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

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REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case squarely presents an important question of federal consumer protection law that has divided state courts of last resort: whether, and in what circumstances, the FTC's regulation known as the Holder Rule limits the attorney's fees a consumer can recover from a creditor in litigation under the Rule. Pulliam does not seriously deny the conflict. She does not contest that this case provides the ideal vehicle for resolving it. And while she disputes the importance of the question, the FTC's recent statements on it and the presence of four major bank associations urging this Court's review amply rebut her assertion.

Pulliam's opposition must therefore rest on her defense of the merits of the decision below. Even if her arguments were convincing, it would not undermine the case for this Court's review. After all, if the decision below were correct, then the majority of lower-court decisions would be wrong.

But Pulliam's defense of the decision below also fails. Fees awarded for prevailing on a substantive cause of action preserved by the Holder Rule are awarded "[]under" the Rule. Pulliam's arguments to the contrary misconstrue the question presented, misstate the basis for such awards, and in several respects conflict with the reading of the Holder Rule she purports to accept and defend.

The Court should grant certiorari to resolve the acknowledged conflict and correct the California Supreme Court's harmful misreading of the Holder Rule.

ARGUMENT

I. State Courts of Last Resort Are Divided.

The conflict among state courts has been acknowledged by courts, commentators, and the FTC. And the decision below stakes out a position directly at odds with the Nebraska and Ohio high courts and with the majority of lower courts to have squarely addressed the question. *See* Pet.13-19. Pulliam's arguments for ignoring that conflict are unpersuasive.

1. Pulliam acknowledges that the decision below conflicts with the Nebraska Supreme Court's holding in *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 755 N.W.2d 583 (2008), that the Holder Rule limits attorney's fees awarded against creditors in Holder-Rule litigation. Opp.12. Although she highlights that the court's review was for an abuse of discretion, she does not attempt to distinguish the decision on that basis. Rightly so. The propriety of the fee award turned exclusively on the meaning of the Holder Rule. In Nebraska, as in federal court, such a legal question is always reviewed *de novo*. *See Vyhlidal v. Vyhlidal*, 973 N.W.2d 171, 182 (Neb. 2022).

Pulliam does purport to be confused by the *Stenberg* court's affirmance of a cost award in excess of the Holder Rule's limitation. Opp.12. But whether costs are also limited by the Holder Rule is a separate issue that was not considered in *Stenberg*. *Cf. Lafferty v. Wells Fargo Bank, N.A.*, 25 Cal. App. 5th 398, 414-15 (2018) (distinguishing between attorney's fees and costs because costs are not "part of the recovery

secured through the cause of action provided by the Holder Rule"). It is not at issue here.

2. Pulliam wrongly contends (at 11) that the decision below does not conflict with the Ohio Supreme Court's decision in *Reagans v. MountainHigh Coachworks, Inc.*, 881 N.E.2d 245 (2008). Like Pulliam, the *Reagans* buyer obtained a judgment against a creditor based on seller misconduct by virtue of a Holder-Rule preserved claim. *See id.* at 248-49. Like the Song-Beverly Act, a provision of the same statute afforded "reasonable attorney's fees" to the "prevailing party"—without explicitly limiting those fees as against the seller only. R.C. 1345.09(F)(2) (1978).

Under the decision below, the *Reagans* buyer would be permitted to obtain attorney's fees against the creditor without regard to the Holder Rule's limitation. *See* Pet.App.32-33. In *Reagans*, the court held that the Holder Rule did not permit the buyer to recover fees from the creditor *at all*. *See* 881 N.E.2d at 254 ("The costs that the FTC rule seeks to shift to the creditor for the seller's misconduct are the actual, compensatory damages incurred in the consumer contract with the seller."). That the Ohio court forbid, rather than merely limit, attorney's fees under the Holder Rule does not eliminate the conflict—it exacerbates it.

Pulliam contends, however, that *Reagans* concerned only "state-law penalties designed to punish a seller[,] rather than to compensate a consumer." Opp.11. But the Ohio court reasoned that attorney's fees under its prevailing-party statute "serve[d] as an additional penalty against sellers" at least in part

because they represented "a statutory exception to the 'American Rule.'" *Reagans*, 881 N.E.2d at 254. The same is true of fees under the Song-Beverly Act—or any other prevailing-party fee provision.

3. Pulliam asserts that certiorari is not warranted because no federal circuit court has weighed in. Opp.9-10. But the lack of circuit court authority is completely unsurprising. The Holder Rule principally operates to preserve *state*-law claims against a seller. Where the buyer sues an in-state seller alongside the creditor, there is no basis for federal jurisdiction. As a result, disputes implicating the Rule are almost always litigated in state court. *See* ABA Amici Br. 6-7. That reality has not led legal commentators (which Pulliam simply ignores) to overlook the conflict. *See* Pet.18-19. It has not stopped the FTC from twice addressing the question in recent years. And it makes the question about the meaning of a federal regulation no less worthy of this Court's review.

4. Finally, Pulliam suggests that the conflict may resolve itself in light of the FTC's recent guidance. Opp.13. That is highly unlikely. The FTC has issued two somewhat unclear, seemingly contradictory statements—the second in response to this litigation. Not even the California Supreme Court, which adopted a position like the FTC's most recent statement, deferred to the FTC. *See* Pet.App.30 (adopting its interpretation "whether or not deference is warranted"). There is no reason to conclude that state courts that previously adopted a contrary position are likely to find the agency's guidance more persuasive. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019) ("[A] court

should decline to defer to a merely 'convenient litigating position'" and "rarely" defer "to an agency construction 'conflicting with a prior' one.") (citations and brackets omitted).

II. The Decision Below Is Wrong.

The California Supreme Court's decision is wrong. Notwithstanding Pulliam's attempt to obscure the issue, the question presented is whether the Holder Rule limits a fee award that a buyer can pursue only because the Holder Rule makes the creditor—who is not alleged to have committed any wrongdoing—derivatively liable for a seller's misconduct under a state statute that contains both (1) a substantive cause of action and (2) a fee-shifting provision for prevailing on that cause of action. The text, purpose, and history of the Rule make clear that such an award is obtained "[]under"—and is therefore limited by—the Holder Rule. *See* Pet.19-30.

1. On the text, Pulliam seemingly now accepts that attorney's fees may constitute "recovery" under the Rule. *But see* Pet.App.11 (noting Pulliam's contrary argument below). But she argues that fees awarded pursuant to a prevailing-party fee provision are not awarded "[]under" the Holder Rule because they are awarded due to a creditor's own conduct and "not because [the creditor] is derivatively liable for the seller's misconduct." Opp.14. That is doubly inaccurate. Contrary to Pulliam's claim, prevailing-party fee awards are not akin to sanctions against a defendant for daring to offer a good-faith defense against a plaintiff's claim. And more importantly, where—as here—

a fee award is available against a creditor based on the consumer's prevailing on a Holder-Rule preserved claim, the fees *are* awarded because the creditor is derivatively liable for the seller's misconduct underlying that preserved claim. Otherwise, there would be no claim on which to prevail.

The Song-Beverly Act exemplifies this reality. California Civil Code § 1794(a) gives consumers a cause of action if they are damaged by "a failure to comply with" obligations the Act imposes on retailers and manufacturers. California Civil Code § 1794(d)—just a few lines down—gives consumers who prevail on that cause of action a right to attorney's fees "as part of th[at] judgment." The fees allowed are those "reasonably incurred by the buyer *in connection with* the commencement and prosecution of such action" under § 1794(a). *Id.* § 1794(d) (emphasis added).

There is nothing independent or "direct" about the Song-Beverly Act fee award Pulliam received. That award was only available because Pulliam prevailed on a Song-Beverly Act claim the Holder Rule allowed her to pursue. And that award is measured by Pulliam's costs of pursuing that claim and part of the judgment granted on that claim. The fee award is thus recovered "[]under" the contract provision the Holder Rule mandates and because of the seller's misconduct, not petitioner's.

It makes no difference that a fee demand may be directed at a non-prevailing creditor, whether or not there exists a non-prevailing seller, and thus, in some technical sense, is not a claim that the consumer

always "could assert" against the seller. *Cf.* Opp.15-16. The decision below does not and cannot rest on such a cramped reading of the "claims and defenses" that the Holder Rule preserves and limits. Under that theory, the Holder Rule would not preserve and limit fee awards based on fee-shifting provisions *expressly* limited to non-prevailing sellers unless the consumer also sued the seller—contrary to the California Supreme Court's and FTC's apparent view. Indeed, if that argument were correct, a consumer could not bring even a substantive claim against a creditor where the seller is defunct and therefore unable to be sued. In that scenario too, the consumer "could [not] assert" her claim against the non-existent seller.

Finally, Pulliam's new argument that the Holder Rule cap does not apply because attorney fees are not recovery "by the debtor" is also unavailing. Opp.16-17. Even if that argument had merit in some cases, it would not here. California Civil Code § 1794(d) expressly authorizes "the *buyer* . . . to recover as part of the judgment" in a Song-Beverly Act case attorney's fees "reasonably incurred *by the buyer*." Cal. Civ. Code § 1794(d) (emphases added). And that is precisely what happened. *See* Pet.App.98.

But, in any case, the argument again proves too much. According to Pulliam, "the only reading [of the Holder Rule] that makes any sense" is the one adopted below—that the Rule limits fee awards only if the award is sought "*against a seller* and the claim is extended to lie against a holder by virtue of the Holder Rule." Opp.13 (quoting Pet.App.3). But if the Holder Rule limits only recovery that the buyer, not her

attorney, will ultimately retain, it would not limit *any* fee award—even one that is "extended to lie against a holder by virtue of the Holder Rule." *Id.* Neither the court below nor Pulliam appears to endorse that reading.

2. Pulliam also fails to show that her view is consistent with the Holder Rule's limited, yet significant, purpose: to eliminate the holder-in-due-course regime under which a consumer's obligation to pay a creditor was unconnected to a seller's obligation of honest and fair dealing. Petitioner's reading reconnects that obligation *without* making the creditor the wholesale insurer of seller misconduct that the creditor was neither involved in nor knew about. Pulliam's reading would make a mockery of the balance the Rule struck—limiting damages against a creditor to the money a debtor has paid under the contract but permitting fee awards that exceed those damages multiple times over.

Contrary to Pulliam's suggestion, the Holder Rule's purpose was not to address every obstacle to consumers' ability to maintain suits against creditors or defend against creditor claims based on seller misconduct. Opp.18. The purpose—evinced in the Rule's plain text—was to partially preserve a consumer's "claims and defenses" concerning consumer credit contracts. Petitioner's reading fully accomplishes that goal, without preventing States from *separately* providing for recovery of attorney's fees "independent of [the] claims or defenses" the Rule preserves—if they conclude that more is required. Pet.28 (citation and emphasis omitted).

Pulliam's concerns about litigation costs are, of course, not unique to consumer credit contracts. The cost of hiring counsel is a potential obstacle in all sorts of lawsuits. Nevertheless, litigation in this country generally follows the American Rule. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). And though the FTC acknowledged the challenges that regime can pose in consumer litigation, it said *not a word* about shifting attorney's fees to creditors uncapped by the Holder Rule's limitation on "recovery." It beggars belief that the FTC would have subjected creditors to unlimited fees that all agree will frequently dwarf any substantive recovery, without even a passing reference.

Notably, this case does not present the question whether fees awarded for successfully *defending* against a collection suit are limited by the Holder Rule. The term "under . . . must draw its meaning from its context." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630 (2018). And the Holder Rule notice's second sentence principally targets affirmative consumer suits, not defenses to collection actions. That may well make a difference. But even if not, that would provide no basis to misconstrue the Rule in a manner that eviscerates the limitation's entire purpose. Instead, States would remain free, as California has done in some contexts, to independently abrogate the holder-in-due-course doctrine for such actions and provide unlimited attorney's fees. *See* Cal. Civ. Code §§ 1811.1, 2983.4.

3. Finally, the FTC's recent apparent reversal on the question presented does not help Pulliam. Until

2022, the FTC agreed with petitioner in a notice-and-comment rulemaking that the Holder Rule limits fee awards against creditors that are "based on claims . . . preserved by the Holder Rule notice." Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18,711, 18,713 (May 2, 2019). The FTC's apparent flip flop in an advisory opinion weighing in on this litigation does not warrant deference. *See* pp. 4-5, *supra*. And Pulliam's assertion (at 20) that the advisory opinion is consistent with the agency's earlier guidance contradicts her concession below that the earlier rulemaking had adopted petitioner's interpretation of the Rule. *See* Answering Br. 42, *Pulliam v. TD Auto Finance, LLC*, No. S267576 (Cal. S. Ct. Aug. 27, 2021).

III. The Question Presented Is Important.

Lastly, Pulliam's attempts to dismiss the significance of the question presented are unpersuasive. As the banking associations explain, "[a]ttorney fees are the driving force in the resolution of the tens of thousands of Holder Rule cases that are filed annually." ABA Amici Br. 4. The question has garnered the attention of the FTC twice since 2019. Both the FTC and the court below recognized that the question had arisen frequently in recent years. *See* Pet.30-34.

1. Pulliam doubts (at 22 n.6) the banking associations' estimation of the number of cases implicating the Holder Rule. But she offers nothing to contradict their representation. Nor does she deny the ubiquitous nature of consumer credit transactions to which the Holder Rule applies, including auto loans, home-

improvement loans, appliance loans, mobile-home loans, and student loans, among others. The FTC itself recognized the substantial number of lawsuits involving such financing *in 1975*. *See* 40 Fed. Reg. 53,510 (Nov. 18, 1975). There is no reason to believe that the number has diminished in the ensuing decades. *See* Pet.31 (describing explosion in consumer lending in vehicle purchases). If even only a tiny fraction of those transactions result in litigation, the number of cases threatened or filed each year would be immense. And the decision below provides only more incentive for such claims.

Pulliam suggests that, if Holder-Rule litigation were prevalent, more state high courts would have addressed the question presented. But as the banking associations explain, the reason more state high courts have not addressed the question is not because the cases are not filed, but because in the vast majority of instances, it is easier for creditors to settle such claims, rather than resist them. *See* ABA Amici Br. 9-10. That is particularly true in Holder-Rule litigation involving sellers that have been dissolved, leaving the creditor to defend third-party conduct in which it was not involved. *See id.* at 9 n.7. That reality—and the resulting unlikelihood of another vehicle presenting itself soon—is not a reason to deny review, Opp.23, but a compelling reason to grant it.

2. Pulliam attempts to minimize (at 20) the potential effects of the California court's decision on the consumer credit market by pointing to the Texas Supreme Court's ambiguous decisions on the question presented. *See* Pet.17-18. But nothing in those decisions

could give consumers or their counsel confidence that unlimited attorney's fees would be available in Texas courts—much less anywhere else. This decision is different. There is a reason that the National Consumer Law Center has declared the decision below the "now leading" case on the question presented, NCLC, *Federal Deception Law* § 4.3.5.2, and four major banking associations are urging this Court's review *now*.

3. In the end, Pulliam argues the Court should deny review because her interpretation is more fair, attempting to bolster the point by accusing petitioner of post-judgment misconduct. Opp.20-22. This Court is not the venue to resolve factual disputes about conduct that is both outside the record and irrelevant to the question presented. Suffice it to say that petitioner has a different view of the course of litigation than Pulliam.

More to the point, which reading of the Holder Rule is the fairer one has no bearing on either the merits of the question or whether that question warrants resolution by this Court. State high courts are divided on a question of federal law that implicates countless consumer transactions across a wide swath of industries every day. Whatever the right (or fair) answer, the question warrants a resolution that only this Court can supply, and this case presents an ideal vehicle to supply it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 13, 2022