

UNITED STATE DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

TCF NATIONAL BANK)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:10-cv-04149-LLP
)	
BEN S. BERNANKE, <i>et al</i>)	
)	
Defendants)	

BRIEF *AMICUS CURIAE* OF MERCHANTS PAYMENTS COALITION
IN SUPPORT OF THE DEFENDANTS

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INTEREST OF THE AMICUS CURIAE

Amicus curiae Merchants Payments Coalition (“MPC”) is a non-profit coalition with more than 20 national trade association members and 80 state trade association members.¹ These associations represent merchant businesses in every state in the nation with diverse business models, including convenience stores, gas stations, restaurants, supermarkets, drug stores, department stores, book stores, on-line merchants, and many other types of retailers. Collectively, MPC trade associations represent merchants with approximately 2.7 million stores employing about 50 million people. These businesses pay very significant fees in order to accept debit and credit cards. For many merchants, aggregate interchange fees exceed all other operating costs except labor costs. Many of these retailers pay more money in card fees each year than they make in pre-tax profits.

The mission of the MPC is to help bring about a more competitive and transparent card system that works better for merchants and consumers alike. The MPC has pursued several avenues to achieve this goal. One such avenue has been advocacy before the United States Congress – including support of the Durbin Amendment which became part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.² Prior to the passage of this legislation, the MPC and its member associations submitted testimony on the subject of debit and credit card interchange fees in six different Congressional hearings before the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection; the House Judiciary Committee; the Antitrust Task Force of the House Judiciary Committee; the House Financial Services Committee; and the Senate

¹ MPC member organizations are listed in Appendix A to this Memorandum.

² The Durbin Amendment is section 1075 of the Act. *See* Pub. L. No. 111-203, 124 Stat. 1376, 2068 (2010) (codified at 15 U.S.C. § 1693o-2).

Judiciary Committee.³ In light of the substantial impact of interchange fees on their and their members' daily business operations, MPC members have a significant interest in defending the Durbin Amendment's reasonable regulation of those fees.

FACTUAL BACKGROUND

The system of payment card interchange fees in the United States is a broken market riddled with antitrust and public policy problems. The current system operates to disadvantage merchants, consumers, small financial institutions and the economy as a whole. The only entities that benefit from this skewed system are the payment card networks (principally Visa and MasterCard) and a small number of the largest banks in the nation – including the plaintiff in this matter. Congress responded to these problems by passing the Durbin Amendment.

The antitrust problem addressed by the Durbin Amendment is straightforward. Banks that issue Visa and MasterCard debit cards agree to charge the same schedule of interchange rates – the rates issuing banks charge merchants who accept Visa and MasterCard. Those rates are centrally set by Visa and MasterCard, acting on behalf of

³ See *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. (Comm. Print Apr. 28, 2010), available at http://judiciary.house.gov/hearings/printers/111th/111-101_56180.PDF; *H.R. 2382, The Credit Card Interchange Fees Act of 2009*; and *H.R. 3639, The Expedited Card Reform for Consumers Act of 2009: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. (Comm. Print Oct. 8, 2009), available at <http://financialservices.house.gov/Media/file/hearings/111/Printed%20Hearings/111-86.pdf>; *Credit Card Fair Fee Act of 2008: Hearing on H.R. 5546 Before the Task Force on Competition Policy and Antitrust Laws of the H. Comm. on the Judiciary*, 110th Cong. (Comm. Print May 15, 2008), available at <http://judiciary.house.gov/hearings/printers/110th/42373.PDF>; *Credit Card Interchange Fees: Hearing Before the Antitrust Task Force of the H. Comm. on the Judiciary*, 110th Cong. (July 19, 2007); *Credit Card Interchange Fees: Antitrust Concerns?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (July 19, 2006); *The Law and Economics of Interchange Fees: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (Feb. 15, 2006).

their bank members. *See* Def.'s. Mem. in Supp. of Mot. to Dismiss at 7, ECF No. 64. The result is that issuing banks effectively do not compete on interchange fees. Not surprisingly, these fees have reached levels that cannot be justified by market forces. *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. 79-80 (Apr. 28, 2010).

In addition, the fees are hidden. While consumers choose their method of payment when making a purchase, banks do not disclose to the consumer the existence or size of interchange fees applicable to their retail transactions. In fact, at the time the Durbin Amendment became law, Visa and MasterCard prohibited merchants from setting different prices based on the different interchange price points attached to different cards. *See* Visa USA Operating Regulations 5.2.D.2; MasterCard Rules 5.9.1; *see also Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. 81 (Apr. 28, 2010) (testimony of Douglas Kantor, Partner, Steptoe & Johnson LLP). Some of those prohibitions are now the subject of a settlement between Visa, MasterCard and the U.S. Department of Justice that is awaiting approval by the U.S. District Court for the Eastern District of New York. *See* Stipulation, *United States v. Am. Express Co.*, No. 1:10-cv-4496 (E.D.N.Y. filed Oct. 4, 2010), ECF No. 4. Some restrictions on price signals by merchants still remain. The result has been that consumers make payment choices with no price signals to inform those choices.

The only form of competition that does occur with respect to these fees is backwards. Visa and MasterCard compete to get banks to issue their cards by offering higher and higher interchange fees on those cards. Smaller networks must follow suit in order to attract banks and keep up with the two dominant networks. This competition

serves to inflate interchange fees and is the opposite of what happens in competitive markets in the United States – in which reducing prices brings a competitive advantage.

These problems are particularly egregious in the case of debit cards. The history of these cards is quite instructive. Debit cards are a device used by consumers to access the funds they keep in demand deposit accounts. Prior to debit cards, the method most frequently used to access these funds was a paper check. Exchange fees on checks – the equivalent of interchange fees – were prohibited by the Federal Reserve in the early twentieth century. *See* Federal Reserve Act, Pub. L. No. 63-43, § 16, 38 Stat. 251, 265-268 (1913). Paper checks can be expensive to process, so banks introduced debit cards in the 1970s.⁴ When first introduced, issuing banks did not charge interchange for debit cards and, in some instances, merchants were actually paid some incentive fees in order to accept the cards. Mott Report, *supra* note 4, ¶ 7. Even with these payments, debit transactions saved the banks money relative to the cost of processing checks.

Debit card interchange fees remained very low into the 1990s. Visa changed that situation. In response to competition from smaller PIN Debit networks, Visa decided to pursue a strategy of pushing debit interchange fees higher in order to spur bank demand for signature debit cards – which clear through Visa's system rather than through PIN debit networks. *Id.* ¶¶ 13-14; Martin, *supra* note 4, at A1. In the backward world of interchange competition, this strategy helped Visa not only raise prices, but build dominant market share in the debit card market. Given Visa's success in attracting

⁴ Stephen Mott, BetterBuyDesign, *Industry Facts Concerning Debit Card Regulation Under Section 920*, Oct. 27, 2010, ¶¶ 2-3, available at http://www.federalreserve.gov/newsevents/files/merchants_payment_coalition_meeting_20101102.pdf [hereinafter Mott Report]; Andrew Martin, *The Card Game: How Visa, Using Card Fees, Dominates a Market*, N.Y. Times, Jan. 5, 2010, at A1, available at <http://www.nytimes.com/2010/01/05/your-money/credit-and-debit-cards/05visa.html>.

issuing banks, other networks including MasterCard followed suit, raising their interchange prices in order to compete with Visa for issuing banks. Mott Report, *supra* note 4, ¶¶ 15-16. Banks sought to encourage consumers to engage in signature debit transactions (which are subject to the higher interchange fee) by charging cardholders for entering their PIN numbers or offering rewards for not doing so at the point of sale. This strategy enhanced bank and card network revenues, while at the same time keeping retail consumers in the dark about the increased interchange costs. *Id.* ¶¶ 16-18. Eventually, even the rates for PIN debit transactions increased dramatically to follow signature rates, *id.* ¶¶ 22-26, resulting in the system that Congress faced during consideration of the Durbin Amendment – vastly inflated, hidden debit card fees adding large costs to merchant businesses and consumer purchases.

Congress was well aware of these problems when it considered the Durbin Amendment. Congressman Bill Shuster (R-PA), for example, testified before the House Financial Services Committee in October 2009:

To put the impact of interchange fees into perspective of a business, I want you to consider a convenience store chain in my district, Sheetz; it is a real-life example. The Sheetz Corporation, which has 363 stores in 6 States, as I said, is headquartered in my congressional district. Last year, Sheetz paid twice as much in interchange fees as they took in, in net income after taxes. Their second largest expense after payroll is the interchange fee, which is incredible to me. This means that, for Sheetz, the interchange fee eclipses the company's cost of rent for 363 stores. The interchange fee is one and a half times the cost of providing health care to their nearly 13,000 employees. And Sheetz is not alone.

Sadly, it is joined by thousands of businesses across the country who are being unfairly penalized through interchange fees.

H.R. 2382, The Credit Card Interchange Fees Act of 2009; and H.R. 3639, The Expedited Card Reform for Consumers Act of 2009: Hearing Before H. Comm. on Fin. Servs., 111th Cong. 2 (Oct. 8, 2009) (statement of Rep. Bill Shuster).

Congress was also aware of the unique inconsistencies attendant to the charging of interchange fees of any kind on debit cards. As Mallory Duncan, the Senior Vice President and General Counsel of the National Retail Federation and President of the Merchants Payments Coalition, testified:

Cash and check pass at par, that is face value. The Federal Reserve says that in return for a \$100 check, a bank must give you \$100 in exchange, yet \$100 on a debit card is subject to interchange fees. But what is a debit card other than a plastic check? There is no loan; they are even called “check cards.” It is time for Congress to demand that Fed do for plastic checks what they have long insisted on for paper checks. Otherwise, again, we will end up eating up the value.

(*Id.* at 19). Congress heard testimony that a small number of the very largest banks in the nation have a stranglehold on the market for debit card interchange. As noted in Mr. Duncan’s testimony, more than 60% of all interchange on signature debit transactions is earned by merely twenty banks and for PIN debit the twenty largest issuers earn more than 40% of all interchange on those cards. *Id.* at 167. The plaintiff in this matter ranks as the 17th largest earner of signature debit interchange in the nation.⁵ No bank outside of the top fifty issuers of signature or PIN debit cards has even one-tenth of one percent of the market for those cards. *Id.* Not coincidentally, the Durbin Amendment exempts from interchange regulation all but about one hundred of the largest banks in the nation.

Congress also heard evidence that banks would be profitable even with very low interchange or with none at all. The House Judiciary Committee received testimony from the Merchants Payments Coalition quoting the finding of the European Union’s Competition Commission on the question of whether reducing interchange would lead to increases in cardholder fees which determined:

⁵ *Id.* The plaintiff and its competitors in Minnesota are in an uncommon position of issuing only signature debit cards – not PIN debit cards.

There is no economic evidence for such a claim. Firstly, the inquiry's data suggests that in most cases card issuers would remain profitable with very low levels of interchange fees or even without any interchange fees at all. Secondly, the international card networks have failed to substantiate the argument that lower interchange fee [sic] would have to be compensated with higher cardholder fees. The evidence gathered during the inquiry rather suggests that the pass-through of higher interchange fees to lower cardholder fees is small. Consumers already pay the cost of the interchange fee without knowing it. This cost is hidden in the final retail price and is therefore non-transparent.⁶

It would be difficult to overstate the impact of these artificially inflated fees on merchants throughout the United States. Interchange fees tripled from \$16 billion to \$48 billion from 2001 to 2009. *See Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong., 93-94 (Apr. 28, 2010) (statement of Douglas Kantor, Partner, Steptoe & Johnson LLP). Debit interchange alone grew 234 percent from 1998 to 2006. Mott Report, *supra* note 4, ¶ 24. And, these fees exceed the annual profits not only for many merchants but for entire sectors of merchants. The convenience store industry, for example, paid more in card fees each year from 2006 to 2009 than it made in pre-tax profits. All of this information was in the legislative record before the Congress when the Durbin amendment was considered.⁷

⁶ *Id.* at 150 (testimony of Mallory Duncan) (quoting European Commission, Directorates on Competition and Financial Services, *Competition: Final Report on Retail Banking Inquiry – Frequently Asked Questions*, Jan. 31, 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/40&format=HTML&aged=0&language=EN&guiLanguage=en>).

⁷ *See generally H.R. 2382, The Credit Card Interchange Fees Act of 2009; and H.R. 3639, The Expedited Card Reform for Consumers Act of 2009: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. 144-179 (Oct. 8, 2009) (testimony of Mallory Duncan, Gen. Counsel, Nat'l Retail Fed'n).

SUMMARY OF ARGUMENT

TCF's principal objection to the Durbin Amendment is that it deprives TCF of the opportunity to earn a reasonable return on its investment in its debit card services and related infrastructure. Citing, *inter alia*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), TCF argues that the Durbin Amendment violates the Due Process Clause's purported prohibition against confiscatory government rate-setting because it does not allow TCF to "recover its actual costs of the service at issue, plus a return on capital." Plaintiff's Mem. in Supp. of Mot. for Prelim. Inj. at 9, ECF No. 16 ("Pl.'s Mem."). TCF's due process challenge falls short for a number of reasons.

First, TCF relies on cases addressing the constitutional right of *public utilities* to a reasonable return on assets dedicated to public use. *See* Pl.'s Mem. at 9-10. While TCF argues that other courts have applied these public utility takings cases in other ratemaking contexts, *see id.* at 10-11 n.26, it neglects to address (or even disclose) *controlling* Eighth Circuit precedent that rejects public utility analysis outside of the public utility ratemaking. *See Minn. Ass'n of Health Care Facilities v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984) ("*MAHCF*").

Instead, TCF's due process challenge must fail unless the Durbin Amendment's interchange fee regulation is arbitrary, discriminatory or irrelevant to a policy that the legislature is free to adopt—none of which TCF has established here. *See Nebbia v. New York*, 291 U.S. 502, 539 (1934); *MAHCF*, 742 F.2d at 447. The Durbin amendment is rationally related to Congress's concern for reducing excessive interchange fees set by Visa and MasterCard in an anticompetitive market. The statute is designed to protect merchants from excessive fees and thus to promote competition and, ultimately,

consumer welfare. It easily survives due process analysis under the proper standard. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988).

TCF's due process challenge would fail even if the public utility "confiscatory rate" standard applied here. The constitutionality of utility rate regulation focuses on the ability of the regulated business *as a whole* to earn adequate returns on invested capital. *See Baltimore & Ohio R.R. v. United States*, 345 U.S. 146, 150 (1953). So long as a regulated company can attract capital necessary to continue as a going concern, rate regulation survives due process scrutiny. Here, TCF's CEO William Cooper has reassured investors that TCF will remain profitable even if the Durbin Amendment is fully implemented. His analysis is confirmed by reputable independent investment firms, which continue to rate TCF as a stable investment opportunity or better. And the market price of TCF's stock belies its argument, having risen nearly 20% in value since the beginning of 2010. TCF cannot satisfy its rigorous burden of establishing confiscatory ratemaking under the Due Process Clause.

Nor does the statute violate Equal Protection. The Constitution grants Congress wide latitude in areas of economic legislation. Courts cannot set aside economic classifications that are rationally related to a legitimate Congressional purpose. The Durbin Amendment's economic line drawing, which exempts debit card issuers with less than \$10 billion in assets, is rationally related to a legitimate government purpose. It targets the largest issuers that gain most from inflated interchange fees while seeking to level the playing field for smaller community banks and credit unions that had been disadvantaged by the debit interchange system relative to larger competitors. This court should decline TCF's invitation to second-guess that legislative compromise.

ARGUMENT

I. TCF'S FACIAL CHALLENGE TO THE DURBIN AMENDMENT FAILS

TCF asserts a facial constitutional challenge to the Durbin Amendment, but makes no attempt to satisfy the rigorous standard applicable to facial challenges. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish *that no set of circumstances exists* under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added); *see also Sabri v. United States*, 541 U.S. 600, 608-09 (2004) (facial challenges “are especially to be discouraged”).

TCF's due process challenge argues only that the Durbin Amendment deprives TCF of a reasonable return on its investment, but does not demonstrate that the statute cannot be constitutionally applied to other regulated banks. Evidence of the statute's narrow effect on TCF cannot, in itself, satisfy *Salerno*. The fact that a statute “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *Salerno*, 481 U.S. at 745. Because it offers no evidence that the Durbin Amendment unconstitutionally deprives *all regulated banks* of due process, TCF's facial challenge fails. *See United States v. Stephens*, 594 F.3d 1033, 1038 (8th Cir. 2010) (facial challenge fails where plaintiff “cannot establish there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate”).

Far from asserting that other regulated banks will suffer similar due process injuries, TCF actually asserts that larger regulated banks are not likely to suffer the same harm as TCF. TCF contends that large regulated banks that offer credit card services “can mitigate the harm” allegedly caused by the Durbin Amendment to some extent.

Compl. ¶ 108, ECF No. 1. “The 11 largest banks have extensive credit card operations, and they may be able to weather the storm, at least in the short run, by steering their debit customers to credit card products whose interchange rates are generally higher than debit interchange and are unaffected by the Durbin Amendment.” *Id.* ¶ 110.

Even cursory attention to statements made by TCF’s competitors during recent earnings calls confirms that they will not be significantly harmed by the Durbin Amendment. Examples of such statements include:

- “The Durbin [A]mendment on debit card interchange fees . . . its economic impact on City National is not going to be material.” Tr. of Q4 2010 Earnings Call: City Nat’l Corp. (Jan. 20, 2011) (Russell Goldsmith, Chairman & CEO, City Nat’l Corp.), *available at* <http://www.morningstar.com/earnings/21308224-city-national-corporation-q4-2010.aspx>.
- “We don’t have much of an impact on debit card interchange or overdraft fees. Those are really small impacts on us.” Tr. of Q4 2010 Earnings Call: Citigroup, Inc. (Jan. 18, 2011) (Vikram Pandit, CEO, Citigroup Inc.), *available at* <http://www.morningstar.com/earnings/21210465-citigroup-inc-q4-2010.aspx>.
- “We’ve been working very hard about strengthening our relationship model. In fact, the relationship model we employ here is probably the best thing — the best anecdote to what’s happening in the regulatory reform arena, because as we deepen relationships, profitability grows exponentially as we add products prophetically. So I think it’s a work in progress.” Tr. of Q4 2010 Earnings Call: Wells Fargo Co. (Jan. 19, 2011) (Howard I. Atkins, Senior EVP & CFO, Wells Fargo Co.), *available at* <http://www.morningstar.com/earnings/21244009-wells-fargo-company-wfc-q4-2010.aspx?t1=1295506164>.
- “I just want to mention again that we expect to substantially mitigate the effect of new [debit interchange] rules. So, we would not expect to ever experience anything like that kind of drop in revenue even if these kinds of proposals are ultimately adopted.” Tr. of Q4 2010 Earnings Call: Fifth Third Bancorp (Jan. 19, 2011) (Daniel T. Poston, EVP & CFO, Fifth Third Bancorp), *available at* <http://www.morningstar.com/earnings/21256702-fifth-third-bancorp-q4-2010.aspx>.

TCF claims that it suffers greater exposure to losses from the Durbin Amendment relative to its peer group because it “generates a larger percentage of its total revenue via

fee income sources than its peer group.” Oppenheimer, Company Update: TCF Fin. Corp., 2 (Dec. 9, 2010) (attached at Tab 1).⁸ The impact of the statute on TCF’s operations might indeed be more substantial – though not constitutionally more significant – than other banks with more traditional banking operations. But TCF’s concession that its competitors are likely to withstand the effect of the Durbin Amendment’s price regulation is fatal to TCF’s claim of facial invalidity.⁹

II. THE DURBIN AMENDMENT SATISFIES DUE PROCESS

A. Public Utility Case Law Does Not Apply Here

As TCF admits, the constitutional proscription on confiscatory rates emerged in the context of ratemaking for public utilities, which are “regulated natural monopolies.” Mem. at 9.¹⁰ Public utilities “are under a state statutory duty to serve the public.” *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). While privately owned, their assets “are employed in the public interest.” *Id.* Public utilities thus have a special relationship with the public and state and federal regulators. Their “partly public, partly private status” raises “its own set of [constitutional] questions.” *Id.* Utility regulators have an obligation to set reasonable rates for consumers, but they also have an obligation

⁸ Full copies of all citations can be provided on request by the Court.

⁹ To the extent that the Complaint could be recast as an as-applied challenge by TCF alone, the claim is not ripe, since the Federal Reserve Board’s proposed regulations are not final at this stage. *Cf. Williamson Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (“[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”). *Amici* proceed, however, on the assumption that the preliminary standards announced by the Federal Reserve Board will be adopted in the final rule.

¹⁰ Though cloaked in the anachronistic language of substantive due process, TCF’s confiscatory rate challenge relies on more modern Takings Clause cases. *See* Pl.’s Mem. at 9 (quoting *Duquesne Light Co.*, 488 U.S. at 307).

to public utilities, borne of the utilities' significant investment of resources for the public good.¹¹ In that unique context, the “guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.” *Id.* (citation omitted).

TCF seeks to expand this public utility ratemaking standard to support a general rule against government price regulation that deprives *any* regulated entity of a reasonable return on its investment, whether or not that entity is required to devote its assets to the public use. TCF cites cases from other jurisdictions that have applied public utility ratemaking standards in the context of non-utility rate regulation. *See* Pl.’s Mem. at 10 n.26. It argues that “[t]he basic theory of confiscatory ratemaking applies with more power to regulation directed at firms in competitive industries than those that operate as natural monopolies.” *Id.* at 33.

TCF has it exactly backward. Its sought-after expansion of the confiscatory ratemaking doctrine has been directly rejected in this circuit, which holds that the confiscatory rate doctrine is limited to the narrow context of public utilities. TCF ignores the one case most relevant to this dispute – the Eighth Circuit’s *MAHCF* decision. That controlling decision expressly concludes that *Hope Natural Gas* and related cases apply only in the unique public utility regulatory context, where regulated firms cannot avoid the effect of rate regulation by exiting the market. *See* 742 F.2d at 446; *accord* *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993) (declining to apply the public utility

¹¹ *See* J. Gregory Sidak & Daniel Spulber, *Deregulatory Takings & the Regulatory Contract* 4 (1997) (“The regulator is thus said to have entered into a bargain with the public utility: In return for assuming an obligation and charging not more than ‘just and reasonable’ prices on a nondiscriminatory basis, the utility is guaranteed a franchise protected by entry regulation and income sufficient to recover and to earn a competitive rate of return on its invested capital.”) (footnote omitted).

doctrine to hospital price regulations); *Whitney v. Heckler*, 780 F.2d 963, 969 (11th Cir. 1986) (same).

In *MAHCF*, the Eighth Circuit rejected a due process and takings challenge to a Minnesota statute that, as a condition of health care provider participation in the state's Medicaid program, limited rates nursing homes could charge certain residents. A health care provider association sued, arguing that, by capping rates on those nursing home residents, the statute deprived nursing homes of due process and resulted in an uncompensated taking of nursing home property. 742 F.2d at 445. The association relied heavily on the public utility confiscatory ratemaking cases, positing that nursing homes were akin to public utilities as a result of the similar degree of regulation of their operations and rates. *Id.* at 446.

The Eighth Circuit rejected the invitation to apply public utility ratemaking cases because nursing home rate regulation does not involve “a forced taking of property by the state.” *Id.* Where a business can avoid lower rates of return on investment caused by regulated rates by voluntarily exiting the regulated field, the constitutional concern for confiscatory ratemaking is lessened. Unlike public utilities, nursing homes “have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by [the state] on the return they obtain from investment of their assets in nursing home operation.” *Id.* (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 772-73 (1968)). Nursing homes subject themselves to regulated rates “only through voluntary participation in the state's Medicaid program.” *Id.* When faced with rates they deem insufficient, they retain a choice not enjoyed by public utilities: terminating their involvement in the regulated activity. *Id.*

TCF clearly retains that same choice here. It could, for example, avoid the Durbin Amendment by setting and charging its own fees rather than agreeing to use the fees that are centrally set by the payment card networks. Indeed, the statute's definition of "interchange fee" covers only those fees established centrally by dominant card networks (*i.e.*, Visa and MasterCard), thus exempting entirely privately negotiated issuer fees. *See* 15 U.S.C. § 1693o-2(c)(8) ("interchange transaction fee" defined as "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") (emphasis added). Thus, the law "in no way addresses the fees TCF, or any other bank can charge." Press Release, Senator Richard Durbin, Durbin Statement on TCF's Court Challenge of Interchange Law (Oct. 12, 2010), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=328221>.

TCF can also freely enter and exit the market for debit cards without government interference. Nothing in the Durbin Amendment *compels* TCF to provide and service debit cards. *See Smyth v. Ames*, 169 U.S. 466, 546 (1898) ("The corporation *may not be required* to use its property for the benefit of the public without receiving just compensation for the services rendered by it." (emphasis added)). Thus, it is free to avoid the effect of the Durbin Amendment by simply discontinuing any unprofitable line of business. *See Whitney*, 780 F.2d at 972 ("It is well established that government price regulation does not constitute a taking of property where the regulated group is not required to participate in the regulated industry.").

TCF argues that, as a practical matter, it is not free to exit the debit card market because it would lose its demand deposit accounts. *See* Pl's Mem. at 24. But *MAHCF*

rejected the argument that “business realities” could transform what is otherwise a wholly voluntary decision to participate in a regulated activity into a government mandate. *See* 742 F.2d at 446 (“Despite the strong financial inducement to participate in Medicaid, a nursing home’s decision to do so is nonetheless voluntary.”). Similarly, in *Garelick*, a group of doctors challenging Medicare fee limitation applicable to in-patient procedures argued that they could not avoid the price regulation because “limiting themselves to outpatient practices is not an economically viable option, since most procedures requiring their services are performed in hospitals.” *Garelick*, 987 F.2d at 917. The court rejected that argument, reasoning that “economic hardship” that results from a regulatory scheme “is not equivalent to legal compulsion” for constitutional purposes. *Id.* Accordingly, the possibility that the market realities necessitate TCF’s participation in the debit card industry does not constitute the legal compulsion necessary to give rise to a constitutional claim. *See MAHCF*, 742 F.2d at 446. Its “confiscatory rate” claim must fail.

B. The Durbin Amendment is Rationally Related to Legitimate Congressional Objectives

Outside of the public utilities context, due process challenges to price regulation are controlled by the familiar rational-basis standard of *Nebbia v. New York*, 291 U.S. 502 (1934): “Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.” *Id.* at 539 (upholding a New York regulation that set prices for milk); *see also Pennell*, 485 U.S. at 11 (applying *Nebbia* standard to rent control ordinance); *MAHCF*, 742 F.2d at 446 (applying *Nebbia* to nursing home rate regulation).

The Durbin Amendment easily satisfies the accommodating *Nebbia* standard. The statute's interchange fee regulation is rationally related to Congress's related goals of protecting merchants and consumers as well as preventing anti-competitive behavior. The promotion of consumer welfare is a "legitimate and rational goal of price or rate regulation." *Pennell*, 485 U.S. at 13; *see also Rock Royal Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394 (1940) ("Price control is one of the means available to the states and to the Congress in their respective domains for the protection and promotion of the welfare of the economy." (citations omitted)).

The provision amends the Electronic Fund Transfer Act, the "primary objective" of which "is the provision of individual consumer rights." 15 U.S.C. § 1693(b). It targets the anti-competitive interchange fee market that has arisen because two giant payment card networks, Visa and MasterCard, dictate the interchange fees applicable to all banks in their network. *See* 15 U.S.C. § 1693o-2(c)(8).

Debit card networks owned by Visa and MasterCard account for 83% of all debit transactions. *See* Steven C. Salop et al., *Economic Analysis of Debit Card Regulation Under Section 920*, 10 (Oct. 27, 2010), available at http://www.federalreserve.gov/newsevents/files/merchants_payment_coalition_meeting_20101102.pdf. The two firms essentially exercise oligopoly power, setting rates above what would be sustained in a competitive market. *Id.*; *see also United States v. Visa U.S.A, Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003) (upholding finding of market power in antitrust context). The networks purchase issuing banks' participation with their cards by passing the revenue from inflated fees on to issuing banks. Salop, *supra*, at 18 ("To the extent that networks can collect supra-competitive fees from merchants, the issuers will gain a large share of the

profits as a result of this competition for issuers. This is a classic rent-seeking behavior by the networks.”). Merchants, lacking the practical ability to refuse MasterCard and Visa, must pay the inflated fees in order to keep retail customers happy. *See* Fumiko Hayashi, *A Puzzle of Card Payment Pricing: Why Are Merchants Still Accepting Card Payments?* 40-41 (Fed. Reserve Bank of Kan. City, Working Paper No. WP04-02, 2004), available at <http://www.kansascityfed.org/PUBLICAT/PSR/RWP/WP04MerchCardAcceptance12-28-04.pdf> (“Only monopoly merchants who are facing an inelastic consumer demand may deny cards when the fees exceed its transactional benefit Merchant competition allows the network to set higher merchant fees.”).

Senator Durbin explained his Amendment as a “response to price fixing by Visa and MasterCard” and an attempt “to bring some fairness” to the market. 156 Cong. Rec. S3569 (daily ed. May 12, 2010) (statement of Sen. Durbin); 156 Cong. Rec. S3130 (daily ed. May 5, 2010) (statement of Sen. Durbin). The purpose of the statute is to lower the cost of goods sold for merchants and ultimately, the cost paid by consumers. *See* 156 Cong. Rec. S3695 (daily ed. May 13, 2010) (statement of Sen. Durbin) (“This amendment will help small businesses, merchants, and consumers by providing relief from high interchange fees for debit card transactions.”). It rationally advances those goals by: (1) directing the Federal Reserve to establish reasonable and proportional interchange transaction fees, and (2) eliminating current market restraints that impose network exclusivity, that prevent merchants from offering discounts based on payment form and that prohibit merchants from establishing minimum purchase requirements. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1075 (2010) (adding these provisions to the Electronic Fund Transfer Act § 920(a)(1)-

(2); (b)(1)-(3)). As a rational effort to eliminate artificially inflated prices in the market for interchange services, the statute satisfies basic due process standards.

C. Even if Public Utility Law Were to Apply, TCF Has Not Met Its Burden of Showing that the Durbin Amendment Violates Due Process

1. The Confiscatory Rate Standard Requires TCF to Prove That It Cannot Earn a Reasonable Return on Its Entire Banking Operation

TCF's due process challenge fails even under the public utility takings cases. TCF initially contends that its return on equity associated with its "checking account product" will fall to less than 7 percent, a level it contends is insufficient to attract new capital. Compl. ¶ 107. TCF's own chief executive acknowledges, however, that the bank's debit card performance cannot be judged in isolation. TCF CEO William Cooper explained in announcing this lawsuit that "[d]ebit cards are not a product in and of itself. It's a delivery system for the checking account in a similar way that checks are." Tr. of Financial Earnings Call: TCF Nat'l Bank, 5:8-10 (Oct. 12, 2010) (William A. Cooper Chairman & CEO, TCF Fin. Corp.) (excerpts attached at Tab 2); *see also id.* at 16:13-19.

TCF's narrow legal focus on the recovery of debit card transactions costs – and even returns on equity relating to checking account products more generally – is thus misplaced. The adequacy of a public utility's rates is not assessed solely in terms of the specific products and services to which the rates apply. Instead, the constitutionality of rate regulation depends on the ability of the regulated business *as a whole* to earn adequate returns on invested capital. *See Baltimore & Ohio R.R.*, 345 U.S. at 150 ("And so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of

noncompensatory rates for carrying some commodities when the public interest is thereby served.”).¹²

Contrary to this principle, TCF argues that a regulated company cannot be forced to operate even a single business segment at a loss.¹³ It contends that a utility cannot be required to subsidize losses in one segment of its business operations with profits from other segments. See Pl.’s Mem. at 14. The Supreme Court squarely rejected that argument in *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925). There, the Court held that a regulated railroad “may be compelled to continue the service of a branch or part of a line, although the operation involves a loss.” *Id.* at 332.

TCF misconstrues the cases it cites for the contrary proposition. In *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001), the Sixth Circuit reasoned that a regulated utility cannot be forced to “subsidize their *regulated services* with . . . revenues generated from *unregulated services*.” 257 F.3d at 594 (emphasis added). Similarly, *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), held that regulators

¹² See also *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 297 (2d Cir. 1986) (“[I]mposing a ceiling on particular rates is not a taking so long as it does not cause the railroad to lose money on its overall business”); *Ind. Harbor Belt R.R. Co. v. United States*, 510 F.2d 644, 650 (7th Cir. 1975) (rejecting takings challenge where railroad “did not make the showing as to its over-all operations”); *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 615 (Cal. 1994) (“[C]onfiscation is judged with an eye toward the regulated firm as an enterprise.”).

¹³ TCF also fails to recognize what its CEO has publically stated, that debit cards are not a product or business segment at all, but instead are merely access devices to a product – the deposit account. There is no right to a rate of return on an access device for a product with many different revenue streams. See Tr. of Financial Earnings Call: TCF Nat’l Bank, 16:13-19 (Oct. 12, 2010) (William A. Cooper) (excerpts attached at Tab 2) (“There are a lot of revenues associated with retail banking. There’s the checking fees, there’s the debit card fees, et cetera. There’s a lot of revenues, plus the margin we collect from the money that we bring in from checking accounts and so forth.”).

could not force a company to subsidize an unprofitable railroad operation with earnings from an unregulated sawmill and lumber business. *Id.* at 399. Those cases cannot be read to prohibit regulations that require a bank to make up for reduced profits in its debit card business from segments of its related banking business. Assuming that public utility analysis applies, TCF would have to establish that the Durbin Amendment makes it impossible for its *entire* banking operation to operate at a level of profitability sufficient to attract new capital.

2. TCF Has Not Met Its Burden of Demonstrating Confiscatory Ratemaking

TCF cannot meet its burden to demonstrate that the Durbin Amendment deprives it of the opportunity for a reasonable return on its banking operations. Relying on some less-than-transparent figures,¹⁴ TCF contends that its overall return on its banking enterprise will also drop to a level below that which is necessary to attract to capital. Compl. ¶ 118. That claim cratered upon the announcement of this lawsuit, when TCF's CEO sought to reassure investors that TCF would still be able to operate profitably if the Durbin Amendment were allowed to take effect:

Now, if you take all of our revenues and expenses into consideration, our retail banking system makes a profit. We'll obviously still be profitable, but certainly not anywhere – certainly not as profitable if this revenue stream went away.

¹⁴ TCF's projected percent return on equity was apparently extrapolated from a baseline 9.4 percent annual return for the most recent year, which TCF described as "historically low," resulting from "high loan losses and related provisions." Stautz Aff. ¶ 5, ECF No. 19. The Constitution, of course, does not guarantee that rates be set at a level sufficient to overcome poor business decisions by a regulated entity. *See Hope Natural Gas Co.*, 320 U.S. at 603 ("regulation does not insure that the business shall produce net revenues") (citation omitted); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1180-81 (D.C. Cir. 1987) (en banc) ("A regulated utility has no constitutional right to a profit and a company that is unable to survive without charging exploitative rates has no entitlement to such rates.") (citation omitted).

Tr. of Financial Earnings Call: TCF Nat'l Bank, 17:4-10 (Oct. 12, 2010) (William A. Cooper) (excerpts attached at Tab 2).

A closer look at TCF's banking rate-of-return projection reveals that it is built on dubious assumptions. TCF chiefly asserts that it will not be able to offset changes in its interchange revenue stream through alternative revenue sources. TCF ignores that the Durbin Amendment leaves it with the option of establishing and charging its own fees outside of the card network process. *See* discussion, *supra*, at 15. Some Wall Street analysts have similarly concluded that regulated banks will be able to offset enough of the decrease in interchange fees to continue to operate profitably. *See, e.g.*, Moody's Downgrades TCF; Outlook Stable, at 1 (Jan. 6, 2011) ("*Moody's*") (noting that TCF "can likely offset some of the impact" of debit interchange and overdraft fee regulatory changes "through other services charges") (attached at Tab 3).

TCF contends that smaller banks exempt from the Durbin Amendment will siphon off its customers if TCF raises customer fees for checking account services. But once again, TCF's CEO William Cooper acknowledged some doubt in its assertions, suggesting that smaller banks will not realize a competitive advantage from the legislation. In announcing TCF's most recent quarterly earnings, he conceded that "most of the smaller banks understand and believe that it is likely, as time goes on, if this legislation stands, that one way or another, this will impact them in a similar manner." Tr. of Q4 2010 Earnings Call: TCF Fin. Corp. (Jan. 20, 2011) (William A. Cooper, Chairman & CEO, TCF Fin. Corp.), *available at* <http://www.morningstar.com/earnings/PrintTranscript.aspx?id=21296386>; *see also* Tr. of 12th Annual Credit Suisse Financial Services Forum, 6 (Feb. 9, 2011) (William A.

Cooper) (Bloomberg Trans., attached at Tab 4). (“[T]he small banks have woken up to hey, this isn’t just going to apply to the big banks. This is going to apply to us as well. And the split that they were able to maneuver through when they passed this thing in the first place is gone.”).

TCF argues that the Durbin Amendment will prevent TCF from being able to attract capital in the market. Its pessimistic projections are not universally shared in the capital markets. Indeed, if the capital markets expected the Durbin Amendment to have a long-term confiscatory effect on TCF, one might expect that impact to be reflected in TCF’s stock price.¹⁵ Yet TCF Financial Corporation’s stock is currently trading at more than \$16/share, well above its \$13.53 price at the beginning of 2010, before the Durbin Amendment purportedly posed a confiscatory threat to TCF. *See* WSJ.com, Historical Quotes for TCF Fin. Corp., Jan. 5, 2010 & Mar. 1, 2011 (attached at Tab 5). Several major investment analysts continue to rate TCF Financial Corporation as a stock “buy” recommendation (e.g., Deutsche Bank) or project it to outperform the market (e.g., RBC

¹⁵ Presumably, under the efficient market theory, the market has already discounted the negative, future effect of the Durbin Amendment (with perhaps some discount for the uncertainty of this legal challenge) in pricing the stock today. *See, e.g., Thompson v. RelationServe Media Inc.*, 610 F.3d 628, 691 (11th Cir. 2010) (efficient market theory “posits that all publicly available information about a security is reflected in the market price of the security”); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 5 n.7 (1st Cir. 2009) (discussing efficient market theory).

Capital).¹⁶ Others rate the stock as “market perform,” meaning that they project TCF to perform at least as well as its peer group.¹⁷

Amici are not aware of any independent investment analysis suggesting that TCF will be unable to attract capital in the long term as a result of the Durbin Amendment. Indeed, while Moody’s recently downgraded TCF’s bank rating and credit rates in light of the Durbin Amendment and unrelated loan performance issues, it maintained that the outlook on TCF’s ratings is stable, even when considering the impact of the Durbin Amendment. Moody’s projects that TCF’s “pre-provision profitability” (meaning profitability before considering bad debt provisions) “should remain reasonably healthy and in line with peers *even though its fee income may be permanently impaired.*” *Moody’s* at 2 (attached at tab 3) (emphasis added).

Hope Natural Gas requires only that regulated rates are sufficient to “assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” 320 U.S. at 60. While the Durbin Amendment will no doubt have some impact on regulated banks’ income streams, the Constitution does not prohibit Congress from adopting regulations that affect a company’s bottom line. As TCF’s own CEO

¹⁶ See RBC Capital Analysts Raise Target Price on TCF Financial Co. Shares to \$18.00, American Consumer News, Jan. 26, 2011 (attached at Tab 6); TCF Financial Raised to Buy From Hold By Deutsche Bank, WSJ.com, January 5, 2011, *available at* <http://online.wsj.com/article/BT-CO-20110105-704703.html>; JP Morgan, Wells Fargo, TCF Financial Named Top Picks at Deutsche Bank, Theflyonthewall.com, January 5, 2011 (attached at Tab 7).

¹⁷ See, e.g., JPMorgan Chase, N. Am. Equity Research: TCF Fin. Corp. (Jan. 20, 2011) (although “days of outsize profitability are now in the history books” as a result, in part, of the Durbin Amendment, long-term earnings power is “in line with peers”) (attached at Tab 8); Keefe, Bruyette & Woods, N. Am. Equity Research: TCF Fin. Corp. (Jan. 21, 2011) (market perform rating) (attached at Tab 9).

emphasized in reassuring the markets of TCF's long-term strength, the Durbin Amendment does not present a serious threat to TCF's long-term profitability. TCF's due process challenge must fail.

III. THE DURBIN AMENDMENT SATISFIES THE EQUAL PROTECTION CLAUSE

TCF cannot satisfy the demanding standard applicable to Equal Protection Clause challenges to economic regulation. “[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). “Congress does not violate the right to equal protection ‘merely because the classifications made by its laws are imperfect,’ . . . ‘or because in practice [a classification] results in some inequality.” *Minn. Senior Fed’n v. United States*, 273 F.3d 805, 808 (8th Cir. 2001) (citation omitted). Instead, “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Beach Commc’ns*, 508 U.S. at 313; *see also Pennell*, 485 U.S. at 14; *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 944 (8th Cir. 2009). .

TCF cannot plausibly claim that a regulation targeted at banks with assets exceeding \$10 billion discriminates against a suspect class. The Supreme Court has rejected wealth as a suspect classification, even when the claim is one of discrimination against the needy. *See, e.g., Harris v. McRae*, 448 U.S. 297, 326 (1980). A “statutory scheme that makes classifications based on income, as interpreted by the government,” thus need only satisfy rational basis review. *Douglas v. Babcock*, 990 F.2d 875, 882 (6th

Cir. 1993 (citation omitted).¹⁸ To hold otherwise would be to subject our entire progressive income tax structure to heightened scrutiny. Yet the Supreme Court has given “large leeway” to legislatures in developing their tax laws. *See Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992) (citations omitted). The same broad latitude applies here to the economic classifications drawn by the Durbin Amendment.

TCF claims that the Durbin Amendment’s exemption for banks with less than \$10 billion in assets “is a pure political contrivance” that “advances no legitimate government end.” Pl.’s Mem. at 17.¹⁹ TCF’s claim invites improper second-guessing of Congressional line-drawing. Congress could rationally have concluded that, while the need for regulation of debit interchange fees was sufficient to justify the Durbin Amendment, the appropriate target of the legislation was those larger banks that are benefiting most from the regulated practices. *See* discussion, *supra*, at 6 (describing how large banks dominate the interchange market). Senator Durbin noted that his amendment targeted only “the very largest banks in America—the ones that have a controlling interest in establishing interchange fees.” 156 Cong. Rec. S3588 (daily ed. May 12,

¹⁸ *See also Murray v. Dosal*, 150 F.3d 814, 818 (8th Cir. 1998) (“indigents [do not] constitute a suspect class”); *See NAACP v. Jones*, 131 F.3d 1317, 1321 (9th Cir. 1997) (“Wealth is not a suspect category in Equal Protection jurisprudence.”); *S. Christian Leadership Conference v. Supreme Court*, 252 F.3d 781, 789 (5th Cir. 2000) (“Classifications based on wealth alone are not subject to strict scrutiny.”).

¹⁹ TCF complains that the “absence of legislative history for the Durbin Amendment complicates applying the equal protection test.” Pl.’s Mem. at 19. The Equal Protection Clause “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.” *Nordlinger*, 505 U.S. at 15. A legitimate state purpose “may be ascertained even when the legislative or administrative history is silent.” *Id.* (citation omitted); *see also Beach Commc’ns*, 508 U.S. at 315. In any event, TCF’s characterization of the legislative record is simply incorrect, since Congress held numerous hearings to study the problem of interchange fees. *See supra* note 3.

2010). The banks subject to interchange fee regulation are “the biggest banks in America, the ones that issue the vast majority of debit cards and get the vast majority of interchange fees.” 156 Cong. Rec. S3697 (daily ed. May 13, 2010) (statement of Sen. Durbin).

Senator Durbin’s observation had ample support in the legislative record. Congress heard testimony that more than half of signature debit card interchange fees are collected by 10 large banks, with Bank of America, Wells Fargo, JPMorgan Chase and U.S. Bank alone accounting for more than 40% of those fees. *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 114 (Apr. 28, 2010) (statement of Douglas Kantor). TCF itself is the 11th largest issuer of Visa Classic debit cards in the country, *see* Stratton Aff. ¶ 8, ECF No. 20, and derives a substantial percentage of its revenues and profits from interchange fees. Its pre-tax debit card income of \$81 million accounted for a significant portion of its overall pre-tax profits of \$188 million in its most recent fiscal year. *See* Stautz Aff. ¶¶ 5-8, ECF No. 19. Congress could have concluded that the principal source of the interchange fee problem was the larger banks that derived substantial profits from interchange fees.²⁰

At the same time, many in Congress “wanted to make sure they did not harm local and community banks.” 156 Cong. Rec. S3588 (daily ed. May 12, 2010) (statement of

²⁰ Congress might also have concluded that smaller banks were not the source of the problem addressed by the statute. Smaller, community banks generally do not derive significant revenues from such fees. For example, Congress heard testimony from a small community bank owner that interchange fees had a *de minimis* impact on his bank’s bottom line, accounting for less than 1 percent of total revenue and no profit. *See Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong., 33-34 (Apr. 28, 2010) (testimony of Dave Carpenter, President, J.D. Carpenter Cos., Inc.) (“I do not understand how any bank the size of mine or smaller could make any money from interchange fees.”).

Sen. Durbin). Exempting those smaller banks from the scope of the Durbin Amendment allows them to compete more fairly for debit card business with the more profitable large banks. Thus, the legislation was a carefully crafted compromise designed “to address anticompetitive elements in the interchange fee system while preserving the ability of small banks and credit unions to compete with big banks in issuing cards.” Letter from Sen. Richard J. Durbin to Sen. Chris Dodd & Sen. Barney Frank (May 25, 2010), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=325262>.

Congress had evidence before it that an unregulated interchange system put smaller banks at a competitive disadvantage compared to their larger competitors. Credit union and community bank representatives, for example, testified before the House Judiciary Committee in 2008 and 2010 that smaller institutions had higher costs for their debit programs than did larger banks.²¹ Merchants testified that due to the centralized price-setting of the card networks and the higher cost structures of smaller institutions, those smaller institutions were at a competitive disadvantage.²²

Similarly, Congress could have concluded that smaller banks lack the ability, relative to larger banks, to absorb the regulatory costs of compliance with the Durbin Amendment. Congress frequently exempts small businesses from the scope of federal

²¹ *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. 45-46, 67 (Apr. 28, 2010) (testimony of both Dave Carpenter and John Blum, Vice-President, Chartway Fed. Credit Union); *Credit Card Fair Fee Act of 2008: Hearing on H.R. 5546 Before the Task Force on Competition Policy and Antitrust Laws of the H. Comm. on the Judiciary*, 110th Cong. 80 (May 15, 2008) (testimony of John Blum).

²² *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. 33-34 (Apr. 28, 2010) (testimony of Dave Carpenter).

regulation in light of similar concerns with regulatory burdens on smaller businesses.²³ Courts have not hesitated to affirm such legislative choices. *See Rebel Motor Freight Inc. v. Freeman Drywall Co.*, 914 F. Supp. 1516, 1523 (W.D. Tenn. 1994) (rejecting Equal Protection challenge to small business exemption in Negotiated Rates Act); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1167 (N.M. App. 2005) (rejecting Equal Protection challenge to small business exemption in minimum wage ordinance).

The Equal Protection Clause does not require Congress to apply the Durbin Amendment to all debit card issuers. Instead, it affords Congress significant leeway “to approach a perceived problem incrementally.” *Beach Commc’ns*, 508 U.S. at 316; *see also MAHCF*, 742 F.2d at 448 (“a legislature may deal with a problem one step at a time, addressing that part of the problem which seems most serious . . . or it may select but one phase of a field of business activity for regulation while neglecting the others”). “[S]cope-of-coverage provisions,” like the \$10 billion dollar exemption, “are unavoidable components of most economic or social legislation.” *See Beach Commc’ns*, 508 U.S. at 316. Congress has broad discretion to address anticompetitive concerns in the marketplace for debit card services.²⁴ The economic classifications drawn in the Durbin Amendment are thus entitled to deference.

²³ *See, e.g.*, 42 U.S.C. § 2000e(b) (exemption from Title VII of the Civil Rights Act of 1964 for business with fewer than fifteen employees); 29 U.S.C. § 203(s)(1)(A)(ii) (exemption from the Equal Pay Act for business with less than \$500,000 in annual revenue); 21 U.S.C. § 343(q)(5)(D) (exemption for nutrition labeling requirement for businesses with gross sales of less than \$500,000).

²⁴ In arguing that the purpose of “sound regulation is to introduce or advance competition,” TCF seeks to impose constitutional limitations Congress’s power to address non-competitive concerns, such as the protection of consumers. Whatever TCF posits as the purpose of “sound regulation,” courts “cannot, in the name of the

CONCLUSION

For the reasons stated herein and in defendants' opposition brief, the motion for preliminary injunction should be denied.

Dated: March 4, 2011

Respectfully submitted,

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Constitution, overturn duly enacted statutes simply 'because they may be . . . out of harmony with a particular school of thought.' *Harris*, 448 U.S. at 326 (citation omitted).

APPENDIX A. Member Associations of Merchant Payment Coalition

National and international association members of the MPC include:

Food Marketing Institute
National Association of Convenience Stores
National Grocers Association
National Retail Federation
National Association of Chain Drug Stores
Retail Industry Leaders Association
National Restaurant Association
Petroleum Marketers Association of America
National Council of Chain Restaurants
National Association of College Stores
National Association of Truck Stop Operators
International Association of Airport Duty Free Stores
National Association of Theatre Owners
American Beverage Licensees
Bowling Proprietors Association of America
National Association of Shell Marketers
Interactive Travel Services Association
Society of American Florists
Society of Independent Gasoline Marketers of America
International Franchise Association
National Franchisee Association
Coalition of Franchisee Associations
National Small Business Association
Digital Media Association
Professional Beauty Association.

APPENDIX A. Member Associations of Merchant Payment Coalition (cont).

State association members of the MPC include:

Alabama Grocers Association
Petroleum & Convenience Marketers of Alabama
Arizona Food Marketing Alliance
California Grocers Association
California Retailers Association
California Independent Grocers Association
Colorado Licensed Beverage Association
Colorado Petroleum Marketers and Convenience Stores Association
Connecticut Retail Merchants Association
Independent Connecticut Petroleum Association
Delaware Food Industry Council; Florida Petroleum Marketers
Georgia Food Industry Association
Georgia Oilman's Association, Inc.
Illinois Retail Merchants Association
Indiana Licensed Beverage Association
Indiana Retail Council
Petroleum Marketers and Convenience Stores of Iowa
Kansas Licensed Beverage Association
Petroleum Marketers and Convenience Store Association of Kansas
Kentucky Grocers Association and Kentucky Association of Convenience Stores
Louisiana Retailers Association
Maryland Retailers Association
Retailers Association of Massachusetts
Massachusetts Licensed Beverage Association
Michigan Grocers Association
Minnesota Grocers Association
Minnesota Licensed Beverage Association
Retail Association of Mississippi
Ozark Empire Grocers Association
Missouri Petroleum Marketers and Convenience Store Association
Montana Petroleum Marketers & Convenience Store Association
Nebraska Petroleum Marketers & Convenience Store Association
Nevada Petroleum Marketers & Convenience Stores Association
New England Convenience Store Association
Independent Oil Marketers Association of New England
Retail Merchants Association of New Hampshire
New Hampshire Grocers Association
New Jersey Food Council
New Jersey Gasoline-C-Store-Automotive Association
New Mexico Retail Association

Empire State Petroleum Association
Empire State Restaurant & Tavern Association
The Food Industry Alliance of New York State
North Carolina Association of Convenience Stores
North Carolina Retail Merchants Association
North Dakota Petroleum Marketers Association
North Dakota Retailers Association
Ohio Grocers Association
East Central Ohio Food Dealers Association
Cleveland Food Dealers Association
Oklahoma Petroleum & Convenience Store Association
Oregon Petroleum Association
Pennsylvania Food Merchants Association/Pennsylvania Convenience Store Council
Pennsylvania Retailers Association
Rhode Island Food Dealers Association
South Carolina Retail Association
South Carolina Petroleum Marketers Association
South Dakota Association of Convenience Stores
South Dakota Retailers Association
South Dakota Petroleum & Propane Marketers Association
Tennessee Grocers & Convenience Store Association
Tennessee Oil Marketers Association
Tennessee Retail Association
Texas Grocery & Convenience Association
Texas Petroleum Marketers and Convenience Store Association
Texas Retailers Association
Utah Food Industry Association
Utah Retail Merchants Association
Utah Petroleum Marketers & Retailers Association
Vermont Grocers' Association
Virginia Petroleum, Convenience and Grocery Association
Washington Food Industry
Washington Oil Marketers Association
West Virginia Oil Marketers & Grocers Association
West Virginia Motor Truck Association
Tavern League of Wisconsin
Wisconsin Petroleum Marketers & Convenience Store Association
Wyoming Petroleum Marketers & Convenience Stores Association
Wyoming Retail Merchants Association
Wyoming State Liquor Association.

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1.B.1
TYPE-VOLUME LIMITATION**

This brief complies with the type-volume limitation of Local Rule of Practice 7.1.B.1 because the amicus curiae brief contains 9,892 words. In making this certification, I have relied on the word count feature of the word-processing program used to prepare the brief.

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