UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ILLINOIS BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, and ILLINOIS CREDIT UNION LEAGUE, *Plaintiffs*, v. KWAME RAOUL, in his official capacity as Illinois Attorney General, *Defendant*.	:	Case No. 1:24-cv-07307 Hon. Virginia M. Kendall

BRIEF OF THE BANK POLICY INSTITUTE, THE CLEARING HOUSE ASSOCIATION L.L.C., AND THE CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Amici respectfully submit this brief in support of Plaintiffs' motion for a preliminary injunction on the ground that the Illinois Interchange Fee Prohibition Act ("IFPA") is preempted by federal law and will do tremendous and irreparable damage to the debit and credit payment systems, banks, and consumers if not enjoined. *Amici* believe this brief will aid the Court in understanding the workings of those card systems, the relevant regulatory structure, and why the IFPA is so harmful to the participation of banks in the debit and credit card systems.

BACKGROUND

Properly functioning national credit and debit card payment systems are crucial to the modern American economy. In 2021 alone, Americans used credit and debit cards in 157 billion transactions amounting to $9.43 trillion in total transaction value.[1] From these systems, consumers benefit from the ability to make electronic purchases and withdraw money anywhere in the world easily and safely with the push of a button or the swipe or tap of a card, to use and build credit on everyday purchases, and to earn rewards based on their spending on credit or debit cards. Merchants benefit from the increased sales volume, reduced operating costs, increased customer reach, fraud protection, and simplicity that card payments provide relative to cash or checks, in addition to the greater certainty and immediacy of card payments compared to checks.

In exchange for card issuers' role in providing these services, maintaining the card systems, providing related functions such as customer support, communication, and billing, and absorbing certain fraudulent or disputed card transactions, card issuers receive an "interchange fee," which is an amount on each transaction that usually comprises a combination of (i) a base

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[1] Fed. Rsrv. Bd., The Federal Reserve Payments Study: 2022 Triennial Initial Data Release (last updated June 24, 2024), https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm.

amount and (ii) a percentage of the value of the transaction. These fees are essential to card issuers' operations of the card systems; this year, interchange fees account for a median of 2.6% of total operating revenue and 12.62% of non-interest income at large banks.[2]

Unsurprisingly given the nationwide nature and importance of these systems, states have, until now, never enacted legislation usurping the regulation of these large and crucial systems from the federal government. That all changed, however, on June 7, 2024, when Illinois enacted the IFPA, which purports to (i) prohibit credit and debit card issuers (including national banks), payment card networks, acquirer banks (including national banks), and processors from receiving or charging an Illinois merchant any interchange fees on the gratuity and state and local tax portions of the transactions ("Interchange Fee Restriction") and (ii) prohibit those same entities from using transaction data from purchases made with cards in Illinois for purposes other than to process the transactions themselves or as otherwise "required by law" ("Data Usage Prohibition"). 815 Ill. Comp. Stat. 151/150-10(a), 15(b).

This Court should enjoin the Defendant from enforcing this aberrant law as preempted by federal law. As explained below, Congress, through the National Bank Act ("NBA"), has determined to preempt state laws that seek to limit national banks in processing card payments, receiving fees, and using card payment data for their operations. This in turn means that the IFPA also cannot be enforced against state-chartered banks because state and federal law extend the benefits of national bank preemption to state-chartered banks. Congress has also preempted state laws restricting national or state banks' ability to receive debit interchange fees through the Durbin Amendment to the Electronic Fund Transfer Act ("EFTA").

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[2] These figures are drawn from year-to-date data available on S&P Global Capital IQ's "Regulated Depositories (US)" tool for large banks subject to federal debit interchange fee limits under the Durbin Amendment. *Amici* will gladly provide this data to the Court if helpful.

Moreover, if not enjoined, the IFPA threatens not only to disturb the proper functioning of the payment systems in Illinois, but also to set a precedent allowing other states (and even localities) to enact their own laws and create an unmanageable patchwork of regulations that would ultimately disrupt card payment systems across the United States. The IFPA is also completely impractical, apparently enacted not only with no consideration of its implications for card payments or consumers in Illinois, but without consideration of whether it is even technically feasible to effectuate. Card issuers likely would not be able to comply with the IFPA without the investment of potentially hundreds of millions of dollars and countless hours to create the necessary technical and human infrastructure.[3]

ARGUMENT

I. THE NBA PREEMPTS THE IFPA.

A. The NBA Preempts The Interchange Fee Restriction.

A state law is preempted by the NBA if it "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers." *Barnett Bank of Marion Cnty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996). The Supreme Court interprets "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law." *Id.* at 32 (emphasis added). Courts applying *Barnett Bank*'s "significant interference" standard should analyze the state laws at issue based on "the text and structure of the laws, comparison to other precedents, and common sense," rather than based on a

[3] Howard W. Herndon, *The Complexities and Costs of Eliminating Interchange Fees on Sales Tax Portions*, Nat'l L. Rev. (June 14, 2024), https://natlawreview.com/article/complexities-and-costs-eliminating-interchange-fees-sales-tax-portions (noting that "industry analysts suggest that the total costs [of eliminating interchange fees on sales tax portions of transactions] could range from hundreds of millions to upwards of a billion dollars or more").

strictly monetary estimation of the economic impact a state law would have on national banks' operations. *Cantero* v. *Bank of Am., N.A.*, 144 S. Ct. 1290, 1301 n.3 (2024).

i. National Banks Have The Power To Process Credit And Debit Card Transactions And Receive Fees For That Service.

The NBA establishes the powers of national banks. On a fundamental level, national banks have the powers to receive deposits, facilitate payments, and make loans, 12 C.F.R. § 5.20(e)(1)(i) (describing "[r]eceiving deposits," "paying checks," and "lending money" as the "three core banking functions"), which inherently encompass the operation of credit and debit card programs. The Office of the Comptroller of the Currency ("OCC"), which supervises and regulates national banks, has expressly stated that "processing credit and debit card transactions . . . [is] clearly part of the business of banking." OCC, Corporate Decision 99-50, at 4 (Dec. 23, 1999); *see also*, *e.g.*, OCC, Interpretive Letter 689, 1995 WL 604271, at *1 (Aug. 9, 1995) ("The processing of credit card transactions for merchants is a part of or incidental to the business of banking within the meaning of 12 U.S.C. 24 (Seventh)."); *Gutierrez* v. *Wells Fargo Bank, NA*, 704 F.3d 712, 723 (9th Cir. 2012) (NBA gives national banks the power to process debit card transactions, as "[b]oth the 'business of banking' and the 'power to receiv[e] deposits' necessarily include the power to post transactions—*i.e.*, tally deposits and withdrawals" (quoting 12 U.S.C. § 24 (Seventh))). National banks have the power to receive fees for these and other services. *See* 12 C.F.R. § 7.4002(a) ("A national bank may charge its customers non-interest charges and fees . . . .")

ii. The IFPA Would Significantly Interfere With National Banks' Power To Process Card Transactions And Receive Fees For That Service.

The Interchange Fee Restriction implements a control on the price that national banks may receive for an aspect of their core products and services by completely preventing banks from receiving fees on certain portions of the card transactions they process. An attempted price

control of this type by a state over national banks categorically "prevents or significantly interferes" with national banks' powers.

In its recent *Cantero* decision, the Supreme Court directed lower courts analyzing NBA preemption questions to compare the state laws before them to the laws that were at issue in the Supreme Court's NBA preemption precedents. 144 S. Ct. at 1298. Two of the precedents identified in *Cantero* as lodestars for NBA preemption analysis—*Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954), and *First National Bank of San Jose* v. *California*, 262 U.S. 366 (1923)—demonstrate that state laws that prohibit national banks from receiving fees for their services are categorically preempted because such laws constitute more significant interferences than the state laws found to be preempted in those two cases. *Franklin* established that a state law regulating the language national banks could use to advertise a service was preempted by the NBA. 347 U.S. at 378-79; *Cantero*, 144 S. Ct. at 1298 (summarizing *Franklin*'s holding as "state law could not interfere with the national bank's ability to [engage in a permitted business] efficiently"). *First National Bank* established that a state law regulating unclaimed deposits was preempted because it interfered with national banks' agreements with their customers. 262 U.S. at 369-70. Far more than the laws at issue in *Franklin* and *First National Bank*, the IFPA seeks to regulate directly national banks' powers to receive fees for activities that are part of the business of banking by completely prohibiting banks from receiving interchange fees on portions of transactions they process. This restriction is a significant interference with national banks' NBA power to receive fees for providing products and services and is therefore preempted. *Cf.* *Baptista* v. *JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 (11th Cir. 2011) (NBA preempts state prohibition of check-cashing fees); *Bank of Am.* v. *City & Cnty. of S.F.*, 309 F.3d 551, 564 (9th Cir. 2002) (NBA preempts state prohibition of ATM fees for non-depositors).

As exemplified by *Franklin* and *National Bank*, the Supreme Court has regularly found that state laws constitute "significant interference" and are preempted by the NBA even when those laws do not have a direct monetary impact on the national banks.

In addition to prohibiting banks from exercising their power to collect fees, the Interchange Fee Restriction also would impose meaningful financial burdens on banks, threatening their ability to fund and support their core operations even more significantly than the laws in *Franklin* and *First National Bank* did. Illinois state sales tax is 6.25% even before accounting for county and city taxes, and the total sales tax in Chicago is 10.25%. In addition, state and local governments impose other types of taxes, such as excise taxes, and many types of businesses have a gratuity-based model. Assuming a 20% gratuity on a meal in Chicago, for example, the Interchange Fee Restriction would reduce by roughly 23% the value of a transaction on which banks could charge an interchange fee. Although it is impossible to calculate precisely the total amount by which the IFPA will reduce card issuers' interchange fee revenue if not enjoined, its reductions are sufficiently meaningful as to interfere significantly with national banks' ability to provide payment card products and services to consumers.

In addition to using interchange fees to fund consumer benefits, national banks rely on interchange fee revenue to defray losses on fraudulent transactions for which card-issuing banks pay merchants but do not charge cardholders.[4] By limiting banks' ability to rely on interchange revenue to fund their card programs and increasing the costs of maintaining those programs, the Interchange Fee Restriction would have a profound effect both on the economic viability of national banks' card-related activities and on consumers, who would likely see national banks'

[4] *See* Fed. Rsrv. Bd., 2021 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions 29-30 (Oct. 2023), https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2021.pdf.

practices change with respect to their card programs and other offerings to accommodate the significant reduction in Illinois interchange revenue. When Congress enacted the Durbin Amendment at the federal level to limit debit interchange fees, it led to a reduction in free checking accounts due to decreased debit interchange fee revenue for national banks.[5] An even further reduction in such accounts is likely if the IFPA becomes effective, in addition to other possible reductions to banks' products and services offered in Illinois.

The Interchange Fee Restriction will also require national bank card issuers and acquirers to expend significant resources—likely hundreds of millions or even billions of dollars[6]—to design and update payment processing systems to comply with the IFPA. Most or all point-of-sale software and hardware used to process card transactions in Illinois will need to be updated or replaced to allow the payment processing systems to separate taxes and gratuities from the total value of a transaction. Banks will be required to develop new systems to exclude taxes and gratuities from interchange fee calculations and hire and train staff to administer the Byzantine system envisioned by the IFPA to reimburse merchants who choose the statutory option to provide after-the-fact notification of the value of taxes and gratuities in their transactions. *See* 815 Ill. Comp. Stat. 151/150-10(b). The burden on banks will be compounded by the fact that they will have to account for the different taxes imposed by over 600 individual tax jurisdictions in Illinois.

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5 *See* Mark D. Manuszak & Krzysztof Wozniak, *The Impact of Price Controls in Two-Sided Markets: Evidence from US Debit Card Interchange Fee Regulation* (Fed. Rsrv. Bd., Working Paper No. 2017-74, 2017), https://www.federalreserve.gov/econres/feds/files/2017074pap.pdf (showing that the Durbin Amendment caused reductions in banks' free checking offerings); Vladimir Mukharlyamov & Natasha Sarin, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers* (2019), https://www.law.nyu.edu/sites/default/files/Mukharlyamov_Sarin_2.4.2019_0.pdf (same).

6 *See supra* note 3.

The economic impact of the Interchange Fee Restriction is heightened by the IFPA's "anti-circumvention" provision, which prohibits national banks from recouping lost interchange fees by increasing the rate of interchange fees on the non-tax, non-gratuities portion of a transaction or by increasing other fees to retailers. 815 Ill. Comp. Stat. 151/150-10(d).

Finally, if not enjoined, the Interchange Fee Restriction's impact on national banks would be exacerbated by emboldening other states to enact regulations interfering with national banks' ability to receive interchange fees. If other states are permitted to follow Illinois's lead, national banks will face the untenable situation of having fifty-one jurisdictions (or more, if local governments join the fray) imposing inconsistent and potentially contradictory requirements, in addition to the complexity of accommodating over 11,000 tax jurisdictions across the country.[7] As just one example, could a state prohibit interchange fees on purchases below a certain amount, with regard to certain products and services, or even completely on all transactions? This would substantially disrupt banks' exercise of their power to process card payments and is exactly the patchwork quilt of inconsistent state regulations of national banks' activities that the NBA was enacted to prevent. *See* *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) ("[The NBA] shields national banking from unduly burdensome and duplicative state regulation.").

Moreover, because the IFPA is preempted as to national banks, it is also preempted as to state-chartered banks. *See* 205 Ill. Comp. Stat. 5/5(11) (Illinois banks have the same powers as national banks); 12 U.S.C. § 1831a(j)(1) (states cannot disadvantage out-of-state state banks relative to national banks).

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[7] Janelle Fritts, *How Many Sales Tax Jurisdictions Does Your State Have?*, Tax Found. (Oct. 14, 2020), https://taxfoundation.org/data/all/state/state-sales-tax-jurisdictions-in-the-us-2020/.

B. The NBA Preempts The Data Usage Prohibition.

i. National Banks Have The Power To Use Card Transaction Data.

The use of debit and credit card transaction data is part of the business of banking under the NBA, and banks therefore have the power to use card transaction data for purposes such as fraud prevention and development of competitive banking products and services. OCC regulations provide that national banks have the broad power as "part of the business of banking under 12 U.S.C. 24 (Seventh) . . . to provide data processing, and data transmission services, facilities . . . , data bases, advice and access to such services, facilities, data bases and advice, for itself and for others, where the data is banking, financial, or economic data," which includes "anything of value in banking and financial decisions." 12 C.F.R. § 7.5006(a). Federal law already sets forth the manner in which banks must protect consumers' data. *See*, *e.g.*, Standards for Safeguarding Customer Information, 16 C.F.R. pt. 314.

In addition, national banks clearly possess the incidental power to use electronic payment transaction data in ways that are convenient and useful to national banks' other explicitly permitted activities, such as operating card programs and processing card payments. *See* 12 C.F.R. § 7.1000(d)(1) (providing that an activity is "incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking"). National banks' use of card transaction data plays a central role in the operation of modern banks. National banks use such data to improve their fraud prevention systems and minimize fraud losses, to set credit lines for customers, to calculate rewards for cardholders, to negotiate agreements with other businesses and financial institutions, to develop new products and improve existing products, to improve customer experience, to obtain consumer insights for merchants and other customers, and to analyze

macroeconomic trends to help banks navigate economic changes safely and soundly.[8] In particular, banks' ability to monitor and prevent the increasingly complex universe of potential fraud involving credit and debit cards will be crippled by the limitations imposed by the IFPA. Without the ability to use card transaction data for purposes other than processing transactions or as "required by law," national banks' ability to operate safely and soundly—and their ability to offer innovative, safe, and useful products to consumers—will be significantly diminished.

ii. The IFPA Would Prevent National Banks' Exercise Of Their Power To Use Transaction Data.

As a near-total ban on national banks' use of card transaction data, the IFPA's Data Usage Prohibition is most analogous to laws prohibiting banks' from exercising their lawful powers such as the total ban on banks selling insurance that was found to be preempted in *Barnett Bank*. 517 U.S. at 27-28. The Data Usage Prohibition precludes the use of debit and credit card transaction data "except to facilitate or process the electronic payment transaction" itself or as "required by law." 815 Ill. Comp. Stat. 151/150-15(b). This is a severe and direct restriction on banks' powers that interferes with those powers to a greater degree than preempted laws prohibiting the use of certain words in banks' advertisements, *Franklin*, 347 U.S. at 374, permitting states to collect unclaimed deposits after twenty years, *First Nat'l Bank*, 262 U.S. at 369-70, or prohibiting federally permissible due-on-sale clauses in trust deeds unless "reasonably necessary," *Fidelity Fed. Sav. & Loan Assoc.* v. *De la Cuesta*, 458 U.S. 141, 149, 170 (1982). The Data Usage Prohibition's limit on national banks' use of card transaction data to use that is "required by law"

[8] *See*, *e.g.*, Guerino Ardizzi et al., *The Use of Payment Transaction Data for Economic Forecasts* (2023), https://www.bis.org/ifc/publ/ifcb61_13.pdf (payment transaction data use improves macroeconomic forecasting); Salim Hasham et al., *Combating Payments Fraud and Enhancing Customer Experience*, McKinsey & Co. (Sept. 26, 2018), https://www.mckinsey.com/industries/financial-services/our-insights/combating-payments-fraud-and-enhancing-customer-experience (transaction data use improves fraud prevention and customer experience).

would significantly interfere with the broad powers granted to national banks under the NBA to engage in certain activities even if they are not "required by law."

It is permissible (though not "required") under the NBA for national banks to use such data, for example, in setting credit lines, calculating rewards, negotiating cobrand and partner arrangements, developing and improving new products or offerings, improving customer experience, obtaining insights for merchants and other customers, and analyzing fraud and macroeconomic trends to facilitate banks' safe and sound operations. *See supra* pp. 9-10. Because the Data Usage Prohibition permits only uses of data that are "required" by law, it would completely prevent all these permissible exercises of national banks' power to use transaction data, and it is therefore preempted by the NBA.[9]

II. THE DURBIN AMENDMENT PREEMPTS THE IFPA WITH RESPECT TO DEBIT INTERCHANGE FEES.

A. Congress Granted The Federal Reserve The Exclusive Authority To Determine Permissible Interchange Fees For Debit Card Transactions.

In 2010, Congress enacted the Durbin Amendment to the Dodd-Frank Act, which required the Federal Reserve to "establish standards" for covered issuers to ensure that the amount of any debit interchange fee that an issuer may receive "shall be reasonable and proportional to the

[9] To the extent Illinois argues that the IFPA does not directly regulate national banks, it is wrong. First, the IFPA directly prohibits national banks from "receiv[ing] or charg[ing]" interchange fees. 815 Ill. Comp. Stat. 151/150-10(a). Second, the IFPA cannot avoid preemption under the NBA by purporting to regulate the ability of non-bank parties to collect interchange fees and deliver them to national banks. *See*, *e.g.*, *Cohen* v. *Cap. One Funding, LLC*, 489 F. Supp. 3d 33, 48 (E.D.N.Y. 2020) ("[A] state statute cannot be allowed to avoid preemption by imposing . . . a [preempted] prohibition indirectly." (quoting *Pac. Cap. Bank, N.A.* v. *Conn.*, 542 F.3d 341, 353 (2d Cir. 2008))); *State Farm Bank* v. *Reardon*, 539 F.3d 336, 345-46 (6th Cir. 2008) ("[W]hen considering whether a state law is preempted by federal banking law, the courts should focus on whether the state law is regulating the exercise of a national bank's power not on whether the entity exercising that power is the bank itself." (internal quotation marks and citation omitted)).

cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(2), (a)(3)(A). The statute also provides that fees may be adjusted to account for card issuers' fraud prevention measures. *Id.* § 1693o-2(a)(5)(A). Pursuant to Congress's directive, the Federal Reserve in 2011 promulgated Regulation II, which states that a debit card transaction fee is "reasonable and proportional" only if it is no more than a sum of (i) $0.21, plus (ii) an *ad valorem* amount of 5 basis points multiplied by the "value of the transaction" (with no carve-outs from the total value of the transaction),[10] plus (iii) up to a $0.01 "fraud-prevention adjustment." 12 C.F.R. §§ 235.3, 235.4.[11] Regulation II therefore limits the interchange fee that covered issuing banks can receive under federal law for a given debit (but not credit) card transaction.

B. The IFPA Conflicts With The Durbin Amendment And Is Therefore Preempted With Respect To Debit Interchange Fees.

Not only is the IFPA's Interchange Fee Restriction preempted by the NBA as to credit and debit interchange fees as discussed in Section I, but the IFPA's limit on debit interchange fees is also preempted because it conflicts with the Durbin Amendment. The Interchange Fee Restriction would frustrate Congress's intent to create a uniform federal scheme for covered issuers tying debit interchange fees to card issuers' operating and fraud-prevention costs for all debit card transactions, including those which may include payments of taxes and gratuities.

Conflict preemption arises when "it is impossible for a person to obey both [state and federal law], or when state law stands as an obstacle to fully accomplishing the objectives of

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[10] Indeed, the data-collection surveys that the Federal Reserve conducted to inform the debit interchange fee limits in Regulation II did not separate tax and gratuity amounts (or any other type of charge) from the rest of the transaction. *See* 76 Fed. Reg. 43394, 43396-97 (July 20, 2011).

[11] Notably, the Federal Reserve declined to include a profit margin as a component of issuers' debit transaction processing "costs" when promulgating Regulation II, *see id.* at 43420-21, 43427 n.119, which makes such issuers' inability to receive interchange fees on substantial portions of transactions even more burdensome to their ability to process debit transactions profitably.

Congress." *Nelson* v. *Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 646-47 (7th Cir. 2019). Through the Durbin Amendment, Congress gave the Federal Reserve the authority to regulate debit interchange fees for the entire country and made clear that it intended debit interchange fees to be proportional to issuers' operating and fraud-prevention costs.

Illinois now attempts to limit interchange fees in a manner that runs counter to Congress's intention by exempting both the tax and gratuity portions of debit transactions from the calculation of interchange fees. *See* 815 Ill. Comp. Stat. 151/150-10(a). Because the IFPA's Interchange Fee Restriction impinges on the Federal Reserve's federal authority to regulate debit interchange fees nationwide and directly contravenes Congress's directives regarding the manner in which debit interchange fee limits are to be calculated, the Interchange Fee Restriction is preempted by the Durbin Amendment with respect to debit interchange fees.

Illinois may point out that EFTA contains a provision stating that "[a] state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." 15 U.S.C. § 1693q. Section 1693q, however, does not save the IFPA's Interchange Fee Restriction from preemption by the Durbin Amendment.

First, the Interchange Fee Restriction is not a consumer protection. The IFPA is designed to benefit merchants, not consumers, given that there is no requirement that merchants pass on any interchange fee savings to consumers. Indeed, research on the effects of interchange fee regulation has found that consumers are not actually helped—and may even be harmed—by such regulation. *See*, *e.g.*, Zhu Wang et al., *The Impact of the Durbin Amendment on Merchants: A Survey Study*, 100 Econ. Q. 183, 184, 197-205 (2014) (finding that while "[a] sizable fraction of merchants are found to raise prices or debit restrictions as their costs of accepting debit cards increase . . . few merchants are found to reduce prices or debit restrictions as debit costs decrease");

David S. Evans et al., *The Impact of the U.S. Debit-Card Interchange Fee Regulation on Consumer Welfare*, 11 J. Comp. L. & Econ. 23, 27, 55-61 (2015) ("Merchants are not giving enough of their gains back to consumers to compensate for the higher fees and reduced services that consumers are facing from banks as a result of the interchange caps."); U.S. Gov't Accountability Off., *Banking Services: Regulators Have Taken Actions to Increase Access, but Measurement of Actions' Effectiveness Could Be Improved* 22-23 (2022) ("[A] study conducted by Federal Reserve economists showed that certain banks subject to the interchange fee cap increased prices for checking accounts by increasing monthly service fees."). Moreover, the IFPA is not limited to circumstances in which consumers use cards, as business purchases are also covered.

Second, even assuming that the Interchange Fee Restriction were a consumer protection, Section 1693q does not apply to the Interchange Fee Restriction because it encompasses only those types of consumer protections contemplated by EFTA, and the Interchange Fee Restriction is not such a consumer protection. EFTA was enacted during a time when consumers were increasingly shifting from the use of physical checks to electronic payment methods and was "designed to create rights for consumers" because an automated system "was seen as . . . much more vulnerable to fraud, embezzlement and unauthorized use than traditional payment methods." *Wachter* v. *Denver Nat'l Bank*, 751 F. Supp. 906, 908 (D. Colo. 1990). In response to these concerns, EFTA set out to "protect consumers from transactions made in error or without their consent." *Wike* v. *Vertue, Inc.*, 566 F.3d 590, 592 (6th Cir. 2009). The overarching purpose of EFTA to protect consumers from fraud and error is evident from its provisions. *See*, *e.g.*, 15 U.S.C. § 1693c (disclosure of terms of electronic fund transfers); *id.* § 1693d (provision of written documentation of electronic fund transfers); *id.* § 1693e (written authorization of preauthorized electronic fund transfers); *id.* § 1693f (guidelines for resolution of errors).

The Ninth Circuit's decision in *Bank of America* v. *City and County of San Francisco* is instructive in describing the kind of consumer protection to which Section 1693q applies. There, the court held that two cities' ordinances prohibiting banks from charging ATM fees to non-depositors were preempted by the NBA. 309 F.3d at 556, 564-66. In doing so, the court rejected the cities' argument that the ordinances were protected from preemption by Section 1693q because the "prohibition of ATM fees [was] the type of consumer protection measure contemplated by the EFTA." *Id.* at 564. This argument failed, the court concluded, because the "language and legislative history" of EFTA indicated that it "was enacted to prevent fraud, embezzlement, and unauthorized disclosure in electronic transfers*, not to regulate service fees charged by financial institutions*." *Id.* (emphasis added); *see also Foreman* v. *Bank of Am., N.A.*, 401 F. Supp. 3d 914, 923 (N.D. Cal. 2019) (noting that EFTA's goals of "promot[ing] disclosure, prevent[ing] fraud, and allocat[ing] liabilities" are not "aimed at 'regulat[ing] service fees charged by financial institutions'" (quoting *Bank of Am.*, 309 F.3d at 564)).

The court's reasoning in *Bank of America* applies equally to state regulation of interchange fees. Limits on interchange fees were not the type of consumer protection measure contemplated by EFTA, as evidenced by the statute's language and stated purpose, and thus the protection of Section 1693q does not extend to the Interchange Fee Restriction.[12]

CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction.

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[12] Even if it applied, Section 1693q would not save the IFPA from preemption by the NBA. Section 1693q's plain language makes clear that it applies only to "this subchapter," *i.e.*, EFTA. *See* 15 U.S.C. § 1693q; *see also*, *e.g.*, *Bank of Am.*, 309 F.3d at 565 ("Because the EFTA's anti-preemption provision is limited to the EFTA, it does not save the Ordinance against preemption by the . . . National Bank Act."); *Bank One* v. *Guttau*, 190 F.3d 844, 850 (8th Cir. 1999) ("[EFTA's] anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks.").

Respectfully submitted,

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