EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

BRIEF OF RESTAURANT LAW CENTER, ILLINOIS RESTAURANT ASSOCIATION AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets that represent a broad and diverse group of owners and operators—from large national outfits and franchisors with hundreds of locations and billions in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. In 2023, restaurants contributed nearly $1 trillion to the national economy.

Amicus Illinois Restaurant Association is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 participants statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry, which includes more than 25,000 owners and operators, and employs hundreds of thousands across the state. The Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for members' interests

Amicus the Retail Litigation Center, Inc. is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The Retail Litigation Center is the only trade organization solely dedicated to representing the retail industry in the courts. The Retail Litigation Center's members employ millions of people throughout the U.S., provide goods and services to tens of

[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

double taxation, forcing businesses to pay fees on money that they receive solely as a pass-through and which isn't even theirs to keep. For a typical family-owned restaurant with $1 million in annual revenue, this unjust system can siphon over $5,000 per year, further eroding already razor-thin profit margins and adding yet another cost amid an already difficult operating environment.

The burden of these exorbitant fees falls on consumers and workers, too. Businesses with low profit margins are sometimes forced to pass on the costs of these fees to customers through higher prices or surcharges, or to workers by reducing tips by the amount of fees. The cost is real: the average American family lost over $1,000 to credit card swipe fees in 2022 alone. And for workers in the service industry, these fees not only effectively reduce their hard-earned tips, but also threaten to tamp down demand and in turn reduce job opportunities.

Meanwhile, estimates suggest that high-volume issuers make an 80% profit margin on interchange fees, while continuing to report record profits. That is powerful evidence that these high fees are not necessary, and that they merely operate as a vehicle to redistribute hard-earned money from businesses, consumers, and workers to well-off banks and credit card companies. Eliminating these unjust fees, particularly on taxes and gratuities, is not just a commonsense solution—it is a critical measure to help alleviate the weighty financial burden of wasteful and unnecessary fees on businesses, consumers, and workers alike.

ARGUMENT

I. The Payment Ecosystem Is Broken and Badly in Need of Reform.

A peek behind the curtain of the card payment ecosystem shines light on the purpose and importance of the Interchange Fee Prohibition Act. An interchange fee is the amount paid by a merchant to bank that issued the consumer's credit or debit card for every single transaction in which a consumer uses its card. This fee is one of several fees that a restaurant or retailer, like other merchants, pays simply to perform every card transaction. In addition to the interchange fees, merchants must pay a fee (a "network fee" to the card network that facilitates each transaction and another fee (an "acquirer fee") to the merchant's bank. Together, these "swipe fees" can total over 4% of any given purchase for credit card payments, the bulk of which consists of the interchange fee. For debit cards, the percentage of a purchase that the merchant must pay can be substantially above 4% because of the significant base rates charged on each purchase, regardless of the amount processed.

There are currently *no* federal laws or regulations that govern the cost of credit card transactions within the U.S. payments ecosystem. This regulatory vacuum has enabled card networks to charge U.S. merchants the highest interchange fees in the industrialized world—as much as 4% of the total transaction amount, including taxes and gratuities (except under the Interchange Fee Prohibition Act).[2] Many other industrialized nations have capped interchange fees at a small fraction of that rate, including 0.3% in Europe,[3] 0.5% in Australia,[4] and 0.95% in Canada.[5] Interchange fee rates charged by virtually every one of the hundreds of banks that issue credit cards are dictated by two dominant card companies—Visa and Mastercard. These giants wield a duopoly in the credit card market, collectively controlling over 80%, so instead of competing to offer the lowest swipe fees, they essentially compete to set the *highest* swipe fees; higher rates mean more revenue for the banks, encouraging them to issue cards from whichever card network has the more lucrative fees.[6] Visa

[2] Nilson Report, Issue 1237, March 2023, "Fees Paid by Merchants in the U.S. – 2022," *available at* https://nilsonreport.com/newsletters/1237/.

[3] CMS, EU Cap on Interchange Fees for Card-Based Payments (Feb. 2016), *available at* https://cms.law/en/bgr/publication/eu-cap-on-interchange-fees-for-card-based-payments201.

[4] Reserve Bank of Australia, Questions & Answers: Card Payments Regulation, *available at* https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/q-and-a/card-payments-regulation-qa-conclusions-paper.html#interchange-fees-q3.

[5] Government of Canada, Government of Canada announced finalized agreements with Visa and Mastercard to lower credit card transaction fees for small businesses (Dec. 5, 2023), *available at* https://www.canada.ca/en/innovation-science-economic-development/news/2023/12/government-of-canada-announces-finalized-agreements-with-visa-and-mastercard-to-lower-credit-card-transaction-fees-for-small-businesses.html.

[6] Board of Governors of the Federal Reserve System, Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions (Nov. 2020), at 7, *available at* https:// www.federalreserve.gov/publications/files/ccprofit2020.pdf.

typically charges the highest credit card interchange fees, currently at a rate of 3.15% of total transaction amount (plus a flat fee per transaction).[7]

Visa, in particular, also collects substantial interchange fees in the debit card market, in which, just a few weeks ago, it was sued by the Antitrust Division of the U.S. Department of Justice for maintaining an illegal monopoly.[8]

The costs of credit and debit swipe fees are mind boggling. In 2022, U.S. merchants paid *$160.7 billion* in swipe fees for all credit and debit card transactions, and *$93.2 billion* in swipe fees on Visa- and Mastercard-branded credit card transactions alone.[9] The amount of total swipe fees in 2022 was up more than 16% compared to 2021, which was itself up more than 25% compared to 2020—an indication of the extent to which card transactions (and, thus, swipe fees) exploded during the pandemic.[10]

The plaintiffs allege that interchange fees "are critical to the card payment processing system," and even "vital to the modern economy," "because they compensate . . . for the costs and risk associated with" credit and debit card transactions. Compl. ¶¶ 2, 53, ECF No. 1. But the prevailing interchanges rates far exceed the costs issuers actually incur to process the overwhelming majority of transactions. Processing costs cannot possibly reach 2-4% of transaction value.[11] Indeed, by one estimate, high-volume issuers make a profit margin of more than 80% on interchange fees.[12] Further,

[7] Wells Fargo, Payment Network Qualification Matrix (Apr. 2024), *available at* http://wellsfargo.com/interchangeplus.

[8] *See generally* Complaint, *United States of America v. Visa, Inc.*, No. 1:24-cv-7214 (S.D.N.Y. Sept. 24, 2024), ECF No. 1.

[9] Nilson Report, *supra* note 2.

[10] *Id.*

[11] Vladimir Mukharlyamov & Natasha Sarin, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers*, Faculty Scholarship at Penn Law 3 (2019).

[12] Letter from Retail Industry Leaders Association to Ann E. Misback (May 10, 2024), *available at* https://www.rila.org/getmedia/79f566d3-f21a-418f-90a8-e9f07a6d9f85/RILA-Comments-Debit-Card-Interchange-Fees-Routing-Docket-No-R-1818-RIN-7100-AG67.pdf.

processing costs do not generally increase linearly with the amount of the transaction; the cost of processing a $100 transaction is not 100 times the cost of processing a $1 transaction.[13] And again, the fact that U.S. interchange fees are considerably higher than rates in other industrialized nations demonstrates that credit and debit card issuers are not merely recouping their costs, but rather exploiting market power and a regulatory void.

What is more, banks issuing Visa or Mastercard amassed an average 30% overall profit margin just last year, compared to a market average of 8.54%, and an average pre-tax margin of just 3-5% for a typical restaurant.[14] Issuers' grievances about the relatively modest reduction in interchange fees that would result from excluding the portion of a transaction attributable to taxes and gratuities for sales in Illinois are thus significantly overstated, and reform to the payment ecosystem is sorely needed.

II. The Interchange Fee Prohibition Act Provides Important Benefits for Businesses, Consumers, and Workers.

Against the backdrop of this broken system, Illinois adopted the Interchange Fee Prohibition Act. The Act is designed to save merchants like restaurant operators and retailers millions of dollars in unnecessarily elevated interchanges fees—for the benefit of businesses, consumers, and workers. And the Act's main prohibition—charging interchange fees on the portion of a transaction attributable to taxes or gratuities—adopts a common-sense rule to address market gaps and prevent exploitation.

A. The Act Saves Money for Restaurants and Retailers, a Lifeblood of the Economy, at a Critical Time When Costs Are Soaring.

The restaurant and foodservice industry is the lifeblood of the Illinois economy. In 2023, the industry accounted for an estimated $42.6 billion in sales across 26,543 locations.[15] Consumer

[13] Mukharlyamov & Sarin, *supra* note 11, at 3.

[14] *See* Nilson Report, *supra* note 2; Margins by Sector, *available at* https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.

[15] National Restaurant Association, Illinois Restaurant Industry at a Glance (2023), *available at* https://restaurant.org/research-and-media/research/industry-statistics/illinois-state-fact-sheet/.

spending at restaurants has a multiplier effect: every dollar spent at table-service restaurants returns approximately $2.30 to the state's economy.[16] Restaurants are also the second-largest private employer in the State, with an estimated 586,100 restaurant and foodservice jobs.[17]

Beyond their economic value, restaurants are cultural centers that create unique neighborhood identities and drive commercial revitalization. Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish."[18] That is especially so for the many small (often family-owned) restaurants that make up the vast majority of the industry. Restaurants are "a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area."[19] And the restaurant industry remains a shining example of upward mobility and empowerment for historically disadvantaged communities. Eight in ten restaurant owners say their first job in the industry was an entry-level position.[20] Even more restaurant managers say the same.[21] More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and to own their own businesses.[22]

Similarly, retail is a driving force of the Illinois economy, employing 1 out of every 5 people in Illinois.[23] With over 163,000 retail establishments in the state as of 2022, the industry has a $211.9

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[16] *Id.*

[17] *Id.*

[18] *LMP Servs., Inc. v. City of Chi.*, 2019 IL 123123, ¶ 18.

[19] *Id.*

[20] National Restaurant Association *National Statistics: Restaurant Industry Facts at a Glance,* https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/ (last accessed Oct. 4, 2024).

[21] *Id.*

[22] *Id.*; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

[23] Illinois Retail Merchants Association, https://irma.org/who-we-are/ (last accessed Oct. 3, 2024).

billion total impact on the state's GDP and $83.8 billion **direct** impact on GDP.[24] As the co-founder of one small retailer poignantly described, swipe fees can "be the difference between a business making it or losing it."[25]

Despite the importance of both the restaurant and retail industries, many businesses struggle to get by because of thin profit margins, shifting demand, and increasing costs. Interchange fees are to blame, in part. Swipe fees are one of the *highest costs* that restaurants incur—often just behind food and labor. Swipe fees have become the second highest cost after labor for some retailers.[26] Just last year, Illinois restaurants and other merchants paid banks and credit card companies *$354 million* in interchange rates on sales taxes alone.[27] Nationwide, interchange fees charged on state and local taxes cost businesses an estimated $7.4 billion annually.[28] And given that American diners tip about 18% on average, more than double the average sales tax rate, it stands to reason that merchants pay even more in interchange fees on gratuities.[29] A single restaurant with $1 million in credit and debit card revenue will spend around $23,000 in swipe fees per year, nearly half the typical profit margin on that amount of revenue. That is a particularly sizeable amount in an industry where the vast majority of businesses are small (95% of Illinois restaurants have fewer than 50 employees[30]) and may yield profits that hardly exceed the amount of swipe fees.

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[24] Retail's Impact in Illinois, *available at* https://5447ef72a1918787c638-f401d17819b7723bf503905fe6b22b93.ssl.cf1.rackcdn.com/pdf/Retail%E2%80%99s%20Impact%20in%20Illinois.pdf (last accessed Oct. 3, 2024).

[25] Illinois poll shows consumers support banning fees for credit card swipes (Sept. 25, 2024), *available at* https://www.wifr.com/2024/09/25/illinois-poll-shows-consumers-support-banning-fees-credit-card-swipes/.

[26] Vladimir Mukharlyamov and Natasha Sarin, *The Impact of the Durbin Amendment on Banks, Merchants, and Consumers*, Faculty Scholarship at Penn Law 4 & 5 (2019).

[27] National Restaurant Association, Illinois Restaurant Industry at a Glance, *supra* note 15.

[28] *Id.*

[29] *See* USA Today, Tipping statistics in the United States for 2024 (Feb. 5, 2024), *available at* https://www.usatoday.com/money/blueprint/credit-cards/tipping-statistics-in-the-us/.

[30] National Restaurant Association, Illinois Restaurant Industry at a Glance, *supra* note 15.

The high cost of interchange fees are only going higher. Today, an estimated 7 in 10 restaurant transactions are paid by customers using either a credit or debit card, up from less than 5 in 10 a decade ago. Furthermore, card networks keep raising fees as card transactions become more popular, exploiting society's increasing shift from cash or checks (for which restaurants do not charge fees, and may even offer discounts). Visa and Mastercard combined have raised or created new fees at least *40 times* since 2011, including to the tune of nearly $2 billion since 2022 alone, notwithstanding concerns about inflation and pleas not to increase fees again.[31]

This surge in interchange fees comes at an especially tough time for restaurants. Food and labor costs *each* are up by approximately 30% in the last four years, and utility, occupancy, and other costs are up by double-digit percentages as well.[32] Wages are up by more than 10% in recent years too, including in Illinois.[33] And just this year, Chicago raised the minimum tipped wage 8%, which it will do every year for the next five years as part of a plan to phase out the tip credit and equalize the tipped minimum wage with the standard minimum wage—which Chicago *also* raised.[34] Given these rising costs, a typical restaurant with $1.5 million in annual revenue now stands to *lose* nearly $300,000, or nearly 20% of revenue, compared to making $45,000 (5% of revenue) in 2019.[35] That does not even count the approximately $25,000 annual swipe fees a restaurant with that amount of

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[31] Merchants Payments Coalition, Mastercard Plans to Raise Credit and Debit Fees by Over $250 Million Despite Settlement (Apr. 3, 2024), *available at* https://merchantspaymentscoalition.com/mastercard-plans-raise-credit-and-debit-card-fees-over-250-million-despite-settlement.

[32] *See* National Restaurant Association, Inflation is Straining Restaurant Operations (June 2024), *available at* https://restaurant.org/research-and-media/research/inflation; *see also* U.S. Bureau of Labor Statistics, Producer Price Indexes, available at https://www.bls.gov/ppi/ (last accessed Sept. 27, 2024).

[33] Restaurant365, Nationwide Restaurant Wage Trends (2023), *available at* https://www.restaurant365.com/blog/metric-monday-nationwide-restaurant-wage-trends/.

[34] Chicago Sun-Times, Clock has started on 5-year plan that'll raise wages for Chicago's tipped workers (July 1, 2024), *available at* https://chicago.suntimes.com/small-business/2024/07/01/chicago-tipped-workers-five-year-plan-raise-subminimum-wages-restaurants.

[35] National Restaurant Association, Inflation is Straining Restaurant Operations, *supra* note 29.

revenue would typically owe these days. And under a proposed rule by the Federal Trade Commission (FTC), restaurants may be prohibited from imposing surcharges to recoup interchange and other swipe fees charged by the dominant global credit card networks.

Interchange fees are egregiously unfair when applied to taxes and gratuities. Restaurants are legally mandated to remit 100% of taxes to state and local governments. In other words, restaurants not only pay swipe fees on the base price of a transaction but also on the sales tax they are collecting for the state and/or locality. This means that while businesses are collecting and remitting sales tax for the state, financial institutions are making an unfair commission at the businesses' expense without any opportunity for the business to recoup the costs of serving as a tax collector.[36] By imposing interchange fees on these amounts, card networks effectively exact a private toll on restaurants' legal duty to collect and remit sales taxes. This practice amounts to double taxation, forcing restaurants to pay fees on money that isn't even theirs to keep.

Similarly, restaurants are required to remit gratuities to employees. Interchange fees on these gratuities function as a predatory charge, leaving restaurants with the difficult choice of either absorbing the cost or reducing their employees' hard-earned tips. This system traps restaurants in a lose-lose situation: they must accept credit cards to remain competitive, yet are forced to pay fees on money they're legally obligated to pass on.

The impact of these fees is particularly devastating for small, independent restaurants already struggling to survive in a highly competitive market. While seemingly small if analyzed on a transaction-by-transaction basis, these charges accumulate significantly over time to reach the remarkable amounts described above, steadily eroding restaurants' already razor-thin profit margins. For instance, a typical family-owned restaurant generating $1 million in annual revenue, with 8% in

[36] *Id.*

sales tax and 15% in gratuities, could be losing over $5,000 per year to interchange fees on these pass-through amounts alone. Meanwhile, credit card companies and banks continue to report record profits.

Eliminating these unjust fees is not just a commonsense solution—it's a powerful tool to alleviate the weighty burden on restaurants and other struggling merchants working hard to survive. And it is a solution that is resoundingly popular. According to a recent survey, 65% of likely voters support swipe fee reform, including 69% of Democrats, 60% of Republicans, and 66% of independents.[37] And swipe-fee reform has garnered support from a philosophical range of consumer advocacy groups like the American Economic Liberties Project, Americans for Financial Reform, the Institute for Self-Reliance, Center for Responsible Lending, and Small Business Rising.[38]

B. The Act Saves Money for Consumers Amid Soaring Inflation and Helps Protect Jobs Amid Soaring Labor Costs.

The harmful effects of interchange fees extend far beyond restaurants and retailers, striking at the heart of American consumers and households. With typical table service restaurants operating on average margins of 3-5% pre-tax, and credit card swipe fees amount to 2-4% per transaction, restaurants are often presented with no practical choice but to pass on these fees to customers in the form of a surcharge. Restaurants needing to surcharge those costs results in consumers bearing the ultimate brunt of swipe fees. As a result, economists estimate that in 2022, credit card swipe fees

[37] Merchants Payments Coalition, Credit Card Swipe Fee Reform Enjoys Strong National Support (Sept. 18, 2023), *available at* https://merchantspaymentscoalition.com/wp-content/uploads/2023/09/Survey-2023-09-18.pdf.

[38] *See* Letter to U.S. Senators and Representatives (Sept. 14, 2023), *available at* https://www.economicliberties.us/wp-content/uploads/2023/09/Letter-Supporting-Credit-Card-Competition-Act-1.pdf.

siphoned over $1,000 from the average American family.[39] That cost matters for the many households who may already be struggling to find time to cook or room in tight budgets for restaurant meals.

This comes as inflation has already been hitting consumers hard, leading to higher restaurant prices. Driven by rising food, labor, and other costs, restaurants have been forced to raise menu prices more than 12% on average since March 2022.[40] Grocery prices have also been increasing.[41] For the third year in a row, American consumers have named inflation or the cost of living as the most important financial problem they face.[42]

The good news is that consumers and workers stand to reap substantial benefits from the elimination interchange fees on taxes and gratuities under the Interchange Fee Prohibition Act. For consumers, the fee reduction would result in lower overall costs when dining out or making purchases, as businesses would no longer need to factor these fees into their pricing or surcharges. This cost reduction could lead to increased spending power and more frequent patronage of local establishments. For workers, particularly those in the service industry who rely heavily on tips, the elimination of these fees would ensure that they receive the full value of gratuities left by customers and may even entice customers to leave greater tips. And as the exorbitant cost of swipe fees drops,

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[39] Merchants Payment Coalition, Merchants Call for Action as Swipe Fees Rise Again (Mar. 21, 2023), *available at* https://merchantspaymentscoalition.com/merchants-call-action-swipe-fees-rise-again.

[40] National Restaurant Association, Menu Prices (2024), *available at* https://restaurant.org/research-and-media/research/economists-notebook/economic-indicators/menu-prices/.

[41] *See, e.g.*, American Institute for Economic Research, The End of Restaurants as We Know Them? (July 10, 2024), *available at* https://www.aier.org/article/the-end-of-the-restaurant-as-we-know-it/

[42] Gallup, Americans Continue to Name Inflation as Top Financial Problem (May 2, 2024), *available at* https://news.gallup.com/poll/644690/americans-continue-name-inflation-top-financial-problem.aspx.

restaurants may have more opportunities to hire more employees, improve wages and benefits, and ultimately grow to provide additional more services to more customers.[43]

CONCLUSION

For the foregoing reasons, *amici curiae* Restaurant Law Center, Illinois Restaurant Association, and the Retail Litigation Center respectfully urge this Court to deny Plaintiffs' motion for a preliminary injunction.

Dated: October 4, 2024

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[43] *E.g.*, Business Insider, Restaurants and hotels were helping power the booming job market. Now, they're barely hiring (July 10, 2024), *available at* https://www.businessinsider.com/hiring-jobs-restaurants-hotels-leisure-hospitality-healthcare-government-2024-7.