KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 897-2000
Telephone: (213) 897-2652
Facsimile: (213) 897-2802
Email: bernard.eskandari@doj.ca.gov

February 1, 2012

Mr. Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *Rose v. Bank of America, N.A.*, No. S199074

Dear Mr. Ohlrich:

I have enclosed eight copies of an amicus letter in support of review in the above-referenced case. May I request that upon receipt, your office stamps and mails a conformed copy back to me using the enclosed postage-prepaid envelope?

Also, please let me know if my submission is deficient in any way, or if you need anything else. Thank you.

Sincerely,

BERNARD A. ESKANDARI
Deputy Attorney General

BAE:jao

KAMALA D. HARRIS
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LOS ANGELES, CA 90013

Public: (213) 897-2000
Telephone: (213) 897-2652
Facsimile: (213) 897-2802
Email: bernard.eskandari@doj.ca.gov

January 31, 2012

Mr. Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *Rose v. Bank of America, N.A.*, No. S199074

Dear Mr. Ohlrich:

The Attorney General respectfully requests that the Court grant the petition for review in *Rose v. Bank of America, N.A.*, No. B230859 (Nov. 21, 2011), reported as 200 Cal.App.4th 1441 (hereafter *Rose*). This case raises important and unresolved questions regarding the extent to which federal laws that do not contain a private right of action may serve as predicate violations for a claim under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) (UCL), and the circumstances under which federal law might preempt the UCL. The decision threatens to hinder public actions brought by the Attorney General and other law-enforcement agencies, should lower courts interpret *Rose*'s rationale to apply in public UCL prosecutions. Alternatively, the Attorney General requests depublication to avoid the inevitable confusion that the opinion will cause to both courts and litigants if it remains as precedent.[1]

I. The Attorney General's Interest as Amicus Curiae

The UCL specifically authorizes the Attorney General and other public prosecutors to enforce the UCL on behalf of the People. (Bus. & Prof. Code, § 17204.) An appeal in a private action involving the UCL, such as the appeal in this case, may have significant ramifications for law-enforcement agencies, which regularly rely on the UCL to combat a host of unfair, deceptive, and unlawful practices. The appellate court's ruling interpreted broadly to prohibit all UCL actions predicated on federal laws that do not provide a private right of action, *if applied in* public actions, will have damaging effects on public prosecutions under the UCL.

[1] The Attorney General takes no position with regard to the merits of plaintiffs-appellants' underlying case.

Moreover, the Attorney General has a significant interest in ensuring that the California's consumer-protection statutes are properly construed and applied in private actions. The Attorney General receives thousands of complaints each year and is not in a position to investigate and prosecute all or even a majority of them. Legitimate actions by private litigants are necessary to supplement law-enforcement efforts and to vindicate consumers' rights.

II. Introduction

Plaintiffs-appellants brought this putative UCL class action on behalf of themselves and others alleging that Bank of America failed to properly notify them of fees and other terms applicable to their deposit accounts, in contravention of the federal Truth in Savings Act (12 U.S.C. § 4301 et seq.) (TISA), and its implementing regulation. Plaintiffs asserted a single cause of action for violation of the UCL, claiming that Bank of America's business practices are unlawful—because they violate TISA—and also unfair. Bank of America successfully demurred to the complaint, arguing that Congress intended to prohibit *all* private rights of action to enforce TISA—including "indirect" private UCL suits predicated on TISA violations—when in 2001, Congress declined to renew a TISA provision affording standing to private litigants to directly enforce TISA. The Court of Appeal affirmed and held that Congress's inaction in allowing TISA's private-right-of-action provision to sunset amounted to a "clear" rejection of the statutory right of consumers to enforce TISA. (*Rose*, *supra*, Opn. at p. 9.) Thus, said the court, Congress "intended to bar *all* private actions alleging TISA violations, including indirect enforcement suits brought under California's [UCL]." (*Id.* at 2.)

Rose marks a significant departure from existing precedent by potentially creating a sweeping new category of laws barred from serving as predicate violations for a private UCL suit. Notwithstanding the Court of Appeal's recognition of this Court's repeated admonitions that virtually any law—whether or not it includes a private right of action—may be properly borrowed for a private UCL claim, the court below essentially excluded the borrowing of federal law in which Congress chose not to afford litigants a private right of action. (See *Rose*, *supra*, Opn. at p. 9.)

Although not once employing the term in its analysis, the Court of Appeal, in effect, determined that TISA *preempts* California's UCL when it borrows TISA's standards. The Court of Appeal arrived at this conclusion without determining that state law was in conflict with federal law, disregarding TISA's "savings clause" (12 U.S.C. § 4312), which narrowly—and expressly—prescribes that TISA preempts state law only to the extent that state law is inconsistent with TISA's requirements. Instead, the Court of Appeal improperly couched its analysis in terms of *standing*, finding that only federal authorities have standing to enforce bank compliance with TISA. (*Rose*, *supra*, Opn. at p. 10.) According to the Court of Appeal, to allow "private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an 'end run' around the limits on enforcement set by Congress." (*Ibid.*) However, the only limit that Congress set when it failed to renew TISA's private-right-of-action provision was to bar *direct* private enforcement of TISA; this alone in no way suggests a Congressional intent to

categorically bar *indirect* private suits through the UCL. Indeed, TISA's savings clause embodies an express Congressional directive to permit supplemental enforcement of TISA's requirements through state law, which, in the case of the UCL, provides a private right of action. Rather than frustrating Congress's intent, permitting private indirect enforcement of TISA's requirements through the UCL furthers it.

If allowed to stand, *Rose* will create confusion among the lower courts, with the potential to significantly undermine the effectiveness of California's consumer-protection laws, by possibly barring an entire category of laws from serving as predicate UCL violations. The decision threatens to hinder public actions brought by the Attorney General and other law-enforcement agencies because lower courts may apply *Rose*'s rationale to public actions as well. Further, *Rose* would cripple the UCL as a vehicle for vindicating the state's own interests in fair, nondeceptive business practices by improperly restricting the circumstances in which private enforcement of state consumer-protection laws may occur.

This Court already has pending before it the question whether a private UCL action may be predicated on a violation of California's Unfair Insurance Practices Act (UIPA), which does not provide a private right of action.[2] (See *Zhang v. Superior Court*, No. S178542.) While *Zhang* addresses the circumstances under which a private UCL claim may be predicated on a violation of *state* law that does not afford a private right of action, *Rose* offers this Court a similar opportunity to address this important issue in the context of *federal* law without a private right of action.

III. The Decision Below Creates a Split Among the Appellate Courts by Barring a Private UCL Suit Predicated on a Violation of Federal Law that Does not Afford a Private Right of Action

The UCL "borrows" violations from other laws—including federal, state, and local laws—by making them independently actionable as unfair competitive practices. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (hereafter *Cel-Tech*).) In enacting the UCL, the Legislature conferred upon private plaintiffs "specific power" to prosecute unfair-competition claims. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 613-614 (hereafter *Stop Youth Addiction*).) The UCL provides its own remedies (e.g., injunctive relief and restitution), which are cumulative and in addition to any other remedies and penalties provided by the borrowed law. (*Manufacturers Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257, 284.) This Court has repeatedly dictated that the UCL should be interpreted and applied as broadly as possible. (See, e.g., *People v. McKale* (1979) 25 Cal.3d 626, 631-632.) Thus, virtually *any* law can serve as a predicate for a UCL claim. (*Ibid.*)

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[2] In *Moradi-Shalal v. Fireman's Fund Insurance Co.* (1998) 46 Cal.3d 287, this Court concluded that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in Insurance Code section 790.03 and that, therefore, section 790.03 did not create a private cause of action under UIPA.

Importantly in respect to the issue presented here, this Court has also held that "a private plaintiff may bring a UCL action even when the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950, citation and quotation marks omitted; see also *Stop Youth Addiction, supra*, 17 Cal.4th at p. 569 [rejecting argument that "remedies [of the UCL] are not available to private parties if the Legislature denied private enforcement rights when it established the appropriate enforcement scheme for the underlying law"].) This is because the UCL claim is an *independent* state-law cause of action that simply borrows and adopts the predicate violation. (See, e.g., *Cel-Tech, supra*, 20 Cal.4th at p. 180.) When plaintiffs bring such a claim, they "seek[] relief from alleged unfair competition, not to enforce the [predicate law]." (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 566.)

The Court of Appeal here held that, because Congress allowed the private-right-of-action provision of TISA to sunset, that law may not serve as a predicate to a UCL claim. In so holding, *Rose* creates a split among California's appellate courts who have squarely held that, even where Congress has not included a private right of action to enforce a federal law, a violation of that federal law may still support a private UCL claim. For example, in *Washington Mutual Bank v. Superior Court* (1999) 75 Cal.App.4th 773, Division Five of the same appellate district addressed the extent to which violations of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. §§ 2601 et seq.) (RESPA), and its attendant regulations, could serve as a predicate for a private UCL suit. (*Id.* at p. 787.) RESPA requires certain disclosures in connection with real-estate transactions, does not include a private right of action (it contemplates administrative enforcement), and includes a savings clause substantially identical to TISA's. (*Id.* at pp. 780-781.) The court held that "the mere absence of a private right of action in a federal law does not mean that a private right of action under state law is inherently in conflict with the federal law and is preempted." (*Id.* at p. 783.) The court refused to "presume that Congress cavalierly preempted all private state causes of action simply by enacting a limited provision preempting state laws that are inconsistent with the RESPA." (*Ibid.*) The court went on to explain that "private state causes of action are not inconsistent with the federal disclosure requirements, but rather are complementary to the federal requirements and in fact will promote full compliance with the disclosure law enacted by Congress." (*Id.* at p. 787.) (See also *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 [private UCL claim predicated on RESPA is not inconsistent with federal law and thus not preempted].)

In contrast to Division Five, Division One here held that a UCL cause of action may not be predicated on violations of federal laws where Congress did not provide a private right of action. The decision below, if left to stand in conflict with the reasoning of Division Five, threatens to create confusion in the trial courts. The Attorney General respectfully requests that the Court resolve the conflict on this important issue. The *Rose* decision could be interpreted to create a sweeping new category of federal laws barred from serving as predicate violations for a private UCL claim. Moreover, if *Rose*'s reasoning is applied to public prosecutions, the Attorney General and other public prosecutors may be hampered in their ability to utilize the UCL to bring actions against defendants who victimize California consumers.

IV. The Court Below, in Effect, Concluded that TISA Preempts a Private UCL Action, Without Engaging in any Preemption Analysis and Seemingly Ignoring TISA's Savings Clause

Although couching its analysis in terms of standing to enforce TISA, the Court of Appeal implicitly found that TISA preempts a private UCL cause of action predicated on a TISA violation. Without engaging in any preemption analysis, the court nonetheless determined that TISA displaces the UCL whenever a private UCL action borrows from TISA. (See, e.g., *Stop Youth Addiction, supra,* 17 Cal.4th at p. 568 ["The doctrine of preemption applies, generally, when it is necessary to determine what displacing effect federal law, pursuant, inter alia, to the supremacy clause of the United States Constitution [citation], may have on state laws."].) TISA, however, does not preempt the UCL, because there is no inconsistency between federal and state law. A UCL claim predicated on a TISA violation is simply a state-law claim that incorporates and adopts a federal standard.

The Court of Appeal critically ignored that Congress included an *express* preemption provision in TISA—a "savings clause." TISA *does not* preempt state law—including the UCL—except to the extent it is *inconsistent* with TISA. (See 12 U.S.C. § 4312.)[3] Where federal law expressly limits the preemption of state law to the extent that law is "inconsistent" with the federal law, the preemption provision should be construed narrowly. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 523; see also, e.g., *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 ("because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). Only state laws that make it impossible to comply with federal law or that stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress are preempted. (See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-143). Where a federal statute contains an express provision that preempts state law only to the extent that it is inconsistent with federal law, "Congress express[es] no desire to preempt state laws or causes of action that supplement, rather than contradict, [federal law]." (*Beffa v. Bank of West* (9th Cir. 1998) 152 F.3d 1174, 1177.)

Here, a UCL claim that borrows TISA's requirements is entirely consistent with federal law. It is axiomatic that the provision of additional remedies under state law—such as a private right of action—does not impose additional requirements or contradict federal law; "rather, it

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[3] Section 4312 of TISA, titled "Effect on State Law," narrowly circumscribes the extent to which TISA preempts state law:

> [TISA] do[es] not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency. . . .

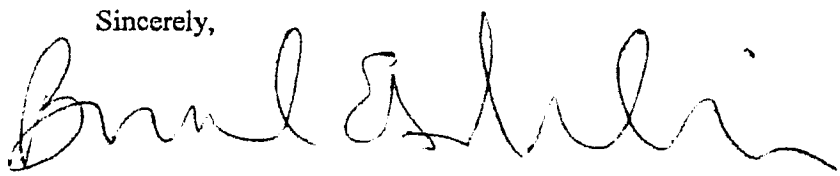
merely provides another reason for business to comply with identical existing 'requirements' under federal law." (*Medtronic, Inc. v. Lohr, supra*, 518 U.S. at p. 495; accord, e.g., *Bates, supra*, 544 U.S. at pp. 447-448 ["[A] state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law." (citation and internal quotation marks omitted)].) Indeed, "[p]rivate remedies that enforce federal [TISA] requirements would seem to aid, rather than hinder, the functioning of [TISA]." (*Bates, supra*, 544 U.S. at p. 451.)

Notably, the Court of Appeal's decision hinders state consumer financial-protection efforts at a time when Congress has taken steps to *enlarge* the scope of state enforcement of consumer financial-protection laws. For example, the recent passing of the Dodd-Frank Wall Street Reform and Consumer Protection—aimed at, among other things, protecting consumers from abusive financial practices—highlights the importance of state law in regulating banks by expressly barring the preemption of state law that affords consumers "greater" protections that afforded under federal law. (See 12 U.S.C. § 5551(a)(2).)

V. Conclusion

The Attorney General respectfully requests that the Court grant the petition for review. However, if the Court determines that review is not appropriate, the Attorney General requests that the Court depublish the opinion.

Sincerely,



BERNARD A. ESKANDARI
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

BAE:jao

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Rose v. Bank of America, N.A.**

No.: **No. S199074**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On February 1, 2012, I served the attached **AMICUS LETTER IN SUPPORT OF REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **FedEx**, addressed as follows:

Mr. Frederick Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102
Tracking No.: 8433-5401-1456

Henry H. Rossbacher
The Rossbacher Firm
811 Wilshire Blvd.. Suite 1650
Los Angeles, California 90017
Trackign No.: 8433-5401-1445

Margaret M. Grignon
Reed Smith LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tracking No.: 8433-5401-1434

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 1, 2012, at Los Angeles, California.

Joyce AguinsOlmos
Declarant

Signature