EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

AMICUS CURIAE SENATOR RICHARD J. DURBIN'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION

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INTEREST OF *AMICUS CURIAE*

Senator Richard J. Durbin is the primary author of Section 920 of the Electronic Fund Transfer Act ("EFTA") (15 U.S.C. §1693o-2), a provision commonly known as the "Durbin Amendment."[1] Senator Durbin offered Section 920 as an amendment on the Senate floor during the consideration of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376 (2010)). The amendment was adopted by a bipartisan vote and ultimately enacted into law. The Durbin Amendment provides for enforcement by the Office of the Comptroller of the Currency ("OCC") with respect to compliance with the amendment by OCC-regulated banks, and Senator Durbin has engaged in oversight of the OCC, including correcting the OCC when its commentary on interchange fees and the Durbin Amendment has been incorrect or incomplete.[2] Senator Durbin has a strong interest in ensuring the proper understanding and application of the law he authored, and he submits this brief to urge the Court to once again reject the Plaintiffs' renewed claim that the Durbin Amendment and its implementing regulation, 12 C.F.R. Part 235 ("Regulation II"), preempt the Illinois Interchange Fee Prohibition Act ("IFPA"), H.B. 4951, Section 150, 815 ILCS 151/150-1 *et seq*., as well as to respond to inaccurate characterizations made by the OCC about interchange fees and the Durbin Amendment in the amicus brief that the OCC filed earlier in this litigation. Dkt. 61.

[1] *See, e.g.,* Plaintiffs' Memorandum in Support of Motion for Summary Judgment and a Permanent Injunction, Dkt. 125 at 5, 12, 38.

[2] *See, e.g.,* Letter from Senator Durbin to Acting Comptroller of the Currency John Walsh, March 10, 2011; Letter from Senator Durbin to Acting Comptroller of the Currency Michael Hsu, November 22, 2024.

INTRODUCTION

As Senator Durbin noted in the amicus brief that he filed on October 4, 2024, (Dkt. 71) and as the Court explained in its Memorandum Opinion and Order on December 20, 2024 (Dkt. 104), the Plaintiffs' claim that the IFPA is inconsistent with and thus preempted by the Durbin Amendment lacks merit. As the Court observed, "there is no such 'inconsistency' between the IFPA and the Durbin Amendment because the Durbin Amendment and its implementing regulation only creates a ceiling for interchange fees," and the IFPA respects that ceiling. Dkt. 104 at 30. Nevertheless, the Plaintiffs have renewed their claim of Durbin Amendment preemption (Dkt. 125 at 38), and Senator Durbin reasserts in full the points he made in response to this claim in his previous amicus brief and briefly summarizes those points again below.

Senator Durbin also seeks to provide the Court with important context regarding the October 2024 amicus brief filed by the OCC, in which the OCC argued that the IFPA's interchange fee restrictions interfere with national banks' fee-charging authority and cited the Durbin Amendment as a relevant source of that authority. Dkt. 61 at 8 (referencing the Durbin Amendment by its statutory citation, 15 U.S.C. § 1693o-2, as well as the citation for the Durbin Amendment's implementing Regulation II, 12 C.F.R Part 235). It is notable that the OCC fails to acknowledge in this litigation that interchange fees within the Visa and Mastercard system are set by card network companies, not banks, despite the fact that the OCC acknowledges as much in its own Handbook on Merchant Processing. This omission is not trivial; the way interchange fees are set is highly relevant to the preemption analysis before the Court. The Plaintiffs and the OCC both assert that federal law grants national banks the authority to charge interchange fees, but the fee-setting authorities they cite only authorize banks to each set and charge their *own* fees on a competitive basis. *See* 12 C.F.R. § 7.4002(b)(1) ("All charges and fees should be arrived at by each bank on a competitive basis[.]") However, in the Visa and Mastercard systems, interchange

fees are not set and charged by each bank on a competitive basis; instead, the fees are centrally fixed by the card network companies, and all card-issuing banks in the Visa and Mastercard systems receive the same network-established schedule of fee rates on card transactions. The federal authorities that the Plaintiffs and OCC cite simply do not describe and authorize fees like interchange fees that banks receive but that are collectively set by a third-party company on the banks' behalf.

The Plaintiffs further contend, despite the Court's December 2024 analysis to the contrary, that the Court must deem the IFPA preempted as to card networks because they claim the card networks are essentially "service providers" to national banks and that applying the IFPA's interchange fee restrictions to card networks would "significantly impair[ ] a national bank's ability to exercise a federally granted power." Dkt. 125 at 3, 36. Essentially, the Plaintiffs seek to extend the National Bank Act ("NBA") preemption to non-bank card network companies that set fees on national banks' behalf, even though the sources of the national banks' fee-setting authority under federal law do not encompass fees that third-party companies set on banks' behalf. The Plaintiffs' summary judgment memorandum and the OCC's amicus brief obscure this fact by failing to accurately portray how interchange fees are actually set in the Visa and Mastercard system, but make no mistake: Visa and Mastercard serve as fee-setting agents of card-issuing banks – an anticompetitive arrangement that insulates the fees from normal marketplace competition between banks, resulting in excessively high fees which the Durbin Amendment sought to rein in – and the Court was correct in its previous rejection of the Plaintiffs' attempts to extend the preemptive effect of the NBA to Visa and Mastercard. Senator Durbin respectfully requests that the Court reaffirm its conclusion that the IFPA is not preempted as applied to Visa

and Mastercard so that the law can take effect and provide Illinois merchants and consumers with relief from the excessive fees that Visa and Mastercard impose.

ARGUMENT

I. THE IFPA COMPLEMENTS AND ALIGNS WITH THE MAXIMUM LIMIT ESTABLISHED BY THE DURBIN AMENDMENT AND ITS IMPLEMENTING REGULATION FOR NETWORK-FIXED DEBIT INTERCHANGE FEES.

Senator Durbin reasserts in full the arguments he made in his amicus brief of October 4, 2024 in response to the Plaintiffs' continued efforts to claim that "the IFPA's Interchange Fee Prohibition…conflicts with, and is thus preempted by, the Durbin Amendment to the EFTA and its implementing regulation." Dkt. 125 at 38. To briefly recapitulate those arguments: the Durbin Amendment was created to constrain the fixing of debit interchange fees that card networks like Visa and Mastercard had been conducting on behalf of banks and other financial institutions that issued Visa and Mastercard-branded cards. The Durbin Amendment provided that a debit interchange fee rate established by a card network on behalf of card issuers with over $10 billion in assets may not exceed an amount that is "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(2). The Durbin Amendment directed the Federal Reserve Board to prescribe implementing regulations "to establish standards for assessing whether the amount of any interchange transaction fee…is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(3)(A). The Federal Reserve Board issued Regulation II in June 2011, and Regulation II is clear that it establishes a rate ceiling for regulated issuers, not a mandated rate structure or uniform rate. Specifically, Regulation II is explicit that "[a]n issuer complies with the requirements" of the reasonable and proportional standard "if each interchange transaction fee received or charged by the issuer for an electronic debit transaction is no more than the sum of (1) 21 cents and (2) 5 basis

points multiplied by the value of the transaction." 12 C.F.R. § 235.3(b) (emphasis added). The Official Board Commentary on Regulation II further explains that 12 C.F.R. § 235.3(b) provides a "standard for the maximum permissible interchange transaction fee that an issuer may receive[,]" and that "[a]n issuer is permitted to charge or receive, and a network is permitted to establish, interchange transaction fees that vary in their base component and *ad valorem* component…provided the amount of any interchange transaction fee for any transaction does not exceed the sum of the maximum permissible based component of 21 cents and 5 basis points of the value of the transaction." Appendix A to 12 C.F.R. § 235 – Official Board Commentary 235.3(b)(1) and (2) (emphasis added). In short, the Durbin Amendment and Regulation II create a ceiling for network-fixed debit interchange rates and permit variation in the rate level and structure so long as the fees remain below that maximum.

The IFPA respects and in no way contravenes the ceiling that the Durbin Amendment and Regulation II established. The IFPA fully aligns with the Durbin Amendment's text, its structure, and its goal of constraining network-fixed debit interchange fees to reduce excessively high fee rates. In fact, the IFPA helps ensure that network-fixed debit interchange fees with *ad valorem* components do not breach the Regulation II fee ceiling, because the IFPA constrains the base transaction amount that an *ad valorem* fee component can be levied against. The Court rightly observed in its order of December 20, 2024, that "the IFPA is consistent with the Durbin Amendment," and the Court should (again) reject the Plaintiffs' renewed claim that the IFPA, as applied to debit card transactions, is preempted by the Durbin Amendment. Dkt. 104 at 30.

II. INTERCHANGE FEES ARE SET BY CARD NETWORK COMPANIES, NOT BANKS, AND THE IFPA'S REGULATION OF INTERCHANGE FEES SET BY CARD NETWORK COMPANIES DOES NOT RUN CONTRARY TO NATIONAL BANKS' AUTHORITY TO SET THEIR OWN FEES.

A. Banks do not set their own interchange fees.

It is undisputed and well-known that card-issuing banks in the Visa and Mastercard systems do not set the interchange fees that they receive on card transactions. In their complaint, the Plaintiffs explicitly concede that "[u]nder the current system, Card networks establish interchange fees". Dkt. 1 at 6. Visa and Mastercard perform this centralized fee-fixing by establishing and publishing interchange fee schedules that provide rate formulas for various types of credit and debit card transactions, and then all card-issuing financial institutions in the Visa and Mastercard systems follow those fee schedules to determine the interchange fee rates they receive on transactions involving their issued cards. Visa and Mastercard also impose contractual "honor all cards" rules that provide that if a merchant wants to accept any Visa or Mastercard-branded card as payment, the merchant must accept all Visa- and Mastercard-branded cards issued by all financial institutions.

This centralized fee-fixing by card networks like Visa and Mastercard is structurally anticompetitive as the thousands of card-issuing financial institutions within the Visa and Mastercard systems respectively do not have to compete with one another for the fees they receive. This is a highly lucrative arrangement for banks, as each bank is guaranteed to receive the same network-established schedule of interchange rates as every other bank in the network system, regardless of how much it costs a particular bank to conduct their card operations and regardless of how efficiently or inefficiently each bank manages its operational and fraud costs. As a result, interchange fees are insulated from normal marketplace competition and the fee rates keep going up, with an industry analyst reporting that the average Visa and Mastercard credit card swipe fee rate rose from 2.26% of the transaction amount in 2023 to 2.35% in 2024.[3] This systematically

[3] *See* Greg Lindenberg, "Credit and Debit Card Swipe Fees Hit Record of $187.2 Billion," CSP Daily News, March 19, 2025.

affects merchants because Visa and Mastercard control around 85% of the credit card and debit card network market and most merchants cannot realistically refuse to accept Visa and Mastercard as forms of payment.[4]

The IFPA was enacted to help restrain the ever-rising interchange fees that Visa and Mastercard impose by exempting taxes and tips from the transaction amount to which Visa's and Mastercard's fee rate formulas are applied. The IFPA's reform is modest and measured; it does not remedy the core structural and anticompetitive defects of the interchange fee system, but it would provide helpful relief for Illinois merchants who paid an estimated $488 million in interchange fees on sales tax in 2023 and would help reduce the inflationary effect that these fees have on the retail prices consumers pay.[5]

B. The sources of national banks' federal authority to charge fees do not confer authority for banks to have third-party companies set the fees that banks receive.

In its amicus brief, the OCC claims that "[n]ational banks have the power under the NBA to process debit and credit card transactions and charge fees for those services," (Dkt. 61 at 7), but the sources of authority cited by the OCC only include fees that banks each set for themselves, not fees set by a third-party company for the banks' collective benefit. The OCC asserts that "[p]ursuant to its authority under federal law, the OCC has issued regulations making explicit national banks' powers to charge fees in connection with providing authorized products and services," and that "[i]n 12 C.F.R. § 7.4002, the OCC specifically addressed the authority of

[4] *See* Federal Reserve, Report to Congress, "Profitability of Credit Card Operations of Depository Institutions," June 2024, at p. 5 ("The general-purpose bank credit card market in the U.S. is dominated by cards issued on the Visa and Mastercard networks, which, combined, accounted for 726.6 million cards, or about 85 percent of general-purpose credit cards, in 2023."); *see also* Complaint, *United States of America v. Visa, Inc.*, 1:24-cv-07214, (S.D.N.Y.) Sept. 24, 2024, at 7 ("Today, over 60% of all U.S. debit transactions run via Visa's payments network. Mastercard is a distant second, processing less than 25% of all U.S. debit transactions.")

[5] *See* CMSPI, "How Much Interchange was Paid on Sales Tax in the U.S.?," Oct. 16, 2024.

national banks to collect non-interest charges and fees." Dkt. 61 at 7. However, 12 C.F.R. § 7.4002 does not confer authority on banks to let third parties set fees for the banks; instead, the regulation explicitly states that "All charges and fees should be arrived at by each bank on a competitive basis." 12 C.F.R. § 7.4002(b)(1) (emphasis added). Interchange fees are not fees that are arrived at by each bank on a competitive basis - they are centrally set by card networks on behalf of banks so that banks all receive the same fee rates and do not need to compete with one another over those rates.

The OCC further notes that 12 C.F.R. § 7.4002 "states that the establishment of [national bank non-interest fees] 'are business decisions to be made by each bank…according to sound [banking][6] judgment and safe and sound banking principles' and identifies factors bearing upon a bank's decision to establish a fee." Dkt. 61 at 8, quoting 12 C.F.R. § 7.4002(b)(2). Interchange fees, however, are not established by "each bank" as the regulation specifies, and the factors that 12 C.F.R. § 7.4002(b) directs a bank to consider as part of "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them," such as "[t]he cost incurred by the bank in providing the service" and "[t]he enhancement of the competitive position of the bank in accordance with the bank's business plan," are not factors that any bank considers in establishing interchange fee rates because Visa and Mastercard establish the fees on the banks' behalf and require merchants to "honor all cards" that follow the Visa and Mastercard fee schedules. 12 C.F.R. § 7.4002(b)(2). In other words, the primary source of federal legal authority that the OCC relies upon, 12 C.F.R. § 7.4002, does not authorize or even contemplate the type of fees that interchange fees are - fees that banks receive but that are centrally established by a third-party company.

[6] The OCC incorrectly cites to 12 C.F.R. § 7.4002(b)(2) as requiring "sound business judgment." The regulation's text actually requires each bank's decision to be made according to "sound banking judgment."

The OCC goes on to claim that: "The OCC has also addressed the specific issue of interchange fees, finding that national banks are authorized to charge them to merchants as part of the standard clearing and settlement process for debit and credit transactions." Dkt. 61 at 8. But the authority the OCC cites as its source for this statement, the OCC Comptroller's Handbook on Merchant Processing, clearly shows that interchange fees are not established or charged by "each bank" as 12 C.F.R. § 7.4002 contemplates. The Comptroller's Handbook instead recognizes that "Bank card associations set interchange rates" and discusses "the interchange rates charged by the bank card associations for each transaction."[7] Nothing in the OCC Handbook states that national banks are "authorized to charge" interchange fees to merchants as the OCC brief asserts, and the mere fact that the Comptroller's Handbook makes references to interchange fees does not in any way convert interchange fees into the type of individually-established and competitive fees that 12 C.F.R. § 7.4002 authorizes national banks to charge. To the contrary, the OCC Handbook's recognition that the card networks, not the banks, set interchange rates demonstrates how far afield those fees are from the types of fees that 12 C.F.R. § 7.4002 authorizes individual banks to charge.

Thus, neither of two specific sources of OCC authority that the OCC relies on to buttress its claim that national banks have the power to charge interchange fees – 12 C.F.R. § 7.4002 and the Comptroller's Handbook on Merchant Processing – authorize fees that are fixed by Visa and Mastercard for banks to uniformly receive. Perhaps recognizing this deficiency, the OCC brief also claims in a footnote that "[o]ther federal law also addresses national banks' authority to charge interchange fees," specifically citing the Durbin Amendment and Regulation II by their citations. Dkt. 61 at 8. This invocation of the Durbin Amendment does not pass the laugh test. Rather than conferring authority on national banks to charge interchange fees, the Durbin Amendment sought

[7] OCC Comptroller's Handbook, Merchant Processing, August 2014, at p. 32, 30. Note that the Handbook calls Visa and Mastercard bank card associations (*see* p. 2).

to constrain and limit the maximum fees that card networks were already setting for the banks' benefit because of the widespread problems those centrally-fixed fees were causing. The very definition of "interchange transaction fee" in the Durbin Amendment (*i.e.*, "any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction")[8] makes plain what the OCC should have acknowledged in its brief - that interchange fees are set by networks on banks' behalf and thus are not actually fees established "by each bank" as 12 C.F.R. § 7.4002(b)(2) contemplates.

Importantly, the way in which interchange fees are centrally set by Visa and Mastercard has relevance to the preemption analysis before the Court. As discussed above, 12 C.F.R. § 7.4002 does not encompass or describe fees that card networks set on banks' behalf. This is relevant because subsection (d) of 12 C.F.R. § 7.4002 discusses the preemptive effect of this pivotal OCC regulation and says "[t]he OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section." 12 C.F.R. § 7.4002(d) (emphasis added). Network-fixed interchange fees are not, however, "fees described in this section," and thus the IFPA's limitation on network-fixed interchange fees is not a limit on "fees described in this section" in a way that triggers 12 C.F.R. § 7.4002 preemption. If each card-issuing bank were to set its own interchange fee rates on a competitive basis after taking into account the considerations identified in 12 C.F.R. § 7.4002, then this discussion might be different.[9] But that is not how interchange fees are actually set.

[8] 15 U.S.C. 1693o-2(c)(8). Additionally, the Durbin Amendment does not address credit card interchange fees at all and certainly should not be invoked by the OCC to imply authorization for national banks to receive network-fixed credit card interchange fees.

[9] If banks set their own interchange fee rates on a competitive basis, then those fees would no longer fall within the definition of interchange fees that the IFPA and the Durbin Amendment regulate. Both the IFPA and Durbin Amendment define interchange fees as fees that are established by networks for the purpose of compensating issuers

C. The Plaintiffs attempt to conflate fees that national banks receive, such as network-established interchange fees, with fees that national banks are authorized to charge under 12 C.F.R. § 7.4002.

Perhaps recognizing that the legal authorities cited by the OCC neither contemplate fees that third-party card networks set on banks' behalf nor authorize national banks to charge such fees, the Plaintiffs shift their terminology in their memorandum to claim that "[t]he NBA authorizes national banks to receive fees for the services they provide." Dkt. 125 at 15 (emphasis added). However, in support of this claim the Plaintiffs' memorandum only cites 12 C.F.R. § 7.4002(a), which does not mention fees that a national bank may "receive," but rather fees that "a national bank may charge." 12 C.F.R. § 7.4002(a). From here, the Plaintiffs go further to try to conflate banks authority to "charge" and "receive" fees, claiming:

> Federal law gives national banks the power to charge and receive fees—including interchange fees paid to Issuers—to process payment card transactions. The IFPA's diktat that banks may not receive such fees on the portion of a transaction attributable to tax or gratuity thus denies national banks a power that the NBA accords them. It is therefore preempted.

Dkt. 125 at 16. The Plaintiffs shift to relying on the word "receive" appears to be in recognition that the NBA and the authorities cited by the OCC only provide banks with authority to "charge" fees on a competitive basis according to business decisions and considerations made by each bank and do not authorize banks to charge fees that third-party companies have centrally established. 12 C.F.R. § 7.4002(a)-(b). But, neither the Plaintiffs nor the OCC identify any source of federal authority that confers power on banks to "receive" fees regardless of how the fees are set; the

on electronic payment transactions. In other words, if banks were to start setting their own fees on an individual and competitive basis, it is arguable that the IFPA would simply become moot because the type of fees that it applies to would no longer be at issue.

authorities they cite are limited to an individual bank's power to individually establish and charge its own fees.[10]

D. The IFPA's regulation of card network companies does not run contrary to national banks' fee-setting authority.

Not only do the Plaintiffs attempt to rely on the NBA and authorities cited by the OCC for their argument that national banks have authority to charge or receive fees when the fees are set by card network companies – an argument that falls apart under scrutiny – but the Plaintiffs go even further and argue that Illinois should be preempted from passing legislation that applies to those non-bank card network companies. The Plaintiffs assert that card networks are "service providers" to national banks and that applying the IFPA's interchange fee restrictions to card networks would "significantly impair[ ] a national bank's ability to exercise a federally granted power." Dkt. 125 at 3, 36. Again, this argument is contradicted by the sources of authority cited by the OCC, which show that the federally-granted authority that national banks have when it comes to setting fees only applies when the banks set their own fees on a competitive basis and through the exercise of each bank's individual business judgment. There is no NBA statutory provision, OCC regulation, or Comptroller Handbook provision that blesses Visa's and Mastercard's system of network-established interchange fees, and Senator Durbin strongly contests any implication that the Durbin Amendment, which was passed to help mitigate the anticompetitive harms caused by such network-established fees in the debit space, actually somehow conferred or ratified banks' authority to receive such fees on debit transactions.

It therefore does not conflict with national banks' fee setting authority for the IFPA to constrain the fees that Visa and Mastercard centrally fix by directing Visa and Mastercard to

[10] The cases cited by Plaintiffs where state and local regulations of bank fees were deemed preempted involve restrictions on fees that each bank set for themselves.

modify their rate formulas so that taxes and tips are subtracted from the transaction amount to which Visa's and Mastercard's rate formulas apply. Of course, banks that do not wish to be bound by Visa's and Mastercard's fee schedules as regulated by the IFPA are free to set their own fees on a competitive basis rather than let Visa and Mastercard fix fees for them.

E. As applied to card networks, the IFPA's interchange fee restrictions would be implemented in a way that promotes smooth and effective functioning.

The IFPA was enacted with catch-all enforcement language that applies the law's prohibitions to all participants in the payments ecosystem, but the core of the law is its application to the card network companies that set the interchange fees and the rules for the system. States do not run afoul of federal banking laws or national bank powers by passing legislation specifically to rein in anticompetitive fees and practices imposed by card network companies, as the Court rightly explained in its December 20 order. Federal banking laws have not occupied the field when it comes to regulation of those non-bank card network companies, and there is ample room for states to act to protect their merchants and consumers from harmful card network practices without conflicting with federal law.

If, as currently scheduled, the IFPA takes effect on July 1 as applied to the card network companies Visa and Mastercard, those card networks would simply be compelled to modify their fee schedules so that the rate formulas for card transactions in Illinois exclude taxes and tips from the transaction amount against which the formulas are applied. For example, Visa's and Mastercard's fee schedules would have to direct that with a typical interchange fee rate formula of 2.30% + $0.10, the 2.30% must be multiplied against a transaction amount that excludes taxes and tips. This is not a complicated calculation, and as global companies, Visa and Mastercard are very familiar with modifying their fee rate schedules for different geographic areas with different regulations. Because all card-issuing banks follow the fee schedules Visa and Mastercard set, to

make reform work across participants in the Visa and Mastercard systems, all that must be done is to obligate the card network companies to modify their fee schedules, as the IFPA would do.

The IFPA's application to card network companies also does not, as the OCC asserts, "undermine the uniformity necessary for the smooth and effective functioning of the national payment system." Dkt. 61 at 2. First, there is no "national payment system" when it comes to credit and debit card transactions; instead, credit and debit card transactions are conducted over a number of proprietary networks in which non-bank card network companies play leading roles. In practice, around 85 percent of the card network marketplace is dominated by two giant companies - Visa and Mastercard – whose conduct stifles marketplace competition and innovation and who impose interchange fee rates that are far higher than what a competitive market would bear.[11] This proprietary landscape is far from a "national payment system," let alone a smooth and effective one, and it is inaccurate for the OCC to represent that there is an existing "national payment system" for which uniformity is necessary and regarding which states are powerless to act to protect their citizens. Second, moderately diminishing interchange fees by precluding card networks from applying interchange fee formulas to the tax and tip portion of transaction amounts would not wreak havoc on the smooth and effective functioning of card transactions. Tax and tip information is already part of the data flow of card transactions and Visa and Mastercard have the capability to identify those tax and tip amounts and exclude them from the calculation of their rate formulas. Finally, many countries around the world have taken far more sweeping steps to rein in network-established interchange fees than the IFPA proposes; the European Union, for example,

[11] For example, the antitrust lawsuit filed by the U.S. Department of Justice against Visa in September 2024 helps demonstrate the types of anticompetitive conduct Visa is engaged in, alleging that Visa has "monopolized debit transactions; penalized industry participants that seek to use alternative debit networks; and co-opted innovators, technology companies, and financial institutions to forestall or snuff out threats to Visa's debit network." *See United States of America v. Visa* Complaint, supra note 4, at 4.

has capped interchange fee rates since 2015 at a small fraction of the average U.S. rates.[12] Those nations continue to enjoy secure, efficient payment systems with far lower interchange fee rates, and Visa and Mastercard operate smoothly and effectively in those overseas markets. In short, the sky will not fall and the card transaction system will not fail should the IFPA take effect and apply to card networks on July 1. Instead, that day will mark an important change as merchants and their customers will finally start to see urgently-needed relief from the excessive interchange fees that Visa and Mastercard impose.

CONCLUSION

For the reasons discussed above, Amicus Curiae Senator Durbin urges that the Plaintiffs' motion for summary judgment and a permanent injunction be denied.

Dated: April 23, 2025

Respectfully submitted,

By: */s/ Paul E. Slater*

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[12] *See* Fumiko Hayashi *et al*., "Public Authority Involvement in Payment Card Markets: Various Countries – August 2023 Update," Federal Reserve Bank of Kansas City (discussing how the European Union has capped interchange rates since 2015 at 0.3% for credit cards and 0.2% for debit cards, as well as discussing regulatory interventions in numerous other countries to rein in network-established interchange fees).