IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

LINNEY'S PIZZA, LLC, Plaintiff, -against- BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	:	Case No. 3:22-cv-00071-GFVT

BRIEF OF *AMICUS CURIAE* AMERICAN BANKERS ASSOCIATION IN SUPPORT OF INTERVENORS THE BANK POLICY INSTITUTE AND THE CLEARING HOUSE ASSOCIATION L.L.C.

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INTEREST OF *AMICUS CURIAE*[1]

The American Bankers Association ("ABA") is the principal national trade association of the $23.7 trillion banking industry. ABA was founded in 1875, and is composed of local, regional, and national banks that together employ approximately 2.1 million people. Members of the ABA are located in each of the fifty States and the District of Columbia, and include debit card issuing financial institutions of all sizes and types, both large and small.

This case concerns the Board of Governors of the Federal Reserve System's ("Board") Regulation II, which was promulgated in 2011 pursuant to the Durbin Amendment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1693*o*-2 (the "Durbin Amendment"). Regulation II regulates, among other things, the interchange fees that debit card issuers may receive for debit card transactions to compensate them for the costs of processing such transactions.

Linney's Pizza, LLC's ("Plaintiff") request, which would require the Board to issue a new rule capping interchange fees far below issuers' transaction costs, puts *amicus*'s members—that have collectively invested billions of dollars to develop and maintain an efficient, convenient, and secure debit card payments system—at great risk. The debit cards that ABA's members offer are crucial to American consumers, the payments system, and the U.S. economy. Consumers benefit from debit cards, which provide an efficient, secure, and widely accepted method of payment. Debit cards also benefit merchants by enabling increased sales and profits. However, in order to enable such services, ABA members rely on interchange revenue to process electronic debit

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[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae* contributed money to fund the preparation or submission of this brief.

transactions. As such, ABA has a direct and vital stake in this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant The Bank Policy Institute and The Clearing House Association L.L.C.'s ("Intervenors") motion for summary judgment and dismiss Plaintiff's claims. Plaintiff argues, incorrectly, that the Board improperly included certain extra-statutory costs in the interchange fee calculation that were not permitted to be considered under the Durbin Amendment. Not so. Plaintiff challenges the inclusion of four categories of costs, namely, "(1) (so-called) 'fixed' ACS costs, (2) transaction-monitoring costs, (3) network processing fees, and (4) a fraud-loss adjustment based on the value of the transaction." (Pl. Br. at 21, ECF No. 39-1.) The Board was fully compliant with the statute when it considered and included these *actual* costs incurred by issuers with respect to electronic debit transactions when drafting Regulation II.

Inclusion of these costs in the interchange fee cap is consistent with the text, structure, and purpose of the Durbin Amendment. The Board is statutorily mandated to establish "standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693*o*-2(a)(3)(A). While the Durbin Amendment establishes certain "[c]onsiderations" to inform the Board's determination of standards that are "reasonable and proportional" to costs, it is ultimately the mandate that controls. *See id.*; 15 U.S.C. § 1693*o*-2(a)(4).

Nothing in the Durbin Amendment limits the costs the Board is permitted to consider to only authorization, clearance, and settlement costs ("ACS costs"). In fact, the only limiting language in the statute is language that prohibits the Board to consider certain "other costs incurred by an issuer which are *not specific* to a particular electronic debit transaction." 15 U.S.C. § 1693*o*-2(a)(4)(B)(ii) (emphasis added). This language does not prohibit the Board from considering

actual costs that *are* specific to a particular electronic debit transaction. Had Congress intended for issuers to be permitted recovery of only *part* of "the cost incurred by the issuer with respect to the transaction," it would have said so directly. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 485 (D.C. Cir. 2014).

In fact, Congress could not have intended to limit recovery to only *part* of an issuer's costs. Constitutional principles instruct that where the government regulates prices, it must enable a company to "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *see also Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (holding that price control regulations that fail to allow a reasonable rate of return are unconstitutional).

This interpretation of the Durbin Amendment is supported not only by its own statutory language and the Constitution, but also by principles of statutory interpretation. Congress is no stranger to price regulation. Had it intended to limit interchange to only the *exact* cost of a transaction, or worse, as Plaintiff suggests, to only a subset of costs, Congress would have said so. But Congress did not say that interchange fees should be "equal to" or "limited to" certain costs. Congress clearly instructed that interchange fees be "reasonable and proportional to" costs associated with an electronic debit transaction. Plaintiff's proposed interpretation of the statute would require issuers to provide electronic debit transactions at a loss—a result that this Court cannot consider to be "reasonable" or "proportional." Indeed, issuers are already unable to recover the full costs of providing debit cards. By the Board's own admission, only 77 percent of issuers recover the subset of costs that the Board deemed allowable to be considered in Regulation II.

Debit Card Interchange Fees & Routing, Notice of Proposed Rulemaking, 88 Fed. Reg. 78,100, 78,113 (Nov. 14, 2023). *Amici* for the Plaintiff,[2] comprised of three retailer groups, are flatly wrong to assert that issuers are making excessive profits as a result of interchange fees, this is simply not true. (Retailers Br. at 2-4, 9-10.)

Finally, the Board was statutorily required to consider the impacts of Regulation II on consumers. The Board's limited review identified potential negative impacts, which have since come to fruition. The Retailers' Brief argues that further restricting the costs that are considered in Regulation II will result in lower costs to merchants that they will, in turn, be able to pass onto consumers. (Retailers Br. at 9-12.) But merchants have not passed along savings to consumers in the decade plus since Regulation II was promulgated and, in fact, they never intended to. Debit cards permit merchants to accept fast, safe, and secure payments at a cost that is not—as Retailers suggest—in lieu of a lower cost alternative. For example, accepting other payment types—like cash and checks—is cumbersome, labor intensive, raises safety issuers, and is more subject to fraud. Offering consumers an expanded range of payment options inherently comes with associated costs, but it also comes with the ability to reach and sell products to more consumers. Plaintiff and the Retailers simply cannot credibly argue that, contrary to a decade's worth of data, their proposed construction of Regulation II will *finally* benefit consumers.

In summary, Plaintiff's proposed construction of Regulation II is wholly without support. Neither the text of the Durbin Amendment itself, constitutional principles, nor statutory interpretation principles support Plaintiff's argument. The Retailers' Brief—which focuses on the time frame after Regulation II was enacted—is irrelevant to the question before this Court and

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[2] Brief of *Amici Curiae* Retail Litigation Center, Inc. National Federation of Independent Business Small Business Legal Center, Inc., and Merchant Advisory Group in Support of Plaintiff Linney's Pizza, LLC (such *amici* "Retailers," and such brief "Retailers' Brief"), ECF No. 42.

paints a highly misleading and incomplete picture that ignores the substantial benefits provided by debit cards to consumers and merchants. As such, this Court should dismiss Plaintiff's claims.

ARGUMENT

I. THE INCLUSION OF CERTAIN CATEGORIES OF COSTS IN THE INTERCHANGE FEE CAP IS CONSISTENT WITH THE TEXT AND PURPOSE OF THE DURBIN AMENDMENT

A. Plaintiff and the Retailers Are Incorrect Regarding the Reasonable and Proportional to Costs Mandate

The interchange fee mandate of the Durbin Amendment is set forth in section (a)(2), which directs that "[t]he amount of any interchange transaction fee . . . shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693*o*-2(a)(2). The statute then directs the Board to promulgate regulations establishing "standards for assessing whether the amount of any interchange transaction fee" meets subsection (a)(2)'s reasonable and proportional to cost mandate. *Id.* § 1693*o*-2(a)(3)(A).

Congress instructed the Board in developing these standards to fulfill the reasonable and proportional to cost mandate, to "consider[]" certain costs, such as "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." 15 U.S.C. § 1693*o*-2(a)(4)(B)(i). Congress also instructed that the Board must not consider "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* § 1693*o*-2(a)(4)(B)(ii). These two instructions, read together, leave a third category of actual costs incurred by issuers unaddressed: costs that *are* specific to a particular debit transaction. The third category was necessary, given Congress's ultimate direction to the Board in subsection (a)(3) 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*." *Id.* § 1693*o*-2(a)(3)(A) (emphasis added).

It is a fact that issuers incur more costs with respect to an electronic debit transaction than are set forth in (a)(4)(i). Had Congress intended for issuers to be permitted recovery of only *part* of "the cost incurred by the issuer with respect to the transaction," it would have said so directly. *See, e.g., NACS*, 746 F.3d at 485. But Congress did not. To the contrary, the statute states clearly that the full "*cost*" incurred by an issuer "*with respect to*" an electronic debit transaction may be considered when establishing a "reasonable and proportional" interchange fee. Thus, subsections (a)(2) and (a)(3) provide, *at minimum*, for an interchange fee that covers the *full* cost incurred by an issuer in relation to an electronic debit transaction.

For example, had Congress intended that (a)(4) list the *only* costs that the Board may consider when establishing interchange fee standards, it could have written the section to exclude "all other costs" or to "consider only" ACS costs, or it could have used interlocking language stating the Board must consider ACS costs and may not consider any other costs. (Board Br. at 17-19, ECF No. 46-2.) But Congress did not do so in either (a)(2) or (a)(4). Not only did Congress not use interlocking language, but Congress also directed the Board not to consider costs that are not specific to a debit card transaction. But there would be no need to expressly exclude any particular cost, if, as Plaintiff and the Retailers suggest, only ACS costs could be considered. This Court should reject Plaintiff and Retailers' reading, as it would render Congress's instruction not to consider certain costs superfluous. *See, e.g.*, *Yates* v. *United States*, 574 U.S. 528, 543 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (citation omitted).

The "[c]onsiderations" in subsection (a)(4) were not meant to override the subsection (a)(2) mandate, they were meant only to guide the Board in assessing the reasonableness and proportionality provided for in subsections (a)(2) and (a)(3). The term "[c]onsiderations" does not

support the narrow price cap suggested by Plaintiff. Indeed, the only costs the statute *prohibits* the Board from considering are certain "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." 15 U.S.C. § 1693*o*-2(a)(4)(B)(ii). The phrase simply reinforces what subsections (a)(2) and (a)(3)(A) already provide—that a cost is allowable so long as it is "with respect to [an electronic debit] transaction." *Id.* § 1693*o*-2(a)(2); (a)(3)(A).

As the Supreme Court has affirmed, Congress drafts legislation intentionally. *See, e.g., Connecticut Nat'l Bank*, 503 U.S. at 253–54. In drafting the Durbin Amendment, Congress did just that by mandating the Board to establish "standards for assessing whether the amount of any interchange transaction fee . . . is *reasonable and proportional* to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693*o*-2(a)(3)(A) (emphasis added). The Durbin Amendment does not, anywhere in its text, limit the fees the Board may consider in fulfilling this mandate, other than to prohibit consideration of certain costs that the Board correctly excluded in Regulation II.

B. The Statute Provides for Inclusion of All Four Categories of Costs Challenged by Plaintiff

The Board correctly concluded that the baseline includes at least the four categories of costs that Plaintiff challenges, namely, (1) (so-called) "fixed" ACS costs, (2) transaction-monitoring costs, (3) network processing fees, and (4) a fraud-loss adjustment based on the value of the transaction. All of these costs are incurred with respect to a debit card transaction, and therefore these costs were correctly included by the Board in the interchange fee calculation. Each is a "cost incurred by the issuer with respect to the transaction," 15 U.S.C. § 1693*o*-2(a)(2), and therefore allowable.

What the Plaintiff and Retailers call "fixed ACS costs" are allowable. Here, that includes every cost related to authorizing, clearing, or settling a transaction—whether fixed or variable—

that an issuer would not have incurred but for the provision of debit card transaction services. Additionally, it is often difficult to determine which ACS costs are "fixed" and which are "variable," and the relevant statutory language does not use the words fixed or variable, but rather uses the word "incremental". It therefore includes what the Plaintiff and Retailers call "fixed" ACS costs because such costs, divided and allocated to each individual transaction, are incremental and transaction specific.

Transaction monitoring permits an issuer to confirm that a card is valid and to authenticate the cardholder for purposes of authorizing a particular transaction. *See Debit Card Interchange Fees & Routing*, Final Rule, 76 Fed. Reg. 43,430, 43,431-432 (July 20, 2011). This function is integral to each debit card transaction, during which, for example, an issuer "may flag a transaction as suspicious and decline the authorization request or require the merchant to verify the transaction with the issuer before deciding whether to approve or deny the transaction." *Id.* at 43,431. The cost of this function is indisputably transaction-specific and is related to authorization.

Network fees "are obviously specific to particular transactions." *NACS*, 746 F.3d at 490; (*see also* Intervenor Br. at 20-21, ECF 44-4). Issuers pay a network processing fee for each electronic debit transaction processed for the issuer by that network, and indeed, cannot process a transaction without using the networks and paying the networks' fees for use. *Debit Card Interchange Fees and Routing*, 75 Fed. Reg. 81,722, 81,735 (Dec. 28, 2010); *see also NACS*, 746 F.3d at 490. Each such cost is indisputably specific to a particular transaction.

Finally, fraud losses, as defined by the Board, include "those losses incurred by the issuer, other than losses related to nonsufficient funds, that are not recovered through chargebacks to merchants or debits to or collections from customers." 76 Fed. Reg. at 43,431. These losses, as the Board recognized, arise from the authorization, clearing, or settlement of particular

transactions, and most commonly result from counterfeit-card fraud, lost-and-stolen-card fraud, and card-not-present fraud. *See id.* Such fraud loss is transaction specific.

Indeed, there are various other costs that are actually incurred and specific to a transaction that the Board should have considered. Thus, the Board's consideration of costs has been underinclusive, not overinclusive. The Board itself has acknowledged that as of 2021, only 77 percent of issuers recover their full base component costs under Regulation II. 88 Fed. Reg. at 78,113. Plaintiff's position would only further reduce this cost recovery shortage.

Although the government may limit returns, it is "plain that the 'power to regulate is not a power to destroy.'" *Permian Basin*, 390 U.S. at 769 (citation omitted). Consistent with this principle, the Durbin Amendment should not be read to direct the Board to cap interchange fees at less than the cost incurred by an issuer with respect to an electronic debit transaction. While Regulation II already fails to allow all issuers to recover their costs, Plaintiff's interpretation would raise "a serious doubt as to [the statute's] constitutionality." *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citation and quotation marks omitted); 88 Fed. Reg. at 78,113; (*see also* Intervenor Br. at 14-15). The Supreme Court has instructed that where the government regulates prices, it must enable a company to "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed[,]" *Permian Basin*, 390 U.S. at 792, and public utility case law informs us that just and reasonable rates must allow an issuer the opportunity to recover its costs and earn a return "commensurate with returns on investments in other enterprises having corresponding risks." *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 399 (1974); *Hope Natural Gas Co.*, 320 U.S. at 603.

Plaintiff's position that the Board should consider only ACS costs—which do not reflect all of an issuer's costs incurred with respect to an electronic debit transaction—is not supported

by the statute or the Constitution, and cannot be upheld by this Court.

C. The Adoption of a Uniform Standard Applicable to All Issuers and Transactions Was Permissible

Plaintiff argues that the Durbin Amendment requires an interchange fee standard that applies different caps for different issuers "tied to the *specific* costs that *each* issuer incurs for its own *specific* transactions." (Pl. Br. at 27.) This interpretation strains credibility. If Plaintiff's suggestion that an issuer-specific standard must be adopted is given credence, it follows that "the transaction" in the same phrase refers to a particular—as opposed to representative—transaction. This would result in a transaction-specific interchange standard that would, in the Board's words, be "virtually impossible to implement." (Board Br. at 27-28 (internal quotations omitted).) This interpretation must be rejected by this Court, as it is a foundational principle of statutory interpretation that Congress does not intend to enact absurd statutes. *United States v. E.T.H.*, 833 F.3d 931, 938 (8th Cir. 2016) (declining to interpret statute to produce "absurd results"); (*see also* Intervenor Br. at 21-24).

II. THE RETAILERS' BRIEF MAKES INCORRECT AND MISLEADING CLAIMS

The Retailers' Brief makes several incorrect and misleading claims about the nature of the debit card market, including with respect to issuers' profits. The Retailers' Brief largely ignores the impact its proposed interpretation of the Durbin Amendment would have on consumers and community financial institutions. Additionally, the Retailers' Brief makes implicit assumptions regarding the cost of other payment methods, by glossing over or ignoring the costs and security risks associated with cash and checks, and thereby creates a misleading view of the cost of debit card acceptance. In reality, debit cards provide significant value to consumers, merchants and banks of all sizes, including community banks.

A. The Retailers' Brief Incorrectly Argues that Regulation II Has Permitted Banks to Incur Record Profits

The Retailers' Brief incorrectly argues that the Board interpreted the Durbin Amendment to allow extremely high issuer profits. (Retailers Br. at 3, 10.) This is simply not true. A proper use of the term "profit" by Retailers would seek to quantify an issuer's actual costs, regardless of whether they are included in the interchange fee calculation. Instead, the "profit" analysis in the Retailers' Brief focuses on only a subset of issuers and only considers the narrow subset of costs that were deemed "allowable" under Regulation II. By the Board's own admission, only 77 percent of issuers currently recover their "allowable" base component costs under Regulation II. 88 Fed. Reg. at 78,113. And those base component costs are only a subset of the full costs associated with debit cards and debit transactions. Both the Durbin Amendment itself, and the Board, acknowledge that there are costs that are actually incurred by debit card issuers but that are not included in the Regulation II rate cap. Issuers are not earning exorbitant profits from debit card transactions, as they are not even permitted to recover all of the costs associated with debit card transactions. The court should disregard this argument entirely.

B. Contrary to Statements in the Retailers' Brief, Merchants Have Not Passed on Savings to Consumers

The Board was statutorily required to consider consumer and economic impact when drafting Regulation II. 15 U.S.C. §§ 1693b(a)(2) and (a)(3). At the time Regulation II was promulgated, the Board predicted—as did numerous commenters—that there may be limited or no consumer benefit as a result of Regulation II, and indeed, that it may even harm consumers. 76 Fed. Reg. at 43,464 ("the Board cannot, at this time, determine whether the benefits to consumers exceed the possible costs to financial institutions."). This fear proved correct. There is no credible evidence that the Durbin Amendment has resulted or will result in any benefit to the American consumer, and adopting the Plaintiff's proposed interpretation of the statute would only exacerbate

the overall harm. The only beneficiaries of Regulation II have been merchants, who receive an unjustified windfall.

The Retailers' Brief misleadingly uses consumer benefit as an argument in support of their proposition that the Board should not include all costs incurred by an issuer in connection with an electronic debit transaction in the interchange fee calculation. (Retailers Br. at 11-12.) But in reality, merchants have not passed along savings and in fact, never intended to. For example, the Federal Reserve Bank of Richmond found most merchants—77 percent—did not adjust prices at all, and 22 percent actually raised them. Zhu Wang *et al.*, *The Impact of the Durbin Amendment on Merchants: A Survey Study*, Fed. Reserve Bank of Richmond Economic Quarterly (2014). Moreover, a 2013 Mastercard survey found that only 3 percent of merchants intended to pass on savings.[3]

Indeed, there is evidence that merchants have never intended to use reduced interchange as anything more than a tool for increased profits. For example, in a 2010 earnings conference, Home Depot's then-Chief Financial Officer stated that, "[b]ased on the Fed's draft regulation, we think the benefit to The Home Depot could be $35 million a year."[4] Plaintiff and the Retailers cannot, and this Court should not enable them to, circumvent the statute's requirement for the Board to consider "the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers" and its obligation to demonstrate, to the extent practicable, "that the consumer protections of [Regulation II] outweigh the compliance costs imposed upon consumers and

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[3] MasterCard Worldwide, "Interchange and Durbin Amendment" at 2, as cited in Bradley Hubbard, "The Durbin Amendment, Two-Sided Markets, and Wealth Transfers: An Examination of Unintended Consequences Three Years Later" at 37, Univ. of Chi. L. Sch. (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2285105.

[4] Seeking Alpha, *The Home Depot's CEO Discusses Q4 2010 Results – Earnings Call Transcript* (Feb. 22, 2011), available at https://seekingalpha.com/article/254224-the-home-depots-ceo-discusses-q4-2010-results-earnings-call-transcript.

financial institutions." 15 U.S.C. § 1693b(a)(2). While the Retailers' Brief misleadingly argues that their own interpretation of the Durbin Amendment will benefit consumers, these arguments are unfounded and inconsistent with historical practices.

C. The Retailers' Brief Ignores Costs of Other Payment Methods

The Retailers' Brief complains about debit card fees and argues that they drive up the price of goods. (Retailers Br. at 11-12.) Implicit in their argument is that there is a lower cost alternative, such as cash or checks.

In reality, handling cash is cumbersome, labor intensive, raises safety issues, and is more subject to fraud. Investing in security measures to ensure cash is kept and deposited safely is costly. The National Association of Convenience Stores, a merchant trade organization, recently estimated that convenience store staff spend as many as 20 paid labor hours a week just counting money. NACS, *The Hidden Costs of Cash Management* (Mar. 26, 2024). Unlike card processing fees, these activities typically do not show up as line items on a business's financial statement, masking their significant costs. Merchants experience various costs across their business through frontline staff, supervisors, and back-office personnel to manage the physical exchange and movement of cash. The fees associated with preparing cash to be picked up by armored couriers and the possibility of theft are additional costs that make card payments cheaper and more streamlined. This implicit cost does not even consider the cost to secure cash or counterfeit costs. According to research conducted on behalf of the retail industry, the cost of accepting cash ranges from 4.7 percent to 15.3 percent of the value of the transaction.[5] This cost dwarfs the cost of debit

[5] Business Wire, "New Research from IHL Group Shows Retailers' Cash-handling Costs Range from 4.7% to 15.3%, Depending on Retail Segment" (Jan. 30, 2018), *available at* https://www.businesswire.com/news/home/20180130005244/en/New-Research-from-IHL-Group-Shows-Retailers%E2%80%99-Cash-handling-Costs-Range-from-4.7-to-15.3-Depending-on-Retail-Segment.

card acceptance.

The same is true of check processing. The number of merchants that accept check payments has been steadily declining, in no small part due to the costs of accepting checks and the risk of such payments bouncing for insufficient funds.[6] In fact, "[i]n both 2018 and 2021, average and median values of returned checks consistently exceeded those of checks collected" and the value of returned checks processed through the Board equal $62 billion.[7] And while Plaintiff is correct that Congress did instruct the Board to consider the functional similarity between debit card and checking transactions, this direction did not purport to require the Board to make debit transactions equivalent to checking transactions in all respects, nor did it require, as Retailers suggest, the Board to ensure that electronic debit transactions clear at par. As the Board establishes in its Brief, it did consider "such similarities and differences . . . in deciding whether to include or exclude specific items of cost from the reasonable and proportional standard[,]" thus complying with its statutory mandate. (Board Br. at 33-34.)

Finally, it is improper for Plaintiff to equate the costs of doing business with the inflation of the price of goods. Each payment method that a merchant chooses to accept comes with benefits (*e.g.*, increased ability of consumers to partake in a merchant's goods and services) and costs (*e.g.*, the costs of accepting that payment method). This is true both of debit cards and of payment methods that Plaintiff and Retailers misleadingly assert are "lower" cost. NACS, *The Hidden Costs of Cash Management*.

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[6] *Id.*

[7] Federal Reserve Bank of Atlanta, "Checks Processed by the Federal Reserve in 2021: Report of the Check Sample Survey" at 12-13 (Apr. 25, 2023), *available at* https://www.atlantafed.org/-/media/documents/rprf/publications/check-sample-survey/2023/05/05/2021-survey/report.pdf.

D. The Retailers' Brief Ignores the Fact that Inclusion of Actual Costs Ensures that Debit Cards Are a Safe, Efficient, and Effective Payment Method

Consumers derive substantial benefits from debit cards, including convenience, safety, and efficiency. Merchants also derive benefits from debit cards, including attraction of customers who want to use debit cards to make payments, and additional sales from customers who do not carry cash or checks. Debit transactions also enable both consumers and merchants to limit the safety and security risks associated with cash and check transactions. Absent revenues from interchange fees reflecting true costs, issuers have been forced to make difficult decisions about where to spend their capital, forced to choose, for example, between innovation in the debit card payments system and free or low-cost consumer banking services.

The Board already failed to consider numerous costs permitted under statute, and now Plaintiff requests that this Court further reduce allowable costs. In addition to being wrong on the law, this would be detrimental to the debit card system. For example, fraud incidence has more than tripled from 2011 to 2021, and issuer fraud losses have also increased. Board of Governors of the Federal Reserve System, Report: 2021 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions (Oct. 2023). Plaintiff is now asking this Court to forbid issuers from recovering fraud costs, and also reduce the available funds to combat fraud losses by billions of dollars, which would serve only to exacerbate the problem of fraud. Fraud prevention is vitally important to the entire debit card ecosystem: consumers, issuers, and merchants, alike. It is not supportable in the statutory text, as the Retailers suggest, that Congress intended the Durbin Amendment to limit recovery of costs necessary to prevent fraud through electronic debit transactions.

E. The Retailers' Brief Ignores the Impact of Regulation II on Community Banks and Credit Unions

The inaccuracies of these arguments are especially prevalent when observing the impact of Regulation II on community banks, which generally have less than $10 billion in assets and are intended to be exempt from Regulation II's coverage. These banks are vital to the U.S. economy, with approximately 4,000 community banks across the country providing "personalized service and maintain[ing] greater connection to their customers." Federal Reserve Bank of Kansas City, *The Critical Role of Community Banks* (Aug. 20, 2024). However, following enactment of the Durbin Amendment, community banks and credit unions saw "their interchange revenue drop 30% per swipe on PIN debit transactions[,]" (Testimony of Charles G. Kim before the S. Judiciary Comm. (May 4, 2022)), and the average inflation-adjusted interchange fee for "exempt" issuers dropped by more than 35 percent for single-message transactions and 8 percent for dual-message (Electronic Payments Coalition, *What Exemption? – Community Banks & Credit Unions Lose Under the Durbin Amendment* (Oct. 20, 2023)).

This is because the debit card market does not operate in a vacuum. As covered issuers were forced to reduce interchange fees, exempt issuers that needed to remain competitive faced downward market pressure from payment card networks and other market participants, resulting in fewer routing options and lower interchange fees. These institutions have lower debit volumes and "face per-transaction costs related to authorization, clearing, and settlement (ACS) services that are 20 times higher than larger banks," meaning that the downstream impacts of the Durbin Amendment result in a substantial impact on their ability to recoup costs. *Id.* This has resulted in a substantial detrimental impact to the margins of supposedly "exempt" issuers.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to grant the Intervenors' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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