No. 22-288

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

BRIEF OF AMICI CURIAE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND CALIFORNIA FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

The American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA"), and California Financial Services Association ("CFSA") respectfully submit this brief as amici curiae in support of TD Bank, N.A.'s ("TD Bank's") Petition for a Writ of Certiorari.[1]

INTEREST OF AMICI CURIAE

1. 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.

[1] At least 10 days before the due date for this brief, counsel of record for both parties received notice of amici curiae's intention to file this brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus organizations, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. 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.

3. 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. 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.

4. CFSA represents 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.

5. The amici have a vital interest in the outcome of this case. The amici's members make loans and purchase retail installment contracts that are subject to the Federal Trade Commission's Holder in Due Course Rule ("Holder Rule"; 16 C.F.R. § 433.2). Like TD Bank, they have been, and likely will be, sued under the Holder Rule on contract, tort, and statutory claims based on alleged misconduct by the sellers of the goods whose purchase they financed. As explained below, resolution of the issue raised by TD Bank's petition is critical to disposition of those suits. In 2016, AFSA submitted comments to the FTC on that issue in connection with the FTC's regulatory review of the Holder Rule. The amici filed an amicus brief in the California Supreme Court, supporting T.D. Auto Finance (which has since merged into TD Bank).

SUMMARY OF ARGUMENT

The Court should grant the petition and hear this case on the merits to resolve a clear split over whether the Holder Rule limits recovery of attorney fees against the holder of a consumer credit contract ("creditor"). As a federal regulation, the Holder Rule should be applied uniformly throughout the country. But, in fact, California's interpretation of this federal law differs markedly from the holdings of other states' courts on the same issue.

The issue is important. Attorney fees are the driving force in the resolution of the tens of thousands of Holder Rule cases that are filed annually, mostly in state court. Under the California Supreme Court's reasoning in this case, consumers will be able to recover uncapped attorney fees from innocent creditors in virtually all Holder Rule cases since comparatively few state statutes allow attorney fee awards exclusively against the seller and not a derivatively liable creditor.

This case presents an appropriate vehicle for the Court to resolve the stark division of authority on this question. Moreover, it may be the Court's only opportunity to do so for the foreseeable future, as most Holder Rule cases settle, are arbitrated or involve stakes that do not warrant an appeal, let alone to this Court. The unique set of circumstances that brought this case here is unlikely to recur in the foreseeable future.

Certiorari should also be granted in this case to rein in the FTC which improperly sought to exercise the judicial power of resolving the split in court decisions interpreting the Holder Rule and did so by issuing a "Statement," while the case was pending before the California Supreme Court, which, without explanation, reversed the interpretation that the FTC had given the Holder Rule just three years before at the conclusion of a notice-and-comment rulemaking proceeding regarding the Holder Rule.

Finally, the petition should be granted because the California Supreme Court's opinion below is plainly wrong. It wrongly applies California, not federal, rules of construction in interpreting the Holder Rule. The California Supreme Court's opinion wrongly finds the Holder Rule ambiguous; whereas, the FTC has declared the contrary is true. It incorrectly finds that "recovery" includes only "damages," not attorney fee awards despite the FTC's twice-stated contrary conclusion. And the California Supreme Court wrongly followed the FTC's about-face "Statement" in construing a fee award on a claim that can be brought against the creditor only because of the Holder Rule as not being a "recovery hereunder."

ARGUMENT

I. The Petition Raises A Question That Is Vital To The Resolution Of Thousands Of Cases Annually On Which There Is A Clear Split Of Authority

Applying to the financed sale of most consumer goods, the Holder Rule affects more of this nation's commerce and state court litigation than almost any other federal regulation.

1. In July 2022, consumers purchased durable goods, the most frequently financed type of consumer purchases, at an annual rate of more than $2 trillion.[2] Of consumer durable goods, automobiles are normally the most expensive and most likely to give rise to litigation. In 2021, about 81% of the $358.7 billion of new car sales and 34.5% of the $245.9 billion of used car sales to consumers were financed directly by loans or indirectly through retail installment sales contracts ("RISCs") subject to the Holder Rule.[3] About $199

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[2] U.S. Bureau of Economic Analysis, Personal Consumption Expenditures: Durable Goods [PCEDG], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/PCEDG, Sept. 26, 2022.

[3] U.S. Bureau of Economic Analysis, Personal consumption expenditures: Durable goods: Table 2.4.5. Personal Consumption Expenditures by Type of Product: Annual, retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/DNMVRC1A027NBEA, Sept. 27, 2022; https://carsurance.net/insights/auto-loan-statistics/ (last visited Sept. 27, 2022); https://www.statista.com/statistics/453075/share-of-used-vehicles-with-financing-usa/#:~:text=In%20the%20first%20quarter%20of,the%20United%20States%20were%20financed (last visited Sept. 27, 2022).

million in new auto loans were originated during the second quarter of 2022.[4]

Though representing only a small fraction of the millions of financed sales of cars (or other durable goods), thousands of cases involving financed car sales are filed each year.[5] Nearly all of these suits are filed in state court as they allege state law claims, and the seller and buyer typically are citizens of the same state. In most of these cases, the buyer sues the creditor under the Holder Rule as well as the seller that he or she accuses of wrongdoing. However, with increasing frequency, buyers sue only the creditor under the Holder Rule, not naming the seller.

2. The issue TD Bank's petition raises is of crucial importance to all of these thousands of cases annually. *See* FTC, Commission Statement on the Holder Rule and Attorneys' Fees and Costs, 1 (Jan. 18, 2022)

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[4] Fed. Reserve Bank of New York, Research & Statistic Group, Household Debt and Credit (2022:Q2; released Aug. 2022), pp. 1, 3 (underlying data) The statistic includes leases which are not subject to the Holder Rule.

[5] About 34,400 lawsuits over new car sales were filed in California state courts from 2018 through 2021, yet they represented only 0.5% of the 7 million new cars sold and registered in the state the same period. https://pirg.org/edfund/media-center/new-report-reveals-most-commonly-sued-car-manufacturers-under-california-lemon-law/#:~:text=Among%20the%20more%20than%207,lawsuit%20filed%20in%20state%20courts (last visited Sept. 27, 2022); *see also* U.S. Bureau of Economic Analysis, Total Vehicle Sales [TOTALSA], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/TOTALSA, September 26, 2022.

("FTC Statement") ("This issue has arisen repeatedly in court cases. . . .").

Under the FTC Statement and the California Supreme Court's opinion in this case, a consumer will be able to recover uncapped attorney fees from the creditor in nearly all Holder Rule cases. Both the Statement and the opinion state that the Holder Rule's second sentence does not limit attorney fee recovery against the creditor unless "a 'consumer is awarded fees in a suit solely against the seller, or the law allows awards only against a seller that has engaged in specified [wrongful] conduct.'" Pet. App., 34 (*quoting* FTC Statement, p. 3). Those two exceptions are null sets.

In a suit "solely against the seller," the creditor is not a defendant and cannot be held liable at all. So, the Holder Rule never comes into play. The other exception will rarely apply. Comparatively few statutes allow an award of attorney fees "only against a seller." The California Supreme Court cited none. Most state and federal statutes under which buyers normally sue allow an award of attorney fees as part of a prevailing plaintiff's recovery without specifying against whom the award is allowed.[6]

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[6] *See*, *e.g.*, 49 U.S.C. § 32710(b) (Federal Odometer Act: "The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person."); Cal. Civ. Code, § 1780(e) (Consumers Legal Remedies Act: "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section."), § 1794(d) (Song-Beverly Warranty Act: "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the

Thus, in practice, a creditor will be held liable for uncapped attorney fees in any action brought against it under the Holder Rule in a state that follows the FTC Statement or the California Supreme Court's decision in this case.

3. Like most civil litigation, the vast majority of these cases settle before trial. Attorney fee liability or limitation plays an outsized role in the settlement process. Potential liability for uncapped attorney fees puts enormous, often irresistible, pressure on creditors to settle these suits early, even when the suits are of dubious merit.[7] The reason is simple: a single loss, like TD Bank's in this case, results in an attorney fee award many times the consumer's damages, outweighing any benefit the creditor might otherwise obtain by successfully defending many other similar suits. Early

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judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees. . . ."), § 2983.4 (Automobile Sales Finance Act: "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract" subject to the Act.); Fla. Stat., § 681.112(1) (Motor Vehicle Sales Warranties: "The court shall award a consumer who prevails in [an] action [under this chapter] the amount of any pecuniary loss, litigation costs, reasonable attorney's fees, and appropriate equitable relief."), N.Y. Gen. Bus. Law, § 349 (UDAP: "The court may award reasonable attorney's fees to a prevailing plaintiff."); Tex. Bus. & Com. Code, § 17.50(d) (Deceptive Trade Practices-Consumer Protection Act: "Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.").

[7] The settlement pressure is particularly strong when, for whatever reason, the seller is not actively defending the case, as then the only percipient witnesses to the sale, often are unavailable or difficult to locate.

settlement of Holder Rule cases of even dubious merit, in turn, encourages the filing of more dubious suits.

When able to recover unlimited attorney fees from creditors, consumer attorneys are motivated to resist early settlement in order to increase claimed fees.[8] Awarding attorney fees by the lodestar plus multiplier method, as California and most other states do, gives attorneys "a financial incentive to extend the litigation so that the attorneys can accrue additional hours (and thus, additional fees)." ALI, Principles of the Law of Aggregate Litig., § 3.13 cmt. b (2010); *see also Benson v. S. California Auto Sales, Inc.*, 239 Cal. App. 4th 1198, 1205, 1212-13, 192 Cal. Rptr. 3d 67, 71, 77 (2015) (plaintiff sought $171,915 in attorney fees though defendant offered appropriate correction less than 30 days after receiving notice of the claim); *Shayler v. 1310 PCH, LLC*, No. 21-56130, ___ F.4th ___, 2022 WL 13743415, at *2 (9th Cir. Oct. 24, 2022) (cataloging abuses stemming from uncapped attorney fee awards in ADA suits). Extending litigation to increase attorney fees unnecessarily clogs court dockets and harms consumers as well as creditors.

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[8] According to one FTC commenter, car buyers' attorneys "try to capitalize on by front loading attorneys' fees and then demanding that all fees be paid as part of the settlement, regardless of whether reasonable, necessary, or legitimately incurred. Unfortunately, it has become somewhat routine for attorneys in these cases to generate as much in attorneys' fees as possible . . . before a lawsuit is even filed. Once filed, hundreds of pages of 'canned' discovery requests (often irrelevant and inapplicable) are served by plaintiff's counsel to further drive up fees." CU Direct Corp., Holder Rule Review (FTC File No. P164800) Ltr., p. 2 (Feb. 12, 2016).

4. As TD Bank's petition shows, Pet., 13-19, there is a stark split among the (mostly) state court decisions on the issue the petition raises. Most courts have held that the Holder Rule's second sentence, limiting "recovery hereunder" applies to, and caps, a consumer's recovery of attorney fees from a creditor[9] on claims of seller wrongdoing that the Holder Rule allows the consumer to bring against the creditor. *See* Pet., 13-19.

The California Supreme Court's contrary decision in this case sows uncertainty in the many states yet to rule on the issue. That uncertainty about the largest element of monetary recovery makes settlement much harder, pushing more cases to trial, and causing more contested attorney fee motions and appeals from the grant or denial of attorney fees. These unfortunate effects of the current uncertainty harm the parties as well as the legal system. Settlement and recompense is delayed for deserving claimants. More judicial resources must be devoted to these cases. Only consumer attorneys profit.

5. As the petition explains, this case is a perfect vehicle for decision of the issue the petition raises. Pet., 34-35. Moreover, it will likely be the only opportunity, for the foreseeable future, for the Court to address this important question of federal law.

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[9] The Holder Rule concerns only the creditor's liability on claims against the seller. The Rule does not affect or limit the seller's direct liability for its wrongs or for the consumer's attorney fees if recoverable under applicable state law.

As already stated, most Holder Rule cases settle pretrial. Many that do not settle are sent to arbitration. The few that proceed to trial rarely result in a judgment that justifies an appeal. When, as in this case, an award of attorney fees is large enough to warrant an appeal, the creditor most often foregoes the appeal to avoid an even greater fee award if the appeal is lost.

This case was the rare exception only because it was the culmination of a multi-year, multi-faceted effort by Pulliam's attorneys, a firm that specializes in representing consumers in automobile cases, to overturn *Lafferty v. Wells Fargo Bank, N.A.*, 25 Cal. App. 5th 398, 235 Cal. Rptr. 3d 842 (2018), which had held that the Holder Rule caps attorney fee awards.[10] The rare alignment of circumstances that brought this case before the Court is highly unlikely to recur in the foreseeable future. So, as a practical matter this is likely to be the Court's only opportunity to resolve the conflict among the state courts on this federal law issue of overriding importance to the resolution of thousands of cases annually.

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[10] *See* https://www.autofraudlegalcenter.com/. Pulliam's attorneys represented the consumers in each of the post-*Lafferty* California appellate decisions on this issue. *See Reyes v. Beneficial State Bank*, 76 Cal. App. 5th 596, 291 Cal. Rptr. 3d 657 (2022); *Melendez v. Westlake Servs., LLC*, 74 Cal. App. 5th 586, 290 Cal. Rptr. 3d 11 (2022); *Spikener v. Ally Financial, Inc.*, 50 Cal. App. 5th 151, 263 Cal. Rptr. 3d 726 (2020). They spearheaded an effort in California's Legislature to overturn *Lafferty* and, either directly or through consumer advocate associations, pushed the FTC to issue its 2022 Statement.

II. The Court Should Grant Certiorari To Rein In Administrative Agency Usurpation Of The Judicial Power To Interpret Regulations

The Court should also grant certiorari in this case to build on the Court's recent administrative law decisions and to rein in the FTC's interference with the judiciary's power to interpret administrative regulations and its unexplained flip-flop in construing the Holder Rule.

1. "Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Neither Congress nor the Executive Branch may "'usurp a court's power to interpret and apply the law to the [circumstances] before it.'" *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) (citation omitted). What is forbidden Congress and the President is equally off limits for the FTC.

Yet that is precisely what the FTC sought to do here. While this case was pending in the California Supreme Court, the FTC issued a Statement that was plainly intended to direct the California Supreme Court's interpretation of the Holder Rule in this case. *See* FTC Statement. In the Statement, the FTC also purported to exercise a power to resolve the split in judicial decisions interpreting the Holder Rule, telling the California Supreme Court which prior California Court of Appeal decisions "correctly" interpreted the

Holder Rule, and which did not. *See id.* at 1, 3 & nn. 2, 6.

In both respects, the FTC infringed upon the courts' exclusive power to interpret the law, including the FTC's regulations. "If [FTC] disagrees with how courts are interpreting an existing [regulation], it is free to amend the [regulation] to establish a different rule going forward. What it cannot do is issue 'a mandate . . . to compel the courts to construe and apply [existing law], not according to the judicial, but according to the [administrative agency's] judgment.'" *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2439 (2019) (Kavanaugh, J., dissenting) (*quoting* T. Cooley, Constitutional Limitations 95 (1868)); *see also Bank Markazi*, 578 U.S. at 225 n. 17.

The FTC's Statement had its intended effect. Though the California Supreme Court purported to avoid the issue of deference, its opinion relies heavily on the FTC Statement to support its interpretation of the Holder Rule. *See* Pet. App., 30-35.

2. The FTC's Statement is also an unexplained reversal of the FTC's more carefully considered interpretation issued less than three years earlier at the conclusion of the FTC's complete review of the Holder Rule, conducted in full compliance with the Administrative Procedure Act's ("APA's") notice and comment requirements, 5 U.S.C. § 553(b)-(d), 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."[11]

In 2015, the FTC published a request for comments on the Holder Rule, specifically seeking suggested modifications to the Rule to increase its benefits to consumers. FTC, 16 CFR Part 433: Request for Comments, 80 Fed. Reg. 75018, 75019 (Dec. 1, 2015). In response to the request, the FTC received 19 public comments, six of which addressed whether the Holder Rule allows or should allow consumers to recover uncapped attorneys' fees from a holder. FTC, Confirmation of Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18711, 18713 (May 2, 2019) ("2019 Rule Confirmation").

The National Consumer Law Center ("NCLC"), one of the four commenters that "supported having no cap on recovery of attorneys' fees," "argued that liability for attorneys' fees under fee-shifting statutes is independent from an assignee's derivative liability under the Holder Rule, and therefore is not capped by the Rule's limitation to 'recovery hereunder.' "[12] 2019 Rule Confirmation, 84 Fed. Reg. at 18713.

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[11] 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.

[12] "The holder's liability for the consumer's attorney fees will be based on a fee-shifting statute that requires the *defendant* to pay fees. The holder's liability for fees is not a derivative liability from the seller, but is based on its own actions in refusing to

In May 2019, the FTC decided to retain the Holder Rule without modification, 2019 Rule Confirmation, pp. 18714-18715, and rejected the NCLC's argument about attorney fees, stating:

> We conclude that if a federal or state law separately provides for recovery of attorneys' fees ***independent of claims or defenses arising from the seller's misconduct***, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is ***based on claims against the seller that are preserved by the Holder Rule Notice***, the payment that the consumer may recover from the holder—including any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract. . . . 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.

Id. at 18713 (emphasis added).

Less than three years later, the FTC abruptly reversed course. Gone from the 2022 FTC Statement is the 2019 Rule Confirmation's focus on "claims or defenses arising from the seller's misconduct" and on

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resolve the consumer's claim. . . . [Para.] [A]ttorney fees are awarded not because of the seller's conduct but because of the holder's conduct. It is the holder who is refusing to settle the claim and who insists on litigating the issues." NCLC, Comments to the Federal Trade Commission Holder Rule Review File No. P164800, pp. 8-9 (Feb. 12, 2016).

"recovery of attorneys' fees . . . based on the seller's conduct." Instead, the FTC Statement adopts the NCLC's argument which the FTC had rejected in 2019. The Statement says a consumer may recover uncapped attorney fees from 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" because the liability for fees is "supported by a law that is independent of the Holder Rule" and the fees are awarded "against a holder because of its role in litigation." FTC Statement, p. 3.

The FTC Statement was issued without any prior public notice, request for comment, or public input. The Holder Rule's text had not changed. The FTC stated no reason for its about face on this issue but tried instead to pass it off as a "correct interpretation" of the 2019 Rule Confirmation. FTC Statement, p. 3 ("Some courts have read the Commission's statements in a 2019 Rule Confirmation notice regarding the Holder Rule as mandating a different result. . . . [T]hey misconstrue the Commission's statements.").

3. Normally, an administrative agency may issue an interpretative rule without following the APA's notice and comment requirements. 5 U.S.C. § 553(b)(A), (d)(2); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 100-01 (2015). The Court has not yet decided whether that remains true when the new interpretative rule reverses an interpretation adopted as part of a notice-and-comment legislative rule-making proceeding, such as the FTC's 2019 Rule Confirmation. Nor has the Court yet adopted the argument that acts of an

independent agency, like the FTC, should be more closely scrutinized by the judiciary because they "have not been supervised by the President in the way that our constitutional structure would suggest." Hon. Brett M. Kavanaugh, The Courts and the Administrative State, 64 Case W. Res. L. Rev. 711, 731 (2014).

But it is clear that since the FTC skirted the APA's notice-and-comment procedures in issuing it, the FTC Statement "do[es] *not* have the force of law." *Kisor*, 139 S. Ct. at 2420; *Mortg. Bankers*, 575 U.S. at 104 & n. 4.

The FTC Statement is also disentitled to deference or persuasive force as it offends the arbitrary and capricious standard, one of "the most notable" of the APA's "constraints on agency decisionmaking." *Mortg. Bankers*, 575 U.S. at 106. Under that standard, this Court insists that an agency " 'articulate a satisfactory explanation for its action.' " *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (*quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *Fox Television Stations*, 556 U.S. at 515. The FTC Statement fails this basic requirement, attempting to pass off its about face as a "correct interpretation" of the 2019 Rule Confirmation. FTC Statement, p. 3.

Further, the arbitrary and capricious standard "requires an agency to provide more substantial justification when 'its new policy rests upon factual

findings that contradict those which underlay its prior policy. . . .'" *Mortg. Bankers*, 575 U.S. at 106 (*quoting Fox Television Stations*, 556 U.S. at 515). The FTC Statement also flunks that test, providing no justification, let alone a "more substantial" one, for its new interpretation that contradicts the 2019 Rule Confirmation.[13]

The FTC's unexplained reversal of its interpretation of the Holder Rule is particularly pernicious because of the unique way the Holder Rule operates. The FTC regulation only requires sellers or lenders to include a specific provision in their contracts, leaving it to the courts—primarily, state courts—to enforce that provision in private litigation between buyers and creditors. *See* 16 C.F.R. § 433.2. The FTC pays no price for skirting APA notice-and-comment requirements because it never enforces the provision that its Statement interprets. *See Kisor*, 139 S. Ct. at 2420. Only creditors pay the high price of the FTC's highhandedness when state courts, like the California Supreme

[13] *Auer* deference is justified in part on the theory that the promulgating agency is in a " 'better position [to] reconstruct' [an ambiguous regulation's] original meaning." *Kisor*, 139 S. Ct. at 2412. But, here, the FTC made no attempt to reconstruct the Holder Rule's original meaning. In response to a FOIA request, the FTC disclosed that, in formulating its Statement, it reviewed no records or other information relating to the Holder Rule's original meaning. There is even less justification for deference here since "lots of time has passed between the [Holder R]ule's issuance [in 1975] and [the FTC's] interpretation [in 2022]—especially [since] the [2022] interpretation differs from one that has come before." *Id.*

Court, give the FTC Statement unwarranted deference or persuasive effect. *See* Pet. App., 30-35.

The Court should grant certiorari to reassert the judiciary's "firm grip on the interpretive function," *Kisor*, 139 S. Ct. at 2421, and instruct state courts, in particular, not to give unwarranted weight to federal agency interpretative utterances that, like the FTC Statement, represent unexplained, arbitrary and capricious departures from prior agency guidance.

III. The Court Should Grant Certiorari Because The Decision Below Is Clearly Wrong

The Court should also grant certiorari because the California Supreme Court's decision is clearly wrong.

To begin with, the state court's opinion makes a fundamental error in following state law rules and citing state court authority in construing the Holder Rule, a federal regulation. *See* Pet. App., 12. "[T]he meaning of words in a federal statute [or regulation] is a question of federal law" that must be decided using the rules of construction outlined in this Court's decisions, not any potentially differing rules state courts may follow in interpreting state statutes. *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 129 (1987); *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603 (1971); *see Am. Alternative Ins. Co. v. Sentry Select Ins. Co.*, 176 F. Supp. 2d 550, 554 (E.D. Va. 2001) ("[W]ere this not so, the anomalous result would be the prospect of conflicting state constructions of a federal statute that

was enacted by Congress to serve as a uniform solution to a national problem. . . .").

Under this Court's precedents, "a court's proper starting point [in interpreting a statute or regulation[14]] 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.'" *Food Mktg. Inst. v. Argus Leader Media*, ___ U.S. ___, 139 S. Ct. 2356, 2364 (2019) (citations omitted).

"There is no need to consult extratextual sources when the meaning of a statute's [or regulation's] terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452, 2469 (2020) (citation omitted). Legislative or regulatory history cannot "be used to 'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst.*, 139 S. Ct. at 2364.

Here, applying California principles of statutory interpretation, the California Supreme Court skipped too easily over the first step of carefully examining the Holder Rule's words, finding ambiguity where none exists, Pet. App., 12-15, and then combing the regulatory history for clues to resolve the non-existent ambiguity, *id.* at 16-25.

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[14] An administrative agency's legislative regulations are interpreted in the same manner as statutes. *Greene v. United States*, 376 U.S. 149, 160 (1964).

In fact, the Holder Rule is not ambiguous. The FTC has said so itself: "The Commission affirms that the Rule is unambiguous, and its plain language should be applied." FTC Advisory Opn., p. 3 (May 3, 2012) (fn. omitted). Even more than most regulations, the Holder Rule must be given its plain meaning to serve its purpose. "Fundamentally, the Holder Rule language for contracts constitutes a notice to consumers. To ensure the notice is conspicuous, the language must be set forth in a typeface that is at least 10 points in size, bold, and uses all capital letters. 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 v. Wells Fargo Bank*, 213 Cal. App. 4th 545, 560, 153 Cal. Rptr. 3d 240, 251 (2013).

Contrary to the California Supreme Court's view, the Holder Rule's use of the term "recovery" is not ambiguous. Considered in its regulatory context, the word could not reasonably mean "damages," as the state court thought, since the FTC would have used "damages" in the Holder Rule if that is all it meant to limit by the Rule's second sentence or alternatively, exempted attorney fees and costs from the limit on recovery.[15] *See*, *e.g.*, N.Y. Pers. Prop. Law, § 302(9)(a), (b).

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[15] The court went farther astray in finding support for its cramped interpretation of "recovery" in *California's* rule that the attorney, not the client, owns statutory fee awards. *See* Pet. App., 13 (*citing Flannery v. Prentice*, 26 Cal. 4th 572, 575, 28 P.3d 860 (2001)). To the extent fee ownership is relevant, the Holder Rule, a federal regulation, would follow federal law, not differing state

Though reaching opposite conclusions on other matters, both of the FTC's recent interpretations state that the Holder Rule's second sentence limits attorney fees as well as damages. 2019 Rule Confirmation, 84 Fed. Reg. at 18713 ("[I]f the holder's liability for fees is based on claims against the seller . . . , 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."); FTC Statement, p. 3 ("The holder's obligation to pay costs or fee awards available exclusively against the seller, . . . would be limited to the amount paid by the consumer.").

The only other term of the Holder Rule that the California Supreme Court mentioned was "hereunder." Pet. App., 30. It did not analyze whether that word was ambiguous, but instead moved directly to considering the FTC's two conflicting interpretations of the term, adopting the NCLC's argument which the FTC rejected in the 2019 Rule Confirmation but accepted in the FTC Statement three years later. *Id.* at 31-35. That argument is plainly wrong. When an attorney fee award is one remedy under a state statute that would not apply to the creditor but for the Holder Rule—as is true of Civil Code § 1794(d), the statute at issue here—the attorney fee recovery is just as much a recovery "hereunder"—i.e., under the Holder Rule—as the

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laws, on the subject. The client owns attorney fee awards under federal law. *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990); *Evans v. Jeff D.*, 475 U.S. 717, 730 n. 19 (1986).

recovery of any other remedy, such as damages, under that statute.

Also, contrary to the NCLC argument, the purpose of fee-shifting statutes like Civil Code § 1794(d) is " 'to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific . . . laws,' " not to punish a defendant for its role in, or failure to settle, the lawsuit. *Flannery*, 26 Cal. 4th at 583 (*quoting Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 565 (1986)).[16]

In short, the California Supreme Court was wrong on an important issue of federal law affecting thousands of lawsuits annually. The Court should grant certiorari to review and reverse that erroneous decision.

CONCLUSION

For the reasons stated above, the Court should grant TD Bank's petition and hold that the Holder Rule caps the recovery of attorney fees as well as

[16] By contrast, other types of laws allow attorney fee awards based on a party's litigation conduct, *e.g.*, Wash. Rev. Code, § 4.84.185 (allowing fee award against a party asserting a claim or defense that was frivolous and advanced without reasonable cause), or without regard to the particular claim asserted, *e.g.*, Alaska R. Civ. P. 82(a) (allowing a fee award to the prevailing party in any civil action).

damages on claims the consumer may bring against the creditor only under the Holder Rule.

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