UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

ILLINOIS BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, and ILLINOIS CREDIT UNION LEAGUE, *Plaintiffs*, v. KWAME RAOUL, in his official capacity as Illinois Attorney General, *Defendant*.	Case No. 1:24-cv-07307 Hon. Virginia M. Kendall

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

For the consumer, a credit or debit card transaction is seamless: the consumer taps or swipes a card at a terminal (or enters card information online) and instantaneously completes a purchase. But each seemingly simple transaction relies on an intricate system that knits together multiple participants, including the cardholder, the cardholder's bank (sometimes called the "Issuing Bank" or "Issuer"), a Card Network (*e.g.*, Visa or Mastercard), the merchant's bank (sometimes called the "Acquiring Bank" or "Acquirer"), and the merchant itself. These participants must develop and maintain hardware, software, and staffing to ensure that they can play their respective roles in processing transactions accurately, protecting consumers from fraud, and facilitating instantaneous access to funds to power the national and state economies. It is hard to overstate credit and debit card transactions' role as an engine of economic activity. In 2021, for example, over 150 billion credit and debit card transactions worth almost $9.5 trillion were processed in the United States.[1] With approximately 4% of the country's population and economy, Illinois sees billions of transactions worth tens of billions of dollars annually. None of this would be possible without the coordinated involvement of all players in the payment system.

These various participants all receive compensation for the roles they play in processing the entire amount paid by the cardholder. Relevant here, Issuers—which administer the cardholder's account, take on risks of non-payment and fraud, and provide popular programs like cardholder rewards—have long been paid an "interchange fee" as compensation for these services based in part on the entire amount that the cardholder pays for the goods or services.

In the recently enacted Illinois Interchange Fee Prohibition Act, 815 ILCS 151/150-1 *et seq.* ("IFPA" or the "Act"), however, Illinois has prohibited charging or receiving interchange fees

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[1] https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm.

on the portion of a transaction attributable to gratuities or Illinois state and local taxes (the "Interchange Fee Prohibition"). The Act forbids charging an interchange fee at all on those portions of a transaction if the merchant transmits the tax and gratuity information to the Acquiring Bank at the time of payment. *Id.* § 150-10(a). And even where a merchant does not do so, if it submits the information to the Acquirer within 180 days, the Issuer must "credit" the merchant that portion of the interchange fee within 30 days. *Id.* § 150-10(b).

The potential penalties for failure to comply are enormous: civil penalties of $1000 *per transaction*. *Id.* § 150-15(a). For perspective, one national bank Acquirer processed over 400 million credit and debit card transactions for Illinois merchants last year alone. Ex. 9, ¶ 5. If it erroneously charged interchange on some amount of tax or gratuity in only 0.01% of those transactions in a given year, it could conceivably be exposed to *$40 million* in civil penalties.

The IFPA also places extraordinary limitations on card transaction data. Specifically, the Act makes it unlawful for "[a]n entity, other than the merchant" involved in a transaction to "distribute, exchange, transfer, disseminate, or use" the associated data "except to facilitate or process the electronic payment transaction or as required by law" (the "Data Usage Limitation"). 815 ILCS 151/150-15(b). Under the statute's plain terms, for example, participants in the system could not use aggregated transaction data to detect fraud or administer rewards programs.

To the extent that compliance is even possible by the Act's July 1, 2025 effective date, both of the IFPA's provisions will impose staggering costs and technical and operational challenges on large and small banks, savings associations, and credit unions alike. Start with the Interchange Fee Prohibition. Even preparing to track the amount of tax on each transaction is immensely complicated, given Illinois's hundreds of different taxing jurisdictions with varying rates and a range of taxes including some, like gas taxes, that are excise taxes bundled into the price of a product, rather than charged separately at checkout. The current payments infrastructure does not support separating the total transaction amount into subparts such as tax or gratuity in the way that would be required to allow such information to be sent and interchange fees to be adjusted at the moment of the transaction (the "Automatic Process"). Nor would such disaggregation be easy to implement. The process would start with Card Networks implementing new specifications, which take significant time and resources to develop. Issuers and Acquirers would then have to adopt those specifications at significant cost. Merchants, too, would likely have to purchase new point-of-sale terminals and new software to run them. In the past, the timeframe for implementing far simpler changes across the payment system has run to *several years*. But Illinois has dictated that tax and gratuity be exempted from interchange fees by *July 1, 2025*. There is simply not time to overhaul the automated payment system to accurately process real-time transactions in compliance with the Act.

What happens, then, if the Act becomes effective? In the near term, the Interchange Fee Prohibition would most likely be implemented through post hoc credit requests by merchants (the "Manual Process"). But the IFPA does not specify the universe of "tax documentation" merchants must submit to receive a refund of interchange fees previously charged; a merchant might be able to simply drop off a shoebox of receipts at its Acquirer. That means that banks and other financial institutions will have to develop procedures, hire new staff, and train existing employees to receive, evaluate, and audit the documentation they may receive from the immense number of merchants at which cardholders might make IFPA-covered purchases. Again, there are billions of credit and debit card transactions in Illinois worth tens of billions of dollars annually, the overwhelming majority of which include state or local tax or gratuity. Each one would have to be separately processed if a merchant seeks a refund. What's more, it is ultimately the *Issuer*'s responsibility to "credit" the merchant within 30 days of when the *Acquirer* receives the "tax documentation." Issuers and Acquirers—which generally do not have direct contractual relationships—will have to work out processes for transmitting "tax documentation"; Issuers will then have to figure out how to "credit" merchants—with whom, again, they generally have no direct contractual relationship. The burden on banks and other financial institutions, from the largest to the smallest, would be staggering. And while meeting the statute's July 1, 2025 effective date will be difficult or even impossible, to even have a hope of doing so, each participant in the payment system would have to commit resources *immediately*—costs so extreme that some of Plaintiffs' members are considering exiting the Issuing or Acquiring business altogether.

The Data Usage Limitation would impose similarly overwhelming operational challenges. Banks and other financial institutions use transaction data for an array of key purposes including—but far from limited to—preventing fraud, administering rewards programs, and determining credit limits. Arbitrarily restricting such data's use will make many of these activities economically or operationally infeasible, to the detriment of consumers, merchants, and financial institutions alike.

In sum, Illinois's hastily adopted statute would blow a hole in the nation's uniform payment processing system. But the IFPA is not only bad policy; it is also unlawful and should be enjoined.

First, Plaintiffs are likely to prevail on the merits of their claims that federal law preempts the IFPA. National banks and other federally chartered financial institutions possess federally granted powers to engage in nationwide business. That includes making loans through credit cards, offering deposit accounts and the debit cards that come with them, processing credit and debit card transactions, receiving fees for all of those services, and using banking or financial information. As the Supreme Court clarified just this past Term, federal law preempts any state law that "prevents or significantly interferes with the exercise by [a] national bank of its powers." *Cantero* *v. Bank of Am., N.A.*, 144 S. Ct. 1290, 1294 (2024). Similar standards apply to other federally chartered financial institutions. The IFPA transgresses those limits both by directly forbidding or limiting actions, like receiving fees and using data, that federal law authorizes, and by impairing the efficient exercise of other powers, like processing card transactions. If Illinois can implement its unique law, other states will likely enact variations, transforming a functional, uniform system into an unworkable patchwork—exactly what preemption in this area of law is designed to prevent.

The IFPA therefore cannot be applied to federally chartered financial institutions such as national banks. And because state and federal law entitles state-chartered financial entities to parity of treatment with their federal counterparts, the IFPA cannot be applied to them either.

With respect to debit card transactions, the IFPA also conflicts with, and is thus preempted by, the uniform federal standard for the permissible amount of interchange fees found in the Durbin Amendment to the Electronic Fund Transfer Act ("EFTA") and its implementing Regulation II.

Second, the remaining requirements for preliminary injunctive relief are also readily met. Absent a preliminary injunction, Illinois's attempt to impose such a drastic change in the payment system on such an abnormally short timeframe will produce chaos as the system's various participants scramble to hire and train new employees and pour millions of dollars into developing new systems—all despite a strong likelihood that the law will ultimately be held preempted. That harm, which for some smaller financial institutions far outpaces their anticipated net income for 2024, will be irreparable, since the costs of those rushed attempts at compliance will be unrecoverable (as will interchange revenue forgone if the IFPA goes into effect). Given the difficulties and costs that attempts to comply would impose on all payment-system participants—including merchants and cardholders—the balance of equities and public interest also decidedly support an injunction. This Court should thus preliminarily enjoin enforcement of the IFPA.

BACKGROUND

A. The United States' Financial System Protects Federally Chartered Institutions from State Interference.

1. Federal law grants national banks and other federally chartered institutions federally guaranteed powers.

In the midst of the Civil War, Congress enacted the National Bank Act ("NBA") in order "to facilitate … a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)). As "instrumentalities of the federal government," national banks are "subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The Office of the Comptroller of the Currency ("OCC") is "charged by Congress with supervision of the NBA," and it "oversees the operations of national banks." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). To that end, the OCC "is authorized to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

"When a bank obtains a federal charter under the National Bank Act, [it] gains various enumerated and incidental powers" pursuant to federal law. *Cantero*, 144 S. Ct. at 1295. For example, national banks may "receiv[e] deposits" and "loan[] money on personal security." 12 U.S.C. § 24 (Seventh). More broadly, the NBA empowers national banks "[t]o exercise … all such incidental powers as shall be necessary to carry on the business of banking." *Id.*

To protect against a patchwork of laws and regulations from all 50 states—not to mention municipalities and other jurisdictions—the NBA preempts any state law that would "prevent or significantly interfere with [a] national bank's exercise of its powers," whether "enumerated" or "incidental." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32-33 (1996); *see also* *Cantero*, 144 S. Ct. at 1300 (reiterating *Barnett Bank* standard); 12 U.S.C. § 25b(b)(1)(B) (codifying the *Barnett Bank* standard in a specific context). In this way, the NBA gives national banks, which serve customers across the country, "needed protection from possible unfriendly state legislation," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003), and avoids the "[c]onfusion" that "would necessarily result from control possessed and exercised by two independent authorities," *Watters*, 550 U.S. at 14 (internal quotation marks omitted). As the Acting Comptroller of the Currency explained just last month, this "concept of preemption" is necessary for national banks to carry out their nationwide activities: it is "[c]ritical to national banking" and "central to the dual banking system." Michael Hsu, *Remarks Before the Exchequer Club: "Size, Complexity, and Polarization in Banking"* (July 17, 2024).[2]

Congress has likewise granted federal powers to other financial institutions, and protected those powers against state intrusion. Thus, Federal savings associations derive their powers from the Home Owners' Loan Act ("HOLA") and its implementing regulations, which the OCC also administers. 12 U.S.C. § 1464; *see, e.g.*, *id.* § 1464(b)(1)(A)(i)-(ii) (power to "raise funds through … deposit[s]" and "issue … evidence of accounts" such as debit cards). The HOLA directs courts to apply "the laws and legal standard applicable to national banks" in determining whether federal law preempts state regulation of Federal savings associations. *Id.* § 1465(a).

The story is much the same for credit unions. During the Great Depression, Congress enacted the Federal Credit Union Act ("FCUA") "to make more available to people of small means credit … , thereby helping to stabilize the credit structure of the United States." *T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 931 (1st Cir. 1995). The FCUA grants federal credit unions powers including "to make loans … and extend lines of credit to [] members," as well as "such incidental powers as shall be necessary or requisite to enable [them] to carry on effectively the business for which [they are] incorporated." 12 U.S.C. § 1757(5), (17). The National Credit Union

[2] https://www.occ.treas.gov/news-issuances/speeches/2024/pub-speech-2024-79.pdf.

Administration ("NCUA") oversees federal credit unions and "prescribe[s] rules and regulations for the administration" of the FCUA. *Id.* § 1766(a). Federal law also guards against duplicative or inconsistent state regulation by "preempt[ing] any state law purporting to limit or affect" "the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit (including credit cards) to members." 12 C.F.R. § 701.21(b)(1) (citing 12 U.S.C. § 1757(5)).

2. The Durbin Amendment and its implementing Regulation II exclusively and uniformly define the permissible amount of debit card interchange fees.

As part of the federal system of financial regulation, Congress enacted the "Durbin Amendment" to the EFTA, which directed the Federal Reserve 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. § 1693o-2(a)(1), (a)(3)(A). In doing so, Congress specified 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," *id.* § 1693o-2(a)(2), taking into account "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).

The Federal Reserve responded by promulgating Regulation II, which limits debit card interchange fees to the sum of a fixed rate of "21 cents" and an *ad valorem* component of 0.05% "multiplied by the value of the transaction." 12 C.F.R. § 235.3(b); *see also id.* § 235.4(a) (permitting issuers that meet certain fraud-prevention standards to charge an additional $0.01 per transaction). This "Uniform Interchange Fee Standard" "applies to *all* electronic debit transactions not otherwise exempt." 76 Fed. Reg. 43394, 43434 (July 20, 2011) (emphasis added); *see also* 12 C.F.R. § 235.5 (noting exemptions from Regulation II's coverage). In setting this "Uniform

Standard," the Federal Reserve relied on surveys considering costs and risks associated with the entire value of transactions, with no carveout for taxes or gratuities. 76 Fed. Reg. at 43397-98.

B. State and Federal Law Ensures That State-Chartered Financial Institutions Are Not Unfairly Disadvantaged by Preemption of State Regulation.

In the United States' dual financial system of parallel federal and state banking regimes, parity principles in both state and federal law ensure that state-chartered institutions compete on a level playing field. The Illinois General Assembly has granted Illinois-chartered banks the power, "[n]otwithstanding any other provisions of [the Illinois Banking Act] or any other law, to do any act … that is at the time authorized or permitted to national banks by an Act of Congress." 205 ILCS 5/5(11). In other words, Illinois has effectively extended NBA preemption to Illinois-chartered banks. And the federal dormant Commerce Clause's prohibition on "regulatory measures" that "benefit in-state economic interests by burdening out-of-state competitors," *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023), demands that out-of-state banks not be discriminated against relative to in-state banks. That means that out-of-state state banks must receive the same follow-on preemption as in-state state banks. Indeed, the Riegle–Neal Interstate Banking and Branching Efficiency Act, 12 U.S.C. § 1831a(j)(1), also protects out-of-state state banks by providing that "[t]he laws of a host State … shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank."

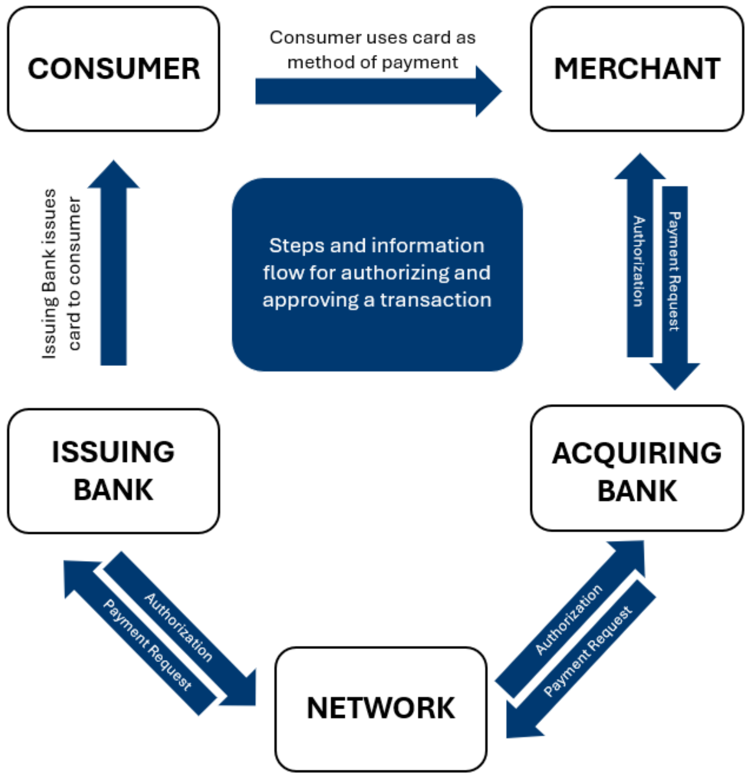
Moreover, just as it has done for the banks it charters, Illinois grants the savings banks and credit unions it charters the same powers as those enjoyed by their federal counterparts, with only limited exceptions not applicable here. *See* 205 ILCS 205/6002(a)(11) (Illinois savings banks); 205 ILCS 305/65 (Illinois credit unions). The dormant Commerce Clause extends that protection to corresponding out-of-state entities too. *See* *Ross*, 598 U.S. at 369.

C. Plaintiffs' Members Exercise Their Federal and State Powers Through the Nation's Credit and Debit Card Payment Systems.

Among the financial services Plaintiffs' members offer pursuant to their federal and state powers are the processing of credit and debit card transactions. These services involve an intricate, nationwide system designed to facilitate commerce while protecting participants.

To begin, a consumer is evaluated and approved for a credit card or deposit account by an Issuer, which then issues a card that works with at least one card network (e.g., Visa, Mastercard, or PULSE) ("Card Networks" or "Networks"). Ex. 2, ¶ 13. Once a financial institution issues a card, it becomes responsible for maintaining the cardholder's account: it provides the consumer with monthly account statements, collects payment from the cardholder (and takes on the risk of non-payment), administers reward programs, monitors the cardholder's account for suspicious or fraudulent activity, and handles the cardholder's fraud and other transaction-related disputes, including by absorbing the costs of fraudulent charges. Ex. 12, ¶ 12, 21. On the merchant side, to accept cards for payment, merchants typically establish a relationship with an Acquirer that is a licensed member of at least one of the Card Networks. Ex. 12, ¶ 20.

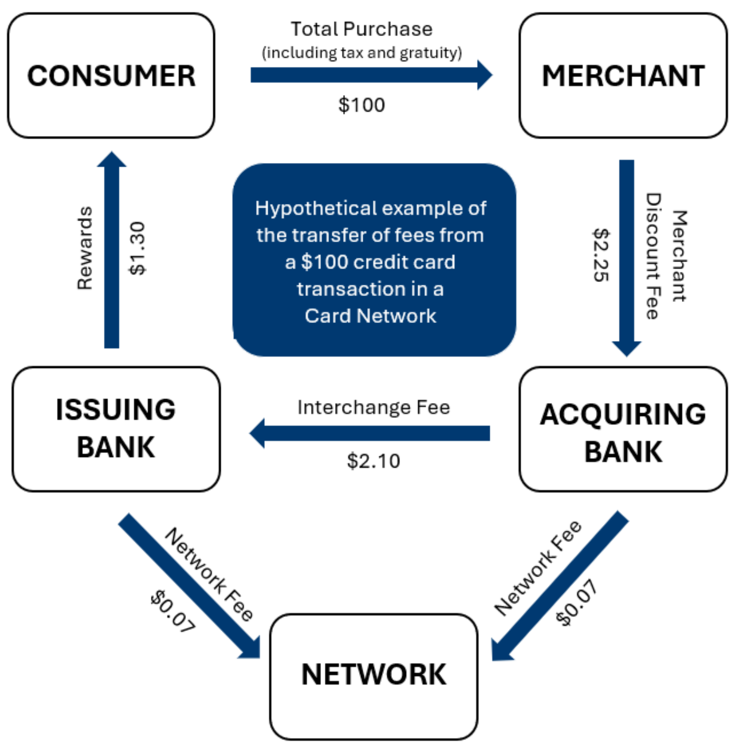
Relying on these relationships, cardholders use credit or debit cards to purchase goods or services from restaurants, stores, gas stations, and other merchants. The steps and information flow for authorizing and approving a transaction are depicted in Figure 1 on the following page:



When a cardholder uses a card to purchase goods or services, the merchant sends information about the card, the merchant, and the total purchase amount to the merchant's Acquirer. Ex. 2, ¶ 14; Ex. 12, ¶ 35. The Acquirer routes that information to the proper Card Network, which requests authorization of the transaction from the Issuer (e.g., to determine whether a cardholder has enough money or credit available to cover the purchase, or if there are any indicia of fraud). Ex. 2, ¶ 14. The Issuer then applies its policies to determine whether to authorize the transaction. *Id.* That determination flows back to the Card Network, to the Acquirer, and then to the merchant's point-of-sale terminal. *Id.* If the transaction is authorized, the point-of-sale terminal reports it as approved, the merchant completes the transaction, and the cardholder receives the goods or services. *Id.* The banks and Card Networks facilitate this entire process in a matter of seconds, using their sophisticated technology and infrastructure to create a seamless experience for both merchant and consumer. Ex. 2, ¶ 11.

Interchange fees are critical to the payment system because they compensate Issuers for the costs and risk of providing and maintaining the cardholder's account and extending credit, and fund core programs that benefit consumers, such as fraud protection and card rewards. Ex. 2, ¶ 16; Ex. 13, ¶ 3. An interchange fee typically consists, in whole or in part, of a percentage of the total transaction amount. Ex. 2, ¶ 16.

After transactions are authorized, approved, and posted, the Card Networks facilitate the flow of funds between cardholders (via Issuers) and merchants (via Acquirers) to settle the transactions—including the assessment of interchange fees to compensate the Issuer for its role in the transactions—as depicted in the illustrative example of Figure 2.



While this Figure depicts a single illustrative transaction, a merchant generally sends a batch of approved transactions to its Acquirer after a set period of time (e.g., at the end of every business day). Ex. 13, ¶ 12. The Acquirer's system then sends the information regarding those approved transactions to the Card Network for settlement. The Card Network's settlement system calculates net payments for all Acquirers and Issuers for the processing period, deducting the applicable interchange fees from the amount to be transferred from Issuers to Acquirers.

The Card Network then debits the appropriate transaction amounts, net of interchange fees, from the Issuers' accounts and credits the corresponding amount to the Acquirers' accounts. Once the Acquirer receives the funds, it deposits the transaction proceeds into the merchant's account, minus a merchant discount fee retained by the Acquirer for its part in processing the transaction on behalf of the merchant. Ex. 12, ¶ 23. The merchant discount fee is set by each Acquirer, generally at a level sufficient to cover the cost of the interchange fee that the Issuer retains in the settlement process. *Id.* Meanwhile, the Issuer debits the cardholder's account (for a debit card transaction) or charges the transaction's value to the cardholder to be repaid as required under the card agreement (for a credit card transaction). To compensate the Card Network for its role in facilitating the card payment process, the Acquirer and Issuer each also pays its own fee to the Card Network in connection with each transaction. Ex. 12, ¶ 24.

D. The Illinois Interchange Fee Prohibition Act Threatens to Upend the Intricate Interchange System by Limiting Interchange Fees and Data Usage.

The IFPA threatens to upend that carefully calibrated system. Passed in June 2024 as part of an omnibus budget bill, HR 4951, the law forbids banks and their business partners from charging or receiving interchange fees—which it defines as "a fee established, charged, or received by a payment card network for the purpose of compensating the issuer for its involvement in an electronic payment transaction"—on the Illinois state or local tax or gratuity portion of any transaction. 815 ILCS 151/150-5, 150-10. Specifically, "if the merchant informs the acquirer bank or its designee of the tax or gratuity amount as part of the authorization or settlement process for [an] electronic payment transaction," then the law forbids entities including "[a]n issuer, a payment card network, [and] an acquirer bank" from "receiv[ing] or charg[ing] a merchant any interchange fee" on any gratuities or any "use and occupation tax or excise tax imposed by" Illinois or by a "local government" in Illinois. *Id.* §§ 150-5, 150-10(a). The Act also provides that if a merchant "does not transmit the tax or gratuity amount data" with the transaction, but instead sends that information to the Acquirer within 180 days, "the issuer must credit to the merchant the amount of interchange fees charged on the tax or gratuity amount" within 30 days. *Id.* § 150-10(b). The Act also contains an anti-circumvention provision that makes it "unlawful" to "alter or manipulate the computation and imposition of interchange fees by increasing the rate or amount of the fees applicable to or imposed upon the portion of a … transaction not attributable to taxes or other fees charged to the retailer to circumvent the effect of [the IFPA]." *Id.* § 150-10(d). A bank or other entity that violates any of the above provisions "is subject to a civil penalty of $1,000 per electronic payment transaction, and the issuer must refund the merchant the interchange fee calculated on the tax or gratuity amount." *Id.* § 150-15(a). The Attorney General may enforce this section pursuant to his general enforcement powers. *See, e.g.*, 15 ILCS 205/4.

The IFPA's Data Usage Limitation also makes it unlawful for any "entity, other than the merchant, involved in facilitating or processing an electronic payment transaction" to "distribute, exchange, transfer, disseminate, or use the electronic payment transaction data except to facilitate or process the … transaction or as required by law." 815 ILCS 151/150-15(b). "A violation of this subsection constitutes a violation of the [Illinois] Consumer Fraud and Deceptive Business Practices Act," *id.*, which the Attorney General may enforce by seeking injunctive relief and other relief such as civil penalties of up to $50,000. *See, e.g.*, 815 ILCS 505/7.

If not enjoined, the IFPA will "take[] effect July 1, 2025." HR 4951, § 999-99. With respect to both the Interchange Fee Prohibition and the Data Usage Limitation, that result would wreak havoc on the payment system on which Illinois businesses and consumers rely and conflict with the uniform federal regime governing debit card interchange fees under the EFTA and Regulation II. Moreover, the short time period before the IFPA's effective date means that costly measures needed to attempt to comply must begin imminently if the Act is not quickly enjoined.

To start, the IFPA's Interchange Fee Prohibition requires Plaintiffs' members to both (a) adapt to any Automatic Process the Networks may implement to contemporaneously identify the tax or gratuity portion of a transaction, and (b) devise, develop, and implement a Manual Process to "credit" a merchant within 30 days of the merchant's submission of tax documentation. The Automatic Process is likely technically infeasible by the Act's July 1, 2025 effective date, and both the Automatic and Manual processes would be enormously costly even if technically feasible.

As to the Automatic Process, the Card Networks' current payment systems transmit only limited, pre-defined information among participants, including the total "transaction amount"—a standard field that encompasses a transaction's entire value, without separately breaking out taxes and gratuities. Ex. 12, ¶ 35.[3] It is not possible to simply input additional information into existing card terminals at the point of sale. *Id.* Any change from the current standard would first require each Card Network to implement its own updated standards and technical specifications, all in conformance with national and international standards bodies that ensure interoperability. Ex. 13, ¶¶ 6, 15-19; Ex. 12, ¶¶ 33, 37. For these new standards to be of any use, they would then require other payment-system participants to conform to those revisions, such as by purchasing new software or hardware—including not just Issuers and Acquirers, but also merchants, who would

[3] To the degree that networks have fields for tax or gratuity, those fields are "used for informational purposes" only, are "not validated for accuracy," and "are not designed or used for complex calculations." *See* Ex. 13, ¶ 23. They thus could not form the basis for IFPA compliance without undermining those fields' existing purposes and creating "significant confusion in the system." *Id.*

have to pay to upgrade their point-of-sale terminals. Ex. 12, ¶¶ 33, 38-39. Completing all of this work is unlikely to be feasible by July 1, 2025. Ex. 13, ¶ 20; Ex. 12, ¶ 33. Indeed, past sweeping updates to the payment system have typically come with years of advance notice. Ex. 2, ¶¶ 18-19; Ex. 13, ¶ 26. Moreover, if and when such updates do come, implementing them would require extraordinary investment of money and other resources. *See, e.g.*, Ex. 8, ¶¶ 19-20 (estimating that such changes would cost one national bank over $25 million, require hiring or reassigning over a hundred employees, and divert resources from other network modernization initiatives that seek to increase the payment system's stability); Ex. 6, ¶ 17 (noting significant costs of implementing such updates for a "small community bank" reliant on a third-party processor).

Both because no Automatic Process appears likely to be operational by July 1, 2025, and because the IFPA requires the Manual Process in any event, Plaintiffs' members—absent an injunction—will also have to try to develop that brand new reimbursement system from the ground up. Given that the IFPA includes "receipts" and "invoices" among its non-exhaustive list of "tax documentation" that may trigger an Issuer's duty to "credit" any of the tens of thousands of Illinois merchants at which their cardholders may shop, *see* 815 ILCS 151/150-5; Ex. 8, ¶ 13, Issuers would have to stand ready to manually review practically all of the billions of Illinois card transactions they facilitate each year. The burden of doing so would be immense for large and small banks alike. For example, large banks may need to hire thousands of new employees, *see* Ex. 11, ¶ 32, while smaller institutions may need to increase their *overall* staffing by as much as 25%, *see* Ex. 15, ¶ 25. And that says nothing of the additional costs Plaintiffs' members would incur to audit or otherwise minimize mistakes and fraud in such manual tax documentation.

Preparing to comply with the Data Usage Limitations carries similar burdens. Plaintiffs' members currently use transaction data for a variety of important purposes, including building fraud-detection algorithms, administering rewards programs, and determining credit limits. Their systems currently have no mechanism for separating data from those transactions that are subject to the IFPA to avoid using them for any of these purposes. If the IFPA is not enjoined, Plaintiffs' members face the need to design and implement new systems to accomplish this. Doing so—especially on the IFPA's compressed timeframe—would be enormously expensive, *see, e.g.*, Ex. 10, ¶ 30 (citing one bank's anticipated implementation costs of "millions of dollars" in 2024 alone); Ex. 6, ¶ 17 (noting need for smaller institution to expend "substantial resources" to pay a third party to implement needed changes). And for that enormous expense, Plaintiffs' members would be purchasing *less* efficient and effective systems, *see e.g.*, Ex. 6, ¶ 31 (explaining how the Data Usage Limitation would hamstring fraud prevention—especially for Illinois-centered institutions where most transactions would be subject to the IFPA).

* * *

In short, the Interchange Fee Prohibition and Data Usage Limitation are both incompatible with the way the payment system actually functions. To the degree that doing so is even operationally feasible for financial institutions with customers who may transact business across state lines, implementing these IFPA provisions would come at enormous cost. For example, one smaller institution estimates that the costs in 2024 alone would be almost half again as much as its entire anticipated net profit for the year. Ex. 14, ¶ 5. Indeed, the IFPA's bans and costs of compliance are so draconian that they threaten to drive multiple Issuing and Acquiring institutions from the market altogether. *See, e.g.*, Ex. 2, ¶ 28; Ex. 15, ¶ 32; Ex. 4, ¶ 25.

ARGUMENT

This Court should grant a preliminary injunction against enforcement of the IFPA because Plaintiffs' members will suffer irreparable harm if they are forced to expend unrecoverable resources preparing to comply with a statute that will ultimately be held preempted in this litigation.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Seventh Circuit "employs a sliding scale approach" under which "if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor." *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019). Moreover, the last two "factors merge when the government is the party sought to be enjoined." *Stevens v. U.S. Dep't of Health & Human Servs.*, 666 F. Supp. 3d 734, 748 (N.D. Ill. 2023) (internal quotation marks omitted). Plaintiffs here readily satisfy each of the requirements for a preliminary injunction.

I. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

The IFPA is preempted by federal law as applied to federally chartered financial institutions and invalid as applied to state-chartered financial institutions under parity principles that undergird the nation's dual banking system.

A. The IFPA Is Preempted by the National Bank Act.

The NBA preempts the IFPA because both the Interchange Fee Prohibition and the Data Usage Limitation significantly interfere with national banks' exercise of multiple federal powers.

As noted above, the NBA preempts any state law that "prevents or significantly interferes with [a] national bank's exercise of its powers." *Cantero*, 144 S. Ct. at 1300; *see also Barnett Bank*, 517 U.S. at 32-33 (same). In its recent *Cantero* decision, the Supreme Court explained that whether a state law significantly interferes with national banking powers should be assessed "based on the text and structure of the [state law], comparison to other precedents, and common sense." 144 S. Ct. at 1301 n.3. In particular, the Supreme Court noted that, alongside *Barnett Bank*, two other precedents—*Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954), and *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982)—"together illustrate the kinds of state laws that significantly interfere with the exercise of a national bank power and thus are preempted." *Cantero*, 144 S. Ct. at 1299. By contrast, *Cantero* recognized that three other cases—*Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1870), and *McClellan v. Chipman*, 164 U.S. 347 (1896)—provide examples of state laws that are not preempted. Under the precedents endorsed in *Cantero*, the Interchange Fee Prohibition and the Data Usage Limitation both plainly "prevent[] or significantly interfere[] with" powers the NBA grants national banks and are thus preempted.

1. The Interchange Fee Prohibition prevents or significantly interferes with national banks' exercise of multiple powers granted by the NBA.

The NBA grants national banks the powers to "carry on the business of banking" by, among other things, "receiving deposits" and "loaning money on personal security," as well as by exercising "all such incidental powers as shall be necessary." 12 U.S.C. § 24 (Seventh). "An activity is authorized for a national bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking." 12 C.F.R. § 7.1000(d)(1). As the OCC has long recognized, "[t]he processing of credit card transactions for merchants is a part of or incidental to the business of banking within the meaning of [the NBA]." OCC Inter. Ltr. 689, 1995 WL 604271, at *1 (Aug. 9, 1995). Likewise, the NBA gives national banks the power to process and post debit card transactions, as "[b]oth the 'business of banking' and the 'power to receiv[e] deposits' necessarily include the power to post transactions—*i.e.*, tally deposits and withdrawals." *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 723 (9th Cir. 2012) (quoting 12 U.S.C. § 24 (Seventh)) (second brackets in original). In short, "processing credit and debit card transactions … [is] clearly part of the business of banking." OCC Corp. Dec. 99-50, at 4 (Dec. 23, 1999)[4]; *see also, e.g.*, OCC, Activities Permissible for National Banks and Federal Savings Associations, Cumulative, at 75 (Oct. 2017) (national banks "can provide authorization and processing services necessary for the merchants to accept online credit and debit card payments in a secure environment").[5]

The NBA also gives national banks the power to receive fees for the services they offer. For example, one non-exhaustive OCC regulation authorizes any national bank to "charge its customers non-interest charges and fees." 12 C.F.R. § 7.4002(a). Thus, the powers to participate in processing card transactions, make loans through credit cards, and administer deposit accounts and their accompanying debit cards carry with them the power to receive fees for those services.

The IFPA's Interchange Fee Prohibition "prevents or significantly interferes" with the exercise of national banks' powers in multiple ways. It significantly interferes with the power to charge and receive fees by forbidding national banks from collecting a portion of the fees that the NBA permits for performing services. And it imposes burdensome requirements on those underlying services, all while decreasing the revenue banks may receive for providing them.

a. The Interchange Fee Prohibition prevents or significantly interferes with national banks' power to receive fees for the services they provide.

The NBA authorizes national banks to receive fees for the services they provide. *See, e.g.*, 12 C.F.R. § 7.4002(a). And courts—including the Supreme Court in cases cited by *Cantero* as emblematic of preemption—routinely recognize that the NBA preempts state law that limits when or how national banks may take an action the NBA permits. Under that principle, Illinois may not forbid national banks from receiving a portion of interchange fees that federal law authorizes.

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[4] https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2000/cd99-50.pdf.

[5] https://www.occ.gov/publications-and-resources/publications/banker-education/files/activities-permissible-nat-banks-fed-savings-associations.html.

Fidelity Federal Savings & Loan demonstrates why. There, federal law allowed, but did "not compel, federal savings and loans to include due-on-sale clauses in their [mortgage] contracts." 458 U.S. at 155. California sought to "limit[]" that right by allowing enforcement of such clauses only when "reasonably necessary" to protect a security interest. *Id.* at 149, 154-55. Although national banks *could* comply with both federal and state law, the Court held that the state law was preempted because it impinged on "the 'flexibility' given" by federal law. *Id.* at 155. So too here. The IFPA "deprive[s] the [banks] of the 'flexibility'" the NBA and its implementing regulations offer by barring national banks from receiving a portion of the fees that the NBA authorizes in connection with virtually every Illinois credit and debit card transaction. *See* 12 C.F.R. § 7.4002(a). That interference is only heightened by the IFPA's anti-circumvention provision, which further intrudes into national banks' powers to set and receive fees for their services.

Barnett Bank is similar. There, federal law authorized national banks to sell insurance, and Florida tried to prohibit that activity, arguing that there was no conflict because federal law did not *require* national banks to sell insurance. *See* 517 U.S. at 31-32. The Court flatly rejected this argument, explaining that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33. Just so here, the federal government's grant of powers to national banks to earn and receive interchange fees on the full amount of a transaction precludes Illinois's attempt to limit or constrain that authority.

By contrast, the IFPA looks nothing like the three statutes upheld against preemption challenges in the cases *Cantero* cited. In *Anderson National Bank v. Luckett*, Kentucky's unclaimed property law "simply allowed the State to 'demand payment of the accounts in the same way and to the same extent that the depositors could' after the depositors abandoned the account"—which did not affect the powers of national banks. *Cantero*, 144 S. Ct. at 1299 (quoting

Anderson, 321 U.S. at 249). Likewise, in *National Bank v. Commonwealth*, 76 U.S. 353, the Court upheld a Kentucky law that "taxed the shareholders of all banks (including national banks) on their shares of bank stock" because the law "in no manner hinder[ed]" national "banking operations" and had no greater effect than any "generally applicable state contract, property, [or] debt-collection law[]." *Cantero*, 144 S. Ct. at 1300. Similarly, in *McClellan v. Chipman*, 164 U.S. 347, the Court held that "a generally applicable Massachusetts contract law" regarding unlawful preferential transfers in advance of insolvency "could apply to national banks" if it did not "impai[r] the efficiency of national banks or frustrat[e] the purpose for which they were created." *Cantero*, 144 S. Ct. at 1300. Here, by contrast, the interference with federal fee powers is direct—the IFPA forbids national banks from receiving a portion of a fee the NBA permits.

Unsurprisingly, circuit courts confronted with examples of such direct and explicit limitations on national banks' fee-related powers have held them preempted. For example, *Bank of America v. City and County of San Francisco* held that municipal ordinances prohibiting ATM fees on non-depositors were preempted, because federal law permitted national banks to charge such fees without reference to whether or not they were charged to depositors or non-depositors. 309 F.3d 551, 562-64 (9th Cir. 2002). Likewise, in *Baptista v. JPMorgan Chase Bank, N.A.*, the Eleventh Circuit held that the NBA preempted a Florida law barring banks from imposing check cashing fees on those without accounts at the bank because OCC's regulations had "the significant objective of … allow[ing] national banks to charge fees and [allowing] banks latitude to decide how to charge them." 640 F.3d 1194, 1198 n.2 (11th Cir. 2011) (citing 12 C.F.R. § 7.4002); *see also Wells Fargo Bank of Tx. NA v. James*, 321 F.3d 488, 495 (5th Cir. 2003) (Texas's similar attempt to ban national banks from charging non-depositors check-cashing fees was "in irreconcilable conflict with the federal regulatory scheme, and it is preempted").

The same principles govern here. Federal law gives national banks the power to receive fees—such as the interchange fees paid to issuers—to process payment card transactions. The IFPA's diktat that banks may not receive such fees on the portion of a transaction attributable to tax or gratuity thus denies national banks a power that the NBA accords them, and is preempted.

b. The Interchange Fee Prohibition prevents or significantly interferes with the powers to process credit and debit card transactions, receive deposits, and make loans through credit cards.

In addition to significantly interfering with national banks' fee powers, the IFPA's Interchange Fee Prohibition "significantly interferes with" national banks' powers to process credit and debit card transactions and, by extension, their powers to make loans and receive deposits. *See, e.g.*, 12 U.S.C. § 24 (Seventh) (powers to "receiv[e] deposits" and "loan[] money"); OCC Inter. Ltr. 689, 1995 WL 604271, at *1 ("The processing of credit card transactions for merchants is a part of or incidental to the business of banking within the meaning of [the NBA]."). Here, *Franklin National Bank*—which the Supreme Court described in *Cantero* as "[t]he paradigmatic example of significant interference"—governs. *Cantero*, 144 S. Ct. at 1298.

In *Franklin National Bank*, the Supreme Court held that, because banks were expressly authorized to receive savings deposits, federal law protected their "incidental power[]" to engage in "advertising" for such accounts. 347 U.S. at 377. As a result, the NBA preempted a New York law that created a "clear conflict" with this incidental advertising power by precluding national banks from using the word "savings" in their advertisements. *Id.* at 374, 378. "Importantly," *Cantero* emphasized, that was so even though "the New York law did not bar national banks from receiving savings deposits, 'or even' from 'advertising that fact'" using different words. *Cantero*, 144 S. Ct. at 1298 (quoting *Franklin Nat'l Bank*, 347 U.S. at 378). Because "[f]ederal law gave national banks the power not only 'to engage in a business,' but also 'to let the public know about it,'" it followed that "state law could not interfere with the national bank's ability to do so efficiently." *Id.* (quoting *Franklin Nat'l Bank*, 347 U.S. at 377-78).

The IFPA's Interchange Fee Prohibition interferes with the "efficient" provision of debit and credit card processing services far more significantly than the New York law at issue in *Franklin National Bank*. Instead of merely limiting the form that advertising for a particular service may take, it targets the service itself. Indeed, under federal law, charges like interchange fees permissibly take into account factors including "[t]he cost incurred by the bank in providing [a] service" and "[t]he deterrence of misuse by customers of banking services." 12 C.F.R. § 7.4002(b)(2). State limitations on national banks' federal authority to charge interchange fees will compromise banks' ability to offer debit and credit card processing services—as well as to hold deposits and extend credit—in the manner that best advances their business goals while deterring and detecting fraud. That is precisely the type of result that the NBA's preemption rule is designed to prevent. And the problem will be exacerbated if the IFPA is not held preempted, because comparable laws under consideration in other states may take effect, further multiplying the inefficiencies and interference with the exercise of federal powers.

For all of these reasons, the IFPA's Interchange Fee Prohibition is a significant interference with national banks' powers under the NBA and is therefore preempted.

2. The Data Usage Limitation prevents or significantly interferes with national banks' exercise of multiple powers granted by the NBA.

The IFPA's Data Usage Limitation is similarly preempted. That provision makes it unlawful for banks and any other entity "involved in facilitating or processing an electronic payment transaction"—except for merchants—to "distribute, exchange, transfer, disseminate, or use the electronic payment transaction data, except to facilitate or process the electronic payment transaction or as required by law." 815 ILCS 151/150-15(b). That cannot be squared with national banks' broad power under the NBA to process data. 12 C.F.R. § 7.5006(a). Nor can it be squared with national banks' need—and, therefore, incidental power, *see* 12 C.F.R. § 7.1000(d)(1)—to process, use, or otherwise employ electronic payment transaction data in various ways to "efficiently" provide credit and debit card processing services, make loans, and receive deposits.

a. The Data Usage Limitation prevents or significantly interferes with the power to process data.

Just as the IFPA's Interchange Fee Prohibition impermissibly limits national banks' power to receive fees in their discretion, the IFPA's Data Usage Limitation impermissibly limits their power to process data in their discretion. A national bank has the express federal power to "provide data processing, and data transmission services … and access to such services … for itself and for others" with respect to "banking, financial, or economic data," which "includes anything of value in banking and financial decisions." 12 C.F.R. § 7.5006(a); *see also id.* (describing these "activities" as "part of the business of banking"). Because federal law permits the processing and use of data whether or not it comes from particular transactions, Illinois's attempt to impose limits based on that characteristic of the data is preempted. *See Bank of Am.*, 309 F.3d 551 at 562-64. In other words, by unlawfully "depriv[ing]" national banks of the "flexibility" federal law accords them to process and otherwise employ data, the IFPA's Data Usage Limitation conflicts with that law and is preempted. *See Fidelity Fed. Sav. & Loan*, 458 U.S. at 155.

b. The Data Usage Limitation prevents or significantly interferes with the power to process credit and debit card transactions, receive deposits, and make loans.

By making it impossible to "efficiently" process credit and debit card transactions, and by extension to make loans and receive deposits, the IFPA's Data Usage Limitation also significantly interferes with those underlying federal powers. The Illinois law's sweeping scope has the potential to outlaw a broad range of data uses that, as common sense indicates, are critical for the operational success or economic viability of these services. For example, financial institutions commonly use transaction data to build predictive models that detect and combat fraud, which poses a continuing and substantial problem. Ex. 2, ¶ 30; *see also, e.g.*, Ex. 6, ¶ 31 ("Historical electronic payment transaction data is very important in detecting patterns of fraud."). Likewise, it is unclear how a reward program for Illinois cardholders making purchases primarily in Illinois could survive the IFPA's Data Usage Limitation. *See, e.g.*, Ex. 12, ¶¶ 61-62; Ex. 8, ¶ 26 (noting the use of transaction data for "cardholder loyalty programs"). As is the case for its Interchange Fee Prohibition, the IFPA's Data Usage Limitation works a far more significant interference with national banks' ability to "efficiently" provide credit and debit card processing services than did the New York advertising limit the Supreme Court called the "paradigmatic example of significant interference" in *Franklin National Bank*. *See* *Cantero*, 144 S. Ct. at 1298 (citing *Franklin Nat'l Bank*, 347 U.S. at 377-78). Here, unlike there, Illinois's law makes it harder for national banks to safeguard—or even provide—the services they offer under the NBA. *See, e.g.*, Ex. 6, ¶ 31 ("[T]he IFPA would render our account data virtually useless for fraud prevention, essentially guaranteeing real dollar losses by customers, the bank or both."). The Data Usage Limitation is thus preempted as well.

3. Illinois and federal law extend the effect of NBA preemption to banks chartered by Illinois and by other states.

In order to provide a level playing field for state-chartered banks, both Illinois and federal law recognize that the preemption available to national banks should often extend as well to state-chartered banks. Thus, Illinois grants banks it charters the power, "[n]otwithstanding any other provisions of [the Illinois Banking Act] or any other law, to do any act … that is at the time authorized or permitted to national banks by an Act of Congress." 205 ILCS 5/5(11). Under this provision, "Illinois state banks for [decades] have enjoyed parity with national banks." Ill. Dep't of Financial & Professional Regulation, Interpretive Ltr. 2000-02, at 1 (Jan. 12, 2000)[6]; *see also* *Johnson v. First Banks, Inc.*, 889 N.E.2d 233, 238 (Ill. App. Ct. 2008) (citing 205 ILCS 5/5(11)).

Federal law has the same effect for non-Illinois state banks. The dormant Commerce Clause forbids "regulatory measures" that "benefit in-state economic interests by burdening out-of-state competitors." *Ross*, 598 U.S. at 369; *see also Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (discriminatory statutes forbidden even if they are enacted for non-discriminatory purposes, such as "protecting consumers"). Because Illinois essentially extends NBA preemption to in-state state banks, the dormant Commerce Clause requires equivalent treatment for out-of-state state banks. Otherwise, Illinois law would violate the "cardinal principle that a State may not benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994) (internal quotation marks omitted); *see also id.* at 194 (collecting a "legion" of cases). And indeed, federal statutory law also protects out-of-state state banks, as 12 U.S.C. § 1831a(j) provides that "[t]he laws of a host State … shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank." In other words, § 1831a(j)(1) gives "an out-of-state, state bank … the same power and authority as a national bank," and interference with those powers is likewise "preempted." *Johnson*, 889 N.E.2d at 238; *see also Pereira v. Regions Bank*, 752 F.3d 1354, 1356-57 (11th Cir. 2014) (similar).

In short, under both Illinois and federal law, state-chartered banks are entitled to the same benefits of NBA preemption of the IFPA as national banks.

[6] https://idfpr.illinois.gov/content/dam/soi/en/web/idfpr/banks/cbt/legal/intrltr/btil0002.pdf.

B. The IFPA Is Preempted by the Home Owners' Loan Act.

Application of the IFPA to Federal savings associations is preempted by the HOLA just as the NBA preempts its application to national banks. The preemption standard governing the two statutes is the same, *see* 12 U.S.C. § 1465(a), and the HOLA gives Federal savings associations comparable powers to those the NBA grants national banks.

1. The Interchange Fee Prohibition prevents or significantly interferes with Federal savings associations' exercise of multiple powers granted by the HOLA.

Under the HOLA and its implementing regulations, Federal savings associations enjoy the powers to offer credit cards, 12 U.S.C. § 1464(c)(1)(T), to "raise funds through … deposit[s]" and "issue … evidence of accounts" such as debit cards, *id.* § 1464(b)(1)(A)(i)-(ii), and to charge fees, including "to transfer … its customers' funds," *see, e.g.*, 12 C.F.R. § 145.17. For all the same reasons that the IFPA's Interchange Fee Prohibition "prevents or significantly interferes with" national banks' exercise of their federally granted powers, that provision does the same with respect to the corresponding powers of Federal savings associations. *See supra* Section I.A.1. This IFPA provision prevents Federal savings associations from receiving fees their governing statute permits, *see supra* Section I.A.1.a, and it also prevents them from efficiently exercising their fundamental underlying powers involving credit cards and deposits, *see supra* Section I.A.1.b.

2. The Data Usage Limitation prevents or significantly interferes with Federal savings associations' exercise of multiple powers granted by the HOLA.

The IFPA's Data Usage Limitation is also preempted under the HOLA just as it is under the NBA. Federal savings associations have the federal power, operating through a service corporation, to engage in "data processing" that is "generally finance-related." 12 C.F.R. § 5.59(f)(2)(vi). Moreover, that power is necessary to efficiently carry out its underlying credit card and deposit operations. Accordingly, the Data Usage Limitation "prevents or significantly interferes with" Federal savings associations' exercise of their federal powers for the same reasons it interferes with national banks' corresponding federal powers. *See supra* Section I.A.2. This provision prevents Federal savings associations from processing data in ways that would otherwise be permitted, *see supra* Section I.A.2.a, and it also prevents them from efficiently exercising their fundamental underlying powers involving credit cards and deposits, *see supra* Section I.A.2.b.

3. The effect of HOLA preemption extends to state savings banks.

Just as with state-chartered banks, Illinois has opted to give the savings banks it charters the same powers their federal equivalents enjoy. Specifically, with exceptions not relevant here, Illinois permits savings banks it charters to "make any loan or investment or engage in any activity that it could make or engage in if it were organized … under federal law as a federal savings and loan association or federal savings bank." 205 ILCS 205/6002(a)(11). Illinois-chartered savings banks thus enjoy parity with Federal savings associations. And here too, the dormant Commerce Clause ensures that out-of-state savings banks and savings associations receive the same preemption benefits as in-state ones. *See* *Ross*, 598 U.S. at 369.

C. The IFPA Is Preempted by the Federal Credit Union Act.

The FCUA preempts the IFPA's application to federal credit unions for similar reasons, since FCUA preemption "fit[s] the same pattern" as NBA preemption. Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. REG. 143, 172 n.138 (2009). As noted above, the FCUA preempts any state law that limits or affects certain powers that that statute grants federal credit unions. *See, e.g.*, 12 C.F.R. § 701.21(b). Both IFPA provisions conflict with the FCUA in this way, and are thus preempted.

1. The Interchange Fee Prohibition conflicts with federal credit unions' exercise of multiple powers granted by the FCUA.

The FCUA grants federal credit unions the powers to "carry on effectively the business for which [they] are incorporated" by, among other things, "mak[ing] loans … and extend[ing] lines of credit to [] members," as well as by exercising "such incidental powers as shall be necessary or requisite." 12 U.S.C. § 1757(5), (17). "An activity meets the definition of an incidental power activity if" it, among other things, "[i]s convenient or useful in carrying out the mission or business of credit unions consistent with the [FCUA]" or "[i]s the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions." 12 C.F.R. § 721.2.

The FCUA and its implementing regulations further give the NCUA "exclusive authority" "to regulate the rates, terms of repayment and other conditions of Federal credit union loans and lines of credit (including credit cards) to members." *Id.* § 701.21(b). Accordingly, federal law "preempts any state law purporting to limit or affect" "amounts of finance charges," "other fees," and "other conditions" associated with credit cards, as well as debit cards. *See id.*; 12 C.F.R. § 721.3(k) ("debit cards"). The regulations also state that federal credit unions' incidental powers include the power to "process[]" "transaction[s]," through "electronic" means and otherwise, from which credit unions "may earn income." *Id.* §§ 721.3(d), 721.6; *see also, e.g.*, *id.* § 704.12 (listing "[p]ayment systems," defined as "any methods used to facilitate the movement of funds for transactional purposes," as a "preapproved service"). Federal credit unions' power to participate in the processing of credit and debit card transactions thus carries with it the power to charge "fees" for those services consistent with NCUA's oversight.

This case fits comfortably with those in which courts have found FCUA preemption. For example, *Neal v. Redstone Federal Credit Union* refused to enforce a usury law that barred credit card issuers from charging over 8% interest, because the FCUA permitted higher interest rates.

447 So. 2d 805, 807 (Ala. Ct. App. 1984). Likewise, *American Bankers Ass'n v. Lockyer* held preempted a California law that required "credit card issuers" to "either impose a 10% minimum monthly repayment" on cardholders or else "be subjected to [certain] onerous [disclosure] requirements." 239 F. Supp. 2d 1000, 1018 (E.D. Cal. 2002). As the court explained, even though the FCUA's implementing regulations do not "preempt state laws concerning credit cost disclosure requirements," the FCUA preempted the law's attempt to "use[] credit disclosures and other requirements … as sanctions to coerce lenders into imposing a 10% minimum payment." *Id.* at 1019. Attempting to indirectly set that minimum payment rate "conflict[ed] with the NCUA's broad power to regulate the rates, terms of repayment, and other conditions of federal credit union loan and lines of credit." *Id.*

So too here. The IFPA bans an action—receiving fees—in circumstances where the FCUA permits it, and thereby "conflicts" with the FCUA and its implementing regulations. Indeed, the IFPA presents an even clearer case for preemption than the statute at issue in *Lockyer*, because it directly prohibits federal credit unions from charging FCUA-permitted fees, rather than merely giving them the choice of forgoing the federally authorized action.

2. The Data Usage Limitation conflicts with federal credit unions' exercise of multiple powers granted by the FCUA.

The Data Usage Limitation is similarly preempted. As the NCUA has recognized, federal credit unions' incidental powers expressly include the power to engage in "[e]lectronic financial services," including "account aggregation services" and "data processing." *See, e.g.*, 12 C.F.R. § 721.3(e) (listing "data processing" as an example of an activity that "serv[es] … members" and "support[s] … business operations"). And just like national banks, federal credit unions may use transaction data to detect and prevent fraud and offer rewards programs to their customers. *See, e.g.*, Ex. 14, ¶ 27. The ability to use transactional data is thus core to federal credit unions' ability to exercise their FCUA powers and to provide services to their members. *See* 12 C.F.R. § 721.2. The Data Usage Limitation conflicts with those powers and is therefore preempted.

3. The effect of FCUA preemption extends to state credit unions.

Similar to its policy for Illinois banks, Illinois grants credit unions it charters "all of the rights, privileges and benefits which may be exercised by a federal credit union." 205 ILCS 305/65. Indeed, the state must, "where necessary, promulgate rules and regulations in substantial conformity with those promulgated by the NCUA under the Federal Credit Union Act." *Id.* Illinois credit unions thus enjoy parity with federal credit unions. *See* 5 Ill. Law & Prac. Banks § 193 (citing 205 ILCS 305/65). And here too, the dormant Commerce Clause ensures that out-of-state credit unions receive the same preemption benefits as in-state ones. *See Ross*, 598 U.S. at 369.

D. Federal Preemption Extends to Other Participants in the Payment System.

Finally, in order to effectuate federal preemption, the IFPA cannot be applied to Card Networks or others involved in the payment process, either. As the Supreme Court has explained, for example, there is no basis to conclude that "the preemptive reach of the NBA extends only to a national bank itself." *Watters*, 550 U.S. at 18. Instead, "in analyzing whether state law hampers the federally permitted activities of a national bank," courts should "focus[] on the exercise of a national bank's *powers*." *Id.* To that end, federal preemption applies "to an action taken by a non-national bank entity" if "application of state law to that action … significantly interfere[s] with a national bank's ability to exercise its power under the NBA." *Madden v. Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015); *see also Eul v. Transworld Sys.*, No. 15 C 7755, 2017 WL 1178537, at *6 (N.D. Ill. Mar. 30, 2017) (similar).

That often happens, for instance, when another entity functions as an agent or on behalf of the entity to which federal law grants a particular power. Thus, in *SPGGC, LLC v. Ayotte*, the First Circuit applied NBA preemption to a non-bank entity that sold gift cards on behalf of a national bank. 488 F.3d 525 (1st Cir. 2007). The court explained that the NBA gives national banks the power to sell gift cards, and to "use 'duly authorized officers or agents'"—including third-party agents—to exercise their powers. *Id.* at 532 (quoting 12 U.S.C. § 24 (Seventh)); *see also, e.g.*, 12 U.S.C. § 1757(1) (permitting credit unions to "make contracts" with others in aid of their operations). Accordingly, a state law banning non-bank entities from selling gift cards would "significantly interfere[]" with the powers federal law granted, and was thus preempted. *SPGGC*, 488 F.3d at 533. As the court put it, the New York restriction on advertising that the Supreme Court deemed preempted in *Franklin National Bank* would have been no more permissible if, instead of regulating banks' use of the word "savings" directly, it had "prohibited billboard owners" from posting advertisements for national banks that used the word "savings." *Id.*

Similar reasoning demonstrates that the IFPA cannot limit parties in the payment system that facilitate federally chartered institutions' exercise of their NBA, HOLA, or FCUA powers. For example, an operating subsidiary or joint venture that issues credit or debit cards in conjunction with a federally chartered entity is every bit as protected from the interference of the IFPA as is the federally chartered entity itself. Likewise, Card Networks and other participants in the payment system are covered by federal preemption, because Illinois may not indirectly prevent or significantly interfere with federally chartered entities' exercise of their federal powers any more than it could do so directly. To take just one example, if those other participants were required to comply with the IFPA and could not "receive or charge a merchant any interchange fee on the tax amount or gratuity of an electronic payment transaction," there would be no way for the federally chartered entities to collect the full interchange fee that federal law permits. Likewise, the Data Usage Limitation would significantly interfere with Card Networks' ability to police fraud and otherwise efficiently run the payment system on which federally chartered entities depend. *See*

Ex. 12, ¶¶ 55-59. Because that interference with the powers of the various federally chartered financial institutions would be significant, Plaintiffs are likely to prevail on a claim that application of the IFPA to Card Networks and other entities in the payment ecosystem is preempted as well.

E. The EFTA Preempts the Interchange Fee Prohibition's Application to Debit Card Interchange Fees.

As applied to debit card transactions, the IFPA's Interchange Fee Prohibition also conflicts with, and is thus preempted by, the Durbin Amendment to the EFTA and its implementing regulation. Conflict preemption "exists if it would be impossible for a party to comply with both local and federal requirements or where local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Aux Sable Liquid Prod. v. Murphy*, 526 F.3d 1028, 1033 (7th Cir. 2008). In particular, where a federal agency has carefully considered a question and established a regulatory standard that balances competing imperatives and reflects a deliberate federal policy choice, a competing state standard will be preempted. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000). Indeed, the EFTA itself contains a provision specifying that preemption follows when a state law is "inconsistent with the provisions of this subchapter … to the extent of the inconsistency." 15 U.S.C. § 1693q.[7]

Such inconsistency is evident here. As noted above, Congress directed the Federal Reserve 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. § 1693o-2(a)(1), (a)(3)(A).

[7] While this provision also clarifies that "[a] State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter," 15 U.S.C. § 1693q, that clarification has no force here, both because the IFPA's Interchange Fee Prohibition applies only to the fees charged to entities, and provides no "protection" to "consumers," and because regulation of "service fees charged by financial institutions" is "not the type of consumer protection measure contemplated by the EFTA," which instead "was enacted to prevent fraud, embezzlement, and unauthorized disclosure in electronic fund transfers," *Bank of Am.*, 309 F.3d at 564.

Congress also specified 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," taking into account "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)(2), (a)(4).

The Federal Reserve responded by promulgating Regulation II, which limits debit card interchange fees to the sum of a fixed rate of "21 cents" and an *ad valorem* component of 0.05% "multiplied by the value of the transaction." 12 C.F.R. § 235.3(b). In setting a "Uniform Interchange Fee Standard," the Federal Reserve's final rule stated that it would "appl[y] to *all* electronic debit transactions not otherwise exempt." 76 Fed. Reg. at 43434 (emphasis added). That uniformity was important, the Federal Reserve explained, because "a uniform standard … is … the most practical and least burdensome approach in the context of a complex and dynamic system that handles large and growing volumes of transactions." *Id.* at 43432.

By setting a different standard, the IFPA disrupts this uniformity and conflicts with both Regulation II and the Durbin Amendment itself. After all, nothing in the Durbin Amendment, Regulation II, or anywhere else in federal law suggests that the "cost incurred by the issuer" referenced in the Durbin Amendment or "the value of the transaction" used in Regulation II to compute the 0.05% *ad valorem* component of permitted interchange fees excludes tax and gratuity. *See* 12 C.F.R. § 235.3; *see also id.* § 235.2(h)(1) (defining "[e]lectronic debit transaction" as "the use of a debit card by a person as a form of payment in the United States to initiate a debit to an account"—without any carveout for tax or gratuity). There is no reason to think that the tax and gratuity portions of a transaction produce less fraud or costs than other portions—let alone that they impose no such costs at all—and indeed, the study the Federal Reserve used to assess those costs included the whole transaction, including tax and gratuity. *See* 76 Fed. Reg. at 43434 (setting *ad valorem* component of fees with reference to the "average per-transaction fraud loss"). The IFPA thus further conflicts with the Durbin Amendment and Regulation II by leaving Issuers on the hook for fraud losses associated with the entire transaction, while limiting their interchange fee compensation to only a portion of those costs.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

Plaintiffs' members face irreparable harm if the IFPA is not enjoined. As the Supreme Court has explained, irreparable harm results when a plaintiff is put to the "Hobson's choice" of either complying with an invalid state law or else violating it and incurring coercive penalties. *See* *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 381 (1992). That is especially true because the costs of complying with an invalid state law cannot be recovered due to the State's sovereign immunity. *See, e.g.*, *Staffing Servs. Ass'n of Ill. v. Flanagan*, __ F. Supp. 3d __, 2024 WL 1050160, at *8 (N.D. Ill. Mar. 11, 2024); *Ohio v. EPA*, 144 S. Ct. 2040, 2052-53 (2024) (recognizing and relying on "weighty" argument for irreparable harm from the "costs" of "having to comply with" a challenged law "during the pendency of this litigation" because those costs would be "nonrecoverable"). Here, the unrecoverable costs of compliance would be enormous because of the scope of changes the IFPA requires and the extremely compressed time scale the Act demands. The weakening effect the Data Usage Limitation would have on fraud protection and other critical functions—which cannot be performed effectively without transaction data—would also be irreparable.

As explained above, adoption of any Automatic Process (if possible at all) is quite likely infeasible by the IFPA's July 1, 2025 effective date, given the timeline for updated standards and technical specifications from the Card Networks. *See supra* at 16 (citing Ex. 13, ¶ 20 and Ex. 12,

¶ 33). But the costs Plaintiffs' members, their service providers, and other participants in the payment system will incur to develop and implement such a process would likely reach tens of millions of dollars for large institutions and be comparably great in relative terms for smaller institutions. *See supra* at 16 (citing Ex. 8, ¶¶ 19-20 and Ex. 6, ¶ 17).

The unrecoverable costs of designing and implementing a Manual Process are likewise immense. As noted above, billions of Illinois-related card transactions occur annually. Under the IFPA, banks and other financial institutions could be responsible for retroactive "credits" of a portion of interchange fees on almost all of them. At the outset, it is far from clear how this process could meaningfully work at all. Issuers seldom have direct commercial relationships with Acquiring Banks, let alone with the merchants where their cardholders shop. Ex. 2, ¶ 24; Ex. 12, ¶ 23. Acquirers thus simply do not currently have systems or staffing that would allow them to transmit any tax documentation they receive to Issuers, nor do Issuers currently have systems or staffing in place to determine the precise amount of interchange fees for which a "credit" is due or to provide such credit—particularly since the IFPA imposes no restrictions on how much of the thirty-day period for processing credits may elapse before Acquirers transmit the information in question to Issuers. *See* Ex. 10, ¶ 21. Indeed, modern payment receipts, which vary widely in size, format, and detail, seldom include sufficient information for an Acquirer to identify the Issuer to whom the information should be passed along, Ex. 12, ¶ 43, or even determine whether the IFPA applies to the transaction at all, Ex. 13, ¶ 25.

Even if developing, implementing, and staffing such systems by the IFPA's July 1, 2025 effective date were theoretically possible, doing so would require enormous technical, financial, and personnel resources. Start with larger Issuers, which—absent a quickly issued injunction—would have to spend up to tens of millions of dollars in 2024 alone, plus the ongoing cost of hiring, training, and retaining thousands of new employees. *See, e.g.*, Ex. 11, ¶ 32 (tens of millions of dollars and thousands of new employees); Ex. 10, ¶ 26 ("tens of millions of dollars" and "hundreds, if not thousands, of new employees"). The burden on smaller Issuers would be no less meaningful. As the president of one such bank explained, the Manual Process requirement "creates an unsustainable burden on debit card issuers of our size," and would likely lead to the bank exiting the debit card market altogether. Ex. 4, ¶ 25. Even though the bank has only 3,500 debit cardholders, a manual process capable of handling the 625,000 debit card transactions it processes annually would require at least two new full-time employees, at a cost of $150,000 or more once salaries, benefits, and hardware and software support are considered. Ex. 4, ¶¶ 5-6, 24; *see also* Ex. 15, ¶¶ 4, 24 (credit union with approximately 100 Illinois employees would have to hire or divert 28 employees and spend almost $1.3 million to try to implement the Manual Process). Such additional costs—combined with the irrevocably forgone revenue from the tax and gratuity portion of transactions—would render debit card services a money-losing line of business. Ex. 4, ¶ 25.

Moreover, aside from these direct financial costs, the Manual Process the IFPA contemplates precludes sufficient safeguards against errors and fraud. Manually reviewing billions of transactions and processing credits for them opens the door to both, particularly in a setting where a financial incentive exists to characterize as much of a transaction as possible as consisting of gratuities or taxes. New manual systems will also have to be created to resolve disputes that arise when transactions are undone through returns—which might occur either before or after a "credit" has been issued. Ex. 12, ¶ 51. Because no such systems currently exist, banks have no procedures or staff in place to audit or otherwise ensure the accuracy of credits provided under the Act. Ex. 2, ¶ 24. Developing those procedures and ensuring that staffing will carry additional costs, as will the increase in errors and fraud that will inevitably occur as a result of introducing billions of manual potential points of failure into the payment system. *See* Ex. 9, ¶ 20.

Likewise, the need to take imminent action to comply with the IFPA's Data Usage Limitation would impose irreparable harm in the form of unrecoverable costs. In particular, Plaintiffs' members currently lack any mechanism to prevent data from transactions subject to the IFPA from being used in their numerous operationally, reputationally, or economically critical functions that use transaction data. Absent an injunction, Plaintiffs' members face the need to design and implement new systems to ensure that IFPA-covered transaction information is not used, for example, to build or refine fraud prevention models, offer cardholder rewards, or determine credit limits. Ex. 2, ¶ 31. In addition to the direct, unrecoverable costs of designing and implementing such systems on a compressed time scale, *see, e.g.*, *supra* at 17 (citing Ex. 10, ¶ 30 and Ex. 6, ¶ 17), this result imposes the irreparable harm of making these key functions less effective or even impossible to carry out, *see, e.g.*, Ex. 6, ¶ 31.

Finally, any revenue forgone under the IFPA will also constitute irreparable harm if the Act is declared invalid after being permitted to go into effect. In such a circumstance, there would be no mechanism to retroactively charge amounts not paid under an Automatic Process, nor would there likely be a meaningful way to recoup any credits offered under the Manual Process.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT PRELIMINARY INJUNCTIVE RELIEF.

At the outset, because of the strength of Plaintiffs' showings with respect to likelihood of success on the merits and irreparable harm, the sliding scale this circuit employs means that "the balance of equities does not need to weigh as heavily in [Plaintiffs'] favor" to justify a preliminary injunction. *Staffing Servs. Ass'n of Ill.*, 2024 WL 1050160, at *9. But in any event, the balance of equities and public interest factors—which "merge" in this case against the Government, *see*

Stevens, 666 F. Supp. 3d at 748—weigh strongly in Plaintiffs' favor as well. The chaos that would follow if the Illinois law is not speedily enjoined—let alone if it is allowed to go into effect—would not benefit the public. Banks, Card Networks, consumers, small business owners, and others would all suffer as the industry scrambled to invest in technology and resources that could separate the tax and gratuity portions from the rest of each of the millions of credit and debit card transactions that occur daily in Illinois. *See supra* Section II. Indeed, many merchants would need to expend substantial resources to update (or replace) the point-of-sale terminals where consumers swipe, insert or tap their cards. *See* Ex. 2, ¶ 21. And some Issuers and Acquirers may exit the market entirely, *see, e.g.*, Ex. 2, ¶ 28; Ex. 15, ¶ 32; Ex. 4, ¶ 25. Allowing the IFPA to stand would also impede fraud protection, cardholder rewards, and other benefits to consumers, which rely on information obtained from transactions to function. *See, e.g.*, Ex. 6, ¶ 31 ("Because the vast majority of First Federal Savings Bank of Champaign-Urbana's cardholders' debit transactions are within the state of Illinois, the IFPA would render our account data virtually useless for fraud prevention, essentially guaranteeing real dollar losses by customers, the bank or both."). On the flip side, of course, "[t]he public 'does not have an interest in the enforcement of state laws that conflict with federal laws.'" *Staffing Servs. Ass'n of Ill.*, 2024 WL 1050160, at *9 (quoting *Pro. Towing & Recovery Operators of Ill. v. Box*, No. 08 c 4096, 2008 WL 5211192, at *14 (N.D. Ill. Dec. 11, 2008)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction against enforcement of the IFPA against any "issuer," "payment card network," "acquirer bank," "processor," or "other designated entity," *see* 815 ILCS 151/150-10(a), 150-15(a), as well as any other participants in the payment system needed to afford complete relief.

Dated: August 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2024, a copy of the foregoing was filed using the CM/ECF system. Because Defendant has not yet entered an appearance, I will attempt to serve the foregoing by process unless Defendant's counsel agrees to service by email. I have also notified counsel at the Office of the Illinois Attorney General of the filing of the underlying complaint and motion for a preliminary injunction. I will both email and mail copies of the motion for a preliminary injunction and this memorandum in support to that counsel.

/s/ *Bethany K. Biesenthal*

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