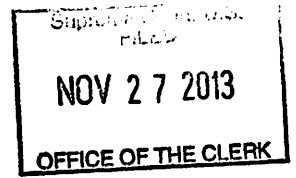


13-662

No. 13-____



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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a state high court's decision authorizing private enforcement of a federal statute despite Congress' intent that it not be privately enforced. The Truth in Savings Act (TISA), 12 U.S.C. §§ 4301 *et seq.*, governs disclosures regarding consumer deposit accounts in banks. Congress repealed TISA's civil liability provision, leaving TISA to be enforced only by federal banking agencies. Respondents' claim under California's Unfair Competition Law (UCL) was based explicitly and solely on alleged TISA violations. That claim is barred by federal law because Congress' intent to foreclose private enforcement of TISA also bars indirect enforcement of TISA through a UCL claim.

Yet, the California Supreme Court held that TISA's savings clause—which authorizes the States to enact laws governing consumer deposit account disclosures—overrode Congress' foreclosure of private enforcement of TISA. That ruling conflicts with this Court's precedents, contravenes Congress' intent, and violates the Supremacy Clause.

The question presented is: When Congress has not authorized private enforcement of a federal statute and has foreclosed indirect enforcement, may a state law that borrows other statutes as predicates for liability be used to privately enforce that federal statute, based on a savings clause that permits States to enact their own laws relating to the specific subject of the federal legislation.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner is Bank of America, N.A. Respondents are Harold C. Rose and Kimberly Lane.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Petitioner Bank of America, N.A. is wholly owned by BANA Holding Corporation. BANA Holding Corporation is wholly owned by BAC North America Holding Company. BAC North America Holding Company is wholly owned by NB Holdings Corporation, which in turn is wholly owned by Bank of America Corporation. No publicly held company owns 10% or more of the stock of Bank of America Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bank of America, N.A. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California.

OPINIONS BELOW

The opinion, order, and judgment of the California Superior Court are unreported and are reprinted in the Appendix to the Petition (“App.”) at 29a-43a. The opinion of the California Court of Appeal is reported at 133 Cal.Rptr.3d 615 (Cal. Ct. App. 2011) and is reprinted at App. 14a-28a. The opinion of the California Supreme Court is reported at 304 P.3d 181 (Cal. 2013) and is reprinted at App. 1a-13a.

JURISDICTION

The California Supreme Court issued its judgment and opinion on August 1, 2013. App. 1a-13a. The time for filing this petition was extended to November 29, 2013 by Justice Kennedy’s Order. No. 13A351 (Oct. 9, 2013). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The savings clause of the Truth in Savings Act, 12 U.S.C. § 4312, provides in pertinent part:

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

The full text of TISA, 12 U.S.C. §§ 4301-4313, effective to July 20, 2011, is reproduced at App. 44a-60a. The text of TISA's former Civil Liability

provision, 12 U.S.C. § 4310, effective to September 29, 2001, is reproduced at App. 61a-66a.

STATEMENT

This Court consistently has instructed that congressional foreclosure of private enforcement of a federal statute means that the statute may not be privately enforced either directly or indirectly. This instruction applies with equal force in state courts because the Supremacy Clause, U.S. Const. art. VI, cl. 2, requires state courts to adhere to federal law and effectuate Congress' intent. Finding that private enforcement of TISA created undue and unnecessary burdens on banks and regulators alike, Congress repealed TISA's civil liability provision, evidencing Congress' judgment that TISA should be enforced by federal banking regulators alone and not through private lawsuits.

Nonetheless, the California Supreme Court authorized indirect private enforcement of TISA through a private action under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, which borrows violations of other statutes by making them actionable under the UCL. This does exactly what the Supremacy Clause and this Court's precedents forbid: it overrides congressional intent to foreclose private enforcement of a federal statute. The decision—which conflicts profoundly with federal law, including this Court's precedents—will contravene congressional intent and

have significant consequences that reach far beyond the private enforcement of TISA in California.

A. The Federal Truth In Savings Act

TISA was enacted as part of the Federal Deposit Insurance Corporation Improvement Act of 1991 to “require the clear and uniform disclosure of ... the rates of interest which are payable on [, ...] and the fees that are assessable against [, consumer] deposit accounts.” Pub. L. 102-242, § 262, 105 Stat. 2236 (1991) (codified at 12 U.S.C. §§ 4301 *et seq.*).

As originally enacted, TISA contemplated two types of enforcement—administrative and private. The “Administrative Enforcement” provision, 12 U.S.C. § 4309, provides that TISA “shall be enforced under— (1) Section 1818 of this title by the appropriate Federal banking agency.” Section 1818, in turn, gives broad enforcement authority to federal banking agencies and prescribes procedures—including notice and hearings—for administrative enforcement. Federal banking agencies may, among other things: issue cease-and-desist orders for violations (§ 1818(b)-(d)); require parties to “make restitution or provide reimbursement, indemnification, or guarantee against loss” (§ 1818(b)(6)); apply to United States district courts for the enforcement of their orders (§ 1818(i)); and

impose civil and criminal penalties (§ 1818(i)). 12 U.S.C. § 1818 (2008) (amended 2010).¹

TISA, as originally enacted, also provided for private enforcement. TISA's "Civil Liability" provision, former § 4310, permitted individual account holders to sue in both state and federal court for TISA violations and obtain "actual damages," civil penalties in "individual actions," and class damages subject to a cap. 12 U.S.C. § 4310 (1991) (repealed 1996).

Congress later concluded that private enforcement of TISA was unnecessarily burdensome for regulators and banks, and that unified agency enforcement was preferable.² In 1996, Congress passed an act repealing TISA's civil liability

¹ All of § 1818's administrative procedures remained in place when the statute was amended by the Consumer Financial Protection Act of 2010 ("CFPA"). Pub. L. 111-203, 124 Stat. 1376 (2010). The CFPA provides an additional method of agency enforcement by giving the Consumer Financial Protection Bureau—but not private individuals—the power to bring civil actions to enforce TISA's requirements. *See* 12 U.S.C. § 5564(a). The CFPA also permits state attorneys general to bring civil actions to enforce the CFPA or the Bureau's regulations in certain circumstances, if the state gives prior notice to the Bureau so the Bureau may intervene, remove the action to district court, or appeal any order or judgment arising from the action. 12 U.S.C. § 5552(b).

² *See infra* at 22-24.

provision, eliminating the private cause of action as of 2001 and leaving the administrative proceedings outlined in § 1818 as the only means of enforcing TISA. Pub. L. 104-208, § 2604(a), 110 Stat. 3009, 3009-470 (1996). In March 2001, six months before TISA's private right of action provision was to sunset, Congress reaffirmed its intent to bar private enforcement of the statute when it rejected the proposed "Truth in Savings Enhancement Act of 2001" (H.R. 1057, 107th Cong. (2001) (proposed)), which would have kept the civil liability provision in place. After 2001, therefore, "private parties may no longer sue for violations of TISA." *Schnall v. Amboy Nat. Bank*, 279 F.3d 205, 209 n.2 (3d Cir. 2002).

TISA includes a savings clause providing that TISA does not supersede state laws "relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency." 12 U.S.C. § 4312.

Soon after TISA was first enacted, California repealed its Financial Code provisions governing deposit account disclosure requirements, because they were ineffective to the extent they differed from TISA and because TISA "provide[d] adequate safeguards for consumers." 1993 Cal. Stats. ch. 107, §§ 1-3 (repealing former Cal. Fin. Code §§ 855, 865). After Congress repealed TISA's "Civil Liability"

section, California did not enact a new, TISA-like statute. Thus, California no longer has a law “relating to the disclosure of yields payable or terms for accounts,” of the type described in TISA’s savings clause. 12 U.S.C. § 4312.

B. The Underlying Allegations And The California Trial And Appellate Court Rulings

Respondents’ complaint asserted a single cause of action under the UCL. The issue here involves the UCL’s unlawful prong, which “borrows violations from other laws by making them independently actionable as unfair competitive practices.” *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003) (citation omitted). Any federal or state statute theoretically may serve as a predicate for a UCL unlawful claim *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1094 (Cal. 1998).

Respondents “ma[d]e clear that their [UCL] claim is solely based on alleged violations of TISA. They wr[ote], ‘This class action arises from Defendant’s violations of the Truth in Savings Act ... and its implementing Regulation DD [12 C.F.R. §§ 230.1 *et seq.* (2005)].’” App. 23a (quoting Respondents’ brief). Petitioner demurred, arguing that because Congress prohibited private enforcement of TISA, Respondents could not sue for TISA violations under the guise of a UCL claim. App. 32a-33a. The trial court sustained Petitioner’s demurrer and dismissed

Respondents' complaint, concluding that the UCL may not be used to "plead around" Congress' bar of private enforcement of TISA. App. 38a-39a. Respondents appealed to the California Court of Appeal.

The California Court of Appeal affirmed the dismissal, holding that Congress' repeal of TISA's civil liability provision meant that private parties may not sue for alleged TISA violations under the UCL's unlawful prong. App. 25a-26a. In reaching its conclusion, the court adhered to federal law by recognizing that Congress' intent regarding private enforcement was paramount and acknowledging that under federal law Congress' express rejection of private enforcement of a statute foreclosed both direct and indirect private enforcement. App. 24a-25a. Citing this Court's precedent, the Court of Appeal explained that "federal courts are reluctant to allow indirect lawsuits based on violations of federal law when Congress has not authorized it, because *such an action 'is in essence a suit to enforce the statute itself.'*" *Id.* (quoting *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1348 (2011)) (emphasis added). The Court of Appeal therefore held that allowing indirect private enforcement of TISA through a UCL claim would improperly circumvent congressional intent. App. 26a.

C. The California Supreme Court's Decision

The California Supreme Court rejected the Court of Appeal's view of federal law and held that a UCL claim may be based solely on an alleged TISA violation, despite Congress' repeal of TISA's private right of action provision and rejection of private enforcement of TISA. App. 13a.

Instead of adhering to this Court's precedents—which hold that Congress' intent to foreclose private enforcement of a federal statute bars indirect enforcement of that statute through another law that would borrow it as a predicate—the California Supreme Court reasoned that Respondents' claim was not barred because it enforced only the UCL, not TISA. And, instead of looking to Congress' specific intent to foreclose private enforcement of TISA, as reflected in its repeal of that statute's private right of action provision in favor of an administrative enforcement scheme, the California Supreme Court concluded that TISA's savings clause authorized Respondents' UCL claim.

On the private enforcement issue, the California Supreme Court concluded that Respondents' claim did not enforce TISA itself. App. 6a-7a. In reaching that conclusion, the court did not put the focus where it belonged—on *Congress'* intent regarding private enforcement of TISA. Instead, the court looked to the *California* legislature's intent “in enacting the UCL” to confer a right to bring suit and to provide

particular relief (restitution and injunctive relief) regardless of whether the predicate statute authorized private enforcement. App. 7a (“[A]s we have long recognized, it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs “specific power” to prosecute unfair competition claims.”) (citations omitted); App. 11a (“the UCL ... is meant to provide remedies *cumulative* to those established by other laws...”). Therefore, according to the California Supreme Court, a UCL claim predicated solely on alleged TISA violations does not constitute private enforcement of TISA. App. 7a.

The California Supreme Court also concluded that Respondents’ UCL claim was authorized by TISA’s savings clause. The court construed TISA’s savings clause broadly to cover all “private actions under state laws consistent with TISA” (App. 9a), despite the savings clause’s plain language which applies only to TISA-like state statutes “relating to the disclosure of yields payable or terms for accounts” (App. 5a-6a; 12 U.S.C. § 4312). The court reasoned that Congress, by not repealing the savings clause, “expressly permit[ted] private actions under state laws consistent with TISA,” and that the UCL was such a law. App. 9a, 5a.

REASONS FOR GRANTING THE PETITION

Review of the California Supreme Court’s decision allowing private enforcement of TISA is urgently

needed. That decision conflicts with established federal law and involves an exceptionally important legal issue with significant consequences.

First, the California court's holding that a UCL claim may be predicated solely on alleged TISA violations fundamentally conflicts with this Court's precedents and the settled federal law principle that there may be no indirect private enforcement of a federal statute when Congress has not expressed an intent to allow private enforcement. Here, Congress has clearly expressed its intent to foreclose private enforcement of TISA by: repealing TISA's civil liability provision; creating a comprehensive administrative enforcement scheme; and plainly stating its reasons for eliminating (and declining to restore) private enforcement.

The California Supreme Court, however, reasoned that it could disregard what Congress has said about private enforcement of TISA—including Congress' repeal of TISA's private right of action provision and rejection of efforts to revive it—because, in that court's view, TISA's savings clause authorizes private enforcement. But that reasoning incorrectly conflates two distinct questions: (1) whether TISA preempts state statutes regulating activities covered by TISA; and (2) whether Congress intended TISA to be privately enforced. As this Court has instructed, each must be answered separately, by looking at Congress' intent on two different issues: (1) did Congress authorize the States to enact and enforce

their own laws similar to a federal statute; and (2) did Congress authorize private enforcement of the federal statute?

TISA's savings clause is relevant only to the first question. It provides that the States may adopt their own laws "relating to the disclosure of yields payable or terms for accounts," to the extent that they do not conflict with TISA. 12 U.S.C. § 4312. Because California has not done so, TISA's savings clause does not apply here. And TISA's savings clause does not address the second question—the one implicated by Respondents' UCL claims—and does not override Congress' intent to foreclose private enforcement of TISA. *Rose's* reading of TISA's savings clause both misconstrues the statute's plain language in a consequential way and disregards Congress' intent on the issue of private enforcement.

Second, the California court's decision will have profound effects. As a result of *Rose*, individuals can bring suit in California based on TISA violations simply by proceeding indirectly under the UCL. Congress deliberately foreclosed private enforcement of TISA. *Rose* circumvents that clear congressional mandate and engenders the same problems Congress sought to avoid by repealing TISA's private right of action provision. *Rose's* impact on TISA in California alone is good reason for review.

Moreover, *Rose* threatens even broader repercussions. Invoking *Rose's* reasoning, plaintiffs will be able to predicate UCL causes of action on a

host of other federal statutes and regulations, even when Congress did not intend that they be privately enforced. Creating further conflict and adding further complication, such claims will face a different fate when brought in federal court than when brought in California state court because federal courts will be bound by this Court's precedents, not *Rose*, on the question of whether the UCL can be used as a means to indirectly enforce those federal statutes.

Finally, *Rose*'s reasoning provides a roadmap for courts in other States to use their state consumer protection statutes as a vehicle for private enforcement of federal statutes and regulations, regardless of congressional intent regarding their private enforcement.

In sum, the need for this Court's review is immediate and acute. *Rose* involves a manifestly important legal question, which the California Supreme Court answered in a way that substantially conflicts with this Court's precedents and circumvents the will of Congress regarding private enforcement of federal statutes. Granting review will allow this Court to intervene to prevent plaintiffs from using the California UCL and other state laws to privately enforce TISA and other similar federal statutes—notwithstanding Congress' silence on, and even express intent to foreclose, private enforcement of those statutes.

I. The California Supreme Court's Decision Conflicts With This Court's Precedents

This Court's settled jurisprudence instructs that, unless Congress has expressed an intent to authorize private enforcement, a federal statute may not be privately enforced either directly or indirectly. Congress has barred private enforcement of TISA. TISA's savings clause does not override that clear congressional intent. The California Supreme Court's decision contravenes federal law and Congress' intent regarding private enforcement by allowing Respondents to enforce TISA via the UCL.

As an initial matter, there can be no doubt that the California court decided a question of federal law. The central issue—whether Congress' foreclosure of private enforcement of TISA bars indirect private enforcement—is a federal law question. *See Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (whether to allow private enforcement of a federal statute depends on the intent of Congress); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (statutory intent on private enforcement is determinative).³

³ Indeed, the California Supreme Court expressly said that it was construing congressional intent and purported to apply this Court's precedents. App. 5a-6a.

A. The California Supreme Court's Decision Conflicts With The Settled Principle Of Federal Law That Federal Statutes May Not Be Privately Enforced Unless Congress Authorized Private Enforcement

It is up to Congress to decide whether the laws it enacts may be privately enforced. *Alexander*, 532 U.S. at 286. A federal statute may be privately enforced only if Congress intended to create both (1) a right, not just a benefit, for a particular class of people; and (2) a private remedy. *Alexander*, 532 U.S. at 286; *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002).

Congressional intent is the touchstone with respect to both direct enforcement of a federal statute and indirect enforcement of the statute via another provision of law. *See Alexander*, 532 U.S. at 286-87 (in the absence of congressional intent, courts may not authorize private enforcement “no matter how desirable that might be as a policy matter, or how compatible with the statute”); *Gonzaga* 536 U.S. at 283-85. *Rose* contravenes Congress’ intent that TISA should not be privately enforced.

A federal statute may not be enforced directly through a private civil action unless Congress’ intent to authorize private enforcement is apparent from the statute itself. That intent is clear when Congress has included in the statute an express private right of action provision, such as TISA’s former § 4310.

Or Congress' intent can be implicit in the text and structure of the statute. Either way, Congress' intent is "determinative" and the statute itself is the beginning and end of the search for congressional intent. *Alexander*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Sea Clammers*, 453 U.S. at 13 ("The key to the inquiry is the intent of [Congress]."); *Astra*, 131 S.Ct. at 1347 ("Recognition of any private right of action for violating a federal statute ... must ultimately rest on congressional intent to provide a private remedy.") (internal quotation marks, citation, and alteration omitted).

Where a statute does not contain an express private right of action provision, it may implicitly authorize direct private enforcement, but only where the language and structure of the statute manifest a congressional intent both to confer a right on a particular class of persons and to create a private remedy. *Alexander*, 532 U.S. at 286. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander*, 532 U.S. at 289 (internal quotation marks and citations omitted); *Gonzaga*, 536 U.S. at 284 n.3 ("where a statute does not include ... explicit 'right- or duty- creating language,' we rarely impute to Congress an intent to create a private right of action"). And the "express provision

of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *Alexander*, 532 U.S. at 290.

TISA does not contain an express private right of action provision; Congress repealed it. And TISA does not implicitly authorize direct private enforcement because its text and structure do not manifest an intent to confer a right or create a private remedy. As for the rights inquiry, TISA focuses on the persons regulated—*i.e.*, banks—and its directives deal with what banks are required to do. *See, e.g.*, 12 U.S.C. §§ 4302(a) (“each advertisement, announcement, or solicitation initiated by any depository institution or deposit broker ... shall state the following information ... in a clear and conspicuous manner”); 4303 (“Each depository institution shall maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the depository institution, in accordance with the requirements of this section and regulations which the Bureau shall prescribe.”). TISA, therefore, does not manifest “an intent to confer rights on a particular class of persons.” *Alexander*, 532 U.S. at 289; *Gonzaga*, 536 U.S. at 284 n.3.

As for the remedy inquiry, TISA contains an administrative enforcement provision, 12 U.S.C. § 4309, but no private enforcement provision, indicating that Congress did not intend to create a

private remedy. Thus, TISA may not be directly enforced.

Nor may TISA be indirectly enforced. Indirect private enforcement, like direct private enforcement, is authorized only if Congress has expressed an intent both to confer a right and to create a private remedy. See *Gonzaga*, 536 U.S. at 285-86. Congressional intent to confer a right still must be found in the statute itself, but the intent to create a remedy may be found in a different statute—one serving as a vehicle for indirect enforcement of the predicate statute. *Id.*

Section 1983 is the paradigmatic example of a statute providing a vehicle for indirect enforcement of another statute. 42 U.S.C. § 1983. It creates a private remedy to enforce the rights created in other federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). This Court, however, has clearly instructed that § 1983 creates a remedy for violations of other statutes only where the predicate statute, on its own terms, confers rights on a class of beneficiaries. *Gonzaga*, 536 U.S. at 285 (“the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry” regarding direct enforcement); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005) (no § 1983 indirect enforcement of the Telecommunications Act of 1996 (TCA), 47 U.S.C. § 332(c)(7), because the TCA did not create an “individually enforceable right”); *Gonzaga*, 536 U.S. at 285 (no § 1983 indirect

enforcement of the federal Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, because it creates no individual right).

This Court also has explained that—because § 1983 expressly creates a private remedy—there is a presumption that it can be used to enforce any federal rights-creating statute. *Gonzaga*, 536 U.S. at 285. However, that presumption is overcome—and § 1983 cannot be used to enforce a federal statute—where Congress has manifested its intent to foreclose indirect private enforcement of the predicate statute. *Sea Clammers*, 453 U.S. at 19. As with direct enforcement, deference to congressional intent is strictly required. *Rancho Palos Verdes*, 544 U.S. at 124 (“limitations upon the remedy contained in the [predicate] statute are deliberate and are not to be evaded through § 1983”).

This Court’s decision in *Sea Clammers* illustrates both the legal principle and the reason for it. 453 U.S. 1. In addressing whether the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401 *et seq.* may be indirectly enforced through a § 1983 claim, this Court first held that Congress’ creation of elaborate enforcement provisions meant that Congress had not implicitly authorized *direct* enforcement. 453 U.S. at 14-15. Then, this Court went on to hold that § 1983 could not be used to enforce the statutes *indirectly* because “the existence of [the statutes] express

remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983.” *Id.* at 21.

In short, although Congress has authorized the indirect enforcement of federal statutes via § 1983, indirect enforcement of a statute is not authorized if “Congress did not intend [a private] remedy for ... [the] right [created by the statute],” and Congress’ intent to bar indirect enforcement often is clear from “the statute’s creation of a ‘comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.’” *Rancho Palos Verdes*, 544 U.S. at 120 (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

With even greater emphasis, this Court has instructed that a *state* law cause of action may not be used to indirectly enforce a federal statute where Congress has not authorized private enforcement. For example, in *Astra USA, Inc. v. Santa Clara County*, this Court held that a private party could not indirectly enforce § 340B of the Public Health Services Act, 42 U.S.C. § 256b, through a state law breach of contract claim. 131 S.Ct. 1342, 1345 (2011).

In *Astra*, public hospitals and community health centers sought to sue a drug manufacturer based on allegations that it was charging them prices higher than permitted under § 340B. *Id.* at 1345. The

defendant manufacturer had opted into the § 340B program by entering into a contract with the federal government (a “Pharmaceutical Pricing Agreement,” or PPA) to supply pharmaceuticals to the health centers at prices determined by a statutory formula. *Id.* at 1346. The health centers—which conceded that there was no private right of action under § 340B—sued under a state law contract theory, basing their claims entirely on “allegations that the manufacturers charged more than the § 340B ceiling price.” *Id.* at 1347-48.

This Court held that the plaintiff health centers could not indirectly privately enforce the provisions of the statute by bringing state law claims. *Id.* at 1345. This conclusion was based on a pragmatic assessment of what the lawsuit actually alleged and the legal foundation on which it actually rested. As this Court explained, because health centers may not sue under the statute, “it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute.” *Id.* at 1345. This Court recognized that the contract claim was “in essence a suit to enforce the statute itself,” explaining: “Though labeled differently, suits to enforce § 340B and suits to enforce PPAs are in substance one and the same. Their treatment, therefore, must be the same, no matter the clothing in which [the plaintiffs] dress their claims.” *Id.* at 1345, 1348.

The result should have been the same here for the same reasons. An examination of TISA's text and structure shows that Congress did not intend for TISA to be privately enforced at all. In TISA, Congress enacted a comprehensive regulatory scheme and granted federal banking agencies broad remedial power to address TISA violations. *See supra* at 4-7. As this Court put it in *Sea Clammers*, "[i]n view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under" the federal statute. *Sea Clammers*, 453 U.S. at 14.

Congress' intent to foreclose private enforcement of TISA also is evident in Congress' affirmative decision to repeal TISA's private right of action provision, as well as its subsequent rejection of attempts to restore it. Repeal of a statutory provision constitutes an affirmative act; it is not equivalent to legislative silence. *Hamdan v. Rumsfeld*, 548 U.S. 557, 558 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation."); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 96 (1935) (rejection of amendment is a "circumstance to be weighed along with others" in statutory interpretation).

The reasons Congress repealed TISA's civil liability provision—namely, to eliminate unnecessary

burdens on banks and regulators and to leave enforcement solely in the hands of agencies in order to promote uniformity and avoid inconsistent enforcement through conflicting judicial decisions—underscore Congress' intent to foreclose any private enforcement and illuminate why any private enforcement would undermine Congress' objectives.

The repeal was simultaneously proposed in each house of Congress to implement a unified, less burdensome administrative enforcement scheme for TISA. See Financial Institutions Regulatory Relief Act of 1995 ("the House Bill") H.R. 1362, 104th Cong. (1st Sess. 1995); Economic Growth and Regulatory Paperwork Reduction Act of 1995 ("the Senate Bill") S. 650, 104th Cong. (1st Sess. 1995). The House Report on the House Bill explained that the civil liability provision was being repealed in order to lessen the burden on regulatory agencies responsible for implementing the statute. H.R. Rep. No. 104-193, at 104 (1995) ("The imposition of civil liability for violation of the TISA has resulted in financial institutions seeking numerous clarifications and commentaries from the Federal Reserve Board increasing the regulatory burden for both the industry and the Board."). The report further explained that TISA's civil liability provision was being repealed to lessen this burden, while leaving federal banking agencies the "authority to take administrative actions to enforce TISA." *Id.* Similarly, the Senate Committee on Banking, Housing, and Urban Affairs' report on the Senate Bill

explained that the repeal was meant to provide “an administrative enforcement scheme” for TISA as an effort to reduce the unnecessary regulatory burden and attendant liability facing banks. S. Rep. No. 104-185, at 21 (1995).

Thus, Congress has expressly considered and foreclosed private enforcement of TISA, in favor of a comprehensive administrative enforcement scheme. See *Doe v. Chao*, 540 U.S. 614, 615 (2004) (concluding that a certain category of damages could not be awarded under the Privacy Act where the “drafting history shows that Congress cut out the very language in the bill that would have authorized such damages”); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of provision in committee “strongly militates against a judgment that Congress intended a result that it expressly declined to enact”).

Allowing indirect private enforcement—as *Rose* does—frustrates Congress’ intent to permit only agency enforcement of a federal statute. For example, this Court recognized in *Astra* that allowing individual private suits, “[f]ar from assisting” the administrative agency “would undermine the agency’s efforts to administer both Medicaid and § 340B harmoniously and on a uniform, nationwide basis,” because they “could spawn a multitude of dispersed and uncoordinated lawsuits.” 131 S.Ct. at 1349. This result was to be avoided—even though the Department of Health and Human Services could

not meet its enforcement burden. *Id.* at 1349-50. Despite evidence of insufficient enforcement resources, this Court declined to infringe on Congress' policymaking function. It was enough simply to note that "Congress did not respond to the reports of inadequate ... enforcement by inviting [health centers] to launch lawsuits in district courts across the country." *Id.* at 1350.

The same considerations hold true here. The repeal of TISA's private right of action provision demonstrates that Congress intended to halt the multiplicity of private TISA-based lawsuits in favor of administrative enforcement, and for similar reasons. Compare *id.* at 1349 (permitting private lawsuits would undermine administration of the statute and "spawn a multitude of dispersed and uncoordinated lawsuits") with H.R. Rep. No. 104-193, at 104 (1995) ("The imposition of civil liability for violation of the TISA has resulted in financial institutions seeking numerous clarifications and commentaries ... increasing the regulatory burden for both the industry and the Board.") and S. Rep. No. 104-185, at 21 ("In light of the fact that ... the requirements of TISA compliance present a variety of potential technical pitfalls, and attendant liability ..., the Committee decided to amend the law so that it would have an administrative remedial enforcement scheme.").

Just as "Congress vested authority to oversee compliance with the 340B Program in HHS and

assigned no auxiliary enforcement role to covered entities,” *Astra*, 131 S.Ct. at 1347, Congress vested authority to oversee compliance with TISA in federal banking agencies, and it explicitly revoked the role that previously had been assigned to private litigants. 12 U.S.C. § 4309; 12 U.S.C. § 1818.

Private suits are not permissible just because they might encourage compliance with a federal statute. “[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law” because “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). As this Court explained in *Astra*, “[t]he absence of a private right to enforce the statutory ceiling price obligations would be rendered meaningless if [health centers] could overcome that obstacle by suing to enforce the contract’s ceiling price obligations instead.” *Astra*, 131 S.Ct. at 1348.

That is precisely what happened here—*Rose* renders TISA’s administrative-enforcement-only regime meaningless. The California Supreme Court justified its decision by reasoning that Respondents’ UCL claim enforced the UCL, not TISA. But, just as in *Astra*, Respondents’ claim was based entirely on an alleged failure to comply with a federal statute. It would make “scant sense” to permit plaintiffs to sue

under the UCL, based solely on allegations of TISA violations. *See Astra*, 131 S.Ct. at 1345.⁴

Ultimately, congressional intent is the touchstone on the indirect enforcement question. If Congress has not expressed an intent to authorize private enforcement of a statute, there may be no indirect enforcement via another law that borrows the federal statute as a predicate. And surely, where Congress has expressed its intent to bar private enforcement of federal statute, as it has here, indirect private enforcement is barred as well. Congress unequivocally declared its intent to foreclose private suits to enforce TISA when it repealed TISA's civil liability section in favor of enforcement solely through a comprehensive administrative scheme. That express intent means that there can be no indirect private enforcement of TISA—including using TISA as the predicate for a claim under the UCL's unlawful prong.

⁴ Unlike federal law, the California Supreme Court takes the position that a UCL unlawful prong claim does not enforce the predicate statute. *Stop Youth Addiction*, 950 P.2d 1086. That court also takes the position that a state statute may serve as a predicate for a UCL claim unless the California legislature has expressly said otherwise. *Id.* But—because Respondents' UCL claim is predicated solely on TISA, just as the *Astra* plaintiffs' state law contract claims were predicated solely on Public Health Services Act § 340B—those California state law principles are not controlling and cannot override federal law or congressional intent on private enforcement.

The Supremacy Clause requires adherence to Congress' clear intent, which under this Court's precedents forecloses indirect private enforcement of TISA through a UCL claim. Yet, the California Supreme Court held that such a claim was authorized.

B. The California Supreme Court's Conclusion That TISA's Savings Clause Overrides Congress' Specific Intent To Bar Private Enforcement Of TISA Conflicts With Federal Law

The California Supreme Court purported to rely on TISA's savings clause to find congressional intent to allow indirect enforcement of TISA via the UCL. That reasoning, however, creates yet further conflict with federal law. As discussed below, TISA's savings clause does not override Congress' manifest intent to bar private enforcement of TISA.

On its face, the savings clause has nothing to do with private enforcement of TISA. *Rose* conflates two separate questions: what did Congress intend regarding state laws covering the same subject matter as TISA; and what did Congress intend regarding private enforcement of TISA itself? TISA's savings clause is relevant only to the first question, and it does not authorize indirect private enforcement via state law causes of action in the face of Congress' foreclosure of private suits.

The California Supreme Court's reasoning is anchored on a misconstruction of TISA's savings clause. The court began by observing 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 ... except to the extent that those laws are inconsistent with [TISA]'" App. 5a (quoting 12 U.S.C. § 4312). That is correct. But the court went astray when it concluded "[t]he UCL is just such a state law." *Id.*

An examination of the plain text of TISA's savings clause shows the court's error. TISA's savings clause permits the States to enact consistent state legislation governing the same subject matter covered by TISA—that is, state legislation "relating to the disclosure of yields payable or terms" for consumer bank accounts. 12 U.S.C. § 4312. But California has no such legislation—indeed, it repealed its own TISA-like statute. And the UCL is not a statute relating to the disclosure of yields payable or terms for accounts—and thus does not fall within the ambit of TISA's savings clause.

The California Supreme Court invoked *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), to support its reading of TISA's savings clause. App. 6a. But *Bates*' holding depends on the very distinction the California court ignored: the difference between a state law claim enforcing a federal statute and a state law claim enforcing a

State's statutory or common law requirements that parallel the federal statute.

In *Bates*, this Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*—which imposes environmental and labeling requirements—preempted farmers' state common law and statutory claims for damages to their peanut crops. 544 U.S. 431. Unlike this case and *Astra*, *Bates* did not involve state law claims to enforce a federal law. The farmers in *Bates* asserted state law claims to vindicate state-law and common-law rights. They did not claim that the defendant violated FIFRA (*id.* at 456, Thomas, J. concurring in part and dissenting in part)—unlike Respondents here and the plaintiffs in *Astra*, who brought claims based solely on alleged violations of federal statutes.

FIFRA's savings clause, like TISA's, allowed the States to regulate in the same area as the federal statute, provided the regulations did not conflict with or add to the federal requirements.⁵ Before

⁵ FIFRA's preemption and savings clauses provided that a "State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by" FIFRA, and they prohibited states from imposing "any requirements for labeling or packaging in addition to or different from those" in FIFRA. 7 U.S.C. § 136v(a)-(b).

considering whether the farmers' claims were preempted, this Court first determined whether they fell within the scope of FIFRA's savings and preemption provisions. *Id.* at 442. This Court found that it was "beyond dispute" that FIFRA's savings and preemption provisions applied because "Texas ... regulates the sale and use of federally registered pesticides...." *Id.* at 432.

Bates then held that, given FIFRA's savings clause, FIFRA did not preempt consistent state laws governing insecticides. *Id.* at 445-46. Likewise, FIFRA did not preempt claims under state laws providing a "traditional damages remedy for violations of *common-law duties* when those duties parallel federal requirements." *Id.* at 447 (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 495 (1996)) (emphasis added). But *Bates* also held that the savings clause did not permit States to create remedies for breaches of duties *created by the federal statute* itself. *See id.* at 453 (holding that claims would be preempted if they imposed labeling and packaging requirements that were not rooted in state statutory or common law, or that conflicted with FIFRA's requirements); *see also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352-53 (2001) (distinguishing between state law claims based on state laws "that parallel federal safety requirements," which are permitted, and state law claims based solely on alleged violations of a federal statute, which are not permitted).

The California Supreme Court was correct, therefore, when it found that claims may be predicated on "California statutes that simply adopt federal requirements." App. 5a. That was one of the holdings of *Bates*. But Respondents' UCL claim was not predicated on a California statute adopting TISA's requirements.⁶ Nor did it seek traditional damages for a violation of a common law duty that paralleled TISA's requirements. Instead, Respondents' claim was predicated solely on alleged violations of TISA itself. As explained above, that is forbidden by federal law. The California intermediate appellate court recognized this and followed this Court's direction not to permit "indirect lawsuits based on violations of federal law when Congress has not authorized it, because such an action 'is in essence a suit to enforce the statute itself'" App. 24a (quoting *Astra*, 131 S.Ct. at 1348).

The California Supreme Court, by contrast, reasoned that the lack of a state law predicate did not matter because "the California Legislature could have provided a private right of action in a statute

⁶ Unlike California's UCL, the Texas statute relied upon by the farmers in *Bates* does not borrow other statutes as predicates for liability. Tex. Bus. & Com. Code, § 17.43 ("violation of a provision of law other than this subchapter is not in and of itself a violation [unless] the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter").

otherwise identical to TISA.” App. 5a. But to say that the California legislature *could* enact a TISA-like statute is decidedly different than saying that it *has* enacted such a statute.⁷ It has not. Thus, the California Supreme Court read the savings clause too broadly when it concluded that it authorized Respondents’ UCL claim. The savings clause permits private actions only under state laws “relating to the disclosure of yields payable or terms for accounts” that are consistent with TISA. 12 U.S.C. § 4312. The UCL is not such a law.

The California Supreme Court’s misreading of TISA’s savings clause stemmed from its erroneous view that the savings clause expressed Congress’ intent on the question of indirect private enforcement of TISA. App. 5a. A savings clause addresses only whether Congress authorized the States to enact their own laws similar to a federal statute, not whether Congress intended to authorize private enforcement of the federal statute.

Rose flouts the distinction between these two questions that this Court recognized in *Sea Clammers*. There, this Court ruled that the

⁷ Importantly, California’s enforcement of its own TISA-like statute would not implicate the negative consequences Congress sought to resolve by repealing TISA’s private action provision, namely inconsistent *TISA law* and the concomitant burden on federal banking agencies.

CWA and the MPRSA could not be indirectly enforced through § 1983. *Sea Clammers*, 453 U.S. at 18. Two justices argued in dissent that the statutes' savings clauses authorized indirect enforcement. *Id.* at 29-30 (Stevens, J., dissenting). The majority responded that "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." *Id.* at 20 n.31. The text of the savings clauses (preserving "any right which any person ... may have under any statute or common law or to seek ... any other relief") made clear that Congress intended "to allow further enforcement of antipollution standards arising under *other* statutes or state common law"—not to allow indirect enforcement of the CWA or the MPRSA standards themselves. *Id.* As in this case, the savings clauses preserved enforcement of other statutes, but did not permit a plaintiff to indirectly enforce the statutes in question when Congress clearly did not intend for private enforcement. *See id.* ("We therefore, are not persuaded that the saving clauses limit the effect of the overall remedial schemes provided expressly in the [statutes] [W]e think it clear that those express remedies preclude suits for damages under § 1983, and that the saving clauses do not require a contrary conclusion.").

Thus, the California Supreme Court missed the mark when it broadly construed Congress' decision to leave TISA's savings clause intact as authorizing private actions indirectly enforcing TISA.

See App. 9a. TISA's savings clause means that Congress left the States free to enact their own statutes imposing requirements consistent with TISA and to enforce those statutes as they see fit. But TISA's savings clause does not authorize indirect private enforcement of TISA itself through a UCL cause of action.

In sum, the California Supreme Court's decision cannot be reconciled with controlling federal law. As explained above, federal law forbids indirect private enforcement of a statute when Congress has manifested its intent to bar private enforcement, and TISA's savings clause does not cover claims to enforce TISA under the UCL. As the California Court of Appeal held, allowing such a suit constitutes an impermissible "end run" around the limits Congress set on who may enforce TISA, as well as the reasons for those limits. App. 26a. The California Supreme Court authorized that end run by holding that Respondents may assert a UCL claim based solely on alleged TISA violations, notwithstanding Congress' judgment that TISA should not be privately enforced. This Court's review, therefore, is urgently needed.

II. The California Supreme Court's Decision Involves An Exceptionally Important Issue And There Is An Immediate And Urgent Need For Review

The problems engendered by *Rose* are manifest and may be widespread. The opinion is likely to have

a disruptive effect on TISA and other federal statutes both in California and elsewhere.

Allowing UCL claims based on TISA undermines Congress' judgment when it repealed TISA's civil liability provision. Congress repealed TISA's private right of action to implement a unified and comprehensive administrative enforcement scheme to lessen the burden on the regulatory agencies and the industry. H.R. Rep. No. 104-193, at 104 (1995). *See supra* at 22-24.

Indirect private enforcement of TISA will impose the same unnecessary burdens and also inevitably will lead to inconsistent enforcement as a result of conflicting judicial decisions. Exposing financial institutions to the risk of private civil suits under the UCL for technical violations of TISA and its implementing regulation will invariably cause them to seek guidance from federal regulators, frustrating Congress' purpose in repealing TISA's civil liability provision.

Moreover, UCL claims based on federal statutes will be treated differently in California state court than they are in federal court because *Rose* departs from federal law. This inevitable conflict will arise because federal courts will be bound by this Court's precedents, not *Rose*, on the question of whether the UCL can be used to indirectly enforce a federal statute. The Ninth Circuit does—and must—adhere to this Court's precedents holding that federal statutes cannot be privately enforced indirectly if

doing so frustrates Congress' intent regarding private enforcement. *See, e.g., Almond Hill School v. U.S. Dep't of Agriculture*, 768 F.2d 1030, 1035, 1038 (9th Cir. 1985) (relying on *Sea Clammers* and holding no indirect enforcement of FIFRA through a claim under § 1983); *Vinson v. Thomas*, 288 F.3d 1145, 1155 (9th Cir. 2002) (citing *Sea Clammers* and holding no indirect private enforcement of the ADA and Rehabilitation Act through a claim under § 1983). Federal district courts in California likewise have adhered to federal law and rejected efforts to base UCL claims on federal statutes when Congress has foreclosed private enforcement. *Hartless v. Clorox Co.*, No. 06CV2705, 2007 WL 3245260, *3-4 (S.D. Cal. Nov. 2, 2007) (plaintiff may not maintain UCL claim based on FIFRA because Congress considered and rejected private actions to enforce FIFRA); *Banga v. Allstate Ins. Co.*, No. S-08-1518, 2010 WL 1267841, *3 (E.D. Cal., Mar. 31, 2010) ("violation of [a section of the Fair Credit Reporting Act] cannot serve as the predicate for a UCL claim" because that section contains "a bar to private suit"). And at least one federal court already has relied on this Court's guidance to hold that Congress' repeal of TISA's private right of action bars indirect private enforcement of TISA. *Gunther v. Capital One, N.A.*, 703 F. Supp. 2d 264, 270-71 (E.D.N.Y. 2010) ("to permit a breach of contract suit based on TISA's substance would frustrate Congress's express indication that TISA be enforced exclusively by public entities" and "would impermissibly undermine Congress's expressed intent that TISA be enforced by

a regulatory agency and not private citizens"). If *Rose* remains the law in California, the conflict between state and federal law will make the forum outcome determinative, encouraging strategic forum shopping.

Rose also opens the door to indirect enforcement of other federal statutes through the UCL, regardless of whether Congress intended to authorize their private enforcement. Many federal statutes reflect Congress' intent not to authorize their private enforcement. And many of those statutes contain savings clauses like TISA's. If *Rose* stands, private litigants will be able to enforce a broad range of federal statutes through a UCL cause of action, including the following:

- Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b)(1)(E) (permitting disclosure of educational information to "authorities to whom such information is specifically allowed to be ... disclosed pursuant to State statute"); *Gonzaga*, 536 U.S. at 290 (FERPA does not create a private right of action);
- Securities Exchange Act of 1934, 15 U.S.C. § 77r(c) ("the securities commission ... of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions"); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (no

private damage remedy under § 17(a) of the Securities Exchange Act);

- Occupational Safety and Health Act (OSHA), 29 U.S.C. § 653(b)(4) (“[n]othing in this chapter shall be construed to supersede or in any manner affect any workmen’s compensation law or to ... affect ... the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment”); *Taylor v. Brighton Corp.*, 616 F.2d 256, 258-64 (6th Cir. 1980) (no implied private damage remedy under OSHA’s retaliation provision);
- Protecting Tenants at Foreclosure Act (PTFA), 12 U.S.C. § 5220(d) (“[t]he requirements of this section shall not supersede any other duty or requirement imposed on the Federal property managers under otherwise applicable law”); *Logan v. U.S. Bank Nat’l Ass’n*, 722 F.3d 1163, 1173 (9th Cir. 2013) (“Because we cannot infer a congressional intent to create a private right of action from the language of the statute, the statutory structure, or any other source, ‘the essential predicate for implication of a private remedy simply does

not exist”) (quoting *Thompson v. Thompson*, 484 U.S. 174, 179 (1988));

- Investment Advisors Act of 1940, 15 U.S.C. § 80b-18a(a) (“[n]othing in this subchapter shall affect the jurisdiction of the securities commissioner ... of any State”); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (no private cause of action for damages under the Investment Advisors Act);
- Wilderness Act of 1964, 16 U.S.C. § 1133(d)(6) (“Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws”); *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F. 3d 751, 758 (8th Cir. 2009) (the Wilderness Act does not create a private right of action);
- Endangered Species Act, 16 U.S.C. § 1535(f) (state law is void only to the extent it conflicts with the Act, which “shall not otherwise be construed to void any State law or regulation which is intended to conserve ... wildlife”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (there is no individual right to enforce federal environmental law in the public interest: only the executive branch has standing to enforce the law).

For any of these statutes—and all others where Congress included a savings clause but did not permit private enforcement—*Rose* paves the way for California courts to functionally override Congress' judgment that there should be no private enforcement merely by pointing to the statute's savings clause.

What is more, the problems engendered by *Rose* could spread beyond California. Other state courts could avoid Congress' foreclosure of private enforcement by adopting *Rose's* reasoning and authorizing private enforcement of a federal statute through their consumer protection statutes.⁸ For example, violations of "Federal consumer protection statutes" constitute violations of the Massachusetts state consumer protection statute. *Barnes v. Fleet Nat. Bank, N.A.*, 370 F.3d 164, 176 (1st Cir. 2004)

⁸ Many states have enacted broad consumer protection statutes similar to the UCL. See, e.g., Alaska Stat. § 45.50.471; Conn. Gen. Stat. § 42-110b; Fla. Stat. § 501.204; Ga. Code § 10-1-393; Haw. Rev. Stat. § 480-2(a); 815 Ill. Comp. Stat. 505/2; Iowa Code § 714.16; La. Rev. Stat. § 51:1405; Me. Rev. Stat. tit. 5, § 207; Md. Code. Com. Law. II, § 13-101; Mass. Gen. Laws ch. 93A, § 2(a); Miss. Code § 75-24-5; Mo. Rev. Stat. § 407.020(1); Mont. Code § 30-14-103; Neb. Rev. Stat. § 59-1602; N.C. Gen. Stat. § 75-1.1; Ohio Rev. Code § 1345.02; Okla. Stat. tit. 15, § 752(14); 73 Pa. Cons. Stat. § 201-3; R.I. Gen. Laws § 6-13.1-2; S.C. Code § 39-5-20; Tenn. Code § 47-18-104; Vt. Stat. tit. 9, § 2453(a); Wash. Rev. Code § 19.86.020; W.Va. Code § 46A-6-104; Wis. Stat. §§ 421-429.

(holding that, before the repeal of TISA's private right of action provision, violation of TISA is a *per se* violation of Massachusetts consumer protection statute) (citing Mass. Gen. Laws ch. 93A, § 2(a), and 940 Mass. Code Regs. 3.16(4)). If Massachusetts adopted *Rose's* reasoning, Massachusetts plaintiffs could sue to privately enforce TISA by invoking the state consumer protection law regardless of the repeal of TISA's private right of action.

Because substantial harm will result in California if *Rose* is allowed to stand and elsewhere if the California Supreme Court's reasoning is followed, there is an immediate need for this Court to set things right.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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