No. 21-10948

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARLOS ALFARO, *et al.*,

Plaintiffs-Appellants,

v.

BANK OF AMERICA, N.A., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
No. 1:19-cv-22762
Hon. Marcia G. Cooke

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC. SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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July 8, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-2, amicus curiae Public Citizen provides the following list of the persons and entities that have or may have an interest in the outcome of this case and have not been identified in the earlier-filed briefs:

- Joshi, Nandan M. – counsel for Amicus Curiae
- Public Citizen, Inc. – Amicus Curiae
- Public Citizen Litigation Group – law firm for Amicus Curiae
- Zieve, Allison M. – counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amici curiae Public Citizen, Inc. is a non-profit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

/s/ *Nandan M. Joshi*
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STATEMENT OF THE ISSUE

Whether the Truth in Savings Act (TISA), 12 U.S.C. § 4301 *et seq*., or its implementing regulation, Regulation DD, 12 C.F.R. pt. 1030, preempts breach-of-contract and related state-law claims.

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal appellate courts.

Public Citizen has a longstanding interest in fighting broad claims that federal regulation preempts state laws that protect consumers.

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party. No party or party's counsel, and no person other than the amicus curiae, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

Public Citizen has accordingly participated as amicus curiae to oppose preemption arguments made by companies operating in a range of industries. *See*, *e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019); *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021); *Cartee v. Boehringer Ingelheim Pharm., Inc.*, No. 21-10305 (11th Cir. pending).

In this case, Bank of America argues that TISA and Regulation DD preempt claims alleging that Bank of America improperly charged its depositors international transactions fees that, under its customer agreement, the bank lacked authority to charge. Public Citizen is concerned that, if accepted by this Court, Bank of America's expansive view of TISA preemption will unduly curtail application of state laws, including state contract law, that govern the legal relationship between a bank and its customers and, in that way, will deny customers the ability to obtain redress when banks breach their contracts to their customers' detriment or violate their state-law obligations to their customers.

SUMMARY OF ARGUMENT

I. Congress enacted TISA both to promote competition among banks and to strengthen consumers' ability to make informed choices about their deposit accounts. To that end, TISA requires a bank to disclose the interest rates and fees for each type of deposit account it offers. Under Regulation DD, a bank's disclosures must reflect the terms of the legal obligation of the account agreement between the bank and its customers. With one exception not relevant here, neither TISA nor Regulation DD regulate the terms of a bank's agreements or the promises that a bank may make to customers.

TISA expressly preserves state laws relating to disclosures of interest and fees on deposit accounts, except to the extent—and only to the extent—that state law is inconsistent with TISA. The federal agencies responsible for implementing TISA have stated that state law is inconsistent with TISA if it contradicts the statute or Regulation DD. Under this standard, where the bank remains able to comply with both state and federal law, state law is not preempted solely because it imposes different or additional disclosure requirements on banks.

II. In this case, the plaintiffs' breach-of-contract and other contract-related claims are not preempted by TISA or Regulation DD. TISA does not regulate the promises that a bank makes its customers about the fees it will charge, and it does not prohibit state contract law from holding banks to their promises. Regulation DD reinforces this conclusion by providing that a bank's TISA disclosures should reflect the terms of its legal obligations, while leaving it to state law to define those terms. That the plaintiffs must prove that Bank of America's customer agreement did not incorporate the right to charge international transaction fees does not transform their claims into "failure to disclose" claims.

Moreover, the plaintiffs' claims are not preempted even if they are viewed as directed at Bank of America's disclosures, rather than the terms of its agreement. Because the bank's disclosure obligation flows directly from the terms of its agreement, the bank is not forced to choose between complying with its contract and complying with TISA. Although Bank of America asserted in the district court that the plaintiffs' claims contradict various provisions of Regulation DD, in fact their claims, if successful, will have no effect on the bank's ability to comply with the regulation.

ARGUMENT

Federal law may preempt state law expressly, by the specific terms of a statutory provision, or impliedly, if state law conflicts with federal law, making it impossible to comply with both federal and state law or creating an obstacle to achieving the objectives of the federal law. *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). Here, although the district court held the plaintiffs' claims preempted, it did not identify the type of preemption that applies. None does. TISA expressly preempts only "inconsistent" state law, and the state-law duties at issue here are not inconsistent with Bank of America's TISA responsibilities. Moreover, TISA does not regulate the terms of a bank's agreement with its customers or shield a bank from being held liable under state contract law for violating those terms. This Court should reverse the district court's preemption determination.

I. TISA regulates bank disclosures to depositors, not the terms of the parties' agreement.

A. TISA requires banks to disclose their fees to facilitate consumers' ability to compare the terms of competing deposit accounts.

Congress enacted TISA in 1991 to enhance "economic stability," improve "competition between depository institutions" (*e.g.*, national

banks), and strengthen "the ability of the consumer to make informed decisions regarding deposit accounts." 12 U.S.C. § 4301(a). To achieve those ends, TISA requires banks to make a "clear and uniform disclosure of … the rates of interest [and] the fees that are assessable against deposit accounts." *Id.* § 4301(b). Specifically, for each type of deposit account offered, a bank must "maintain a schedule of fees, charges, interest rates, and terms and conditions." *Id.* § 4303(a). The schedule must include a "description of all fees, periodic service charges, and penalties which may be charged or assessed against the account …, the amount of any such fees, charge, or penalty (or the method by which such amount will be calculated), and the conditions under which any such amount will be assessed." *Id.* § 4303(b).

Because TISA's principal purpose is to enable consumers to make "informed decisions about [bank] accounts" and "meaningful comparisons among depository institutions," 12 C.F.R. § 1030.1(b), TISA requires banks to disclose their fees to "any potential customer before an account is opened or a service is rendered" or by mail if "a depositor is not physically present" at the bank's office, 12 U.S.C. § 4305(a), (b). Account

holders also must be notified of any changes to the schedule "at least 30 days before the change takes effect." *Id.* § 4305(c).

TISA is implemented through a rule known as Regulation DD. Under TISA, a bank "need not include in [its] schedule" any information "not specified" by Regulation DD. *Id.* § 4303(a). As relevant here, Regulation DD provides that a bank's "disclosures shall reflect the terms of the legal obligation of the account agreement between the consumer and the depository institution," 12 C.F.R. § 1030.3(b), and shall include the "amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed," *id.* § 1030.4(b)(4). In addition, a bank must disclose "[f]ees related to deposits or withdrawals, such as fees for use of the institution's ATMs." 12 C.F.R. pt. 1030, Supp. I, ¶ 4(b)(4).1.iii.

With one exception not relevant here, *see* 12 U.S.C. § 4306 (relating to the calculation of interest), TISA does not regulate the substance of terms and conditions that govern the legal relationship between the bank and the depositor. *See* Bd. of Govs. of Fed. Reserve Sys., Truth in Savings, 57 Fed. Reg. 43,337, 43,337 (Sept. 21, 1992) (1992 Rule) (adopting

original version of Regulation DD).[2] TISA's disclosure obligation "does not impose any contract terms or supplant state or other laws that define how the legal obligation between a consumer and a depository institution is determined (for example, whether a written contract is required or whether disclosures may act as the basis for the obligation)." 1992 Rule, 57 Fed. Reg. at 43,346.

B. TISA and Regulation DD preempt only inconsistent state laws.

As a general rule, TISA "do[es] not supersede" state laws that "relat[e] 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." 12 U.S.C. § 4312. To facilitate consumers' ability to make comparisons and promote "uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed," *id.* § 4301(a), however, Congress provided, that "to the extent that those laws are

[2] The Board of Governors of the Federal Reserve System initially had responsibility for implementing TISA. In 2010, Congress transferred responsibility for implementation of TISA 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. 1376, 2109–10 (2010).

inconsistent with" TISA, they are preempted—but "only to the extent of the inconsistency," *id.* § 4312.

As originally enacted in 1991, TISA authorized the Federal Reserve Board to "determine whether such inconsistencies [between TISA and state law] exist." Truth in Savings Act, Pub. L. No. 102-242, § 273, 105 Stat. 2334, 2342; *see* 12 U.S.C. § 4312. When the Board first promulgated Regulation DD, it recognized that TISA "provides a narrow standard for preemption of state laws (only if they are inconsistent) and refers only to state disclosure laws." 1992 Rule, 57 Fed. Reg. at 43,338. Concluding that "under general preemption standards a state law could not require what federal law prohibits," the Board concluded that "Congress intended for the Board to make determinations of preemption for all aspects of [TISA], not just disclosures." *Id.* As the Board explained, "a state law could not permit use of a … method of calculating interest" prohibited by TISA and Regulation DD. *Id.* Regulation DD accordingly extends TISA's "inconsistency" standard to state laws generally, 12 C.F.R. § 1030.1(d), and provides that state laws that "contradict the requirements of the federal law" are inconsistent with federal law, *id.* Pt. 1030, App. C, ¶ (a).

Under both the express terms of TISA and Regulation DD, "inconsistency" is the touchstone for preemption.

An early consideration of the application of TISA's preemption provision arose in 1994, when the Board determined that a Wisconsin law requiring banks to make certain disclosures was not preempted. *See* Bd. of Govs. of Fed. Reserve Sys., Truth in Savings; Final Preemption Determination (Wisconsin), 59 Fed. Reg. 24,032 (May 10, 1994) (Wisconsin Decision). The Wisconsin law permitted banks to provide certain disclosures that were "more general than the federal law allows" and to provide notice of a change in terms that contained "more detailed disclosures" than required under federal law. *Id.* at 24,033. In discussing why TISA did not preempt the state law, the Board explained that the law was "not inconsistent simply because [it] requires more information than federal law requires, or because the state law requires disclosures in cases where the federal law is silent." *Id.* The Board reiterated that "preemption is appropriate only where a state law requires a depository institution to make disclosures or take actions that contradict the requirements of the federal law." *Id.*

In short, even when "state and federal laws have different requirements, … they are not inconsistent" where "a bank can comply with both requirements without violating either." *Id*. The scope of TISA preemption is, therefore, "very narrow." *Id*.

II. TISA does not preempt state-law claims that sound in contract because TISA does not regulate the terms of a bank's agreement with depositors.

TISA creates uniformity in *how* banks disclose the terms and conditions of interest and fees charged to consumers. *See* 12 U.S.C. § 4301. TISA does not regulate—much less limit—a bank's choice about *which* fees it will charge. A TISA disclosure is designed to "reflect the terms of the legal obligation of the account agreement," 12 C.F.R. § 1030.3(b), but the disclosure requirement "does not impose any contract terms or supplant state or other laws that define the legal obligation" between the bank and its depositors. 1992 Rule, 57 Fed. Reg. at 43,346. Consistent with the scope of TISA's disclosure provisions, TISA's express preemption provision concerns only those state laws that "require[] the disclosure of [yields payable] or terms for accounts." 12 U.S.C. § 4312. Thus, as the district court recognized, "claims properly based on the

breach of a promise made in a disclosure are not preempted by TISA." Dist. Ct. Op. 4.

Here, the plaintiffs assert four state-law claims arising from the bank's imposition of international transaction fees for foreign debit-card transactions: "Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Unconscionability, and Unjust Enrichment." Dist. Ct. Op. 2. Each of the claims turn on the same core question: whether the agreement that Bank of America entered into with the plaintiffs authorized it to charge international transaction fees. For instance, under Florida law, a claim for a breach of the covenant of good faith and fair dealing is not an "independent cause of action," but "protect[s] the contracting parties' reasonable expectations" in the "performance of an express term of the contract." *Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 969–70 (Fla. Dist. Ct. App. 2021) (internal quotation marks omitted); *cf. Nw., Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014) (suggesting that the Airline Deregulation Act would not preempt good faith and fair dealing claims where state law applies the doctrine to "protect [the parties'] reasonable expectations" (internal quotation marks omitted)). Likewise, unconscionability focuses on questions surrounding the

formation of the contract. *See* 8 Williston on Contracts § 18:12 (4th ed.) ("The determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time." (footnote reference omitted)). Again, TISA does not regulate the Bank's choice of the fees that it will charge or the manner of contract formation. TISA thus neither addresses nor preempts state laws providing a remedy for fees collected in contradiction to the customer agreement.

That the challenged conduct may be described as a failure to "disclose" the international transaction fees, *see* SAC ¶¶ 4, 58, 66, does not transform the state-law claims alleged into something other than contract-based claims that are outside the preemptive scope of TISA. Many state-law contract claims can be defeated *on the merits* if the evidence shows that the defendant provided adequate disclosure of the complained-of act or practice. But the fact that federal law separately regulates disclosures is not a basis for dismissal at the motion to dismiss stage. *See Page v. Alliant Credit Union*, No. 19-cv-5965, 2020 WL 5076690, at *2 (N.D. Ill. Aug. 26, 2020) (stating that "true breach of contract and affirmative misrepresentation claims are not federally

preempted [by TISA], even if the result of those claims may affect a federal credit union's fee disclosures" (quoting *Lambert v. Navy Fed. Credit Union*, No. 1:19-cv-103, 2019 WL 3843064, at *2 (E.D. Va. Aug. 14, 2019))).

For example, this Court recently held that the Higher Education Act, which expressly preempts "any disclosure requirements of any State law," 20 U.S.C. § 1098g, "preempts only state law that imposes disclosure requirements," *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 917 (11th Cir. 2020). "[S]tate law causes of action arising out of affirmative misrepresentations a [defendant] voluntarily made that did not concern the subject matter of required disclosures impose no 'disclosure requirements.'" *Id.* Here as well, the plaintiffs' claims do not arise from a state law that imposes a disclosure requirement with respect to bank fees. Rather, the state law imposes a generally applicable cause of action where one party to an agreement acts in contravention of the agreement.

The Office of Comptroller of the Currency (OCC), which charters national banks, *see* 12 U.S.C. §§ 1, 26, draws a similar distinction. The OCC has by regulation provided that national banks are not bound by

"state law limitations concerning … [d]isclosure requirements," 12 C.F.R. § 7.4007(b)(3), but that state laws addressing subjects such as "[c]ontracts" or "[t]orts" are "not preempted," *id.* § 7.4007(c)(1), (c)(2). As the Ninth Circuit has explained, under this regulation, state unfair-practices laws are preempted to the extent they would require a bank to make particular disclosures, but not preempted to the extent they bar or provide a remedy for deceptive statements. *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 726–27 (9th Cir. 2012).

In other contexts, the Supreme Court has made clear that federal regulatory statutes that preempt state regulation generally do not preempt state contract law. For example, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Court considered the Airline Deregulation Act's preemption of state laws "relating to rates, routes, or services of any air carrier," *id.* at 223 (quoting 49 U.S.C. App. § 1305(a)(1), currently codified at 49 U.S.C. § 41713). The Court declined to read that provision "to shelter airlines from suits alleging no violation of state-imposed obligations," but seeking recovery under contract law "for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 228.

The Court reiterated this distinction in *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005), which concerned preemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA bars states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required" by the federal law. *Id.* at 443 (quoting 7 U.S.C. § 136v(b)). The Court held that this provision did not preempt "a cause of action on an express warranty" that appeared on the product label because the claim "asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook by placing that warranty on its product." *Id.* at 444.

Similarly, here, the principles of state contract law at issue do not purport to "require[] the disclosure of … terms for accounts." 12 U.S.C. § 4312. Rather, they seek to hold Bank of America responsible for the voluntary commitments it allegedly undertook in its customer agreement. TISA and Regulation DD do not regulate a bank's contractual commitments, and they do not preempt state-law claims seeking to hold a bank to its commitments.

III. TISA does not preempt claims that are not inconsistent with TISA.

A. Because TISA contains an express preemption provision, the text of that provision "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Lawson-Ross*, 955 F.3d at 920, 923 (holding that the express preemption provision refutes claims of conflict and field preemption). Here, TISA expressly *preserves* state disclosure laws, except to the extent of any "inconsistency" with federal law. 12 U.S.C. § 4312. And the federal agency charged with implementing TISA has stated that TISA preempts only those state laws that "contradict" federal law, 12 C.F.R. Pt. 1030, App. C, ¶ (a), such as when a bank cannot "comply with both requirements without violating either," Wisconsin Decision, 59 Fed. Reg. at 24,033. Further, state laws that "require[] more information than federal law requires, or … disclosures in cases where the federal law is silent" do not create an inconsistency with TISA. *Id.* at 24,033. In short, "TISA and federal banking regulations preempt only *contrary* state law." *Kriegel v. Bank of Am., N.A.*, No. 07-cv-12246, 2010 WL 3169579, at *5 (D. Mass. Aug. 10, 2010).

Below, the district court did not address the express preemption provision, and it did not consider whether the plaintiffs' claims are inconsistent with TISA or Regulation DD. They plainly are not inconsistent. For a bank to charge international transaction fees, TISA requires disclosure of those fees to customers. *See* 12 U.S.C. § 4303(b) (requiring disclosure of "fees … which may be charged or assessed against the account"); 12 C.F.R. Pt. 1030, Supp. I, ¶ 4(b)(4).1.iii (stating that "[f]ees related to deposits or withdrawals" must be disclosed); *see also* 12 U.S.C. § 4301(b)(2) ("It is the purpose of this chapter to require the clear and uniform disclosure of … the fees that are assessable against deposit accounts"). And a state-law contract claim premised on the terms of a customer agreement that does not include international transaction fees in the list of fees to be charged is fully consistent with TISA's disclosure requirement.

Nonetheless, in the district court, Bank of America asserted that the plaintiffs' claims are inconsistent with three provisions of Regulation DD: 12 C.F.R. § 1030.3(a), which permits a bank to disclose fees for each account it offers combined in one document or in separate documents; § 1030.4(a)(1), which permits a bank to mail or deliver disclosures if the

consumer is not present at the bank when an account is opened; and § 1030.4(c)(1), which governs notice of the availability of disclosures to existing customers. *See* Mot. to Dismiss (Dist. Ct. ECF 90), at 8–10. The state-law claims, however, would not prevent the bank from complying with any of these regulatory provisions. And to the extent that Bank of America relied on these regulations to argue that the fees were authorized by the agreement between the parties, that argument goes to the merits, not to preemption.

Bank of America's contrary assertion rests on its statement that "the required disclosures" under federal law are themselves "part of the legal agreement between the parties, because the disclosures 'reflect the terms of the legal obligation of the account agreement.'" Mot. to Dismiss (Dist. Ct. ECF 90), at 9 (quoting 12 C.F.R. § 1030.3(b)). As the Board of Governors stated when it adopted Regulation DD, however, the regulation "does not impose any contract terms or supplant state or other laws that define how the legal obligation between a consumer and a depository institution is determined," including "whether disclosures may act as the basis for the obligation." 1992 Rule, 57 Fed. Reg. at 43,346. As another district court recently explained, "[a]lthough Defendant may

have incorporated in its Contract with customers some of the rights and obligations of the parties under … TISA, Plaintiff's claims are not premised on allegations that Defendant violated federal statutes, they are premised on Defendant's violation of the terms of the contract and the covenant of good faith and fair dealing." *South v. Onpoint Cmty. Credit Union*, No. 3:21-cv-567, 2021 WL 2459466, at *4 (D. Or. June 14, 2021).

Moreover, although in 1996 Congress repealed the private right of action previously included in TISA, Congress "left section 4312 intact, expressly permitting private actions under state laws consistent with TISA." *Rose v. Bank of Am., N.A.*, 57 Cal. 4th 390, 398 (Cal. 2013). The CFPB and the U.S. Solicitor General agree. *See* Brief for the United States as Amicus Curiae, *Bank of Am., N.A. v. Rose*, No. 13-662 (U.S. May 27, 2014), at 11 ("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."), available at https://www.consumerfinance.gov/compliance/amicus/briefs/bank-america-rose/.

B. None of the three unpublished decisions cited by the district court support the conclusion that claims such as those at issue here are preempted.

First, in *Cinar v. Bank of America, N.A.*, No. 13-cv-3230, 2014 WL 3704280 (D. Md. July 22, 2014), the plaintiff brought a breach-of-contract action challenging attorney fees charged in connection with garnishment. The court held that TISA preempted that claim. *Id.* at *3. The court recognized that "state laws of general application, like contract law, govern national banks to the extent those laws do not conflict with federal law." *Id.* at *4. The court, however, found an inconsistency between the plaintiff's claim and the CFPB's official interpretation of Regulation DD, *id.* at *3, which states that banks "need not disclose … fees associated with … garnishment or attorneys fees," 12 C.F.R. Pt. 1030, Supp. I, ¶ 4(b)(4).2.ii. In addition, the court held that the plaintiff could not state a claim for breach of contract because the contract "clearly allow[ed]" for the charges at issue. 2014 WL 3704280 at *5. Putting aside the question whether the court correctly assumed that violation of a contractual promise could be excused if Regulation DD did not require the disclosure, *but see supra* pp. 18–19, *Cinar* turned on an express CFPB statement

that a bank need not disclose garnishment or attorney fees. The agency has made no such statement concerning international transaction fees, and neither the district court nor Bank of America suggested below that the fees could be charged without prior disclosure.

Second, in *Whittington v. Mobiloil Federal Credit Union*, No. 1:16-cv-482, 2017 WL 6988193 (E.D. Tex. Sept. 14, 2017), the plaintiff brought several state-law claims (but not for breach of contract) relating to a credit union's practices concerning its overdraft program. The court held that the plaintiff's unfair-trade-practices and unjust-enrichment claims were preempted by a regulation expressly preempting state regulation of credit union fees. *Id.* at *7 (citing 12 C.F.R. § 701.35(c)). No similar regulation is at issue here. *Whittington* further held that the plaintiff's fraud claim was partially preempted by TISA to the extent that the plaintiff sought "to force additional disclosures or require [that] disclosures be made in a particular manner." *Id.* at *10. The court recognized, however, that TISA does not preempt fraud allegations based on a "direct misrepresentation" or the bank's alleged practice of "assess[ing] overdraft fees despite sufficient available funds." *Id.* at *11. Unlike in *Whittington*, the plaintiffs' claims here do not seek to force

Bank of America to make particular disclosures, but rather to act in accordance with the terms of its agreement with depositors. As in *Whittington*, TISA does not foreclose liability if a bank charges fees that are not authorized by the contract.

Last, in *Lambert v. Navy Federal Credit Union*, which also involved a challenge to a credit union's overdraft practices, the plaintiff included claims for breach of contract and the covenant of good faith and fair dealing, along with an unfair-trade-practices claim. 2019 WL 3843064, at *1. Without distinguishing between TISA and preemption regulations applicable only to credit unions, *see* 12 C.F.R. § 701.35(c), the court held that the plaintiff's claims were preempted "[t]o the extent Plaintiff challenges a perceived failure to disclose, the specific language used in the disclosure, or the fairness of the fee practice itself." *Lambert*, 2019 WL 3843064, at *3. Recognizing, however, that "federal credit unions must still comply with the terms of their contracts related to fee practices and not affirmatively misrepresent those practices," the court held that the plaintiff's claims were not preempted to the extent that they alleged that the credit union "failed to comply with the express terms of the parties' contract or affirmatively misrepresented its fee practices." *Id*. In

contrast, here, because the plaintiffs' claims are based in contract law rather than an unfair-trade-practices statute, and because the substantive regulations applicable to credit unions are not at issue, the district court should have held that the plaintiffs' claims—like the contract-based claims in *Lambert*—are not preempted by TISA or Regulation DD.

CONCLUSION

This Court should reverse the decision of the district court holding that the plaintiffs' claims are preempted.

July 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
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1. Type-Volume. This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,596 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 8, 2021, this Brief for Amicus Curiae Public Citizen, Inc. in Support of Plaintiffs-Appellants and Reversal was served through the Court's ECF system on counsel for all parties.

/s/ *Nandan M. Joshi*
Nandan M. Joshi