No. S267576

Supreme Court

OF THE

State of California

TANIA PULLIAM,

Plaintiff and Respondent,

vs.

TD AUTO FINANCE, LLC,

Defendant and Appellant.

Amicus Brief Supporting TD Auto

By American Bankers Association, American Financial Services Association, California Financial Services Association, and Consumer Bankers Association

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From A Published Decision of the Court of Appeal (2d Dist., Div. 5; B293435)
Affirming an Order of the Los Angeles County Superior Court
Awarding Attorney Fees (No. BC633169)
Honorable Barbara M. Scheper, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Case No.: S267576

Case Name: *Tania Pulliam v. TD Auto Finance, LLC*

☑ There are no interested entities or persons that must be listed in this certificate under Rule 8.208

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I.

INTEREST OF AMICI CURIAE

A. American Bankers Association

The ABA is the largest national trade association of the banking industry in the country. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia. The ABA also represents savings associations, trust companies, and savings banks. ABA members hold approximately 95% of the United States banking industry's domestic assets. The ABA frequently appears in litigation, as either a party or amicus curiae, to protect and promote the interests of the banking industry its members, and its customers.

B. American Financial Services Association

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 100 years, AFSA has represented financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA supports financial education for consumers of all ages. AFSA advocates before legislative, executive, and judicial bodies on issues affecting its members' interests. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1245.)

C. California Financial Services Association

CFSA is a non-profit trade association representing major national and international corporations and independent lenders with operations in the State of California that provide a broad range of financial services, including consumer and commercial loans, retail installment financing, automobile and mobile home financing, home purchase and home equity loans, credit cards, and lines of credit.

CFSA was established to promote laws and regulations that protect consumers while preserving their access to credit options, and to support and encourage responsible industry practices. CFSA acts as a unified voice of the finance industry in lobbying the Legislature, interfacing with industry regulators, and representing the industry in court.

The ABA, AFSA, CBA and CFSA have often appeared in this Court and others as parties or amici in cases affecting their members' interests. Each of these associations includes members who, in the regular course of their business, finance automobiles and other products sold to California consumers through direct loans or indirectly by purchasing retail installment sales contracts from dealers.

D. Consumer Bankers Association

CBA is the only member-driven trade association focused exclusively on retail banking. CBA members operate in all 50 states, serve more than 150 million Americans, and hold two thirds of the country's total depository assets. The CBA's members include the nation's largest retail banks, with 85% holding over $10 billion in assets.

Since 1919, CBA members have provided financing to consumers to help them buy homes, automobiles and other goods, pay tuition for

education, or start a small business. Much of this financing by CBA members is provided under contracts subject to the FTC Holder Rule.

On behalf of its members and their customers, the CBA advocates with regulatory agencies, courts, and federal legislators on issues affecting retail banking.

II.

INTRODUCTION

In this case, the Court must decide an important but quite narrow issue: As used in the FTC Holder Rule's second sentence, does the word "recovery" include attorney fee awards?[1]

The Holder Rule's plain meaning compels an affirmative answer. "Recovery" is a broad term. It includes attorney fees as well as damages, as *Lafferty II*,[2] *Spikener*,[3] and the FTC[4] have all correctly held. Hence, the FTC Holder Rule's second sentence limits a consumer's "recovery" of attorney fees as well as damages against a holder.

The Court should reach that conclusion both because the FTC Holder Rule's language compels it and because the FTC authoritatively settled the

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[1] The FTC Holder Rule's second sentence states: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." (16 C.F.R. § 433.2; capitalization removed.)

[2] *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 412.

[3] *Spikener v. Ally Financial, Inc*. (2020) 50 Cal.App.5th 151, 154-155, 160.

[4] FTC, Confirmation of Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 2, 2019) 84 Fed. Reg. 18711 ("FTC Confirmation").

Rule's meaning while readopting the Rule after full compliance with the FTC Act's and Administrative Procedure Act's rulemaking procedures.

Pulliam's and the Court of Appeal's contrary arguments are mistaken. Both misconstrue the FTC Holder Rule's plain language and mistake the purpose served by the Rule's second sentence. They also wrongly assert that the protections of the FTC Holder Rule and state consumer protection laws will be lost or rendered ineffective unless consumers can recover full attorney fees from holders under the FTC Holder Rule. They cite no evidence to support that claim. More importantly, the FTC, to which Congress has delegated authority to make such policy choices, has rejected that proposition. Both also misinterpret the FTC Confirmation, which Pulliam wrongly denigrates as mere "comments," ignoring the fact that the Confirmation was issued in the exercise of the FTC's full rule-making authority under the FTC Act and the Administrative Procedure Act (5 U.S.C. § 553; 15 U.S.C. § 57a(a)(1)(B)).

If the Court chooses to go beyond the petition's single question for review, it should also hold that Civil Code section 1459.5 is preempted. The FTC Holder Rule provides that "the money that a consumer may obtain from a holder based on" the Rule is limited to the amount the consumer paid under the contract. (FTC Confirmation, 84 Fed. Reg. 18713 n. 32.) Section 1459.5 says the opposite—that a consumer may obtain, under the Holder Rule, an award of attorney fees in addition to the amount the consumer paid under the contract. While the California Legislature is free to enact more protective consumer protection statutes, it cannot authorize greater recovery under the FTC Holder Rule than that Rule allows.

III.

THE FTC HOLDER RULE'S SECOND SENTENCE LIMITS ALL MONETARY "RECOVERY" INCLUDING ATTORNEY FEES

Under the FTC Holder Rule, every consumer credit contract must contain a two-sentence clause. The first sentence subjects any holder of the contract to all claims and defenses that the "debtor" may have against the seller of goods or services obtained under the contract. (See *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 558-562 ("*Lafferty I*").) The second sentence limits the debtor's "recovery" under the Rule to the amounts the debtor paid under the contract.

The issue on this review is whether the FTC Holder Rule's second sentence limits "recovery" of attorney fees as well as damages. For the reasons, stated below, the Court should answer that question in the affirmative.

A. Interpreting A Federal Regulation, The Court Should Apply The U.S. Supreme Court's Rules Of Construction

Because the Court applies a federal regulation in this case, it should follow the rules of construction enunciated by the United States Supreme Court. (*Spikener, supra,* 50 Cal.App.5th at p 158; *RCJ Medical Servs. v. Bonta* (2001) 91 Cal.App.4th 986, 1006; *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500, 505; *Kilroy v. Superior Court* (1997) 54 Cal. App.4th 793, 801.)

Under federal law, the same rules of construction are used to interpret regulations as are used to construe statutes. (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2415 ("*Kisor*"); *Greene v. United States* (1964) 376 U.S. 149, 160; *see* A. Scalia & B. Garner, Reading Law (2012) 51; *Amazon.com, Inc. v. Commissioner* (9th Cir. 2019) 934 F.3d 976, 984 ("Regulations are

interpreted according to the same rules as statutes, applying traditional rules of construction.").)

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.' " (*Food Mktg. Inst. v. Argus Leader Media* (2019) 139 S.Ct. 2356, 2364; citations omitted.)

"As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." (*Exxon Mobil Corp. v. Allapattah Servs*. (2005) 545 U.S. 546, 568; see also *American Rivers v. FERC* (9th Cir. 1999) 201 F.3d 1186, 1204 ("[L]egislative history – no matter how clear – can't override statutory text.").)

B. The Ordinary, Common Meaning Of "Recovery" Encompasses All Monetary Sums Awarded By A Judgment, Including Any Attorney Fee Award

In construing the FTC Holder Rule's second sentence, the Court properly starts by carefully examining the ordinary meaning of the sentence's words, and in particular its first word—"recovery."

In general, "[u]nless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning.' " (*Bilski v. Kappos* (2010) 561 U.S. 593, 603; citations omitted.) It is especially important to follow that general rule in construing the FTC Holder Rule. "[T]he Holder

Rule language for contracts constitutes a notice to consumers. … It would be antithetical to the language and its typographic emphasis to hold that the Holder Rule language does not mean what it says." (*Lafferty II, supra,* 25 Cal.App.5th at p. 412; *Lafferty I, supra,* 213 Cal.App.4th at p. 560.)

Moreover, the FTC, itself, has stated that its Holder Rule must be construed and applied according to the plain meaning of its words. "The Commission affirms that the Rule is unambiguous, and its plain language should be applied. … It remains the Commission's intent that the plain language of the Rule be applied …." (FTC Advisory Opinion (May 3, 2012) p. 3; fns. omitted; see also FTC Confirmation, 84 Fed. Reg. at p[. 18712 (reiterating the advisory opinion).)[5]

"Black's Law Dictionary defines 'recovery' to mean: 'An amount awarded in or collected from a judgment or decree.' (Black's Law Dict. (10th ed. 2014) p. 1466, col. 2.)" (*Lafferty II, supra,* 25 Cal.App.5th at p. 412.) Other dictionaries agree.[6]

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[5] The opinion letter is publicly available at https://www.ftc.gov/policy/advisory-opinions/16-cfr-part-433-federal-trade-commission-trade-regulation-rule-concerning. Pulliam wrongly asserts that the Advisory Opinion "emphasized that any reading of the Rule must comport with its plain language ***together with*** the Rule's Statement of Basis and Purpose." (Ans. Brief, 30; emphasis added.) Quite to the contrary, the Advisory Opinion held that the Holder Rule's plain language overrode the Statement of Basis and Purpose's seemingly contrary suggestion that a debtor could obtain affirmative recovery only in cases of "non-delivery, total failure of consideration or the like." (See FTC Statement of Basis and Purpose (Nov. 18, 1975) 40 Fed. Reg. 53506, 53527; Advisory Opinion, at pp. 4-5; *Lafferty I,* 213 Cal.App.4th at pp. 560-563.)

[6] See, e.g., Webster's New Third Internat. Dict. (1971) p. 1898 "recovery," def. 2 a ("the obtaining in a suit at law of a right to something by verdict, decree, or judgment of court"); Dictionary.com, "recovery," def. 9 ("*Law.* the obtaining of right to something by verdict or judgment of a court of

(Fn. cont'd)

In keeping with these dictionary definitions, courts regularly use the word "recover" or "recovery" to refer to all relief granted by a judgment or order, including attorney fees. (See *Lafferty II*, *supra*, 25 Cal.App.5th at p. 412; TDAF Opening Brief, 24.)[7]

The attorney fees at issue in this case were sums awarded by a judgment or decree. So, those fees are part of Pulliam's "recovery" and are limited by the FTC Holder Rule's second sentence.

The Court of Appeal disagreed but offered no plausible alternative definition of "recovery." (*Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396, 413 ("*Pulliam*").) Nor does Pulliam. (Ans. Brief, 33-34.) The Court of Appeal wrongly turned Black's "(esp. damages)" into "only damages." (See TDAF Opening Brief, 23-24.) Moreover, if the FTC had

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law."); Collins English Dict., "recovery," def. 6 (*law* a. the obtaining of a right, etc, by the judgment of a court. b. (in the US) the final judgment or verdict in a case); Law.com Legal Dict., "recovery" ("the amount of money and any other right or property received by a plaintiff in a lawsuit"); FindLaw Legal Dict., "recovery," def. 3 b ("an amount awarded by or collected as a result of a judgment or decree"); New Oxford American Dict. (3d ed. 2010) p. 1459 "recovery," def. 2 b ("the action of regaining or securing compensation or money lost or stolen by means of a legal process"); see also Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 1040 "recover," def. 3 b ("to gain by legal process").)

[7] See also *State Compensation Fund v. Nelson* (1987) 153 Ariz. 450, 453, 737 P.2d 1088, 1091; *Willis v. American Nat. Life Ins. Co*. (Mo. Ct. App. 1956) 287 S.W.2d 98, 105; *United States v. Konstovich* (4th Cir. 1927) 17 F.2d 84, 85; *Vaughan v. Humphreys* (1922) 153 Ark. 140, 239 S.W. 730, 731. Pulliam wrongly criticizes *Lafferty II* for "rel[ying] primarily on out-of-state decisions" in discerning "recovery's" meaning. (Ans. Brief, 33.) The FTC Holder Rule is a federal regulation. It is written in standard American English used throughout the United States, not in a California-specific argot. Notably, neither the Court of Appeal nor Pulliam has cited any decision from California or elsewhere that has treated "recovery" as synonymous with "damages."

intended to limit only damage awards it would have rewritten the Rule's second sentence thus: "Recovery of damages hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."[8] (See *Villanueva v. Fidelity National Title Co*. (2021) 11 Cal.5th 104, 116 (employing similar reasoning).)

In further narrowing "recovery's" meaning to "restoring money that was taken away from the plaintiff," the Court of Appeal rendered the Rule's second sentence meaningless. (*Pulliam, supra,* 60 Cal.App.5th at p. 413.) The only "money taken from the plaintiff" that a holder could "restore" are the sums the plaintiff paid under the consumer credit contract. So, under *Pulliam's* reasoning, both ends of the second sentence have the same meaning. That mistaken reading "violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." (*Kungys v. United States* (1988) 485 U.S. 759, 778; citations omitted.)

Moreover, under the Court of Appeal's reading, "recovery" would not encompass consequential damages as those damages compensate for collateral losses; they do not restore money taken. (See Bouvier Law Dict., "consequential damages"; Com. Code, § 2715(2).) Yet, the FTC clearly intended the Holder Rule's second sentence to limit any award of

[8] The FTC used the word "damage(s)" seven times in explaining its reasons for adopting the Holder Rule. (See FTC, Statement of Basis and Purpose, 40 Fed. Reg. at pp. 53511, 53517, 53519, 53522, 53527.) It deliberately began the Holder Rule's second sentence with a different word having a broader meaning. Use of a different word is presumed to be purposeful and to evince an intention to convey a different meaning. (See *Russello v. United States* (1983) 464 U.S. 16, 23.)

consequential damages, as the Court of Appeal acknowledged. (*Pulliam, supra,* 60 Cal.App.5th at p. 415.)[9]

Pulliam also errs in attempting to support the Court of Appeal's implausible definition of "recovery" by citing California law's statutes and decisions treating attorney fees as distinct from "damages." (Ans. Brief, 34.) "Recovery" encompasses more than just "damages." So. even if attorney fees are not "damages," they still fall within the "recovery's" broader scope. Also, the FTC wrote its Rule for the nation, not just California. So, the Holder Rule's meaning cannot properly be found in this state's unique statutes and decisions.

Finally, both the Court of Appeal and Pulliam erroneously attribute significance to the fact that the Holder Rule's second sentence does not expressly mention attorney fees.[10] (*Pulliam, supra,* 60 Cal.App.5th at p. 413; Ans. Brief, 35.) The FTC purposefully wrote its Holder Rule in highly condensed fashion. (See Statement of Basis and Purpose, 40 Fed. Reg. at pp. 53524-53526.) The second sentence is only 14 words long, employing the single word "recovery" to encompass all the various types of monetary relief that a debtor might obtain against a holder under the Rule. Not only would including a comprehensive list of included types of "recovery" be superfluous given that word's clear meaning, but also including a list would

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[9] See also FTC, Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 14, 1976) 41 Fed. Reg. 20022, 20023 ("FTC Staff Guidelines").

[10] Pulliam also wrongly asserts that by not specifically mentioning attorney fees, "the FTC explicitly left this an open issue that could only be decided by the states." (Ans. Brief, 11, 35, 38.) There is absolutely nothing in the FTC Holder Rule or any of the FTC's commentary on it to support this notion. Quite to the contrary, the FTC adopted the Rule to achieve nationwide uniformity, not state-by-state variation.

have ballooned the Holder Rule and increased the burden on sellers without significantly benefiting debtors. Alternatively, mentioning only attorney fees would risk unintentionally excluding other types of "recovery." (See *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 109 (explaining operation of ejusdem generis rule of construction).)

In short, as the FTC affirmed in 2012 and reaffirmed in 2019, the FTC Holder Rule is unambiguous. Its plain language should be applied. (FTC Advisory Opinion (May 3, 2012) p. 3; FTC Confirmation, 84 Fed. Reg. at p. 18713 n. 32.) The Rule's second sentence limits the debtor's "recovery" against the holder. "Recovery" is a broad term including all money obtained by judgment or decree, including attorney fee awards. Thus, the Rule's plain language unambiguously answers in the affirmative the question on which this Court granted review. As a careful examination of the ordinary meaning of the Holder Rule's words "yields a clear answer, judges must stop." (*Food Mktg. Inst. v. Argus Leader Media, supra,* 139 S.Ct. at p. 2364.)

C. Pulliam's Appeal To Regulatory Purpose Is Misplaced

Unable to find support for her position in the FTC Holder Rule's words, Pulliam turns, as the Court of Appeal did, to a lengthy discussion of the Rule's purpose or objective, quoting snippets of the FTC's Statement of Basis and Purpose, and arguing that neither the Rule's purpose or objective nor the intended protections of California's consumer legislation can be achieved unless debtors can recover their full attorney fees from holders. (See *Pulliam, supra,* 60 Cal.App.5th at pp. 413-416; Ans. Brief, 35-41.) That discussion is misguided for several reasons.

First, as already pointed out, the FTC Holder Rule's language is unambiguous, leaving no room for consideration of the Rule's regulatory

history,[11] purpose or objective. (*Exxon Mobil Corp. v. Allapattah Servs., supra,* 545 U.S. at p. 568.)[12]

Second, Pulliam's argument assumes that in adopting the FTC Holder Rule, the FTC pursued only a single policy of protecting consumers. (See Ans. Brief, 10, 31, 39.) That assumption is wrong.

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice —and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

(*Rodriguez v. United States, supra,* 480 U.S. at pp. 525-526.)

The assumption is even more wrong in this instance. The FTC Holder Rule's second sentence clearly limits, rather than promotes, the Rule's primary purpose of "reallocating the costs of the seller's misconduct from the consumer back to the seller and creditor." (See *Pulliam, supra,* 60 Cal.App.5th at pp. 414, 415; Ans. Brief, 36-38.) Had the FTC intended

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[11] In support of its decision, the Court of Appeal quoted at length from testimony the FTC's Acting Director gave before a Congressional committee. (See *Pulliam, supra,* 60 Cal.App.5th at pp. 414-415.) In this Court, Pulliam wisely ignores that testimony. " '[E]xcerpts from committee hearings' are 'among the least illuminating forms of legislative history.' " (*Food Mktg. Inst. v. Argus Leader Media, supra,* 139 S.Ct. at p. 2364; citations and internal quotes omitted.)

[12] "Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' " (*Rodriguez v. United States* (1987) 480 U.S. 522, 526; citations omitted.)

to pursue the FTC Holder Rule's primary purpose "at all costs," it would not have imposed any limitation on the debtor's recovery under the Rule.

As even Pulliam and the Court of Appeal agree, the Rule's second sentence at least bars debtors from recovering consequential damages (in excess of amounts paid under the contract) from a holder. (FTC Staff Guidelines, 41 Fed.Reg. at 20023; *Pulliam, supra,* 60 Cal.App.5th at p. 415; Ans. Brief, 16, 38.) Even though consequential damages are a cost "of the seller's misconduct," the Rule's second sentence prevents the full reallocation of that cost to the holder, undercutting rather than promoting the Rule's purported primary purpose.

Therefore, the Rule's second sentence must further some "competing value" that, to some extent, conflicts with the Rule's primary objective. It is that "competing value," not the Rule's primary objective, which must be consulted in determining the second sentence's scope. To reiterate, "it frustrates rather than effectuates [regulatory] intent simplistically to assume that whatever furthers the [regulation's] primary objective must be the law." (*Rodriguez v. United States, supra,* 480 U.S. at p. 526.)

Third, both Pulliam and the Court of Appeal assume that consumer protections granted in the FTC Holder Rule and in California's statutes are worthless and can never be enforced unless consumers can recover attorney fees in unlimited amounts from the holder under the Rule. (*Pulliam, supra,* 60 Cal.App.5th at p. 416; Ans. Brief, 10, 27, 28, 31, 38-40.) The assumption is not a self-evident truth. Other states have held that the Holder Rule limits recovery of attorney fees. (See TDAF Opening Brief, 14-15.) Neither Pulliam nor the Court of Appeal cite any evidence that consumer protections have gone unenforced in those jurisdictions.

More importantly, there is no indication that the FTC has ever agreed that full recovery of attorney fees from the holder is needed to enforce the FTC Holder Rule. The Statement of Basis and Purpose expressly recognized that consumers need legal representation to bring affirmative actions against sellers or holders, but nowhere indicated that the Holder Rule's protections would be rendered meaningless unless consumers could recover full attorney fees from holders. (See Statement of Basis and Purpose, 40 Fed. Reg. at pp. 53511-53512.) As TDAF rightly points out, the FTC would not have remained silent on this point if it agreed that full fee recovery was essential to effectuating the Holder Rule's consumer protections. (TDAF Reply Brief, 8.) And the FTC has expressly rejected that notion in readopting the Holder Rule. (FTC Confirmation, 84 Fed. Reg. at p. 18713.)

Pulliam and the Court of Appeal further err in treating this issue as one for the Court's decision. It most definitely is not. Congress delegated to the FTC, not the courts, the authority to find facts, weigh competing policies, determine what acts or practices are unfair, and formulate appropriate remedies. (*FTC v. Colgate-Palmolive Co*. (1965) 380 U.S. 374, 385; *FTC v. Motion Picture Advertising Service Co*. (1953) 344 U.S. 392, 395; *Jacob Siegel Co. v. FTC* (1946) 327 U.S. 608, 612-613.) The FTC has decided unlimited awards of attorney fees are not required to enforce the Holder Rule's consumer protections. (FTC Confirmation, 84 Fed. Reg. at p. 18713.) Courts must enforce that FTC policy decision, not second-guess it.

Finally, both Pulliam and the Court of Appeal assert that full attorney fee recovery is needed to incentivize holders to settle early rather than prolong litigation, causing consumers to incur high litigation costs. (*Pulliam, supra,* 60 Cal.App.5th at p. 416; Ans. Brief, 29-30, 40.) And Pulliam goes

to great lengths to castigate TDAF for its allegedly scorched-earth defense of this litigation.[13] (Ans. Brief, 25-26.)

Pulliam and the Court of Appeal raise this policy argument before the wrong body. It is for the FTC, not this Court, to decide whether fee recovery will promote settlement—or incentivize consumer attorneys to run up the fee bill before agreeing to settle. (See TDAF Reply Brief, 17.) Pulliam cites no evidence that the FTC has adopted her policy argument.

In short, Pulliam's policy arguments cannot overcome the FTC Holder Rule's plain language which unambiguously limits all monetary relief, including attorney fee awards, against a holder.

IV.

THE COURT SHOULD DEFER TO THE FTC CONFIRMATION

As just shown, the FTC Holder Rule's unambiguous language fully answers the issue posed by TDAF's petition. But even were the Rule's words susceptible of the narrow interpretation Pulliam and the Court of Appeal opinion seek to ascribe to it, the FTC Confirmation unequivocally resolves the ambiguity against Pulliam. The Court should defer to the FTC's clarification of its own regulation.

A. The FTC Confirmation Was Issued In The Exercise Of The FTC's Full Rulemaking Authority And So Controls As It Is Not Arbitrary Or Capricious

The Court should follow the FTC Confirmation because its clarification of the FTC Holder Rule was issued in the exercise of the FTC's

[13] Plainly, TDAF's litigation tactics in this suit, whether good or ill, have nothing to do with the meaning of the FTC Holder Rule which was adopted more than 40 years before this suit was filed.

full substantive rule-making authority and is not merely an interpretative rule.

The federal Administrative Procedure Act distinguishes between substantive or legislative rules and interpretative rules. In adopting a substantive or legislative rule, a federal agency must publish a formal notice of proposed rulemaking, allow an opportunity for public comment, and publish the final rule. (5 U.S.C. § 553(b), (c), (d).) An agency may skip several of these steps in adopting an interpretative rule. (5 U.S.C. § 553(b)(3)(A), (d)(2); see *General Motors Corp. v. Ruckelshaus* (D.C. Cir. 1984) 742 F.2d 1561, 1565.)

Formally adopted substantive or legislative rules are followed unless arbitrary or capricious. "When an agency exercises authority expressly delegated to it by Congress it is at the zenith of its powers. Its regulations are entitled to 'more than mere deference or weight.' " (*American Trucking Assn., Inc. v. United States* (D.C. Cir. 1980) 627 F.2d 1313, 1320, quoting *Batterton v. Francis* (1977) 432 U.S. 416, 426.) Courts may set such rules aside "only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " (*American Transfer & Storage Co. v. ICC* (5th Cir. 1983) 719 F.2d 1283, 1298, quoting 5 U.S.C. § 706(2)(A).)

By contrast, it is the courts' ultimate responsibility to construe existing statutes or regulations, so interpretative rules are not controlling but may be entitled to either *Chevron* or *Auer* deference depending on whether they interpret federal legislation or regulations. (*Kisor, supra* 139 S.Ct. at p. 2415, citing *Auer v. Robbins* (1997) 519 U.S. 452; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. (1984) 467 U.S. 837.)

The FTC Confirmation is a substantive or legislative regulation issued in the exercise of the rule-making authority that Congress delegated to the FTC. (15 U.S.C. § 57a(a)(1)(B).) The FTC issued the Confirmation as part

of its regular program of reviewing all its rules and guides every decade to "ensure that they continue to achieve their intended goals without unduly burdening commerce."[14] "Pursuant to this program, the FTC has rescinded 37 rules and guides promulgated under the FTC's general authority and updated dozens of others since the early 1990s." (*Ibid*.)

In issuing the FTC Confirmation, the FTC scrupulously followed the procedures 5 U.S.C. § 553 requires for the substantive or legislative rules, publishing notice of its proposed rulemaking,[15] allowing the public an opportunity to submit comments,[16] and then publishing its final decision to retain the Holder Rule as clarified by the Confirmation (FTC Confirmation, 84 Fed. Reg. 18711).

Had the FTC concluded that the Holder Rule no longer achieved its intended goals or unduly burdened commerce, it could have rescinded the Rule, instead of confirming it. Likewise, had the FTC determined that the Holder Rule language lacked sufficient clarity or did not fully achieve the purpose for which it was adopted, the FTC could have amended the Rule's wording to better accomplish the desired result.

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[14] FTC, Regulatory Review Plan: Ensuring FTC Rules Are Up-to-Date, Effective, and Not Overly Burdensome (Sept. 2011), p. 1, publicly available at https://www. ftc.gov/system/files/documents/one-stops/retrospective-review-ftc-rules-guides/regreview plan.pdf.

[15] In February 2015, the FTC published notice that it would review the Holder Rule that year. FTC Press Release, FTC Announces Schedule for Reviewing Regulations (Jan. 28, 2015), publicly available at https://www. ftc.gov/ news-events/press-releases/2015/01/ftc-announces-schedule-reviewing-regulations; FTC, Regulatory Review Schedule (Feb. 3, 2015) 80 Fed. Reg. 5713, 5714.

[16] In December 2015, the FTC published an official request for comments on the rule. FTC, 16 CFR Part 433: Request for Comments (Dec. 1, 2015) 80 Fed. Reg. 75018 ("FTC Request").

Instead, the FTC concluded that the Holder Rule continued to serve its intended purpose and that none of the modifications suggested in public comments were warranted. (FTC Confirmation, 84 Fed. Reg. at pp. 18711-18712.) In particular, the FTC declined to modify the Holder Rule to allow recovery of attorney fees in excess of amounts paid by the debtor under the contract.

> The Commission does not believe that the record supports modifying the Rule to authorize recovery of attorneys' fees from the holder, based on the seller's conduct, if that recovery exceeds the amount paid by the consumer.

(FTC Confirmation, 84 Fed. Reg. at p. 18713; fn. omitted.)

In declining to alter the Holder Rule to allow unlimited recovery of attorney fees, the FTC exercised the full regulatory authority Congress delegated to it. That decision was not a mere "comment" as Pulliam repeatedly mischaracterizes it. (See Ans. Brief, 12, 22-2432, 35, 42-42-51.) Nor was it just an interpretation of the Holder Rule. The decision not to modify the Rule to allow unlimited recovery of attorney fees was a substantive rule-making decision which, as shown above, must be followed. The decision was not arbitrary or capricious. Instead, it was a reasonable policy choice reconciling competing values.

B. Even If Deemed An Interpretative Rule, Deference Is Due The FTC Confirmation As It Satisfies *Kisor's* Test

Even if the FTC Confirmation is treated as an interpretative rather than a substantive rule, the Court should defer to it since the Confirmation easily satisfies *Kisor's* refined test for *Auer* deference.

1. The FTC Confirmation Stated The FTC's Official Position

The FTC Confirmation unquestionably stated the FTC's authoritative, official position on the Holder Rule's meaning. It "emanate[d] from those actors, using those vehicles, understood to make authoritative policy in the relevant context." (*Kisor*, 139 S.Ct. at p. 2416.)

The FTC Confirmation was published by a unanimous vote of all five FTC Commissioners.[17] The FTC Commissioners are the actors "understood to make authoritative policy" for the FTC. (See 15 U.S.C. § 41; 16 CFR §§ 0.1, 0.8; see *Humphrey's Executor v. United States* (1935) 295 U.S. 602, 624.)

The FTC Confirmation was no mere "ad hoc statement not reflecting the agency's views."[18] (*Kisor*, 139 S.Ct. at p. 2416.)

2. The FTC Confirmation Implicates The FTC's Expertise

The FTC Confirmation also "implicate[d] the [FTC's] substantive expertise." As already mentioned, Congress has delegated to the FTC the authority to proscribe unfair or deceptive practices by regulation as well as by administrative proceedings and court suits.[19] (15 U.S.C. §§ 45(a)(2), (b), 53(a), 57a(a)(1)(B), 57b(a).)

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[17] FTC Confirmation, 84 Fed.Reg. 18711; FTC Press Release, FTC Completes Review of Holder Rule (May 2, 2019), publicly available at https://www.ftc.gov/news-events/press-releases/2019/05/ftc-completes-review -holder-rule.

[18] *See Spikener*, 50 Cal.App.5th at p. 159 ("The Rule Confirmation was issued by the FTC and published in the Federal Register, and was indisputably the FTC's official position.").

[19] "Interpretation of the Holder Rule, which provides that taking a consumer credit contract without the prescribed language is an unfair or deceptive act or practice, falls within the substantive expertise of the FTC. (See 15 U.S.C.

(Fn. cont'd)

The FTC's authority and expertise also extend to determining the scope of the appropriate remedy for an unfair or deceptive practice that it has found.

> The [FTC] is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

(*Jacob Siegel Co. v. FTC, supra,* 327 U.S. at pp. 612-613.)

The FTC employed its substantive expertise in devising remedies for unfair trade practices in initially adopting the Holder Rule. It exercised that same expertise in deciding whether to modify or clarify the Holder Rule's application to attorney fee awards when it issued the FTC Confirmation.

Contrary to the Court of Appeal's reasoning, "[r]esolution of the issue [did not] turn on the particular state statute providing for attorney fee recovery at issue."[20] (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.) The issue before the FTC was what its own Holder Rule meant and whether the Rule should be modified to allow unlimited recovery of attorney fees against

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§ 45 [empowering the FTC to prevent the use of "unfair or deceptive acts or practices in or affecting commerce"].)" (*Spikener*, 50 Cal.App.5th at p. 159.)

[20] Pulliam espouses a variant of this argument, claiming that the FTC Confirmation found that "holders cannot be liable for attorney's fees regardless of state law," thus requiring a consideration of state laws that lay outside the FTC's expertise. (Ans. Brief, 44-45.) The premise to the argument is wrong. The FTC Confirmation clarified that the Holder Rule's limitation on recovery applies to attorney fee awards on claims brought against the holder under the Holder Rule. It did not purport to limit holders' liability for attorney fee awards in connection with state law claims that are not brought against the holder under the Holder Rule.

holders. That did not turn on any facts about particular state attorney fee statutes,[21] but rather on the meaning of the word "recovery" and the FTC's weighing of competing policies in fashioning its remedy for the unfair trade practice it had found.

The Court of Appeal and Pulliam also err in asserting that the FTC did not exercise substantive expertise because no commenter submitted "data on the costs and benefits to consumers or businesses in different jurisdictions based on the availability of attorney fees." (*Pulliam, supra,* 60 Cal.App.5th at p. 420; Ans. Brief, 45.) No data is needed to construe the FTC Holder Rule's words—as the Court of Appeal's own opinion demonstrates. Nor is data needed to weigh and reconcile the competing values that led the FTC to limit recovery under the Holder Rule. Moreover, as the United States Supreme Court recently pointed out:

> [T]he FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. … In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.

(*FCC v. Prometheus Radio Project* (2021) 141 S.Ct. 1150, 1160; citations omitted.)

[21] The Court of Appeal's own interpretation of the Holder Rule proves the point. It cites no state statute. It holds that "recovery" does not include *any* attorney fee award, whether or not intended to be punitive or compensatory. (See *Pulliam, supra,* 60 Cal.App.5th at pp. 413-416.)

3. The FTC Confirmation Reflected The FTC's Fair And Considered Judgment

The Court of Appeal asserted that the FTC Confirmation does not reflect the FTC's "fair and considered" judgment because it "followed a request for comments that did not mention attorney fees," which in the Court of Appeal's view rendered the FTC's consideration of the issue "informal." (*Pulliam, supra,* 60 Cal.App.5th at p. 420.) Pulliam echoes that argument. (Ans. Brief, 47.)

The assertion is wrong. *Kisor* states that the "fair and considered" judgment test means "that a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalizatio[n] advanced' to 'defend past agency action against attack.' " (*Kisor, supra,* 139 S.Ct. at p. 2417.) Plainly, the FTC Confirmation was not a litigating position, post-hoc rationalization or defense of past FTC action. That is enough to satisfy the "fair and considered" judgment test.

Formal proceedings are not required before deference is given administrative agency interpretations. (See *id*., at p. 2416 (deference tests "must recognize a reality of bureaucratic life").) And, the FTC's review of the Holder Rule was formal in any event, closely adhering to all Administrative Procedure Act requirements. (See 5 U.S.C. § 553(b)-(d).) The request for comments was not required to specifically mention attorney fees, and its more general call for comments on "modifications, if any, [that] the Commission [should] make to the Holder Rule to increase its benefits to consumers" did not transform the official rulemaking proceeding into an informal proceeding. (See FTC Request, 80 Fed.Reg. at p. 75019.)

4. The FTC Confirmation Created No Unfair Surprise

The FTC Confirmation passes *Kisor's* final test as well. It created no " 'unfair surprise' to regulated parties." (*Kisor*, *supra*, 139 S.Ct. at p. 2418.) Consumers and their attorneys are not "regulated parties." The Confirmation "imposed [no] retroactive liability on" them. (*Ibid.*)

Since the FTC had not previously addressed the issue and judicial opinions on the subject were divided (*Pulliam*, *supra*, 60 Cal.App.5th at pp. 410-411), no enforceable reliance interests could have been formed based on the unsettled state of the law or on current practice in any particular jurisdiction. (See *Vazquez v. Jan-Pro Franchising Internat., Inc*. (2021) 10 Cal.5th 944, 953-957.) *Pulliam's* contrary assertion is simply wrong. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 420.)

5. The FTC Confirmation Also Satisfies The Reasons For *Auer* Deference

Before formulating its four-part test for *Auer* deference, *Kisor* explains the reasons why courts defer to administrative agencies' interpretations of their own regulations. Each of those reasons supports deference to the FTC Confirmation.

First, "the agency that promulgated a rule is in the 'better position [to] reconstruct' its original meaning." (*Kisor*, *supra*, 139 S.Ct. at p. 2412.) Pulliam argues that this reason does not support deference because "lots of time [44 years] has passed between the rule's issuance and its interpretation." (*Ibid.*; Ans. Brief, 48.) But that argument ignores the fact that the FTC reviewed the Holder Rule in 2016-2019, contemporaneously with its consideration of and eventual publication of the FTC Confirmation. (See pp. 25-28 above.) In that review, the FTC could have modified the Rule to allow for unlimited recovery of attorney fees if it agreed with commenters

espousing Pulliam's view that fee recovery was essential to enforcement of the consumer protections the Rule was intended to provide. The FTC did not do so. It made that policy choice for a second time and clarified the existing Rule's meaning at the same time.

Second, "*Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.' " (*Kisor, supra,* 139 S.Ct. at p. 2413.) Having delegated rule-making authority to the FTC in the first place, Congress presumably wants the FTC, not the courts, to exercise those judgment calls based on the FTC's assessment of the relevant policy concerns. (*Ibid*.)

Here, Pulliam's and the Court of Appeal's principal argument is one based on policy. They claim that unless debtors can collect their full attorney fees from the holder, the consumer protection objective of the FTC Holder Rule cannot be achieved. (*Pulliam, supra,* 60 Cal.App.5th at p. 416; Ans. Brief, 10, 28, 31, 38-40.) Surely, Congress would want the FTC to decide the merits of that policy question, not the courts. " '[D]ecisions … about how best to construe an ambiguous term in light of competing policy interests' should not be shifted from 'the agencies that administer the statutes to federal courts.' " (*Spikener, supra,* 50 Cal.Aapp.5th at p. 106, quoting *Arlington v. FCC* (2013) 569 U.S. 290, 304 .)

Third, *Auer* deference "reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules." (*Kisor, supra,* 139 S.Ct. at p. 2413.) Uniformity of interpretation is a particularly strong reason for applying *Auer* deference here. The FTC Confirmation achieves national

uniformity of interpretation.[22] By contrast, having courts decide the same issue has led to a patchwork of conflicting results under the same regulation. (See *Pulliam, supra,* 60 Cal.App.5th at p. 411; TDAF Opening Brief, 14-15; Ans. Brief, 17-19.) Because most Holder Rule cases arise in state court, leaving this issue to the courts leads to even greater lack of uniformity than is true of other federal regulations interpreted by federal courts. Compared with the 12 federal circuits there are 50 states, each with its own set of intermediate appellate courts that may disagree, as California's have.

In short, each of the reasons for *Auer* deference applies here. The Court should defer to the FTC Confirmation.

V.

THE FTC HOLDER RULE PREEMPTS SECTION 1459.5

This Court granted review only of the issue raised by TDAF's petition, not Pulliam's answer. If the Court, nevertheless, reaches Pulliam's issues, it should follow *Spikener* in holding that the FTC Holder Rule preempts Civil Code section 1459.5.

The Supremacy Clause (U.S. Const., art. VI) makes " 'federal law paramount, and vests Congress with the power to preempt state law.' " (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059; citation omitted.)

"Federal regulations have no less preemptive effect than federal statutes." (*Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta* (1982) 458 U.S. 141, 153; accord: *Hillsborough County v. Automated Medical Labs., Inc*. (1985)

[22] See FTC Statement of Basis and Purpose, 40 Fed. Reg. at p. 53521 ("Proponents of the rule emphasized a need for uniformity of protection. They believe that a comprehensive trade regulation rule, uninfluenced by local pressure, would be a major step in achieving this goal.").

471 U.S. 707, 713; *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814 ("*Olszewski*").)

Congress or a federal regulatory agency may expressly preempt state law. Or, "courts may infer preemption under one or more of three implied preemption doctrines: conflict, obstacle, or field preemption." (*Brown v. Mortensen, supra*, 51 Cal.4th at p. 1059.)

"[C]onflict preemption will be found when simultaneous compliance with both state and federal directives is impossible." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936; see also *Olszewski*, 30 Cal.4th at p. 815; *Spikener*, 50 Cal.App.5th at p. 161.) Obstacle preemption occurs when a state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67; see also *Quesada v. Herb Thyme Farms, Inc*. (2015) 62 Cal.4th 298, 312.)

Both conflict and obstacle preemption bar enforcement of section 1459.5.

A. Section 1459.5 Is Conflict Preempted

As already explained, the FTC Holder Rule's second sentence states that the debtor's "recovery," including attorney fees, from the holder cannot exceed the amount the debtor paid under the contract. (See pp. 15-24 above; FTC Confirmation, 84 Fed. Reg. at p. 18713.)

Section 1459.5 *directly* contradicts that limitation. It provides that "[a] plaintiff who prevails on a cause of action against a defendant named pursuant to [the Holder Rule] … 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."

Thus, where the Holder Rule provides that recovery of attorney fees is capped at the amount the debtor paid under the contract, section 1459.5 says the opposite; namely, fee recovery is not capped.

Attorney fee recovery cannot be both limited and unlimited, capped and uncapped. The FTC has decreed that attorney fee recovery under its Holder Rule is limited, capped. Section 1459.5 states the opposite, allowing recovery of attorney fees beyond the Holder Rule's limit or cap. For that reason, the statute is conflict preempted.

In *Olszewski*,30 Cal.4th 798, this Court held federal law preempted California statutes under similar circumstances. There, Medicaid statutes and regulations limited a heath care provider's recovery from the patient to nominal amounts even when a third-party tortfeasor was found liable for the injuries the provider had treated. (*Olszewski*, *supra*, 30 Cal.4th 798 at p. 820.) However, California statutes allowed a provider to recover the full cost of its services from any judgment, award, or settlement the patient obtained from the tortfeasor. (*Id.*, at pp. 805, 820.) Because the state laws "allow the provider to recover more than these cost-sharing charges from the beneficiary, they cannot coexist with federal law," this Court reasoned, holding the state statutes were, therefore, preempted. (*Id.*, at p. 820; *Spikener*, 50 Cal.App.5th at p. 161.)

In the same way, section 1459.5 allows the debtor to recover more attorney fees from the holder than the Holder Rule permits, so it "cannot coexist with federal law," and thus is conflict preempted.

> [T]o the extent section 1459.5 authorizes a plaintiff's total recovery—including attorney fees—for a Holder Rule claim to exceed the amount the plaintiff paid under the contract, it directly con-

> flicts with the Holder Rule and is therefore pre-empted.

(*Spikener,* 50 Cal. App.5th at pp. 162-163.)

B. Section 1459.5 Is Obstacle Preempted

Section 1459.5 also "stands as an obstacle to the accomplishment and execution of [the Holder Rule's] full purposes and objectives" and is pre-empted for that additional reason. (*Hines v. Davidowitz, supra,* 312 U.S. at p. 67.)

The Holder Rule's "full purposes and objectives" are to impose only limited liability on holders for the seller's wrongs. The Rule's second sentence expressly limits holders' liability under the Rule. (See FTC Guidelines, 41 Fed. Reg. at p. 20023.) By authorizing added recovery against the holder, section 1459.5 stands as an obstacle to the Rule's purpose of imposing only limited liability, and so is obstacle preempted.

C. Pulliam's Contrary Arguments Lack Merit

Trying to show that *Spikener* was wrongly decided, and that section 1459.5 is not preempted, Pulliam raises a series of meritless arguments.

First, Pulliam argues that the FTC is not authorized to bar state laws. (Ans. Brief, 50-51, 54.) She is wrong. The only authority she cites for that proposition is *California State Bd. of Optometry v. FTC* (D.C. Cir. 1990) 910 F.2d 976, 980 which concerned the agency's exercise of authority over a State as a sovereign, not preemption of state statutes that conflict with federal regulations.

Pulliam also errs in suggesting that the FTC Holder Rule or FTC Confirmation deters consumers from pursuing their rights or limits their recovery under California's consumer protection statutes, such as the Song-Beverly

Act and Consumers Legal Remedies Act—or bars California's Legislature from enacting statutes that protect consumers or permit them to recover attorney fees in enforcing those statutes.[23] (Ans. Brief, 26-28, 31, 37, 50-52.)

Nothing in the FTC Holder Rule or the FTC Confirmation prevents California's Legislature from enacting consumer protection statutes or from providing state law remedies for violation of those statutes.[24] But here, Pulliam brought claims under state statutes, the Song-Beverly Act and Consumers Legal Remedy Act, that, while they allow recovery of damages

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[23] Oddly, as support for her suggestion, Pulliam cites a sentence from the FTC Confirmation which states when the Holder Rule does *not* limit recovery; namely, when "a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct." (Ans. Brief, 51, citing FTC Confirmation, 84 Fed. Reg. at p. 18713.) Plainly, the sentence allows rather than bars state legislation. And, the following sentence, which Pulliam never quotes, makes it clear that the Holder Rule's second sentence limits recovery only " if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice." (FTC Confirmation, 84 Fed. Reg. at p. 18713.)

[24] Pulliam's brief also repeatedly mischaracterizes two snippets from the FTC Holder Rule's regulatory history. First, she states that the FTC encouraged states to enact consumer protection statutes, citing the Statement of Basis and Purpose's suggestion that the Holder Rule "will serve as a model for further state legislation." (See Ans. Brief, 10, 15, 44-45, 48, 53; citing FTC Statement of Basis and Purpose, 40 Fed. Reg. at p. 53521.) Read in context, the suggestion concerned only state laws limiting or abolishing the holder in due course doctrine and waiver of defense clauses, not consumer protection laws in general. Second, Pulliam also cites the FTC Guidelines for the proposition that state law "controls." (Ans. Brief, 16, 45, 48-49, 53; FTC Guidelines, 41 Fed. Reg. at pp. 20023-20024.) The FTC Guidelines say only that state law governs the debtor's claims and defenses against the seller, which the Holder Rule's first sentence "preserves" against the holder. The Guidelines do not state or imply that state law governs the amount of the holder's liability on those state law claims.

and full attorney fees against the seller, do not provide for any remedy against the holder. (See Civ. Code, §§ 1780(a), (e), 1794(a), (d).) To impose liability on the holder for the seller's violation of those statutes, Pulliam had to invoke the FTC Holder Rule—and it is for that reason only that her recovery (including any attorney fee award) is limited.[25]

Second, Pulliam asserts that section 1459.5 reinstates pre-*Lafferty II* practice in California courts and "reflects California's interest in protecting its consumers and deterring fraud." (Ans. Brief, 54.) The argument is irrelevant. If there was a prior practice of awarding unlimited attorney fees, it was inconsistent with the Holder Rule and legally improper. Also, federal regulations preempt conflicting state laws even when those laws promote strong state interests such as consumer protection and fraud prevention.[26]

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[25] "[T]he Rule Confirmation expressly preserves a state's ability to authorize attorney fees against holders *independent of Holder Rule claims*, and clarifies that such fee claims are not constrained by the Holder Rule's limitation on recovery. (*Spikener*, 50 Cal.App.5th at p. 162; citation omitted.) Thus, the FTC did not "block[] state laws on attorney fees," as Pulliam erroneously argues. (Ans. Brief, 51, 52, 54, 55.)

[26] *De Canas v. Bica* (1976) 424 U.S. 351, 357 ("Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation."); *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 105-106 ("We can no longer adhere to the aberrational doctrine … that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration."); *id.*, at p. 108 ("We recognize that 'the States have a compelling interest in the practice of professions within their boundaries …' [b]ut under the Supremacy Clause, … ' "any state law … which interferes with or is contrary to federal law, must yield." 'We recognize that 'the States have a compelling interest in the practice of professions within their boundaries …' [b]ut under the Supremacy Clause, … ' "any state law … which interferes with or is contrary to federal law, must yield." ' ").

Third, Pulliam argues that *Spikener* wrongly relied on *Olszewski*. (Ans. Brief, 55.) Contrary to Pulliam's argument, *Olszewski* cannot be distinguished on the ground that California agreed to abide by federal Medicare statutes and regulations. That fact played no part in this Court's stated reasons for holding the state statutes preempted. Moreover, California has also agreed to abide by federal law, including the FTC Holder Rule. (See Cal. Const., art. III, § 1 ("the United States Constitution is the supreme law of the land").)

Pulliam is also wrong in arguing that there is no "physical impossibility"[27] in complying with "the FTC's *minimum* protections and California's more robust ones" and in urging that section 1459.5 can escape preemption under the reasoning employed in *Viva!*, *supra*, 41 Cal.4th 929 and *Jankey v. Lee* (2012) 55 Cal.4th 1038 ("*Jankey*"). (Ans. Brief, 55-56.)

Pulliam's two cases are easily distinguishable. *Viva!* involved an *absence* of federal regulation of importation of kangaroo products. (*Viva!*, 41 Cal.4th at p. 945 ("Adidas asserts preemption by nonregulation.").) A state law forbidding importation of such products did not conflict with the federal non-regulation since federal law did not make importation lawful, but merely did not prohibit it. (*Id.*, at p. 952.)

This case involves nothing similar. Here, there is federal regulation: the FTC Holder Rule. Moreover, that federal regulation expressly prohibits

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[27] "Physical impossibility" is not the sole test of federal preemption, as *Olszewski* shows. (*Olszewski*, 30 Cal.4th at p. 820; see also *Arizona v. United States* (2012) 567 U.S. 387, 399 ("[S]tate laws are pre-empted when they conflict with federal law. [Citation.] This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' [citation] *and* those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ").)

any recovery by the debtor against the holder under the Rule—"including any recovery based on attorneys' fees—[that] exceed[s] the amount the consumer paid under the contract." (FTC Confirmation, 84 Fed. Reg. at p. 18713.) Section 1459.5 permits a consumer to recover attorney fees in excess of that federal limit. By permitting what the FTC Holder Rule and FTC Confirmation prohibit, section 1459.5 directly conflicts with federal law, and so is preempted.

Though Pulliam cites it (Ans. Brief, 55-56), *Jankey* undermines rather than supports her argument. *Jankey* concerned Civil Code section 55,[28] which creates a new cause of action under state law, and allows recovery of attorney fees by the party prevailing on that cause of action, whether plaintiff or defendant. This Court held that section 55's reciprocal attorney fee clause did not conflict with and was not preempted by the ADA's plaintiff-only fee provision.

> The fee award here is not in any meaningful sense for or on account of having to defend against an ADA claim, but instead a consequence of Jankey's purely voluntary decision to seek additional state remedies. State law does not declare ADA fees compensable, only section 55 fees; it does not dictate an outcome at odds with federal law.[15]
>
> [15] Jankey repeatedly describes section 55 as a law imposing fees "for" a nonfrivolous ADA action. Such a law *would* be preempted; a state law that provided state court defendants with prevailing party fees for defending against

[28] Section 55 provides that "[a]ny person who is aggrieved or potentially aggrieved by a violation of [various California statutes, some of which incorporate the federal Americans with Disabilities Act ("ADA") provisions] may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

> federal ADA access claims under 42 United States Code section 12182 would, in fact, conflict with federal law. But section 55 does no such thing.

(*Jankey*, 55 Cal.4th at p. 1053.)

Unlike section 55, section 1459.5 does not separately prohibit conduct or create a state law claim, attaching to it a remedy beyond that allowed under a federal statute. Instead, section 1459.5 purports to grant an added remedy to a consumer who prevails under the FTC Holder Rule. Further, that added remedy is one which is contrary to and expressly precluded by the FTC Holder Rule. Thus, section 1459.5 is exactly the sort of statute that *Jankey's* footnote 15 said would be preempted. (*Jankey*, 55 Cal.4th at p. 1053 n. 15.)

Jankey also illustrates the fallacy in Pulliam's argument that section 1459.5 states a more robust California rule that can coexist with the FTC Holder Rule's "minimum protections." (Ans. Brief, 55.) Unlike section 55, section 1459.5 did not create a new, separate state law claim. Had it done so, it would not be preempted. Instead, section 1459.5 purports to change the remedies available under the FTC Holder Rule itself. Hence, it conflicts with and is preempted by that Rule.

Finally, Pulliam offers what she calls "practical considerations" that counsel against preemption of section 1459.5. (Ans, Brief, 57-61>) Those "considerations" are merely a retread of the public policy arguments that *Spikener* correctly refused to consider. (*Spikener*, 50 Cal.App.5th at p. 160.) Public policy and "practical considerations" are for the FTC to resolve. It did so. This Court exercises no authority to second-guess the FTC's policy choices.

This Court should follow *Spikener's* lead and hold that the FTC Holder Rule preempts Civil Code section 1459.5.

VI.

CONCLUSION

For the reasons stated above, the Court should hold that the FTC Holder Rule's second sentence limits all monetary recovery from the holder, including attorney fees as well as damages, on claims or defenses based on seller misconduct that the Holder Rule allows the debtor to assert against the holder.

If it chooses to address the issue, the Court should also hold that the FTC Holder Rule preempts Civil Code section 1459.5.

DATED: November 16, 2021

SEVERSON & WERSON
A Professional Corporation

By: */s/ Jan T. Chilton*
Jan T. Chilton

Attorneys for Amici Curiae American Bankers Association, American Financial Services Association, Consumer Bankers Association and California Financial Services Association

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.520(c)(1)]

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the foregoing brief contains 9,465 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: November 16, 2021

/s/ Jan T. Chilton
Jan T. Chilton

PROOF OF SERVICE

Pulliam v. TD Auto Finance

California Supreme Court, No. S267576

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On November 16, 2021, I served true copies of the **Amicus Brief Supporting TD Auto By American and Consumer Bankers Associations, American and California Financial Services Associations** on the interested parties in this action as follows:

[SEE ATTACHED SERVICE LIST]

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I electronically served the document(s) described above via **TrueFiling** system on the recipients designated on the Transaction Receipt located on the **TrueFiling** website (https://www.TrueFiling.com) pursuant to the Court Order establishing the case website and authorizing service of documents.

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

Executed on November 16, 2021, at San Francisco, California.

Sandra Chao

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California Supreme Court, No. S267576

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