No. 14-200

In the Supreme Court of the United States

NACS, FKA NATIONAL ASSOCIATION OF CONVENIENCE STORES, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the final rule promulgated by the Board of Governors of the Federal Reserve System establishing the maximum "interchange transaction fee" that the issuer of a debit card may charge for each debit-card transaction, 12 C.F.R. 235.3, constitutes a permissible exercise of the Board's statutory authority under 15 U.S.C. 1693*o*-2(a) to regulate the amount of such fees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 746 F.3d 474. The opinion of the district court (Pet. App. 46a-116a) is reported at 958 F. Supp. 2d 85.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2014. On June 4, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 21, 2014. On July 9, 2014, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including August 18, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When a consumer uses a debit card to make a purchase from a merchant, the merchant typically bears the cost of, *inter alia*, an "interchange transaction fee" charged by the bank that issued the debit card. Board of Governors of the Federal Reserve System, *Debit Card Interchange Fees and Routing: Final Rule*, 76 Fed. Reg. 43,394 n.2, 43,396 (July 20, 2011); see Pet. App. 7a. The interchange transaction fee serves to "compensate[e] [the] issuer for its involvement" in the transaction. 76 Fed. Reg. at 43,394 n.2; see 15 U.S.C. 1693*o*-2(c)(8) (defining "interchange transaction fee"). The issuer's role includes, but is not limited to, authorization (verifying that the cardholder's bank account has sufficient funds to cover the purchase and that the card was not lost or stolen); clearance (processing the formal request for payment from the cardholder's account); and settlement (transferring the funds from the cardholder's account to the merchant's bank). See Pet. App. 6a-8a.

By 2009, the average interchange transaction fee had increased to 44 cents per transaction (1.15% of the amount of an average transaction). 76 Fed. Reg. at 43,397; see Pet. App. 8a-9a. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), Pub. L. No. 111-203, § 1075(a)(2), 124 Stat. 2068 (15 U.S.C. 1693*o*-2), Congress directed that "[t]he 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." 15 U.S.C. 1693*o*-2(a)(2). To effectuate that directive, Congress authorized the Board of Governors of the Federal Reserve System

(Board) to "prescribe regulations * * * regarding any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction." 15 U.S.C. 1693*o*-2(a)(1). The Act further provides that those regulations 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." 15 U.S.C. 1693*o*-2(a)(3)(A).

Although the Act does not define what a "reasonable and proportional" fee would be, it provides some guidelines for the Board's determination of the "standards for assessing" reasonableness and proportionality. 15 U.S.C. 1693*o*-2(a)(4). First, the Act states that the Board shall "consider the functional similarity between * * * electronic debit transactions" and "checking transactions that are required within the Federal Reserve bank system to clear at par" (*i.e.*, to be paid at face value, with costs recouped in other ways that do not require the presenting bank to pay a fee for the transaction). 15 U.S.C. 1693*o*-2(a)(4)(A); 76 Fed. Reg. at 43,400. Second, the Act states that the Board shall "distinguish between" (a) 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, which cost shall be considered," 15 U.S.C. 1693*o*-2(a)(4)(B)(i), and (b) "other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered," 15 U.S.C. 1693*o*-2(a)(4)(B)(ii).

2. Shortly after the Act's enactment, the Board held numerous meetings with various stakeholders,

including both merchants and banks. Board of Governors of the Federal Reserve System, *Debit Card Interchange Fees and Routing, Notice of Proposed Rulemaking*, 75 Fed. Reg. 81,724 (Dec. 28, 2010). After those meetings, the Board issued a Notice of Proposed Rulemaking (NPRM). *Ibid.* The NPRM observed that, under 15 U.S.C. 1693*o*-2(a)(4)(B), "the Board shall consider the incremental cost of authorizing, clearing, and settling a particular transaction and shall not consider other costs that are not specific to a particular transaction" in setting the standards for reasonable and proportional interchange transaction fees. 75 Fed. Reg. at 81,734. The NPRM explained, however, that "[t]he statute is silent with respect to costs that are specific to a particular transaction other than incremental costs incurred by an issuer for authorizing, clearing, and settling the transaction," and that the Board accordingly had discretion about whether those costs should be considered. *Id.* at 81,734-81,735. The NPRM proposed that the Board would limit permissible interchange transaction fees to an amount that reflects only authorization, clearance, and settlement costs (ACS costs), and only to the extent that such costs are "variable"—*i.e.*, "vary with the number of transactions" within each one-year reporting period. *Ibid.* The Board noted the possibility of alternative approaches and solicited comments about how it should proceed. *Id.* at 81,735-81,736.

After receiving submissions from more than 11,500 commenters—including "issuers, payment-card networks, merchants, consumers, consumer advocates, trade associations, and members of Congress," 76 Fed. Reg. at 43,394—the Board decided to promulgate final regulations that would permit interchange

transaction fees to reflect a greater degree of issuer costs than the NPRM had originally proposed. The final rule does not allow interchange transaction fees to reflect *all* costs "incurred in effecting a transaction"; the Board determined, for example, that "costs related to customer inquiries and the costs related to rewards programs" should not be included. *Id.* at 43,404, 43,429. The final rule does, however, allow interchange transaction fees to reflect certain ACS costs—such as network connectivity, software, hardware, equipment, and associated labor—that under the NPRM would have been considered non-"variable" and thus would not have been included. *Ibid.* The Board's final rule takes the form of a cap below which interchange transaction fees will be considered reasonable and proportional, which is set at 21 cents per transaction, plus .05% of the value of the transaction (for fraud losses). 12 C.F.R. 235.3(b); see 76 Fed. Reg. at 43,404.

In promulgating its final rule, the Board again explained that the statute divides costs into three categories: incremental ACS costs, which the Board is required to consider, 15 U.S.C. 1693*o*-2(a)(4)(B)(i); "other costs incurred by an issuer which are not specific to a particular electronic debit transaction," which the Board is prohibited from considering, 15 U.S.C. 1693*o*-2(a)(4)(B)(ii); and costs that fall into neither of the first two categories, which the Board may, but need not, consider. 76 Fed. Reg. at 43,426. The Board reasoned that, for purposes of its rulemaking, the only category it needed to define with precision was the category of "prohibited costs." *Id.* at 43,427. So long as the Board did not consider any such prohibited costs, it could consider all remaining

ACS costs "for which data were available," without specifically determining whether any particular such cost fell within the category of "incremental" ACS costs (and thus was required to be considered) or the category of unspecified costs (and thus could be considered at the Board's discretion). *Id.* at 43,427.

In explaining the scope of the category of prohibited costs in Section 1693*o*-2(a)(4)(B)(ii), the Board observed that reading the "ambiguous" language of the statute to "prohibit[] consideration of all costs that are not able to be specifically identified to a given transaction" would create "tremendous burdens and practical absurdities." 76 Fed. Reg. at 43,426. First, such a reading "would appear to exclude almost all costs related to electronic debit transactions because very few costs could be specifically assigned to a given transaction." *Ibid.* Second, "operational constraints make the determination of which in-house costs an issuer incurs in executing any particular transaction virtually impossible in practice." *Ibid.* The Board therefore applied "another straightforward interpretation that is workable and gives important meaning to this section," under which Section 1693*o*-2(a)(4)(B)(ii) precludes consideration only of "those costs that are not incurred in the course of effecting any electronic debit transaction." *Ibid.*

Although the Board did not precisely define the contours of the category of "incremental" ACS costs, it noted that the term "incremental cost" had "no single generally-accepted definition" and that no commenter had suggested interpreting the term to include only the "marginal cost" of each transaction. 76 Fed. Reg. at 43,426, 43,427 n.118. The Board also rejected as unsound the suggestion of several com-

menters that it distinguish between costs labeled as "variable" and those labeled as "fixed." *Id.* at 43,427. The Board first observed that "whether a cost incurred by an issuer for authorization, clearance, and settlement of transactions is thought of as 'fixed' or 'variable' depends on the relevant time horizon and volume range." *Ibid.* "For example, if an increase in the number of transactions processed from one year to the next requires the acquisition of additional equipment in the second year, hardware costs that would be considered fixed in the first year would be variable in the second year." *Ibid.* The Board additionally observed that, "even if a clear line could be drawn between an issuer's costs that are variable and those that are fixed," the "subjective judgment" inherent in how each issuer tracks costs for accounting purposes "could result in significant variation across issuers as to which costs are allowable and which are not." *Ibid.* The Board further explained that "nearly any cost that could be defined as fixed if incurred by an issuer that performs its transactions processing in-house could be considered as variable if the issuer were to outsource its debit card operations to a third-party processor that charged issuers a per-transaction fee based on its entire cost, including both fixed and variable costs. This makes enforcement of a distinction between fixed and variable costs very difficult and potentially uneven." *Ibid.*

3. Petitioners are merchant groups who preferred the approach the Board had proposed in its NPRM to the approach it adopted in its final rule. Pet. App. 13a. They challenged the final rule in district court, alleging (as relevant here) that the final rule violates 15 U.S.C. 1693*o*-2(a). Pet. App. 13a-14a. In their

view, Section 1693*o*-2(a) "allows issuers to recover only average variable ACS costs, not 'fixed' ACS costs, transactions-monitoring costs, fraud losses, or network processing fees." *Ibid.* The district court agreed with petitioners and granted summary judgment in their favor. *Id.* at 14a-15a; see *id.* at 46a-116a.

4. The court of appeals reversed and remanded. Pet. App. 1a-45a. Applying "the familiar two-step framework set forth in" *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court of appeals considered whether "Congress has 'directly spoken to the precise question at issue'" and, if not, "whether the Board's rules rest on 'reasonable' interpretations" of the statute. Pet. App. 16a (quoting *Chevron*, 467 U.S. at 842, 844). For the most part, the court of appeals found the Board's rulemaking to be a reasonable interpretation of a "confusing" and "convoluted" statute, although the court remanded the rule to the Board for further consideration of one specific issue. *Ibid.*; see *id.* at 16a-45a.

a. The court of appeals first determined that the Board had permissibly interpreted Section 1693*o*-2(a)(4)(B) to "split[] costs into three categories: (1) incremental ACS costs, which the Board must allow issuers to recover; (2) costs specific to a particular transaction, other than incremental ACS costs, which the Board may, but need not, allow issuers to recover; and (3) costs not specific to a particular transaction, which the Board may not allow issuers to recover." Pet. App. 29a; see *id.* at 19a-29a. The court found the statute to be "ambigu[ous]" on that issue and the Board's reading to be "reasonable." *Id.* at 29a. The court stressed, *inter alia*, that the two categories described in Section 1693*o*-2(a)(4)(B) did not clearly

cover the entire universe of costs, *id.* at 19a-21a, and that "had Congress wanted to allow issuers to recover only incremental ACS costs, it could have done so directly," *id.* at 21a.

b. The court of appeals then considered "whether the Board reasonably concluded that issuers can recover the four specific types of costs [petitioners] challenge." Pet. App. 29a-30a. The court upheld some, but not all, of the Board's determinations. See *id.* at 29a-39a. As most pertinent here, the court held that the Board had permissibly allowed interchange transaction fees to reflect "fixed" ACS costs, "such as equipment, hardware, and software" used to process transactions, rather than just "variable" ACS costs. *Id.* at 30a-33a (internal quotation marks and citation omitted).

The court of appeals rejected petitioners' argument that "fixed" ACS costs "are not 'specific' to any 'particular' transaction" and therefore are precluded from consideration under 15 U.S.C. 1693*o*-2(a)(4)(B)(ii). Pet. App. 31a (citation omitted). While acknowledging that petitioners' argument "has some persuasive power," the court observed that petitioners "have never argued that issuers should be allowed to recover only costs incurred as a result of processing individual, isolated transactions," and that petitioners "seem[ed] to endorse" the proposal in the NPRM, which "would have allowed recovery of costs that are variable over the course of a year but could not be traced to any one particular transaction." *Ibid.* (citing 75 Fed. Reg. at 81,763 and 76 Fed. Reg. at 43,427 n.118). The court thus understood the parties to "agree[] that the 'specific to a particular electronic debt transaction' phrase should not be read to limit issuers to recovering only

the marginal costs of each particular transaction." *Id.* at 20a.

The court of appeals held that the Board had reasonably determined that drawing a line between "variable" and "fixed" costs "would prove artificial and unworkable." Pet. App. 31a-33a. The court agreed with the Board that "the distinction [petitioners] urge between what they refer to as non-includable 'fixed' costs and includable 'variable' costs depends entirely on whether, on an issuer-by-issuer basis, certain costs happen to vary based on transaction volume in a particular year." *Id.* at 31a. "For example, in any given year one issuer might classify labor as an includable cost because labor costs happened to vary based on transaction volume over that year, while another issuer might classify labor as a non-includable cost because such costs happened to remain fixed over that year." *Id.* at 31a-32a (citing 76 Fed. Reg. 43,427). The court also pointed to the Board's observation that "the distinction between variable and fixed ACS costs depends in some instances on whether an issuer 'performs its transactions processing in-house' or 'outsources its debit card operations to a third-party processor that charges issuers a per-transaction fee based on its entire cost.'" *Id.* at 32a (quoting 76 Fed. Reg. 43,427) (brackets omitted). And the court highlighted the Board's determination that "requiring issuers to segregate includable 'variable' costs from excludable 'fixed' costs on a year-by-year basis would prove 'exceedingly difficult.'" *Ibid.*

The court of appeals thus found reasonable the Board's interpretation of Section 1693*o*-2(a)(4)(B) "as allowing issuers to recover costs they must incur in order to effectuate particular electronic debit card

transactions but precluding them from recovering other costs too remote from the processing of actual transactions." Pet. App. 32a. "This reading," the court explained, "interprets costs that 'are not specific to a particular electronic debit transaction,' and . . . cannot be considered by the Board, to mean those costs that are not incurred in the course of effecting any electronic debit transaction." *Id.* at 32a-33a (quoting 76 Fed. Reg. at 43,426) (brackets omitted). The court additionally determined that the agency had "reasonably" applied its approach to differentiate between, for example, "equipment, hardware, software, and labor costs," which are recoverable because "'each transaction uses the equipment, hardware, software and associated labor, and no particular transaction can occur without incurring these costs,'" and "the costs of producing and distributing debit cards," which are not recoverable because "'an issuer's card production and delivery costs . . . are incurred without regard to whether, how often, or in what way an electronic debit transaction will occur.'" *Id.* at 33a (quoting 76 Fed. Reg. at 43,428, 43,430) (brackets omitted).

c. The court of appeals also rejected petitioners' challenges to the Board's inclusion of two additional types of costs—network processing fees and fraud losses—in the calculation of the final rule's cap on interchange transaction fees. Pet. App. 33a-36a. The court observed that "[n]etwork processing fees, which issuers pay on a per-transaction basis, are obviously specific to particular transactions." *Id.* at 33a. The court further found that including such costs in the interchange transaction fee did not violate a separate statutory provision that addressed network fees. *Id.*

at 33a-34a. The court also observed that petitioners "nowhere challenge the Board's conclusion that fraud losses, which result from the settlement of particular fraudulent transactions, are specific to those transactions." *Id.* at 34a. The court held that including such costs in the interchange transaction fee did not violate a separate statutory provision that addressed fraud-prevention costs. *Id.* at 34a-36a.

Finally, the court of appeals held that the Board had not adequately explained its decision to permit interchange transaction fees to include transaction-monitoring costs. Pet. App. 36a-39a. The court ordered a remand to allow the Board an opportunity to provide a sufficient explanation of its action. *Id.* at 38a-39a.

ARGUMENT

Petitioners contend (Pet. 17-32) that the Board's final rule impermissibly permits interchange transaction fees to reflect costs that 15 U.S.C. 1693*o*-2(a)(4)(B)(ii) prohibits the Board from considering. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. In addition, the question presented has no implications beyond the particular statute and rule at issue, and there is no assurance that the Board's cap on interchange transaction fees would be as low as petitioners advocate even under their interpretation of Section 1693*o*-2(a)(4)(B)(ii). Further review is not warranted.

1. As the court of appeals correctly recognized, and as petitioners acknowledge, judicial review of the Board's interchange-transaction-fee rule is governed by the "familiar two-step framework set forth in" *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Pet. App. 16a; see, *e.g.*, Pet. 26-27. Under that framework, a reviewing court first considers "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the statute is silent or ambiguous with respect to the disputed question, the court must decide "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. At this second step, the court defers to the agency's statutory construction so long as the agency's approach "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* at 845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

The "precise question at issue" here, *Chevron*, 467 U.S. at 842, is whether the recovery of certain costs as part of an issuer's interchange transaction fee is "forbidden by" Section 1693*o*-2(a)(4)(B)(ii). Pet. i. The only costs in dispute at this point are the ones petitioners have labeled "'fixed' ACS costs." See Pet. App. 30a-33a.[1] As the court of appeals recognized, *ibid.*, the Board's inclusion of those costs in the final rule's cap on interchange transaction fees was consistent with *Chevron*. Congress has not "directly spoken to" the question whether "fixed" ACS costs may be reflected in the interchange transaction fee, and the agency's resolution of that issue was a "reasonable accommodation of conflicting policies that

[1] Although petitioners' suit challenged the inclusion of other types of costs as well, those challenges were premised not on contentions that Section 1693*o*-2(a)(4)(B) prohibits the Board from considering such costs, but instead on contentions that inclusion of those types of costs was inconsistent with other portions of Section 1693*o*-2(a). See pp. 11-12, *supra*; Pet. App. 33a-39a.

were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 842, 845 (citation omitted).

a. Contrary to petitioners' contention (Pet. 17), nothing in Section 1693*o*-2(a) "unambiguously forbids" the recovery of "fixed" ACS costs. The statute's overarching directive is that the Board "establish standards for assessing whether the amount of any interchange transaction fee * * * is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. 1693*o*-2(a)(3)(A). By framing the mandate in terms of "standards for assessing" whether fees are "reasonable and proportional" to an issuer's costs, *ibid.*, Congress vested the Board with "exceptionally broad authority," *Atkins* v. *Rivera*, 477 U.S. 154, 161-162 (1986), to chart an appropriate course in this fact-intensive area. See *id.* at 161-162 (reaching a similar conclusion in the context of a statute authorizing promulgation of certain Medicaid standards that were "reasonable" and "comparable for all groups"); see also *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 501 (2002) (statute authorizing agency to set "'just and reasonable' rates" left "methodology largely subject to discretion").

Section 1693*o*-2(a)(4)(B) limits the Board's discretion to some degree by requiring the Board to "distinguish between" (a) 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, which cost shall be considered," and (b) "other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered." 15 U.S.C. 1693*o*-2(a)(4)(B)(i) and (ii). That provision, however, does

not unambiguously preclude consideration of "fixed" ACS costs. The court of appeals found it to be undisputed that Section 1693*o*-2(a)(4)(B) allows consideration of at least some ACS costs that are not "incurred as a result of processing individual, isolated transactions." Pet. App. 31a. The court explained that, even under the approach petitioners "seem[ed] to endorse," issuers may recover "costs that are variable over the course of a year but [can] not be traced to any one particular transaction." *Ibid.* The statutory language draws no line—let alone an unambiguous line—between the "variable" ACS costs that petitioners would include and the "fixed" ACS costs they would exclude.

As the court of appeals recognized, the distinction between "fixed" and "variable" costs is "artificial." Pet. App. 32a. The terms "fixed" and "variable" do not appear in Section 1693*o*-2(a)(4)(B). And, as the Board explained (76 Fed. Reg. at 43,427), the court of appeals recognized (Pet. App. 31a-32a), and petitioners nowhere meaningfully dispute, none of the so-called "fixed" costs are truly invariable. Instead, "whether a cost incurred by an issuer for authorization, clearance, and settlement of transactions is thought of as 'fixed' or 'variable' depends on the relevant time horizon and volume range. * * * For example, if an increase in the number of transactions processed from one year to the next requires the acquisition of additional equipment in the second year, hardware costs that would be considered fixed in the first year would be variable in the second year." 76 Fed. Reg. at 43,427. Nothing in the statute requires the Board to define "variable" and "fixed" costs in the

manner petitioners posit and to include only the former but not the latter.[2]

b. The Board's interpretation of Section 1693*o*-2(a)(4)(B) as allowing consideration of "fixed" ACS costs also satisfies the second step of the *Chevron* inquiry because it "is based on a permissible construction of the statute." 467 U.S. at 843.

First, the Board reasonably interpreted Section 1693*o*-2(a)(4)(B) to permit consideration of all ACS costs so long as they "are not within the category of prohibited costs." 76 Fed. Reg. at 43,426. As the court of appeals explained in detail (Pet. App. 19a-29a), that approach is reasonable in light of the Act's silence as to how certain costs are to be treated. Although the Act requires consideration of "incremental" ACS costs, 12 U.S.C. 1693*o*-2(a)(4)(B)(i), and forbids consideration of "other costs incurred by an issuer which are not specific to a particular electronic debit transaction," 12 U.S.C. 1693*o*-2(a)(4)(B)(ii), it says nothing about "costs specific to a particular transaction, other than incremental ACS costs," Pet. App. 29a; see 76 Fed. Reg. at 43,426 ("[T]here exist costs that are not encompassed in either the set of costs the

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[2] To the extent petitioners suggest (*e.g.*, Pet. 21) that the Board is allowing interchange transaction fees to include costs (such as network and equipment costs) attributable to credit-card processing or other programs not related to debit cards, that suggestion is mistaken. In order to allow an issuer "to take advantage of economies of scope and scale," the Board permits an issuer to "use the same processing platform for its debit card and credit card operations (or debit card and ATM card operations)." 76 Fed. Reg. at 43,429. To fairly apportion such "joint costs" of debit and credit or ATM operations, however, the Board requires issuers to allocate joint costs to electronic debit transactions on a *pro rata* basis. *Ibid.*; see *id.* at 43,433.

Board must consider * * * or the set of costs the Board may not consider.").

The petition for certiorari, which for the most part leaves this aspect of the court of appeals' decision unchallenged, briefly asserts (Pet. 23) that it is "implausible" that Congress "impliedly created by silence a third category of costs" that the Board would have discretion to consider. As the court of appeals explained, however, the source of the Board's authority to consider that category of costs is not the silence of 15 U.S.C. 1693*o*-2(a)(4)(B), but instead the explicit directive of 15 U.S.C. 1693*o*-2(a)(3)(A), which "clearly grants the Board authority to promulgate regulations ensuring that interchange fees are reasonable and proportional to costs issuers incur." Pet. App. 27a-28a. It was therefore reasonable for the Board to interpret Section 1693*o*-2(a)(4)(B) as specifying how two particular categories of costs should be treated, rather than as covering the entire waterfront of possible costs. See *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002) ("[S]ilence * * * normally creates ambiguity. It does not resolve it.").

Second, the Board reasonably interpreted the set of costs that Section 1693*o*-2(a)(4)(B) prohibits it from considering—"other costs incurred by an issuer which are not specific to a particular electronic debit transaction," 12 U.S.C. 1693*o*-2(a)(4)(B)(ii)—"to mean those costs that are not incurred in the course of effecting any electronic debit transaction." 76 Fed. Reg. at 43,426. The Board explained that this provision cannot tenably be read to "prohibit[] consideration of all costs that are not able to be specifically identified to a given transaction." *Ibid.* Such a reading "would appear to exclude almost all costs related to electronic

debit transactions because very few costs could be specifically assigned to a given transaction." *Ibid.* In addition, "operational constraints make the determination of which in-house costs an issuer incurs in executing any particular transaction virtually impossible in practice." *Ibid.* The interpretation adopted by the Board, in contrast, "gives life and meaning to the prohibition * * * without creating [such] tremendous burdens and practical absurdities." *Ibid.*

As the court of appeals recognized (Pet. App. 32a-33a), the Board's interpretation was reasonable. The court "not[ed] the parties' agreement that the 'specific to a particular electronic debit transaction' phrase should not be read to limit issuers to recovering only the marginal cost of each particular transaction." *Id.* at 20a. In light of the apparent agreement that the phrase could be construed to allow the consideration of "variable" costs that petitioners have not challenged, *id.* at 31a, it is not unreasonable to construe it to allow so-called "fixed" costs as well. As explained above, see pp. 15-16, *supra*, the line between "fixed" and "variable" costs is illusory in this context, as *all* of the "fixed" ACS costs at issue here (such as labor and equipment) will vary over the long run depending on the number of transactions that an issuer performs. The basic premise of petitioners' criticism of the Board's approach—that "fixed" costs "do not vary with the number of transactions," Pet. 19—is accordingly misguided. See Pet. App. 31a-32a (rejecting the "distinction [petitioners] urge between what they refer to as non-includable 'fixed' costs and includable 'variable' costs"); 76 Fed. Reg. at 43,427. Particularly misplaced is respondent's criticism of the Board's approach as "incoherent" (Pet. 27-30), since the standard

petitioners advocate is no more easily administrable than the one the Board has adopted.

The petition for certiorari appears to assert an argument that the court of appeals did not perceive petitioners to be making below—namely, that a cost cannot be "specific to a particular transaction" unless it is unique to a single (presumably identifiable) transaction. See, *e.g.*, Pet. 19-21. On that view, many "variable" costs could not be considered "specific to a particular transaction." Although that might be a permissible interpretation of the Act, it is not compelled, particularly in light of the Act's overarching instruction that fees be "reasonable and proportional to the cost incurred by the issuer *with respect to* the transaction." 15 U.S.C. 1693*o*-2(a)(3)(A) (emphasis added); see, *e.g.*, *Cohen* v. *de la Cruz*, 523 U.S. 213, 220 (1998) (describing the phrase "debt with respect to" as "connoting broadly any liability arising from a specified object"); *Smith* v. *United States*, 508 U.S. 223, 237-238 (1993) (using the phrase "with respect to" to define the "expansive" phrase "in relation to"). If four neighbors on the same floor of an apartment building schedule a painter to come on the same day to each of their homes, and the painter agrees that his fees will be "reasonable and proportional to the cost incurred with respect to" each painting task and will include only costs "specific to a particular" painting task, the painter could reasonably charge a quarter of his travel expenses to each neighbor. The travel expenses could reasonably be viewed either as "specific to" each of the four painting tasks (since none of those tasks could be accomplished without the painter's travel) or as "specific to" the task that the painter completed first, with the cost apportioned in a "reasonable and

proportional" manner among all those who benefited from it.

Additional reasoning supports the Board's construction of the statutory language at issue here. The Board decided—and petitioners do not dispute that it was entitled to decide—to issue a single rule setting a cap for interchange transaction fees for all issuers. See 12 C.F.R. 235.3(b). Under that approach, the Board necessarily had to treat various types of costs uniformly, rather than tailoring the cap to the individualized manner in which an issuer incurs those costs. As the Board explained, "nearly any cost that could be defined as fixed if incurred by an issuer that performs its transactions processing in-house could be considered as variable if the issuer were to outsource its debit card operations to a third-party processor that charged issuers a per-transaction fee based on its entire cost, including both fixed and variable costs." 76 Fed. Reg. at 43,427; see Pet. App. 32a (citing this observation by the Board). It was therefore reasonable for the Board, in a regulation that treats all covered issuers as a single undifferentiated class, to treat costs that issuers could incur, and that some issuers presumably do incur, on a per-transaction basis as costs that are "specific to a particular transaction," even if not every issuer incurs those costs in the same way. See 76 Fed. Reg. at 43,427 (observing that relying on issuer-specific accounting practices "could result in significant variation across issuers as to which costs are allowable and which are not"); see also 15 U.S.C. 1693*o*-2(a)(6) (exempting issuers with covered assets of less than $10 billion); 12 C.F.R. 235.5(a)(ii) (same).

c. Because the Board's regulation is valid under *Chevron*, petitioners' contention (Pet. 24-26) that the court of appeals committed a methodological error—by purportedly applying an unduly deferential standard of review drawn from decisions involving "ratemaking"—does not warrant this Court's intervention. "This Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation and internal quotation marks omitted).

In any event, the court of appeals did not commit the error petitioners attribute to it. As a preface to its analysis, the court stated that it would "apply the familiar two-step framework set forth in *Chevron*." Pet. App. 16a. The court also described its disposition of the case in *Chevron* terms, explaining that "[a]pplying traditional tools of statutory interpretation, we hold that the Board's rules generally rest on reasonable constructions of the statute." *Id.* at 3a; see *Chevron*, 467 U.S. at 842-844 & n.9.

In the portion of its opinion addressing the reasonableness of the agency's treatment of particular categories of costs, the court of appeals did analogize the Board's rulemaking to a ratemaking that would receive "special deference." Pet. App. 30a. The court of appeals noted that, "much like agency ratemaking, determining whether issuers or merchants should bear certain costs is 'far from an exact science and involves policy determinations in which the [Board] is acknowledged to have expertise.'" *Ibid.* (quoting *Time Warner Entm't Co.* v. *FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (per curiam), cert. denied, 516 U.S. 1112 (1996)) (brackets in original); see *ibid.* (citing *BNSF Ry. Co.* v. *Surface Transp. Bd.*, 526 F.3d 770,

774 (D.C. Cir. 2008)). The court stated that it would keep such "caution in mind" in analyzing the regulatory provisions at issue here. *Ibid.* The court's reference to ratemaking, however, did not appear to affect its conclusion that the Board's treatment of "fixed" ACS costs was reasonable, since the court supported that conclusion with a citation to a traditional *Chevron* case. *Id.* at 33a (citing *ExxonMobil Gas Mktg. Co.* v. *FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002), cert. denied, 540 U.S. 937 (2003)); see *ExxonMobil*, 297 F.3d at 1083 ("To the extent that petitioners are challenging FERC's interpretation of section 1(b) of the Natural Gas Act * * * we apply the two-step approach of *Chevron*."). In any event, even outside the ratemaking context, this Court has recognized that "principles of deference have particular force" when the "subject under regulation is technical and complex." *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (cited at *Chevron*, 467 U.S. at 865 n.39).

2. The question presented is not of sufficient continuing legal importance to warrant this Court's review. If this Court granted certiorari, its determination whether the Board's rule reflects a valid understanding of 15 U.S.C. 1693*o*-2(a) would be unlikely to affect the disposition of any other case. Petitioners identify no other statute with similar language or other rule that raises similar issues. Petitioners also do not suggest that other D.C. Circuit decisions exhibit the methodological error that petitioners attribute to the panel in this case.

Petitioners' arguments in favor of certiorari (as well as those of their amici) rest almost exclusively on the financial impact of the Board's rule. See Pet. 32-

36. Petitioners assert that "[t]he cumulative financial effect of the Rule is massive," Pet. 32, and posit that "the costs imposed on merchants by the Board's decision to substantially increase the maximum interchange fee in the final Rule over the proposed rule" is approximately $4.04 billion annually, Pet. 33. That assertion presents a false dichotomy between the approach that the Board initially proposed in its NPRM—which it never adopted—and the final rule that the Board actually promulgated.

In promulgating the final rule, the Board did not determine whether the sorts of costs at issue here are among the "incremental" ACS costs (15 U.S.C. 1693*o*-2(a)(4)(B)(i)) that the agency is *required* to consider. See 76 Fed. Reg. at 43,427. The Board found it unnecessary to decide that question because it concluded that consideration of those costs was consistent with the overall purposes of the Act and was not *precluded* by 15 U.S.C. 1693*o*-2(a)(4)(B)(ii). See 76 Fed. Reg. at 43,427. Petitioners' counter-argument under 15 U.S.C. 1693*o*-2(a)(4)(B)(ii) relies heavily on the words "specific to" in that provision. See, *e.g.*, Pet. 19-22. Petitioners contend that a cost cannot be "specific to" a particular transaction unless it is attributable solely to that transaction. See Pet. 19-20.

Even if this Court granted certiorari and adopted petitioners' narrow interpretation of the words "specific to" in 15 U.S.C. 1693*o*-2(a)(4)(B)(ii), the Board would retain significant discretion in fashioning an appropriate revised rule on remand. The words "specific to" do not appear in 15 U.S.C. 1693*o*-2(a)(4)(B)(i), which describes the "incremental" ACS costs that the Board *must* consider in setting interchange transaction fees. And under the plain text of 15 U.S.C. 1693*o*-

2(a)(4)(B)(i), a particular cost could reasonably be viewed as an "incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction," even if that cost was not attributable *solely* to a single transaction. If the Board took that approach, Section 1693*o*-2(a)(4)(B)(ii) would not preclude consideration of any such costs because Section 1693*o*-2(a)(4)(B)(ii) refers to "*other* costs incurred by an issuer"—*i.e.*, costs *other than* the incremental ACS costs described in Section 1693*o*-2(a)(4)(B)(i)—that "are not specific to a particular electronic debit transaction." 15 U.S.C. 1693*o*-2(a)(4)(B)(ii) (emphasis added). There is consequently no reason to assume that this Court's endorsement of petitioners' narrow reading of the words "specific to" would compel the Board to adopt the approach previously described in the NPRM.

Further review is particularly unwarranted because the challenged rule significantly reduces interchange transaction fees by capping them at approximately half of their previous average value. See 76 Fed. Reg. at 43,397 (previous average of 44 cents per transaction); *id.* at 43,404 (cap of 21 cents per transaction plus .05% of the transaction's value). If that is higher than Congress would like (see, *e.g.*, Pet. 23-24), then Congress can amend the Act to ensure its desired result. There is no need, however, for this Court to review the Board's exercise of its discretion under the current statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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