ORAL ARGUMENT SCHEDULED FOR JANUARY 17, 2014

United States Court of Appeals
for the
District of Columbia Circuit

No. 13-5270

NACS, NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, MILLEROIL CO., INC., BOSCOV'S DEPARTMENT STORE, LLC, and NATIONAL RESTAURANT ASSOCIATION,

Plaintiffs-Appellees,

– v. –

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
JUDGE RICHARD J. LEON, CIVIL NO. 11-02075 (RJL)

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici.* Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Defendant-Appellant Board of Governors of the Federal Reserve System ("Board"): (a) the Retail Litigation Center, Inc.; (b) Amici 7-Eleven, Inc., CKE Restaurants Holdings, Inc., International Dairy Queen, Inc., Starbucks Corporation, and The Wendy's Company; and (c) Senator Richard J. Durbin.

B. Rulings Under Review. References to the rulings at issue appear in the brief for the Board.

C. Related Cases. This case has not previously been before this Court and there are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel states and certifies that the Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

CERTIFICATE AS TO NECESSITY OF SEPARATE *AMICUS* BRIEF

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that this separate brief is necessary because the agency action at issue directly prejudices the constituents and members of the Retail Litigation Center, Inc. ("RLC"), a leading national association of retail merchants designed specifically to give voice to the concerns of the retail industry in the courts. The RLC represents national merchants and can provide unique insight on the impact that the Federal Reserve's improper construction of the statute will have on a large segment of the merchant community. The agency's Rule violates the law, will depress competition in the debit card acceptance market, reinforces the dominant networks' market power, and will result in substantial increases in debit card network fees. As discussed more fully below, the RLC is uniquely situated to assist the Court with this issue because of the practical effects the action of the Board will have on its constituents and members.

Although appellees in this case include other businesses impacted by the Board's Rule, appellees will not be in a position to devote adequate attention to a core issue specific to *Amicus* the RLC: the negative economic consequences that the Federal Reserve's failure to properly interpret the network non-exclusivity provision will have on the RLC's constituents and members throughout the United States.

STATUTES AND REGULATIONS

All pertinent statutory provisions and regulations are set forth in the Brief for the Board of Governors of the Federal Reserve System.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor other person other than counsel for *amicus* contributed money intended to fund the preparation or submission of this brief.

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Nat Rudarakanchana, *US E-Commerce Growth Slows, As International E-Commerce Growth Booms, Especially In Russia, Middle East, Australia*,
International Business Times, October 15, 2013.....17

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* Authorities upon which we chiefly rely are marked with asterisks.

Steven C. Salop et al., Economic Analysis of Debit Card Regulation Under Section 920 (Oct. 27, 2010) 6

75 Fed. Reg. at 81,371(December 28, 2010) 15, 17

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156 Cong. Rec. S5926 (daily ed. July 15, 2010) 9

GLOSSARY

Board	Board of Governors of the Federal Reserve System
PIN	Personal Identification Number
Rule	*Regulation II, Debit Card Interchange Fees and Routing, Final Rule*, 76 Fed. Reg. 43,394 (July 20, 2011)
PAVD	PIN authenticated Visa Debit
RLC	Retail Litigation Center, Inc.

STATEMENT OF IDENTITY OF *AMICUS CURIAE*, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus, the Retail Litigation Center, Inc., is a public policy organization representing national and regional retailers in the United States. The RLC identifies and engages in legal proceedings that have national impact upon the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the industry-wide consequences of significant pending cases.

Amicus has a substantial interest in this case because its members and constituents are directly impacted by the Rule promulgated by the Board of Governors of the Federal Reserve System ("Board") governing competition for debit network routing fees ("Rule").[1] In 2009 alone, retailers paid in excess of $4.1 billion in network routing fees for debit transactions, which fees are then often passed on to consumers. This is a substantial, inflated, and unnecessary drain on the resources of the RLC's members and their customers, largely a consequence of

[1] *See Regulation II, Debit Card Interchange Fees and Routing, Final Rule*, 76 Fed. Reg. 43,394 (July 20, 2011) ("Rule"); 12 C.F.R. § 235.3; 12 C.F.R. § 235.7.

the lack of competition for debit card acceptance in the United States, and the dominance of Visa and MasterCard in that market.

The Durbin Amendment was intended to create competition in the debit market and lower debit card network fees in two ways. The first key provision delegated control over interchange fees to the Federal Reserve. The second ensured that merchants would have a routing choice for each debit card transaction (whether signature or PIN). The Board's final rule gravely misinterprets the law, thereby thwarting its purpose. As written, the Board's final rule permits issuers to restrict access to debit cards to just one PIN debit network and just one signature debit network.[2] This has two practical effects that are extremely harmful to competition generally and to the RLC's membership and constituency specifically.

First, because PIN debit is not available for the vast majority of debit transactions, the RLC's members and constituent businesses, representing billions of transactions annually, will have no choice but to use the signature debit networks as the only option. For example, virtually no Internet transactions can be completed via the PIN debit method, and, as a general matter, neither hotels nor restaurants in the United States use PIN. Indeed, approximately 75% of debit transactions cannot use PIN. The Federal Reserve's Rule consigns 75% of the

[2] Amicus also supports affirmance of the district court's opinion regarding interchange fees but limits this submission to the Board's improper Rule concerning network routing fees.

debit market to a duopolistic, signature-only regime dominated by Visa and MasterCard, a disastrous result at odds with the language, purpose, and spirit of the Durbin Amendment. Second, even as to the remaining 25% of the debit market, the Rule leaves no room for competition, because, as even the Board admits, PIN networks and signature networks do not compete. Specifically, as a result of the anti-competitive rules adopted by Visa and MasterCard, merchants cannot elect to use one method instead of the other for all debit transactions – and thus cannot play one method off of the other to achieve a competitive price.[3]

Without competition, Visa and MasterCard will continue their stranglehold on the debit market, and network routing fees will continue to rise in direct contravention of the congressional purpose behind the Durbin Amendment. The Rule renders a key component of the Durbin Amendment – the requirement of meaningful competition in the debit market – a nullity. For this reason, the RLC urges affirmance of the district court's well-reasoned opinion striking down the Rule and directing the Board to promulgate regulations that properly interpret the

[3] Visa has recently introduced a service referred to as PIN authenticated Visa Debit ("PAVD") which allows merchants to send PIN transactions to VisaNet, in addition to any unaffiliated network on their cards. MasterCard has a rule requiring issuers with MasterCard to also carry Maestro as a PIN mark. Nonetheless, this activity has done nothing but entrench Visa's and Mastercard's duopoly on the front of the card, while undermining truly unaffiliated competition for PIN transactions. As discussed below, ultimately, a rule that was intended to lessen Visa's and MasterCard's dominance has actually further entrenched them as market powers.

Durbin Amendment in order to bring competition to the debit market.

Pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b), all parties previously consented to RLC appearing as *amicus*. A motion to file separate *amicus* briefs is being filed concurrently.

SUMMARY OF ARGUMENT

In 2010, Congress enacted the Durbin Amendment, legislation designed to foster competition in the debit card acceptance market and, specifically, to allow merchants to choose between competing debit networks. In a market long dominated by Visa and MasterCard, network fees (fees charged to merchants in the technological processing of debit transactions over a "network") were rising, and competition was extremely limited. Congress's remedy was simple: to subject *every* debit card transaction (whether undertaken by the PIN or the signature method) to competition by having at least two unaffiliated networks available for routing. Congress empowered the Board of Governors of the Federal Reserve System to promulgate rules to effectuate this intent, but the Board has failed to do so. Instead, the Board adopted a Rule for network non-exclusivity that requires no competition at all for any debit card transaction. For PIN transactions, no competition is required. For signature transactions, no competition is required. In a world where 75% of merchants do not accept *any* PIN transactions, the Board's final rule allows but one network method for routing debit transactions – signature

debit – to dominate. Even as to the minority of transactions that can accommodate PIN debit, the Board's final Rule offers but one network to process each transaction: one network, no competition. The Rule undermines and defies the Durbin Amendment.

In a thorough and well-reasoned opinion, the district court rejected the Board's misguided approach. The district court correctly held that the Board's Rule violated the plain language of the statute, its spirit, and its purpose. This case has vast implications for the members and constituents of *Amicus* and for the retail economy at large. The district court's judgment should be affirmed.

ARGUMENT

I. The Durbin Amendment Was Enacted Against a Backdrop of Anti-Competitive Conduct by Visa and MasterCard

a. A Backdrop of Anti-Competitive Conduct

In 2010, Congress enacted legislation to address the exorbitant increase in debit card interchange and network routing fees. 15 U.S.C. § 1693o-2. Sponsored by Illinois Senator Richard J. Durbin, the provision now known as the "Durbin Amendment" was passed against a backdrop of near-virtual monopolization of the card acceptance market by Visa and MasterCard. For years, Visa and MasterCard not only dominated the credit card market, but they also illegally tied debit to credit, requiring retailers to accept Visa and MasterCard debit cards under their "Honor All Cards" rule. This anti-competitive conduct, as reflected in the tie, was

broken only by a federal lawsuit. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000); *see also* JA 293; 304-05 (Steven C. Salop et al., Economic Analysis of Debit Card Regulation Under Section 920 ¶¶ 23-25 (Oct. 27, 2010)).

As a general matter, consumers can use a debit card in two ways: the so-called signature method (where consumers press the "credit" button on an electronic pad at the point of sale, then sign their names to complete the transaction), or the "PIN" method (where consumers press the "debit" button and enter a personal identification number, or PIN, to authenticate the transaction).

As debit cards emerged as an alternative to credit cards and checks, Visa and MasterCard barred other networks (such as Discover) from handling signature transactions on their debit cards. For example, "Visa has maintained a rule that does not permit other brands to co-reside on its signature debit cards, and thus issuers typically have offered only one signature brand on the card." JA 306. As dominant players in the *credit* card acceptance market, Visa and MasterCard were able to extend their dominance to the *debit* card market. They "leverage[d] [their] credit card network infrastructure" to dominate the debit card market. *See* 76 Fed. Reg. at 43,395; *see also* JA 293; 307-14 (Salop, *supra*, ¶¶ 32-48). Not surprisingly, Visa and MasterCard were able to inflate their network routing fees to merchants without consequence.

Debit card fees for both signature and PIN transactions ballooned. By 2009, total network fees exceeded $4.1 billion, 76 Fed.Reg. at 43,397, due in large part to the lack of competition resulting from Visa's and MasterCard's exclusivity arrangements. Indeed, all fees charged to merchants for debit transactions – including both "interchange fees" (fees paid between banks and passed on to merchants for the acceptance of debit card transactions, 76 Fed.Reg. at 43,396) and so-called "network fees," purportedly designed to cover transaction-processing costs associated with the routing network for the transaction – rose as a result of Visa's and MasterCard's dominance of this market segment. *Id*.

The impact of higher fees is not limited to merchants; it also extends to ordinary consumers. A study released by the Merchants Payments Coalition and authored by Robert J. Shapiro, the former United States Under Secretary of Commerce for Economic Affairs, concluded that "[i]n the first three quarters of 2011, … [d]ebit card issuers collected interchange fees … of $16.7 billion over the nine-month period; and most of these charges were passed along to consumers through higher prices."[4] The same study noted that from "the first quarter of 2009 to the fourth quarter of 2011, … interchange fee revenue grew at a 27 percent

[4] Shapiro, Robert J., The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees, at 1, https://www.competitionpolicyinternational.com/assets/Durbin-Event-Briefing-Room/Shapiro-Economic-Effects-Interchange-Fees.pdf (last visited November 19, 2013).

annual rate," and "62 percent of recent increases in interchange revenues reflect higher interchange rates while the increases in transactions explain only 38 percent of rising interchange revenues." *Id* at 4. "The source of higher interchange charges matters," Mr. Shapiro explained, "since most of the fees are passed along to consumers in higher prices, including higher prices for millions of low and moderate-income people who do not use payment cards." *Id.* The Shapiro report also noted that "[a] growing body of research also has found that the levels set for interchange fees exceed the 'socially-optimal' levels justified by the system's actual value and costs." *Id.*

b. Congress Steps In

Signed into law on July 21, 2010, the Durbin Amendment sought to address the problem of debit transaction fees in two ways: (i) a limitation on interchange fees, and (ii) a provision requiring competition in the network fees market, by requiring that two unaffiliated networks compete for each debit *transaction*. 15 U.S.C. § 1693o–2(b)(1)(A). As to interchange fees, the Durbin Amendment requires the Board to promulgate rules that set standards for those fees, effectively regulating their amount. The statute requires interchange fees to be "reasonable

and proportional to the cost incurred by the issuer with respect to the transaction." *Id.* § 1693o–2(a)(3)(A).[5]

Critical to this *amicus* brief, however, Congress took a different approach for regulating network routing fees: instead of directing the Board to set standards for the amount of the fees, Congress required the Board to promulgate regulations to ensure competition among the debit networks. Specifically, Congress mandated that at least two *unaffiliated* networks be available to process each debit card *transaction*, reasoning that market forces would reduce previously-inflated network fees. As Senator Durbin explained, the legislation

> is intended to enable each and every electronic debit transaction—*no matter whether that transaction is authorized by a signature, PIN, or otherwise*—to be run over *at least two* unaffiliated networks, and the Board's regulations should ensure that networks or issuers do not try to evade the intent of this amendment by having cards that may run on only two unaffiliated networks where one of those networks is limited and cannot be used for many types of transactions.

156 Cong. Rec. S5926 (daily ed. July 15, 2010) (statement of Sen. Richard J. Durbin) (emphasis added).

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[5] In addition, interchange fees must "distinguish between" two categories of costs: (i) "incremental" or variable costs, incurred for "authorization, clearance, or settlement," that relate to a "particular" or single electronic debit transaction (§ 1693o–2(a)(4)(B)(i)) which are allowed; and (ii) "other costs" "incurred by an issuer which are not specific to a particular electronic debit transaction," which "shall not be considered." § 1693o–2(a)(4)(B)(ii).

In its preamble to the Rule, the Board recognized that promoting merchant choice among networks was a principal objective of the Durbin Amendment's non-exclusivity requirement. "From the merchant perspective," the Board acknowledged, "the availability of multiple card networks for processing debit card transactions and the elimination of routing restrictions are attractive because they give merchants the flexibility to route transactions over the network that will result in the lowest cost to the merchant, such as through the network with the lowest interchange fee." 76 Fed. Reg. at 43,446. "This flexibility," the Board stated, "may promote direct price competition for merchants among the debit card networks that are enabled on the debit card." *Id*. The routing restrictions targeted for elimination by Section 1693o-2(b)(1)(A) "limit merchants' ability to route transactions over lower-cost networks and may reduce network price competition." *Id*.

c. The Board Subverts the Statute

Despite the clear mandate of the statute, the direct statement of the legislation's sponsor, the Board's own acknowledgments of the legislation's purpose, and robust submissions from merchants, the Board's Rule fails to deliver on the Durbin Amendment's promise of network competition.

Under the rule, no competition is required for any debit card transaction. If the customer chooses the signature debit approach, only one network need be

available to route the transaction. If the customer chooses PIN, the same is true: only one network is available. By allowing the two unaffiliated networks on each debit card to be split between signature and PIN networks, the Rule requires no competition at all. The Board determined in the Rule that, so long as a card is enabled with one PIN network and one signature network, the statutory mandate is satisfied. 12 C.F.R. § 235.7(a)(2) & Official Cmt. 1; *see also* 76 Fed. Reg. at 43,447–48. But, as set forth below, signature and PIN transactions *do not currently compete with each other*. The Rule's perpetuation of the current duopolistic state of the market will do nothing to reduce fees or encourage competition. To the contrary, it will only solidify Visa's and MasterCard's stranglehold on the market for debit card acceptance – a result antithetical to the goal of the Durbin Amendment.

II. The District Court Correctly Held That the Board's Rule Fails to Implement the Statute's Plain Language Requiring Network Competition for Debit Transactions

The district court correctly held that the Board's Rule contravenes "[t]he plain text of the statute … [which] supports the conclusion that Congress intended for each transaction to be routed over at least two competing networks for each authorization method." JA 85.

When evaluating the Board's Rule, a court must determine "whether Congress has directly spoken to the precise question at issue," *Chevron, U.S.A.*.

Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842 (1984), by considering whether "the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill," *Nat'l. Cable & Telecomms. Ass'n. v. Brand X Internet Servs*., 545 U.S. 967, 982–83 (2005). The court must begin with the plain meaning of the statutory text. *S. California Edison Co. v F.E.R.C.*, 195 F3d 17, 23 (D.C. Cir. 1999).

Subsection (b)(1)(A) of the Durbin Amendment provides that the Board must promulgate regulations that prohibit issuers and networks from "restrict[ing] the number of payment card networks on which an electronic debit transaction may be processed" to one network or multiple affiliated networks. 15 U.S.C. § 1693o–2(b)(1)(A). In addition, subsection (b)(1)(B) requires the Board to supplement these regulations to prohibit issuers and networks from "inhibit[ing] the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions." *Id.* § 1693o–2(b)(l)(B).

Together, these provisions make clear that Congress intended to use "a market-oriented approach to network fees, … [to] regulate such fees only as necessary to ensure that they are not used to 'directly or indirectly compensate an issuer with respect to an electronic debit transaction' or 'circumvent or evade the restrictions ... and regulations' prescribed by the Board under this subsection." JA

48 (quoting 15 U.S.C. § 1693o–2(a)(8)(B)(i)–(ii)).[6] As the district court correctly determined, "[t]he plain text of the statute thus supports the conclusion that Congress intended for each transaction to be routed over at least two competing networks for each authorization method." JA 85.

Despite the plain language and clear intent of the statute, the Board determined that subsection (b)(1)(A) allowed a rule limited to "requir[ing] issuers and networks to make available two unaffiliated networks for each debit *card*, not for each method of authentication (signature and PIN)." JA 82-83 (citing 12 C.F.R. § 235.7(a)(2) & Official Cmt. 1; *see also* 76 Fed. Reg. at 43,404, 43,447–48) (emphasis added). Thus, the Board improperly focused its Rule on the debit *card*, not the debit *transaction*. *See id.* But "it defies both the letter and purpose of the Durbin Amendment to read the statute as allowing networks and issuers to continue restricting the number of networks on which an electronic debit *transaction* may be processed to fewer than two per transaction." JA 86 (emphasis added). "In the end, any reading that denies *merchants* the ability to *choose*

[6] For all of the above reasons, "Congress has directly spoken to the precise question at issue," which leaves no room for the Board's interpretation. *Chevron*, 467 U.S. at 842. But should the Court disagree with *Amicus* that the statute is clear and instead conclude that the statute is ambiguous, that would not end the inquiry. Even then, the rule is valid only if it is "based on a permissible construction of the statute" – that is, if the rule is not "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843, 844. Here, the Board's failure to create a Rule that prohibits issuers from restricting the number of payment card networks to process a transaction to fewer than two unaffiliated networks cannot clear even this low hurdle.

between multiple networks for each transaction cannot be squared with a statute that plainly requires at least two networks per transaction." *JA 88.* (emphasis added). In sum, while Congress demanded choice, the Board failed to provide for it. As the district court correctly held, under any plain language analysis or analysis of the statute's purpose, the Rule fails.

III. In Practice, the Board's Rule Fails to Prevent Network Restrictions on Competition

The Rule prejudices the members and constituents of *Amicus* and the entire retail industry. It fails to provide for network competition. Instead, it permits issuers to restrict the number of networks available for signature and PIN transactions to *one* each. In contrast, both the Board's alternative proposed approach (its so-called "Alternative B") and other options could create the competition contemplated by the statute.

a. The Board's Rule Does Not Foster Competition

The Rule does not create competition despite the law's mandate. Under the Rule as written, banks may elect to provide only one signature network and one PIN network, in which case the merchant generally has no choice of which network to use for each transaction: it must use either the sole signature debit network or the sole PIN network on the card. These authentication methods (PIN and signature) do not compete with each other, as even the Board all but admits. In its preamble to the proposed rule, the Board acknowledged that "the

effectiveness of the rule promoting network competition could be limited in some circumstances if an issuer can satisfy the requirement simply by having one payment card network for signature debit transactions and a second unaffiliated payment card network for PIN debit transactions." 75 Fed. Reg. 81, 371, 81,749 (December 28, 2010). "[O]nce the cardholder has authorized the transaction using either a signature or PIN entry," the Board reasoned, "the merchant would have *only a single network* available for routing the transaction." *Id.* at 81,749-50 (emphasis added). This is the reality and the core problem with the Rule.

As even the Board admits, once the consumer elects PIN or signature, the transaction can only be routed over one network, with no competition. The Rule is vulnerable to both consumer caprice (arbitrary choice, failure to remember a PIN, or the perception that a PIN transaction is less secure) and issuer incentives that compel consumers to use their signature networks (for example, penalties, rewards or other financial incentives for using the issuer's network). Worse yet, under current market and technological conditions, the vast majority of debit transactions can only occur by the signature method (and thus over signature debit routing networks); PIN is simply not widely available. In addition, if a card issuer enables its cards with just one PIN and one signature option, those relatively few merchants who only accept PIN at the point of sale are deprived of a second PIN routing option, and therefore no choice at all as to network.

Because of limitations in existing PIN networks, entire categories of transactions, such as hotel stays and car rentals, generally cannot accommodate PIN, because the exact amount of the transaction cannot be known at the time of authorization (when clearance information is sent). *See* 76 Fed. Reg. at 43,395. And PIN debit payments also cannot generally be accepted for Internet, mail order and telephone purchases – a massive and growing market for which routing network competition will be non-existent if the Board's Rule is allowed to stand. *Id.*[7] The Board *itself* estimated that only "*one-quarter* of the merchant locations in the United States that accept debit cards have the capability to accept PIN-based debit transactions." *Id.* (emphasis added). The remaining 75% of merchants take only signature debit, and thus will be limited to *one* network choice on *all* of their debit transactions as a result of the Board's misguided interpretation of the statute. *Id.*

This disparity is significant because the markets that are served by signature-only transactions are large and growing. Market intelligence firm International Data Corporation projects U.S. e-commerce sales will grow, on average, 7%

[7] In addition, while some merchants have developed the functionality to approve PIN transactions online, issuers consistently resist the implementation of that functionality. As a result, simply requiring one unaffiliated network, without regard to the method of transaction, does not translate into a merchant network choice for each and every transaction, as the Durbin Amendment requires.

annually between 2012 and 2017.[8] The latest forecast by eMarketer shows U.S. e-commerce will generate $262.3 billion in sales, an increase of 16.4% year over year, up from a 16.2% increase last year. By 2017, eMarketer estimates there will be $440 billion in sales, a compound annual growth rate of 13.8%.[9]

b. The Board Improperly Rejected Alternative Approaches That Would Have Complied With the Statute

Not only did the Board choose the option that creates virtually no competition, it declined to adopt other available approaches that would have promoted competition. For example, the Board's alternative proposal for network routing, referred to as "Alternative B," would have "required at least *two* active unaffiliated payment card networks for each type of authorization method – *i.e.*, at least two to process PIN transactions and two to process signature." JA 52 (citing 75 Fed.Reg. at 81,749) (emphasis added). Two or more networks per authentication method would mean choice for the merchant – and thus, actual competition and reduced fees, just as the Durbin Amendment intended. As the

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[8] Nat Rudarakanchana, *US E-Commerce Growth Slows, As International E-Commerce Growth Booms, Especially In Russia, Middle East, Australia*, International Business Times, October 15, 2013, available at http://www.ibtimes.com/us-e-commerce-growth-slows-international-e-commerce-growth-booms-especially-russia-middle-east.

[9] Chuck Jones, *Ecommerce Is Growing Nicely While Mcommerce Is On A Tear*, Forbes, October 2, 2013, available at http://www.forbes.com/sites/chuckjones/ 2013/10/02/ecommerce-is-growing-nicely-while-mcommerce-is-on-a-tear/.

district court held, Alternative B was but one way to properly reflect Congress' intent.

There is at least one other way to reach the same result. The Board could also have required the dissolution of the distinction between signature and PIN transactions; that is, allow PIN and signature networks to be interoperable and thus create actual competition between signature and PIN. Historically, networks that support signature and PIN debit have remained separate – but that is principally, if not solely, a historical artifact, not a technological requirement. The PIN/signature distinction emerged as an anticompetitive device to preserve market dominance in each segregated method of processing transactions. But today, PIN networks are technologically capable of accepting signature transactions, but are prohibited from doing so by Visa's and MasterCard's rules. As the district court held, the Board could adopt regulations to foster interoperability and competition between PIN and signature networks as a means of fostering competition and furthering the purpose of the Durbin Amendment.

"It was possible for the Board to implement the law without requiring brand new networks be added to each card … by barring the dominant networks' anti-competitive rules to allow PIN-only networks to process signature transactions, and *vice versa*." JA 90 (Op. at 25). By adopting rules that "required networks to allow cross-routing of signature and PIN transactions," the Board *could* have

"ensur[ed] that each debit card had multiple unaffiliated dual message network options on which every type of debit transaction could be processed." *Id* at 90-91. But the Board did not adopt that approach either. Instead, the Board adopted a rule flatly inconsistent with the statute, a rule that will cement Visa's and MasterCard's dominance and reduce competition even further.

Without a rule that fosters the network competition directed by the Durbin Amendment, the members and constituents of *Amicus* and the entire retail industry will continue to operate in an anti-competitive regime dominated by Visa and MasterCard. Network routing fees will continue to rise. And a key section of the Durbin Amendment will be rendered a nullity.

CONCLUSION

The Court should affirm the district court, invalidate the Rule's interchange fee standard (12 C.F.R. § 235.3) and network exclusivity provisions (12 C.F.R. § 235.7), and remand to the Board to adopt a rule in compliance with the plain language of the Durbin Amendment that will restore the competition in network routing demanded by Congress and necessary for a vital sector of the economy to

survive and to thrive. For the foregoing reasons, the district court's July 31, 2013 decision should be affirmed.

Dated: November 20, 2013
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The brief is set in 14-point Times New Roman type and, according to the word processing system used to prepare the brief (Microsoft Word 2010), contains 4,489 words, excluding those portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2013 the attached Brief of the Retail Litigation Center, Inc. as *Amicus Curiae* in Support of Plaintiffs-Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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