No. 13-662

IN THE
Supreme Court of the United States

BANK OF AMERICA, N.A.,
Petitioner,
v.

HAROLD C. ROSE AND KIMBERLY LANE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KIM M. WATTERSON
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-7996

MARGARET M. GRIGNON
Counsel of Record
Reed Smith LLP
355 South Grand Avenue
Suite 2900
Los Angeles, CA 90071
(213) 457-8056
mgrignon@reedsmith.com
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

ARGUMENT

I. Respondents' Arguments Confirm The Need For Review

When Congress repealed the civil liability provision of the Truth in Savings Act (TISA), it expressed its intent that TISA be enforced through only its comprehensive administrative enforcement scheme, not private lawsuits. Nonetheless, the California Supreme Court allowed Respondents to bring claims under California's Unfair Competition Law (UCL), based explicitly and solely on alleged TISA violations. The Petition explains how that holding conflicts with this Court's precedents and points out its far reaching negative repercussions. Respondents' Opposition avoids the legal question and its ramifications, and their approach actually highlights the urgent need for this Court's review.

The California court went astray because it concluded that Congress' intent to bar private enforcement of TISA—and the settled federal law principle that Congress' intent to bar private enforcement of a federal statute forecloses *indirect* private enforcement—gives way to TISA's savings clause, which permits the States to enact their own legislation regulating consumer deposit account disclosures. This approach not only misinterprets the savings clause, it conflates two different legal issues: (1) whether Congress authorized indirect private enforcement of TISA; and (2) whether the States may enact their own non-conflicting TISA-like

statutes. As Petitioner sees it, the analysis is controlled by this Court's jurisprudence governing private enforcement of federal statutes. As Respondents see it, only this Court's preemption jurisprudence applies.

These divergent views place this case at the intersection of this Court's precedents on indirect private enforcement of federal statutes and those on federal preemption. There is a profound need to resolve what happens at this junction because the answer implicates not only TISA and the UCL, but a host of federal and state statutes. Respondents barely contend with this doctrinal dilemma, choosing instead to argue the merits of the question as they see it.

More specifically, Respondents seek to avoid this Court's review by defending *Rose's* approach, which turns exclusively on TISA's savings clause, rather than addressing the underlying conflict between *Rose's* holding and this Court's precedents on indirect private enforcement of federal statutes. Respondents beg the question presented by *Rose* by presuming that the only issue is one of preemption (*i.e.*, whether TISA's savings clause covers Respondents' UCL claim) and presuming *Rose* correctly determined that the UCL falls within TISA's savings clause.

Respondents also seek to avoid review by mischaracterizing *Rose* as based on state, not federal, law. They insist *Rose* relies "solely upon California case law" to hold that the UCL does not enforce

TISA. Opposition 9. But whether a state law claim enforces a federal statute—and whether it may—plainly are federal questions. *Astra U.S.A., Inc. v. Santa Clara County*, 131 S.Ct. 1342 (2011). While California law governs whether the UCL enforces other *California* statutes, federal law controls whether a state law cause of action may be premised on alleged violations of a federal statute whose private enforcement Congress has not authorized.[1] Moreover, the California court plainly had to, and did, construe a federal statute (TISA), as well as federal law principles and precedents, to reach its conclusion. App. 4a-6a.

In sum, the issue raised is whether indirect private TISA enforcement through a UCL claim contravenes Congress' intent and conflicts with this Court's jurisprudence on indirect private enforcement of federal statutes. Respondents' approach sheds no light on the intersection of that jurisprudence and this Court's preemption cases—it only highlights the core doctrinal debate and underscores the need for review.

---

[1] The "California case law" *Rose* cites is based on the California law presumption that the *California* legislature knows its statutes might be used as predicates for UCL claims even if they do not contain a private right of action provision. When it comes to federal statutes, the presumption is reversed: there is no private enforcement, direct or indirect, absent congressional intent. Petition 27 n.4.

This case provides a perfect vehicle for this Court to instruct that a federal statute's savings clause permitting States to enact their own consistent laws relating to the specific subject of the federal legislation does not override Congress' intent on private enforcement of the statute. This will ensure fidelity—as the Supremacy Clause demands—to this Court's precedents holding that, because Congress' intent is paramount, where Congress has not authorized private enforcement of a federal statute, it may not be indirectly enforced through a state law claim predicated on a violation of the federal statute.

II. Respondents' Arguments Presume The Answer To The Question On Which Guidance Is Needed

Following the California Supreme Court's lead, Respondents focus exclusively on TISA's savings clause and avoid addressing whether enforcing TISA through a UCL claim violates this Court's precedents on indirect enforcement of federal statutes.

Respondents presume TISA's savings clause is determinative. Respondents' Opposition is built on their assertion—parroting *Rose*—that TISA's savings clause is the only relevant consideration. But whether TISA's savings clause may be stretched to justify indirect private enforcement of TISA through a state statute like the UCL and to override this Court's indirect private enforcement precedents is the very question *Rose* raises.

In keeping with their "only-the-savings-clause-controls" approach, Respondents characterize Petitioner's argument—that UCL claims based on alleged TISA violations conflict with Congress' intent—as only a preemption argument. And they argue that the existence of a savings clause means "arguments of implied preemption are not available." Opposition 15. But "neither an express pre-emption provision nor a saving clause bars the ordinary working of conflict pre-emption principles." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (citation and quotation marks omitted). Thus, Respondents are wrong that the inquiry into congressional intent ends with the savings clause, particularly since TISA's savings clause does not cover the UCL.[2]

Respondents presume the UCL falls within TISA's savings clause. Respondents' defense of *Rose* rests on their assertion that the UCL falls within the ambit of TISA's savings clause. That view is flawed.

---

[2] Even if the question in this case were framed in terms of preemption, private enforcement of TISA through the UCL would be impliedly preempted because it conflicts with Congress' purposes and objectives. But that position does not mean that TISA preempts the UCL, as Respondents wrongly characterize the preemption analysis.

TISA's savings clause plainly describes which state laws it covers: those "relating to the disclosure of … terms for accounts to the extent such State law requires the disclosure of such … terms for accounts," *i.e.* TISA-like state laws mandating disclosures of consumer savings account terms. 12 U.S.C. § 4312. Of *those* state laws, some are expressly "not supersede[d]" (*i.e.*, are "saved")—those consistent with TISA— and some are expressly preempted—those inconsistent with TISA. But the UCL, which neither "relat[es] to" nor "require[s]" disclosures of consumer savings account terms, is not a TISA-like state law and thus does not fall within TISA's savings clause.

Respondents insist, however, that *Rose* correctly held that the UCL is a TISA-like statute because it "matters not whether the borrowing [of a federal statute by a state law] is accomplished by specific legislative enactment or by a more general operation of law." App. 6a. But whether that distinction matters depends on the text of TISA's savings clause, which *Rose* and Respondents misread.

Respondents' reading would render superfluous the savings clause language limiting its application to state laws "relating to the disclosure of … terms for accounts." This Court has made clear that courts must give effect to statutory language setting a savings clause's scope. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778, (2013) ("'with respect to the transportation of property'" "massively limits" a

preemption clause's scope). In this way as well, the Opposition does not eliminate the conflict with this Court's precedents, but only magnifies it.

Respondents presume their UCL claim merely adds a permissible state remedy to TISA. Respondents rely on *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005) to support their argument that the UCL is not preempted because it merely adds to TISA a remedy (private enforcement), but not a new requirement. This argument not only elides the difference between the indirect private enforcement and preemption questions, it also misconstrues *Bates'* preemption holding and ignores crucial differences between the claims and statutory language in *Bates* and those here.

Bates addressed the part of the savings clause in FIFRA prohibiting states from imposing "any requirements for labeling or packaging in addition to or different from" FIFRA's. 7 U.S.C. § 136v(b). Noting that states play a "supplementary role" in regulating pesticide labels and FIFRA "authorizes a relatively decentralized scheme that preserves a broad role for state regulation," *Bates* held that FIFRA's preemptive scope is narrow, preempting only state imposition of new "requirements," not new remedies. 544 U.S. at 442, 447, 450 (citation omitted).

Bates' narrow reading of FIFRA preemption does not apply here because TISA and FIFRA have different savings clauses (and the UCL and the Texas

statute in *Bates* are likewise dissimilar). As the Petition explains, TISA contemplates a uniform enforcement scheme, not a decentralized one. And the claims in *Bates* were based on Texas regulations and "common-law duties [that] parallel federal requirements," unlike Respondents' claims, which are predicated solely on an alleged violation of federal law. 544 U.S. 432, 447; *see* Petition 29-32. Thus, *Bates* did not address whether, and did not hold that, state laws could impose liability solely for violations of federal statutes. 544 U.S. at 453; *see also Buckman*, 531 U.S. at 352-53. That is a question of indirect enforcement.

In short, while *Bates* may touch on the issue here, it does not resolve it. Respondents' insistence that *Bates* supports their position, despite the clear distinctions between it and this case, merely highlights the need for review to clarify the relationship between this Court's preemption cases and its indirect enforcement cases.

III. Respondents' Presumptions Collide With This Court's Precedents On Indirect Private Enforcement Of Federal Statutes

Respondents barely contend with this Court's unbroken line of indirect private enforcement cases. Those cases make clear that a federal statute may not be indirectly enforced absent congressional authorization. Petition 15-28. When Respondents do turn to the indirect enforcement jurisprudence, they

try to avoid its implications by again presuming the savings clause controls the resolution of this case.

First, they attempt to distinguish this Court's cases holding that Congress' provision of a particular enforcement scheme indicates congressional intent to foreclose private enforcement by arguing that the savings clause provides "a second enforcement pathway for the states." Opposition 25 (discussing *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005)). But that approach presumes the savings clause here provides that second pathway—a highly questionable assumption. *See Sea Clammers*, 453 U.S. at 20 n.31 (rejecting dissent's view that savings clauses authorized indirect enforcement of federal statutes because the "the saving clauses do not refer at all to a suit for redress of a violation of these statutes—regardless of the source of the right of action asserted").

Second, Respondents' discussion of *Alexander v. Sandoval*, 532 U.S. 275 (2001), is not only based on the faulty presumption that the savings clause permits Respondents' UCL claim, it also draws a false distinction. Opposition 26. Contrary to Respondents' assertion, they did not bring suit "under" the savings clause—they brought suit to enforce TISA's substantive provisions, just as the plaintiff in *Alexander* brought suit to enforce Title VI, Section 602—both of which focus on the "person

regulated rather than the individuals protected." 532 U.S. at 289.

Third, Respondents' argument regarding this Court's cases on indirect enforcement of a federal statute through Section 1983 also presumes the savings clause applies to their UCL claims and fails to reckon with the central point that the UCL, like Section 1983, enforces the predicate statute. Opposition 27-28.

Finally, Respondents hardly discuss this Court's *Astra* decision rejecting an effort to use a state law claim to indirectly enforce a federal statute whose private enforcement Congress has not authorized. *Astra* held that a contract claim could not be based solely on an allegation that the defendants had violated a federal statute with which the contracts required them to comply. 131 S.Ct. at 1345. Respondents argue that "none of the key issues of *Astra* … are involved here because there is no contract at issue." Opposition 28. But the contract questions played no part in *Astra's* holding that "it would make scant sense to allow" a claim based on contract "terms identical to those contained in the statute" because it would be "in essence a suit to enforce the statute itself." 131 S.Ct. at 1345, 1348. That basic principle—that the "treatment … must be the same" when suits are "in substance one and the same … no matter the clothing in which [the plaintiffs] dress their claims"—applies here too. *Id.* at 1345 (citation and quotation marks omitted).

The bottom line is this: Respondents contend that only this Court's preemption cases are relevant to the question here. But Respondents do not explain how an application of those cases can be squared with this Court's jurisprudence on indirect private enforcement of federal statutes. Petitioner believes that jurisprudence plainly controls the resolution of this case. At a minimum, there is a need to explain what happens at the intersection of these two lines of cases—that is, which one applies and why.

IV. Respondents' Mischaracterizations Of Petitioner's Arguments Do Not Dispel The Need For Review

In a transparent attempt to avoid review, Respondents also distort key portions of Petitioner's argument.

Petitioner does not rely exclusively on legislative history. Petitioner's argument does not, as Respondents contend, rely solely on legislative history. Instead, as the Petition explains, TISA's plain text and structure, including Congress' repeal of TISA's civil liability provision, demonstrate congressional intent to consolidate TISA enforcement in the hands of federal regulators.

TISA's text and structure reflect its primary goals—ensuring uniform disclosures to consumers and uniform enforcement of disclosure requirements. As *amici curiae* California Bankers Association and American Bankers Association explain, Congress

stated in TISA's findings, 12 U.S.C. § 4301, that uniformity would enhance economic stability, improve competition, and strengthen consumers' ability to make informed decisions. Amicus Brief 10-12.

TISA's structure and Congress' repeal of its civil liability provision likewise demonstrate that Congress did not intend TISA to be privately enforced. Before the repeal, TISA included numerous safeguards—scrivener's error, prompt correction, and good faith reliance on regulatory guidance defenses, as well as a one-year statute of limitations and specific caps on damages—because Congress found them necessary to ensure uniformity and economic stability. 12 U.S.C. § 4310 (repealed 1996). TISA no longer contains those safeguards. It beggars belief to suppose that, merely because Congress did not amend the savings clause when it repealed TISA's private enforcement provision, it intended to subject banks to a host of private suits indirectly enforcing TISA without those safeguards. *See* Amicus Brief 9-10, 21-23.

Another textual statement of congressional intent to promote uniform enforcement of TISA can be found in the recent Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), which provides for enforcement of federal consumer financial regulations only by the Bureau, or by a State itself—in which case the State must first consult with the Bureau, which is

authorized to intervene and remove the action to federal court. *See* 12 U.S.C. § 5552(b); Amicus Brief 15-20. Permitting indirect private enforcement of TISA without Bureau involvement would undermine the carefully crafted system Congress established to ensure uniform enforcement of federal consumer financial regulations, including TISA.

Petitioner does not elevate "form over substance." The Opposition implies that the issue *Rose* presents is purely academic. Parroting the California court, Respondents accuse Petitioner of elevating "form over substance." Opposition 14 (citing App. 6a). But the issues *Rose* raises are very real with far-reaching consequences.

As discussed, TISA's text and structure reflect Congress' intent to promote uniform enforcement and interpretation of TISA. Respondents contend that allowing indirect enforcement of TISA through the UCL does not undermine uniformity because TISA's savings clause authorizes the Bureau to determine whether any inconsistencies exist. Opposition 32. But, whereas the Bureau can easily review a state law "relating to the disclosure of … terms for accounts" for consistency with TISA, there is no way for the Bureau to police private lawsuits to ensure consistency. The grant of authority to the Bureau demonstrates Congress intended the Bureau to review state statutes, not to watch court dockets across the country for cases predicated on TISA violations. *Cf.* 12 U.S.C. § 5552(b).

In addition to these inherent problems, *Rose* threatens to create a substantial disparity in the treatment of UCL claims predicated on federal laws depending whether they are lodged in state or federal court, which will drive plaintiffs to state court to enforce federal statutes. *See* Petition 36-37. About that risk, Respondents say nothing at all. Nor do they address that *Rose* could give rise to similar actions to enforce other federal statutes (Petition 38-40) both in California and in other states (Petition 41-42).

Petitioner has not "waived" or "conceded" any argument. Respondents' waiver and concession contentions (Opposition 1) are based on their incorrect presumptions discussed above. For example: Acknowledging California could enact its own TISA-like statute is not a concession that TISA authorizes Respondents' UCL claim to enforce TISA itself, but instead a statement of the law based on a plain reading of TISA's savings clause. Respondents' concession argument is merely an effort at misdirection that relies on their assumption that the UCL is a TISA-like state law.

It is that assumption, and the ease with which *Rose* adopts it, that warrants this Court's review. The difference between the question as the California Supreme Court and Respondents see it—a question of preemption—and as the California Court of Appeal and Petitioner see it—a question of indirect

enforcement—highlights the need for this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

KIM M. WATTERSON
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-7996
kwatterson@reedsmith.com

MARGARET M. GRIGNON
Counsel of Record
Reed Smith LLP
355 South Grand Avenue
Suite 2900
Los Angeles, CA 90071
(213) 457-8056
mgrignon@reedsmith.com

February 17, 2014

Attorneys for Petitioner