APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-1639

[Filed December 14, 2022]

North Dakota Retail Association;)
North Dakota Petroleum Marketers)
Association; Corner Post, Inc.)
Plaintiffs - Appellants)
)
v.)
)
Board of Governors, of the)
Federal Reserve System)
Defendant - Appellee)
)

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: October 19, 2022
Filed: December 14, 2022

Before SMITH, Chief Judge, BENTON and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

The North Dakota Retail Association and the North Dakota Petroleum Marketers Association sued the Board of Governors of the Federal Reserve System, alleging that fees for merchants in debit card transactions violated the Durbin Amendment. The district court[1] dismissed the case, ruling that the claims were barred by the statute of limitations. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

NDRA and NDPMA filed claims against the Board under the Administrative Procedures Act, 5 U.S.C. § 704. They alleged that the interchange and processing fees paid by merchants in debit card transactions are arbitrary and capricious, contrary to the APA, and in violation of the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Durbin Amendment authorized the Board to regulate "any interchange fee that an issuer may receive or charge with respect to an electronic debit transaction[,]" requiring such fees to be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." **15 U.S.C. § 1693o-2(a)(1), (2)**. The Board then issued Regulation II, setting a maximum interchange fee of 21 cents per transaction and an ad valorem allowance of 0.05 percent of the transaction (to account for fraud loss). *See* **Regulation II, Debit Card Interchange**

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[1] The Honorable Daniel M. Traynor, United States District Judge for the District of North Dakota.

Fees and Routing, 76 Fed. Reg. 43,394, 43,420 (July 20, 2011).

Other merchant associations challenged the validity of Regulation II. *See* ***NACS V. Bd. of Governors of Fed. Rsrv. Sys.***, 958 F. Supp. 2d 85 (D.D.C. 2013) (*NACS I*). The district court ruled that Regulation II violated the plain language of the Durbin Amendment. The D.C. Circuit reversed, holding "that the Board's rules generally rest on reasonable constructions of the statute." ***NACS v. Bd. of Governors of Fed. Rsrv. Sys.***, 746 F.3d 474, 477 (D.C. Cir. 2014) (*NACS II*). However, the circuit court required the Board to clarify its exercise of discretion in "determining that transactions-monitoring costs properly fall outside the fraud-prevention adjustment." ***Id.*** at 493. The Board published its clarification on August 14, 2015 ("Clarification"), which explained its treatment of transactions-monitoring costs without altering or amending Regulation II. *See* **Clarification, Debit Card Interchange Fees and Routing**, 80 Fed. Reg. 48,684, 48,685 (Aug. 14, 2015).

On April 29, 2021, NDRA and NDPMA filed the original complaint here, raising a facial challenge to Regulation II as a violation of the APA that is contrary to law, arbitrary, and capricious. The Board moved to dismiss based on the statute of limitations. NDRA and NDPMA amended the complaint, adding Corner Post, Inc. as a plaintiff (collectively with NDRA and NDPMA, "Merchants"). Incorporated in 2017, Corner Post opened for business as a convenience store in 2018. The Board again moved to dismiss for lack of

subject matter jurisdiction and failure to state a claim under the statute of limitations.

The district court dismissed, finding (i) the Clarification did not constitute a final agency action to renew the statute of limitations, (ii) the statute of limitations on Corner Post's claims began to run with the publication of Regulation II in 2011, and (iii) the Merchants' claims did not warrant equitable tolling. The Merchants appeal.

II.

The Merchants allege that the statute of limitations renewed when the Board published the Clarification in 2015. This court "review[s] de novo whether a statute of limitations bars a party's claim." ***Humphrey v. Eureka Gardens Pub. Facility Bd.***, 891 F.3d 1079, 1081 (8th Cir. 2018).

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." **5 U.S.C. § 704**. Under the APA, "[t]wo conditions must be satisfied for an agency action to be final." ***Sisseton-Wahpeton Oyate of Lake Traverse Res. v. Corps of Eng'rs***, 888 F.3d 906, 914-15 (8th Cir. 2018). First, the action cannot be tentative or interlocutory in nature and "must mark the 'consummation of the agency's decisionmaking process.'" ***Id.*** at 915, *quoting* ***Bennett v. Spear***, 520 U.S. 154, 177-78 (1997). "Second, 'the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" ***Id.***, *quoting* ***Bennett***, 520 U.S. at 178. "To constitute a final agency action, the agency's action

must have inflicted 'an actual, concrete injury' upon the party seeking judicial review." ***Id.***, *quoting* ***Williamson Cty. Reg'l Planning v. Hamilton Bank***, 473 U.S. 172, 193 (1985).

The Clarification was not a final agency action. The D.C. Circuit found nothing unlawful in Regulation II. *See* ***NACS II***, 746 F.3d at 493. Rather, the court upheld Regulation II as "a reasonable interpretation of the statute." ***Id.*** ("vacating [Regulation II] would lead to an entirely unregulated market . . . we see no need to vacate."). The court ordered publication of a clarification so the Board could "articulate a reasonable justification for determining that transactions-monitoring costs properly fell outside the fraud-prevention adjustment." ***Id.***

The Clarification was not the final "consummation of the agency's decisionmaking process." ***Sisseton-Wahpeton Oyate***, 888 F.3d at 915. It did not modify Regulation II or create any additional rights or obligations on behalf of the Merchants. *See* ***id.*** It did not create a new fee or expand any existing fees, nor did it "inflict[] 'an actual, concrete injury' upon the [Merchants]." ***Id.***, *quoting* ***Williamson Cty. Reg'l Planning***, 473 U.S. at 193. The Merchants' claims relate to the unmodified provisions of Regulation II as originally published on July 20, 2011. The Clarification did nothing to change Regulation II, which remains the final agency action since its publication in 2011.

The Merchants also argue that, even if the Clarification is not a final agency action, it renewed the statute of limitations under the D.C. Circuit's reopening doctrine. *See* ***CTIA – The Wireless Ass'n v.***

FCC, 466 F.3d 105, 110 (D.C. Cir. 2006) ("The reopening doctrine, well-established in [the D.C.] [C]ircuit is an exception to statutory limits on the time for seeking review of an agency decision" when an agency conducts "a later rulemaking," "actually reconsider[s] the rule," or "open[s] the issue up anew." (quotations omitted)). This court has not adopted or even referenced the D.C. Circuit's reopening doctrine. More importantly, the Supreme Court "has never adopted it, and the doctrine appears to be inapposite to the question of final agency action." ***Biden v. Texas***, 142 S. Ct. 2528, 2545 n.8 (2022). Even if the reopening doctrine has any validity, the Clarification is not a "later rulemaking" and did not "actually reconsider the rule," or "open[] the issue up anew." ***CTIA***, 466 F.3d at 110.

III.

The Merchants allege that their facial challenge to Regulation II first accrued when Corner Post opened in 2018, rather than when Regulation II was published in 2011.

Claims arising under the APA are subject to a six-year statute of limitations. *See* **5 U.S.C. § 704**; **28 U.S.C. § 2401(a)** ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). *See also* ***Izaak Walton League of Am., Inc. v. Kimbell***, 558 F.3d 751, 758 (8th Cir. 2009) ("The statute of limitations set forth in 28 U.S.C. § 2401(a) . . . applies" to "claims under the [APA]."). "A claim against [the] United States first accrues on the date when all the events have occurred which fix the

liability of the Government and entitle the claimant to institute an action." ***Id.*** at 759. The "standard rule [is] that accrual occurs when the plaintiff has a complete and present cause of action." ***Rassier v. Sanner***, 996 F.3d 832, 836 (8th Cir. 2021), *quoting* ***Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California***, 522 U.S. 192, 201 (1997).

This court has not explicitly addressed whether a plaintiff which comes into existence more than six years after the publication of a final agency action is barred from bringing an APA facial challenge to the agency action. But, in *Izaak Walton*, this court held that the six-year statute of limitations accrued upon publication of the regulation and barred plaintiffs' facial challenge—although one plaintiff was founded 16 years later. *See* ***Izaak Walton***, 558 F.3d at 762. The *Izaak Walton* case did not directly address the issue because the complaint there was not filed until 10 years after plaintiff's founding. *See* ***id.*** The *Izaak Walton* case did hold that facial challenges to agency actions accrue upon the publication of the agency action in the Federal Register. *See* ***id.*** at 761 ("Wilderness Watch's claims accrued no later than April 4, 1980, when the Forest Service published in the Federal Register the legal description and maps for the BWCAW.").

Other circuit courts hold that APA claims accrue, and the statute of limitations begins to run, when an agency publishes a regulation. *See, e.g.,* ***Trafalgar Cap. Assocs. v. Cuomo***, 159 F.3d 21, 34 (1st Cr. 1998) ("A complaint under the APA for review of an agency action is a civil action that must be filed within the six

year limitations period set forth in 28 U.S.C. § 2401(a)."); ***Wong v. Doar***, 571 F.3d 247, 263 (2d Cir. 2009) ("Under the APA, the statute of limitations begins to run at the time the challenged agency action becomes final."); ***Paucar v. AG of the United States***, 545 Fed. Appx. 121, 124 (3d Cir. 2013) ("Generally, the right of action first accrues on the date of the final agency action."); ***Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.***, 983 F.3d 671, 681-82 (4th Cir. 2020) (holding that "when 'plaintiffs bring a facial challenge to an agency [action] . . . the limitations period begins to run when the agency publishes the regulation'" (quoting ***Hire Order Ltd. v. Marianos***, 698 F.3d 168, 170 (4th Cir. 2012)); ***Sierra Club v. Slater***, 120 F.3d 623, 631 (6th Cir. 1997) ("Under the APA, a right of action accrues at the time of 'final agency action.'" (quoting 5 U.S.C. § 704)); ***Shiny Rock Min. Corp. v. United States***, 906 F.2d 1362, 1363 (9th Cir. 1990) (declining "to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period" because "[t]o hold otherwise would render the limitation on challenges to agency orders we adopted . . . meaningless"); ***Vincent Murphy Chevrolet Co. v. United States***, 766 F.2d 449, 452 (10th Cir. 1985) ("To hold that the twelve-year [quiet title act] statute of limitations did not begin to run until conditions began changing would give rise to an interpretation of the term 'claim' under § 2409a(f) which would extend the limitations period indefinitely."); ***Ctr. for Biological Diversity v. Hamilton***, 453 F.3d 1331, 1334-35 (11th Cir. 2006) (rejecting plaintiffs' argument that "the passage of each day creates an additional cause of action, which triggers anew the running of the six-year limitations

period"); ***Harris v. FAA***, 353 F.3d 1006, 1010 (D.C. Cir. 2004) ("The right of action first accrues on the date of the final agency action."); ***Preminger v. Sec'y of Veterans Affairs***, 498 F.3d 1265, 1272 (Fed. Cir. 2007) ("[A] cause of action seeking judicial review under the APA accrues at the time of final agency action.").

The Merchants rely on a Sixth Circuit case, which held that a challenge to an agency action first accrued upon injury to the plaintiff rather than publication of the agency action. *See* ***Herr v. United States Forest Serv.***, 803 F.3d 809, 822 (6th Cir. 2015) ("When a party *first* becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings."). Rejecting the claim that "a right of action under the APA accrues upon final agency action regardless of whether the action aggrieved the plaintiff," the court in *Herr* reasoned:

> But that contradicts the text of the statute and Supreme Court precedent to boot. Only "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702 says, "is entitled to judicial review thereof." If a party cannot plead a "legal wrong" or an "adverse[] [e]ffect[]," *id.*, it has no right of action. No doubt, the party must *also* plead final agency action, *see* 5 U.S.C. § 704, but that is another necessary, but not by itself a sufficient, ground for stating a claim under the APA.

> Some courts, it is true, have suggested that an APA claim first accrues on the date of the final agency action. . . . These cases all involved settings in which the right of action happened to accrue at the same time that final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured. . . . But that is not the case when, as here, the party does not suffer any injury until *after* the agency's final action.

Herr, 803 F.3d at 819-20 (citations omitted). But *Herr* did not distinguish between as-applied and facial challenges.

Assessing the time of accrual of rights of action, other circuits distinguish between as-applied and facial challenges under the APA. The Fourth Circuit has held that the right of action for facial challenges to a final agency action accrues upon publication of the regulation, not when plaintiffs later became federally licensed firearm dealers and suffered injury. *See* ***Hire Order Ltd. v. Marianos***, 698 F.3d 168, 170 (4th Cir. 2012) ("When, as here, plaintiffs bring a facial challenge to an agency ruling—[they] do not deny theirs is a facial challenge—the limitations period begins to run when the agency publishes the regulation." (citations omitted)). The Fifth Circuit agrees. *See* ***Dunn-McCampbell Royalty Int. v. National Park Serv.***, 112 F.3d 1283, 1287 (5th Cir. 1997) ("On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register."). The D.C. Circuit agrees. *See* ***Citizens Alert Regarding***

the Env't v. EPA, 102 Fed. Appx. 167, 168-69 (D.C. Cir. 2004) ("Under the six-year statute of limitations for actions against the United States, 28 U.S.C. § 2401(a), any facial challenge to EPA's approval of Pennsylvania's environmental review process is time-barred."). *Cf.* ***Wind River Mining Corp. v. United States***, 946 F.2d 710, 715 (9th Cir. 1991) ("[I]f the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years. . . . The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure.") (acknowledging "[i]f, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger").

This court concludes that, when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation. This comports with this court's precedent. *See* ***Izaak Walton***, 558 F.3d at 759 ("A claim against [the] United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." (quotation omitted)); ***id.***, at 761 ("[T]he appearance of regulations in the Federal Register g[ives] legal notice of their content to all affected thereby." (quoting ***United States v. Wiley's Cove Ranch***, 295 F.2d 436, 447 (8th Cir. 1961))). *See also* ***Rassier***, 996 F.3d at 836 (The "standard rule [is] that accrual occurs when the

plaintiff has a complete and present cause of action." (quotation omitted)). For facial challenges, liability is fixed and plaintiffs have a complete and present cause of action upon publication of the final agency action.

In this case, the Merchants challenge the collection of interchange fees by third parties authorized to collect interchange fees by Regulation II. *See* **Regulation II**, 76 Fed. Reg. 43,394. The Merchants seek to invalidate the text of Regulation II in all applications. Thus, the Merchants bring a facial challenge to Regulation II, which is untimely. *See* **28 U.S.C. § 2401(a)**.

Plaintiffs, like Corner Post, with untimely facial challenges may have a remedy. "In some cases, a plaintiff may escape the statute of limitations by establishing that he or she is eligible for equitable tolling." ***Sisseton-Wahpeton Oyate***, 888 F.3d at 917. "Equitable tolling allows for an extension of the prescribed limitations period 'when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his [or her] claim.'" ***Id.*** "But not every statute of limitations can be equitably tolled." ***Id.*** "While courts presume that a statute of limitations permits equitable tolling in suits against the United States, the presumption is rebuttable." ***Id.*** "One way for the government to rebut the presumption is to show that Congress made the statute of limitations jurisdictional," which "cannot be equitably tolled." ***Id.***, *citing* ***United States v. Kwai Fun Wong***, 575 U.S. 402, 408 (2015) (holding that the statute of limitations for private civil actions in 28

U.S.C. § 2401(b) was *not* jurisdictional and thus can be equitably tolled).

This court has "long considered § 2401(a) a jurisdictional bar." ***Id.*** at 917 n.4, *citing* ***Konecny v. United States***, 388 F.2d 59, 61-62 (8th Cir. 1967). Although the Supreme Court has not addressed § 2401(a), all the circuits to do so since *Kwai Fun Wong* have held that § 2401(a)'s time bar is not jurisdictional. *See, e.g.,* ***Desuze v. Ammon***, 990 F.3d 264, 269-70 (2d Cir. 2021); ***Jackson v. Modly***, 949 F.3d 763, 776-78 (D.C. Cir. 2020); ***Chance v. Zinke***, 898 F.3d 1025, 1029-33 (10th Cir. 2018); ***Matushkina v. Nielsen***, 877 F.3d 289, 292 n.1 (7th Cir. 2017); ***Herr***, 803 F.3d at 814-18. *See also* ***Clymore v. United States***, 217 F.3d 370, 374 (5th Cir. 2000) (holding, before *Kwai Fun Wong*, that § 2401(a) was not a jurisdictional bar); ***Cedars-Sinai Med. Ctr. v. Shalala***, 125 F.3d 765, 769-71 (9th Cir. 1997) (same). Based on *Kwai Fun Wong* and the persuasive opinions of the other circuits, this court now holds that § 2401(a) is not a jurisdictional bar. *See* ***Kwai Fun Wong***, 575 U.S. at 410 ("[M]ost time bars are nonjurisdictional. . . . Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."); ***Desuze***, 990 F.3d at 269-70 ("Like its companion Section 2401(b), Section 2401(a) belongs to the general class of filing deadlines serving as 'quintessential claim-processing rules, which seek to promote the orderly progress of litigation, but do not deprive a court of authority to hear a case.'" (quoting ***Kwai Fun Wong***, 575 U.S. at 410)); ***Herr***, 803 F.3d at 815-17 (analyzing the relevant legislative history of 28 U.S.C.

§§ 2401(a), (b), and 2501); ***Chance***, 898 F.3d at 1031-33 (same); ***Jackson***, 949 F.3d at 777 ("In *Kwai Fun Wong*, the Court flatly rejected" . . . "the belief that [§ 2401(a)] is attached to the government's waiver of sovereign immunity, and as such must be strictly construed."). *See generally* ***United States v. Taylor***, 803 F.3d 931, 933 (8th Cir. 2015) ("[A] prior panel ruling does not control when the earlier panel decision is cast into doubt by an intervening Supreme Court decision.").

The Merchants' equitable tolling argument fails on its merits. This court reviews "a denial of equitable tolling *de novo*" and "underlying fact findings for clear error." ***English v. United States***, 840 F.3d 957, 958 (8th Cir. 2016). A plaintiff is entitled to equitable tolling only by showing "'(1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstances stood in his [or her] way' and prevented timely filing." ***Holland v. Florida***, 560 U.S. 631, 649 (2010), *quoting* ***Pace v. DiGuglielmo***, 544 U.S. 408, 418 (2005).

NDRA and NDPMA had notice of the publication of Regulation II in 2011, submitting a comment letter in February 2011. NDRA and NDPMA did not sue the Board until more than ten years later. Confronted with the Board's first motion to dismiss, NDRA and NDPMA amended the complaint on July 23, 2021, adding Corner Post as plaintiff. Incorporated on June 26, 2017, Corner Post opened for business in March 2018, immediately paying the disputed interchange fees in all its debit card transactions. Corner Post does not explain why it waited more than three years to file this lawsuit.

The Merchants fail to show that they have been pursuing their rights diligently. *See* ***Holland***, 560 U.S. at 649. Because the Board published Regulation II in 2011 and the Merchants are not eligible for equitable tolling, the Merchants' facial challenge to Regulation II remains time-barred by the six-year statute of limitations under 28 U.S.C. § 2401(a).

* * * * * * *

The judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Case No. 1:21-cv-00095

[Filed March 11, 2022]

Corner Post, Inc., North Dakota Retail Association, and North Dakota Petroleum Marketers Association, Plaintiff,	)
vs.	)
Board of Governors of the Federal Reserve System, Defendant.	)

ORDER GRANTING MOTION TO DISMISS

INTRODUCTION

[¶ 1] THIS MATTER comes before the Court on a Motion to Dismiss for Lack of Jurisdiction, Motion to Dismiss for Failure to State a Claim, and, alternatively, Motion to Change Venue filed by the Defendant, Board of Governors of the Federal Reserve System ("Board'"), on August 6, 2021. Doc. No. 20. The Plaintiffs filed a Response on September 17, 2021. Doc. No. 26. The Board filed a Reply on October 8, 2021. Doc. No. 27. For the Reasons set forth below, the

Board's Motion to Dismiss is **GRANTED**. Because this case is dismissed for filing outside the statute of limitations and the Plaintiffs have failed to show good cause why the statute of limitations should be tolled, the Board's alternative Motion to Change Venue is **MOOT**.

[¶ 2] The current Motions seek to dismiss the Amended Complaint filed on July 23, 2021 (Doc. No. 19). Prior to filing the Amended Complaint, the Board sought dismissal of the original Complaint on similar grounds. Doc. No. 17. In response to the initial Motion, the Plaintiffs filed an Amended Complaint, adding the Corner Post, Inc., as a Plaintiff. Because the Amended Complaint supersedes the original Complaint, the Board's earlier Motion are **MOOT**.

BACKGROUND[1]

[¶ 3] This case is about the fees associated with debit card transactions. These fees generate billions of dollars in revenue for the banks that issue the debit cards because debit cards are one of the most popular forms of payment in the United States. In fact, thirty-five percent (35%) of all noncash payments made in the United States were made by debit card. Consumers' frequent use of noncash methods of payments, such as debit cards, forced retailers and restaurants to accept customers' use of Visa and Mastercard. Because of the fees associated with debit cards, costs associated with these transactions have increased, and the cost of the

[1] The Background largely from the Amended Complaint (Doc. No. 19) and is largely undisputed in terms of factual relevancy to the current Motions.

fees has been passed along to the consumer. These fees are known as "interchange fees," which will be discussed in greater detail later. The issuers of debit cards (i.e., banks) have profited greatly from these interchange fees.

[¶ 4] The Corner Post, Inc., ("Corner Post") is a truck stop and convenience store in Watford City, North Dakota. It incorporated on June 26, 2017, but did not open for business until March 2018. Corner Post has been accepting debit cards for payments since it first opened its doors for business.

[¶ 5] The North Dakota Retail Association ("NDRA") is a non-profit trade association headquartered in Bismarck, North Dakota. It exists to "provide a sustainable environment for legislative and regulatory advocacy, education, networking, and member services for its retail-industry members." Doc. No. 19 at ¶ 20. NDRA seeks to promote the best interest of the retail industry in North Dakota by keeping its eye on legislative and regulative actions aimed at business which could impact business profitability. Its members accept debit card transactions.

[¶ 6] The North Dakota Petroleum Marketers Association ("NDPMA")[2] is a nonprofit trade association, tracing its roots back to the mid-1950s entity known as the North Dakota Petroleum Dealers and Jobbers. NDPMA has over 400 petroleum marketers and associate members, which include gas stations, convenience stores, and truck stops. NDPMA

[2] The Court will refer to the NDRA and NDPMA collectively as the "Associational Defendants."

exists to train, advocate, and educate its members on the legal and regulatory aspects of retail. Its members accept debit card transactions.

[¶ 7] The Board is the governing body of the Federal Reserve System. It is an "agency" by definition[3] based in Washington, D.C., where it operates the Federal Reserve System and promulgates rules and regulations for banks. It is responsible for issuing the regulation at the heart of this dispute—the so-called "Regulation II."

[¶ 8] The crux of this case revolves around the interchange fees paid by merchants. When a consumer purchases goods or services from a merchant—like the Corner Post—and pays with a debit card, that transaction triggers a payment process that includes the merchants getting charged the interchange fee. As the Amended Complaint puts it, the payment process has four key players: (1) card networks like Visa and Mastercard ("Networks"); (2) the banks that issue the debits cards ("Issuers"); (3) merchants who accept debit card payments; and (4) the merchant's banks ("Acquirers").

[¶ 9] The Networks provide the physical and digital framework for these transactions. They are the ones who provide the software responsible for routing the data for debit card authorization, clearance, and settlement They also provide the connection between the issuers and acquirers to allow for merchants to accept the debit card payments.

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[3] See 5 U.S.C. § 551(1)

[¶ 10] Issuers provide customers debit cards. This allows customers to use debit transactions over the Network. Depending on the Network, debit cards can run on the same line as credit cards, although some Networks have separate lines for debit cards and credit cards.

[¶ 11] When using debits cards, several fees are attached to each transaction. Interchange fees are the largest. Merchants pay the interchange fee, which has been passed through by the Acquirers. Networks set the fees. The fees are paid to the Issuers as compensation for their involvement in the debit transactions. Over time, the Networks began raising the prices to compete with one another. This allowed the Issuers to receive more significant fee payments and, thus, more money in their coffers. Merchants were left to pay.

[¶ 12] This process began escalating in the 1990s when debit card use gained in popularity. Fee hikes continued to increase through the early 2000s[4] until Senator Richard J. Durbin proposed certain amendments to the Electronic Fund Transfer Act as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. These changes are known as the "Durbin Amendment," which authorizes the Board to prescribe regulations relating to "any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction." 15 U.S.C. § 1693o-2(a)(1). Such

[4] In 2009 alone, merchants paid Issuers about $16.2 billion in debit card interchange fees. Doc. No. 1 at ¶ 7.

interchange fees, however, must be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(2). Congress directed the Board to make certain considerations during the rulemaking process, specifically:

(4) **Considerations; consultation**

In prescribing regulations under paragraph (3)(A), the Board shall—

(A) consider the functional similarly between—
(i) electronic debit transactions; and
(ii) checking transactions that are required within the Federal Reserve bank system to clear at par;

(B) distinguish between—
(i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement[5] of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and
(ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not

[5] Authorization, clearance, or settlement costs are commonly referred to as ACS costs.

be considered under paragraph (2); and

(C) consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of the Small Business Administration, and the Director of the Bureau of Consumer Financial Protection.

15 U.S.C. § 1693o-2(a)(4) (footnote added).

[¶ 13] This Rule defined the final interchange fee standard and is commonly known as "Regulation II." Id. Regulation II "provides that an issuer may not receive or charge an interchange transaction fee in excess of the sum of a 21-cent base component and 5 basis points of the transaction's value (the ad valorem component)." 76 Fed. Reg. 43394-01, 43463. Issuer costs effecting a transaction, including (1) ACS costs, including network connectivity, software, hardware, equipment, and associated labor costs; (2) network processing fees; (3) transaction monitoring costs; and (4) fraud losses. Id. at 43404. After the proper notice and comment period, the Board published Regulation II on July 20, 2011. See 76 Fed. Reg. 43394-01 (2011).

[¶ 14] Certain business associations challenged Regulation II shortly after its publication. In NACS v. Board of Governors of Federal Reserve System, 958

F.Supp.2d 85 (D.D.C. 2013), the plaintiffs brought a facial challenge to the final rule at issue in this case nearly identical to the claims at issue here. The district court held the final rule violated the Durbin Amendment's plain language. Id. The Board appealed in that case and the Court of Appeals for the District of Columbia Circuit reversed the district court's finding the rule violated the statute. NACS v. Board of Governors of Federal Reserve System, 746, F.3d 474, 477 (D.C. Cir. 2014). The D.C. Circuit specifically held, "Applying traditional tools of statutory interpretation, we hold that the Board's rules generally rest on reasonable constructions of the statute." Id. However, the Circuit concluded remand was appropriate on "one minor issue—the Board's treatment of so-called transactions-monitoring costs—to the Board for further explanation." Id. The Circuit concluded the Board needed to provide further clarification explaining why it exercised its discretion in relation to the transactions-monitoring costs. Id. at 492-93. The D.C. Circuit expressly refused to vacate the final Rule, instead, allowing the Board to provide the needed clarification. Id. at 493.

[¶ 15] The Board made the requisite clarification, including transactions-monitoring costs in the interchange fee standard ("Clarification"). See 80 Fed. Reg. 48684. The Clarification was published on August 14, 2015. Id.

[¶ 16] On April 29, 2021, the Associational Plaintiffs in this case filed a Complaint against the Board. Doc. No. 1. The Complaint alleges two causes of action, challenging the interchange fee generally as well as the

specific fees relating to (1) ACS costs, including network connectivity, software, hardware, equipment, and associated labor costs; (2) network processing fees; (3) transaction monitoring costs; and (4) fraud losses. Doc. No. 1 at pp. 32-37. The Complaint alleges violations of the Administrative Procedure Act in so far as the final Rule is (1) Contrary to Law and (2) Arbitrary and Capricious. Id. On July 2, 2021, the Board filed a Motion to Dismiss. Doc. No. 17. In response, the Plaintiffs filed an Amended Complaint, adding the Corner Store as a Plaintiff. The causes of action alleged in the Amended Complaint are substantially the same as in the Complaint. See Doc. No. 19 at pp. 32-37. The present dispute requires the Court to determine whether the Clarification relating to the transactions-monitoring costs reset the clock for the statute of limitations on bringing challenges to the Rule. The Court concludes it does not. The Court further holds the Plaintiffs are not entitled to equitable tolling of the statute of limitations.

DISCUSSION

I. Legal Standards

[¶ 17] The Board challenges the subject matter jurisdiction of the Court to adjudicate the Amended Complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P. The Board contends the Court lacks subject matter jurisdiction because the Plaintiffs' claims fall outside the statute of limitations. The burden of demonstrating subject matter jurisdiction is on the Plaintiffs. See Herden v. United States, 726 F.3d 1042, 1046 (8th Cir. 2013). The Court has an obligation to decide the jurisdictional issue and may not simply rule that there

is or is not enough evidence to have a trial on the issues. Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990). The Court may look outside the pleadings to determine whether jurisdiction exists, allow an evidentiary hearing, and receive evidence by any rational mode of inquiry. Buckler v. United States, 919 F.3d 1038, 1044 (8th Cir. 2019).

[¶ 18] Alternatively, the Board contends the Plaintiffs have failed to state a claim because their claims fall outside the statute of limitations. Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint is sufficient if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The Court must accept all factual allegations as true, except for legal conclusions or "formulaic recitation of the elements of a cause of action." Id. at 681. When a complaint establishes that a cause of action is time-barred, "[a] court may dismiss a claim under Rule 12(b)(6) as barred by the statute of limitations." Humphrey v. Eureka Gardens Public Facility Board, 891 F.3d 1079, 1081 (8th Cir. 2018).

[¶ 19] The Parties agree the statute of limitations issue here is governed by 28 U.S.C. § 2401(a), which

provides, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

II. August 14, 2015, Clarification

[¶ 20] The first question the Court must answer is whether the publication of the August 14, 2015, Clarification of the basis for the transaction-monitoring costs by the Board on remand from the D.C. Circuit constituted the issuance of a new final rule that reset the statute of limitations to bring facial challenges to Regulation II. The Board contends the D.C. Circuit did not vacate Regulation II, but merely remanded for further clarification on a very narrow matter relating to the transaction-monitoring costs. The Plaintiffs contend, despite the D.C. Circuit reaffirming the validity of Regulation II, the NACS decision in effect rendered the entire rule legally invalid until the 2015 Clarification was published. Essentially, the Plaintiffs contend the statute of limitations to challenge each provision of the rule at issue here was reset when the Board published the Clarification in 2015 relating to the transaction-monitoring costs. According to the Plaintiffs, the statute of limitations for the entire Rule was reset "because the NACS holding made the interchange-fee standard legally invalid until" the publication of the Clarification. The Court disagrees with their contention because the Clarification was not a final rule.

[¶ 21] The Eighth Circuit has explained an agency's action is "final" if two conditions are met. "First, the action must mark the consummation of the agency's

decisionmaking process." Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers, 888 F.3d 906, 914-15 (8th Cir. 2018) (quotation marks and citation omitted). Tentative or interlocutory actions are categorically not "final." Id. "Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Id. (quotation marks and citations omitted). Under the second condition, the agency action must be a definitive statement that determines "the rights and obligations of the parties." Id. Put differently, "[t]he agency action must determine parties' rights or obligations or compel legal consequences." Id. A resulting legal injury is necessary to establish this second condition: "[i]t may either compel affirmative action or prohibit otherwise lawful action." Id. "To constitute a final agency action, the agency's action must have inflicted an 'actual, concrete injury' upon the party seeking judicial review." Id. (quoting AT&T Co. v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001)).

[¶ 22] The Clarification at issue here does not meet the first condition of a "final" rule because it is not the final consummation of the Board's decisionmaking process. Sisseton-Wahpeton Oyate, 888 F.3d at 915. The NACS holding clearly shows the legal enforceability of the entire rule pending the publication of the minor clarification. In NACS, the D.C. Circuit considered challenges to the exact same fee provisions of the Rule at issue here. Compare NACS, 746 F.3d at 483-93 (discussing the interchange fee, "fixed" ACS costs, network processing fees and fraud losses fees, and remanding on the transaction-monitoring costs for

further clarification) with Doc. No. 19 at ¶¶74 – (challenging the interchange fee generally, fixed ACS costs, fraud losses, transaction-monitoring costs, and network processing fees). The D.C. Circuit upheld each of the challenged provisions with the minor remand relating to the transaction-monitoring costs for further clarification. NACS, 746 F.3d at 483-493. Contrary to the Plaintiff's contention that NACS invalidated the entire rule until the Clarification was issued, the NACS court expressly refused to vacate Regulation II pending clarification for numerous reasons:

> Because the interchange fee rule generally rests on a reasonable interpretation of the statute, because the Board may well be able to articulate a sufficient explanation for its treatment of fraud-prevention costs, and because vacatur of the rule would be disruptive—the merchants seek an even lower interchange fee cap, but vacating the Board's rule would lead to an entirely unregulated market, allowing the average interchange fee to once again reach or exceed 44 cents per transaction—we see no need to vacate.

Id. at 493. In all respects, even as it related to the transaction-monitoring costs, the Board left all of Regulation II in effect. Id.

[¶ 23] As it related specifically to the transaction-monitoring costs, the D.C. Circuit concluded such costs "can reasonably qualify both as costs 'specific to a particular . . . transaction (section 920(a)(4)(B)) and as fraud-prevention costs (section 920(a)(5))." NACS, 746 F.3d at 492. This gives the Board discretion under

either option to promulgate the transaction-monitoring costs. Id. But, at that point in the NACS litigation, the D.C. Circuit concluded the Board did not adequately explain why it exercised its discretion in that particular way. Id. The remand on this issue was to provide the Board the opportunity to "articulate a reasonable justification for determining that transaction-monitoring costs properly fall outside the fraud-prevention adjustment." Id. at 493.

[¶ 24] The 2015 Clarification did nothing to change the substance of the underlying Rule. Because the Board's rules were based on a reasonable interpretation of the statute, the interchange fee, fixed ACS costs, fraud losses, transaction-monitoring costs, and network processing fees have remained in effect as promulgated in 2011. All of the challenged fees were promulgated in the 2011 Final Rule. See 76 Fed. Reg. 43394 ("The Board is publishing a final rule, Regulation II, Debit Card Interchange Fees and Routing."), 43404 (final rule includes the challenged fees). The August 2015 Clarification merely clarified the rationale for the transaction monitoring fees. See 80 Fed. Reg. 48684 ("The Board is explaining its treatment of transaction-monitoring costs in this Clarification."). This fee—along with all the challenged fees—has remained in effect since July 2011. See NACS, 746 F.3d at 492-93

[¶ 25] Put simply, the 2015 Clarification fails to meet the first condition to constitute a final rule. The action does not constitute the consummation of the agency's decisionmaking process. The action that constituted the Board's final decision was published in July 2011. The Clarification in 2015 provided a minor explanation

relating to a very narrow issue relating to the transaction-monitoring costs. This is buttressed by the fact that the D.C. Circuit refused to vacate the entire rule on remand. Instead, that court left the entire rule in effect.[6]

[¶ 26] The Clarification also fails on the second condition because it does not determine the rights or obligations of the Plaintiffs. The rights and obligations of Plaintiffs were explained in detail in the Final Rule promulgated in 2011. The Clarification provides no additional rights or obligations. It merely provides clarification for the rationale behind the transaction-monitoring costs. The Clarification does not provide an additional rights or obligations to the Plaintiffs. It explains the agency's action and nothing more. It does not create a new fee. It does not expand the transaction-monitoring costs fee. It does not give the Plaintiffs any additional rights. It does not create any

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[6] While the Board does not raise this issue, the claims raised by the Plaintiffs are essentially an impermissible collateral attack on Regulation II in an attempt to circumvent the statute of limitations. The Fifth Circuit has rejected these types of challenges to final agency actions. In El Paso Electric Co. v. FERC, 832 F.3d 495, 509 (5th Cir. 2016), the Fifth Circuit noted, "[t]o distinguish between collateral attacks and permissible challenges, we ask whether the FERC order the petition challenges was a clarification or a modification of a prior FERC order." The Fifth Circuit has declined to consider a collateral attack on a final FERC order. Id. (quoting City of Redding v. FERC, 693 F.3d 828, 837 (9th Cir. 2012)). The Court finds this reasoning persuasive. The Plaintiffs are essentially collaterally attacking the Final Rule arguing the Clarification provides a basis to skirt the statute of limitations. As discussed above, the 2015 Clarification is not a final rule and therefore does not reset the statute of limitations.

additional or new legally enforceable requirement or obligation. The Clarification does not inflict "an actual, concrete injury" on the Plaintiff. See Sisseton-Wahpeton Oyate, 888 F.3d at 915. Any purported injury to the Plaintiffs based on the Rule occurred in 2011, not in 2015. See id. ("Generally, an agency does not inflict injury merely by expressing its view of the law." (citation and quotation marks omitted)).

[¶ 27] Putting all of this together, the Court concludes the 2015 Clarification is not a final rule.

III. Statute of Limitations

[¶ 28] Now that the Court determined the 2015 Clarification is not a final Rule, the Court now turns to when the right to challenge the Rule first accrued. Section 704 of the Administrative Procedures Act gives the Court authority to review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Section 2401(a) of Title 28 of the United States Code provides a six-year statute of limitations for claims against the United States, stating "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The Parties agree Section 2401(a) governs the present dispute. A right of action first accrues "on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action." Chandler v. U.S. Air Force, 255 F.3d 919, 921 (8th Cir. 2001). This mean, the right to challenge the agency action accrues when the Plaintiff "either knew, or in the exercise of reasonable diligence should have known that they had a claim." Loudner v. United

States, 108 F.3d 896, 900 (8th Cir. 1997). Publication of a regulation in the Federal Register provides "legal notice of their content to all affected thereby" and the statute of limitations begins to run on the publication date. See Izaak Walton League of America, Inc. v. Kimbell, 558 F.3d 751, 761 (8th Cir. 2009) (quoted material); Hire Order Ltd. v. Marianos, 698 F.3d 168, 170 (4th Cir. 2012) (limitations period begins to run at time of rule publication when a facial challenge to the rule is brought).

[¶ 29] The limitations period in this case began on July 20, 2011. Because the Clarification was not a final agency action, the statute of limitations period does not reset. See Chandler, 255 F.3d at 921 (time accrues when all events have occurred that fix liability with the United States). The Clarification is not a final rule and the Plaintiffs have brought a facial challenge to the statute. With the limitations period beginning on July 20, 2011, all facial challenges must have been brought before July 20, 2017. This action was commenced on April 29, 2021. The claims asserted in the Amended Complaint fall well outside the six-year statute of limitations.

[¶ 30] As it relates to the Corner Post, who did not exist as a legal entity until June 26, 2017, when it was incorporated, the conclusion is the same. The Plaintiffs argue the fact the Corner Post did not exist as a legal entity until shortly before the statute of limitations ran resets the statute of limitations to the time the Corner Post was incorporated. The Board contends the wealth of caselaw contradicts the Plaintiffs' position and the

incorporation date has no bearing on when the statute of limitations runs. The Court agrees.

[¶ 31] The limitations period under 28 U.S.C. § 2401(a) for bringing a facial challenge to an agency action begins to run at the time of publication of the agency's action. Hire Order Ltd., 698 F.3d at 170. The Board points to numerous cases where courts declined to modify the statute of limitations accrual date to when a party is subject to the regulation.[7]

[¶ 32] In Hire Order, the Fourth Circuit rejected a similar argument raised by the Plaintiffs, concluding such a claim "utterly fails." Id. Hire Order dealt with a challenge to federal firearms dealer regulations. Id. at 169. The plaintiffs argued their cause of action did not accrue until 2008, when they became federally licensed firearms dealers. Id. "The contention of Hire Order and Privott that their cause of action did not accrue until they became federally licensed firearms dealers in 2008 utterly fails." Id. at 170. When bringing a facial challenge, such as Plaintiffs here, the statute of limitations accrues at the time the agency publishes the final rule, not at the time a business is subject to the regulation. See id. In Hire Order, the Court concluded the statute of limitations began to run when the rule was published in 1969, not when the Plaintiffs became federally licensed firearms dealers. Id.

[¶ 33] In Shiny Rock Min. Corp. v. United States, the plaintiff brought a challenge to Public Land Order

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[7] Neither party provides reference to a case in the Eighth Circuit regarding the relationship between the statute of limitations at 28 U.S.C. § 2401(a) and a party's incorporation date.

3502, which "withdrew from appropriation under the United States mining laws all lands lying within a certain area of forest road S80 in the Williamette National Forest." 906 F.2d 1362, 1363 (9th Cir. 1990). The agency's decision was effective on December 8, 1964. Id. Plaintiffs did not bring their challenge until 1981. Id. The Ninth Circuit declined "to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period. To hold otherwise would render the limitation on challenges to agency orders we adopted . . . meaningless." Id. at 1365 (citing Vincent Murphy Chevrolet Co. v. United States, 766 F.2d 449, 452 (10th Cir. 1985) ("To hold that the twelve-year [quiet title act] statute of limitations did not begin to run until conditions began changing would give rise to an interpretation of the term 'claim' under § 2409a(f) which would extend the limitations period indefinitely."). The Ninth Circuit further held, "[t]he only injury required for the statutory period to commence was that incurred by all persons when, in 1964 and 1965, the amount of land available for mining claims was decreased." Id. at 1365-66. Accordingly, the Ninth Circuit applied the general rule, "[o]nce notice of the land withdrawals was given by publication in the Federal Register, the six-year limitation period of 28 U.S.C. § 2401(a) was triggered, for at that time any interested party acquired a 'right to file a civil action in the courts against the United States.'" Id. at 1366 (quoting Crown Coat Front Co. v. United States, 386 U.S. 503, 511 (1967)).

[¶ 34] The same analysis holds true here. The Plaintiffs in this case indisputably bring a facial challenge to

Regulation II.[8] The time the statute of limitations began to run was at the time of final publication. It was not at the time the Corner Store incorporated and thus became subject to the Final Rule's requirements. See id. To permit the Corner Store to pursue its claims here would effectively render the six-year statute of limitations period meaningless. Congress chose to give a finality to the Rule by imposing the limitations period. 28 U.S.C. § 2401(a). Courts have rejected similar arguments to Plaintiffs' here because the limitations period begins at the time the Rule was published. See Hire Order, 698 F.3d 169-70; Shiny Rock, 906 F.2d at 1363-65. Congress has determined there is a time in which facial challenges to the rules and regulations of administrative agencies must cease. That time is six years after publication of the final rule. See 28 U.S.C. § 2401(a); see also Chandler, 255 F.3d at 921 (A right of action first accrues "on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action."). Under Plaintiffs' theory, anytime an

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[8] The D.C. Circuit has noted the statute of limitations "does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it." Functional Music, Inc. v. F.C.C., 274 F.2d 543, 546 (D.C. Cir. 1958). Plaintiffs here contend Corner Post effectively brings an as-applied challenge to Regulation II. Doc. No. 26 at p. 28. The Plaintiffs, however, immediately concede the interchange fee is not a regulation the Board directly enforces—the Rule allows third-parties to collect fees. Id. In other words, Plaintiff's contention Corner Post's claim is "as-applied" is grounded on the facial attack to the Rule itself. This is circular reasoning. They claim it is an as-applied challenge because the Rule is invalid on its face. Plaintiffs have brought a facial challenge to the Rule.

individual wanted to bring a facial challenge against an agency rule or regulation beyond the six-year statute of limitations, all a party would need to do is create a new entity that would be subject to the Rule. This plainly contravenes the purpose of the statute of limitations, which is to bring finality to the rule's application.

[¶ 35] Accordingly, the statute of limitations began to run on July 20, 2011, and expired seven years later. See 28 U.S.C. § 2401(a). Because Plaintiffs filed their complaint more than three years after the statute of limitations ran, their claims are time-barred.

IV. Jurisdictional Nature of Section 2401(a) and Equitable Tolling

[¶ 36] The Parties dispute whether 28 U.S.C. § 2401(a)'s statute of limitations is a jurisdictional bar to Plaintiffs' claims. If it is not a jurisdictional bar, then Plaintiffs' can request the Court to toll the six-year limitations period. The Court does not need to definitively resolve this issue because Plaintiffs have failed to establish the statute of limitations should be tolled.

[¶ 37] The Eighth Circuit has "long considered § 2401(a) a jurisdictional bar." Sisseton_Wahpeton Oyate, 888 F.3d at 917, n.4 (citing Konecny v. United States, 388 F.2d 59, 61-62 (8th Cir. 1967)). In 2015, the United States Supreme Court found the statute of limitations for private civil actions in 28 U.S.C. § 2401(b) was not jurisdictional and, therefore, subject to equitable tolling. United States v. Kwai Fun Wong, 575 U.S. 402 (2015). Courts have since applied Kwai Fun Wong to Section 2401(a), concluding the statute of

limitations is not jurisdictional. See Matushkina v. Nielsen, 877 F.3d 289, 292 n.1 (7th Cir. 2017). In Sisseton-Wahpeton Oyate, the Eighth Circuit declined to review its long-standing precedent in light of Kwai Fun Wong because the Plaintiffs there failed to establish it was entitled to equitable tolling. As the law of this Circuit currently stands, Section 2401(a) appears to be a jurisdictional bar, even though there may be good reason for the Circuit to reconsider that determination in light of Kwai Fun Wong. As it stands in the Eighth Circuit, however, Section 2401(a) appears to be a jurisdictional bar to Plaintiffs' claims.

[¶ 38] But this Court ultimately does not need to decide this issue because the Plaintiffs have failed to establish they are entitled to equitably toll the statute of limitations. Statutes of limitations presumptively permit equitable tolling. Sisseton-Wahpeton Oyate, 888 F.3d at 917. This presumption can be rebutted by the defendants. Id. When permitted, however, "[a] plaintiff is entitled to equitable tolling only if he or she shows (1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstances stood in his [or her] way and prevented timely filing." Id. (citations and quotation marks omitted; alterations in original). In making this determination, courts ask "whether a reasonable person in the plaintiff's situation would be expected to know about the violation of their legal rights."

[¶ 39] The Plaintiffs contend the Court should equitably toll the statute of limitations based on Corner Post's incorporation date in 2017. Plaintiffs contend Corner Post's lack of legal existence constitutes an

extraordinary circumstance that stood in its way of filing a cause of action. Plaintiffs claim Corner Post diligently pursuant its rights because it joined a lawsuit three years after it was incorporated and started to accept regulated debit card payments. The Board argues the Plaintiffs have failed to establish they are entitled to equitable tolling because they fail to meet the two requirements to equitably toll the statute of limitations. The Court agrees with the Board.

[¶ 40] Plaintiffs have not diligently pursued their rights. The Associational Plaintiffs have been in existence long before Regulation II's publication and could have filed suit years before it chose to do so. The Associational Plaintiffs were aware of Regulation II, evidenced by their participation in a comment letter in February 2011. See Letter from Retail Industry Representatives to Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System, at https://www.federalreserve.gov/SECRS/2011/February/20110204/R-1404/R-1404_020311_63702_497677994095_1.pdf. The Associational Plaintiffs filed their original Complaint approximately four years after the Final Rule's publication, all while knowing the regulation existed. See id.; Doc. No. 1. Plaintiffs have offered no explanation why the Associational Plaintiffs waited almost four years after the statute of limitations period ran. As for the Corner Post, Plaintiffs have likewise failed to provide any explanation why it waited three years to join in this lawsuit. It is apparent the only reason Corner Post joined the suit was as an attempt to save Plaintiffs' claims from the statute of limitations. Corner Post waited three years to assert its

claims. Corner Post could have brought its claims much earlier and has not provided any justification for waiting three years, except that the Court should simply excuse the delay. The Plaintiffs have, therefore, failed to show they diligently pursued their rights as it relates to challenging Regulation II.

[¶ 41] Plaintiffs also fail to establish extraordinary circumstances. Again, the Associational Plaintiffs have not provided any explanation why their circumstances are extraordinary. As discussed above, they were aware of the Rule and participated in its comment period. The Corner Post's lack of existence at the time the Final Rule was published is hardly extraordinary. Businesses come and businesses go—it is the nature of the marketplace in the United States. There is simply nothing extraordinary about a business coming into existence and being subject to an administrative regulation. Plaintiffs provide no other explanation for this delay that shows extraordinary circumstances exist. Plaintiffs have failed to show extraordinary circumstances justifying equitable tolling of the statute of limitations to allow this case to proceed on the merits.

CONCLUSION

[¶ 42] Section 28 U.S.C. § 2401(a) provides a six-year statute of limitations for challenging final agency actions. As discussed above, the time under the statute of limitations began to run in July 2011, when the Final Rule was published and expired six years later. Plaintiffs, however, waited approximately three years to file the instant case and have failed to show any

justification for equitably tolling the statute of limitations.

[¶ 43] Accordingly, the Board's Motion to Dismiss for Lack of Jurisdiction or, alternatively, for Failure to State a Claim are **GRANTED**. The Amended Complaint is, therefore, **DISMISSED**. Because the Plaintiffs claims fall outside the statute of limitations, the Board's Motion to Change Venue is **MOOT**. Defendants' earlier Motions to Dismiss or Change Venue are also **MOOT**.

[¶ 44] **IT IS SO ORDERED**.

DATED March 11, 2022.

/s/ Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

APPENDIX C

United States District Court
District of North Dakota

Case No. 1:21-cv-095

[Filed March 11, 2022]

Corner Post, Inc., North Dakota Retail Association, and North Dakota Petroleum Marketers Association, Plaintiff,	)
vs	)
Board of Governers of the Federal Reserve System, Defendant.	)

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☒ **Decision on Motion**. This action came before the Court on motion. The issues have been considered and a decision rendered.

- ☐ **Stipulation**. This action came before the court on motion of the parties. The issues have been resolved.
- ☐ **Dismissal**. This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the Order filed March 11, 2022, the Board's Motion to Dismiss for Lack of Jurisdiction or, alternatively, for Failure to State a Claim are GRANTED. The Amended Complaint is, therefore, DISMISSED.

Date: March 11, 2022

ROBERT J. ANSLEY, CLERK OF COURT
by: */s/ Melissa Fischer, Deputy Clerk*

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION**

Case No. 1:21-cv-95-DMT-CRH

[Filed July 23, 2021]

CORNER POST, INC; NORTH DAKOTA	)
RETAIL ASSOCIATION, & NORTH DAKOTA	)
PETROLEUM MARKETERS ASSOCIATION,	)
Plaintiffs,	)
	)
v.	)
	)
BOARD OF GOVERNORS OF THE	)
FEDERAL RESERVE SYSTEM,	)
Defendant.	)
	)

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Corner Post, Inc., North Dakota Retail Association, and North Dakota Petroleum Marketers Association file this Amended Complaint for Declaratory Relief against Defendant Board of Governors of the Federal Reserve System. For a decade, the Board has failed to properly follow Congress's instructions to ensure that debit-card processing fees are reasonable and proportional to the

costs of debit-card transactions. Because the Board has not done what Congress said to cure this market failure, American consumers and merchants continue to suffer the same harms that prompted Congress to act in the first place. Enough is enough.

INTRODUCTION

1. This case is about debit cards. More precisely, it's about the behind-the-scenes fees attached to every debit-card transaction—fees that generate billions of dollars in profits annually for banks that issue debit cards. It's about how those billions of dollars in bank fees ultimately lead to higher costs for retailers and higher prices for consumers. And it's about how, in 2010, Congress told the Federal Reserve Board to fix that problem—and how the Board's solution to that problem is no fix at all. Rather, the Board's actions perpetuate by government fiat the same problem that prompted Congress's 2010 directive: A decade later, banks *still* reap billions of dollars in annual profits from debit-card fees at retailers' and consumers' expense, directly contrary to Congress's instruction.

2. Americans' enthusiasm for debit cards predates the COVID-19 pandemic. At the beginning of 2020, debit cards were one of the most popular forms of payment. American consumers used debit cards in 35 percent of all noncash payment transactions. In fact, as summarized in the below table, data from biennial government reports show a 111 percent increase in the number of debit-card transactions from 2009 to 2019:

Number and dollar value of debit card transactions in U.S.		
Year	**Number of transactions**	**Dollar value of transactions**
2009	37,600,000,000	$1,430,000,000,000
2011	46,700,000,000	$1,820,000,000,000
2013	53,700,000,000	$2,070,000,000,000
2015	60,600,000,000	$2,310,000,000,000
2017	68,500,000,000	$2,620,000,000,000
2019	79,200,000,000	$3,100,000,000,000

See Bd. of Governors of the Fed. Reserve Sys., *Regulation II (Debit Card Interchange Fees and Routing): Reports and Data Collections*, https://bit.ly/3705HaI.

3. The COVID-19 pandemic has turbocharged consumers' shunning of cash payments for noncash alternatives. In 2020, cash withdrawals from ATMs declined a "staggering" 22 percent. R. Robin McDonald, *Pandemic Drives Dramatic Card Transaction Shifts*, Credit Union Times (Sept. 8, 2020), https://bit.ly/2W2Mq2x. Debit-card use, in contrast, continues to spike; to take just one example, it "was up 19.6% for the week ending Aug. 9[, 2020] compared to the same week in 2019." *Id.* Experts see no signs that this trend will stop. On the contrary, they expect it to continue. *See id.*

4. Indeed, "[t]he COVID-19 crisis is pushing people in the U.S. to increasingly choose debit cards over credit cards." Emily Bary, *Square Stands to Benefit from Growing Usage of Debit Cards, Analyst Says*, MarketWatch (Oct. 5, 2020), https://on.mktw.net/3nnzGiF. "Visa disclosed in early September that overall U.S. payment volume was up 7% in August, led by a 24% increase in debit [card] volume as credit [card] volume fell 8%." *Id.* Beyond that, "Mastercard saw U.S. debit [card] volumes exceed credit [card] volumes for the first time in the June quarter, while Visa saw its widest spread to date between the two payment types then." *Id.* Visa itself "estimates, based on past behaviors, that there could be a $100 billion annual shift to debit-card spending from credit-card spending over time." Emily Bary, *Visa Says COVID-19 Crisis Could Help Drive $100 Billion Annual Shift to Debit Cards Over Time*, Marketwatch (June 3, 2020), https://on.mktw.net/3u3xRuY.

5. The surge in debit-card usage is an unstoppable trend with inescapable implications for America's merchants. Consumers now use debit cards for so many transactions that, as a practical matter, most merchants in most sectors must accept debit cards. As one commentator put it, "[r]etailers and restaurants cannot feasibly refuse Visa and Mastercard." Charlie Thaxton, *The Hidden Price of Cashless Retail*, Forbes (Apr. 3, 2019), https://bit.ly/3oWKchn. That makes the costs of accepting debit cards a necessary (and ever-larger) cost of doing business.

6. That merchants must accept debit cards will prompt no objections from the banks that issue them. Nor will it draw protest from Visa or Mastercard, which operate the largest networks over which almost all debit-card transactions are processed. Banks that issue debit cards, commonly referred to as "issuers," receive a fee from merchants—known as an "interchange fee"—every time a customer uses a debit card to buy something. Ostensibly, this interchange fee compensates the issuers for their costs in the transaction. But those fees have become a lush profit center for issuers—contrary to Congress's express instructions in 2010.

7. Back then, when responding to the Great Recession, Congress recognized how debit-card interchange fees had skyrocketed in the preceding decades. Those fees exploded because they are (1) set by card networks, like Visa and Mastercard; (2) paid *to* the issuers; but (3) paid *by* the merchants. So, in this broken market, networks have no incentive to compete with each other to offer lower interchange fees to merchants. Instead, the networks compete for the issuers' business by offering the highest interchange fees possible, and then pass those fees on to the merchants to pay. Merchants, in turn, remain captive to whatever interchange fees the networks set. As a result, debit-card interchange fees over Visa's network more than tripled between the early 1990s and 2010. In 2009 alone, merchants paid issuers $16.2 billion in debit-card interchange fees.

8. Congress acknowledged the consequences of continued unfettered interchange-fee increases for both

merchants and consumers. The increasing interchange fees would threaten merchants' continued profitability, lead to higher prices for consumers, or both. Consumers, in turn, would be stuck paying ever-higher prices, face job losses from shuttered businesses, lose ready access to goods and services, or suffer some of all those consequences.

9. Congress deemed those outcomes unacceptable. So, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended the Electronic Fund Transfer Act to regulate the interchange fees that large issuers can receive for debit-card transactions. Those changes are known as the "Durbin Amendment," after their sponsor, Senator Richard Durbin. Those regulated interchange fees apply only to debit-card transactions with large issuers—those with $10 billion or more in assets. The Durbin Amendment reins in interchange fees for those issuers by limiting those fees to a level 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).

10. Congress also directed the Federal Reserve Board to issue regulations that set a standard for assessing whether an interchange fee is "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." *Id.* §1693o-2(a)(3)(A). It then told the Board how to set that standard. In particular, Congress required "the Board" to "distinguish between" two types of costs. *Id.* §1693o-2(a)(4)(B). ***First***, the Board "shall" consider the "incremental cost incurred by an issuer for the role of

the issuer in the authorization, clearance, or settlement"—that is, the processing costs, sometimes called ACS costs—"of a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(i). ***Second***, the Board "shall not" consider "other costs incurred by the issuer which are not specific to a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(ii).

11. As the Durbin Amendment required, in 2010 the Board proposed a rule for setting reasonable and proportional debit-card interchange fees. The Board's proposed rule contained two alternative approaches, both of which hewed to Congress's careful delineation and looked (as instructed) only to costs associated with the "authorization, clearance, or settlement" ("ACS costs") of a particular debit-card transaction.

12. But, sensing an end to untold billions of dollars in profits, covered issuers responded to the Board's 2010 proposed rulemaking by pushing the Board to consider a third, *nonstatutory* category of costs when setting the standard. In a dramatic departure from its proposed rule, the Board ultimately adopted in its final rule a variant of one of its proposed approaches—but based the final rule on that third category of nonstatutory costs. The upshot? The final rule's maximum interchange fee didn't just increase from the proposed rule's maximum interchange fee. It more than *doubled*.

13. Worse yet, the final rule does not even tie the maximum interchange fee to a covered issuer's actual costs for a particular transaction. Congress, of course, instructed the Board to do just that—the Durbin Amendment requires the "amount of *any* interchange

fee" to "be reasonable and proportional to *the* cost incurred by *the* issuer with respect to *the* transaction." *Id.* §1693o-2(a)(2) (emphasis added). But the final rule sets a one-size-fits-all fee, allowing *all* covered issuers to charge a fee of up to 21 cents for any debit-card transaction—no matter the issuer's actual costs to process it—*and* an ad valorem component of .05% of the transaction's value to compensate the issuers for fraud losses. 12 C.F.R. §235.3(b).

14. Using the Board's own data, the 21-cent maximum allowable per-transaction fee in its final rule continues to provide a windfall for issuers that has existed since day one. For every year since the Durbin Amendment was passed in 2010, covered issuers' average per-transaction ACS costs have been less than a fourth of the final rule's maximum fee of 21 cents:

Average per-transaction ACS costs for covered issuers (excluding fraud losses)				
Year	**Average ACS costs (per transaction), or what Congress effectively mandated**	**Maximum allowable interchange fee, or what the Final Rule allows**	**Average difference (per transaction), or amount that exceeds the mandate**	**Average profit for issuers (per transaction, as a %)**
2009	8¢	21¢	13¢	163%
2011	5¢	21¢	16¢	320%
2013	4.4¢	21¢	16.6¢	377%

2015	4.2¢	21¢	16.8¢	400%
2017	3.6¢	21¢	17.4¢	483%
2019	3.9¢	21¢	17.1¢	438%

See Bd. of Governors of the Fed. Reserve Sys., *Regulation II (Debit Card Interchange Fees and Routing): Reports and Data Collections*, https://bit.ly/3705HaI.

15. It is not hard to see why covered issuers pulled out every stop to get the Board to adopt the higher, one-size-fits-all standard in the final rule. In 2019, the final rule facilitated an average profit of 438% every time a consumer used a covered issuer's debit card. (Average profit of 17.1 cents per transaction divided by average cost of 3.9 cents per transaction = 438.5%.) Profit margins so stratospheric in other sectors might prompt antitrust or price-gouging investigations; here, they're protected by a regulatory fiat that contradicts the Durbin Amendment's plain text and purpose.

16. Those differences between the average per-transaction ACS costs and the maximum allowable interchange fee in the Board's final rule confirm that the rule has been anything but reasonable and proportional since 2011. And it grows less reasonable and proportional with every passing year. In fact, the Board correctly anticipated both that issuers' ACS costs would drop over time and that those declines would require it to "to reexamine and potentially reset the fee standard." 76 Fed. Reg. at 43,422. But after nearly a decade of cost declines, the same fee persists.

17. Corner Post, Inc., North Dakota Retailers Association, and North Dakota Petroleum Marketers Association thus have no choice but to file this suit challenging the Board's final rule, known as Regulation II (pronounced "eye-eye"). *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394 (July 20, 2011), as updated by Debit Card Interchange Fees and Routing, 80 Fed. Reg. 48,684, 48,684 (Aug. 14, 2015) ("Updated Rule").

18. Regulation II must be vacated and set aside because it exceeds the Board's statutory authority in three ways. ***First***, the Board flouted Congress's decision to separate all costs into two categories: (a) incremental ACS costs, which the Board *must* consider; and (b) all other costs, which Board *must not* consider. The Board claimed authority to consider more than just incremental ACS costs in setting the standard, and used those nonstatutory costs to raise the recoverable fee in its final rule. ***Second***, even assuming the Board could consider nonstatutory costs when setting an interchange fee, it included costs that the Durbin Amendment allowed the Board to account for elsewhere. ***Third***, even if the Board were correct to consider all those costs, it set a single standard for all issuers when the Durbin Amendment plainly requires a case-by-case approach.

PARTIES

19. Corner Post, Inc. is a truck stop and convenience store located in Watford City, North Dakota. It was incorporated on June 26, 2017 and opened for business in March 2018. One form of payment that Corner Post accepts from its customers

is debit cards, including debit cards issued by banks subject to Regulation II. Corner Post first started accepting debit-card payments from its customers when it opened. Corner Post is a member of the North Dakota Retail Association and the North Dakota Petroleum Marketers Association.

20. North Dakota Retail Association is a nonprofit trade association with its headquarters in Bismarck, North Dakota. NDRA's mission is to provide a sustainable environment for legislative and regulatory advocacy, education, networking, and member services for its retail-industry members. NDRA represents and promotes the best interests of the retail industry for retailers across North Dakota. It does so by, among other things, monitoring legislative and regulatory activity at the state and national level to protect members against legislation or regulations that could erode businesses' profitability. NDRA also provides training and education to its members.

21. The North Dakota Petroleum Marketers Association is a nonprofit trade association that has existed since the mid-1950s, when it was known as the North Dakota Petroleum Dealers and Jobbers. Today, NDPMA represents over 400 petroleum marketers and associate members, including service station dealers, convenience stores, and truck stops. Among other things, NDPMA provides training, advocacy, and education for its members about legal and regulatory aspects of the retail landscape—an essential part of ensuring that NDPMA's members, a majority of which are small businesses, can continue to boost North

Dakota's economy by providing over 10,000 jobs for area residents.

22. Corner Post's customers purchase goods using debit cards from covered issuers. Corner Post pays interchange fees for covered debit-card transactions subject to Regulation II. And those fees harm Corner Post by unlawfully decreasing the amount of money it collects for each covered debit-card payment it accepts. That's a classic pocketbook injury, readily establishing that Corner Post has standing to challenge Regulation II.

23. NDRA's and NDPMA's members include other retailers like Corner Post that have customers who purchase goods using debit cards from covered issuers. NDRA and NDPMA have associational standing to litigate this case on behalf of their members whose debit-card transactions are subject to Regulation II's unlawful interchange fees. NDRA's and NDPMA's members are injured by Regulation II's unlawful fees, and would have standing to challenge Regulation II in their own right. This lawsuit seeks to protect merchants' interests, NDRA's and NDPMA's very reason for being. And neither the claims asserted nor the relief requested requires individual participation by NDRA's or NDPMA's members. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

24. Defendant Board of Governors of the Federal Reserve System is an agency of the United States within the meaning of 5 U.S.C. §551(1). Its principal place of business is at 20th Street and Constitution Ave., NW, Washington, DC. The Board is the federal

agency responsible for operating the Federal Reserve System and for promulgating rules and regulations for banking institutions, including Regulation II. The Board is sued in its official capacity only.

JURISDICTION AND VENUE

25. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 2201–2202; 5 U.S.C. §§701–706.

26. Venue is proper because Corner Post, NDRA, and NDPMA reside in this district. 28 U.S.C. §1391(e)(1).

STATUTE OF LIMITATIONS

27. Claims under the Administrative Procedure Act are subject to a six-year statute of limitations. *See* 28 U.S.C. §2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The claims here are filed within that limitations period.

28. The Board issued Regulation II in July 2011. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394 (July 20, 2011). That rule was challenged under the APA in the United States District Court for the District of Columbia. Not one of the Plaintiffs here were involved or participated in that litigation in any way.

29. The district court concluded that Regulation II violated the APA and vacated it. *See*

NACS v. Bd. of Governors of Fed. Reserve Sys., 958 F. Supp. 85 (D.D.C. 2013) (Leon, J.).

30. The D.C. Circuit reversed. *See NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474 (D.C. Cir. 2014). But it also concluded that the Board failed to justify important portions of the rule. *Id.* at 492-93. It thus remanded to the Board to address that deficiency, if possible. *Id.* at 493. On August 14, 2015, the Board reevaluated and stood by its rule with further justification to support it. *See* Updated Rule, 80 Fed. Reg. 48,684.

31. This lawsuit is timely because it was filed within six years of the Board's issuing the Updated Rule.

32. This lawsuit is also timely because the Corner Post and some of NDRA's and NDPMA's other members were formed or began accepting regulated debit cards within six years of the date this suit was filed. For its part, the Corner Post opened its doors for business in March 2018 and began accepting debit cards from covered issuers that same month. That was the point at which the Corner Post began to be "adversely affected or aggrieved" by Regulation II. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 818-19 (6th Cir. 2015); *see also Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corp of Eng'rs*, 888 F.3d 906, 917 (8th Cir. 2018). In other words, Regulation II first "invade[d] [the Corner Post's] legally protected interest" in lawful debit-card interchange fees less than six years before this suit was filed; and March 2018 is when the Corner Post's "right to redress that injury under the APA accrue[d]" for the purpose of the APA's

statute of limitations. *Herr*, 803 F.3d at 818-19 (citing *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 882–83 (1990)). The Corner Post's claims are thus timely under the APA. And NDRA's and NDPMA's claims are timely because they have associational standing to bring claims on behalf of the Corner Post and all their similarly situated members.

BACKGROUND

I. The Durbin Amendment and the Board's regulations.

A. Debit-card interchange fees.

33. When consumers use a debit card to buy goods or services from a merchant, they trigger a reticulated behind-the-scenes payment process that gets their money to the merchant. That process consists of four key players: (1) payment card networks such as Visa and Mastercard ("networks"); (2) the banks that issue debit cards (known as "issuers"); (3) merchants that accept payment by debit card; and (4) the merchant's banks (known as "acquirers"). *See* 76 Fed. Reg. 43,395.

34. Networks provide the infrastructure and software that route data for debit-card authorization, clearance, and settlement, and connect issuing banks with the merchant's acquirers so merchants can accept debit cards as a form of payment. Visa and MasterCard own the networks that process the vast majority of debit-card transactions.

35. Issuers provide debit cards to their customers. Those cards allow customers to run

electronic debit transactions over the networks. Debit-card transactions may occur on the same type of electronic payment network that processes credit-card payments, though there are a number of debit-card networks that handle debit payments but do not handle credit-card payments. The main difference between a debit card and a credit card is that the debit card pays the merchant from existing funds in the customer's bank account instead of drawing on the customer's credit.

36. Debit-card transactions involve several fees. This case is about the largest of those fees—the "interchange fee." The interchange fee is a fee that merchants pay, passed through by the acquirers. That fee is set by the networks and paid to the issuers to compensate the issuers for their involvement in debit-card transactions. *See* 76 Fed. Reg. 43,396. As Senator Durbin explained before Regulation II was put in place, "every time a sale is made with a Visa or MasterCard debit or credit card the person who makes the sale only receives 97 or 98 cents on the dollar because the card networks take an unregulated cut out of the transaction amount and share it with their issuing banks." *See* Letter from Senator Durbin to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, at 2 (Feb. 22, 2011), https://bit.ly/3jrg9wq ("Durbin Letter").

37. This problem worsened when interchange fees exploded as debit cards became more popular in the 1990s and early 2000s. For example, interchange fees for PIN debit transactions grew 234 percent from 1998 to 2006. *See* Stephen Mott, Industry Facts

Concerning Debit Card Regulation Under Section 920, at 14 (Oct. 27, 2010), https://bit.ly/3fK7fYB.

38. The reasons for that spike were no secret. First, networks' "market dominance allows" them "to largely dictate card fees to merchants." Thaxton, *supra*. Second, the networks set the interchange fee that issuers receive, and the networks want the issuing banks to issue as many cards as possible to drive up transaction volume and fees that the networks themselves can charge. As a result, the networks motivate issuers by promising them high interchange fees for every transaction. *See* Durbin Letter at 5. Competition among networks, then, is upside down. The networks compete to *raise* the fees they set rather than compete to *lower* them, as typical market actors do—and their market dominance leaves merchants with no feasible alternative.

39. The consequences for merchants are predictably devastating. For many merchants, interchange fees are their second-highest operating cost after payroll. Since consumers expect merchants to accept debit cards, merchants have no leverage to negotiate with the networks or issuers to lower interchange fees. *See* 156 Cong. Rec. S5,802 (daily ed. July 14, 2010) (statement of Sen. Richard J. Durbin). And since the issuers benefit from the networks' pricing practices, issuers have no incentive to negotiate directly with merchants.

B. Congress passed the Durbin Amendment to address the staggering increase in interchange fees.

40. Congress adopted the Durbin Amendment in 2010 to provide relief for merchants—and ultimately for the consumers who shared the burden of debit interchange fees in the form of higher prices for goods and services, even if they didn't pay those prices with a debit card—while ensuring issuers could keep collecting enough revenue to cover their costs. The statute applies to debit-card issuers with more than $10 billion in assets. 15 U.S.C. §1693o-2(a)(6)(A). Interchange fees for covered issuers must be "reasonable and proportional" to the issuer's "incremental costs" for processing its particular debit-card transactions. 15 U.S.C. §§1693o-2(a)(2), (a)(4)(B)(i). The Board must prescribe regulations to "establish standards for assessing whether" an interchange fee is reasonable and proportional to a transaction's incremental costs. *Id.* §1693o-2(a)(3)(A). After all, the statute's entire point is to limit "[t]he amount of any interchange transaction fee that an issuer may receive or charge" to an amount that "shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction." *Id.* §1693o-2(a)(2); *see also id.* §1693o-2(a)(3)(A) (providing that the Board's regulation should "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").

41. When issuing the regulation to establish "reasonable interchange fees," the Board "shall … distinguish between … the *incremental* cost" and "*other* costs." *Id.* §1693o-2(a)(4)(B) (emphasis added). Eliminating all ambiguity, Congress defined both types of costs—and told the Board what role each should play in setting the interchange fee.

42. First, the statute defines "incremental cost" as those costs "incurred by an issuer for the role of the issuer in the *authorization*, *clearance* or *settlement* of a particular debit transaction." *Id.* §1693o-2(a)(4)(B)(i) (emphasis added). Those are also known as "ACS" costs. ACS costs "shall be considered" when the Board sets the standard for interchange fees. *Id.*

43. Second, the statute defines "other costs" as those "incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(ii). Unlike ACS costs, "other" costs "shall not be considered" when the Board sets the standard for interchange fees. *Id.*

44. The Durbin Amendment established that dichotomy—between must-consider ACS costs and must-not-consider "other" costs—to create a debit-card payments regime that resembles the checking system, where payment transactions are regulated and clear at par (that is, with no interchange fees at all). *See id.* §§1693o-2(a)(4)(A) (requiring the Board to consider the "functional similarity between (i) electronic debit transactions; and (ii) checking transactions that are required within the Federal Reserve bank system to clear at par"). Put another way, merchants pay *no* ACS costs for a *paper* check that debits a consumer's bank

account—and Congress instructed the Board to make the debit-card system as "functional[ly] similar[]" to the paper-check system as possible.

45. Even while imposing those limits on the Board's discretion, Congress recognized that fraudulent debit-card transactions impose costs that should be mitigated. For that reason, after the Board determines a "reasonable and proportional" interchange fee, the Durbin Amendment permits the Board to "adjust[]" that fee to account for fraud-prevention costs. But Congress specifically limited this adjustment to "costs incurred by the issuer in *preventing* fraud." *Id.* §1693o-2(a)(5)(i) (emphasis added). That is the only "adjustment" Congress allows the Board to make to its established interchange fee.

C. The Board's proposed rule followed the Durbin Amendment's instructions.

46. The Board hewed to the Durbin Amendment's statutory text in its notice of proposed rulemaking. The proposed rule created an interchange fee that limited the costs that issuers could recover to "those associated with authorization, clearing and settlement of a transaction." 75 Fed. Reg. 81,734 (Dec. 28, 2010) ("Proposed Rule"). In fact, the proposed rule contemplated a fee cap based on "only those costs that are specifically mentioned for consideration in the statute." *Id.* at 81,734-35. The Board specifically invoked Congress's "mandate to consider the functional similarities between debit transactions and check transactions" to bolster its plan to limit allowable costs "*to those that the statute specifically allows to be*

considered, and not" "expand[]" allowable costs "to include additional costs that a payor's bank in a check transaction would not recoup through fees from the payee's bank." *Id.* at 81,735 (emphasis added).

47. As a result, the proposed rule excluded all "other costs of a particular transaction beyond authorization, clearing and settlement costs" from the standard for the interchange fee. *Id.* at 81,735. The Board specifically excluded network processing fees, as well as overhead and "fixed costs, even if incurred for activities related to authorization, clearance, and settlement," since those costs were not attributable to the ACS costs of any one transaction. *Id.* at 81,735, 81,760. The Board also deemed fraud losses, and the costs of fraud-prevention and reward programs, unallowable because they are not attributable to the variable ACS costs an issuer incurs.

48. Proceeding from those background principles, in 2010 the Board outlined two potential standards in its proposed rule. Under "Alternative 1," the Board proposed an "Issuer-Specific" fee "up to a Cap, with a Safe Harbor." *Id.* at 81,736. That proposal, set at the median issuer's ACS costs, allowed an issuer to receive a per-transaction interchange fee up to a 7-cent safe harbor. *See id.* at 81,736-38. If an issuer's allowable costs per transaction exceeded 7 cents, the issuer could have proven those costs and received a higher per-transaction interchange fee to compensate, up to a 12-cent-per-transaction cap. *Id.* at 81,737-38.

49. Under "Alternative 2," the Board proposed a universal 12-cent cap; all issuers could receive 12 cents

per transaction without showing their actual costs per transaction. *See id.* at 81,738.

50. The Board determined that either option would more than suffice to cover the transaction's ACS costs. *Id.* at 81,737-38. And the Board believed the proposal furthered "the statute's mandate to consider the functional similarities between debit transactions and check transactions." *Id.*

D. The Board buckled under pressure from issuers and networks and reversed course in the final rule.

51. The Board received over 11,500 comments in response to the NPRM. Many commenters supported the proposed rule, including some who pushed for even lower fees. Merchants and their trade groups overwhelmingly supported the proposed rule's Alternative 1. Issuers and networks, in contrast, were among the proposed rule's most outspoken critics opposing both alternatives. In response to those comments, the Board yielded to pressure from the issuers and networks and issued a final rule on July 20, 2011, that differed drastically from its proposed rule.

52. The final rule adopts "a variant of the approach proposed in Alternative 2" from the proposed rule. Regulation II, 76 Fed. Reg. at 43,422. Under Regulation II, "an issuer may not receive an interchange fee that exceeds the sum of a base component, corresponding to the per-transaction allowable costs of the issuer at the 80th percentile as reported on the Board's survey, and an ad valorem

component, corresponding to the per-transaction fraud loss of the median issuer as reported on the Board's survey." *Id.*

53. In adopting this variant, the Board first rejected its previous view that the Durbin Amendment split the universe of relevant costs into two categories, and made the costs of "authorization, clearing and settlement of a transaction" the only allowable costs it could consider when setting the interchange fee. In its revised view, the Board could consider any costs not *specifically excluded* by §1693o-2(a)(4)(B)(ii). *Id.* at 43,426-27. That cleared a path for the Board to conclude that a *third* category of relevant costs exists—specifically, costs "that are not encompassed in either the set of costs the Board must consider in Section 920(a)(4)(B)(i), or the set of costs the Board may not consider under Section 920(a)(4)(B)(ii)." *Id.* at 43,427. "These costs," the Board explained, "are those that are specific to a particular electronic debit transaction but that are not incremental costs related to the issuer's role in authorization, clearance, and settlement." *Id.*

54. The Board claimed virtually unfettered discretion to add costs to this third category and consider them when setting the recoverable interchange fee:

> The Board does not find it necessary to determine whether costs are "incremental," fixed or variable, or incurred in connection with authorization, clearance, and settlement. Under the framework established by the statute, all costs related to a particular transaction may be considered, and some—the incremental costs

> incurred by the issuer for its role in the authorization, clearance, and settlement—must be considered.

Id. That let the Board base the interchange standard on any costs that could be justified as somehow "specific" to debit transactions.

55. The Board then considered four types of costs that were not "incremental" ACS costs: (1) fixed ACS costs, such as "network connectivity, software, hardware, equipment, and associated labor"; (2) network processing fees incurred by the issuer; (3) transaction monitoring costs (*i.e.*, costs for monitoring transactions before authorization); and (4) fraud losses. *Id.* at 43,426, 43,429-31. In this revised view, the only costs that Regulation II excluded as "other costs incurred by an issuer which are not specific to a particular electronic debit transaction," 15 U.S.C. §1693o-2(a)(4)(B)(ii), were "costs of corporate overhead (such as senior executive compensation); establishing the account relationship; card production and delivery; marketing; research and development; and network membership fees," Regulation II, 76 Fed. Reg. at 43,404.

56. Incorporating those four costs into its analysis, the Board set a uniform cap for the amount issuers could recover: 21 cents per transaction, with a 5 basis-point (.05%) fee per transaction to account for potential fraud losses. *Id.* at 43,422; 12 C.F.R. §235.3(b).

57. After the D.C. Circuit held that the Board needed to further justify its decision to base the

interchange fee in part on transaction-monitoring costs, *see NACS*, 746 F.3d at 492-93, the Board rested its decision on "[t]he same rationale" that it thought supported the rest of the final rule—"'any cost that *is* incurred in effecting any electronic debit transaction'" could be part of the standard. Updated Rule, 80 Fed. Reg. at 48,685.

II. Though the Board's own biennial reports show marked reductions in issuer-reported ACS costs since 2009, the Board still refuses to revise the interchange fee.

58. Since adopting Regulation II, the Board has known that it does not accomplish Congress's goal of establishing reasonable and proportional debit-card interchange fees. Time and again, merchants and retailers have met with the Board, raising concerns about (and providing evidence of) how Regulation II's fee cap far exceeds covered issuers' average ACS costs. *See, e.g.*, Meeting Between Federal Reserve Board Staff and Representatives of the Merchant Advisory Group (MAG), July 7, 2015, https://bit.ly/3r7Tb1l (noting discussion of "concerns regarding the increase in interchange fees for low-value debit card transactions since Regulation II took effect"); Meeting Between Federal Reserve Board Staff and Representatives of the National Retail Federation (NRF) et al., March 25, 2016, https://bit.ly/2KxSZYo (noting discussion of "concerns regarding the level of regulated interchange fees compared to issuer costs and the increase in interchange fees for low-value debit card transactions since Regulation II took effect"); Meeting Between Staff

of the Federal Reserve Board and Representatives of the Retail Industry Leaders Association, Dec. 5, 2019, https://bit.ly/3mvg37r (noting discussion of "debit card transaction and fraud-prevention costs in connection with the interchange fee cap and fraud-prevention adjustment in Regulation II").

59. Reports about skyrocketing interchange fees have even hit the popular press. In early 2019, for example, the Wall Street Journal reported that "[m]erchants paid an estimated $64 billion in Visa and Mastercard credit and debit interchange fees" in 2018, totals "up 12% from a year earlier and 77% from 2012." AnnaMaria Andriotis, *Purchases with Plastic Get Costlier for Merchants—and Consumers*, Wall St. J. (Feb. 15, 2019), https://on.wsj.com/3r7ZKRx. Other accounts describe the specific stress that interchange fees place on small businesses, like the Harborside Harvest Market in North Hero, Vermont (population 600), where interchange fees are now the store's "fourth-highest operating expense, after labor, rent and utilities." Todd Keyworth, *U.S. Needs Swipe Fee Reform*, Burlington Free Press (Nov. 14, 2014), https://bit.ly/2K6spp6. To put that in perspective, "[t]he fees are always larger than" the store's "profits—last year twice as large." *Id.*; *see also* AnnaMaria Andriotis, *Another Challenge for Small Businesses: Higher Card Fees Could Be on the Way*, Wall St. J. (Apr. 9, 2020), https://on.wsj.com/3agu2ew (quoting CEO of the Hub Convenience Stores, "a small business comprising six gas stations, sa[ying] his company paid nearly $400,000 last year in credit- and debit-card fees, including interchange fees," making credit- and debit-

card fees the company's third-largest line item behind only rent and payroll).

60. But the Board need not look beyond its own data for proof that Regulation II has given issuers a decade-long, government-sanctioned windfall. The Durbin Amendment instructs the Board to collect and publish biennially information about costs that issuers incur and fees they receive. 15 U.S.C. §1693o-2(a)(3)(B). As directed, the Board has issued reports disclosing its findings for the years 2009, 2011, 2013, 2015, 2017, and 2019. *See* Federal Reserve, Regulation II (Debit Card Interchange Fees and Routing), Reports and Data Collections, https://bit.ly/2CWMT0d.

61. Those reports confirm that Regulation II's cap was too high from the beginning. When Regulation II took effect in 2011, ACS costs for all covered issuers averaged 5 cents per transaction. 2011 Report at 4. High-volume issuers—whose cards accounted for 94% of all covered debit-card transactions—had average ACS costs of 4.7 cents per transaction. *Id.* at 31-32. Put differently, the Board's 21-cent cap created an average windfall of 16.3 cents for 94% of all covered debit-card transactions in 2011. Mid-volume issuers accounted for 5.9% of covered debit transactions that year, and their ACS costs averaged about 12 cents per transaction. *Id.* That means those issuers received, on average, 9 cents more per transaction than it cost to perform those transactions. Taken together, these figures represent a massive boon for covered issuers in 99.9% of regulated transactions that directly contravenes the Durbin Amendment.

62. Issuer ACS costs have only fallen since then. The Board's 2019 survey found that the average issuer ACS costs had fallen to 3.9 cents per transaction. *See* 2019 Report at 20-21. High-volume issuers' share of all regulated debit transactions remained steady at 94%, and their average costs fell to 3.5 cents per transaction. *Id.* at 21 & Tables 12-13. Regulation II thus created an average windfall of 17.5 cents for 94% of covered debit-card transactions in 2019. Mid-volume issuers made up all but .02%of the remaining regulated transactions. *Id.* Their average costs have dropped to 10.7 cents per transaction—a windfall of 11.3 cents per transaction. *Id.*

63. Because Regulation II allows almost all covered issuers to charge interchange fees 6 times their actual ACS costs, covered issuers have continued to reap tens of billions of dollars in profits from interchange fees even after Congress moved to halt networks' harmful pricing practices.

64. The harm to retailers is enormous. Corner Post, for example, is a small business and has paid hundreds of thousands of dollars in debit-card fees since it opened in 2018. It would have paid 400% less in fees (to date) if the Board had followed Congress's instructions and set the interchange fee to issuers' actual ACS costs.

III. Regulation II's interchange fee exceeds the Board's authority, is contrary to law, and is arbitrary and capricious.

65. Regulation II, as confirmed by the Updated Rule, must be vacated and set aside because it exceeds

the Board's statutory authority, is contrary to law, or is arbitrary and capricious in at least three ways.

A. Congress gave the Board authority to consider only incremental ACS costs.

66. The Durbin Amendment instructed the Board to set a standard for interchange fees that 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) (emphasis added). Congress specified the set of baseline costs against which the Board must measure an interchange fee's reasonableness and proportionality; that measuring stick is the "*incremental* cost" of "authorization, clearance, or settlement of a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(i) (emphasis added). Beyond that, Congress explicitly prohibited the Board from considering any "other costs incurred by the issuer which are not specific to a particular electronic debit transaction." *Id.* §1693o-2(a)(4)(B)(ii). In other words, "incremental costs" are the *only* costs the Board can consider in setting interchange fees.

67. Regulation II and the Updated Rule flout that plain language. After initially—and properly—considering only incremental ACS costs in its NPRM, *see* 75 Fed. Reg. at 81,755-56, Regulation II invents a third category of costs that even the Board admits "the statute is silent" on—*i.e.*, costs "specific to a particular transaction but that are not incremental costs related to the issuer's role in authorization, clearance, and settlement." 76 Fed. Reg. at 43,426. The Board then claims discretion to include (and exclude) particular costs from that third category in setting an allowable

interchange fee. Relying on those additional costs, the Board increased the allowable interchange fee from a maximum of 12 cents per transaction in the NPRM to 21 cents per transaction in the final rule, with another .05% of the transaction's value for fraud losses. And the Updated Rule doubles down on basing the regulated fee on nonstatutory transaction-monitoring costs. 80 Fed. Reg. at 48,685. That exceeds the Board's statutory authority and is arbitrary, capricious, or otherwise not in accordance with law.

B. The Board exceeded its authority in considering the specific costs it relied on.

68. Even if the Durbin Amendment gave the Board authority to consider more than just incremental ACS costs, it still prohibits the Board from considering the four specific additional costs it invoked to support the rule: (1) fixed ACS costs, (2) fraud losses, (3) transaction monitoring costs, and (4) network processing fees. By expressly including each of those costs in Regulation II, the Board exceeded its statutory authority and acted arbitrarily, capriciously, and not in accordance with law.

69. ***Fixed ACS Costs.*** Regulation II relied on fixed—rather than "incremental"—ACS costs, such as "network connectivity, software, hardware, equipment, and associated labor" costs, to support its 21-cent cap. Regulation II, 76 Fed. Reg. at 43,426, 43,429-31; Updated Rule, 80 Fed. Reg. at 48,685. But the Board cited no statutory support to justify that interpretation. Instead, the Board justified its approach by pointing to alleged difficulties in discerning each transaction's

incremental ACS costs. Regulation II, 76 Fed. Reg. at 43,426-27. That's an excuse, not a reasoned explanation. And agencies violate the APA when they ignore difficult congressional mandates rather than solve them. *See Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) ("That a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect the calculation on" a statutorily mandated cap).

70. The Board's focus on the alleged difficulties instead of the statutory language was intentional and impermissible. Even under the Board's expansive statutory reading that it contends allows for its third category of costs, the Durbin Amendment still prohibits the Board from considering "costs incurred by an issuer which are not *specific* to a *particular* electronic debit transaction." 15 U.S.C. §1693o-2(a)(4)(b)(ii) (emphasis added). And fixed costs, by definition, are not "specific" to any "particular" transaction. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "fixed cost" as "[a] cost whose value does not fluctuate with changes in output or business activity"); *San Antonio v. United States*, 631 F.2d 831, 851 n.11 (D.C. Cir. 1980) ("By definition, fixed costs are not associated with any particular traffic."). So the Board exceeded its statutory authority, and acted arbitrarily and capriciously, by considering them.

71. ***Fraud losses***. Regulation II's inclusion of a 5-basis-point (0.05 percent) allowance for "fraud losses" likewise exceeded the Board's authority and was arbitrary, capricious, and not in accordance with law.

12 C.F.R. §235.3(b)(2); *see* Regulation II, 76 Fed. Reg. at 43,431 ("fraud losses are best assessed through an *ad valorem* component in the interchange fee standards"). The Durbin Amendment authorizes issuers to recoup only one specific kind of fraud-related costs—those related to "preventing fraud." 15 U.S.C. §1693o-2(a)(5)(A)(i). It provides that, *after* the Board calculates the interchange fee standard, "[t]he Board may allow for an *adjustment* to the fee amount … if such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in *preventing fraud*." *Id.* (emphasis added). And to obtain that "adjustment" for costs of "preventing fraud," issuers must first "compl[y] with the fraud-related standards" that the Durbin Amendment requires the Board to promulgate. *Id.* §§1693o2(a)(5)(A)(ii) & (5)(B). Those standards, the Durbin Amendment provides, "shall be designed to ensure that *any fraud-related* adjustment of the issuer is *limited* to" fraud prevention. *Id.* §1693o-2(a)(5)(A)(ii)(I) (emphasis added).

72. None of this is news to the Board. It conducted a separate notice-and-comment proceeding for fraud-prevention costs, and allowed a 1-cent upward adjustment of the interchange fee for issuers that implement policies and procedures reasonably designed to prevent fraud. *See* 12 C.F.R. § 235.4. So by also accounting for "fraud losses" in the interchange fee, the Board flouted the Durbin Amendment's careful limitation that any "fraud related" recovery be "limited to" fraud prevention. 15 U.S.C. §1693o-2(a)(5)(A)(ii)(I). And the Updated Rule goes so far as to label "most costs of the authorization process" as "some type of fraud"-prevention costs. 80 Fed. Reg. at 48,685.

73. Labeling authorization costs as fraud prevention, and including "fraud losses" in the interchange fee, also creates perverse outcomes. Congress authorized the adjustment to "*require* issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions." 15 U.S.C. §1693o-2(a)(5)(ii)(II) (emphasis added). But Regulation II reduces issuers' incentives to implement fraud-prevention measures because it allows them to charge a 5 basis-point fee for *all* transactions to reimburse them for fraud-related losses—making fraud a profit center for some issuers no matter if they implement adequate fraud-prevention protocols. This frustrates Congress's goal of encouraging fraud reduction.

74. ***Transaction-monitoring costs***. The Board's reliance on transaction-monitoring costs exceeds its statutory authority and is arbitrary and capricious for the same reason. The Board agrees that monitoring costs are those "costs incurred by the issuer during the authorization process to *detect indications of fraud* or other anomalies." Updated Rule, 80 Fed. Reg. at 48,684 (emphasis added). And the Board has admitted that "[t]he most commonly reported fraud-prevention activity was *transaction monitoring*." Regulation II, 76 Fed. Reg. at 43,394 (emphasis added).

75. But here again, Congress specifically authorized a separate "adjustment … to make allowance for costs incurred by the issuer in preventing fraud." *Id.* §1693o-2(a)(5)(A)(i). As a result, "fraud prevention costs" are not to "be considered as part of the incremental issuer costs upon which the reasonable

and proportional fee amount is based." 156 Cong. Rec. S5902-01, 5925 (July 15, 2010) (Statement of Senator Durbin). By ignoring that directive, the Board increased the amount issuers can recover in an interchange fee, further discouraging issuers from adopting stringent fraud-prevention measures. Regulation II and the Updated Rule make issuers' fraud-prevention costs recoverable no matter if their fraud-prevention efforts satisfy the Board's standard for recovering the adjustment.

76. ***Network processing fees.*** A network processing fee is the fee that networks (like Visa and Mastercard) charge issuing (cardholder) banks and acquiring (merchant) banks to process a debit card transaction. Proposed Rule, 75 Fed. Reg. at 81,735. The Durbin Amendment did give the Board the authority to regulate those fees. But that authority was limited to issuing regulations necessary "to ensure that a network fee is not used to *directly or indirectly compensate* an issuer with respect to an electronic debit transaction." *Id.* §1693o-2(a)(8)(B)(i) (emphasis added). Rather than preventing issuers from using network fees as "direct[] or indirect[]" compensation, the Board did the opposite. It relied on those costs to *raise* the interchange fee and *increase* the compensation that issuers receive for "electronic debit transaction[s]." *Id.* §1693o-2(a)(2).

77. The Durbin Amendment's definition of "network fee" confirms that the Board must exclude such fees from its calculations. A "network fee" is "any fee charged and received by a payment card network with respect to an electronic debit transaction, *other than an interchange transaction fee*." 15 U.S.C. §1693o-

2(c)(10) (emphasis added). A "network fee" cannot be both *different from* an "interchange transaction fee" (as defined in subsection 2(c)(10)) *and* a *component of* an "interchange transaction fee" (as Regulation II proclaims). Congress treated network processing fees as a separate issue. The Board must do so too.

C. The Board cannot set a one-size-fits-all cap.

78. Even if the Durbin Amendment lets the Board consider more than incremental ACS costs—and if those other permissible costs included the four types discussed above—Regulation II as confirmed by the Updated Rule still exceeds the Board's statutory authority and is arbitrary and capricious because it implements a one-size- fits-all approach for interchange fees.

79. The Durbin Amendment provides that:

> The amount of any interchange transaction fee that an issuer may receive with respect to an electronic debit transaction shall be reasonable and proportional to ***the*** cost incurred by ***the*** issuer with respect to ***the*** transaction.

15 U.S.C. §1693o-2(a)(2) (emphasis added). The word "the" is one "of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4–5 (D.C. Cir. 2000) (cleaned up); *see also Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019) ("[T]he 'use of the definite article ... indicates that there is generally only one' person covered" (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004)). By using "the definite article

'the,'" Congress "particularize[d] the subject which it precedes," *Slater*, 231 F.3d at 5 (cleaned up), which means that Congress intended the words "cost" and "transaction" to be particularized for each issuer. In other words, the interchange fee that each issuer can recover must be tied to the specific costs that each issuer incurs for its own specific transactions. *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) ("[G]rammar and usage establish that 'the' is a function word indicating that a following noun or noun equivalent is definite or has been previously specified by context.") (cleaned up).

80. The Durbin Amendment's other sections confirm this reading. The statute directs the Board to consider "the incremental cost by an issuer for the role of ***the*** issuer in the authorization, clearance, or settlement of a ***particular*** electronic debit transaction." 15 U.S.C. §1693o-2(a)(4)(B)(i) (emphasis added). Along with using (again) the definite article "the," this section requires the Board to tie the "cost" that issuers can recover to "particular" transactions. And "particular" means "[p]ertaining to a single definite thing or person, or set of things or persons, as distinguished from others," or "[b]elonging only to a specified person or thing; restricted *to*." Shorter Oxford English Dictionary 2110 (6th ed. 2007).

81. Section 1693o-2(a)(2) also requires that the interchange fee be "proportional" to the costs incurred. As the Board recognized, "the term 'proportional' requires a relationship between the interchange fee and the costs incurred." Regulation II, 76 Fed. Reg. at 43,423.

82. Regulation II, as confirmed by the Updated Rule, breaks from both directives. Rather than issue a standard that is "particular" to each issuer and "proportional" to issuer-specific costs, Regulation II lets every issuer recover the same amount—21 cents plus .05% of each transaction—regardless of the costs the issuer incurs for each transaction. That exceeds the Board's statutory authority and is arbitrary, capricious, or otherwise not in accordance with law.

* * *

83. For these reasons, Corner Post—and NDRA's and NDPMA's members—are substantially harmed by the Board's unlawful implementation of the Durbin Amendment's interchange-fee cap. Regulation II, as confirmed by the Updated Rule, permits issuers to recover far more costs than the Durbin Amendment's plain language allows. It exceeds the Board's statutory authority. And it constitutes a construction of the Durbin Amendment that is arbitrary, capricious, or otherwise not in accordance with law.

CLAIMS FOR RELIEF

COUNT I
Administrative Procedure Act
(Contrary to Law)
5 U.S.C. §706

84. Plaintiffs repeat and re-allege the allegations in paragraphs 1-83 as if set forth fully herein.

85. Regulation II and the Updated Rule are final agency action. *See* 5 U.S.C. §704.

86. Under the APA, a reviewing court must hold unlawful and set aside agency action that is "not in accordance with law" or is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5 U.S.C. §706(2)(A), (C). Regulation II as confirmed by the Updated Rule is contrary to law and exceeds the Board's statutory authority under the Durbin Amendment for at least three reasons.

87. First, Congress directed the Board to ensure that any interchange fees an issuer receives for covered debit-card transactions are reasonable and proportional to a specific set of the issuer's transaction costs—its incremental ACS costs. And Congress specifically commanded that, when setting the interchange fee cap, "other costs … shall not be considered." 15 U.S.C. §1693o-2(a)(4)(B)(ii). But in Regulation II and the Updated Rule, the Board expressly considered costs *other than* incremental ACS costs. As a result, Regulation II and the Updated Rule are contrary to law and exceed the Board's statutory authority.

88. Second, Regulation II and the Updated Rule also exceed the Board's authority and are contrary to law because the Board based them on four specific costs—fixed ACS costs, fraud losses, transaction-monitoring costs, and network-processing fees—that Congress precluded the Board from considering, or directed the Board to consider through mechanisms other than interchange fees. Basing Regulation II on fixed ACS costs exceeds the Board's authority because fixed costs are not "specific to a particular electronic debit transaction." 15 U.S.C. §1693o-2(a)(4)(B)(ii). Including fraud losses and transaction-monitoring costs

in interchange fees exceeds the Board's authority and is contrary to law because Congress required the Board to account for those costs, if at all, through other adjustments—ones for fraud *prevention*. *Id.* §§1693o-2(a)(5)(A)(i), 2(a)(5)(A)(ii)(I). And Congress expressly excluded network-processing fees from the definition of interchange fees, *id.* §1693o-2(c)(10), and directed the Board "to ensure that a network fee is not used to directly or indirectly compensate an issuer" for debit transactions, *id.* §1693o-2(a)(8)(B)(i). But the Board *incorporated* network-processing fees into its interchange-fee calculus, thereby ensuring that issuers *would* be compensated *directly* for network fees. Each of those decisions exceeded the Board's statutory authority and is contrary to law.

89. Third, Congress instructed the Board to adopt a cap on covered debit-card interchange fees that "is reasonable and proportional to *the* cost incurred by *the* issuer with respect to *the* transaction." *Id.* §1693o-2(a)(3)(A) (emphasis added). By using the definite article "the" three separate times, Congress left no doubt: interchange fee caps must be specific to each issuer's specific incremental ACS costs. Yet the Board flouted that command, adopting instead a one-size-fits-all cap for all covered debit-card transactions. Because it operates on broad generalities, rather than on a specific issuer's costs, Regulation II as confirmed by the Updated Rule exceeds the Board's statutory authority and is contrary to law.

COUNT II
Administrative Procedure Act
(Arbitrary and Capricious)
5 U.S.C. §706

90. Plaintiffs repeat and re-allege the allegations in paragraphs 1-89 as if set forth fully herein.

91. The APA requires a reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

92. Regulation II, as confirmed by the Updated Rule, is arbitrary and capricious for several reasons, including but not limited to the following.

93. First, the Board failed to consider important aspects of the problem that Congress passed the Durbin Amendment to solve. Congress designed the Durbin Amendment to yield interchange fees that are sufficient to cover issuers' incremental ACS costs but are still as "functional[ly] similar[]" as possible to "checking transactions," which "are required within the Federal Reserve bank system to clear at par." 15 U.S.C. §1693o-2(a)(4)(A)(ii). Congress's evident purpose was to make covered debit-card transactions look as much as possible like checking transactions—like the latter, the former should bear as few processing costs as possible. But the Board's rulemaking process proceeded in the opposite direction. The Board moved from a proposed cap of either 7 cents plus a safe harbor, or a flat 12-cent fee, to a final cap of 21 cents plus 0.05% *ad valorem*—a movement *away* from clearing transactions at par, not *toward* it. Whatever "functional similarity" might mean

(*id.* §1693o-2(a)(4)(A)), it cannot equate one (paper-check) system that clears transactions at par to another (electronic-check) system that creates billions of dollars in interchange fees annually. The Board did not adequately consider or explain how that jump in allowable costs from its proposed rule to its final rule followed Congress's instruction to consider the functional similarity of debit-card interchange fees and checking transactions. That failure makes Regulation II as confirmed by the Updated Rule arbitrary and capricious.

94. Second, the Board set the interchange fee cap based on factors that Congress did "not intend[] it to consider." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Those factors include the four examples of nonstatutory costs—fixed ACS costs, fraud losses, transaction-monitoring costs, and network processing fees—described above. *See supra* ¶¶ 65-74. Agency decision making based on prohibited factors is the very definition of arbitrary and capricious agency action.

95. Third, the Board's reasoning behind Regulation II and the Updated Rule "runs counter to the evidence before the" Board. *State Farm*, 463 U.S. at 43. Though it had only one year of ACS data, the Board found that average issuer processing costs were 8 cents per transaction. 2009 Report at 9. And the Board expected that issuers' ACS costs would drop over time—so much so that those declines would require it to "to reexamine and potentially reset the fee standard." 76 Fed. Reg. at 43,422. The Board's assumption has borne out; in 2015, when it issued the

Updated Rule, average ACS costs had fallen to 4.2 cents per transaction. 2015 Report at 4. By 2017, average ACS costs had fallen to just 3.6 cents per transaction. 2017 Report at 3. Despite having those data, the Board still set the interchange fee cap at 21 cents per transaction plus an 0.05% *ad valorem* charge for fraud losses, did not change it in the Updated Rule, and has kept it there since. But the Board never adequately explained how a cap so significantly greater than issuers' actual incremental ACS costs—and leading to billions of dollars of ever-increasing profits every year for issuers—follows Congress's command to make debit-card interchange fees "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. §1693o-2(a)(3)(A). That failure makes Regulation II, as confirmed by the Updated Rule, arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court to enter judgment in their favor and to provide the following relief:

(1) A declaratory judgment holding that the standard for reasonable and proportional interchange fees in Regulation II and confirmed by the Updated Rule (12 C.F.R. §235.3(b)) is contrary to law and exceeds the Board's statutory authority;

(2) A declaratory judgment holding that the standard for reasonable and proportional interchange fees in Regulation II and confirmed by the Updated Rule (12 C.F.R.

§235.3(b)) is arbitrary and capricious under the APA;

(3) A declaratory judgment and permanent injunction finding the standard for reasonable and proportional interchange fees in Regulation II and confirmed by the Updated Rule (12 C.F.R. §235.3(b)) invalid and setting it aside;

(4) All other relief to which Plaintiffs are entitled, including attorney's fees and costs.

Dated: July 23, 2021

Respectfully Submitted,

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