No. 14-200

In The
Supreme Court of the United States

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

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

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

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AMICUS CURIAE BRIEF OF WAL-MART STORES, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Wal-Mart Stores, Inc. owns and operates over 4,900 stores in the United States. These include Walmart Supercenters, Discount Stores, Neighborhood Markets, Sam's Clubs, and small formats, such as Walmart Express. In FY 2014, there were over three billion debit card transactions in U.S. Walmart stores and Sam's Clubs. Debit card transactions accounted for 38% of all transactions and were the most common payment method. With an average interchange fee of $0.24 per transaction for regulated transactions and higher fees on unregulated transactions, interchange fees represent a significant business expense for Wal-Mart Stores, Inc. The failure to limit the interchange fee standard as directed by Congress costs Wal-Mart Stores, Inc. millions of dollars every year due to unreasonable and disproportionate interchange fees.

SUMMARY OF THE ARGUMENT

This *amicus* brief is filed by Wal-Mart Stores, Inc. which owns and operates over 4,900 stores in the United States. In FY 2014, consumers used their

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amicus curiae* or its counsel has made any contribution intended to fund the preparation or submission of this brief. After receiving timely notice, the parties have consented to the filing of this brief.

debit card for more than three billion transactions in stores owned by Walmart or its affiliates. Debit card transactions accounted for almost 40% of all transactions. Debit cards were the most common payment method. Thus, the interchange fee is a substantial expense for Walmart and, as a result, its customers.

These expenses are massive – and much higher than Congress intended. These heightened expenses are a result of the regulation that was adopted by the Board of Governors of the Federal Reserve ("Board") and that is challenged in this case. Because the regulation is contrary to Congress' intent and this issue is of great importance to millions of Americans, this Court's review is appropriate.

In enacting the Durbin Amendment, Congress understood the history of debit interchange fees and the harm caused by market failure. Electronic debit transactions began as a cheaper, but functionally equivalent, alternative to checking transactions. As with checks, PIN debit transactions initially cleared at par. However, interchange fees and the popularity of the more expensive signature debit transactions increased as Visa, and then MasterCard, gained a larger share of the debit market. As the market evolved, it became dysfunctional. Networks held significant power over merchants but competed for issuing banks. As a result, networks set higher and higher interchange fees to be paid by merchants for the benefit of issuers. Nothing in the market provided a competitive check on the rate of interchange fees,

and the fees bore no connection to any measure of the issuers' processing costs.

Congress addressed this specific market failure by regulating the fees set by the networks for the benefit of issuers. In doing so, Congress sought to restrict interchange fees and to treat debit transactions more like the checking transactions debit effectively replaced. Therefore, Congress explicitly mandated that the Board consider the functional similarities between debit and checks. Congress also instructed the Board to consider the incremental costs an issuer incurs for its role in the authorization, clearance, or settlement of a particular transaction and prohibited consideration of other costs not specific to the particular transaction.

The Board interpreted this statute to allow consideration of any costs involved in effecting any or all electronic debit transactions, including a number of fixed costs. This statutory construction is contrary to Congress' clearly expressed intent and renders meaningless Congress' explicit directions regarding appropriate considerations for setting interchange rates. As such, the Board's interpretation is unreasonable, and the D.C. Circuit erred in granting it deference. Given the gravity of the D.C. Circuit's error and the far-flung impact of unreasonable interchange fees, the petition for a writ of certiorari should be granted.

ARGUMENT

This case involves the regulation of interchange fees, which merchants must pay issuing banks for every electronic debit transaction. Congress sought to rein in the previously-unregulated interchange fees through the Durbin Amendment in the Dodd-Frank Wall Street Reform and Consumer Protection Act, *codified at* 15 U.S.C. § 1693o-2 (2012) (amending the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq*.). Relying on its understanding of the history of debit interchange fees and the present market failure, Congress sought to limit significantly the considerations that could be used to justify interchange fees. Specifically, Congress mandated that interchange fees be "reasonable and proportional" to the issuer's costs of the transaction, and instructed the Board to prescribe standards to regulate the fees. *Id.* § 1693o-2(a)(2).

Acting on this delegation, the Board promulgated a regulation which set a flat cap for permissible interchange fees but based it on costs well beyond those identified in the statute.[2] 76 Fed. Reg. 43,394 (July 20, 2011). In doing so, the Board relied on a counter-textual interpretation of the Durbin Amendment. The Board's statutory construction diminished the relevance of the considerations it was mandated

[2] Pursuant to the statute, the limitations do not apply to interchange fees for issuers with assets less than $10 billion. The regulation also does not apply to certain government-administered payment programs and certain reloadable, general-use prepaid cards. 76 Fed. Reg. 43,394, 43,394 (July 20, 2011).

to include and included costs it was prohibited from considering.

By sanctioning the Board's interpretation, the D.C. Circuit has departed so far from accepted principles governing judicial review and statutory construction as to warrant this Court's review. The D.C. Circuit has affirmed an interpretation that renders key provisions of the statute meaningless and upheld a regulation outside the authority granted by Congress. This decision will have a substantial impact on millions of merchants and consumers nationwide. The Board's failure to limit the interchange fee standard to the costs identified in the statute will result in additional fees of billions of dollars every year – a cost which will be borne by the merchants directly, and consumers indirectly, through all segments of the economy. This Court's review is necessary to uphold Congress' policy judgment that these merchants and their customers should be free from this burden.

I. The Board's Failure to Limit the Interchange Fee Standard as Directed by Congress Forces Merchants and Consumers to Pay Billions of Dollars In Unreasonable Fees.

A. Debit Card Payments Account for a Substantial and Growing Portion of All Consumer Transactions.

The Board's erroneous statutory construction and resulting regulation will have a substantial impact on

the nation's economy. The use of debit cards has grown tremendously over the last several years and continues to grow. In 2012, consumers used debit cards to pay for 47 billion transactions, valued at over $1.9 trillion. *See The 2013 Federal Reserve Payment Study: Recent and Long-Term Trends in the United States: 2000-2012* 15 (July 2014), http://bit.ly/1qdh8fD; Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees* 11 (Sept. 26, 2013) ("Shapiro Rep."), http://bit.ly/1uRbTGd. This represented an increase of over $1.5 trillion from debit card usage in 2000. *Id.* Indeed, electronic debit transactions are the fastest growing consumer payment method in the United States. *Id.*

The increasing importance of debit in consumer transactions is evident in the experience of domestic Walmart stores and Sam's Clubs. When viewed over the last few years, debit transactions have increased from less than 30% of the total U.S. Walmart and Sam's Club transactions in FY 2009, to nearly 40% in FY 2014. As a result, debit cards are now the most-often used payment method in those stores. The impact of debit is even larger when viewed in terms of the dollar value of the transactions. Year-to-date in FY 2015, debit transactions represented nearly 50% of the total dollar value of all transactions. Thus just slightly less than half of the money spent on consumer transactions at Walmart stores and Sam's Clubs was paid through the medium of debit cards. Given the popularity of debit cards, interchange fees present

a significant business expense for Wal-Mart Stores, Inc. and for millions of other merchants nationwide.

B. The Board's Unauthorized Interchange Fee Standard Creates a Significant Burden on Merchants and Consumers.

The Board's failure to follow the statutory text has allowed unreasonable interchange fees contrary to Congress' intent and costs merchants billions of dollars every year. Economist Robert Shapiro conducted an economic review of the impact of interchange-fee regulation in a study supported by the Merchant Payments Coalition. Shapiro compared the costs under the Board's final rule with the interchange costs merchants would have incurred under the Board's proposed rule, which purported to limit the basis to the statute's identified costs. *See* Shapiro Rep. 2. Shapiro found that merchants paid an additional $4.04 billion in interchange fees under the broader final rule in 2012 alone. *Id.* This represents an increase of 52% over what the interchange fees would have likely been under the Board's proposed rule. *Id.*

The impact of the unauthorized rule is particularly harsh on merchants that have a large number of small-value transactions. Prior to regulation, the networks used a tiered schedule to set interchange fees, with lower fees for small-value transactions. The Board's rule authorizes a base interchange fee of $0.21, plus 0.05% of the value and a potential $0.01

adjustment for fraud prevention. *See* Board of Governors of the Federal Reserve System, *2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* 2 (Mar. 5, 2013) ("Fed. Res. 2011 Rep."), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20130305a.htm. For transactions less than $15, this results in a higher interchange fee than was imposed pre-regulation. Shapiro Rep. 15. For transactions less than $7.50, the impact is even more devastating as the interchange fee allowed by the regulation exceeds the estimated profit margin for a number of industries dependent on small-value transactions. *Id.* at 17-18. These include supermarkets, grocery stores, convenience stores, gas stations, and drug stores. *Id.* Nor is the number of these small-value transactions insignificant. In 2009, 46.7% of signature debit transactions and 32.8% of PIN debit transactions were for less than $15. *Id.* at 16. Given that, Shapiro estimated that there would have been 13.8 billion debit transactions under $15 that were covered by the regulation in 2012. *Id.* The average value of those transactions was $7.50. *Id.* The fact that the regulation raised interchange fees over pre-regulation rates led to an estimated additional $690.6 million in interchange costs for merchants. *Id.* at 19.

Consumers also bear a heavy burden from the Board's unauthorized standard because merchants pass on a portion of the costs through higher prices. In his report, Shapiro discussed a recent study which examined more than 20,000 cost reductions for over

1,000 retail grocery and drugs stores to determine how much the cost changes decreased consumer prices. *Id.* at 19-20. The study found that, on average, 69% of the change in the merchants' costs was passed through to consumers, and Shapiro noted that this result was consistent with theoretical work in economics and smaller-scale studies. *Id.* Using the study's results, Shapiro estimated that consumers were forced to pay an additional $2.79 billion in higher prices in 2012 over what they would have paid under the Board's proposed rule. *Id.* at 24. In this way, all consumers, and not merely those who use debit cards, are suffering the consequences of the D.C. Circuit's failure to constrain the Board's authority to the terms of the statute.

C. Interchange Fee Regulation Does Not Impact the Viability of the Debit Market.

There is no evidence that reducing interchange fees to a reasonable measure of an issuer's transaction-specific processing costs harms the viability or strength of the debit market. Since the Board's regulation took effect, the interchange fee paid to covered issuers has averaged $0.24 per transaction. *See* Fed. Res. 2011 Rep. 2. This is a 52% decrease from the average interchange fee of $.50 per transaction prior to regulation. *Id*. Notwithstanding this decrease, the number of debit transactions has grown both as a percentage of the total number of transactions and of the dollars spent. *Id.* Moreover, several countries

have thriving debit markets in which debit transactions clear at par or which impose a small interchange fee closely tied to the issuers' processing costs. *See* Steven C. Salop, *Economic Analysis of Debit Card Regulation Under Section 920* (Oct. 27, 2010) ("Salop Rep."), Dist. Ct. Dkt. No. 33, J.A. of Relevant Admin. Rec. Excerpts 359 ("J.A.") (noting 2006 data which showed that "in seven of the eight countries with the highest debit card usage per capita there is no interchange fee"). For example, in Canada, electronic debit transactions compose a comparable percentage of payment transactions to that in the U.S. and still clear at par.[3] *Id.* at 358. Also, Australia reformed its interchange fees a few years ago to establish fees ranging from a negative interchange (-$0.25) to $0.05 per transaction, and debit card payments have continued to grow at a 10% annual rate. *See* Shapiro Rep. 9; *Scheme Fees and Interchange Fees*, http://www.eftposaustralia.com.au/corporate/resources/scheme-fees-and-interchange-fees (listing rates) (last visited Sept. 16, 2014). Nothing in the experience of the United States after the Board's final regulation or of other countries suggests that a higher interchange fee

[3] Canada's debit system illustrates the very low actual costs efficient issuers incur in processing debit transactions. In Canada, Interac is a national, non-profit payment network which operates the debit system. *Interac Fees*, http://www.interac.ca/en/interac-about/interac-fees (last visited Sept. 16, 2014). Interac charges its members a 'per transaction' fee solely to recover its costs in processing the transaction. Currently, Interac's per-transaction fee for debit transactions is less than a penny – $.006362. *Id.*

is necessary for the stability or growth of a debit market. There is simply no justification for ignoring Congress' clearly expressed intent for a more limited interchange fee standard.

II. The Board's Approach Is Contrary to the Intent of Congress, Which Enacted the Durbin Amendment to Restrict the Basis for Interchange Fees.

A. Interchange Fees Rose as a Result of Market Dysfunction and Were Never Tied to a Measure of the Issuer's Costs.

Electronic debit transactions began as a cheaper and more convenient payment alternative to checks. *See* Stephen Craig Mott, *Industry Facts Concerning Debit Card Regulation Under Section 920* (Oct. 27, 2010) ("Mott Rep."), J.A. 295. The transactions allowed account holders to access funds in their accounts without withdrawing cash or writing a check and provided significant cost savings for the issuing banks over checking transactions. *Id.* Both PIN debit transactions and signature debit transactions were introduced around the same time, but PIN debit was initially more popular. By 1993, PIN debit transactions accounted for over 60% of all debit transactions. *Id.* at 296 n.8, 305.

For the first several years, PIN debit transactions were processed over the regional networks that were used for ATMs. *Id.* at 295; J.A. 343 (Salop Rep.). As with the checking transactions they

functionally replaced, PIN debit transactions typically cleared at par, with no interchange fee. J.A. 297 (Mott Rep.), 343 (Salop Rep). Sometimes the issuer paid a small fee to the merchant (a reverse interchange) in order to encourage merchants to invest in the equipment necessary to effect the debit transactions. J.A. 297 (Mott Rep.), 343 (Salop Rep.). Otherwise, each side bore its own costs, just as in checking transactions. J.A. 297 (Mott Rep.), 360 (Salop Rep.). Notwithstanding the lack of interchange fees, the transactions still provided substantial benefits to issuers because of the cost and efficiency savings and because it allowed the banks to build stronger relationships with account holders. J.A. 297 (Mott Rep.). This benefit extended to potentially all of the banks checking account holders due to the small fraud risk inherent in PIN debit transactions. Banks were able to offer PIN debit cards to practically all checking account holders because the transaction's authorization, settlement and clearance occurred at the same time, minimizing the risk of insufficient-funds transactions. *Id.* at 296.

In contrast, signature debit transactions were processed over the same networks as credit card transactions, and Visa and MasterCard processed essentially 100% of all signature debit transactions. *Id.* at 298, J.A. 344 (Salop Rep.). Those networks typically set interchange fees comparable to the fees imposed for credit card transactions. *See* J.A. 345 (Salop Rep.). In addition, banks offered signature debit cards only to the most creditworthy account

holders because a signature debit transaction typically does not clear until a few days after the transaction is authorized, increasing the risk that the account funds will be depleted before clearance. J.A. 299 (Mott Rep.).

In the 1990's, Visa adopted policies to encourage use of their signature debit cards. In particular, Visa required merchants who accepted their credit cards to also accept their signature debit cards. *See* J.A. 344 (Salop Rep.), 300 (Mott Rep.). Given the widespread use of credit cards among consumers, merchants had no realistic business choice but to accept Visa signature debit cards also. The issuing banks then began to issue more Visa signature debit cards because of the high interchange fees they received and the increasing acceptance of the cards among merchants. J.A. 300 (Mott Rep.). MasterCard followed Visa's example and adopted similar rules and high interchange fees for signature debit transactions. *Id.* at 301.

Visa also undertook efforts in the 1990's to gain power within the PIN debit market. In the early 1990's, Visa bought Interlink, the largest PIN debit network, which at the time accounted for approximately 60% of PIN debit transactions. J.A. 305 (Mott Rep.), 344 (Salop Rep.). Visa promptly raised the interchange fee for Interlink transactions from at par to $0.45, making it the first network to charge merchants a significant interchange fee for PIN debit transactions. J.A. 305 (Mott Rep.), 344 (Salop Rep.). All of the competing PIN debit networks at the time

cleared debit transactions at par or paid a reverse interchange fee to the merchant. J.A. 305-06 (Mott Rep.).

Visa further raised the interchange fee for Interlink PIN debit transactions several times over the next 10 years and narrowed the gap between the interchange fee for PIN debit transactions and the interchange fee for signature debit transactions. J.A. 306 (Mott Rep.), 352-53 (Salop Rep.). Competing PIN networks followed suit and increased their fees under Visa's price umbrella. J.A. 306 (Mott Rep.), 352-53 (Salop Rep.).

Merchants were forced to accept the networks' cards notwithstanding the high interchange fees because of the growing importance of debit to their businesses. In 2009, consumer expenditures totaled \$7 trillion – \$1.6 trillion involved electronic debit transactions, compared to \$1.8 trillion in credit card transactions, and \$1.6 trillion in cash payments. *See* James C. Miller III, *Addressing the Debit-Card Industry's Market Failure* (Feb. 2011) ("Miller Rep."), J.A. 217. Merchants could not – and cannot – afford to reject cards bearing certain network brands because of the risk of losing an ever-increasing segment of consumers who prefer to pay with debit cards. This is particularly true for the Visa and MasterCard networks which, together, account for over 80% of electronic debit transactions. J.A. 348 (Salop Rep.). Hundreds of millions of consumers carry Visa and MasterCard debit cards, and merchants generally

have very little power to bargain against the impositions of those networks. *Id.*

In contrast, the networks compete for the issuing banks' business. Issuers choose which network to offer on their debit cards and have a greater ability to reject or accept particular networks because merchants accept multiple networks. *Id.* at 351. Therefore, networks sought to attract issuers by setting high interchange fees which the merchants must pay to the issuing banks. *Id.* at 352. The networks also established rules requiring merchants to accept all cards carrying a network's brand once they accepted any card with that brand. J.A. 221-22 (Miller Rep.). As a result, issuing banks did not need to negotiate with individual merchants to gain acceptance of their debit cards. *Id.* Instead, the issuers relied on the market power of the networks to gain acceptance and receive high interchange fees. *Id.*

The combination of the networks' power over merchants and the networks' competition to attract issuers led to a highly dysfunctional interchange-fee market. The fees were set solely to attract issuers, with little regard for the merchants that were paying the fees. As a result, the fees varied based on how much the merchants could be forced to pay, instead of serving as a mechanism to recoup issuers' costs. Indeed, the interchange fees were never tied to any measure of the issuers' costs of processing electronic debit transactions. Visa's General Counsel testified to as much before Congress, suggesting that the interchange fee should be based on the "value" added to

the transaction and should not be viewed as a measure connected to the issuers' costs. *See* J.A. 219-20 (Miller Rep.).

The fact that interchange fees were never intended to reflect the issuers' costs was also evident in the networks' structuring of interchange fees. Although there is no evidence that the processing costs fluctuate among PIN debit transactions or among signature debit transactions, the interchange fee charged for a particular transaction varied based on the type of merchant involved and the value of the transaction. *Id.* For certain businesses and larger transactions, there were fewer viable payment alternatives for customers to choose. Those transactions incurred a higher interchange fee under the networks' tiered fee schedule. *Id.* For businesses and transactions with greater flexibility in payment decisions, the networks charged a lower interchange fee even though the issuer's costs did not change. *Id.*

In his report, economist Robert Shapiro found that the unregulated interchange fees bore little connection to the issuers' costs. Shapiro Rep. 6. For example, in 2011, the average interchange fee was slightly over 10 times the average processing costs of the transaction. *Id.* Furthermore, interchange fees continued to rise in the years leading up to the Board's regulation even though the issuers' costs were constantly decreasing. Between 2009-11, issuers' average cost of authorization, clearance, and settlement decreased by 34%; issuers' other costs (except for fraud prevention costs) declined more than 23%; and issuers decreased

the amount spent on customer rewards and incentives. *Id.* at 7-8. However, during the same time period, the average interchange fee rose from $0.43 per transaction to $0.48 per transaction. *Id.* at 8. Given this and the networks' market power, Shapiro concluded that "[t]here is considerable evidence the card-issuing industry has raised interchange fees mainly because it can." *Id.*

The result was market failure with respect to interchange fees. The only competition regarding the fees continually pushed the fees higher. There was little incentive for the networks or issuers to increase the efficiency or quality of the services provided to merchants, and there was nothing in the market to check the costs of the fees.

B. Congress Enacted the Durbin Amendment to Address the Market Failure and Make Electronic Debit Transactions More Akin to Checking Transactions.

Congress addressed this dysfunctional market through the Durbin Amendment. In doing so, Congress legislated with an understanding of the history of electronic debit transactions; the purpose of interchange fees; and the present market failure. Specifically, Congress understood that electronic debit transactions rose as a functionally-equivalent alternative to checks and that, for several years, issuers found the system profitable with no interchange fee on a large segment of the transactions. Congress also

knew that the interchange fees set by the networks were never intended as a mechanism to recoup the general costs of the debit program. In establishing its legislative solution, Congress chose to emphasize the similarity to checking transactions, which clear at par, and to limit greatly the types of costs that could be employed as a justification for an interchange fee.

Importantly, Congress sought only to resolve the consequences of the specific market failure – the unchecked fees that result when networks set the interchange rates merchants must pay the issuing banks. Nothing in the statute prohibits issuers from charging merchants a direct fee intended to recoup costs of the electronic debit program. Competition among issuers would keep such fees in line and create incentives for the issuers to improve the quality and efficiency of their services. Rather, the legislation focuses only on the fees which abuse the networks' market power over the merchants for the benefit of the issuing banks.

As relevant here, Congress sought to solve the issue by mandating that the interchange fee actually reflect the costs the issuer incurred in effecting that individual transaction. Specifically, Congress required that any fee charged 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 to prescribe regulations which set standards for determining whether an interchange fee satisfies this requirement. *Id.* § 1693o-2(a)(3). In prescribing the regulations, Congress required the

Board to consider the similarity with checking transactions, which clear at par. *Id.* § 1693o-2(a)(4). Congress also expressly instructed the Board to distinguish among types of costs incurred by the issuer. Congress ordered the Board to consider "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," and prohibited the Board from considering "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.*

C. The Board Ignored Congress' Intent and Interpreted the Statute to Allow Issuers to Recoup Broad Costs Related to Effecting Electronic Debit Transactions Generally.

The Board interpreted § 1693o-2 to allow interchange fees based on all costs related to effecting electronic debit transactions. In particular, the Board read the statute to allow consideration of any costs not expressly prohibited and then narrowly interpreted the prohibited category to refer only to costs that "are not incurred in the course of effecting any electronic debit transaction." 76 Fed. Reg. 43,394, 43,426. Costs related to effecting *all* electronic debit transactions as a whole fall outside the prohibited classification and may be considered. Accordingly, the Board considered a number of costs beyond the specified incremental costs of a particular transaction, including fraud losses, and the fixed costs of connecting to

the network, purchasing and operating hardware and software, and associated labor expenses. *Id.* at 43,427, 43,429-30. The D.C. Circuit upheld the Board's interpretation under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as a reasonable construction of an ambiguous statute.

III. The D.C. Circuit's Decision Departs Substantially From Well-Accepted Principles Governing Judicial Review of Agency Rulemaking.

While the Constitution grants Congress the power to legislate, Congress may delegate rulemaking authority to executive agencies if Congress establishes clear limits on the scope of that authority. Specialized agencies may then use their expertise to gather information from affected entities and to prescribe responsive rules. *See*, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 372 (1989). However, it is critical to the preservation of our foundational governing principles that the agency's exercise of that authority remain within the bounds of congressional intent. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.").

It is the province and duty of the courts to uphold these limits on agency authority if a regulation is

challenged. *See generally* 5 U.S.C. §§ 704, 706 (2012); *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment). The court's review is conducted under the familiar framework announced in *Chevron*, 467 U.S. 837. First, the court must determine whether Congress has expressed clear legislative intent and follow unambiguous expressions of such intent. *See*, *e.g.*, *id.* at 843 n.9; *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). If Congress' intent is not clear, the court will defer to reasonable agency interpretations. *See Chevron*, 467 U.S. at 843. But a "reasonable" interpretation must be consistent with the language, structure, and intent of the legislation. *See*, *e.g.*, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). An agency regulation that is not consistent with the statutory "design and structure" is not entitled to deference. *Id.* (quotation marks omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

The Board's interpretation of § 1693o-2 – sanctioned by the D.C. Circuit – violates the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quotation marks omitted); *see also TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation marks omitted); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011). The Board views the specified incremental costs as only one component of the relevant basis for the fee standard, such that the

standard may also incorporate a number of other unidentified and non-specific costs, including "fixed" costs and fraud losses. Under this construction, however, there is no reason for the provision specifically mandating consideration of the identified incremental costs of the particular transaction. Those costs would easily be encompassed within the Board's purported discretion to consider all costs related to effecting debit transactions as a whole.

Congress was not worried that the Board would *refuse* to consider relevant costs in setting the fee standards, and there was little risk that the Board would forget to include the incremental costs of the particular transaction. If the Board's interpretation were correct, the mandate to consider those incremental costs would be superfluous. *See*, *e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("The dissent would read the regulation as simply clarifying that discretionary agency actions are included within the scope of § 7(a)(2), but not confining the statute's reach to such actions. But this reading would render the regulation entirely superfluous. Nothing . . . suggests that discretionary actions are *excluded* from the scope of the ESA, and there is no need for a separate regulation to bring them within the statute's scope.") (citation omitted) (emphasis in original).

The minimal relevance of the "incremental costs" provision under the Board's construction is evident in the Board's discussion of those costs. In addressing the costs included in the standard, the Board explained

that it was not necessary to determine whether costs were incremental or whether they were incurred in connection with authorization, clearance, or settlement because it had the discretion to consider *all* costs related to a particular transaction. 76 Fed. Reg. 43,394, 43,427. Thus the Board did not define the types of costs mandated for consideration or attempt to separate those from other costs included in the basis for the fee standard. *Id.* Rather, the Board concluded that it satisfied the statutory directive because it considered all costs for which it had data, except specifically prohibited costs. It is clear from this discussion that the provision mandating consideration of the identified incremental costs had little or no effect on the Board's final analysis, as the Board wholly relied on its purported discretion to consider any cost it deemed not-prohibited. In other words, under the Board's reading of the statute, the incremental costs provision was irrelevant and superfluous.

The statutory interpretation of the Board and D.C. Circuit also cannot be reconciled with Congress' intent to carefully restrict the basis for interchange fees. The statutory language and structure demonstrates that Congress wanted to restrict the types of costs considered in determining the fee. Congress highlighted the functional similarity to checking transactions, which clear at par, and chose the specified incremental costs as the express consideration for establishing what is reasonable and proportional. Furthermore, Congress saw it necessary to authorize

a separate adjustment for fraud-prevention costs, and even then, specified more limited circumstances under which the adjustment could be available. 15 U.S.C. § 1693o-2(a)(5). In order to read the statute as a "harmonious whole," *Brown & Williamson*, 529 U.S. at 132-33 (quotation marks omitted), and give effect to all provisions, the Durbin Amendment cannot be read to authorize interchange fees which incorporate substantial, unstated costs related to all electronic debit transactions as a whole. Rather, the statute can only reasonably be read to tie permissible interchange fees to the identified incremental costs of a particular electronic debit transaction. *Cf. Utility Air Regulatory Group*, 134 S. Ct. at 2442 ("A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (quotation marks omitted).

The Board's regulation does not purport to relate interchange fees to the specified costs, and the maximum fee established bears no reasonable proportion to the actual incremental costs the issuers incur in the authorization, clearance, or settlement of an individual electronic debit transaction. The average interchange fee charged under the Board's final rule is $0.24 per transaction. *See* Fed. Res. 2011 Rep. 2. In contrast, the average issuer cost of authorization, clearance, and settlement in 2011 was $0.05 per transaction. *Id.* at 33 (Table 13). The average cost of high-volume issuers, which accounted for over 94% of

regulated transactions, was $0.047 per transaction. *Id.* Thus the averages for almost 95% of debit transactions allow an interchange fee over five times the issuers' costs. Given that these numbers are self-reported and include a broad definition of allowable costs, the actual disparity between the Board's chosen standard and the statute's specified measure of costs is even greater.

The regulation exceeds the authority delegated to the Board by Congress to establish a standard for interchange fees based on a sharply limited measure of costs. In deferring to such an interpretation, the D.C. Circuit abdicated its responsibility to uphold clear expressions of congressional intent and to reject unreasonable statutory constructions.

CONCLUSION

The D.C. Circuit has departed from well-accepted principles of statutory construction and judicial review. The Court of Appeals' decision allows for billions of dollars in interchange fees every year that are unreasonable and unintended by Congress and that negatively impact millions of merchants and consumers. This Court's review is necessary to uphold Congress' clearly expressed intent. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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