply the prohibitions of section 1747.08 to transactions without the benefit of any countervailing protections to verify the cardholder's identity.

In conclusion, section 1747.08's plain language reflects a consistent legislative intent to apply the prohibitions against the recordation of personal identification information to in-person transactions. Likewise, the text of section 1747.08, as a whole, embodies a delicate policy balance between privacy protection and fraud prevention that cannot be applied to

online transactions. And where the card is physically presented at the automated gas pump (outside the presence of a cashier), the policy embodied in section 1747.08's text permits some personal identification information (the ZIP code) to be recorded. Neither the statutory language nor the policy judgment embodied in the statutory text can be reconciled with the application of section 1747.08 to online transactions.

B. Section 1747.08 Should Be Construed To Avoid Adverse And Unintended Consequences.

"'When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction "which serve as aids in the sense that they express familiar insights about conventional language usage." [Citation.]'" (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 340.) "[T]he court should utilize those tools of interpretation that most clearly illuminate the legislative objective." (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50 (dis. opn. of Kennard, J.).)

One settled rule of statutory construction is that "[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *People v. Cruz, supra*, 13 Cal.4th at p. 782.) "We are obligated to select the construction that comports most closely with the apparent intent of the Legislature, to

promote rather than defeat the statute's general purpose and to avoid an interpretation that would lead to absurd and unintended consequences." (*People v. Carter* (1996) 48 Cal.App.4th 1536, 1539; accord *Pineda*, *supra*, 51 Cal.4th at p. 533 ["'A statute open to more than one interpretation should be interpreted so as to "'avoid anomalous or absurd results'"'"].)

1. Applying Section 1747.08 To Online Transactions Will Facilitate Fraud Against The Very Consumers The Statute Is Meant To Protect.

Section 1747.08 was created to protect consumers, particularly from "'misuse of personal identification information . . . .'" (*Pineda*, 51 Cal.4th at p. 534.) But interpreting the statute's prohibitions to apply to online transactions, where there is no way to confirm the customer's identity or right to use the credit card in question, would *harm* consumers by facilitating the very fraud that subdivision (d), which authorizes requests for identification, and subdivision (c)(3)(B), which authorizes the use of ZIP codes at gas pump payment islands, is designed to prevent. In short, applying the statute to online transactions facilitates the "misuse of personal identification information" but *by thieves*, rather than *by merchants*. *Id.*

Unfortunately, computer criminals can engage in online credit card fraud on a vast automated scale, requiring even greater vigilance and verification than in person-to-person transactions. For instance, "phishing" scams are used to deceive someone to go to a website pursuant to a request from an official-looking email from a familiar source, such as a bank or

credit card company, and to enter the consumer's credit card information and other financial data, which will then be captured and used fraudulently. (Ramasastry, *Hooking Phishermen* (Aug. 16, 2004) CNN.com <www.cnn.com/2004/law/08/16/ramasastry.phishing> [as of May 10, 2012].) Likewise, a single hacker that penetrates a secure network can install a network analyzer (also known as a "sniffer") that will log all activity across the "secure" network, including the exchange of credit card numbers, which can then be used fraudulently. (McCurdy, *Computer Crimes* (2010) 47 Am. Crim. L. Rev. 287, 292–293.) In addition, a hacker can develop a program that inputs hundreds of names and credit card numbers in fraudulent transactions in rapid sequence, and an internet "bot" can generate hundreds of thousands of randomized credit card numbers in seconds. (See *Ibid.*) Moreover, it is frighteningly easy for a dishonest waiter to copy a diner's credit card number and purchase goods online, or an unscrupulous online purchaser to claim that he never made a purchase while retaining the goods, or a criminal to make unauthorized purchases after snapping a camera-phone photo of an unsuspecting person's credit card number while waiting to check out at a store.

Unlike brick-and-mortar transactions, the only effective means that an online e-retailer has to prevent fraud is to ask the customer for personal identification information that a fraudster would have difficulty obtaining, namely, the cardholder's billing address and telephone number. Thus,

online merchants must collect personal identification information to verify "that the cardholder is who she claims to be." (*Saulic*, *supra*, 596 F.Supp.2d at p. 1335.) Indeed, the "collection of personal information in an online . . . transaction may be the only means of verifying a customer's identity in order to prevent credit card fraud." (*Mehrens*, *supra*, 2012 WL 77220 at p. *3.)

Even the Los Angeles County Superior Court, which issued the decision at issue, collects the very same personal information that Apple purportedly collected here (address, telephone number, and e-mail address) when it processes credit card transactions for the purchase of court filings.[4] As the court's website explains, it "takes online fraud very seriously and coordinates with local and Federal authorities to prosecute anyone attempting to use stolen credit cards . . . ."[5]

According to the Merchant Risk Council,[6] all of the world's 120 largest Internet retailers—which together account for 15% of all e-commerce revenue—now use address verification, among other strategies, to guard against credit card fraud.[7] The protections granted by section

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[4] <https://www.lasuperiorcourt.org/onlineServices/civilImages> [as of May 10, 2012].

[5] *Ibid.*

[6] The Merchant Risk Council identifies itself as "the leading non-profit trade association for merchants, vendors, and e-commerce risk management professionals."

[7] Donlea, *Risk Management Solutions for e-Commerce* (Nov. 2007) LP Magazine < http://www.lpportal.com/feature-articles/item/441-risk-

1747.08 to brick-and-mortar retailers to verify the cardholder's identity demonstrate that the Legislature did not intend to strip online merchants of any ability to verify customers' identities and protect themselves and their customers from fraud.

With the exception of the trial court that issued the decision here, California courts have consistently rejected a broad reading of the Act that would extend its application to circumstances that would encourage fraud. (See, e.g., *TJX Cos., Inc. v. Superior Court* (2008) 163 Cal.App.4th 80, 89 [declining to apply section 1747.08 to refund transactions because of concerns over fraud, among other reasons]; *Saulic*, *supra*, 596 F.Supp.2d at pp. 1334–35 [examining cases that declined to extend section 1747.08 where it would encourage fraud and finding that online transactions are not covered under the Act]; *Mehrens*, *supra*, 2012 WL 77220 at p. *3 ["Given the Act's focus on preventing unnecessary use of personal identification information, the language cannot reasonably be read to encompass online transactions, where recording such information is necessary for a legitimate purpose."].)

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management-solutions-for-e-commerce.html> [as of May 10, 2012] ["E-commerce presents its own set of business challenges. Online merchants do not have the ability to ask to see a driver's license or match a signature, so they need to have systems and tools to review information to authenticate the customer in real time. Some of the tools used by online merchants include matching zip codes, or IP addresses, combined with advanced scoring systems."].

In sum, an interpretation of section 1747.08 that would hamstring e-retailers' ability to protect against fraud—contrary to the carefully crafted legislative balance established for brick-and-mortar retailers—would only serve to harm consumers who would be at greater risk of identity theft and perhaps increased prices as e-retailers pass through their increased costs resulting from fraud. The rule of statutory construction against interpretations that lead to anomalous results suggests that section 1747.08 should not be construed to extend to online transactions.

2. Applying Section 1747.08 To Online Transactions Will Also Lead To The Absurd Result Of e-Retailers Violating The Act In Order To Comply With The Act.

In *Pineda*, *supra*, 51 Cal.4th at page 531, this Court ruled that "'personal identification information' includes 'the cardholder's address,'" which "include[s] components of the address," because "[o]therwise, a business could ask not just for a cardholder's ZIP code, but also for the cardholder's street and city in addition to the ZIP code, so long as it did not also ask for the house number."

However, applying section 1747.08 to online transactions would lead to the absurd result that an online e-retailer would not know that a customer is from California and subject to the statute until the e-retailer had violated the Act by requesting the customer's address, in whole or in part. Unlike a brick-and-mortar retailer in California which is conducting business with customers who walk into its store, an online e-retailer is

operating a virtual marketplace that serves the entire country (if not multiple countries). An online e-retailer does not know the customer's location when he or she visits its website and does not know if California law will apply to the credit card transaction. (Cf. *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 128 [Penal Code section 632 prohibition on recording calls without consent applied to Georgia business's California customer].)

Yet, if an e-retailer requests the customer's address, or even asks for the customer's state of residence (which is a component of the customer's address), it would violate the Song-Beverly Act. (See *Pineda*, *supra*, 51 Cal.4th at p. 531.) Further, there is no principled basis drawn from the text of section 1747.08 to claim that personal identification information can include *any* component of the cardholder's address, even the ZIP code, but excludes the cardholder's state of residence. After all, section 1747.08, subdivision (b) defines "personal identification information" to mean "information concerning the cardholder, *other than information set forth on the credit card*, and including, but not limited to, the cardholder's address and telephone number." (Italics added.)

As a result, if the Act applies to online e-retailers, then e-retailers will violate the law when they attempt to determine if the statute applies by asking whether the customer is a California resident before it accepts a credit card payment. Clearly, the Legislature never had this absurd result in

mind when it enacted section 1747.08 to deal with simple credit card transactions at the register.[8]

C. The Legislative History Demonstrates That The Legislature Did Not Consider Applying Section 1747.08 To Online Transactions.

"When a statute is ambiguous, . . . [the courts] typically consider evidence of the Legislature's intent beyond the words of the statute, and examine the history and background of the statutory provision in an attempt to ascertain the most reasonable interpretation of the measure." (*Watts v. Crawford* (1995) 10 Cal.4th 743, 751; *People v. Birkett* (1999) 21 Cal.4th 226, 231–232.)

1. The Legislature Created The Statute With In-Person Transactions In Mind.

Section 1747.08 was originally enacted through the passage of Assembly Bill No. 2920 ("AB 2920") in 1990. There is nothing in the legislative history of AB 2920 suggesting that the Legislature contemplated applying the statute to online commercial transactions.

To the contrary, when the Legislature enacted former section 1747.8 in 1990,[9] the Internet was still in its embryonic stages and e-commerce over

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[8] Even if the state of residence did not constitute a component of the cardholder's address and thus was a lawful inquiry, an online retailer would presumably need further verification that the customer was a California resident before it exempted that individual from the requirement of verifying his or her identity. Otherwise, such a practice would encourage widespread fraud, as computer criminals would be given an easy means to falsely claim California residency so as to exempt themselves from providing any verifying information of their identity.

the Internet did not exist. In 1990, the federal government through the National Science Foundation ("NSF") regulated the Internet and prohibited the commercial use of the Internet through its NSFNET acceptable use policy. (National Science Foundation, *Nifty 50: The Internet* <http://www.nsf.gov/od/lpa/nsf50/nsfoutreach/htm/n50_z2/pages_z3/28_pg.htm> [as of May 11, 2012].) Indeed, it was not until 1991 that researchers at CERN (the European Organization for Nuclear Research) developed a new tool for sharing information on the Internet using hypertext, which they called the "World Wide Web." (National Science Foundation, *NSF and the Birth of the Internet* <http://www.nsf.gov/news/special_reports/nsf-net/textonly/90s.jsp> [as of May 11, 2012].)

Significantly, it was not until March 1991—after AB 2920 had been passed—that the NSF altered its NSFNET acceptable-use policy to allow commercial traffic, which would eventually lead to commercial websites. (National Science Foundation, *Nifty 50: The Internet*, *supra*, at p. 1.) As the NSF has explained, "[w]ith the NSFNET structure providing a stable platform and the World Wide Web providing an easy way to share data on it, the commercial side of the Internet grew in ways that were unimaginable just a few years earlier." (National Science Foundation, *NSF and the Birth of the Internet*, *supra*, at p. 4.)

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[9] The statute was later amended and renumbered as section 1747.08. (Stats. 2004, ch. 183, § 29.)

Accordingly, it is absolutely clear that the California Legislature could not have intended AB 2920 to regulate online commercial transactions, which had not been invented and which were not permitted by the federal government in any event. (*Santa Barbara County Taxpayers Assoc. v. County of Santa Barbara* (1987) 194 Cal.App.3d. 674, 680 [noting that in analyzing statutory history it is important to consider the "social history" in which statute was enacted].)[10]

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[10] Plaintiff has argued that telephone and fax existed when former section 1747.8 (now section 1747.08) was enacted but that the Legislature did not expressly exempt retailers who used those forms of transmission. First, there is no authority suggesting that section 1747.08 *does apply* to telephone or fax transactions, *such that any exemption was necessary*. As addressed in Section A, *ante*, the statutory language contemplates in-person transactions. Second, even if section 1747.08 does apply to such transactions, that does not suggest that the Legislature intended to apply section 1747.08 to an unknown form of communication that is not covered by the plain language of section 1747.08, *which was written only to address in-person transactions*. Third, online transactions are distinguishable from telephonic and fax transactions. Telephonic communications are person-to-person transactions, which allow requests for verification, even if the answers are not written down. Furthermore, unlike online transactions, which often involve the digital download of information (as is the case with Apple's iTunes store), virtually all telephonic or fax communications that involve payment by credit card also involve shipping or installation of the purchased merchandise, in which case subdivision (c)(4) exempts the transaction from the prohibition against recording personal identification information; thus, the request for personal identification information in the context of a telephonic or fax transaction is rarely a problem. (Subdivision (c)(4) provides, "Subdivision (a) does not apply in the following instances: [¶] (4) If personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information related to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.") Accordingly, brick-and-mortar merchants who take credit

Given that online commerce did not exist in 1990, it is not surprising that the legislative history of AB 2920 demonstrates that the Legislature solely contemplated in-person transactions at brick-and-mortar locations when it considered the bill. For instance, the background summary for AB 2920 prepared for the Assembly Committee on Finance and Insurance explained that credit card companies require retailers "to complete a *credit card sales slip form*, upon *presentation* of a credit card, which must be *signed* by the card holder." (Assem. Com. on Finance & Insurance, Background Summary for Assem. Bill No. 2920 (1989-1990 Reg. Sess.); italics added.) The summary complained, however, that "many retailers routinely require consumers to provide additional personal information, such as home addresses and telephone numbers, *on credit card sales slip forms*. In fact, a number of retailers have begun to use credit card transaction forms with a designated space for addresses and telephone numbers *printed right on them*." (*Id.* at p. 3; italics added.) Similarly, the Senate Committee on Judiciary's analysis of AB 2920 explained "[t]he retailer is required to verify the identification of the cardholder *by*

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card information by telephone had no motivation to seek language excepting telephonic transactions from section 1747.08. Either they believed that section 1747.08 did not apply or the exemptions made its application of little significance. Indeed, the enrolled bill report for AB 2920 indicates that the only opposition to the bill came from a single company, Southern Lumber Company (San Jose). (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 2920 (1989-1990 Reg. Sess.) July 21, 1990), p. 3.)

comparing the signature on the credit card transaction form with *the signature on the back of the credit card.*" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2920 (1989-1990 Reg. Sess.) as amended June 27, 1990, p. 3; italics added.)

Of course, online e-retailers (which did not exist when the Legislature was considering this bill) do not provide credit card sales slips, have customers sign sales slips, or compare signatures on sales slips to the signature on the back of a credit card. As the *Saulic* court observed, this history demonstrates that "[t]he purpose of the Act appears to be to protect consumer privacy in the course of a retail transaction, and this Committee analysis suggests the Act was specifically passed with a brick-and-mortar merchant environment in mind. While the use of computer technology is mentioned, the language does not suggest the Legislature considered online transactions or the perils of misappropriation of consumer credit information in an online environment where there is no ability to confirm the identity of the customer." (*Saulic*, *supra*, 596 F.Supp.2d at p. 1333.)

The legislative history also shows that the Legislature recognized that the bill established a balance that authorized the presentation, but not recording, of personal identification information. Assembly Bill No. 1477 was a clean-up bill enacted the following year, which was designed to expressly "specify that the merchant may require reasonable forms of identification, including a driver's license provided that no information

contained thereon is recorded on the credit card transaction form or otherwise." (Leg. Counsel's Digest, Assem. Bill No. 1477, approved by Governor, Oct. 14, 1991 (1991-1992 Reg. Sess.), p. 1.)

2. Subsequent Amendments To The Act Fail To Reflect An Intent To Expand Section 1747.08 To Apply To Online Transactions.

Since the passage of section 1747.08 in 1990, online commerce was invented and has become an increasingly important part of the California economy.[11] None of the subsequent five amendments to section 1747.08—the most recent of which was in 2011—provide a basis for inferring that section 1747.08 should be applied to online transactions. (See Stats. 1990, ch. 999 (A.B. 2920) § 1, as amended by Stats. 1991, ch. 1089 (Assem. Bill No. 1477) § 2, eff. Oct. 14, 1991; Stats. 1995, ch. 458 (Assem. Bill No. 1316) § 2, renumbered § 1747.08 and as amended by Stats. 2004, ch. 183 (Assem. Bill No. 3082) § 29; amended by Stats. 2005, ch. 22 (Sen. Bill No. 1108) § 14.)

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[11] In 2011, online sales in the United States reached $256 billion, up 12 percent from 2010. (Radwanick and Lipsman, *U.S. Digital Future In Focus* (2012) <http://www.comscore.com/Press_Events/Presentations_Whitepapers/2012/2012_US_Digital_Future_in_Focus> [as of May 11, 2012].) Online sales make up nine percent of total sales, up from five percent just five years ago (The Economist, *Clicks and Bricks* (Feb. 25, 2012) <http://www.economist.com/node/21548241> [as of May 11, 2012]), and 76% percent of all Californians that use the Internet are shopping online (Public Policy Institute of Cal., Californians & Information Technology (2011) p. 9 <http://www.ppic.org/content/pubs/survey/S_611MBS.pdf> [as of May 11, 2012]).

Indeed, the 2011 amendment to the Act, Assembly Bill No. 1219, authorizes gas stations to collect ZIP codes—a form of personal identification information—at automated gas pumps. (§ 1747.08, subd. (c)(3)(B).) The superior court in this case incorrectly concluded that the authorization of gas stations to collect ZIP codes at automated gas pumps implies that the Legislature intended to include online transactions under the Act, reasoning that if the Legislature wanted to exclude online transactions it would have specifically called out such an exception, like it did for gas stations. (Exh. 30 at 580.) This reasoning is flawed for six reasons:

First, the 2011 Legislature's decision to *exempt* transactions involving individuals swiping a credit card at an automated gas pump (a brick-and-mortar facility) did nothing to *extend* the statute's coverage to online transactions. Following the *Pineda* decision, ruling that ZIP codes constituted personal identification information, the Western States Petroleum Association ("WSPA") argued to the Legislature that "class action suits have been filed against WSPA members who requested zip codes for credit card transactions at gas pumps" and contended that "[w]ithout specific language expressly exempting fraud prevention, . . . its member companies 'may face years of costly litigation.'" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1219 (2011-2012 Res. Sess.) as amended May 4, 2011, p. 8.) The enacted version of Assembly Bill No.

1219 merely granted WSPA legislative relief; as such, it did not reflect an intent regarding the reach of previously enacted section 1747.08 to online transactions.[12]

Second, the act of a *subsequent* Legislature cannot affect the intent of a *prior* Legislature in enacting legislation: "'The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.'" (*Lolley v Campbell* (2002) 28 Cal.4th 367, 379, quoting *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52.) Instead, "the Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But, it has no legislative authority simply to say what it *did* mean." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893 fn. 8; italics in original; *Bell v. Department of Motor Vehicles* (1992) 11 Cal.App.4th 304, 313.)

Third, the trial court started from the assumed, but erroneous, premise that section 1747.08 applies to all types of transactions unless they are explicitly excluded. However, as explained earlier, section 1747.08's

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[12] A bill analysis for Assembly Bill No. 1219 explained that "[w]hile the courts may determine in current litigation, in response to the Pineda case, that such an exemption always existed, this bill creates an express exemption." (Concurrence in Senate Amendments to Assem. Bill No. 1219 (2011-2012 Res. Sess.) as amended September 1, 2011, p. 3.)

statutory language and the legislative history surrounding its enactment demonstrate that it was never intended to apply to online transactions.

Fourth, to the extent that the trial court's analysis implicitly assumes that automated pay-at-the-pump transactions are closely analogous to online credit card transactions, that assumption is unfounded. Unlike an online transaction, and like other in-person transactions, the customer engaging in a pay-at-the-pump transaction has physical possession of the credit card, which must be swiped. This is not the case with online transactions where the customer may not have physical possession of (or the right to use) the credit card at the time of purchase, which exposes online e-retailers to a whole host of fraud concerns not present in gas station transactions. Yet, even though the cardholder has physical possession of the credit card for an automated gas pump transaction, the Legislature authorized the recordation of some personal identification information in the form of ZIP codes to verify the cardholder and prevent fraud. (§ 1747.08, subd. (c)(3)(B).)

Pay-at-the-pump transactions are also different than online transactions because the customer is capable of being seen, either because an employee is at the gas station, or because there is video surveillance of the pump. As the Central District of California explained in *Mehrens*, *supra*, 2012 WL 77220 at page *10, footnote 3, the Legislature amended the Song-Beverly Act to include pay-at-the pump transactions at least in

part because gas stations are brick-and-mortar establishments with "onsite attendants, who are available to monitor and investigate suspicious credit card use."

Fifth, although the legislative history underlying the automated gas pump exemption indicates that a prior version of that bill sought to limit section 1747.08's application to transactions where "a cardholder physically presents a credit card . . . and the credit card has a properly functioning magnetic stripe or other electronically readable device" (Assem. Bill No. 1219, amended April 25, 2011) in order to "clarify existing law" (Assem. Bill No. 1219, amended May 4, 2011), the fact that the bill was subsequently narrowed to only address motor vehicle fuel dispensers (Assem. Com. on Jud., Analysis of Assem. Bill No. 1219 (2011-2012 Reg. Sess.) amended May 4, 2011) is not meaningful for purposes of interpreting the reach of section 1747.08 in 1990: "'"[U]npassed bills, as evidences of legislative intent, have little value." [Citations.]'" (*People v. Mendoza* (2000) 23 Cal.4th 896, 921.) "The unpassed bills of later legislative sessions evoke conflicting inferences. . . . The light shed by such unadopted proposals is too dim to pierce statutory obscurities." (*Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 58.)

Finally, legislative inaction can just as easily be inferred to support the interpretation that section 1747.08 does not apply to online transactions.

In 2009, the Central District of California in *Saulic, supra*, 596 F.Supp.2d 1323, 1333–1334, ruled that "[n]either the language of the Act nor its legislative history suggests the Act includes online transactions." "'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' [Citations.]" (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353; see *People v. Overstreet* (1986) 42 Cal.3d 891, 897 ["the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in light of such decisions as have a direct bearing upon them'"].)

In sum, the subsequent legislative history provides no basis for expanding section 1747.08 to encompass online transactions. The Legislature could not have contemplated section 1747.08's application to online commercial transactions in 1990 because they did not exist. Instead, it established a policy balance between privacy protection and fraud prevention for in-person transactions. The proper balance between privacy and fraud prevention for online transactions should be left to the Legislature, which clearly did not address that balance in 1990-1991 or in 2011.

D. Review Of The Separate Statutory Scheme Regarding The Collection Of Personal Identification Information Online Also Demonstrates That Section 1747.08 Does Not Govern Online Transactions.

"One 'elementary rule' of statutory construction is that statutes in pari materia—that is, statutes relating to the same subject matter—should be construed together. [Citation.] [The courts] have long recognized the principle that even though a statute may appear to be unambiguous on its face, when it is considered in light of closely related statutes a legislative purpose may emerge that is inconsistent with, and controlling over, the language read without reference to the entire scheme of the law. [Citations.] The rule of pari materia is a corollary of the principle that the goal of statutory interpretation is to determine legislative intent." (*Droeger v. Friedman, Sloan & Ross, supra,* 54 Cal.3d 26, 50 (dis. opn. of Kennard, J.).)

In contrast to the Song-Beverly Act, which does not make any reference to online transactions, the California Online Privacy Protection Act of 2003 ("COPPA"), codified at Business and Professions Code section 22575 et seq., expressly governs the collection of "personally identifiable information" on "commercial" websites.

COPPA provides that "[a]n operator of a commercial Web site or online service that *collects personally identifiable information* through the Internet about individual consumers residing in California *who use or visit*

its commercial Web site or online service shall conspicuously post its privacy policy on its Web site . . . ." (Bus. & Prof. Code, § 22575, subd. (a); italics added.) Similar to the Song-Beverly Act, "personally identifiable information" under COPPA includes an address and other personal information. (Bus. & Prof. Code, § 22577, subd. (a)(1)–(7).) The privacy policy must identify, inter alia, the personally identifiable information that the operator collects and the categories of third-party persons or entities with whom the information may be shared. (*Id.*, § 22575, subd. (b)(1).) Like section 1747.08's focus on commercial transactions, COPPA is expressly directed at Web sites "operated for commercial purposes" (Bus. & Prof. Code, § 22577, subd. (c)) and is designed to protect "consumers," who are defined as any individual, who "seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes" (*id.*, subd. (d)). Obviously, these purchases or leases might include the use of a credit card, which was a common form of payment when COPPA became effective in 2004.

Considered in conjunction with section 1747.08, COPPA further evidences that section 1747.08 does not apply to online transactions. To the contrary, because of the different considerations associated with commercial websites, including out-of-state websites, the Legislature struck a different policy balance for the collection of personally identifiable

information in online transactions. Indeed, the Legislature passed COPPA to deal with the online collection of personally identifiable information precisely because it recognized that the State did not have laws in place that governed such conduct. The Senate Rules Committee Analysis of COPPA indicated that "*[e]xisting law does not directly regulate the privacy practices of online business entities.*" (Senate Com. on Judiciary, Analysis of Assem. Bill No. 68 (2003-2004 Reg. Sess.) as amended Sept. 3, 2003), p. 1; italics added.)

In describing COPPA, Assemblymember Simitian, the bill's author, explained that the bill was designed to provide customers with sufficient information regarding how their personally identifiable information may be used and to require that the online e-retailers would abide by their privacy policies, so that consumers would feel safe "to do business online":

> AB [68] requires that all individuals or entities that operate a website or online service that collects personal information through the internet from California residents conspicuously post a privacy policy stating what information they collect and the categories of individuals with whom they [share] the information. *Any policy will do. The bill simply requires that an operator have a policy and then follow it.* Many consumers refuse to do business online because they have little protection against abuse. This bill provides meaningful privacy protections that will help foster the continued growth of the Internet economy.

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 68 (2003-2004 Reg. Sess.) as amended April 2, 2003, p. 2; italics added.)[13]

COPPA demonstrates that the Legislature knows how to make clear that it is regulating online transactions, uses unambiguous language to do so, and carefully balances competing interests in regulating them. Further, COPPA recognizes the interstate nature of online commerce and therefore embodies a different policy judgment in regulating the collection of "personally identifiable information" than that proposed by those who would apply the Song-Beverly Act to online transactions. (Bus. & Prof. Code, § 22577, subd. (a).) Under COPPA, online e-retailers, unlike brick-and-mortar retailers, are required to *disclose* in their online privacy policies what personal information may be collected and how it is used, but are not required to adopt any particular privacy policy (which avoids imposing specific California standards on websites engaged in interstate commerce). (*Id.*, subd. (b)(1).) As a result, online customers are armed with the information they need to understand e-retailers' privacy practices and can avoid e-retailers whose practices they dislike.

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[13] The Assembly Committee analysis also indicates that COPPA was modeled on the Gramm-Leach-Bliley Act, which governs financial institutions' collection of personal identification information "when consumers conduct their transactions online." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 68 (2003-2004 Reg. Sess.) as amended April 2, 2003, p. 2; italics added.)

In short, when section 1747.08 is read in conjunction with the privacy protections for personally identifiable information offered under COPPA, it is clear that the Legislature treats the collection of personal information differently in online commercial transactions than it does for traditional credit card transactions at brick-and-mortar locations. In light of the Legislature's clear desire to govern the collection of personally identifiable information by commercial websites through COPPA, the Song-Beverly Act should not be stretched to include online transactions which were never contemplated when the Act was enacted.

E. Construing The Act To Only Regulate In-Person Transactions Avoids Difficult Constitutional Questions.

Another well-established principle of statutory construction is that "a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*People v. Engram*, *supra*, 50 Cal.4th 1131, 1161; see also *In re Smith* (2008) 42 Cal.4th 1251, 1269; *Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 846–847; *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.)

Here, construing the Act to apply to in-person, but not online, transactions, avoids two serious constitutional infirmities: (1) the violation of the notice requirements of due process; and (2) the impermissible regulation of interstate commerce.

1. Applying The Act To Online Transactions Would Violate The Due Process Clause.

A person who violates section 1747.08 is subject to a civil penalty not to exceed $250 for the first violation and $1000 for each subsequent violation. The number of online transactions for an online merchant can number in the tens of thousands in a single day. (See, e.g., Apple Inc. Form 10-Q for period ended Mar. 31, 2012, p. 27 [sales in iTunes Store alone (where individual songs cost $0.99-$1.29) were $3.6 billion in the first six months of 2012].)

"[A] civil penalty [is] subject both to the state and federal constitutional bans on excessive fines as well as state and federal provisions barring violations of due process. It makes no difference whether [the courts] examine the issue as an excessive fine or a violation of due process." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2006) 37 Cal.4th 707, 728.)

Under the due process clause, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . . ." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574 & fn. 22 ["the basic protection against 'judgments without notice' afforded by the Due Process Clause, [citation], is implicated by civil *penalties*"].)

Here, in terms of notice, an online retailer does not have the luxury of a physical storefront to allow it to determine the purchaser's location and thus to determine whether California law applies. Thus, the retailer has no notice whether the Song-Beverly Act applies when a customer seeks to make a purchase online. The only way for the online merchant to determine whether the Act applies is to violate its terms by asking the purchaser to identify his or her residence. Yet, this Court in *Pineda*, *supra*, 51 Cal.4th 524, 531, has ruled that the request for "'personal identification information' includes 'the cardholder's address,'" which "should be construed as encompassing not only a complete address, but also its components."

Accordingly, construing the Song-Beverly Act to cover online transactions offends due process: Either the e-retailer must ask for personal identification information to determine whether the customer is a California resident and violate the Act *before the e-retailer has notice* that the Act applies. Or the merchant must not ask for personal identification information from anyone, even where it is legal to do so, because the requisite notice whether California law applies cannot be obtained without violating the law; consequently, the merchant must act as if the Song-Beverly Act applies to every transaction because it cannot lawfully obtain notice when it does apply. Either way, this lack of prior notice before the merchant acts violates due process because the U.S. Supreme Court has

"insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)

2. Applying The Act To Online Transactions Would Impermissibly Regulate Interstate Commerce.

Interpreting the Act to cover online transactions also raises serious questions whether section 1747.08 violates the commerce clause of the United States Constitution.

The courts "have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." (*United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority* (2007) 550 U.S. 330, 338.) This is referred to as the "dormant" aspect of the commerce clause. (*Ibid.*)

"[T]he [U.S. Supreme] Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. [Citation.]" (*CTS Corp. v. Dynamics Corp. of America* (1987) 481 U.S. 69, 87.) "Regulations that 'clearly discriminate against interstate commerce [are] virtually invalid per se' [citation], while those that incidentally burden interstate commerce will be struck down only if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits'

[citation]." (*American Booksellers Foundation v. Dean* (2d Cir. 2003) 342 F.3d 96, 102.)

In describing the type of direct regulation of interstate commerce which is invalid per se, the U.S. Supreme Court has explained as relevant here: "Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' [citations] . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. [Citation.] Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory

regime into the jurisdiction of another State." (*Healy v. Beer Institute* (1989) 491 U.S. 324, 336–337 (*Healy*).)

Thus, in *Healy, supra*, 491 U.S. 324, 326, a Connecticut statute required out-of-state shippers of beer to affirm that their prices for products sold to Connecticut wholesalers during the next month were no higher than the prices at which they sold them in neighboring states. Because the statute had *the effect* of fixing the minimum price at which beer could be sold in the neighboring states, the Court concluded that "the Connecticut statute ha[d] the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" (*id.* at p. 337) and was the "kind of potential regional and even national regulation of the pricing mechanism for goods [that] is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual statutes." (*Id.* at p. 340.)

In this case, if section 1747.08 were construed to apply to online commercial transactions, the practical effect of such regulation would be for California to impermissibly govern all online purchases, regardless of where the merchant is located, thereby risking a per se violation of the commerce clause.

Unlike their brick-and-mortar counterparts, online transactions have no particular geographic limitation. An online merchant is unable to determine whether any particular customer is a resident of California or

another state—unless, of course, the online merchant requests the purchaser's address information. But if the Act applies to online transactions, then that type of request is prohibited by the Song-Beverly Act because it constitutes "personal identification information." (§ 1747.08; *Pineda*, 51 Cal.4th at p. 531 [construing the Act's definition of "personal identification information" "to include components of the address"].) The only way for the online merchant to ensure compliance with the Song-Beverly Act, short of refusing to accept credit card payments from any California residents, is to apply California law to every transaction, regardless of whether that transaction involved a purchaser who resides in this State.

In such a case, "the practical effect of the regulation [would be] to control conduct beyond the boundaries of the State" and thus would be invalid per se under the commerce clause, like the beer-pricing statute in *Healy*, *supra*, 491 U.S. at page 336. This would also usurp other states' determinations to allow online merchants to verify credit cardholders' identities through the transmittal of personal identification information. As noted in *Healy*, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (*Ibid.*)

Indeed, at least fourteen other states, and the District of Columbia, have enacted laws prohibiting retailers from recording personal

identification information as a condition of accepting a credit card as payment for consumer goods.[14] But none of these states has applied its statute to prohibit *online* retailers from requesting personal identification information as a condition of a credit card transaction. Indeed, several of the statutes have exceptions that plainly allow retailers to request personal identification information in such transactions even if their statutes do apply to online transactions. For example, Oregon's statute provides that the prohibition on recording personal information should not be construed to "[i]nterfere with the ability of a merchant to make and enforce policies regarding verification of the identity of a person who presents a credit card or debit card in payment for goods or services." (Or. Rev. Stat. § 646A.214, subd. (4)(b).) Ohio's statute allows personal identification information to be recorded "for a legitimate business purpose," provided that the consumer "consents" to having the information recorded, and the personal identification information is "not disclosed to a third party for any purpose other than collection purposes and is not used to market goods or

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[14] Delaware (Del. Code Ann. tit. 11, § 914); District of Columbia (D.C. Code § 47-3153); Georgia (Ga. Code Ann. § 10-1-393.3); Kansas (Kan. Stat. Ann. § 50-669a); Maryland (Md. Code Ann., Com. Law § 13-317); Massachusetts (Mass. Gen. Laws Ann. ch. 93, § 105); Minnesota (Minn. Stat. Ann. § 325F.982); Nevada (Nev. Rev. Stat. § 597.940); New Jersey (N.J. Stat. Ann. § 56:11-17); New York (N.Y. Gen. Bus. Law § 520-a, subd. (3)); Ohio (Ohio Rev. Code § 1349.17); Oregon (Or. Rev. Stat. § 646A.214); Pennsylvania (69 Pa. Cons. Stat. § 2602); Rhode Island (R.I. Gen. Laws § 6-13-16); and Wisconsin (Wis. Stat. Ann. § 423.401).

services unrelated to the goods or services purchased in the transaction." (Ohio Rev. Code § 1349.17, subds. (B)(1)–(3).) Moreover, the vast majority of States have not enacted any provision at all prohibiting the collection of personal identification information, and a retailer presumably is allowed to request and record such information in transactions with residents of those states.

However, as noted, if the Song-Beverly Act is construed to apply to online transactions, the effect would be either to compel online retailers to cease accepting credit card transactions with California residents or to apply the Song-Beverly Act to all of their sales, which would impose California's standard on other states *and* facilitate credit card fraud. Indeed, "[b]ecause the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'project[ing] its legislation into other States.'" (*American Booksellers Foundation v. Dean, supra*, 342 F.3d 96, 103.) As the Second Circuit observed in the context of Vermont's extension to internet communications of its prohibition against the distribution of sexually explicit materials to minors, "internet regulation of the sort at issue here still runs afoul of the dormant Commerce Clause because the Clause 'protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.' [Citation.]" (*Id.* at p. 104; see also *PSINet, Inc. v. Chapman* (4th Cir. 2004) 362 F.3d

227, 240 ["Given the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material . . . can be construed to have only a local effect"]; *American Civil Liberties Union v. Johnson* (10th Cir. 1999) 194 F.3d 1149, 1161 [statute regulating online conduct violates commerce clause when the statute "contains no express limitation confining it to [conduct] which occur[s] wholly within [the State's] borders"].)

Moreover, under the dormant commerce clause, there is a second test for invalidating state statutes: "Even if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471; accord *Edgar v. MITE Corp.*, *supra*, 457 U.S. 624, 643.) This test, often referred to as the "*Pike* balancing test," provides as follows:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on *whether it could be promoted as well with a lesser impact on interstate activities*."

(*Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142; citations omitted; italics added.)

In this case, the application of section 1747.08 to online transactions imposes a clearly excessive burden on interstate commerce. First, the only way to ensure compliance with the Song-Beverly Act is to apply California law to every transaction, notwithstanding the inevitable facilitation of fraud from the lack of any verification, which will affect prices for a significant segment of the economy.

Second, even if an online retailer could record the state of residence of a consumer's address without violating section 1747.08 under *Pineda* and could then exclude California residents from the obligation to transmit their personal identification information, such an arrangement would "impose[] a substantial burden on interstate commerce which outweighs its putative local benefits" pursuant to the *Pike* balancing test. (*Edgar v. MITE Corp.*, *supra*, 457 U.S. at p 646.) For one thing, the exemption for California residents' personal identification information, based solely on their unconfirmed assertion that they are California residents (assuming that this inquiry is legal under the Song-Beverly Act despite *Pineda*'s language), would create a giant loophole for the verification of cardholder identity and would facilitate fraud by anyone willing to assert California residency. Such fraud would necessarily create an excessive burden on interstate commerce, particularly since California's local interest in avoiding the misuse of personal information could be furthered through other means "with a lesser impact on interstate activities" (such as by

prohibiting the information to be used for marketing). (*Pike v. Bruce Church, Inc.*, *supra*, 397 U.S. at p. 142.)

Thus, in *Southern Pacific Co. v. State of Arizona ex. rel. Sullivan* (1945) 325 U.S. 761, the U.S. Supreme Court ruled that the Arizona Train Limit Law—which made it unlawful to operate within the State a railroad train of more than 14 passenger or 70 freight cars as a safety measure to reduce accidents—contravened the commerce clause. Observing that the "findings show that the operation of long trains . . . is standard practice over the main lines of the railroads of the United States [just as the request for addresses is standard practice in online transactions], and that . . . national uniformity in the regulation adopted . . . is practically indispensable to the operation of an efficient and economical national railway system" (*id.* at p. 771), the Court explained that "[c]ompliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state" or "for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state" (*id.* at p. 773). The Court concluded that "the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail." (*Id.* at pp. 783–784.)

So, here, too, the collection of addresses is standard practice in online transactions; compliance with California's law (assuming it applies to online transactions) would either require different treatment for California residents (which would create a gigantic loophole for any cardholders seeking to avoid verification by asserting California residency) or require online merchants to conform all of their credit card transactions to California's standard. As the Second Circuit observed, "[w]e think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.' [Citation.]" (*American Booksellers Foundation v. Dean, supra,* 342 F.3d at p. 104.)

There is also a third excessive burden on interstate commerce that would result from the application of section 1747.08 to online transactions: The prohibitions on recording personal identification information would unduly interfere with online retailers' maintenance of the business records necessary to demonstrate their compliance with other states' tax laws.

Online retailers must grapple with the complexity of more than 6,000 different taxing jurisdictions in the United States. (*Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 313, fn. 6.) As of 2006, twenty-one states had imposed sales and use taxes on charges for digital downloads; California currently does not. (II Healey and Schadewald, 2007 Multistate Corporate Tax Guide (CCH 2006) II-486.) To demonstrate compliance

with the evolving rules regarding sales and use tax on digital property, online retailers must collect various types of information, including credit card billing addresses. As the New Jersey Department of Treasury has instructed, "[d]igital property is subject to sales tax when the property is electronically delivered to the customer at an address in New Jersey. If the property is not received by the purchaser at the seller's New Jersey business location or at the purchaser's New Jersey location, the sale is subject to New Jersey sales tax *if either the seller's business records or the address provided by the purchaser during the sale* indicate a New Jersey billing address. For example, if a New Jersey resident is traveling to another state and downloads music to a hand held electronic device, the sale of the digital property is subject to New Jersey sales tax because the customer's billing address is in New Jersey." (N.J. Dept. of the Treasury, *Tax Notes—Digital Property* (Jun. 28, 2007) <www.state.nj.us/treasury/taxation/digitalproperty.shtml> [as of May 11, 2012].) The Michigan Department of the Treasury also cautions, "It is incumbent upon the taxpayer [e.g., a corporation collecting tax from customers and paying it to the state] to maintain adequate documentation through business books and records, supporting its determining regarding where the benefit . . . was received . . . ." (Mich. Dept. of the Treasury, *Revenue Administrative Bulletin 2010-5* (May 20, 2010) <www.michigan.gov/documents/treasury/RAB2010-5__321910_7.pdf> [as of May 11, 2012].)

Thus, if online retailers are unable to collect personal identification information from California residents, including addresses, they will not be able to prove that the customer with the unidentified address was not subject to another state's use or sales tax. Further, if additional states were to apply the prohibitions of section 1747.08 to online transactions, it would be extremely difficult for retailers to have competent records confirming the states to which a particular transaction should be attributed.

Accordingly, at a minimum, construing the Song-Beverly Act to apply to online transactions risks the imposition of an excessive burden on interstate commerce by facilitating online fraud at a national level and interfering with online retailers' ability to maintain proper business records for tax purposes. On the other hand, construing the Act not to apply to online transactions avoids this serious question regarding the constitutionality of section 1747.08. Such a construction is also the most reasonable interpretation in light of the statutory language, the rules of statutory construction, and the legislative history of section 1747.08, all of which evidence that the Legislature *never* intended to apply section 1747.08, or the policy embodied therein, to online transactions.

V. CONCLUSION

For all of the foregoing reasons, Petitioner Apple respectfully requests that this Court direct the Court of Appeal to reverse the trial court's order overruling its demurrer and to issue a new order sustaining the demurrer.

Respectfully submitted,

DATED: May 14, 2012

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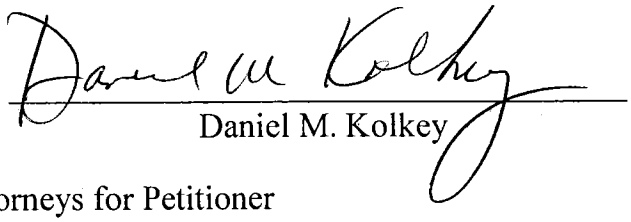
By: 
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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 8.520(c), CALIFORNIA RULES OF COURT

In accordance with rule 8.520(c), California Rule of Court, the undersigned hereby certifies that this Opening Brief on the Merits contains 13,920 words, as determined by the word processing system used to prepare this brief, excluding the tables, the cover information, the signature block, and this certificate.

Respectfully submitted,

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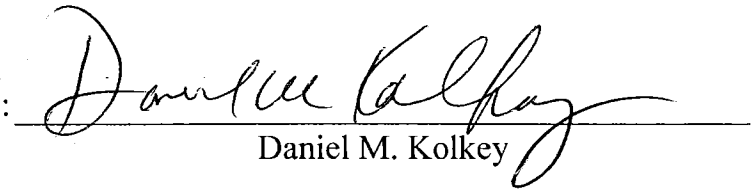
By: 
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PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of 18 and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 555 Mission Street, Suite 3000, San Francisco, CA 94105. On May 14, 2012, I served the within:

APPLE INC.'S OPENING BRIEF ON THE MERITS

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