No. 13-662

In the Supreme Court of the United States

BANK OF AMERICA, N.A., PETITIONER

v.

HAROLD ROSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Congress has preempted private actions brought under California's unfair competition law, Cal. Bus. & Prof. Code § 17200 *et seq.* (West 2008), to the extent liability is predicated on a violation of the Truth in Savings Act, Pub. L. No. 102-242, 105 Stat. 2334.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In 1991, Congress enacted the Truth in Savings Act (TISA), Pub. L. No. 102-242, 105 Stat. 2334, "to require the clear and uniform disclosure of * * * the rates of interest which are payable on deposit accounts by depository institutions; and * * * the fees that are assessable against deposit accounts." § 262, 105 Stat. 2334 (12 U.S.C. 4301(b)). TISA requires depository institutions to, *inter alia*, "maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts." 12 U.S.C. 4303(a). TISA further requires that the schedule be made available to potential customers

before an account is opened and that notice of any change thereto be provided to account holders at least 30 days before the change takes effect. 12 U.S.C. 4305(a) and (c).

Depository institutions regulated under TISA are subject to the rulemaking and enforcement authority of various federal agencies. TISA originally authorized the Board of Governors of the Federal Reserve System (the Board) to "prescribe regulations to carry out the purpose and provisions" of the Act. § 269, 105 Stat. 2338; see 57 Fed. Reg. 43,337 (Sept. 21, 1992) (promulgating regulations). In 2010, Congress transferred that rulemaking authority to the Consumer Financial Protection Bureau (CFPB). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100B, 124 Stat. 2109-2110. The CFPB may bring enforcement actions against large depository institutions that violate TISA. 12 U.S.C. 4309(a)(3), 5515(c). Federal banking regulators and the National Credit Union Administration may also enforce TISA against depository institutions that are subject to those agencies' respective jurisdictions. 12 U.S.C. 4309(a)(1)-(2).

As originally enacted, TISA included a private right of action for account holders. § 271, 105 Stat. 2340 (12 U.S.C. 4310 (1994)). Under that provision, "any depository institution which fail[ed] to comply with any requirement imposed under [TISA] or any regulation prescribed under [TISA] with respect to any person who [was] an account holder [was] liable to such person" for actual and statutory damages. § 271(a), 105 Stat. 2340. In 1996, Congress repealed the private right of action, effective September 2001. See Omnibus Consolidated Appropriations Act, 1997

(1997 Appropriations Act), Pub. L. No. 104-208, § 2604(a), 110 Stat. 3009-470.

TISA contains (and has always contained) a savings provision allowing States to impose their own disclosure requirements on depository institutions. 12 U.S.C. 4312. That provision states that TISA does not "supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts," unless "those laws are inconsistent" with TISA, "and then only to the extent of the inconsistency." *Ibid.* Congress authorized the CFPB (previously, the Board) to "determine whether such inconsistencies exist." *Ibid.* In 1994, the Board described Section 4312 as "provid[ing] a very narrow preemption standard" that allows States to require disclosure of "more information than federal law requires," so long as "a bank can comply with both requirements without violating either." 59 Fed. Reg. 24,033 (May 10, 1994).

2. California law prohibits unfair competition, including "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200 (West 2008) (UCL). A business act or practice is "unlawful" if it is "forbidden by law." *Cel-Tech Commc'ns, Inc.* v. *Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999) (*Cel-Tech*) (citations omitted). The UCL "'borrows' violations of other laws and treats them as unlawful practices" that are "independently actionable." *Id.* at 539-540 (citations omitted). A violation of federal law "may serve as the predicate for a UCL cause of action." Pet. App. 3a. Under the UCL, private parties may seek injunctive and restitutionary relief if they have "suffered injury in fact and [have]

lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204 (West Supp. 2014); see *id.* § 17203 (West 2008). Damages, however, are not available. See *Cel-Tech*, 973 P.2d at 539.

3. Respondents (deposit account holders who are California residents) filed a putative class action against petitioner (a national bank) under the UCL in California state court. Pet. App. 15a. Respondents sought to represent all California residents holding noncommercial, in-state deposit accounts with petitioner. *Id.* at 31a. They alleged that petitioner had engaged in unlawful and unfair business acts or practices by increasing certain fees applicable to their deposit accounts without providing the disclosures required by TISA. *Id.* at 15a-16a, 30a-31a.

a. Petitioner demurred, and the California state trial court sustained the demurrer and dismissed respondents' complaint. Pet. App. 29a-43a. The court concluded that "the repeal of the private cause of action [in TISA] reflects an intent to absolutely bar a private cause of action," and that the UCL "could not be used to 'plead around'" that "absolute bar." *Id.* at 38a.

b. The California Court of Appeal affirmed. Pet. App. 14a-28a. The court agreed with the trial court that "Congress ha[d] clearly rejected a private right to enforce TISA," and that "[a]llowing private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an 'end run' around the limits on enforcement set by Congress." *Id.* at 25a-26a.

4. The California Supreme Court reversed and remanded for further proceedings. Pet. App. 1a-13a. The court first noted that Congress had not "ruled out

any private enforcement of TISA." *Id.* at 4a-5a. The court explained that, "[b]y 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,'" absent an inconsistency with TISA. *Id.* at 5a (quoting 12 U.S.C. 4312). The court then concluded that "[t]he UCL is such a state law." *Ibid.*

The California Supreme Court rejected petitioner's contrary arguments. The court noted that petitioner had "concede[d] that the California Legislature could have provided a private right of action in a statute otherwise identical to TISA." Pet. App. 5a. The court further explained that, "[w]hen Congress permits 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 6a. To hold otherwise, the court continued, would "elevate[] form over substance." *Ibid.*

The California Supreme Court also rejected petitioner's attempt to characterize respondents' UCL action as a means of privately "enforc[ing]" TISA. Pet. App. 6a-7a. The court explained that, "by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism," but instead "provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is 'unlawful.'" *Id.* at 8a. The court thus concluded that respondents are suing to enforce "the UCL's restraints against unfair competition," not "to enforce TISA." *Id.* at 9a.

DISCUSSION

The California Supreme Court held that Congress has not foreclosed respondents' state-law suit predicated on a violation of TISA. That decision is correct, and it does not conflict with any decision of this Court or a federal court of appeals. In addition, the state supreme court's decision is interlocutory. The petition for a writ of certiorari should be denied.

A. The Decision Below Is Correct

Under 12 U.S.C. 4312, States are generally permitted to enact, and to provide for the enforcement of, laws governing bank disclosures for deposit accounts so long as the laws are not inconsistent with the provisions of TISA. Although Congress repealed the federal private right of action to enforce TISA itself, it did not prohibit private actions to enforce consistent state requirements. The California Supreme Court correctly held that Congress has not foreclosed California from applying its unfair competition law in private actions predicated on a violation of TISA.

1. Because TISA's savings provision specifically addresses the statute's "[e]ffect on State law" (12 U.S.C. 4312), that savings provision "necessarily contains the best evidence" of Congress's intent with respect to the question presented here. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Section 4312 provides that TISA "do[es] not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts"—unless the state law is "inconsistent" with the provisions of TISA and, even then, "only to the extent of the inconsistency." 12 U.S.C. 4312. That savings provision makes clear

that Congress intended to permit States to adopt laws governing bank disclosures for deposit accounts, and to authorize enforcement of those state laws in state court, so long as the state laws are consistent with the provisions of TISA.

The UCL "borrows" TISA's standards for "disclosure of yields payable or terms for accounts" (12 U.S.C. 4312), declares the failure to make those disclosures an "unlawful" business act or practice, and provides for private enforcement. *Cel-Tech Commc'ns., Inc.* v. *Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539-540 (Cal. 1999); see Pet. App. 3a. The UCL therefore "relat[es] to the disclosure of yields payable or terms for accounts." 12 U.S.C. 4312. And the UCL is not "inconsistent" with the provisions of TISA. *Ibid.* To the contrary, as applied to this case, the UCL's requirements are identical to those that TISA imposes. The California Supreme Court therefore correctly held that the UCL "is such a state law," *i.e.*, a state law expressly preserved by Section 4312. Pet. App. 5a.

Petitioner argues (Pet. 33) that the UCL "is not such a law." More specifically, petitioner contends (Pet. 29, 33) that Section 4312 does not apply to the UCL because the UCL "is not a statute relating to the disclosure of yields payable or terms for accounts." Petitioner never explains, however, why that is so. To the extent petitioner views Section 4312 as distinguishing between a "TISA-like" statute (Pet. 32-33; Reply Br. 6) and a general unfair-competition law that also applies to conduct other than bank disclosures on deposit accounts, its argument lacks merit.

In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), the Court considered whether the

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, "pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." The provision at issue "expressly pre-empt[ed] the States" from enacting or enforcing laws "relating to rates, routes, or services of any air carrier." *Morales*, 504 U.S. at 383. The Court explained that "the key phrase, obviously, is 'relating to,'" and that "[t]he ordinary meaning of these words is a broad one." *Ibid.* The Court then rejected "the notion[s] that only state laws specifically addressed to the airline industry are pre-empted" and that the statute "imposes no constraints on laws of general applicability." *Id.* at 386. Such a reading, the Court concluded, would have "ignore[d] the sweep of the 'relating to' language" and "create[d] an utterly irrational loophole," since "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Ibid.*; see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328, 330 (2008) (state tort law preempted as a requirement "with respect to a [medical] device," even though the requirement applied to "all products and all actions in general") (emphasis omitted); cf. *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 86-87 (2008) (distinguishing between "broader" phrase "relating to" and narrower phrase "based on").

Because Section 4312 uses the same phrase ("relating to") as the Airline Deregulation Act, the *Morales* Court's analysis is fully applicable here. Petitioner concedes that "the California Legislature could have provided a private right of action in a statute other-

wise identical to TISA," Pet. App. 5a; that "claims may be predicated on 'California statutes that simply adopt federal requirements,'" Pet. 32 (quoting Pet. App. 5a); and that a private action to enforce a "TISA-like" state statute would fall within TISA's savings provision, Pet. 33. Thus, if the California Legislature had simply copied the entire text of TISA and its implementing regulations into the state code and authorized private enforcement, respondents' state-law claims would not be barred under petitioner's own theory. The UCL accomplishes precisely the same end through judicial interpretation of the term "unlawful." Pet. App. 8a. There is little reason why Congress would have wanted to permit the former but not the latter. As applied to the circumstances of this case, both the actual UCL and the hypothetical state statute "relat[e] to the disclosure of yields payable or terms for accounts," 12 U.S.C. 4312. Petitioner's attempt to limit the means by which a State may legislate is untethered to the language of TISA's savings provision, and exalts "form over substance," Pet. App. 6a.[1]

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[1] Suppose that Section 4312, rather than expressly preserving consistent state laws, instead provided that "[n]o State may enact or enforce any law relating to the disclosure of yields payable or terms for accounts." Such a provision would surely preempt any effort by California to treat banking practices proscribed by TISA as unlawful business practices actionable under the UCL. Under *Morales*, the UCL (as applied to such disclosure requirements) would be a law "relating to" the relevant disclosures, even though the UCL does not focus on account disclosures or even on banking more generally. There is no reason to construe the phrase "relating to" differently simply because Section 4312 preserves, rather than preempts, state laws within the relevant category.

2. Notwithstanding Section 4312, petitioner contends that Congress's repeal of TISA's private right of action bars respondents' state-law suit. The argument proceeds in three steps: (i) the repeal evidences Congress's intent to preclude all private enforcement of TISA, whether "direct" or "indirect"; (ii) respondents' state-law action is an attempt to "indirectly" enforce TISA; and (iii) respondents' state-law action is therefore barred. The California Supreme Court correctly rejected petitioner's contentions.

a. Petitioner's argument starts from a flawed premise: that a federal statute can foreclose a state-law action under the Supremacy Clause without a finding that Congress intended to "preempt" state law. See Pet. App. 11a n.7 (noting that petitioner was not arguing preemption); *id.* at 39a n.2 (noting that petitioner had not "argue[d] that TISA preempts California law"); *id.* at 4a (noting petitioner's argument that "considerations of preemption are irrelevant"); Pet. Cal. S. Ct. Answer Br. 48 ("federal preemption is the wrong question"); see also, *e.g.*, Pet. 11-12; Reply Br. 2. Petitioner has it exactly backwards when it suggests (Pet. i, 11-12, 33) that States need congressional "authoriz[ation]" to "enact and enforce their own laws similar to a federal statute." "States are independent sovereigns with plenary authority to make and enforce their own laws." *Danforth* v. *Minnesota*, 552 U.S. 264, 280 (2008). The question here is not whether Congress has "expressed an intent to authorize private enforcement" (Pet. 27), but whether Congress has expressed an intent to "exercise its constitutionally delegated authority to set aside the laws of a State," *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 30 (1996). The presence or absence of a

federal private right of action sometimes may be relevant to ascertaining Congress's intent in that regard but, at bottom, the question remains one of preemption.

b. The preemption argument (if petitioner had made one) presumably would run as follows: the repeal of TISA's private right of action, in favor of "a comprehensive administrative enforcement scheme" (Pet. 11), evidences Congress's intent to preempt state laws that allow private parties to "indirect[ly]" (Pet. 27) enforce TISA.[2] That argument, in turn, would presumably rely on the principle that state law is impliedly preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000); see Reply Br. 5 n.2. To the extent petitioner has preserved an implied-preemption argument, that argument lacks merit.

Congress's repeal of a federal private right of action under TISA does not evidence an intent to preempt a private state-law action predicated on a TISA violation. The 1996 amendments provided only that "[e]ffective [September 30, 2001], section 271 of [TISA] (12 U.S.C. 4310) is repealed." 1997 Appropriations Act § 2604(a), 110 Stat. 3009-470. Respondents thus could not bring a federal claim in federal court for actual or statutory damages against a depository institution for violations of TISA's requirements. See TISA § 271, 105 Stat. 2340 (12 U.S.C. 4310 (1994)).

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[2] Petitioner's argument may, in fact, be considerably broader. At times, petitioner suggests (Pet. 13, 27, 38) that congressional "silence" alone would be sufficient to preclude a state-law claim predicated on a violation of federal law.

But the repealing legislation says nothing about state-law claims. Neither does the legislative history on which petitioner relies. See Pet. 23-25. And when Congress specifically addressed state-law claims, it unambiguously preserved state laws not "inconsistent" with TISA. 12 U.S.C. 4312; cf., *e.g.*, H.R. 1858, 104th Cong., 1st Sess. § 141 (1995) (proposed bill that would have repealed the savings provision along with the private right of action). Congress's decision to retain TISA's savings provision strongly suggests that Congress did not intend to impliedly preempt state laws governing disclosures for deposit accounts by repealing TISA's federal private right of action.[3]

That conclusion accords with this Court's interpretation of similar statutory schemes. The Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, provides one example. Section 337(a) of Title 21 of the United States Code states that "proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. 337(a). In *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), however, all nine Justices agreed that States could "provide a traditional damages remedy for violations" of state requirements that parallel the FDCA's labeling and design requirements for

[3] Petitioner (Reply Br. 12) and its amici (Cal. Bankers Ass'n et al. Amicus Br. 9, 22 n.10) note that, under the now-repealed federal right of action, depository institutions had certain statutory defenses to liability, whereas such defenses are unavailable under the UCL. Even assuming that the prior defenses are unavailable in a UCL action (a question the courts below did not confront, since the case was dismissed on a demurrer), that disparity offers little support to petitioner. Petitioner concedes (Pet. 33) that private parties can enforce "TISA-like" state statutes, and such statutes need not incorporate the (now-repealed) federal statutory defenses.

medical devices. *Id.* at 495; see *id.* at 513 (O'Connor, J., concurring in part and dissenting in part); see also *Riegel*, 552 U.S. at 330; cf. *Farm Raised Salmon Cases*, 175 P.3d 1170, 1173 (Cal. 2008) (holding that the FDCA does not preempt UCL claim to enforce state food-labeling requirements that incorporate federal food-labeling regulations), cert. denied, 555 U.S. 1097 (2009).[4] Similarly, in *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005), the Court held that, "although [the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*] does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements," States are not precluded from "providing such a remedy." 544 U.S. at 448.[5]

Petitioner repeatedly characterizes (*e.g.*, Pet. 35) respondents' UCL claim as "indirect private enforcement of TISA itself." But a state-law claim predicated on a violation of a federal statute or regulation remains a state-law claim. In *Lohr*, for example, this

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[4] A petition for a writ of certiorari was filed in the *Farm Raised Salmon Cases*, see *Albertson's, Inc.* v. *Kanter* (No. 07-1327), and the Court invited the Acting Solicitor General to file a brief expressing the views of the United States, see 555 U.S. 808 (2008). The government's brief argued (*e.g.*, U.S. Amicus Br. 8) that the state court's decision was correct and that the petition should be denied. This Court denied certiorari. 555 U.S. 1097 (2009).

[5] Petitioner's attempt to distinguish *Bates* (Reply Br. 7-8) is not persuasive. Petitioner contends (*id.* at 8) that "*Bates* did not address whether * * * state laws could impose liability solely for violations of federal statutes." The Court in *Bates* determined, however, that "[n]othing 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." 544 U.S. at 442.

Court held that the FDCA did not preempt state-law claims that included allegations that the defendant had "violated [Food and Drug Administration (FDA)] regulations." 518 U.S. at 495. In *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), the Court rejected the plaintiffs' "attempt to characterize * * * the claims at issue in [*Lohr*] * * * as 'claims arising from violations of FDCA requirements.'" *Id.* at 352 (citation omitted). As the Court explained, that characterization was inaccurate because the claims in *Lohr* arose from a state-law duty, "not solely from the violation of FDCA requirements." *Ibid.*; see also *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 808-812 (1986) (*Merrell Dow*).

The same is true of respondents' claim here. California has imposed an independent state-law duty that requires depository institutions (among others) to refrain from engaging in unlawful business acts and practices. In delineating the contours of that duty, California courts have long treated as "unlawful" various business practices that violate the substantive requirements of other state and federal laws. As the California Supreme Court held, "a UCL action does not 'enforce' the law on which a claim of unlawful business practice is based," but instead "borrows violations of other laws and treats them as unlawful practices that the UCL makes *independently* actionable." Pet. App. 6a-7a (internal quotation marks omitted) (quoting *Cel-Tech*, 973 P.2d at 539); see *id.* at 8a (UCL uses "other laws only to define what is 'unlawful'"). "[T]he party who brings a suit is master to decide what law he will rely upon," *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.), and therefore may sue under state law whether or not the

same allegations would support a federal-law cause of action. See, *e.g.*, *Merrell Dow*, 478 U.S. at 809 & n.6. Here, respondents "are not suing to enforce TISA"; they are suing to enforce "the UCL's restraints against unfair competition." Pet. App. 9a; cf. *Smiley* v. *Kansas*, 196 U.S. 447, 455 (1905) ("We accept the construction given to a state statute by [the State's highest] court.").[6]

Petitioner also argues (Pet. 22-23) that allowing respondents to proceed with their UCL claim would frustrate Congress's desire to "eliminate unnecessary burdens on banks and regulators," to "promote uniformity[,] and [to] avoid inconsistent enforcement through conflicting judicial decisions." The interest in uniformity of regulation and enforcement under TISA, however, is not so "unyielding" as to bar all private state-law suits concerning bank disclosures by depository institutions. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 70 (2002); see *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) (Congress does not pursue federal objectives "at all costs.") (citation omitted). As described above, Section 4312 expressly

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[6] Respondents' claim requires not only proof of the violation of a state requirement (predicated here on a violation of TISA), but also proof of at least one additional element—injury as a result of the violation. See Cal. Bus. & Prof. Code § 17204 (West Supp. 2014) (requiring proof of injury in fact and loss of money or property as a result of unfair competition). And the equitable remedies that respondents may receive if they prevail are "quite different from the remedies formerly provided in TISA, which included actual damages, limited additional amounts, costs, and attorney fees." Pet. App. 12a. The existence of an additional element and the different remedies available reinforce the conclusion that respondents are seeking not to enforce TISA itself, but rather to enforce an identical state-law duty.

permits States to regulate bank disclosures by depository institutions, subject to the CFPB's authority to preempt "inconsistent" state laws. 12 U.S.C. 4312. Thus, Congress's interest in uniformity does not preclude the States from enforcing bank disclosure requirements.

B. The Decision Below Does Not Conflict With Any Decision Of This Court Or A Federal Court Of Appeals

1. Contrary to petitioner's contention (Reply Br. 2; Pet. 15-20), the California Supreme Court's decision does not conflict with "this Court's jurisprudence governing private enforcement of federal statutes." The decisions on which petitioner relies all address a fundamentally different question: whether Congress has provided a private right of action or a private remedy *under federal law*. See *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Middlesex Cnty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Respondents sued petitioner under state law, and California indisputably *has* provided a private right of action. The only disputed question is whether Congress's repeal of a federal right of action under TISA evidences an intent to preempt a state-law suit to enforce substantive requirements that are consistent with (indeed, identical to) those that TISA imposes. None of the decisions on which petitioner relies holds (or even suggests) that Congress's decision not to authorize a private action under federal law precludes a State from creating and adjudicating a parallel or identical private action under state law.

In particular, *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011) (*Astra*), does not sup-

port petitioner's theory. Contrary to petitioner's contention (Pet. 20), the Court in *Astra* did not hold that a "*state* law cause of action may not be used to indirectly enforce a federal statute where Congress has not authorized private enforcement." The plaintiffs in *Astra* were entities covered by a federal Medicaid program that required drug manufacturers who opted into the program to "offer discounted drugs to covered entities." 131 S. Ct. at 1345. Those plaintiffs sued as purported "third-party beneficiaries" to the contracts entered into between drug manufacturers and the federal government. *Id.* at 1345-1346. The operative claim was premised on "federal common law," *id.* at 1348; it was not a "state law breach of contract claim" as petitioner contends (Pet. 20). In that context, the Court held that "it would make scant sense to allow [the covered entities] to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute," when they could "not sue under the statute" itself. 131 S. Ct. at 1345. The Court in *Astra* had no occasion to deal with the distinct question whether, and under what circumstances, Congress's decision not to provide for private enforcement of federal requirements precludes enforcement of parallel state-law requirements.

2. Nor does the decision below conflict with *Buckman*, *supra*. See Pet. 31. In *Buckman*, the Court held that the FDCA preempted state-law claims alleging that the defendant had made fraudulent representations to the FDA in order to secure clearance to market certain medical devices. 531 U.S. at 343-344. The Court concluded that those claims conflicted with federal law because they would "skew[]" the "delicate balance of statutory objectives" that the FDA was

charged with achieving in policing fraud and administering the device-clearing process. *Id.* at 348. The Court explained, *inter alia*, that the claims might deter would-be applicants from seeking approval for beneficial devices, or lead applicants to deluge the FDA with information that the agency neither wanted nor needed. *Id.* at 350-351. Unlike the suit in *Buckman*, respondents' suit does not involve alleged fraud on an agency, an agency's approval of a product, or any other agency determination. Respondents' suit therefore does not pose the concerns about skewing an agency's decision-making process on which the Court relied in *Buckman*.

3. The decision below also does not conflict with any decision of a federal court of appeals. Petitioner does not contend that any such conflict currently exists. Instead, petitioner predicts (Pet. 13, 36) that there will be an "inevitable conflict" between federal courts and California state courts on the question presented. Petitioner's prediction of a future conflict, however, rests entirely on the premise that the California Supreme Court decision "departs from federal law." Pet. 36. For the reasons set forth above, the decision below is fully consistent with the balance struck in TISA, through which Congress eliminated the private enforcement mechanism that had previously existed under federal law, while preserving state-law requirements (and attendant enforcement mechanisms) that are consistent with TISA's substantive requirements. The possibility that a federal court applying the same law may someday reach a different result provides no reason for the Court's review.

Petitioner (Pet. 13, 36, 41 & n.8) and its amici (Cal. Bankers Ass'n et al. Amicus Br. 2, 5) suggest that the

decision below "threatens to open a floodgate of class action litigation" within and beyond California that would "lead to inconsistent enforcement" and "impose" regulatory "burdens" on "financial institutions" and "federal regulators" alike. TISA's private right of action, however, was repealed more than a decade ago. Petitioner identifies only one decision that has even arguably addressed the question presented here. See Pet. 37-38 (citing *Gunther* v. *Capital One, N.A.*, 703 F. Supp. 2d 264 (E.D.N.Y. 2010)); cf. Br. in Opp. 3 (citing two other post-repeal decisions). The prospect of future class-action litigation, and the projected burden of such litigation on the regulated and the regulators, is at best uncertain. Review by the Court at this time would be premature.

The question whether UCL actions may be predicated on violations "of other federal statutes" is not presented here. See Pet. 38-40. The preemptive effect of a statute turns on a host of considerations, including the text, structure, and purposes of the federal statute, as well as the requirements imposed by the state law under review. The California Supreme Court did not hold that UCL claims predicated on violations of federal law can *never* be preempted. It simply held that Congress, by retaining TISA's savings provision while repealing its federal private right of action, had not evidenced an intent to foreclose respondents' state-law claim.

In the end, the actual dispute here is extremely narrow. It is undisputed that a State may impose TISA's requirements as a matter of state law, and that private parties may enforce those requirements through civil actions. The disagreement concerns only the *means* by which a State may do so. The contested

issue is whether, for purposes of TISA preemption, a state court's use of TISA to identify "unlawful" business practices under the UCL is meaningfully different from the incorporation of TISA's substantive requirements into state legislation or state agency regulations. The semantic and elusive distinction between state laws that "borrow" TISA and those that adopt TISA verbatim does not warrant the Court's review.

C. The Decision Below Is Interlocutory

Even if the question presented otherwise warranted review, this Court should deny the petition for a writ of certiorari because the decision below is interlocutory. The California Supreme Court reversed the dismissal of respondents' complaint and remanded for further proceedings. The state courts therefore have not yet made any determinations concerning whether petitioner's conduct actually violates TISA or what form of relief, if any, might be available as a matter of state law if respondents ultimately prevail on the merits. The proceedings on remand will yield more information about the precise contours of respondents' claim and petitioner's defenses. Accordingly, it would be premature for the Court to grant review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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