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 Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF UNITED STATES SENATOR RICHARD J. DURBIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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156 Cong. Rec. S3695-6 (daily ed. May 13, 2010) (statement of Sen. Richard Durbin) 10, 19

156 Cong. Rec. S4839 (daily ed. June 10, 2010) (statement of Sen. Richard Durbin) 3

156 Cong. Rec. S4930 (daily ed. June 15, 2010) (statement of Sen. Richard Durbin) 16

157 Cong. Rec. S3574 (daily ed. June 8, 2011) (statement of Sen. Richard Durbin) 13

Hearing on Credit Card Interchange Fees Before the Antitrust Task Force, H. Comm. on the Judiciary, 110th Cong. (2007) 5

Hearing on Credit Card Interchange Fees: Antitrust Concerns? Before the S. Comm. on the Judiciary, 109th Cong. (2006) 5

Hearing on H.R. 2382, The Credit Card Interchange Fees Act of 2009 Before the H. Comm. on Financial Services, 111th Cong. (2009) 5

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Hearing on H.R. 5546, The Credit Card Fair Fee Act, Before the Antitrust Task Force, H. Comm. on the Judiciary, 110th Cong. (2008)...........5

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Senate Amendment 392, 157 Cong. Rec. S3558-9 (daily ed. June 7, 2011).......................................12

OTHER MATERIALS

AM. BANKERS ASS'N DAILY NEWSBYTES (March 15, 2011), "Sens. Tester, Corker Introduce Bill to Stop Interchange Rule," *available at* http://www.aba.com/aba/documents/news/SPED031511.pdf 11, 12

Board of Governors of the Federal Reserve press release (May 23, 2013), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20130523a.htm 20

Terri Bradford & Fumiko Hayashi, *Developments in Interchange Fees in the United States and Abroad*, Federal Reserve Bank of Kansas City (Apr. 2008), *available at* http://www.kansascityfed.org/Publicat/PSR/Briefings/PSR-BriefingApr08.pdf..5

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Dennis W. Carlton, *Externalities in Payment Card Networks: Theories and Evidence, Commentary*, The Changing Retail Payments Landscape: What Role for Central Banks, proceedings of a conference held at the Federal Reserve Bank of Kansas City (Nov. 9-10, 2009), *available at* http://www.kc.frb.org/publicat/pscp/2009/PDF/A1.completeproceedings.pdf 6, 24

Digital Transactions News, *Applying the Durbin Maximum, Visa and MasterCard Could Squash Small Tickets* (Sept. 27, 2011), http://www.digitaltransactions.net/news/story/3217 23

Alan S. Frankel & Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 ANTITRUST L.J. 627 (2006) 6, 7

Fumiko Hayashi, *Payment Card Interchange Fees and Merchant Service Charges – An International Comparison*, LYDIAN PAYMENTS J. (Jan. 2010)..6

Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency* (2012), *available at* http://www.kc.frb.org/publicat/econrev/pdf/13q1Hayashi.pdf 21

TABLE OF AUTHORITIES – Continued

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Frank Keating, President and CEO of the American Bankers Association, *Who won and who lost with the Federal Reserve's final debit interchange rule?*, AM. BANKERS ASS'N WASHINGTON PERSPECTIVE (July 1, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=68d6ba0d-0238-4d5f-b9a8-a38f782a24fb 12, 24

Letter from Senator Durbin to Jaime Dimon, Chairman and CEO, JPMorgan Chase & Co., April 12, 2011, *available at* http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=f122bc2c-9381-44e9-8327-f90c88ebf9bc 21

Andrew Martin, *How Visa, Using Card Fees, Dominates a Market*, N.Y. TIMES (Jan. 4, 2010) 6, 7, 24

James McAndrews & Zhu Wang, *The Economics of Two-Sided Payment Card Markets: Pricing, Adoption and Usage*, Federal Reserve Bank of Kansas City (Dec. 2008), *available at* http://www.kansascityfed.org/Publicat/RESWKPAP/PDF/RWP08-12.pdf 5

Daniel Purl, *Redbox to raise price in response to Durbin Amendment*, BANK CREDIT NEWS (Oct. 28, 2011) 23

Arlene Satchell, "Allegiant gives debit card holders a discount online," SUN-SENTINEL (Aug. 24, 2012) 20

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Shareholder Letter from Jamie Dimon, Chairman and CEO, JPMorgan Chase (Apr. 4, 2011), *available at* http://files.shareholder.com/downloads/ONE/1279744849x0x458384/6832cb35-0cdb-47fe-8ae4-1183aeceb7fa/2010_JPMC_AR_letter_.pdf 17

James Sterngold, *Banks' Fee Bonanza Dries Up*, WALL ST. J. (Sept. 2, 2014)..............................21

U.S. Gov't Accountability Office, *Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist*, GAO-08-558 (May 2008).........................5

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The 2013 Federal Reserve Payments Study (Dec. 19, 2013), *available at* http://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf........................19, 20

Visa presentation to Federal Reserve on U.S. Debit EMV, January 8, 2014, *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/visa-meeting-20140108.pdf...........22

Kevin Wack, *Free Checking Increased After Durbin: Study*, THE AM. BANKER (Dec. 11, 2013) 21

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Senator Richard J. Durbin is the primary author of the statutory provision at issue in this litigation, Section 920 of the Electronic Fund Transfer Act (15 U.S.C. §1693o-2) as amended by Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376 (2010)) ("Dodd-Frank"). This provision is commonly known as the "Durbin Amendment." *See, e.g.*, Appendix to Petitioners' Writ of Certiorari ("App.") at 9a. Senator Durbin wrote the text of the Durbin Amendment and led the effort to secure its enactment. His statements on the statutory structure and purpose of the Durbin Amendment were cited extensively by both Petitioners and the Board of Governors of the Federal Reserve System ("Board") to assist the courts below in conducting their analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At each stage of this litigation, Senator Durbin has filed *amicus* briefs to ensure that his statements and views are accurately represented.

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[1] No counsel for a party authored this brief, in whole or in part, and no person or entity, other than *amicus* and his counsel, has made a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of this brief and were timely informed with 10 days notice *of amicus'* intent to file.

Senator Durbin has a strong interest in ensuring that the Board is compelled to comply with the Durbin Amendment's text and purpose, and accordingly he supports the Petitioners' petition for certiorari and agrees with the arguments cited therein. Senator Durbin submits this brief to further explain how the final rule issued by the Board and the D.C. Circuit's decision to uphold the rule contravene both the plain text and purpose of the Durbin Amendment.

In light of the importance of the debit system to our nation's economy, the errors of statutory interpretation and analysis made by the D.C. Circuit, and the distortions and consumer harms created by the Board's failure to sufficiently follow the text and purpose of the law, Senator Durbin urges this Court to grant the Petitioners' petition for certiorari.

SUMMARY OF ARGUMENT

Congress enacted the Durbin Amendment with the goals of (1) enhancing competition, transparency and choice in the debit system; (2) squeezing out inefficiencies in the debit system by reducing network-fixed interchange fees to cover only a limited measure of incremental cost, thereby compelling large card-issuing banks to compete against each other to manage their other costs more efficiently; and (3) "help[ing] every single Main Street business that accepts debit cards keep more of their money, which is a savings they can pass on to their consumers."

156 Cong. Rec. S4839 (daily ed. June 10, 2010) (statement of Sen. Richard Durbin). The Amendment was carefully crafted and its purpose was clearly expressed in legislative history. Unfortunately, the Board's final rulemaking failed to sufficiently follow the text and purpose of the law. Debit Card Interchange Fees and Routing: Final Rule, 76 Fed. Reg. 43,394 (July 20, 2011) (codified at 12 C.F.R. pt. 235) ("Final Rule").

The Board initially issued a draft rulemaking that was consistent with the law's text and purpose, but the Board significantly altered its rule in response to heavy lobbying by the banking industry. The result was a Final Rule that not only perpetuated the interchange system's inefficient and excessive subsidization of banks' fixed costs, but also approved the setting of interchange fees by Visa and MasterCard that were in many instances significantly *higher* than fees previously charged on debit transactions. Because interchange fees are ultimately borne by consumers in the form of higher retail prices, consumers have suffered as a result of the inefficiencies and fee increases that the Board's Final Rule permitted.

This Court should grant certiorari to correct the D.C. Circuit's errors in statutory interpretation and *Chevron* analysis. The D.C. Circuit deferred to the Board's decision to include so-called "third category" costs, such as fixed costs, in its debit fee regulations, but the inclusion of these costs was in conflict with the Durbin Amendment's plain text and legislative

history. Unless this holding is corrected, the debit system, which is one of the primary ways by which Americans transact money, will suffer from inefficiency and excessive fees and American businesses and consumers will bear the cost.

ARGUMENT

I. THE DURBIN AMENDMENT WAS CAREFULLY CRAFTED TO RESPOND TO COLLUSION, MARKET FAILURES, AND EXCESSIVE FEES WITHIN THE ELECTRONIC DEBIT SYSTEM.

The Durbin Amendment. In 2010, Congress enacted landmark reform of the electronic debit system. This reform, authored by Senator Durbin and enacted as an amendment to Dodd-Frank, sought to rein in the interchange fee collusion that thousands of financial institutions were engaging in through payment card networks like Visa and MasterCard and to reduce the billions in excessive debit interchange fees that were being charged to merchants and were ultimately borne by consumers in the form of higher retail prices. *See* App. 8a-9a. The Amendment was motivated by years of Congressional

hearings,[2] Government Accountability Office reports,[3] Federal Reserve expert studies,[4] academic

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[2] *See, e.g., Hearing on Credit Card Interchange Fees: Antitrust Concerns? Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *Hearing on Credit Card Interchange Fees Before the Antitrust Task Force, H. Comm. on the Judiciary*, 110th Cong. (2007); *Hearing on H.R. 5546, The Credit Card Fair Fee Act of 2008 Before the Antitrust Task Force, H. Comm. on the Judiciary*, 110th Cong. (2008); *Hearing on H.R. 2382, The Credit Card Interchange Fees Act of 2009 Before the H. Comm. on Financial Services*, 111th Cong. (2009); *Hearing on H.R. 2695, the Credit Card Fair Fee Act of 2009 Before the H. Comm. on the Judiciary*, 111th Cong. (2010); *Hearing on Oversight of Federal Payment of Interchange Fees: How to Save Taxpayer Dollars Before the Subcomm. on Financial Services and General Government of the S. Comm. on Appropriations*, 111th Cong. (2010).

[3] *See, e.g.,* U.S. Gov't Accountability Office, *Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist*, GAO-08-558 (May 2008); U.S. Gov't Accountability Office, *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges*, GAO-10-45 (Nov. 2009).

[4] *See, e.g.,* Terri Bradford & Fumiko Hayashi, *Developments in Interchange Fees in the United States and Abroad*, Federal Reserve Bank of Kansas City (Apr. 2008), *available at* http://www.kansascityfed.org/Publicat/PSR/Briefings/PSR-BriefingApr08.pdf, at 2 (stating that "While regulation of interchange fees is still just a point of discussion in the United States, regulation abroad is a reality. In about 20 countries, public authorities have taken actions that limit the level of interchange fees or merchant discount fees. Many of these actions require interchange fees to be set according to cost-based benchmarks, although the cost categories that are eligible for the benchmarks vary by country. In several countries, interchange fees are set at zero."); James McAndrews & Zhu Wang, *The Economics of Two-Sided Payment Card Markets: Pricing, Adoption and Usage*, Federal Reserve Bank of Kansas City (Dec. 2008), *available at* http://www.

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articles,[5] and press reports[6] that demonstrated that the interchange fee system was not a properly

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kansascityfed.org/Publicat/RESWKPAP/PDF/RWP08-12.pdf (stating that "privately determined card pricing, adoption and usage tend to deviate from the social optimum, and imposing a ceiling on interchange fees may improve consumer welfare.").

[5] *See, e.g.,* Fumiko Hayashi, *Payment Card Interchange Fees and Merchant Service Charges – An International Comparison*, LYDIAN PAYMENTS J., Jan. 2010, at 6, 11-12 (finding that "[i]n general, the United States has the highest debit card interchange fees" and that "the United States has the highest interchange fees for both credit and debit cards among the 13 countries where adoption and usage of payment cards are well advanced."); Alan S. Frankel & Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 ANTITRUST L.J. 627, 671 (2006) (finding that the interchange fee "acts much like a sales tax, but it is privately imposed and collected by banks, not the government. It significantly and arbitrarily raises prices based not on technologically and competitively determined costs, but through a collective process."); Dennis W. Carlton, *Externalities in Payment Card Networks: Theories and Evidence, Commentary*, The Changing Retail Payments Landscape: What Role for Central Banks, proceedings of a conference held at the Federal Reserve Bank of Kansas City, Nov. 9-10, 2009 at 125, 129, *available at* http://www.kc.frb.org/publicat/pscp/2009/PDF/A1.completeproceedings.pdf (finding that "in seven of the eight countries with the highest debit card usage per capita there is no interchange fee . . . ").

[6] *See, e.g.,* Andrew Martin, *How Visa, Using Card Fees, Dominates a Market*, N.Y. TIMES (Jan. 4, 2010). ("Competition, of course, usually forces prices lower. But for payment networks like Visa and MasterCard, competition in the card business is more about winning over banks that actually issue the cards than consumers who use them. Visa and MasterCard set the fees that merchants must pay the cardholder's bank. And higher fees mean higher profits for banks, even if it means that merchants shift the cost to consumers.").

functioning market. These analyses showed that the interchange fee system was designed and operated by payment card networks and their card-issuing banks to avoid transparency and competition and to generate high fees that exceeded what could be sustained in a normal competitive market environment.[7] For years, card-issuing banks had agreed to let the Visa and MasterCard networks fix the interchange fee amounts that all banks in those networks received from merchants each time a debit card is swiped. *See* App. 8a. This centralized fee-fixing diminished the card-issuing banks' incentive to manage their operational and fraud costs efficiently, because all banks were guaranteed the same set of network-fixed interchange fees regardless of how efficient or secure their card operations were. *See* App. 55a. Further, Visa and MasterCard had incentive to constantly increase interchange fees in order to encourage banks to issue more cards, and given those networks' enormous market power there was no countervailing market force that enabled those who accepted debit cards as payment (merchants, universities, charities, government agencies, etc.) to temper those fee increases.[8] The result was ever-rising debit interchange fees that subsidized bank inefficiencies, and the billions charged annually through these fees ($16.2 billion in 2009) were ultimately borne by consumers in the form of higher retail prices. *See* App. 53a, 55a; 76

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[7] *See, e.g.,* Frankel & Shampine, *supra* note 5.

[8] *See, e.g.,* Martin, *supra* note 6; App. 8a.

Fed. Reg. at 43,397. The enactment of the Durbin Amendment reflected a bipartisan recognition in Congress that interchange reform was needed to bring transparency, competition and choice to a system that lacked it.[9]

The Durbin Amendment was adopted on the Senate floor by a bipartisan vote of 64-33 on May 13, 2010. It was maintained in conference committee with the House of Representatives and signed into law as part of Dodd-Frank on July 21, 2010.[10]

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[9] *See* 156 Cong. Rec. S3589 (daily ed. May 12, 2010) (statement of Sen. Richard Durbin) ("This amendment is needed. It is a response to price fixing by Visa and MasterCard. Interchange fees are received by the card-issuing bank in a debit transaction. However, Visa and MasterCard – which control 80 percent of the debit market – set the debit interchange fee rates that apply to all banks within their networks. Every bank gets the same interchange fee rate regardless of how efficient they have been in conducting debit transactions. Visa and MasterCard do not allow banks to compete with one another or negotiate with merchants over interchange rates, and there is no constraint on Visa's and MasterCard's ability to fix rates at unreasonable levels.").

[10] It is not clear that the D.C. Circuit recognized the legislative path that the Durbin Amendment followed. That court stated that "[p]erhaps unsurprising given that the Durbin Amendment was crafted in conference committee at the eleventh hour, its language is confusing and its structure convoluted." App. 16a. However, the Senate held a floor vote on the Durbin Amendment and the Amendment emerged from weeks of House-Senate conference negotiations with the statutory provisions that are relevant to this litigation (15 U.S.C. §1693o-2(a)(2), (a)(3)(A), and (a)(4)(B)) preserved in nearly identical form. Senator Durbin delivered remarks in the Congressional Record

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Congress carefully crafted the provisions of the Durbin Amendment that are at issue in this litigation. First, Congress mandated that if a card network establishes a debit interchange fee on behalf of large card-issuing banks,[11] the fee amount set by the network must be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(2). Congress then directed the Board in §1693o-2(a)(3)(A) to prescribe implementing regulations "to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction," and instructed the Board in §1693o-2(a)(4) on the considerations it could and could not apply when establishing these standards under (a)(3)(A). In §1693o-2(a)(4)(A), Congress instructed the Board to "consider the functional similarity between (i) electronic debit transactions; and (ii) checking transactions that are required within the Federal Reserve bank system to clear at par." In §1693o-2(a)(4)(B), Congress directed the

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explaining his Amendment and its purpose on numerous occasions – before the Senate vote, during conference negotiations, and before the final vote on the conference report – but the D.C. Circuit did not cite any of these statements in its analysis of the Durbin Amendment despite saying "we must do our best to discern Congress's intent and to determine whether the Board's regulations are faithful to it." App. 16a.

[11] The fee regulation applies to card-issuing financial institutions with over $10 billion in assets.

Board to "distinguish between (i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and (ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2) . . . ". Congress strictly limited the cost considerations for the Board to apply when crafting its standards because Congress intended to create a closer equivalency between the debit card system and the checking system in which transactions are regulated to clear at par.[12] In so limiting network-established debit interchange fees to the incremental cost of authorization, clearance and settlement ("ACS"), Congress identified what it saw as the core cost of actually conducting a debit transaction and permitted only that cost to be covered by a centrally-established interchange fee, thereby giving card issuers incentive to manage all

[12] Senator Durbin explained the rationale as follows: "All that happens in a debit card transaction is you deduct money from your bank account. It is akin to writing a check. That is why debit cards are advertised as check cards. Right now in the United States there are zero transaction fees deducted when you use a check. The Federal Reserve does not allow transaction fees to be charged for checks. But when it comes to debit cards, Visa and MasterCard charge high interchange fees just as they do for credit. Why? Because they can get away with it. There is no regulation, there is no law, there is no one holding them accountable." 156 Cong. Rec. S3696 (daily ed. May 13, 2010) (statement of Sen. Richard Durbin).

other costs of their debit card operations more efficiently.

The Board's Final Rule. The mandate and the directives Congress gave to the Board were clearly articulated in the Durbin Amendment's text and were reinforced by Senator Durbin's statements of legislative intent. Recognizing this, the Board issued a draft rulemaking in December 2010 that proposed to implement the Amendment in a way that was largely consistent with its plain text as well as its expressed purpose. *See* Debit Card Interchange Fees and Routing: Proposed Rule, 75 Fed. Reg. 81,722 (Dec. 28, 2010). The Board's draft rulemaking was centered around a proposed 12 cent debit interchange fee cap for large regulated issuers, a standard the Board based on an issuer's per-transaction variable ACS cost. *See* 76 Fed. Reg. at 43,424.

The banking industry expressed outrage with the Board's draft rulemaking and launched an aggressive lobbying campaign to weaken the draft rule and secure a final rule that preserved more of the industry's existing interchange revenue stream.[13] The industry simultaneously pushed for a vote on legislation that would delay the Board's rulemaking and

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[13] *See* AM. BANKERS ASS'N DAILY NEWSBYTES (March 15, 2011), "Sens. Tester, Corker Introduce Bill to Stop Interchange Rule," *available at* http://www.aba.com/aba/documents/news/SPED031511.pdf ("ABA . . . for months has been working along with a coalition of bank and credit union trade groups to stop the interchange rule . . . ").

direct the Board to "consider all fixed and incremental costs associated with debit card transactions" in issuing final rules.[14] This legislation faced bipartisan opposition and was rejected in a Senate floor vote on June 8, 2011.

Even though Congress had twice considered and rejected the arguments of the banking industry, the industry succeeded in influencing the Board to announce a Final Rule on June 29, 2011 that deviated from the plain text and purpose of the statute that Congress had enacted.[15] The Board made the Final Rule significantly more generous to issuing banks than the draft rulemaking by including fixed costs and other costs beyond incremental ACS cost in its cap. *See* 76 Fed. Reg. at 43,429. The resulting cap permitted regulated issuers to receive an interchange fee of 21 cents plus 5 basis points plus a one cent fraud prevention adjustment on each debit transaction, reflecting an apparent desire by the Board to split the baby between banks and merchants by

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[14] *See id.*; *see also* Senate Amendment 392, 157 Cong. Rec. S3558-9 (daily ed. June 7, 2011).

[15] *See* Frank Keating, President and CEO of the American Bankers Association, *Who won and who lost with the Federal Reserve's final debit interchange rule?*, AM. BANKERS ASS'N WASHINGTON PERSPECTIVE (July 1, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=68d6ba0d-0238-4d5f-b9a8-a38f782a24fb (stating "I am pleased that the Fed took what action it could to ease the rule's impact on banks. . . . It's clear to me that the aggressive six-month campaign that ABA, state bankers associations and bankers waged on this issue had a real bottom-line impact.").

setting a cap at approximately half of the pre-existing 44-cent average fee. *Id*. at 43,397.

Congress neither instructed nor empowered the Board to impose its own policy judgments and engage in a line-drawing exercise between merchants' desire for low fees and banks' desire for high fees. In enacting the Durbin Amendment, Congress had made its own policy determination to reduce network-fixed interchange fees to cover only a limited measure of incremental ACS cost, thereby compelling large issuers to compete against each other to manage their other costs more efficiently. And eleven months after the Durbin Amendment was enacted, the Senate reaffirmed this approach by defeating legislation that specifically sought to require the Board to include fixed issuer costs in its rulemaking.[16] Congress tasked the Board to follow the law Congress enacted, not to circumvent it at the request of the banking industry.

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[16] *See* 157 Cong. Rec. S3574 (daily ed. June 8, 2011) (statement of Sen. Richard Durbin) ("The Tester-Corker amendment requires the Fed to allow interchange fees to cover 'all fixed and incremental costs associated with debit card transactions and program operations, including incentives.' This is a truck-size loophole the banks are begging for, because they know they can get up to 44 cents and beyond . . . ").

II. THE D.C. CIRCUIT ERRED BY DEFERRING TO THE BOARD'S INCLUSION OF "THIRD CATEGORY" BANK COSTS IN ITS RULEMAKING, AS THE INCLUSION OF SUCH COSTS WAS CONTRARY TO THE DURBIN AMENDMENT'S TEXT AND LEGISLATIVE HISTORY.

Although the Durbin Amendment carefully circumscribed the Board's authority with respect to the setting of interchange fee standards, the D.C. Circuit essentially gave the Board a blank check to include within its interchange standards a category of bank costs that Congress did not authorize and that the law's plain text precludes.

The Board in its Final Rule claimed that there was a universe of costs not mentioned in 15 U.S.C. §1693o-2(a)(4)(B) – namely, costs "that are specific to a particular electronic debit transaction but that are not incremental costs related to the issuer's role in [ACS]" – and that the statute's silence regarding these costs permitted the Board to consider such costs in its fee standards. 76 Fed. Reg. at 43,426. The D.C. Circuit held that the Board engaged in a "reasonable determination" when the Board considered this so-called "third category" of "costs specific to a particular transaction, other than incremental ACS costs" and counted such costs, including fixed costs, toward its interchange cap. App. 29a.

By including in its Final Rule cost considerations that were not mentioned in the statute's text, the Board claimed regulatory authority that Congress did

not give it. Congress only authorized the Board to consider one cost under 15 U.S.C. §1693o-2(a)(2)'s reasonable and proportional analysis, and that was the cost specified in clause (a)(4)(B)(i). Acknowledging this lack of express authorization, the D.C. Circuit cited two other justifications for the Board's consideration of unmentioned "third category" costs: the punctuation of subparagraph (a)(4)(B) and the court's assessment that subparagraph (a)(3)(A) granted the Board broad authority in its regulations to consider other "costs issuers incur." App. 23a-25a, 27a-28a.

However, the D.C. Circuit overlooked that the "third category" of costs it endorsed ("costs specific to a particular transaction, other than incremental ACS costs") is specifically precluded from consideration by the precise language of subparagraph (a)(3)(A). In (a)(3)(A), Congress authorized the Board to establish standards for assessing whether an interchange fee is reasonable and proportional "to the cost incurred by *the* issuer with respect to *the* transaction." Similarly, in paragraph (a)(2) Congress mandated that regulated interchange fees be reasonable and proportional "to the cost incurred by *the* issuer with respect to *the* transaction" for which the fee was charged or received. Congress' focus on "the" relevant issuer and "the" relevant transaction in (a)(2) and (a)(3)(A) reflected Congress' intent to reform the existing system in which card networks had set a uniform schedule of fees across all issuers regardless of differences in those issuers' costs. Congress sought to require that regulated fees be linked more closely to

the specific costs that regulated issuers incurred in conducting the particular transaction.[17]

The statute was not silent on whether "costs specific to *a* particular transaction, other than incremental ACS costs" could be considered pursuant to (a)(2) and (a)(3)(A). The statute's plain text precludes such costs from consideration because they do not constitute costs "incurred by *the* issuer with respect to *the* transaction." The statute only permits the Board to deviate from (a)(2)'s and (a)(3)(A)'s focus on "the" issuer and "the" transaction in one circumstance: clause (a)(4)(B)(i)'s directive that "the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction" be considered under (a)(2) and also be considered in the Board's regulations prescribed under (a)(3)(A). In doing so, the statute reflects Congress' policy judgment that an assessment of incremental ACS cost incurred by "an" issuer in "a" debit transaction could be considered as an allowable proxy for the exact cost incurred by "the" issuer for "the" transaction in every case in which a fee was charged. But the plain text of (a)(2) and (a)(3)(A) precludes the Board from issuing

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[17] *See, e.g.*, 156 Cong. Rec. S4930 (daily ed. June 15, 2010) (statement of Sen. Richard Durbin) ("When I said in this amendment that we really want those fees to reflect the reasonable and proportional cost of processing *the* transaction, [the banks] screamed bloody murder because there is a lot of money being made . . . ") (emphasis added).

regulations that incorporate any other costs, beyond what was stated in (a)(4)(B)(i), unless those costs were incurred by "the" issuer with respect to "the" transaction.

It was a rational policy decision by Congress not to give the Board discretion to deviate in other ways beyond clause (a)(4)(B)(i) from the focus in (a)(2) and (a)(3)(A) on "the" exact issuer and transaction involved. Congress knew that the banking industry had long tried to justify high interchange fees by claiming the fees were needed to cover a wide range of fixed and operational banking costs – even though many of these costs were not necessarily associated with the debit transaction on which the fee was being charged and even though banks also charged numerous other checking account fees, credit card fees and ATM fees purportedly to cover the same costs.[18] If Congress permitted the Board to establish a "reasonable and

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[18] *See, e.g.,* U.S. Gov't Accountability Office, GAO-10-45, *supra* note 3, at 21 ("Issuers report that the revenue they receive from interchange fees is used to cover a variety of costs in their card programs. . . . Although issuers incur costs for offering cards, concerns remain about the extent to which interchange fee levels closely relate to the level of card program expenses or whether they are set high so as to increase issuer profits."); *see also* Shareholder Letter from Jamie Dimon, Chairman and CEO, JPMorgan Chase, Apr. 4, 2011, at 25, *available at* http://files.shareholder.com/downloads/ONE/1279744849x0x458384/6832cb35-0cdb-47fe-8ae4-1183aeceb7fa/2010_JPMC_AR _letter_.pdf (arguing that banks need debit interchange fees to pay for the "fixed costs of servicing checking accounts and debit cards" such as "the costs of ATMs and branches.").

proportional" standard that was linked to an unspecified universe of costs beyond the incremental ACS cost specified in the statute, then any interchange fee, no matter how exorbitant, could be justified as reasonable and proportional. The effectiveness of the Durbin Amendment's "reasonable and proportional" mandate necessarily depended on the carefully limited nature of the costs that could be considered.

Thus, the D.C. Circuit erred when it approved the Board's interpretation of the statute as permitting the incorporation of a third category of "costs specific to *a* particular transaction, other than incremental ACS costs." The D.C. Circuit's reliance on the Congressional grant of authority in (a)(3)(A) should have taken the language of (a)(3)(A) as it reads, with its focus on "the" issuer and "the" transaction, rather than the D.C. Circuit's attempt to fudge that language into a broader grant of authority for the Board to generally consider "costs issuers incur." App. 28a. And while the D.C. Circuit said that punctuation matters, surely words do as well when the plain reading of the words comports with the statute's clearly-expressed purpose. Simply put, the Board's interpretation conflicts with the plain text of the statute, and accordingly the D.C. Circuit erred in according the Board's interpretation deference. *See, e.g., Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992).

III. THE ELECTRONIC DEBIT SYSTEM IS ONE OF THE PRIMARY METHODS BY WHICH AMERICANS TRANSACT MONEY, AND CONSUMER WELFARE WILL BE ENHANCED IF LARGE BANKS ARE REQUIRED TO COMPETE WITH ONE ANOTHER TO MANAGE FIXED COSTS EFFICIENTLY INSTEAD OF HAVING THOSE COSTS UNIFORMLY SUBSIDIZED BY INTERCHANGE FEES UNDER THE BOARD'S RULEMAKING.

Debit cards have become the most common form of non-cash payment in America. In 2012, there were 47 billion payments made by debit card, compared to 23.8 billion by credit card and 18.3 billion by check. *The 2013 Federal Reserve Payments Study*, Dec. 19, 2013, at 41, *available at* http://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf. America's economy is rapidly transitioning from paper-based forms of payment to electronic transactions, and as Senator Durbin stated, this means that

> the way we do business in America is increasingly falling under the control of these two giants of the credit and debit card industry – Visa and MasterCard. . . . Unfortunately, these two companies are looking for profits, and they are not always looking out for the best interests of the merchants, the small businesses, the retail businesses or the consumers.

156 Cong. Rec. S3695-6 (daily ed. May 13, 2010) (statement of Sen. Richard Durbin).

Congress enacted the Durbin Amendment because American consumers and businesses deserve a debit system that is efficient, subject to competitive market forces, and free from excessively high network-established interchange fees. The Amendment was carefully crafted to promote these goals while avoiding possible negative impacts on consumers, small issuers, fraud prevention, and the overall viability of the debit system. In most respects, the Durbin Amendment is working as Congress intended. The debit system remains vibrant and growing.[19] Small banks and credit unions have been able to continue competing successfully in the debit card issuance market, with the Federal Reserve stating that the Durbin Amendment's fee regulation exemption for small issuers "is working as intended." Board of Governors of the Federal Reserve press release (May 23, 2013), available at http://www.federalreserve.gov/newsevents/press/bcreg/20130523a.htm. Certain merchants have been able to reduce their debit card acceptance costs and pass those cost savings on to consumers in visible ways.[20] Consumers have not seen

[19] Between 2009 and 2012, the number of general-purpose debit card payments grew by 7.7 percent each year – the largest growth among all types of payment. *The 2013 Federal Reserve Payments Study*, at 18.

[20] *See., e.g.,* Arlene Satchell, "Allegiant gives debit card holders a discount online," SUN-SENTINEL (Aug. 24, 2012) ("It's not uncommon for gas stations to give customers a lower price at the pump if they pay with cash or a debit card, but now at least one U.S. carrier is offering similar incentives to fliers.") Note though that in the absence of explicit debit card discounts, "[t]he

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an overall increase in bank account fees in response to the Durbin Amendment, as fee transparency and market competition between banks for consumer business has helped restrain these fees.[21] A study by the Federal Reserve Bank of Kansas City concluded that free checking accounts became more widely available after the Amendment took effect, despite bank industry claims that the Amendment would eliminate free checking. *See* Kevin Wack, *Free Checking Increased After Durbin: Study*, THE AM. BANKER (Dec. 11, 2013). And the Durbin Amendment has succeeded in motivating card networks and banks to adopt fraud prevention technology that they had long resisted.[22]

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pass-through of cost savings from merchants to consumers is not easy to measure, even when merchants pass on all their savings to consumers." Fumiko Hayashi, *The New Debit Card Regulations: Effects on Merchants, Consumers, and Payments System Efficiency*, 2012, at 102, *available at* http://www.kc.frb.org/publicat/econrev/pdf/13q1Hayashi.pdf. And for many merchants, the interchange fee increases that have taken place under the Board's Final Rule have made it difficult to achieve debit cost savings at all.

[21] *See* James Sterngold, *Banks' Fee Bonanza Dries Up*, WALL ST. J. (Sept. 2, 2014) ("After peaking in 2009, the annual account fees collected at U.S. commercial banks have declined markedly, even as the volume of bank deposits has swelled . . . ").

[22] Prior to the Durbin Amendment, banks often refused to promote fraud prevention measures like PINs, preferring instead to steer consumers toward less secure signature debit transactions which carried higher interchange fees. *See* Letter from Senator Durbin to Jaime Dimon, Chairman and CEO, JPMorgan Chase & Co., April 12, 2011, at 3, *available at*

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However, the Board's impermissible inclusion of "third category" costs in its Final Rule is countermanding the Durbin Amendment's goal of reducing the burden of excessively high interchange fees for businesses and consumers. By incorporating fixed costs and other "third category" costs into its Final Rule, the Board actually gave its blessing for Visa and MasterCard to increase interchange fees on many transactions. This is because debit interchange fees were traditionally established by networks as a combination of an *ad valorem* (i.e., percentage of the value of transaction) fee plus a flat fee. *See* 75 Fed. Reg. at 81,724. This fee structure meant that before the Final Rule took effect, small ticket (i.e., small dollar) debit transactions were typically assessed interchange fees that amounted to several cents.

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http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=f122bc2c-9381-44e9-8327-f90c88ebf9bc (noting that Chase urged its U.S. customers to "always select" signature debit whereas in Canada, where debit interchange fees are not charged, Chase's subsidiary promoted secure chip and PIN technology.). But the Durbin Amendment directed the Board to allow issuers to receive an upward adjustment in interchange fees if, and only if, the issuers take effective steps to reduce fraud. *See* 15 U.S.C. §1693o-2(a)(5). Mere weeks after the Senate vote to delay the Durbin Amendment failed and the Board announced its rulemaking, Visa announced a roadmap to promote U.S. adoption of EMV smart-card fraud prevention technology (a standard already used by nearly all other developed countries). *See* Visa presentation to Federal Reserve on U.S. Debit EMV, January 8, 2014, at 2, *available at* http://www.federalreserve.gov/newsevents/rr-commpublic/visa-meeting-20140108.pdf ("In August 2011, Visa announced a U.S. EMV roadmap.").

However, after the issuance of the Final Rule, MasterCard and Visa promptly raised their small ticket interchange fees to the Final Rule's cap level, tripling the fees previously charged on many transactions and resulting in retail price increases for consumers.[23] These small ticket fee increases will be corrected and consumers will benefit only if this Court grants certiorari and compels the Board to comply with the text and purpose of the Durbin Amendment by removing "third category" costs from the Final Rule.

If the D.C. Circuit's erroneous grant of broad deference to the Board is not corrected, not only will businesses and consumers continue to bear the burden of excessively high small ticket fees, but the banking industry will likely pressure the Board to further raise the interchange cap to cover more of their "third category" costs and in higher amounts. Every additional cost beyond incremental ACS cost that the Board permits to be subsidized by interchange fees is a cost that issuing banks lose incentive to manage efficiently. But the Board has already

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[23] *See, e.g.,* Digital Transactions News, *Applying the Durbin Maximum, Visa and MasterCard Could Squash Small Tickets* (Sept. 27, 2011), http://www.digitaltransactions.net/news/story/3217 ("[A] merchant on a $2 sale for a cup of coffee currently pays 7.1 cents when either a Visa or MasterCard debit card is presented. Now that cost will more than triple to 23 cents . . . On an $8 sale, the cost will increase 59%."); Daniel Purl, *Redbox to raise price in response to Durbin Amendment*, BANK CREDIT NEWS (Oct. 28, 2011) (citing an increase in DVD rental charges from $1 to $1.20).

shown once that it will accommodate the banking industry's requests to raise the interchange fee cap[24] – even though past experience in the United States[25] and present examples in other countries[26] demonstrate that banks can easily offer debit card services without the subsidy of high interchange fees. Requiring the Board to implement the Durbin Amendment according to its text and purpose and to exclude fixed costs and other "third category" costs from the Final Rule will limit banks' ability to further insulate their debit operations from competitive market forces.

CONCLUSION

This Court should grant certiorari to reverse the Court below, to give proper effect to the text and purpose of the Durbin Amendment by correcting the

[24] *See* Keating, *supra* note 15.

[25] *See* Martin, *supra* note 6 ("Fees were not an issue when debit cards first gained traction in the 1980s. . . . Merchants were not charged a fee for accepting PIN debit cards, and sometimes they even got a small payment because it saved banks the cost of processing a paper check. That changed after Visa entered the debit market.").

[26] *See* Carlton, *supra* note 5, at 129; *Hearing on H.R. 2695, The Credit Card Fair Fee Act of 2009, supra* note 2, Prepared Statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group, at 6 ("[N]umerous countries operate payment systems without the use of interchange fees. In those countries the ultimate cost of these systems is modest and the systems operate quite efficiently.").

Board's Final Rule, and to help ensure the efficient operation of the debit system for the benefit of consumers and our nation.

Respectfully submitted,

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