S267576

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TANYA PULLIAM,

Plaintiff and Respondent,

v.

TD AUTO FINANCE, LLC,

Defendant and Petitioner.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B293435

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to California Rule of Court 8.520(f), the Chamber of Commerce of the United States of America hereby requests permission to file the attached brief as amicus curiae supporting Petitioner TD Auto Finance, LLC. This application is timely made within 30 days of the filing of the last party brief.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Pursuant to California Rule of Court 8.520(f), no party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: November 17, 2021

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by participating in cases involving issues of concern to American businesses, including in this Court and in cases affecting the consumer lending industry. (See, e.g., *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (Consumer Legal Remedies Act); *Green Tree Fin. Corp. – Ala. v. Randolph* (2000) 531 U.S. 79 (Truth in Lending Act); *Midland Funding, LLC v. Madden* (2016) 136 S.Ct. 2505 [denying cert.] (National Bank Act).)

The Chamber has a strong interest in the proper resolution of this case, as its members include businesses that are subject to the Federal Trade Commission's Holder Rule, as well as businesses that depend on the availability of consumer credit to finance the purchases of their goods and services. By construing the Holder Rule to authorize large-scale attorneys' fees awards against innocent lenders—awards that will frequently eclipse a claimant's out-of-pocket damages by many orders of magnitude—the Court of Appeal not only departs from the Rule's text and purpose, but also risks serious detrimental consequences for California lenders (who will be forced to pass on increased costs, if not exit the market altogether), California consumers (who will find it more difficult and expensive to make purchases on credit), and California sellers of goods and services (who likewise will find it more difficult and expensive to sell those goods and services to credit-constrained customers). The Chamber here shares its perspective in urging this Court to reverse the judgment of the Court of Appeal.

INTRODUCTION

In promulgating the Holder Rule, which requires sellers to include language in consumer credit contracts that preserves a consumer's defenses and claims, the Federal Trade Commission (FTC) sought to strike a balance: The FTC reallocated the costs of sellers' misconduct from consumers to innocent lenders by allowing buyers to assert claims not only against the seller but also against a third-party creditor holding the contract. But at the same time, the Holder Rule limited the relief that borrowers could seek from those third-party holders of contracts. Toward that latter end, the second part of the Holder Rule ensures that borrowers cannot "recover[]" more than the "amounts paid" under their loans. (16 C.F.R. § 433.2(a).) Thus, the Holder Rule gives consumers the option to sue third-party creditors for sellers' failure to perform a sales contract, but constrains the scope of liability that those creditors may face.

Since the Holder Rule went into effect more than 45 years ago, California appellate courts—until now—have respected these twin aims. Specifically, California courts (and the vast majority of courts in other jurisdictions) have held that the Holder Rule limits a consumer's total recovery—including compensatory damages, punitive damages, consequential damages, and attorneys' fees—to the amount that the consumer had paid under the loan. The Court of Appeal in this case, however, broke with that precedent (including two prior California Court of Appeal decisions). It held that the term "recovery" in the Holder Rule excluded attorneys' fees, so as to put innocent lenders on the hook for uncapped attorneys' fees—even when those fees exceed the amount of the loan, as they often do (including in this case), by several times over. That was reversible error.

First, the Court of Appeal's decision flouts the plain language of the Holder Rule's limitation on "recovery" that "exceed[s] amounts paid by the debtor" on a consumer loan. (16 C.F.R. § 433.2(a).) That limitation is straightforward: Dictionaries (legal and non-legal alike), case law, and scholarship all support construing "recovery" (consistent with its common understanding) as the total amount awarded to a consumer against a creditor, including attorneys' fees. The Court of Appeal's contrary construction—artificially excluding attorneys' fees from "recovery"—advances a one-sided view of the Holder Rule that disregards the text's natural meaning.

Second, the Court of Appeal's decision runs roughshod over the Holder Rule's dual purposes and inflicts unintended harm on the consumer credit market. The Holder Rule strikes a careful balance between (i) reallocating the risks of seller misconduct to protect consumers and (ii) avoiding unduly punishing innocent lenders for that misconduct. The decision below upsets that balance by exposing creditors to the risk of uncapped fee awards that may exceed contract payments by many multiples. In reaching that outlier result, the Court of Appeal's decision poses a serious threat to the health of the consumer lending industry—to the detriment of both lenders (who will be forced either to exit the market or to raise the costs of borrowing) and their customers (who rely on the availability of credit to afford essential goods and services), as well as businesses that benefit from the availability of consumer credit to finance the purchases of their goods and services. This Court should reject that outcome—particularly where, as here, the Rule's text and purpose compel the opposite result.

ARGUMENT

I. THE PLAIN TEXT OF THE HOLDER RULE LIMITS "RECOVERY" OF ATTORNEYS' FEES.

Ordinary rules of statutory construction govern the interpretation of regulations promulgated by administrative agencies. (*Guzman v. Cnty. of Monterey* (2009) 46 Cal.4th 887, 898 ["[The] same rules of statutory construction govern interpretation of regulations by administrative agencies"], citing *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234-1235.) Under those rules, the words of a statute or regulation "provide the most reliable indicator of legislative intent." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871; see also *Kirby v. Immoos Fire Prot., Inc.* (2012) 53 Cal.4th 1244, 1250 ["[Courts] must look first to the words of the statute"].) If the text is unambiguous, then its plain meaning controls. (*Ste. Marie v. Riverside Cnty. Reg'l Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 288 ["If the language of the [regulation] is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the [administrative agency's] intent is unnecessary"], quoting *Kavanaugh v. W. Sonoma Cnty. Union High School* (2003) 29 Cal.4th 911, 919; see also *Meyer v. Spring Spectrum L.P.* (2009) 45 Cal.4th 634, 640 ["If there is no ambiguity in the language, we presume the [administrative agency] meant what it said and the plain meaning of the [regulation] governs"], internal quotation marks and citations omitted.)[1]

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[1] These rules apply equally to the interpretation of a federal regulation like the Holder Rule. (See *Luther v. Countrywide Fin. Corp.* (2011) 195 Cal.App.4th 789, 794 ["The rules of federal statutory interpretation are much the same as those used when construing California statutes. [Citation.] 'In interpreting a statute a court should always turn first to one, cardinal canon before all others . . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete'"], quoting *Connecticut*

The Holder Rule was adopted pursuant to Section 5 of the Federal Trade Commission Act, which outlaws unfair and deceptive acts and practices in or affecting commerce. (15 U.S.C. § 45.) Under the Holder Rule, a seller's failure to include specific language in a consumer credit contract is a deceptive and unfair practice. (16 C.F.R. § 433.2(a); see also Opening Br. 12-13.)

The Holder Rule has two parts. First, the Holder Rule *preserves* any defenses and claims that the buyer of the good or services would have against the seller, so that the buyer can assert them against a future holder of the consumer credit contract (an ability that a buyer-borrower did not have prior to the Rule's promulgation). (16 C.F.R. § 433.2(a); see also Opening Br. 12-13.) Second, the Holder Rule *limits* the buyer-borrower's recovery on such a claim against the innocent lender to amounts paid by the borrower on the contract. (16 C.F.R. § 433.2(a); see also Opening Br. 13.) The central question in this case begins and ends with the language in the second part of the Holder Rule, which states that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." (16 C.F.R. § 433.2(a).)

By its plain language, the Holder Rule limits the debtor's total "recovery." Looking to dictionaries (both legal and non-legal) published at the time the Holder Rule was promulgated, see *Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1491, "recovery" is defined as the amount awarded from a court's judgment in connection with a legal or equitable claim. (BLACK'S LAW DICTIONARY (5th ed. 1979) ["The obtaining of a

Nat. Bank v. Germain (1992) 503 U.S. 249, 253-254; see also *Reilly v. Marin Hous. Auth.* (2020) 10 Cal.5th 583, 591 [applying familiar principles of statutory construction, including resort to dictionary definitions, in interpreting U.S. Department of Housing and Urban Development regulations].)

thing by the judgment of a court, as a result of an action brought for that purpose. The amount finally collected, or the amount of judgment"]; MOZLEY & WHITELEY'S LAW DICTIONARY (9th ed. 1977) ["an actual or real recovery of a thing, or the value thereof, by judgment"]; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1976) ["the obtaining in a suit at law of a right to something by a verdict, decree, or judgment of court"]; LONGMAN MODERN ENGLISH DICTIONARY (1976) ["the obtaining of a right to something by verdict or judgment"].)

As part of an award recoverable in a judgment when authorized by statute, attorneys' fees—along with various types of damages—plainly fall within the broad scope of "recovery." (See *Southern California Edison Co. v. State Bd. of Equalization* (1972) 7 Cal.3d 652, 661-662 [holding that "broad terms of [a] statute" must be given the interpretation used "in common parlance," not an "unorthodox meaning"); see also Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) p. 101 [general terms should be accorded "their full and fair scope" and not "be arbitrarily limited"].) Nothing in the Holder Rule's text suggests—as the Court of Appeal incorrectly concluded (*Pulliam v. HNL Auto. Inc.* (2021) 60 Cal.App.5th 396, 415)—that the Rule excludes certain types of remedies or amounts awarded to a consumer for a claim against an innocent lender.

To the contrary, the definitive treatise on remedies law—on which this Court has relied (see *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 Cal.4th 960, 968)—identifies attorneys' fees as an amount that parties may "recover" in specific causes of action. (See Dobbs & Roberts, LAW OF REMEDIES (3d ed. 2018) § 1.3 [damages include those that are "measured by trying to estimate the costs plaintiff may incur after the primary harm has been done and in consequence of that primary loss" as well as the "recover[y] . . . of attorney fees"]; *id.* § 1.5 [under the American Rule, "neither litigant can recover attorney fees from the other," which is "subject only to some discrete exceptions in private litigation"]; *id.* § 3.10 [parties increasingly "recover [] attorney fees from the losing party in a number of particular cases"].)

Consistent with this black-letter approach, courts have long treated attorneys' fees as part of an award that may be "recovered" when authorized by statute. (See, e.g., *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 135 ["Seven employees . . . brought an action under the Fair Labor Standards Act . . . to recover overtime, liquidated damages, and attorneys' fees"]; see also *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 324-328 [affirming trial court's "judgment" that the plaintiff "'shall [] recover attorneys' fees' on the UCL claim"].) In fact, the 1976 Civil Rights Attorney's Fees Awards Act—enacted into law the year the Holder Rule took effect—authorized the recovery of attorneys' fees as part of a judgment in favor of a plaintiff bringing a federal civil rights claim. (42 U.S.C. § 1988(b) ["[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in a claim under provisions of enumerated civil rights statutes]; see also *Southeast Legal Def. Grp. v. Adams* (D.Or. 1977) 436 F.Supp. 891, 895 [finding "plaintiffs are entitled to *recover* reasonable attorneys' fees from the state defendants" under 42 U.S.C. § 1988(b)], italics added.)

Departing from that legal backdrop establishing the meaning of "recovery" as used in the Holder Rule, the Court of Appeal concluded that recovery refers only to "restoring money that was taken away from the plaintiff." (*Pulliam*, *supra*, 60 Cal.App.5th at p. 413.) The Court of Appeal then explained that "recovery" is designed to cap "consequential damages, not attorney's fees." (*Id.* at p. 415.) But consequential damages, by definition, do not "restor[e] money that was taken away from the plaintiff."

(*Ibid.*) Rather, consequential damages are "consequent upon but distinct from harm to plaintiff's entitlement." (Dobbs & Roberts, *supra*, at § 3.3(4).) Whereas "[g]eneral damages measures the loss in the very thing to which plaintiff is entitled . . . [c]onsequential damages measures something else; not the very thing plaintiff was entitled to, but instead the income it can produce or losses it can avoid." (*Ibid.*) Attorneys' fees and consequential damages are *both* "item[s] of special damages." (*Id.* § 12.10.) The Court of Appeal's construction of "recovery" therefore proves too much, and only highlights that attorneys' fees are subject to the Holder Rule's limitation provision.

Thus, the Court of Appeal erred in adopting an atextual definition of "recovery," and departing from the weight of precedent (from California courts and elsewhere) recognizing that "recovery" includes all amounts awarded as part of a claim for relief. (See Opening Br. 22-26; see also *Lafferty v. Wells Fargo Bank* (2018) 25 Cal.App.5th 398, 412 [collecting cases]). Because the "plain and ordinary meaning" of the term "recovery" is clear, that meaning resolves this case and requires reversal of the Court of Appeal's judgment. (See *Joyce*, *supra*, 198 Cal.App.4th at pp. 559-560; see also *Diamond Multimedia Sys., Inc. v. Super. Ct.* (1999) 19 Cal.4th 1036, 1047 ["If [the language] is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it"].)

II. PERMITTING UNCAPPED RECOVERY OF ATTORNEYS' FEES WOULD TRAMPLE UPON THE HOLDER RULE'S DUAL PURPOSES AND HARM THE CONSUMER CREDIT MARKET.

In any event, the Holder Rule's purpose is fully consonant with the statutory text. As explained in Petitioner's principal brief (Opening Br. 26-30), the Holder Rule is designed to reallocate the risks of seller misconduct from buyer-borrowers to creditors, while shielding creditors from responsibility for *all* amounts consumers might be able to recover from a seller directly. The Holder Rule thus provides consumers with enhanced protections without making creditors the "guarantor[s]" of seller performance. (*Riggs v. Anthony Auto Sales, Inc.* (W.D.La. 1998) 32 F.Supp.2d 411, 417; see also Opening Br. 28.) The Court of Appeal's judgment below disregards—and indeed, is contrary to—this purpose.

A. The Court of Appeal Impermissibly Advanced One Purpose of the Rule to the Exclusion of the Other Purpose, Disrupting the Balance the FTC Struck.

For starters, the Court of Appeal's approach would disrupt the careful balance the FTC struck in promulgating the Holder Rule. The decision below takes a distorted view of the FTC's purpose, placing undue weight on the remedies the Rule preserves for consumers while ignoring the protections the Rule provides for innocent creditors.

At common law, a buyer's duty to pay for goods or services was independent of a seller's reciprocal duty to perform. (See Hyman & Mohseni, *California Court of Appeal Finds that the FTC Holder Rule Limits a Holder's Liability for a Consumer's Attorneys' Fees* (2018) 72 CONSUMER FIN. L.Q. REP. 432, 434.) Under that approach, if a seller sold goods or services on credit and transferred the credit, the buyer could not obtain affirmative relief from the innocent lender if the seller failed to perform its obligations. (*Ibid.*) And despite a seller's breach, the buyer could not assert seller misconduct as a defense against the third-party lender and was required to continue to pay the lender under the consumer loan contract. (*Ibid.*) Consumers were thus "caught in a 'no-win' situation when the seller failed to remedy the defect either because of its unwillingness or its disappearance from the market." (*Tinker v. De Maria Porsche Audi, Inc.* (Fla.Dist.Ct.App. 1984) 459 So.2d 487, 492.) They remained obligated to continue to pay for the defective product, and could not seek recourse against the holder of the note except in limited, hard-to-prove circumstances. (See Opening Br. 26-27.)

In promulgating the Holder Rule, the FTC abrogated that default rule. (Opening Br. 26-27.) The Rule does so by allowing consumers to avoid payment obligations on a "debt for a defective product or deficient service." (*Lafferty*, *supra*, 25 Cal.App.5th at p. 411.) The Rule further allows buyer-borrowers to preserve claims and defenses against the original sellers, so that they could be asserted against a future holder of the consumer credit contract. (16 C.F.R. § 433.2.) The Rule thus protects consumers from bearing the full risks of seller misconduct, as had been the case before the Rule was enacted. (See *Home Sav. Assn. v. Guerra* (Tex. 1987) 733 S.W.2d 134, 135.)

At the same time, however, the Holder Rule promotes a second (competing) purpose: protecting blameless lenders from uncapped liability for sellers' misconduct. "[A] rule of unlimited liability would place the creditor in the position of an insurer or guarantor of the seller's performance." (*Riggs*, *supra*, 32 F.Supp.2d at p. 417.) This result would burden lenders, who would face uncertain, derivative liability due to no fault of their own. Accordingly, the second part of the Holder Rule ensures that consumers cannot seek recovery from innocent lenders beyond the amount paid on the loan. (See Tanner, *The FTC Holder in Due Course Rule: Neither Creditor Ruination Nor Consumer Salvation* (1977) 31 Sw. L.J. 1097, 1108-1109 ["Creditor protests [to the Holder Rule] would be understandable if the rule resulted in their unrestricted and indefinite liability for all consumer claims and defenses . . . . The rule does not, however, impose such unrestricted liability on creditors"].)

In short, the Holder Rule strikes a careful balance: It helps consumers by shifting some of the costs of seller misconduct to innocent lenders, but protects those lenders by capping their exposure to the amount paid on the loan. The Rule thus recognizes that third-party creditors may be positioned to mitigate seller misconduct (to a certain extent), but that uncapped liability would tip the scales too far in the opposite direction and place unwarranted burdens on innocent lenders. California appellate courts previously respected the careful balance the Holder Rule strikes, holding that the cap on lenders' total liability includes potential claims for attorneys' fees. (See *Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 151; *Lafferty*, *supra*, 213 Cal.App.4th at p. 563.)

But the Court of Appeal below focused exclusively on only one of the two purposes of the Rule: its consumer-protective purpose. (*Pulliam*, *supra*, 60 Cal.App.5th at p. 416 [concluding that "consumer rights . . . would be frustrated if attorney fees were not recoverable from both the seller and the creditor-assignee"].) Even if this reliance on one of the Rule's two purposes could overcome the plain text—which it cannot (see Opening Br. 22-26; see p. 17, *supra*)—the Court of Appeal's disruption of the balance the FTC struck is reversible error. (See, e.g., *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993-994 ["We could not, of course, ignore the actual words of the statute in an attempt to vindicate our perception of the Legislature's purpose in enacting the law . . . . To the extent [plaintiff] contends the playing field should be tilted even more in favor of consumers, that argument is more properly addressed to the Legislature"]; *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal.3d 488, 498-499 [holding that where an enactment furthers dual, competing purposes—there, "both the encouragement of settlements and the equitable allocation of costs among multiple tortfeasors"—the enactment "would be disserved by an approach which emphasizes one to the virtual exclusion of the other"].)

Indeed, the Court of Appeal's approach below represents the very type of misstep that often occurs when courts improperly inquire into an enactment's purpose: The Court of Appeal identified what it believed to be the Holder Rule's "primary objective," and improperly "assume[d] that *whatever* furthers the [rule]'s primary objective must be the law." (See *Rodriguez v. United States* (1987) 480 U.S. 522, 526 (per curiam); cf. *id.* at pp. 525-526 ["[N]o legislation pursues its purposes at all costs"].) For this reason, the U.S. Supreme Court has cautioned that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." (*Mertens v. Hewitt Assocs.* (1993) 508 U.S. 248, 261-262.) This Court has issued the same warning. (See *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 176, fn. 9 ["Identification of the laudable purpose of a statute alone is insufficient to construe the language of the statute. . . . Without due attention to the statutory terms, the statute becomes an open charter, a hunting license to be used where any prosecutor, plaintiff and judge sees an evil encompassed by the statute's purpose"], internal quotation marks and citation omitted.) That warning applies with special force where, as here, the court below failed to grasp the Rule's dual (and competing) purposes.

B. The Decision Below Risks Unleashing Unintended Harmful Consequences on the Consumer Lending Industry.

The Court of Appeal's improper focus on "consumer rights" is not just an abstract error. Its unreasonably narrow construction of "recovery" threatens significant negative consequences, many of which may harm the consumers the Rule is supposed to protect. Lifting the "recovery" cap for attorneys' fee awards would mark a drastic change in established practice and disrupt settled expectations for all participants in the consumer lending industry. Lenders would face increased cost pressures restricting their ability to provide affordable consumer loans. And consumers who need credit most would face more limited and expensive options. Businesses that depend on the availability of consumer credit will find it harder to sell their goods and services. The Holder Rule could not have intended those deleterious consequences.

On the lender side, the Court of Appeal's decision will expose lenders to significant new liabilities. That is because attorneys' fees associated with claims under the Holder Rule typically exceed the original purchase price under the contract—often by several multiples, as this case illustrates. (See, e.g., *Pulliam*, *supra*, 60 Cal.App.5th at pp. 403-404 [awarding $21,957.25 in damages and $169,602 in attorneys' fees]; *Spikener*, *supra*, 50 Cal.App.5th at p. 155 [seeking more than $13,000 in attorneys' fees—nearly four times the amount paid on the contract]; *Lafferty*, *supra*, 25 Cal.App.5th at p. 404 [seeking $1,980,070 in post-trial attorneys' fees and $464,220 in post-appeal attorneys' fees in connection with stipulated judgment for $68,000 (amount due under loan)].) As basic principles of economics command, those unexpected costs will either deter lenders from engaging in future consumer financing activity or cause lenders to pass along those costs in the form of higher interest rates—or both. (See Getter, *Consumer Credit Markets and Loan Pricing: The Basics* (2018) CONGRESSIONAL RESEARCH SERVICE ["Lender profits are principally generated from the difference between the loan price (interest rate charged to the borrower) and the costs incurred by the lender to acquire the funds that will be lent"]; see also Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation* (2016) 28 LOY. CONSUMER L. REV. 167, 187-188 [empirical studies have demonstrated that regulating consumer credit terms has several unintended consequences, including term repricing, which is "the practice of offsetting any terms that are regulated below market levels by adjusting other terms of the contract to try to reestablish the equilibrium price and quantity" and rationing "where debtors either lose access to certain types of credit or experience a reduction in credit lines and the amount of credit available"].)

Consumers, in turn, will have fewer borrowing options as financing companies exit the market and the credit market tightens. When credit is tight, the poor, who rely on consumer credit most, are the first affected. (See Katzman, *A Round Peg for a Square Hole: The Mismatch Between Subprime Borrowers and Federal Mortgage Remedies* (2009) 31 CARDOZO L. REV. 497, 543 [observing that "borrowers with poor credit . . . experience particular difficulty qualifying for new deals in the . . . tight credit environment"]; see also Baxter, *Section 85 of the Nat'l Bank Act and Consumer Welfare* (1995) 1995 UTAH L. REV. 1009, 1023 ["[R]estrictions in credit markets hurt highest-risk borrowers the most"].) Uncapped attorneys' fees exposure for innocent lenders under the Holder Rule may therefore deprive the neediest consumers of their already limited borrowing options. (Cf. Pinheiro & Ronen, *Unintended Consequences of the Credit Card Act* (2016) 1 J.L. FIN. & ACCT. 93, 95-96 [limiting interest rates triggered market response driving poor consumers, who represent higher risks, out of the consumer credit market].)

A tightened credit market also hurts other consumers, businesses that sell their goods and services to consumers who use consumer credit, and the California economy more broadly. In 2008, for example, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to (among other reasons) protect consumers and reduce mortgage fees. In response, mortgage providers "reduced credit to middle-class households by 15%." (See D'Acunto & Rossi, *Regressive Mortgage Credit Redistribution in the Post-Crisis Era* (May 31, 2017) (unpub. manuscript).)[2] Many middle-class households were pushed out of

[2] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833961.

mortgages due to increased costs of originating mortgages—a market response triggered by the legislation. (*Id.* at p. 26.)

Imposing uncapped attorneys' fees liability on innocent lenders could trigger a similar market response. Take car loans. Consumers increasingly rely on financing to purchase their vehicles. Over 85 percent of vehicles designed in 2020 were purchased with financing, compared with under 50 percent for 2013 and just 13 percent for 2006. (See Zabritski, *Experian Automotive Industry Insights: Finance Market Report Q2 2020* (Aug. 28, 2020), at p. 42.)[3] As of 2019, just 18 percent of U.S. householders had enough liquid assets to cover the cost of a new car. (See Eisen & Roberts, *The Seven Year Auto Loan: America's Middle Class Can't Afford Its Cars*, W.S. Journal (Oct. 1, 2019).)[4] And the size of the average automobile loan has grown by about a third over the past decade to $32,119 for a new car. (*Ibid.*) Higher interest rates and other lending costs would thus have a substantial impact on these ubiquitous and important transactions.

In sum, by foisting uncapped liability for attorneys' fees on innocent lenders for the misconduct of sellers—in contravention of the text and purpose of the Holder Rule—the Court of Appeal risks undermining the availability of affordable consumer credit in large swaths of the California economy. In enacting a Rule meant to help buyer-borrowers, the FTC could not have intended such a negative impact on consumers.

[3] Available at https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf.

[4] Available at https://www.wsj.com/articles/the-seven-year-auto-loan-americas-middle-class-cant-afford-their-cars-11569941215.

CONCLUSION

For all of the foregoing reasons, the Chamber respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: November 17, 2021

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CERTIFICATE OF COMPLIANCE

This brief consists of 4569 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

November 17, 2021

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1999 Avenue of the Stars, Suite 600, Los Angeles, California 90067. On November 17, 2021, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** on the interested parties below, using the following means:

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☒ **BY U.S. MAIL:** I placed a true copy of the foregoing document for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage prepaid for deposit in the United States Mail at Los Angeles, California, addressed as set forth below:

Hon. Barbara M. Scheper
Attn: Appeals Department
LOS ANGELES SUPERIOR COURT
111 North Hill Street
Los Angeles, California 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 17, 2021, at Los Angeles, California.

/s/ Tatiana Thomas
Tatiana Thomas

SERVICE LIST

Tanya Pulliam v. TD Auto Finance, LLC S267576

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