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,
Second Appellate District, Division Five
Case No. B293435

APPLICATION BY WESTLAKE SERVICES, LLC FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER TD AUTO FINANCE, LLC

BRIEF BY AMICUS CURIAE WESTLAKE SERVICES, LLC IN SUPPORT OF PETITIONER TD AUTO FINANCE LLC

MADISON LAW, APC
Jenos Firouznam-Heidari (Bar No. 266257)
jheidari@madisonlawapc.com
James S. Sifers (Bar No. 259105)
jsifers@madisonlawapc.com
Brett K. Wiseman (Bar No. 265770)
bwiseman@madisonlawapc.com
17702 Mitchell North
Irvine, California 92614
Tel: (949) 756-9050
Fax: (949) 756-9060

Attorneys for Amicus Curiae Westlake Services, LLC

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,
Second Appellate District, Division Five
Case No. B293435

APPLICATION BY WESTLAKE SERVICES, LLC FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER TD AUTO FINANCE, LLC

MADISON LAW, APC
Jenos Firouznam-Heidari (Bar No. 266257)
jheidari@madisonlawapc.com
James S. Sifers (Bar No. 259105)
jsifers@madisonlawapc.com
Brett K. Wiseman (Bar No. 265770)
bwiseman@madisonlawapc.com
17702 Mitchell North
Irvine, California 92614
Tel: (949) 756-9050
Fax: (949) 756-9060

Attorneys for Amicus Curiae Westlake Services, LLC

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, proposed amicus curiae Westlake Services, LLC ("Westlake") respectfully requests permission to file the attached amicus curiae brief in support of defendant and petitioner TD Auto Finance LLC ("Petitioner").

I. Interest of Amicus Curiae

Westlake is a "creditor" (like Petitioner) who, "pursuant to business arrangements" with "sellers" of automobiles, regularly purchases "consumer credit contracts" that embody "purchase money loans" to automobile "consumers"; such contracts are typically referred to as retail instalment sales contracts ("RISC") and contain the Federal Trade Commission's ("FTC") Holder Rule language as required by statute. (See 16 C.F.R. §§ 433.1(b)–(d), (g), (i)–(j), and 433.2.) Westlake has been party (as the holder of a RISC) to hundreds of court and arbitration cases brought by automobile consumers, the vast majority of which include, as the primary claims, causes of action for the seller/dealer's alleged violations of the Consumers Legal Remedies Act and the Song-Beverly Consumer Warranty Act (such as in the instant case). Over the past few years, attorneys for Westlake herein have litigated about a hundred such cases on behalf of Westlake alone, and over a thousand such cases on behalf of their "holder" clients overall.

Westlake is currently the appellant in one appeal and the respondent in seven other appeals, pending before the Second, Third, and Fourth Appellate Districts—all of which are primarily concerned with the Holder Rule's cap on recovery, specifically as to application of that cap to attorney

fees.[1] All of the above-mentioned appeals will undoubtedly ultimately result in requests for review to this Court, whether it be by Westlake or the consumer party, and thus their final outcomes will depend on this Court's decision in the instant case.

Westlake is thus deeply interested in this Court's interpretation of the Holder Rule and the rule's cap on "recovery," and this Court's determination as to federal preemption of Civil Code section 1459.5. A consistent and articulated decision on the foregoing issues is critically necessary to provide direction to courts and litigants, primarily in the above-mentioned nine appellate cases and the several dozen currently pending Superior Court and arbitration matters to which Westlake is a party as the holder of a RISC.

II. Necessary Further Discussion of Matters That Will Assist This Court in Deciding the Issues

The proposed brief provides additional discussion and analysis of matters that will assist this Court in deciding the following issues before it: (1) whether the Holder Rule's limit on recovery includes and thus caps

---

[1] These cases included: (1) *Melendez v. Westlake Services LLC*, Second Appellate District Appeal No. B306976; (2) *Valdez et al. v. Kareem Eldin Samir Farag et al.*, Second Appellate District Appeal No. B307280; (3) *Hernandez Flores v. Westlake Services, LLC*, Second Appellate District Appeal No. B308288; (4) *Guevara et al. v. Westlake Services, LLC*, Second Appellate District Appeal No. B308365; (5) *Sanchez v. Westlake Services, LLC*, Second Appellate District Appeal No. B308435; (6) *Contreras v. The Western Surety Co. et al.*, Second Appellate District Appeal No. B309417; (7) *Granados v. Bravado Auto, Inc. et al.*, Second Appellate District Appeal No. B310436 ; (8) *Bulmer v. Carfast San Diego, Inc. et al.*, Fourth Appellate District Appeal No. D079267; and (9) *Jones v. Westlake Services, LLC*, Third Appellate District Appeal No. C094938.

In each of these nine appeals, attorneys for Respondent Tania Pulliam represent the consumer-appellant or consumer-respondent.

attorney fees; and (2) whether Civil Code, section 1459.5 is federally preempted by the Holder Rule. The categories of said additional discussion and analysis are as follows:

- Why the FTC's May 2, 2019 interpretation of the Holder Rule is entitled to deference, including discussion of each of the four *Kisor*[2] factors.
- The ordinary meaning of the term "recovery" as it appears in the Holder Rule, and an explanation of the flaws in the appellate court's determination of the meaning of "recovery," including that the appellate court used the wrong definition from the wrong dictionary.
- The FTC's Statement of Basis and Purpose,[3] and why the appellate court's reliance on the same does not support its holding.
- Federal preemption of Civil Code section 1459.5, including why Respondent's "state action" argument is inapplicable.
- To the extent relevant at all, the statements made by the FTC's acting director at an August 26, 1976 congressional hearing,[4] including why said testimony does not support the appellate court's holding and instead provides further support that the Holder Rule imposes limitations on all recovery, including that of attorney fees.
- The appellate court's misguided reliance on the Greenfield and Rosmarin articles.

---

2 *Kisor v. Wilkie* (2019) 139 S.Ct. 2400

3 40 Fed. Reg. 53506 (Nov. 18, 1975)

4 Consumer Claims and Defenses: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce House of Rep., 94th Cong., 2nd Sess. (1976), Serial No. 94-145

III. Certificate of Compliance with Rule 8.520(f)(4)

In submitting this application, Westlake hereby certifies under provisions of California Rule of Court 8.520(f)(4)(A) that no party or counsel for any party authored the attached proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Westlake further certifies under California Rule of Court 8.520(f)(4)(B) that no person or entity other than Westlake and its counsel made any monetary contribution intended to fund the preparation or submission of the attached proposed brief.

Respectfully submitted,

Dated: October 14, 2021

MADISON LAW, APC

By: */s/ Jenos Firouznam-Heidari*
Jenos Firouznam-Heidari
James S. Sifers
Brett K. Wiseman
Attorneys for Amicus Curiae
Westlake Services, LLC

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,
Second Appellate District, Division Five
Case No. B293435

BRIEF BY AMICUS CURIAE WESTLAKE SERVICES, LLC IN SUPPORT OF PETITIONER TD AUTO FINANCE LLC

MADISON LAW, APC
Jenos Firouznam-Heidari (Bar No. 266257)
jheidari@madisonlawapc.com
James S. Sifers (Bar No. 259105)
jsifers@madisonlawapc.com
Brett K. Wiseman (Bar No. 265770)
bwiseman@madisonlawapc.com
17702 Mitchell North
Irvine, California 92614
Tel: (949) 756-9050
Fax: (949) 756-9060

Attorneys for Amicus Curiae Westlake Services, LLC

TABLE OF CONTENTS

INTRODUCTION 13
ARGUMENT 14
I. THE FTC'S INTERPRETATION OF THE HOLDER RULE IS DISPOSITIVE: ALL RECOVERY, INCLUDING ATTORNEY FEE RECOVERY, IS CAPPED..... 14
II. THE FTC'S INTERPRETATION OF THE HOLDER RULE IS ENTITLED TO DEFERENCE..... 15
1. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was the FTC's Official Position. 17
2. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was Within the FTC's Substantive Expertise..... 17
3. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was the FTC's Fair and Considered Judgment..... 21
4. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Does Not Create Unfair Surprise..... 23
III. THE HOLDER RULE IS APPROPRIATELY UNDERSTOOD TO LIMIT ALL RECOVERY, EVEN INDEPENDENT OF THE FTC'S RECENT INTERPRETATION..... 24
1. The Ordinary Meaning and Dictionary Definition of the Word "Recovery" Support Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards 25
2. The FTC's Statement of Basis and Purpose Supports Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards..... 29

3. Commentary Provided at the August 26, 1976 Congressional Hearing on the Then-Recently Enacted Holder Rule Supports Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards…….…….. 33
4. The Greenfield and Rosmarin Articles Cited by the Appellate Court Do Not Support the Policy Arguments Advanced in the Opinion……... 35
i. Greenfield, Limits on a Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder in Due Course Rule (1990)….. 35
ii. Rosmarin, Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process (1994)…….. 37
IV. MOST JURISDICTIONS INTERPRET THE HOLDER RULE TO CAP ATTORNEY FEE AWARDS…… 40
V. PURSUANT TO THE SUPREMACY CLAUSE, SECTION 1459.5 IS PREEMPTED BY THE HOLDER RULE…… 43
1. Respondent's "State Action" Argument Is Inapplicable…….... 45
2. Section 1459.5 Is in Conflict with the Holder Rule, Whether or Not Section 1459.5 Is Somehow More Protective…….……... 47
CONCLUSION 50
CERTIFICATE OF WORD COUNT 51

TABLE OF AUTHORITIES

Cases

Am. Fin. Servs. Ass'n v. FTC (1985) 767 F.2d 957 17

Arlington v. FCC (2013) 569 U.S. 290 15

Auer v. Robbins (1997) 519 U.S. 452 ..... 16, 22

Calif. State Bd. of Optometry v. F.T.C. (D.C. Cir. 1990) 910 F.2d 976 47

Cap. Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 699 44

Carcieri v. Salazar (2009) 555 U.S. 379 26

Christensen v. Harris Co. (2000) 529 U.S. 576 47

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta (1982) 458 U.S. 141 44

FTC v. Ticor Title Ins. Co. (1992) 504 U.S. 621 46

Goodman v. Lozano (2010) 86 Cal.App.4th 1366 26

Hillsborough County v. Automated Med. Lab., Inc. (1985) 471 U.S. 707 .. 44

Jankey v. Lee (2012) 55 Cal.4th 1038 ..... 48, 49

Jarecki v. G. D. Searle & Co. (1961) 367 U.S. 303 27

Kilroy v. Superior Court (1997) 54 Cal.App.4th 793 15

Kisor v. Wilkie (2019) 139 S.Ct. 2400 ..... 23, *passim*

Lafferty v. Wells Fargo Bank, N.A. (2018) 25 Cal.App.5th 398 ..... 25, 43

N.C. State Bd. of Dental Exam'rs v. FTC (2015) 574 U.S. 494 46

Parker v. Brown (1943) 317 U.S. 341 46

People v. Superior Court (Cervantes) (2014) 225 Cal.App.4th 1007 27

Perrin v. United States (1979) 444 U.S 37 26

Pulliam v. HNL Automotive Inc. (2021) 60 Cal.App.5th 396 ..... 14, *passim*

Reilly v. Marin Housing Auth. (2020) 10 Cal.5th 583 16

Sandifer v. U.S. Steel Corp. (2014) 571 U.S. 220 26

Santos v. Brown (2015) 238 Cal.App.4th 398 35

Spikener v. Ally Fin., Inc. (2020) 50 Cal.App.5th 151 ..... 14, *passim*

Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929 ..... 47, 48, 49
Wasatch Prop. Mgmt. v. Degrate (2005) 35 Cal.4th 1111 25

Statutes

16 U.S.C. § 1535(f) 47, 48
Cal. Civ. Code, § 1459.5 ..... 14, *passim*

Other Authorities

Black's Law Dict. (11th ed. 2019) 26
Black's Law Dict. (4th ed. 1951) 27
Black's Law Dict. (4thR ed. 1968) 27
Consumer Claims and Defenses: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce House of Rep., 94th Cong., 2nd Sess. (1976), Serial No. 94-145 ..... 34, 44

Rules

Cal. Rules of Court Rules 8.204(c) 13, 28, 34

Regulations

16 C.F.R. § 433.2 ..... 9, 10, 27
40 Fed. Reg. 53506 (November 18, 1975) 29, 30, 31, 32
40 Fed. Reg. 53507 (November 18, 1975) 29
40 Fed. Reg. 53509 (November 18, 1975) 29
40 Fed. Reg. 53511 (November 18, 1975) 30
40 Fed. Reg. 53512 (November 18, 1975) 30
40 Fed. Reg. 53518 (November 18, 1975) 31
40 Fed. Reg. 53523 (November 18, 1975) 31, 32
40 Fed. Reg. 53524 (November 18, 1975) 32

40 Fed. Reg. 53527 (November 18, 1975) 32
84 Fed. Reg. 18711 (May 2, 2019) 13, 14, 15, 19
84 Fed. Reg. 18713 (May 2, 2019) 13, 14, 15, 19

Constitutional Provisions

U.S. Const., art. IV, § 3, cl. 2 44

TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

INTRODUCTION

The Holder Rule (16 C.F.R. § 433.2) partially abrogated the doctrine of the "holder in due course" in certain consumer contracts. The Holder Rule permits a consumer to bring as against a financer (or holder of the contract) those claims and defenses that the consumer has against a seller. In other words, Petitioner TD Auto Finance LLC ("Petitioner") has liability as "holder" of the consumer contract simply because it purchased that contract.

The Holder Rule does not, however, make a financer the unconditional guarantor of every seller with which the financer does business. To that end, recovery under the Holder Rule was expressly limited with the following language:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(16 C.F.R. § 433.2.)

The Federal Trade Commission ("FTC") provided a formal interpretation of the above language on May 2, 2019. (84 Fed. Reg. 18711, 18713 (May 2, 2019).) Pursuant to that interpretation, all recovery—including attorney fees—is capped at the amounts paid by the debtor on the contract. Pursuant to the rules of federal preemption and deference to a federal agency's interpretation of its own rules, this issue was conclusively

resolved. (See, e.g., *Spikener v. Ally Fin., Inc.* (2020) 50 Cal.App.5th 151 ("*Spikener*"), review denied Oct. 14, 2020.)

In summary, there is a federal regulation directly on point for the questions at issue before this Court. That federal regulation preempts state law. The federal agency has interpreted its own regulation as one that forecloses any attorney fee or other recovery in excess of the amounts paid by the debtor/consumer.

For the reasons set forth in Petitioner's briefs filed with this Court and for the reasons set forth herein, Amicus Curiae Westlake Services, LLC ("Westlake") respectfully requests this Court reject the holdings of the Second Appellate District (the "appellate court") in *Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396 ("*Pulliam*") and find that the Holder Rule caps recovery of attorney fees and preempts Civil Code section 1459.5.[5]

ARGUMENT

I. THE FTC'S INTERPRETATION OF THE HOLDER RULE IS DISPOSITIVE: ALL RECOVERY, INCLUDING ATTORNEY FEE RECOVERY, IS CAPPED

The FTC published a regulatory review of the Holder Rule. On May 2, 2019, the FTC confirmed the application of the cap on recovery (including as to attorney fees) contained in the Holder Rule. (84 Fed. Reg. 18711, 18713 (May 2, 2019).) In response to various requests that it clarify the scope of the Holder Rule with respect to attorney fees, the FTC issued its comments, wherein it concluded:

---

[5] All further statutory references are to the Civil Code unless otherwise indicated.

> [I]f the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder—including any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract.

(84 Fed. Reg. 18711, 18713 (May 2, 2019).)

Thus, the FTC has provided the FTC's interpretation of the FTC's regulation (commonly known as an agency interpretation). This interpretation is clear and straightforward. There is no need for further analysis.

II. THE FTC'S INTERPRETATION OF THE HOLDER RULE IS ENTITLED TO DEFERENCE

Where entitled to deference, an agency's interpretation is dispositive of the interpretation of that regulation. The *Spikener* court approached this directly, stating: "We need not address Plaintiff's challenges to *Lafferty* because we conclude the Rule Confirmation is dispositive on the Holder Rule's application to attorney fees." (*Spikener*, *supra*, 50 Cal.App.5th at p. 158.)

As ably provided in *Spikener*, a court interpreting a federal regulation is bound to apply the rules of construction enunciated by the United States Supreme Court. (*Spikener*, *supra*, 50 Cal.App.5th at p. 158, quoting *Kilroy v. Superior Court* (1997) 54 Cal.App.4th 793, 801.) As the U.S. Supreme Court has warned: "We have cautioned that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency." (*Spikener*, *supra*, at p. 160, quoting *Arlington v. FCC* (2013) 569 U.S. 290, 304.)

The type of deference at issue here is so-called *Auer* deference.[6] This deference is well summarized by *Auer* itself: "Because the [disputed provision] is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" (*Auer v. Robbins* (1997) 519 U.S. 452, 461.) As reiterated in *Auer*, if an agency's interpretation is entitled to deference, then it is controlling. Therefore, if the FTC's interpretation of the Holder Rule is entitled to deference, then it is controlling and should be adopted by this Court.

The U.S. Supreme Court relatively recently provided a further exploration in *Kisor* of what factors may be considered to make deference appropriate or inappropriate.[7] (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2412 ("*Kisor*").) The *Spikener* court addressed each of the *Kisor* factors and held that the FTC's interpretation was entitled to deference. (*Spikener*, *supra*, 50 Cal.App.5th at p. 159.)

The appellate court in *Pulliam* disagreed with *Spikener*'s deference analysis in two sections of the opinion, one entitled "The FTC's Rule Confirmation Does Not Change This Result," and one entitled "We Disagree with *Spikener*." (*Pulliam*, *supra*, 60 Cal.App.5th at pp. 416, 421.) The appellate court identified four "markers"[8] under *Kisor* that determine whether the agency's interpretation is entitled to, as the appellate court put it, "dispositive deference." (*Id.* at pp. 419–420.)

---

[6] The distinction between *Auer* deference and *Chevron* deference is not relevant to this issue.

[7] Notably, this Court also recently addressed the issue of federal agency deference. (See *Reilly v. Marin Housing Auth.* (2020) 10 Cal.5th 583.) In *Reilly*, this Court stated that "[c]ourts should defer to an agency's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." (*Id.* at p. 603.)

[8] Referred to herein as "factors."

The appellate court analyzed each of these four factors and concluded that they rendered deference inappropriate. However, the appellate court's interpretation of the *Kisor* factors appears to conflict with the plain text of *Kisor*, including *Kisor*'s explanation of each factor. It therefore is appropriate to address the *Kisor* factors and the appellate court's contentions as to each.

1. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was the FTC's Official Position

The appellate court conceded the first *Kisor* factor: that the FTC's interpretation was one actually made by the agency. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.) The FTC's interpretation was published by the FTC in the Federal Register—inarguably the official position taken by the FTC.

2. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was Within the FTC's Substantive Expertise

The FTC's interpretation is plainly within the FTC's substantive expertise. The U.S. Supreme Court has expressly recognized that the FTC is an "expert" in determining an appropriate remedy. (*Am. Fin. Servs. Ass'n v. FTC* (1985) 767 F.2d 957, 988 ("*American Financial*").)

As identified by *Kisor*, "[g]enerally, agencies have a nuanced understanding of the regulations they administer." (*Kisor*, *supra*, 139 S.Ct. at p. 2417.) Thus, the FTC may be presumed to have substantive expertise in interpreting the contours of the Holder Rule, a regulation that it administers. Likewise, the Holder Rule addresses "unfair or deceptive acts or practices in or affecting commerce" and is therefore within the FTC's authority. (See, e.g., *Spikener*, *supra*, 50 Cal.App.5th at p. 159.)

The Holder Rule is not "distant from the agency's ordinary duties" and does not "fall within the scope of another agency's authority." (*Kisor*, *supra*, 139 S.Ct. at p. 2417.) The issue is not an issue of common law; to the contrary, the Holder Rule expressly *abrogated* the common-law holder-in-due-course rule on point. The FTC did not recite an existing statute. (*Kisor*, *supra*, at p. 2417, fn. 5.) Thus, *Kisor* would provide that the FTC acted within its substantive expertise.

The appellate court in *Pulliam* raised two specific contentions for the proposition that the interpretation of the Holder Rule is not within the FTC's substantive expertise: (1) that "resolution of the issue may turn on the particular state statute providing for attorney fee recovery at issue, and whether that statute is intended to be punitive against the payor or simply to make the payee whole"; and (2) that "[n]o commenter provided the FTC with data on the costs and benefits to consumers or businesses in different jurisdictions based on the availability of attorney fees or any limitations based on them." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.) These objections are mistaken and lack any connection to *Kisor*.

First, it should be noted that neither of these objections relate in any way to the language of *Kisor*. Though the appellate court included these items under the heading of "implicat[ing] its substantive expertise," the discussion does not actually address anything that is described in *Kisor* for this factor.

Second, the actual contentions raised by the appellate court appear to misapprehend the situation. The interpretation of the Holder Rule on this issue cannot—and has no reason to—turn on the particular state attorney fee statute at issue. The Holder Rule was intentionally created from whole cloth by the FTC, and the limitation on recovery is likewise created entirely by the FTC. The rule applies, without limitation, to all kinds of claims (i.e., it is not limited to claims for fraud, negligence, or breach of contract; nor is

it limited to categories of damages, e.g., principal, interest, fees, penalties, treble, etc.). The consumer's recovery available under the Holder Rule does not depend on the blameworthiness of the creditor or the attorney fee statute's punitive functions. That has never been a part of the Holder Rule and there is no reason to believe that it ever will be.[9] Moreover, the FTC's interpretation here did not turn on those factors. Instead, as with the original rule, the FTC declared that the limitations on recovery under the Holder Rule are universal, and apply to fees and all recovery, exactly as written.

The appellate court had a final objection to the FTC's expertise, arguing that the FTC's statement "was not an exercise of its substantive expertise, but simply a position taken after limited arguments were made on each side." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.)[10] Here, the

---

[9] Indeed, the Holder Rule provides liability as against a party for actions performed by a separate party. By design, the creditor is held liable in matters in which the creditor is blameless. A blame*worthy* creditor, which was involved with the seller in the misdeeds, already has direct liability under common law or statute and could not benefit from the holder in due course rule. It would be novel and unexpected to see the FTC suddenly split which claims and defenses are applicable as against the creditor based on the creditor's level of blameworthiness. Notably, the FTC's 2019 comments already allow for fees based on independent wrongdoing. (84 Fed. Reg. 18711, 18713 (May 2, 2019) ["We conclude that if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder—including any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract."].)

[10] Many of the appellate court's errors appear to be matters of confusion. For example, this discussion in *Pulliam* appears to follow from the *Spikener* court's discussion of the FTC's comment period during the *Spikener* court's discussion of the "fair and considered judgment" *Kisor*

appellate court appears to confuse the requirements to *issue* a regulation and the deference paid to an *interpretation* of that regulation. The FTC need not seek comments or data to provide an interpretation. The Holder Rule already existed, and the FTC was already aware of the Holder Rule's use over the last 45 years. The FTC had already passed all the regulatory language that exists on this issue and issued no new language, as there was no new area to explore. All the FTC did, through its comments, was clarify the correct interpretation of the language at issue as a result of some commentators indicating that there was confusion. The FTC provided the requested clarity and explained its interpretation of the existing rule. That requires no data, and it is not clear what data might be received by the FTC. The FTC might desire data to determine where it would be desirable or appropriate to *change* the Holder Rule. But the interpretation is specifically not a change to the Holder Rule. That, as explained by *Kisor*, is one of the fundamental purposes of deference to an agency in interpreting an agency regulation—not because it gives the agency a chance to change the regulation, but because it lets the agency *explain* the regulation's original and intended meaning:

> In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem. […] Want to know what a rule means? Ask its author.

---

factor. The appellate court appears to have conflated that discussion with a connection to the "substantive expertise" factor.

(*Kisor*, *supra*, 139 S.Ct. at p. 2412.)

To reiterate—an agency's interpretation of its regulation is an explanation of the regulation's *original meaning* and the *intended meaning* of what might be an otherwise ambiguously worded regulation. An interpretation is not a *new* regulation that requires the solicitation of data and consideration of how the agency would, based on today's information, desire the regulation to mean at present. To the contrary, such an *ex post* interpretation of convenience is one of the few areas where an interpretation is not provided deference. (*Kisor*, *supra*, 139 S.Ct. at p. 2423.)

Thus, the "substantive expertise" factor relates to the agency's scope of authority and responsibility on the topic (e.g., environment, trade, etc.), familiarity with the regulation at issue, and presumed access to institutional knowledge relating to the creation of the regulation and how other similar matters are considered or handled in the agency, and so on—precisely as described in *Kisor*. Substantial expertise has nothing to do with the agency being able to demonstrate that it performed sufficient scientific research, statistical sampling, or town halls, or otherwise engaged in a sufficient showing of hard work to satisfy an unspecified standard. All of that would necessarily relate to opinions and information formed *after* the creation of the regulation and therefore is irrelevant to the permitted scope of interpretation.

3. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Was the FTC's Fair and Considered Judgment

The appellate court in *Pulliam* also determined that the FTC's interpretation was not "fair and considered" because the comments received during review of the rule were not sufficiently on point or somehow not sufficient in number. That is irrelevant to the *Kisor* factor. The *Kisor* court

specifically defined the meaning of the "fair and considered" factor: "That means, we have stated, that a court should decline to defer to a merely 'convenient litigation position' or '*post hoc* rationalization advanced to defend past agency action against attack.'" (*Kisor*, *supra*, 139 S.Ct. at p. 2417.) More specifically, the *Kisor* court explained in a footnote as follows:

> The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs. But we have not entirely foreclosed that practice. *Auer* itself deferred to a new regulatory interpretation presented in an amicus curiae brief in this Court. There, the agency was not a party to the litigation, and had expressed its views only in response to the Court's request. "In the circumstances," the Court explained, "there was simply no reason to suspect that the interpretation did not reflect the agency's fair and considered judgment on the matter in question."

(*Kisor*, *supra*, at fn. 6, quoting *Auer*, *supra*, 519 U.S. at p. 462.) Notably, the agency in *Auer* appears to have provided its interpretation in response to a question, as here; and the agency in *Auer* does not appear to have solicited or obtained data in a round of comments. Yet, the U.S. Supreme Court deemed that to be the agency's "fair and considered" judgment.

The FTC's interpretation was not advanced in a legal brief. No party or litigant was challenging the FTC's regulation in court on this issue, and the FTC had taken no substantive action on point that it was necessary to *post hoc* justify it to avoid any consequence. In short, the FTC did not have a "dog in this fight," was not "covering" for itself, but, on its own initiative, offered a statement of its interpretation of the regulation, unmodified by any clear bias or expediency caused by pending litigation against the FTC. As noted by *Spikener*, the interpretation was issued during a regularly scheduled rule review—not during litigation or during any dispute with the

FTC. (*Spikener*, *supra*, 50 Cal.App.5th at p. 159.) There is no reason to dispute the FTC's interpretation, and *Kisor* offers no basis to do so.

4. The FTC's 2019 Interpretation of the Holder Rule Cap to Include Recovery of Attorney Fees Does Not Create Unfair Surprise

The final factor identified by *Kisor* is that:

> [A] court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. That disruption of expectations may occur when an agency substitutes one view of a rule for another. […] Or the upending of reliance may happen without such an explicit interpretative change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed.

(*Kisor*, *supra*, 139 S.Ct. at pp. 2417–2418.) The appellate court in *Pulliam* conceded that "we cannot say the position taken in the rule confirmation was a change in interpretation…" (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.) Therefore, there is no reason to avoid deference under this factor.

However, the appellate court continued to discuss this factor and took issue with the FTC "address[ing] an issue never previously addressed, and undermin[ing] the existing practice in those jurisdictions in which attorney fees in excess of the cap had been, and were being, imposed as a matter of course." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.) The *Kisor* court offered no criticism of an agency issuing an interpretation where one did not previously exist—the first interpretation on *every* issue is "new" at some point or another in time. The *Kisor* court **only** concerned "unfair surprise to regulated parties." (*Kisor*, *supra*, 139 S.Ct. at pp. 4217–4218.) The instant interpretation by the FTC imposed no "retroactive penalty" or

other consequence on any party in this case. Therefore, there is no concern of unfair surprise.

The *Kisor* court also never addressed any concern for jurisdictions that were acting in opposition to the agency's interpretation of a regulation—those jurisdictions were not in compliance with the regulation, as properly interpreted, and are bound to the "new" interpretation, absent a retroactive penalty or other rationale preventing application.[11] A "jurisdiction" has no standing on this matter.

III. THE HOLDER RULE IS APPROPRIATELY UNDERSTOOD TO LIMIT ALL RECOVERY, EVEN INDEPENDENT OF THE FTC'S RECENT INTERPRETATION

As addressed *supra*, the FTC has issued an agency interpretation that is dispositive on this issue and on this case. However, the Holder Rule rather clearly supports Petitioner and Westlake's position even in the absence of the FTC's recent interpretation, precisely as explained in

---

[11] The appellate court's definition of "unfair surprise" appears to be, in its entirety, a concern that the interpretation renders one or more court's prior rulings on the regulation to be incorrect. That seems unlikely to be a workable concept of unfair surprise. An agency interpretation is only necessary where there is an ambiguous regulation. An interpretation is sought only where there is a dispute over that ambiguity. Disputes typically give rise to lawsuits. As soon as a court makes a decision based on its understanding of the regulation, any interpretation by the agency at variance with the court's decision would constitute "unfair surprise" under *Pulliam,* and remove any deference to the agency and its interpretations. Such interpretation creates an incentive to be "first to the courthouse" in whichever courthouse in the nation is politically most aligned with a desired outcome to obtain a determination of any regulation—thereby neutering the regulation permanently and nationally, absent further legislation. Mechanisms that permit state law to constrain federal action, particularly where achieved through gamesmanship, are not ordinarily appropriate.

Lafferty. (*Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 405 ("*Lafferty*"), review denied Oct. 31, 2018 [holding that "a consumer cannot recover more *under the Holder Rule cause of action* than what has been paid on the debt regardless of what kind of a component of the recovery it might be—whether compensatory damages, punitive damages, or attorney fees," ital. in original].)

The appellate court in *Pulliam* addressed its preferred interpretation of the Holder Rule at some length. It stated its primary consideration of the matter as follows: "The statutory interpretation question for us is: Does the word 'recovery', as used in the Holder Rule, include attorney fees." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 413.) The appellate court then presented its argument in four essential stages: (1) the appellate court cited to a dictionary definition of the word "recovery" to determine the ordinary meaning; (2) the appellate court quoted to the "Statement of Basis and Purpose" for the FTC rule to address intent; (3) the appellate court quoted to a congressional hearing occurring months after the issuance of the Holder Rule with comments made by an FTC official to address intent; and (4) the appellate court quoted some commentators to advance policy arguments. Each of these issues will be addressed in turn.

1. The Ordinary Meaning and Dictionary Definition of the Word "Recovery" Support Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards

The appellate court in *Pulliam* contended that the ordinary meaning of the words in the Holder Rule could be appropriately determined by resorting to a dictionary, citing *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 413.)

The appellate court then cited the 2019 edition of *Black's Law Dictionary*, the 11th edition, for its interpretation of the statute/regulation. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 413.) However, the statute was enacted in 1975–1976. As cited by the appellate court, "[i]n interpreting a statute, our primary goal is to determine and give effect to the underlying purpose of the law." (*Pulliam*, *supra*, at p. 412, citing *Goodman v. Lozano* (2010) 86 Cal.App.4th 1366, 1371.) It would appear unlikely that the commonly accepted meaning of a legal term would necessarily be the same in 2019 as it was in 1975. To avoid jurisprudence based on anachronistic interpretations, it is directed, by the United States Supreme Court, that a reviewing court should "look to the ordinary meaning of the term […] **at the time Congress enacted the statute**…." (*Perrin v. United States* (1979) 444 U.S 37, 42 ("*Perrin*"), emphasis added; see also *Sandifer v. U.S. Steel Corp*. (2014) 571 U.S. 220, 227; *Carcieri v. Salazar* (2009) 555 U.S. 379, 388.) Thus, the resort would be to a dictionary in publication at the time the law was enacted. (*Perrin*, *supra*, at p. 42.)

The appellate court put great weight on the initial definition of "recovery," citing the 2019 edition of *Black's*, to wit, "1. The regaining or restoration of something lost or taken away." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 413.) That definition does not exist in the edition of *Black's* in publication in 1975. It appears, based on Westlake's review, that the fourth edition, published in 1951 and revised in 1968, was the latest edition available at the time the Holder Rule was created. The definitions provided for the word "recovery" in the then-existing edition of *Black's* each relate to the relief provided by way of a judgment. To avoid imposing undue "spin," the complete definition of "recovery" at issue appears below:

> In its most extensive sense, the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at this instance and suit, or the obtaining,

> by such judgment, of some right or property which has been taken or withheld from him. This is also called a "true" recovery, to distinguish it from a "feigned" or "common" recovery. See Common Recovery.
> The obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose. Vaugn v. Humphreys, 153 Ark. 140, 239 S.W. 730, 22 A.L.R. 1201.
> The amount finally collected, or the amount of judgment. In re Lalum, 179 App.Div. 757, 167 N.Y.S. 217, 219.
> Final Recovery
> The final judgment in an action. Also the final verdict in an action, as distinguished from the judgment entered upon it. Fisk v. Gray, 100 Mass. 193.

(Black's Law Dict. (4th ed. 1951 and 4thR ed. 1968).) Thus, the dictionary definition and ordinary meaning of the word "recovery" encompass the judgment and are more appropriately understood to include attorney fees—the opposite conclusion than that reached by the appellate court based on an inapplicable definition.[12]

Of course, persons of differing ideological perspectives commonly read into a definition what they expect to find, or, more simply, choose the definition that most suits their purposes. Resorting to a dictionary is rarely the end of the analysis in any case. Likewise, it is unhelpful to address the interpretation of a single word, such as "recovery," in isolation. Ordinarily, the terms in a statute should be read together to provide a holistic meaning. (See, e.g., *Jarecki v. G. D. Searle & Co.* (1961) 367 U.S. 303, 307 ["'Discovery' is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it."]; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014 ["The meaning of a statute may not be determined

---

[12] Westlake notes the apparent incongruity in using a specialty dictionary of legal terms of art for the purpose of identifying the "ordinary" meaning of words. That, however, appears to be the nearly universally accepted practice in this state and in the nation.

from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible."].)

The matter in dispute here is contained in only two sentences in the text of the Holder Rule. These sentences are as follows:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(16 C.F.R. § 433.2; see also I AA 73.) We may then analyze the statute from the beginning to the end.

What does the first sentence do? It describes a right to bring claims and defenses under this section. This is the creation of a new right. This right permits a consumer to bring claims of all sorts—claims relating to warranties, to statutory rights, on common law principles, to attorney fees, and so on. The first sentence creates the ability of the consumer to pursue claims.

What does the second sentence do? It describes a limitation on the relief available under this section. To what does that limitation apply? A natural contextual reading may conclude that the limitation on recovery in the second sentence is intended to limit the recovery available on the right created in the immediately preceding sentence. A rather unnatural contextual reading would be to conclude that the limitation on recovery is intended to limit the relief available on only *some* of the claims that may be pursued under the first sentence.

Notably, if the statute or regulation was unambiguous, then the interpretation stops at this stage. However, the appellate court clearly believed that the wording of this regulation was ambiguous, as the bulk of the appellate court's efforts are addressed at attempting to determine the FTC's *intent* at the time of enacting the Holder Rule. As previously addressed, the FTC's interpretation is entitled to deference and is conclusive in the event of such ambiguity.

2. The FTC's Statement of Basis and Purpose Supports Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards

After investigating the dictionary definition of the terms, the appellate court next addressed the 1975 history, and particularly the FTC's detailed "Statement of Basis and Purpose." (See 40 Fed. Reg. 53506 (Nov. 18, 1975).)

As addressed at length in the Statement of Basis and Purpose, the FTC was aimed at eliminating undesired effects caused by the "holder in due course" rule, which would cause the creditor to take the contract "free and clear of any claim or grievance that the consumer may have with respect to the seller." (40 Fed. Reg. 53506, 53507 (Nov. 18, 1975).) This rule created the primary issue that the FTC was intending to address. (*Ibid.* ["The rule is directed at what the Commission believes to be an anomaly. . . The creditor may assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale."].) The intended effect of the FTC's new rule was to provide the consumer the ability to avoid payment on the debt. (40 Fed. Reg. 53509 (Nov. 18, 1975) ["Because he is prevented from asserting the seller's breach of warranty or failure to perform against the assignee of the

consumer's instrument, the consumer loses his most effective weapon – nonpayment."].)

Indeed, the FTC's focus on the right of nonpayment is most clear where the FTC provided a discussion of "[c]ommon elements in all the cases on the record" that was purportedly a summary of *all* of the comments and investigation done and considered by the FTC. (40 Fed. Reg. 53506, 53511 (Nov. 18, 1975).) The FTC identified five elements that were purportedly common in "all the cases on the record." The fourth and fifth elements are instructive here, "(4) interruption in payments by the consumer to the financer; and (5) assertion by the financer of its protected status in order to obtain payment on the obligation." (*Ibid.*) Thus, in the FTC's analysis, the common element in *all* of the cases considered by the FTC in creating the Holder Rule, was that the financer creditor asserted a right to payment and asserted that the consumer's defenses were waived by application of the then existing law.

The FTC also described why an affirmative suit against the seller under then-existing law was *not* a sufficient remedy that would avoid the need for the "Holder Rule." Such a suit was insufficient, in part, because an affirmative suit against the seller does not ordinarily prevent the creditor from collecting the debt in the meanwhile. (*Ibid.* [the "consumer must pay the creditor holding his note or contract whether or not he ultimately receives a judgment against the seller"].) The FTC also discussed how difficult it could be to overcome the "holder in due course" rule in litigation attempting to link the creditor and seller. (40 Fed. Reg. 53512 (Nov. 18, 1975) ["To show that a creditor is not entitled to superior rights which render the debt independent of seller misconduct, the consumer must prove that the creditor had 'knowledge' of the seller's misconduct and/or that the instrument relied on by the creditor was obtained in 'bad faith.'"].) The

FTC, in that context and only two sentences later discussed that such efforts were difficult with heavy litigation expenses and risk of failure. (*Ibid.*)

Naturally, the passage of the Holder Rule obviated all of those costs and concerns that were described under preexisting law. There is no risk of failure or substantial costs incurred by the consumer in overcoming the "holder in due course" rule, because the Holder Rule avoided any need by the consumer to offer proof to overcome the holder in due course rule. The Holder Rule was effective in achieving its purpose—for example, in this case, Respondent-consumer incurred $0 in costs associated with overcoming the "holder in due course" rule and was able to bring affirmative claims directly against Petitioner-creditor. None of this discussion, however, appears to relate to the cap on recovery at issue in this case.

Further, where the FTC discussed attorney fees in its discussion of "What the Revised Rule Does and Why," the FTC addressed the factors of "delay" and "unpredictable results" suffered by a consumer litigant. Despite discussing *costs* in that very paragraph (and addressing litigation difficulties as discussed above), the FTC never indicated that attorney fees or costs would be recoverable against the creditor. (40 Fed. Reg. 53506, 53523 (Nov. 18, 1975).)

Indeed, the Statement of Basis and Purpose does not address whether a consumer could or should conceivably obtain uncapped attorney fees as against the creditor or that this was a separate or significant issue. In rejecting the objections to the proposed Holder Rule, the FTC described the options available to a creditor, including that "[w]hile it may be true that even the most conscientious program of screening sellers will not eliminate all risk of seller misconduct, a repurchase agreement of the use of a 'reserve' account can protect the financial institution against any risk that remains." (40 Fed. Reg. 53506, 53518 (Nov. 18, 1975).) Of course, such

method would work to protect, in full or in part, a financer from obligations relating to the *debt owed on the contract/note*. However, such methods would do little or nothing to protect a financer from *attorney fees* relating to a lawsuit affirmatively brought by a consumer as against the financer. Thus, the FTC's rule, and apparent solution, indicate no belief that the Holder Rule could be used to acquire a right to uncapped attorney fees.

The FTC also made express the "costs" it was actually addressing. "Where applicable economies militate against a creditor effort to return misconduct costs to a particular seller, due to the limited or irregular nature of such costs, the rule would require the creditor to absorb such costs himself. That is, where a consumer claim or defense is valid, but limited in amount, a creditor may choose to accept less payment from the consumer to save transaction costs associated with pursuing the seller whose conduct gave rise to the claim." (*Id.* at 53523.) In other words, the "costs" that the FTC intended to shift, were the bad debt or risk of nonpayment. The FTC at no time provided any policy for shifting attorney fees, despite discussing and acknowledging the difficulties and expense of litigation throughout its discussion.

The impact of the rule was expressly defined: "From a consumer's standpoint, this means that a consumer can (1) defend a creditor suit for payment of an obligation by raising a valid claim against the seller as a setoff, and (2) maintain an affirmative action against a creditor who has received payments for a return of monies paid on account. The latter alternative will only be available where…" (40 Fed. Reg. 53506, 53524 (Nov. 18, 1975).) This same topic is reiterated, with the same limitations. (40 Fed. Reg. 53527 ["Consumers will not be in a position to obtain an affirmative recovery from a creditor, unless they have actually commenced payments and received little or nothing of value from the seller. In a case of

nondelivery, total failure of performance, or the like, we believe that the consumer is entitled to a refund of monies paid on account."].)

In short, the FTC's express written purpose and intent for the Holder Rule discloses that the FTC had no belief that the Holder Rule could be used to recover any sums above and beyond what was paid on the contract. The FTC considered and addressed the litigation costs and burdens faced by consumers and the issues presented, and identified the Holder Rule's elimination of the "holder in due course" bar to claims to be a solution to those issues; at no time did the FTC indicate that any attorney fee or other relief above the amounts paid on the contract would be recoverable pursuant to the Holder Rule. Instead, the FTC's discussion about the potential for recovery—and dismissive response to concerns by the industry and others about the potential scope of recovery under the rule—demonstrates a lack of belief and rejection of the implication that uncapped attorney fees might be recoverable under the Holder Rule.

3. Commentary Provided at the August 26, 1976 Congressional Hearing on the Then-Recently Enacted Holder Rule Supports Petitioner and Westlake's Interpretation That the Holder Rule Caps Attorney Fee Awards

The appellate court in *Pulliam* also quotes, at some length, to the statements of Margery Waxman Smith, acting director of the FTC's Bureau of Consumer Protection, which were made in the context of an August 26, 1976 congressional hearing shortly after enactment of the Holder Rule. (*Pulliam*, *supra*, 60 Cal.App.5th at pp. 414–415.)

First, Westlake contends that the transcript of this hearing is of questionable relevance. The hearing included an "on the spot" question and answer session and occurred after the passage and implementation of the Holder Rule. It therefore provides limited clarity on the intent of the rule

that was not contained in the written "Statement of Basis and Purpose" that was officially put together to describe that intent.

To the extent that the statements made by the acting director at the hearing are relevant, it is significant that the acting director believed that attorney fees, above the Holder Rule's cap, were not available. At various points in her testimony, the acting director reiterates the very limitations that are argued by Westlake herein. Specifically, the acting director testified that a consumer's "damages" are capped. (Consumer Claims and Defenses: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce House of Rep., 94th Cong., 2nd Sess. (1976), Serial No. 94-145, p. 23 ["The consumer, in all cases, is limited to the exact amount of legal damages"].) The acting director also testified that a creditor's "liability" is capped. (*Id.* at p. 30 ["The liability, in the case of tort or in the case of other actions, extend only up to the amount that the buyer has paid under the contract, so the creditor is not opening himself up to a suit for $3 million when the contract is only for $300."].) The express language of 16 C.F.R. § 433.2 states that the "recovery" is capped. Therefore, if the statements by the acting director at the August 1976 hearing are persuasive and aid in interpretation, then the FTC believed that each of "recovery," "damages," and "liability" under the FTC's Holder Rule is capped at the amounts paid under the contract. The FTC did not intend "attorney fees" to be a uniquely privileged category of recovery—taking these three terms in conjunction, the FTC rather clearly and comprehensively meant for *all recovery of everything of every nature and with no limitation* to be capped at the amounts paid under the contract.

4. The Greenfield and Rosmarin Articles Cited by the Appellate Court Do Not Support the Policy Arguments Advanced in the Opinion

Somewhat unusually in a case about divining the FTC's intention in 1975–1976 when it issued the Holder Rule, the appellate court includes almost a full page of quotations from two commentators in the 1990s. (*Pulliam*, *supra*, 60 Cal.App.5th at pp. 415–416.) It seems unlikely that these quotes would be relevant to the issues then under consideration by the appellate court; indeed, they seem to be relevant only as to why a modern-day individual or jurist may view a societal benefit in one or another outcome of the case. Such outcome-based decision-making at the expense of the language of the Holder Rule as written would, of course, be impermissible. (See, e.g., *Santos v. Brown* (2015) 238 Cal.App.4th 398, 430 [holding "no amount of lexicological alchemy, no matter how well intentioned, permits the language to be stretched, manipulated, and tortured to reach what to some would be a 'correct' result"].)

To the extent these quotes are deemed relevant by this Court, it should be noted that the publications do not support the position for which they were quoted. Respondent Tania Pulliam ("Respondent") contends that the appellate court cited to "law review articles that have examined the history of the Rule" and "which confirm *Pulliam*'s interpretation." (Answering Brief, p. 37.) As shown directly below, that contention is flatly inaccurate.

i. Greenfield, Limits on a Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder in Due Course Rule (1990)

The first publication quoted by the appellate court is an article dated 1990, published in the *Business Lawyer* and entitled "Limits on a

Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder in Due Course Rule." (See *Pulliam*, *supra*, 60 Cal.App.5th at pp. 416–417.) That article indeed addresses the FTC Holder Rule. However, a review of the article demonstrates that the article's author believes that attorney fees are capped by the Holder Rule, and appears to view this cap as an appropriate outcome. (See *Greenfield, Limits on a Consumer's Ability to Assert Claims and Defenses Under the FTC's Holder in Due Course Rule* (1990) 46 Bus. Law. 1135 (hereafter cited as "Greenfield").) In summary, the author contends that a creditor-assignee should be liable for statutory damages, punitive damages, and other varieties of damages on affirmative claims, and that this is appropriate because the consumer's remedies are entirely capped at the amounts paid under the contract. (See, e.g., Greenfield, p. 1140, fn. 20 ["This affirmative recovery, of course, could not exceed the amount defendants had already paid"]; p. 1147 [a creditor should be liable for multiplication of damages or punitive damages because "…the maximum exposure of the assignee is the total amount the consumer has paid under the contract…"].) The article addresses attorney fees in the context of permitting them as an *offset* against amounts owed on the contract by the consumer. (Greenfield, p. 1148.)

The interpretation advanced in the article is that the "claims" which may be brought under the Holder Rule are meant, under the author's interpretation of the FTC's Staff Guidelines, to include not just substantive claims, but all *remedies* available to the consumer (including punitive damages). Notably, attorney fees are a "remedy." (See, e.g., *Santisas v. Goodin* (1998) 17 Cal.4th 599, 611 [addressing the "mutuality of remedy" for attorney fees under Section 1717].)

The article stresses on several occasions the purpose of the Holder Rule. (Greenfield, p. 1137 ["The FTC adopted the Holder Rule specifically to prevent the seller from making the consumer's obligation to pay

independent of the seller's own obligation to perform the contract and comply with consumer protection laws"]; p. 1148 ["The Rule carefully ties the liability of the assignee to the liability of the consumer under the instrument held by the assignee."].)

The most notable discussion in the article is an exploration of the possible roles that a creditor might be deemed to occupy:

> …the creditor might be viewed as:
> (1) Insurer of the seller's conduct, in which event the creditor would be liable for all damages the consumer sustains;
> (2) Stakeholder, in which event the creditor would be liable to the extent the consumer has already paid;
> (3) Surrogate of the seller for the limited purpose of collecting payment, in which event the creditor would be liable only to the extent the consumer has not yet completed payment.
> **Using [these] categories, the FTC Rule contemplates the creditor as 'stakeholder-plus': the creditor is liable for amounts the consumer has paid under the instrument, but the creditor is liable for these amounts even if the consumer has paid them to the seller.**

(Greenfield, pp. 1143–1144, fn. 29, emphasis added.) The categorization of the creditor as a stakeholder/stakeholder-plus on that metric would unambiguously reflect a belief that the creditor is not liable for amounts, including attorney fees, above the amounts paid by the consumer.

ii. Rosmarin, Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process (1994)

The appellate court also quoted a 1994 article in the William and Mary Law Review. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 417.) These quotations are inappropriate. The quoted sections do not discuss appropriate limitations of liability under the Holder Rule, or the Holder Rule at all. Instead, the quoted sections—and the surrounding discussion in that publication—relate to proposals to re-write Section 2 of the UCC in

their entirety, and argue in favor of providing attorney fees to consumers as a matter of statute on transactions generally. (Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process* (1994) 35 Wm. & Mary L.Rev. 1593, 1615 (hereafter cited as "Rosmarin").)

The second sentence quoted by the appellate court, which addresses the need for fees to "level the playing field," has even less connection to this issue. Indeed, the argument in the article being quoted is that *one-way* attorney fee clauses are contained in contracts as between consumers and the commercial parties with which the consumers *directly* contract. Thus, providing a corresponding right for attorney fees to consumers in consumer transactions of all kinds is argued to "level the playing field," by providing attorney fees to both sides. This discussion has nothing to do with the Holder Rule, does not address issues with buyers of paper, the "holder in due course" rules or the appropriate distribution of rights and liabilities as between the parties, or anything else at issue in this case. Instead, it appears to be a citation simply for the idea that the author (who, not surprisingly, was working for the National Consumer Law Center) wanted increased consumer protections. Apparently, the appellate court would agree with consumer lobbyist organizations that it would be good policy to rewrite the law to create additional access for consumers to awards of attorney fees.

Outside of the issues with context, it is rather more notable that the appellate court would quote the second author for the concept that the availability of attorney fees would "**cut down on litigation** and encourage settlement." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 417, emphasis added, citing to Rosmarin at p. 1615.) That claim is extraordinary and contrary to common sense and what is seen on a daily basis in a variety of contexts. With an extraordinary claim, one would expect extraordinary evidence. However, Rosmarin cites only to one commentator who published in the

same law journal (who also was not addressing the Holder Rule). (Rosmarin, pp. 1615–1616, citing Miller, Consumer Issues and the Revision of U.C.C. Article 2, 35 Wm. & Mary L. Rev. 1565 (1994).) The cited article does *not* argue that there is a reduction in litigation occasioned by the availability of attorney fees. Instead, that article only claims, in a footnote (without any citation to authority on this point), that permitting attorney fees in cases under the UCC does not "prompt undue litigation." (Miller, Consumer Issues and the Revision of U.C.C. Article 2, 35 Wm. & Mary L. Rev. 1565 (1994), pp. 1577–1578, fn. 45–46.) Thus, in the 1990s, one person said that there was no evidence broad attorney fees would make more litigation and someone else misquoted the first person for the proposition that the availability of attorney fees would *reduce* litigation and litigation costs. That falls somewhat short of the anticipated extraordinary evidence.

Again, Westlake would reiterate that modern day policy arguments or what these parties believe is the societally better outcome is not the matter in dispute. As a final word on policy, we are better equipped in 2021 and with the benefit of hindsight to identify the relative effects of broad fee provisions and their effect on litigation for relatively small claims. Attorney fees in such context, especially one-way attorney fees, are commonly referred to as an *incentive* to commence litigation. (See, e.g., *Rodriguez v. Investco, L.L.C.* (M.D.Fla. 2004) 305 F.Supp.2d 1278, 1281 ["Although the ADA's private remedies are limited to injunctive relief, id. § 12188(a), the ADA, nevertheless, contains an incentive to private litigation - an attorney's fee provision," discussed by the court under a heading literally entitled: "A Cottage Industry is Born"].) As known to all trial judges in this State, two of the fastest growing burdens on the legal system and the public generally are drive-by ADA lawsuits and employment PAGA cases. Those cases are much like the auto-consumer

litigation here, which have relatively small general recoveries for the plaintiff or any individual, but have one-way attorney fees available for consumer attorneys. Individuals are not rushing the doors of the courthouse to vindicate their rights on nearly nominal claims; instead, the economics of attorney fees are the cause of such gluts of litigation. (See, e.g., *ibid.* ["The current ADA lawsuit binge is, therefore, essentially driven by economics-that is, the economics of attorney's fees"].) As discussed, it is an extraordinary claim that attorney fees *decrease* the incidents or extent of litigation.

IV. MOST JURISDICTIONS INTERPRET THE HOLDER RULE TO CAP ATTORNEY FEE AWARDS

With respect to persuasive authority, outside of California, the Holder Rule cap has been considered by a number of courts in this country. Some courts raise a concern that imposing unlimited liability (i.e., fees, costs, punitive damages, penalties, and so forth) would render the creditor an involuntary guarantor of the seller. (See, e.g., *Riggs v. Anthony Auto Sales, Inc*., 32 F.Supp.2d 411, 417 (W.D. La. 1998) ("*Riggs*") ["Nor was the Rule meant to "place the creditor in the position of an insurer or guarantor of the seller's performance."].) Many courts do not mince words on their interpretation. (See, e.g., *Alduridi v. Community Tr. Bank, N.A*. (Ct.App. Oct. 26, 1999, Appeal No. 01A01-9901-CH-00063) 1999 Tenn. App. LEXIS 718, at *32.) ["Therefore, where the plaintiff's claim for attorney's fees is based on the seller's misconduct, recovery under the Holder Rule is limited to the amounts paid under the contract"].)

The apparent majority of jurisdictions that have taken a position on this issue find that the amounts paid by the consumer under the contract do act as a "cap" on a consumer's recovery, including recovery of attorney fees. The appellate court itself provided a brief sampling of cases taking

different positions, and identified cases applying the cap to an award of attorney fees (as in *Lafferty*) in courts located in the 5th District, Nebraska, and New Jersey. (See, e.g., *Pulliam*, *supra*, 60 Cal.App.5th at p. 411.) Westlake has identified further cases in accord with the FTC's position that were decided by several other jurisdictions. (See, e.g., *Reagans v. Mountainhigh Coachworks, Inc.*, 2008-Ohio-271, ¶ 27, 117 Ohio St.3d 22, 29; *Knight v. Springfield Hyundai*, 2013 PA Super 309; *Alduridi v. Community Tr. Bank, N.A.* (Ct.App. Oct. 26, 1999, Appeal No. 01A01-9901-CH-00063) 1999 Tenn. App. LEXIS 718, at *32; *Riggs v. Anthony Auto Sales, Inc.* (W.D.La. 1998) 32 F.Supp.2d 411, 417; *Jim Walter Homes, Inc. v. Adams* (Bankr.M.D.Fla. 1992) 146 B.R. 1015, 1021.)

Despite listing three jurisdictions that held the cap applied to awards of attorney fees, the appellate court in *Pulliam* curiously identified only one case that held that the cap did not apply. (*Oxford Fin. Cos. v. Velez* (Tx.Ct.App. 1991) 807 S.W.2d 460, 464–465.)[13] That does not appear to be an accurate representation of *Oxford*. The court in *Oxford* did not make that determination and was not actually called upon to decide that issue. The bases of error addressed in *Oxford* are stated expressly in the decision, in a numbered list with only three items. (*Id*. at p. 462.) *Oxford* does not identify any request by a party to cap attorney fees under the Holder Rule or contain a statement that such a cap does, or does not, apply to an

---

[13] For completeness, Westlake located one other jurisdiction that held that the cap did not apply: Washington. (See, e.g., *Houser v. Diamond Corp.* (Ct.App. Jan. 18, 2005, No. 51901-8-I) 2005 Wash. App. LEXIS 96.) Westlake acknowledges that other cases on both sides of this issue may exists that were not picked up by Westlake in its last survey of this area. However, as in this footnote, Westlake has included those cases that address this issue regardless of whether that case is for, or against, Petitioner. The disproportionate weight of authority in Petitioner's favor is not an example of cherry-picking, but what appears to be the majority opinion in the country.

attorney fee award. Because the issue was never under consideration, *Oxford* would not appear to be authority in support of ignoring the FTC's cap on recovery under the Holder Rule. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered"].)

Although *Oxford* does not actually address this issue, other Texas cases expressly permit an award of attorney fees above the cap. However, the determination of this issue in Texas appears to be nearly accidental and does not appear to represent actual interpretation of the language of the Holder Rule.

Uncapped fees in Texas arise out of the 1987 case of *Guerra*. (*Home Sav. Ass'n v. Guerra* (Tex. 1987) 733 S.W.2d 134, 137.) Notably, in *Guerra*, the appellant failed to preserve the issue of attorney fees for review by failing to object to the ruling before the trial court, and therefore *Guerra* may have addressed the attorney fee issue gratuitously. *Guerra*'s discussion of the Holder Rule's cap on fees appears to consist of approximately two sentences. (*Ibid.*) The court based its decision on its interpretation of a prior case, *Kish v. Van Note* (Tex. 1985) 692 S.W.2d 463, despite acknowledging that *Kish* did not actually provide any reasoning on the issue. (*Ibid.* ["Although we did not discuss the purpose or intent of the FTC rule, we held that, because the bank had not violated the DTPA, its joint and several liability was limited to the amount paid under the contract plus attorneys fees."].) In fact, the situation was worse than suggested by *Guerra*, as *Kish* did not even *mention the existence of the Holder Rule*. As a result of decisions entered without any examination of the issue, Texas courts that continue to provide uncapped awards of attorney fees do so with a notably limited endorsement. (See, e.g., *Reliance Mortg. Co. v. Hill-Shields* (Tex.Ct.App. Jan. 10, 2001, No. 05-99-01615-

CV) 2001 Tex. App. LEXIS 140, at *9, [noting that the court is bound to follow *Guerra* and *Kish* although "the opinions provide no analysis supporting the creditors' liability for attorney's fees…"].) Thus, although Texas may have rulings that permit uncapped fees, it does not appear to have interpreted the Holder Rule on this issue or agreed with one side or another.

Finally, as previously discussed, at least two appellate districts in California have held that the Holder Rule limits the recovery of attorney fees to the amounts paid by the consumer under the contract: *Lafferty* and *Spikener*. This Court denied review of those cases. (See *Lafferty v. Wells Fargo Bank, N.A.* (Oct. 31, 2018, No. S250794) Cal.5th [2018 Cal. LEXIS 8573]; *Spikener v. Ally Fin., Inc.* (Oct. 14, 2020, No. S263361) Cal.5th [2020 Cal. LEXIS 7204].)

That leaves Washington as an isolated source of any remaining persuasion, outside the appellate court's opinion in *Pulliam*, for the concept that a creditor should have unlimited liability as an involuntary guarantor under the Holder Rule.[14]

V. PURSUANT TO THE SUPREMACY CLAUSE, SECTION 1459.5 IS PREEMPTED BY THE HOLDER RULE

In early 2019, the California Legislature introduced AB 1821, which would allow a debtor to recover attorney fees as against a holder. In July 2020, Section 1459.5 was codified, presenting a conflict between federal and California law:

> A plaintiff who prevails on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of

[14] Notably, no decision was noted in Washington on this issue after the FTC's recent interpretation. It is therefore not clear that Washington would again permit uncapped fees.

> Federal Regulations or any successor thereto, or pursuant to the contractual language required by that party or any successor thereto, may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.

(Cal. Civ. Code, § 1459.5.)

Pursuant to the Supremacy Clause (U.S. Const., art. IV, § 3, cl. 2), Section 1459.5 is unconstitutional on its face because it directly contradicts the Holder Rule. (U.S. Const., art. IV, § 3, cl. 2.) State laws interfering with or contrary to federal law are invalid by operation of the Supremacy Clause. (*Hillsborough County v. Automated Med. Lab., Inc*. (1985) 471 U.S. 707, 712–713; *Spikener*, *supra*, 50 Cal.App.5th at pp. 13–14.) Similarly, regulations issued by federal agencies also preempt state laws that conflict with or stand as obstacles to those regulations. (See *Spikener, supra*, at p. 14; *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta* (1982) 458 U.S. 141, 153–154; *Cap. Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699.)

The Holder Rule and Section 1459.5 are inconsistent, and the California statute appears to have been issued to adjust the meaning of an area occupied by a federal agency. The state statute is therefore preempted, and the court in *Spikener* expressly determined that the Holder Rule preempts Section 1459.5. (*Spikener*, *supra*, 50 Cal.App.5th at pp. 162–163.)

Notably, the appellate court in *Pulliam* provided significant deference to the August 26, 1976 statements by the FTC's acting director. During those proceedings, the acting director testified that a state law that is inconsistent with the holder in due course rule, that, for example, allowed claims and defenses to be asserted only for a particular time, would be preempted by the FTC's Holder Rule. (Consumer Claims and Defenses:

Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce House of Rep., 94th Cong., 2nd Sess. (1976), Serial No. 94-145, p. 28.) The California statute here, Section 1459.5, is likewise a statute that is inconsistent with the holder in due course rule, and likewise varies the relief provided by the Holder Rule. To the extent the acting director's testimony has weight, it would appear that the FTC in 1976 would agree with *Spikener* that Section 1459.5 is preempted in this matter.

Respondent attempts to maneuver around the obvious conflict between Section 1459.5 and the Holder Rule. Specifically, Respondent contends: "the FTC exceeded its authority by attempting to bar states from passing laws on the availability of attorneys' fees under their own statutes"; and that Section 1459.5 does not conflict with the Holder Rule because it is more protective of consumers. (Answering Brief, pp. 50-57.) These arguments are without merit.

1. Respondent's "State Action" Argument Is Inapplicable

In a bold move, Respondent argues against the bedrock principles of federalism, claiming that state law should defeat federal law: e.g., "But the FTC is not authorized by Congress to block state law, while California *can* enact its own consumer protection statutes as our Legislature did with Section 1459.5." (Answering Brief, p. 51, ital. in original.)

Respondent's statement is wrong—FTC regulations can preempt state law. "[I]t has long since been firmly established that state statutes and regulations may be superseded by validly enacted regulations of federal agencies such as the FTC." (*American Financial, supra*, 767 F.2d at p. 989.) "While the Commission was not given the authority to occupy the field of state unfair competition in consumer protection law, it was

authorized to declare by rule preemption of state activities that conflict with regulations." (*Id.* at 990.) Indeed, it might be noted that the Holder Rule itself preempted many then-existing state statutes that addressed consumer contracts.

In support of Respondent's claim that federal agencies cannot preempt state law, Respondent cites *California State Bd. of Optometry v. F.T.C.* (D.C. Cir. 1990) 910 F.2d 976, 980 ("*Optometry*"). The *Optometry* decision addressed the "state action doctrine," sometimes also known as "*Parker* immunity," named after the case which originated the policy. (See *Parker v. Brown* (1943) 317 U.S. 341.) As summarized by recent cases: "For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." (*N.C. State Bd. of Dental Exam'rs v. FTC* (2015) 574 U.S. 494, 503.)

This is not an antitrust case, and the cited authority has little to nothing to do with these circumstances. To the extent there is any application in this context, Respondent has not demonstrated that the doctrine applies. As a general statement, "state-action immunity is disfavored . . ." (*FTC v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 636.) In an appropriate case, such immunity may apply upon meeting a two-part showing: "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." (*Id.* at 631.) Respondent has not made such a showing.

2. Section 1459.5 Is in Conflict with the Holder Rule, Whether or Not Section 1459.5 Is Somehow More Protective

Respondent argues that Section 1459.5 does not conflict with the Holder Rule, and therefore the state statute is not preempted.

As addressed in *Spikener*, an agency's interpretation of its own regulation is entitled to deference. (See also *Christensen v. Harris Co.* (2000) 529 U.S. 576, 588 ["an agency's interpretation of its own regulation is entitled to deference"].) In light of the FTC's 2019 interpretation, the preemption question is answered—the state statute is in conflict and preempted.

Respondent does not appear to articulate a single principle that would permit this Court to ignore the FTC's interpretation of its own regulation, or which alters the fundamental precepts of preemption. Instead, Respondent argues that a state law should not be preempted if it conflicts with a federal regulation, so long as the state law is more protective than the federal regulation. Respondent's position lacks any support, and relies on inapposite authority.

Respondent cites *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929 (*Viva!*). The court in *Viva!* addressed a statute which expressly authorized the states to pass laws in that area. (*Id.* at p. 941 [addressing 16 U.S.C. § 1535(f)].) The case addressed the specific language of that statute. The statute at issue in *Viva!* stated as follows:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter.

The court continued to cite to a savings clause worded as follows:

> This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

(*Id.* at p. 941.)

Thus, *Viva!* analyzed the meaning and scope of the words "prohibited" and "authorized" under 16 U.S.C. § 1535(f). Respondent takes that discussion and misrepresents the language of *Viva!* as though the discussion was announcing a rule applicable to preemption generally. (See, e.g., Answering Brief, p. 56 ["In *Viva,* the court also found that 'every action falls within one of three possible federal categories: an action may be prohibited, it may be authorized, or it may be neither prohibited nor authorized. Here, the Rule itself does not prohibit or authorize the recovery of attorneys' fees when a consumer must sue…'"].)

To be clear, whether a given interpretation of the Holder Rule would satisfy the requirements of categories created in the Endangered Species Act is not relevant to the determination of this matter.

Respondent also cites to *Jankey v. Lee* (2012) 55 Cal.4th 1038 (*Jankey*). The *Jankey* case was an Americans with Disabilities Act ("ADA") case. As quoted by *Jankey*, the ADA states that it is not meant to preempt more expansive state protections:

> Here, Congress has spoken to preemption directly: a construction clause in the ADA spells out the act's intended effect on state laws. The clause disavows any broad preemptive intent, instead permitting states to enact and enforce complementary laws: "Nothing in this Act shall be

> construed to invalidate or limit the remedies, rights, and procedures of any …law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."

(*Id.* at p. 1049.)

Respondent relies on *Jankey* for the argument that a state law is not preempted if it expands on the protections intended by a federal law. No. States can engage in lawmaking that conflicts with federal law *if the federal law permits them the authority to do so*. As explained by *Jankey*, "We previously have recognized the congressional 'power to preclude conflict [and obstacle] preemption, allowing states to enforce laws even if those laws are in direct conflict with federal law or frustrate the purpose of federal law.'" (*Jankey*, supra, 55 Cal.4th at p. 1049, citing *Viva!*, *supra*, 41 Cal.4th 929.) Absent such authorization, or certain exceptions not relevant here, a state law cannot stand in conflict with applicable federal law.

Thus, both *Viva!* and *Jankey* involve federal statutes which expressly addressed conflict with state laws, and authorized further lawmaking by the states that was more protective than federal law. Respondent fails to identify any similar authorizing language that surrounds the Holder Rule. To the contrary, the FTC's 2019 interpretation demonstrates that the FTC deems the Holder Rule in conflict with a state statute such as Section 1459.5.

CONCLUSION

The FTC issued a dispositive interpretation of the Holder Rule in accord with Petitioner and Westlake's position. No further analysis is required to reach a determination that the Holder Rule's cap on recovery includes recovery of attorney fees.

The wide majority of courts in this country share Petitioner and Westlake's understanding of the Holder Rule, including two California appellate districts that have issued decisions on this matter. The below appellate court made straightforward errors in reasoning and its presentation of the law in this area.

This Amicus Curiae respectfully recommends this Court find the Holder Rule's limitation on recovery to encompass attorney fees and find Section 1459.5 preempted by the Holder Rule.

Respectfully submitted,

Dated: October 14, 2021

MADISON LAW, APC

By: */s/ Jenos Firouznam-Heidari*
Jenos Firouznam-Heidari
James S. Sifers
Brett K. Wiseman
Attorneys for Amicus Curiae
Westlake Services, LLC

CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The text of this brief, Brief by Amicus Curiae Westlake Services, LLC In Support of Petitioner TD Auto Finance LLC, consists of 11,406 words, inclusive of all headings and footnotes, which is fewer than the 14,000 words permitted by the Rules of Court (rule 8.204). In making this certification, counsel for Amicus Curiae has relied on the word count of the Microsoft Word program used to prepare this brief.

Dated: October 14, 2021

MADISON LAW, APC

By: */s/ Jenos Firouznam-Heidari*
Jenos Firouznam-Heidari
James S. Sifers
Brett K. Wiseman
Attorneys for Amicus Curiae
Westlake Services, LLC

CERTIFICATE OF SERVICE
Tania Pulliam v. HNL Automotive, Inc. et al.
Supreme Court Case No. S267576

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 17702 Mitchell North, Irvine, California 92614.

On October 14, 2021, I served the following document(s):

APPLICATION BY WESTLAKE SERVICES, LLC FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER TD AUTO FINANCE, LLC

BRIEF BY AMICUS CURIAE WESTLAKE SERVICES, LLC IN SUPPORT OF PETITIONER TD AUTO FINANCE LLC

on the interested parties in this action addressed as follows:

Hallen D. Rosner Arlyn L. Escalante Michelle A. Cook ROSNER, BARRY & BABBITT, LLP 10085 Carroll Canyon Rd., Suite 100 San Diego, CA 92131 858.348.1005 / Fax 858.348.1150 hal@rbblawgroup.com arlyn@rbblawgroup.com michelle@rbblawgroup.com Attorneys for Respondent TANIA PULLIAM **[VIA TRUEFILING]**	Tanya L. Greene, Esq. Jamie D. Wells, Esq. Anthony Q. Le, Esq. MCGUIREWOODS LLP 1800 Century Park East, 8th Floor Los Angeles, California 90067 (310) 315-8200 / F: (310) 315-8210 *tgreene@mcguirewoods.com* *jwells@mcguirewoods.com* *ale@mcguirewoods.com* Attorneys for Petitioner TD AUTO FINANCE, LLC **[VIA TRUEFILING]**

Duncan J. McCreary, Esq. MCCREARY PC 11601 Wilshire Boulevard, 5th Floor Los Angeles, California 90025 (310) 575-1800 *djm@mccrearypc.com* Attorneys for Defendants/Appellants HNL AUTOMOTIVE, INC. *dba* HOOMAN NISSAN OF LONG BEACH and TD AUTO FINANCE, LLC **[VIA TRUEFILING]**	John A. Taylor HORVITZ & LEVY LLP Business Arts Plaza 3601 W. Olive Ave., 8th Floor Burbank, CA 91505 818.995.0800 jtaylor@horvitzlevy.com Pub/Depublication Requestor **[VIA TRUEFILING]**
Jan T. Chilton SEVERSON & WERSON One Embarcadero Center. Suite 2600 San Francisco, CA 94111 415.398.3344 / Fax 415.956.0439 jtc@severson.com Pub/Depublication Requestor AMERICAN FINANCIAL SERVICES ASSOCIATION **[VIA TRUEFILING]**	William N. Elder, Jr. Foell & Elder 3818 E. La Palma Ave. Anaheim, CA 92807 714.999.1100 / Fax 714.630.3300 bill@foellandelder.com Pub/Depublication Requestor CALIFORNIA FINANCIAL SERVICES ASSOCIATION **[VIA TRUEFILING]**
Hon. Barbara M. Scheper Attn: Appeals Department LOS ANGELES SUPERIOR COURT 111 North Hill Street Los Angeles, California 90012 **[By U.S. Mail]**	CALIFORNIA COURT OF APPEAL **[Electronic Service under Rule 8.212(c)(2)]**
Office of the Attorney General 1300 "I" Street Sacramento, CA 95814-2912 916.445.9555 **[VIA UPLOAD TO AG WEBSITE]**	

[X] **(BY TRUEFILING ELECTRONIC E-FILING/ SERVICE):** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by court rules.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 14, 2021, at Irvine, California.

Crystal Amaro

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PULLIAM v. HNL AUTOMOTIVE**
Case Number: **S267576**
Lower Court Case Number: **B293435**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **camaro@madisonlawapc.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Westlake Amicus Curiae Brief - Pulliam - final for filing

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jan Chilton Severson & Werson, APC 47582	jtc@severson.com	e-Serve	10/18/2021 3:26:32 PM
William Elder Foell & Elder 110463	bill@foellandelder.com	e-Serve	10/18/2021 3:26:32 PM
Hallen Rosner Rosner Barry & Babbitt LLP 109740	richard@rbblawgroup.com	e-Serve	10/18/2021 3:26:32 PM
Leslie Mason Rosner, Barry & Babbitt, LLP	leslie@rbblawgroup.com	e-Serve	10/18/2021 3:26:32 PM
Hallen Rosner Rosner Barry & Babbittt, LLP 109740	hal@rbblawgroup.com	e-Serve	10/18/2021 3:26:32 PM
Lisa Perrochet Horvitz & Levy, LLP 132858	lperrochet@horvitzlevy.com	e-Serve	10/18/2021 3:26:32 PM
Tanya L. Greene McGuireWoods LLP 267975	tgreene@mcguirewoods.com	e-Serve	10/18/2021 3:26:32 PM
John Taylor Horvitz & Levy, LLP 129333	jtaylor@horvitzlevy.com	e-Serve	10/18/2021 3:26:32 PM
Michelle Cook Rosner, Barry & Babbitt, LLP 319340	michelle@rbblawgroup.com	e-Serve	10/18/2021 3:26:32 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/18/2021

Date

/s/Jenos Firouznam-Heidari

Signature

Firouznam-Heidari, Jenos (266257)

Last Name, First Name (PNum)

Madison Law, APC

Law Firm