No. 14-200

In The Supreme Court of the United States

NACS (FORMERLY KNOWN AS NATIONAL ASSOCIATION OF CONVENIENCE STORES), NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, MILLER OIL CO., INC., BOSCOV'S DEPARTMENT STORE, LLC, AND NATIONAL RESTAURANT ASSOCIATION,

Petitioners,

V.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

FEDERAL REGISTER & RULEMAKING MATERIALS

MISCELLANEOUS

INTEREST OF AMICUS[1]

Amicus, the Retail Litigation Center, Inc., is a public policy organization representing national and regional retailers in the United States. The RLC identifies and engages in legal proceedings that have national impact upon the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the industry-wide consequences of significant pending cases.

Amicus has a substantial interest in this case because its members and constituents are directly affected by the Rule promulgated by the Board of Governors of the Federal Reserve System ("Board") governing competition for debit network routing fees ("Rule").[2] Retailers pay billions of dollars annually in interchange fees for debit transactions, which fees are then often passed on to consumers. This is a

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[1] No counsel for a party authored this brief in whole or in part, and no party or entity, other than the RLC, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The undersigned counsel provided appropriate notice to all counsel of record of its intention to file an *amicus curiae* brief, in accordance with Supreme Court Rule 37(2)(a). The parties have consented to the filing of this brief.

[2] *See* Debit Card Interchange Fees and Routing: Final Rule, 76 Fed. Reg. 43,394 (July 20, 2011) ("Rule") (codified at 12 C.F.R. pt. 235).

substantial, inflated, and unnecessary drain on the resources of the RLC's members and their customers, largely a consequence of the lack of competition for debit card acceptance in the United States, and the dominance of Visa and MasterCard in that market.

SUMMARY OF ARGUMENT

The Board Rule challenged here stems from the 2010 Durbin Amendment,[3] which Congress enacted to remedy the distortions in the market for debit card interchange fees. Long dominant in the market for credit card acceptance, Visa and MasterCard had leveraged that market dominance to require merchants to accept their debit cards as a condition of gaining access to their credit cards. While an antitrust lawsuit, *In re Visa Check/MasterMoney Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), ultimately broke the ongoing illegal "tie" between credit and debit, by that time, Visa and MasterCard had used their anti-competitive advantage to unfairly hike debit interchange fees.

The Durbin Amendment sought to correct this market failure by requiring the Board to set reasonable interchange fees for debit card use. Recognizing that banks access a variety of revenue streams from debit cards, of which interchange fees are just one, Congress decreed that the Board must limit the acceptable interchange fee to the incremental cost incurred by issuing banks from each

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[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1693o-2).

particular debit card transaction and not consider any cost "not specific to a particular electronic debit transaction." 15 U.S.C. § 1693o-2(a)(4)(B)(ii).

Initially, the Board proposed setting interchange fees no higher than 12¢ per transaction based only on the issuers' cost to process a particular debit card transaction. But the banks were not satisfied with this amount and, after extensive lobbying, the Board nearly doubled the cap in the final Rule to 21¢ plus a percentage of the transaction. The Board's decision to nearly double what it viewed as a "reasonable" interchange fee was based largely, if not entirely, on its newfound willingness to include in the calculation "fixed" costs to operate a debit card program, such as network equipment costs and computer hardware and software costs.

Because fixed costs are not "particular" to a "specific" debit card transaction and, thus, are outside the statutory mandate, the merchants sued to block the final Rule and prevailed in the district court. The D.C. Circuit reversed and upheld the Rule. The D.C. Circuit's conclusion has a striking effect on every merchant that accepts debit cards—numbering in the millions nationwide. And it will end up costing merchants—and their customers—billions of dollars in excessive interchange fees annually.

The Court should grant the petition for *certiorari* and reverse the D.C. Circuit's judgment. The D.C. Circuit failed to apply the proper standard of review to the question at issue. Because the Durbin Amendment specifically barred the Board from considering any cost that is not "specific to a particular electronic debit transaction" when it determined a reasonable interchange fee—a

statutory mandate far more pointed than the general instruction applicable to rate-making decisions—the D.C. Circuit should have applied the familiar rule of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984), to consider whether the Board's decision to nonetheless consider fixed costs comported with the statute. The D.C. Circuit did not do so. It never considered whether "Congress has directly spoken to the precise question at issue," *id.*, namely whether the Board could consider fixed costs. It never determined that the statutory phrase "specific to a particular electronic debit transaction" in Section 920(a)(4)(B)(ii) was ambiguous, as is required to defer to the agency under the second step of *Chevron*. *Id.* Instead, the court of appeals mischaracterized the merchants' arguments as a "ratemaking" challenge, and then applied the "particularly deferential," App. 30a, standard of review applicable to agency ratemaking actions.

This result is not only incorrect as a matter of law, it is inexplicable as a matter of fact, since even the Board never claimed it was entitled to the deference owed to ratemaking actions. The issue in this case is one of classic statutory interpretation: what is the meaning of the statute's prohibition on the Board's consideration of "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." 15 U.S.C. § 1693o-2(a)(4)(B)(ii). While surely judicial review of the inexact science of ratemaking merits the greatest judicial deference, review of an agency's interpretation of an unambiguous statute does not, as such review is well within a court's province and expertise.

Having improperly applied an exceptionally generous standard of review, it is perhaps less surprising that the D.C. Circuit could uphold a regulation which, as one commentator has noted, is facially at odds with the "only tenable reading of the Durbin Amendment." Richard A. Epstein, *The Improbable Fate of the Durbin Amendment in the Circuit Court of Appeals for the District of Columbia: A Learned Court Makes Intellectual Hash of an Ill-Conceived Statute*, PointofLaw.com (Mar. 28, 2014), http://pointoflaw.com/columns/2014/03/improbablefate-of-the-durbin-amendment.php. As Petitioners repeatedly explained before the Board and the courts below, the plain language of the Durbin Amendment precludes consideration of fixed costs. Neither the D.C. Circuit nor the Board have so much as conjured an alternate meaning of the words "specific" and "particular" to explain how the Board's Rule comports with the statute, much less sought to justify the Board's unseemly about-face as to the propriety of considering fixed costs. Under the plain language of the statute, fixed costs are not costs "specific to a particular debit transaction." The Board's Rule should be vacated.

ARGUMENT

I. THE D.C. CIRCUIT ERRED IN APPLYING THE DEFERENTIAL STANDARD OF REVIEW RESERVED FOR RATEMAKING

The job of the court of appeals in this case was to review the Federal Reserve's interpretation of the straightforward statutory directive to establish a debit interchange fee without considering "other

costs incurred by an issuer which are not specific to a particular electronic debit transaction." 15 U.S.C. § 1693o-2(a)(4)(B)(ii). The court applied a "special deference" standard to do so, based on its determination that the Board had engaged in "ratemaking." App 30a. This was error.

The circuit court could hardly have been more clear: it held that, in reviewing the Board's application of Section 920(a)(4)(B), it would afford the Board the "particularly deferential" review that applies to "ratemaking" determinations:

> Much like agency ratemaking, determining whether issuers or merchants should bear certain costs is "far from an exact science and involves policy determinations in which the [Board] is acknowledged to have expertise." *Time Warner Entertainment Co. v. Federal Communications Commission*, 56 F.3d 151, 163 (D.C. Cir. 1995) (internal quotation marks omitted). We afford agencies special deference when they make these sorts of determinations. *See, e.g., BNSF Railway Co. v. Surface Transportation Board*, 526 F.3d 770, 774 (D.C. Cir. 2008) ("In the ratemaking area, our review is particularly deferential, as the Board is the expert body Congress has designated to weigh the many factors at issue when assessing whether a rate is just and reasonable."); *Time Warner*, 56 F.3d at 163.

App. 30a. At the conclusion of its discussion of fixed costs, the court again cited this highly-deferential standard, asking whether the Board's determination is "'patently unreasonable, having no relationship to the underlying regulatory problem.'" App. 33a (quoting *ExxonMobil Gas Mktg. Co. v. Fed. Energy*

Regulatory Comm'n., 297 F.3d 1071, 1085 (D.C. Cir. 2002)). Applying this profoundly relaxed standard of review, the D.C. Circuit affirmed the Board's inclusion of fixed costs in the interchange fee.

The "particularly deferential" review that is afforded to ratemaking decisions has no place in this case, for several reasons. First, the highly-deferential review afforded to ratemaking decisions is a species of arbitrary-and-capricious review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). It is doctrinally distinct from an analysis of whether the agency's actions conformed with the statutory mandate. As the D.C. Circuit made clear in *Time Warner*, such special deference is limited to claims based on an agency's determination of an appropriate *rate*. To the extent the "challenges involve the [agency's] interpretation of [a congressional] Act, we apply the rule of *Chevron*, [467 U.S. at 842–43]." *Time Warner*, 56 F.3d at 163.[4]

Petitioners here challenge the Board's interpretation of the Durbin Amendment's language, not the rate of 21¢-plus per transaction. *Id.* Interpretation of the phrase "specific to a particular electronic debit transaction" is not

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[4] Other cases have also made clear this distinction between a ratemaking challenge and a statutory interpretation challenge. *See Aluminum Co. of Am. v. Bonneville Power Admin.,* 903 F.2d 585, 594-95 (9th Cir. 1989) (explaining that courts must first determine if the legislation "prohibit[s] the ratemaking decision that is challenged"; only if there is no statutory bar does the court consider whether the "agencies' interpretation is a reasonable one, and if there is substantial evidence to support it"); *see also Elec. Power Supply Ass'n v. F.E.R.C.*, 753 F.3d 216, 224 (D.C. Cir. 2014) (same).

ratemaking; it is classic statutory interpretation that starts with the plain meaning of two words—"specific" and "particular"—to determine whether Congress permitted consideration of fixed costs that are *not* "specific" to a "particular" transaction. Courts are well equipped to perform this task, which is their essential role; heightened deference to an agency's interpretation in these circumstances amounts to an abandonment of the judicial function. *See Aluminum Co. of Am. v. Bonneville Power Admin.,* 903 F.2d 585, 590 (9th Cir. 1989) ("courts are the final authorities on issues of statutory construction," as distinct from the court's deference to federal agency's "substantial expertise in approving and confirming [power authority] rates").

Ratemaking determinations at the agency level, in contrast, are accorded broader deference because, as the circuit court noted, a determination of the exact numerical amount of a fair rate is uniquely suited to agency expertise. *Time Warner,* 56 F.3d at 163 (holding that it is the "nature of the task assigned to the agency" that determines the level of deference due). In enacting a reasonable rate, an agency must bring "its expertise and experience to bear in deciding how to weigh the various data." *Id.* at 170. Ratemaking requires an agency to balance competing concerns to ensure that the rate both appropriately compensates providers for their costs and does not overcompensate providers at the expense of consumers.

A review of several cases where courts appropriately deferred to agency ratemaking actions demonstrates how inapt that framework is here. For example, the Tenth Circuit upheld a challenge to the

F.C.C.'s decision to lower rates for Video Relay Service (VRS)—a service for persons with hearing disabilities, in lieu of a telephone—against a VRS provider's claim that the agency's rates were too low. *Sorenson Commc'ns, Inc. v. F.C.C.*, 659 F.3d 1035 (10th Cir. 2011). The *Sorenson* court first applied *Chevron* to consider, *inter alia*, whether the agency's rate was so low as to violate the statutory mandate to provide "functionally equivalent" service. *Id.* at 1042-43. After finding that the FCC's interpretation of that ambiguous term was permissible under *Chevron*, the court turned to the claim that the agency's action was "arbitrary and capricious in violation of the [APA]." *Id.* at 1045-46. It was only at this second stage that the court applied the "particularly deferential" review applicable to ratemaking actions. *Id.* at 1046. Under that highly deferential standard, it upheld the FCC's decision to lower VRS rates because past rates were based on "overstate[d] true costs," and the new rates "mov[e] reimbursement rates closer to actual costs while avoiding a too onerous cut." *Id.* at 1046, 1048.

Similarly, *BNSF* involved a challenge to changes in the Surface Transportation Board's methodology for setting rail shipping rates. 526 F.3d 770. Faced with a challenge by railroads that "certain changes improperly benefit shippers" (*i.e.*, the claim that the agency had set the rate too low) and a challenge by shippers that "certain changes improperly benefit railroads" (*i.e.*, the counter-assertion that the agency set the rate too high), the D.C. Circuit understandably gave "particular[]" deference to the Board's determination that the rate was set at the appropriate amount. *Id.* at 773, 774.

The *Time Warner* case provides a third example of a true ratemaking challenge. The statute at issue in that case required the FCC to set reasonable cable rates in areas without effective competition. Several cable companies sued, claiming that the "FCC's new ratemaking regime results in rates that are too low." *Time Warner*, 56 F.3d at 162. Because the "agency ratemaking" was entitled to "particularly deferential" review, the D.C. Circuit held that (with one irrelevant exception), the "Commission struck an appropriate balance between the competing interests of the cable companies and their subscribers." *Id.* at 162, 163.

Unlike in the cases cited above, this is not a case about the particular *rate* the Board set for debit interchange (*i.e.*, whether the rate of 21¢-plus reflects an agency error in relying upon "overstated" costs of computer hardware, for example), and the merchants here are not arguing that the debit interchange rate is "too high." Instead, the merchants argue that Congress forbade the Board from taking into account certain costs at all—fixed costs—and that the Board ignored that prohibition.

To be sure, the Durbin Amendment provided that, after the Board excluded the costs specified in Section 920(a)(4)(B)(ii), the Board must then set an interchange fee "reasonable and proportional to the cost incurred by the issuer with respect to the transaction," 15 U.S.C. § 1693o-2(a)(2) & (a)(3)(A). Had Petitioners challenged the amount of the interchange fee—for example, claiming that the cap of 21¢-plus is not "reasonable and proportional," as required by the Durbin Amendment—the propriety of the amount would be subject to arbitrary-and-capricious review under the APA, and

the D.C. Circuit's decision to accord special deference to the agency may have been warranted.[5] But here, Petitioner's challenge involves the threshold question: whether the Board ignored or adhered to the statute's mandate limiting the Board's consideration only to those "costs incurred by the issuer with respect to the transaction." Because Petitioner's challenge is limited to the meaning of statutory terms ("specific" and "particular," in their statutory context), heightened ratemaking deference is not appropriate.

Moreover, ratemaking is generally accorded extra deference because the agency is "the expert body Congress has designated" to make these difficult calls about the precise weight to be given to each factor. *BNSF*, 526 F.3d at 774**.** Here, Congress could have instructed the Board to determine an interchange fee that is "reasonable and proportional to the cost incurred"—and stopped there. 15 U.S.C. § 1693o-2(a)(2) & (a)(3)(A); *cf. Time Warner*, 56 F.3d at 165 (rate determination was entirely within the agency's discretion because Congress did not guide the agency as to how it "should weigh the rate data."). But Congress went further, delineating those costs that may be considered as well as those that are out-of-bounds. *See* 15 U.S.C. § 1693o-2(a)(4)(B). Congress thereby left the Board bound to implement its instructions. *Cf. Time Warner*, 56

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[5] Undercutting even this approach, however, is the Board's express determination that it was *not* engaging in ratemaking. *See* 75 Fed. Reg. at 81,733 & n.44 (noting that "[p]ublic utility rate-setting involves unique circumstances, none of which are present in the case of setting standards for interchange transaction fees").

F.3d at 165 ("In the absence of any statutory requirement that could be read to require the Commission to give 'proportionate weight' to the rates charged by low penetration systems, however, we are not at liberty to oblige the petitioners."). Petitioners' challenge is limited to the Board's decision to consider fixed costs—costs Congress disallowed; they do not challenge the Board's methodology for determining a "reasonable and proportional" rate on questions where Congress was silent.

It is thus no surprise that the Board itself has never claimed that its determination was entitled to the heightened deference attendant to ratemaking proceedings. To the contrary, its statements during the rule-making process disclaim any effort at rate-making, and its briefing below repeatedly sought only *Chevron* deference. *See* Debit Card Interchange Fees and Routing: Proposed Rule, 75 Fed. Reg. 81,721, 81,733 & n.44 (Dec. 28, 2010); Resp. C.A. Br. 15; Resp. D. Ct. M. Summ. J. and Opp. to Summ. J., at 14-16 (April 13, 2012).

Use of the heightened standard of deference reserved for ratemaking is a clear error that infects the D.C. Circuit's opinion and, standing alone, warrants granting *certiorari* and reversing the D.C. Circuit's opinion.

II. FIXED COSTS ARE NOT SPECIFIC TO A PARTICULAR ELECTRONIC DEBIT TRANSACTION, AND THE BOARD'S CLAIM TO THE CONTRARY FAILS

The Board's final rule construes the statutory phrase "other costs incurred by an issuer which are

not specific to a particular electronic debit transaction," to include issuers' "fixed costs," such as hardware, software, and other overhead, theorizing that such fixed costs are "specific to each and every electronic debit transaction." Debit Card Interchange Fees and Routing: Final Rule, 76 Fed. Reg. 43,394, 43,426-27 (July 20, 2011) (codified at 12 C.F.R. pt. 235). As Petitioners explain, this construction fails the first step of *Chevron* as it ignores the plain meaning of the words "specific" and "particular" and instead considers underlying costs necessary for debit transactions on the whole.

Significantly, in its notice of proposed rulemaking, the Board recognized that fixed costs and other general overhead should *not* be considered in determining the incremental costs of a debit transaction. 75 Fed. Reg. at 81,734-36. The Board explained that it would "*not* consider costs that are common to all debit card transactions and could never be attributed to any *particular* transaction (*i.e.*, fixed costs), even if those costs are specific to debit card transactions as a whole. Such fixed costs of production could not be avoided by ceasing production of any particular transaction (except perhaps the first)." *Id.* at 81,736 (emphasis added). The Board proposed two alternative cost structures, each based solely on "per-transaction processing costs, which are those costs related to authorization, clearance, and settlement [ACS] of a transaction." *Id.* at 81,725. The Board sought comment as to whether it should "allow recovery through interchange fees of other costs of a particular transaction beyond authorization, clearing, and settlement costs." *Id.* at 81,735.

Having determined that costs should be limited to ACS costs, the Board faced the issue of how such costs would be measured. Here, the Board determined that it would be too difficult to measure the actual costs incurred by an additional debit transaction, *i.e.*, the marginal costs. Instead, it proposed using "average variable costs," calculated by dividing the average of the total annual ACS costs by the number of annual debit transactions. *Id.* at 81,736. Finding that the average variable costs were "more readily measurable" than the individual marginal costs, the Board proposed relying on average variable costs instead of a transaction's marginal costs and solicited comments as to whether "costs should be limited to the marginal cost of a transaction." *Id.*

In their comments on the proposed Rule, merchants supported the Board's proposal that only ACS costs should be considered, and fixed costs should not. *See* Comments of the Merchants Payments Coalition (Feb. 22, 2011) ("MPC Comments") at 12 ("'the statute explicitly forbids . . . all fixed costs that are incurred in order to establish, maintain and operate the system'" (quoting briefing by TCF National Bank, an issuer of debit cards in *TCF Nat'l Bank v. Bernanke*, No. 10-cv-4149(LLP) (D.S.D. Nov. 4, 2010));[6] Comments of the Retail Industry Leaders Association ("RILA") (Feb. 22, 2011) at 5 ("Alternative 1 is preferable, but the safe harbor and cap should be much closer to the average per-transaction costs of authorization, clearance, and

[6] All comments before the Board referenced herein were submitted in Docket No. R-14 04/RIN No. 7100AD63 (Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010)). The comments are available in the Joint Appendix filed in the D.C. Circuit as document 1462209, dated October 21, 2013, with the exception of RILA's comments.

settlement"); Comments of the National Association of Convenience Stores ("NACS") (Feb. 22, 2011) at 4 (arguing that "the costs to create the payment networks" should not be allowable and the "Fed has built in a substantial rate of return" based on ACS costs alone); Comments of the Food Marketing Institute ("FMI") (Feb. 21, 2011) at 1 ("We do not think that costs beyond authorization, clearance and settlement should be considered.").

The D.C. Circuit incorrectly interpreted the record when it stated that "merchants have never argued that issuers should be allowed to recover only costs incurred as a result of processing individual, isolated transactions." App. 31a (citing 76 Fed. Reg. at 43,427 n.118 where the Board stated it "did not receive comments regarding the use of marginal cost"). The foregoing illustrates that Petitioners repeatedly argued to the Board that it should not include fixed costs and should consider only ACS costs to determine a reasonable fee; that is the relevant issue here. The Board's decision on how to *measure* those ACS costs (which Petitioners supported) is not relevant to this case. *See* MPC Comments at 13 ("the MPC appreciates the Board's proposal to use 'average variable' costs as a proxy and believes it is a reasonable approximation that could simplify calculation and supervision"); *see also* Comments of Senator Richard J. Durbin (Feb. 22, 2011) at 7.

When the Petitioners brought their challenge to federal court, the Board continued to claim that it could consider fixed costs, even as the Petitioners highlighted the Board's reversal of the position it took in its proposed rule that fixed costs "could never be attributed to any particular transactions." 75 Fed. Reg. at 81,736. In its summary judgment motion, Petitioners explained that the Board erred in the final Rule by "defining '*specific* to a *particular* electronic debit transaction' to mean 'specific to effecting debit transactions *as a whole*.'" Pet'r. D. Ct.

M. Summ. J., at 18 (March 2, 2012) (emphasis in original); *see also id.* at 24 ("*fixed* authorization, clearance and settlement costs . . . must not be considered under the plain language of the statute" (emphasis in original; citing proposed Rule)); *id.* at 32 ("under its final interpretation, it does not matter whether costs are variable and arise only as a result of a particular transaction or fixed and thus common to all"); *id.* at 33 ("Rather than requiring that [costs be] *specific* to *particular* debit card transactions, the Board declares that it has authority to consider any costs that are *common* or *universal* to all debit transactions." (emphasis in original)); *id.* at 37 ("the statute plainly indicates that Congress did not intend [fixed costs of authorization, clearance, and settlement] to be included in the interchange fee standard"); Pet'r. D. Ct. Reply M. Summ. J., at 14 (May 11, 2012) ("But whatever the range of permissible definitions of that phrase, it clearly cannot refer, as the Board concludes, to costs that are 'not specific to debit transactions as a whole' – unless the statutory terms 'specific' and 'particular' are to be deprived of any real meaning."); *id.* at 15 & n.13 ("the costs that the Board found not to be excluded by this language—such as fixed costs of equipment, hardware and software—are incurred regardless of whether a *particular* transaction takes place" (emphasis in original)); *see generally id.* at 30 (section titled "The Board Includes Numerous Costs Explicitly Excluded by the Statute").

In its opposition brief before the district court, the Board stated only that "[b]y precluding consideration of costs that are not incurred in the course of effecting *any* electronic debit transaction, the Board necessarily precluded consideration of costs not

specific to a *particular* electronic debit transaction," and noted that "the Board's approach eliminates consideration of costs that may be related in some way to electronic debit transactions, such as corporate overhead and marketing, but that are not specific to a particular transaction" (emphasis in original). Resp. D. Ct. M. Summ. J. and Opp. to Summ. J., at 29 (April 13, 2012). But the Board's recognition that it excluded *some* costs that Congress required it to exclude (e.g., "corporate overhead") in no way sufficed to satisfy the statutory mandate of excluding *all* costs "which are not specific to a particular electronic debit transaction." Indeed, as Petitioners argued below, the Board's decision to *exclude* corporate overhead costs inherently undermines the Board's decision to *include* fixed costs, since corporate overhead costs are no less specific to a particular debit card transaction than the fixed costs shared by an issuer's debit and credit card platforms. Pet'r. D. Ct. M. Summ. J., at 43-44 (March 2, 2012) ("Congress would not have directed the Board to exclude an issuing bank's costs that are not *specific* to a *particular* debit transaction if it meant to permit the Board to include costs common to all debit card transactions. . . . Indeed, in excluding from consideration fixed corporate overhead costs, such as management salaries and costs 'incurred with respect to the cardholder account relationship,' the Board seems to recognize some limitation on its authority to consider *generalized* costs of debit card transactions." (emphasis in original)).

Faced with such a lukewarm attempt to retreat from both the plain language of the Durbin Amendment and its prior position on the propriety of

considering fixed costs, it is little surprise that the district court roundly rejected the Board's position, holding:

> Congress thus directed the Board to omit "other costs incurred by an issuer which are not [unique] to a [distinct or individual] transaction." The plain text of the Durbin Amendment thus precludes the Board from considering in the interchange fee standard any costs, other than variable ACS costs incurred by the issuer in processing each debit transaction.

App. 85a-86a (internal citations omitted; quoting dictionary definitions of "specific" and "particular").

On appeal to the D.C. Circuit, Petitioners reiterated that Congress barred consideration of fixed costs, and again the Board (having ignored the argument in its opening brief) had no persuasive response on reply. *See generally* Pet'r C.A. Br. 34 (section titled "The Board's Interpretation of the Excludable Cost Provision Contravenes Its Plain Language"); *see id.* at 35-36 ("Under the Board's view, it does not matter whether costs are variable costs attributable to a 'particular' transaction or fixed costs common to all transactions. A more countertextual reading is difficult to imagine . . . The terms 'specific' and 'particular' clearly foreclose the Board's interpretation."); *id.* at 36 ("The Board concedes that when Congress wanted to address costs relevant to transactions 'as a whole,' [as it did in the fraud prevent adjustment in Section 920(a)(5)(A)(i)] it used different language."); *id.* at 37 ("Through artificially *narrowing* excludable costs, the Board finds authority to *expand* allowable costs beyond those defined by Congress." (emphasis in original)); *id.* at 38 ("Notwithstanding Section

920(a)(4)(B)'s limitation of allowable costs to the 'incremental' ACS costs of a particular transaction, 15 U.S.C. § 1693o-2(a)(4)(B), the Board determined that it had the authority to include fixed costs as well."); *id.* at 39 ("It vastly expanded allowable costs to include *any* ACS costs, such as network hardware and software costs, that do not vary with a particular transaction." (emphasis in original)); *id.* ("The Board's allowance for fixed costs is at odds with the plain language of Section 920(a)(4)(B)(ii). By definition, fixed costs are not 'specific' to any 'particular' transaction and fall squarely within the statute's excludable costs provision, Section 920(a)(4)(B)(ii).").

The Board's anemic response on reply was to dismiss this argument as "off the mark." Resp. C.A. Reply Br. 21. Making meaningless the terms "specific" and "particular," the Board conjured: "If *no* electronic debit transaction can be effected without incurring some specific cost, then that cost must be specific to *some* particular transaction." *Id.* at 22 (emphasis in original). And it claimed that it would be "virtually impossible," "to trace each allowable cost to the precise transaction to which it relates," *id.,* though its own proposed rules envisioned using average variable costs to solve this difficulty—a proposal that was not objectionable to merchants.

Following the Board's lead, the D.C. Circuit all but ignored the critical issue of how the Board's consideration of *any* issuer's fixed costs—which will result in a roughly $3 billion annual cost to merchants in extra debit interchange fees[7]—could

[7] *See* Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card*

ever be consistent with Congress's prescription that the Board cannot consider costs "which are not specific to a particular electronic debit transaction." The court of appeals never found any ambiguity in the phrase "costs . . . which are not specific to a particular electronic debit transaction," as would be required to defer to a reasonable agency interpretation under the second step of *Chevron*. *See* App. 31a. To the contrary, the D.C. Circuit admitted that the "merchants' argument certainly has some persuasive power," noting that the plain meaning of "specific" and "particular" would generally preclude the Board's interpretation. *Id.* (providing, as a hypothetical, that no one would claim a shoe store's rent is "somehow 'specific' to a 'particular' shoe sale"). Yet it erroneously rejected the Petitioners' argument, for reasons that have little support either in the record or the law, while improperly applying an inflated level of deference reserved for ratemaking—an activity that the Board itself disclaimed undertaking. The D.C. Circuit's error warrants granting *certiorari*.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for a writ of *certiorari*.

Interchange Fees 23-24 (Oct. 1, 2013), http://21353cb4da875d727a1d-ccea4d4b51151ba804c4b0295d8d06a4.r8.cf1.rackcdn.com/SHAPIROreport.pdf (estimating the annual additional cost at $4.04 billion with the majority stemming from the allowance of fixed costs).

Respectfully submitted,

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