SUPREME COURT NO.
S178241

In the Supreme Court
OF THE
State of California

SUPREME COURT COPY

JESSICA PINEDA
Plaintiff, Appellant and Petitioner,

v.

WILLIAMS-SONOMA STORES, INC., a California Corporation
Defendant and Respondent.

AFTER DECISION BY THE FOURTH APPELLATE DISTRICT, DIVISION ONE
Appeal No. D054355

ON APPEAL FROM THE SUPERIOR COURT
OF THE COUNTY OF SAN DIEGO
HONORABLE JUDGE RONALD S. PRAGER
Case No. 37-2008-00086061-CU-BT-CTL

SUPREME COURT
FILED
APR 12 2010
Frederick K. Ohlrich Clerk
Deputy

RESPONDENT WILLIAMS-SONOMA STORES, INC.'S

ANSWER BRIEF ON THE MERITS

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
P. CRAIG CARDON, CAL. BAR NO. 168646
ELIZABETH S. BERMAN, CAL. BAR NO. 252377
1901 AVENUE OF THE STARS, SUITE 1600
LOS ANGELES, CALIFORNIA 90067
TEL: (310) 228-3700
CCARDON@SHEPPARDMULLIN.COM
EBERMAN@SHEPPARDMULLIN.COM

Attorneys for Defendant and Respondent, WILLIAMS-SONOMA STORES, INC.

TABLE OF CONTENTS

Page

I. ISSUE PRESENTED 1

II. INTRODUCTION 1

III. FACTS & PROCEDURAL HISTORY 8

IV. STANDARD OF REVIEW 8

V. SUMMARY OF THE ARGUMENT 9

VI. ARGUMENT 11

A. A ZIP CODE IS NOT "PERSONAL IDENTIFICATION INFORMATION" UNDER *PARTY CITY*. 13

1. *Party City Addressed Reverse Lookup and Found This Not Relevant to Definition.* 13

2. *A ZIP Code, Which Includes "Tens of Thousands of People," Is not "Personal" Like an Address or Telephone Number.* 14

3. *Justice Huffman Was Well Aware of the Alleged Factual Distinctions When Joining the Pineda Opinion, Since He Authored Party City.* 16

4. *A Zip Code Does Not Identify A Person.* 17

B. UNDER THE PLAIN LANGUAGE OF SONG-BEVERLY, IF THE INFORMATION REQUESTED IS NOT "PERSONAL IDENTIFICATION INFORMATION," THE INQUIRY ENDS 19

C. LEGISLATIVE HISTORY MAY NOT BE USED TO INTERPRET UNAMBIGUOUS PORTIONS OF A STATUTE 23

D. LOOPHOLES ARE TO BE CLOSED BY THE LEGISLATURE, NOT THE COURTS. 26

1. *Ms. Pineda Wants to Prevent Retailers From "Circumvent[ing] the Statute."* 26

2. *The Legislature Must Be Presented With and Consider All Arguments For and Against a Practice.* 28

3. *Existing Laws Address Many of Ms. Pineda's Policy Concerns.* 31

E. MS. PINEDA'S INTERPRETATION OF SONG-BEVERLY VIOLATES RETAILERS' RIGHTS TO DUE PROCESS. 32

1. *Ms. Pineda's Interpretation of Song-Beverly Is Unconstitutionally Oppressive.* 34

2. *Ms. Pineda's Interpretation of Song-Beverly is Unconstitutionally Vague.* 34

3. *Due Process Instructs the Interpretation of Song-Beverly.* 39

F. IN TWENTY YEARS, NO APPELLATE COURT IN ANY STATE OR ENFORCEMENT AGENCY IN CALIFORNIA HAS APPLIED THIS STATUTE THE WAY MS. PINEDA ADVOCATES. 40

G. MS. PINEDA'S GOAL (PROHIBIT RETAILERS FROM OBTAINING HOME ADDRESSES) WOULD NOT BE ACCOMPLISHED BY HER INTERPRETATION OF SONG-BEVERLY. 41

H. A REGULATION PROHIBITING THE SEARCH FOR A HOME ADDRESS WOULD RESTRICT THE USE OF A NAME, NOT A ZIP CODE. 45

I. THIS SECTION OF SONG-BEVERLY IS PENAL IN NATURE AND SHOULD THEREFORE BE NARROWLY CONSTRUED. 46

1. *Party City Correctly Held that this Section of Song-Beverly Should be Strictly Construed.* 47

2. *A Civil Statute That is Both Penal and Remedial in Nature Must Be Strictly Construed Absent Express Statutory Instruction to the Contrary.* 49

J. MS. PINEDA'S COLLATERAL INTERPRETATION OF SUBSECTION (d) IS WRONG AND IRRELEVANT. 54

VII. THERE IS NO JURISDICTION TO REVIEW 59

VIII. CONCLUSION 61

IX. CERTIFICATE OF WORD COUNT 62

TABLE OF AUTHORITIES

FEDERAL CASES

Ashcroft v. Free Speech Coalition
(2002) 535 U.S. 234 32

BMW of N. Am. v. Gore
(1996) 517 U.S. 559 35

Calautti v. Franklin
(1979) 439 U.S. 379 34

Conroy v. Aniskoff
(1993) 507 U.S. 511, 113 S. Ct. 1562, 123 L. Ed. 2d 229.......... 24

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr Trades Council
(1988) 485 U.S. 568 31

Forbes v. Napolitano
(9th Cir. 2000) 236 F.3d 1009 36

Frisby v. Schultz
(1988) 487 U.S. 474 32

Giaccio v. Pennsylvania
(1966) 382 U.S. 399 34

Hoffman Estates v. Flipside, Hoffman Estates
(1982) 455 U.S. 489 36

McBoyle v. United States
(1931) 283 U.S. 25 35

Mourning v. Family Publications Service, Inc.
(1973) 411 U.S. 356 35

Planned Parenthood v. Arizona
(9th Cir. 1983) 718 F.2d 938 36

Shelton v. Tucker
(1960) 364 U.S. 479 32

Silveira v. Lockyer
(9th Cir. 2003) 328 F.3d 567 24

State Farm Auto Ins. Co. v. Campbell
(2003) 538 U.S. 408 31

United States v. Playboy Entm't Group
(2000) 529 U.S. 803 31

STATE CASES

Aguilar v. Atlantic Richfield Co.
(2001) 25 Cal. 4th 826 23

Baba v. Board of Supervisors of San Francisco
(2004) 124 Cal. App. 4th 504 31

Bermudez v. Municipal Court
(1992) 1 Cal. 4th 855 .... 10, 26

Bigge Crane Rental Co. v. County of Alameda
(1972) 7 Cal. 3d 414 26

Brougton v. Cigna Healthplans of California
(1999) 21 Cal. 4th 1066 28

Cal. Assn. of Health Facilities v. Dept. of Health
(1997) 16 Cal. 4th 284 51

Calvillo-Silva v. Home Grocery
(1998) 19 Cal. 4th 714 .... 22, 23

Cemetery Board v. Telophase Society of America
(1978) 87 Cal. App. 3d 847 31

City of La Mesa v. California Joint Powers Ins. Auth.
(2005) 131 Cal. App. 4th 66 18

Crowley v. Katleman
(1994) 8 Cal. 4th 66 8

Dakin v. Dept. of Forestry & Fire Prot.
(1993) 17Cal.App.4th 681, 687-88 37

Davison v. Indus. Accident Comm'n.
(1966) 241 Cal. App. 2d 15 53

Diamond Mulimedia Systems, Inc. v. Superior Court
(1999) 19 Cal. 4th 1047 .... 22, 23

Dix v. Superior Court
(1991) 53 Cal. 3d 442 29

Dyna-Med, Inc. v. Fair Employment & Housing Comm.
(1987) 43 Cal. 3d 1379 14

Florez v. Linens 'N' Things
(2003) 108 Cal. App. 4th 447 .... 25, 48

Foley v. Interactive Data Corp.
(1988) 47 Cal.3d 654 29

Gilbert v. Municipal Court
(1977) 73 Cal. App. 3d 723 27

Granberry v. Islay Investments
(1995) 9 Cal. 4th 738 55

Hale v. Morgan
(1978) 22 Cal.3d 392 .... 11, 33, 35, 50. 51

In re Daoud
(1976) 16 Cal. 3d 879 59

In re Vioxx Class Cases
(2009) 180 Cal. App. 4th 116 43

J.*A. Jones Construction Co. v. Superior Court*
(1994) 27 Cal. App. 4th 1568 .... 22, 23

January 22, 2010. *Pineda v. Williams-Sonoma Stores, Inc.*
(Feb. 4, 2010) 2010 Cal. LEXIS 1319 59

Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.
(2005) 133 Cal. App. 4th 26 23

Foley v. Interactive Data Corp.
(1988) 47 Cal. 3d 654), ... 28

Los Angeles County v. Ballerino
99 Cal. 593, [32 P. 581, 34 P. 329] 49

Lungren v. Superior Court
(1996) 14 Cal.4th 294, 305 .... 11, 34, 35, 49, 50, 51, 52

In re Marriage of McClellan
(2005) 130 Cal. App. 4th at 255 .... 56, 57

Mejia v. Reed
(2003) 31 Cal. 4th 657 7

Metropolitan Water Dist. v. Imperial Irrigation Dist.
(2000) 80 Cal. App. 4th 1403 23

Miller v. Municipal Court
(1943) 22 Cal. 2d 818 48

Moore v. California State Bd. of Accountancy
(1992) 2 Cal. 4th 999 16

Morrison v. State Board of Education
(1969) 1 Cal. 3d 214 35

Moss v. Smith
(1916) 171 Cal. 783 48

Newman v. Emerson Radio Corp.
(1989) 48 Cal. 3d 973 37

Party City,
(2009) 169 Cal. App. 4th 497 .... *passim*

Party City Corporation v. S.C. (Palmer)
(Apr. 1, 2009) 2009 Cal. LEXIS 3474) 13

People v. Black
(1961) 55 Cal. 2d 275 59

People v. Bonnetta
(2009) 46 Cal. 4th 143 .... 10, 26

People v. One 1940 Ford V-8 Coupe
(1950) 36 Cal.2d 471 22

People v. United Bonding Ins. Co.
(1971) 5 Cal. 3d 898 59

People v. Western Air Lines, Inc.
(1954) 42 Cal. 2d 621 33

People ex rel. Gallo v. Acuna
(1997) 14 Cal.4th 1115 11

Pineda v. Williams-Sonoma Stores, Inc.
(Feb. 10, 2010) 2010 Cal. LEXIS 1003 .... 9, 12

Roberts v. City of Palmdale
(1993) 5 Cal. 4th 363 .... 29, 53

Sarracco Tank & Welding Co. v. Platz
(1944) 65 Cal. App. 2d 306 51

State of California v. Western Natural Rubber
(1991) 235 Cal. App. 3d 1495 27

Symmes v. Sierra Nevada Mining Co.
(1915) 171 Cal. at 429-30 .... 48, 49, 50, 52

The TJX Companies, Inc. v Superior Court
(2008) 163 Cal. App. 4th 80 .... 48, 52

Tos v. Mayfair Packaging Co.
(1984) 160 Cal. App. 3d at 78 .... 50, 51, 52

Tyron v. Superior Court
(2007) 151 Cal. App. 4th 839 29

Valdez v. Himmelfarb
(2006) 144 Cal. App. 4th 1261 49

Weber v. Piyan
(1937) 9 Cal. 2d at 229-30.................................... 11, 46, 47, 51

Weber v. County of Santa Barbara
(1940) 15 Cal. 2d 82.. 20

Young v. Bank of America
(1983) 141 Cal. App. 3d 108 .... 47, 48

CALIFORNIA CONSTITUTION

Art. 1, Section 17 .... 11, 33

STATE STATUTES

Cal. Bus. & Prof. § 22575 31

Cal. Civ. Code
§ 1747.08.. 2, 12, 40, 48, 52, 55
§ 1747.08(a) 21, 26
§ 1747.08(a)(2).. 3, 20
§ 1747.08(a)-(b).. 11, 18
§ 1747.08(b) 3, 5, 19, 25, 26, 45
§ 1747.08(c) 41
§ 1747.08(d) 54
§ 1747.08(e) 3, 21, 40, 52
§ 1798.81.. 31
§ 1798.83.. 31
§ 1798.85.. 31
§ 1858.. 19

Cal. Fin. Code
§ 4050 et. seq.. 28, 29
§ 4052(a) 29, 30
§ 4056(a) 30

Cal. Health & Safety Code
§ 25249.7(b) 51
§ 25249.7(b)(1).. 51

Del. Code Ann. tit. 11, § 914 (2010) 40

Kan. Stat. Ann. § 50-669a (2009).. 40

Labor Code § 5814 53

Mass. Gen. Law Ann. ch. 93, § 105 (2009) 40

Md. Code Ann., Com. Law § 13-317 (2009) 40

Nev. Rev. Stat. § 597.940 (2008)) 40

New York, Gen. Bus. Law. § 520-a (2007) 40

R.I. Gen. Laws § 6-13-16 (2009) 40

COURT RULES

Cal. R. Ct. 8.516(a)(2) 12

Ca. R. Ct. 8.512(b) 59

OTHER AUTHORITIES

Dictionary.com Unabridged (v 1.1). Random House, Inc., 25 Mar. 2010 18

Witkin, Cal. Proc. 5th Ed., Ch. XIII 59

WordNet 3.0. Princeton University, 25 Mar. 2010 18

Williams-Sonoma Stores, Inc. ("**Williams-Sonoma**") hereby respectfully submits its Answer Brief on the Merits.

I. ISSUE PRESENTED

"Does a retailer violate the Song-Beverly Credit Card Act of 1971 (Civ. Code § 1747.08), which prohibits a retailer from recording a customer's "personal identification information" when the customer uses a credit card in a transaction, by recording a customer's zip code for the purpose of later using it and the customer's name to obtain the customer's address through a reverse search database?" *Pineda v. Williams-Sonoma Stores, Inc.* (Feb. 10, 2010) 2010 Cal. LEXIS 1003 (Order Granting Review).[1]

II. INTRODUCTION

Plaintiff and Petitioner Jessica Pineda ("**Ms. Pineda**") argues for imposing hundreds of millions to billions of dollars in fines against Williams-Sonoma. These fines are completely penal in nature and do not even have a claimed relationship to any alleged actual harm. The alleged basis for imposing this penalty is requesting a zip code and "later using it" in conjunction with a customer's name to look up his or her home address through publicly available databases. In

[1] A jurisdictional issue relating to the timing of the grant of review also exists, which is addressed below in Section VII.

other words, if you shop in a store, the store might send you a catalogue.

But the language of the statute at issue, Civil Code section 1747.08 ("Song-Beverly"), passed in 1990, does not in any way prohibit any **use** of information.[2] It not only lacks any reference to looking up information, it is completely silent as to any conduct other than the request and recording of quite specific information – "personal identification information" – during a credit card transaction. Moreover, the information that is allegedly collected, a zip code, has been held by two unanimous panels of the Court of

---

[2] Song-Beverly provides in relevant part: "No . . . corporation that accepts credit cards for the transaction of business shall . . . **Request, or require** as a condition to accepting the credit card as payment . . . **, the cardholder to provide personal identification information**, which the . . . corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise . . .." Cal. Civ. Code § 1747.08(a)(2) (emphasis added).

"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**." Cal. Civ. Code § 1747.08(b) (emphasis added).

Any person who violates it "**shall be subject to a civil penalty** not to exceed two hundred fifty dollars ($250) for the first violation and **one thousand dollars ($1,000) for each subsequent violation**, to be assessed and collected in a civil action brought by the person paying with a credit card, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred." Cal. Civ. Code § 1747.08(e) (emphasis added).

Appeal (and the trial court in this matter prior to either Court of Appeal ruling), to not fit within the definition of "personal identification information." *Party City v. Superior Court* (2009) 169 Cal.App.4th 497, 518-19; Opinion, pp. 5-6; Appellant's Appendix ("**AA**"), Vol. 2, p. 386-87. In each case, the Court found that a zip code is too general (covering approximately 25,000 people) to "identify" an individual or family group the way a telephone number or address (the two types of information expressly defined as "personal identification information") does. And in each case the Court found that if a zip code is therefore not "personal identification information," it cannot be transformed into it based on how the zip code is used.

Song-Beverly was never intended to be broad or dramatic privacy legislation that prevents a retailer from using otherwise legal means to find out how to send catalogues to its own customers. It sought to address a perceived problem 20 years ago caused by carbon copy credit card forms that contained preprinted lines for addresses and phone numbers when they were not needed for the transaction.

Retailers could then, and still can, use other information about consumers to ascertain their address, such as looking their names up in a phone book or an electronic database. All a zip code does is

potentially narrow those search results. Moreover, there are other geographic filter alternatives to a customer's zip code, such as the store's zip code, the city in which the store is located, county, etc. If the Legislature had wanted to bar looking up customer addresses with information gleaned in a credit card transaction, it would have barred using the name, rather than expressly permitting using the name. Cal. Civ. Code § 1747.08(b) ("personal identification information" excludes information "set forth on the credit card").

In sum, Ms. Pineda wishes to impose these crippling penalties on Williams-Sonoma for 1) collecting information that is not mentioned in Song-Beverly (a zip code), is not of the same type or character as that which is mentioned (a telephone number or address), and which trial and appellate courts have repeatedly held is not covered by Song-Beverly, and 2) using a zip code to have legitimate third party vendors narrow down publicly available address search results from a legal name search. She argues that **two rights make a wrong**: collecting a zip code (permitted by Song-Beverly pursuant to *Party City*) and running a legal name search for an address using the zip code to narrow search results, somehow together violate Song-Beverly, when neither separately violates any law.

To reconcile this tortured interpretation, she alleges that a zip code sometimes is not "personal identification information" (such as in *Party City*), and other times is, depending on how it is later used (such as in *Pineda*). But the Court of Appeal was correct in twice rejecting this reasoning. Either a piece of information falls within the definition or it does not. It does not and cannot change depending on circumstances, such as how it may later be used. To do so would subject a retailer to enormous fines for a never-ending list of conduct not disclosed in the statute. This would defy the plain language of the statute and would render it constitutionally infirm as violative of due process.

Not finding refuge for this "usage"-based interpretation anywhere in the language of the statute, Ms. Pineda turns to the legislative history for broad policy sound-bites. Finding such a statement and taking it out of the context of the conduct that was the impetus for Song-Beverly (preprinted lines for addresses and phone numbers on credit card forms), Ms. Pineda boldly declares that any conduct that would run afoul of this policy goal must therefore violate the statute. The policy behind a statute is not coterminous with the proscriptions of the statute. For example, a statute intended to promote water conservation does not make illegal any and all conduct that arguably wastes water. Ms. Pineda's discussion of the

policy allegedly behind Song-Beverly has one purpose – to divert attention from the actual language of the statute; language that nowhere prohibits a request for a zip code and nowhere prohibits later looking up a customer's address with the assistance of that zip code.

Notwithstanding that her *ad hominen* arguments about identity theft involving other companies, totally unrelated to the allegations of this case, never appeared in her complaint and were stricken from her briefing in the Court of Appeal, the incidents cited have nothing to do with using a zip code to narrow multiple results from a name search. They involved the theft of credit card numbers due to security breaches, issues for which California has enacted other laws to address specifically. This is a stark attempt to play on the legitimate fear of identity theft that we all share. But that fear should not result in broadly expanding a 20-year old law far beyond practices and technologies that it was intended to cover. Instead, as Justice McIntyre pointed out below, any legitimate issues about using a zip code or any other information in connection with the search for a publicly available address are properly addressed in the Legislature. It is there that the potential policy and economic impacts of such a restriction can be debated. And if after such debate and consideration, the Legislature were to pass a law

restricting the conduct complained of here, presumably it would state on its face that this conduct is proscribed. As Justice Huffman stated in *Party City*: "Absent express statutory language dictating that a group identifier such as a ZIP code qualifies as personal identification information under the Act, we are reluctant to conclude that [the] Legislature intended to control business marketing decision in this way." *Party City*, 169 CalApp.4th at 521.

Ms. Pineda's convoluted and contrived interpretation was unanimously rejected by the trial court below and two panels of the Court of Appeal. If six judges in three different settings do not read Song-Beverly as Ms. Pineda does, then a retailer cannot be, and cannot have been, expected to do so, particularly with such dire consequences for any error. "Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. *Party City*, 169 Cal.App.4th at 508, citing *Mejia v. Reed* (2003) 31 Cal.4th 657, 663. Before a business in California can be fined, and potentially fined out of business, for violating a statute, that statute must clearly and plainly identify what is proscribed. If Song-Beverly does clearly and plainly identify what it proscribes, as it must, then using a zip code in connection with a reverse search database cannot possibly be prohibited by it.

III. FACTS & PROCEDURAL HISTORY

Ms. Pineda's appeal arose from an order sustaining a demurrer. Factual issues, such as whether point of sale signage at Williams-Sonoma retail locations disclosing that the request for the zip code is voluntary and for marketing purposes insulates Williams-Sonoma from liability, have not yet been addressed and are therefore not before this Court. By the same token, the *ad hominem* references to identity theft (against an entirely different company and in entirely different circumstances) contained in the Petition and in Ms. Pineda's Opening Brief on the Merits are not before this Court. They were not in the complaint, and when Williams-Sonoma sought to strike them from the record on appeal, that request was granted and never appealed. (Order filed October 8, 2009 ("The respondent's motion to strike portions of the appellant's opening brief is granted. The court has disregarded the stricken portions of the appellant's opening brief.").)

IV. STANDARD OF REVIEW

The Court is certainly well familiar with the standard of review of an order sustaining a demurrer. *Crowley v. Katleman* (1994) 8 Cal.4th 66, 672.

V. SUMMARY OF THE ARGUMENT

The language of Song-Beverly addressing what conduct is proscribed is clear and unambiguous: if the information the retailer requests from the consumer during a credit card transaction is not "personal identification information" as that term is defined by the statute, **then there is no violation of the statute and the inquiry ends.** As Justice McIntyre noted below, either information is or is not "personal identification information," and either the corporation does or does not request and record it when accepting a credit card for payment. (*See* Opinion, p. 6.) There are no caveats in the statute that make a single piece of information "personal identification information" in some instances but not in others, nor is the corporation's intent or purpose for requesting the information relevant.

Ms. Pineda's Petition for Review presented three issues for review. The question of whether a zip code is "personal identification information" was not certified for review. *Pineda v. Williams-Sonoma Stores, Inc.* (Feb. 10, 2010) 2010 Cal. LEXIS 1003. Thus, the Fourth Appellate District's reasoned decision in *Party City*, 169 Cal.App.4th 497, that "personal identification information" is "intended to be specific in nature regarding an

individual [such as an address or telephone number], rather than a group identifier such as a ZIP Code," stands.

Ms. Pineda's theory in her Opening Brief can be framed in either one of two ways: (1) a zip code is "personal identification information" when **used** to obtain a home address, or (2) regardless of whether a zip code is "personal identification information," a retailer violates Song-Beverly by **using** a zip code to obtain a home address because the statute was meant to prevent retailers from acquiring that information. Under either interpretation of Ms. Pineda's position, it requires her to run afoul of several principles of statutory interpretation, doctrines of jurisprudence, constitutional protections, and common sense to reach her desired result, as follows:

- Ms. Pineda's primary argument is that a loophole in Song-Beverly exists, and that the Court should adopt her interpretation to prevent retailers from defeating the statute's "intended purpose." This Court has held time and time again that such "loophole arguments" are properly addressed to the Legislature, not to the courts, where the issues – including those that did not exist at the time the statute was passed – can be fully and fairly debated by all interested parties. *Bermudez v. Municipal Court*, 1 Cal. 4th 855, 864 (1992); *People v. Bonnetta* (2009) 46 Cal.4th 143, 151.

- Ms. Pineda's premise that the Legislature intended to prevent retailers from obtaining their customers' addresses via a credit card transaction is unfounded. Even her interpretation of Song-Beverly would not prevent them from looking up the same information in other ways, such as by name alone,

name plus city, or name plus store zip code. Cal. Civ. Code § 1747.08(a)-(b).

- Ms. Pineda's interpretation would render Song-Beverly constitutionally infirm, subject to challenge on several due process grounds. *Hale v. Morgan* (1978) 22 Cal.3d 388, 399; California Constitution, Art. 1, Section 17; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. Primarily, her interpretation of Song-Beverly fails to give sufficient notice of its proscriptions, and instead requires one to guess at its meaning, while imposing crippling penalties for any error.

- In the twenty years since Song-Beverly was enacted, no court or government agency has applied or enforced this statute in the way that Ms. Pineda advocates. Since the enormous fines available would go to the government in an enforcement action, rather than a private individual, once can safely assume enforcement authorities do not interpret the statute as Ms. Pineda does.

- Ms. Pineda seeks a rule of law that would unfairly punish retailers for not following an alleged prohibition disclosed nowhere on the face of the statute and for following *Party City*'s guidance once it was decided. Courts have an important role in commerce, and businesses do rely on and defer to the Court of Appeal and the reasonable advice of lawyers. Businesses should not be punished and fined out of business for having the same interpretation as five appellate court justices, comprising two unanimous panels.

- If there is any ambiguity with regard to the meaning of Song-Beverly, it should be resolved in Williams-Sonoma's favor because it is penal in nature and subject to strict construction. *Weber v. Piyan* (1937) 9 Cal. 2d 226, 229-30. Mandatory penalties based on thousands of transactions per day, prohibit any interpretation beyond the strict language of the state.

VI. ARGUMENT

Ms. Pineda begins with an argument not accepted by the Supreme Court for review – that the express definition of "personal

identification information" found in Section 1747.08 includes zip codes. (Opening Brief on the Merits ("**OB**"), p. 5.) Issue Presented #1 in Ms. Pineda's Petition for Review was whether a zip code is "personal identification information." (Petition for Review, p. 1.) But the Court's Order Granting Review was limited to Issue Presented #2.[3] *Pineda v. Williams-Sonoma Stores, Inc.* (Feb. 10, 2010) 2010 Cal. LEXIS 1003 (granting review but limiting issues to be briefed and argued). Whether a zip code falls within the definition of "personal identification information" is not a question covered by any reasonable interpretation of the Court's instructions to the parties for briefing.[4] Cal. R. Ct. 8.516(a)(1). Regardless of the propriety of Ms. Pineda's efforts to overturn *Party City* in her Opening Brief, they lay stark the logic of the Fourth Appellate District below: if a zip code is not "personal identification information," there can be no violation of the statute.

---

[3] Issue Presented #2: "Does Williams-Sonoma's company-wide practice of requesting and recording customers' zip codes during credit card transactions, for the purpose of using the zip codes to obtain the respective consumer's home addresses, and not for any required security or verification purpose, constitute a violation of California Civil Code Section 1747.08?" (Petition for Review, p. 1.)

[4] Notwithstanding the limited scope of review, if this Court intends to consider the viability of *Party City*, Williams-Sonoma assumes the Court would want to afford it the opportunity to fully brief that issue

A. A ZIP CODE IS NOT "PERSONAL IDENTIFICATION INFORMATION" UNDER *PARTY CITY*.

1. ***Party City*** ***Addressed Reverse Lookup and Found This Not Relevant to Definition.***

Party City was decided in 2008 on a writ, specifically to give guidance to California trial courts and retailers throughout the State. *Party City*, 169 Cal.App.4th at 506. This Court denied review of *Party City* on April 1, 2009 (*Party City Corporation v. S.C. (Palmer)* (Apr. 1, 2009) 2009 Cal. LEXIS 3474) and retailers and courts throughout the State have been relying on it in the processing of millions of transactions for over a year.

Party City held that the issue of whether a zip code meets Song-Beverly's definition of "personal identification information" was one of statutory interpretation that could be decided as matter of law on the pleadings. *Party City*, 169 Cal.App.4th at 502 (holding retailer entitled to judgment "on the threshold definitional issue presented in the pleadings"); 506 (statutory interpretation of the terminology of statute is a legal question). Significantly, the Fourth Appellate District *expressly* considered whether facts regarding the "present state of technology allows the use of a ZIP Code plus [other information] to be sufficient information for locating an individual,

---

and in that circumstance Williams-Sonoma respectfully requests

using some kind of computer software" were relevant and **determined that they were not**. *Id.* at 505, n. 6. Thus, whether a zip code can later be used with other information to locate an individual using computer software *has nothing to do* with whether zip codes fall within the definition of "personal identification information" under Song-Beverly.

2. *A ZIP Code, Which Includes "Tens of Thousands of People," Is not "Personal" Like an Address or Telephone Number.*

Ms. Pineda argues that *Party City* was wrongly decided. But she does this based on a misleadingly truncated definition of "personal identification information." (*See, e.g.,* OB pp. 5-7 (Ms. Pineda omits the statutory language "including but not limited to, the cardholder's address and telephone number").) Without citation to any authority, Ms. Pineda argues that the statutory reference to addresses and telephone numbers should not be considered, and the definition read in its unrestricted sense. (OB, p. 7 ("the subjective criteria of being 'similar to an address or telephone number' simply do not apply. . ."). But this is counter to the concept of *ejusdem generis* and the express instructions of this Court. On this definitional issue, the *Party City* panel noted of particular

---

such additional briefing. *See* Cal. R. Ct. 8.516(a)(2).

importance the phrase "including but not limited to, the cardholder's address and telephone number." Relying on this Court's opinion in *Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1391, n. 12, the *Party City* panel applied the doctrine of *ejusdem generis*; " [I]f the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage." *Party City*, 169 Cal.App.4th at 515.

Citing to federal regulations establishing zip codes, *Party City* noted that zip codes are geographic designations ("units of area thirty minutes square, identical with a quarter of the area formed by these intersecting parallels of latitude and meridians of longitude") "made for the purpose of isolating particular population sectors for improved mail delivery..." *Id.* at 517-518. Recognizing that zip codes "provide identification of a relatively large group," ("approximately 27,000"... "in the location of the Superior Court that decided..." both *Party City* and *Pineda*), the *Party City* panel held that "*ejusdem generis* supports a construction of [...] 'personal identification information' [...] as meaning that the enumerated items (address and telephone number) were intended to be specific in nature regarding an individual, rather than a group identifier such as

a ZIP code. If the Legislature had intended 'address' to be used in its unrestricted sense, it would not also have mentioned a specific item such as a telephone number in this context."[5] *Id.* at 518, 520 (internal citations omitted), *See also Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012 (under *noscitur a sociis*, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make the item markedly dissimilar to the other items in the list).

3. *Justice Huffman Was Well Aware of the Alleged Factual Distinctions When Joining the Pineda Opinion, Since He Authored Party City.*

Ms. Pineda states that the *Pineda* Court of Appeal failed to consider the "obvious purpose" of Song-Beverly, which she claims is to prevent retailers from obtaining consumers' "personal identification information" through credit card transactions. (OB, p. 9-10.) She further alleges that, "in reality, Williams-Sonoma's sole intent is to use its customers' zip codes to obtain [customers'] home

---

[5] Telephone numbers and addresses set up the pattern for any non-specified items of information to be included in the list. There are two patterns common to telephone numbers and address: (1) in 1990, consumers likely believed that they were required to process their credit cards; and (2) on their own, they allow one to contact the cardholder personally. Today, even if Ms. Pineda's allegation that she believed that her zip code was required to process her credit card is true, a zip code does not fit the overlap of the two patterns

addresses for its own business purposes." (OB, p. 9.) Ms. Pineda argues that the *Pineda* panel misunderstood or did not recognize the factual distinction between this case and *Party City* – i.e., in *Party City*, where the defendant submitted evidence that it did not use zip codes to obtain home addresses, whereas in *Pineda*, the Complaint alleged that Williams-Sonoma was doing so. That is simply not plausible. Justice Huffman, who authored the *Party City* decision, did not forget or misunderstand the relevance between the differences in the factual records of the two cases when he joined in the Court of Appeal's unanimous decision in *Pineda*. Facts – whether merely alleged or actually found – regarding whether technology allows a retailer to locate a specific person by using a zip code to narrow the geographic cross-reference with a name are simply irrelevant to whether a zip code meets the definition of "personal identification information." *See Party City*, 169 Cal.App.4th at 505, n.6.

4. ***A Zip Code Does Not Identify A Person.***

To avoid comparisons with the express statutory references to addresses and telephone numbers, Ms. Pineda boldly maintains that "identification" does not mean "unique" or nearly unique. (OB, pp. 6-

---

because her zip code alone does not allow one to personally contact

7.) This ignores the very language of the term being defined. In addition to references to addresses and telephone numbers, the statute includes the term "identification." Cal. Civ. Code § 1747.08(a)-(b). "Identification" means "evidence of identity." "IDENTIFICATION." *WordNet 3.0.* Princeton University. 25 Mar. 2010.[6] "Identity" is synonymous with "individuality" and "uniqueness." "IDENTITY." *Dictionary.com Unabridged* (v 1.1). Random House, Inc. 25 Mar. 2010.[7] Accordingly, the term "personal identification information" means that the item of information is somehow unique or nearly unique to an individual, such as a telephone number or address. Ms. Pineda's interpretation to reach her desired result impermissibly disregards the language of the statute — the actual words of the thing being defined. Cal. Civ. Proc. Code § 1858 (when interpreting a statute, court cannot insert what has been omitted or omit what has been inserted); *City of La Mesa v. California Joint Powers Ins. Auth.* (2005) 131 Cal.App.4th 66, 75 (same); *Weber v. County of Santa Barbara* (1940) 15 Cal.2d

---

her like a telephone number or address do.

[6] Dictionary.com, http://dictionary.reference.com/browse/identification

[7] Dictionary.com, http://dictionary.reference.com/browse/identity

82, 85-86 (courts must give effect to every word of a statute and avoid an interpretation that would render any part void of meaning).

B. UNDER THE PLAIN LANGUAGE OF SONG-BEVERLY, IF THE INFORMATION REQUESTED IS NOT "PERSONAL IDENTIFICATION INFORMATION," THE INQUIRY ENDS.

The definition of "personal identification information" is the only arguably ambiguous provision of Song-Beverly because it uses the open-ended phrase "including but not limited to." Cal. Civ. Code § 1747.08(b). *Party City* resolved that ambiguity as it relates to the inclusion of zip codes within that definition.

The balance of the statute is unambiguous, and therefore the issue upon which the Supreme Court granted review does not relate to any ambiguity within the language of Song-Beverly. The balance of the statute provides the actual proscription; it regulates the collection and recording of the defined information from consumers. Specifically, it prohibits a retailer from requesting "personal identification information," which it then records. Cal. Civ. Code § 1747.08(a)(2). Williams-Sonoma requests a zip code, which it then records. (Opinion, p. 2.) A zip code ***is not*** "personal identification information." *Party City*, 169 Cal.App.4th at 518. Thus, Song-Beverly does not apply here and the inquiry ends.

Stated differently, the determination of whether a retailer violates Song-Beverly (excluding any exemptions) is a simple three-step inquiry that directly tracks the language of the statute:

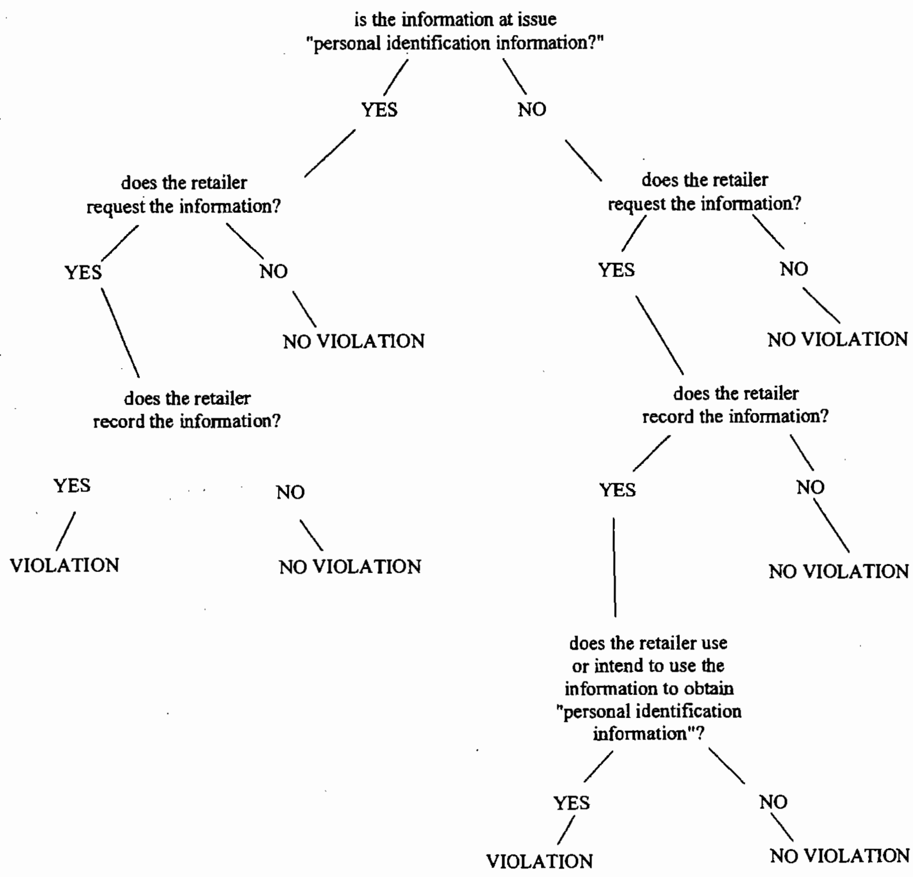
1) Is the information at issue "personal identification information?"

2) Does the retailer request the "personal identification information?"

3) Does the retailer record the requested "personal identification information?"

If the answer is "NO" to any of these questions, there has been no violation and the inquiry ends.

Ms. Pineda, however, asks this Court to disregard the language of the statute and impose a more complex inquiry that includes an ultimate step contemplated nowhere in the language of the statute. Her interpretation, rather than a simple three question inquiry, is most easily viewed as a flow chart, the complexity of which is evident:



The entire right hand branch consists of an analysis **after** the conclusion that the information in question is not "personal identification information." The final question in that branch, relating to **later use** of the non-"personal identification information," is an inquiry found nowhere in the language of the statute. It relates to conduct beyond the collection of information during the credit card transaction – the only type of conduct regulated by Song-Beverly. *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 ("In construing the statutory provisions a court is not authorized to insert

qualifying provisions not included and may not rewrite the statute to conform to an assumed intention and which does not appear from its language."). This interpretation adds the additional regulation to **use** (or intended use)[8] of the information after it is collected.

Where a statute can be interpreted based on its plain language, there is no need for the Court to go further in its analysis. *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal. 4th 1036, 1047 ("To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent. If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. **If there is no ambiguity in the language we presume the Legislature meant what it said and the plain meaning of the statute governs.**") (emphasis added).

---

[8] Neither is intent an element; Song-Beverly is a strict liability statute that imposes mandatory civil penalties per transaction. Cal. Civ. Code § 1747.08(e). The retailer's *purpose* for the collection of the information is wholly irrelevant. *See* Cal. Civ. Code § 1747.08(a); *Florez v. Linens 'N' Things*, 108 Cal.App.4th 447, 451 (retailer's unannounced subjective intent is irrelevant in determining whether Song-Beverly has been violated).

C. LEGISLATIVE HISTORY MAY NOT BE USED TO INTERPRET UNAMBIGUOUS PORTIONS OF A STATUTE.

Ms. Pineda, despite her admission that Song-Beverly is "clear and unambiguous" (OB, p. 5), proceeds to analyze the legislative history of Song-Beverly for the sole purpose of cherry-picking broad policy statements from it (OB, pp. 8-10). In light of the clear and unambiguous language of the prohibitory portions of the statute itself, her arguments based upon the legislative history are misleading and not permitted. *See Diamond Mulimedia*, 19 Cal.4th 1047; *see also* J.A. *Jones Construction Co. v. Superior Court* (1994) 27 Cal. App. 4th 1568, 1577 ("[R]eading the tea leaves of legislative history is often no easy matter. Even assuming there is such a thing as meaningful collective intent, courts can get it wrong when what they have before them is a motley collection of authors' statements, committee reports, internal memoranda and lobbyist letters."). Indeed, the "motley collection" may be of little or no help and, worse, may represent attempts by interested parties to influence the judiciary after the bill has been passed. *Id.* ("Legislative history directly represents only the views of the few actors in the legislative process, including lobbyists and committee staff people, who are intimately involved with particular legislation. . . . Legislative history

has become contaminated by documents which are more aimed at influencing the *judiciary* after the bill is passed than explaining to the rest of the *legislature* what the bill is about before it is passed.") (emphasis in original). Therefore, courts may only rely on legislative history that clearly indicates the view of the legislature as a whole. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App. 4th 26, 30. Courts must not rely on individual statements as evidence of legislative intent, absent clear proof that the statement was communicated to the entire legislature. *Id.* at 39; *see also Calvillo-Silva v. Home Grocery* (1998) 19 Cal. 4th 714, 726, *overruled, in part, by Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826; *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal. App. 4th 1403, 1426 ("Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. This is because such materials are generally not evidence of the Legislature's *collective* intent. For the same reason, letters to various legislators and to the Governor expressing opinions in support of or opposition to a bill, press releases by a bill's author and enrolled bill reports generally should not be considered.") (emphasis in original); *Silveira v. Lockyer* (9th Cir. 2003) 328 F.3d 567, 571 ("relying on [historical scholarship] becomes like relying on

legislative history: 'entering a crowded cocktail party and looking over the heads of the guests for one's friends.' ") (citing *Conroy v. Aniskoff* (1993) 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

Moreover, even Ms. Pineda's citation to the discussion of the legislative history of Song-Beverly in *Florez v. Linens 'N' Things* (2003) 108 Cal.App.4th 447 (OB, p. 9), in a different context (i.e. where the information collected, a telephone number, was "personal identification information") is misplaced here in light of the Fourth Appellate District's more recent and detailed discussion of the legislative history in *Party City*, where the retailer, as here, was requesting zip codes. *Party City*, 169 Cal.App.4th at 514-16. By contrast, in *Florez*, the retailer was requesting telephone numbers, which are undisputedly "personal identification information." Cal. Civ. Code § 1747.08(b). In fact, the *Party City* court expressly distinguished the facts presented here and in *Party City* from those in *Florez*. *Id.* at 517-18.[9]

---

[9] This distinction is stark when viewed as a function:

Compare	*Florez*:	PII	+	non-PII	=	violation
with	*Pineda*:	non-PII	+	non-PII	=	no violation

D. LOOPHOLES ARE TO BE CLOSED BY THE LEGISLATURE, NOT THE COURTS.

1. *Ms. Pineda Wants to Prevent Retailers From "Circumvent[ing] the Statute."*

Notwithstanding that the lack of ambiguity in the prohibitory language, Ms. Pineda argues that use of a zip code to obtain a home address *should be* considered a violation of the statute because, otherwise, retailers would be allowed to "circumvent the statute." (OB, pp. 9-10.)[10] Ms. Pineda has described a classic loophole argument.

Specifically, she argues that even though the plain language of Song-Beverly does not include the "reverse lookup" concept, it nevertheless should be interpreted in a way that furthers the broad policy goal of prohibiting retailers from acquiring their customers' home addresses from information obtained during a store visit where the consumer pays with a credit card.[11] (OB, pp. 2, 8, 10, 13.) Ms.

---

[10] In support of this argument, she presents only the classic chestnut about a duck. But the question of whether the information at issue fits within the definition of a "duck" or not was answered by *Party City.* It is not.

[11] Even this characterization of the policy goal of Song-Beverly is unfounded. Retailers would still be permitted in many ways to acquire a home address even if it were a violation to obtain it via use of a zip code. For example, Song-Beverly does not prevent a retailer from requesting this information, whether directly or

Pineda is asking the Court to ignore the language of the statute, which regulates what information a retailer can collect, and look instead to the result, which is that retailers can eventually obtain information the Legislature purportedly (or at least Ms. Pineda believes) did not want them to have.

The Fourth Appellate District below was correct to direct Ms. Pineda and her *amici* to the Legislature with these arguments. (Opinion, p. 6.) *Bermudez v. Municipal Court*, 1 Cal. 4th 855, 864 (1992) ("[T]he Legislature failed to close this particular aspect of the statutory 'loophole' . . . . Whether or not we believe this is a wise result in terms of policy, we are bound to construe the statute as we find it."); *Bigge Crane Rental Co. v. County of Alameda*, 7 Cal. 3d 414, 418-19 (1972) (Mosk, J., dissenting) ("On the other hand, if there is a statutory loophole large enough to drive a truck through, the Legislature should close it: if a change is to be made, it should be effected through the legislative process." (internal quotations and citations omitted)); *State of California v. Western Natural Rubber*, 235 Cal. App. 3d 1495, 1502 (1991) (holding that "[i]f it appears that

---

indirectly, during a cash transaction. *See* Cal. Civ. Code § 1747.08(a). Nor does it prevent a retailer from using just a cardholder's name to look up a home address, since a name is not "personal identification information" because it is set forth on the credit card. Cal. Civ. Code § 1747.08(b).

public entities again have found a loophole in the statute, the matter is best left to the Legislature to correct once again."); *Gilbert v. Municipal Court*, 73 Cal. App. 3d 723, 728, 734 (1977) (holding that the closing of "a loophole in our appellate system . . . is a matter which should be addressed by the Legislature).

2. *The Legislature Must Be Presented With and Consider All Arguments For and Against a Practice.*

Indeed, if this issue were ever squarely presented to the Legislature, there are arguments, including the privacy concerns articulated by Ms. Pineda, to consider on both sides as to whether the conduct alleged here should be regulated, and if so, how. But, there are additional arguments to consider, such as environmental concerns. Targeted distribution of catalogues and other communications drastically reduce paper and ink consumption and waste by allowing retailers to only send their materials to their own shoppers, rather than to blanket entire zip codes or other geographic areas with catalogues mailed to their customers and non-customers alike. Issues related to competitive productivity (e.g. will retailers divert their attention to states in which marketing is more efficient and targeted), and to consumer experience (i.e., whether consumers prefer to receive fewer targeted marketing mailings, or more indiscriminate marketing mailings) are also relevant to this debate.

Both sides deserve a full and fair hearing of their relevant concerns and the opportunity to present their arguments to the Legislature (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 694 n. 31), rather than ask the Court to anticipate what the Legislature **might** do if presented with this issue.

> "The task of the courts is to determine what the Legislature intended at the time it enacted a statute, not to speculate on what the Legislature might have done had it enacted the statute at a later time when other factors were present."

People v. Bonnetta (2009) 46 Cal.4th 143, 151; *Brougton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1096; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 ("It is not our function, however, to add language or imply exceptions to statutes passed by the Legislature.")

The California Legislature is fully capable of crafting language to close the purported loophole that Ms. Pineda argues exists. For example, the California Financial Information Privacy Act, California Financial Code § 4050 *et. seq.*, authored by the same person that sponsored Song-Beverly, expressly contemplates and prevents financial institutions from using certain information to derive other

information about their consumers. Cal. Fin. Code § 4052(a).[12] If Congresswoman Speier had wished when drafting Song-Beverly to prohibit retailers from reverse-searching for "personal identification information," she presumably would have included similar language in Song-Beverly to that which she included when sponsoring the California Financial Information Privacy Act. She did not. *See Dix v. Superior Court* (1991) 53 Cal.3d 442, 461-62 (omitting language included in previous statute evidences legislative intent to alter meaning of the statute); *Tyron v. Superior Court* (2007) 151 Cal.App.4th 839, 850 ("When a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted.") (internal citations and quotations omitted).[13]

---

[12] " 'Nonpublic personal information' means personally identifiable financial information . . . [and] shall include any list, description, or other grouping of consumers, and publicly available information pertaining to them, **that is derived** using any nonpublic personal information other than publicly available information." Cal. Fin. Code § 4052(a) (emphasis added).

[13] Moreover, even under the California Financial Information Privacy Act, a zip code is not "nonpublic personal information." Cal. Fin. Code § 4056(a) ("This division shall not apply to information that is not personally identifiable to a particular person."). Thus, the use of a zip code to derive additional information about the consumer would not violate even that statute regulating financial firms. Cal.

3. *Existing Laws Address Many of Ms. Pineda's Policy Concerns.*

If presented to the Legislature, it is likely that even if it agreed with Ms. Pineda's concerns, it would determine that closing this purported loophole is unnecessary because other laws already exist that offer sufficient protection to consumers who object to the use of their information.

- Cal. Civ. Code § 1798.81 - requires businesses to take all reasonable steps to dispose of customer's personal information in their possession;
- Cal. Civ. Code 1798.83 - requires businesses which provide customer's personal information to third parties and know or reasonably know that the personal information was used by the third party for direct marketing purposes to provide the ability for the consumer to opt out of such sharing, or, on request, provide the customer, free-of-charge, statutorily-mandated information, including, the names and addresses of all of the third parties that received personal information;
- Cal. Civ. Code § 1798.85 - prohibits persons and entities from disseminating an individual's social security number in unencrypted format; and
- Cal. Bus. & Prof. § 22575 - requires operators of commercial Web sites or online services to conspicuously display its privacy policy regarding collection, use and management of personally identifiable information.

Fin. Code § 4052(a) ("nonpublic personal information" shall not include any list of consumers and publicly available information pertaining to them that is derived without using nonpublic personal information).

E. MS. PINEDA'S INTERPRETATION OF SONG-BEVERLY VIOLATES RETAILERS' RIGHTS TO DUE PROCESS.

Ms. Pineda would subject retailers to hundreds of millions (if not billions) of dollars in penalties wholly unrelated to any actual damage, and without sufficient notice of specifically what conduct is prohibited. But, the Court must not construe Song-Beverly in a way that would make it vulnerable to constitutional attack. *Cemetery Board v. Telophase Society of America* (1978) 87 Cal.App.3d 847, 858; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 575 ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Frisby v. Schultz* (1988) 487 U.S. 474, 483. Just as was raised in *Party City*, if the Court were to adopt Ms. Pineda's interpretation here, it would do just that.[14] *Party City*, 169 Cal.App.4th at 515.

---

[14] Song-Beverly regulates speech; thus, it is also subject to the limitations of the First Amendment. *United States v. Playboy Entm't Group* (2000) 529 U.S. 803, 812. Even under the lowest level of scrutiny given to commercial speech, preventing a retailer from requesting a zip code because of the existence of technology developed post-enactment would be an overbroad, never-ending restriction. *Baba v. Board of Supervisors of San Francisco* (2004) 124 Cal.App.4th 504, 513-14 (setting forth standard of protected

Such an interpretation would deprive retailers of their fundamental due process right to notice of what conduct is prohibited. No retailer could be expected from the actual language of the statute to understand that Song-Beverly prohibits the use of a zip code to reverse search for a home address through legitimate third party vendors, when neither the terms "zip code" nor "reverse search" nor "lookup" (nor any similar term) are contained in the statute, and when the trial court and *two* unanimous panels of California appellate justices did not read Song-Beverly in this way. Similarly, it would turn concepts of adequate notice upside down to hold retailers that for a year have followed the express guidance of *Party City* (and subsequently, *Pineda*) liable for this conduct now, particularly where they would be subject to mandatory civil penalties of up to $1,000 *per transaction* without regard to any actual harm suffered.

---

commercial speech), *Shelton v. Tucker* (1960) 364 U.S. 479, 489-90 (holding sweeping statute violates first amendment right under overbreadth doctrine), *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244 ("[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").

1. ***Ms. Pineda's Interpretation of Song-Beverly Is Unconstitutionally Oppressive.***

"Courts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process." *Hale v. Morgan* (1978) 22 Cal.3d 388, 399 (citing, *e.g., People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 642).[15] The Legislature may not, "in defiance of due process requirements, compel the exaction of penalties which, in a particular case, demonstrably overbalance and outweigh reasonable goals of punishment, regulation and deterrence." *Id.* at 402-03. Song-Beverly's penalties, when applied to retailers that conduct thousands of transactions per day, unfairly approach confiscation of their entire business without adequate notice of the conduct that Song-Beverly proscribes. *C.f., Hale*, 22 Cal.3d at 392, 404-05 (mandatory penalty of $100 per day totaling $17,300 is constitutionally excessive, confiscatory result, wholly disproportionate to legislative goal and is violative of due process).

2. ***Ms. Pineda's Interpretation of Song-Beverly is Unconstitutionally Vague.***

If using a zip code to reverse search for a home address violates the statute, then Song-Beverly is unconstitutionally vague.

It does not provide adequate notice on its face that it proscribes such conduct. The due process clause of the Fourteenth Amendment guarantees individuals the right to fair notice of whether their conduct is prohibited by law. *Calautti v. Franklin* (1979) 439 U.S. 379, 390-91. If a zip code alone is not "personal identification information" generally, but can *become* "personal identification information" based upon how a retailer subsequently uses it or intends to use it once it has been collected, Song-Beverly is impermissibly vague because this is nowhere in the statute. *See Giaccio v. Pennsylvania* (1966) 382 U.S. 399, 402-03 ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."); *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 ("[T]he underlying concern is the core due process requirement of adequate *notice*. . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

---

[15] *See also* California Constitution, Art. 1, Section 17 (commanding that no "excessive fines" be imposed).

differ as to its application, violates the first essential of due process of law.'") (citing *Connally v. General Construction Co.* (1926) 269 U.S. 385) (emphasis in original)); *State Farm Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417 (Kennedy, J.) (citing *BMW of N. Am. v. Gore* (1996) 517 U.S. 559, 574 (Stevens, J.); *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 231 ("Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited . . . .").[16]

Moreover, if this subsequent use of a zip code is now restricted by Song-Beverly, at what point in time was a retailer put on notice that this conduct – only possible because of new software technology that did not exist twenty years ago when this statute was passed – is prohibited? Was it when the technology first came into existence? Was it when third party vendors began to offer these services? Was it when retailers first began to use third party vendors for these services? Or was it when a significant number of

---

[16] Indeed, as Justice Baxter has aptly noted, "fundamental fairness dictates that before a law subjects persons to such significant sanctions, criminal or civil, it should give fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 316 (BAXTER, J., Dissenting) (citing *Mourning v. Family Publications Service, Inc.* (1973) 411 U.S. 356, 375, quoting *McBoyle v. United States* (1931) 283 U.S. 25, 27; *see Hale v. Morgan* (1978) 22 Cal.3d 388, 398-406).

retailers began to do so? And at what point in time from the point of sale forward does the alleged violation occur? Does a retailer violate the statute only if it *intends* to use the zip code later to look up an address, or is it enough that the retailer requests a zip code, even if its only purpose is to identify where to open up its next store location? What if the retailer intends to look up the customer's address when it collects the zip code, but ends up not attempting to do so? What if the retailer attempts to look up the address, but gets no results? Or gets multiple results? Or realizes that the particular customer's address is already in the retailer's database?

The language of the statute (or even the legislative history, for that matter) does not answer any of these questions. Statutes must be intelligible, defining a "core" of proscribed conduct that allows people to understand whether their actions will result in adverse consequences. *Forbes v. Napolitano* (9th Cir. 2000) 236 F.3d 1009, 1011-13 (citing *Planned Parenthood v. Arizona* (9th Cir. 1983) 718 F.2d 938, 947 (statute is void for vagueness if persons of common intelligence must guess at meaning).[17] Ms. Pineda's interpretation

---

[17] Further, if the law interferes with the right of free speech, like Song-Beverly does as discussed briefly above in Section VI(E) footnote 16, a more stringent vagueness test applies. *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498-99.

requires one to guess whether the capability of newly-developed technology could create a violation of the statute when none existed at the time the statute was passed, and if it could, when that potential for the violation came into existence. If the trial court and two unanimous panels of Appellate Court Justices did not understand the statute this way, it is unfair to expect reasonably intelligent persons to understand it this way.

Indeed, the only hope to save her interpretation from this constitutional infirmity, especially because of the existing precedent set forth in *Party City*, would be to enforce it solely on a prospective basis. *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 984 ("A court may [apply a decision prospectively] when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would **unfairly undermine the reasonable reliance of parties on the previously existing state of the law**.") (emphasis added); *Dakin v. Dept. of Forestry & Fire Prot.* (1993) 17Cal.App.4th 681, 687-88 ("In light of this past confusion and reliance on our previous opinion, and particularly in light of the severe results of noncompliance with [the statute], the interests of fairness require that our decision operate prospectively only.") If enforced prospectively, retailers would be on clear and unambiguous notice of

what conduct is proscribed, but would not be liable for enormous penalties for relying upon the Fourth Appellate District's opinion in *Party City*, or for previously reaching the same conclusion that the *Party City* and *Pineda* panels subsequently did. But Ms. Pineda does not seek a prospective ruling; she is seeking hundreds of millions of dollars in retrospective penalties.

3. ***Due Process Instructs the Interpretation of Song-Beverly.***

These due process considerations further instruct the interpretation of any statute. As an interpretation approaches a due process violation, it becomes less and less likely that the interpretation represents the Legislature's actual intent. In other words, there is an inverse relationship between the proximity of an interpretation to a due process violation, and the likelihood that this is the intended interpretation. Here, as the severe mandatory penalties unrelated to any actual harm and the lack of any direct, much less clear, language articulating the alleged prohibition cause this interpretation to hurtle toward a violation of due process rights, the likelihood that this interpretation embodies the actual intent of the Legislature in 1990 reaches its vanishing point.

F. IN TWENTY YEARS, NO APPELLATE COURT IN ANY STATE OR ENFORCEMENT AGENCY IN CALIFORNIA HAS APPLIED THIS STATUTE THE WAY MS. PINEDA ADVOCATES.

Song-Beverly was modeled after a similar law in New York, Gen. Bus. Law § 520-a (2007). (AA, Vol. I, p. 85.) Delaware, Kansas, Maryland, Massachusetts, Nevada, and Rhode Island each have a comparable law to Song-Beverly. Del. Code Ann. tit. 11, § 914 (2010); Kan. Stat. Ann. § 50-669a (2009); Md. Code Ann., Com. Law § 13-317 (2009); Mass. Gen. Law Ann. ch. 93, § 105 (2009); Nev. Rev. Stat. § 597.940 (2008); R.I. Gen. Laws § 6-13-16 (2009). None of these statutes prohibit the collection of zip codes expressly. Further, Williams-Sonoma has located no authority in any of those states that interpret those respective state statutes to prohibit the requesting and recording of zip codes in any way, shape or form.

Song-Beverly did not initially include a private right of action. (AA, Vol. I, pp. 67-70.) Adding a private right of action occurred towards the end of the legislative process. (*Id.* at 58-78 (added by amendment in assembly May 29, 1990, final version drafted July 27, 1990). The Legislature principally intended for it to be enforced by the Attorney General, the District Attorneys or the City Attorneys who continue to have enforcement authority to this day. (*Id.*; Cal. Civ. Code § 1747.08(e), (f).) Nevertheless, in Song-Beverly's twenty-

year history, Williams-Sonoma has been unable to identify a single enforcement action brought by any one of these agencies on the grounds that a retailer requested and recorded a zip code in connection with a credit card transaction.[18] Certainly, in the State's current budget crisis, if these agencies believed that Song-Beverly means what Ms. Pineda alleges it means, they would be bringing enforcement actions to collect these considerable penalties for their respective general funds, rather than sitting back and allowing private plaintiffs like Ms. Pineda to exclusively reap the spoils. Civ. Code § 1747.08(e).

G. MS. PINEDA'S GOAL (PROHIBIT RETAILERS FROM OBTAINING HOME ADDRESSES) WOULD NOT BE ACCOMPLISHED BY HER INTERPRETATION OF SONG-BEVERLY.

Ms. Pineda claims that the goal of Song-Beverly is to prevent retailers from acquiring their customers' home addresses. But this would not be met by adopting her interpretation. In other words, the

---

[18] Williams-Sonoma sent a public records request to the following agencies: the California Attorney General, the San Francisco District and City Attorneys, the Los Angeles District and City Attorneys, and the San Diego District and City Attorneys. The requests sought all public records related to an enforcement action pursuant to Civil Code § 1747.08 on the basis that the defendant collected, recorded or otherwise used zip code information. All responses indicated that there were no records related to any enforcement action on that basis. (Williams-Sonoma's Request for Judicial Notice ("RJN"), Exhibits 2—8.)

"judicial-fix" she seeks would not actually affect the result she seeks. Song-Beverly does not prohibit retailers from taking information set forth on the credit card, such as the customer's name, going to a phone book or other publicly available electronic source, and searching for that customer's address. Neither would Ms. Pineda's interpretation prevent a retailer from cross-referencing the customer's name with the store location's zip code, city or other geographic identifier in a phone book or publicly available database to identify a home address, since most consumers shop near where the live.[19]

Ms. Pineda's position is premised on the unstated assumption that a retailer can always identify a particular customer's address

---

[19] Neither does Song-Beverly prevent a retailer who selects the zip code security-verification option from a credit card company, as is common with automated gas stations, from requesting a zip code to complete the transaction, **and then using the zip code to look up home addresses**. Cal. Civ. Code § 1747.08(c). As a result of this exception for zip code security usage, Ms. Pineda argues (though she did not allege it in the Complaint) that consumers believe that they are always required to provide their zip codes, and therefore, the statute should be expanded to encompass any non-exempt request for a zip code. (OB, pp. 8-9.) This argument turns the statutory interpretation of Song-Beverly on its head, arguing that an exemption creates a situation that expands the underlying breadth of the statute, i.e. that collection of zip codes is covered by the statute based upon a consumer belief arising from the *exempt* conduct of collecting them for security purposes. The existence of exempt conduct does not expand the breadth of a statute to create more liability.

from a haystack of people with the same name just by knowing that customer's name and zip code. (OB, p. 2.) Not true. Not every search will yield a single correct result. A zip code only narrows the geographic search field to be cross-referenced with a name.

If the Court were to adopt Ms. Pineda's interpretation and prevent retailers from requesting a zip code simply because it lends more accuracy to a name search, retailers will not stop this practice altogether. Rather, businesses would remain free to use less accurate search fields, such as the city or county where the customer shopped, which will just yield more results; the only practical effect being that retailers send out *more* catalogues to California consumers with similar names. Ms. Pineda will still receive her catalogue. Or, alternatively, retailers would be free to go back to their historical practice of blanketing entire neighborhoods, zip codes, or cities with catalogues or other materials to reach their target customers. Again, Ms. Pineda and others in her same situation will continue to receive catalogues. And so will many thousands of others who currently do not, benefiting only paper manufacturers and the concept of inefficiency.

Moreover, Ms. Pineda's interpretation would itself prevent class certification. The complexity of the issues invoked would require individual issues to dramatically predominate. *In re Vioxx*

Class Cases (2009) 180 Cal.App.4th 116, 128, 135-137. Specifically, not every search for a home address using a name and a zip code yields an actual or even correct result. The process may not lead to that particular customer's home address, which may or may not have already been in the retailer's database. The outcome may differ substantially from customer to customer. For example, even though a zip code is collected, the following issues would have to be adjudicated for each individual purported class member:

- Was the zip code actually used to look up a home address?
- Did it yield any hits?
- Did it yield multiple hits?
- If so, was one of the multiple hits selected?
- Is the single hit or selected hit the customer's correct address?
- Did the retailer already have the address it in its database?

Even under Ms. Pineda's interpretation, only those searches that yield the customer's correct address ("personal identification information") would give rise to a violation. These individual issues – sifting out only class members whose "personal identification information" was actually obtained – would overwhelmingly predominate.

If the Legislature wishes to prevent California retailers from looking up their customers' addresses in publicly available, legitimate third party sources, that issue should be fully debated and voted on in the Legislature. Song-Beverly, as written and even as interpreted by Ms. Pineda, will not advance that policy goal. When examined just beyond the rhetoric and fear-mongering, it is apparent that this is a multi-faceted and complicated issue, and any statute addressing it would have to address all of the nuances of different types of searches and different types of results, balanced against the competing interests of retailers, the environment, and other interested parties.

H. A REGULATION PROHIBITING THE SEARCH FOR A HOME ADDRESS WOULD RESTRICT THE USE OF A NAME, NOT A ZIP CODE.

The single most important piece of information to be used in looking up or searching for a person's address is unquestionably a name. The only purpose of a zip code or other geographic designation is to lay a filter over all of the results for that name. This is true for electronic databases as well as historically for telephone books organized by neighborhood, city or region.

If the Legislature had intended to prohibit or restrict retailers from looking up a person's address based upon information

collected during a credit card transaction, the piece of information to regulate is the name, not the zip code. But a name is not "personal identification information" because it exists on the face of the card (Cal. Civ. Code § 1747.08(b)), and therefore even Ms. Pineda must concede that the name, the most valuable piece of information by far, can be used to look up an address without violating Song-Beverly.

While we all may criticize the wisdom or even the efficiency of the Legislature from time to time, certainly the Legislature did not intend to prohibit the looking up of addresses by restricting the use of a somewhat helpful filter while permitting the use of the most effective piece of information – a name – even in conjunction with other filters.

I. THIS SECTION OF SONG-BEVERLY IS PENAL IN NATURE AND SHOULD THEREFORE BE NARROWLY CONSTRUED.

Ms. Pineda argues that the Fourth Appellate District below was wrong to strictly construe Song-Beverly. She argues that California case law holds that this statute specifically, and remedial statutes generally, should be liberally construed and that the rule of strict construction of penal statutes applies only to criminal, not civil,

statutes. (OB, pp. 10-13.) This is wrong as to what the Fourth Appellate District below held and wrong in its analysis.

The Fourth Appellate District in this case did not strictly construe Song-Beverly to reach its conclusion. Indeed, it did not articulate any specific standard of construction when it determined that the statute does not apply here. (Opinion, pp. 4-6.) Ms. Pineda admits as much when she cites not to the Opinion below, but to *Party City* in her Opening Brief. (OB, p. 10.) *Party City* did interpret Song-Beverly strictly and was correct in determining that the mandatory penalties unrelated to actual damages in this statute require such strict construction. Regardless, this issue is a red herring. Construing a statute "liberally" does not mean that the Court is allowed to close a purported loophole left open by the Legislature or read language into the statute that does not exist, as Ms. Pineda asks this Court to do. The Fourth Appellate District was correct no matter which standard applies.

1. ***Party City* Correctly Held that *this Section* of Song-Beverly Should be Strictly Construed.**

Strict construction of a statute that is penal in nature (applies a penalty) is the longstanding law of this Court. *Weber v. Piyan* (1937) 9 Cal. 2d 226, 229-30. But Ms. Pineda claims that this section of Song-Beverly is not subject to strict construction because *Party City*

ignored *Florez*. (OB, p. 10-11.) Not so. Instead, *Party City* started from *Weber* and conducted a full analysis, which included *Florez*, and came to the reasoned conclusion that this section of Song-Beverly should be strictly construed. *Party City*, 169 Cal.App.4th at 510-14. *Florez*, by contrast, cited to *Young v. Bank of America* (1983) 141 Cal.App.3d 108, without analysis. Upon closer examination, it is quite obvious that the *Florez* court's reliance on *Young* was misplaced because *Young* addressed an entirely different section of Song-Beverly that does not have mandatory penalties. *Florez* was simply wrong to hold that **this** section of Song-Beverly should be liberally construed.

Young held that the section of Song-Beverly involved there must be liberally construed because it is remedial in nature. *Young*, 141 Cal.App.3d at 114. But *Young* interpreted a **completely different** section of Song-Beverly, which **did not** impose a mandatory penalty. *Young*, 141 Cal. App. 3d 108 (applying award of **compensatory and discretionary treble damages** based on provisions of Song-Beverly related to credit card billing errors). *Young* is inapposite. The section addressed in *Young*, which requires proof of harm and only provides for damages directly related to that harm, is not penal in nature. The *Florez* court did not identify this distinction and therefore incorrectly assumed *Young*

addressed the entirety of Song-Beverly. Unlike the section at issue in *Young*, section 1747.08 does impose a mandatory penalty for each and every single credit card transaction and is therefore penal in nature. *See The TJX Companies, Inc. v Superior Court* (2008) 163 Cal. App. 4th 80, 85-86.[20] *Party City* correctly recognized this and accordingly did find Section 1747.08 to be penal in nature and subject to strict construction.

2. ***A Civil Statute That is Both Penal and Remedial in Nature Must Be Strictly Construed Absent Express Statutory Instruction to the Contrary.***

Whether a statute is remedial or penal is not a mutually exclusive proposition. A statute may be **both** remedial and penal in nature. *Symmes v. Sierra Nevada Mining Co.* (1915) 171 Cal. 427.

Civil statutes are penal in nature when they do not seek to compensate the plaintiff's loss, but instead seek to punish the defendant. *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 862 (citing 1 Corpus Juris Secundum, page 1180, section 69). "[T]he moment the element of compensation for loss is eliminated, the statute itself becomes highly penal in its nature and the argument of

[20] Moreover, the threshold issue of what information is covered by Song-Beverly was never before the Court in *Florez* – that case addressed **when** in the transaction a telephone number (expressly identified as "personal identification information") could be requested.

appellants that it may still be considered purely as a remedial statute is without force." *Moss v. Smith* (1916) 171 Cal. 777, 783; *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, 1269 n.17 ("An action on a penalty . . . is generally considered one in which the plaintiff is allowed to recover from a wrongdoer without regard to the actual damages sustained.") "[U]nder a remedial statute all that is permitted is compensation to make good a loss . . . ." *Moss, 171 Cal.* at 782. "What is meant by a statutory penalty was defined in *Los Angeles County* v. *Ballerino,* 99 Cal. 593, [32 P. 581, 34 P. 329], to be 'one which an individual is allowed to recover against a wrongdoer as a satisfaction for wrong or injury suffered and **without reference to the actual damage sustained**.' " *Id.* at 783 (emphasis added). "The fact that a statute may have a remedial phase is not at all inconsistent with its being of highly punitive character." *Id.* at 784.

Ms. Pineda argues that the rule of strict construction only applies to criminal statutes and cites to *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305. (OB, pp. 12-13.) Again, not so. Courts have regularly found that civil statutes which impose a mandatory penalty, especially one that is wholly unrelated to actual damages suffered and can be as opprobrious as most criminal statutes, are to be strictly construed. *Symmes*, 171 Cal. at 429-30; *Tos*, 160 Cal.App.3d at 78 (twice amount of actual damages

suffered sufficient to warrant strict construction); *Sarracco Tank & Welding Co. v. Platz* (1944) 65 Cal.App.2d 306, 319.

In *Lungren*, this Court merely observed that strict construction of penal statutes has "**generally**" been applied to criminal statutes, not exclusively applied to them. *Lungren*, 14 Cal.4th at 312 (emphasis added). The rule of strict construction is rooted in due process concerns (*id.* at 313), which are not always present when dealing with civil statutes but, as discussed above, are clearly apposite here.[21] For example, the maximum mandatory penalty in *Lungren* at $2,500 per day would not exceed $912,500 in a year. Cal. Health & Safety Code § 25249.7(b). By contrast, the maximum mandatory penalty imposed by Song-Beverly – up to $1,000 per transaction – is so severe that it could potentially *bankrupt* a California retailer, imposing hundreds of millions of dollars, or more, in penalties. The Due Process clauses of the United States and California Constitutions protect property as well as liberty; *Lungren* simply dealt with a statute that was less impactful on California citizens' property.

---

[21] *See also Hale*, 22 Cal. 3d at 401 ("Uniformly, we have looked with disfavor on ever-mounting penalties **and have narrowly construed the statutes which either require or permit them.**") (emphasis added).

Regardless, the Court in *Lungren* was not even asked to address the impact of the civil penalties to begin with. The Court went on to explain that, there, it was concerned with the scope of the government's authority to enjoin and prohibit certain conduct, "rather than the method of assessing the amount of penalty for transgressing the proscription," which is squarely at issue here. *Lungren*, 14 Cal.4th at 314. For example, many remedial statutes, including the one at issue in *Lungren*, that impose penalties also provide guidance to the courts in the statute itself about how to determine the appropriate amount of the penalty. *See, e.g., Cal. Assn. of Health Facilities v. Dept. of Health* (1997) 16 Cal.4th 284, 294-95. Ameliorating factors in the assessment of proper civil penalties are included precisely to afford due process protections to the person subject to them. *See Hale*, 22 Cal.3d at 399. There is no such guidance in Song-Beverly.

The law is long-standing and well-settled that if a statute gives rise to a new remedy or is penal in effect – *even if the statute has a remedial purpose* – it must be construed in favor of the party sought to be subjected to it. *Weber*, 9 Cal.2d at 229-30; *see also Tos v. Mayfair Packaging Co.* (1984) 160 Cal. App. 3d 67, 78. The penal nature of such a statute trumps its remedial purpose, and it should be strictly construed in favor of the defendant. *See id.*; *Moss*, 171

Cal. at 783.[22] This is, of course, logical and fair. When a party is subject to a punishment, the law must be exceedingly clear regarding what conduct is prohibited.

Williams-Sonoma does not dispute that Song-Beverly has a remedial purpose. But, Song-Beverly gave rise to a new remedy to consumers and imposes mandatory civil penalties up to $1,000 per violation. Cal. Civ. Code § 1747.08(e).[23] For retailers like Williams-

---

[22] Only where the Legislature expressly instructs that a statute which is both remedial and penal in nature is to be liberally construed have courts applied a liberal construction. *See, e.g., DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 395-98 (construing Labor Code § 5814, which imposes mandatory penalty that bears direct relationship to actual damages and which **includes express instruction** from Legislature pursuant to Labor Code § 3202 to liberally construe statute) (emphasis added); *Davison v. Indus. Accident Comm'n* (1966) 241 Cal.App.2d 15, 18 (same). Such an instruction is glaringly absent here. Cal. Civ. Code § 1747.08.

[23] Ms. Pineda argues that the statute is not penal in nature because a court could impose as little as the proverbial peppercorn as a penalty. (OB, p. 12.) The argument is irrelevant. *The TJX Companies, Inc. v Superior Court* (2008) 163 Cal. App. 4th 80, 85-86 (Song-Beverly imposes a mandatory penalty even if the amount of the penalty is discretionary and spans from a peppercorn to the maximum allowed by the statute). Nor is there any list of factors or other instructions in the statute to be used to determine where in the available range the penalty must fall. *C.f. Lungren,* 14 Cal.4th 294 (interpreting Health & Safety Code § 25249.7(b)(1), which sets forth 7 factors the court must consider) . Moreover, the suggestion is disingenuous. Ms. Pineda certainly does not mean to suggest that if this case were remanded for trial, she (and all the other plaintiffs that have filed and will file class actions in this State against retailers who request zip codes) will only seek civil penalties of a mere peppercorn per violation?

Sonoma that conduct thousands of transactions statewide per day, this number could approach hundreds of millions to billions of dollars. This is dramatically out of proportion to the actual harm (minimal to none from receiving an unwanted catalogue) allegedly suffered by these consumers.[24] The statute is, therefore, penal in nature.

The rules of statutory construction in this state never intended for a party to be subject to mandatory penalties of hundreds of millions of dollars without the statute being exceptionally clear on its face as to precisely what conduct could give rise to such tremendous liability.

J. MS. PINEDA'S COLLATERAL INTERPRETATION OF SUBSECTION (d) IS WRONG AND IRRELEVANT.

Subsection (d) was added in 1991 to address **retailers'** concerns that Song-Beverly prohibited them from asking to see a driver's license or other photo identification to confirm that the

[24] The fear-mongering about identity theft in the Opening Brief is just that. There was no reference to identity theft in the Complaint and those newly created hypotheses were stricken by the Court of Appeal. None of the identity theft incidents mentioned have anything to do with using zip codes to obtain home addresses. That is a security issue, not a privacy issue, covered by other laws and industry self-regulation, such as PCI (Payment Card Industry) Standards and Audits.

customer is in fact the credit card holder. It provides that "[Song-Beverly] does not prohibit any…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…provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise." Cal. Civ. Code. § 1747.08(d).

Ms. Pineda argues that Subsection (d) "specifically prohibits retailers from recording zip codes, which further evidences that the Legislature intended zip codes to fit within the definition of 'personal identification information' " under Subsection (b). (OB, p. 6, n. 2.) She is so far afield in her interpretation of Subsection (d) that the intellectual honesty of her analysis of the remainder of Song-Beverly must be called into question.

First, as set forth above, the question of whether a zip code is "personal identification information" under Subsection (b) is not before the Court. Thus, Ms. Pineda's argument with respect to how Subsection (d) lends to the interpretation of the definition is Subsection (b) is irrelevant.

Second, *Party City* already addressed and disposed of this "Subsection (d)" argument. The court held that even though a zip

code may exist on a driver's license, a zip code does not become "personal identification information" simply because Subsection (d) prohibits the use of a driver's license as a source of information. *Party City*, 169 Cal.App.4th at 518. In other words, Subsection (d) permits requiring a driver's license to be shown, prohibits using the driver's license as a source of information, but does not prohibit a retailer from otherwise requesting information from a customer that is not "personal identification information" under Subsection (b). *Id.*

Third, Subsection (d) is a perfect illustration of ambiguous language for which it is appropriate to look to the legislative history. *See Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.

Ms. Pineda claims that Subsection (d) prohibits a retailer from recording any information that appears on a customer's driver's license, regardless of whether that license is used as the source. Yet, Subsection (b) expressly allows a retailer to record certain non-personal identification information that is contained on a customer's driver's license, such as their name (*see* Civil Code section 1747.08(b)), and *Party City* held that a zip code (which would also be contained on a driver's license) may be requested under subsection (a). Thus, Ms. Pineda's interpretation of Song-Beverly is internally inconsistent on its face, and, at best for her, is ambiguous as to whether Subsection (d) prohibits the recordation of all

information contained on a driver's license – or merely the information deemed "personal identification information" under subsections (a) and (b).

Her interpretation would make Subsection (d) an expansion of the scope of Song-Beverly, rather than merely clarify the existing statute. A court looks to the legislative history to ascertain whether an amendment was an expansion or a clarification, i.e., the Legislature's intent. *In re Marriage of McClellen* (2005) 130 Cal.App.4th 247, 255- 256.

The history of Subsection (d) makes clear that the Legislature intended to clarify that, although a retailer may request that a customer provide identification, such as a driver's license, as a condition for accepting a credit card as payment, the retailer may not use the driver's license as a source to record information it would otherwise be prohibited from requesting under subsection (a). Specifically, Subsection (d) was part of a "clean up bill" passed in 1991 to resolve the confusion caused by the 1990 amendment to Song-Beverly (the "Cleanup Amendments"). (RJN, Exhibit 1.) Retailers throughout California were concerned that their practice of checking a customer's identification for fraud purposes violated Song-Beverly. In response to these concerns, the Cleanup Amendments specifically authorized the person accepting the credit

card to require reasonable ID, including a driver's license or a California state ID card. (*Id.*) The bill specifically noted that subsection (d) was a ***clarifying non-substantive change*** meant to clarify that subsection (a) was never intended to prohibit a retailer from asking for a driver's license or similar ID. (*Id.*)

Subsection (d), a non-substantive change, could not have enlarged Song-Beverly's coverage beyond the information proscribed under Subsection (a). *See In re Marriage of McClellan*, 130 Cal.App.4th at 255 ("[w]here a statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time...The clarified law is merely a statement of what the law has always been"). This is consistent with the treatment of non-substantive clarifications in the retroactivity context. To have retroactive effect, a non-substantive clarification need not have an express retroactivity provision because it does not change existing law. *Id.* Because Subsection (d) merely clarified what Song-Beverly had always prohibited, it could not have added any new rights or expanded its coverage beyond information already proscribed under Subsection (a).

VII. THERE IS NO JURISDICTION TO REVIEW

Williams-Sonoma respectfully submits that this Court did not grant review within the jurisdictional time limitations prescribed by the CALIFORNIA RULES OF COURT and, therefore, does not have jurisdiction to now review the lower court's decision.

Ms. Pineda filed her Petition for Review on November 25, 2009. CALIFORNIA RULES OF COURT Rule 8.512(b) provides: "(1) The court may order review within 60 days after the last petition for review is filed. Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed. . . . (2) If the court does not rule on the petition within the time allowed by (1), the petition is deemed denied." Cal. R. Ct. 8.512(b). Thus, an order on the petition for review, or an order extending the time to order review, was due on or before January 25, 2010. No such order was filed by that date and, therefore, the petition was deemed denied by operation of law.

Rule 8.512(b) is jurisdictional. *See People v. Black* (1961) 55 Cal.2d 275, 277 (explaining that a "jurisdictional" statute is one that requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations); Witkin, Cal. Proc. 5th Ed., Ch. XIII, sect. 933(b)(1) ("Thus, the time within

which the Supreme Court has jurisdiction to order review is measured from the date of filing of the petition for review.") Indeed, if the rule were not jurisdictional or was otherwise subject to some unspecified exception, prevailing parties would be prejudiced because they would not be able to rely upon the finality of lower courts' decisions if the losing parties petition for review.

Here, however, over one week after the deadline, on February 4, 2010, the Court granted an extension to grant or deny review *nunc pro tunc* as of January 22, 2010. *Pineda v. Williams-Sonoma Stores, Inc.* (Feb. 4, 2010) 2010 Cal. LEXIS 1319. Williams-Sonoma is unaware of any other reported decision in which the Court has issued such an order after the deadline to grant or deny review has passed. Rather, this Court has held that a *nunc pro tunc* order entered after the expiration of the period in which the court must act constitutes "an empty gesture by a court lacking jurisdiction . . . a court cannot revive lapsed jurisdiction by the simple expedient of issuing an order *nunc pro tunc.*" *In re Daoud* (1976) 16 Cal.3d 879, 882 (citing *People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 904 (". . . a jurisdictional time limit which has been exceeded cannot be defeated by the simple device of a *nunc pro tunc* order."). Thus, the lower court's decision should be left undisturbed.

VIII. CONCLUSION

For the foregoing reasons, Williams-Sonoma respectfully requests that the opinion of the Court of Appeal below be affirmed.

Respectfully submitted,

Dated: April 12, 2010

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By

P. CRAIG CARDON
ELIZABETH S. BERMAN

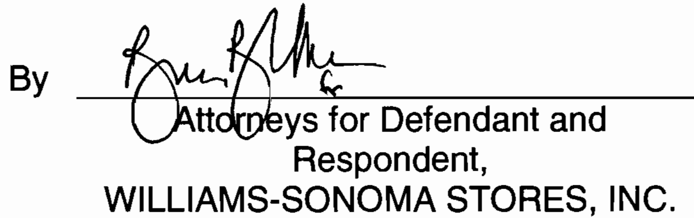
Attorneys for Respondent
WILLIAMS-SONOMA STORES, INC.

IX. CERTIFICATE OF WORD COUNT

I certify that, pursuant to California Rule of Court 8.204(c), the attached Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 13,294 words, according to the counter of the word processing program with which it was prepared.

Dated: April 12, 2010

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

Attorneys for Defendant and Respondent,
WILLIAMS-SONOMA STORES, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On April 12, 2010, I served the following document(s) described as **WILLIAMS-SONOMA'S ANSWER BRIEF ON THE MERITS** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

James R. Patterson, Esq. — 1 Copy
Cary A. Kinkead, Esq.
Matthew J. O'Connor, Esq.
Harrison Patterson O'Connor & Kinkead LLP
402 West Broadway, 29th Floor
San Diego, CA 92101
Telephone: (619) 756-6990
Facsimile: (619) 756-6991

Attorneys for Plaintiff and Appellant Jessica Pineda

James M. Lindsay, Esq. — 1 Copy
Gene J. Stonebarger, Esq.
Richard D. Lambert, Esq.
Lindsay & Stonebarger
620 Coolidge Drive, Suite 225
Folsom, CA 95630
Telephone: (916) 294-0002
Facsimile: (916) 294-0012

Attorneys for Plaintiff and Appellant Jessica Pineda

Court of Appeal — 1 Copy
Fourth District, Division One
Symphony Towers
750 B. Street, Suite 300
San Diego, California 92101

Honorable Ronald S. Praiger | 1 Copy
San Diego Superior Court
Central Division
Department 71
330 W. Broadway
San Diego, California 92101

☒ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 12, 2010, at San Francisco, California.

Anna Carr