

Nos. 15-961, 15-962

In The
Supreme Court of the United States

—◆—
VISA INC., et al.,

Petitioners,

v.

SAM OSBORN, et al.,

Respondents.

—◆—
VISA INC., et al.,

Petitioners,

v.

MARY STOUMBOS, et al.,

Respondents.

—◆—
**On Writs Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

—◆—
**BRIEF OF UNITED STATES PUBLIC INTEREST
RESEARCH GROUP EDUCATION FUND, INC. AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

—◆—
MICHAEL C. LANDIS
Counsel of Record
UNITED STATES PUBLIC INTEREST RESEARCH
GROUP EDUCATION FUND, INC.
1543 Wazee St., Ste. 400
Denver, CO 80202
(303) 573-5995 Ext. 389
mlandis@pirg.org

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INTERESTS OF *AMICUS CURIAE*¹

United States Public Interest Research Group Education Fund, Inc. (“U.S. PIRG Education Fund”) is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public’s health, safety, or well-being. U.S. PIRG Education Fund participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. Since the mid-1990s, U.S. PIRG Education Fund and its sister 501(c)(4) social welfare organization, United States Public Interest Research Group, Inc. (“U.S. PIRG”), have been the leading public interest organizations working to protect consumers from unfair ATM surcharge fees. U.S. PIRG Education Fund and U.S. PIRG are also the leading public interest organizations working to protect retailers and consumers from unfair swipe fees.



¹ The parties in this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Data collected by U.S. PIRG Education Fund and U.S. PIRG demonstrate that ATM surcharge fees have steadily increased since they were introduced in 1996. The Access Fee Rules imposed by Petitioners contribute to the rise of ATM surcharge fees because they prohibit ATM operators from competitively pricing the ATM surcharge fees based upon their own costs to provide the ATM services. Consumers are harmed by the Access Fee Rules because they decrease the number of ATMs available to consumers and increase the cost for consumers to use ATMs.



ARGUMENT

THE ACCESS FEE RULES HARM CONSUMERS BY INFLATING ATM SURCHARGE FEES.

On April 1, 1996, the two largest ATM networks – Visa’s Plus network and MasterCard’s Cirrus network – began allowing their member banks to impose a surcharge fee on ATM transactions initiated by non-accountholders. Plus and Cirrus also imposed contractual restraints – the Access Fee Rules at issue in this case – that prohibited their member banks from charging consumers a lower surcharge fee for transactions processed over non-Plus or non-Cirrus networks.

The Access Fee Rules prohibit competitive pricing in the market for ATM services, thereby forcing consumers to pay inflated surcharge fees. Because of the Access Fee Rules, ATM operators cannot charge

consumers different surcharge fees based on the network over which the transaction is processed, even though the ATM operator receives different interchange fees depending on the network used. Thus, the ATM operator must charge every consumer the high surcharge fee that it imposes when a transaction is processed over a network that provides it with the lowest interchange fee, even when the transaction is, in fact, processed over a network that provides the ATM operator with a higher interchange fee. In a normal functioning market, the ATM operator would impose a lower surcharge fee on transactions processed over a network that provides the ATM operator with a higher interchange fee. However, the Access Fee Rules prevent ATM operators from charging market-dictated surcharge fees.

Due to this market failure, not only are consumers harmed when they are forced to pay inflated surcharge fees, but the Access Fee Rules also reduce the number of ATMs available for consumers to use. High surcharge fees dissuade consumers from using foreign ATMs. Lower volume causes ATM operators to deploy fewer ATMs (or impose even higher surcharge fees, which would only further dissuade consumers from using foreign ATMs). Thus, the Access Fees Rules result in fewer ATMs that are more expensive for consumers to use.

When surcharging began in 1996, U.S. PIRG Education Fund and U.S. PIRG immediately recognized the threat that surcharge fees pose to consumers and began conducting national surveys to document

surcharging practices. The results of those surveys, detailed below, demonstrate that surcharge fees have steadily increased since they were first introduced.

In June 1997, the director of U.S. PIRG's consumer program, Ed Mierzwinski, testified before the Senate Committee on Banking, Housing, and Urban Affairs and summarized the results of U.S. PIRG's March 1997 survey. *Automated Teller Machine Fees and Surcharges: Hearing before S. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1997) (prepared testimony of Edmund Mierzwinski).² The survey found that the average surcharge had risen almost 19% in just six months – from \$0.97 in September 1996 to \$1.15 in March 1997. *Id.* The survey also found that large banks imposed higher surcharges and charged them more often. *Id.* (showing that 52% of the largest 100 banks (by assets) imposed surcharges and the average surcharge imposed by those banks was \$1.24, compared with only 39% of the non-largest 300 banks imposing a surcharge with an average surcharge imposed by those banks of \$1.06).

In its survey, U.S. PIRG also noted that consumers are charged the surcharge fee in addition to the “off-us” or foreign fee that most banks impose on account holders for using an ATM not operated by that bank. For example, U.S. PIRG found that, in 1995, 80% of banks charged their customers a foreign fee of \$1.01 for each transaction conducted on a foreign ATM. *Id.*

² Available at http://www.banking.senate.gov/97_06hrg/061197/witness/mierzwin.htm.

The proceeds of the foreign fee are divided between the consumer's bank, the ATM owner, and the ATM network. *Id.* The portion of the foreign fee that goes to the ATM owner is called the interchange fee, and the portion of the foreign fee that goes to the ATM network is called the switch fee. Because consumers pay a surcharge fee to the ATM operator on top of a foreign fee (a portion of which goes to the ATM operator), they are, in effect, being charged twice for a single transaction.

Over the years, both the number of banks imposing surcharges and the amount of those surcharges increased steadily. By 1999, 95% of big banks (defined as the largest 300 banks by assets) and 93% of all banks imposed surcharges, and the average surcharge imposed by those big banks had risen to \$1.35. PIRG, *ATMs: ALWAYS TAKING MONEY: A FOURTH PIRG NATIONAL SURVEY OF ATM SURCHARGING RATES 1 (1999)*,³ *THE STATE PIRGS, BIG BANKS, BIGGER FEES: PIRG'S 1999 BANK SURVEY 6 (1999)*.⁴ In U.S. PIRG's view, "some banks [were] raising fee income to offset the costs associated with their too-high merger costs," which were also rising according to a report from the Federal Reserve. PIRG's 1999 BANK SURVEY at 7. In addition, by 1999, the average foreign fee charged by big banks had risen to \$1.27. *Id.* at 6. Thus, on average, the

³ Available at http://www.uspirg.org/sites/pirg/files/reports/Always_Taking_Money_1999_USPIRG.pdf.

⁴ Available at http://www.uspirg.org/sites/pirg/files/reports/Big_Banks_Bigger_Fees_1999_USPIRG.pdf.

customer of a big bank paid a total of \$2.62 in combined surcharge and foreign fees when using a foreign ATM.

In a whitepaper released in 2000, the State PIRGs (the state-based affiliates of U.S. PIRG and U.S. PIRG Education Fund) catalogued legislative efforts around the country, and at all levels of government, to protect consumers from ATM surcharge fees. *THE STATE PIRGS, ATM FEE BACKLASH: LOCAL REBELLIONS AGAINST UNFAIR SURCHARGE SPREAD* (2000).⁵ Not surprisingly, banks lobbied hard against such efforts. *Id.* at 1. The whitepaper noted the banks' "attempt to re-define their own industry term 'ATM surcharge' to the softer more benign-sounding terms 'access fee' or 'convenience fee.'" *Id.* at 3. Banks also attempted to argue that, prior to surcharging, ATM owners were not compensated by non-customers; however, this argument omitted the fact that ATM operators receive interchange fees. *Id.*

The 2000 whitepaper detailed how ATM surcharge and foreign fees contribute to bank profits. Citing reporting from the Federal Deposit Insurance Corporation, the whitepaper observed that "'continued strength in non-interest revenues, particularly fee income,' is a critical part of commercial bank income." *Id.* at 5. For example, in the fourth quarter of 1999, non-interest income accounted for 44% of commercial banks' net operating revenues. *Id.* From 1989 to 1998,

⁵ Available at http://www.uspirg.org/sites/pirg/files/reports/ATM_Fee_Backlash_USPIRG.pdf.

the category of commercial banks' revenue that includes foreign fees rose from \$10.3 billion to \$19.8 billion, and the revenue category that includes surcharge fees rose from \$29.0 billion to \$77.2 billion. *Id.* The whitepaper noted that, in March 2000, Bankrate (a leading aggregator of financial rate information) projected that ATM surcharge revenue alone would total \$2 billion in 2000. *Id.*

U.S. PIRG's 2001 national survey found that the cost of using a foreign ATM had nearly tripled since surcharging began in 1996. PIRG, DOUBLE ATM FEES, TRIPLE TROUBLE: A FIFTH PIRG NATIONAL SURVEY OF ATM SURCHARGE RATES 1 (2001).⁶ By 2001, 97% of big banks were charging surcharge fees, and the average surcharge fee imposed by those big banks had increased to \$1.55. *Id.* at 3. The average foreign fee charged by big banks had also increased to \$1.52. *Id.* at 4. Thus, on average, the customer of a big bank paid a total of \$3.07 in fees when using a foreign ATM (up from \$2.62 in 1999).

The methodology used to conduct the 2001 national survey highlights the lack of transparency with regard to ATM fees. The 2001 survey noted that "[b]anks are not required to post ATM surcharge data on brochures or Internet sites." *Id.* at 10.⁷ As a result, it was necessary for U.S. PIRG surveyors to "randomly select banks

⁶ Available at http://www.uspirg.org/sites/pirg/files/reports/Double_ATM_Fees_2001_USPIRG.pdf.

⁷ The Truth in Savings Act requires depository institutions to maintain and distribute a schedule of fees and charges. 12 U.S.C. § 4303. Such requirement, however, applies only to fees and

and ma[ke] phone calls or visits to determine surcharges and obtain fee schedules for other ATM transaction fee policies” and “[w]hen possible, surveyors verified data at actual ATM machines, including by testing with ATM cards.” *Id.* Given this lack of transparency, it is practically impossible for a consumer to compare ATM surcharge fees when choosing where to bank.

Because of the difficulty in obtaining the information, U.S. PIRG Education Fund did not include ATM fees in its 2011 survey and instead focused on other bank fees and fee disclosure policies. U.S. PIRG EDUCATION FUND, *BIG BANKS, BIGGER FEES 2011: A NATIONAL SURVEY OF BANK FEES AND FEE DISCLOSURE POLICIES* 8 (2011) (“We did not survey ATM surcharges. Surcharges are difficult to survey as they are only imposed on non-customers, only disclosed on ATM screens after a card has been inserted and are not included in account fee schedules.”).⁸ However, the 2011 survey did note that, “[a]ccording to press reports and consumer complaints to U.S. PIRG, Chase Bank is imposing non-customer ATM surcharges of \$5 in Illinois and Texas.” *Id.*

U.S. PIRG Education Fund’s 2012 survey reported that “[o]nly a few banks surveyed disclosed non-customer ATM surcharges.” U.S. PIRG EDUCATION

charges on accounts held by the depository institution, not accounts held by other depository institutions.

⁸ Available at <http://www.uspirg.org/sites/pirg/files/reports/Big-Banks-Bigger-Fees.pdf>.

FUND, BIG BANKS, BIGGER FEES 2012: A NATIONAL SURVEY OF FEES AND DISCLOSURE COMPLIANCE 12 (2012).⁹ With regard to foreign fees, the 2012 survey found that 33 of the 35 big banks surveyed charged customers for using a foreign ATM. *Id.* at 10. The average foreign fee for the big banks charging such a fee was \$2.02. *Id.* at 11.

In 2016, ATM surcharges “hit new highs,” with the average ATM surcharge rising “for the 12th consecutive year to \$2.90.” Bankrate, *Cities with highest ATM fees*, <http://www.bankrate.com/finance/banking/cities-with-highest-atm-fees-1.aspx> (last visited Oct. 19, 2016) (stating that “[t]he data come from surveying 10 banks and thrifts in each of 25 large U.S. markets from July 14 to Aug. 6, 2016). The average foreign fee for all banks also rose to \$1.67. Mike Cetera, *2016 Bankrate checking account survey: ATM fees stay on record-setting streak*, BANKRATE, Oct. 4, 2016, <http://www.bankrate.com/finance/checking/2016-checking-account-survey-1.aspx>. Thus, on average, consumers are charged \$4.57 each time they use a foreign ATM.

The surveys and data summarized above demonstrate that, since they were first imposed in 1996, ATM surcharge fees have steadily increased. High ATM fees harm all consumers, but low-income consumers are especially hard hit. ATM fees are “flat,” meaning that they are not proportional to the amount of money withdrawn. If a low-income consumer can afford to

⁹ Available at http://www.uspirg.org/sites/pirg/files/reports/USPIRG_Big_Banks_Bigger_Fees_0.pdf.

withdraw only \$20 and is charged \$4.57 in fees, the fees represent 22.85% of the transaction. Whereas, the same fees represent only 4.57% of the transaction if \$100 is withdrawn.

The Access Fee Rules contribute to the rise in ATM surcharge fees because they purposefully prevent ATM operators from competitively pricing the cost of the ATM services that they provide. Because of this lack of competition in the market, consumers have fewer options for ATM services and the options that they do have are priced artificially high. Only by removing the Access Fee Rules can this harm to consumers be remedied.

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CONCLUSION

Respondents seek redress for the harm that they have experienced as a result of inflated ATM surcharge fees. Respondents have sufficiently stated their claim, and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL C. LANDIS

Counsel of Record

UNITED STATES PUBLIC INTEREST RESEARCH

GROUP EDUCATION FUND, INC.

1543 Wazee St., Ste. 400

Denver, CO 80202

(303) 573-5995 Ext. 389

mlandis@pirg.org

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