No. 22-

IN THE
Supreme Court of the United States

TD BANK, N.A.,

Petitioner,

v.

TANIA PULLIAM, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

PETITION FOR A WRIT OF CERTIORARI

Matthew A. Fitzgerald
Caroline S. Burton
Kathryn M. Barber
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219

Tanya L. Greene
MCGUIREWOODS LLP
355 South Grand Avenue
Suite 4200
Los Angeles, CA 90071

Jonathan Y. Ellis
Counsel of Record
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

Counsel for Petitioner

QUESTION PRESENTED

The Holder Rule, 16 C.F.R. § 433.1 *et seq.*, requires that all consumer credit contracts used to purchase or lease goods or services "in or affecting commerce" include a provision that makes any holder of the credit contract "subject to all claims and defenses which the debtor could assert against the seller" of the purchased goods or services. 16 C.F.R. § 433.2(a) (capitalization omitted). The provision makes the bank or other entity who finances a consumer transaction—or any subsequent assignee of the financing agreement—responsible for any seller misconduct in connection with the financed sale. The mandated provision further states, however, that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." *Id.* (capitalization omitted). The question presented is as follows:

Whether, and in what circumstances, the Holder Rule's limit on "recovery" by the debtor, 16 C.F.R. § 433.2(a), applies to, and thus caps, an attorney's fee award in a Holder Rule suit, asserting claims against a creditor based on seller misconduct.

PARTIES TO THE PROCEEDING

Petitioner in this Court is TD Bank, N.A. (TD Bank). Petitioner in the California Supreme Court and defendant in this case was TD Auto Finance LLC (TDAF), previously a wholly-owned subsidiary of TD Bank. On December 31, 2021, TDAF merged with and into TD Bank.

Respondents in this Court are Tania Pulliam, respondent in the California Supreme Court and plaintiff in this case, and HNL Automotive Inc., defendant in this case and non-participating respondent in the California Supreme Court.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner TD Bank is a national banking association and wholly-owned subsidiary of TD Bank US Holding Company, a Delaware corporation, which in turn is a wholly-owned subsidiary of TD Group US Holdings LLC, a Delaware limited liability company.

TD Group US Holdings LLC is a wholly-owned subsidiary of The Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol "TD". No publicly held company directly owns more than 10% of the stock of TD Bank.

RELATED PROCEEDINGS

This case arises from and relates to the below proceedings in the California Superior Court for the County of Los Angeles, the California Court of Appeal, and the California Supreme Court:

- *Pulliam v. HNL Automotive Inc., et al.*, No. BC633169 (Cal. Sup. Ct. Aug. 29, 2018);
- *Pulliam v. HNL Automotive Inc., et al.*, No. B293435 (Cal. Ct. App. Jan. 29, 2021);
- *Pulliam v. HNL Automotive Inc., et al.*, No. B309224 (Cal. Ct. App., stayed July 20, 2021);
- *Pulliam v. HNL Automotive Inc., et al.*, No. S267576 (Cal. May 26, 2022).

There are no other proceedings in state or federal trial or appellate courts directly related to this case under this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

Other

INTRODUCTION

For nearly 50 years, the Federal Trade Commission's (FTC's) Holder Rule has embodied a compromise. The holders of loans for consumer goods like cars, furniture, and appliances are made liable for the wrongdoing of the sellers in connection with the financed sales, even if the creditor had no involvement in, and lacked any knowledge of, the misconduct. But any "recovery" from the creditor under the Rule is limited to the amount of money the consumer has paid on the loan. 16 C.F.R. § 433.2(a) (capitalization omitted). A buyer is thus not required to pay on a loan if a seller fails to perform—but, at the same time, the creditor is not made the wholesale insurer of seller wrongdoing.

The California Supreme Court has dismantled that compromise. In this case, a jury awarded Respondent Tania Pulliam the full amount of the money she paid on a consumer loan—about $22,000—in damages against the seller and Petitioner TD Bank, based on misrepresentations by the seller (and the seller alone). The trial court then awarded an additional almost *$170,000* in attorney's fees against both defendants, on the theory that the award was not "recovery" within the meaning of the Holder Rule. The California Supreme Court affirmed. Under the court's decision, the Holder Rule imposes no limit on attorney's fee awards under the typical state-prevailing party statute. And creditors are suddenly exposed to judgments for many times any benefit they might receive on consumer loans, based on third-party misconduct for which they bear no responsibility.

The California Supreme Court's decision squarely conflicts with the decisions of other state high courts to have considered the question and of the majority of lower courts across the country. It is inconsistent with the text, purpose, and history of the Holder Rule—as well as the FTC's own understanding until at least midway through this litigation. And by creating binding precedent in one of the Nation's major consumer markets—and potentially persuasive authority in other States—it threatens to substantially disrupt the consumer credit market and the availability of that credit to needy borrowers and honest retailers who depend on it. It warrants this Court's review.

OPINIONS BELOW

The opinion of the California Supreme Court (App., *infra*, 1-39) is reported at 13 Cal. 5th 127. The opinion of the California Court of Appeal (App., *infra*, 40-77) is reported at 60 Cal. App. 5th 396. The order of the California Superior Court awarding attorney's fees (App., *infra*, 78-87) is unreported but is available at 2018 WL 8333172.

JURISDICTION

The California Supreme Court issued its judgment on May 26, 2022. On August 17, 2022, Justice Kagan extended the time to file a petition for a writ of certiorari until September 23, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix, *infra*, 99-108.

STATEMENT OF THE CASE

A. Legal Background

1. The FTC promulgated the Holder Rule in 1975, in the wake of a dramatic increase in consumer credit contracts during the preceding decades. *See Promulgation of Trade Regulation Rule and Statement of Basis and Purpose*, 40 Fed. Reg. 53,506, 53,507 (Nov. 18, 1975) (noting the "five-fold increase in outstanding consumer credit [since] the year 1950"). Before the Rule's promulgation, a creditor that purchased a consumer debt was frequently considered under state law as a "holder in due course." *Id.*; *see* U.C.C. § 3-302(a) (1952) (defining "holder in due course"). The Holder Rule was designed to address the FTC's concerns with that state-law doctrine's application in the consumer context.

Under the holder-in-due-course doctrine, the creditor would receive a consumer loan "free and clear of any claim or grievance that the consumer may have with respect to the seller . . . provided [the creditor] ha[d] no knowledge of seller misconduct." 40 Fed. Reg. at 53,507. Even if the *seller* failed to satisfy its obligations from the sale, that failure did not affect the buyer's reciprocal obligation to pay the *creditor* under the contract that financed the sale. *See* U.C.C. § 3-305(b) (1952). As the FTC observed, because the buyer

was "prevented from asserting the seller's breach of warranty or failure to perform against the assignee" of the loan, "the consumer los[t] his most effective weapon" to protect against "disreputable and unethical sales practices" by sellers—"nonpayment." 40 Fed. Reg. at 53,509.

The FTC sought to change that with the Holder Rule. Pursuant to its authority under Section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45, the FTC found it "unfair" for "a seller to employ procedures in the course of arranging the financing of a consumer sale which separate the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised." 40 Fed. Reg. at 53,522. To "preserv[e]" those "consumer claims and defenses," the Holder Rule declares it "an unfair or deceptive act or practice" within the meaning of 15 U.S.C. § 45(a)(1) for a seller to "[t]ake or receive a consumer credit contract which fails to contain the following provision":

> 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 pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

16 C.F.R. § 433.2(a) (capitalization altered).

In effect, the Holder Rule abolishes the holder-in-due-course doctrine, reconnecting the buyer's duty to pay to the seller's obligation to perform "by . . . contract

modification." 40 Fed. Reg. at 53,524. The required provision for consumer credit contracts permits the buyer to assert against the creditor any claim or defense to repayment that she could have asserted against the seller had the seller originated and held the loan. At the same time, to *only* reconnect the duty to pay and obligation to perform—without imposing unlimited liability on the creditor for the seller's misconduct—the provision limits any recovery from the creditor to the amount that the buyer has paid on the consumer loan. *See* 16 C.F.R. § 433.2 (limiting the "recovery" from the creditor to "amounts paid by the debtor" under the contract).

The Holder Rule reflects the FTC's determination that the cost of seller misconduct should be "reallocate[d]" from the buyer to the creditor, who is "in a better position than the buyer to return seller misconduct costs to sellers, the guilty party." 40 Fed. Reg. at 53,523. By shifting the risk of loss to creditors and preserving a consumer's claims and defenses, the Holder Rule "provide[s] both a shield and a (small) sword to consumers, thus enabling them with a level of self-protection against creditor claims that they would not otherwise have." *Crews v. Altavista Motors, Inc.*, 65 F. Supp. 2d 388, 391 (W.D. Va. 1999).

2. This case concerns the Holder Rule's application to the recovery of attorney's fee awards from creditors in connection with claims asserted under the Holder Rule. The FTC has twice addressed that question in recent years.

a. In 2015, as part of its "regular review of all its regulations and guidelines," the FTC invited public comment on, among other things, "the overall costs and benefits, and regulatory and economic impact" of the Holder Rule and "[w]hat modifications, if any, should be made to the Holder Rule." *Rules and Regulations Under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses*, 80 Fed. Reg. 75,018, 75,018-19 (Dec. 1, 2015). The FTC received six comments addressing "whether the Rule's limitation on recovery to 'amounts paid by the debtor' allows or should allow consumers to recover attorneys' fees above that cap." *Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses*, 84 Fed. Reg. 18,711, 18,713 (May 2, 2019) (2019 Rule Confirmation). The FTC ultimately decided to "retain the rule without modification." *Id.* at 18,711.

The FTC explained that, as it currently stands, the Holder Rule limits the recovery of fees obtained under the Rule, but not recovery sought on independent state- or federal-law grounds. So, the Commission explained, "if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice," then "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." *Id.* at 18,713. On the other hand, "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." *Id.* The FTC found no basis for "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." *Id.*

b. Earlier this year—while this litigation was pending—the FTC returned to the issue. In January 2022, the Commission issued an advisory opinion addressing the Holder Rule's "impact on consumers' ability to recover costs and attorneys' fees." FTC, Commission Statement on the Holder Rule and Attorneys' Fees and Costs (Jan. 18, 2022) (2022 Advisory Op.) p. 1. Citing this case among others, the Commission noted that the issue had "arisen repeatedly," and that courts were divided on the question. *Id.* at 1 & nn. 1-2 (collecting cases).

At the outset, the FTC observed, seemingly consistent with the 2019 Rule Confirmation, that the "Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law." 2022 Advisory Op. 2. Where a separate state, local, or federal law provides for attorney's fees from creditors, "[n]othing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act" or that creditors should be exempt from those laws. *Id.*

The FTC further stated, again seemingly consistent with the 2019 Rule Confirmation, that the Holder Rule limits recovery only when "based on the Holder Rule Notice"; it "places no cap on a consumer's right to recover from the holder for other reasons." 2022 Advisory Op. 3. In elaborating on that statement, however, the FTC appeared to shift course from

its previous statements. In the 2022 opinion, the Commission offered that "in an action between a consumer and a holder, if the applicable law authorizes the consumer to recover costs or fees from parties that unsuccessfully oppose the consumer's claims or defenses, a prevailing consumer's right to recovery against the holder is not restricted by the Holder Rule Notice." *Id.* Instead, the FTC explained, only if "the applicable law permits assessing costs or attorneys' fees exclusively against the seller" would a fee award against the creditor be limited. *Id.*

The Commission insisted that, "[i]nsofar" as courts had "conclude[d] that the Holder Rule precludes state law from providing for costs or attorneys' fees against the holder, they misconstrue the Commission's [previous] statements." 2022 Advisory Op. 3. According to the 2022 opinion, "[n]either the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies." *Id.*

B. The Present Controversy

1. Respondent Tania Pulliam purchased a used vehicle from Respondent HNL Automotive Inc. for about $12,500, pursuant to a consumer credit contract that included the required Holder Rule notice. App., *infra*, 3-4. The contract was subsequently assigned to TDAF, now merged into Petitioner TD Bank, which became the "holder" of the contract. *Id.* at 4. HNL had advertised the vehicle as "Certified Pre-Owned" and represented that it had cruise control and six-way power-adjustable seats. *Id.* at 3-4. Pulliam later

learned that the car did not meet the requirements of the Certified Pre-Owned program or have the advertised features she needed due to a disability. *Id.* at 4.

Pulliam sued HNL in California state court, alleging that the dealership had falsely advertised the car's features and asserting six claims under California law. App., *infra*, 4. She asserted the same claims against TDAF under the Holder Rule. *Id.* The case was tried before a jury, which found for Pulliam on one claim, a breach of the implied warranty of merchantability under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1790 *et seq.* (Song-Beverly Act). App., *infra*, 4. That Act provides that "every sale of consumer goods that are sold at retail in [California] shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable." Cal. Civ. Code § 1792. The jury found that HNL violated that implied warranty and that the purchase contract was subsequently assigned to TDAF. App., *infra*, 93-94, 97. It awarded Pulliam damages in the amount of $21,957.25, for which the court ordered HNL and TDAF jointly and severally liable. *Id.* at 4, 97.

Pulliam filed a post-trial motion seeking attorney's fees under the Song-Beverly Act for more than seven times the amount of recovery—totaling $169,602. *See* App., *infra*, 4. Section 1794(a) of the Act supplies a "buyer of consumer goods" a private right of action to enforce the duties the Act imposes on sellers. Cal. Civ. Code § 1794(a). Subdivision (d) of the same section provides, in turn, that, if a "buyer prevails in an action under this section, the buyer shall be allowed by the

court to recover as part of the judgment . . . attorney's fees . . . reasonably incurred by the buyer in connection with the commencement and prosecution of such action." *Id.* § 1794(d). TDAF opposed, arguing among other things, that under the Holder Rule, it could be liable—in damages and fees—for no more than what Pulliam had paid under the consumer credit contract. The trial court granted Pulliam's motion for attorney's fees in full, amending the judgment to make HNL and TDAF jointly and severally liable for a final judgment of $221,240.76 in damages, attorney's fees, costs, and prejudgment interest. App., *infra*, 97-98.

2. The California Court of Appeal affirmed. App., *infra*, 40-77. The court observed that "[t]he parties wrestle with the final sentence of the Holder Rule" and its application to attorney's fee awards. *Id.* at 57. It noted that a "number of voices, including state and federal courts, the California Legislature, and the FTC, have all expressed opinions on the issue—many of them contradictory." *Id.* The Court of Appeal concluded that the term "recovery" in the Holder Rule does not include attorney's fees, and therefore the Rule's limitation on recovery did not apply to the fee award. *Id.* at 61-62, 77.[1]

---

[1] On appeal, Pulliam also cited Cal. Civ. Code § 1459.5, which was enacted after the attorney's fee award issued. *See* App., *infra*, 57. A prior Court of Appeal decision had held that the new provision was inconsistent with, and therefore preempted by, the Holder Rule. *See id.* at 58-59 (citing *Spikener v. Ally Financial, Inc.*, 50 Cal. App. 5th 151 (2020)). Because the Court of Appeal held here that the Holder Rule did not limit fees under Section 1794(d), it did not "address whether [S]ection 1459.5 independently applies." *Id.* at 77.

3. On petition from TDAF, the Supreme Court of California affirmed. App., *infra*, 1-39. The court acknowledged that "attorney's fees may be a type of 'recovery' in some contexts." *Id.* at 14. But it held that the Holder Rule's limitation on "'recovery hereunder' does not include attorney's fees for which a holder may be liable under state law, as long as the existence of such liability is not due to the Holder Rule extending the seller's liability *for attorney's fees* to the holder." *Id.* at 11 (emphasis added). It concluded that a fee award under the Song-Beverly Act was not limited because Section 1794(d) "contains no language limiting fee awards to sellers as opposed to any other parties against whom a buyer has prevailed" on a Song-Beverly Act claim. *Id.* at 32-33.

In reaching that conclusion, the California Supreme Court relied heavily on its reading of the Holder Rule's regulatory history and purpose. The court observed, for example, that the preamble to the Rule "do[es] not refer to attorney's fees." App., *infra*, 16. And it noted that guidance issued by the FTC's staff in 1976 explains that the Rule's limitation applies to "consequential damages and the like," but also does not discuss attorney's fees. *Id.* at 17-18. The court thus determined that the FTC must have "had damages in mind when limiting recovery," but found "no indication that attorney's fees were intended to be included within [the Rule's] scope." *Id.* at 19.

The California Supreme Court further reasoned that applying the Holder Rule's limitation on recovery to attorney's fees would impede some consumers' ability to pursue litigation against creditors. The court

noted that the FTC was aware that, under the pre-Holder Rule regime, legal costs imposed barriers to vindicating some consumers' claims against sellers. App., *infra*, 20-22. And the court emphasized that, under the new regime, the FTC "envisioned affirmative suits against creditors over seller misconduct" in some circumstances. *Id.* at 23. "Given th[o]se expectations," the court found it "unlikely that the FTC intended without comment or explanation to include attorney's fees in its limitation on creditor liability under the Rule." *Id.*

Finally, the California Supreme Court reasoned that the FTC "intended the [Holder] Rule to provide a minimum, not maximum, liability rule for the nation." App., *infra*, 30. "To be sure," the court acknowledged, "the FTC chose to limit creditor liability under the Holder Rule to amounts paid by the debtor under the contract rather than pass on all seller misconduct costs to creditors." *Id.* at 28. But it noted that the limitation applied only to "recovery *hereunder*" the Holder Rule. *Id.* The court thus reasoned that permitting consumers to obtain attorney's fees under state law in Holder Rule suits "is not at odds with the Holder Rule's purpose." *Id.*

REASONS FOR GRANTING THE PETITION

The California Supreme Court's decision in this case warrants this Court's review. The California court's interpretation of the Holder Rule is inconsistent with every other state high court to squarely address the question and creates a three-way conflict

among state courts of last resort on an important question of federal law. The California Supreme Court's decision, moreover, is also inconsistent with the federal regulation's text, history, and purpose, and eviscerates the careful compromise the Rule represents. By its own force, the decision implicates the rights of creditors and consumers in a myriad of transactions every year in one of the country's largest consumer markets and will affect many more beyond California if it manages to persuade other state courts; if left unreviewed, the decision threatens to disrupt settled expectations surrounding consumer transactions in a wide swath of industries, and to undermine the consumer credit market. This case provides an ideal vehicle for resolving the question presented because the California Supreme Court's judgment rests entirely on its resolution of the question presented. The petition for a writ of certiorari should be granted.

I. The California Supreme Court's Decision Conflicts With Decisions of Other State Courts of Last Resort.

Whether, and under what circumstances, the Holder Rule limits the amount of attorney's fees that may be awarded in Holder Rule litigation is the subject of an acknowledged conflict among state courts of last resort, as well as numerous other lower courts. Most courts to address the issue have correctly held that the Holder Rule limits fee awards that are based on a plaintiff's prevailing on substantive claims preserved by the Holder Rule, while one state high court has gone farther, holding that claims for attorney's fees are not even shifted to creditors by the Holder

Rule. The California Supreme Court has now effectively created a converse outlier position, under which many, if not the majority, of fee-shifting statutes will authorize unlimited awards against creditors in Holder Rule litigation. That square conflict warrants this Court's review.

1. The Nebraska Supreme Court's decision in *State ex rel. Stenberg v. Consumer's Choice Foods,* 755 N.W.2d 583 (2008), is a prominent example of the majority approach. That case involved a suit brought on behalf of Nebraska consumers against a food and appliance retailer that sold its products under installment contracts, as well as against a third-party creditor that had purchased many of those contracts. *Id.* at 483-85. The plaintiff alleged that the retailer had engaged in various deceptive practices and that the creditor was liable under the Holder Rule. *Id.* at 485, 488. The trial court entered judgment against the retailer and the creditor, awarding restitution and attorney's fees. *Id.* at 485-86. But the court limited the award, including fees, against the creditor to the amount that the customers had paid under the contracts. *Id.* at 486.

The Nebraska Supreme Court affirmed. The court observed that "[c]ourts are divided" on whether the Holder Rule limits an award of attorney's fees against a creditor. *Stenberg*, 755 N.W.2d at 493. After surveying several decisions on the question, the court held that the Holder Rule limit applies. *Id.* at 495-96. "A rule of unlimited liability," the court noted, "would place the creditor in the position of an insurer or guarantor of the seller's performance." *Id.* at 495 (citation

omitted). And the court reasoned that such a position would exceed the limited purpose of the Rule. "[U]nder the FTC Holder Rule," the court explained, "the debtor may not recover more than the amount the debtor paid." *Id.* at 495-96.

Numerous other state court decisions are in accord. In *Alduridi v. Community Trust Bank, N.A.*, No. 01A01-9901-CH-63, 1999 WL 969644 (1999), for example, the Tennessee Court of Appeals echoed the Nebraska court's recognition that all "[r]ecovery under the Holder Rule . . . is limited to amounts paid by the consumer under the contract" and that any recovery "in excess of th[ose amounts]," including attorney's fees, "must be based on an independent statutory or common law ground." *Id.* at *12. Because the plaintiffs "premise[d] their claim against [the creditor] for attorney's fees on [its] status as a holder of the credit contracts and [the seller's] alleged violations of the Tennessee Consumer Protection Act," the court reasoned that the claim for attorney's fees was "not entirely on an independent statutory or common law ground" and was therefore limited. *Id.*; *see* Tenn. Code § 47-18-109(e)(1) (1991) ("Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.").

Courts across the country have reached similar conclusions. *See, e.g.*, *Griffor v. Airport Chevrolet, Inc.*, No. 08-3063-HO, 2009 WL 151696, at *4 (D. Or. Jan. 22, 2009) ("Under the FTC Holder Rule, the amount plaintiffs can recover against an assignee of a

contract cannot exceed the amounts paid on the underlying contract," including attorney's fees.); *Houser v. Diamond Corp.*, No. 51901-8-I, 125 Wash. App. 1009, 2005 WL 94452, at *6 (Wash. Ct. App. Jan. 18, 2005) (holding that attorney's fees are "subject to the limitation on total recovery contained in 16 C.F.R. sec. 433.2"); *Scott v. Mayflower Home Improvement Corp.*, 831 A.2d 564, 576 (N.J. Sup. Ct. 2001) ("[P]laintiffs may not recover from the defendants . . . counsel fees if that would result in a recovery in excess of the amount paid by the consumer."), overruled on other grounds by *Psensky v. Am. Honda Finance Corp.*, 875 A.2d 290 (N.J. Super. Ct. 2005); *Riggs v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 411, 417 (W.D. La. 1998) (permitting plaintiffs in Holder Rule litigation to recover damages, costs, and the creditor's "pro rata share of reasonable attorney's fees, provided that the maximum recovery by any plaintiff may not exceed the amount paid the lender by that plaintiff"). Indeed, before this case, California courts agreed. *See Lafferty v. Wells Fargo Bank, N.A.*, 25 Cal. App. 5th 398, 414 (2018).

2. The Ohio Supreme Court has gone further and interpreted the Holder Rule not to merely limit attorney's fee awards against creditors, but to exclude them altogether. In *Reagans v. MountainHigh Coachworks, Inc.*, 881 N.E.2d 245 (Ohio 2008), the plaintiffs sued the retailer that allegedly sold them a defective motor home and the bank that financed their purchase. *Id.* at 247. Unlike in this case, the plaintiffs did not seek affirmative recovery—in the form of damages or attorney's fees—in excess of the amount paid under the credit contract with the bank. Instead, they sought to

set off their damages and attorney's fees against the remaining balance on their loan. *Id.* at 250.

The Ohio Supreme Court rejected that request. "Assuming, without deciding," that the Holder Rule would permit plaintiffs to set off against their loan "an amount greater than the amount they paid on their loan contract," the court held that the bank was not liable for attorney's fees because the Holder Rule never "impose[s] derivative liability on a bank for an attorney-fees award against a seller." *Reagans*, 881 N.E.2d at 252, 254. The court reasoned that "[t]he costs that the FTC rule seeks to shift to the creditor for the seller's misconduct" are only "the actual, compensatory damages incurred in the consumer contract with the seller." *Id.* at 254. "Neither the FTC rule nor the purpose behind it requires that innocent creditors also be held derivatively liable for additional awards," such as attorney's fees, "intended as penalties against sellers." *Id.*; *see Hardeman v. Wheels*, 565 N.E.2d 849, 853 (Ohio 1988) (concluding that requests for attorney's fees are not "claims" within the meaning of the Holder Rule).

3. Finally, before the decision below, the Texas Supreme Court had permitted attorney's fees to be awarded in excess of the Holder Rule's limitation—but without ever expressly considering whether the text, purpose, or history of the Holder Rule required otherwise.

In *Kish v. Van Note*, 692 S.W.2d 463 (1985), the Texas Supreme Court granted an attorney's fee award of $5,400 to the buyers of a defective swimming pool

against the holder of a consumer credit contract. *Id.* at 468-69. Although the court recognized the Holder Rule limitation in an earlier portion of its opinion, *see id.* at 465, it did not acknowledge or expressly consider whether the limit might apply to the fee award. The court's failure to do so may be explained by its conclusion that, even apart from the Holder Rule, the creditor did not "qualif[y] as a holder in due course" under state law. *Id.* at 467.

Two years later, in *Home Savings Association v. Guerra*, 733 S.W.2d 134 (1987), the Texas Supreme Court affirmed an award of $10,000 in attorney's fees against a creditor in excess of the Holder Rule's limitation. *Id.* at 137. There, the court rejected the creditor's contention that the fees should be limited to the amount paid under the contract. *Id.* But the court again declined to undertake any analysis of the Holder Rule's text, purpose, or history, relying instead on the creditor's failure to ask the trial court to allocate the fee award by claim. *See id.*[2]

4. The conflict among state courts on the meaning of the Holder Rule has been recognized by legal commentators. As one frequently cited treatise explains, "[c]ourts are divided over whether attorney fees can be awarded over and above the cap or must also fit within the cap." National Consumer Law Center, *Unfair and*

---

[2] Several lower court decisions have similarly permitted attorney's fees in excess of the amount paid under the contract without any explanation for why the Holder Rule limit does not apply. *See, e.g.*, *Oxford Finance Cos. v. Velez*, 807 S.W.2d 460, 464-65 (Tex. Ct. App. 1991); *In re Stewart*, 93 B.R. 878, 889 (Bankr. E.D. Pa. 1988).

Deceptive Acts and Practices § 10.5.2.4 (10th ed. 2021); *see* Dee Pridgen et al., *Consumer Credit and the Law* § 13:15 (Jan. 2022) (contrasting the approach of the Ohio and Nebraska Supreme Courts); Scott J. Hyman and Tara Mohseni, *California Court of Appeal Finds that the FTC Holder Rule Limits a Holder's Liability for a Consumer's Attorneys' Fees*, 72 Consumer Fin. L.Q. Rep. 432, 442 (2018) (noting that "most judicial opinions" hold that the Holder Rule caps attorney's fees) (capitalization omitted).

The California Supreme Court's decision thus creates binding precedent in a massive consumer market contrary to the rule that has been followed in most of the country. *See* National Consumer Law Center, *Federal Deception Law* § 4.3.5.1 (4th ed. 2022) (recognizing that the California Supreme Court's decision in this case is "contrary" to the decisions in *Reagans*, *Griffor*, *Riggs*, *Scott*, and *Alduridi*, among others). It eliminates any reasonable possibility that the conflict will resolve without this Court's intervention. It warrants this Court's intervention.

II. The California Supreme Court's Interpretation of the Holder Rule Is Wrong.

This Court's review is also needed to correct the California Supreme Court's erroneous interpretation of the Holder Rule. The California court's decision is inconsistent with the text, purpose, and history of the Holder Rule—all of which demonstrate that the Rule's limitation on "recovery" applies to any claim for attorney's fees that is based on prevailing on a substantive

claim for which a creditor is liable only by reason of the Rule itself.

1. The Holder Rule's text most naturally limits an attorney's fee award based on a substantive claim that the Holder Rule shifts to a creditor. The mandated contract provision requires that "any holder of [a] consumer credit contract [be] subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant" to the contract or "with the proceeds" of the contract. 16 C.F.R. § 433.2 (capitalization omitted). But the provision limits any "recovery hereunder by the debtor" to the "amounts paid by the debtor hereunder." *Id.* (capitalization omitted). The question is thus whether an award of attorney's fees that is premised on a substantive claim asserted under the Holder Rule is properly considered "recovery hereunder." It is.

An award of attorney's fees fits comfortably within the ordinary meaning of "recovery." As the California Supreme Court acknowledged, definitions of the term in legal dictionaries from both today and at the time of the Holder Rule's adoption are broad enough to include such awards. The current edition of *Black's Law Dictionary* defines "recovery" to include "[a]n amount awarded in or collected from a judgment or decree." Black's Law Dictionary (11th ed. 2019). The definition at the time of the Holder Rule's 1975 adoption was similar, including the "vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit," or "the obtaining, by such judgment, of some right or property which has been taken or withheld from him." Black's Law

Dictionary 1440 (4th ed. 1968); *see id.* (defining "recover" as including "to obtain in any legal manner in contrast to voluntary payment"). An attorney's fee award is readily described as an "amount awarded in or collected from a judgment," and represents the "vindication of a right . . . by the formal judgment."

Unsurprisingly, courts—including this one—have frequently recognized that a litigant's "recovery" may include "attorney's fees." *See, e.g.*, *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) (discussing the "recovery of attorney's fees"); *Cianbro Corp. v. George H. Dean, Inc.*, 749 F. Supp. 2d 1, 2 (D. Me. 2010) (holding that an award of attorney's fees qualifies as a "judgment in an action for the recovery of money"); *Ardestani v. INS*, 502 U.S. 129, 132 (1991) (explaining that the EAJA allows prevailing parties to "recover attorney's fees"); *Rogers v. 66-36 Yellowstone Blvd. Co-Op. Owners, Inc.*, 599 F. Supp. 79, 80-81 (E.D.N.Y. 1984) (discussing the circumstances for an "attorney's fees recovery"); *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 220 F. Supp. 735, 737 (E.D. Pa. 1963) ("Recovery . . . must include the entire remedy effectuated and thus encompasses the total benefit conferred."); *Lowry v. Department of Labor and Industries*, 151 P.2d 822, 823 (Wash. 1944) (holding that the "amount of recovery against [a] third person" included attorney's fees); *Vaughan v. Humphreys*, 239 S.W. 730, 731 (Ark. 1922) (holding that the "legal meaning of 'recovery' . . . includes the amount of the attorney's fee allowed").

And fee-shifting statutes themselves, including the California statute at issue here, likewise often provide

for the "recovery" of attorney's fees. Section 1794(d), under which Pulliam's attorney's fee award was granted, authorizes a buyer who prevails on a Song-Beverly Act claim "to *recover* as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees." Cal. Civ. Code § 1794(d) (emphasis added). Many federal statutes are similar. *See, e.g.*, 11 U.S.C. § 363(n) (referring to the "recover[y]" of "costs, attorneys' fees, or expenses"); 15 U.S.C. § 3611(d) ("A defendant may recover reasonable attorneys' fees."); 18 U.S.C. § 2421A(c) (specifying that the "[c]ivil recovery" available to a victim of prostitution includes "damages and reasonable attorneys' fees").

The term "hereunder," in turn, indicates that the Holder Rule limits any "recovery," including attorney's fees, available as a result of the Rule's operation. The current edition of *Black's Law Dictionary* defines the term "hereunder" as "in accordance with th[e] document" in which the term appears. Black's Law Dictionary (11th ed. 2019). The 1968 edition—though not defining "hereunder"—defines "under" to similarly include "according to." Black's Law Dictionary 1695 (4th ed. 1968). And although this Court has recognized that the term "under" is a word that ultimately "must draw its meaning from context," it often means "pursuant to," or "by reason of the authority of." *Ardestani*, 502 U.S. at 135 (citations, brackets, and internal quotation marks omitted); *see National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 630 (2018) ("[U]nder means 'subject [or pursuant] to' or 'by reason of the authority of.'") (citation omitted).

If attorney's fees are awarded based on a substantive claim that is available against a creditor *only* because of the contract provision mandated by the Holder Rule, those fees are naturally considered to be awarded "in accordance with" or "by reason of the authority of" the Rule. After all, such a claim for attorney's fees—no less than the substantive claim underlying such an award—is a "claim . . . which the debtor could [only] assert against the seller of [the] goods or services obtained" but for the Holder Rule. 16 C.F.R. § 433.2(b). If not for the required contract provision, the creditor would not be a proper defendant in a case like this one. And if not for the same contract provision, a buyer like respondent could not claim fees under a fee-shifting statute like Section 1794(d), which requires her to have "prevail[ed] in an action under [Section 1794(a)]" against the party she seeks to hold liable for the fees. Cal. Civ. Code § 1794(d).

The California Supreme Court questioned whether an attorney's fee award "sought directly against a holder under a state law" could be deemed to be recovery "hereunder" the Holder Rule. App., *infra*, 15. But that misunderstands the operation of the Rule. A claim for attorney's fees from a creditor under an ordinary fee-shifting statute is not sought directly "under a state law" any more than is a substantive claim for relief that would otherwise lie only against the seller. In either case, the creditor's liability depends on its promise to make itself contractually liable for "all claims . . . [that] the debtor could assert against the seller." 16 C.F.R. § 433.2(a). Because both claims depend on that contractual obligation, both types of recovery are collected "hereunder" the Rule.

2. Limiting attorney's fees to the amounts paid under the consumer credit contract is also consistent with the limited purpose of the Holder Rule. The Rule was promulgated to address the problems caused by the application of the holder-in-due-course doctrine to consumer credit transactions. As the FTC explained, that doctrine permitted creditors to "assert [their] right to be paid by the consumer despite [alleged] misrepresentation, breach of warranty or contract, or even fraud on the part of the seller." 40 Fed. Reg. at 53,507. By separating a consumer's obligation to pay from the seller's obligations for honest and fair dealing, the FTC observed, the doctrine deprived the consumer of "his most effective weapon—nonpayment." *Id.* at 53,509; *see* Bureau of Consumer Protection, FTC, *Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses*, 41 Fed. Reg. 20,022, 20,022 (1976) (The doctrine "robbed" consumers of "the only realistic leverage he possessed that might have forced the seller to provide satisfaction—his power to withhold payment.").

The Rule was designed to address that problem by "aboli[shing] the holder in due course doctrine." 40 Fed. Reg. at 53,517; *see id.* at 53,522 ("The Commission believes that it is an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separate the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised."). It thus restores the link between the consumer's obligation to pay the creditor with the seller's obligation to perform by preserving claims against the seller as a reason to excuse payment to the creditor. As a result of the

Holder Rule, consumers can again assert a seller's misconduct as the basis to avoid their obligation to pay for the financed good or service.

But limiting a consumer's recovery from the creditor to the money paid to the creditor—and any outstanding liability—is a critical aspect of that modest purpose of the Rule. *See* 41 Fed. Reg. at 20,023 ("There is an important limitation on the creditor's liability[.]"). The limitation ensures that the Rule's shifting of claims from the seller to the creditor serves *only* to restore the link between the seller's obligation to perform and the consumer's obligation to pay, without punishing the creditor for a seller's misconduct or converting creditors into wholesale insurers of seller misconduct. *See id.* ("In other words, the consumer may assert, by way of claim or defense, a right not to pay all or part of the outstanding balance owed the creditor under the contract; *but the consumer will not be entitled to receive from the creditor an affirmative recovery which exceeds the amounts of money the consumer has paid in*.") (emphasis added).

By removing that limitation for attorney's fee awards that can dwarf any benefit that a creditor has received from a given transaction, the California Supreme Court's decision undermines the Rule's design. This case is a prime example. The jury awarded respondent damages on the merits of her claim in the amount of $21,957.25. App., *infra*, 98. The court then awarded respondent *more than seven times* that amount in attorney's fees—a total of nearly $170,000. *Id.* And that amount covers only the fees for the trial proceedings. Respondent and her counsel have since

sought against TD more than $148,000 in additional attorney's fees for appellate proceedings in the California courts and another $70,000 in fees to enforce the judgment. *See* Memo. in Support of Mot. for Appellate Attorney's Fees, No. BC633169 (Cal. Sup. Ct. Aug. 10, 2022); Memo. of Costs After Judgment, No. BC633169 (Cal. Sup. Ct. Mar. 11, 2022). If this Court does not reverse the decision below, they will undoubtedly seek additional fees for the proceedings here. And TD's potential liability for *all* of them is premised on its acquisition of a *$13,000 loan*. *See* App., *infra*, 3-4. The California Supreme Court's decision does not merely "preserve" or "restore" a buyer's leverage against the holder of such a loan to ensure that the seller lives up to its end of the bargain—it provides plaintiffs and the plaintiffs' bar a cudgel to extract settlement from creditors with no role in and, by definition, no knowledge of that misconduct.

The California Supreme Court's contrary conclusion rested on its concern that affirmative Holder Rule litigation against creditors would be "financially infeasible for many buyers if attorney's fees were not recoverable." App., *infra*, 20. It observed that the FTC, in promulgating the Rule, had "considered the challenges, including high legal costs, for consumers associated with bringing suits against sellers as an impetus to adopting the new rule." *Id.* at 20-21. And it reasoned that "[w]ere attorney's fees part of the Holder Rule's limit on recovery, the effective result for many, if not most, consumers would be the same as their options were under the holder in due course rule that the FTC sought to supplant." *Id.* at 24.

The California Supreme Court's reasoning misconstrues both the preamble and the design of the Holder Rule. The portion of the Rule's preamble on which the court relied explains why "[a]ffirmative suits by consumers *are not* an adequate remedy" for the FTC's concerns surrounding the holder-in-due-course doctrine. 40 Fed. Reg. at 53,511 (emphasis added). The FTC, in other words, did not see the cost of the consumer litigation as the ultimate problem to solve, but as an obstacle principally to be avoided. *See id.* at 53512 (noting that, in addition to cost, consumer litigation leads to missed "days of work"); *id.* (emphasizing one commentor's observation that a consumer forced to become a "plaintiff has many, many problems").

The design of the Holder Rule reflects that focus. Contrary to the California Supreme Court's assertion, whether or not attorney's fee awards are limited by the Holder Rule, *all* consumers are in a better position under the Rule than under the holder-in-due-course doctrine. By effectively abolishing that doctrine in the consumer sales context, the Rule restores the consumer's "most effective weapon" in holding sellers to their end of the bargain—not litigation, but "nonpayment." 40 Fed. Reg. at 53,509. Although that weapon may now be wielded against creditors rather than guilty sellers directly, the FTC reasoned that creditors are often in a better position than buyers to police and protect against misconduct by the sellers and seek legal recourse. *See* 40 Fed. Reg. at 53,523 ("[T]he creditor possesses the means to initiate a lawsuit and prosecute it to judgement [sic] where recourse to the legal system is necessary."). And none of those benefits to

consumers depends on the need for a *buyer* to bring suit against the creditor or the seller.

To be sure, the FTC envisioned—and the Holder Rule enables—affirmative suits against creditors by buyers in some circumstances. *See* 40 Fed. Reg. at 53,527 ("If the consumer stops payment, . . . [t]he financer may . . . elect not to bring suit, especially if he knows that he would be unable to implead [a] seller [that is out-of-business] and he knows the consumer's defenses may be meritorious."). But consistent with the text of the Rule, the FTC foresaw a narrow role for such litigation. In the agency's view, "[c]onsumers w[ould] 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." *Id.* "In a case of nondelivery, total failure of performance, or the like," the FTC explained, "the consumer is entitled to a refund of monies paid on account." *Id.* The California Supreme Court erred in concluding that the FTC's limited view of the role of consumer litigation implied that the Holder Rule must be read to make creditors liable for attorney's fee awards that dwarf any benefit they may have received on a consumer credit contract.

3. Finally, interpreting the Holder Rule to limit attorney's fee awards under state fee-shifting statutes is consistent with the FTC's pre-2022 guidance. Although FTC guidance has not been a model of clarity, the agency's 2019 Rule Confirmation states that the Holder Rule does not preempt state laws that "separately provide[] for recovery of attorneys' fees *independent* of claims or defenses arising from the seller's

misconduct." 84 Fed. Reg. at 18,713 (emphasis added). But 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." *Id.* (emphasis added). In addition, the agency expressly declined to "modify[] 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." *Id.*

A state fee-shifting statute, like Section 1794(d), that awards fees to the prevailing party on a substantive claim based on seller misconduct does not provide for fees "independent" of those underlying claims. 84 Fed. Reg. at 18,713. Instead, a creditor's liability for fees under such a statute is "based on claims against the seller that are preserved by the Holder Rule Notice." *Id.* Accordingly, "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." *Id.*

In the 2022 advisory opinion, the FTC appears, in some respects, to have walked away from its 2019 position. The newest guidance—issued in response to this litigation while it was pending before the California Supreme Court—suggests that the Holder Rule does not limit attorney's fees if those fees are awarded "against a holder because of its role in litigation," without asking (as the 2019 Rule Confirmation did) whether the right to seek attorney's fees is "independent of" or "based on" the shifted claim. To the extent

the FTC is adopting a new line, that line is both inconsistent with the Rule's text and the 2019 Rule Confirmation. Such a new interpretation is neither persuasive nor a basis for this Court not to adopt the best interpretation of the Holder Rule under the traditional tools of construction. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019) ("[A] court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalization'" and should "rarely" defer "to an agency construction 'conflicting with a prior' one.") (citations and brackets omitted). If anything, the FTC's seemingly conflicting interpretations of the Rule only underscore the need for this Court's intervention.

III. The Question Presented Is Exceptionally Important.

The California Supreme Court's decision implicates a significant question of federal consumer-protection law. Because the Holder Rule applies to a myriad of consumer transactions across the country, the question presented recurs frequently in state and federal courts. The California Supreme Court's interpretation of the Rule will have far-reaching consequences that undermine the Rule's purposes and hurt lenders, retailers, and consumers.

The Holder Rule applies to every "consumer credit contract" issued "[i]n connection with any sale or lease of goods or services to consumers, in or affecting commerce." 16 C.F.R. § 433.2. Such contracts are ubiquitous across the United States and a large swath of industries, from furniture sales to student loans. The

automobile industry, at issue here, is illustrative. Consumer lending has skyrocketed in vehicle purchases over the last decade—over 85 percent of vehicles designed in 2020 were purchased with financing, compared with nearly 50 percent in 2013 and 13 percent in 2006. *See* Melinda Zabritski, *Experian Automotive Industry Insights: Finance Market Report Q2 2020* (Aug. 28, 2020), p. 6. Almost all those contracts will contain the Holder Rule's language, making the Holder Rule relevant to the vast majority of disputes concerning a financed vehicle purchase—whether under state or federal law for fraud, misrepresentation, warranty, unfair and deceptive practices, or other misconduct.

Unsurprisingly, given its broad reach, the question presented frequently recurs. *See* App., *infra*, 8 (recognizing that "several recent Court of Appeal decisions have considered an award of attorney's fees in the context of a claim against a seller under the Holder Rule" and reached different conclusions); *Id.* at 57 (noting that a "number of voices, including state and federal courts . . . have all expressed opinions on the issue—many of them contradictory"); 2022 Advisory Op. 1 ("This issue has arisen repeatedly in court cases."); Pridgen, *supra* § 13:15.

The California Supreme Court's decision is thus likely to have far-reaching effects and drastic consequences. Although this case concerns only a claim under the Song-Beverly Act's fee-shifting provision, App., *infra*, 19-20, it will likely be argued that the court's holding extends to any state fee-shifting provision that "contains no language limiting fee awards to

sellers as opposed to any other parties against whom a buyer has prevailed," *id.* at 32-33.

Outside California, the decision is, of course, not binding. But as an extensively reasoned decision from a prominent high court, even though incorrect, it is likely to be viewed as persuasive authority. And if followed elsewhere, the court's reasoning would likely sweep in a host of the fee-shifting statutes in other States—including many other large consumer markets.[3] *See* National Consumer Law Center, *Federal Deception Law* § 4.3.5.2 (referring to the decision below as the "most recent—and now leading—case on whether the FTC Holder Rule caps attorney fees"). Indeed, the National Consumer Law Center has posited that if the decision "is followed in other states, this would mean that under *most* fee-shifting statutes, fees awarded against the holder would not be subject to a cap." *Id.* (emphasis added).

The contraction of the Holder Rule's protection for lenders will provide a powerful incentive to initiate more lawsuits against creditors where, as here, the creditor is not alleged to have committed any wrong-

[3] *See, e.g.*, Fla. Stat. § 501.2105 ("In any civil litigation resulting from an act or practice involving a violation" of Florida's consumer-protection law, "the prevailing party . . . may receive his or her reasonable attorney's fees and costs from the nonprevailing party."); N.Y. Gen. Bus. Law § 349(h) ("The court may award reasonable attorney's fees to a prevailing plaintiff" in an action under New York's consumer-protection law.); Tex. Bus. & Com. Code § 17.50(d) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.").

doing whatsoever. As in this case, attorney's fees associated with claims under the Holder Rule frequently exceed the amount paid under the contract that is otherwise recoverable—often by several multiples. *See* pp. *9-10, *supra*; *see also, e.g.*, *Lafferty*, 25 Cal. App. 5th at 404 (considering nearly $2.5 million fee award based on $68,000 in damages); *Spikener*, 50 Cal. App. 5th at 155 (seeking more than four times the amount paid under the contract in damages). The potential for such outsized awards will not be missed by plaintiffs' lawyers seeking a windfall.

More lawsuits against lenders will either cause lenders to provide less consumer credit, to do so at an increased cost, or both. *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167, 184 (2016) ("Strengthening restrictions on creditor remedies . . . will simultaneously shift the supply curve inward by increasing the loss rate and thus the cost of lending, and the demand curve outward by increasing consumer demand as a result of smaller adverse consequences from default."). And less supply at higher prices means a tighter market for consumers, who will have less opportunity to borrow. James Cooper et al., *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 Antitrust L.J. 947, 969 (2017) (explaining that a proliferation of consumer protection statutes only serves to "transfer money . . . to trial attorneys" and hurts consumers who "suffer[] higher prices and a more congested legal system"). The most economically disadvantaged consumers—who rely on credit the most—will be among those hardest hit. *See* Arielle L. Katzman, *A Round*

Peg for a Square Hole: The Mismatch Between Subprime Borrowers and Federal Mortgage Remedies, 31 Cardozo L. Rev. 497, 543 (2009) ("[B]orrowers with poor credit . . . experience particular difficulty qualifying for new deals in the . . . tight credit environment."). And a tightened credit market will further harm even scrupulously ethical small and large businesses selling consumer goods on credit. Such predictable, unintended consequences underscore the need for this Court's review.

IV. This Case Is an Ideal Vehicle To Resolve the Question Presented.

This case presents an ideal vehicle to resolve the question presented. Whether the Holder Rule's limit on recovery bars the award of attorney's fees when a consumer prevails against a creditor was the central question presented below. *See* App., *infra*, 2-3 ("We granted review to address whether 'recovery' under the Holder Rule . . . includes attorney's fees and limits the amount of fees plaintiffs can recover from holders to amounts paid under the contract."). The court's decision rests solely on its conclusion that the Rule does not limit attorney's fees under state fee-shifting statutes, like the Song-Beverly Act, that do not expressly limit fee awards to "sellers." *See id.* at 3 ("We conclude that the Holder Rule does not limit the award of attorney's fees where, as here, a buyer seeks fees from a holder under a state prevailing party statute."). And the court's analysis—while thoroughly flawed—is extensive, providing the Court ample basis, alongside

previous decisions, to consider the potential arguments for the appropriate interpretation of the Holder Rule.

If this Court granted review and adopted a contrary answer to the question presented, the California Supreme Court's decision provides no other basis to sustain its judgment. While respondent advanced alternative grounds for the decision in the proceedings below, including deference to the FTC's most recent opinion, the decision below does not rest on those grounds. *See* App., *infra*, 30 (declining to determine whether "deference is warranted"); *see also* p. 30, *supra* (explaining why deference is not warranted). No alternative ground provides any obstacle to this Court's reaching and resolving the question presented on which state high courts are intractably divided.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan Y. Ellis
Counsel of Record
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2887
jellis@mcguirewoods.com

Matthew A. Fitzgerald
Caroline S. Burton
Kathryn M. Barber
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219

Tanya L. Greene
MCGUIREWOODS LLP
355 South Grand Avenue
Suite 4200
Los Angeles, CA 90071

Counsel for Petitioner

SEPTEMBER 23, 2022