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

NORTH DAKOTA RETAIL ASSOCIATION & NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION, Plaintiffs, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant.	Case No. 1:21-cv-00095-DMT-CRH

DEFENDANT BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER

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INTRODUCTION

Plaintiffs' claims in this case accrued in 2011 and are barred by the applicable six-year statute of limitations. Although plaintiffs assert various theories in an effort to escape the time bar, none are viable. The complaint fails as a result and should be dismissed.

Alternatively, the case should be transferred to the U.S. District Court for the District of Columbia. While the dismissal analysis is straightforward and dispositive, factors arising from prior parallel litigation in the D.C. federal courts – including *res judicata* issues stemming from that litigation, which must be resolved under D.C. Circuit preclusion law, as well as plaintiffs' reliance on a limited 2014 remand order from the D.C. Circuit – support transfer in the alternative.

* * *

This case involves a trade association challenge to a federal regulation regarding debit card fees issued by defendant the Board of Governors of the Federal Reserve System ("Board") as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").

As explained in greater detail below, a decade after the rule in question was promulgated – by a rulemaking proceeding in which plaintiffs directly participated – and subsequently upheld by the D.C. Circuit after a challenge by national retail trade associations, *NACS v. Board of Governors of the Federal Reserve System*, 746 F.3d 474 (D.C. Cir. 2014) ("*NACS*"), plaintiffs now belatedly seek to revive the claims of the prior litigation because they continue to disagree with its result. Plaintiffs' contention here, as in the prior litigation, is that the Board exceeded its statutory authority in issuing the debit card interchange fee portion of its final regulation implementing the requirements of Section 920 of the Electronic Fund Transfer Act ("EFTA")

(15 U.S.C. § 1693 *et seq.*) as amended by Dodd-Frank Act Section 1075 (P.L. 111-203, 124 Stat. 1376 (July 10, 2010)) ("section 920" or the "Durbin Amendment").

Not surprisingly in view of the belated nature of their challenge, plaintiffs' claims are time-barred by the general six-year statute of limitations contained in 28 U.S.C. § 2401(a) and their facial challenge to the Board's final regulation implementing section 920 at 12 C.F.R. Part 235 ("Regulation II") is precluded as a result. Indeed, while there may be complexities to the debit card payments system and its regulation as mandated by Congress and implemented by the Board, the application of the mandatory statute of limitations to plaintiffs in this case is straightforward. Moreover, the D.C. Circuit's decision in *NACS* upholding the Board's rule creates no ambiguity as to when the statute of limitations began to run. And even assuming there was any ambiguity, that court is best positioned to consider the ramifications of its own order. Transfer to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a) therefore provides an alternative option in resolving that issue and any others that may be presented by the interrelationship between the prior litigation and plaintiffs here.

STATUTORY AND PROCEDURAL BACKGROUND

A. The Debit Card Industry and Interchange Fees

Debit cards enable consumers to directly access funds in their bank deposit accounts. *See Debit Card Interchange Fees and Routing, Final Rule*, 76 Fed. Reg. 43,394, 43,395 (July 20, 2011) ("Final Rule") (cited in Plaintiffs' Complaint for Declaratory and Injunctive Relief (Dkt. 1) ("Compl."), ¶ 17). Debit cards evolved from a means of withdrawing funds and performing other banking activities at automated teller machines ("ATMs") in the late 1960s and early 1970s to their current role as "one of the most popular forms of payment" in the United States. Compl. ¶ 2; *see also* Final Rule, 76 Fed. Reg. at 43,395. Debit card transactions, which had grown more than any other form of electronic payment in the decade preceding the Final Rule, have for some time been the most frequently used form of noncash payment in the United States. Compl. ¶¶ 2-3; 76 Fed. Reg. at 43,395.

Various fees are associated with debit card transactions. The largest of those, the interchange transaction fee (the "interchange fee"), is set by networks that process electronic debit transactions (most commonly, Visa or Mastercard), and paid by the merchant's bank (the "acquirer") to the entity that issued the debit card (the "issuer") to compensate the issuer for its role in the transaction. 76 Fed. Reg. at 43,396. Separately, "switch fees" are charged by networks to acquirers and issuers for network costs associated with processing card transactions. The acquirer charges the merchant a "merchant discount" – the difference between the face value of a transaction and the amount the acquirer transfers to the merchant – which includes the interchange fee, some network switch fees, other acquirer costs, and an acquirer markup. *Id.* The interchange fee typically comprises a large fraction of the merchant discount for a debit card transaction. *Id*.

Prior to the Board's promulgation of the Final Rule in 2011, networks reported that the average interchange fee for all debit card transactions was 44 cents per transaction, or 1.15 percent of the average transaction amount. 76 Fed. Reg. at 43,397.

B. Section 920 of EFTA

Section 1075 of the Dodd-Frank Act amended EFTA by adding a new section 920, codified at 15 U.S.C. § 1693o-2, regarding interchange fees for debit card transactions and other rules for payment card transactions. Among other things, section 920(a) gave the Board direction and broad authority to promulgate regulations establishing standards for reasonable and proportional interchange fees for debit cards.

Section 920(a)(2) provided 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."[1] 15 U.S.C. § 1693o-2(a)(2). Section 920(a)(3)(A) required the Board to issue regulations "to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(3)(A). The statute did not define the terms "reasonable" and "proportional" to cost.

In prescribing regulations under paragraph (3)(A), the statute stated that the Board shall "(A) consider the functional similarity between – (i) electronic debit transactions; and (ii) checking transactions that are required within the Federal Reserve bank system to clear at par." 15 U.S.C. § 1693o-2(a)(4)(A). Section 920(a)(4)(B) further provided that, in promulgating regulations, the Board shall "distinguish between – (i) 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 under paragraph (2); and (ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2)." *Id.* § 1693o-2(a)(4)(B). Outside of these provisions, the statute provided no guidance with regard to criteria the Board should take into account in setting a standard for interchange fees that are "reasonable" and "proportional" to cost. A separate provision, section 920(a)(5)(A), provided that "[t]he Board may allow for an

[1] "[I]nterchange transaction fee" was defined as "any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction." 15 U.S.C. § 1693o-2(c)(8). An "issuer" is "any person who issues a debit card, or credit card, or the agent of such person with respect to such card." *Id.* § 1693o-2(c)(9). The statute defined "electronic debit transaction" as "a transaction in which a person uses a debit card." *Id.* § 1693o-2(c)(5).

adjustment to the fee amount" if "reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions." *Id.* § 1693o-2(a)(5)(A) and (i).

C. The Board's Proposed and Final Rule

Shortly after passage of the Dodd-Frank Act, Board staff began meeting with parties interested in the interchange fee rulemaking, including representatives of merchants and retailers, card-issuing banks, networks, and others to discuss the provisions of section 920, and distributed surveys requesting information on the costs associated with debit card transactions, among other items, in order to assist it in developing proposed rules. *See Debit Card Interchange Fees and Routing, Notice of Proposed Rulemaking*, 75 Fed. Reg. 81,722, 81,724, 81,725 (Dec. 28, 2010) ("NPRM"); *see also* Compl. ¶ 11.

On December 28, 2010, the Board requested public comment on a proposed rule implementing section 920. *See* NPRM. The Board received comments 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. Notably, plaintiffs themselves submitted a joint comment letter to the Board along with other state and national trade associations and businesses.[2] The Board thoroughly reviewed all comments, along with statutory provisions, survey data, and other relevant information in promulgating the Final Rule. *Id.*

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[2] *See* Letter from Retail Industry Representatives to Ben Bernanke, Chairman, Bd. of Governors of the Fed. Res. Sys., (Feb. 2, 2011), *at* https://www.federalreserve.gov/SECRS/2011/February/20110204/R-1404/R-1404_020311_63702_497677994095_1.pdf (hereinafter "Plaintiffs' 2011 Comment Letter") (last visited July 1, 2021).

The Final Rule, which was published in the Federal Register on July 20, 2011, set a standard for assessing whether the amount of any interchange fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. 76 Fed. Reg. at 43,404. The Final Rule permitted each issuer to receive interchange fees that did not exceed a base amount of 21 cents per transaction (the "base component") plus an *ad valorem* (i.e., percentage of the value of the transaction) component of 5 basis points, cutting roughly in half the pre-Rule level. *Id.* at 43,422; *see also supra* p. 3. In setting the standard, the Board reasonably determined, based on the language of section 920, that it could permissibly take into account costs in addition to incremental authorization, clearance, or settlement ("ACS") costs as long as those costs are related to a particular electronic debit transaction and not excluded from consideration by section 920(a)(4)(B)(ii). 76 Fed. Reg. at 43,427. As a result, the final standard was based on certain costs incurred by the issuer to effect an electronic debit transaction, including both fixed and variable ACS costs such as network connectivity, software, hardware, equipment, and associated labor, network processing fees, the costs of processing chargebacks and other non-routine transactions, and transactions-monitoring costs. 76 Fed. Reg. at 43,404, 43,429. The Board also included an allowance for fraud losses (through the *ad valorem* component) as an issuer cost incurred as a consequence of effecting a transaction. *Id.* at 43,404. Several costs that may be incurred in effecting a transaction, such as costs relating to consumer inquiries and rewards programs, were excluded from allowable costs for reasons described in the Final Rule. *Id*. at 43,404, 43,429. The Board excluded costs not incurred to effect a particular transaction, including corporate overhead (such as senior executive compensation), costs associated with establishing the account relationship, card production and delivery, marketing, research and development, and network membership fees. *Id.* at 43,404. The Board recognized that costs may change over time, and stated that it would periodically conduct surveys to monitor the fee standard.[3] *Id.* at 43,422.

D. The First Challenge to the Final Rule and the D.C. Circuit's Decision

Shortly after publication of the Final Rule, a group of trade associations representing merchants, including the National Association of Convenience Stores ("NACS"), the National Retail Federation ("NRF"), the Food Marketing Institution ("FMI"), and the National Restaurant Association ("NRA"), as well as two individual plaintiff merchants, sued the Board seeking a declaration that the Final Rule was arbitrary and capricious and exceeded the Board's statutory authority. *See NACS v. Bd. of Governors of the Fed. Res. Sys.*, No. 1:11-cv-02075 (D.D.C. filed Nov. 22, 2011) (the "NACS" litigation). Among other things, the first amended NACS Complaint – which largely parallels plaintiffs' Complaint – challenged the portion of the Final Rule establishing standards for assessing reasonable and proportional debit card interchange fees. First Amended Complaint (Dkt. 18), filed March 2, 2012 ("NACS Complaint"), ¶ 1. Like the plaintiffs here, the NACS plaintiffs claimed that in promulgating Regulation II the Board "vastly expand[ed] the categories of recoverable costs and thus the allowable debit interchange transaction fee" from the NPRM proposal, and that "the Final Rule exceeds the statutory authority delegated to the Board by the Durbin Amendment and is an unreasonable interpretation of that statute" that is "invalid under the [APA]." NACS Complaint ¶ 5. The NACS plaintiffs sought a judgment "declaring that the portions of the Final Rule setting standards for reasonable

[3] The Board has conducted biennial fee surveys since the passage of the Durbin Amendment. On May 13, 2021, the Board sought public comment on a proposal to amend a portion of Regulation II unrelated to interchange fees. *See* Debit Card Interchange Fees and Monitoring, 86 Fed. Reg. 26,189, 26,190 (May 13, 2021). The Board stated that while its current proposal did "not affect the other parts of Regulation II that directly address interchange fees for certain electronic debit transactions[, t]he Board will continue to review the regulation in light of the most recent data collected by the Board pursuant to EFTA section 920 and may propose additional revisions in the future."

and proportional interchange fees (12 C.F.R. § 235.3(b)) … are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law." NACS Complaint, Prayer for Relief.

On July 31, 2013, a judge of the U.S. District Court for the District of Columbia issued an opinion and order finding that the interchange fee provisions of the Final Rule violated the APA. *NACS v. Bd. of Governors of the Fed. Res. Sys*., 958 F. Supp. 2d 85 (D.D.C. 2013). On appeal, the D.C. Circuit reversed, finding "that the Board's rules generally rest on reasonable constructions of the statute." *NACS v. Bd. of Governors of the Fed. Res. Sys.*, 746 F.3d 474, 477 (D.C. Cir. 2014), *cert. denied*, 574 U.S. 1121 (2015). The D.C. Circuit held that "section 920(a)(4)(B)(i) requires the Board to include 'incremental cost[s] incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction,' and that section 920(a)(4)(B)(ii) prohibits the Board from including 'other costs incurred by an issuer which are not specific to a particular electronic debit transaction.'" *Id.* at 483 (quoting 15 U.S.C. §§ 1693o-2(a)(4)(B)(i) and (ii)). The court observed that "[t]he Board may well have been able to interpret section 920(a)(4)(B) as the merchants urge ... [, but] we certainly see nothing in the statute's language compelling that result." *Id*. at 484. It further explained that, "[g]iven the Durbin Amendment's ambiguity as to the existence of a third category of costs, we must defer to the Board's reasonable determination that the statute splits 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." *Id*. at 488 (citing *Chevron U.S.A. Inc*. *v. NRDC*, 467 U.S. 837, 843 (1984)).

Having determined that "[t]he Board reasonably interpreted the Durbin Amendment as allowing issuers to recover some costs in addition to incremental ACS costs," the court turned to a determination of whether the Board reasonably included "the four specific types of costs the merchants challenge: 'fixed' ACS costs, network processing fees, fraud losses, and transaction-monitoring costs." *Id.* at 489. Those four categories are identical to the costs plaintiffs challenge here. *See* Compl. ¶¶ 65, 85. The D.C. Circuit determined that the Board had reasonably interpreted the statute to permit recovery of all four categories of costs. *Id.* at 489-92. With regard to transaction-monitoring costs, the court "agree[d] with the Board that transactions-monitoring costs can reasonably qualify both as costs 'specific to a particular ... transaction' (section 920(a)(4)(B)) [within the base component] and as fraud-prevention costs (section 920(a)(5))," which are subject to the separate statutory adjustment for fraud prevention costs (the *ad valorem* component). *Id*. at 492 (quoting section 920). The court held that while "the Board may well be able to articulate a reasonable justification for determining that transactions-monitoring costs properly fall outside the fraud-prevention adjustment" but within the base component of the interchange fee, "the Board has yet to do so." *Id.* at 493. Accordingly, without vacating the Final Rule, the court remanded to the Board for additional explanation of its inclusion of transactions-monitoring costs in the base component of the interchange fee standard, rather than in the separate fraud prevention adjustment, and reversed the district court's grant of summary judgment to the NACS plaintiffs. *Id.* at 493, 496; *see also id.* at 477 ("we remand one minor issue—the Board's treatment of so-called transactions-monitoring costs—to the Board for further explanation").

The Supreme Court subsequently denied the NACS plaintiffs' petition for a writ of *certiorari*. *NACS v. Bd. of Governors of the Fed. Res. Sys.*, 574 U.S. 1121 (2015).

On August 14, 2015, the Board published a 3-page clarification of its rationale with respect to transactions-monitoring costs as required by the D.C. Circuit. *See* Debit Card Interchange Fees and Routing, 80 Fed. Reg. 48,684 (Aug. 14, 2015) (the "August 2015 Clarification"). The Clarification provided an additional explanation for one aspect of the Final Rule – its inclusion of transactions-monitoring costs in the base component of the interchange fee standard rather than the fraud prevention adjustment – but did not alter, amend, or modify the Rule. The Board stated: "On March 21, 2014, the [D.C. Circuit] upheld the Board's Final Rule … [but] held that one aspect of the rule – the Board's treatment of transactions-monitoring costs – required further explanation from the Board, and remanded the matter to the Board for further proceedings. The Board is explaining its treatment of transactions-monitoring costs in this Clarification." *Id.* at 48,684.

The Board explained that "[t]ransactions-monitoring costs are costs incurred by the issuer during the authorization process to detect indications of fraud or other anomalies in order to assist in the issuer's decision to authorize or decline the transaction." *Id.* at 48,685. "The Board included transactions-monitoring costs as part of the interchange fee standard called for in section 920(a)(3)(A) (costs incurred by an issuer for the issuer's role in the authorization of a particular transaction) based on the Board's determination that these costs are incurred in the course of effecting a particular transaction." *Id.* The Board further explained that most steps in the authorization process, including transactions-monitoring costs, are "'specific to a particular transaction' in the sense that they occur in connection with each transaction that is authorized or declined," and thus are properly included in determining the base component of the interchange fee standard. *Id.* The Board distinguished transactions-monitoring costs from "fraud-prevention costs," which are "designed to prevent debit card fraud at times other than when the issuer is authorizing, settling, or clearing a transaction," and thus were included in the separate fraud-prevention adjustment authorized under section 920(a)(5). *Id.* Thus, contrary to plaintiffs' characterization of the Clarification as an "Updated Rule," Compl. ¶¶ 28, 29, 55, 62, 64 *et seq.*, the Board's Clarification was a supplemental explanation of the Board's rationale for one discrete portion – in the D.C. Circuit's words "minor" – of the Final Rule. The Board did not issue a new Rule, nor did it modify, alter, or amend the Final Rule.

E. Plaintiffs' Complaint

Plaintiffs North Dakota Retail Association ("NDRA"), a non-profit trade association representing retailers across North Dakota, and North Dakota Petroleum Marketers Association ("NDPMA"), a non-profit trade association that represents over 400 petroleum marketers and associate members such as service station dealers, convenience stores, and truck stops, filed suit on April 29, 2021, seeking a declaration that the interchange fee provisions of Regulation II are arbitrary, capricious, contrary to law, and exceed the Board's authority under section 920(a) of EFTA in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Compl. ¶¶ 19-21, 81-92. Like the NACSs plaintiffs, plaintiffs here contend that "Regulation II must be vacated and set aside because it exceeds the Board's statutory authority" under section 920 of EFTA in that the Board exercised its discretion to consider a third bucket of costs – on which the statute was silent – in addition to incremental ACS, which the Board was required to consider. *Compare* Compl. ¶ 18 ("Regulation II must be vacated and set aside because it exceeds the Board's statutory authority") and ¶ 85 (the Board exceeded its statutory authority by taking into account "four specific costs – fixed ACS costs, fraud losses, transaction-monitoring costs, and network processing fees"), *with* NACS Complaint ¶ 5 ("[i]n vastly expanding the categories of recoverable costs and thus the allowable debit interchange transaction fee, the Final Rule exceeds the statutory authority delegated to the Board by the Durbin Amendment and is an unreasonable interpretation of that statute").

Like the NACS plaintiffs, plaintiffs here seek "[a] declaratory judgment holding that the standard for reasonable and proportional interchange fees in Regulation II" is arbitrary, capricious, contrary to law, and exceeds the Board's statutory authority. Compl., Prayer for Relief; *accord* NACS Complaint, Prayer for Relief (seeking "a declaratory judgment … declaring that portions of the Final Rule setting standards for reasonable and proportional interchange fees (12 C.F.R. § 235.3(b)) … are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law").

STANDARD OF REVIEW

Under longstanding Eighth Circuit precedent, a motion to dismiss based on the limitations period of 28 U.S.C. § 2401(a) is a Rule 12(b)(1) challenge to the court's subject-matter jurisdiction. *Konecny v. United States*, 388 F.2d 59, 65 (8th Cir. 1967). In such cases, the court is "'free to weigh the evidence and satisfy itself as to the existence of its power to hear the case,'" *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990), and the plaintiff, "not the government, bears the burden of establishing the existence of subject matter jurisdiction." *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 744 (8th Cir. 2001) (quoting *Osborn*, 918 F.2d at 730).

Although some courts have questioned the ongoing jurisdictional nature of 28 U.S.C. § 2401(a) in light of the Supreme Court's contrary treatment of the 28 U.S.C. § 2401(b) tort claims limitation in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), the Eighth Circuit's precedent remains unaltered. *See Sisseton-Wahpeton Oyate of the Lake Traverse Res. v. U.S. Army Corps of Eng'rs*, 888 F.3d 906, 917 n.4 (8th Cir. 2018) (recognizing *Kwai Fun Wong*, but declining "to reconsider our prior decision that § 2401(a) is a jurisdictional statute of limitations").[4] The distinction is in large part immaterial, however, as even those courts that consider § 2401(a) to be non-jurisdictional dismiss untimely APA claims under Rule 12(b)(6). *See Jackson v. Modly*, 949 F.3d 763, 778 n.16 and 779 (D.C. Cir. 2021) ("[b]ecause we hold that § 2401(a)'s statute of limitations is not jurisdictional, the dismissal of [plaintiff's] APA claim should be reviewed pursuant to Rule 12(b)(6) for failure to state a claim" and "the district court correctly dismissed").[5]

Moreover, when it is evident "from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff" even in a non-jurisdictional context. *Varner v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004). And even in Rule 12(b)(6) cases, the court may consider certain "materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp*., 186 F.3d 1077, 1079 (8th Cir. 1999) (internal citations and quotations omitted).

[4] *See also Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) ("[t]he 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed"); *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335-36 (11th Cir. 2006) ("[b]ecause section 2401[a] unambiguously imposes a six-year statute of limitations, our refusal to extend the application of the continuing [violation] doctrine comports with principles of sovereign immunity").

[5] *Accord Desuze v. Ammon*, 990 F.3d 264, 270 (2d Cir. 2021) (affirming district court's dismissal of APA claim under Rule 12(b)(6) because, "[u]nder a straightforward application of section 2401(a), the [plaintiffs'] claims are time-barred"); *Chance v. Zinke*, 898 F.3d 1025, 1035 (10th Cir. 2018) (remanding time-barred APA claim to the district court with instructions to dismiss under Rule 12(b)(6) for failure to state a claim).

ARGUMENT

I. PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE THEY ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

A. Plaintiffs' Claims First Accrued July 20, 2011 When the Final Rule Was Published in the Federal Register

As plaintiffs concede, the general federal six-year statute of limitations contained at 28 U.S.C. § 2401(a) applies to their claims. Compl. ¶ 26. Section 2401(a) provides in pertinent part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues," and this six-year limitations period applies to cases challenging final agency action under the APA. *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 758-59 (8th Cir. 2009) ("jurisdiction is limited to judicial review under the APA, which provides for review of 'final agency action,'" and "because the APA does not include its own statute of limitations, the general statute of limitations set forth in § 2401(a) applies" (internal quotations omitted)).

A claim against the United States must be brought within six years of when the claim *first* accrues, i.e., the date on which "'all of the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Izaak Walton*, 558 F.3d at 759 (quoting *Chandler v. U.S. Air Force*, 255 F.3d 919, 921 (8th Cir. 2001)) (internal citations omitted). Here, plaintiffs are mounting a facial challenge to the interchange fee provisions of the Final Rule, that is, they claim that those provisions exceed the Board's statutory authority under section 920 of EFTA and are invalid as to all, not simply as applied to the plaintiffs. *See* Compl. ¶ 18 ("Regulation II must be vacated and set aside because it exceeds the Board's statutory authority in three ways."). In the case of a facial challenge, a claim accrues as of the date of final agency action, typically the date the regulation was published in the Federal Register. *See Izaak*

Walton, 558 F.3d at 761 ("'The appearance of regulations in the Federal Register g[ives] legal notice of their content to all affected thereby.'" (quoting *United States v. Wiley's Cove Ranch*, 295 F.2d 436, 447 (8th Cir. 1961))); *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 682 (4th Cir. 2020) (when "plaintiffs bring a facial challenge to an agency [action] … the limitations period begins to run when the agency publishes the regulation" (internal quotations omitted)); *Comanche Nation of Okla. v. Zinke*, 754 Fed. App'x 768, 772 (10th Cir. 2018) ("[p]ublication in the Federal Register generally starts the limitations period for facial challenges"); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv*., 112 F.3d 1283, 1287 (5th Cir. 1997) (limitations period for a facial challenge to a regulation begins to run with publication in the Federal Register).

Here, plaintiffs' claims first accrued on July 20, 2011, the date that the Board published the Final Rule, including the interchange fee provisions, in the Federal Register. Compl. ¶ 27 ("the Board issued Regulation II in July 2011"). Not only did the Final Rule as published on that date contain all of the interchange fee cost components that plaintiffs now challenge,[6] but it is plain from the face of the Complaint that plaintiffs were aware of, and are challenging, the Final Rule as promulgated on that date.

As the Eighth Circuit explained in *Izaak Walton*, "a plaintiff's claim 'accrues' for purposes of § 2401(a) when the plaintiff 'either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim.'" 558 F.3d at 759 (quoting *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997)). Here, it is clear from the Complaint that plaintiffs have known of their claims since publication of the Final Rule on July 20, 2011. Indeed,

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[6] *Compare NACS*, 746 F.3d at 489-94 (reviewing and upholding Board's inclusion of fixed ACS costs, network processing fees, fraud losses, and transactions-monitoring costs in the interchange fee standard), *with* Compl. ¶¶ 66, 68, 71, 73, 85 (challenging Board's inclusion of those same four costs in the interchange fee standard).

plaintiffs had just submitted a comment letter to the Board along with others – including the National Association of Convenience Stores, National Retail Federation, and all of the other plaintiffs that subsequently sued the Board in the *NACS* case – on February 2, 2011, *see* Plaintiffs' 2011 Comment Letter, and were certainly aware that their claim had accrued when the Final Rule issued a few months later. As plaintiffs themselves frame their objection, "the rule has been anything but reasonable and proportional *since 2011*." Compl. ¶ 16 (emphasis added). Plaintiffs' challenge to the Final Rule therefore needed to be brought by July 20, 2017, six years after the Final Rule was published in the Federal Register. Plaintiffs' claims, which were filed nearly a decade after the Final Rule issued and few months shy of four years after the statute of limitations had already run, are plainly time-barred.

B. The Board's August 2015 Clarification of a "Minor" Portion of the Final Rule Did Not Cause New Claims to Accrue

Apparently recognizing that their suit is time-barred, plaintiffs attempt to shoehorn their untimely complaint into this Court's jurisdiction by arguing that their claims did not accrue at the time the Final Rule was first promulgated, but rather when the Board published the narrow August 2015 Clarification of its reasons for including transactions-monitoring costs in the base component of the interchange fee standard rather than the fraud prevention adjustment as required by the D.C. Circuit. Compl. ¶ 29 ("[t]his lawsuit is timely because it was filed within six years of the Board's issuing the Updated Rule"); *see also supra* pp. 10-11 (discussing August 2015 Clarification). Indeed, plaintiffs attempt to inflate the importance of the Clarification by calling it the "Updated Rule." Compl. ¶¶ 17, 28, 29, 55, 62, 64 *et seq*. However, section 2401(a) and Eighth Circuit precedent are clear that the six-year statute of limitations begins to run when a claim "*first*" accrues – that is, July 20, 2011, when the Final Rule was published – and not the date of the August 2015 Clarification. 28 U.S.C. § 2401(a) (emphasis added); *Izaak Walton*, 558 F.3d at 759. Indeed, under plaintiffs' own allegation that both "Regulation II and the Updated Rule are final agency action," Compl. ¶ 82 (citing 5 U.S.C. § 704), their claims *first* accrued when the Final Rule was initially published, not when the later in time Clarification (which made no substantive change to the Final Rule) issued.

Moreover, even a cursory examination of the August 2015 Clarification reveals that it is not an action for which new APA claims accrued to plaintiffs. The August 2015 Clarification did not amend, alter, revoke, or modify the interchange fee provisions of the Final Rule in any way. *Sisseton-Wahpeton Oyate*, 888 F.3d at 915 (a challengeable agency action "'must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,'" and must "inflict some legal injury upon the party seeking judicial review") (internal quotation omitted). Here, the August 2015 Clarification did not determine any new rights or obligations regarding the interchange fee standard, nor did it inflict any legal injury upon the plaintiffs. Rather, it simply provided more explanation of the Board's reasons for including one narrow component – transactions-monitoring costs – in the base component of the interchange fee standard rather than the separate fraud prevention adjustment. *See supra* pp. 9-11.

Indeed, transactions-monitoring costs – and *all* of the other costs that are currently included in the interchange fee provisions of the Final Rule that plaintiffs challenge – were included in the Final Rule as promulgated in 2011 and were not altered by the August 2015 Clarification. *Compare* Final Rule, 76 Fed. Reg. at 43,429 ("The Board has included in its establishment of the interchange fee standard the following types of costs from its issuer survey: total transactions processing costs (including costs reported as fixed and variable authorization, clearance, and settlement costs, network processing fees (*e.g.,* switch fees), and the costs of processing chargebacks and other non-routine transactions), transactions monitoring, and fraud losses"), *with* 80 Fed. Reg. at 48,684 ("The Board is explaining its treatment of transactions-monitoring costs in this Clarification."); *see also NACS*, 746 F.3d at 489-94 (reviewing costs included in interchange fee standard, including the four specific costs – fixed ACS costs, fraud losses, transactions-monitoring costs, and network processing fees – challenged by plaintiffs, *see* Compl. ¶¶ 65, 85). Under such circumstances, where the August 2015 Clarification created no new substantive rights or obligations, and inflicted no legal injury on the plaintiffs, no new claims accrued to plaintiffs as of the date of its publication. *See, e.g.*, *Sisseton-Wahpeton Oyate*, 888 F.3d at 915 (2010 letter from agency to plaintiff did not constitute challengeable agency action where letter ""applied the law at the time [the agency] issued the permit and exemption determinations … , did nothing to change [agency's] earlier decisions," and did "not determine the parties' rights or obligations or compel legal consequences").

Moreover, notwithstanding plaintiffs' claims that "Regulation II [w]as confirmed by the Updated Rule," *see, e.g.*, Compl. ¶¶ 75, 79, 80, 83, 86, the D.C. Circuit did not vacate the Final Rule and there was no need for it to be "confirmed" or reinstated by the Board by means of the Clarification or otherwise. *See supra* pp. 9-11. The NACS plaintiffs never sought review of the Clarification. And, even if the Clarification was independently challengeable by these plaintiffs, it could only feasibly apply to the inclusion of transactions-monitoring costs in the base component of the interchange fee standard, or to the Board's explanation on that point, and not to the broad challenge to *all* components of the base interchange fee provision that plaintiffs now bring.

Courts have thus consistently held that plaintiffs cannot use a lawsuit purportedly challenging an agency's mere clarification of prior agency action, which effected no substantive modification, as a vehicle to challenge the prior action after the time to do so has otherwise expired. *See, e.g., Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1087 n.14, 1088 (9th Cir. 2017) (alleged update to an agency decision that merely described measures required by the decision did not restart statute of limitations); *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 509 (5th Cir. 2016) (agency orders that "did little more than clarify" a prior order's directive were not independently challengeable by the plaintiff (citations omitted)); *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 589 (D.C. Cir. 2002) (explaining that if an agency action was "merely a 'clarification'" of prior agency action, then the petitioner was "not aggrieved by it") (citations omitted); *see also* 3 Charles H. Koch, Jr. and Richard Murphy, *Administrative Law & Practice* § 8:24 (3d ed. 2021) (agency clarification that does not result in an unforeseeable construction of the prior action affects no modification and thus does not reset the statute of limitations); 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 8367 (2d ed. 2021) (same). Here, the Board's 2015 action only clarified its reasoning for a discrete part of the rule, and did not effect a modification that might have reset the statute of limitations in some circumstances.

C. The Formation of New Merchants After July 20, 2011 Did Not Cause New Claims to Accrue

Plaintiffs also unpersuasively argue that their lawsuit is "timely because some of NDRA's or NDPMA's members were formed or began accepting regulated debit cards within six years of the date this suit was filed." Compl. ¶ 30. The Complaint alleges, "[f]or example," that "Corner Post opened its doors for business in March 2018 and began accepting debit cards from covered issuers that same month," which "was the point at which the Corner Post began to be 'adversely affected or aggrieved' by Regulation II." *Id*.

However, plaintiffs' claim that they timely filed due to the formation of new merchants in the years after the Final Rule ignores the fact that other retailers, marketers, and merchants –

including plaintiffs' own members – were and have been subject to the Final Rule since it was first promulgated on July 20, 2011. Compl. ¶¶ 19-21 (describing plaintiffs' members); Plaintiffs' 2011 Comment Letter. Plaintiffs provide no precedent or explanation as to why their claim would accrue on the date of formation (or the first day of business) of the *last-added member*, rather than when the Final Rule was published and plaintiffs' members first became subject to the interchange fee, thus allowing *plaintiffs* to bring suit. Indeed, their assertion is directly contrary to Eighth Circuit precedent and the statutory language of section 2401(a).

The express language of section 2401(a) makes clear that a "civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action *first* accrues." 28 U.S.C. § 2401(a) (emphasis added); *accord Izaak Walton*, 558 F.3d at 759; *Konecny*, 388 F.2d at 65 (FTCA and Tucker Act claim against the United States must be brought within six years of when the cause of action "*first accrue[d]*" (emphasis added)). Thus, the statutory language of section 2401(a), as well as Eighth Circuit precedent, make plain that the applicable limitations period for facial APA challenges is measured from the date of first accrual, here, the date the Final Rule was published in the Federal Register, and not some other subsequent event. *See supra* pp. 14-15. Indeed, plaintiffs in this case are suing as representatives of their members, *see* Compl. ¶ 22 (claiming associational standing), and clearly recognized that the Final Rule could impact at least some of those members when they joined the industry comments submitted to the Board during the rulemaking process. *See* Plaintiffs' 2011 Comment Letter.

Moreover, plaintiffs' theory is inconsistent with existing case law, and for good reason. If an industry association's time-barred APA claim raising a facial challenge to agency action could be revived simply by the addition of a recently-incorporated member to its ranks, the statute of limitations would carry no force. As a result, a number of courts have rejected claims similar to the plaintiffs'. *See Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 437 (D.C. Cir. 1989) (refusing to permit an industry association to "undercut a deliberate congressional choice to impose statutory finality on agency orders" by asserting standing based on the addition of new members not previously subject to agency action) (internal citations and quotations omitted); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (finding a facial challenge to a 1969 agency action restricting firearms sales untimely despite the plaintiffs' claim that they only became federal firearms dealers subject to the rule in 2008); *Harris v. FAA*, 353 F.3d 1006, 1010-12 (D.C. Cir. 2004) (rejecting as time-barred air traffic controllers' challenge to an FAA regulation and holding that section 2401(a)'s six-year statute of limitations began to run when the FAA published the regulation in the Federal Register, not when the individual air traffic controllers affected by the regulation were hired); *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1365-66 (9th Cir. 1990) ("[i]n order … to sustain a challenge to the legal sufficiency of a government land withdrawal, a party must make a showing that it has standing *and* that the cause of action was filed within six years of the publication of the withdrawal in the Federal Register" (emphasis in original)); *Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d 96, 104 (D.D.C. 2014) (rejecting theory that statute of limitations had not run because "each time EPA publishes the NCP Product Schedule or lists a new product, it is taking final agency action that is subject to judicial review," and holding instead that "the decision being challenged here is EPA's deliberate decision, as spelled out in the 1984 rule, not to pre-specify waters and quantities for use for each product listed").[7]

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[7] Plaintiffs cite the Sixth Circuit's decision in *Herr v. U.S. Forest Service*, 803 F.3d 809, 818-19 (6th Cir. 2015), and the Eighth Circuit's decision in *Sisseton-Wahpeton Oyate*, 888 F.3d at 917, for the proposition that Corner Post became "adversely affected" or "aggrieved" by Regulation II when it first opened its doors for business in March 2018. Compl. ¶ 30. However, *Herr*

Finally, the Eighth Circuit has held that "the continuing violation doctrine does not apply" in the circumstances presented here. *Izaak Walton,* 558 F.3d at 761; *see also id.* at 759 (rejecting theory, advanced by plaintiff in the context of section 2401(a), that "each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times") (internal quotations omitted). Rather, the Eighth Circuit in *Izaak Walton* held that the APA challenge accrued as of the date that the agency "published in the Federal Register the legal description" in question. *Id.* at 761; *see also Konecny*, 388 F.2d at 65 ("a cause of action accrues *as soon as* the right to institute and maintain a suit arises," and repeated flooding of plaintiff's property by a United States dam does not result in accrual of a new cause of action (citing 54 C.J.S. Limitations of Actions § 109) (emphasis added)). So too here. Plaintiffs cannot escape the fact that their facial challenge to the interchange fee provisions of the Final Rule first accrued on July 20, 2011, not at some later date, and that their lawsuit is therefore time-barred under the six-year statute of limitations of section 2401(a).

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involved an as-applied challenge to a Forest Service regulation by property owners seeking "to enjoin the Forest Service from enforcing the motorboat restriction against them." 803 F.3d at 813. By contrast, plaintiffs here seek a facial declaration that the Final Rule was invalid from its inception, and not simply an injunction against application of the interchange fee provisions to the Corner Store. Their claims therefore accrued on July 20, 2011, when the Final Rule was published in the Federal Register and allegedly aggrieved at least some of its membership, and not in 2018 when the Corner Store opened for business. *See supra* pp. 14-16. Similarly, the Eighth Circuit's decision in *Sisseton-Wahpeton Oyate*, in which it declined to reconsider its longstanding precedent that statutes of limitation are jurisdictional in cases against the government, does not address the particular issue for which it is cited in the Complaint or otherwise support plaintiffs' claims here. 888 F.3d at 917 and n.4.

II. ALTERNATIVELY, THE COURT SHOULD TRANSFER THE CASE TO THE FORUM OF THE PRIOR RELATED *NACS* LITIGATION

In the alternative, the Board respectfully requests that the Court transfer this action to the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a).[8]

Transfer is particularly appropriate in this case because the Complaint raises virtually identical claims to those that were fully litigated in the U.S. District Court for the District of Columbia and appealed to the D.C. Circuit, which, as discussed, ordered a limited remand for additional clarification by the Board on one narrow issue without vacating any part of the Final Rule. *See supra* pp. 9-10. The D.C. Circuit is thus already familiar with the issues and the positions of the various stakeholders. And the effects of its decision are directly at issue in this action, both because it appears that the *NACS* decision subjects plaintiffs to *res judicata* given their relationships with institutional parties to the prior action, and because plaintiffs argue that they are challenging the Final Rule as clarified on remand from, and by direction of, the D.C. Circuit. *See* Compl. ¶¶ 26-29. Indeed, to the extent that this action is not dismissed on timeliness grounds, the Board anticipates pursuing the question of whether plaintiffs (whose counsel is an employee in Washington, D.C. of one of the institutional litigants to the prior action, *see* Compl. at 37), and the prior institutional litigants (who claimed to represent, *inter alia*, numerous unidentified state retail associations, *see* NACS Complaint ¶ 17), are related such that plaintiffs are bound by the prior judgment, and adjudication of this issue would require application of D.C. Circuit preclusion law.[9] *See Corrado v. Life Invs. Ins. Co. of Am.*, 804 F.3d

[8]Although the Court must have subject-matter jurisdiction in order to transfer a case under section 1404(a), whether the timeliness issue remains jurisdictional is in question. *See supra* pp. 12-13. And, even if the Court were to determine that it does have jurisdiction and not dismiss, transfer would be appropriate for the reasons discussed below.

[9] The Board is not raising the preclusion argument in this motion brought under Federal Rule of Civil Procedure 12 because it expects to rely on materials that are not publicly available.

915, 917 (8th Cir. 2015) (courts must apply the preclusion law of the circuit that adjudicated a prior federal-question case in order to determine the preclusive effect of the prior judgement).

A. Transfer Standard

Section 1404(a) states that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). As long as venue is also proper in the transferee district, section 1404(a) permits transfer to a more convenient forum, notwithstanding that a plaintiff has sued in an appropriate forum. *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (citations omitted). There is no "exhaustive list of specific factors to consider," and courts must weigh "case-specific factors" in ruling on a transfer motion. *Id.* (citations omitted). In addition to considering private factors such as burdens on the parties and where the controversy arose, courts consider factors such as judicial economy in determining whether transfer is in the "interest of justice." *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 696 (8th Cir. 1997). The court is vested with discretion in the matter and conducts an "individualized, case-by-case consideration" of the relevant factors. *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). The party seeking transfer generally bears the burden of demonstrating that transfer is warranted, but the weight of that burden depends on how much emphasis the circumstances justify giving to the plaintiff's choice of forum. *In re Apple*, 602 F.3d at 913.

B. Venue Is Proper in the District of Columbia

As a threshold matter, in order to transfer an action, the Court must find that the action "might have been brought" in the transferee forum, i.e., venue is proper in the transferee court. 28 U.S.C. § 1404(a); *Caleshu v. Wangelin*, 549 F.2d 93, 96 n.4 (8th Cir. 1977). Here, because the challenged rule was promulgated by the Board, which is located in the District of Columbia, and the Board's decision-making process occurred in that district, this suit could have been brought there. *See* 12 U.S.C. § 241 (Board's principal offices located in the District of Columbia); 28 U.S.C. § 1391(e)(1)(A)-(B) (suits against a defendant agency may be brought where the defendant resides or "a substantial part of the events or omissions giving rise to the claim occurred"); *Reilly v. United States*, 93 Fed. Cl. 643, 653 (Fed. Cl. 2010) ("[t]he statute governing the selection of venue for APA actions, 28 U.S.C. § 1391(e), indicates that venue in [the U.S. District Court for the District of Columbia] is proper" and granting request for transfer to that district); *Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 267 n.6, 268 (7th Cir. 1978) (where an agency headquartered in the District of Columbia engaged in the administrative process in that district, both the defendant's residence and the location where a substantial part of the events giving rise to a suit challenging that process were in the District of Columbia).

C. Transfer Would Be Convenient to the Parties and Witnesses

In weighing convenience, courts typically consider "(1) the convenience of the parties, (2) the convenience of the witnesses—including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony, (3) the accessibility to records and documents, (4) the location where the conduct complained of occurred, and (5) the applicability of each forum state's substantive law." *Terra Int'l*, 119 F.3d at 696.

Since this is an APA suit where the merits are adjudicated on the agency record, considerations of witness convenience and access to sources of proof are neutral or tilt slightly in favor of transfer to the District of Columbia where the record is kept. *See Missouri ex rel. Schmitt v. United States Dep't of the Interior-Bureau of Reclamation*, No. 2:20-CV-4018-NKL, 2020 WL 3051608, at *3 (W.D. Mo. June 8, 2020) (discussing irrelevance of most convenience factors in APA suit); *Hoban v. FDA*, No. CV 18-269 (JNE/LIB), 2018 WL 3122341, at *2

(D. Minn. June 26, 2018) (finding that, even in the era of electronic filing, "the location of the record in the District of Columbia . . . carries some small weight" in favor of transfer of an APA suit (citing *In re Apple*, 602 F.3d at 914)). With respect to the parties' convenience, the only party represented by in-house employees is the Board, and all parties have counsel in Washington, D.C., which weighs in small measure on the side of transfer. *See Hoban*, 2018 WL 3122341, at *2 (noting reduced costs to the parties when all parties have counsel in the region of the transferee court); *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, No. 12-CV-3085-AP, 2013 WL 136204, at *4 (D. Colo. Jan. 9, 2013). And, to the extent any extra-record material concerning the relationship between plaintiffs and the NACS institutional plaintiffs is necessary to adjudicate the Board's contention that a sufficient relationship exists between these parties for purposes of preclusion, these considerations are neutral because while plaintiffs are based in this district, the more numerous institutional NACS plaintiffs are based in Washington, D.C. and its suburb of Arlington, Virginia. *See* NACS Complaint ¶¶ 15, 17, 19.

Finally, the fact that the rulemaking in question occurred in the District of Columbia weighs in favor of transfer.[10] *In re Apple*, 602 F.3d at 914-915 (case should have been transferred to district housing defendant's corporate headquarters, where alleged misconduct asserted to have had worldwide impacts had originated); *see also Schmitt*, 2020 WL 3051608, at *4 (W.D. Mo. June 8, 2020) (noting that the transfer analysis in cases brought under the APA focuses "on where the decisionmaking process occurred to determine where the claims arose … [w]here the decisionmaking process was concentrated in a particular city or state, courts have found this factor to weigh heavily in the transfer analysis"); *Sierra Club v. U.S. Defense Energy*

[10] The applicability of each forum state's substantive law is not a relevant consideration because this case is brought under federal law, but as described *infra* pp. 29-30, the deciding court will have to apply D.C. Circuit caselaw to adjudicate the Board's defense that this suit is barred by *res judicata*, which weighs in favor of transfer.

Support Ctr., No. C 10–02673 JSW, 2011 WL 89644, at *2 n.1 (N.D. Cal. Jan. 11, 2011) (APA suit challenging Defense Department action with nationwide effects not limited to the plaintiffs' chosen venue was transferred to the district housing the Pentagon, where the challenged agency action was formulated).

D. Transfer Is in the Interest of Justice

More importantly, the prior involvement of the U.S. District and Circuit Courts for the District of Columbia in a related action adjudicating the same issues weighs heavily in favor of a transfer in the interest of justice, as do related factors. Factors typically considered relevant to the "interest of justice" are "(1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law." *Terra Int'l, Inc.*, 119 F.3d at 696 (citations omitted).

While some of these factors are inapplicable to the instant action,[11] and cost considerations tilt slightly in favor of transfer due to the location of the parties' counsel,[12] considerations of judicial economy overwhelmingly favor transfer due primarily to the prior litigation in the District of Columbia considering the same issues (which also impacts the last

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[11] The ability to enforce a judgment and obtain a fair trial are typically not at issue in actions against federal agencies brought under the Administrative Procedure Act. *See, e.g.*, *Clean Air Carolina v. N. Carolina Dep't of Transp.*, No. 3:14-CV-338-GCM, 2014 WL 6387656, at *2 (W.D.N.C. Nov. 14, 2014).

[12] Costs are potentially reduced through litigation of this action in the District of Columbia due to the presence of counsel to all the parties in Washington or its suburb of Arlington, Virginia. *See Hoban*, 2018 WL 3122341, at *2 (finding that consideration of costs favored transfer in a rulemaking challenge where all parties had counsel in the transferee district but not in the transferor district); *Sierra Club*, 2011 WL 89644, at *2 n.1 (noting, in a case seeking review on an agency record, that location of counsel for all parties near the transferee district would result in lower costs should the court need to hold any hearings).

two factors). *See Regents of the Univ. of California v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (affirming transfer due to transferee court's familiarity with the issues raised in a case because "[c]onsideration of the interest of justice, which includes judicial economy, may be determinative to a particular transfer motion" (citing *Allen v. Scribner*, 812 F.2d 426, 436–37 (9th Cir. 1987); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220–21 (7th Cir.1986); and *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir.1979)) (internal quotations omitted)). And plaintiffs' choice of forum is entitled to less deference than it might otherwise receive because the agency action they challenge is the promulgation of a nationwide rule in the District of Columbia rather than in this District.

Transfer to a jurisdiction that is already familiar with the issues in this case because it has adjudicated virtually identical claims through the appellate level, and whose rulings are at issue in this action with respect to their *res judicata* effect and the import of the limited remand order, would promote judicial economy. *See Liquor Salesmen's Union Loc. 2 of State of NY v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981) ("whether one circuit is more familiar with the same parties and issues or related issues than other courts" is relevant to consideration of the interest of justice); *Mandan, Hidatsa & Arikara Nation v. U.S. Dep't of the Interior*, 358 F. Supp. 3d 1, 9-10 (D.D.C. 2019); *Mountain W. Mines, Inc. v. Cleveland-Cliffs Inc.*, No. 1:08-CV-01929, 2009 WL 10664229, at *3 (N.D. Ohio Feb. 13, 2009) (transfer was in the interest of justice because "[t]he District of Wyoming and the Tenth Circuit are substantially more familiar with the parties, facts, and issues than either this court or the Sixth Circuit" due to prior District of Wyoming litigation that has resulted in an appeal).

This factor weighs especially heavily, where, as here, the litigation turns in part on the scope of a remand order issued by the D.C. Circuit and the preclusive effect of its ruling. Courts are especially likely to grant an agency's request to transfer cases to jurisdictions that have issued prior remand orders relating to the agency action being challenged by the plaintiff, as is the case here. *See, e.g.*, *WildEarth Guardians*, 2013 WL 136204, at *4. Similarly, courts have found transfer appropriate to a forum that litigated a prior controversy when the preclusive effect of its prior determination is at issue. *See, e.g.*, *Shelby v. Factory Five Racing, Inc.*, No. CV08-7881 CAS (JTLx), 2009 WL 481555, at *3-4 (C.D. Cal. Feb. 23, 2009) (transferring action to court that had previously adjudicated a prior suit where its preclusive effect was contested by the parties); *Mountain W. Mines, Inc.*, 2009 WL 10664229, at *3 (same).[13] Transfer is especially appropriate here because D.C. Circuit law would determine the preclusive effect of the *NACS* ruling, *Corrado*, 804 F.3d at 917, and it furthers judicial economy to have the court that must routinely apply that circuit's precedents address the issue.

Further, the controlling nature of D.C. Circuit law in addressing the *res judicata* effect of the *NACS* ruling means that conflict of law issues and the advantages of having a local court determine questions of local law also make transfer in the interest of justice. Such issues are often not relevant to a case arising under federal law, *United States v. Vision Quest Indus*., *Inc.*, No. CV 20-2365 (MJD/KMM), 2021 WL 2143138, at *5 (D. Minn. May 26, 2021), "because 'the federal courts comprise a single system in which each tribunal endeavors to apply a single body of law.'" *Flick v. Sessions*, 298 F. Supp. 3d 205, 207 (D.D.C. 2018) (citation omitted).

[13] Moreover, judicial economy would be furthered by transfer because there are, on average, 20% more pending cases assigned to judges in this District. *See* Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile, at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2021.pdf (last visited July 1, 2021) at 2, 62 (464 pending cases per judge in this District, as opposed to 387 pending cases per judge in the District of Columbia); *cf. In re Apple*, 602 F.3d at 915 (although a more crowded docket is not in itself dispositive, it can be relevant to consideration of a Section 1404(a) motion (citing *Terra Int'l*, 119 F.3d at 696)).

However, when adjudicating *res judicata* matters relating to a prior federal question suit, the deciding court must "look to the preclusion law of the [deciding] Circuit." *Corrado*, 804 F.3d at 917. Moreover, "the D.C. Circuit appears not to have grappled with [the] issue" of preclusion based on representation by an association, *Cigar Ass'n of Am. v. FDA*, 436 F. Supp. 3d 70, 82 (D.D.C. 2020), and not transferring this case could require this Court and the Eighth Circuit to predict how a different circuit would rule on the issue, and thus makes transfer especially appropriate to a circuit that is most familiar with its own precedents and can conclusively decide the issue. *Cf. Liberty Mut. Ins. Co. v. Fairbanks Co.*, 17 F. Supp. 3d 385, 398 (S.D.N.Y. 2014) (preference for transfer to court familiar with governing law "assumes added significance when the governing law . . . is 'shown to be unclear, unsettled or difficult'" (citation omitted)); *Dalton v. 3M Co.*, No. 10-00114, 2011 WL 5881011, at *1 (E.D. Pa. Aug. 2, 2011) (indicating that transfer to the District of Mississippi under section 1404(a) is appropriate in a case potentially requiring an *Erie* prediction of how Mississippi courts would rule on an undecided issue).

In contrast, plaintiffs' choice of forum is entitled to less weight because the suit arose from actions taken in the District of Columbia rather than in this District and because these actions do not have a particularized impact in this District over any other; in fact, the entities whose conduct is most directly impacted by the aspects of the Final Rule that plaintiffs challenge are large financial institutions,[14] none of which are based in this District, and merchants, which are located nationwide. The weight given to a plaintiff's choice of forum varies based on the extent to which a "relevant connection exists" between the parties, the dispute, and a plaintiff's

[14] The rule in question applies only to financial institutions whose assets together with those of their affiliates are valued at $10 billion or more. *See* 12 C.F.R. § 235.5(a)(1)(ii). No such entities are based in this District. *See* Bd. of Governors of the Fed. Res. Sys., Institutions Not Exempt from the Debit Card Interchange Standards, *at* https://www.federalreserve.gov/paymentsystems/files/debitfees_nonexempt.pdf (last visited July 1, 2021).

chosen forum. *In re Apple*, 602 F.3d at 913. Consequently, it "garners less weight where, as here, the claims alleged in the action do not arise in the forum state." *Klatte v. Buckman, Buckman & Reid, Inc.*, 995 F. Supp. 2d 951, 957 (D. Minn. 2014) (citations omitted); *accord Green Plains Trade Grp. LLC v. Archer Daniels Midland Co.*, No. 8:20CV279, 2020 WL 6544289, at *4 (D. Neb. Nov. 6, 2020) (same); *see also Chicago, R.I. & P.R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955) (plaintiff's choice is entitled to "minimal value" where "none of the conduct complained of occurred in the forum selected by the plaintiff" (citations omitted)); *Boyd v. Snyder*, 44 F. Supp. 2d 966, 970 (N.D. Ill. 1999) ("When the conduct and events giving rise to the cause of action did not take place in the plaintiff's selected forum, the plaintiff's preference has minimal value even if it is his home forum." (internal citations and quotations omitted)); *Kafack v. Primerica Life Ins. Co.*, 934 F. Supp. 3, 6-7 (D.D.C. 1996) (same). This is especially so when, as in this case, the complained-of conduct both occurred elsewhere and also concerns nationwide policies. *See Alec L. v. Jackson*, No. C-11-2203 EMC, 2011 WL 8583134, at *2–3 (N.D. Cal. Dec. 6, 2011) (giving "little weight" to plaintiffs' choice of forum where the operative facts relating to governmental decision-making processes took place in the transferee district and concerned policies whose effect was felt nationwide).[15]

Transfer is in the interest of justice as a result.

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[15] Plaintiffs' preferred venue is also given less weight where, as here, the plaintiff is suing in a representative capacity. *Deutsch v. Purdue Pharma Co.*, No. 4:04 CV 354 JCH, 2004 WL 1179337, at *2 (E.D. Mo. May 27, 2004); *see also Williams v. WinCo Foods, LLC*, No. 2:12-CV-02690-KJM-EFB, 2013 WL 211246, at *3 (E.D. Cal. Jan. 10, 2013) (citations omitted); *accord Boyd*, 44 F. Supp. 2d at 969 (citation omitted).

CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that the case be dismissed as untimely or, in the alternative, transferred to the United States District Court for the District of Columbia for further proceedings.

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Respectfully submitted,

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