**IN THE SUPREME COURT OF THE STATE OF GEORGIA**

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| SUNTRUST BANK,<br><br>Appellant,<br><br>v.<br><br>CHARLES DANIEL BICKERSTAFF, as executor of the Estate of JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated,<br><br>Appellee. | Case No. S25C0969 |

# BRIEF OF AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER SUNTRUST BANK

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## INTEREST OF *AMICUS CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $24.1 trillion banking industry and its 2.1 million employees. ABA members provide banking services in each of the 50 states and the District of Columbia. Among them are banks of all sizes chartered under the laws of Georgia and other states.

The ABA has a significant interest in this case because many of its bank members provide overdraft protection services to help their customers meet important or unforeseen expenses. The decision of the Court of Appeals holding that overdraft fees can be considered interest under Georgia's usury statute is contrary to Georgia legislative and regulatory authority, as well as the consensus among almost every state and federal court to consider the issue. The interests of the ABA and its members, along with those of consumers seeking the benefits of overdraft protection, will be harmed if the appellate court's decision is allowed to stand. If adopted more broadly, the court's ruling could force some of the ABA's members to cease offering overdraft protection services, harming the very consumers the laws seek to protect.

## SUMMARY OF ARGUMENT

For decades, banks in Georgia and throughout the United States have offered overdraft protection services to help consumers avoid declined transactions. When a consumer writes a check or uses a debit card to pay for expenses such as rent, groceries, or medical bills, overdraft protection allows a bank to approve and process the transaction even if the consumer does not have enough money in his or her checking account. In return for this service, banks typically charge a flat fee, regardless of the amount of the overdraft. This fee is called an "overdraft fee."

SunTrust Bank, a Georgia-chartered bank, is one of the many banks that offer overdraft protection. Jeff Bickerstaff, Jr., was a SunTrust customer who made extensive use of the services provided as part of SunTrust's overdraft protection program. Bickerstaff's representative nonetheless contends that the overdraft fees SunTrust charged him in return for these services constitute "interest" that is subject to Georgia's usury law. Adopting a view contrary to the consensus among legal authorities in Georgia and elsewhere, the Court of Appeals affirmed the trial court's ruling that whether overdraft fees constitute interest is for a jury to decide.

The Court of Appeals erred because overdraft fees are not interest as a matter of law.

*First*, overdraft fees do not meet the definition of "interest" as a matter of law or basic economics. Interest charges compensate a bank for the use of money loaned.

Overdraft fees do not. Instead, they compensate a bank for approving and processing an overdraft, as well as for the costs of and services associated with administering an overdraft protection program. Unlike interest charges, which vary in amount and are due over time, overdraft fees are a flat fee due immediately.

*Second*, the Georgia Legislature has confirmed in an amendment to Georgia's usury law that overdraft fees are not interest. This statutory clarification codified the pre-existing views of the Georgia Department of Banking and Finance and the Georgia Attorney General, which also confirmed that overdraft fees are not interest subject to Georgia's usury laws. As Georgia's banking regulator remarked, the contrary view was not only inconsistent with Georgia law, but could cause Georgia banks to terminate overdraft programs, adversely affecting consumers in Georgia counties where Georgia-chartered banks are the primary, if not only, banks present.

*Third*, the near-unanimous consensus among courts is that overdraft fees are not interest because they lack the hallmarks of interest charges: they are flat fees charged for overdraft services (not for the use of money), and are contingent upon customers overdrawing their accounts. This reasoning aligns with Georgia authority and confirms that overdraft fees cannot be considered interest subject to Georgia's usury statute as a matter of practice as well as established law.

## ARGUMENT

### I. The Court Should Grant Certiorari to Clarify That Overdraft Fees Are Not Interest and Thus Are Not Subject To Georgia's Usury Law.

The Court of Appeals erred in holding that whether overdraft fees constitute interest for purposes of Georgia's usury law is a question of fact to be resolved by the jury. Order at 27. The Court of Appeals' decision to allow a jury to determine this issue abrogates Georgia's allocation of decision-making responsibility. Juries determine facts; judges decide the law. *See* Ga. Const. Art. VI, § 1, ¶¶ 1-5. And whether overdraft fees are usurious is a question of law that must be decided by the court, and now by this Court. Simply put, this Court should grant certiorari to make clear that, as a matter of law and practice, overdraft fees cannot be considered "interest" and therefore are not subject to Georgia's usury statute.

#### A. Interest Is a Charge for the Time Value of Money.

"Interest" has long been understood to mean "compensation for the use or forbearance of money." *Deputy v. du Pont*, 308 U.S. 488, 498 (1940); *see* Black's Law Dictionary (12th ed. 2024) (similar). Charges for interest reflect the time value of money, the fundamental economic concept that a dollar received today is more valuable than a dollar received in the future because money you have today can grow through investments.[1] In other words, even if a borrower fully repays the amount of

[1] Lawrence Lokken, *The Time Value of Money Rules*, 42 Tax L. Rev. 1, 11–12 (1986).

money he or she borrowed from a lender (the "principal"), the lender still loses out on the time value of money (*i.e.*, the opportunity to grow the money through investments). A borrower pays interest to compensate a lender for the time value of the money loaned.[2]

Because interest compensates for the time value of money loaned, the amount of interest varies based on the amount and term of the loan; it is not a flat fee.[3] For that reason, interest is typically expressed as an annual percentage of the principal amount of the loan (the "interest rate").[4] Consider a consumer who takes out a $1000 loan from the bank at a fixed interest rate of 5% for a period of one year. At the end of the year, the consumer will have paid the bank a total of $1050: the original loan amount of $1000 and interest payments totaling $50 (or 5% of $1000). The borrower's $50 in total interest payments compensates the bank for the lost opportunity to grow the money loaned ($1000) through other investments.

Georgia's usury law incorporates this ordinary, common-sense understanding that "interest" is a charge to compensate for the time value of money. The usury law defines "interest" as "a charge for the use of money computed over the term of the

[2] Diane Lourdes Dick et al., *Reevaluating Risk and Return in Chapter 11 Secured Creditor Cramdowns: Interest Rates and Beyond*, 93 Am. Bankr. L.J. 175, 185 (2019).

[3] FDIC, *Consumer Assistance Topics: Loans* (Aug. 22, 2022), https://www.fdic.gov/resources/consumers/consumer-assistance-topics/loans.html.

[4] *Id.*

contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form." O.C.G.A. § 7-4-2(a)(3). In other words, "interest" under Georgia law, as elsewhere, is a charge (1) "for the use of money" (2) "computed" or "precomputed" at a specified "rate" based on, for example, "the scheduled principal balance." *Id.; see also Ruth v. Cherokee Funding, LLC,* 304 Ga. 574 (2018) (rejecting usury claim where transaction lacked an *unconditional agreement* to repay advanced funds).

### B. Overdraft Fees Are Not Interest Because They Are Flat Fees Charged for Overdraft Protection Services.

Overdraft fees charged for overdraft protection services fall outside the definition of interest under the usury laws of Georgia or any other state because they do not reflect the time value of money: they are neither charges (1) "for the use of money" nor (2) based on any sort of mathematical or other computation, "precomputed" or otherwise. *Id.*

Overdraft protection is a bank-provided service that helps consumers avoid declined transactions. An "overdraft" occurs when a consumer does not have enough money in his or her checking account to cover a transaction, but the bank nevertheless processes the transaction. When a bank pays an overdraft for a transaction, the bank typically charges an "overdraft fee." If the consumer's account remains overdrawn for several days, the bank may also charge an "extended

overdraft fee," an additional fee to compensate the bank for holding the account open while it remains overdrawn.

As compared to interest, overdraft fees do not compensate a bank "for the use of money." Instead, they compensate a bank for the services of processing an overdraft. That is why overdraft fees and the amount the bank has paid to cover an overdraft are due immediately: they are compensating the bank for a service it has already provided. Consumers do not have the right to defer payment. As the Consumer Financial Protection Bureau ("CFPB") has recognized, "institutions typically obtain repayment of a consumer's negative overdraft credit balance by *immediately* taking any incoming deposit to the asset account."[5] Yet the right to defer payment of a principal loan amount, and to use that money in the interim, is precisely what a consumer is buying when paying interest.[6] Put differently, interest compensates a bank "for the use of money" by the consumer during the term of a loan; overdraft fees do not.[7]

[5] Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13852, 13872 (Feb. 23, 2024) (emphasis added).

[6] *See* Dick et al., *supra* note 2 at 185.

[7] *See* R. David Whitaker, *Key Issues and Considerations in Drafting Deposit Agreements and Funds Transfer Services Agreements for Financial Institutions*, 50 Consumer Fin. L.Q. Rep. 37, 43 (1996) (explaining that overdraft fees are not interest because they are "charged for processing the bad check" and "[t]he bank expects to be repaid immediately and does not intend for the customer to repay the overdraft after a period of time or over a period of installments").

In addition, overdraft fees are *not* based on any sort of mathematical or other computation, "precomputed" or otherwise; they are flat fees. When a bank like SunTrust provides overdraft protection services, the bank charges the same overdraft fee regardless of the amount of the overdraft. Interest charges, by contrast, vary based on the amount and term of a loan because they compensate for the time value of money. *Supra* at Part I.A. For this reason, as Georgia's usury law recognizes, interest is typically charged "at a stated rate" based on "the scheduled principal balance." O.C.G.A. § 7-4-2(a)(3). In sum, because overdraft fees compensate a bank for the completed service of processing an overdraft, and not for the amount or duration of the overdraft, no mathematical or other computation is required; they are flat service charges.

Indeed, not only do overdraft fees compensate a bank for the service of processing an overdraft, but also the cost of administering an overdraft coverage program more broadly. When a Georgia-chartered bank charges an overdraft fee, the Georgia Department of Banking and Finance—like federal bank regulators—holds the bank responsible for establishing the fee "in accordance with safe and sound banking principles." Declaratory Order, 2013 WL 5780773, at *2, *5 (Ga. Dep't of Banking & Fin. July 3, 2013) (effective June 2, 2003) (adopting federal banking regulator's standards). An overdraft fee is in accordance with safe and sound banking principles "if the bank employs a decision-making process through

which it considers" specifically identified factors including "[t]he cost incurred by the bank in providing the service." *Id.* At *2-3.

ABA's members—including its Georgia-chartered bank members—report that the costs and services associated with administering an overdraft protection program are not limited to processing the overdraft, but also include:

- Customer Inquiries. Bank staff review and respond to customer inquiries related to overdrafts, submitted in person at a branch, over the telephone to a bank representative, or online.
- Branch Servicing. Branch employees spend time to determine if transactions that overdrew customers' accounts should be paid into overdraft, and communicate with frequent users of the overdraft protection programs.
- Mailing Overdraft Notices. The bank prints and mails copies of overdraft notices, and bank staff spend time to process the notices.
- Core Provider and Other Technology Costs. Core providers impose costs to manage the bank's overdraft program, along with other technology costs directly related to the overdraft program.
- Compliance Costs. Bank compliance staff spend time to monitor the operation of the overdraft program to ensure compliance with applicable law and regulations.

Considering the costs and services associated with an overdraft protection program, a $32 or $36 overdraft fee is within the range typically charged by banks per overdraft.[8] Of course, no one likes to pay fees. But a large majority of consumers

[8] FDIC, *Study of Bank Overdraft Programs* 15 (Nov. 2008), https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf (survey of overdraft fees assessed by banks).

(72%) view overdraft fees as reasonable, especially when considering benefits overdraft coverage provides consumers.[9]

### C. Loss of Overdraft Protection Would Harm Georgia Consumers.

The appellate court's ruling, if adopted more broadly, could force some of the ABA's members to cease offering overdraft protection services, harming consumers who use these services as a safety net to pay for rent, utilities, or medical bills.[10]

Here is a simple example: a consumer writes a check for $1200 to pay his monthly rent, even though his checking account balance is only $1000. If the consumer's bank offers overdraft protection, the bank may authorize the transaction and then obligate the consumer to deposit sufficient funds to bring the account back to a positive balance, which the consumer might do with his next paycheck or other deposit. Without overdraft protection, however, the consumer's bank will return or "bounce" the check, and may also charge the consumer a nonsufficient funds ("NSF") fee.[11] The consumer's landlord may charge him an additional late fee and

[9] ABA, *ABA Unveils Consumer Survey Data on Debit Cards, Overdraft and Other Banking Issues in Play in Washington* (Mar. 20, 2024), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-data-on-debit-cards-overdraft-and-other-banking-issues.

[10] Aluma Zernik, *Overdrafts: When Markets, Consumers, and Regulators Collide*, 26 Geo. J. Poverty L. & Pol'y 1, 7 (2018).

[11] Sam Davis & Stanley D. Mabbitt, *Checking Account Bounce Protection Programs*, 57 Consumer Fin. L.Q. Rep. 26, 33 (2003).

possibly report the missed rental payment to credit bureaus, damaging the consumer's credit score.[12]

Many consumers use overdraft protection to ensure that important expenses—such as rent, utilities, and medical bills—are paid if they experience a shortfall in funds.[13] According to a consumer study by the Federal Reserve, "[t]he majority of participants" indicated that they would like to continue to have banks pay overdrafts for check transactions and preauthorized electronic fund transfers, because "they used these methods of payment to pay important household bills, such as rent and utilities."[14] An analysis of transaction data from 11 banks found that the median size of transactions resulting in overdrafts is $370.[15] Another analysis of data from 14 financial institutions found that the average size of such transactions was $198.[16]

Overdraft protection is particularly valuable to consumers who lack access to affordable, alternative options to pay important or unexpected expenses. According

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[12] *See* Todd J. Zywicki, *The Economics and Regulation of Bank Overdraft Protection*, 69 Wash. & Lee L. Rev. 1141, 1150–51 (2012).

[13] Stephen C. Veltri & Greg Cavanagh, *Payments*, 64 Bus. Law. 1199, 1200 (2009) (analyzing research by the Federal Reserve suggesting consumers "would like to continue to have their banks pay overdrafts" to "cover their most important bills (like rent or utilities)").

[14] Electronic Fund Transfers, 74 Fed. Reg. 5212, 5215, 5218–19 & n.28 (Jan. 29, 2009).

[15] G. Michael Flores, *An Assessment of Usage of Overdraft Protection by American Consumers* 18 (2017), https://www.aba.com/-/media/documents/archives/white-paper/smalldollarwhitepaper2017apr.pdf.

[16] Curinos, *An Update: Competition Drives Overdraft Disruption* 8 (2021)

to a Federal Reserve survey, 37 percent of consumers who used overdraft services at least once in 2022 said they were "not confident" they would be approved if they applied for credit.[17]

Consumers appreciate and value the benefits of overdraft services. In a March 2024 survey conducted by Morning Consult, more than two-thirds of consumers (67%) stated that they found their bank's overdraft protection valuable, while eight in ten consumers (79%) who used overdraft services in the past year reported that they were glad that the bank had honored their transaction rather than returning or declining a payment.[18]

## II. The Georgia Legislature and Bank Regulators Have Confirmed That Overdraft Fees Are Not Interest.

The Georgia Legislature, in a 2014 amendment to Georgia's usury statute, confirmed that "overdraft" fees "shall not be considered interest." O.C.G.A. § 7-4-2(d).

The 2014 amendment to Georgia's usury statute clarified, rather than changed, the statutory definition of "interest." Indeed, the Georgia Legislature's stated purpose for the amendment was "to clarify that the term 'interest' does not

[17] Weston Lloyd, *By The Numbers: How Consumers May Be Harmed By CFPB Regulatory Action Limiting Access To Overdraft*, Consumer Bankers Ass'n (Dec. 19, 2023) (analyzing Federal Reserve survey results), https://consumerbankers.com/press-release/by-the-numbers-how-consumers-may-be-harmed-by-cfpb-regulatory-action-limiting-access-to-overdraft/.

[18] *ABA Unveils Consumer Survey Data on Debit Cards, Overdraft and Other Banking Issues in Play in Washington*, *supra* note 9.

include" overdraft fees. 2014 Ga. Laws 515 (H.B. 824); *see also* Ga. House Daily Report, 2014 Reg. Sess. No. 17 (Feb. 7, 2014) (explaining that the law "clarifies the difference between financial charges and interest" and that "[o]verdraft . . . charges . . . are not to be considered interest"). The Legislature "amended the statute to ratify" the "correct interpretation" of interest as excluding overdraft fees, and to "clarify" that this was "the legislative intent" all along; "the law did not change." *Blank v. Collins*, 260 Ga. 70, 72 (1990) (rejecting argument that amendment clarifying statutory definition changed the law).

The Legislature's statutory clarification that overdraft fees are not interest codified the position taken a year earlier by the Georgia Department of Banking and Finance, the regulator empowered by the Georgia Legislature to oversee state-chartered banks and their overdraft-coverage programs. In 2013, the Georgia banking regulator issued a declaratory order confirming that "overdraft fees imposed by state-chartered banks in connection with deposit accounts are not subject to state law usury limitations." Declaratory Order, 2013 WL 5780773, at *1. This order was issued pursuant to a Georgia statute authorizing the banking regulator to issue orders "[t]o provide parity with other federally insured financial institutions," O.C.G.A. § 7-1-611 (2005) (amended 2015), and applied "as of June 2, 2003." Declaratory Order, 2013 WL 5780773, at *1, *5.

Georgia's banking regulator identified four reasons that support its conclusion that overdraft fees are not interest.

1. The Georgia Attorney General ("Georgia AG") had concluded a decade earlier that "overdraft fees charged in connection with checking account transactions are generally not considered interest under Georgia law." Declaratory Order, 2013 WL 5780773, at *6. In 2003, the Georgia AG issued an opinion concluding that "an overdraft fee will not be considered interest when the transaction is readily characterized as a checking account transaction, lacking the legal and economic reality of a loan or extension of credit, and when the fee is not determined based on the character and time value of overdraft amounts." Ga. Op. Att'y Gen. 2003-9, 2003 WL 25960293, at *4 (Aug. 12, 2003).

The Georgia AG's conclusion relied on a "plain reading" of Georgia's usury statute. *Id.* at *1 & n.1. The term "interest" was defined then, as now, as a charge for the use of money "computed over the term of the contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form." O.C.G.A. § 7-4-2(a)(3). "Implicit in th[is] phrase . . . is the idea that, in order to be 'interest'," "the arrangement must involve some form of 'time value of money' calculation"—typically expressed as a percentage of the principal amount of the loan. Ga. Op. Att'y Gen. 2003-9, 2003 WL 25960293, at *1 & n.1. "A charge that is not truly based on a 'time value of

money' calculation will not, then, be 'interest', provided that the [bank] is actually providing a service for which the charge is assessed." *Id.* at *2.

Applying this plain reading of the definition of "interest," the Georgia AG considered whether a series of hypothetical overdraft fees constitute interest. For example, if an overdraft program—like SunTrust's program—provides that the bank "*may*" honor a check transaction without sufficient funds, and the bank "*charges a flat fee*" for the service when doing so, "the fee charged under this overdraft program is not 'interest' because its determination does not involve a 'time value of money' calculation." *Id.* at *2–3.

2. "Federal law has provided for more than a decade that such overdraft fees are not interest" as well. Declaratory Order, 2013 WL 5780773, at *5. Banks chartered under the National Bank Act are authorized to "receive deposits," 12 C.F.R. § 7.4007(a), and one incidental power to receiving deposits is the ability of the national bank to "charge its customers non-interest charges and fees, including deposit account service charges," *id.* § 7.4002(a). The U.S. Office of the Comptroller of the Currency ("OCC"), which regulates national banks, confirmed in 2007 that a bank's overdraft fees are "non-interest charges" for "a service to its depositors"—namely, "[c]reating and recovering overdrafts" when "a customer creates debits on his or her account for amounts in excess of the funds available in

that account." OCC Interpretive Ltr. 1082, 2007 WL 5393636, at *2, *4 (May 17, 2007).

The Georgia Department of Banking and Finance concluded that the reasons that overdraft fees are not interest under federal law apply equally under Georgia law. "Just like national banks, state-chartered banks are authorized to accept deposits," and a Georgia bank's ability to charge overdraft fees is "directly related to the receipt and withdrawal of deposits." Declaratory Order, 2013 WL 5780773, at *3 (citing O.C.G.A. § 7-1-280 (authorizing Georgia banks "[t]o receive money or commercial paper for deposit and to provide by its rules or by agreement for the terms of withdrawal")). Overdraft fees charged by Georgia banks are therefore also non-interest charges "imposed on deposit accounts as part of the deposit taking power of state-chartered banks" like SunTrust in this case. Declaratory Order, 2013 WL 5780773, at *3.

3. Treating overdraft fees as non-interest charges under Georgia law ensures "fair and equal competition between state-chartered banks and national banks in Georgia" during the period covered by the declaratory order (2003 to the present). *Id.* at *5. Because any "state law characterize[ing] an overdraft fee as interest . . . is preempted as to national banks," national banks "have charged overdraft fees outside of any usury limitations without any risk of liability" for decades. *Id.* at *3, *5. Considering the Georgia AG's 2003 opinion and the federal

banking regulator's position on overdraft fees, Georgia banks have also had, and continue to have, a "good faith" basis for believing they can do the same. *Id.* at *6.

If Georgia banks were subject to the risk of liability under usury laws for charging overdraft fees, then they would be placed at a competitive disadvantage vis-à-vis national banks. *See id.* at *5. As compared to national banks, Georgia banks would be uniquely exposed to "expensive, time consuming, and perhaps crippling litigation" challenging their overdraft coverage programs (*id.* at *6), as evidenced by this lawsuit filed more than a decade ago. This result is directly contrary to one of Georgia's "primary objectives" in regulating its banks: "to provide for competition and parity between state-chartered banks and national banks." *Id.* at *5 (citing O.C.G.A. § 7-1-3 (explaining that one of the "underlying objectives of this chapter" regulating banks is to provide "competition" between "financial institutions" and "other financial organizations . . . organized under the laws of the United States")).

4. The Georgia Department of Banking and Finance also concluded that treating overdraft fees as interest "would adversely affect many bank customers, including those customers in the many Georgia counties without national banks." Declaratory Order, 2013 WL 5780773, at *6. Recognizing the benefits of overdraft coverage (*see supra* at Part I.C), "many bank customers voluntarily choose to participate in bank overdraft programs." *Id.* Yet Georgia banks facing a risk of

liability for charging overdraft fees "may consider not offering overdraft programs in the future." *Id.* "This result threatens the very fabric of many local communities where state-chartered banks are often the primary, if not only, source of capital." *Id.* As the Georgia banking regulator explained, "[t]he gravity and importance of this issue to . . . consumers throughout Georgia simply cannot be overstated." *Id.*

Each of these reasons—the Georgia AG's 2003 opinion, established federal law, the need for parity with national banks, and the impact on Georgia citizens—demonstrated a "genuine necessity" for the banking regulator's order clarifying that overdraft fees are not interest under Georgia's usury statute. *Id.*

## III. Virtually Every Court Agrees that Overdraft Fees Are Not Interest.

In rejecting the arguments that the overdraft fees are not interest as a matter of law, the Court of Appeals staked out a position that is not only contrary to persuasive Georgia authority, but also to the overwhelming consensus among courts that overdraft fees are not interest.

More than twenty years ago, the U.S. Court of Appeals for the Eleventh Circuit held that overdraft fees "do not constitute interest." *Video Trax, Inc. v. Nationsbank, N.A.*, 205 F.3d 1358 (11th Cir. 2000) (adopting reasoning in *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1049 (S.D. Fla. 1998)). Acknowledging that the "plain and ordinary meaning" of "interest" is "the price which is fixed for the use of money" typically charged as "a percentage of the

amount borrowed," the district court, which the Eleventh Circuit affirmed, held that this definition does not encompass overdraft fees because they are not "fixed" or "for the use of money." *Video Trax*, 33 F. Supp. 2d at 1049–50. Overdraft fees are instead "default" or flat charges "contingent" upon customers overdrawing accounts that are "charged for the processing of bad checks." *Id.* at 1050, 1053–55; *see McGee v. Bank of Am., N.A.*, 674 F. App'x 958 (11th Cir. 2017) (reaffirming *Video Trax*).

Following the Eleventh Circuit's decision in *Video Trax*, other federal courts of appeals have reached the same conclusion. The Tenth Circuit, for example, held that overdraft fees are not interest because they are "a flat fee applied to any overdrawn balance," whereas interest is "a percentage applied to a specific principal." *Walker v. BOKF, Nat'l Ass'n*, 30 F.4th 994, 1008 (10th Cir. 2022). The First Circuit agreed because overdraft fees, unlike interest, are not charges for the use of money, but are charges to "compensate a bank for its deposit account services," including "the service of continuing to hold open an overdrawn checking account," as well as "additional monitoring to protect the bank against losses from a deposit accountholder who fails to remedy her overdrawn account." *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 139 (1st Cir. 2019).

Indeed, nearly every federal court that has addressed whether overdraft fees are interest has concluded that they are not. *See In re TD Bank, N.A. Debit Card*

*Overdraft Fee Litig.*, 2018 WL 1101360, at *3 (D.S.C. Feb. 28, 2018) ("[T]he law is still clear that sustained overdraft fees are not interest."); *Johnson v. BOKF, Nat'l Ass'n*, 341 F. Supp. 3d 675, 679 (N.D. Tex. 2018) ("declining to interpret the term 'interest' to include extended overdraft fees"), *aff'd*, 15 F.4th 356 (5th Cir. 2021); *Moore v. MB Fin. Bank, N.A.*, 280 F. Supp. 3d 1069, 1072 (N.D. Ill. 2017) ("overdraft fees . . . are not interest under the ordinary meaning of the term."); *In re TD Bank, N.A.*, 150 F. Supp. 3d 593, 641 (D.S.C. 2015) (joining the "litany" of cases "that have held that overdraft fees do not constitute interest."); *Shaw v. BOKF, Nat'l Ass'n*, 2015 WL 6142903, at *3–4 (N.D. Okla. Oct. 19, 2015) (same); *Nicolas v. Deposit Guar. Nat'l Bank*, 182 F.R.D. 226, 234 (S.D. Miss. 1998) (same).[19]

The overwhelming consensus that overdraft fees are not interest is shared by state courts that have addressed the issue. *See First Bank v. Tony's Tortilla Factory Inc.*, 877 S.W.2d 285, 285 (Tex. 1994). ("We hold that as a matter of law the [overdraft] fees in this case are not interest"); *Freeman v. Hawthorn Bank*, 516 S.W.3d 417, 423–26 (Mo. Ct. App. 2017) (similar); *Hernandez v. Wells Fargo Bank N.M., N.A.*, 128 P.3d 496, 499 (N.M. Ct. App. 2005) (overdraft fees "are not interest

[19] The lone exception is *Farrell v. Bank of America, N.A.*, 224 F. Supp. 3d 1016 (S.D. Cal. 2016), which "stands as the sole outlier to an otherwise uniform line of precedent" rejecting the argument that overdraft fees are interest. *Johnson*, 341 F. Supp. 3d at 681; *see TD Bank*, 2018 WL 1101360, at *10 (explaining why *Farrell* is unpersuasive, including because it relied on an inapplicable regulation's characterization of overdrafts).

or compensation for the use of money" because they "are fees for the processing of Plaintiff's debit transactions made on insufficient funds"); *Feld v. Apple Bank for Sav.*, 984 N.Y.S.2d 319, 323 (N.Y. App. Div. 2014) (overdraft fees do not constitute interest because "the contingency of an account overdraft would have been within plaintiff's control").

The Court of Appeals did not acknowledge, let alone engage with, the reasoning of these courts: that overdraft fees are not interest because they are: (i) charged for overdraft services rather than for the use of money; (ii) flat fees applied to an overdrawn balance rather than percentages of a loan principal; and (iii) contingent upon customers overdrawing their accounts, and not fixed. This reasoning is further supported by Georgia authority and the common-sense and longstanding understanding, accepted by consumers as well as banks, that overdraft fees are *not* "interest." Considering the importance of this issue to consumers as well as Georgia banks, this Court should grant review in this case to decide whether the Court of Appeals' decision should not have strayed from this Court's holding in *Ruth v. Cherokee Funding, LLC*, 304 Ga. 574 (2018), from the prevailing view throughout the country, and from common sense and actual practice with respect to the handling of overdrafts.

## CONCLUSION

Georgia authorities, the overwhelming consensus among courts, and basic economics establish that SunTrust's overdraft fees are not interest subject to usury limitations under the laws of Georgia or any other state. The Court should grant the petition and reverse the contrary ruling of the Court of Appeals and direct that judgment be granted in favor of SunTrust.

Dated: April 17, 2025

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## RULE 20 CERTIFICATION OF WORD COUNT

This submission does not exceed the word count limit imposed by Rule 20.

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## CERTIFICATE OF SERVICE

I certify that on April 17, 2025, I served all counsel of record in this matter with the **BRIEF OF *AMICUS CURIAE* AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER SUNTRUST BANK** by email and by placing the same in the United States Mail, addressed as follows:

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