No. 11-1805

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TCF NATIONAL BANK,
Plaintiff-Appellant,

v.

BEN S. BERNANKE, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of South Dakota, No. 10-cv-4149-LLP

BRIEF *AMICI CURIAE* OF THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MID-SIZE BANK COALITION OF AMERICA, AND NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS IN SUPPORT OF PLAINTIFF-APPELLANT TCF NATIONAL BANK

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), none of the *amici curiae* has a parent corporation or publicly-held corporation that owns 10% or more of its stock.

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INTRODUCTION

This appeal concerns a single, but vitally important, issue—whether TCF National Bank's constitutional challenge to the regulation of debit-card interchange fees must be analyzed under the confiscatory-rate doctrine (as TCF argues) or, instead, under only the deferential rational-basis standard (as the district court concluded). *Amici* strongly support TCF.[1] The district court declined to apply the long established confiscatory-rate doctrine because banks are not public utilities and therefore have the freedom, at least theoretically, to leave the debit-card business *en masse* in response to the Durbin Amendment. As *amici* demonstrate in this brief, the confiscatory-rate doctrine has never been so limited.

The issue is extraordinarily important, and this Court's decision could have far-reaching effects. Under the district court's holding, the government would be free effectively to regulate an industry out of existence by intervening in an otherwise free market and dictating that prices for goods or services be set far below cost; the Constitution would preclude such action only if the government were regulating a public utility or other entity that is compelled to provide a good

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund its preparation or submission to the Court. No person other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

or service to the public. Fortunately, for the sake of private enterprise in the United States, this is not the law, as *amici* demonstrate.

INTEREST OF *AMICI CURIAE*

Amici, who are listed in Appendix A to this brief, constitute every major nationwide bank and credit union trade association in the United States. With virtually unprecedented unanimity, *amici* stand in opposition to the Federal Reserve Board's imposition of unreasonable and drastic price controls on debit-card interchange fees under the Durbin Amendment.

Over the past several decades, the financial institutions represented by *amici* have collectively invested billions of dollars to develop an efficient, convenient, and secure debit-card payments system. Today, debit cards have become the primary form of non-cash payment for millions of Americans and merchants, who conducted almost 38 billion debit-card transactions worth more than $1.45 trillion in 2009 alone. The innovation of electronic debit-card payment has been a tremendous economic boon for all—consumers, merchants, the financial-services industry, and the country as a whole.

Amici submitted a brief in the district court demonstrating that the Board's Proposed Rule, if permitted to take effect, would immediately reduce interchange fee revenues by as much as 80 percent, resulting in a staggering drop of approximately *$12 billion* in revenues *per year* for banks and credit unions. *Amici*

further showed why, under the confiscatory-rate doctrine, the Board's Action raises serious constitutional concerns. Finally, *amici*'s submission in the district court further showed that the Board's unprecedented economic intervention would deprive millions of Americans (particularly low-income Americans) of access to the inexpensive, reliable, convenient, secure, and efficient method of debit-card payment.

STATEMENT

A. The Durbin Amendment

The Durbin Amendment was enacted as part of the Consumer Financial Protection Act of 2010, which in turn is part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1075, 124 Stat. 1375, 2068-2074 (2010) ("Dodd-Frank Act"). There were no hearings on this amendment, no opportunity for meaningful input from the bank regulatory agencies, little to no consideration by Congress of the legislation's ramifications, and no stand-alone vote on the legislation in the House of Representatives, the amendment having been hurriedly enacted into law shortly after it was introduced on the Senate floor.

The Durbin Amendment requires that interchange fees received by debit-card issuers be "reasonable and proportional" to the issuer's costs. The statute

places this requirement in a new § 920(a)(2) of the preexisting Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693o-2(a)(2):

> (2) Reasonable interchange transaction fees.—The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

This requirement applies to an "issuer"—*i.e.*, entities that issue debit cards—but theoretically exempts "any issuer that, together with its affiliates, has assets of less than $10,000,000,000." *Id.* § 1693o-2(a)(6)(A).[2]

The Durbin Amendment directs the Federal Reserve Board ("the Board") to promulgate regulations establishing "standards for assessing whether the amount of any interchange transaction fee" meets the requirement set forth in § 1693o-2(a)(2)—*i.e.*, whether the fee is "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(3)(A). Congress instructed the Board, in developing these standards, to "consider" certain matters, such as "the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction." *Id.* § 1693o-2(a)(4)(B)(i). Congress also instructed the Board not to

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[2] Notwithstanding this exemption, as a practical matter the Durbin Amendment puts at risk the debit-card businesses of more than 15,000 financial institutions of all sizes. *See, e.g.*, Senate Banking Committee Hearing Transcript, LexisNexis (CQ Transcriptions database), Feb. 17, 2011 (statements of Federal Reserve Board Chairman Bernanke and FDIC Chairwoman Bair).

"consider" "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." *Id.* § 1693o-2(a)(4)(B)(ii). As the Government has acknowledged, these two instructions, read together, at minimum authorize the Board to consider costs that issuers incur beyond simply "authorization, clearance, [and] settlement" costs. *See* Dkt. No. 64, Mem. in Supp. of Defs.' Mot. to Dismiss 2, 28, *TCF Nat'l Bank v. Bernanke*, No. 10-cv-4149 (D.S.D. Feb. 18, 2011) (hereinafter "Gov't D. Ct. Br.").

The Durbin Amendment provides for the Board to issue a final rule by April 21, 2011, 15 U.S.C. § 1693o-2(a)(3)(A). On March 29, 2011, however, the Board announced that it would not be able to meet its deadline. *See* Letter from Chairman Benjamin S. Bernanke to Senator Tim Johnson & Senator Richard Shelby 2 (Mar. 29, 2011).[3] The Board stated that it intends to issue a final rule by July 21, 2011, *see id.*, which is the date that the Durbin Amendment takes effect, *see* 15 U.S.C. § 1693o-2(a)(9).

B. The Board's Action

On December 16, 2010, the Board announced its initial action under the Durbin Amendment, which it subsequently published in a notice of proposed rulemaking in the *Federal Register*. *See Debit Card Interchange Fees and Routing*, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010) ("Board Action").

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[3] A copy of the letter can be found at http://www.electronicpaymentscoalition.org/downloads/letter_Bernanke-to-Johnson-and-Shelby_2011-03-29.pdf.

The Board Action contains two alternatives for implementation of the Durbin Amendment's debit-card fee provisions. Rather than setting forth factors for "assessing" a fee's compliance with the statutory "reasonable and proportional" mandate, as the statute requires (15 U.S.C. § 1693o-2(a)(3)(A)), both alternatives establish hard price caps. The Board chose to fix prices even though, as the Government itself has noted, the statute does not direct the Board to "set a specific rate for debit interchange fees." Gov't D. Ct. Br. 2; *see id.* at 31 & n.36 (noting that the Durbin Amendment "is in marked contrast to the explicit ratemaking authority granted to" agencies like the FERC and the FCC).

Alternative 1 is an issuer-specific rule with both a safe harbor and cap. The rule allows an issuer to receive a per-transaction interchange fee up to a 7-cent safe harbor. *See* 75 Fed. Reg. at 81,738. If an issuer's allowable costs per transaction exceed 7 cents, then the rule allows the issuer the option of demonstrating its costs and receiving a higher per-transaction interchange fee equal to such allowable costs, not to exceed 12 cents. *Id.* at 81,737-81,738. The Board narrowly limited "allowable" costs to only those that an issuer incurs for the authorization, clearance, and settlement of debit-card transactions. *Id.* at 81,734. The Board acknowledged that its definition excludes substantial costs that issuers incur in the provision of debit-card services (*see id.* at 81,734-81,735) even though the statute authorizes the allowance of additional costs (*see* Gov't D. Ct. Br. 2, 28). Even

within the limited category of "authorization, clearance, and settlement" costs, the Board's rule is narrowly confined to only those costs that vary with the number of debit-card transactions up to an issuer's existing capacity levels ("average variable cost"). 75 Fed. Reg. at 81,735. Again, the Board acknowledged that this limitation excludes many costs that issuers incur for the authorization, clearance, and settlement of debit-card transactions. *Id.*

Alternative 2 is simpler, but still harsh. It sets a cap on interchange fees of 12 cents per transaction. *See* 75 Fed. Reg. at 81,738. The cap also operates as a safe harbor. Any issuer can charge up to the cap without demonstrating its actual allowable costs per transaction. *Id.*

C. The Trade Associations' Comment Letter

The Board requested comment by February 22, 2011. *See* 75 Fed. Reg. at 81,722. On that date, speaking with a single voice, *amici* submitted a 65-page comment letter expressing strong opposition to the Board's deeply flawed approach to the Durbin Amendment. *See* Bank and Credit Union Trade Associations' Comment Letter (Feb. 22, 2011), *available at* http://www.electronicpaymentscoalition.org/interchange/fedrule/letters.aspx.

The comment letter demonstrated that the Board Action contravened the Durbin Amendment. The "reasonable and proportional" standard of the statute *precludes* the Board from imposing a confiscatory rate on debit-card issuers (*i.e.*, a

rate set below an amount sufficient for an issuer to recover costs plus a reasonable rate of return). The statute does not authorize the Board's below-cost price caps. By nevertheless imposing such confiscatory rate caps, the Board Action both deviates from the statute and raises serious constitutional issues.

The comment letter also explained the profound adverse consequences the Board Action would have for consumers (particularly low-income Americans), financial institutions (particularly the nation's smaller banks and credit unions), the domestic payments system, and the economy as a whole.

For banks and credit unions, the harm is substantial and irreversible. By the Board's own estimate, its rule threatens to slash almost $12 billion from financial institutions' revenues during a period of continuing financial uncertainty. Prospective losses of this magnitude would compel significant changes in the banking sector. Issuers would need to fundamentally change their current business arrangements to find savings, including the possibility of layoffs in an industry that already has seen recent and severe declines in its workforce. By slashing interchange fee revenues, the Board Action also would adversely impact the capital position of banks and credit unions, thus undermining their ability to lend to businesses and consumers to support the nascent economic recovery. Finally, forcibly reducing interchange revenue by 80 percent annually also would have a severe effect on the payments system itself, making it difficult for banks to

maintain the debit-card system in its current form, much less to continue to innovate and build out the infrastructure that has given consumers the ability to seamlessly and conveniently purchase goods and services with a single payment vehicle. As *amici* explained in the comment letter, the inevitable result of the Board Action would be the degradation of the dynamism and efficiency of the payments system.

D. The Proceedings Below

Amici again joined together to file a brief in the district court, to make three main points. *See* Dkt. 121, Brief *Amici Curiae* of The Clearing House Association L.L.C. et al. in Support of Plaintiff TCF National Bank, *TCF Nat'l Bank v. Bernanke*, No. 10-cv-4149 (D.S.D. Mar. 11, 2011) (hereinafter "*Amici* D. Ct. Br."). *First*, the Durbin Amendment does not authorize the Board to issue a rule precluding debit-card issuers from recovering their costs plus a reasonable rate of return. *See id.* at 8-14. *Second*, the Board Action, by setting price caps below issuers' costs, raises serious constitutional concerns under the Due Process and Takings Clauses. *See id.* at 14-27. *Third*, if the Board's final rule also precludes issuers from recovering their costs and a reasonable rate of return, then TCF's motion for a preliminary injunction should be granted. In that event, absent an injunction, both financial institutions (regulated and unregulated) and consumers would face substantial and irreparable harm. *See id.* at 28-33.

On Monday, April 4, 2011, the district court heard oral argument on, and issued an oral ruling denying, TCF's preliminary injunction. *See* Dkt. No. 151, Transcript, *TCF Nat'l Bank v. Bernanke*, 10-cv-4149 (D.S.D. Apr. 4, 2011). The court denied the motion on one ground—that, in the court's view, TCF was not likely to prevail on the merits of its constitutional challenge to the Durbin Amendment. *See* Dkt. No. 166, Order on Mot. for Prelim. Inj. 7, *TCF Nat'l Bank v. Bernanke*, No. 10-cv-4149 (D.S.D. Apr. 25, 2011) ("Order"). The court based its ruling on a broad reading of this Court's decision in *Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), which the district court read as establishing a rule that only public utilities may invoke the protection of the confiscatory-rate doctrine. *See* Order 6. Because the government does not require TCF to issue debit cards and because, in the court's view, TCF does not bear "the hallmark of a classic utility," the court concluded that only rational basis scrutiny was appropriate. *Id.* Applying that scrutiny, the court found that the Durbin Amendment was "likely to satisfy rational basis review." *Id.* The court did not say, or explain why, below-cost price caps (*i.e.*, a confiscatory rate) would be reasonably related to a legitimate government objective. Finally, the court found that TCF was unlikely to prevail on its due process claim because it did not have an expectation of a "guarantee[d] ... certain level of interchange income." *Id.*

SUMMARY OF ARGUMENT

It is "plain that the power to regulate is not a power to destroy," *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968) (internal quotation marks omitted), yet that is precisely what the Board's implementation of the Durbin Amendment would do to the debit-card businesses of TCF and *amici*'s members. By slashing interchange fees from an average of 44 cents per transaction to 7 or 12 cents, the Board Action would, in the aggregate, cost issuers approximately *$12 billion* in interchange revenues yearly, a reduction of around 80 percent. That would not only eliminate any return on debit-card products and services; it would also cap interchange fees at an amount far below an issuer's per-transaction costs. Contrary to the district court's conclusion, the confiscatory-rate doctrine set forth and applied in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968), and *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 312 (1989), does apply to this case.

The district court wrongly read *Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), to have an impact far beyond the case's limited context. The decision does not stand for the broad proposition that the government may impose confiscatory price controls on businesses other than public utilities, subject only to the lowest

and most deferential standard of constitutional scrutiny, the rational basis test. That would have been an unprecedented holding. The decision instead stands for a much narrower and entirely unremarkable proposition—namely, the principle that a company that voluntarily subjects itself to a rate, as a condition of receiving taxpayer funds as part of a government program, cannot complain of the confiscatory nature of that rate. The government, when acting as a participant in a market and exercising its spending power, has broader powers than it would have were it acting instead as a regulator. A company may decline government funds if it objects to the restrictions that come along with that money. The *Minnesota Association of Health Care Facilities* decision holds that such conditions, in this context, are subject only to rational-basis scrutiny. The same is not true, however, when the government, as regulator, sets a confiscatory price—as the Board's Action under the Durbin Amendment does.

Even if it were the law that the confiscatory-rate doctrine applies only to government price controls in industries that bear certain hallmarks of public utilities, however, banks and credit unions are sufficiently akin to public utilities in these respects that they should be entitled to the same constitutional protections. Banks and credit unions, acting under their legislative and regulatory mandates, serve established, important public interests. And the interest at issue here—enablement and innovation of the electronic payments system—is one that the

federal government both supports and expects financial institutions to support. The theoretical possibility that banks and credit unions could exit the debit-card business altogether should accordingly be no answer to TCF's constitutional challenge.

Finally, the district court also erred in tersely concluding that TCF lacked a constitutionally cognizable property interest. We are aware of no other court that has ever rejected a constitutional challenge to a price-control scheme for lack of a cognizable "property" interest.

ARGUMENT

THE DISTRICT COURT ERRED IN APPLYING THE RATIONAL BASIS TEST

A. The Confiscatory-Rate Doctrine Prohibits Government Price Controls That Would Preclude Recovery Of Costs And A Reasonable Return

The Supreme Court has held that the Due Process and Takings Clauses of the Fifth Amendment forbid the government from dictating a price for a product or service at an amount that has a "confiscatory" effect, meaning a price that is so low as to be "inadequate to compensate current equity holders for the risk associated with their investments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 312 (1989). When the government regulates prices, it must "enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed." *Hope Natural Gas*, 320 U.S. 591,

605 (1944). Whether a price regulation satisfies those criteria depends upon the "net effect" of the regulation. *Duquesne Light*, 488 U.S. at 314.

Pursuant to this precedent, courts around the country have held—as to *both* public utilities *and* other private companies—that price-control regimes are facially unconstitutional where their net effect is to preclude a regulated company from recovering its costs and a reasonable return. *See, e.g.*, *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 596 (6th Cir. 2001); *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 515 (9th Cir. 1990); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1255-1256 (Cal. 1989); *Aetna Cas. & Sur. Co. v. Commissioner of Ins.*, 263 N.E.2d 698, 703 (Mass. 1970). For example, in *Michigan Bell Telephone*, the Sixth Circuit held that a Michigan statute abolishing a fee charged to consumers by two telephone companies and freezing the rates charged by those companies was facially unconstitutional under the Fifth Amendment. Michigan law deemed a rate inadequate only if it was less than the "'total service long run incremental cost' of providing the service." 257 F.3d at 595 (quoting Mich. Comp. Laws § 484.2102(y) (2001)). Because that formula limited the companies to recovering only their costs, and disallowed a reasonable return, the court held that the law "clearly" did not guarantee the "fair and reasonable rate of return on investment" required by the Constitution. *Id.* at 595-596.

In *Guaranty National*, the Ninth Circuit held that a statute reducing automobile-insurance rates by 15 percent for a single year—about one-fifth of the cost reduction the Board Action would impose here—on its face deprived insurance companies of due process. *See* 916 F.2d at 509. The relevant law permitted an insurer only to break even on its costs, and therefore failed to "guarantee the constitutionally required 'fair and reasonable return.'" *Id.* at 515 (quoting *Hope Natural Gas*, 320 U.S. at 603). In *Calfarm*, too, the California Supreme Court held that an initiative that reduced automobile-insurance rates by 20 percent for one year facially deprived insurance companies of due process. *See* 771 P.2d at 1250-1251, 1255-1256. And finally, in *Aetna* as well, the Massachusetts Supreme Judicial Court held that a law reducing automobile-insurance rates by "at least fifteen per cent" was unconstitutionally confiscatory. *See* 263 N.E.2d at 703. The Commonwealth could not, the court said, "constitutionally fix rates which are so low that *if the insurers engage in business* they may do so only at a loss." *Id.* (emphasis added).

These cases follow from the Supreme Court's own case law. While the confiscatory-rate doctrine originally developed in cases concerning public utilities, no Supreme Court decision has ever stated that the doctrine is so limited. Any possible doubt on this score was laid to rest by the Supreme Court in the *Permian Basin Area Rate Cases*. There, the Supreme Court applied the *Hope Natural Gas*

test (*i.e.*, the confiscatory-rate doctrine) to resolve a constitutional challenge brought by natural gas producers against allegedly confiscatory rates for gas produced in the Permian Basin. The Supreme Court expressly noted that "[p]roducers of natural gas cannot usefully be classed as public utilities.... They are intensely competitive vendors of a wasting commodity[.]" *In re Permian Basin Area Rate Cases*, 390 U.S. at 756-757. The gas producers also could abandon the natural gas production business. *See id.* at 771.

Nonetheless, the Supreme Court applied the confiscatory-rate doctrine of *Hope Natural Gas* to determine whether the government gas rates were constitutional. *See* 390 U.S. at 770. Specifically, the Court found that the governing statute in that case—the Natural Gas Act—required rates to be "just and reasonable" and the Court concluded that the requirement "'coincides' with the applicable constitutional standards." *Id.* After citing *Hope Natural Gas* as the authority for those constitutional standards, the Court found that "any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as *confiscatory*." *Id.* (emphasis added).

In sum, both the Supreme Court's confiscatory-rate precedent and decisions by federal courts of appeals and state supreme courts applying that precedent make clear that the confiscatory-rate doctrine applies beyond the public utility context.

The district court's decision did not address any of these authorities, in particular the Supreme Court's decision in *Permian Basin*.

B. This Court's Decision In *Minnesota Association Of Health Care Facilities* Does Not Require A Contrary Result

The district court based its denial of TCF's motion for a preliminary injunction on one case—this Court's decision in *Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*, 742 F.2d 442 (1984). Specifically, the district court understood the decision as establishing a rule that only "a public utility" can invoke the protections of the confiscatory-rate doctrine. Order at 6. That understanding is wrong.

The *Minnesota Association of Health Care Facilities* decision does not establish the broad rule the district court applied. Rather, it stands for the narrower and uncontroversial principle that rational-basis scrutiny applies to price controls that a company voluntarily accepts as a condition to receiving taxpayer funds as part of a government-funded program like Medicaid. It is frequently the case that the government may accomplish objectives through its spending power that it could not attain in its role as regulator. This Court's application of rational-basis scrutiny rather than the confiscatory-rate doctrine in that context—*i.e.*, to analyze a challenge to an allegedly unconstitutional commercial condition imposed by the government as a market participant—is not surprising, and should not be read as

holding anything about the applicability of the confiscatory-rate doctrine outside that context.

In *Minnesota Association of Health Care Facilities*, nursing homes challenged a rate restriction Minnesota had placed upon them as a condition of participation in the State's Medicaid program. Minnesota's Medicaid regulations prescribed the rates at which the State would reimburse nursing homes for residents receiving Medicaid assistance. *See* 742 F.2d at 445. The regulations also went further, and established pricing conditions for charges by participating nursing homes to persons who were not receiving Medicaid assistance. *Id.* The nursing homes argued that this second price control yielded rates that were insufficient for the homes to earn a reasonable return, and therefore violated substantive due process and constituted a taking in violation of the Fifth Amendment. *See id.* at 445-446.

This Court disagreed. It found that the Supreme Court's confiscatory-rate precedent was inapplicable because "Minnesota nursing homes, unlike public utilities, have freedom to decide whether to remain in business and thus subject themselves voluntarily to the limits imposed by Minnesota on the return they obtain from investment of their assets in nursing home operation." 742 F.2d at 446. In particular, Minnesota nursing homes were not required to "admit medical assistance residents and participate in the Medicaid program" in the first instance.

Id. "It is, of course, *only through voluntary participation in the State's Medicaid program* that a nursing home falls within the purview" of the challenged rate regulations. *Id.* (emphasis added). This Court's decision focused specifically on *that* particular form of "voluntary participation": "This voluntariness"—*i.e.*, the "voluntary" decision "to participate in Medicaid"—"forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation." *Id.*

The *Minnesota Association of Health Care Facilities* decision then went on to separately examine the plaintiffs' argument that the government nevertheless imposed an unconstitutional condition on nursing homes as the price for their participation in Minnesota's Medicaid program. *See* 742 F.2d at 446-447. The Court ruled that the plaintiffs' unconstitutional-conditions challenge was subject to analysis under the rational-basis standard set forth in *Nebbia v. New York*, 291 U.S. 502 (1937): "'If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied[.]'" 742 F.2d at 447 (quoting *Nebbia*, 291 U.S. at 537). The challenged rate restrictions satisfied that test. This Court found that Minnesota reasonably could seek to ensure that its Medicaid program did not create "differences in rates for the same nursing home services, depending wholly upon

whether or not a resident receives medical assistance," as such discrimination would be "inimical to the public welfare." *Id.*

That this Court refused to analyze the plaintiffs' constitutional challenge under the confiscatory-rate doctrine, and instead analyzed it under a different and more forgiving standard, is not surprising. There is a "sharp" difference between "the status of the Government as a ... market participant" and its status "as regulator or administrator" of economic activity. *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 (1995). The scope of the government's power is different when it exercises its spending power as a market participant from when it exercises its regulatory power as the government. For example, in the First Amendment context, when the government exercises its spending power, it may "selectively fund a program to encourage certain activities" in ways that it could not operate were it simply exercising its regulatory power. *Rust v. Sullivan*, 500 U.S. 173, 192-193 (1991); *see also National Endowment for Arts v. Finley*, 524 U.S. 569, 587-588 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); *Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461-462 (8th Cir. 1999). Similarly, the Commerce Clause prohibits a State from interfering with interstate commerce "through

burdensome regulation," but when the State acts as a market participant, it is subject to a different standard, and may spend its money to "ma[k]e it more lucrative" for companies to do business within the State without running afoul of the Constitution. *See, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

This Court's decision in *Minnesota Association of Health Care Facilities* reflects this commonsense distinction—and no more. While the confiscatory-rate doctrine does govern challenges to price-control regulation, it does not govern a challenge to a pricing condition set forth by the government when exercising its spending power. The district court was wrong to read *Minnesota Association of Health Care Facilities* more broadly. Indeed, as explained *supra* Part A, any interpretation of the decision as narrowing the confiscatory-rate doctrine to public utilities alone would be flatly inconsistent with Supreme Court precedent.

There is also no principled reason why the confiscatory-rate doctrine should apply only to public utilities. Under *Hope Natural Gas* and *Duquesne Light*, the property interest protected against a confiscatory-rate regulation is not the "specific physical assets" that are devoted to public use, "but [rather] the capital prudently devoted" to the business by its owners. *Duquesne Light*, 488 U.S. at 309. Both forms of property are protected by the Constitution. So-called public utilities are privately owned, and all privately owned companies must earn the returns on

capital necessary to allow their businesses to operate. If the confiscatory-rate doctrine were narrowed to the public utility context alone, then the government would have the very "power to destroy" private businesses that the Supreme Court has made clear is not part of the power to regulate. *In re Permian Basin Area Rate Cases*, 390 U.S. at 769.

Once *Minnesota Association of Health Care Facilities* is read properly, it is plain that it has no application here. The Durbin Amendment is not an exercise of the federal government's power as market participant. The debit-card fee restrictions are not conditions placed on banks and credit unions as the price for providing debit cards to the government.[4] The Board Action under the Durbin Amendment is accordingly subject to the confiscatory-rate doctrine, consistent with the decisions of the Supreme Court, federal courts of appeals, and state supreme courts discussed earlier (Argument Part A, *supra*).

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[4] Indeed, to the extent that the Durbin Amendment regulates the government's participation in the debit-card market, it *exempts* from its debit-card fee provisions those debit cards "provided to a person pursuant to a Federal, State or local government-administered payment program, in which the person may only use the debit card … to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such a program." 15 U.S.C. § 1693o-2(a)(7)(A)(i). In other words, the Durbin Amendment is the opposite of *Minnesota Association of Health Care Facilities* in that the statute allows higher interchange fees when debit cards are provided for the government's use as part of its benefit programs.

C. Banks And Credit Unions, In Any Event, Deserve The Same Protection As Public Utilities

Even if there were some principled basis on which to limit the constitutional protection against confiscatory-rate regulation to companies expected to serve the public, such as public utilities, banks and credit unions are sufficiently similar to utilities in this regard that the doctrine would apply here. Before the district court, the Government argued that public utilities are protected by the confiscatory-rate doctrine because they "are required by the government to employ their assets in the public interest." Gov't D. Ct. Br. 20 (citing *Duquesne Light*, 488 U.S. at 307). Banks and credit unions unmistakably fall into this category.

National banks in particular, for example, "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government." *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873). Their origins are precisely as "instrumentalities of the federal government," *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), designed "to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositaries," *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954). Federal law continues to recognize the important public purposes of national banks today. Indeed, because of the public interest involved, the National Bank Act still permits chartering of a national bank only

with approval from the Office of the Comptroller of the Currency ("OCC"), *see* 12 U.S.C. §§ 26, 27, and once chartered, the bank cannot relinquish its charter without OCC oversight, *see* 12 U.S.C. § 181; 12 C.F.R. §§ 5.48, 5.53.

More broadly, too, the Supreme Court has long recognized that "commercial banking [plays] a key role in the national economy." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326 (1963); *id.* ("For banks do not merely deal in but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply."). "[T]he proper discharge of these [banking] functions is indispensable to a healthy national economy." *Id.* at 326-327. The government's treatment of banks confirms their indispensable public role—and, indeed, their "partly public, partly private status" (Gov't D. Ct. Br. 20 (quoting *Duquesne Light*, 488 U.S. at 307)). The availability of short-term credit provided to banks by the Federal Reserve Banks under the "discount window" provisions of the Federal Reserve Act, *see* 12 U.S.C. §§ 248(i)-(j), 343, and the long-standing program of FDIC deposit insurance, *see id.* §§ 1811-1835a, demonstrate recognition of the need for banks to provide financial services vital to the public interest, such as lending to promote economic growth and job creation.

Congress likewise has determined that credit unions serve important public purposes. *See, e.g.*, Pub. L. No. 105-219, 112 Stat. 913 (1998); Pub. L. No. 73-

467, 48 Stat. 1216 (1934). Federal credit unions are federal instrumentalities. *See, e.g.*, *California Credit Union League v. City of Anaheim*, 95 F.3d 30, 31 (9th Cir. 1996), *vacated on other grounds by* 520 U.S. 1261 (1997); *TI Federal Credit Union v. DelBonis*, 72 F.3d 921, 930-934 (1st Cir. 1995); *United States v. Michigan*, 851 F.2d 803, 805-807 (6th Cir. 1988). All federally insured credit unions are public depositories that can serve as fiscal agents of the United States, *see* 12 U.S.C. § 1789a, and have federal share (deposit) insurance that is backed by the full faith and credit of the United States, *see, e.g.*, Pub. L. No. 100-86, § 901, 101 Stat. 657 (1987).

For these reasons, the Government cannot plausibly argue, as a ground for saying that the Constitution's prohibition on confiscatory price controls has no application here, that it is indifferent to the myriad financial services, including electronic-debit payment functions, that banks and credit unions provide. "The governmental controls of American banking are manifold." *Philadelphia Nat'l Bank*, 374 U.S. at 327. A plethora of statutory and regulatory requirements impose on banks the very obligation "to employ their assets in the public interest" (Gov't D. Ct. Br. 20) that the Government identifies as the threshold requirement for applying the confiscatory-rate doctrine, including provisions concerning the Community Reinvestment Act, *see* 12 C.F.R. §§ 345.21, 345.25, the process for

approval of bank acquisitions, 12 U.S.C. § 1842(c)(2), and the requirements to obtain FDIC insurance, *id.* § 1816.

Debit cards, in particular, provide a tremendous public benefit that the government fully expects banks to provide. Federal law unambiguously supports the electronification of the payments system—indeed, it is one of the very purposes of the Electronic Fund Transfer Act of which the Durbin Amendment became a part. *See, e.g.*, 15 U.S.C. § 1693(a) ("The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers."). The effects on the U.S. economy would be devastating if issuers were to respond to the Board Action by leaving the debit-card business. Customers and merchants alike depend heavily on debit cards as a fast, efficient, safe, and easy method of conducting transactions. During 2009 alone, debit cards constituted 35% of all non-cash transactions, compared to 20% for credit cards and 22% for checks.[5] Indeed, debit cards have become the primary non-cash payment methodology of choice for millions of Americans and merchants. The importance

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[5] *See* Stan Sienkiewicz, *The Evolution of EFT Networks from ATMs to New On-Line Debit Payment Products* 12 (Apr. 2002), http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2002/EFTNetworks_042002.pdf; *see also* Federal Reserve System, *The 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States* 16 (Dec. 8, 2010), *at* http://www.frbservices.org/files/communications/pdf/press/2010payments_study.pdf ("Debit card payments continued their double-digit growth from 2006 to 2009 and accounted for 34.8 percent of noncash payments in 2009 (2.0 percent by value).").

of debit cards to the economy is illustrated by their proliferation, growing from 60 million cards in 1983 to 491 million cards in 2008, with projections of 585 million cards in 2011. The percentage of U.S. households using debit cards likewise has exploded, growing from 20% in 1995 to 71% by 2007. As a practical reality, banks and credit unions cannot, consistent with their responsibilities to the public, simply abandon the debit-card business for another, more profitable line of business.

Governing case law establishes that the confiscatory-rate doctrine is not limited to the context of public utilities and similarly situated companies subject to a government-imposed obligation to serve the public interest. *See supra* Argument Parts A & B. But even were it, there is ample reason to apply even that narrowed doctrine here. This is not a case where anyone—the government or the general public—could reasonably expect (or desire) that banks and credit unions take up the invitation implicit in the district court's ruling and, *en masse*, terminate debit cards as a form of electronic payment.

D. Banks And Credit Unions Have A Valid Property Interest In The Assets And Goodwill Of Their Debit-Card Businesses

Prior to the district court's decision, no court of which *amici* are aware had rejected a constitutional challenge to a price-control scheme on the ground that there is no cognizable "property" interest at stake. That is so even for heavily regulated industries like electricity, natural gas, and telecommunications, and it is

no less so here. Yet the district court concluded that TCF's claim is unlikely to prevail because "Visa retains unmitigated discretion to set debit interchange fees" and TCF therefore is not "guarantee[d]" "a certain level of interchange income," and also because "[f]ees associated with payment transactions initiated by bank customers have … been historically subject to regulation and market pressures beyond TCF's control." Order 6. The district court's conclusion was erroneous.

1. With respect to the first point, neither TCF nor *amici*'s members claim a property right to receive the precise current level of interchange fees or a constitutional right to freeze the status quo allocation of fees in perpetuity. Rather, the claim is to a well-established, cognizable property interest—earning a reasonable return on investments in one's business. The Supreme Court has long acknowledged that companies have a cognizable property interest in the business itself as a "going concern." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 11 (1949). "The assets of a business (including its goodwill) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).[6]

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[6] Indeed, the Government's own primary case on this point, *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007), plainly demonstrates that the district court's conclusion is wrong. There, Hawkeye argued that a prohibition on the private operation of certain video-lottery machines was an unconstitutional taking and a deprivation of its property rights. Although the

These property interests, long regarded by the Supreme Court as "legitimate claim[s]" under "existing rules or understandings" of property, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), are the very same interests that TCF and *amici*'s members have in their debit-card lines of business, that the Board would confiscate through its price controls, and that the Supreme Court's confiscatory-rate precedent protects. TCF and *amici*'s members collectively have invested billions of dollars in their electronic debit-card payments systems. These financial institutions have a valid property interest in their debit-card lines of business and—as *Duquesne Light* recognizes—in earning a reasonable return on that capital investment. *See* 488 U.S. at 310, 312.

2. Contrary to the district court's implication, government regulation of interest rates and fees charged by national banks does not establish that a bank has no cognizable property interest in the revenues it can earn. Were that so, government regulation of rates and fees would have rendered the constitutional inquiry in cases like *Duquesne Light* and *Hope Natural Gas* unnecessary. Moreover, the existence of other regulatory provisions that *do not have* a

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Eighth Circuit concluded that certain of Hawkeye's alleged property interests were not constitutionally protected, *id.* at 440, the Eighth Circuit's holding was that Hawkeye had a cognizable property interest in the "business itself," *id.* at 439, 440, which encompassed "intangible" interests like "business ... goodwill" and "earning power," *id.* at 439 (quoting *Kimball Laundry*, 338 U.S. at 5, 11). It rejected the takings and due process claims on the merits, but not because Hawkeye had no cognizable property interest.

confiscatory effect on banks does not undermine the validity of banks' constitutional right against price controls that *would have* that effect. That some regulation of interchange fee amounts is conceivable does not imply that an issuer has no cognizable property right against confiscatory government price controls on those fees. There is a constitutional distinction between reasonable regulation and confiscatory regulation.

CONCLUSION

For the foregoing reasons, the district court's order denying TCF's motion for a preliminary injunction should be reversed.

Respectfully submitted,

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APPENDIX A

ALPHABETICAL LIST OF *AMICI CURIAE*

American Bankers Association

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The Clearing House Association L.L.C.

Established in 1853, The Clearing House is the nation's oldest banking association and payments company. Its members include the world's largest commercial banks, which employ 1.4 million people in the U.S. and hold more than half of all U.S. deposits. The Clearing House is a nonpartisan advocacy organization representing through regulatory comment letters, *amicus* briefs and white papers the interests of its owner banks on a variety of systemically important banking issues. The Clearing House frequently represents the interests of the banking industry as *amicus curiae* in litigation concerning a variety of systemically important banking issues, including in recent cases in the United States Supreme Court, the United States Courts of Appeals for the First, Second, Third, Fifth,

Ninth, Eleventh, and Federal Circuits, and United States district courts. The Clearing House Payments Company provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily.

Consumer Bankers Association

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

Credit Union National Association

The Credit Union National Association ("CUNA") is the largest credit union advocacy organization in the country, representing approximately 90 percent of the nation's nearly 7,700 state and federal credit unions, which serve approximately 93 million members. CUNA benefits its members by partnering with its state leagues to provide proactive representation, the latest information on credit union issues, economic reports, regulatory analyses, compliance assistance, and education.

The Financial Services Roundtable

The Financial Services Roundtable ("Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

Independent Community Bankers of America

The Independent Community Bankers of America ("ICBA"), the nation's voice for community banks, represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers of ICBA's members. With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold over $1.2 trillion in assets, $960 billion in deposits and $750 billion in loans to consumers, small businesses and the agricultural community.

Mid-Size Bank Coalition of America

The Mid-Size Bank Coalition of America ("MBCA") is a group of 22 United States banks formed for the purpose of providing the perspectives of

midsize banks on financial regulatory reform to regulators and legislators. The 22 institutions that comprise the MBCA operate more than 3,300 branches in 41 States, Washington, DC, and three territories. The MBCA's members' combined assets exceed $322 billion (ranging in size from $7 to $25 billion) and, together, its members employ approximately 60,000 people. Its member institutions hold nearly $241 billion in deposits and total loans of more than $195 billion.

National Association of Federal Credit Unions

Founded in 1967, the National Association of Federal Credit Unions ("NAFCU") exclusively represents the interests of federal credit unions before the federal government. Membership in NAFCU is direct; no state or local leagues, chapters or affiliations stand between NAFCU members and its headquarters in Arlington, VA. NAFCU provides its members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU represents nearly 800 federal credit unions, accounting for 63.9 percent of total FCU assets and 58 percent of all FCU member-owners. NAFCU represents many smaller credit unions with limited operations as well as many of the largest and most sophisticated credit unions in the nation, including 82 out of the 100 largest FCUs.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 6,888 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participant:

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ANTI-VIRUS CERTIFICATION

I, James A. Power, hereby certify that the foregoing brief and accompanying addendum submitted in PDF form through the Court's CM/ECF system was scanned using Trend Micro OfficeScan Client, program version 8.0 (service pack 1), and found to be virus free.

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