Supreme Court Case No. S267576

IN THE SUPREME COURT

OF THE

State of California

TANIA PULLIAM
Plaintiff and Respondent,

VS.

TD AUTO FINANCE LLC
Defendant and Petitioner.

After A Decision By The Court Of Appeal For the Second Appellate District
Division Five
2nd Civil No. B293435

After An Appeal From the Superior Court of Los Angeles County
Hon. Barbara M. Scheper, Judge
Case Number BC633169

REPLY BRIEF ON THE MERITS OF DEFENDANT AND APPELLANT TD AUTO FINANCE LLC

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CERTIFICATE OF INTERESTED PARTIES

TD Auto Finance LLC is a Michigan Limited Liability Company, and a wholly-owned subsidiary of TD Bank, N.A., a national banking association, which is a wholly-owned subsidiary of TD Bank US Holding Company, a Delaware Corporation, which in turn is a wholly-owned subsidiary of TD Group US Holdings LLC, a Delaware Limited Liability Company, which in turn is a wholly-owned subsidiary of the Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD."

DATED: October 18, 2021 Respectfully submitted,

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INTRODUCTION

Respondent Tania Pulliam, like the Court of Appeal below, ignores the Holder Rule's unambiguous text to advance extreme policy arguments that upset the pro-consumer balance the Federal Trade Commission struck in crafting the regulation. Although Pulliam barely addresses the Rule's text, the straightforward reading of the Holder Rule caps recovery of attorney's fees. Had the FTC meant to treat attorney's fees differently, it would have explicitly said so. Instead, it capped those fees along with the consumer's total recovery. The FTC decided that this approach protects consumers by expanding creditor liability (and consumer power) on the one hand, while at the same time limiting the scope of that liability to ensure that creditors continue to finance consumer contracts.

Both sides of this equation serve consumers. At the outset, the Rule changes the landscape in consumers' favor by (1) allowing consumers to defend against creditor claims when they previously could not, and (2) giving consumers the ability to affirmatively sue creditors for contract rescission or recovery of amounts paid, which consumers likewise were previously unable to do. At the same time, the Rule ensures that consumers will be able to obtain financing for their transactions. Because "reasonable" fee awards routinely exceed many multiples of a consumer's actual contract payments, allowing uncapped fees would force creditors into unwarranted settlements (if consumers and their counsel even agree to settle) and discourage them

from financing consumer contracts. Indeed, the fee award here was more than fifteen times the amount Pulliam paid for the car at issue, which does not even include the additional calculation of fees for post-judgment proceedings. The FTC reasonably chose to avoid this result by creating a pro-consumer regulation that capped creditor liability.

Though some consumers and their attorneys might prefer for creditors to settle immediately, others will be incentivized by the promise of excessive fees to refuse settlement offers early in a case. Regardless, creditors have a right to pursue meritorious defenses—just as the Holder Rule allows *consumers* to do when sued by creditors. The Court of Appeal's incorrect ruling deprives creditors of this right, creates an opportunistic litigation landscape for consumers' attorneys, and ultimately harms consumers by discouraging financing of consumer loans. It also creates perverse incentives for consumers and their counsel to refuse creditor settlement offers and seek instead to rack up the fee bill through unnecessary litigation—conduct that again threatens to disincentive consumer lending and thereby harm consumers. The FTC properly accounted for these issues when crafting the Rule to protect consumers.

The FTC has correctly read the Holder Rule this way since its inception, and that view warrants deference. From the outset, the FTC and its staff viewed the Holder Rule as "limit[ing] the consumer to a refund of monies paid under the contract" when the consumer seeks an "affirmative

recovery." Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20022, 20023 (May 14, 1976); *see also* Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53506, 53527 (Nov. 18, 1975). This longstanding and correct interpretation of the FTC's own regulation is entitled to deference, especially when made explicit in its published Rule Confirmation.

The FTC intended the Rule to provide national "uniformity of protection" against the previous separation of "the consumer's duty to pay from the seller's duty to perform." 40 Fed. Reg. at 53527. Although the FTC hoped its Rule would "serve as a model for further state legislation," *id.*, it by no means called for (much less encouraged) state legislation undermining or conflicting with the uniformity created by this federal regulation.

As a result, California's explicit attempt to overturn the Holder Rule fails as a matter of conflict preemption. This Court need not and should not reach this issue, however, as the Court of Appeal did not address it. Pulliam also ignores the fact that resolving preemption would first require her to establish that Cal. Civ. Code § 1459.5 can apply retroactively to a fee motion ruled on years before the law took effect. Pulliam has not tried to make such a showing, nor can she.

This Court should thus reject Pulliam's expansive and erroneous view of the Holder Rule and its relationship with state law—one that, like the Court of Appeal's decision, is untethered to the Rule's text and purpose. Either the Rule's clear pro-consumer terms decide this appeal, or the FTC's binding guidance does. On either basis, this Court should reverse.

ARGUMENT

Unable to defend a definition of "recovery" that improperly and unjustifiably removes attorney's fees from its bounds, Pulliam seeks refuge in what she asserts is the Holder Rule's purpose. Pulliam's response boils down to one unsupportable assertion: the Holder Rule means nothing if a consumer cannot recover uncapped attorney's fees against a lender. This assertion is inaccurate. Significantly, this position finds no support in the Rule's text, history, or practical effect. If unlimited recovery of attorney's fees was so central to the Holder Rule's success, why didn't the Rule's text or guidance expressly remove attorney's fees from the Rule's use of the otherwise broad term "recovery?" In short, because "recovery" includes attorney's fees; the Rule effectively promotes consumer interests while limiting recovery of the same. In arguing to the contrary, Pulliam, like the Court of Appeal, fundamentally misconstrues the Rule's meaning, role, and effect. Pulliam's arguments should be rejected and the Court of Appeal's decision should be reversed.

I. Pulliam's atextual arguments do not rescue the Court of Appeal's misreading of the Holder Rule's plain language.

TDAF explained in its opening brief that the term "recovery" has a clear and unambiguous meaning and that the Court of Appeal erred by refusing to apply that meaning. Opening Br. at 22-26. Nothing in Pulliam's response undermines the Holder Rule's clear import and the broad definition of "recovery." Tellingly, Pulliam does not argue that the term "recovery" is ambiguous. Rather, Pulliam leapfrogs over the threshold question of whether "recovery" is ambiguous and instead relies heavily on the fact that the Court of Appeal declared the term "recovery" to be silent as to attorney's fees. But this erroneous interpretation does not make the term "recovery" unclear. The Holder Rule's plain language provides that "recovery hereunder shall not exceed amounts paid by the debtor hereunder." This language unambiguously limits a consumer's "recovery" under the Holder Rule—regardless of whether the recovery she seeks is called costs, damages, attorney's fees, or any other type of monetary relief. This Court should reject the contrary interpretations advanced by the Court of Appeal and Pulliam and assign "recovery" its plain meaning in interpreting the Holder Rule.

At the outset, Pulliam's argument that attorney's fees are not damages, Answering Br. at 33-35, provides no insight into the Holder Rule's meaning. It is true that the Rule does not expressly say damages *or* attorney's fees. It does not refer to any specific type of award. Instead, because the

Rule is meant to function as a clear consumer notice in contracts, it uses the simplest, most inclusive term possible to effectively convey the point that all monetary recovery is limited.

The Rule simply refers to "recovery hereunder." And "recovery" broadly includes any "amount awarded in or collected from a judgment or decree," as well as "a right to something" obtained "by a judgment or decree." Recovery, Black's Law Dictionary (11th ed. 2019). "Judgment" and "decree," in turn, broadly include "any order from which an appeal lies" (judgment) and "any court order" or "judicial decision" (decree). Judgment, Black's Law Dictionary (11th ed. 2019); Decree, Black's Law Dictionary (11th ed. 2019). An appealable court order awards attorney's fees, meaning such fees are "amount[s] awarded in or collected from a judgment or decree." *Norman I. Krug Real Est. Invs., Inc. v. Praszker* (1990) 220 Cal. App. 3d 35, 46, *reh'g denied and opinion modified* (June 4, 1990) (A "postjudgment order which awards or denies costs or attorney's fees is separately appealable."). That attorney's fees are sometimes "incidental" to a merits judgment does not somehow remove them from the Holder Rule's limit on "recovery." Nor were the attorney's fees here incidental to the judgment, as the Song-Beverly Act makes "costs and expenses, including attorney's fees," a "part of the judgment" a buyer can obtain. Cal. Civ. Code § 1794(d). Despite Pulliam's arguments to the contrary, the use of the inherently broad

term "recovery" unambiguously covers any type of relief a consumer might attempt to obtain under the Holder Rule.

Lafferty's treatment of statutory costs also has no bearing on whether the Court of Appeal erred by allowing Pulliam to recover uncapped attorney's fees—particularly because statutory costs are not at issue on this appeal. *Lafferty* properly held that attorney's fees that exceeded the amounts paid on the buyers' contract were not recoverable under the Holder Rule. *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal. App. 5th 398, 414. The court separately held that costs authorized by independent statutes—ones the court did not view as preserved by the Holder Rule—were not so limited. 25 Cal. App. 5th at 415-16; *see also* Cal. Code Civ. P. §§ 1032(b), 1033.5, 3287(a). But the attorney's fee award *was* limited because the plaintiffs could only pursue that award against the lender under the Holder Rule. *Lafferty* is thus consistent with the view that the Holder Rule limits the recovery available for any claim that the Rule preserves.

II. The Rule's history and purpose do not justify disregarding its plain meaning and limits on recovery.

A. By misconstruing the Rule and its context, Pulliam and the Court of Appeal undermine its consumer-protection purpose.

Pulliam's arguments about regulatory history and purpose ignore the careful balance the Holder Rule struck and the significant expansion of

consumer protection the Rule provides *without* permitting uncapped attorney's fees.

Pulliam points to nothing in the regulatory history showing the FTC's intent to allow uncapped fees—much less showing that uncapped fees are central to effecting the Holder Rule's purpose. At best, the select soundbites Pulliam references, *see* Answering Br. at 36-37, signal that the FTC was concerned about the difficulties consumers faced in pursuing judgment-proof sellers while facing creditor collections claims against which they could not defend. The FTC addressed these concerns by allowing consumers to sue holders (in addition to sellers) and defend against creditor suits.

Nowhere in the regulatory history did the FTC discuss attorney's fees as a crucial element of this scheme—because they are not. The key to the Rule's efficacy is instead giving consumers substantive claims and defenses against creditors, which prior to the Holder Rule consumers did not have. And in doing so, the FTC thought it best to give consumers only a limited "set-off" or "refund" right, rather than impose unlimited liability on creditors already taking on new obligations for sellers' conduct. 41 Fed. Reg. at 20023-20024. This limited right makes particular sense given that consumers may still pursue sellers directly and receive uncapped attorney's fees in such actions. If fee-shifting to *holders* and the provision of uncapped attorney's fees against those parties had been the Holder Rule's critical focus as Pulliam claims, surely that intent would have been far better demonstrated

in the regulatory history than the few fleeting references to consumers' ability and challenges to accessing the legal system. Moreover, that focus would have culminated into an express carve-out by the FTC from the Holder Rule's limitation on "recovery."

Indeed, it is the threat of uncapped fees that would undermine the Rule's purpose by making creditors the guarantors of sellers' performance, thereby discouraging them from lending. Contrary to Pulliam's assertion, the FTC has not "rejected" this view or determined that uncapped attorney's fees would have no such impact on lending. Answering Br. at 37. The FTC did note in issuing the rule that some "emerging state legislation similar to the rule" had not exerted a "negative impact" on consumer financing. 40 Fed. Reg. at 53519. It meant only that the change in the holder in due course doctrine—not liability for unlimited attorney's fees—had not harmed consumer financing.

The FTC referenced testimony to that effect in reasoning that changing the holder in due course rule would not negatively impact consumer financing. A witness was asked: "It is fair to say then . . . that by and large the holder in due course doctrine is a dead letter, and that as a matter of fact financial institutions are still flourishing?" *Id.* The witness responded: "They are flourishing . . . I don't think the Rees-Levering [Act] change has persuaded any banks to get out of the automobile financing business." *Id.* The Rees-Levering Act, now the Automobile Sales Finance Act (ASFA),

allowed buyers to directly sue holders. *See infra* at 21. This discussion, therefore, focused on the impact of changing the holder-in-due-course rule as a general matter—not on allowing consumers to recover uncapped attorney's fees against holders. The other witness testimony cited confirms this view, as it discusses Massachusetts' decision "to abolish holder-in-due-course" and the Wisconsin Consumer Act's similar prohibitions. 40 Fed. Reg. at 53519-53520; *see also id.* (discussing "extent to which credit availability would be reduced or interest rates affected by abolishment of these two remedies"). Nothing in this testimony refers to attorney's fees. The FTC's reasoning on this point thus focused on the fundamental shift in the holder-in-due course doctrine the Holder Rule created, and not on any impact the availability of uncapped attorney's fees would have under that new regime.

In fact, it is likely that the FTC was not concerned about the Rule's impact on financial institutions because it expressly limited the newly created liability by capping all recovery, including attorney's fees. This explicit limit balances the Rule's corresponding expansion of liability. It does not, as Pulliam contends, "revert[] consumers" to a pre-Rule regime or give creditors "carte blanche to litigate as much as they want." Answering Br. at 37, 40. Consumers maintain their new Holder Rule rights to defend against creditor claims and to affirmatively sue creditors—on top of their existing right to directly pursue sellers and receive uncapped fees from those entities.

And when read properly, and without improperly grafting one-sided fee-shifting onto the Rule's clear terms, the Rule does not give any party—consumer or creditor—a perverse incentive to over-litigate the case simply to get fees.

It is Pulliam and the Court of Appeal's misreading of the Holder Rule that will impair the availability and cost of creditor financing. Consumers (and their counsel) that believe they can recover hundreds of thousands in fees beyond their actual damages are incentivized to refuse to settle a case—even one that may lack merit. This result undermines the FTC's aim to protect consumers while avoiding "unjustified reliance on the legal system" and "frivolous or unsubstantiated claims." 41 Fed. Reg. at 20024. In contrast, under the correct interpretation of the Rule, both parties bear responsibility for their own attorney's fees, giving each an incentive to reach an early resolution. Further, although creditors (like consumers) have a right to assert meritorious defenses, it is not always the creditor's decision whether to keep litigating, even when the consumer agrees to settle. A seller named in the same suit may wish to continue litigating to defend itself for its own reasons. Meanwhile, a buyer may refuse to individually settle with the creditor when the seller will not also settle. As a result, the creditor may be stuck in the case regardless of its own wish to settle, as continued litigation racks up the potential attorney's fee award. The correct reading of the Rule avoids this situation, one that threatens to discourage creditors from

financing consumer contracts. A loss of creditor financing will, in turn, ultimately harm the consumers who depend on such financing, thereby undermining the Rule's consumer-protection purpose.

The text, purpose, and history of the Rule all unambiguously establish that the Holder Rule limits attorney's fees by limiting "recovery." This Court should reject Pulliam's effort to expand the Rule beyond its carefully prescribed parameters.

B. Pulliam also misunderstands the relationship between the Holder Rule and state law causes of action.

Much of Pulliam's argument rests on a fundamental misconstruction of how the Holder Rule interacts with state law. By asserting that state consumer protection laws are "unenforceable" if the Holder Rule limits recovery of attorney's fees, Pulliam downplays the profound effect that the Holder Rule—properly construed—exerts on the consumer protection landscape. Pulliam argues that if the Holder Rule caps attorney's fees, it undermines state protections. However, the Holder Rule does the opposite: the Rule builds on state law that, without the Rule, would only allow buyer-seller suits and no lawsuits against creditors. And it does so without allowing consumers to recover from creditors fees that far exceed amounts paid on their contracts. Because Pulliam prioritizes her contrary policy views over the Rule's plain text and proper relation to state law, her purposivist arguments fail to salvage the Court of Appeal's incorrect decision.

The Holder Rule created a kind of derivative or vicarious liability extending the reach of existing state statutes that previously covered only buyer-seller lawsuits. Before the Holder Rule, for example, the Song-Beverly Act allowed a buyer to sue a seller that engaged in fraud or misconduct—but *only* the seller. The buyer could not sue the holder to which the seller assigned its consumer contract. Nor could the buyer defend against a claim for payment or breach of contract brought by that holder without proving the holder's own misconduct. As a result, the Song-Beverly Act's "consumer protection" aim, *see* Answering Br. at 27, as well as its provision for attorney's fees, only covered consumers suing sellers. It did nothing for consumers that wished to sue holders or defend against holder claims. The same is true for the California Consumers Legal Remedies Act (CLRA). *See id.* Thus, these laws sought to protect consumers, but only in a buyer-seller lawsuit.

The Holder Rule expanded these existing protections by allowing consumers to bring a substantive Song-Beverly, CLRA, or other buyer-seller claim against the lenders holding consumer loans. Consumers were no longer limited to pursuing a judgment-proof or otherwise problematic seller. Just as importantly, the Rule allowed consumers to defend against a holder's claims when a holder sought payment on a contract. These dual extensions of creditor liability and consumer power went far beyond what statutes, previously limited to buyer-seller claims, did to protect consumers.

To achieve this expansion, the Rule did not have to, and in fact did not, allow uncapped attorney's fees against creditors—even if state law permits recovery of uncapped fees from a seller. Instead, the Rule greatly extended state law's reach by empowering consumers to assert substantive state claims and defenses against creditors that they otherwise could only assert against sellers. Contrary to Pulliam's claim, Answering Br. at 38, capping recovery of attorney's fees would not "gut" that principal objective and effect of the Rule.

Nor would it contravene the FTC's statement that "[a]ppropriate statutes, decisions, and rules in each jurisdiction will control" the substantive claims that a buyer may assert. 41 Fed. Reg. at 20023-20024. These state laws "control" because the Holder Rule extended the reach of existing buyer-seller causes of action by allowing consumers to bring such claims against holders. But "all claims or defenses connected with the transaction" and preserved by the Holder Rule remained "subject to the limitation of recovery under [the] Rule to the amounts paid in." *Id.* In this way, the Holder Rule meaningfully expanded consumer protections. It simply did not go so far as to make newly liable creditors responsible for both the buyer's amounts paid and their uncapped attorney's fees.

If a state law creates an independent cause of action that allows a consumer to directly (rather than derivatively) sue or defend against a holder, the Holder Rule has nothing to say about recovery under that claim. *See*

Lafferty, 25 Cal. App. 5th at 413 (noting that plaintiffs/buyers, along with suing lender under Holder Rule, brought direct action against seller and recovered far more ($700,000) than the amounts paid under their contract). Any recovery under such a statute is not "recovery hereunder"—meaning it is not recovery under a Holder Rule-preserved claim—and thus the Rule does not limit that recovery's amount. *See* 41 Fed. Reg. at 20023 ("The words 'recovery hereunder' which appear in the text of the Notice refer specifically to a recovery under the Notice. If a larger affirmative recovery is available *against a creditor as a matter of state law*, the consumer would retain this right." (emphasis added)).

California's ASFA (formerly the Rees-Levering Act) exemplifies the kind of statute that falls outside the Holder Rule's scope. ASFA explicitly allows direct lawsuits, and fee awards, between buyers and holders: "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of this chapter *regardless of whether the action is instituted by the seller, holder or buyer*." Cal. Civ. Code § 2983.4 (emphasis added). If a buyer has an ASFA claim or defense, she does not need the Holder Rule.

Jaramillo v. Gonzales (N.M. Ct. App. 2002) 132 N.M. 459, 461, which Pulliam cites in a misguided effort to show that courts do not apply the Holder Rule's cap, also reflects this distinction between (1) a cause of action preserved against a holder by the Holder Rule, and (2) an independent

buyer-holder cause of action to which the Holder Rule does not apply.[1] The *Jaramillo* court upheld a fee award against a lienholder when that fee award rested on an Unfair Practices Act (UPA) claim brought directly against the holder. The court made clear that it only allowed fees under that independent claim, for which no Holder Rule preservation was necessary. *Id.* at 469; *see also id.* at 467 (bank's refusal to concede liability violated UPA). In contrast, the court did not authorize fees for the buyer's revocation claim, which was preserved and available to the buyer only pursuant to the Holder Rule. *Id.* at 469. State law may separately authorize fee awards when it authorizes direct buyer-holder actions. But if the Holder Rule is the only thing that made the buyer's action against the holder possible, its cap on recovery applies.

Pulliam ignores this critical distinction between state laws that the Holder Rule expanded versus those that allow consumers to directly sue holders without the Rule. She focuses instead on the irrelevant argument that

[1] Most of the other decisions Pulliam points to lack any reasoned discussion about the Holder Rule's recovery cap, including because the parties did not raise the issue on appeal and so the court did not address it. *See, e.g.*, *Oxford Fin. Cos. v. Velez* (Tex. App. 1991) 807 S.W.2d 460, 464-65; *Diaz v. Paragon Motors of Woodside, Inc.* (E.D.N.Y. May 7, 2008) 2008 WL 2004001, at *8; *Green Tree Acceptance, Inc. v. Pierce* (Tex. App. 1989) 768 S.W.2d 416, 424-25; *In re Stewart* (Bankr. E.D. Pa. 1988) 93 B.R. 878, 889. The court in *Home Sav. Ass'n v. Guerra* (Tex. 1987) 733 S.W.2d 134, 136, comes the closest to explicitly holding that the Holder Rule does not limit fee recovery, yet did so only in briefly citing its earlier decision in *Kish v. Van Note* (Tex. 1985) 692 S.W.2d 463, where the court awarded fees with no discussion of whether the Holder Rule affects attorney's fees. Pulliam cites no fully reasoned decision analyzing the Rule's text and purpose.

courts award attorney's fees only after determining that the amount of fees is incurred and reasonable, and only after a creditor decides to defend itself on the merits rather than settle. These assertions not only ignore other realities of Holder Rule suits, but they also say nothing about the central question here: whether the Holder Rule precludes recovery of attorney's fees that exceed the amounts paid under a buyer's contract. The Rule's unambiguous terms bar such uncapped recovery in the first instance and thus the reasonableness of such fees and the stage of the litigation at which they are incurred are irrelevant.

III. Pulliam Fails to Overcome TDAF's Showing That the FTC's Rule Confirmation Warrants Deference.

The FTC's Rule Confirmation adopting the correct interpretation of the Holder Rule is entitled to deference, should the Rule be found ambiguous (and it should not). Pulliam's arguments otherwise are without merit.

First, Pulliam apparently concedes that the Rule Confirmation was the FTC's official position, which it plainly is. Opening Br. at 36-37.

Second, however, Pulliam argues that the Rule Confirmation could not have been within the FTC's substantive expertise because it involves state-law issues and may have relied on case law rather than supporting data. The FTC did not need to look to state-law issues in commenting on the Holder Rule it promulgated and such issues did not affect the FTC's analysis. The FTC did not encourage states to enact any laws conflicting with its

uniform policy of (1) preserving consumer claims and defenses while (2) limiting creditor liability. Again, that the FTC intended the Rule to "serve as a model for further state legislation" and allowed consumers to assert each jurisdiction's "appropriate statutes, decisions, and rules" against creditors does not mean the FTC sanctioned state legislation that would undermine or conflict with the "uniformity of protection" it sought to provide nationwide. 40 Fed. Reg. at 53521. Nor does it mean that any such state statutes are relevant to the FTC's interpretation of its own regulation—conduct that is manifestly within an agency's substantive authority. *See Kisor v. Wilkie* (2019) 139 S. Ct. 2400, 2417.

Further, Pulliam, like the Court of Appeal, points to no requirement that an agency rely on a specific quantity of data or information to interpret its own regulation—much less to confirm what the Rule has always said and maintain that framework. *See* Opening Br. at 38. Instead, Pulliam suggests—with no support—that the FTC might have relied on *Lafferty*'s reasoning rather than reaching its own considered decision about its regulation's meaning. Answering Br. at 45-46. This specious argument has no basis in the record or in the Rule Confirmation itself, which discusses only different commenters' debate over the Rule's language. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18711-01, 18714 (May 2, 2019).

Third, Pulliam ignores the standard for reaching a "fair and considered judgment," which simply cautions courts not to "defer to a merely convenient litigating position or post hoc rationalization." *Kisor*, 139 S. Ct. at 2417. The time that has passed since a regulation's issuance does not speak to this factor. *Kisor* discussed timing only in the context of the various justifications underlying *Auer* deference, and highlighted that an *inconsistent* interpretation years after the fact provides less justification for deference. 139 S. Ct. at 2412. There is no support for according less deference here because nothing about the Rule Confirmation conflicted with any previous interpretation of the Holder Rule. In fact, although the FTC had never explicitly addressed the Rule's impact on attorney's fees, it had sanctioned decisions holding that the Rule caps fees. *See* 2012 Opinion Letter at 3 & n.7. And its 2019 decision tracked (1) its original guidance that Holder Rule cases would "involve a limited right of set-off against the unpaid balance," 41 Fed. Reg. at 20024, and (2) its consistent admonition that courts should apply the Rule's "plain" and "unambiguous" terms, *id.* at 1, 3. The Rule Confirmation simply reflects an explicit acknowledgment of the FTC's longstanding view of the Rule. And that longstanding view is an eminently reasonable one for all the reasons discussed above.

Fourth and finally, no one experienced unfair surprise because of the Rule Confirmation. The FTC did not "substitut[e] one view of [the] rule for another," *Kisor*, 139 S. Ct. at 2418—it instead made express what the Rule's

plain language and accompanying guidance had always reflected. That the California legislature had read the Rule otherwise does not show any unfair surprise, especially because many courts had read the Rule as the FTC does, and the FTC had approved of those decisions. *See* Opening Br. at 15.

In sum, the relevant factors all point towards deference. This Court should reverse the Court of Appeal's contrary decision.

IV. This Court Should Not Reach Pulliam's Preemption Argument, Which Fails on Multiple Fronts.

Pulliam tries to avoid reversal by inserting an issue that the Court of Appeal did not reach and that this Court did not agree to address: preemption. Pulliam objects to a different Court of Appeal decision, *Spikener*, that held that the Holder Rule preempts Cal. Code Civ. P. § 1459.5. *Spikener v. Ally Financial, Inc.* (2020) 50 Cal. App. 5th 151, 162–63. Pulliam argues that the FTC lacks authority to preempt state law, and thus *Spikener* got it wrong. This issue is not properly presented here, and even if it were, *Spikener*'s conclusion is correct.

A. Section 1459.5 was not addressed below and does not apply retroactively to this case.

This Court should decline to address § 1459.5's import and should instead leave this issue for the Court of Appeal to address in the first instance on remand. *See Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal. 4th 298, 324 (declining to address issue the trial court did not rule on and the Court of Appeal did not address, "leaving it to the lower courts in the first

instance"). The Court of Appeal declined to decide whether § 1459.5 "independently applies" at all, much less whether it was preempted. Opinion 33. And the statute does not apply here at all, because California enacted it years after this lawsuit began and the lower court awarded attorney's fees. The California legislature created § 1459.5 in 2019, and it took effect in January 2020. This lawsuit was filed in 2016, however, and the attorney's fees motion was granted in August 2018. Applying § 1459.5 would thus impose on Petitioner liability for attorney's fees based on conduct years before § 1459.5 ever existed.

Before even deciding preemption, therefore, Pulliam would have to prove that § 1459.5 validly applies retroactively to this action. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal. 4th 828, 830 ("a statute that operates to increase a party's liability for past conduct is retroactive"). But there is a "strong presumption against retroactivity"—one that Pulliam makes no effort to overcome in her response brief. *McClung v. Employment Dev. Dep't* (2004) 34 Cal. 4th 467, 475.

Nor can Pulliam overcome it. Although older precedent held that some attorney's fee statutes were "procedural" and thus could apply retroactively, *Woodland Hills Residents Ass'n, Inc. v. City Council* (1979) 23 Cal. 3d 917, this Court has since moved away from the "procedural versus substantive" distinction, *Quarry v. Doe I* (2012), 53 Cal. 4th 945, 980 ("when we are called upon to determine whether a statute permissibly may apply

retroactively, the distinction between procedural and substantive rules is not particularly helpful."). More recent precedent has held that a new court rule imposing additional costs cannot apply retroactively. *Andreini & Co. v. MacCorkle Ins. Serv., Inc.* (2013) 219 Cal. App. 4th 1396, 1406. Although "total unanimity" is lacking among the lower courts on this front, *USS-Posco Indus. v. Case* (2016) 244 Cal. App. 4th 197, 221, applying § 1459.5 retroactively here would "clearly qualify as new or different liability, an increased liability, and thus a substantial change in the legal consequences of past conduct," *Andreini*, 219 Cal. App. 4th at 1406 (changing an award from $6,500 to $221,000 would be an improper retroactive application of law).

At the very least, this Court would have to resolve the issue of when an attorney's fee statute can apply retroactively, and determine whether § 1459.5 falls within those parameters, before it ever reaches the issue of preemption. And it would have to do so without the benefit of briefing by the parties or any decision on the issue below. In deciding these questions that no lower court ruled on here, the Court could very well end up not even reaching preemption if it decides the statute cannot apply retroactively. The better course is to remand for the Court of Appeal to consider any such questions in the first instance.

B. The Holder Rule (as properly interpreted by the FTC) validly preempts state laws like § 1459.5 that conflict with its clear terms.

At the outset, Pulliam's view of preemption fails because it hinges on the idea that the FTC's Rule Confirmation conflicts with the Holder Rule itself and that the FTC exceeded its authority by issuing the Rule Confirmation. But the Rule Confirmation accords with, and correctly interprets, the Holder Rule. So the preemptive effect comes from the Holder Rule itself, as properly interpreted by the FTC.

The FTC has authority to enact a federal regulation limiting the recovery available under that regulation. And when a state law directly conflicts with that federal regulation, so that complying with both laws would be impossible, the state law is conflict preempted. *Oneok, Inc. v. Learjet, Inc.* (2015) 575 U.S. 373, 377; *see also Geier v. Am. Honda Motor* Co. (2000) 529 U.S. 861, 884 ("[C]onflict pre-emption . . . turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent.").

This scenario is different from the express preemption or field preemption Pulliam appears to discuss. *Arizona v. United States* (2012) 567 U.S. 387, 433 (Scalia, J., conc. in part and dis. in part) ("[F]ield pre-emption . . . (concededly) does not occur beyond the terms of an express pre-emption provision."). No one contends that the FTC seeks to "occupy the field" of consumer protection or to prohibit "parallel" complementary efforts in that area. Answering Br. at 52-53. For example, California (as it has done

in ASFA) could enact statutes giving consumer direct claims against holders that do not require the consumer to resort to the Holder Rule. *See supra* at 21. Nor does the Holder Rule make any state law or action itself an unfair or deceptive practice. *See California State Bd. of Optometry v. FTC* (D.C. Cir. 1990) 910 F.2d 976, 979 (FTC purported to make specific kinds of state laws unfair acts).

Although the Holder Rule does not purport or operate to prohibit state action, including state legislation that complements or otherwise supplements its consumer protection aims, it still preempts any state law that directly conflicts with its terms. If California passed a law providing that it is *not* an unfair act or practice to omit the Holder Rule from a consumer contract, it would be impossible to comply with both that state law and the federal regulation, and the Holder Rule would prevail. The same result would hold true here, where § 1459.5 directly contradicts the Holder Rule's terms, so that complying with the state law violates the Holder Rule's express limit on recovery. The federal Holder Rule limits recovery against the holder of the loan to "amounts paid by the debtor." 16 C.F.R. § 433.2. Section 1459.5, on the other hand, states that a plaintiff who prevails "on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of Federal Regulations"—that is, against a holder of the loan, based on a claim preserved by the Holder Rule—may "claim attorney's fees . . . to the fullest extent permissible if the plaintiff had prevailed on that cause of action

against the seller." Cal. Civ. Code § 1459.5. The direct conflict between the two provisions—one California's legislature expressly intended—is evident. *See Spikener*, 50 Cal. App. 5th at 162–63.

This conflict exists because the Holder Rule's limit on recovery is different from the other federal provisions Pulliam identifies as lacking preemptive effect. This limit is not a "minimum protection" or a "floor" on which state law can build for claims or defenses preserved by the Holder Rule. Answering Br. at 55. Nor is it a separate state law directly providing for both a cause of action directly against a holder and for unlimited fees. Instead, § 1459.5 purports to change or add to a federal law—exactly the kind of provision the court in *Jankey v. Lee* said would be preempted. *Jankey v. Lee* (2012) 55 Cal. 4th 1038, 1053 n.15. And, unlike in cases like *Jankey*, nothing in the FTCA or the FTC's guidance ever stated or suggested that the Rule's recovery limit would not preempt state efforts to change that limit. *Cf. id.* (no preemption where Americans with Disabilities Act expressly disclaimed preemption of state remedies giving greater protection). This limit is instead a central part of the Rule, one that the FTC saw as vital to the balance it struck in drafting the regulation. Section 1459.5 requires California consumers to violate that part of the Rule. And in doing so, it threatens to upset the compromise the Rule reflects. The Holder Rule thus preempts California's statute.

CONCLUSION

This Court should reverse the Court of Appeal and remand.

DATED: October 18, 2021 Respectfully submitted,

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DATED: October 18, 2021 Respectfully submitted,

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Supreme Court of California

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