No. S199074

IN THE
SUPREME COURT OF CALIFORNIA

HAROLD ROSE, et al.,

Plaintiffs and Appellants,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

After A Decision By The Court of Appeal,
Second Appellate District, Division Two, Case No. B230859.
On Appeal From The Superior Court For Los Angeles County,
Case No. BC 433460, The Honorable Jane L. Johnson

REPLY BRIEF ON THE MERITS OF PLAINTIFFS AND APPELLANTS HAROLD ROSE, ET AL.

Unfair Competition Law Case (Cal. Bus. & Prof. Code § 17209)

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I. INTRODUCTION

A. A Tale of Two Clauses

Respondent Bank of America, N.A. (Bank) has taken a strong position against the key argument by appellants Harold Rose, Kimberly Lane, and a class of California bank customers (Customers) based upon the Supremacy Clause of the United States Constitution and a long unbroken line of federal and state jurisprudence.

Here both parties look to a federal law, the Truth in Savings Act (TISA), to make their respective cases. At issue are just two clauses, Sections 4310[1] and 4312.[2]

The Bank would have this Court look at Section 4310 and its legislative history in isolation. Under its view, California's Unfair Competition Law (UCL) may not borrow from TISA because Congress allegedly "expressly" intended the law to have no private right of action, state or federal. This argument, to survive, will require that two conditions be met: First, the Bank bears the burden of proving Congress "clearly and

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[1] 12 U.S.C § 4310, repealed by Act of Sept. 30, 1996, Pub.L. 104-208, Div. A, Title II, Subtitle F, § 2604(a), 110 Stat. 3009-470.

[2] 12 U.S.C § 4312.

manifestly" intended the repeal to end all state consumer suits.[3] And second, to do this, the Bank must also persuade the Court to avert its eyes from Section 4312, a part of the law that has been in TISA since the beginning, that Congress was not able to repeal (despite repeated attempts), and that Congress has recently reenacted.

The Customers would more simply have this Court look at the words Congress used in Section 4312 to define the role of state law. If that law is consistent with TISA, then this case should go forward.

B. There is No There There.

The Bank's argument relies heavily on the legislative history of the Section 4310 repeal. To this end, the Bank has asked the Court to judicially notice nearly 400 pages of historical exhibits. These exhibits show just the opposite of what the Bank needs to prove. Rather than support the Bank's contention, peppered throughout its answer, that Congress "expressly" barred state consumer suits, the full story told by these documents and proposed bills is that Congressional committees tried three times to repeal Section 4312 along with Section 4310 but, without the requisite votes and under threat of a Presidential veto, none of these bills ever made it out of

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[3] Oddly, the Bank also interprets Section 4312 as saying California could (re)enact its own TISA-like statute at some hypothetical time in the future. *See, e.g.,* Answer at 46 ("the proper interpretation of savings clauses . . . shows only that California may enact a statute like TISA – something that the Bank does not dispute").

committee. Before the bill made it to the floor for a vote, the conference committee modified the legislation so Section 4312 would survive.

There were indeed members of the Congressional banking committees who wanted a total ban on private TISA suits. Other members fought vigorously, and eventually successfully, to protect the established banking rights of state consumers. What is necessary for the Bank to prevail — assuming this Court chooses to delve into the legislative history — is a showing of Congress' clear and manifest intent at the time of the enactment, *not* a showing that once upon a time a handful of members of Congress wanted to repeal Section 4312.

Banking fraud and deceit in California have traditionally been areas of state interest. State truth-in-savings legislation preceded TISA. It was repealed after TISA was enacted, based on the preemption clause wording, so that state court enforcement of the UCL would be consistent with federal law and, therefore, allowed. This is what the Legislature wanted. This is what the preemption clause commanded. And this is what Congress *intended* for states when it saved the preemption clause from extinction.

TISA's preemption clause is central to this litigation. It is an important and recently reenacted part of TISA that cannot and should not be ignored. It is a cornerstone of TISA's regulatory scheme. Precedent supports analyzing this case in light of it. Legislative history shows why

and how Congress and the President fought to keep it. And this case should be allowed to go forward to trial because of it.

II. ARGUMENT

A. Constitutional Sovereignty Principles Set a High Bar for Preempting State Law in an Area of Traditional Concern.

Federalism is central to the design of the United States Constitution according to a recent decision of the United States Supreme Court, *Arizona v. United States,* 183 L.Ed.2d 351, 368 (2012). National and state governments must respect each other's sovereignty. *Id.* When the laws of these sovereigns come into conflict, federal law reigns supreme. *Id.* (citing U.S. Const. art. VI, cl. 2).

It is this principle of federal supremacy that grants Congress the power to preempt state law. *Id.* "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an *express* preemption provision." *Id.* (citing *Chamber of Commerce v. Whiting,* 179 L.Ed.2d 1031 (2011)) (emphasis added). In an area of traditional state concern, a state law may only be preempted "on a showing of 'clear and manifest' congressional intent." *Id.* at 402 (Alito, J., concurring in part, dissenting in part). A "high threshold must be met if a state is to be pre-empted for conflicting with the purposes of a federal Act." *Id.* (citing *Whiting* at 1055).

The constitutional bar to federal preemption of state laws is set very high. That is why *Whiting* insists courts must base their decisions on the exact wording of a preemption clause and not on a foray into the legislative mists of Congress. *See Whiting* at 1050 (Congress' "authoritative statement is the statutory text, not the legislative history").

The Bank blithely and dismissively declares that "this case does not implicate federal preemption jurisprudence." Answer at 1. The Bank characterizes Customers' position as the "product of the wrong turn they have taken in framing the question." *Id.* at 47 "As always, if you ask the wrong question, you get the wrong answer." *Id.* at 48. As a result of the Bank's misplaced confidence in this assertion, it has mostly declined to refute or discuss the line of United States and California Supreme Court preemption precedents raised in the Opening Brief.

In applying the sovereignty principles of *Arizona,* it is crucial to look at the state interests involved. California has a long-standing practice of protecting its citizens from bank fraud and deceit. It addressed this interest by passing a truth-in-savings statute which was designed to be borrowed and enforced under the UCL. After TISA was passed, the Legislature repealed the statute to continue to protect consumers by making sure California's banking disclosure laws would be consistent with TISA and thus continue in force. Opening Brief at 29-31. These state concerns were not changed by the repeal of TISA's Section 4310. In fact, with private

federal suits no longer available, California's need to protect its citizens may actually have been heightened.

The clause California relied upon in repealing its truth-in-savings laws was most assuredly TISA's Section 4312 because it is the only part of TISA that demands state law consistency. In the wording of the preemption clause there is no "clear and manifest" intent that state citizens no longer be allowed to enforce banking disclosure laws. To the contrary, the language explicitly provides for states to enforce consistent laws.

This is a preemption case precisely because the Bank wants to avoid responsibility for its unlawful acts by relying on a federal law (TISA) to reign supreme over a consistent state law (the UCL borrowing TISA). This would violate a state's ability to regulate in a traditional area (banking). This is something a party may not do without vaulting over the constitutional high bar protecting state sovereignty.

B. Legislative History Shows Congress Intended for State Citizens to Enforce TISA.

The keystone of the Court of Appeals decision and, indeed, the Bank's entire argument is the bold assertion — made despite the continued existence of Section 4312 — that legislative history proves Congress intended to deprive both federal and state citizens of the right to bring TISA suits. A complete analysis of the acts and words of Congress, however, leads to an entirely different conclusion.

When one views the complete legislative process that led to the enactment of H.R. 3610[4], the bill which repealed TISA's federal civil liability, one sees that Congress intended for the preemption clause to remain in place and have the same effect as it had prior to the repeal. The failure to repeal Section 4312 along with Section 4310 was no mere oversight. The legislative history clearly shows that while the House majority initially wanted to repeal both sections, the minority refused and threatened that the President would veto any such legislation. On the other side of the Capitol, the Senate sought to rewrite and rename TISA. In the end, after contentious negotiations, a compromise was reached which included the *repeal* of Section 4310 and the *retention* of Section 4312. This was the bill that became law.

1. House Bill — H.R. 1362.

On March 30, 1995, Congressman Doug Bereuter introduced H.R. 1362, the Financial Institutions Regulatory Relief Act of 1995. Resp. Exhibits at 1. The Congressional Research Service (CRS), a non-partisan agency of the Library of Congress, noted in its summary of H.R. 1362 that the bill: (1) "amends the Truth in Savings Act (TISA) to prohibit depository institutions . . . from making misleading or inaccurate . . . disclosures," and (2) "[r]epeals TISA provisions relating to . . . civil liability, and effect on

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[4] The Economic Growth and Regulatory Paperwork Reduction Act of 1996.

State law." *See* Resp. Exhibits at 3-4. This sparse language, however, did not expand upon what precise "effect" the bill was to have on state law.

To see how H.R. 1362, if passed, might have affected state law, it is necessary to look directly at the text of proposed Section 131(g): "Sections 271 and 273 of the Truth in Savings Act (12 U.S.C. 4310 and 4312) are hereby repealed." App. Exhibits at 393.

So, when the bill was first introduced, it was clearly the majority's plan to eliminate all private enforcement of TISA on both the federal and the state level. The preemption clause, Section 4312, was to have been thrown out along with Section 4310.

This revelation is important for two reasons. First, it shows Congress understood that the correct way to eliminate all private TISA suits was to eliminate both the civil jurisdiction and preemption clauses. And second, the fact that the bill was never passed — in fact it never made it beyond the subcommittee — indicates there was no agreed intent to taking away states' rights in an area like bank regulation where states have traditionally litigated.

In the end, H.R. 1362 died on June 15, 1995, when it was forwarded to the full Banking and Financial Services Committee. Resp. Exhibits at 1.

2. House Bill — H.R. 1858.

Immediately after the demise of H.R. 1362, Congressman Jim Leach introduced H.R. 1858, the Financial Institutions Regulatory Relief

Act of 1995, on June 15, 1965. Resp. Exhibits at 8. Like the prior bill, H.R. 1858 also repealed both TISA Sections 4310 and 4312 141(e). *See* § 141(e), Resp. Exhibits at 34. The House Report provided a background section which declared that certain "needless regulations" were causing "inefficiency and increased costs to both financial institutions and consumers." Resp. Exhibits at 66. Thus, the bill was designed to "encourage operational efficiency . . . without compromising the . . . consumer protections required to uphold the integrity of the U.S. banking system." *Id.*

As for TISA, its required disclosures were said to have caused banks "more compliance problems than they have provided useful information to savers." Resp. Exhibits at 72. H.R. 1858 sought to "eliminate certain provisions of the TISA which have caused the most compliance problems, such as the requirement to disclose an APY [annual percentage yield]." *Id.* The report specifically criticized how many pages TISA's regulations took up in the Federal Register. *Id.* Later in the report, the majority analyzed the proposed statutory provisions. "The changes that section 141 makes to the TISA primarily concern the requirement that financial institutions disclose the 'annual percentage yield' for accounts and the application of civil liability for violations of the TISA." *Id.* at 121. The majority claimed the problem with civil liability for TISA violations was that it had "resulted in financial institutions seeking numerous clarifications and commentaries

from the Federal Reserve Board[5] increasing the regulatory burden for both the industry and the Board."[6] *Id.*

The minority unanimously opposed H.R. 1858 calling it "ill-conceived" and "a danger to the safety and soundness of the nation's banking industry" which "seriously compromises many consumer safeguards." *Id.* at 256. The minority also pointed its finger at the earlier subcommittee-written H.R. 1362, calling it an "overreaching" response to "special interests and lobbyists." *Id.*

The new law crafted by the full banking committee, H.R. 1858, failed to address the minority's concern that it was "damaging, to the point of embarrassing our colleagues" and "simply bad policy". *Id.* The minority members were apparently so frustrated by H.R. 1858 that they played the ultimate gambit:

> As a result, the bill has justly earned the distinction of becoming a *veto target*. In fact, following the Committee's action, Secretary of the Treasury Robert Rubin wrote to inform Chairman Leach that *he would recommend that the President veto the bill* in its current form.

Id. (emphasis added).

One section of the minority report entitled "The Consumer is the Big Loser" directly addresses the repeal of Section 4310:

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[5] The Federal Reserve Board administered TISA prior to 2011.

[6] The majority never explains why a bank which is still subject to agency suits would not ask for the same burdensome rule clarifications.

> Additionally, the [bill] strips TISA of its civil liability provisions. Therefore, if a consumer is misled about the terms of an account or even if the bank fails to give the consumer the proper interest rate, the consumer is left without recourse against the bank under the Act. Only administrative remedies remain. *Administrative remedies alone are insufficient to enforce the Act's provisions and vindicate an individual customer's rights.*

Id. at 263 (emphasis added). The minority concluded it would either "further improve this bill or ultimately work for its timely demise." *Id.* at 267. With battle lines drawn over the repeal of federal and state private action rights, it is hardly a surprise that H.R. 1858 died in committee. *See Id.* at 8.

3. Senate Bill — Two versions of S. 650.

The Senate banking committee made a separate stab at TISA reform in S. 650, the Economic Growth and Regulatory Paperwork Reduction Act of 1995, introduced by Senator Richard Shelby on March 30, 1995. Resp. Exhibits at 279. The Senate bill went through two separate drafts and ultimately was laid to rest after the final draft was reported on December 14, 1995. *Id.* at 279.[7]

Originally S. 650 sought to gut TISA of everything except its interest payment provisions. The Senate bill left so little of TISA that S. 650's first version changed the name of TISA to the "Payment of Interest

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[7] The CRS Summary provided by the Bank *only* analyzes the first draft. *See* Resp. Exhibits at 279-85. The first and second draft bills may be found at App. Exhibits at 395-422.

Act." See § 261, App. Exhibits at 397. The new act opens with a finding that TISA "created unnecessary paperwork, administrative and compliance burdens, and liability for depository institutions without enhancing the ability of consumers to make informed decisions regarding deposit accounts." *See* § 262(a), *id*. The stated purpose was to repeal all of TISA's "unnecessary disclosure requirements" while retaining TISA interest calculations. *See* § 262(b), *id*.

Interestingly enough, this first version of S. 650 left civil liability intact. *See* § 266, App. Exhibits at 400-405. In fact, Section 266(c)'s new civil liability provisions, which include S. 650's private right of action, provided jurisdiction for both federal and state courts. *Id*. at 402. The Payment of Interest Act, however, does not appear to have included a preemption clause.

By the time December 14, 1995 rolled around, Senator Al D'Amato reported an entirely new version of S. 650 which struck out the Payment of Interest Act. *See* App. Exhibits at 411-20. In its place were repeals to TISA's Sections 4307 and 4310 and only a few other changes in statutory language. *See id.* at 421-422. In the banking committee report, the reason given for "retaining most of the disclosure requirements that benefit consumers" was that most banks were making "good-faith" efforts which already had been "integrated into the industry's compliance programs." Resp. Exhibits at 311. Due to liability for "technical pitfalls", the

committee amended the law to have "an administrative remedial enforcement scheme." *Id.* Or, as stated later in the report, "TISA compliance remains subject to administrative enforcement, with violations subject to administrative action." *Id.* at 350.

While the report on the final S. 650 bill mentions the fact that the committee retained TISA's administrative enforcement, it is important to note that the bill's authors did so by *retaining* Section 4309. *See id.* at 311. The report is silent, however, on state enforcement of consistent laws under Section 4312, a clause the authors also *retained*. This last reported version of S. 650 never made it any further in the legislative process.[8]

One significant factor the Court may want to consider about the second draft of S. 650 is that at the very same time the House was proposing to repeal both Sections 4310 and 4312 as a way to curtail state and federal private TISA lawsuits, the Senate was not only deciding to leave Section 4312 in the law, it was specifically deciding to *put it back* into the law after the first draft had effectively repealed it.

4. The Conference Bill — H.R. 3610

At long last, and after 355 pages of the Bank's exhibits, the convoluted legislative history of TISA reform arrives at its most relevant

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[8] With this history in mind, it becomes clear that the Bank's Exhibit D, the CRS Summary of the first version of S. 650 is not probative of anything other than details of the Payment of Interest Act, the failed Senate attempt at replacing almost all of TISA. *See* Resp. Exhibits at 279-85.

point: H.R. 3610, the enactment that actually relates to the case before the Court. *See People v. Williams,* 26 Cal.4th 779, 785 (2001) ("As always, we begin with the statute and seek to ascertain the Legislature's intent at the *date of enactment*.") (emphasis added). This final bill no longer contained a provision to repeal Section 4312 as had three of the earlier committee versions. These clauses had been deleted. This key fact is relevant because this Court has held consistently, "Our past decisions note *deletions from bills prior to their passage as significant indicia of legislative intent." Wells v. One2One Learning Found.,* 39 Cal.4th 1164, 1191-92 (2006) (emphasis added).

On September 28, 1996, Senator Bob Livingston submitted a Conference Report, *see* Resp. Exhibits at 356-65, on the omnibus Department of Defense Appropriations Act, 1997, which included H.R. 3610, the Economic Growth and Regulatory Paperwork Reduction Act of 1996, in Subtitle F. This newly negotiated version of the TISA reform bill called for the repeal of the Section 4310 civil liability rules and, like S. 650 before it, did not touch the Section 4312 state preemption rules. *See* § 2604(a), *id.* at 360.[9] The repeal of Section 4310 would not become

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[9] Section 2604(a) provides in full: "Repeal. – 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."

effective until 5 years after enactment.[10] *Id.* What follows is the *complete* legislative analysis as contained in the Conference Report:

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

Resp. Exhibits at 364. There is no further legislative examination of TISA, its administrative remedies, or the effect of H.R. 3610 on state law.

This Conference Report is the identical type of evidence of legislative intent that the Bank provided the Court for the earlier bills H.R. 1362, H.R. 1858, and S. 650, none of which were enacted, none of which even made it to the floor of Congress for a vote. It should follow, then, that the legislative history as contained in the Bank's selected pages of this conference report is the complete text and analysis of the repeal of TISA's private right of action.

Should the Court determine it is necessary to review the legislative record, the Court should greatly limit its scope to the enacting legislation. Other than looking at the statute itself, the only competent extrinsic evidence of Congressional intent in the history of H.R. 3610 that bears on the case at hand is a vague desire to "provide more cost-effective delivery of financial services." This is by no means a clear and manifest statement of

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[10] During the course of this litigation, this often has been referred to as the "Sunset Clause".

an intent to prevent states from using their consumer rights laws to enforce consistent banking disclosure regulations.

5. The House Debate — September 28, 1996

Because the Bank has also provided the Court with evidence of the floor debate in the House of Representatives, it may be instructive to see how Congress' decision to repeal Section 4310 and retain Section 4312 came out of difficult and contentious party negotiations that led to an uncomfortable but necessary compromise.

In session on September 28, 1996, Congressman Bob Livingston, H.R. 3610's sponsor, opened debate on the bill by noting that "the procedure that we were forced to follow was less than desirable." He then thanked House members for their "dedicated, steadfast, and conscientious effort," and tipped his hat to "the other dedicated staff, many of whom have *not even slept a single minute over the last 3 to 4 days* to prepare this bill." Resp. Exhibits at 366 (emphasis added). As Rep. Livingston explained, "some of the bills got stymied on the other side." *Id.*

To get a sense of the TISA negotiations, what follows are a few of the floor comments from Congressman Jim Leach, sponsor of the earlier H.R. 1858, in which he displays his discontent with the content of the final conference bill:

> This is a solid nonpartisan approach which balances consumer, taxpayer and industry concerns; *less extensive than I would have like[d]* but, nonetheless, of historic dimensions.

App. Exhibits at 423 (emphasis added).[11]

> While I would have preferred to be here seeking support for *more comprehensive financial services reform,* the pending measure provides for Congressional action on several of the most pressing issues facing banking and financial services today.

Id. (emphasis added).

> It is my view that *the House Banking Committee went further than was judicious in early approaches* to regulatory relief and that a number of provisions in earlier bills were *properly pared back* with my support because of administration and minority member concerns.

Resp. Exhibits at 367 (emphasis added). Could Congressman Leach have been referring to H.R. 1362 and 1858 and their total elimination of state enforcement of TISA actions? It is important to realize in this regard that the consistent element of the two earlier bills was the repeal of Section 4312.

At the time of the debate, the repeal of Section 4312 was no longer part of the conference bill. Because the original bills only contained three main parts — disclosure rule changes, repeal of the federal private right of action, and repeal of the preemption clause — there is quite a good chance that the Section 4312 repeal was one of the early bill provisions the congressman spoke about that had been "properly pared back". If so, this

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[11] This statement is on page H12093 of the Congressional Record. The Bank's Exhibit G inadvertently skipped this page.

may provide the Court with evidence of Congress' implied intent — coming from both sides of the debate — to keep the preemption clause.

From across the aisle, Congressman Bruce Vento declared, "I rise in support of this conference. I think it is nothing short of a *great victory* for us to come to a compromise after the *struggle last year*." Resp. Exhibits at 367 (emphasis added). Vento went on to explain how the White House had actively helped negotiate H.R. 3610:

> I want to commend the Clinton administration for standing up for consumers and making certain that the price of and the cost of this was not borne by *reduction in terms of 30 years of consumer law,* which happened to be undone and upset by a lot of misunderstandings and action *that were proposed in earlier iterations of this bill.*

Id. (emphasis added). Turning to the provisions in the negotiated conference bill, Vento continued,

> The final agreement represents a victory of sorts for those of us who wanted to pass regulatory burden relief for financial institutions but did not [want to] *unravel consumer protection laws of the past 25 years* nor the potential safety and soundness of financial institutions. This bill provides regulatory streamlining, burden relief and sensible improvements in policy *without harming key consumer laws* . . . . With improvements being made until the very end, the banking package before us was excised of many provisions that gave me great pause and to which I was opposed. *Provisions which would have weakened the . . . Truth in Savings [Act] . . . have finally been set aside . . . .*

Id. at 368 (emphasis added).

These statements from the House floor show that: (1) compromise would not have been reached without pressure from the White House, (2)

some majority members were unhappy because their favored provisions had been cut back, (3) others in the majority felt the early bills had gone too far, and (4) the minority considered it a "great victory" to have kept three decades of "key" consumer protections in the final bill.[12]

6. Congressional Intent

On multiple occasions, the Bank has referred to "Congress's express intent that TISA may not be privately enforced." *See, e.g.,* Answer at 5. Assuming the Bank means private suits in both state and federal jurisdictions, there is no explicit expression of this, or anything approaching it, clearly and manifestly stated in the legislative history of H.R. 3610. Consequently, the Court must look to the statute. Because there is no longer a civil liability section, TISA resembles any other statute that does not have a private right of action. As was made clear in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,* 17 Cal.4th 553, 561-67 (1998), this fact alone does not prevent a UCL plaintiff from borrowing the rules contained in such a statute.

If the Court should choose to take a broad view of the legislative history and look at all the prior drafts, the bill's history will show that several members of Congressional banking subcommittees and committees may have intended to eviscerate TISA's disclosure laws, stop federal and

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[12] The Truth in Lending Act, Pub. L. 90-321, 82 Stat. 146 (1968) (TILA) – which was a model for TISA and included a similar preemption clause – was enacted around 28 years earlier.

state private actions, and only allow federal administrative enforcement but — under threat of a presidential veto and in difficult twelfth-hour negotiations — were forced to greatly scale back their ambitions, saving Section 4312 and state private enforcement through consumer protection laws, so the reform bill could pass. In the end, the bill was enacted with wide bi-partisan support.

TISA's preemption clause thus saved, it may not be said that the legislative history of H.R. 3610 clearly and manifestly shows that Congress expressly intended to oust states from using the clause to protect consumer banking rights in the same way it had been used for the prior three decades.

C. The Legislature Expressly Intended for Californians to Borrow TISA to Protect Banking Consumers from Fraud and Deceit.

While the Court is looking into legislative history, provided it sees fit to do so, it would be important to also look to the history of the Legislature's repeal of California's *former* truth-in-savings laws. *See* Opening Brief at 29-31. This repeal was based on the wording of TISA's preemption clause which says it will supersede any inconsistent state laws. The Legislature's expectation was to protect state banking consumers by allowing them to rely directly on TISA's rules rather than by amending the then-existing state rules which differed slightly.[13]

[13] Borrowing TISA is consistent with the UCL's flexible nature. The Legislature has long intended for the UCL to be broad enough "to deal with the innumerable 'new schemes which the fertility of man's invention would

Ignoring the Legislature's intent, the Bank appears to take the fairly narrow position that Section 4312 of TISA and its implementing regulations — including the Consumer Financial Protection Bureau's policy to, upon request, evaluate state law for consistency[14] — would only apply to a hypothetical *future* legislative enactment:

> Application of TISA's savings clause means only that TISA leaves California free to adopt its own laws that are similar or even identical to TISA. While, under a preemption analysis, *a state could include a private right of action* in a TISA-like state statutory scheme *even if Congress did not include a private right of action* in the federal scheme, California has no TISA-like statute.

Answer at 41 (emphasis added). This reading would greatly limit the scope of the Bureau's statutorily-required and expressly stated administrative duties. Note that the Bureau says it will "determine whether a *state law requirement* is consistent", it does not say it will *only* determine whether a *proposed state statute* is consistent. *See* 12 C.F.R. § 1030.1(d), Appendix C. Nothing in the wording of Section 4312 or Regulation DD expressly bars the Bureau from looking at current statutes or court opinions (both provide legal "requirements") to evaluate consistency with TISA.

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contrive' . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal.4th 163, 181 (1999) (quoting *American Philatelic Soc. V. Claibourne*, 3 Cal.2d 689, 698 (1935)).

[14] *See* 12 C.F.R. § 1030.1(d), Appendix C (An "interested party may request the Bureau to determine whether a state law requirement is inconsistent with the federal requirements.").

When California repealed the truth-in-savings sections of the Financial Code shortly after the enactment of TISA, the Legislature never intended to deprive state citizens of their right to bring failure-to-disclose lawsuits. One need only look at the wording of the repeal of California's former TISA law, § 3 Assembly Bill No. 687, 1993 Cal.Stats. ch. 107, to get a comprehensive understanding of the Legislature's reasoning and intent:

> 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.*
>
> . . . 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.

(Emphasis added.)

In explicit terms, California's legislature declared: (1) TISA covered much of the same ground as the state statute, (2) state disclosure laws needed to be consistent with TISA, and most significantly, (3) TISA would "provide adequate safeguards for consumers." These repealing paragraphs show the Legislature carefully read and compared both statutes and then

relied on the wording of the preemption clause to assure that California's citizens, agencies, and courts would still have a role to play in protecting state consumers.[15] The Legislature gave no indication of a desire to cede all enforcement to federal agencies.

The Legislature relied on TISA saving a role for state law through its preemption clause. The Legislature enacted a bill which expressly declared California's interest in maintaining adequate consumer safeguards. During the sixteen years after Congress repealed Section 4310, the Legislature has not taken a single step toward enacting a new truth-in savings law. It must then follow that the Legislature does not believe California is out of the truth-in-savings business.[16]

Accordingly, this Court should consider how a ruling that only federal agencies may enforce TISA might frustrate the Legislature's well-stated and duly enacted intention to protect bank customers from fraudulent and deceitful disclosures.

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[15] *See Pineda v. Williams-Sonoma Stores, Inc.,* 51 Cal.4th 524, 530 (2011) ("We are also mindful of 'the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'") (quoting *People ex rel. Lundgren v. Superior Court,* 14 Cal.4th 77, 83 (2006)).

[16] *See generally, Arnold v. Newhall County Water Dist.,* 11 Cal.App.3d 794, 804 (1970) ("'The courts presume that the Legislature, aware of judicial decisions, enacts and amends statutes in the light of such knowledge.'") (quoting *In re Farrant,* 181 Cal.App.2d 231, 238 (1960)).

D. The Bank Fails to Correctly Analyze Several Cases.

In its brief, the Bank cites a potpourri of cases that don't really support its argument or say what the Bank wants them to say. Because these cases represent a number of avenues and thus elude easy categorization, Customers will address them one by one.

1. The Bank is not moored in a safe harbor.

In *Rubin v. Green,* 4 Cal.4th 1187 (1993), the Court dealt with a UCL suit for the crime of attorney solicitation brought by a mobile-home park owner against a disgruntled resident and her attorney who had allegedly attempted to stir up several other residents to file law suits against him for failing to properly maintain the park. *Id.* at 1190-91. This Court held that such good faith communications related to an anticipated lawsuit were absolutely privileged under the Civil Code. *Id.* at 1193-94. Allowing attorneys to speak freely with potential clients promotes a public policy of assuring free access to the court system. *Id.* at 1194, 1201. In support of this "sufficiently strong" policy, a plaintiff may not "plead around" the absolute litigation privilege by using a "different label for . . . identical conduct." *Id.* at 1201, 1203.

The logic of *Rubin* is that one cannot bring a UCL suit for unlawful acts if a statute explicitly makes the subject behavior lawful or otherwise grants immunity from suit (in other words, provides a "safe harbor"). *See also Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*

Co., 20 Cal.4th 163, 182 (1999) ("When specific legislation provides a 'safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor")

The situation is much different here because the Bank's failure to follow TISA's disclosure rules is clearly unlawful. The Bank's acts are not privileged like those of the *Rubin* defendants. The Bank is not moored in a safe harbor.

2. The Bank may not rely on previously distinguished California Insurance Commission cases.

In *Manufacturers Life Ins. Co. v. Superior Court,* 10 Cal.4th 257 (1995), insurance companies wanting to get away with low-ball payouts boycotted a broker who had been providing attorneys with actual cash settlement values. The insurance companies — hoping to be subject only to administrative enforcement under the Unfair Insurance Practices Act (UIPA), and desiring to dodge both state antitrust (Cartwright Act) and UCL claims — "believed they could violate the law and be subject only to sanctions imposed by the Insurance Commissioner." *Id.* at 281. This Court ruled against the insurers allowing, in addition to administrative enforcement, for the boycotted plaintiff to bring a UCL suit which borrowed Cartwright antitrust prohibitions. *Id.* at 283. The plaintiff could not, however, bring a UCL case for UIPA violations because that law lacked a private civil cause of action. *Id.*

Not surprisingly, this is the part of *Manufacturer's Life* the Bank relies upon to argue that the UCL may not borrow laws which lack a private cause of action.[17] See Answer at 13-14. At first glance, there would appear to be some tension between this holding — based on the earlier UIPA case of *Moradi-Shalal v. Fireman's Fund Ins. Companies,* 46 Cal.3d 287 (1988) — and the rule that the UCL may borrow from a law without a private cause of action as set forth later in *Stop Youth Addiction v. Lucky Stores,* 17 Cal.4th 553, 563 (1998) ("[H]ad the Legislature at any time desired to change the UCL so as to restrict its application to situations in which the predicate statute expressly provides for private action, it undeniably has had ample time to do so.").

This tension was relieved in *Stop Youth Addiction* itself when this Court limited the reach of *Moradi-Shalal*,[18] and explained, under *Manufacturers Life*, that in crafting the UIPA, the Legislature had not intended to create a new cause of action that would bar private suits from the earlier Cartwright Act. *Stop Youth Addiction* at 565. Under the legal

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[17] The Bank also cites *Lu v. Hawaiian Gardens Casino*, 50 Cal.4th 592 (2010), as another case about a statute without a private right of action. *See* Answer at 48. Yet in *Lu*, this Court affirmed a lower court ruling that despite the lack of a private right to sue, the Labor Code "may nonetheless serve as a predicate for a UCL claim because plaintiff presented triable issues of fact . . . ." *Lu* at 596.

[18] "In *Manufacturers Life*, moreover, we explained that *Moradi-Shalal* was not meant to impose limitations on private antitrust or *unfair competition actions*." *Stop Youth Addiction* at 565 (emphasis added).

situation presented in *Manufacturers Life*, it would have made little sense for the plaintiff to go forward with two causes of action based on identical law and facts: UCL/Cartwright and UCL/UIPA (adopting Cartwright). Avoiding a mirror-image trial, it would appear the Court chose the path that best preserved settled antitrust and standing law.

Neither of these Insurance Commission cases, as tempered by *Stop Youth Addiction*, reaches the situation presented here where Customers seek to bring a state case consistent with a federal regulatory statute that no longer has a private cause of action. Here there are no dual state paths.

3. The Bank may not use a preemption case to show this is not a preemption case.

The Bank, which time and again insists this is not a preemption case, nevertheless uses a leading California preemption case, *Farm Raised Salmon,* 42 Cal.4th 1077 (2008), to raise the singular point that, unlike TISA, the Sherman Law contained a private right of action. Answer at 16. Unfortunately for the Bank, this is a line of reasoning already precluded by *Stop Youth Addiction*, as quoted in *Kasky v. Nike, Inc.,* 27 Cal.4th 939, 949-50 (2002) ("[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.'").

What *Farm Raised Salmon* says, and what the Bank wants this Court to ignore, is that Congress must have a "clear and manifest purpose" to preempt state law and that the UCL is "subject to the presumption against preemption." *Id.* at 1088. Since the Bank has now put the case into play, the Court should use it to evaluate TISA's preemption clause.

4. California may borrow a federal law even if it doesn't provide a private remedy.

One unpublished federal district court case used by the Bank is wrongly decided. *See* Answer at 35 n.17. In *Hartless v. Clorox Co.*, 2007 U.S.Dist.LEXIS 81686 (S.D.Cal. 2007), the court dismissed a UCL claim which borrowed the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) because it erroneously held FIFRA bared all state private causes of action. The court relied on the similarly questionable *Almond Hill Sch. v. U.S. Dept. of Agriculture*, 768 F.2d 1030 (9th Cir. 1985).

Neither precedent may stand. In *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the Supreme Court remanded a FIFRA case to state court to proceed under a Texas consumer protection statute. "[A]lthough FIFRA does not provide a federal remedy to farmers and others . . . nothing in [the preemption clause] precludes States from providing such a remedy." *Id.* at 448.

E. The Currency Comptroller Warned Banks They May Be Subject to California UCL Suits for "Unfair or Deceptive Acts or Practices".

The Bank questions why Customers cited an Office of the Comptroller of the Currency (OCC) advisory letter entitled "Guidance on Unfair or Deceptive Acts or Practices".[19] *See* Answer at 42, n.18. This 2002 letter, written well after the repeal of Section 4310, was a warning sent to all national banks. The Comptroller's advice applies industry-wide to any unfair or deceptive banking practices, and thus the Bank's attempt to distinguish this letter because it dealt with consumer credit rather than deposit accounts is wholly unconvincing.

This Court has declared, "As a general matter, we owe deference to reasonable agency interpretations of agency-promulgated regulations, *including the OCC's interpretations* of its regulations interpreting federal banking law." *Miller v. Bank of America, NT & SA,* 46 Cal.4th 630, 644 n.7 (2009) (emphasis added).

F. Customers Have Never Abandoned Their Claim Under the UCL's "Unfair" Prong.

The Bank seeks to dismiss Customers' claim under the UCL's "unfair" prong because the complaint allegedly "does not contain a single factual allegation unrelated to" TISA and Regulation DD. Answer at 39. This is patently untrue. Paragraph 30 of the Complaint deals specifically

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[19] A copy of the OCC Advisory Letter may be found at 2 AA 324-31.

with Customers' "unfair" cause of action. *See* 1 AA at 10. Customers claim the Bank's practices are unfair because the "gravity of harm to Plaintiffs and the Class outweighs the utility of Defendant's practices." These practices, among other things, "offend[] public policy", and are "unethical" as well as illegal because money was wrongfully taken out of Customers' accounts. *Id.*

The Court of Appeal utilized three tests from *Drum v. San Fernando Valley Bar Assn.,* 182 Cal.App.4th 247, 256 (2010), to evaluate Customers' unfair claim: (1) statutory tethering, (2) balancing utility against harm, and (3) applying the Federal Trade Commission's definition of "unfair". *Rose v. Bank of America, N.A.,* 200 Cal.App.4th 1441, 1453 (2011).

Employing the first statutory test, the court said there was no tethering and referred the reader to "the preceding section" which discussed the repeal of TISA's private right of action. *Id.* It is Customers' contention that the claimed failure of this first test renders the lower court's analysis of the second and third tests unnecessary.[20] The lower court, like Customers in their opening brief, saw no reason to raise the already-stated statutory arguments for a second time in connection to the unfair claim.

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[20] The court also erred by making a factual finding that Customers were not sufficiently harmed because they didn't relocate their accounts. *See Rose* at 1453. This argument may address damages but not injunctive remedies. The underlying fact finding should be left to the trial court.

If TISA preempts all state private suits, the unlawful and the unfair prongs will fail together. On the other hand, if the Court rules that TISA does not preempt this suit, Customers should be allowed to present evidence supporting both the unlawful and unfair prongs at trial.

In their opening brief, Customers addressed the specific question that was presented by the court. The issues regarding TISA's effect on state law are primary and crucial to both their unlawful and unfair claims. They have not, as the Bank suggests, *see* Answer at 40 n.17, inadvertently "abandoned" their unlawful claim by failing to discuss the second and third unfair prong tests.

III. CONCLUSION

TISA, the federal law at issue, has a detailed state law preemption clause that should, under ample precedent, be the sole concern of this Court.

The Bank of America insists the legislative history of the 1996 repeal of TISA's private right of action makes it possible for the Court to ignore this recently reenacted provision.

When looked at in its totality, legislative history may reveal a great many things. In this case, it helps explain why three separate House and Senate attempts to rid TISA of its preemption clause, Section 4312, failed to make it out of committee. The records provided by the Bank, when

examined side-by-side with early versions of the bill, show a nexus between the repeal of Section 4310 and the retention of Section 4312. It was, in short, a necessary compromise that allowed the bill to become law.

As it stands today, TISA is a regulatory statute without a private right of action that nonetheless allows citizens to bring suit under consistent state laws. The dual role played by the Consumer Financial Protection Bureau to both enforce the statute and determine state law consistency attests to this fact.

To now rule that the UCL may not borrow from laws lacking private rights of action would overturn a great deal of settled law such as *Stop Youth Addiction* and *Kasky* and would necessarily require the Court to overturn, or at least find appropriate grounds to distinguish, a significant body of settled law. There is simply no basis for such a ruling under state law, the statutory text, or the legislative history.

The Customers offer a simpler analytical pathway. If the Bank wants to use the acts and words of Congress to dismiss state charges against it for illegal disclosures, then it is asking the Court for a ruling based upon the supremacy of federal law. So the Bank, through its own advocacy, has made this a case about preemption. And under TISA's explicit preemption clause, this consistent state case must be allowed to go forward.

Accordingly, the Court should overrule the decision of the Court of Appeal and remand this case for trial.

DATED: August 20, 2012

RESPECTFULLY SUBMITTED,

THE ROSSBACHER FIRM

____

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to California Rules of Court, Rule 8.520(c)(1), the foregoing Reply Brief on the Merits of Plaintiffs and Appellants Harold Rose, et al., is proportionally spaced, has no type size smaller than 13 point, and contains 8,365 words, including footnotes (but excluding the title page, tables, and this Certification), which is less than the 8,400 words permitted by the foregoing rule. Undersigned counsel relied on the word count feature of the computer program used to prepare this brief.

DATED: August 20, 2012

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE
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STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is: 811 Wilshire Blvd., Suite 1650, Los Angeles, California 90017-2666.

On August 20, 2012, I served the foregoing document described as **REPLY BRIEF ON THE MERITS OF PLAINTIFFS AND APPELLANTS HAROLD ROSE, ET AL.** on the interested parties in this action by placing [ ] the original [x] a true copy thereof enclosed in a sealed envelope addressed as follows:

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Maricela Ruiz

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