NO. 18-1012

In the Supreme Court of the United States

PATRICK LAFFERTY and MARY LAFFERTY,

Petitioners,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Third District

REPLY BRIEF FOR PETITIONERS

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The Bank opens its opposition claiming that "the real issue here is attorney fees."

To the contrary, the real issue here is that the Third District Court of Appeal is in conflict with this Court's mandates in *Ziglar v. Abbasi*, 582 U.S. ___, 137 S. Ct. 1843 (2017) and *Alexander v. Sandoval*, 532 U.S. 275, 286-287(2001), because the court decided that the Holder Regulation, 16 C.F.R. section 433.2, created a new implied cause of action for consumers.

The rebellious lower court thereby has explicitly refused to follow this Court's instructions about when to imply a private cause of action under a federal statute. Grant of certiorari is appropriate.

Supreme Court Rule 10(c) provides in relevant part:

> . . . A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . .
>
> (c) a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As well the Third District disregarded the intent of the FTC stated by its Advisory Opinion about its rule, "On Preservation of Consumers' Claims and Defenses." The FTC stated (App.74a),

> The rule does not create new rights for the consumer against the seller. Claims and defenses of a consumer, assertable against a seller under state law, remain unchanged under the rule.

At once the Bank argues the Third District decision is unimportant because "the Holder Rule has not attracted much judicial attention," while it concedes that "millions of consumer credit contracts are written each year." (Opp.Br.16.) The holder notice is included in each of the millions of contracts and not only in California. The Bank thus admits that the Third District decision is of wide importance, because the decision will influence the interpretation of millions of consumer contracts throughout the country.

The Bank argues that despite its use of explicit language to the contrary (App.14a)[1], the Third District did not hold that 16 C.F.R. section 433.2 creates a new cause of action, (Opp.Br.3) because it referred to the decision in *Holloway v. Bristol-Myers Corp.*, (D.C. Cir. 1973) 485 F.2d 986, 987.

The Bank misstates the Third District opinion. The court cited to *Holloway* as support for the proposition that the FTC, not consumers, enforces the FTC Act. That proposition is unrelated to the Third District's primary holding, that, "This new cause of action, how-

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[1] "In addition to preventing the creditor from continuing to collect on a debt for a defective product or deficient service, the FTC also provided consumers with a new cause of action against their creditors. This new cause of action allows consumers to assert against the creditors "all claims and defenses which the debtor could assert against the seller of goods or services" to which the Holder Rule applies. (40 Fed. Reg. 53506)"

ever, was expressly constrained," (App.14a) and the Laffertys could therefore not recover their attorney fees.

The California Third District Court of Appeal expansively and wrongly decided that the "Holder Rule" is not of a contractual nature. Rather, the Court discerned that the "Holder Rule" created a "new [implied] cause of action."

This interpretation of the "Holder Rule" disregards the *Notice's* existence as an individual term of contract. In fact the "Holder Rule" as pronounced by the FTC, suggests inclusion of additional contract language that has no existence apart from a RISC.

The holder *Notice* is a promise of a limited refund to the consumer. That is, the ordinary consumer-and here the Laffertys-reading their contract and seeing the *Notice's* 10 point bold face type, would conclude that they could have all their money back if they got a lemon.

But the Third District's interpretation of 16 CFR section 433.2 as placing a "cap" on the Laffertys' recovery for their attorneys' fees unnecessarily creates a federal Constitutional issue. This interpretation of the "Holder Rule" requires that the FTC intended to preempt California Consumer law: Specifically, to preempt the California *Consumers Legal Remedies Act*, *Civil Code* section 1780(e) that mandates award of costs and attorney fees to a prevailing consumer. The Laffertys assert that the FTC intended no such thing.

Litigation between the Laffertys and Wells Fargo Bank has been continuously ongoing since 2006. There have been motions and a trial and four appeals and

petitions for rehearings and a petition for review and all of the acts and complications attendant to 13 years of litigation. Of course such sustained litigation will consume a huge number of attorney hours and will generate a large fee. The size of the claimed fee is not the issue in this petition-it is the conflicting nature of the Third District Court of Appeal's opinion with this Court's prior decisions. *See*, *e.g., SEC v. Otis & Co.*, 338 U.S. 843 (per curiam).

Respondent asserts that the Laffertys "did not press their implied right of action argument in the Court of Appeal." (Opp.Br.3) The Bank argues that because the Third District did not use the word "pre-empt," it has no preemptive effect. (Opp.Br.15) Both arguments are wrong.

The Court of Appeal decision holding that the "FTC provided consumers with a new cause of action" (App.14a) was a bolt from the blue. Such a theory was not briefed by any party. California law provides that in similar circumstances, the court of appeal should offer an opportunity to brief. (*See*, *Government Code* section 68081; California *Rules of Court*, Rule 8.500(c)(2).) In this case the Third District did not so offer.

After the decision the Laffertys timely argued in their Petition for Rehearing:

> 6. The court wrongly invented a new "cause of action," *e.g.*, "per Holder Rule." The Holder Regulation creates no "cause of action." If the bank chooses to include the *Holder Legend* in its RISC, it creates a consumer contract right enforceable under contract law (*Opinion*, pps.11, 12, 15, 28);

The Laffertys briefed that point at *Petition* pps.15-16. In their *Petition for Review* to the California Supreme Court, the Laffertys argued that, "The Holder Rule Creates No New Cause of Action in California," stating the assertion as "Issue 4" for review and briefing the issue between pages 31-35.

Respondent's contention that petitioners failed to preserve their points for review is incorrect.

Finally the Bank's observation that the Third District failed to use the word "preempt" in its opinion, does not mean that the opinion lacks preemptive effect. The court necessarily found a preemption when it held that the "Holder Rule " cap precluded the Laffertys from their attorney fee recovery mandated by the California *CLRA.*

CONCLUSION

The petition should be granted and the order of the appellate court refusing to award a reasonable attorney fee recovery under California law should be reversed.

Should the Court be unwilling to allow plenary review, it should consider granting the Writ, vacating the decision below and remanding for further proceedings.

Respectfully submitted,

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