

# THE FTC HOLDER RULE—REDUX IN 2022

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## I. INTRODUCTION

In 1975, the Federal Trade Commission promulgated the “FTC Holder Rule,” which states that:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as “commerce” is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to: (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.<sup>1</sup>

The regulation thus subjects the holder of any consumer credit contract to the same claims that a buyer of a good or service could bring against the seller of that good in connection with the purchase. Through its requirement to be included as a contractual term in all consumer credit transactions subject to its regulation, the FTC Holder Rule mandates that “consumers [have] a practical means of redress in their purchase of consumer goods and services, and gives[s] creditors an incentive to supervise their sellers to prevent losses.”<sup>2</sup>

Despite the FTC Holder Rule’s unambiguous language capping a buyer or “debtor’s” recovery for claims brought under the regulation to amounts paid under the credit contract, the interpretation and application of this language has varied through “attempts by courts, commentators, and the consumers’ bar to ‘expand assignee liability well beyond any fair reading of the FTC Holder Rule’s purpose and plain limits’—by seeking attorneys’ fees and costs far beyond” such amounts.<sup>3</sup>

In California, multiple courts “had addressed the scope of the FTC Holder Rule’s first clause, but”<sup>4</sup> despite having been the subject of multiple decisions across the nation,<sup>5</sup> “the issue of the scope of the [] second clause and whether it capped attorneys’ fees and costs had [only recently] been addressed at the appellate level.”<sup>6</sup> Previously, in California, “the question of whether the FTC Holder Rule’s second clause capped the buyer’s attorneys’ fees was relegated to a few scattered trial court level and arbitration rulings, and an unpublished California Court of Appeal decision.”<sup>7</sup>

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1. 16 C.F.R. § 433.2 (1975).

2. *Comment Letter on Holder Rule Review*, AM. FIN. SERVS. ASS’N 2 (Feb. 12, 2016), [https://www.ftc.gov/system/files/documents/public\\_comments/2016/02/00025-100572.pdf](https://www.ftc.gov/system/files/documents/public_comments/2016/02/00025-100572.pdf) [<https://perma.cc/32WM-2U86>] [hereinafter AFSA Comment Letter].

3. Scott J. Hyman & Tara Mohseni, *California Court of Appeal Finds that the FTC Holder Rule Limits a Holder’s Liability for a Consumer’s Attorneys’ Fees*, 72 Conf. on Cons. Fin. L. Q. 432, 434 (2019) (quoting AFSA Comment Letter). The author also would like to thank Tara Mohseni, Esq., currently of Ogletree Deakins, for her work on portions of an initial draft of this Article.

4. *See Music Acceptance Corp. v. Lofing*, 32 Cal. App. 4th 610, 617, 626 (Cal. Ct. App. 1995) (noting that often, to make consumers whole, assignees must be liable for the seller’s improper actions).

5. Hyman & Mohseni, *supra* note 3, at 434–35.

6. *Id.* at 435.

7. *Id.*

The debate in California finally came to a head in *Lafferty v. Wells Fargo Bank*,<sup>8</sup> where “the Court of Appeal found that the attorneys’ fees that the Laffertys incurred to prosecute the case as a whole were not recoverable against the holder, except to the extent such fees fell within the ‘amount paid by the debtor hereunder’ plain language [cap of] the Holder Rule.”<sup>9</sup> In short, the FTC Holder Rule capped their attorneys’ fees. Notably, the Court signaled the matter was better suited for legislative action should it disagree with the Court’s interpretation.<sup>10</sup> A detailed summary of the regulatory and judicial history regarding the FTC Holder Rule can be found in our previous article.<sup>11</sup>

The backlash after *Lafferty* was immediate and vocal. Amidst pressure from the consumers’ bar,<sup>12</sup> the California State Assembly introduced an Assembly Bill 1821 on March 6, 2019,<sup>13</sup> which authorized the award of attorney’s fees, costs, and expenses “to the fullest extent permissible” for prevailing plaintiffs in cases brought pursuant to the FTC Holder Rule.<sup>14</sup> The Assembly Committee’s analysis justified the legislation on the—some would say false—basis that:

The prevailing rule in California for many years was that consumers exercising the rights afforded by the Holder Rule were eligible to receive attorneys’ fees in excess of the amounts paid on the underlying contract. However, a recent California appellate court ruling overturned this long-standing precedent. This bill returns the law to its previous form, allowing the award of attorneys’ fees in these consumer protection cases.<sup>15</sup>

On May 2, 2019, after *Lafferty* and while Assembly Bill 1821 was working through the California Legislature, the FTC issued long-awaited guidance affirming the preservation of the FTC Holder Rule without any modifications to its existing language.<sup>16</sup> The FTC confirmed that the Holder Rule

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8. *Lafferty v. Wells Fargo Bank*, 25 Cal. App. 5th 398 (Cal. Ct. App. 2018).

9. Hyman & Mohseni, *supra* note 3, at 436.

10. *Lafferty*, 25 Cal. App. 5th at 425 (“Given the long-standing validity of the American rule in both federal and California jurisprudence, we decline to invade the prerogative of a legislative body to remove the limit on attorney fees imposed by the Holder Rule.”).

11. See generally Hyman & Mohseni, *supra* note 3 (summarizing the legislative and judicial history of the FTC Holder Rule).

12. AB 1821 Assembly Judiciary Analysis (April 7, 2019). (file:///C:/Users/shyman/Downloads/201920200AB1821\_Senate%20Floor%20Analyses.pdf).

13. ASSEMB. WKLY. HIST. (Cal. Leg., Sacramento, Cal.), Feb. 6, 2020, at 1139.

14. Assemb. B. 1821, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

15. *Contracts: Hearing on Assemb. B. 1821 Before the S. Comm. on the Judiciary*, 2019–2020 Leg., Reg. Sess. 1 (Cal. 2019) [hereinafter *S. Comm. on the Judiciary Hearing*].

16. Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 84 Fed. Reg. 18711 (May 2, 2019) (to be codified at 16 C.F.R. pt. 433).

“places no limits on a consumer’s right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract.”<sup>17</sup> Notably, the commission concluded that the Holder Rule specifically caps attorneys’ fees accordingly, “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.”<sup>18</sup>

Nevertheless, despite the FTC’s statement of its clear intent, the author of Assembly Bill 1821 doubled-down before the Senate Judiciary Committee and on the Senate Floor, reiterating the purported “prevailing rule” in California arguing that the pre-*Lafferty* rule needed to be “restored,” relying on an unpublished California case and never mentioning the FTC’s May 2, 2019 Guidance.<sup>19</sup> Despite the possibility that the proposed statute was preempted by federal law, and the clear misrepresentation of the status of the FTC Holder Rule, California’s Assembly swiftly pushed the Assembly Bill 1821 through the enactment process. The legislation was unopposed,<sup>20</sup> underwent no revisions,<sup>21</sup> and by July 12, 2019, Assembly Bill 1821 was approved by Governor Gavin Newsom and chaptered by the Secretary of State as California Civil Code section 1459.5.<sup>22</sup>

This Article addresses what happened judicially after *Lafferty* and the enactment of Civil Code 1459.5. However, the FTC weighed in again in

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17. *Id.* at 18712.

18. *Id.* at 18713.

19. *S. Comm. on the Judiciary Hearing, supra* note 15, at 4 (“As detailed above, the Holder Rule is part of regulations promulgated by the FTC that require consumer credit contracts to include a provision making any holder of such contracts subject to the same claims and defenses as the original seller. (16 C.F.R. Section 433.2.) This rule ensures that consumers are protected from unscrupulous sellers by holding the financiers of these contracts equally liable for consumer claims. The rationale is that the creditors of such contracts, not the consumers, are in a better position to hold the seller accountable or otherwise absorb the cost. The issue relevant here is whether consumers bringing actions against defendants pursuant to the Holder Rule in California are able to claim attorneys’ fees uncapped by the amount paid by the consumer on the underlying credit contract. The longstanding interpretation of the rule in California was that such awards were available to consumers and that courts ‘should not artificially cap the consumer’s recovery of attorney fees’ because ‘[s]uch a rule effectively insulate[s] holders from paying fees and costs, even if they refused to refund payment made or reach reasonable settlements’ on consumer claims. *Duran v. Quantum Auto Sales, Inc.*, 2017 Cal. App. Unrep. LEXIS 8476, at \*14.”)

20. *Third Reading of Assemb. B. 1821 Before the S. Rules Comm., Off. of S. Floor Analyses*, 2019–2020 Leg., Reg. Sess. 6 (Cal. 2019) [hereinafter *S. Rules Comm. Third Reading*].

21. *Id.*

22. *ASSEMB. WKLY. HIST.*, *supra* note 13, at 1139.

2022. As of the publication of this Article, the issue of liability under the FTC Holder Rule is pending in *Pulliam v. HNL Automotive Inc.*,<sup>23</sup> which has been fully briefed and argued before the California Supreme Court.

## II. PRE-EMPTION OF SECTION 1459.5

### A. The FTC's Post-*Lafferty* Guidance.

Since its promulgation in 1975, the FTC never really revisited the meaning or purpose of the FTC Holder Rule.<sup>24</sup> In 2012, however, the FTC issued an advisory opinion letter in response to a query from the National Consumer Law Center.<sup>25</sup> The FTC's 2012 letter "affirmed the 'plain language' of [the Holder] Rule does not limit the claims and defenses that can be asserted against the Holder under the [FTC] Holder Rule's first clause[,] and confirmed that the plain language of the FTC Holder Rule limited a consumer's recovery to amounts not to exceed what had been paid by the consumer under the contract.<sup>26</sup> The FTC cited a subset of decisions holding that the FTC Holder Rule's liability cap is inclusive of attorneys' fees and costs<sup>27</sup> in a footnote appended to this sentence: "It remains the Commission's intent that the plain language of the Rule be applied, which many courts have done."<sup>28</sup>

In February 2015, the FTC gave public notice of its intent to request comments for the first time regarding the continued viability of the FTC Holder Rule,<sup>29</sup> specifically seeking public comment on the overall costs, benefits, and regulatory and economic impact of its Rules and Regulations

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23. *Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396 (Cal. Ct. App. 2021), *aff'd*, 509 P.3d 998 (Cal. 2022), *petition for cert. filed*, TD Bank, N.A. v. Pulliam, No. 22-288 (U.S. Sept. 23, 2022).

24. 16 C.F.R. § 433; Federal Trade Commission Trade Regulation Rule Concerning the Preservation of Consumers' Claims and Defenses (The Holder Rule), F.T.C. Adv. Op. at 2 (May 3, 2012).

25. *Opinion Letter on the Holder Rule*, FTC (May 3, 2012), [https://www.nclc.org/images/pdf/rulemaking/P124802\\_Holder.pdf](https://www.nclc.org/images/pdf/rulemaking/P124802_Holder.pdf) [<https://perma.cc/9YD2-MZTG>] [hereinafter FTC Opinion Letter].

26. AFSA Comment Letter, *supra* note 2, at 9; *see also id.* at 7 (confirming that the Commission's intent is indicated by the plain language of the Holder Rule).

27. FTC Opinion Letter, *supra* note 25, at 3.

28. *Id.* The three cases the FTC cites are: *Simpson v. Anthony Auto Sales, Inc.*, 32 F.Supp.2d 405, 409 n.10 (W.D. La. 1998); *Riggs v. Anthony Auto Sales, Inc.*, 32 F.Supp.2d 411, 416 n.13 (W.D. La. 1998); and *Scott v. Mayflower Home Improvement Corp.*, 831 A.2d 564, 573–74 (N.J. Super. Ct. Law Div. 2001). The FTC also cited *Jaramillo v. Gonzalez*, 50 P.3d 554, 563–64 (N.M. Ct. App. 2002), in which the court affirmed an award of attorneys' fees without considering whether the fee award was limited by the Holder Rule's limit on "recovery" against the holder.

29. Modified Ten-Year Schedule for Review of FTC Rules and Guides, 80 Fed. Reg. 5713, 5714 (Feb. 3, 2015).

under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, commonly known as the "FTC Holder Rule."

The FTC noted that none of the commentators advocated that the Holder Rule should be abrogated, and, therefore, found a continued need for the Rule.<sup>30</sup> As to the first clause of the Holder Rule, the FTC confirmed that the Holder Rule "places no limits on a consumer's right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract."<sup>31</sup> Notably, the FTC concluded that the Holder Rule caps attorneys' fees, "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."<sup>32</sup>

The FTC also recognized that the Holder Rule would not cap fees where the federal or state law provided a claim against a holder that was independent of the claims or defenses that arose from the seller's conduct.<sup>33</sup>

B. The California Legislature Responds to *Lafferty* by Passing Civil Code § 1459.5, but Never Mentions the FTC's May 2, 2019 Guidance.

While the FTC was still reviewing comments submitted in its administrative review of the FTC Holder Rule, on March 6, 2019, the California Assembly Committee on Judiciary introduced Assembly Bill 1821.<sup>34</sup> The bill's express intent was to provide that a plaintiff who prevails on a cause of action against a defendant named pursuant to the FTC Holder Rule, "can claim attorney's fees, costs and expenses from that defendant to the fullest extent possible as if the plaintiff had prevailed" on that cause of action against the seller.<sup>35</sup> To that end, the proposed statute stated:

A plaintiff who prevails on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of Federal Regulations or any successor thereto, or pursuant to the contractual language required by that part or any successor thereto, may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.<sup>36</sup>

The bill was assigned to the Assembly Committee on Judiciary for analysis, which stated its purpose was to "correct" the effect of the Court's

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30. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. at 18712.

31. *Id.*

32. *Id.* at 18713.

33. *Id.*

34. *Contracts: Application of Federal Law: Hearing on Assemb. B. 1821 Before the Assemb. Comm. on Judiciary*, 2019–2020 Leg., Reg. Sess. 1 (Cal. 2019) [hereinafter *Assemb. Comm. on Judiciary Hearing*].

35. *Id.*

36. Assemb. B. 1821.

ruling in *Lafferty* and “restore” the FTC Holder Rule to its original meaning—“restoration” purportedly meaning to “restore” the law to a reading that purportedly would allow consumers to recover attorney’s fees from financial institutions.<sup>37</sup> The Committee explained that the meaning of the FTC Holder Rule’s second clause shielded a lender or assignee of a sales contract from liability for punitive and consequential damages stemming from a seller’s misconduct.<sup>38</sup>

As a matter of public policy, the Committee opined that the *Lafferty* ruling purportedly had caused “a chilling effect on attorneys’ willingness to take on auto fraud and lemon law cases” due to their inability to recover fees and costs beyond the amounts their clients paid under the contract at issue.<sup>39</sup> It purported to draw support from a myriad of public interest law firms and non-profits such as the California Low-Income Consumer Coalition, National Consumer Law Center, and Consumer Attorneys of California, as well as two individual attorneys.<sup>40</sup> Public interest groups predominately cited the “occasional disproportionality between the client’s damages and their attorney’s fees,” the lack of incentive to settle as opposed to wearing down the consumer with protracted litigation, and the impracticality for consumers’ attorneys to pursue claims where the dealer employs abusive litigation tactics.<sup>41</sup>

Assembly Bill 1821 passed committee on April 9, and the proposed bill was read a second and third time on the Assembly Floor on April 10 and April 25, 2019.<sup>42</sup> The Assembly’s analysis prepared in anticipation of the third reading largely summarized the initial bill analysis and confirmed that no arguments in opposition of the bill had been presented.<sup>43</sup> The bill passed in the Assembly and moved to the Senate for first reading on April 25.<sup>44</sup> This process repeated in the California Senate, moving to the Senate Committee on Judiciary the same day—*with no mention that the FTC had itself issued its Guidance on May 2, 2019*.<sup>45</sup> The bill was set for hearing on June 11, 2019, where it passed the Senate Committee without opposition, mention of the FTC’s new guidance, or correction of the Assembly Analyses’ false statement that Assembly Bill 1821 was required to “return” California to what its author claimed was the prior state of the law.<sup>46</sup> Following

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37. *Assemb. Comm. on Judiciary Hearing, supra* note 34, at 2–3.

38. *Id.* at 4.

39. *Id.* at 6.

40. *Id.* at 8.

41. *Id.* at 6.

42. ASSEMB. WKLY. HIST., *supra* note 13, at 1139.

43. *Third Reading of Assemb. B. 1821 Before the Assemb. Comm. on Judiciary, 2019–2020 Leg., Reg. Sess. 2 (Cal. 2019)* [hereinafter *Assemb. Comm. on Judiciary Third Reading*].

44. ASSEMB. WKLY. HIST., *supra* note 13, at 1139.

45. *Id.*

46. *S. Comm. on the Judiciary Hearing, supra* note 15, at 1, 6.

a second and third reading in the Senate, the bill was approved in both houses and was presented to Governor Gavin Newsom for signing on July 8, 2019.<sup>47</sup> The bill was signed into law on July 12, 2019 and chaptered by the Secretary of State under Chapter 116, Statutes of 2019.<sup>48</sup> The rule was slated to take effect on January 1, 2020.<sup>49</sup>

C. The FTC Holder Rule Preempts Civil Code § 1459.5.

In 2020, *Spikener v. Ally Financial, Inc.*<sup>50</sup> flew into this perfect storm of competing attempts to control the interpretation and application of the FTC Holder Rule, and squarely contemplated whether Civil Code section 1459.5's authorization of uncapped recovery of attorney's fees was preempted by the FTC Holder Rule. As in *Lafferty*, the First District Court of Appeal held that to the extent Civil Code section 1459.5 "authorizes a plaintiff to recover attorney[s'] fees on a Holder Rule claim even if that results in a total recovery greater than the amount paid under the contract [at issue], section 1459.5 conflicts with, and is therefore preempted by, the Holder Rule."<sup>51</sup>

Damien Spikener sued Ally Financial, Inc. before the legislature's passage of Civil Code section 1459.5. Spikener had purchased a vehicle from Premier Automotive of Oakland, LLC in 2016, but the seller had not advised him at the time of sale that the vehicle had previously been involved in a major collision.<sup>52</sup> Shortly after the sale, the contract was assigned to Ally for financing.<sup>53</sup> In February 2018,<sup>54</sup> Spikener filed a complaint against Ally for violation of the Consumers Legal Remedies Act due to seller's alleged misrepresentations about the condition of the vehicle.<sup>55</sup> A few months later, the parties settled the matter for \$3,500, the approximate amount Spikener had paid to Ally under the contract.<sup>56</sup> The settlement preserved Spikener's claim for attorneys' fees and declared him the prevailing party in that claim, but simultaneously preserved Ally's right to oppose any motions for fees.<sup>57</sup>

As expected, Spikener filed a motion for recovery of his \$13,000 in attorney's fees and costs.<sup>58</sup> The Superior Court in Alameda County, pursuant to *Lafferty*, awarded Spikener his costs and expenses but denied his request

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47. ASSEMB. WKLY. HIST., *supra* note 13, at 1139.

48. *Id.*

49. CAL. CIV. CODE § 1459.5 (West 2022).

50. *Spikener v. Ally Fin., Inc.*, 50 Cal. App. 5th 151 (Cal. Ct. App. 2020).

51. *Id.* at 155.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*



for attorney's fees.<sup>59</sup> The court specifically stated it was unwilling to apply the then pending Civil Code section 1459.5, partly because it was not slated to take effect until January 1, 2020.<sup>60</sup> Most importantly, the court stated Civil Code section 1459.5 was preempted by the FTC's May 2019 Guidance which clarified its interpretation of the FTC Holder rule to limit recovery of attorney's fees to amounts paid under the relevant contract.<sup>61</sup> Spikener appealed to the First District Court of Appeal.<sup>62</sup>

The Court found itself presented with similar issues it contemplated in *Lafferty*, but this time with the benefit of the FTC's Guidance. The Court outlined an abridged history of the FTC Holder Rule before discussing the *Lafferty* progeny.<sup>63</sup> It restated its holding under *Lafferty* that "a consumer cannot recover more under the Holder Rule cause of action than what has been paid on the debt regardless of what kind of a component of the recovery it might be—whether compensatory damages, punitive damages, or attorney fees."<sup>64</sup> It also set the stage for its ultimate holding by restating the FTC's Rule Confirmation and conclusion that it did 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."<sup>65</sup>

Spikener argued for the Court to challenge *Lafferty*. In responding, the Court applied "*Auer* deference," or the Supreme Court's principles of construction in interpreting agencies' reasonable readings of genuinely ambiguous regulations.<sup>66</sup> It assumed, *arguendo*, Plaintiff's interpretation of the FTC Holder rule was also a reasonable one, rendering the regulation ambiguous.<sup>67</sup> But, the Court declined to contradict *Lafferty*, citing the Guidance as dispositive as to the Holder Rule's application to attorney fees<sup>68</sup> and deferring to it as the "official position" on the interpretation of the FTC Holder Rule.<sup>69</sup> It also reasoned that the Guidance fell within the FTC's substantive expertise, and was only issued after the FTC solicited and reviewed public comments so it reflected the agency's reasoned judgment.<sup>70</sup> Taking such factors into consideration, the Court concluded that the FTC's

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59. SUPER. CT. OF CAL. CNTY. OF ALAMEDA (Nov. 25, 2019), <https://www.severson.com/wp-content/uploads/2019/11/Holder.pdf> [<https://perma.cc/LD6K-J98E>].

60. *Id.*

61. *Id.*

62. *Spikener*, 50 Cal. App. 5th at 155.

63. *Id.* at 156–57.

64. *Id.* at 157 (quoting *Lafferty*, 25 Cal. App. 5th at 414).

65. *Id.* at 158 (quoting Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. at 18713).

66. *Id.* at 158–59.

67. *Id.* at 159.

68. *Id.* at 158.

69. *Id.* at 159.

70. *Id.*

interpretation of the Holder Rule was subject to deference.<sup>71</sup> The Court rejected Spikener's arguments that his claim for attorney's fees under the CLRA arose independent of the car dealer's misconduct, and was therefore not subject to the Holder Rule's cap on recovery.<sup>72</sup> It also dismissed his demands to rule in favor of unspecified policy arguments in a manner that would shift deference from "the agencies that administer the statutes to federal courts."<sup>73</sup> With this reasoning, the Court concluded "the Holder Rule's limitation on recovery applies to attorney fees based on a claim asserted pursuant to the Holder Rule, such that a plaintiff's total recovery on a Holder Rule claim—including attorney fees—cannot exceed the amount paid by the plaintiff under the contract."<sup>74</sup>

In the second part of its holding, the Court concluded that Civil Code section 1459.5 was preempted by the FTC Holder Rule.<sup>75</sup> The Court again relied on the FTC's interpretation of the Rule, and specifically that its limitation on recovery should apply regardless of whether the state claim being asserted contains a fee shifting provision (such as under the CLRA), to reflect a clear intent to prohibit states from circumventing the stated cap.<sup>76</sup> The trial court's judgment was affirmed and Ally was awarded its costs on the appeal.<sup>77</sup>

### III. ENTER *PULLIAM*, AND A WITHDRAWAL BACK TO PRE-*LAFFERTY* AND PRE-*SPIKENER*

#### A. *Spikener* Disagrees With *Lafferty* (and the FTC's Guidance on What the FTC Said the FTC Rule Means).

Those following the *Lafferty* debate assumed the California Supreme Court nailed the coffin on the issue of whether a consumer can seek recovery beyond amounts they paid under the contract when pursuing FTC Holder Rule claims, when it denied review of *Lafferty*<sup>78</sup> and declined to depublish the Court of Appeal's decision.<sup>79</sup> Not so. Enter the Court of Appeal for the Second District in its decision in *Pulliam v. HNL Automotive Inc.*,<sup>80</sup> where the Court of Appeal disagreed with *Lafferty*'s conclusion that the FTC Holder Rule capped attorneys' fees.<sup>81</sup>

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71. *Id.*

72. *Id.*

73. *Id.* at 160 (citation omitted).

74. *Id.*

75. *Id.*

76. *Id.* at 162.

77. *Id.*

78. Hyman & Mohseni, *supra* note 3, at 451.

79. *Id.*

80. *Pulliam*, 60 Cal. App. 5th at 396.

81. *Id.* at 412 ("Not surprisingly, TD would have us follow *Lafferty* and *Spikener*. In our ensuing discussion, we first disagree with *Lafferty*'s interpretation of the Holder Rule, and conclude that the Holder Rule's cap itself does not apply to

Following a trial against both an automobile dealer and the assignee/holder of the retail installment sales contract, the Plaintiff prevailed and was awarded \$169,602 in attorney fees jointly against the dealer and the holder.<sup>82</sup> The dealer and holder appealed. The Court of Appeal engaged in a lengthy opinion supporting the attorneys' fee award and costs against the dealer.<sup>83</sup> And therein lies the rub: after noting that "[t]he trial court specifically found defense counsel's litigation tactics complicated the case and made what could have been a 'simple' case into a difficult one[,]" the Court turned to—or some may say "on"—the Holder Rule.<sup>84</sup>

As to *Lafferty* and the Holder Rule cap, the Court started from the proposition that "[b]oth consumer rights and the rule's purpose would be frustrated if attorney fees were not recoverable from both the seller and the creditor-assignee."<sup>85</sup> The Court examined the FTC's May 2, 2019 Guidance and found that the FTC's statement as to what the FTC meant in the FTC's own rule was not entitled to deference. The Court of Appeal stated that "given the informal nature of the FTC's consideration of the issue—one that followed a request for comments that did not mention attorneys' fees—we are not convinced that the confirmation truly represented the 'fair and considered judgment' [necessary] to receive . . . deference"—despite the fact that the *Pulliam* court noted earlier in the decision that consumer protection organizations and industry organizations such as the American Financial Services Association had commented on the fee cap of the Rule.<sup>86</sup> Finally, the Court of Appeal stated that:

although we cannot say the position taken in the Rule Confirmation was a change in interpretation—as the FTC had not previously interpreted the rule at all—it did, in fact, address an issue never previously addressed, and undermined the existing practice in those jurisdictions in which attorney fees in excess of the cap had been, and were being, imposed as a matter of course.<sup>87</sup>

Thus, having concluded that "the Holder Rule cap does not include attorney's fees within its limit on recovery and that the FTC's interpretation to the contrary is not entitled to deference, the Holder Rule is consistent with section 1459.5, and we need not address whether section 1459.5 independently applies."<sup>88</sup>

## B. The Floodgates Open, and the FTC Flows Through.

With a split of authority on the FTC Holder Rule cap, trial courts, arbitrators, and other Courts of Appeal could simply choose which decision

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attorney's fees. Then, we disagree with *Spikener's* conclusion regarding the binding nature of the FTC's contrary interpretation in its Rule Confirmation.").

82. *Id.* at 404.

83. *Id.*

84. *Id.* at 409.

85. *Id.* at 416.

86. *Id.* at 418, 420.

87. *Id.*

88. *Id.* at 422.

to follow.<sup>89</sup> And, choose they did.<sup>90</sup> Trial courts generally followed *Lafferty*. The consumers' bar, however, sought a "weak link" to present a different emboldened Court of Appeal with a case to challenge *Lafferty's* conclusion on the FTC Holder Rule cap and *Spikener's* conclusion with regard to preemption of section 1459.5. Still other Courts of Appeal followed *Lafferty*, but concluded that section 1459.5 was a game-changer.<sup>91</sup>

At the same time, the FTC gratuitously jumped in, again. On January 18, 2022, the FTC issued an "advisory opinion" on the "Holder Rule, and its impact on consumers' ability to recover costs and attorneys' fees."<sup>92</sup> With no notice of proposed rulemaking, no formal *amicus* brief, and no prompt or legal basis to do so,<sup>93</sup> the FTC Advisory Opinion noted that certain courts have "misinterpret[ed] the Holder Rule as a limitation on the application

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89. See *Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 456 (Cal. 1962) (acknowledging how lower courts presiding over Holder Rule cases must choose which conflicting appellate court decision to follow).

90. Compare *Jones v. First Choice Auto*, No. B306976, 2021 Cal. Super. LEXIS 10001, at \*13 (Sac. Co. Sup. Aug. 18, 2021) ("This Court Shall Follow *Spikener*. In light of (1) the respective positions advanced by the parties to the case at bar with respect to the Holder Rule's impact on a plaintiff's ability to recover attorney fees and (2) the California Supreme Court's own statement in granting review of *Pulliam* about trial courts remaining free to exercise discretion to decide which of the conflicting appellate authorities to follow, this Court is now essentially compelled to choose between following *Pulliam* or following *Spikener*."), with *Flores v. Westlake Servs., LLC*, No. B308288, 2021 Cal. App. Unrep. LEXIS 7876, at \*1 (Dec. 16, 2021) ("Guided primarily by [*Pulliam*], we conclude that title 16, section 433.2 of the Code of Federal Regulations (CFR) (the Holder Rule) does not cap the attorney fees, costs, expenses, or prejudgment interest that Plaintiff may recover from Westlake, the creditor-assignee, or from Southgate, the seller. Therefore, we reverse and remand for the trial court to re-determine the matter."), and *Melendez v. Westlake Servs., LLC*, 74 Cal. App. 5th 586, 595 (Cal. Ct. App. 2022) ("Accordingly, we conclude the holder-rule limitation on recovery does not preclude recovery of attorney fees, and the FTC's contrary interpretation is not entitled to deference. These conclusions eliminate any need to consider defendant's further contention that Civil Code section 1459.5 is preempted by the holder rule.").

91. See *Reyes v. Beneficial State Bank*, 76 Cal. App. 5th 596, 615–16 (Cal. Ct. App. 2022) (holding that a Holder Rule cause of action does not preempt Civ. Code, § 1459.5 and that plaintiffs were entitled to its benefit).

92. *Commission Statement on the Holder Rule and Attorneys' Fees and Costs*, FTC 1 (Jan. 18, 2022), <https://www.ftc.gov/policy/advisory-opinions> [<https://perma.cc/54G3-2F5Q>] [hereinafter FTC Commission Statement].

93. See COMPETITION ADVISORY OPINIONS, <https://www.ftc.gov/advice-guidance/competition-guidance/competition-advisory-opinions> ("The FTC provides guidance in the form of advisory opinions concerning proposed conduct. The process starts with a request for advice from the party proposing the conduct. Many competition advisory opinions are rendered by Bureau staff, and often involve issues in the health care field. Commission advisory opinions are voted on by the Commission and are intended to address substantial or novel questions of fact or law, or subjects of significant interest.").

of state cost-shifting laws to holders”—citing to *Spikener* and *Lafferty*, whereas others have “correctly conclude[d] that the Holder Rule does not limit recovery of attorneys’ fees and costs when state law authorizes awards against a holder.”<sup>94</sup>

The FTC Advisory Opinion stated:

The Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law. Consequently, whether costs and attorneys’ fees may be awarded against the holder of the credit contract is determined by the relevant law governing costs and fees. Nothing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws.<sup>95</sup>

The FTC Advisory Opinion further states that where “the applicable law requires or allows costs or attorneys’ fee awards against a holder, the Holder Rule does not impose a cap on such an award.”<sup>96</sup> Therefore, some courts found that while the FTC’s new “advisory opinion” did not change *Lafferty*, it did express the FTC’s opinion that state law could act within the space and, therefore, did not preempt section 1459.5.<sup>97</sup> Of course, the theoretical contradiction is patent, where the *Spikener* Court gave deference to a mere letter from the FTC whereas the *Pulliam* Court refused to defer to the FTC’s 2019 Guidance after notice and public comment due to alleged criticism of the FTC’s administrative comment process.<sup>98</sup>

### C. *Pulliam* Proceeds to the California Supreme Court.

#### 1. *Everyone jumps in.*

The Holder appealed *Pulliam* to the California Supreme Court and filed its opening brief on June 28, 2021. Briefing was concluded by December

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94. *Id.*

95. *Id.* at 2.

96. *Id.* at 3.

97. *See Reyes*, 76 Cal. App. 5th at 615–16 (“But for the enactment of section 1459.5, we would likely view the Holder Rule provision as limiting a prevailing party’s ability to recoup attorney fees from a holder in excess of amounts paid pursuant to a retail installment contract. With the passage of section 1459.5, however, such a prevailing party may now obtain an award of attorney fees even if it exceeds the amount he or she has paid under the contract. We conclude there is no conflict between section 1459.5 and the Holder Rule provision.”).

98. *Cf. id.* at 612 (“As discussed above, *Pulliam* concluded the 2019 Rule Confirmation was not entitled to deference on the issue of attorney fee recovery. We agree with *Pulliam*’s deference analysis. Moreover, as we now know, the FTC contends that courts applying the deference doctrine to the 2019 Rule Confirmation to arrive at the conclusion that section 1459.5 is preempted have misconstrued the 2019 Rule Confirmation. The FTC has expressly stated its disagreement with those cases. As a result, we conclude section 1459.5 is not preempted.”).

18, 2021. A panoply of consumer organizations,<sup>99</sup> industry organizations,<sup>100</sup> and specific individuals or entities<sup>101</sup> filed *amicus* briefs with the California Supreme Court.<sup>102</sup> Notably, the FTC did not file an *amicus* brief as to the meaning of its own rule. Instead, as discussed above, the FTC issued its Advisory Opinion on January 18, 2022, criticizing a number of decisions issued by California courts, and seeming to disagree with its own 2020 Guidance.<sup>103</sup> The Supreme Court understandably required a panoply of new briefing on the meaning of and scope of deference required to the 2022 Advisory Opinion. That briefing concluded on February 7.

On March 1, 2022, the Supreme Court heard oral argument on the *Pulliam* matter. Commenters predicted that argument favored the consumer's position, meaning *either* the FTC Holder Rule did not cap fees *or* that it did, but did not preempt section 1459.5.<sup>104</sup>

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99. UC Berkeley Center for Consumer Law & Economic Justice; Centers for Public Interest Law and the University of San Diego; Consumers for Auto Reliability and Safety; Consumer Federation of California; East Bay Community Law Center; Housing & Economic Rights Advocates; National Consumer Law Center; and Public Law Center.

100. The American Bankers Association; American Financial Services Association; California Financial Services Association; Consumer Bankers Association, and the U.S. Chamber of Commerce. *See generally* John Culhane, Jr., *Banking Trade Groups File Amicus Brief with CA Supreme Court in Case Involving Whether FTC Holder Rule's Recovery Limit Includes Attorney's Fees*, CONSUMER FIN. MONITOR, Dec. 6, 2021.

101. Westlake Financial Services.

102. *Pulliam v. HNL Automotive Inc.*, No. S267576, 2022 Cal. LEXIS 2914, at \*1 (May 26, 2022).

103. FTC Commission Statement, *supra* note 92, at 3–4.

104. Brooke Conkle et al., *California Supreme Court Prepares to Weigh In on Holder Rule*, JD SUPRA (Mar. 4, 2022), <https://www.jdsupra.com/legalnews/california-supreme-court-prepares-to-9116562/> [<https://perma.cc/3ML3-W6US>] (“Several justices pointed to the pro-consumer purpose of the Holder Rule, asking whether the language in the first sentence of the Holder Rule, which subjected a holder to ‘all claims and defenses’ a consumer could assert against a seller, was broad enough to allow for attorneys’ fee awards under state statutes. HNL Automotive argued that the first sentence must be read in light of the second sentence, which limits amounts recovered ‘hereunder.’ In other words, while the first sentence expands the types of claims and defenses that may be asserted against a holder, the second sentence caps the amount of the recovery for all those claims, including attorneys’ fee recovery. HNL Automotive also argued that the FTC weighed the consumer impacts when creating and confirming the Holder Rule, deciding that a limitation on holders’ exposure was consumer-friendly because it encouraged lenders to stay in the market. Pulliam, however, argued that the FTC identified holders as better able to bear the costs of the attorneys’ fee awards that enabled consumers to litigate.”)

Overall, the justices’ questioning indicated that they may favor Pulliam’s position. At least one justice seemed disinclined to give much weight to the

The Court consisted of Chief Justice Tani Cantil-Sakauye, Justice Ronald Robie sitting by designation from the Court of Appeal, Justice Carol Corrigan, Justice Goodwin Liu, Justice Leondra Kruger, Justice Martin Jenkins, and Justice Joshua Groban. Attorney Tanya Green argued the case for appellants; Arlyn Escalante argued the case for the appellees.<sup>105</sup>

The appellant argued that it was held liable for a substantial attorney fee despite the fact that it was merely the holder of the loan.<sup>106</sup> It became immediately clear that the FTC's 2022 Advisory Opinion would frame the argument, as Justice Kruger lead off with the query. Addressing the Advisory Opinion, Appellants argued that no deference was required but, even if it was, the Advisory Opinion stated that recovery "including attorneys' fees" was limited by the Holder Rule. To the extent the FTC criticized judicial decisions, it was not the role of the FTC to do so. Justice Jenkins stated immediately that he disagreed—that disagreement with contrary state decisions was exactly the role of the FTC. Justice Kruger opined that the Advisory Opinion gives more information on what the Holder Rule means. Accordingly, Justice Kruger framed this issue of whether the relevant attorneys' fee statute imposes obligations "as such" or "derivative" and "through" the Holder Rule. So, Justice Kruger concluded that the "cause of action" is not determinative; what determines whether fees are direct or derivative turns on the attorneys' fee statute, not the liability-imposing cause of action.

Justice Liu posited that no one disputes that the liability on the holder comes from the underlying cause of action; but, the fee award comes from

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2022 advisory opinion, but several of the justices expressed pro-consumer leanings, and HNL Automotive faced much heavier questioning than Pulliam. Justice Robie from the California Court of Appeals also sits pro tempore on this appeal to fill the current vacancy on the California Supreme Court, but he did not consider the case below, and his stance on this question is untested.").

105. *Pulliam*, 2022 Cal. LEXIS 2914, at \*1. A link to the oral argument can be found at <https://jcc.granicus.com/player/clip/2671>. A transcription of the oral argument is set forth at **Appendix A**. Although the transcription was performed by a licensed court reporter hired by the author to do so from the foregoing link, the author does so as a courtesy for the readers of this Article, and makes no representation or warranty as to the accuracy of the transcription. The comments herein are the author's interpretation of the arguments, having watched the oral argument. Readers are encouraged to watch or read the transcript to form their own conclusions.

106. The appellant used the term "loan" throughout even though automobile RISCs are not "loans". See Dep't of Fin. Prot. & Innovation, *About California Financing Law*, CA.gov (May 10, 2021, 11:53 AM), <https://dfpi.ca.gov/california-financing-law/about/> [<https://perma.cc/DQN9-TK9P>] ("There are a number of 'non-loan' transactions, such as bona fide leases, automobile sales finance contracts (Rees-Levering Motor Vehicle Sales and Finance Act) and retail installment sales (Unruh Act), that are not subject to the provisions of the California Financing Law.").

the attorneys' fee statute section 1459.5, which is a "direct" claim against the holder. Appellant responded that the Justices are ignoring the second sentence—liability imposed on the holder must be capped by the second sentence of the holder rule. Justice Liu then went back to the 2019 Guidance, and the FTC's language that nothing in the rule protects the holder against independent claims, stating that the "fee award" is not derivative because it exists in its own right and is independent.

The Chief Justice said that the FTC 2019 and 2022 opinions were of no help and were contradictory, which explained why the Justices were pushing back. The Chief Justice thus fell back to the purpose of the FTC Holder Rule, which was to protect consumers, that it applies to "all" claims, and that a limitation the "all" claims is a "weak read". Justice Kruger asked whether section 1459.5 was preempted, and whether the section fit the exemption for direct state statutes that impose liability under the Holder Rule. Appellants responded that section 1459.5 was neither raised in the trial court nor should it be at issue in this appeal because the statute was not in effect at the time of the trial court's decision. Appellants also argued that section 1459.5 should be preempted anyway by conflict preemption to the extent the statute imposes greater liability on holders than the FTC Holder Rule does. Finally, although the FTC's 2022 Advisory Opinion commented on many states' legislation, it never mentioned section 1459.5.

Appellees argued that the FTC spoke on this issue: state law governs what is imposed on consumers, and the second clause's cap does not apply to states' imposed liability for attorneys' fees. Appellee's argued that the FTC's 2022 Advisory Opinion clarified the Holder Rule and how states, such as California, have applied the Holder Rule incorrectly. Justice Groban asked whether the 2019 Guidance doomed appellees' case, or whether the 2020 Advisory Opinion changed the FTC's position. Appellee argued that they were fighting against the *Spikener* argument until the FTC came out and said that *Spikener* was wrong in 2022. So, as the Justices implied, that was then, and this is now. Appellee argued that the unlimited attorney fee award was necessary because sellers do not stand behind their product or go insolvent after litigating cases for a lengthy period of time. The only way to have consumers be protected would be to have an attorney fee award act as an incentive for consumers' lawyers to take on important consumer protection cases. Appellees argued that section 1459.5 was not preempted because it merely returned the status quo of the law before *Lafferty*. Chief Justice asked whether the holder would always be responsible for attorneys' fees under section 1459.5, and appellees responded affirmatively.

2. *The Supreme Court issues the Pulliam decision, finds the FTC Holder Rule does not cap attorneys' fees.*

On May 26, 2022, Justice Liu issued a unanimous opinion for the California Supreme affirming the Court of Appeal's decision in *Pulliam*.<sup>107</sup> The

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107. *Pulliam*, 2022 Cal. LEXIS 2914, at \*44.



Court framed the issue as addressing “whether ‘recovery’ under the Holder Rule . . . includes attorney’s fees and limits the amount of fees plaintiffs can recover from holders to amounts paid under the contract.”<sup>108</sup> Noting that the Courts of Appeal were divided on the issue,<sup>109</sup> the Court concluded that

the Holder Rule does not limit the award of attorney’s fees where, as here, a buyer seeks fees from a holder under a state prevailing party statute. The Holder Rule’s limitation extends only to “recovery hereunder.” This 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. Where state law provides for recovery of fees from a holder, the Rule’s history and purpose as well as the Federal Trade Commission’s repeated commentary make clear that nothing in the Rule limits the application of that law.<sup>110</sup>

The Court first went through the legislative history of the Holder Rule. In passing, the Court noted that the FTC had requested commentary on the Holder Rule and, following completion of that review, “determined to retain the Rule in its present form”.<sup>111</sup> Notably, the Supreme Court ignored the part of the FTC Commentary stating that, in doing so, the FTC was preserving the Holder Rule’s cap on attorneys’ fees: “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.”<sup>112</sup>

Instead, the Court focused on the FTC’s January 18, 2022 Advisory Opinion observing that the issue had recurrently appeared “in court cases, with some courts correctly concluding that the Holder Rule does not limit recovery of attorneys’ fees and costs when state law authorizes awards against a holder, and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders.”<sup>113</sup> In other words, ignoring public and industry comment in connection with the FTC’s 2019 Commentary preserving the Holder Rule cap on fees, ignoring its own confirmation in the Commentary that the Holder Rule caps fees, and ignoring the fact that the *Lafferty* decision and multiple other state court decisions in accord preceded the FTC’s 2019 Commentary, the FTC’s 2022

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108. *Id.* at \*3.

109. *Id.*

110. *Id.* at \*4.

111. *Id.* at \*8.

112. See Hyman & Mohseni, *supra* note 3, at 442 (quoting Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 84 Fed. Reg. at 18713).

113. *Pulliam*, 2022 Cal. LEXIS 2914, at \*9 (quoting FTC Commission Statement, *supra* note 92, at 1).

Letter expressed shock—shock!<sup>114</sup>—to learn that cases had followed the plain language of the Rule and the FTC’s own interpretation of it.

The Court framed the issue in two ways: (1) that the Holder Rule’s use of the term “recovery” applies to attorneys’ fees, and not just damages and, (2) if the meaning is ambiguous, the 2019 Commentary is entitled to deference.<sup>115</sup> Ultimately, the Court found that, based on the Rule’s history and purpose, its most persuasive reading was “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[.]” so the Court need not delve in to the deference issue—on the purported claim that the Court’s interpretation was consistent with the FTC 2022 letter.<sup>116</sup>

The Court first engaged in legal gymnastics to determine whether attorneys’ fees constituted “recovery hereunder” under the Holder Rule. The Court said attorneys’ fees were not “recovery hereunder” because “[t]he fact that attorney’s fees may be a type of ‘recovery’ in some contexts because they are ‘collected’ or ‘obtained’ by a judgment does not necessarily mean that such fees constitute ‘recovery . . . by the debtor’ or ‘recovery hereunder’ within the meaning of the Holder Rule.”<sup>117</sup> The Court then determined that the Rule was ambiguous, permitting it to turn to extrinsic sources. The Court noted that “attorney’s fees are absent from the FTC’s discussions of what constitutes recovery under the Rule until its 2019 Rule Confirmation”<sup>118</sup> and so, “the FTC had damages in mind when limiting recovery under the Rule, and there is no indication that attorney’s fees were intended to be included within its scope.”<sup>119</sup> Thus, the Court held that:

TDAF argues that if attorney’s fees were “so central to the Holder Rule’s success,” the Rule’s text or guidance would have “expressly removed attorney’s fees from the Rule’s use of the otherwise broad term ‘recovery.’” But the history of the Rule leaves us no reason to believe that the FTC thought it was addressing attorney’s fees at all by reference to “recovery.” To the contrary, given the FTC’s discussion of the legal costs facing consumers, one would expect the FTC to have expressly stated a limitation on collection of attorney’s fees if that is what it had intended the Rule to encompass.<sup>120</sup>

Thus, the Court concluded:

In sum, the FTC was cognizant of the challenges facing consumers bringing suit, including high legal costs, and it intended and expected affir-

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114. *CASABLANCA* (Warner Bros. 1942) (“I’m shocked, shocked, to find that gambling is going on in here!”).

115. *Pulliam*, 2022 Cal. LEXIS 2914, at \*13.

116. *Id.* at \*13–14.

117. *Id.* at \*18.

118. *Id.* at \*19.

119. *Id.* at \*23.

120. *Id.* at \*30.

mative suits by consumers to help correct the market failures it identified. In light of this history, it would be antithetical to the purpose of the Holder Rule to conclude that the FTC intended to “render . . . uneconomic” one of the two ways it provided to address the concerns it sought to alleviate by implicitly limiting a consumer’s ability to obtain attorney’s fees. The FTC was focused on consumers’ recovery of damages and intended the Rule to provide a minimum, not maximum, liability rule for the nation. In light of the FTC’s contemporaneous explanation of the Rule’s purposes, we find it unlikely that the FTC intended the Rule’s limitation on recovery to apply to attorney’s fees sought by a consumer from a holder under state law.<sup>121</sup>

The Court rejected TDAF’s argument that the Court should defer to the FTC’s interpretation of its own rule. The Court said it was unnecessary, because its ruling was consistent with the FTC’s 2019 Rule Confirmation. The Court paid homage to the 2019 Rule Confirmation’s statement that “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.”<sup>122</sup> But, the Court again engaged in legal gymnastics by stating:

The sentence that immediately follows likewise provides: “Claims *against the seller* for attorneys’ fees or other recovery may also provide a basis for set off against the holder that reduces or eliminates the consumer’s obligation.” In other words, the FTC’s interpretation is that the 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. It does not apply where the claim for fees lies against the third party creditor in the first instance. If state law authorizes fees against a holder, the FTC agrees that the Holder Rule places no limitation on their recovery. In such circumstances, it is of no moment that the buyer’s substantive claims against the holder may be related to the seller’s misconduct.<sup>123</sup>

The Court concluded—in a holding never made before by any court—that the Song-Beverly Act could be pursued directly against the Holder. Accordingly, since the Song-Beverly Act permitted attorneys’ fees, such fees would not be capped by the Holder Rule.

Of course, this analysis fails because if the Song-Beverly Act permits a direct action against the Holder, as posited, then neither the Holder Rule’s “claims and defenses” nor its “recovery hereunder” cap are ever triggered. The Holder Rule has no application to direct actions against a Holder that are not derivative of the claims against the seller. In other words, if the Court’s analysis is correct with respect to the Song-Beverly Act permitting a non-derivative action against a Holder, then the entire discussion of the

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121. *Id.* at \*37–38.

122. *Id.* at \*38 (quoting Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 84 Fed. Reg. at 18713).

123. *Id.* at \*39.

Holder Rule is unnecessary and *dicta*. Hinging on the direct claim premise, the Court found that the FTC's 2022 Advisory Opinion sealed the deal:

Neither the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies. To the contrary, the 2019 Rule Confirmation says that nothing in the Holder Rule limits recovery of attorneys' fees if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.<sup>124</sup>

Thus, the Court concluded:

It is clear that the FTC contemplated that state law might offer greater protections for consumers and that these protections might be accompanied by recovery in excess of the amounts paid on the contract. We have found no reason to interpret the Rule's limitation on "recovery hereunder" to extend more broadly than its plain language suggests or more broadly than the FTC intended. 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. We disapprove of [*Lafferty*] and [*Spikener*] to the extent they are inconsistent with this opinion.<sup>125</sup>

Commentators universally responded that *Pulliam* has significant implications.<sup>126</sup> At a minimum, the decision jeopardizes the panoply of federal

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124. *Id.* at \*42–43. Cf. Alan D. Wingfield et al., *The Holder Rule and Attorneys' Fees*, NALFA (Feb. 24, 2022), <https://www.thenalfa.org/blog/article-the-holder-rule-and-attorneys-fees/> [<https://perma.cc/4A87-HWNB>] ("The FTC previously voted 5-0 to issue a confirmation of the Holder Rule in 2019, which noted that several commentators had asked whether the Holder Rule's limitation on recovery to 'amounts paid by the debtor' allows consumers to recover attorneys' fees above that cap. The rule confirmation stated, '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.' Three of those five commissioners are still serving on the FTC.

Now, in a 180 degree turn, the FTC has voted 4-0 (including aye votes from the three commissioners who were already serving in 2019) to adopt this opinion that if the applicable state or federal law allows an attorneys' fee award against any defendant, whether holder or seller, then the Holder Rule places no limit on the amount of fees and costs the plaintiff may recover from a holder.").

125. *Pulliam*, 2022 Cal. LEXIS 2914, at \*44.

126. See, e.g., Alexander Farrell & Regina McClendon, *California Supreme Court Interprets FTC "Holder Rule" to Allow Uncapped Attorneys' Fees Awards*, JD SUPRA (June 1, 2022), <https://www.jdsupra.com/legalnews/california-supreme-court-interprets-ftc-3485105/#:~:text=The%20Pulliam%20court%20found%20that,Pulliam%20decision%20%20significant%20implications> [<https://perma.cc/J45B-8UWQ>] ("The *Pulliam* decision has significant implications. It is likely to increase plaintiffs' incentive to aggressively litigate given the probability of a sizable fee award if they prevail. It also increases creditors' liability exposure, because the downside risk is no longer limited to the amount paid under the

and state decisions across the nation holding the exact opposite of what the Court held in *Pulliam*.<sup>127</sup>

#### IV. CONCLUSION

Pre-*Lafferty*, almost every state in the Union—subject to several exceptions—had held that the FTC Holder Rule capped attorneys’ fees and costs.<sup>128</sup> *Lafferty* put California in that good company and, shortly after *Lafferty*, the FTC’s Guidance echoed that opinion. California Courts then decided that the FTC in its own Guidance, following administrative process and public commentary, was not entitled to say what the FTC’s own rule meant—instead, California Courts would do so. And just to be sure, California’s legislature passed section 1459.5 on faulty legal and factual premises. Then, rather than subject itself to formal scrutiny by filing an *amicus* brief, the FTC in 2022 offered a gratuitous letter that, as Justice Groban pointed out, conflicted with the FTC’s Guidance from 2019.

We’ve seen this before. In 2012, the FTC issued a gratuitous letter purporting to state that the Holder Rule did not cap fees.<sup>129</sup> But, even that letter did not withstand the FTC’s own scrutiny when the FTC revisited the Holder Rule after public comment issued its Guidance in 2019. The United States Supreme Court may have to be the ultimate arbiter on whether finance companies who take assignment of retail installment sales contracts will be responsible for unlimited attorneys’ fees incurred in cases filed against sellers.<sup>130</sup>

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sales contract, and attorneys’ fee awards are often disproportionate to the good’s sale price. *Pulliam* means that creditors will have to ensure they have enforceable indemnity agreements with sellers with which they do business and that they thoroughly screen, and regularly re-screen, those sellers.”).

127. See Hyman & Mohseni, *supra* note 3, at 442–43 (compiling cases that contradict *Pulliam*).

128. *Id.*

129. *Id.* at 441.

130. Petition for Writ of Certiorari, TD Bank, N.A. v. Pulliam, No. 22-288 (demonstrating a petition for certiorari was filed on September 23, 2022).

APPENDIX A

*Certified Copy*

In Re: Supreme Court )  
Oral Argument ) Case No. 267576  
\_\_\_\_\_ )

VIDEO/AUDIO TRANSCRIPTION OF ORAL ARGUMENT

VIDEO DATE: Tuesday, March 1, 2022

Transcribed By: Josie C. Gonzalez  
CSR No. 13435

Job No. 23901

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In Re: Supreme Court )  
Oral Argument ) Case No. 267576  
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Audio Transcription of Oral Argument,  
transcribed on May 19th, 2022 in San Diego, California,  
by JOSIE C. GONZALEZ Certified Shorthand Reporter  
No. 13435, in and for the State of California.

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2 Start of Video

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4 CHIEF JUSTICE: Good morning. Welcome to oral  
5 argument. The clerk may call the calendar.

6 CLERK NAVARRETE: Good morning. The Supreme  
7 Court California hearing oral arguments in San Francisco  
8 Tuesday, March 1st, 2022 at 9:00 A.M., case number is  
9 267576. Tonya Pullman plaintiff and respondent versus  
10 H & L Automotive, Inc et al, defendants and appellants.  
11 For appellants Ms. Tanya L. Greene.

12 MS. GREENE: Good morning.

13 CLERK NAVARRETE: And for respondent Ms. Arlyn  
14 L. Escalante.

15 MS. ESCALANTE: Ready.

16 CLERK NAVARRETE: Case number is 258966.  
17 Gustavo Naranco on behalf of himself and all other  
18 similar situated. Plaintiff and respondent versus  
19 Spectrum Security Services, Inc. Defendant and appellant  
20 for respondent, Mr. Jason C. Marsili.

21 MR. MARSILI: Ready.

22 CLERK NAVARRETE: And for appellant, Mr. Paul J.  
23 Gilleon.

24 MR. GILLEON: Ready.

25 CLERK NAVARRETE: Case number is 263375. The

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1 People, plaintiff and respondent, versus Mario Salvador  
2 Padilla, defendant and appellant. For respondent,  
3 Mr. Daniel Hilton.

4 MR. HILTON: We're ready to proceed.

5 CLERK NAVARRETE: And for appellant,  
6 Mr. Jonathan Demson.

7 MR. DEMSON: Ready.

8 CHIEF JUSTICE: Thank you. And calling the  
9 first matter Tonya Pullman versus H & L Auto, Inc.  
10 et al. We welcome the honorable Ronald B. Robie,  
11 associate justice Court of Appeal third appellate  
12 district.

13 And whenever you're ready, Counsel.

14 MS. GREENE: Good morning, your Honors. May it  
15 please the Court. Tanya Greene appearing for TD Bank.  
16 I would like to reserve five minutes for rebuttal.

17 In this case TV -- TD Bank was found liable for  
18 \$170,000 in attorneys' fees based on a \$12,000 car loan.  
19 TD Bank was in this litigation only because respondent's  
20 contract was assigned to TD Bank. TD Bank was not  
21 accused of any wrongdoing whatsoever in the proceedings  
22 below. As the holder of the loan, TD Bank was liable  
23 solely under the Holder Rule. The Holder Rule extends  
24 consumer protection liability beyond the car's seller to  
25 whoever holds the note, but it adds that, quote,

1 "recovery hereunder by the debtor shall not exceed  
2 amounts paid by the debtor," end quote.

3           The core issue in this case is whether the word  
4 "recovery" means the entire sum that can be collected  
5 from the holder. It does. By its plain text that is  
6 what recovery means. So when the Holder Rule opened up  
7 liability to the innocent holders, it kept that  
8 liability at the amount the consumer paid. Now, to be  
9 clear, a consumer may still recover attorneys' fees from  
10 the actual wrongdoer. But as against the holder, who by  
11 definition is never alleged to have done anything wrong,  
12 recovery is limited.

13           Respondent's reading of the holder rule, which  
14 excludes attorneys' fees from the word recovery, erases  
15 a key limitation from the Holder Rule. And so for that  
16 reason the Court of Appeals should be reversed on two  
17 grounds.

18           JUSTICE KRUGER: Ms. Greene, I -- I was  
19 wondering as you're -- you're starting your  
20 presentation, if you can address the import of the FTC's  
21 recent guidance on the advisory opinion. It seems to  
22 take a little bit more of a nuanced position with  
23 respect to whether attorneys' fees count for purposes of  
24 the recovery cap in the Holder Rule.

25           MS. GREENE: Thank you for that question. Yes,

1 the FTC -- the 2022 FTC advisory opinion, a couple of  
2 things to note about it. First of all, it's our  
3 position that that opinion does not warrant deference.  
4 It does not satisfy the -- our criteria for deference.  
5 But to more directly address your Honor's question, the  
6 opinion on Page 3 supports our interpretation of the  
7 Holder Rule. And in that sense, what I mean is that the  
8 FTC -- the FTC said that recovery including attorneys'  
9 fees is limited under the Holder Rule. And so it's very  
10 important to note that that is consistent with the  
11 interpretation that we're urging the Court to adopt  
12 here.

13           The -- to the extent that the advisory opinion  
14 went on to address the -- it's -- and to offer its  
15 interpretation of cases that had come out, our position  
16 is that those -- that critique is not afforded deference  
17 here. Critiquing state court decisions is not something  
18 that falls within the substantive expertise of the FTC.  
19 And also to the extent that that --

20           JUSTICE JENKINS: Counsel, that -- that doesn't  
21 make a lot of sense to me. I don't know that you can --  
22 can truncate the 2022 guidance that way. It seems to me  
23 that those citations are in aid of the initial statement  
24 it makes with respect to whether or not there is --  
25 there could be an independent basis for attorneys' fees.

1 MS. GREENE: Yes, your honor. I would -- so let  
2 me break down the advisory opinion because there are a  
3 few things that it's doing. One thing that it does is  
4 it is interpreting the Holder Rule itself. And that's  
5 on Page 3. And that's where it says the Holder Rule  
6 does limit attorneys' fees. Now, when it goes on into  
7 critiquing and analyzing the various cases and saying  
8 whether or not those cases are in line with its  
9 interpretation, that's where we're drawing the nuance  
10 and saying the analysis of judicial court decision --  
11 decisions is not something that falls within the FTC's  
12 expertise. In other words, it can offer its opinion as  
13 to what the text of the rule says. But in terms of --  
14 of declaring whether one case got it right and one case  
15 got it wrong, that is not something that falls within  
16 its expertise.

17 JUSTICE KRUGER: Ms. Greene, I take your point  
18 about the FTC substantive expertise with respect to the  
19 interpretation of -- of state law, but it seems to me  
20 that the advisory opinion also contains a little bit  
21 more about the FTC's interpretation of the Holder Rule  
22 itself. On the top of Page 3 it says -- and I'm quoting  
23 -- "further, the applicable law requires or allows costs  
24 or attorneys' fee against the holder. The Holder Rule  
25 does not impose a cap on such an award." So it seems to

7

1 be the question for us is whether the relevant attorney  
2 fee statutes in this particular case can be said to  
3 impose the attorney fee obligations on the holder as  
4 such as opposed to on the holder as a matter that's  
5 derivative of the seller's liability, sort of by means  
6 of through the Holder Rule. Do you interpret the FTC's  
7 guides in the same way that I do?

8 MS. GREENE: Your honor, we would agree that to  
9 the extent there is a specific state statute at issue  
10 which permits attorneys' fees, there is a separate  
11 analysis of that state statute that is required here.  
12 And the reason why is because the way that these cases  
13 come about, in some situations the case is -- the holder  
14 is brought into the litigation only as a result of the  
15 Holder Rule, and in other situations the holder can  
16 actually be directly sued under a particular state  
17 statute. And if that state statute affords fee shifting  
18 or attorneys' fees, then I -- we would agree that there  
19 is a separate analysis required there.

20 But to the extent that the holder is only in the  
21 litigation due to a cause of action that's preserved  
22 under the Holder Rule, that's when the holder rules  
23 hereunder labels kick in and says this is a cause of  
24 action that's preserved against a holder only because of  
25 the Holder Rule. And in that situation, recovery is

1 limited. Now, if a buyer has a claim directly against a  
2 holder, then that buyer would presumably start their  
3 litigation and they would allege a -- the separate  
4 substantive state law as a -- and they would allege that  
5 the holder violated that substantive state law, and then  
6 there would be a separate analysis as to whether the fee  
7 shifting statute applicable to that state law is  
8 something that the holder can be held liable for.

9 And --

10 JUSTICE KRUGER: So -- so why, in your view, is  
11 the cause of action the right unit to resolve this  
12 question as opposed to looking specifically at the  
13 attorney fee statute in question? So if you have a  
14 cause of action that depends on the application of the  
15 Holder Rule but you have a specific attorney fee statute  
16 that says the -- setting of the Holder Rule aside,  
17 holders in addition to sellers are obligated to pay  
18 attorney fees if they lose, why isn't that sufficient  
19 for purposes of what the FTC has told us about the  
20 meaning of the Holder Rule?

21 MS. GREENE: Because there's -- in order to give  
22 meaning to the word hereunder, the Holder Rule says  
23 recovery hereunder. Our interpretation of hereunder  
24 means any cause of action that is preserved against the  
25 Holder Rule. I'm sorry. Preserved against the holder

1 under the Holder Rule. If there is a separate state  
2 cause of action even -- let's take, for example, 1794D  
3 which says if the buy -- if the -- if the buyer prevails  
4 and that in -- a claim under that statute meaning under  
5 Song-Beverly Act, then that -- then the buyer is  
6 entitled to attorneys' fees. However, the buyer is  
7 entitled to attorneys' fees from the seller and under  
8 that statute. And the only reason they can claim  
9 attorneys' fees from the holder is because the Holder  
10 Rule has preserved a cause of action and extended  
11 liability to the holder. And, again, that's when --

12 JUSTICE LIU: Counsel, that's -- if I may, I  
13 think just the line of questioning I think here is --  
14 but that's not the basis on which the fee award is being  
15 levied here, right? I mean, no one's disagreeing with  
16 you that the -- that the underlying cause of action is  
17 something that traveled with the Holder Rule, but where  
18 did the fee -- where does the fee award come from? What  
19 basis in law -- what is the basis in law that supplies  
20 the authority for the fee award?

21 MS. GREENE: The fee award comes from 17 -- in  
22 other words, the buyer in this case claimed attorneys'  
23 fees based on 1794.

24 JUSTICE LUI: Right.

25 MS. GREENE: That -- that is not a claim that

1 respondent would have been able to directly assert  
2 against the holder in the case. They had to -- she had  
3 to -- the only way that she was able to assert liability  
4 on behalf of TD Bank was through the Holder Rule. And  
5 so the -- it's -- what we're not -- we're not saying  
6 that the holder -- the holder cannot be held liable. We  
7 are saying the recovery hereunder is limited to the  
8 amount that the consumer paid under the contract, and  
9 that's -- that's sort of how the two sentences in the  
10 Holder Rule work together. The first sentence says the  
11 buyer is able to extend -- is able to bring all of the  
12 claims and defenses that it has against a seller. It  
13 can bring those claims against the holder. But in order  
14 to give meaning to that second sentence and not render  
15 it superfluous, it -- you have to understand that the  
16 recovery hereunder language is what is going to limit  
17 the fee award against the holder and --

18 JUSTICE LUI: Could I -- could I point you,  
19 Counsel, to the 2019 rule confirmation?

20 MS. GREENE: Yes.

21 JUSTICE LUI: Where the FTC here said that --  
22 that -- I think the disputed sentence here is if a  
23 federal or state law separately provides for recovery of  
24 attorneys' fees independent of claims or defenses  
25 arising from the seller's misconduct, nothing in the



1 rule limits such recovery. And so your view is that  
2 this is not independent, right? That's -- that's your  
3 view. But then the very next sentence, the very next  
4 sentence says conversely if the holder's liability for  
5 fees is based on claims against the seller that are  
6 preserved by the Holder Rule notice, the payment that  
7 the consumer recovered from the holder including any  
8 recovery based on attorneys' fees cannot exceed the  
9 consumer -- the amount the consumer paid on the  
10 contract, right? I -- I don't know. I -- I -- this is  
11 not the clearest language in the world, but it seems to  
12 me that the two contrasting situations being raised are  
13 one, yeah, the latter, right, in which the attorneys'  
14 fee recovery, right, is as to -- just as (inaudible)  
15 raised -- is derivative of, right, a claim for those  
16 same fees against the seller, but that's not what we  
17 have here. We have a situation where the fee claim is  
18 not derivative of a fee award claim that would have laid  
19 -- that would have lied against the seller. It's just a  
20 separate claim that the -- that the statute -- the state  
21 law here provides against the prevailing party in a suit  
22 against the holder.

23 MS. GREENE: Your Honor --

24 JUSTICE LUI: Why isn't that -- why doesn't that  
25 satisfy the definition of independent?

1 MS. GREENE: Because 1794D provides attorneys'  
2 fees to the prevailing party in a cause of action under  
3 the Song-Beverly Act. And normally those cases would be  
4 cases directly between the consumer and the seller of  
5 the car. And so we understand that in those situations  
6 the California legislature wanted to make sure that  
7 buyers were able to get attorneys' fees from the  
8 prevailing party, but it -- like I said, in those  
9 situations normally that prevailing party is the buyer.  
10 And the only reason that there's a difference here is  
11 because the Holder Rule permits the holder to now be a  
12 part of that litigation, but it's still a cause of  
13 action that against -- as against the holder -- it's  
14 still a cause of action against the holder under the  
15 Holder Rule and not a direct claim of liability against  
16 the holder under 1794D. Because, as you mentioned  
17 before, it is derivative.

18 And so to the extent that a claim for  
19 entitlement of attorneys' fees from the seller can be  
20 made against the holder, then we are now in the Holder  
21 Rule land, and that recovery hereunder is limited to the  
22 amount that the consumer paid under the contract. And  
23 this fits in with the purpose behind the Holder Rule.  
24 So when -- in 1975 when the FTC set out to address a key  
25 issue this is what the actual language -- this is

1 language from the regulatory history. It says this is  
2 at 40 Federal Register 53506 to 53507. It says "The  
3 rule is directed at what the Commission believes to be  
4 an anomaly. The creditor will assert his right to be  
5 paid by the consumer despite misrepresentation, breach  
6 of warranty or contract or even fraud on the part of the  
7 seller and despite the fact that the consumer's debt was  
8 generated by the sale."

9           So, in other words, the FTC wanted to correct  
10 the effect of the prior holder in Due Course Rule which  
11 gave the creditor a right to demand payment from the  
12 consumer even though there had been seller misconduct.  
13 And so this -- this was a very narrow focus on remedying  
14 the buyer's payment obligation. So when you put that in  
15 context with the plain text of the Holder Rule, now you  
16 can understand why the FTC said recovery hereunder is  
17 limited to the amount that is paid by the debtor under  
18 the contract. So we --

19           JUSTICE LUI: Could I -- could I point you,  
20 though, to the Statute 1794. I'm looking at it, and I  
21 don't see that it -- it -- it doesn't mention the  
22 seller. It just says that a buyer prevails in an action  
23 under this section.

24           MS. GREENE: Correct. Your Honor, it says --

25           JUSTICE LUI: It doesn't -- but -- but it's --

1 there's no limitation, right, to the notion that this is  
2 a fee award that's based on having sued the seller,  
3 per se.

4 MS. GREENE: Your Honor, let me -- allow me to  
5 clarify, please. The 1794D says if the buyer prevails  
6 in an action under this section.

7 JUSTICE LUI: Right.

8 MS. GREENE: Okay. Then you flip over to the  
9 Holder Rule which says recovery hereunder. So it's an  
10 -- it's a recognition that there are some instances  
11 where a buyer is recovering under the Holder Rule, and  
12 then in 1794D there are some instances where a buyer is  
13 prevailing in an action under this section, under  
14 section -- under -- meaning under the Song-Beverly Act  
15 they have successfully shown that a seller engaged in  
16 misconduct. And so that playing to attorneys' fees is  
17 under that cause of action and it's under -- and it's  
18 against -- that's why we would say that typically this  
19 is read to be against the seller. And the only way that  
20 it can be applied -- the only way that the holder is in  
21 this litigation at all is because of the Holder Rule  
22 which has extended liability to the holder but only up  
23 to a certain amount. So that's the --

24 CHIEF JUSTICE: Ms. Greene -- Ms. Greene, you're  
25 -- you're feeling some pushback from the Court because I

1 think you've acknowledged as much that the FTC's rule in  
2 2019 confirmation and the 2022 advisory opinion aren't  
3 really helpful to us in the sense that they are peer --  
4 potentially contradictory, but we're not providing our  
5 defense to it. So it's not helpful to us in deciding  
6 this, but there is legislative history about the Holder  
7 Rule, its purpose and the language that Justice Lui  
8 quoted about states being able to provide more  
9 protection for consumers in this area.

10           So I wanted to draw your attention to the first  
11 sentence of the Holder Rule. I know you focus on the  
12 second sentence about what that recovery is limited, but  
13 when you claim and argue that the TD's -- TD Bank's  
14 liability here is only as a result of the -- only under  
15 the Holder Rule, I read the Holder Rule to say any  
16 holder is subject to all claims and defenses which the  
17 debtor could assert against the seller of goods. All  
18 claims and defenses. So one of all of those claims is  
19 the Song-Beverly Act. And within the Song-Beverly Act  
20 claim is the right to attorneys' fees or even under the  
21 prevailing party as statute independent of that which  
22 would apply naturally in cases. Is your argument that  
23 the Holder Rule uses the word recovery to limit the  
24 application of those two state statutes that protect  
25 consumers seems to be what we like to say a weak read to

1 support that argument. What is your answer to that?

2 MS. GREENE: Your Honor, we are not arguing that  
3 those state laws do not apply at all. We are saying you  
4 can apply the laws, but the recovery that a buyer can  
5 obtain under the Holder Rule is limited. So I think  
6 that's the -- that's the distinction we would draw here.  
7 There is no question -- we do not dispute that the first  
8 sentence of the Holder Rule works to extend liability to  
9 the holder. But in order for that second sentence to  
10 have meaning, it says recovery hereunder is limited to  
11 the amount of -- that the debtor has paid. And, once  
12 again, that does fit within the purpose of the history.  
13 It fits within the regulatory history. I know that  
14 respondents have cited to several very general pro  
15 consumer statements out of the regulatory history. But  
16 if you focus on what the purpose of the rule was for,  
17 which is to make sure that a buyer is not held to pay  
18 for a debt even though there's been seller misconduct,  
19 then this all is -- our reading is consistent with that  
20 very narrow purpose of the Holder Rule.

21 I'd also like to make the point that in -- in  
22 limiting recovery to the amount paid under the contract,  
23 if you look at the regulatory history, there was --  
24 there was a focus on the commercial utility in balancing  
25 certain equities. In other words, the FTC was weighing

1 the effect that it would have on the Holder Rule, on the  
2 -- on the holders. And in a sense that actually is pro  
3 consumer as well because it is making sure that the  
4 credit markets remain open to -- to buyers. So there is  
5 -- there -- believe it or not, there is some pro  
6 consumer policy behind making sure that holders are only  
7 allowed to be -- only allowed to be on the hook for the  
8 amount paid by the buyer under the contract.

9 JUSTICE KRUGER: Ms. Greene, can I -- can I  
10 return you briefly to the question of whether California  
11 law provides for a recovery of attorneys' fees  
12 independent of the Holder Rule. We've talked a lot  
13 about the attorney fee provision in the Song-Beverly Act  
14 itself in Section 1794, but I'd like to have you  
15 address, if you could, the import of the more recent  
16 enactment of Section 1495.5 which is, you know, as you  
17 know, specifically targeted to holders as opposed to  
18 sellers.

19 MS. GREENE: Yes, your Honor. Our position is  
20 that 1459.5 should not be applied retroactively and that  
21 it is also preempted. And I'll go into those a little  
22 bit more, but I just want to make the point here that we  
23 believe under this court's precedence in case law that  
24 this court need not reach 1459.5. As I'm sure this  
25 court is aware, that was not as statute that was

1 addressed by the trial court. (Inaudible) rules here  
2 also declined to address 1459.5.

3 But very briefly, in order for 1459.5 to apply  
4 here, it would have to be applied retroactively.  
5 Meaning that TD -- TD Bank was assigned the loan back in  
6 2016, and the statute 1459.5 to the extent that it  
7 purports to permit attorneys' fees against TD Bank, it  
8 is increasing the liability for past conduct. Meaning  
9 it's increasing the amount of exposure that TD Bank  
10 would not have been liable for at least under our rule  
11 -- reading of the Holder Rule. It would not have been  
12 liable for back in 2016 when it took over the contract.  
13 So that's one issue that would have to be resolved  
14 first. And we believe there is no retroactivity here  
15 against -- and that's based on this court's McClone  
16 decision and the presumption against retroactivity.

17 And then on the issue of preemption, we believe  
18 that the hold -- the 1459.5 statute is preempted because  
19 it does exactly the opposite of what the Holder Rule  
20 says. In other words, if the Holder Rule says that  
21 attorneys' fees are limited, if they're -- if it's based  
22 on a cause of action preserved under the Holder Rule on  
23 one hand and then 1459.5 on the other hand says a buyer  
24 can recover attorneys' fees to the fullest extent  
25 possible, then those two are at odds and there is



1 obstacle preemption. If there's --

2 JUSTICE KRUGER: Is there a difference between  
3 what 1459.5 says in terms of expanding a liability for  
4 attorneys' fees to holders and a provision that, you  
5 know, at least I know that we dispute the amount of  
6 deference that's owed to the 2019 and 2022 documents  
7 from the FTC, but they do suggest that if state law  
8 independently provides for attorneys' fees separate and  
9 apart from the Holder Rule then that's fine. That's not  
10 subject to the recovery cap under the Holder Rule.  
11 Isn't that essentially what 1459.5 does? It's -- it  
12 essentially provides for an independent basis for  
13 recovery of attorneys' fees against holders for purposes  
14 of California law.

15 MS. GREENE: Your Honor, neither the 2019 rule  
16 confirmation nor the 2022 advisory opinion invited the  
17 states to direct -- to establish legislation that goes  
18 directly against what the Holder Rule says in the second  
19 sentence. I'd really like to point out to the Court  
20 that even in the 2022 advisory opinion that was issued,  
21 the FTC footnoted to a bunch of state laws. And the one  
22 state law that it did not footnote to as a proper  
23 example of an application of an independent state law is  
24 1459.5.

25 So, again, we feel that 2022 advisory opinion

1 has not afforded any difference but to the extent that  
2 the Court is looking at it for persuasive value, we do  
3 think it should find it very persuasive that the FTC did  
4 not cite 1459.5 as one of those statutes that it would  
5 consider as separately providing for state law for  
6 attorneys' fees. And I think the reason for that is  
7 because the state laws that the FTC did cite to are  
8 state laws that do not -- do not speak to the Holder  
9 Rule itself. In other words, those are state laws that  
10 do -- as a general matter they provide attorneys' fees  
11 for certain causes of action, but they do not actually  
12 seek to undo what the second sentence of the Holder Rule  
13 does. So our view is that 1459.5 went too far, and it  
14 goes directly against the -- the second sentence of the  
15 Holder Rule. And in not citing to 1459.5, we would --  
16 we would make -- we believe that that is -- is -- it  
17 signals how the FTC viewed 1459.5 in this context.

18 So with that, I would like to save the remainder  
19 of my time, the less than a minute, for rebuttal if no  
20 one has any further questions, your Honors.

21 CHIEF JUSTICE: Thank you, Ms. Greene. We  
22 started a little bit after 9:00, so I think you have  
23 about three minutes for rebuttal. Thank you.

24 Mr. Escalante? I'm sorry. Ms. Escalante.

25 MS. ESCALANTE: Good morning. And may it please

1 the Court. The FTC's Holder Rule regulation requires  
2 one thing, that certain consumer credit contracts  
3 contain this notice to consumers and to holders  
4 regarding what claims and defenses a consumer can bring.  
5 However, the FTC has always maintained that how the  
6 clause is applied and what remedies are available to  
7 consumers is exclusively a matter of state law. The FTC  
8 has never attempted to preempt state law on what -- on  
9 consumer remedies. Our legislature has already spoken  
10 through this issue.

11           In California a consumer is entitled to her  
12 attorneys' fees and costs when she sues and prevails  
13 against a defendant whose liability is derived from  
14 their status as the holder of the consumer's contract.  
15 The FTC has also spoken recently on this issue agreeing  
16 that it is state law and not the FTC that determines  
17 whether attorney fees and costs can be awarded to a  
18 consumer.

19           This court should put this issue to rest by  
20 finding that the limit on recovery in the holder clause  
21 limits damages a consumer may recover from a holder.  
22 But under California law that limit does not apply to  
23 reasonable statutory attorneys' fees and costs that are  
24 awarded to prevailing consumers in -- in litigations  
25 against holders. When in 1975 the FTC used the term

1 recovery in the holder clause and used that limitation,  
2 it did not contemplate that some states mandate  
3 prevailing consumers be awarded attorneys' fees and  
4 costs and other states do not. That was beyond the  
5 FTC's analysis and beyond the scope of the regulation  
6 than being promulgated.

7           A year later the FTC clarified that the limit on  
8 recovery was meant to exclude damages such as incidental  
9 and consequential damages that went beyond what the  
10 consumer paid under the contract. The FTC also  
11 specifically stated that the holder clause was to be  
12 applied in accordance with the laws -- the particular  
13 local laws of the jurisdiction in which the consumer was  
14 seeking redress. This has always been the FTC stance on  
15 this issue.

16           Now, as to the FTC's 2022 advisory opinion, we  
17 agree that that clarifies its 2019 -- the FTC 2019  
18 comments and how they have been misapplied by courts  
19 such as Spigner and how -- the misapplication of those  
20 comments by financial institutions. The FTC clarified  
21 that nothing within its 2019 comments was meant to  
22 preempt state law that allows consumers to recover their  
23 attorneys' fees and costs as -- as prevailing parties  
24 especially in -- in states as in California where our  
25 consumer protection statutes allow consumers to recover

1 these and as well as our costs -- our general cost  
2 statutes allow consumers to recover their attorneys'  
3 fees as costs, cost of the litigation.

4 JUSTICE GROBAN: Ms. Escalante -- Ms. Escalante,  
5 when you say that the 2022 advisory opinion clarifies  
6 the -- the 2019 rule confirmation, correct me if I'm  
7 wrong, but I had read your answer brief as essentially  
8 saying -- conceding that the 2019 rule confirmation  
9 barred a consumer from recovering fees and in excess of  
10 the amount paid on the debt in the situation like this.  
11 Now I hear you to be, I think, saying something  
12 different. So, I mean, if I -- if I'm reading your  
13 answer brief correctly, it seems you have two choices;  
14 either to argue that you were wrong in your answer brief  
15 and in interpreting the 2019 guidance or the -- or the  
16 FTC in 2022 contradicted its 2019 guidance. Which is  
17 it, I guess?

18 MS. ESCALANTE: I agree, your Honor. It is --  
19 it is confusing, but it's -- what our argument is is  
20 that with -- with its 2022 letter, the FTC -- well, in  
21 -- in our answer brief first we -- we were really  
22 defending against the interpretation of the 2019  
23 comments as advanced by the Spigner Court. The Spigner  
24 Court took it as, and -- and that is exactly what TD and  
25 other financial institutions have argued that the 2019

1 comments were clear, that they specifically stated that  
2 recovery included attorneys' fees and costs. So in a  
3 way that -- that's what we were faced against in a -- in  
4 our answer, and that's what we were arguing against.

5 With the 2022 letter, the FTC specifically  
6 stated that it disagreed with Spigner's reading of its  
7 -- of the 2019 comment and -- and Lafferty's  
8 interpretation of the -- of the Holder Rule. So  
9 essentially agreeing with our position and saying no, we  
10 never intended that. We never intended to preempt state  
11 law. That -- that was not -- never our intention. So  
12 -- so I -- I agree. Our answer was taking one position  
13 and -- and now the FTC clarified that for us.

14 JUSTICE GROBAN: So -- so how would you now --  
15 how would you now -- with -- with the illumination  
16 provided by the 2022 advisory opinion, how would you now  
17 describe the 2019 rule confirmation?

18 MS. GREENE: I -- I believe it -- it makes sense  
19 to analyze it as the FTC has always maintained that if  
20 attorneys' fees and costs are allowed to a consumer  
21 through a separate state law or -- or as separate from  
22 what the consumer can only recover -- exclusively  
23 recover from the seller, then that -- attorneys' fees  
24 and costs are recoverable as -- and not limited by -- by  
25 the recovery hereunder language. The --

1 JUSTICE KRUGER: Ms. Escalante, you -- you heard  
2 of the Court asking a number of questions and the  
3 colloquy with your friend on the other side about  
4 whether or not 1794 (inaudible) which side of that line  
5 it falls on. How would you suggest we understand how  
6 the FTC would draw that line for us? What is the --  
7 what is an attorney fees (inaudible) that is independent  
8 of their Holder Rule versus one that is -- is depending  
9 on it and, therefore, comes with lower recovery?

10 MS. ESCALANTE: Yes. Thank you, your Honor. I  
11 think the language to focus on in the 2022 letter is  
12 that the FTC says that if there's attorney fees and  
13 costs that are exclusively awarded -- and I believe  
14 Justice Lui alluded to this as well -- if it's  
15 exclusively something that can be recovered from the  
16 seller, then the holder would not be liable for that.  
17 But -- but Song-Beverly Act 1794D it doesn't have that  
18 limitation. It does not say anything about that fees  
19 and costs may be awarded exclusively from the seller.  
20 They are awarded to the prevailing buyer in this -- in  
21 this action.

22 And as, I believe, Justice Kruger said as well,  
23 our costs, general costs statutes also allow for  
24 attorneys' fees and costs as incidental to the  
25 litigation. And those are awarded to consumers as -- as

1 statutory attorneys' fees and costs under the -- our  
2 consumer protection statutes. Neither the Song-Beverly  
3 Act nor the Consumer Legal Remedies Act have any kind of  
4 language directing courts to only award attorneys' fees  
5 and costs against the -- the seller who committed the  
6 misconduct. They awarded to the consumer as -- as the  
7 prevailing party.

8           And the difference that the FTC pointed out  
9 to and -- and we briefed in our supplemental briefing is  
10 that other states don't -- don't allow those -- those  
11 kinds of recovery. The Ohio Consumer Protection Statute  
12 awards attorneys' fees exclusively to -- to -- from the  
13 seller if the -- if it's -- if the trial court -- in the  
14 trial court's discretion and also if the consumer can  
15 prove some other kind of intent or some other kind of  
16 malicious act against the consumer. So those fees under  
17 that statute would be exclusively from the seller  
18 because the -- the consumer has to prove -- has to go  
19 the extra step to prove it against the seller, and the  
20 holder would be -- would be separate. So I think that  
21 -- that is what -- if I answered your question -- that  
22 -- that is the -- the difference between -- between what  
23 the 2022 advisory opinion kind of clarifies with the  
24 language in the 2019 rule confirmation.

25           So the -- the other issue is what was discussed



1 previously is the -- the policy and -- and the -- the  
2 balancing test that the FTC took when it promulgated  
3 this rule. In -- in 1975 it went through the regulatory  
4 history to really show how consumers were being affected  
5 and -- and to this day consumers are being affected by  
6 fraudulent sellers especially fraudulent sellers that  
7 sell them a defective good and then the consumer sues  
8 them and then they disappear. They go out of business  
9 or sometimes they litigate the case for years, and right  
10 before trial or right before arbitration they disappear.

11           So the -- throughout that litigation the holder  
12 has been in -- in the same litigation and being defended  
13 by the seller or has been the one defending the lawsuit.  
14 So under -- under our consumer protection statutes, the  
15 litigation against the holder led to the attorneys' fees  
16 and costs incurred by the consumer. And unless the  
17 consumer can recover these fees as -- at the end of the  
18 litigation once to prevails, consumers would be left  
19 without legal recourse, without being able to afford  
20 attorneys because sometimes it -- it does take years to  
21 -- to recover the payments that they made under the  
22 contract in -- in these kinds of litigations.

23           So both the FTC and our legislature have weighed  
24 the risks involved and have decided that financial  
25 institutions are in a better position to withstand these

1 risks because they can protect themselves at the time  
2 that they go into contract with these sellers. They can  
3 put provisions in their contracts, indemnity clauses  
4 where the seller can guarantee the defense of the holder  
5 and -- and these already exist, and they can also have  
6 provisions where the seller must repay any -- any of the  
7 liability the holder incurs in these consumer actions.  
8 So at the same time the consumer has no way of  
9 negotiating these kinds of provisions up front when  
10 they're buying a consumer good.

11           So the -- the real -- the real issue here is  
12 that the FTC thought -- thought these through, thought  
13 through the -- the opposition by -- by banks from back  
14 -- back in 1975 and -- and saw that it was -- it was  
15 better for consumers to be allowed to -- to seek redress  
16 in these kinds of actions and for the risk to be  
17 transferred to the financial institutions.

18           So with -- as to Section 1459.5, we believe  
19 that, like -- like we said, our legislature has analyzed  
20 this -- these issues and it was after 2018 when the  
21 Lafferty decision came out that the legislature stepped  
22 in and -- and drafted Section 1459.5 to clarify that  
23 even before Lafferty, attorneys' fees had been awarded  
24 to consumers through the Holder Rule and -- and they  
25 tried to get -- get the state of the law back to how it

1 was before Lafferty. We believe that Section 1459.5 is  
2 not preempted by the Holder Rule especially as it has  
3 been now clarified by the FTC. And Section 1459.5 would  
4 apply in the -- in this case under the Palermo -- a  
5 state -- the case law from Palermo that states that  
6 attorney fees and costs of statutes that are -- can be  
7 applied to cases that are still in litigation as it  
8 would be in this case or in the other pending appeals  
9 that we have on -- on the same issue. We -- we believe  
10 Section 1459 would be applicable to all of these cases,  
11 so we urge the Court to also decide the issue of whether  
12 it's preempted and -- and really disagree with Spigner's  
13 analysis on -- on preemption of -- of that section.

14 CHIEF JUSTICE: Ms. Escalante, can I ask you  
15 just a clarifying question on your argument and that is  
16 -- your argument, then, is that under the Holder Rule  
17 the holder will always be responsible for attorney fees  
18 in California because of 1459.5, maybe not brought under  
19 the Song-Beverly but certainly under 1459.5?

20 MS. ESCALANTE: Yes. Yes, your Honor. I mean,  
21 under -- under that, the legislature has -- the statute  
22 states that once a holder is sued under that -- under --  
23 under the Holder Rule then they may -- may recover their  
24 attorneys' fees from the holder. What would happen -- I  
25 mean, as it happened in this case, the attorneys' fees

1 were awarded to the consumer jointly and severally  
2 against both the seller and the TD Finance. So, again,  
3 that -- that would be something that TD Finance could  
4 negotiate up front with the businesses that it does  
5 business with, the sellers it does business with to make  
6 sure it protects itself, to make sure that any liability  
7 would be either indemnified or -- or covered in -- in  
8 some way through -- through their business transaction.

9 CHIEF JUSTICE: Thank you.

10 JUSTICE KRUGER: Can I ask another clarifying  
11 question. So I heard you say earlier that -- I think --  
12 that even setting aside in 1794 and 1459.5 that there  
13 would be background principles about allocation of costs  
14 and fees that would come into play. Can you say a  
15 little bit more about that.

16 MS. ESCALANTE: The only thing I mentioned was  
17 regarding the -- our general cost statute as -- as a --  
18 as the prevailing party the consumer would be entitled  
19 to their -- their fees and costs as the prevailing party  
20 under the -- the consumer protection statutes. So  
21 that's what I meant.

22 So unless there are any other questions from the  
23 Court we would really ask -- ask for the the Court of  
24 Appeals' opinion to be affirmed, for this court to  
25 disagree with the analysis in Lafferty and Spigner and

1 -- and also hold that Section 1459.5 is -- is not  
2 preempted by the Holder Rule.

3 CHIEF JUSTICE: Thank you, Ms. Escalante.

4 MS. ESCALANTE: Thank you.

5 CHIEF JUSTICE: Ms. Greene?

6 MS. GREENE: Thank you, your Honors. I want to  
7 focus on the -- the American Rule here. That was  
8 something that I didn't cover in my initial remarks.  
9 Obviously we're all aware of the American Rule, the  
10 default that every party pays their own attorneys' fees  
11 no matter whether they have prevailed. If we are  
12 focusing on the Holder Rule specifically, then there is  
13 nothing in the regulatory history that suggests that the  
14 FTC intended to change that rule. And there's nothing  
15 in the text that suggests that the FTC intended to  
16 change the rule. So what's really important is not it  
17 -- just as much as what's in the regulatory history is  
18 what is not in the regulatory history. And what is not  
19 there, there's about -- it spans about 40 pages long.

20 There's maybe two or three references to  
21 attorneys' fees, and most of those references come from  
22 witness testimony. If the FTC intended to change the  
23 American Rule to shift attorneys' fees to the creditor,  
24 one would think that there would have been far more  
25 discussion if that was the aim of the FTC, but there is

1 not. And that was not the aim.

2           And what also is not in the regulatory history  
3 is an intent to make the creditor and insurer or a  
4 guarantor of all seller misconduct in this situation.  
5 This -- what the rule did is very extraordinary. Where  
6 (inaudible) already had entitlement to attorneys' fees  
7 from the wrongdoer, the seller. This rule worked to  
8 extend liability to a blameless holder. My friend has  
9 made many references to the -- to the idea that banks  
10 are in a better position to protect themselves. Well,  
11 an indemnity provision against a seller that is, you  
12 know, supposedly going insolvent or not in a good  
13 financial situation, that doesn't -- for the same  
14 reasons that the consumer argues that the seller --  
15 claimed fees against the seller is no good, well, the  
16 same thing applies on the banks end. In an indemnity  
17 provision nothing will protect the bank either. So  
18 those are -- but in any event, those are policy  
19 arguments that should be left to the FTC.

20           In 2019 the FTC look in comments regarding  
21 attorneys' fees, and they -- and one of those -- the  
22 NCLC and amicus here in this case also made the same  
23 claim and tried to urge the FTC to permit attorneys'  
24 fees in these situations and that -- and the FTC  
25 nonetheless stood firm on its interpretation that

1 recovery under the Holder Rule is barred in situations  
2 like this. And if not in this situation where a holder  
3 is only in the litigation because of the Holder Rule,  
4 then when else would attorneys' fees be barred against  
5 the holder?

6           That's what we can all agree on is that the FTC  
7 absolutely said attorneys' fees are limited against the  
8 holder under the Holder Rule. And if it's not in a case  
9 like this where the holder is only in it because of the  
10 Holder Rule, then what were those situations? The  
11 situations where the FTC was saying that separate state  
12 law can apply, well, those are situations where the FTC  
13 is recognizing there are some instances where the holder  
14 is in the case because of the Holder Rule and also in  
15 the case because the seller -- the buyer is alleging  
16 direct misconduct against the Holder Rule. And so of  
17 course in those situations where the buyer is not solely  
18 relying on the Holder Rule, they're relying on a  
19 separate state statute, then those are the situations  
20 where a holder could be found liable for attorneys' fees  
21 and the buyer could recover the entire sum of attorneys'  
22 fees because they're not relying solely on the Holder  
23 Rule in that situation.

24           So I may be coming to the end of my time, so I'd  
25 like to just reiterate here that there is nothing in the

1 text of the rule. There's nothing in the purpose of the  
2 rule or the regulatory history that's in -- that shows  
3 that the FTC intended to make a creditor liable for the  
4 entire sum of attorneys' fees that a consumer has in  
5 situations like this.

6 Thank you.

7 CHIEF JUSTICE: Thank you, Ms. Greene and thank  
8 you, Ms. Escalante. The matter's under submission.

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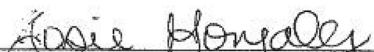
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REPORTER'S CERTIFICATION

I, Josie C. Gonzalez, a Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing audio file was reported by me stenographically to the best of my ability and later transcribed into typewriting under my direction; that the foregoing is a true record of the audio file.

IN WITNESS WHEREOF, I have subscribed my name this 2nd day of June, 2022.

  
\_\_\_\_\_  
JOSIE GONZALEZ, CSR NO. 13435  
Certified Shorthand Reporter  
in and for the County of San Diego,  
state of California