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 Writ of Certiorari to the Supreme Court of California

RESPONDENT TANIA PULLIAM'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Trade Commission's "Holder Rule" requires that consumer credit contracts explicitly permit consumers who buy goods or services on credit to assert "all claims and defenses" they "could assert against the seller" against any subsequent holder of the contract. 16 C.F.R. § 433.2(a). The required provision also states that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." *Id.* The question presented is whether this limitation applies to attorneys' fees for which a creditor is not derivatively liable under the Holder Rule, but instead directly liable under a state fee-shifting statute.

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INTRODUCTION

The Federal Trade Commission's Holder Rule governs the purchase of consumer goods and services on credit. The Rule provides that any "holder" of a consumer credit contract—that is, any creditor that acquires the debt—is "subject to all claims and defenses" the consumer "could assert against the seller." 16 C.F.R. § 433.2(a). The Rule has one limitation: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor." *Id.* The question presented here is whether attorneys' fees awarded *directly* against a creditor under a state statute—not derivatively under the Holder Rule—constitute a "recovery [ ]under" the Rule. The California Supreme Court concluded that they do not.

TD Bank claims that this seemingly unremarkable conclusion is, in fact, an "outlier position," and that the question it resolves is "exceptionally important" and "frequently recurs." Pet. 14, 30–31. But none of these assertions pan out. In the nearly fifty years since the Rule was enacted, not a single Circuit has ever even considered the issue. Most state supreme courts haven't either. And those that have largely agree: The Texas Supreme Court reached the same conclusion the California Supreme Court reached here decades ago. Ultimately, the Bank's conflict argument boils down to a single opinion from the Nebraska Supreme Court—decided before the FTC issued guidance on the issue. And even that opinion doesn't adopt the Bank's view.

An issue that's reached three state supreme courts—and no federal appellate courts—in fifty years is not one that requires this Court's intervention. All the more so because the decision below is correct. By its terms, the Holder Rule only applies where a creditor is being held derivatively liable for a seller's misconduct. Here, the court awarded attorneys' fees against TD Bank for its own conduct: fighting a consumer's meritorious claim and then refusing to pay the judgment against it. The text, history, and purpose of the Rule all make clear that it does not limit such an award.

Unable to rely on text or purpose, the Bank resorts to repeating the same flawed policy arguments the FTC rejected in enacting the Holder Rule in the first place. Those arguments were wrong fifty years ago, and they are wrong now. In any event, they should be directed at the Commission, not this Court. This Court should deny review.

STATEMENT

I. Regulatory background

As the United States emerged from World War II, mass production increased the availability of desirable household goods, such as cars, televisions, and refrigerators. Andrea Ryan, Gunnar Trumbull, & Peter Tufano, *A Brief Postwar History of U.S. Consumer Finance*, 85 Bus. Hist. Rev. 461 (2011). And retailers launched aggressive marketing campaigns, hoping to capitalize on a rise in disposable income. *Id.* at 467-71. To buy these goods, many consumers relied on credit. *Id.* at 469. As a result, consumer debt became a common feature of American life. Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53,506 (Nov. 18, 1975). By the early 1970s, nearly half of all U.S. families dedicated over ten percent of their disposable income to paying off debt on installment contracts for consumer goods and services. *Id.* at 53,507. Meanwhile, banks and other financial institutions emerged as powerful partners in the distribution of these goods and services, financing retailers by purchasing billions of dollars of consumer debt. *Id.*[1]

These financial institutions typically had close and ongoing relationships with retailers, encouraging them to execute consumer credit transactions and financing the acquisition of inventory. *Id.* at 53,524. But they were insulated from any misconduct retailers might commit. As third-party creditors, they generally acquired consumer debt as a "holder in due course"—that is, "free and clear of any claim or" defense the consumer might have against the seller. *Id.* at 53,507–08 (explaining the history of the holder-in-due-course doctrine). These financial institutions, therefore, could, and would, require consumers to fulfill their credit obligations regardless of seller misconduct in the underlying retail transaction. *Id.* at 53,506-07.

But this immunity soon created an unsustainable situation. "[S]tores were selling shoddy furniture, fly-by-night contractors were promising to install aluminum siding that never appeared, the proverbial used car dealers were hawking lemons, and countless other shady characters were operating in similar fashion in scores of different fields." Michael F. Sturley, *The Legal Impact of the Federal Trade Commission's Holder in Due Course Notice on A Negotiable Instrument: How Clever Are the Rascals at the FTC?*, 68 N.C. L. Rev. 953, 954 (1990). To make matters worse, creditors facilitated these practices, eager to profit from their insulated position in the retail market. 40 Fed. Reg. at 53,530. Unscrupulous sellers would sell a defective or fraudulent product on credit, disappear, and leave the consumer still having to pay off the debt. *See id.*

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[1] Unless otherwise specified internal citations, quotation marks, and alterations are omitted from quotations throughout this brief.

After years of study, the Federal Trade Commission decided it had to intervene to protect consumers. *See* 40 Fed. Reg. at 53,506. The Commission enacted the Holder Rule—a rule that allows consumers to bring the same claims and defenses against third-party creditors that acquire consumer debt that those consumers could assert against the original sellers. *Id.* at 53,525. The Rule requires that consumer credit contracts involving the sale or lease of goods or services 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 with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

(Holder Rule Notice). Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2.

Consumers may use the Holder Rule in two ways: by withholding payment and "defend[ing] a creditor suit for payment of an obligation"; or by "maintain[ing] an affirmative action against a creditor who has received payments for a return of monies paid on account." 40 Fed. Reg. at 53,524.

The Rule essentially "reallocate[s] the costs of seller misconduct" from consumers to creditors. *Id.* at 53,523. The FTC recognized that "[t]he creditor is always in a better position than the buyer to return seller misconduct costs to the seller." *Id.* at 53,524. Creditors have "superior information," enabling them to develop "an accurate and reliable picture of a merchant's reputation." *Id.* at 53,518, 53,524. And they also have "the means and capacity" consumers lack "to deal with seller misconduct costs expeditiously and economically." *Id.* at 53,524. They can, for example, require sellers to indemnify them for suits against consumers or to repurchase any credit contract to which a consumer asserts a defense. *Id.* at 53,523. As the FTC explained, reallocating the cost of seller misconduct would serve to minimize overall costs in the consumer market because creditors, unlike consumers, would effectively police the market, refusing to finance unscrupulous retailers to avoid liability. *Id.*

The Holder Rule places only one restriction on consumer recovery from creditors. It states: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." 16 C.F.R. § 433.2. In guidance released the day the Rule went into effect, the FTC clarified that this limitation "does not eliminate any other rights the consumer may have as a matter of local, state, or federal statute." Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (May 14, 1976). By its terms, it limits recovery under *the Rule*. *See id.* "If a larger affirmative recovery is available against a creditor" under state law, the Commission explained, "the consumer would retain this right." *Id.* Indeed, part of the FTC's purpose in enacting the Holder Rule in the first place was to spur states to pass their own legislation. 40 Fed. Reg. 53,521.

In 2015, the FTC requested public comment on the Holder Rule as part of a routine review of all its regulations. Rules and Regulations Under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 80 Fed. Reg. 75,018 (Dec. 1, 2015). It received only a few comments mentioning attorneys' fees. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18,713 (May 2, 2019).

Still, when the agency confirmed in 2019 that it was leaving the Rule unchanged, it also clarified 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." *Id.* at 18,713.

The Commission soon realized, however, that some were "misconstru[ing]" this clarification to suggest that the Rule "limit[s] the application of state cost-shifting laws to holders"—the opposite of what the agency intended. FTC, Commission Statement on the Holder Rule and Attorneys' Fees and Costs, 2022 WL 343408, at *1–*2 (Jan. 18, 2022). So, shortly thereafter, the FTC reiterated its view more clearly: "[I]n 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.* at *1. "In this scenario," the Commission explained, "the cost or fee award is separate and supported by a law that is independent of the Holder Rule." *Id.* The Rule only limits fees "where the applicable law" authorizes them "exclusively against the seller"—and, therefore, the seller is only liable for those fees derivatively via the Holder Rule. *Id.* at *2.

II. Factual and procedural background

Six years ago, Tania Pulliam decided to buy a car. App. 41. Because of a disability, Ms. Pulliam needed cruise control and power-adjustable seats. App. 41-42. So she bought a vehicle advertised as having those features from a car dealership called HNL Automotive. App. 41. Ms. Pulliam purchased the car on credit, entering into an installment contract with the dealership. *Id.* The contract contained the provision required by the Holder Rule—that "any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller." App. 42. Following the purchase, the contract was assigned to TD Bank, which became, and remains, the "holder" of the contract. App. 2.[2]

Soon after buying the car, Ms. Pulliam discovered that—contrary to the dealership's assurances—the vehicle did not have either of the features she needed. App. 42. So she sued both HNL and TD Bank, alleging that the Bank was liable for HNL's misconduct under the Holder Rule. App. 43. A jury found for Ms. Pulliam on one of her claims: violation of the implied warranty of merchantability under California's Song-Beverly Consumer Warranty Act. *Id.* The jury concluded that HNL failed to adequately package and label the car, and that the car failed to conform to the promises made on the label. App. 2.

The Song-Beverly Act provides that if a "buyer prevails in an action under [the statute], the buyer shall be allowed by the court to recover . . . attorney's fees." Cal. Civ. Code § 1794(d). Following trial, therefore, Ms. Pulliam filed a motion for attorneys' fees. App. 2. In response, TD Bank argued that the court could not award fees against it because the Holder Rule limits "recovery hereunder by the debtor" to "amounts paid by the debtor"—a limitation the Bank argued applied even to fees awarded directly against a creditor under a prevailing-party statute. App. 4. Both the trial court and the Court of Appeal disagreed. App. 41, 86.

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[2] Technically, the contract was assigned to TD Auto Finance, which has since been merged into TD Bank. App. 2.

In a unanimous opinion, the California Supreme Court affirmed. The court held that "the most persuasive reading of the Rule, in light of its history and purpose, is that its cap 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." App. 11.

First, the court rejected the Bank's argument that the text of the Rule "unambiguous[ly]" limits a creditor's liability for fees awarded against it under a state prevailing party statute. App. 15. The court carefully considered each of the Bank's textual arguments—the same arguments the Bank makes here—and on each point, concluded that the more natural reading was to the contrary. *See* App. 12–15.

Next, the court turned to the purpose and history of the Rule. After a detailed review of the regulatory history, the court found that "the FTC had damages in mind when limiting recovery under the Rule"—not attorneys' fees. App. 19. The FTC "expect[ed] buyers would be able to assert defenses against creditor claims based on the Holder Rule as well as pursue affirmative litigation against creditors for seller misconduct, which would be financially infeasible for many buyers if attorney's fees were not recoverable." App. 20. The Commission, the court concluded, intended to protect—not "restrict"—the application of state statutes awarding attorneys' fees. App. 25–27.

The court explained that "[t]his understanding" is reflected in the text of the Holder Rule notice itself, "which provides that 'recovery *hereunder* by the debtor shall not exceed amounts paid by the debtor hereunder.'" App. 28. These words "limit" the "extension" to creditors of "claims and defenses" that would otherwise only "lie against" sellers to "amounts paid by the debtor under the contract." *Id.* But, the court held, they say nothing to limit states' ability "to provide consumers greater recovery against creditors than that available solely under the Holder Rule or to provide for the award of fees from creditors following suit." *Id.*

Finally, the court noted that the FTC's interpretation of the Rule accorded with its own: "[T]he Holder Rule's cap on recovery applies to attorney's fees where a plaintiff's claim to attorney's fees lies against a *seller* and, by virtue of the Holder Rule, is extended to lie against third party creditors." App. 30. "It does not apply where the claim for fees lies against the third party creditor in the first instance." *Id.* "In such circumstances," the court explained, "it is of no moment that the buyer's substantive claims against the holder may be related to the seller's misconduct." *Id.*

The court concluded by rejecting the Bank's request that it "interpret the Rule's limitation on 'recovery hereunder' to extend more broadly than its plain language suggests or more broadly than the FTC intended." App. 35. "Where state law provides for attorney's fees against a holder, nothing in the Rule prevents their award to the full extent provided by state law." *Id.*

REASONS FOR DENYING THE WRIT

I. There is no split of authority that warrants this Court's review.

According to TD Bank, an intractable conflict wracks the lower courts, with no "reasonable possibility" of resolution absent this Court's intervention. Pet. 19. But the Bank concedes there's no Circuit split. There couldn't be: In the fifty years since the Holder Rule was issued, not a single federal Court of Appeals has ever decided a dispute about the Rule's application to attorneys' fees. Nor is the issue roiling the state courts. TD Bank cites only three other state supreme courts that have *ever* considered anything remotely like the question presented here—all three over a decade ago, long before the FTC issued guidance on the issue. And these courts largely agree. The only potential outlier is a Nebraska Supreme Court decision from fifteen years ago—a decision the court would likely reconsider given the chance, now that the FTC itself has explained how the Rule applies.

That is hardly a conflict at all—let alone a conflict worthy of this Court's attention.

1. Despite the infrequency with which this issue arises, the California Supreme Court is not the first state high court to conclude that the Holder Rule's cap on "recovery hereunder by the debtor" doesn't apply to attorneys' fees awarded on some basis other than the Holder Rule. Long before the decision below, the Texas Supreme Court had already come to the same conclusion. In *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985) and again in *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987), the court authorized an award of attorneys' fees against a creditor that exceeded the amount the consumer had paid under the contract. The basis for the fee award in both cases was a state law awarding attorneys' fees to a consumer who prevails in litigation. *See Guerra*, 733 S.W.2d at 137; *Kish*, 692 S.W.2d at 466; Tex. Bus. & Com. Code § 17.50(d) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."). In other words, as here, the fees were not damages for the seller's misconduct, imposed on the creditor via the Holder Rule; the fees were awarded against the creditor itself because the creditor challenged the consumers' meritorious claims and lost.

TD Bank emphasizes that the Texas Supreme Court offered little reasoning for its decision; but it didn't need to. Its conclusion follows directly from the text of the Holder Rule: The Holder Rule caps "recovery *hereunder* by the debtor." 16 C.F.R. § 433.2 (emphasis added). An award of attorneys' fees under a state statute directly against a creditor for its own litigation conduct is not a recovery *under* the Holder Rule. The limitation on recovery under the Rule, therefore, does not apply. And, following in the Texas Supreme Court's footsteps, that's exactly what the California Supreme Court held here.

2. Contrary to the Bank's contention (at 16–17), the Ohio Supreme Court has not held otherwise. In fact, the Ohio Supreme Court has not weighed in on this issue at all. TD Bank cites *Reagans v. MountainHigh Coachworks, Inc.*, 881 N.E.2d 245 (Ohio 2008), but that case had nothing to do with the application of the Holder Rule's damages limitation to attorneys' fees. The issue in *Reagans* was whether claims for state-law penalties designed to punish a seller—rather than to compensate a consumer—are included in the "claims and defenses" a consumer may derivatively assert against a creditor under the Holder Rule. *Id.* at 254. The court held they are not. *Id.*

This holding may be dubious, but it is not relevant to the question presented in this case. The question here is not what claims for seller misconduct a consumer may bring against a creditor; it's whether the limitation on damages recovered under the Holder Rule caps attorneys' fees awarded against the creditor for its own conduct under state law. The Ohio Supreme Court has never considered that question.[3]

3. That leaves *Stenberg*, a single Nebraska Supreme Court case from fifteen years ago, as the only basis for TD Bank's claim that there's an important conflict between state high courts that this Court must resolve now. *See State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 755 N.W.2d 583 (Neb. 2008). The Bank contends that *Stenberg* is a "prominent example of the majority approach," but a Westlaw search reveals not a single case that has ever followed it.

It's not even entirely clear what, exactly, the Nebraska Supreme Court's approach is. The court affirmed—under an abuse of discretion standard—the trial court's decision that the Holder Rule capped the attorneys' fees awarded in that case but did not limit the award of costs. *Id.* at 595. The court did not explain why, in its view, the attorneys' fees constituted part of a consumer's "recovery [ ]under" the Holder Rule, while the other costs of litigation did not. But, in affirming the costs award, the court necessarily rejected TD Bank's position here: that the Holder Rule caps *all* awards against a creditor—even those based on the creditor's own conduct in opposing meritorious litigation. That means not a single state supreme court or federal Court of Appeals has ever taken the position the Bank asks this Court to grant certiorari to adopt.

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[3] TD Bank seizes on the fact that *Reagans* mentions attorneys' fees. Pet. 16–17. But it does so simply because attorneys' fees were among the penalties for seller misconduct provided by the Ohio statute at issue. The decision says nothing about attorneys' fees, like those here, awarded against a creditor for its own conduct—fighting a consumer's meritorious claim and losing.

And, now that the FTC has issued guidance explaining how the Holder Rule applies to fee awards, any tension between the decision below and *Stenberg* is likely to resolve itself—at least, it will if there's ever another case in Nebraska that raises this issue. Even including trial and state intermediate courts, there are only a handful of decisions from *any* state that have ever considered this question—over the course of *fifty years*.[4]

A single outlying state supreme court decision on a question that occurs so rarely that no Circuit has ever even considered it does not necessitate this Court's intervention.

II. The decision below is correct.

The Holder Rule requires that credit contracts for consumer goods or services state: "[A]ny holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller . . . . Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." 16 C.F.R. § 433.2. The most natural reading of this Rule—indeed, the only reading that makes any sense—is the one the California Supreme Court reached below: The Rule "caps fees only where a debtor asserts a claim for fees *against a seller* and the claim is extended to lie against a holder by virtue of the Holder Rule." App. 3 (emphasis added). It does not limit fees that are awarded directly against a

[4] The Bank asserts that the majority of this small handful have gone its way. Not so. *See, e.g.*, *In re Stewart*, 93 B.R. 878, 889 (Bankr. E.D. Pa. 1988); *Diaz v. Paragon Motors of Woodside, Inc.*, 2008 WL 2004001 (E.D.N.Y. May 7, 2008).

holder for its own conduct—such as, here, opposing a consumer's meritorious claim and losing. *See id.*

1. Start with the text. The Holder Rule does not cap *all* recoveries. It only caps "recovery *hereunder* by the *debtor*." 16 C.F.R. § 433.2 (emphasis added). TD Bank does not dispute that a "recovery hereunder" is solely a recovery on claims a consumer has against the seller, for which the creditor is derivatively liable under the Holder Rule. Nor does the Bank dispute that a recovery asserted directly against the creditor for its own conduct—not derivatively for the seller's misconduct—is not a "recovery hereunder."

The necessary consequence of these two undisputed propositions is that the decision below is correct: Where, as here, a state statute awards fees directly against a creditor—not because it is derivatively liable for the seller's misconduct, but because the creditor itself fought a consumer's claims and lost—those fees are not a "recovery [ ]under" the Holder Rule. And they are not, therefore, subject to the Rule's damages cap.

Nevertheless, TD Bank insists (at 23) that the damages limitation applies because, absent the Rule, Ms. Pulliam could not have sued the Bank at all. On that view, if, during the lawsuit, the court had sanctioned the Bank for discovery misconduct, that sanctions award would also be subject to the damages cap. That can't be right. And the text of the Rule shows why: The Rule governs a consumer's recovery only for *specific* "c*laims and defenses*"—those lodged against a seller for which the creditor is only derivatively liable—not lawsuits as a whole. 16 C.F.R. § 433.2 (emphasis added). Sanctions, like prevailing-party fee awards, are not claims against the seller, for which the creditor is only derivatively liable. They are awards directly against the creditor itself for its own conduct.

The Bank recognizes (at 23)—and this Court has repeatedly made clear—that a "claim for attorney's fees" is distinct from a party's "substantive claim[s]" on the merits. *See, e.g.*, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) ("As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain."); *accord Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs. & Participating Emps.*, 571 U.S. 177, 183 (2014).[5] But it then ignores the distinction.

That distinction, though, is crucial here. While Ms. Pulliam's substantive claims against the Bank were brought under the Holder Rule, her request for attorneys' fees was not. Attorneys' fees were not awarded against the Bank because the seller committed misconduct; they were awarded against the Bank because it "chose to oppose a consumer's claim" and lost. App. 33.

Indeed, these fees *couldn't* have been awarded "[ ]under" the Holder Rule. By its terms, the Holder Rule only applies to claims that a consumer "could assert" against the seller. 16 C.F.R. § 433.2. But a consumer who sues a creditor and prevails could *not* assert the resulting claim for attorneys' fees against the seller—by definition, prevailing-party fees are awarded against the party over

[5] As this Court has explained, "awards of attorney's fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of 'costs' awarded to a prevailing party, which are generally not treated as part of the merits judgment." *Ray Haluch Gravel Co.*, 571 U.S. at 184. That is precisely how they are treated under California law today. App. 19.

whom the consumer prevailed. Here, Ms. Pulliam happened to sue and prevail over both the seller and the creditor. So the prevailing party statute provided for attorneys' fees against both. But that doesn't change the nature of the fee award against the Bank: It remains an award directly against the creditor for its own litigation conduct, not an award against the seller for which the creditor is only derivatively liable. That alone puts to rest the Bank's claim that the Holder Rule limits such an award.

But if more were needed, the Holder Rule specifies that its damages cap applies solely to "recovery" under the Rule "*by the debtor*." 16 C.F.R. § 433.2 (emphasis added). TD Bank simply reads this limitation out of the Rule. Every award, on the Bank's view, constitutes a recovery "by the debtor." The California Supreme Court's interpretation, on the other hand, gives the phrase meaning: It applies to money the debtor actually recovers—not money that goes to the consumer's attorney. *Cf.* App. 13–14 (explaining that "[i]n ordinary parlance, ... [a]ttorney's fees would not be considered part of a consumer's recovery because any fees collected end up not with the consumer but with the consumer's attorney").

Courts, including this one, frequently distinguish between a client's "recovery"—what the client receives in recompense for their claims—and the fees their attorney receives for procuring that recovery. *See, e.g.*, *Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 438 (2005) ("Sometimes, as when the plaintiff seeks only injunctive relief, or when the statute caps plaintiffs' recoveries, or when for other reasons damages are substantially less than attorney's fees, court-awarded attorney's fees can exceed a plaintiff's monetary recovery."); *Marek v. Chesny*, 473 U.S. 1, 4, (1985) ("[T]he $139,692 in postoffer legal services resulted in a recovery $8,000 less than petitioners' settlement offer."). The attorneys' fees here compensate Ms. Pulliam's counsel for securing a "recovery . . . by the debtor"; they are not the debtor's recovery itself.

Indeed, if the limit on a consumer's "recovery [ ]under" the Holder Rule included the attorneys' fees required to procure that recovery, many debtors could not actually "recover[ ]" anything at all. As TD Bank points out, the payments a consumer has made for a product that turns out to be defective or fraudulent often amount to less than is required to hire an attorney to recover those payments. Pet. 33; *see* 40 Fed. Reg. 53,511–12. So if the Holder Rule's damages limitation applied to attorneys' fees, the Rule would be self-defeating: It would authorize consumers to bring claims against the holders of consumer debt, but prevent them from hiring attorneys to actually do so. That makes no sense.

And it makes even less sense when applied to defenses. The Holder Rule doesn't just enable consumers to bring affirmative claims against a creditor; it also enables them to assert the seller's misconduct as a defense to a debt-collection lawsuit. *See* 16 C.F.R. § 433.2. Because the cost of hiring competent counsel often exceeds a consumer's debt, many states award attorneys' fees when a consumer prevails in a collection action—that helps prevent consumers from being forced to pay an unlawful debt simply because they can't afford to challenge it. *See, e.g.*, Ark. Code § 16-22-308; Cal. Civ. Code § 1811.1; Idaho Code § 12-120(3); Nev. Rev. Stat. § 97B-170. But on the Bank's reading, these fees for *defending* against unlawful debt collection would constitute a "recovery . . . by the debtor," no less than fees for bringing an affirmative suit. They would, therefore, be capped by the Holder Rule to the amount the consumer had already paid on the debt—which, if the consumer is being sued, may well be zero.

On the Bank's view, then, not only is the Holder Rule nearly impossible to use affirmatively; invoking it defensively would make the consumer *worse* off than paying the debt. There is no basis in the text of the Rule for such an absurd reading. The California Supreme Court was right to reject it.

2. The Bank fares no better appealing to the purpose of the Holder Rule. Again, the whole point of the Rule is to enable consumers, harmed by seller misconduct, to either "defend" a collection action brought by a creditor or "maintain an affirmative action against a creditor who has received payments." 40 Fed. Reg. 53,524. If, as the Bank claims, the Rule effectively exempts creditors from state fee-shifting statutes, consumers would be unable to do either. As the decision below points out, the FTC was well aware that—absent fee-shifting statutes—the low value of consumer claims makes it difficult, if not impossible, for consumers to find counsel. *See id.* at 53,511–12; App. 20-22. It defies logic that the Commission would pass a Rule designed to ensure that consumers have legal recourse, but include a limitation the agency knew would almost always prevent that recourse from being used.

The Bank argues that the "only" goal of the Holder Rule is "to restore the link between the seller's obligation to perform and the consumer's obligation to pay." Pet. 25. But, again, the Bank's countertextual reading of the Rule would undermine this goal: Consumers could not get counsel to raise the claims and defenses the FTC provided to restore this link. Contrary to the Bank's contention (at 27), the FTC recognized—and discussed extensively—the need for affirmative litigation against creditors. 40 Fed.

Reg. 53,526–27. After all, absent affirmative litigation, a consumer has no way to rescind an unlawful loan, recover payments made under it, or clear their credit unless the creditor simply agrees to do so—knowing that it will suffer no consequences if it does not. *See id.*

The Bank asserts (at 24–27) that affirmative litigation is largely unnecessary because the Holder Rule restores to consumers their "most effective weapon—nonpayment." The banking industry made this argument before the Holder Rule was enacted, and the FTC rejected it—with good reason. *See id.* at 53,526–27. Nonpayment is useless if consumers cannot hire counsel to defend the resulting debt-collection lawsuit or clear the negative credit reporting creditors can submit even without having to sue. *See id.*

And awarding prevailing-party attorneys' fees does not, as the Bank claims (at 25), "punish[ ] the creditor for a seller's misconduct or convert[ ] creditors into wholesale insurers of seller" wrongdoing. The basis for prevailing-party fees is the creditor's *own* conduct in challenging a consumer's meritorious claims.

Put simply, everything in the Rule's purpose and history points to the same conclusion as its text: The Rule caps the derivative liability of creditors for fee awards against a seller, but it does not limit attorneys' fees awarded directly against a creditor itself under a state prevailing-party statute.

3. The FTC agrees. In its recent advisory opinion, the Commission interpreted the Holder Rule in precisely the same way the California Supreme Court did here. *See* FTC, Commission Statement on the Holder Rule and Attorneys' Fees and Costs (Jan. 18, 2022); *id.* at n.1 (explicitly approving of the Court of Appeal decision in this case).

The Bank argues that this opinion represents a change in position, but the Commission itself has said otherwise. *See id.* at 3 (explaining that this view "misconstrue[s] the Commission's statements"). To the contrary, the FTC has consistently interpreted the Rule as preserving state-law rights—including the right to attorneys' fees provided by state prevailing party statutes. *See id.* at 3–4; 41 Fed. Reg. at 20,023 (FTC guidance issued shortly after the Rule stating that the damages limitation "does *not* eliminate any other rights the consumer may have as a matter of local, state, or federal statute" (emphasis added)).

III. The question presented is neither "exceptionally important" nor "frequently recurring."

If the question presented here were as "exceptionally important" and "frequently recurring" as TD Bank claims, at least one Circuit would have considered it in the last fifty years.

The Bank warns (at 33) that if this Court doesn't intervene now to stop courts from occasionally awarding attorneys' fees against creditors, lenders will either "provide less consumer credit," "do so at an increased cost, or both." That's exactly the same threat banks like TD lodged with the FTC when it was considering the Rule in the first place. *See* 40 Fed. Reg. at 53,517. It was false then, and it is false now. *See id.* at 53,519–20. The Texas Supreme Court held nearly forty years ago that the Holder Rule does not limit attorneys' fee awards under the state's Deceptive Trade Practices Act. *See Kish*, 692 S.W.2d at 463. But the Bank offers no evidence that because of that decision, Texans can't get loans—or that the cost of credit is higher in Texas than elsewhere.

Nor is there anything unfair about allowing states to award attorneys' fees against creditors when consumers prevail against them. As the FTC explained when it passed the Rule, creditors are well-positioned to determine whether a merchant is reputable—and therefore to avoid doing business with sellers likely to commit misconduct. *See, e.g.*, 40 Fed. Reg. 53,518 (citing "industry testimony" that creditors are able to "detect and predict the incidence of consumers sales abuse on a statistically reliable scale" and detailing methods for doing so). And creditors can—and do—easily protect themselves from the consequences of seller misconduct by requiring sellers to indemnify them or entering "recourse" agreements, which mandate that the seller repurchase a contract should the consumer assert a defense to collection. *See id.*

TD Bank complains that the attorneys' fees to litigate Holder Rule cases typically exceed the consumer's damages, but that's precisely the point. It's why states include prevailing party provisions in consumer protection statutes: to ensure that consumers can get competent counsel to litigate claims and defenses that, while perhaps small in an absolute sense, are essential to the consumer's livelihood. *Cf.* 40 Fed. Reg. 53,511–12 ("The amount of a consumer's damages in such a case may be substantial in real terms, hundreds of dollars or more, but such damages are rarely enough to attract competent representation.") Otherwise, consumers would have no recourse when a creditor sought to collect from them an unlawful debt—precisely the circumstance the Holder Rule is designed to avoid.

Take this case as an example. Not only did Ms. Pulliam have to win a jury trial to get relief, she had to fight the Bank for nearly two years after the verdict before it would obey the judgment. Escalante Decl., Mot. Judicial Notice at 8, *Pulliam v. TD Auto Finance, LLC,* No.

S267576 (Cal. S. Ct. Aug. 27, 2021); *id.* Ex. 1, at 36–41. Although the Bank did not dispute the damages award (only the attorneys' fees), it nevertheless refused to pay it. *See id.*; App. 47 (showing only attorneys' fees issues were appealed). It even continued to collect on the contract—forcing Ms. Pulliam to make payments a jury had made clear she did not owe. It was only after the trial court issued a bench warrant for the Bank's CEO that it finally paid what it indisputably owed. Escalante Decl., at 8.

The attorneys' fees here exceed the damages because, at every turn, the Bank fought to prevent Ms. Pulliam from getting the relief to which she was entitled. If the Holder Rule capped fee awards under state fee-shifting statutes, consumers like Ms. Pulliam would be hard-pressed to find counsel who could afford to take a case like this one. And banks like TD could continue to collect unlawful debts simply by making it too expensive for consumers to challenge them.

Finally, contrary to the Bank's repeated insinuation, there is no evidence that attorneys are clamoring to bring frivolous Holder Rule cases—typically, small-value individual lawsuits—just because, *if they win*, they might be compensated for their time. If they were, presumably some Circuit—or, at least, more than a few state supreme courts—would have considered this issue.[6]

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[6] The banking industry *amici* offer no evidence for their claim that the question presented here "is vital to the resolution of thousands of cases annually." American Bankers Ass'n Br. at 6 (caps omitted). The brief relies on a report demonstrating that there are thousands of cases under California's lemon-law statute, but it cites nothing to support its contention (at 6) that in "most of these cases, the buyer" invokes the Holder Rule. Nor could it. As the report makes clear, these lemon-law cases are typically brought against the car

Of course, if that changes, this Court can intervene then. But the Bank identifies no reason to grant certiorari now: The decision below correctly resolved an issue few other courts have even considered—there simply is no problem for this Court to solve. And although the Bank's desire to avoid paying for its intransigence in this case is understandable, it is not a valid basis for this Court's review. This Court should deny its petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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manufacturer. *New report reveals most commonly sued car manufacturers under California lemon law*, U.S. PIRG Education Fund (May 24, 2022), https://perma.cc/5SAQ-JK4W. Companies like Ford and GM are unlikely to disappear, so there's no need to sue the holder of the credit contract.

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