No. 13-662

In The
Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

HAROLD C. ROSE, KIMBERLY LANE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Has Petitioner presented compelling reasons to review the California Supreme Court's ruling that, under Section 4312 of the Truth in Savings Act (TISA), the state may enforce a consumer protection law that "borrows" TISA's rules and regulations to define violations of state law?

Did the California Supreme Court's ruling interpreting the state's consumer protection law involve an important question of federal law?

Did the California Supreme Court's ruling conflict with any of this Court's relevant decisions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTRODUCTION	1
ARGUMENT	5
I. The Facts	5
II. The Opinion Below	7
III. The Court's Preemption Precedents	12
A. The Bank Avoids the Relevant Cases	12
B. The Express Preemption Clause Rules	14
IV. The Bank's Petition	18
V. The Bank's Federal Court Cases	23
VI. The Plain Text of the Preemption Clause	29
VII. The Myth of the Crazy Quilt	31
VIII. The Purpose of TISA	32
CONCLUSION	34

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001)... 25, 26, 27

Almond Hill School v. U.S. Dept. of Agriculture, 768 F.2d 1030 (9th Cir. 1985)..... 11

Arizona v. United States, 132 S.Ct. 2492 (2012)..... 4, 14, 28

Astra U.S.A., Inc. v. Santa Clara County, 131 S.Ct. 1342 (2011)..... 28

Barnes v. Fleet Nat'l Bank, 370 F.3d 164 (1st Cir. 2004)..... 3

Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005).....*passim*

Blessing v. Freestone, 520 U.S. 329 (1997) 27

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163 (1999)..... 9, 11, 31

Chamber of Commerce of the United States v. Whiting, 131 S.Ct. 1968 (2011).....*passim*

Cipollone v. Liggett Group, 505 U.S. 504 (1992).....4, 12, 16, 29, 30

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005)..... 25

CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993)..... 4, 14

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005)..... 15

TABLE OF AUTHORITIES – Continued

Page

Gade v. National Solid Wastes Management Assn., 505 U.S. 88 (1992) 16

Gonzaga University v. Doe, 536 U.S. 273 (2002) 27

Gunther v. Capital One, N.A., 703 F. Supp. 2d 264 (E.D.N.Y. 2010) 11, 32

Hartless v. Clorox Co., No. 06CV2705, 2007 WL 324560 (S.D. Cal. Nov. 2, 2007) 11

Hirschbach v. NVE Bank, 496 F. Supp. 2d 451 (D.N.J. 2007) 3

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134 (2003) 10

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 4, 16, 17, 31

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) 11, 23, 24, 25

People v. McKale, 25 Cal. 3d 626 (1979) 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 17

Rose v. Bank of America, N.A., 200 Cal. App. 4th 1441 (2011) 6

Rose v. Bank of America, N.A., 57 Cal. 4th 390 (2013) .....*passim*

Roskind v. Morgan Stanley Dean Witter & Co., 80 Cal. App. 4th 345 (2000) 7

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 16

TABLE OF AUTHORITIES – Continued

Page

Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463 (2005) 3, 7

Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553 (1998)..... 9, 10, 11

Zhang v. Superior Court, 57 Cal. 4th 364 (2013)..... 11

STATUTES

12 U.S.C. § 4301 33

12 U.S.C. § 4310 .....*passim*

12 U.S.C. § 4312 .....*passim*

20 U.S.C. § 1232g 27

42 U.S.C. § 2000d *et seq*. 26

43 U.S.C. § 1983 ..... 23, 24, 27

1975 Cal. Stats. ch. 837 § 1 20

1976 Cal. Stats. ch. 1279 § 1 20

1993 Cal. Stats. ch. 107 § 3 ..... 21, 22

Truth in Savings Act (TISA), 12 U.S.C. §§ 4301-4313 .....*passim*

Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200 *et seq*.....*passim*

RULES AND REGULATIONS

12 C.F.R. § 230 *et seq*. 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

104 Cong. Rec. H11644-12120 (daily ed. Sept. 28, 1996) 18

104 Cong. Rec. H11768 19

104 Cong. Rec. H12016 19

H.R. 1057 18

H.R. 1362 8

H.R. 1858 ..... 8, 18

H.R. 3610 ..... 8, 18, 19

H.R. Rep. No. 104-863 18

S. 650 ..... 8, 18

Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine (Oct. 16, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/index7.htm 15

INTRODUCTION

Petitioner Bank of America, N.A. (the Bank), has not presented any compelling reasons why the Court should issue a Writ of Certiorari.

The Bank has waived the issue it claims to be presenting to the Court. The Bank concedes that no federal law or doctrine preempts the state law claims brought by Mr. Rose and the class of bank account holders (the Customers). The Bank further concedes that when California enforces a state disclosure law based upon the Truth in Savings Act (TISA), 12 U.S.C. §§ 4301-4313, it acts in accordance with powers reserved to it by Section 4312, TISA's "savings" or "preemption" clause.[1]

The Customers' state law claims – brought under California's consumer protection statute, the Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200 *et seq.*, as enabled and preserved by Section 4312 – were upheld unanimously by the California Supreme Court in *Rose v. Bank of America, N.A.*, 57 Cal. 4th 390 (2013).

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[1] For simplicity throughout this brief, respondents will refer to Section 4312 as a "preemption clause." While one in the same, such a clause has been said to either "save" a federal law for the state to enforce or to "preempt" the state from enforcing it. In this case, Section 4312 both allows California to enforce laws consistent with TISA and prevents the state from enforcing laws inconsistent with it.

The Bank, while arguing that California's consumer protection statute, the Unfair Competition Law, could not enforce TISA itself, conceded that Section 4312 allows California to enact a state law which imports TISA's required disclosures. The California Supreme Court decided the UCL, a law which "borrows" unlawful standards from other statutes, was such a law. *Id.* at 395.

California's court looked only at the text and structure of TISA and did not delve into its legislative history. The court found that Congress retained TISA's preemption clause which preserved respondents' right to bring UCL claims for TISA violations. By leaving TISA's preemption clause in place, Congress explicitly approved the enforcement of consistent state laws "relating to . . . terms for accounts." The California Supreme Court, relying on well-established California precedents, unanimously decided, "The UCL is such a state law." *Id*.

There is, therefore, no federal dispute for this Court to decide. The California Supreme Court settled the question as a matter of state law in which it interpreted the nature and range of claims brought under the UCL and dismissed the Bank's proffered distinction between borrowing and importing as overly formalistic.

The Bank's arguments to the contrary were each considered and rejected on state law grounds. Indeed, the California Supreme Court emphasized, "The

Bank's position elevates form over substance and ignores the familiar principles on which the UCL operates." *Id.* at 396. The Bank's position that the UCL enforces federal laws was soundly rejected, citing California's settled jurisprudence. Unfair business practices are *independent* violations of state law defined by the provisions of other laws. *Id.* "[T]he UCL does not serve as a mere enforcement mechanism." *Id.* at 397.

The *Rose* decision does not conflict with any decision of a federal Court of Appeals or state court of last resort. Three courts have, in fact, upheld private enforcement of TISA's requirements under state consumer laws. See *Barnes v. Fleet Nat'l Bank*, 370 F.3d 164, 175-176 (1st Cir. 2004) (Massachusetts law); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1475-1483 (2005) (California law); *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451 (D.N.J. 2007) (New Jersey law). The Bank's petition ignores these authorities, fails to acknowledge they are in accord with *Rose*, fails to cite *Smith,* and buries *Barnes* on the last page.[2]

There is no conflict for this Court to resolve. California's court followed *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005), in examining TISA's express preemption clause. Commencing with

[2] Although *Barnes* was filed prior to the repeal of 12 U.S.C. § 4310, the wording and meaning of the preemption clause, 12 U.S.C. § 4312, was the same both before and after repeal.

Cipollone[3] and continuing through *Medtronic*,[4] *Bates*, *CSX Transportation*,[5] *Whiting*,[6] and *Arizona*,[7] this Court has instructed courts to limit their inquiry to the text of such a clause without resort to legislative history. The California Supreme Court did exactly that. Throughout the ruling below, the court acted in accord with this Court's preemption clause jurisprudence. The court followed *Bates* in viewing the text of the preemption clause as the defining provision of the statute and its retention, despite repeal of another section, as the definitive expression of congressional intent. Under the authority granted by Section 4312, the court decided the state law question correctly under its own precedents and, as a result, there is no federal question for this Court to decide.

The Bank's real argument about preemption of state private claims should be presented to Congress which was unable to repeal Section 4312 despite the efforts of bank lobbyists. Having successfully labored during the middle 1990s to bowdlerize TISA in some areas, the banking industry never gained a congressional consensus to proscribe state law enforcement of the statute.

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[3] *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

[4] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[5] *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

[6] *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1977 (2011).

[7] *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012).

Because the Bank concedes there is no federal bar to California enforcing a state truth-in-savings law, it is now reduced to claiming that California has no such law. The California Supreme Court entertained this argument then unanimously and conclusively determined the Bank's claims were meritless under California's consumer protection cases. In construing the reach and operation of the UCL, the court did not need to answer any questions of Constitutional or federal law.

There is simply no compelling reason for this Court to grant the Writ and review this case.

ARGUMENT

I. The Facts.

In 2009, without the proper and timely notification required under the Truth in Savings Act, 12 U.S.C. § 4301 *et seq.*, and its implementing regulations, 12 C.F.R. § 230 *et seq.*, petitioner Bank of America, N.A. for the first time charged respondent Harold C. Rose to have checks enclosed with his bank statement, raised respondent Kimberly Lane's

monthly fee, and similarly hiked the charges and fees of other Bank customers throughout California.[8]

The Customers brought a class action suit against the Bank for violation of the UCL and borrowed the notification rules of TISA to show that the Bank had committed an unlawful business practice under California law.

The Bank demurred and the Superior Court sustained on the ground that the 1996 repeal of 12 U.S.C. § 4310,[9] which had provided a federal private right of action for TISA, was an "absolute bar to relief." The Court of Appeal affirmed the judgment. *Rose v. Bank of America, N.A.*, 200 Cal. App. 4th 1441 (2011). The California Supreme Court granted review and reversed in the opinion below holding that the Customers could pursue their UCL case under TISA's preemption clause, 12 U.S.C. § 4312.[10] *Rose v. Bank of America, N.A.*, 57 Cal. 4th 390, 399 (2013).

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[8] More detailed facts may be found in respondent's Opening Brief on the Merits before the California Supreme Court, 2012 CA S.Ct. Briefs LEXIS 1220 at *1-5.

[9] For the rest of this brief, the former 12 U.S.C. § 4310 will be referred to simply as Section 4310.

[10] For the rest of this brief, 12 U.S.C. § 4312 will be referred to simply as either Section 4312 or the preemption clause.

II. The Opinion Below.

In *Rose v. Bank of America, N.A.*, 57 Cal. 4th 390 (2013), the California Supreme Court reviewed the effect eliminating Section 4310 had on a UCL claim which "borrowed" TISA's prohibitions and requirements. The court unanimously concluded that, despite the repeal, the Customers' suit fell squarely within the ambit of Section 4312 because the UCL, as interpreted by state law, was consistent with TISA.

Under California precedents, the court first determined, "Violations of federal statutes, including those governing the financial industry, may serve as the predicate for a UCL cause of action." *Id.* at 394 (citing *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1480 (2005); *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 352 (2000)).

In their briefs, the Customers had argued under federal preemption principles that Section 4312 preserved California's ability to regulate bank disclosures because by borrowing TISA's requirements, the UCL remains consistent with federal law. *Id.* at 394-95. The Bank had responded that preemption law was irrelevant and only argued that Congress intended to prevent private enforcement of TISA in both state and federal courts. *Id.* at 395.

The California Supreme Court, which had been amply briefed on the legislative history of Section

4310's repeal,[11] declined to delve into the historical details and, instead, based its determination of congressional intent on the simple fact that Congress had not repealed Section 4312:

> [C]onsiderations of congressional intent *favor plaintiffs*. By leaving TISA's savings clause in place, Congress explicitly approved the enforcement of state laws "relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." (§ 4312.) *The UCL is such a state law*.

Id. at 395 (emphasis added).

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[11] The Bank had asked the court to judicially notice 371 pages of Congressional committee reports, floor transcripts, and a presidential signing statement related to three bills that were never enacted (H.R. 1362, H.R. 1858, and S. 650), and H.R. 3610, the bill that actually repealed Section 4310. See Motion for Judicial Notice, Decl. of M. Grignon, 2012 CA S.Ct. Briefs LEXIS 1221 at *71-74 (2012).

The Customers painstakingly dissected and analyzed these exhibits in their Reply Brief on the Merits, 2012 CA S.Ct. Briefs LEXIS 1222 at *8-26 (2012), and concluded that – despite early attempts to repeal Section 4312 along with 4310 – in H.R. 3610, the bill that actually repealed Section 4310, Congress resolved the legislators' disputes over the early drafts by intentionally retaining the preemption clause, thus preserving private and governmental enforcement of state law so long as it is consistent with TISA. *Id.*

Relying in part on *Bates, supra* at 447, the court declared the Bank's argument – that the UCL doesn't fall under Section 4312 because it doesn't explicitly mention bank account disclosures – "elevates form over substance" and ignores how UCL borrowing works. *Rose*, 57 Cal. 4th at 395-96. The Bank had insisted California could have enacted a separate statute identical to TISA instead of employing the UCL to borrow the statute's rules and regulations "directly." *Id.* at 395. But the court reasoned, "When Congress permits a state law to borrow the requirements of a federal statute, it matters not whether the borrowing is accomplished by specific legislative enactment or by a more general operation of law." *Id.* at 184 (citing *Bates*, 544 U.S. at 447).

Relying solely upon California case law, the court further explained,

> Contrary to the Bank's insistence that plaintiffs are suing to enforce TISA, a UCL action does not "enforce" the law on which a claim of unlawful business practice is based. "By proscribing 'any unlawful' business practice, [Business and Professions Code] 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes *independently* actionable.

Id. at 396 (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999)) (emphasis original). A UCL plaintiff does not seek to enforce the underlying statute. *Id.* (citing *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17

Cal. 4th 553, 560 (1998)). By enacting the UCL, the California legislature gave private plaintiffs a "specific power" to bring unfair competition claims. *Id.* (quoting *People v. McKale*, 25 Cal. 3d 626, 633 (1979); citing *Stop Youth Addiction* at 562).

The UCL "provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is 'unlawful'." *Id.* at 397 (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003)). Because the Customers sought equitable remedies under UCL's restraints, their suit was consistent with congressional intent relating to TISA. *Id.* "Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA." *Id.*

Most importantly, and once again referring only to California cases, the court declared,

> When Congress repealed section 4310, foreclosing private actions for damages under TISA, it left section 4312 intact, *expressly permitting private actions under state laws consistent with TISA*. Thus the abolition of the TISA remedy does not amount to a bar against UCL claims. It is settled that a UCL action is not precluded "merely because some other statute on the subject does not, itself, provide for the action or prohibit the challenged conduct. To forestall an action under

> the [UCL], *another provision must actually 'bar' the action* or clearly permit the conduct.

Id. at 397-98 (citing *Cel-Tech*, 20 Cal. 4th at 182-83; *Zhang v. Superior Court*, 57 Cal. 4th 364, 376-77 (2013); *Stop Youth Addiction*, 17 Cal. 4th at 566) (emphasis added).

In response to the Bank's argument regarding a 2001 failed attempt by Congress to restore Section 4310 to TISA, the court said it revealed nothing about congressional intent regarding state claims under the preemption clause. *Id.* at 398. Instead, the court ruled, "The *retention of section 4312*, allowing states to maintain laws consistent with TISA, *demonstrates the intent* to permit state law remedies." *Id.* (emphasis added).

Finally, because the UCL's "distinct restitutionary and injunctive remedies" are meant to be *distinct* from and *cumulative* to TISA, the court rejected the Bank's several arguments based on *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030 (9th Cir. 1985); *Hartless v. Clorox Co.*, No. 06CV2705, 2007 WL 324560 at *3-4 (S.D. Cal. Nov. 2, 2007); and *Gunther v. Capital One, N.A.*, 703 F. Supp. 2d 264 (E.D.N.Y. 2010). *Rose*, 57 Cal. 4th at 398-99. In fact, the court held that neither *Almond Hill* nor *Hartless* were good law in light of the Court's ruling in *Bates*, 544 U.S. at 447-48. *Id.* at 398 n.7.

In sum, the California Supreme Court held that the Customers' UCL case was permitted under California law. Along the way, it examined congressional intent by looking solely to the text and structure of TISA without referring to any of the voluminous historical documents presented by the Bank. In doing so, the court correctly followed the Court's Supremacy Clause doctrine as it relates to preemption clauses and did not raise any further questions of federal law.

III. The Court's Preemption Precedents.

Over the last twenty years, beginning with *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), the Court has developed a distinct set of rules that apply to state enforcement of federal laws like TISA which have express preemption clauses.

A. The Bank Avoids the Relevant Cases.

Throughout this litigation, the Bank has assiduously avoided almost any mention of the preemption law cases.

For example, before the California Supreme Court, the Bank opened its brief, "Despite the one-dimensional focus of Plaintiffs' brief, this case *does not implicate federal preemption jurisprudence*." 2012 CA S.Ct. Briefs LEXIS 1221 at *1 (emphasis added). This was more forcefully put in the body of the brief:

> Plaintiffs' brief includes a lengthy analysis of the United States Supreme Court's opinion

> in *Chamber of Commerce of U.S. v. Whiting* (2011) ___ U.S. ___, 131 S.Ct. 1968 (*Whiting*) and asserts that the Court of Appeal's decision violates the federal preemption principles embodied in *Whiting*. . . . Plaintiffs' assertions in this regard, *like the entirety of their preemption argument*, are a product of the *wrong turn* they have taken in framing the question and analyzing the issues involved in this case. As always, if you ask the wrong question, you get the wrong answer. Here, *federal preemption is the wrong question*.

Id. at *62-63 (emphasis added).

In the Petition, the only relevant case the Bank discusses is *Bates*, which it says doesn't apply because the UCL *borrows* rather than *parallels* TISA.[12] Petition at 29-30. Here, the Bank renews its curious and

[12] There is no such formalistic distinction in *Bates* regarding how a state may duplicate a federal law. A borrowing statute such as the UCL is merely one method of achieving a law with parallel requirements. As the Court declared,

> Nothing in the text of FIFRA would prevent a State from *making the violation of a federal labeling or packaging requirement a state offense*, thereby imposing its own sanctions on pesticide manufacturers who violate federal law. The imposition of state sanctions for violating *state rules that merely duplicate federal requirements* is equally consistent with the text of § 136v.

544 U.S. at 442 (emphasis added).

unsupportable notion – which the California court chided as elevating form over substance[13] – that California may *adopt* federal laws but may not *borrow* them. Petition at 32.[14]

B. The Express Preemption Clause Rules.

The Court's primary concern under the Supremacy Clause is one of federalism, "National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). Congress' power to preempt state law is embodied in the Supremacy Clause. *Id.* Therefore, "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.* at 2500-01.

When a federal law has an express preemption provision, the Court must focus on the "plain wording of the clause" because it provides the "best evidence of Congress' pre-emptive intent." *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1977 (2011) (quoting *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

Congress' "authoritative statement" of the reach of a preemption clause is "the statutory text, not the

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[13] See *Rose*, 57 Cal. 4th at 396.

[14] "The California Supreme Court was correct, therefore, when it found that claims *may be predicated* on 'California statutes that simply *adopt* federal requirements.'" (emphasis added).

legislative history." *Id.* at 1980 (quoting *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005)). *Whiting* points out that legislative history is particularly useless[15] when the vast majority of documents "fail to discuss the savings clause at all." *Id.*

When a statute has a preemption clause, arguments of implied preemption are not available. *Id.* at 1981 ("Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority."). Neither are balancing tests. *Id.* at 1984 ("Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States.").

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[15] For some years, the Court has been moving away from the inherent burdens of legislative historical analysis. As Justice Scalia recently observed:

> I think the current Court pays much more attention to the words of a statute than the Court did in the eighties. And uses much less legislative history. If you read some of our opinions from the eighties, my God, two thirds of the opinions were discussing committee reports and floor statements and all that garbage. We don't do much of that anymore.

Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine (Oct. 16, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/index7.html.

Where there is a preemption clause, the Court will not imply preemption unless a "high threshold" is met:

> Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law." *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment); see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Our precedents "establish that a *high threshold* must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Gade*, *supra*, at 110.

Whiting, 131 S.Ct. at 1985 (emphasis added).

And where a state, as an independent sovereign, is legislating in a field it traditionally has occupied, the Court employs a "presumption against the preemption of state police power regulations" to narrowly interpret Congress' express preemption "command." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 523 (1992)).

Setting the standard for the Court's scrutiny, *Medtronic* held that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of

Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

A state law, operating under a preemption clause, may still be consistent with the federal statute, even if the state law has different or additional remedies. *Bates, supra* at 448. The state may apply common law and does not need to explicitly incorporate the federal standard, so long as the two laws have "parallel requirements." *Id.* at 447.

Summing up these rules and applying them to the case at hand, to get the Court to go outside the plain language of Section 4312's preemption command, the Bank bears the burden of proving, without recourse to legislative history, that Congress clearly and manifestly intended to keep California from employing its police power over banking disclosures and consumer protection, traditional areas of state interest. It does not matter that the UCL has different remedies from TISA.

Under a plain reading of Section 4312, "any provisions" of state law requiring disclosure of account terms will not be preempted unless they are inconsistent with TISA. This – not desultory references to legislative reports from bills that were never passed – is the most authoritative statement of Congress' intent, set forth clearly and manifestly: States may enforce any state banking account disclosure law so long as it is consistent with TISA.

IV. The Bank's Petition.

At no point in its petition nor at any time during this case has the Bank ever argued that the UCL borrowing TISA is inconsistent with TISA itself and, therefore, expressly preempted under Section 4312. This is significant, for the entirety of the Bank's case must now be based on getting the Court to imply preemption after determining Congress' intent through reading several congressional committee reports that only relate to earlier failed attempts at repealing Section 4310 and are clearly not related to the exact bill that repealed Section 4310.[16]

What the Bank is suggesting is exactly the type of "freewheeling judicial inquiry" decried in *Whiting*. The repeal of Section 4310 was accomplished by H.R. 3610. Yet the Bank urges the Court to examine a committee report on S. 650,[17] a committee report on H.R. 1858,[18] and the text of H.R. 1057,[19] a 2001 bill that was proposed but never passed.

When it comes to the enacting legislation which was contained in H.R. 3610, an enormous omnibus defense appropriations bill, the Bank did not provide a single reference to the Conference Report, H.R. Rep. No. 104-863, *reprinted in* 104 Cong. Rec. H11644-12120

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[16] See *supra,* p. 8, n.11.

[17] See Petition at 23-25.

[18] See *id.* at 23, 25, 36.

[19] See *id.* at 6.

(daily ed. Sept. 28, 1996),[20] in its petition even though the Bank asked the court below to take judicial notice of this same committee report. Significantly, the report says nothing to support the Bank's claim that Congress repealed Section 4310 so that TISA could only be enforced by federal and state administrative agencies.[21]

The Bank is using sleight-of-hand to try to get the Court to accept its wishful and highly inaccurate version of Congress' intent by pointing to legislative reports from early draft bills which specifically called for the repeal of the preemption clause. These early legislative reports of course say what the Bank wants the Court to hear: that Congress intended to end states' ability to hear private TISA cases. Because, in the final act, Section 4312's preemption clause was

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[20] *Available at* http://thomas.loc.gov/cgi-bin/query/D?r104:1:./temp/~r104tjNVvw:b3702905:.

[21] Here, in its entirety, is the conference committee's analysis of Subtitle F of H.R. 3610 which contained all the bill's amendments to TISA including the repeal of Section 4310:

> Subtitle F includes a number of regulatory clarifications, studies and statutory improvements that are intended to provide more cost-effective delivery of financial services.

Id. at 483, *reprinted in* 104 Cong. Rec. at H12016. The relevant text of H.R. 3610, merely says:

> Effective as of the end of the 5-year period beginning on the date of the enactment of this Act, section 271 of the Truth in Savings Act (12 U.S.C. 4310) is repealed.

Id. at 483, *reprinted in* 104 Cong. Rec. at H11768.

retained, all these earlier committee comments are inapplicable. They refer to nonexistent laws that never made it to the floor for a vote and had completely different provisions than the bill that eventually was enacted.

Surely, none of the Bank's proffered congressional comments about early failed drafts meet the high threshold requirement for implying that TISA preempts consistent California law. The only way Congress could have clearly and manifestly shown that it wanted state law preempted would have been by repealing the preemption clause in its entirety. That never happened.

One thing that makes the Bank's petition all the more puzzling is its oft-repeated notion that Congress intended, under Section 4312, that a state may enact and enforce a TISA-like statute, one that empowers the government and private citizens to bring an action, but a state may not use a consumer protection statute that borrows TISA's requirements to define state law. This is a false dichotomy which elevates, as the California Supreme Court determined, form over substance.

For a long time, California has had truth-in-savings legislation. California's interest in truthful bank disclosures began in 1975-76 when it passed Financial Code Sections 855, see 1975 Cal. Stats. ch. 837 § 1, and Sections 865 through 865.10, see 1976 Cal. Stats. ch. 1279 § 1, entitled "Disclosure of Consumer Bank Account Charges." And significantly, any

violation of this statute was actionable through borrowing under the "unlawful" wing of the UCL.

After Congress passed TISA, however, California repealed Sections 855 and 865-865.10. 1993 Cal. Stats. ch. 107. Section 3 of the repealing legislation sets forth in detail the reason for the repeal and expresses California's continued interest in the subject matter:

> The federal deposit disclosure laws largely cover the subject matter of the California deposit disclosure laws. Although the federal deposit disclosure laws differ in many respects from the California deposit disclosure laws, the differences are mainly in points of detail, and the federal deposit disclosure laws provide adequate safeguards for consumers.
>
> Subdivision (g) of Section 865.6 of the Financial Code provides that banks shall not be liable for any failure to comply with the disclosure law to the extent that its provisions are *inconsistent* with federal statutes or regulations. Because of the many differences between state and federal disclosure laws, several provisions of the California deposit disclosure laws were repealed on a *de facto* basis with the enactment of the federal deposit disclosure laws.
>
> *It would not be in the public interest to continue to require banks to comply with, and regulatory agencies to enforce, both the*

> *California deposit disclosure laws and the federal deposit disclosure laws.*
>
> Considering all the relevant circumstances, it is appropriate that the California deposit disclosure laws be repealed.

Id. (emphasis added).

There are many important take-aways from this repealing legislation. First, California has had a longtime public interest in truthful banking disclosures. Second, in 1976, California enacted a specific section of the law to make sure its laws were consistent with federal law. This shows that for over thirty years California took pains to make sure its banking disclosure laws would not be preempted. Third, soon after Congress passed TISA, the Legislature reviewed the federal law including, we may reasonably assume, its preemption clause, and determined that the best method for preserving California's interest was to repeal its scheme and rely on TISA's standards. Fourth, after the repeal of TISA's Section 4310, the Legislature did not seek to reenact the state scheme, presumably because it felt that California's continued public interest in enjoining improper bank disclosures would be vindicated by TISA as enforced through the UCL both by public prosecutors and private citizens.

The Bank has, essentially, built its whole case around a fanciful notion of congressional intent, something it can not show. The rest of this opposition brief, therefore, will summarily address the Bank's

inapplicable line of federal court cases that bear no relation to federalism, the Supremacy Clause, the express preemption clause or, indeed, this case.

Even if deemed relevant, the application of any one of these precedents would first require the Court to find a clear and manifest expression of the Bank's preposterous notion that Congress intended to prevent states from borrowing the requirements of TISA while simultaneously allowing them to enact a photocopied version of TISA.

V. The Bank's Federal Court Cases.

In its petition, the Bank has cited a slew of federal cases, many for the first time in this litigation, that do not touch upon issues of federalism. Most of the cases do not relate to preemption clauses. Several of the cases were brought under 43 U.S.C. § 1983 (Section 1983) which has a discrete jurisprudence, inapplicable here, because it only allows injured private parties to sue a state for violations of federally created *rights* as opposed to mere laws. Another case involves the federal common law of third-party contract beneficiaries. But none have to do with the enforcement of a consistent state law as sanctioned by an express preemption clause.

In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), fishermen brought suit against a sewage plant for damaging their fishing grounds under federal common law and two federal acts. *Id.* at 4. Each of

the federal laws provided for citizen-suits. *Id.* at 6-8. The Court did an extensive review of legislative history to determine Congress' intent. *Id.* at 13. It also focused upon the "unusually elaborate enforcement provisions" of the federal laws which were available to both the government and private citizens. *Id.* The Court concluded that a private action could not be implied under the acts because Congress specifically intended private parties to obtain their relief through the statutorily designed citizen-suit system. *Id.* at 18-19. The Court also decided that the citizen-suit procedures were "sufficiently comprehensive" to preclude remedies under Section 1983. *Id.* at 20. Likewise, the fishermen's federal common law nuisance suit was preempted as well. *Id.* at 21-22.

Throughout the petition, the Bank invokes *Sea Clammers* to show that Congress may bar private suits. See, for example, Petition at 14, 16, 19. There is nothing novel in this contention. Certainly, Congress *may* do so, but the more important questions are did it? Did it do it effectively? And did it do it clearly and manifestly? With respect to TISA, the answer is no to all three.

Congress, after much politicking and many drafts and conferences,[22] passed a bill retaining Section 4312 which expressly allowed for consistent state law enforcement. It could have repealed Section 4312

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[22] See Customers' Reply Brief, 2012 CA S.Ct. Briefs LEXIS 1222 at *8-26 (2012).

along with Section 4310 but it did not. Or, it could have amended Section 4312 to change "any provisions of the law of any State" to "any state enactments that copy but do not borrow federal law," but it did not.

Or, more relevant to *Sea Clammers*, Congress could have provided a *comprehensive* remedial scheme that gave private parties an exclusive pathway to bring suit, but it did not. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("'[t]he express provision of *one method* of enforcing a substantive rule suggests that Congress intended to preclude others.'") (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)) (emphasis added).

Sea Clammers, to sum up, requires a specific showing of congressional intent to bar private implied or common law suits coming from outside the adjudicative provisions contained in the federal law at issue. Such a bar will only be put in place where Congress has designed an exclusive and comprehensive remedial scheme, preferably one that provides an avenue for private enforcement. Such a bar would not, however, be appropriate where, as here, Congress has expressly provided a second enforcement pathway for the states.

The Bank also misunderstands *Alexander v. Sandoval*, 532 U.S. 275 (2001), when it attempts to argue that TISA is a regulatory statute only focused on banks and, as such, doesn't confer rights on private parties, Petition at 17. First of all, Section 4312 is clearly focused on the rights of states, not banks.

Second, the inquiry in *Alexander* was limited to the scope of two different sections of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.* The first, Section 601, prohibited *intentional* racial discrimination. *Alexander*, 532 U.S. at 280. The second, Section 602, prohibited activities that had a *disparate impact* on racial groups. *Id.* at 281. The Court evaluated congressional intent from the "text and structure" of these two clauses. *Id.* at 288. Section 601 had "rights-creating" language while Section 602 merely authorized federal agencies to "effectuate the provisions of § 601." *Id.* at 288-89. Thus, reasoned the Court, Section 602 was "focuse[d]" on the federal *agencies* which were to "effectuate" the rights and not at the *persons* who had been given those rights under Section 601. *Id.* at 289.

The Bank wants to say that TISA is only focused on banks. Petition at 17. But *Alexander*'s focus analysis doesn't involve the entire civil rights statute, only the section under which the plaintiff brought his disparate impact suit. While Title VI was generally focused on creating civil rights for private parties, Section 602 was specifically focused on agency enforcement.

Here, the Customers brought their state action under Section 4312 which is explicitly designed for and focused on the states, their citizens and the type of disclosure laws they may enforce. Section 4312 is also focused on the Consumer Financial Protection Bureau (the Bureau) because the agency is given the job of making determinations of whether or not the

disclosures a state law requires are inconsistent with TISA. Significantly, in relation to the rule in *Alexander,* there are no commands in Section 4312 directed at banks even though one reasonably might agree that the overall focus of TISA is to regulate banks.

The school records disclosure case, *Gonzaga University v. Doe*, 536 U.S. 273 (2002), deals with the specific realm of individual rights creation unique to Section 1983 jurisprudence. The Court held that in drafting the "spending legislation" at issue,[23] Congress did not manifest an unambiguous intent to confer individual rights. *Id.* at 280. As a result, the plaintiffs were barred from maintaining their Section 1983 case against the university.

What distinguishes *Gonzaga* and the other Section 1983 cases from the case at hand is that, "'To seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.'" *Id.* at 282 (quoting *Blessing v. Freestone*, 520 U.S. 329, 240 (1997)) (emphasis in original). The rights versus law distinction has been developed over time with respect to Section 1983 but has no application here because, under the preemption clause, a state may enforce rights, laws, and regulations, no matter how these terms may be

[23] Under 20 U.S.C. § 1232g, the federal government may cut off funds to a school that releases education records without first obtaining written consent.

defined, so long as the resulting state law is consistent with the federal one.

Lastly, the drug price regulation case, *Astra U.S.A., Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1345 (2011), differs from the case at hand because it dealt with a county's attempt to enforce a federal program as a third-party beneficiary to a pricing agreement between drug manufacturers and the federal government. *Id.* None of the key issues of *Astra,* involving such questions as whether there was a transaction or a bargained-for price are involved here because there is no contract at issue.

In all the federal cases cited above, some presented for the first time during the pendency of this litigation, there are no state law preemption clauses. And because all the cases were brought in federal court based on alleged violations or enforcement of federal laws, none of them involves the Supremacy Clause.[24] As a result, the issues of federalism which are a "primary concern" of the Court when faced with an express preemption clause don't come into play. See *Arizona*, 132 S.Ct. at 2500.

[24] Note that the Bank specifically asks the Court to grant a writ of certiorari based on the Supremacy Clause. See Petition at 2.

VI. The Plain Text of the Preemption Clause.

The crux of the Bank's objection to the California Supreme Court's ruling rests on a false dichotomy. The Bank insists that Section 4312 allows states to *adopt* consistent TISA-like laws,[25] but does not allow states to *borrow* TISA's required disclosures themselves.[26] This is a fanciful notion that the California Supreme Court dismissed as elevating form over substance. *Rose*, 57 Cal. 4th at 396.

There is, of course, nothing in the text of Section 4312 to support such an interpretation. The Preemption Clause expressly says TISA "do[es] not supersede *any provisions* of the law of any state" related to account disclosures unless "those laws are inconsistent" with TISA. Consistency determinations may be made by the Bureau.

There is no hint in this language that "any provisions" refers only to legislative enactments. As allowed by *Cipollone* and *Bates*, any provisions may include state common law. *Bates*, 544 U.S. at 443 ("The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those

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[25] See Petition at 12 ("It provides that States may adopt their own laws"), *id.* at 29 ("TISA's savings clause permits the States to enact consistent state legislation governing the same subject matter covered by TISA").

[26] See Petition at 29 ("the UCL is not a statute relating to the disclosure of yields payable or terms for accounts – and thus does not fall within the ambit of TISA's savings clause").

words easily encompass obligations that take the form of common law rules") (quoting *Cipollone*, 505 U.S. at 521).

This analysis is particularly apt. The enact versus borrow debate, if it has any substance, is an issue of state common law that falls under the preemption clause. The California Supreme Court addressed the issue below and held there is no meaningful difference between the two statutory approaches. This was a state law matter, determined under California common law, that the Court need not address.

When California borrows TISA it does so to define what is "unlawful," a term used in the UCL. The word "borrow" does not appear in the state statute. Used alone, "unlawful" is a broad notion that is inherently ambiguous. Over time, the concept of "borrowing" federal and state statutes as a measure of unlawfulness has been ironed out by California's courts which are the institutions best suited to do so.

Below, the California Supreme Court relied upon state precedent in deciding,

> Contrary to the Bank's insistence that plaintiffs are suing to enforce TISA, a UCL action does not "enforce" the law on which a claim of unlawful business practice is based. "By proscribing 'any unlawful' business practice, [the UCL] 'borrows' violations of other laws and treats them as unlawful practices

> that the [UCL] makes *independently* actionable."

Rose, 57 Cal. 4th at 396 (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999)) (emphasis in original).

As in *Bates* and *Medtronic*, this is a case where California is enforcing "parallel requirements" to those set forth in TISA. See *Bates*, 544 U.S. at 447-48 ("[n]othing in [21 U.S.C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements") (quoting *Medtronic*, 518 U.S. at 495). Obviously, the requirements are parallel here because, under California's common law understanding of the operation of its consumer protection law, when the UCL borrows TISA, the statute and its regulations are imported verbatim by operation of law and the required disclosures are identical.

VII. The Myth of the Crazy Quilt.

The Bank and the amici bank associations raise the specter of a "crazy quilt" of state TISA rulings if the Court does not reverse the opinion below. See Petition at 38.[27] Under TISA generally and Section 4312 and its regulations specifically, this will not

[27] "If *Rose* remains the law in California, the conflict between state and federal law will make the forum outcome determinative, encouraging strategic forum shopping."

happen because of the duties delegated to the Bureau.

Because Section 4312 of TISA explicitly provides for the Bureau to determine the issue of state law consistency, this should allay any fears that various states will go too far afield by creating widely differing rules. At issue here is a 30-day notice requirement. No state will be able to turn this number into, say, 15 or 45 and still be consistent with TISA.

On the whole, the Bank's fears are out of proportion with reality. Before repeal, TISA operated for ten years with Section 4310 private suits available in both federal and state courts. Over that time, there were no wildly divergent determinations that were adverse to the banking industry. In fact, there were almost no suits to enforce TISA at all. The only one mentioned in the petition is a federal, not a state, case. See *Gunther v. Capital One, N.A.*, 703 F. Supp. 2d 264 (E.D.N.Y. 2010). There is absolutely no support in either reason or experience for the Bank's overinflated contention that because of *Rose* "substantial harm" will result in California and elsewhere. See Petition at 42.

VIII. The Purpose of TISA.

TISA is a disclosure law. Its purpose is to encourage comparative shopping for bank accounts. It accomplishes this by requiring banks truthfully and uniformly to tell customers about their account interest rates and fees in a clear, conspicuous and

timely manner. When banks comply with TISA, it will improve our economy. Congress set forth this and other important goals at 12 U.S.C. § 4301:

> (a) Findings. The Congress hereby finds that *economic stability* would be enhanced, *competition* between depository institutions would be improved, and the *ability of the consumer to make informed decisions* regarding deposit accounts, and to verify accounts, would be strengthened if there was uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed in connection with such accounts.
>
> (b) Purpose. It is the purpose of this subtitle to require the *clear and uniform disclosure* of –
>
> (1) the rates of interest which are payable on deposit accounts by depository institutions; and
>
> (2) the *fees that are assessable* against deposit accounts,
>
> *so that consumers can make a meaningful comparison* between the competing claims of depository institutions with regard to deposit accounts.

(Emphasis added.)

No matter how many times the Bank has gratuitously and incorrectly invoked the phrase "congressional intent" in its petition, the sad truth is that by refusing to give proper notification of fee hikes under TISA, the Bank has undermined the intent of Congress. As such, its unlawful acts undermine economic stability, frustrate competition, and keep consumers from making informed and economically sound banking decisions.

CONCLUSION

When it reviewed this case, the California Supreme Court correctly interpreted and applied federal and state law precedents. Its use of standards consistent with the Truth in Savings Act were expressly authorized by the Act's preemption clause.

Accordingly, under the Supremacy Clause of the United States Constitution, the Court should deny the Bank of America's petition for a writ of certiorari.

Respectfully submitted,

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