From Cannabis to Crypto: Federal Reserve Discretion in Payments

Julie Andersen Hill[*]

ABSTRACT: From its inception, the Federal Reserve has operated payment systems that let banks move money for their customers. Checks, wire transfers, and electronic consumer payments all happen thanks to the Federal Reserve. Congress by statute specified which banks get access to the Fed's payment services. For more than a century, the Federal Reserve provided services to all legally eligible banks. But when the Federal Reserve received requests for payments access from a cannabis-focused credit union and a cryptocurrency custody bank (both of whom are legally eligible), it denied them. The Fed also issued sweeping guidelines claiming discretion to conduct risk vetting and deny bank requests. These guidelines apply to all banks and reverberate far beyond cannabis and crypto.

This Article examines whether the Federal Reserve's payments discretion is as great as it now claims—a question that has been raised in five recent cases, but never answered. It concludes the Fed has overstepped. The language and structure of the Federal Reserve Act require that the Federal Reserve provide payment services to all eligible banks. In support of this statutory interpretation, the Article excavates long forgotten legislative history and more than a century of sometimes hidden Federal Reserve payments practices. It shows that although the Federal Reserve has some discretion over the payments it processes and terms under which it offers it payments services, the Fed's discretion is not so broad that it can deny access to legally eligible banks. If the Fed wants to exclude banks, it should ask Congress to change the law.

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INTRODUCTION

The amount of money that flows through the Federal Reserve's ("the Fed") payment systems is staggering. The Fed processes an average of about four trillion dollars in wire transfers every day.[1] Its automated clearing house system ("ACH"), which enables consumers' automatic deposits and withdrawals,

1. *Fedwire Funds Service—Annual Statistics*, FED. RSRV. BANK SERVS. (Jan. 24, 2023), https://www.frbservices.org/resources/financial-services/wires/volume-value-stats/annual-stats.html [https://perma.cc/QKA7-8V4U].

processes $154.74 billion in commercial transactions.[2] Another $35.8 billion moves through the Federal Reserve via commercial checks.[3] Government payments add $32.46 billion daily.[4]

To say that the Fed is a payments juggernaut might be an understatement. There are private competitors to the Federal Reserve's payment rails. The largest is The Clearing House, an association of commercial banks, which operates its own wire, ACH, and check systems.[5] But even payments processed through The Clearing House's payment systems are settled through accounts at regional Federal Reserve Banks.[6]

The Fed's payment rails are not open to all. Congress has authorized the Federal Reserve Banks to provide accounts and payment services to only a narrow range of entities, including banks (or as the law more technically puts it: "member banks" and "depository institutions").[7]

But what does it mean to say that banks get access to Federal Reserve accounts and payments? Does it mean that all member banks and depository institutions are legally entitled to an account and payment services? Or does the Federal Reserve have discretion to deny some bank requests for access? If the Federal Reserve has discretion, how far does that discretion extend?

Perhaps unsurprisingly, the Federal Reserve claims "complete discretion" over its access decisions.[8] The Federal Reserve Board recently adopted Guidelines

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2. *Commercial Automated Clearinghouse Transactions Processed by the Federal Reserve—Annual Data*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 21, 2023), https://www.federalreserve.gov/paymentsystems/fedach_yearlycomm.htm [https://perma.cc/2XQH-6JYH].

3. *Commercial Checks Collected Through the Federal Reserve—Annual Data*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 21, 2023), https://www.federalreserve.gov/paymentsystems/check_commcheckcolannual.htm [https://perma.cc/6U6X-3YQG].

4. *Government Automated Clearinghouse Transactions Processed by the Federal Reserve—Annual Data*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 21, 2023), https://www.federalreserve.gov/paymentsystems/fedach_yearlygovt.htm [https://perma.cc/GG2T-65VE]; *Government Checks Processed by the Federal Reserve—Annual Data*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Feb. 21, 2023), https://www.federalreserve.gov/paymentsystems/check_govcheckprocannual.htm [https://perma.cc/6W9K-6396].

5. *See Payments*, THE CLEARING HOUSE, https://www.theclearinghouse.org/payment-systems [https://perma.cc/X7TK-875N]. "In 2021, [The Clearing House's ACH network] carried approximately [fifty percent] of overall ACH U.S. commercial volume and [fifty-five percent] of the volume from the 50 largest financial institutions." *The Clearing House: ACH Transaction Volume on EPN Network Outpaces National Level*, ABA BANKING J. (Mar. 7, 2022), https://bankingjournal.aba.com/2022/03/the-clearing-house-ach-transaction-volume-on-epn-network-outpaces-national-level [https://perma.cc/96NN-J2AN].

6. *See* Dan Awrey, *Unbundling Banking, Money, and Payments*, 110 GEO. L.J. 715, 736 (2022).

7. 12 U.S.C. § 342 (2018). The Reserve Banks can provide accounts for the U.S. government, certain government-sponsored enterprises, foreign organizations, and financial market utilities. *See id.* §§ 286d, 342, 347d, 358, 391, 1435, 1452(d), 1723a(g), 5465. They can also provide limited purpose clearing accounts for trust companies and nonmember banks. *Id.* § 342. This Article focuses on Federal Reserve full-service accounts for banks.

8. Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 16901942, at *5 (D. Wyo. Nov. 11, 2022).

for Evaluating Account and Services Requests.[9] These Guidelines establish an extensive risk-vetting framework for accounts and services. The Board stresses "that legal eligibility does not bestow a right to obtain an account and services."[10]

The Federal Reserve's claims of discretion are not hypothetical. The Fed denied an account request from a credit union (a "bank" for our purposes) that wanted to serve the state legal cannabis industry in Colorado.[11] It also denied the requests from a cryptocurrency custody bank and a fintech bank designed to facilitate international trade.[12] In addition, the Fed is currently trying to close the account of a Puerto Rican offshore bank.[13] Other account denials or closures are looming on the horizon.

Access to Federal Reserve accounts and payment services is crucial for financial technology and cryptocurrency focused banks. The Fed's payment rails allow these banks to handle U.S. dollar payments. The banks can then serve as on and off ramps for investments in digital assets. Some, like the large crypto exchange Kraken, have already requested Federal Reserve accounts.[14] Others are testing the waters.[15] Whether any of these banks become full-fledged participants in the payments infrastructure turns on whether the Federal Reserve has discretion to deny them access.

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9. Guidelines for Evaluating Account and Services Requests, 87 Fed. Reg. 51,099, 51,106–10 (Aug. 19, 2022) [hereinafter Account Access Guidelines].

10. *Id.* at 51,106.

11. Letter from Esther L. George, Pres., Fed. Rsrv. Bank of Kan. City, to Deirdra A. O'Gorman, CEO, The Fourth Corner Credit Union (July 16, 2015) (on file with author).

12. Kyle Campbell, *Kansas City Fed Rejects Custodia's Master Account Application*, AM. BANKER (Jan. 27, 2023, 6:07 PM), https://www.americanbanker.com/news/kansas-city-fed-rejects-custodias-master-account-application (on file with the *Iowa Law Review*); Jon Hill, *SF Fed Sued Over Denial of Fintech's Master Account Bid*, LAW360 (June 29, 2023, 8:57 PM), https://www.law360.com/articles/1694439/sf-fed-sued-over-denial-of-fintech-s-master-account-bid (on file with the *Iowa Law Review*).

13. Luc Cohen, *NY Fed Defends Cutoff of Puerto Rican Bank After Venezuela-Linked Crackdown*, REUTERS (Aug. 23, 2023, 2:12 PM), https://www.reuters.com/business/finance/ny-fed-defends-cutoff-puerto-rican-bank-after-venezuela-linked-crackdown-2023-08-23 [https://perma.cc/2NBC-6V2Z].

14. *See Master Account and Services Database: Requests for Access*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (June 16, 2023), https://www.federalreserve.gov/paymentsystems/master-account-and-services-database-access-requests.htm [https://perma.cc/9D2P-4ZP2] [hereinafter *Master Accounts Requests for Access Database*]; *Kraken CEO Jesse Powell, Crypto's First Banker, Steps Down*, PYMNTS (Sept. 21, 2022), https://www.pymnts.com/news/2022/kraken-ceo-jesse-powell-cryptos-first-banker-steps-down [https://perma.cc/HT9J-ZEJH]; Miriam Cross, *Bank in Puerto Rico Launches Its Digital-Asset Custody Service*, AM. BANKER (Nov. 9, 2022, 6:00 AM), https://www.americanbanker.com/news/bank-in-puerto-rico-launches-its-digital-asset-custody-service (on file with the *Iowa Law Review*) (stating that crypto-focused FV Bank has requested a Federal Reserve account).

15. *See, e.g.*, *Digital Assets and the Future of Finance: Understanding the Challenges and Benefits of Financial Innovation in the United States: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 136 (2021) (statement of Charles Cascarilla, CEO & Co-Founder, Paxos) (urging policymakers to give "digital asset platforms direct access to the Federal Reserve's services"); *Fed Master Accounts Give FinTechs Firepower to Meet, and Beat, Banks on Their Own Payments Turf*, PYMNTS (Apr. 22, 2022), https://www.pymnts.com/bank-regulation/2022/fed-master-accounts-give-fintechs-firepower-to-meet-and-beat-banks-on-their-own-payments-turf [https://perma.cc/S5AQ-FMWN].

Banking models beyond cannabis and crypto should be nervous too. The Federal Reserve is especially hesitant to process payments for banks without federal deposit insurance.[16] Credit unions, public (government owned) banks, and Puerto Rican offshore banks all routinely operate without federal deposit insurance.[17] If the Federal Reserve decided to close their accounts they could not move money; they would become "nothing more than a vault."[18] Moreover, the Federal Reserve claims "authority to grant or deny an access request by [any] institution."[19]

If past legal skirmishes are any indication, banks denied Federal Reserve accounts and services will challenge the Fed's exercise of discretion. In 2015, the cannabis credit union that was denied an account sued the Federal Reserve Bank of Kansas City arguing that Reserve Banks have no discretion to deny account requests.[20] Although the discretion issue was not conclusively resolved in that case,[21] the argument that all eligible banks are entitled to a Federal Reserve account has reprised in four more cases.[22] They have not resolved the discretion question either.[23]

So far, the Federal Reserve's purported discretion over access to accounts and payment services has received only brief scholarly attention. Peter Conti-Brown wrote a short article concluding that statutory language "appears to eliminate the Fed's discretion entirely."[24] Similarly, David Zaring describes the statutory authority as a "discretionless legal command" for the Federal

16. Account Access Guidelines, *supra* note 9, at 51,109–10 (subjecting banks without federal deposit or share insurance to greater levels of scrutiny); TNB USA Inc. v. Fed. Rsrv. Bank of N.Y., No. 18-cv-07978, 2020 WL 1445806, at *3 (S.D.N.Y. Mar. 25, 2020) (stating that the Federal Reserve subjected a narrow bank to "due diligence" because the bank "was not insured and regulated by the FDIC").

17. *See infra* Part III.

18. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1053 (10th Cir. 2017) (quoting Complaint at 23, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 154 F. Supp. 3d 1185 (D. Colo. 2016) (No. 15-cv-01633), 2015 WL 8642618).

19. Account Access Guidelines, *supra* note 9, at 51,109.

20. *Fourth Corner Credit Union*, 154 F. Supp. 3d at 1188, *vacated*, 861 F.3d 1052 (10th Cir. 2017).

21. *Fourth Corner Credit Union*, 861 F.3d at 1053, 1062 (remanding the case after the credit union changed its business model to avoid cannabis until it becomes legal under federal law).

22. Opposition to Defendant's Motion to Dismiss at 14, TNB USA Inc. v. Fed. Rsrv. Bank of N.Y., No. 18-cv-07978, 2020 WL 1445806 (S.D.N.Y. Mar. 25, 2020), 2019 WL 2098395; Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 16901942, at *9 (D. Wyo. Nov. 11, 2022); Complaint ¶¶ 85–88, PayServices Bank v. Fed. Rsrv. Bank of S.F., No. 23-cv-00305 (D. Idaho June 27, 2023) [hereinafter PayServices Complaint]; Memorandum of L. in Support of BSJI's Motion for Temp. Restraining Ord. & Preliminary Injunction at 18, Banco San Juan Internacional, Inc. v. Fed. Rsrv. Bank of N.Y., No. 23-cv-06414 (S.D.N.Y. July 25, 2023), ECF No. 7 [hereinafter BSJI's Motion for TRO].

23. *See infra* Part II.

24. Peter Conti-Brown, *The Fed Wants to Veto State Banking Authorities. But Is That Legal?*, BROOKINGS (Nov. 14, 2018), https://www.brookings.edu/research/the-fed-wants-to-veto-state-banking-authorities-but-is-that-legal [https://perma.cc/9QB6-8CB2].

Reserve to provide accounts and services.[25] Others seem to assume that Federal Reserve accounts must be available to all eligible banks.[26] In contrast, Arthur Wilmarth, Jr. argues that the Federal Reserve has discretionary authority to limit access.[27] And some scholars seem to assume that the Federal Reserve has discretion.[28] None of these scholars have provided a complete analysis of the legal basis for the Federal Reserve's claimed discretion over accounts and payment services.

This Article provides a thorough analysis of the statutory text, the legislative purpose underpinning the statutes, and past Federal Reserve practices to show that the Federal Reserve's discretion over its accounts and services is far

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25. David Zaring, Professor, Dep't of Legal Stud. & Bus. Ethics, The Wharton Sch., Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 2 (July 7, 2021), https://www.federalreserve.gov/SECRS/2021/July/20210721/OP-1747/OP-1747_071221_138732_418138947088_1.pdf [https://perma.cc/5TVV-TZ3S]; *see also* Kyle Campbell, *Should the Fed Decide Who Gets a Master Account?*, AM. BANKER (June 10, 2022, 10:59 AM), https://www.americanbanker.com/news/should-the-fed-decide-who-gets-a-master-account (on file with the *Iowa Law Review*) ("Aaron Klein, a senior fellow in economic studies at the Brookings Institution, said the Fed was never given the authority to decide which banks are given access to its services, but rather it has 'invented' that discretion.").

26. Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 231 n.148 (2004) ("[T]he [Monetary Control Act] requires all services to be . . . made available to all depository institutions on equal terms."); Thomas C. Baxter, Jr. & James H. Freis, Jr., *Fostering Competition in Financial Services: From Domestic Supervision to Global Standards*, 34 NEW ENG. L. REV. 57, 70 (1999) ("The Federal Reserve Banks are required by the Monetary Control Act . . . to provide all domestic depository institutions . . . with payments services ranging from currency and check collection to wire transfer and securities settlement." (footnote omitted)); Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 YALE J. ON REGUL. 197, 235 (2023) ("In 1980, Congress passed the Monetary Control Act, requiring the Fed to offer its services not just to its member banks but to all depository institutions regardless of their membership status."); Fred H. Miller, Robert G. Ballen & Hal S. Scott, *Commercial Paper, Bank Deposits and Collections, and Commercial Electronic Fund Transfers*, 39 BUS. LAW. 1333, 1365 (1984) ("The Monetary Control Act . . . required the Federal Reserve . . . to provide access to virtually all of its services to all depositary institutions on the same terms and conditions, and to charge for such services." (footnote omitted)).

27. Nat'l Cmty. Reinvestment Coal., Nat'l Consumer L. Ctr. & Arthur E. Wilmarth, Jr., Professor Emeritus of L., Geo. Wash. Univ. L. Sch., Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 1 (Jan. 17, 2023), https://ncrc.org/wp-content/uploads/2023/01/NCRC-NCLC-Wilmarth-Fed-Master-Account-Guidelines-OP-1788-FINAL.pdf [https://perma.cc/LVR4-SQ2L] ("The Federal Reserve Act . . . rightfully confers the right to determine access to Fed services to the Federal Reserve and only to the Federal Reserve."); *see also* Thomas M. Hoenig & Brian Knight, Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 2 (July 1, 2021), https://www.federalreserve.gov/SECRS/2021/July/20210716/OP-1747/OP-1747_070121_138293_350695730079_1.pdf [https://perma.cc/4ALH-LH4R] ("[T]he Fed should . . . retain[] the right to exclude firms that, owing to their own deficiencies, present an unacceptable risk to the Fed's legitimate and clearly articulated interests.").

28. Erik Gerding has urged the Federal Reserve to curtail account and payment services to some banks, implying that he believes the Federal Reserve has this authority. Ams. for Fin. Reform Educ. Fund, Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 1 (July 12, 2021), https://www.federalreserve.gov/SECRS/2021/July/20210714/OP-1747/OP-1747_071221_138238_358666957091_1.pdf [https://perma.cc/6B5W-JS7L]; *see also* Awrey, *supra* note 6, at 746 ("[E]ven within [the] relatively narrow universe of eligible institutions, the Fed has considerable discretion to impose further access restrictions.").

narrower than it has recently claimed. The Article excavates long forgotten legislative history and more than a century of sometimes hidden Federal Reserve account and payment practices. It shows that beginning in 1913, as required by the Federal Reserve Act, the Federal Reserve provided accounts and payment services to all member banks.[29] In 1980, Congress amended the Federal Reserve Act to require that Federal Reserve Banks provide the same account and payment services to all depository institutions. Congress made this determination knowing that some institutions posed more risk than others.[30] Yet there is no evidence that Congress or the Federal Reserve contemplated a risk-vetting framework or intended that the Federal Reserve act as a supervisor for state-chartered nonmember banks.

Based on the language of the Federal Reserve Act and a century of history, the Article concludes that the law requires that the Federal Reserve provide accounts and payment services to all member banks and depository institutions. The Federal Reserve has some discretion over the payments it processes and terms under which it offers payments services. For example, the Federal Reserve need not launder money or allow an accountholder to excessively overdraw its account. But this discretion is not so broad as to allow the Federal Reserve to preclude access based in part on deposit insurance status or lack of federal supervision. The Article cautions the Federal Reserve to avoid tarnishing its legitimacy by exceeding its congressionally granted power.

This Article proceeds in five parts. Part I provides an overview of the Federal Reserve and its accounts and payment systems. It describes the Federal Reserve's recently adopted Guidelines for Evaluating Account and Services Requests. Part II canvasses recent cases brought by banks seeking access to the Federal Reserve's accounts and payments. Part III explores the types of banks most likely to be harmed by the Federal Reserve decisions to limit access. Part IV examines the statutes governing the Federal Reserve's accounts and payments. In addition to scrutinizing the language and structure of the Federal Reserve Act, Part IV analyzes legislative history and past Federal Reserve practices. Part V evaluates Federal Reserve claims that open access introduces excessive risk. It concludes that the larger risk is that the Federal Reserve will damage its legitimacy by exceeding its statutory authority.

I. FED PAYMENTS AND ACCOUNTS

Although the Federal Reserve is most well-known for its role in monetary policy, it has been a hub of payments from its inception.[31] Today, the twelve regional Federal Reserve Banks provide money and payments services to

29. *See infra* Section IV.C.1.

30. *See infra* Section IV.B.2.

31. *See* FED. RSRV. SYS., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 87 (11th ed. 2021) ("The Federal Reserve has provided payment services to the banking industry since shortly after the Reserve Banks were established in 1914.").

banks and the federal government.[32] Banks can then provide payment services to their customers. As the Federal Reserve explains, its payment services "keep cash, check, and electronic transactions moving reliably through the U.S. economy on behalf of consumers, businesses, and others participating in the economy."[33]

A. PAYMENT SERVICES

The regional Federal Reserve Banks currently provide three types of payment services to banks. First, they "distribute and receive currency and coin."[34] Second, they collect checks (a task that today is largely electronic).[35] Third, they provide systems that electronically transfer payments.[36] If you receive your paycheck directly in your bank account, that payment was probably transferred via a system called FedACH. If your bank wired money to the seller when you bought your home, that payment was probably transferred via the descriptively named Fedwire. Your bank can process these payments for you because it has access to the Federal Reserve's payment services.

B. ACCOUNTS

Federal Reserve accounts undergird all the Federal Reserve's payment systems. Just as you cannot write a check or use a debit card without opening a bank account, a bank cannot use the Federal Reserve's payment systems without having access to a Federal Reserve account. Federal Reserve accounts facilitate settlement.[37] Suppose, for example, a customer of Bank A wants to send money to a customer of Bank B. If Bank A and Bank B both have accounts at a Federal Reserve Bank, the Federal Reserve can settle the transaction by moving money from Bank A's account to Bank B's account. Accounts, or as

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32. *Id.* at 86–87.

33. *Id.* at 86.

34. *Id.* at 87.

35. *Id.*

36. The Federal Reserve's electronic payment systems include:

- FedACH: An automated clearing house network for processing batched electronic small dollar payments. 108 BD. OF GOVERNORS OF THE FED. RSRV. SYS. ANN. REP. 59–62 (2021).
- Fedwire: A system for larger electronic payments. *Id.*
- National Settlement Services: A system that allows private sector clearing services to settle transactions through accounts at the Federal Reserve. *Id.* at 60–61.
- Fedwire Securities Service: A securities settlement system that allows the transfer of government-related securities. *Id.* at 60–62.
- FEDNOW: A real-time gross settlement service. *Id.* at 58–59.

For additional information on these systems, see *Financial Services*, FRBSERVICES.ORG, https://www.frbservices.org/financial-services [https://perma.cc/MA2C-3QCZ]; *Policies: The Federal Reserve in the Payments System*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Aug. 11, 2020), https://www.federalreserve.gov/paymentsystems/pfs_frpaysys.htm [https://perma.cc/93P5-DNZH].

37. FED. RSRV. SYS., *supra* note 31, at 86–87.

the Federal Reserve calls them, "master accounts,"[38] are critical to the Federal Reserve's payment services.

The Federal Reserve Banks have issued a uniform operating circular that establishes "the terms under which a Financial Institution may open, maintain, and terminate" an account.[39] Operating Circular 1 requires that a bank's account be held at the Federal Reserve Bank in the district where the bank is headquartered.[40] A national bank headquartered in New York would request an account from the New York Fed, and a state-chartered bank in Wyoming would request an account from the Kansas City Fed.[41] In general, a financial institution can only hold one master account.[42]

If the Federal Reserve Banks providing these account and payment services were private companies, they might be afforded wide latitude to decide who can use their accounts and payment services. But although the Reserve Banks have private shareholders,[43] they are not wholly private.[44] They were created

38. 12 C.F.R. § 201.10(b)(3); *see* FED. RSRV. FIN. SERVS., OPERATING CIRCULAR 1: ACCOUNT RELATIONSHIPS 1 (2021), https://www.frbservices.org/binaries/content/assets/crsocms/resources/rules-regulations/081621-operating-circular-1.pdf [https://perma.cc/WS44-M37J] [hereinafter OPERATING CIRCULAR 1 (2021)].

The Federal Reserve began using the term "master account" in 1998. *See* Press Release, Fed. Rsrv. Bank of St. Louis, New Account Structure Will Support Interstate Branching (May 2, 1996), https://fraser.stlouisfed.org/files/docs/publications/frbsl_news/frbsl-news-release-19960502.pdf [https://perma.cc/VF9H-NX5C]. Before that time, some banks held accounts at more than one Federal Reserve Bank. *Id.* The Federal Reserve Banks consolidated these accounts into "a single (master) account" to better accommodate interstate bank branching. *Interstate Branching: New Account Structure*, FED. RSRV. BD. (Sept. 27, 2002), https://www.federalreserve.gov/generalinfo/isb/qanda.htm [https://perma.cc/LMS5-BCNW].

In other contexts, people advocate discarding the use of the word "master" due to concerns that the term "evoke[s] racist history." Kate Conger, *'Master,' 'Slave' and the Fight Over Offensive Terms in Computing*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/technology/racist-computer-engineering-terms-ietf.html?(on file with the *Iowa Law Review*) (discussing use of the term "master" in computer programming). Because the Federal Reserve uses this term, it is impractical to completely remove it from this Article. Nevertheless, I have attempted to minimize its use.

39. OPERATING CIRCULAR 1 (2021), *supra* note 38, at 1.

40. *Id.* at 4.

41. Officially, the New York Fed is named the Federal Reserve Bank of New York, but each of the regional Reserve Banks is commonly known by the city in which they are located, followed by Fed. Hence, the Federal Reserve Bank of Kansas City is commonly called the Kansas City Fed.

42. OPERATING CIRCULAR 1 (2021), *supra* note 38, at 1.

43. *See* 12 U.S.C. §§ 282, 321. Unlike typical private shareholders, the Reserve Bank shareholders receive a dividend that is set at six percent by statute. *Id.* § 289(a)(1)(A). Earnings after this are given to the U.S. Treasury. *Id.* § 289(a)(3)(B). There are limits on the purchase and sale of stock. *Id.* §§ 286–87. And unlike in traditional companies or banks, the shareholders are not the residual claimholders if a Reserve Bank is liquidated. *Id.* § 290.

44. *Making Sense of the Federal Reserve: Who Owns the Federal Reserve Banks?*, FED. RSRV. BANK OF ST. LOUIS, https://www.stlouisfed.org/in-plain-english/who-owns-the-federal-reserve-banks# [https://perma.cc/HV9H-GDGE] ("The Federal Reserve Banks are *not* a part of the federal government, but they exist because of an *act of Congress*. Their purpose is to serve the public. So is the Fed *private* or *public*? The answer is *both*.").

by Congress in part to improve the efficiency of the existing payments infrastructure.[45] Accordingly, the Federal Reserve Act describes which banks are eligible to open Federal Reserve accounts.[46] Today that includes member banks and depository institutions (collectively referred to in this Article as "banks").[47] Member banks (not to be confused with the regional Federal Reserve Banks) are national banks or state-chartered banks that become "members" by purchasing stock in their district Reserve Bank.[48] "Depository institutions" are federally insured banks and credit unions as well as banks and credit unions that are eligible to apply for federal insurance.[49]

The Federal Reserve Banks' account and services practices are constrained by the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"). Unlike the Reserve Banks, the Board is an independent government agency with seven members who are appointed by the President and confirmed by the Senate.[50] The Board oversees the Reserve Banks' provision of payment systems by developing regulations and exercising supervisory authority over the Reserve Banks.[51]

C. ACCOUNT ACCESS GUIDELINES

Although the Federal Reserve Banks have been providing account and payment services for more than one hundred years, the Board only recently adopted Guidelines for Evaluating Account and Services Requests ("Account

45. *See* Paul M. Connolly & Robert W. Eisenmenger, *The Role of the Federal Reserve in the Payments System*, *in* THE EVOLUTION OF MONETARY POLICY AND THE FEDERAL RESERVE SYSTEM OVER THE PAST THIRTY YEARS: A CONFERENCE IN HONOR OF FRANK E. MORRIS 131, 134 (Fed. Rsrv. Bank of Bos. ed., 2000); M.K. LEWIS & K.T. DAVIS, DOMESTIC & INTERNATIONAL BANKING 139–40 (1987); Sharon A. Sweeney & Jane Ann Schmoker, *Federal Reserve Bank and the Payment System: Regulation J, Regulation CC, Operating Circulars, and Other Deposit Account Issues*, 51 CONSUMER FIN. L.Q. REP. 204, 205 (1997).

46. 12 U.S.C. § 342; *see also* Account Access Guidelines, *supra* note 9, at 51,099 ("Each institution requesting an account or services must be eligible under the Federal Reserve Act or other federal statute to maintain an account at a Reserve Bank.").

47. 12 U.S.C. § 342. Reserve Banks are authorized to offer accounts "solely for the purposes of exchange or collection" to nonmember banks, trust companies, and depository institutions. *Id.*

48. *Id.* § 221.

49. *Id.* § 461(b)(1)(A).

50. FED. RSRV. SYS., *supra* note 31, at 8.

51. 12 U.S.C. § 248(a)(j) (granting the Board authority "[t]o examine at its discretion the accounts, books, and affairs of each Federal [R]eserve [B]ank" and "[t]o exercise general supervision over . . . Federal [R]eserve [B]anks"); Fasano v. Fed. Rsrv. Bank of N.Y., 457 F.3d 274, 278 (3d Cir. 2006) (stating that the Board "loosely oversees the Federal Reserve Banks' operations"); 108 BD. OF GOVERNORS OF THE FED. RSRV. SYS. ANN. REP. 74 (2021), https://www.federalreserve.gov/publications/files/2021-annual-report.pdf [https://perma.cc/FLH5-LCWC] ("The Board's reviews of the Reserve Banks include a wide range of oversight activities, conducted primarily by its Division of Reserve Bank Operations and Payment Systems.").

Access Guidelines").[52] The Board explained that it developed the Guidelines because payment technology is rapidly evolving and "novel charter types [are] being authorized or considered by federal and state banking authorities across the country."[53] "As a result, the Reserve Banks are receiving an increasing number of inquiries and access requests from institutions that have obtained, or are considering obtaining, such novel charter types."[54] "[G]iven the increase in the number and novelty of such inquiries," the Board decided "that a more transparent and consistent approach to such requests should be adopted by the Reserve Banks."[55]

The Board's Account Access Guidelines are a monument to the Federal Reserve's claimed discretion over accounts and payment services. The Board labels the process to get an account as an "account request" rather than "an application."[56] "[I]t is important to make clear," the Board stresses, "that legal eligibility does not bestow a right to obtain an account and services."[57] "[D]ecisions regarding individual access requests remain at the discretion of the individual Reserve Banks . . . ."[58] Although the Guidelines "broadly outline considerations for evaluating access requests," the Guidelines "are not intended to provide assurance that any specific institution will be granted an account and services."[59] Moreover, "[i]f the Reserve Bank decides to grant an access request, it may impose (at the time of account opening, granting access to service, or any time thereafter) obligations relating to, or conditions or limitations on, use of the account or services as necessary to limit operational, credit, legal or other risks."[60]

To provide "transparency" in the Reserve Bank's exercise of discretion, the Board's Guidelines contain a list of risk management principles.[61] Those principles are:

1. Accountholders should be legally eligible for an account and "should have a well-founded, clear, transparent, and enforceable legal basis for [their] operations."
2. Accountholders "should not present or create undue credit, operational, settlement, cyber or other risks to the Reserve Bank."

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52. Account Access Guidelines, *supra* note 9, at 51,106–10 (adopting the Account Access Guidelines); *see* WALTER EARL SPAHR, THE CLEARING AND COLLECTION OF CHECKS 291–329 (1926) (discussing the Fed's early role in check clearing and wire transfers).

53. Account Access Guidelines, *supra* note 9, at 51,099.

54. *Id.*

55. Guidelines for Evaluating Account and Services Requests, 86 Fed. Reg. 25,865 (proposed May 11, 2021).

56. Account Access Guidelines, *supra* note 9, at 51,102–03.

57. *Id.* at 51,106.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

3. Accountholders should not "present or create undue . . . risks to the overall payment system."
4. Accountholders "should not create undue risk to the stability of the U.S. financial system."
5. Accountholders "should not create undue risk to the overall economy by facilitating activities such as money laundering, terrorism financing, fraud, cybercrimes, economic or trade sanctions violations, or other illicit activity."
6. "Provision of an account and services to an institution should not adversely affect the Federal Reserve's ability to implement monetary policy."[62]

Within each risk principle, the Guidelines prompt the Reserve Banks to consider an applicant's financial condition, internal controls, policies, procedures, risk assessments, systems security measures, management expertise, governance arrangements, training programs, and more.[63]

The Guidelines establish a "three-tiered review framework" where some requests for access receive greater scrutiny than others.[64] "Tier 1" federally insured financial institutions will "generally be subject to a less intensive and more streamlined review."[65] Next are the "Tier 2" institutions that do not have federal insurance but do have a federal supervisor. Tier 2 institutions include: (1) federally chartered institutions without deposit insurance like national trust banks chartered by the Office of the Comptroller of the Currency (OCC), (2) state-chartered financial institutions without federal insurance that are members of the Federal Reserve System, and (3) Edge and Agreement Corporation and U.S. branches of foreign banks.[66] For an institution with a holding company to be evaluated as a Tier 2 institution, the institution's holding company must be subject by statute or commitment to oversight by the Federal Reserve.[67] Tier 2 institutions "receive an intermediate level of review."[68] "Tier 3" institutions are those that are not federally insured and do not meet the requirements to be considered Tier 2 institutions.[69] They "will generally receive the strictest level of review."[70] Even here though, the Board emphasizes that "a Reserve Bank has the authority to grant or deny an access request by an institution in any of the three . . . tiers."[71]

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62. *Id.* at 51,107–09.
63. *Id.*
64. *Id.* at 51,100.
65. *Id.* at 51,109.
66. *Id.* at 51,109–10.
67. *Id.*
68. *Id.* at 51,110.
69. *Id.*
70. *Id.*
71. *Id.* at 51,109.

Beyond issuing the Account Access Guidelines, it is unclear what role the Board plays in handling account requests. The Guidelines instruct the Reserve Banks to consult with the Federal Reserve Board when a request poses risk to the U.S. financial system or adversely impacts the Federal Reserve's ability to implement monetary policy.[72] Some account requestors believe the Board acts less like a supervisor or consultant and more like a puppet master controlling the purported Reserve Bank decisions.[73] Still, the Guidelines state that the discretionary authority over accounts and payments lies with the Federal Reserve Banks.[74]

Regardless of the Board's role, the Guidelines clarify that the Federal Reserve intends to subject requesting banks without deposit insurance to the regulatory equivalent of a proctology exam. Except that proctology exams do not last for years. Some novel banks have spent years in the risk-vetting process and the Guidelines are not poised to improve that.[75]

II. ACCOUNT ACCESS LITIGATION

So, who are the controversial novel banks that prompted the Federal Reserve Board to develop the Account Access Guidelines? In the last decade the Federal Reserve has faced litigation over four novel bank requests for accounts and payment services. In another case, a bank is seeking to prevent the Federal Reserve from closing its account. The banks themselves are quite different—a cannabis-focused credit union, a narrow bank with no lending, a

72. *Id.* at 51,108–09.

73. *See, e.g.*, Complaint ¶ 6, Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 16901942 (D. Wyo. Nov. 11, 2022) [hereinafter Custodia Complaint] (alleging that an account request from a cryptocurrency custody bank in Wyoming "was derailed when, in Spring 2021, the Board asserted control over the decision-making process"); Rob Blackwell, *How Far Does American Samoa Have to Go to Get a Bank?*, AM. BANKER (July 31, 2017, 5:11 PM), https://www.americanbanker.com/news/how-far-does-american-samoa-have-to-go-to-get-a-bank (on file with the *Iowa Law Review*) (reporting that when the Territorial Bank of American Samoa, a public bank without deposit insurance, requested an account, the San Francisco Fed "sent the case to the Federal Reserve Board to review given the unusual circumstances"); Rob Blackwell, *American Samoa Finally Gets a Public Bank. And U.S. States Are Watching*, AM. BANKER (Apr. 30, 2018, 9:45 PM), https://www.americanbanker.com/news/american-samoa-finally-gets-a-public-bank-and-us-states-are-watching (on file with the *Iowa Law Review*) (stating that the Federal Reserve's decision to open an account for the Territorial Bank of American Samoa came only "after the intervention of Randal Quarles," a member of the Federal Reserve Board).

74. Account Access Guidelines, *supra* note 9, at 51,106.

75. For example, TNB began trying to open an account in 2017. TNB USA Inc. v. Fed. Rsrv. Bank of N.Y., No. 18-cv-07978, 2020 WL 1445806, at *2 (S.D.N.Y. Mar. 25, 2020). More than six years later, TNB is still waiting for a decision. Minutes of the Special Meeting of the Banking Comm'r, Conn. Dep't of Banking (Feb. 7, 2022), https://egov.ct.gov/PMC/Minutes/Download/14177 [https://perma.cc/2Z3L-P44W]. When the Guidelines were adopted, Federal Reserve Governor Michelle Bowman warned that the Guidelines did not signal that "reviews will now be completed on an accelerated timeline." Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Statement on Guidelines to Evaluate Requests for Accounts and Services at Federal Reserve Banks by Governor Michelle W. Bowman (Aug. 15, 2022), https://www.federalreserve.gov/newsevents/pressreleases/bowman-statement-20220815.htm [https://perma.cc/4YTK-UEKU].

cryptocurrency custody bank, a bank to facilitate international trade, and a Puerto Rican offshore bank. Nevertheless, these cases have some commonality. In each case, the Federal Reserve employed a lengthy risk-vetting process to evaluate the banks. The banks then objected to the risk vetting, asserting that they were entitled to Federal Reserve accounts. The Federal Reserve responded, asserting wide discretion to conduct reviews and deny account access. And the courts have not yet resolved the extent of the Federal Reserve's discretion.

A. CANNABIS BANK

The first of these cases involves Fourth Corner Credit Union, a proposed bank to serve the cannabis industry. Colorado had legalized marijuana, and the cannabis industry was growing rapidly.[76] The trouble was that marijuana was (and is) illegal under federal law.[77] Accordingly, handling funds related to marijuana violates federal anti–money laundering laws.[78] This meant that many existing financial institutions were understandably reticent to bank the growing cannabis industry.[79] Fourth Corner's organizers, with the support of Colorado banking regulators, hoped to be different.[80] After receiving its charter, Fourth Corner promptly requested an account at the Federal Reserve Bank of Kansas City.[81] But the Kansas City Fed was concerned. It informed Fourth Corner that it was reviewing the credit union's risk profile, emphasizing that "[i]ssuance of a master account is within the Reserve Bank's discretion."[82] Ultimately, the Kansas City Fed decided Fourth Corner was too risky and declined to open the account.[83]

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76. COLO. CONST. art XVIII, § 16; Alison Felix, *The Economic Effects of the Marijuana Industry in Colorado*, ROCKY MOUNTAIN ECON. (FED. RSRV. BANK OF KAN. CITY) (Apr. 15, 2018), https://www.kansascityfed.org/denver/rocky-mountain-economist/rme-2018q1 [https://perma.cc/2K36-GB2E] (detailing the growth of marijuana in Colorado).

77. 18 U.S.C. §§ 802(6), 812, 841(a).

78. *Id.* §§ 1956(a)(1)(B), 1957(a).

79. Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043, 1049–50 (2021); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RSRV. L. REV. 597, 600 (2015).

80. *See* Colorado Comm'r of Fin. Servs., Charter No. 272 The Fourth Corner Credit Union (Nov. 19, 2014); David Migoya, *Colorado Pot Credit Union Could Be Open by Jan. 1 Under State Charter*, DENVER POST (Nov. 20, 2014, 10:31 AM), https://www.denverpost.com/2014/11/20/colorado-pot-credit-union-could-be-open-by-jan-1-under-state-charter [https://perma.cc/7B7V-JYJW].

81. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 154 F. Supp. 3d 1185, 1187 (D. Colo. 2016), *vacated*, 861 F.3d 1052 (10th Cir. 2017).

82. First Amended Complaint ¶ 100, *Fourth Corner Credit Union*, 154 F. Supp. 3d 1185 (No. 15-cv-01633), 2015 WL 5025343.

83. Letter from Esther L. George to Deirdra A. O'Gorman, *supra* note 11 (explaining that "[a]s a de novo depository institution, there is no historical record for the Bank to review, and the NCUA found insufficient information to assess [Fourth Corner's] ability to safely and soundly operate and comply with applicable laws and regulations, including Bank Secrecy Act and Anti-Money Laundering responsibilities" especially given the credit union's "focus on serving marijuana-related businesses").

Fourth Corner sought a federal court injunction requiring that the Kansas City Fed open its account. Fourth Corner argued that an amendment to the Federal Reserve Act adopted as part of the Monetary Control Act of 1980 requires that Federal Reserve Banks open accounts for all legally eligible institutions.[84] That amendment, found in Section 11A, states that "[a]ll Federal Reserve bank services covered by the fee schedule *shall* be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks."[85] The credit union read this "shall" language as obligatory—Reserve Banks must provide payment services to nonmember depository institutions.[86]

In response, the Kansas City Fed argued that it has discretionary authority to deny access to Federal Reserve accounts and payment services. It cited Section 13 of the Federal Reserve Act which states that Reserve Banks "*may* receive . . . deposits."[87] The Kansas City Fed argued that this "may" language confers broad discretion to deny accounts. In light of the Federal Reserve Act's provision, the Kansas City Fed argued that the "shall" language in Section 11A should be read to pertain only to "the pricing of services provided by the Bank" and "not the Bank's obligation to provide a [Federal Reserve] account."[88] In addition, the Kansas City Fed argued that it should not be required to provide services that would "facilitate the distribution of marijuana."[89]

The district court dismissed Fourth Corner's request for an injunction. Although the court was not persuaded that Section 11A's "shall" language was limited to pricing, the court held that "it is at least implicit that this statute does not mandate the opening of a master account that will facilitate activities that violate federal law."[90]

Fourth Corner appealed the district court's decision, arguing that the court erred in deciding the case based on marijuana's illegality. Fourth Corner explained that it had amended its complaint to promise that it would only serve the cannabis industry "if authorized by state and federal law."[91] Fourth Corner then reprised its argument that Section 11A's "shall" language required that the Kansas City Fed open an account for a depository institution

84. *Fourth Corner Credit Union*, 154 F. Supp. 3d at 1187 (citing 12 U.S.C. § 248a(c)(2)).

85. 12 U.S.C. § 248a(c)(2) (emphasis added).

86. Plaintiff the Fourth Corner Credit Union's Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 at 12–15, *Fourth Corner Credit Union*, 154 F. Supp. 3d 1185 (No. 15-cv-01633), 2015 WL 6635715.

87. Defendant Fed. Rsrv. Bank of Kan. City's Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) at 13–14, *Fourth Corner Credit Union*, 154 F. Supp. 3d 1185 (No. 15-cv-01633), 2015 WL 13021567 (citing 12 U.S.C. § 342).

88. *Fourth Corner Credit Union*, 154 F. Supp. 3d at 1188.

89. *Id.*

90. *Id.* at 1189.

91. Appellant's Opening Brief at 17–18, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052 (10th Cir. 2017) (No. 16-1016), 2016 WL 2342501.

authorized under state law and legally operating.[92] The Kansas City Fed protested that Fourth Corner's newly narrowed business plan was "something of a sleight of hand."[93] The Kansas City Fed reaffirmed its claim of discretionary authority under Section 13 of the Federal Reserve Act.[94] The Federal Reserve Board weighed in as amicus curiae similarly asserting the Reserve Banks' "broad" discretion.[95]

The Tenth Circuit's per curium opinion shows confusion about whether Fourth Corner intended to serve illegal businesses. Judge Moritz concluded that the credit union never "unequivocally" promised to comply with federal law.[96] Thus, she voted to affirm the district court's decision to dismiss the case because Fourth Corner would facilitate illegal activity.[97] Judge Matheson opined that the case was not ripe for decision. Because Fourth Corner's promise to comply with federal law first surfaced in an amended complaint, Judge Matheson said that the Reserve Bank had not had the opportunity to consider it before rejecting the account request.[98] He thought the district court should dismiss the case without prejudice to allow the Kansas City Fed to consider Fourth Corner's revised business plan.[99] Neither Judge Moritz nor Judge Matheson addressed the Federal Reserve's asserted discretion over accounts. [100]

Judge Bacharach's opinion is different. It contains an extensive discussion about the Federal Reserve Bank's claimed discretion. Unlike his colleagues, Judge Bacharach took Fourth Corner's amended complaint at face value; he assumed Fourth Corner would comply with federal law.[101] He then turned to the question of discretion concluding that Section 11A "unambiguously entitle[d] Fourth Corner to a master account."[102] In reaching this conclusion, Judge Bacharach reviewed the language of Section 11A, the "legislative history" of the Monetary Control Act, "repeated interpretations by the Board of Governors and regional Federal Reserve Banks," and "the longstanding interpretation of [the] statute by other courts and academics."[103] At the time of the litigation, the Board had not yet adopted its Account Access

92. *Id.* at 14–15; Reply Brief of Appellant at 20, *Fourth Corner Credit Union*, 861 F.3d 1052 (No. 16-1016), 2016 WL 3971773.

93. Answer Brief of Appellee at 7–11, *Fourth Corner Credit Union*, 861 F.3d 1052 (No. 16-1016), 2016 WL 3644944.

94. *Id.* at 15.

95. Brief of Amicus Curiae the Bd. of Governors of the Fed. Rsrv. Sys. in Support of Defendant-Appellee the Fed. Rsrv. Bank of Kan. City at 14, *Fourth Corner Credit Union*, 861 F.3d 1052 (No. 16-1016), 2016 WL 3752238.

96. *Fourth Corner Credit Union*, 861 F.3d at 1057.

97. *Id.* at 1053.

98. *Id.* at 1059.

99. *Id.* at 1064.

100. *Id.* at 1058.

101. *Id.* at 1066.

102. *Id.* at 1068.

103. *Id.*

Guidelines, and Judge Bacharach saw the Federal Reserve's claims of discretion as nothing more than a litigation position that diverged from past Federal Reserve statements and practices.[104]

Ultimately, the fractured Tenth Circuit panel remanded Fourth Corner's case, with instructions to dismiss it without prejudice.[105] Fourth Corner filed a new request for an account, this time providing a corporate resolution promising that it would "not serve marijuana-related businesses until there is a change in federal law that authorizes financial institutions to serve marijuana-related businesses."[106] In response, the Kansas City Fed requested additional information, explaining that Fourth Corner's "unique" application raised "legal and policy questions."[107]

Rather than provide additional information, Fourth Corner filed suit arguing that Section 11A's language, implemented as part of the Monetary Control Act, requires the Federal Reserve Bank to provide an account to all legally eligible institutions.[108] The issue of discretion seemed poised for judicial resolution, but it was not to be. Before any significant briefings, the Kansas City Fed conditionally granted Fourth Corner a Federal Reserve account.[109] Among other things, the Kansas City Fed required that Fourth Corner secure share insurance (the credit union equivalent of deposit insurance).[110] Although credit unions without share insurance are eligible for Fed accounts,[111] the Kansas City Fed used its claimed discretion to require Fourth Corner to have insurance. Because Fourth Corner was unable to get share insurance, it never received a Federal Reserve account.[112]

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104. *Id.* at 1071.

105. *Id.* at 1053.

106. Complaint ¶ 41, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, No. 17-cv-02361 (D. Colo. Sept. 29, 2017) [hereinafter Fourth Corner 2017 Complaint]; Answer ¶ 41, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, No. 17-cv-02361 (D. Colo. Nov. 8, 2017).

107. Fourth Corner 2017 Complaint, *supra* note 106, ¶¶ 33, 50; Answer ¶¶ 33, 50, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, No. 17-cv-02361 (D. Colo. Nov. 8, 2017).

108. *See* Fourth Corner 2017 Complaint, *supra* note 106.

109. Stipulation of Dismissal at 1, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, No. 17-cv-02361 (D. Colo. Feb. 2, 2018).

110. Letter from Susan E. Zubradt, Senior Vice Pres., Fed. Rsrv. Bank of Kan. City, to Deirdra O'Gorman & Christopher E. Nevitt, Fourth Corner Credit Union 2 (Feb. 2, 2018) (on file with author).

111. 12 U.S.C. § 342 (authorizing Reserve Banks to receive deposits from "depository institutions"); *id.* § 461(b)(1)(A) (defining "depository institution" to include "any credit union which is eligible to make application to become an insured credit union" under a federal program of share insurance).

112. E-mail from Mark Mason, Att'y, Fourth Corner Credit Union, to author (June 19, 2023) (on file with author).

B. NARROW BANK

TNB USA Inc., a Connecticut-chartered bank, was the next to question the Federal Reserve's discretion in court.[113] But again the federal court sidestepped the discretion question due to procedural issues.

TNB's business plan is unconventional but simple. It plans to take large deposits from institutional investors and hold them in an account at the New York Fed.[114] TNB is indeed "the narrow bank" that its name implies.[115] It will not make loans or engage in fractional reserve banking.[116] TNB would earn interest on the Fed deposits and pass a portion of that interest on to its depositors.[117] Thus, a Federal Reserve account is critical to TNB's success. It began trying to open an account at the New York Fed in the fall of 2017.[118]

The Federal Reserve, however, had concerns about TNB. Because TNB would be uninsured and have no federal supervisor, the New York Fed began a risk assessment of the bank.[119] In addition, the Federal Reserve Board became concerned that TNB's business model "could complicate the implementation of monetary policy, disrupt financial intermediation, and negatively impact our nation's financial stability."[120]

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113. TNB USA Inc. v. Fed. Rsrv. Bank of N.Y., No. 18-cv-07978, 2020 WL 1445806, at *1 (S.D.N.Y. Mar. 25, 2020).

114. *Id.* at *2; Michael S. Derby, *Bank Sues New York Fed Over Lack of Account*, WALL ST. J. (Sept. 5, 2018), https://www.wsj.com/articles/bank-sues-new-york-fed-over-lack-of-account-1536185523 (on file with the *Iowa Law Review*). Because institutional investors typically deposit far more money than is covered by federal deposit insurance, institutional investors' bank deposits are subject to liquidity and credit risk associated with the bank where the deposit is held. *See* 12 U.S.C. § 1821(a)(1)(E) (describing the limits of FDIC insurance). TNB proposed to limit this risk by holding customer deposits at the Federal Reserve. *See* Account Access Guidelines, *supra* note 9, at 51,108 ("Balances held in Reserve Bank accounts present no credit or liquidity risk, making them very attractive in times of financial or economic stress.").

115. *TNB USA Inc.*, 2020 WL 1445806, at *2.

116. *Id.*

117. *Id.* TNB's business plan was enabled by the Federal Reserve's decision in 2008 to begin paying interest on excess reserves. Julie Andersen Hill, *Opening a Federal Reserve Account*, 40 YALE J. ON REGUL. 453, 476–77 (2023).

118. *TNB USA Inc.*, 2020 WL 1445806, at *2.

119. Memorandum of L. in Support of Defendant Fed. Rsrv. Bank of N.Y.'s Motion to Dismiss at 6–7, *TNB USA Inc.*, No. 18-cv-07978, 2019 WL 2559325 [hereinafter N.Y. Fed Motion to Dismiss, TNB]. TNB explains it has not sought deposit insurance because its customers' deposits would far exceed the insurable amounts. Complaint at 9, *TNB USA Inc.*, No. 18-cv-07978 [hereinafter TNB Complaint].

120. Memorandum of L. of Amicus Curiae the Bd. of Governors of the Fed. Rsrv. in Support of Defendant the Fed. Rsrv. Bank of N.Y.'s Motion to Dismiss at 3, *TNB USA Inc.*, No. 18-cv-07978, 2020 WL 1647305 [hereinafter Board Amicus Brief, TNB]. The Board worried that, unlike traditional banks, a narrow bank would earn interest from the Federal Reserve without being constrained by "the costs of capital requirements and the other elements of federal regulation and supervision." Regulation D: Reserve Requirements of Depository Institutions, 84 Fed. Reg. 8829, 8830 (proposed Mar. 12, 2019) (to be codified at 12 C.F.R. pt. 204). The Board also worried that the narrow bank might draw deposits away from traditional banks, requiring those banks to seek more expensive funding to provide credit to consumers and businesses. *Id.*

After about a year of waiting for the New York Fed's decision, TNB filed suit asking a federal court to declare that TNB was entitled to a Federal Reserve account.[121] The New York Fed responded by asking the court to dismiss the case. It argued that TNB's case was not ripe because TNB's "application for a master account is still under consideration."[122] Moreover, it argued that TNB's "claimed right to a master account is foreclosed by [Federal Reserve Act] Section 13, which gives Federal Reserve Banks discretion to reject deposits in stating that Reserve Banks '*may* receive' them, rather than 'shall receive' them."[123] Relying on Judge Bacharach's opinion in *Fourth Corner*, TNB countered that "[t]he only sensible reading of" the Monetary Control Act's language stating that "Reserve Bank services . . . shall be available to nonmember depository institutions" is that the New York Fed "must make services, including master accounts available to any depository institution, including TNB."[124]

The court dismissed the case on ripeness grounds without any consideration of the parties' arguments about the Federal Reserve's discretion.[125] The court explained that "the outcome of TNB's application [was] not a certainty" because the New York Fed could still deny TNB's account request "for a procedural reason like the expiration of its temporary" banking charter from Connecticut.[126] The court apparently believed TNB's Connecticut charter had expired.[127] If TNB was no longer a bank, it would no longer be legally eligible for a Federal Reserve account and the court would not have needed to reach the question about the Federal Reserve's discretion.

In fact, TNB's Connecticut charter has not expired.[128] Connecticut is prepared to let TNB begin operating if TNB can open a Federal Reserve account.[129] But rather than appeal the district court's decision, TNB decided to "work directly with the Federal Reserve to resolve" the account issue.[130]

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121. TNB Complaint, *supra* note 119, at 1, 3.

122. N.Y. Fed Motion to Dismiss, TNB, *supra* note 119, at 9.

123. Reply in Further Support of Defendant Fed. Rsrv. Bank of N.Y.'s Motion to Dismiss at 2, *TNB USA Inc.*, No. 18-cv-07978, 2019 WL 3777823 (citing 12 U.S.C. § 342).

124. Opposition to Defendant's Motion to Dismiss at 14–15, *TNB USA Inc.*, No. 18-cv-07978, 2019 WL 2098395 (citing 12 U.S.C. § 248a).

125. *TNB USA Inc.*, No. 18-cv-07978, 2020 WL 1445806, at *10.

126. *Id.* at *6, *9.

127. *Id.* at *3 ("TNB's temporary [Certificate of Authority] was set to expire by its terms in early 2019, so presumably, it has expired at this point.").

128. *New Banks in Connecticut*, CONN. DEP'T OF BANKING, https://portal.ct.gov/DOB/Bank-Information/Bank-Information/New-Banks-in-Connecticut [https://perma.cc/2ZC3-ANH2] (showing that TNB's temporary certificate of authority was extended on January 25, 2019, August 18, 2020, and February 9, 2022); E-mail from James McAndrews, Chairman & CEO, TNB USA Inc., to author (Sept. 10, 2023) (on file with author) (stating that the Connecticut Department of Banking extended TNB's temporary certificate of authority for eighteen months in August 2023).

129. E-mail from James McAndrews to author, *supra* note 128.

130. Minutes of Special Meeting of the Conn. Dep't of Banking Requested by the Organizers of TNB Bank for Extension of the Temp. Certificate of Auth. (Aug. 18, 2020), https://portal.ct.g

More than six years since starting the process, TNB is still trying to convince the New York Fed to grant its request for an account.[131] The Federal Reserve's claim of discretion allows it to keep TNB waiting.

C. CRYPTO CUSTODY BANK

Like TNB, Custodia Bank, a Wyoming cryptocurrency focused bank, challenged the Federal Reserve's long delay in handling its account request.[132] Rather than deciding the case on ripeness grounds, the court allowed Custodia's case to proceed.[133] The Kansas City Fed then denied Custodia's account request.[134] Although the court has not yet resolved questions surrounding the Federal Reserve's discretion, these questions are percolating.

Custodia, as its name implies, plans to custody cryptocurrency for institutional customers like crypto exchanges, hedge funds, pension funds, and family offices.[135] It also plans to provide real-time payments for institutional traders and corporate treasurers using its own stable coin.[136] To operationalize its business plan, Custodia received a special purpose depository institution ("SPDI," pronounced speedy) charter from the Wyoming Division of Banking.[137] The SPDI charter allows banks to provide custody services, accept U.S. dollar deposits, and provide payment services.[138] However, unlike traditional banks, SPDIs cannot make loans.[139] Moreover, SPDIs have a one

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ov/-/media/DOB/Enforcement/FID/TNB-USA-Special-Meeting-8-18-2020-Minutes.pdf [https://perma.cc/CQK7-AWTZ].

131. *Master Accounts Requests for Access Database*, *supra* note 14 (showing that TNB's request for an account is pending). Elsewhere I argue that the Federal Reserve's lengthy delays are evidence of a broken account access process. I recommend that Congress enact legislation to require that Reserve Banks address account access requests in the timely manner. Hill, *supra* note 117, at 501, 510, 512–13.

132. Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 16901942, at *5 (D. Wyo. Nov. 11, 2022).

133. *Id.*

134. Campbell, *supra* note 12.

135. Maria Aspan, *How Caitlin Long Turned Wyoming into Crypto Country*, FORTUNE (July 29, 2021, 4:26 AM), https://fortune.com/2021/07/29/caitlin-long-wyoming-crypto (on file with the *Iowa Law Review*); Penny Crosman, *Avanti Got a Bank Charter. Here's What's Next on Its Agenda*, AM. BANKER (Nov. 5, 2020, 1:30 PM), https://www.americanbanker.com/news/avanti-got-a-bank-charter-heres-whats-next-on-its-agenda (on file with the *Iowa Law Review*). Custodia Bank was initially known as Avanti Financial Group, Inc. *Avanti Is Now Custodia, Announces Countdown to Launch in Q2*, CUSTODIA (Feb. 24, 2022), https://www.custodiabank.com/press/avanti-is-now-custodia-announces-countdown-to-launch-in-q2 [https://perma.cc/DZ7G-YWYV]. To avoid confusion, I use the name Custodia throughout this Article.

136. *Avanti Financial Group Announces Accelerated Charter Application*, CUSTODIA (July 23, 2020), https://www.custodiabank.com/press/bank-charter-application-accepted [https://perma.cc/FP6U-NTLJ].

137. Crosman, *supra* note 135.

138. Act of Feb. 26, 2016, ch. 92, § 2, 2019 Wyo. Sess. Laws 328 (codified as amended at WYO. STAT. ANN. § 13-12-103 (2020)).

139. WYO. STAT. ANN. § 13-12-103(c) (2020).

hundred percent reserve requirement for their U.S. dollar deposits.[140] Custodia promised "to hold a minimum of $1.08 in cash and short-term high-quality liquid assets such as T-Bills to back each $1.00 of customer deposits during its first three years."[141]

Custodia formally began seeking an account at the Kansas City Fed in October 2020.[142] Yet its application languished. Senator Cynthia Lummis (R-WY) accused the Federal Reserve of "starving the master account applicant until it dies."[143] Sick of waiting, Custodia filed suit against the Kansas City Fed and the Federal Reserve Board requesting that the court provide "an order compelling the Board and/or the Kansas City Fed to promptly decide Custodia's application for a master account."[144] Alternatively, Custodia asked the court to declare that Section 11A's "shall be available" language requires the Kansas City Fed to provide Custodia an account.[145]

In what is becoming a pattern, the Kansas City Fed and the Board asked the court to dismiss the case on ripeness grounds because it was still considering Custodia's account request. They explained that the lengthy review process was justified by the broad discretion granted by the "may receive . . . deposits" language in Section 13 of the Federal Reserve Act.[146]

Unlike the *TNB* court, the *Custodia* court refused to dismiss the complaint on ripeness grounds.[147] However, it also declined to resolve the question of the Federal Reserve's discretion. The court explained that "whether Congress afforded [the Reserve Banks] complete discretion (under [Section 13]) or no discretion (under [Section 11A])" may depend on the facts of the case.[148] "For example, if discovery reveals that the Board of Governors in fact inserted itself into [the Kansas City Fed's] consideration of Custodia's application, the level of discretion held by [the Kansas City Fed] under the law may matter

140. WYO. STAT. ANN. § 13-12-105 (2019).

141. *Roughstock: Wrangling Ideas for Better Banking*, CUSTODIA, https://custodiabank.com/roughstock [https://perma.cc/Y6AZ-8XDZ].

142. Kevin Travers, *Avanti, Crypto Banks Shut Out*, FINTECH NEXUS (Nov. 22, 2021), https://news.fintechnexus.com/avanti-crypto-banks-shut-out [https://perma.cc/PU4V-AUHF].

143. *Nomination of Jerome H. Powell, of Maryland, to be Chairman of the Board of Governors of the Federal Reserve System: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. 33–34 (2022) (statement of Sen. Cynthia Lummis).

144. Custodia Complaint, *supra* note 73, ¶ 81.

145. *Id.* ¶¶ 142–44 (citing 12 U.S.C. § 248a(c)(2)).

146. Defendant Bd. of Governors of the Fed. Rsrv. Sys.'s Memorandum of Points & Authorities in Support of Its Motion to Dismiss at 17–26, Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 9283301 (D. Wyo. Aug. 16, 2022) [hereinafter Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022)]; Defendant Fed. Rsrv. Bank of Kan. City's Memorandum of Points & Authorities in Support of Its Motion to Dismiss at 21–29, *Custodia Bank, Inc.*, No. 22-cv-00125, 2022 WL 9283293 (D. Wyo. Aug. 16, 2022) [hereinafter Kansas City Fed Motion to Dismiss, Custodia].

147. *Custodia Bank, Inc.*, No. 22-cv-00125, 2022 WL 16901942, at *17 (D. Wyo. Nov. 11, 2022).

148. *Id.* at *7.

little because it may be that [the Reserve Bank] failed to exercise any such discretion . . . ."[149]

Then, as the case entered the discovery phase, the Kansas City Fed denied Custodia's account request.[150] The Kansas City Fed did not publicly release its denial letter or the reasons for its decision.[151] However, in what appears to be a coordinated decision, the Federal Reserve Board announced that it had denied Custodia's separate request to become a member bank.[152] The Board explained that "[t]he firm proposed to engage in novel and untested crypto activities that include issuing a crypto asset on open, public and/or decentralized networks."[153] The Board concluded that this "novel business model and proposed focus on crypto-assets presented significant safety and soundness risks."[154] "The Board also found that Custodia's risk management framework was insufficient to address concerns regarding the heightened risks associated with its proposed crypto activities, including its ability to mitigate money laundering and terrorism financing risks."[155]

The account denial set off another round of legal briefing arguing about the Federal Reserve's discretion. Custodia amended its complaint to allege that the Federal Reserve had improperly denied its account request.[156] Custodia again claimed that it is entitled to an account under Section 11A's instruction that Federal Reserve Bank services "shall be available" to depository institutions.[157] The Federal Reserve requested that the

149. *Id.*

150. Joint Motion of Defendants Fed. Rsrv. Bank of Kan. City & Fed. Rsrv. Bd. of Governors to Dismiss the Complaint as Moot at 1, Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125, 2022 WL 18401268 (D. Wyo. Jan. 27, 2023) (stating that the Kansas City Fed denied Custodia's account request on Jan. 27, 2023, the same day the Board denied Custodia's membership application); *see also* Campbell, *supra* note 12 (reporting the Kansas City Fed's denial of Custodia's account request).

151. The Kansas City Fed denied my information request for a copy of its decision letter. Letter from Craig Zahnd, Senior Vice Pres. & General Couns., Fed. Rsrv. Bank of Kan. City, to author (Mar. 30, 2023) (on file with author) (explaining that "[r]eleasing this type of information can negatively impact the [Reserve] Bank's operations by deterring requestors from sharing all information necessary for the Bank to fully analyze requests for master accounts or Federal Reserve financial services").

152. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Announces Denial of Application by Custodia Bank, Inc. to Become a Member of the Federal Reserve System (Jan. 27, 2023), https://www.federalreserve.gov/newsevents/pressreleases/orders20230127a.htm [https://perma.cc/73EZ-8T4P]. Custodia had previously filed an application to become a Federal Reserve member bank. *Avanti Statement on Its Application to Become a Federal Reserve Member Bank*, CUSTODIA BANK (Aug. 28, 2021), https://custodiabank.com/press/avanti-statement-on-its-application-to-become-a-federal-reserve-member-bank [https://perma.cc/65JM-H2ZA].

153. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., *supra* note 152.

154. *Id.*

155. *Id.*

156. First Amended Complaint ¶¶ 5–7, Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-cv-00125 (D. Wyo. Feb. 28, 2023).

157. *Id.* ¶¶ 5, 29–35, 71–73, 90, 99 (emphasis omitted).

court dismiss Custodia's complaint, arguing that Reserve Banks have broad discretion to deny account requests.[158] Again, the court held that the case could proceed, but did not rule on the question of the Federal Reserve's discretion.[159] The court reiterated its conclusion "that a full statutory interpretation of the matter is more appropriate after further development of important facts."[160]

D. INTERNATIONAL TRADE BANK

Like Custodia, PayServices Bank, an uninsured bank designed to facilitate international trade, is challenging the denial of its account request.[161] PayServices also believes that Section 11A of the Federal Reserve Act requires that the Fed provide accounts and payment services.[162] So far, the federal district court in Idaho has made no substantive rulings in PayServices's case.

PayServices plans to focus "on facilitating trade of commodities for the small to medium enterprises from and to the United States."[163] Its founder, Lionel Danenberg, explains: "If I'm a small U.S. business who wants to import [commodities like cocoa beans] from Ivory Coast, there's simply no way for me right now to send the money."[164] PayServices hopes to use "face- and voice-recognition technology and GPS data" to satisfy anti–money laundering laws and to verify the clearance of exports and imports through customs agencies before releasing payments.[165] PayServices would not lend.[166]

PayServices had previously sought bank charters with federal deposit insurance, but after those proved unsuccessful, it turned to an Idaho uninsured

158. Defendant Bd. of Governors of the Fed. Rsrv. Sys.'s Memorandum of Points & Authorities in Support of Its Motion to Dismiss the Amended Complaint at 5–9, *Custodia Bank, Inc.*, No. 22-cv-00125 (D. Wyo. Mar. 28, 2023) [hereinafter Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023)].

159. Order on Defendants' Motion to Dismiss Amended Complaint at 1, 15–16, *Custodia Bank, Inc.*, No. 22-cv-00125 (D. Wyo. June 8, 2023).

160. *Id.* at 10–11.

161. PayServices Complaint, *supra* note 22, at 1–2.

162. *Id.* ¶¶ 69, 89, 95 (citing 12 U.S.C. § 248a(c)(2)).

163. *Id.* ¶ 44.

164. Chris Matthews, *'Only the Elites Have the Ability to Have Bank Accounts All over the World': Small Businesses Battle for Fed Master Account Access.*, MARKETWATCH (Aug. 22, 2023, 9:12 AM), https://www.marketwatch.com/story/only-the-elites-have-the-ability-to-have-bank-accounts-all-over-the-world-small-businesses-battle-fed-for-master-account-access-dba40059 [https://perma.cc/DZ8L-LAFA].

165. *Id.*; PayServices Complaint, *supra* note 22, ¶¶ 47–48; *see also* Press Release, PayServices, Inc., PayServices Implementing Unique FinTech Solution with Governments Worldwide (May 10, 2021), https://www.einnews.com/pr_news/540749654/payservices-implementing-unique-fintech-solution-with-governments-worldwide [https://perma.cc/T5R6-ZQ87] (stating that PayServices will provide "real-time, cutting edge, auditable end-to-end traceability in banking and financial compliance").

166. PayServices Complaint, *supra* note 22, ¶ 46.

bank charter.[167] As with the previously discussed uninsured banks (TNB and Custodia), PayServices's deposits would be fully reserved.[168]

After receiving preliminary approval from the Idaho Department of Finance, PayServices requested an account from the San Francisco Fed.[169] According to PayServices, Reserve Bank officials were initially positive about PayServices's account,[170] but the account opening process dragged on for more than nine months.[171] On May 31, 2023, the San Francisco Fed denied the account request claiming that PayServices's "novel, monoline business model and focus on transactions that are largely foreign in nature or involve mostly foreign participants present undue risks."[172] The San Francisco Fed said that PayServices's "unproven risk management framework is insufficient to . . . mitigate money laundering and terrorism financing risks."[173] Shortly thereafter, PayServices sued the San Francisco Fed for improperly denying its account request.[174]

PayServices's complaint echoes claims made by the other banks litigating their account requests. It asserts that Section 11A's "shall be available" language requires that Reserve Bank payment services be available to all nonmember depository institutions, including PayServices.[175] Because these

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167. *See* Alex Graff, *PayServices' Business Model Clashes with FDIC's Insurance Approval Process*, S&P GLOB. MKT. INTEL. (Mar. 28, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/payservices-business-model-clashes-with-fdic-s-insurance-approval-process-69520189 [https://perma.cc/E4BU-6BY8] ("PayServices executives said the company's status as an institution that does not issue loans is posing a major hurdle in its efforts to obtain approval from a regulatory body that largely functions to insure banks that take deposits and make loans."); PayServices Complaint, *supra* note 22, ¶ 46 (stating that the FDIC "agreed that PayServices' model did not warrant the need for FDIC insurance coverage").

168. PayServices Complaint, *supra* note 22, ¶¶ 20, 46.

169. *Id.* ¶¶ 22–23 ("On August 10, 2022, PayServices held a meeting with Thomas Doerr, FRBSF Senior Manager, Supervision & Credit, Credit Risk Management and formally requested a master account."). The Federal Reserve's Master Account and Services Database states that PayServices's account request was made on August 8, 2022. *Master Accounts Requests for Access Database*, *supra* note 14. It is unclear what accounts for this two-day discrepancy. PayServices's complaint alleges that its executives also met with San Francisco Fed officials on April 22, 2022, prior to receiving preliminary approval from the Idaho Department of Finance. PayServices Complaint, *supra* note 22, ¶ 16.

170. PayServices Complaint, *supra* note 22, ¶¶ 16–20, 39.

171. *Master Accounts Requests for Access Database*, *supra* note 14 (showing that PayServices requested an account on August 8, 2022, and the San Francisco Fed denied the account on May 31, 2023).

172. Letter from Wallace Young, Vice Pres. Credit Risk Mgmt., Fed. Rsrv. Bank of S.F., to Lionel Danenberg, PayServices Inc. 1 (May 31, 2023) (on file with author); PayServices Complaint, *supra* note 22, ¶¶ 43, 50. PayServices's complaint suggests that the San Francisco Fed was prodded to a decision only after Senator Marco Rubio applied political pressure. *Id.* ¶¶ 40–43.

173. Letter from Wallace Young to Lionel Danenberg, *supra* note 172, at 1.

174. *See generally* PayServices Complaint, *supra* note 22 (utilizing Wallace Young's letter as a factual basis to support its allegation that the San Francisco Fed unlawfully denied PayServices's request for a master account).

175. *Id.* ¶¶ 69, 89, 95 (citing 12 U.S.C. § 248a(c)(2)).

services "require a master account," PayServices argues that the Reserve Banks must also provide a Federal Reserve account.[176] PayServices believes that the Federal Reserve's Account Access Guidelines unfairly discriminate against state-chartered institutions by subjecting those without a federal regulator to heightened scrutiny.[177]

The San Francisco Fed responds that Section 13 of the Federal Reserve Act "provides [the Reserve Banks] with discretion to deny master account requests."[178] It further argues that "[p]ermitting every single state and territory to dictate which entities can directly access the Federal Reserve System—with *no* room for federal oversight—would remove a vital tool for the Reserve Banks to guard against money laundering, contain cybersecurity breaches, or address a myriad of other risks."[179] The court has not yet resolved any questions of statutory interpretation.

E. PUERTO RICAN OFFSHORE BANK

Unlike the other banks challenging the Federal Reserve over account and payments access, Banco San Juan Internacional, Inc. ("BSJI") has a Federal Reserve account and payment services.[180] BSJI is asking a federal court to prevent the New York Fed from closing its account.[181] The New York Fed says that BSJI, which operates under a Puerto Rican charter for offshore banks, presents money laundering concerns.[182] The New York Fed claims that, in any event, Reserve Banks have the discretion to terminate accounts and services for any reason or no reason at all.[183]

176. *Id.* ¶ 69.

177. *Id.* ¶¶ 85–88; Account Access Guidelines, *supra* note 9, at 51,109–10.

178. Defendant Fed. Rsrv. Bank of S.F.'s Memorandum of L. in Support of Its Motion to Dismiss Plaintiff's Complaint for Declaratory & Injunctive Relief at 8, 13, PayServices Bank v. Fed. Rsrv. Bank of S.F., No. 23-cv-00305 (D. Idaho Aug. 14, 2023), ECF No. 22-1 [hereinafter S.F. Fed's Motion to Dismiss] (citing 12 U.S.C. § 342's language that Reserve Banks "may . . . receive deposits").

179. *Id.* at 11.

180. *Master Account and Services Database: Existing Access*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (May 31, 2023), https://www.federalreserve.gov/paymentsystems/master-account-and-services-database-existing-access.htm [https://perma.cc/8G55-XBXM] [hereinafter *Master Accounts Existing Access Database*] (searching Banco San Juan Internacional Inc.).

181. BSJI's Motion for TRO, *supra* note 22, at 1.

182. Letter from Christopher D. Armstrong, Head of Operations & Resiliency Grp., Fed. Rsrv. Bank of N.Y., to Julie Williams, Wilmer Cutler Pickering Hale & Dorr LLP 1 (June 30, 2023) (noting the New York Fed's "significant AML [(anti–money laundering)] concerns related to BSJI's transaction activity").

183. Letter from Christopher D. Armstrong, Head of Operations & Resiliency Grp., Fed. Rsrv. Bank of N.Y., to Hector J. Vazquez, CEO, & Pedro Crespo, Chief Risk Officer, Banco San Juan Internacional, Inc. 2 (Sept. 1, 2022).

BSJI was chartered as a Puerto Rican international banking entity ("IBE") in 2011.[184] Under Puerto Rican law, IBEs operate as offshore banks.[185] They can provide traditional banking services including deposit accounts and loans to customers outside of Puerto Rico.[186] But they can also provide investment banking and brokerage services—something that is prohibited for traditional onshore banks in the United States.[187] Like their offshore counterparts in the Cayman Islands, the Bahamas, and elsewhere, Puerto Rican IBEs receive important tax benefits in their home jurisdiction.[188] IBEs do not have federal deposit insurance and do not have a federal bank supervisor.[189]

BSJI received an account at the New York Fed shortly after receiving its charter.[190] It began "offer[ing] commercial and investment banking services."[191] BSJI's majority owner, Marcelino Bellosta Varady, has family ties to Venezuela and the bank soon began doing business with customers in Venezuela.[192] One

184. *Concessionaire Search*, OFF. OF THE COMM'R OF FIN. INSTS., http://69.79.227.78/en/License/Index?LicenseTypeFilter=&NameFilter=BANCO+SAN+JUAN+INTERNACIONAL%2C+INC.&NameExactMatchFilter=true&CityFilter=&PageSize=10 [https://perma.cc/AU5C-KSLE] (searching Banco San Juan Internacional, Inc. and showing a charter approval date of July 22, 2011).

185. *See* Michael Quint, *Puerto Rico Establishes International Banking*, N.Y. TIMES, Aug. 21, 1989, at D2 (explaining that Puerto Rico's International Banking Center Act, adopted in 1989, was designed to allow Puerto Rico banks to compete with Caribbean offshore banks in the Cayman Islands and the Bahamas).

186. P.R. LAWS ANN. tit. 7, §§ 232c, 232j (2011).

187. *Compare id.* § 232j(a)(9) (allowing Puerto Rican IBE's to "[u]nderwrite, distribute, and otherwise trade in securities, notes, debt instruments, drafts and bills of exchange issued by a foreign person for final purchase outside of Puerto Rico"), *with* 12 U.S.C. § 24 (stating that nationally chartered banks cannot "underwrite any issue of securities or stock"), *and* 12 U.S.C. § 1831a(a)(1) (stating that in general, insured state-chartered banks may not engage in activities that are impermissible for a national bank).

188. *See* Alejandro A. Santiago Martínez, *Banking in Puerto Rico: Opportunities for International Financial Entities*, 9 U. P.R. BUS. L.J. 72, 79–83 (2017) (describing the tax benefits for international banking entities and international financial entities in Puerto Rico); Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign Against Harmful Tax Competition*, 4 COLUM. J. TAX L. 1, 43 (2012) (describing Cayman Islands, the Bahamas, and other offshore jurisdictions as having "low-tax" policies).

189. U.S. DEP'T OF THE TREAS., NATIONAL MONEY LAUNDERING RISK ASSESSMENT 70 (2022), https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf [https://perma.cc/WBJ9-AZ3S] (explaining that IBEs do not have deposit insurance or a federal regulator).

190. A Federal Reserve database of institutions with access to accounts and payment services reports that BSJI began accessing services on October 4, 2011. *Master Accounts Existing Access Database*, *supra* note 180 (searching Banco San Juan Internacional Inc). BSJI's court filings indicate that it opened its account at the New York Fed on April 5, 2012. BSJI's Motion for TRO, *supra* note 22, at 5.

191. *See* BSJI's Motion for TRO, *supra* note 22, at 5.

192. *See* Luis J. Valentín Ortiz, *Pequeños Bancos Internacionales de Puerto Rico Se Asoman en los Pandora Papers*, CENTRO DE PERIODISMO INVESTIGATIVO (Oct. 5, 2021), https://periodismoinvestigativo.com/2021/10/pequenos-bancos-internacionales-de-puerto-rico-se-asoman-en-los-pandora-papers [https://perma.cc/MF76-6APZ] (stating that Marcelino Bellosta Varady's father, Venezuelan

of its borrowers was Petróleos de Venezuela S.A. ("PdVSA"), the state-owned oil company of Venezuela.[193]

BSJI's relationship with the New York Fed has been rocky for years. In 2016, the Financial Crimes Enforcement Network ("FinCEN"), the federal agency tasked with policing money laundering, became concerned that banks without a federal regulator, like BSJI and the other Puerto Rican offshore banks, were not required to have the same anti–money laundering controls as federally supervised banks.[194] The concern apparently spread. Soon the New York Fed adopted new account and payments guidance for "high risk" banks, like the Puerto Rican offshore banks.[195] This guidance focused on compliance with money laundering and trade sanction laws.[196] At the same time, the United States began to impose increasingly severe sanctions on individuals and companies with ties to Venezuelan President Nicolás Maduro.[197] In 2019, the U.S. Treasury determined that PdVSA, BSJI's then customer, was subject to sanctions.[198]

The issue came to a head in February 2019 when the FBI raided BSJI's office looking for "funds that might be linked to entities or individuals on the

businessman Carlos Marcelino José Bellosta Pallarés, was the beneficiary of three offshore trusts that held bank accounts at BSJI).

193. Verified Complaint for Forfeiture In Rem at 2, United States v. Funds in the Amount of $53,082,824.19.00 in U.S. Currency, No. 19-cv-01930 (Sept. 27, 2019), ECF No. 1 [hereinafter Forfeiture Complaint].

194. Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator, 81 Fed. Reg. 58425, 58428 (proposed Aug. 25, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020) (identifying Puerto Rico's IBEs as one type of entity excluded from laws requiring anti–money laundering controls); Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator, 85 Fed. Reg. 57129 (Sept. 15, 2020) (to be codified at 31 C.F.R. pts. 1010, 1020).

195. FED. RSRV. BANK OF N.Y., GUIDANCE FOR FEDERAL RESERVE FINANCIAL SERVICES APPLICANTS THAT ARE DEEMED HIGH RISK BY THE FEDERAL RESERVE BANK OF NEW YORK (July 19, 2017), https://app.frbservices.org/assets/forms/accounting/guidance-high-risk-new-york.pdf [https://perma.cc/4LYG-GQDB].

196. *Id.* In 2020, the New York Fed replaced this guidance with a more robust Account and Financial Services Handbook. FED. RSRV. BANK OF N.Y., ACCOUNT AND FINANCIAL SERVICES HANDBOOK (Feb. 25, 2020) [hereinafter N.Y. FED. HANDBOOK], https://www.frbservices.org/binaries/content/assets/crsocms/forms/district-information/0220-frbny-financial-services-handbook.pdf [https://perma.cc/ZLJ3-KAZU]. For a summary of this Handbook, see Hill, *supra* note 117, at 467–69.

197. *See* CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10715, VENEZUELA: OVERVIEW OF U.S. SANCTIONS 1–2 (2023) (explaining that the United States had concerns about the "increasing authoritarianism of President Nicolás Maduro" and "Venezuela's lack of cooperation on antidrug and counterterrorism efforts").

198. Press Release, U.S. Dep't of the Treas., Treasury Sanctions Venezuela's State-Owned Oil Company Petroleos de Venezuela, S.A. (Jan. 28, 2019), https://home.treasury.gov/news/press-releases/sm594 [https://perma.cc/T9XN-B5F4] (describing sanctions); Forfeiture Complaint, *supra* note 193, at 2 (stating that BSJI made loans to PdVSA in 2017).

sanction list."[199] Federal agents seized fifteen million dollars in BSJI accounts at Merrill Lynch and more than thirty-eight million dollars held in BSJI's account at the New York Fed.[200] These funds were apparently related to loan payments received by BSJI from PdVSA.[201] The New York Fed also suspended BSJI's master account.[202]

The combined seizure of assets and Federal Reserve account suspension was crippling for BSJI. In addition to losing the payment services provided by the Federal Reserve, two of BSJI's correspondent banks also stopped providing services.[203] BSJI lost "more than [ninety percent] of its client base."[204]

But BSJI was not dead yet. BSJI immediately hired outside consultants to improve its anti–money laundering policies and procedures.[205] BSJI also challenged the government's civil forfeiture of its funds.[206] Eventually, the U.S. Attorney's Office agreed to return the fifty-three million dollars in seized funds and end its investigation into BSJI and its officials.[207] BSJI agreed to pay a one million dollar fine for deficiencies in its anti–money laundering policies and procedures.[208] The U.S. Attorney's Office "acknowledged . . . the corrective actions BSJI ha[d] undertaken in order to improve its [Bank Secrecy Act] and Anti-Money Laundering policies and procedures."[209]

At the same time, BSJI worked to convince the New York Fed that, with its revamped compliance policies, its master account did not present undue

199. Danica Coto, *FBI Raids Puerto Rico Bank Amid Venezuela Sanction Probe*, ASSOCIATED PRESS (Feb. 6, 2019), https://www.apnews.com/efe9d78a67d0441eb557325a390920be [https://perma.cc/4HZG-67F5].

200. Forfeiture Complaint, *supra* note 193, at 2.

201. Banco San Juan Internacional's Motion to Dismiss for Failure to State a Claim at 9–10, United States v. Funds in the Amount of $53,082,824.19.00 in U.S. Currency, No. 19-cv-01930 (Oct. 9, 2019), ECF No. 19.

202. BSJI's Motion for TRO, *supra* note 22, at 6.

203. *Id.* at 16 n.2.

204. *Id.* at 9, 16 ("Today [BSJI] retains only about two percent of the depositors it had prior to the suspension of its access to [Federal Reserve] services, while the corresponding dollar amount to total deposits dropped by over [sixty-six percent] during the same period.").

205. *Id.* at 7–8.

206. *See generally* Banco San Juan Internacional's Motion to Dismiss for Failure to State a Claim, United States v. Funds in the Amount of $53,082,824.19.00 in U.S. Currency, No. 19-cv-01930 (Oct. 9, 2019), ECF No. 19 (alleging that the federal government failed to prove the heightened pleading standard for civil forfeitures and failed to identify the correct assets).

207. Press Release, U.S. Att'y's Office, Dist. of P.R., Bank of San Juan Internacional, Inc. and the U.S. Attorney's Office for the District of Puerto Rico Resolve Pending Litigation and Related Matters (Feb. 11, 2020), https://www.justice.gov/usao-pr/pr/bank-san-juan-internacional-inc-and-us-attorney-s-office-district-puerto-rico-resolve [https://perma.cc/8UES-CSNZ] (noting that "BSJI cooperated fully in the investigation").

208. *Id.* ("BSJI has acknowledged that it had opportunities to improve governance, risk management and controls with respect to its [Bank Secrecy Act] compliance and the filing of [suspicious activity reports] with respect to a number of depositor account-holders.").

209. *Id.*

risk.[210] The New York Fed agreed to a two phased services restoration plan. The first phase gave BSJI access to Fedwire Securities Services.[211] The second phase, "unrestricted online access to the Fedwire Funds Service," would not occur until BSJI was fully compliant with the newly adopted New York Fed handbook for high-risk accounts.[212] Under that handbook IBEs are required to submit regular independent assessment reports.[213]

In July 2022, the New York Fed wrote to BSJI executives to inform them that BSJI had missed reporting deadlines, and that the New York Fed was "exercising [its] discretion to terminate BSJI's master account."[214] BSJI protested that there was confusion about the reporting deadline and asked the New York Fed to reconsider.[215] Later correspondence from the New York Fed to BSJI explains that the New York Fed also has concerns that "BSJI's account had processed numerous high-risk transactions suggestive of illicit activity" and BSJI's anti–money laundering controls were lacking.[216]

However, the correspondence also reveals that the New York Fed does not believe that it must justify its account closures. For example, on September 1, 2022, the New York Fed wrote:

> We also remind BSJI that both Operating Circular 1 as well as the New York Fed's [Handbook]—a binding contract BSJI entered on March 16, 2020—govern here. Under those agreements, the New York Fed has the right to terminate BSJI's access to financial services and close its account at any time by giving written notice, which we have done. . . . *[T]hese contractual rights do not require the New York Fed to establish or rely on any particular basis—whether related to Handbook non-compliance, undue risk, or otherwise—before it can terminate BSJI's services' access and close its account.*[217]

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210. Declaration of Richard J. Wolf ¶¶ 9–16, Banco San Juan Internacional, Inc. v. Fed. Rsrv. Bank of New York, No. 23-cv-06414 (July 25, 2023), ECF No. 18.

211. *Id.* ¶¶ 24, 27.

212. *Id.* ¶ 27.

213. N.Y. FED. HANDBOOK, *supra* note 196, at 8–10.

214. Letter from Suzanne Benvenuto, Chief Operating Officer, Operations & Resiliency Grp., Fed. Rsrv. Bank of N.Y., to Hector J. Vazquez, CEO & Pedro Crespo, Chief Risk Officer, Banco San Juan Internacional, Inc. (July 18, 2022); *see also* Letter from Christopher D. Armstrong to Hector J. Vasquez & Pedro Crespo, *supra* note 183 (calling the missed deadline the "primary driver" of the New York Fed's decision to close BSJI's account).

215. BSJI's Motion for TRO, *supra* note 22, at 9–11.

216. Letter from Michael M. Brennan, Assistant Gen. Couns., Fed. Rsrv. Bank of N.Y., to Judge John G. Koeltl, S.D.N.Y. (Aug. 11, 2023); *see also* Letter from Christopher D. Armstrong, Head of Operations & Resiliency Grp., Fed. Rsrv. Bank of N.Y., to Hector J. Vazquez, CEO & Pedro Crespo, Chief Risk Officer, Banco San Juan Internacional, Inc. (Apr. 24, 2023) (noting "concerning transactions" and compliance program deficiencies).

217. Letter from Suzanne Benvenuto, Chief Operating Officer, Operations & Resiliency Grp., Fed. Rsrv. Bank of N.Y., to Hector J. Vazquez, CEO & Pedro Crespo, Chief Risk Officer, Banco San Juan Internacional, Inc. (Sept. 1, 2022) (emphasis added).

Further emphasizing that its discretion is not in any way cabined, the New York Fed explained that there is no process for appealing its account closure decision.[218] The Federal Reserve Board likewise instructed that the New York Fed "has discretion over BSJI's master account and access to Federal Reserve services."[219]

Facing imminent closure of its account, BSJI asked a federal court for a temporary restraining order to prevent the New York Fed from closing the account.[220] Like other litigants, BSJI argues that Section 11A of the Federal Reserve Act "confer[s] nondiscretionary access to Federal Reserve payment services (which require a master account to facilitate these services) to all nonmember depository institutions."[221]

The New York Fed responded that "Reserve Banks are authorized to close master accounts by Section 13 of the [Federal Reserve Act], which expressly permits them to reject deposits."[222] The New York Fed explains account closures are completely discretionary and not subject to judicial review.[223] Nevertheless, the New York Fed explains that its closure of BSJI's account is justified because BSJI's "business consists entirely of processing transactions for and among close family members of its owner, all of whom are located in offshore jurisdictions associated with money laundering."[224]

The *BSJI* court has not yet resolved the question of the Federal Reserve's discretion over accounts.

III. OTHER BANKS SEEKING ACCESS

As Part II illustrates, the question of whether the Federal Reserve has discretionary authority to deny bank requests for master accounts is currently

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218. Letter from Christopher D. Armstrong to Hector J. Vazquez & Pedro Crespo, *supra* note 183 ("[T]he relevant contract provisions give the New York Fed broad rights to close BSJI's account on written notice, and . . . those rights do not contemplate or afford to BSJI any appellate or ombuds review of our decision.").

219. E-mail from Evan Winerman, Assistant Gen. Couns., Bd. of Govs. of the Fed. Rsrv. Sys., to William M. Isaac, Chairman, Secura/Isaac Group, LLC (Aug. 31, 2022, 3:46 PM).

220. BSJI's Motion for TRO, *supra* note 22, at 1.

221. *Id.* at 18 (emphasis omitted) (citing 12 U.S.C. § 248a(c)(2)'s statement that "[a]ll Federal Reserve [B]ank services covered by the fee schedule shall be available to nonmember depository institutions"). BSJI also argues that even if the New York Fed has discretion to close accounts, it is improperly exercising its authority. *Id.* at 22–28 (raising arguments based on the Administrative Procedure Act, due process, and the duty of good faith).

222. Defendant Fed. Rsrv. Bank of N.Y.'s Memorandum of L. in Opposition to Motion for Preliminary Injunction at 2, Banco San Juan Internacional, Inc. v. Fed. Rsrv. Bank of N.Y., No. 23-cv-06414 (S.D.N.Y. Aug. 23, 2023) [hereinafter N.Y. Fed's Opposition to Injunction] (citation omitted).

223. *Id.* at 24.

224. *Id.* at 1. The New York Fed's filing explains that "[a]s of June 2023, BSJI informed the FRBNY that its customer base consisted of 13 individuals and entities primarily located in Curaçao," a jurisdiction it describes as presenting "significant money laundering concerns." *Id.* at 8. For more on Curaçao as an offshore jurisdiction, see generally Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT'L L.J. 377 (2009).

unresolved. This legal question impacts far more than the five banks that have challenged the Federal Reserve's discretion in court. As Part I explains, the Account Access Guidelines instruct the Reserve Banks to use their discretion to scrutinize, and in some cases deny, access requests from all banks.[225] And the *BSJI* case emphasizes that the Reserve Banks believe they have discretion to close existing accounts without providing any justification for their decisions.[226] The banks most likely to be excluded by the Federal Reserve are banks without federal deposit insurance.[227] These banks span a variety of business models in a variety of jurisdictions.

One hundred state-chartered credit unions have private share insurance instead of federal insurance from the National Credit Union Administration.[228] They have urged the Federal Reserve not to subject them to increased scrutiny.[229]

Two public banks (banks owned by a governmental entity) operate without federal deposit insurance but have Federal Reserve accounts.[230] The critical banking service they provide in North Dakota and American Samoa[231]

225. Account Access Guidelines, *supra* note 9, at 51,109–10.

226. *See supra* notes 217–19 and accompanying text.

227. Account Access Guidelines, *supra* note 9, at 51,109 (explaining that Tier 2 and Tier 3 institutions will "face greater due diligence and scrutiny that institutions in a lower tier").

228. Stephanie O. Crofton, Luis G. Dopcio & James A. Wilcox, *American Share Insurance: The Sole Surviving Private Deposit Insurer in the United States*, 28 ESSAYS IN ECON. & BUS. HIST. 27, 27 (2010); *How Is My Credit Union Doing?*, AM. SHARE INS., https://www.americanshare.com/cu-financials [https://perma.cc/HN6B-F8PY] (search State: All States) (listing one hundred credit unions with ASI primary insurance).

229. Theresa Mason, CEO, Am. Share Ins., Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 1 (May 5, 2022), https://www.federalreserve.gov/SECRS/2022/May/20220513/OP-1747/OP-1747_050522_141806_329394943489_1.pdf [https://perma.cc/T994-TMJV]. About ninety privately insured credit unions have access to Federal Reserve accounts. *Compare Master Accounts Existing Access Database*, *supra* note 180 (providing a database including credit unions "that have access to Reserve Bank master accounts and financial services"), *with How Is My Credit Union Doing?*, *supra* note 228 (providing a database of credit unions with private share insurance).

230. *Master Accounts Existing Access Database*, *supra* note 180 (listing Bank of North Dakota and Territorial Bank of American Samoa as having access to Federal Reserve accounts); N.D. CENT. CODE § 6-09-10 (2022) (stating that Bank of North Dakota deposits are guaranteed by the full faith and credit of the State of North Dakota); Fili Sagapolutele, *TBAS Board Is Proposing Legislation for ASG to Guarantee Deposits*, SAMOA NEWS (Apr. 4, 2022, 7:55 AM), https://www.samoanews.com/local-news/tbas-board-proposing-legislation-asg-guarantee-deposits [https://perma.cc/V6LC-99MM] (reporting that the Territorial Bank of American Samoa does not have federal insurance and would like the government of American Samoa to guarantee deposits).

231. The Bank of North Dakota partners with local banks to offer agricultural, business, and student loans that have an estimated six-billion-dollar annual impact on the state's gross domestic product. BANK OF N.D., EVOLVING: 2021 ANNUAL REPORT 11 (2021), https://bnd.nd.gov/annual-report [https://perma.cc/288A-9HC7]. Territorial Bank of American Samoa, currently the only bank with physical operations in the territory, provides consumers with deposit and payment services. *Good Bye ANZ — Last Day of Business in the Territory Is Today*, SAMOA NEWS (Sept. 30, 2022, 9:57 AM), https://www.samoanews.com/local-news/good-bye-anz-last-day-business-territory-today [https://perma.cc/4BZP-KU2B]; *Territorial Bank of American Samoa Introduces TBAS Debit*

would end if the Fed changes course. Other state and local governments periodically consider public banks for similar purposes,[232] but without access to Federal Reserve payments, most public banks would be nonstarters.

Eight uninsured Puerto Rican offshore banks have access to Federal Reserve accounts and payment services.[233] Eight additional banks have pending requests.[234]

Connecticut, Maine, Nebraska, Vermont, and Wyoming have uninsured bank charters that allow banks to accept nonretail deposits.[235] Banks with these charters are seeking Federal Reserve accounts. Banking Circle, an international cross-border payments platform, has preliminary approval for a Connecticut uninsured bank charter and is seeking a Federal Reserve account.[236] Acceleron Bank, a technology-focused bank designed to facilitate foreign exchange transactions for small banks and credit unions, has received preliminary approval from the Vermont Department of Financial Regulation

Mastercard, SAMOA NEWS (Aug. 3, 2020, 9:48 AM), https://www.samoanews.com/local-news/territorial-bank-american-samoa-introduces-tbas-debit-mastercard [https://perma.cc/DTY2-AVXZ].

232. *See, e.g.*, HR&A ADVISORS, INC., CONTEXT AND PATH FOR A SAN FRANCISCO PUBLIC BANK 5 (2022), https://sfgov.org/lafco/sites/default/files/rwgo81822_item6.pdf [https://perma.cc/ALB5-42HU]; LEVEL 4 VENTURES, INC., STATE BACKED FINANCIAL INSTITUTION SERVING THE CANNABIS INDUSTRY: FEASIBILITY STUDY REPORT 1 (2018), https://weho.granicus.com/MetaViewer.php?view_id=22&clip_id=3385&meta_id=168586 [https://perma.cc/NJ4N-YV4V]; John Chesto, *Black Economic Council of Mass. Makes Forming a Public Bank a Top Legislative Priority*, BOS. GLOBE (May 19, 2021, 7:16 PM), https://www.bostonglobe.com/2021/05/19/business/black-economic-council-mass-makes-forming-public-bank-top-legislative-priority (on file with the *Iowa Law Review*).

233. *Master Accounts Existing Access Database*, *supra* note 180 (listing the following banks with access: Bancaribe Int'l Bank, Inc.; Banco San Juan Int'l Inc.; BanPlus Int'l Bank, Inc.; Elite Int'l Bank, Inc.; Face Bank Int'l Corp.; Intercam Banco Int'l, Inc.; and Stern Int'l Bank, LLC).

234. *Master Accounts Requests for Access Database*, *supra* note 14 (listing pending applications from Caribe Int'l Bank, Corp.; Zenus Bank Int'l, Inc.; FV Bank Int'l, Inc.; Advantage Int'l Bank, Corp.; Medici Bank Int'l; CB Int'l Bank, LLC; Tolomeo Bank Int'l, Corp.; and WTC Int'l Bank Corp.).

235. CONN. GEN. STAT. § 36a-70(t) (2023); ME. STAT. tit. 12, § 1231 (2023); NEB. REV. STAT. §§ 8-3001–3031 (2023); VT. STAT. ANN. tit. 8, § 12604 (2023); WYO. STAT. ANN. § 13-12-108 (2023). Other states do not have a specific uninsured bank charter but may still allow uninsured banks. *See, e.g.*, IDAHO CODE § 26-217 (2023) (authorizing Idaho chartered banks to seek federal deposit insurance but not requiring that they do so); MICH. COMP. LAWS § 487.13201(2) (2023) (requiring that Michigan banks get federal deposit insurance "unless the commissioner, for good cause shown, waives this requirement"); ALASKA STAT. § 06.05.355 (2022) (requiring that state banks have federal deposit insurance when chartered, but allowing them to later "relinquish" insurance with the consent of the department).

236. *New Banks in Connecticut*, STATE OF CONN. DEP'T OF BANKING, https://portal.ct.gov/DOB/Bank-Information/Bank-Information/New-Banks-in-Connecticut [https://perma.cc/4LK5-8FB9] (showing that "[a] temporary certificate of authority was issued to the organizers of Banking Circle US on August 10, 2021"); *Master Accounts Requests for Access Database*, *supra* note 14 (showing a pending account application from Banking Circle US); Daniel Webber, *Banking Circle: Taking on Global Payments' Interoperability Challenge*, FORBES (Aug. 24, 2022, 6:38 AM), https://www.forbes.com/sites/danielwebber/2022/08/24/banking-circle-taking-on-global-payments-interoperability-challenge/? [https://perma.cc/PYL5-AP7D].

and has requested a Federal Reserve account.[237] Three Wyoming special depository institutions have account requests pending.[238] As financial technology advances, these types of charters may become even more popular.

More than a dozen trust-chartered institutions without deposit insurance have access to Federal Reserve accounts.[239] Trust charters have become popular with fintech and crypto-related companies and those companies may seek Federal Reserve accounts.[240] For example, Protego, a company that allows customers to custody and trade digital assets, has applied for a Federal Reserve account.[241]

Whether any of these banks without federal insurance can use the Federal Reserve's payment systems may depend on whether the Federal Reserve has the discretionary authority to exclude them.

Moreover, the Federal Reserve's claims of discretion are not limited to banks without federal deposit insurance. As the Board explains, "a Reserve Bank has the authority to grant or deny an access request by an institution in any of the three" risk categories, including the category for federally insured

237. *See* ACCELERON BANK, https://acceleronbank.com [https://perma.cc/2RMG-WBEL] (describing the bank's proposed offerings); Amended and Restated Order Granting Permission to Organize as an Investor-Owned Uninsured Bank at 2, *In re* Acceleron Corp., No. 22-034-B (Vt. Dep't of Fin. Regul. Nov. 8, 2022), https://dfr.vermont.gov/sites/finreg/files/regbul/dfr-order-docket-22-034-b-acceleroncorp.pdf [https://perma.cc/VGZ5-KV27] (granting Acceleron permission to organize an uninsured bank); *Master Accounts Requests for Access Database*, *supra* note 14 (showing that Acceleron Bank requested an account from the Boston Fed on August 5, 2022).

238. *See* Nikhilesh De, *Kraken Hits Key Milestone in Quest to Gain Fed Account, Equal Treatment with Traditional Banks*, COINDESK (Mar. 26, 2022, 9:40 AM), https://www.coindesk.com/policy/2022/03/26/kraken-hits-key-milestone-in-quest-to-gain-fed-account-equal-treatment-with-traditional-banks [https://perma.cc/XSE7-S4PV]; *Master Accounts Requests for Access Database*, *supra* note 14 (showing pending account requests from BankWyse, Commercium Financial, and Kraken Financial).

239. *Master Accounts Existing Access Database*, *supra* note 180 (listing the following trusts with access: ADP Trust Company, NA; Associated Trust Company, NA; Blackrock Institutional Trust Co., NA; Chilton Trust Company NA; Deutsche Bank National Trust Co.; Fidelity Management Trust Co.; Fiduciary Trust Company; Raymond James Trust, National Association; Security National Trust Co; State St. Bk & Tr. of NH; State Street Bank & Trust Company; State Trust of Tennessee; U.S. Bank Trust Natl Assn SD; and Wellington Tr. Co. of Boston, NA).

240. Reserve Trust, the self-described "first fintech trust company with a Federal Reserve master account," was chartered as a Colorado limited purpose trust. *Built on Trust*, RESERVE TR. (July 9, 2021), https://www.reservetrust.com [https://web.archive.org/web/20210709165613/https://www.reservetrust.com]. Several crypto-related companies have trust charters. *See, e.g.*, Press Release, BitGo, Announcing BitGo Trust Company, The Only Regulated, Qualified Custodian Purpose-Built for Digital Assets (Sept. 13, 2018), https://www.bitgo.com/newsroom/press-releases/announcing-bitgo-trust-company [https://perma.cc/LF95-QAKH] (announcing that BitGo Trust Company had received a South Dakota trust company charter); Jason Brett, *Coinbase and Gemini Weigh In on the Business of Crypto Custody*, FORBES (Nov. 11, 2020, 2:29 PM), https://www.forbes.com/sites/jasonbrett/2020/11/11/coinbase-and-gemini-weigh-in-on-the-business-of-crypto-custody/? [https://perma.cc/98ZD-E3LS] (noting that Gemini and Coinbase have New York limited-purpose trust charters).

241. ANDREW P. SCOTT, CONG. RSCH. SERV., R47014, AN ANALYSIS OF BANK CHARTERS AND SELECTED POLICY ISSUES 15 (2022) (describing Protego); *Master Accounts Requests for Access Database*, *supra* note 14.

banks.[242] The Federal Reserve, for example, might decide to close the accounts of all banks with marijuana-related customers. Or the Federal Reserve might decide that all banks using blockchain technology are too risky. Nothing in the Account Access Guidelines suggests that the Reserve Banks must defer to other federal or state banking regulators when evaluating bank access requests.[243]

Of course, banks without deposit insurance and banks with novel business plans present unique risks. Part V addresses how the Federal Reserve can minimize and manage these risks. But the existence of risk does not magically give the Federal Reserve power. Congress created the Federal Reserve and defined its power.

IV. STATUTORY INTERPRETATION

Accordingly, whether the Federal Reserve's claimed discretion over accounts and payments rests on a firm legal foundation is a critical question for many banks. As previewed in Part II, the Federal Reserve's authority over accounts and payments comes from the Federal Reserve Act and its 1980 amendments implemented as part of the Monetary Control Act. Of course, "the starting point for interpreting a statute is the language of the statute itself."[244] Section 13 of the Federal Reserve Act uses the generally permissive language "may," while Section 11A, enacted through the Monetary Control Act, uses the generally commanding language "shall."[245] This apparently dueling language powers the conflict between the Federal Reserve's broad claims of discretion and the Fed's critics who believe that accounts and services are a matter of right. This Part analyzes the statutory text, concluding that it grants the Federal Reserve Banks only narrow discretion related to the types of payments it processes rather than wide discretion over which banks may open accounts.

A. STATUTORY TEXT

The Federal Reserve Act has long provided that the Federal Reserve Banks "may receive . . . deposits."[246] Today Section 13 provides:

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242. Account Access Guidelines, *supra* note 9, at 51,109.

243. Some commentators suggested that the Board explicitly "defer to the primary regulator's assessment of the risks posed by the institution," but the Board declined to adopt the suggestion. *Id.* at 51,102.

244. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

245. *Compare* 12 U.S.C. § 342 ("Any Federal [R]eserve [B]ank may receive . . . deposits . . . ."), *with id.* § 248a(c)(2) ("All Federal Reserve [B]ank services . . . shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks . . . .").

246. Federal Reserve Act, Pub. L. No. 63-43, § 13, 38 Stat. 251, 263 (1913) (codified as amended at 12 U.S.C. § 342) ("Any Federal [R]eserve [B]ank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank

> Any Federal [R]eserve [B]ank *may* receive from any of its member banks, or other depository institutions, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation or other items, and also, for collection, maturing notes and bills . . . .[247]

The Federal Reserve seizes the Federal Reserve Act's "may receive . . . deposits" language to justify its claims of broad discretion. It is true that the word "may" is often used to signal discretion—that an action that is allowed, but not required.[248] But "[t]his common-sense principle of statutory construction is by no means invariable . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure . . . of the statute."[249]

Consider the structure of Section 13. It provides two things. First, it provides a list of institutions from which Federal Reserve Banks are authorized to received deposits: member banks, depository institutions, and the United States.[250] Second, Section 13 provides a list of types of deposits the Federal Reserve Banks may receive: "deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation or other items."[251]

The Federal Reserve reads Section 13 broadly. It claims that the "may" language gives the Reserve Banks authority over both the types of deposits they receive (current funds in lawful money, national-bank notes, etc.) and which member banks and depository institutions are allowed to open accounts.[252] As the Kansas City Fed argues, "Reserve Banks' discretion to *receive* a deposit plainly includes the discretion to decline to receive a deposit—or all deposits—from an institution."[253]

As explained below, Supreme Court precedent and other portions of the Federal Reserve Act show that Section 13's "may" language gives Reserve Banks

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notes, Federal [R]eserve notes, or checks and drafts upon solvent member banks, payable upon presentation . . . .").

247. 12 U.S.C. § 342 (emphasis added).

248. *See* Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 346 (2005); United States v. Rodgers, 461 U.S. 677, 706 (1983).

249. *Rodgers*, 461 U.S. at 706 (citing Mason v. Fearson, 50 U.S. 248, 258–60 (1850); United States *ex rel.* Siegel v. Thoman, 156 U.S. 353, 359–60 (1895)).

250. 12 U.S.C. § 342.

251. *Id.*

252. *See, e.g.*, Reply in Further Support of Defendant Fed. Rsrv. Bank of N.Y.'s Motion to Dismiss at 6, TNB USA Inc. v. Fed. Rsrv. Bank of N.Y., No. 18-cv-07978, 2020 WL 1445806 (S.D.N.Y. Apr. 12, 2019), 2019 WL 3777823 ("On its face [the "may" language in the Federal Reserve Act] clearly gives Federal Reserve Banks discretion over whether to accept deposits at all from a given depository institution and also to decide what types of deposits to accept.").

253. Kansas City Fed Motion to Dismiss, Custodia, *supra* note 146, at 21.

discretion over the types of deposits they can receive, but not discretion over which member banks and depository institutions are allowed to open accounts.

1. The Supreme Court's "May"

One hundred years ago, the Supreme Court considered the meaning of Section 13's "may receive" language. That case, *Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, held that Section 13 of the Federal Reserve Act gave Reserve Banks discretion over the types of deposits they accept.[254] But it would be wrong to extend that holding to give the Federal Reserve discretion over which banks get accounts. *Farmers & Merchants Bank* was not about which banks could access Federal Reserve accounts or payment services. Rather it was about how the Federal Reserve Banks went about collecting checks that member banks sent to them for collection.

In particular, *Farmers & Merchants Bank* was about how the Federal Reserve handled deposited checks that were drawn on banks that were not member banks and did not have Federal Reserve accounts.[255] At the time, the Federal Reserve was trying to encourage universal par clearance of checks (payment of the check by the payor bank at face value without a fee), but some state-chartered nonmember banks still wanted to charge exchange fees when they paid the checks drawn on them by draft.[256] Federal law prohibited the Reserve Banks from paying an exchange fee.[257] To encourage the banks to pay items without the exchange fee, the Federal Reserve began demanding that the nonpar banks pay the checks drawn on them with cash rather than by a nonpar draft.[258] The nonmember state banks did not like this, because it denied them the exchange fee and forced them to keep larger reserves of cash on hand to cover the checks presented by the Federal Reserve.[259] In response, several states, including North Carolina, enacted laws stating that

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254. Farmers & Merchs. Bank of Monroe v. Fed. Rsrv. Bank of Richmond, 262 U.S. 649, 662 (1923).

255. *Id.* at 652 (explaining that all the plaintiffs were state-chartered nonmember banks).

256. The Supreme Court explained par clearance and exchange fees as follows:

> [C]hecks, except where paid at the banking house over the counter, were customarily paid either through a clearing house or by remitting, to the bank in which they had been deposited for collection, a draft on the drawee's deposit in some reserve city. For the service rendered by the drawee bank in so remitting funds available for use at the place of the deposit of the check, it was formerly a common practice to make a small charge, called exchange, and to deduct the amount from the remittance.

Id. at 654.

257. *Id.* at 656–57 (citing 12 U.S.C. § 342 (1923); Federal Reserve Banks—Charges for the Collection and Payment of Checks, 31 Op. Att'y Gen. 245, 251 (1918)).

258. *Id.* at 657. The Federal Reserve Banks would send their own employees, "express companies, or . . . other suitable agents" to the drawee bank to demand payment. 7 BD. OF GOVERNORS OF THE FED. RSRV. SYS. ANN. REP. 64 (1920).

259. *Farmers & Merchs. Bank of Monroe*, 262 U.S. at 657–58.

when the Federal Reserve presented checks for collection, the banks could pay by nonpar draft; they did not have to pay in cash.[260] The Federal Reserve thought such state laws were unconstitutional and refused to accept nonpar drafts.[261] If the drawee bank did not pay in cash, the Federal Reserve returned the check to the depositing bank as dishonored.[262] The banks whose checks were dishonored sued to enjoin the Federal Reserve from returning their checks in violation of the North Carolina law.[263]

The Richmond Fed responded by arguing that North Carolina's law should be struck down because it violated federal law.[264] In an argument that seems strange given the Federal Reserve's claims of discretion today, the Richmond Fed argued that North Carolina's law should be struck down because Section 13 of the Federal Reserve Act "*required*" the Reserve Banks to receive nonmember bank checks for collection but prohibited the Reserve Banks from paying an exchange fee.[265] In explaining the meaning of the "may receive" language in Section 13, the Richmond Fed stated:

> It is an elementary principle in the construction of statutes that where power is given to public officers or institutions for the benefit of the public or of individuals, the language, though permissive must be construed as mandatory and the power so given must be exercised in the interests of the individuals or the public for whose benefit it is conferred.[266]

If the North Carolina law was upheld, the Richmond Fed argued it would be required to either breach the duty to accept such checks for collection or would run afoul of the federal bar on paying exchange fees.[267]

The Supreme Court, however, rejected the Richmond Fed's argument that it lacked discretion over the types of checks it received for collection. It held that "neither [S]ection 13, nor any other provision of the Federal Reserve Act, imposes upon [R]eserve [B]anks any obligation to receive checks for collection. The act merely confers authority to do so."[268] The Court continued that "even if it could be held that the [R]eserve [B]anks are ordinarily obliged to collect checks for authorized depositors, it is clear that they are not required to do so where the drawee has refused to remit except upon allowance of exchange charges which [R]eserve [B]anks are not permitted

260. *Id.* at 658 n.5.
261. *Id.* at 652, 659–67.
262. *Id.* at 652.
263. *Id.*
264. Brief for Respondent at 49–62, *Farmers & Merchs. Bank of Monroe*, 262 U.S. 649 (No. 823).
265. *Id.* at 14 (emphasis added); *see also Farmers & Merchs. Bank of Monroe*, 262 U.S. at 662.
266. Brief for Respondent at 35, *Farmers & Merchs. Bank of Monroe*, 262 U.S. 649.
267. *Id.* at 47–48; *Farmers & Merchs. Bank of Monroe*, 262 U.S. at 662.
268. *Farmers & Merchs. Bank of Monroe*, 262 U.S. at 662.

to pay."[269] In reaching this conclusion, the Court contrasted Section 13's use of the word "may" with other Federal Reserve Act provisions that use the obligatory language "shall."[270]

The Supreme Court, however, did not hold that Section 13's discretionary language should be read to confer discretion even when other parts of the Act created obligations. Quite to the contrary. The Court explained that Section 16 required that Reserve Banks receive checks drawn on member banks even though Section 13 says that Reserve Banks "may receive" checks. At the time, Section 16 provided that: "Every Federal [R]eserve [B]ank shall receive on deposit at par from member banks or from Federal [R]eserve [B]anks checks and drafts drawn upon any of its depositors."[271]

The Supreme Court explained that "[t]he depositors in a [F]ederal [R]eserve [B]ank are the United States, other [F]ederal [R]eserve [B]anks, and member banks. It is checks on these depositors which are to be received by the [F]ederal [R]eserve [B]anks. These checks from these depositors the [F]ederal [R]eserve [B]anks must receive."[272] Section 13's "may" language gave the Reserve Banks discretion to reject checks drawn on nonmember banks only because those checks were not covered by Section 16's "shall" language. Because *Farmers & Merchants Bank* acknowledges that Reserve Banks were required to receive some deposits from member banks, it would be wrong to stretch its interpretation of the discretion granted by the word "may" to encompass discretion to reject all deposits from legally eligible banks.

2. Pre-1980 Obligatory "Shalls"

As *Farmers and Merchants Bank* highlights, Section 13 should be read consistently with other parts of the Federal Reserve Act.[273] As the Supreme Court has held: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[274]

Accordingly, Section 13's "may" language should be read to allow the Federal Reserve Banks to reject account requests only if other parts of the Federal Reserve Act do (or did) not require that the Reserve Banks provide accounts. But when the Federal Reserve Act was passed in 1913, some of its

269. *Id.* at 663.

270. *Id.* at 663 n.6.

271. *Id.* at 665 (quoting 12 U.S.C. § 360 (1923)).

272. *Id.*

273. *Id.* at 663–65.

274. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citations omitted); *see also* King v. Burwell, 576 U.S. 473, 492 (2015) (explaining the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 320 (2014)).

provisions did require that the Reserve Banks accept deposits. These provisions prevent us from reading Section 13 as a broad grant of Federal Reserve discretion over accounts and payments.

As originally implemented, Section 13 of the Act stated that the Reserve Banks "may receive from any of its member banks, and from the United States, deposits of current funds in lawful money."[275] Yet the Act as a whole clarified that the Reserve Banks were required to receive deposits from the United States. Section 15's language on this point was prescriptive: "[W]hen required by the Secretary of the Treasury, [the Reserve Banks] *shall* act as fiscal agents of the United States."[276] Reserve Banks have this same mandate to act as fiscal agents today.[277] The Federal Reserve Banks' "role as fiscal agents has typically involved the provision of various financial services for the Treasury, such as redeeming government securities, processing payments to and from the federal government, monitoring collateral for Treasury funds, maintaining the government's bank account, and keeping records of these activities."[278] If the Federal Reserve Banks did not open accounts and accept deposits from the Treasury, it would be impossible for the Reserve Banks to act as fiscal agents. Even the Federal Reserve concedes that the Federal Reserve Act "*requires* Reserve Banks to accept deposits of moneys from the general fund of the U.S. Treasury."[279] In light of Section 15's requirement, Section 13's "may" cannot be read to imply a right to refuse to accept all deposits.

Section 15 was not the only part of the Federal Reserve Act that required deposit taking. When adopted in 1913, Section 19 of the Federal Reserve Act stated that member banks "*shall* hold and maintain" a portion of their required reserves in Federal Reserve Banks.[280] A few years later, Congress required member banks to keep all required reserves at Reserve Banks.[281] As a practical matter, requiring member banks to keep some or all of their reserves in Federal Reserve Banks meant that Reserve Banks had to open accounts for and receive deposits from member banks, otherwise member banks would have no way to comply with the statutory reserve requirement. Beginning in 1980, member banks and other depository institutions were allowed to keep reserves in correspondent banks.[282] But the fact remains that for more than half a century, the Federal Reserve Act required the Reserve

275. Federal Reserve Act, Pub. L. No. 63-43, § 13, 38 Stat. 251, 263 (1913).

276. *Id.* § 15, 38 Stat. at 265 (codified as amended at 12 U.S.C. § 391) (emphasis added).

277. 12 U.S.C. § 391.

278. Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 953 (2020) (footnote omitted).

279. Board Amicus Brief, TNB, *supra* note 120, at 5 n.3. Fed. Rsrv. Bd. Motion to Dismiss, Custodia's Complaint (2022), *supra* note 146, at 17 n.22 (emphasis added).

280. Federal Reserve Act, Pub. L. No. 63-43, § 19(a), 38 Stat. 251, 270 (1913) (emphasis added).

281. Act of June 21, 1917, Pub. L. No. 65-25, § 19(c), 40 Stat. 232, 239.

282. Monetary Control Act of 1980, Pub. L. No. 96-221, § 104, 94 Stat. 132, 138–39 (codified at 12 U.S.C. § 461).

Banks to open accounts for the institutions legally eligible for general accounts under Section 13 (member banks and the United States). Section 13's "may" language had never meant that Reserve Banks had authority to reject account requests from legally eligible banks.

Finally, as *Farmers & Merchants Bank* notes, Section 16 of the Federal Reserve Act required that: "Every Federal [R]eserve [B]ank . . . receive on deposit at par from member banks or from Federal [R]eserve [B]anks checks and drafts drawn upon any of its depositors."[283] If, as the Supreme Court states, the Reserve Banks are required to let member banks deposit checks drawn on member banks,[284] then it stands to reason that the Reserve Banks were required to provide member banks an account to hold those deposits. A "deposit" is, after all, money kept in a bank account.[285] Again the structure of the Federal Reserve Act shows that Congress did not intend the Federal Reserve to have discretion to deny account requests from legally eligible banks.

3. Monetary Control Act

Against this backdrop, the Monetary Control Act of 1980 amended the Federal Reserve Act to add "depository institutions" to the entities from which the Reserve Banks "may receive" deposits under Section 13.[286] The term "depository institutions" was defined broadly to include not only federally insured banks and credit unions, but also banks and credit unions that were eligible to apply for deposit insurance.[287] Inclusion of "depository institutions" in Section 13 meant that Reserve Banks were required to treat depository institutions' deposits the same way that Reserve Banks previously handled member bank and U.S. Treasury deposits: Reserve Banks have the authority to reject some types of deposits, but Reserve Banks do not have the authority to refuse to provide accounts for depository institutions that request them.

The Monetary Control Act also amended Section 16 of the Federal Reserve Act. Previously the Reserve Banks were required to receive some deposits at par (without an exchange fee) from member banks and other Federal Reserve Banks—its depositors.[288] After the Act, the Federal Reserve Banks were required to receive some deposits at par from depository

283. Farmers & Merchs. Bank of Monroe v. Fed. Rsrv. Bank of Richmond, 262 U.S. 649, 665 (1923) (quoting 12 U.S.C. § 360 (1923)).

284. *Id.*

285. *See* Marine Bank v. Fulton Bank, 69 U.S. 252, 256 (1864) (describing the difference between bailments and ordinary bank deposits).

286. Monetary Control Act of 1980, Pub. L. No. 96-221, § 105, 94 Stat. 132, 139–40 (codified at 12 U.S.C. § 342).

287. *Id.* § 103 (codified at 12 U.S.C. § 461(b)).

288. *See supra* notes 271–72 and accompanying text (explaining that under the par clearance statute the Reserve Banks were required to receive deposits from member banks at par if the item was drawn on Reserve Bank account holders).

institutions.[289] Accordingly, under the Monetary Control Act, the Reserve Banks were now required to receive some deposits from depository institutions.[290] Again this shows that Reserve Banks were to treat depository institutions as they had previously treated member banks.

Finally, the Monetary Control Act contains a provision, codified in section 11A of the Federal Reserve Act, about the pricing of Federal Reserve payment services.[291] It has become the crux of the argument for banks claiming a right to Federal Reserve accounts and payments. It states:

> All Federal Reserve [B]ank services covered by the fee schedule *shall be available* to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks, except that nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks.[292]

Like the "shall" language previously included in Section 15 (fiscal agent), Section 19 (reserves), and Section 16 (par deposits), this language further confirms that Section 13 does not give Reserve Banks unlimited discretion over the accounts they provide. As Judge Bacharach explained in *Fourth Corner Credit Union*: "[T]he statute commands Federal Reserve Banks to make all services covered by 'the fee schedule' available to 'nonmember depository institutions.'"[293] The services covered by the fee schedule are a long list of payment services, like check clearing and wire transfers, that effectively require an account.[294] Consequently, Reserve Banks must provide accounts to fulfill the statutory requirement. Just as the Reserve Banks cannot provide fiscal service to the U.S. Treasury without allowing the United States to maintain

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289. Monetary Control Act of 1980, Pub. L. No. 96-221, § 105, 94 Stat. 132, 139–40 (codified at 12 U.S.C. § 342).

290. *Id.* § 105(c) (codified at 12 U.S.C. § 360). The provision currently reads: "Every Federal [R]eserve [B]ank shall receive on deposit at par from depository institutions or from Federal Reserve [B]anks checks and other items, including negotiable orders of withdrawals and share drafts and drafts drawn upon any of its depositors . . . ." 12 U.S.C. § 360.

291. *See supra* notes 84–86, 92, 124, 145, 175–76, 221 and accompanying text.

292. 12 U.S.C. § 248a(c)(2) (emphasis added).

293. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1068 (10th Cir. 2017).

294. *Id.* at 1069 ("Without a master account, none of the fee schedule's services would be available."). The statute states:

> The services which shall be covered by the schedule of fees under subsection (a) are—(1) currency and coin services; (2) check clearing and collection services; (3) wire transfer services; (4) automated clearinghouse services; (5) settlement services; (6) security safekeeping services; (7) Federal Reserve float; and (8) any new services which the Federal Reserve System offers, including but not limited to payment services to effectuate the electronic transfer of funds.

12 U.S.C. § 248a(b).

an account,[295] the Reserve Banks cannot process payments for depository institutions without allowing them an account. Section 13's "may" language must be read consistently with this mandate.

The Federal Reserve does not argue that it can somehow provide payment services to banks without providing an account. Rather it argues that Section 11A's language is very narrow. It "merely requires the Board to adopt 'pricing principles' for certain services offered by Reserve Banks to depository institutions and publish a schedule of fees for priced services."[296] In other words, according to the Federal Reserve, Section 11A "requires only that nonmember institutions that do obtain Federal Reserve Bank services pay the same amount for those services as member banks."[297] The Federal Reserve's argument stems from introductory language in Section 11A(c). It instructs the Board that "[t]he schedule of fees prescribed pursuant to this section shall be based on the following principles."[298] The section then includes the "services . . . shall be available" language as one of the pricing principles.[299] The Federal Reserve argues that "the introductory language in Section [11A(c)] indicat[es] that what follows are principles for fee-setting rather than independent mandates."[300]

The Federal Reserve's reading of Section 11A is, at best, awkward. By insisting that the introductory language must be given meaning by limiting the provision to fees,[301] the Federal Reserve's interpretation leaves other language in the Federal Reserve Act without meaning. The statute does not say: Reserve Bank services covered by the fee schedule shall be available to nonmember depository institutions at the same fee schedule applicable to member banks. Rather the statute says: "Reserve [B]ank services covered by the fee schedule *shall be available* to nonmember depository institutions and such services *shall be priced* at the same fee schedule applicable to member

295. *See supra* notes 275–78 and accompanying text discussing the Reserve Banks' obligation under 12 U.S.C. § 391.

296. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 20; *see also* Defendant Fed. Rsrv. Bank of Kan. City's Reply in Support of in Support of Its Motion to Dismiss at 12, Custodia Bank, Inc. v. Fed. Rsrv. Bd., No. 22-cv-00125, 2022 WL 16901942 (D. Wyo. Nov. 11, 2022); Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 13–16.

297. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 21; Board Amicus Brief, TNB, *supra* note 120, at 10 (emphasis omitted).

298. 12 U.S.C. § 248a(c).

299. *Id.* § 248a(c)(2).

300. Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 15; *see also* S.F. Fed's Motion to Dismiss, *supra* note 178, at 10 (stating that Section 11A "is an anti-price discrimination provision" that "says nothing about whether a depository institution is entitled to a master account").

301. *Id.* If possible, courts generally construe statutes so as to avoid rendering any parts superfluous. *See, e.g.*, Hibbs v. Winn, 542 U.S. 88, 101 (2004); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

banks . . . ."[302] The double use of "shall" language is more naturally read to require both that the payment services be available and that they be priced similarly.[303] Accordingly, many articles concluded that the Monetary Control Act's amendments required the Federal Reserve to make its payment services "available to all depository institutions."[304]

The Federal Reserve, however, argues that its tortured reading of the "shall be available" language is forced by Section 13's broad grant of discretion. The Reserve Board explains that the Monetary Control Act "did not change the permissive 'may' language in that section to 'shall', as it presumably would have done had it intended to require Reserve Banks to receive deposits from all depository institutions."[305] It further argues that the Section 11A pricing provision required action of "the Board—not Federal Reserve Banks."[306] According to the Board, "[i]t makes no sense . . . that Congress meant [the Monetary Control Act] . . . to overturn the discretion permitted the Reserve Banks since 1913 to accept deposits by requiring them to open master accounts for all comers regardless of risk or other considerations."[307]

But as explained in Section IV.A.2, Reserve Banks did not have unfettered discretion between 1913 and 1980. The Reserve Banks had been required to provide accounts because Section 15 required the Reserve Banks to act as a fiscal agent for the United States, Section 19 required the Reserve Banks to accept member bank reserves, and Section 16 required Reserve Banks to accept some kinds of member bank deposits. In this context, Congress's failure to change the "may" language in Section 13 cannot be

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302. 12 U.S.C. § 248a(c)(2) (emphasis added).

303. The Federal Reserve's argument is ironic given its reading of Section 13. In Section 13, the Federal Reserve sees the word "may" once and concludes it must provide discretion over two parts of the sentence. But in Section 11A, the Federal Reserve sees the word "shall" twice and concludes it creates an obligation over only one part of the sentence.

304. *See* authorities cited *supra* note 26; *see also* Ronald L. Weaver & Andrew M. O'Malley, *Genesis of Federal Financial Institution Deregulation and Equalization: An Overview of the Depository Institutions Deregulation and Monetary Control Act of 1980*, 54 FLA. B.J. 733, 774 (1980) ("The FRB must establish prices for services provided by the Federal Reserve [B]anks and provide these services to all depository institutions on the same terms and conditions as FRB member banks."); Marilyn B. Cane & David A. Barclay, *Competitive Inequality: American Banking in the International Arena*, 13 B.C. INT'L & COMP. L. REV. 273, 278 n.83 (1990) ("The Federal Reserve's services can be used by all depository institutions pursuant to the [Monetary Control Act]."); Robert D. Raven, *Banks, Near Banks, and Almost Banks—Expanding Competition Blurs Traditional Distinction Among Financial Institutions*, 50 ANTITRUST L.J. 389, 400 n.33 (1981) ("The Monetary Control Act of 1980 . . . also ordered the Federal Reserve Board to make its services available to all 'depository institutions' and to price these services, on a unit pricing basis, to reflect all direct and indirect costs . . . ."); Melanie L. Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 AM. U. L. REV. 633, 681 (1980) ("Under the [Monetary Control Act], all depository institutions that are required to maintain reserves are entitled to the same Federal Reserve System services as member banks.").

305. Board Amicus Brief, TNB, *supra* note 120, at 14.

306. *Id.* at 8.

307. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 22.

viewed as an endorsement of expansive Federal Reserve discretion. It seems much more plausible to conclude that Section 13, when read in the context of the Federal Reserve Act as a whole, never gave the Reserve Banks discretion over which banks could open accounts. Rather, Section 13 establishes the list of legally eligible institutions for which the Reserve Banks must provide accounts and gives Reserve Banks some discretion as to what types of deposits it accepts from accountholders. The Monetary Control Act did not upset this reading. It simply added "depository institutions" to the list of authorized accountholders and confirmed that payment services "shall be available" to them.

The Federal Reserve argues that if Congress wanted all depository institutions to have access to payment services it would have used the term "all depository institutions" instead of just "depository institutions."[308] The Federal Reserve believes this reading is justified because Congress used the word "all" to describe which Reserve Banks services were to be available in the same sentence.[309] But this reads too much into an allegedly missing word. "[N]ot every silence is pregnant."[310] As Judge Bacharach notes in his *Fourth Corner* opinion, statutory drafting guides recommend that legislation omit the word "all."[311] Moreover, given the broader statutory context discussed above,[312] it is clear that all depository institutions were to have access. No inference should be drawn from congressional silence, when the inference would be "contrary to all other textual and contextual evidence of congressional intent."[313] Indeed, as will be explained in Section IV.C, after the passage of the Monetary Control Act, the Federal Reserve itself routinely stated that its payment services were available to all financial institutions.

Finally, the Federal Reserve notes that the Monetary Control Act changed where banks could keep required reserves. It "permits banks to maintain reserves in the form of vault cash or in a correspondent's account at a Federal Reserve Bank, meaning that a bank may fulfill its reserve requirements without having a master account."[314] The Federal Reserve suggests that because banks can now keep reserves with a correspondent, the Reserve Banks are no longer required to provide Federal Reserve accounts for member banks or depository institutions.[315] But "Congress . . . does not alter the fundamental details of a

308. *Id.* at 23.

309. *Id.*

310. Burns v. United States, 501 U.S. 129, 136 (1991) (quoting Ill., Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).

311. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1070 (10th Cir. 2017) (citing 101 PA. CODE § 15.142(c); WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 184 (2d ed. 1984); REED DICKERSON, LEGISLATIVE DRAFTING 81 (1954); G.C. THORNTON, LEGISLATIVE DRAFTING 77 (1970); LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE § 22.10, at 297–98 (2d ed. 2008)).

312. *See supra* Section IV.A.2.

313. *Burns*, 501 U.S. at 136.

314. Board Amicus Brief, TNB, *supra* note 120, at 14 n.8.

315. *Id.*

regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[316] As the Supreme Court recently emphasized, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power."[317] Prior to the Monetary Control Act, the Federal Reserve was required to provide accounts for member banks.[318] It is farfetched to maintain that Congress suddenly and impliedly granted the Federal Reserve discretion over payment access for both member banks and depository institutions while simultaneously directing that Federal Reserve payment services "shall be available to nonmember depository institutions."[319]

4. Lack of Discretionary Framework

The Federal Reserve Act's structure provides additional guidance about how Section 13's "may" should be interpreted. The Federal Reserve Board claims that Section 13 justifies its recent adoption of an extensive risk-vetting framework for account and payment service requests.[320] But if Congress wanted the Federal Reserve to create such a framework for handling account and payment requests, it knew how to do so.

From the beginning, the Federal Reserve Act instructed the Federal Reserve Board to set up a risk-vetting framework for state-chartered banks seeking membership in the Federal Reserve. The Act explained that state banks could apply to become members of the Federal Reserve Bank in their district.[321] The Federal Reserve Board was given authority to enact "rules and regulations" governing Reserve Bank membership and "by-laws" to govern the Board's "conduct in acting upon [membership] applications."[322] The Act further provided that if a member bank violates the Board's regulations, the Board could revoke the bank's membership.[323] Section 13 contains no similar grants of authority for Federal Reserve accounts. The Supreme Court has explained that "a familiar principle of statutory construction . . . is that a

316. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

317. Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023) (citing U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

318. *See supra* Sections IV.A.1–.2.

319. 12 U.S.C. § 248a. Furthermore, neither legislative history nor the Federal Reserve's actions shortly after passage of the Monetary Control Act suggests that the Act was designed to grant the Federal Reserve expansive discretionary authority over access to accounts and payment services. *See infra* Sections IV.B.2 and IV.C.2.

320. Account Access Guidelines, *supra* note 9, at 51,106.

321. Federal Reserve Act, Pub. L. No. 63-43, § 9, 38 Stat. 251, 259 (1913) (codified at 12 U.S.C. § 321).

322. *Id.*

323. *Id.* at 260 (codified at 12 U.S.C. § 327).

negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."[324]

5. Disclosure Statute

Finally, the Federal Reserve Board claims that disclosure requirements adopted by Congress in late 2022 confirm the Federal Reserve Banks' discretion over accounts and services.[325] This statute requires the Federal Reserve Board to "create and maintain a public, online, and searchable database that contains . . . a list of every entity that currently has access to a [R]eserve [B]ank master account and services."[326] In addition, the Board must provide:

> [A] list of every entity that submits an access request for a [R]eserve [B]ank master account and services after enactment of this section (or that has submitted an access request that is pending on the date of enactment of this section), including whether, and the dates on which, a request—(i) was submitted; and (ii) was approved, rejected, pending, or withdrawn.[327]

The Federal Reserve argues that:

> If it were the case that Reserve Banks were required to provide a "[R]eserve [B]ank master account and services" on a mandatory basis to every depository institution, then there would be no need for the Board to publish a list of the depository institutions "rejected" for such services. The only way that the [disclosure law] can be read to give effect to all of its provisions is that there may be rejections of requests for "[R]eserve [B]ank master account and services" from depository institutions.[328]

Again, however, the Federal Reserve Board has misinterpreted the statutory language. The statute requires disclosure of the status of account and services requests from "any entity."[329] The Federal Reserve Act requires that the Federal Reserve deny account requests from entities that are legally

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324. Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006); *see also* Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also* City of Chicago v. Env't Def. Fund, 511 U.S. 328, 337–38 (2015) (finding it relevant that "Congress knew how to draft" a provision with a specific result but had not done so).

325. Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 8.

326. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419 (Dec. 23, 2022) (to be codified at 12 U.S.C. § 248c).

327. *Id.*

328. Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 23–24; *see also* S.F. Fed's Motion to Dismiss, *supra* note 178, at 11–12 ("[B]y its plain terms, Congress specifically contemplated that requests for master accounts from uninsured depository institutions (such as PayServices here) may be 'rejected.'").

329. Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419.

ineligible for accounts.[330] For example, ordinary corporations, partnerships, and individuals are not authorized to maintain Federal Reserve accounts.[331] Thus, the Federal Reserve can reject some account requests (those from ineligible entities) even if it has no discretionary authority to deny requests from depository institutions. Moreover, regardless of whether the Federal Reserve has the authority to deny other account requests, they do.[332] Accordingly, the law can be read as "simply acknowledging that" account requests are denied.[333] The disclosure provisions do not contain any language granting the Federal Reserve Banks' discretion over account and services requests.[334]

B. CONGRESSIONAL PURPOSE

When interpreting statutes, courts sometimes consider the congressional purpose and legislative history of the statute.[335] As the Supreme Court has

330. 12 U.S.C. § 342 (listing entities from which the Reserve Banks may receive deposits); Account Access Guidelines, *supra* note 9, at 51,107 ("Each institution requesting an account or services must be eligible under the Federal Reserve Act or other federal statute to maintain an account at a Federal Reserve Bank . . . and receive Federal Reserve services.").

331. *See* 12 U.S.C. § 342 (authorizing accounts for the United States, Federal Reserve Banks, member banks, depository institutions, trust companies, and nonmember banks); *Does the Federal Reserve Maintain Accounts for Individuals? Can Individuals Use Such Accounts to Pay Bills and Get Money?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Apr. 15, 2021), https://www.federalreserve.gov/faqs/does-the-federal-reserve-maintain-accounts-for-individuals-can-individuals-use-such-accounts-to-pay-bills-and-get-money.htm [https://perma.cc/W27U-Q55F] ("Individuals cannot, by law, have accounts at the Federal Reserve.").

332. *See* Letter from Esther L. George to Deirdra A. O'Gorman, *supra* note 11 (denying Fourth Corner Credit Union's initial request for a Federal Reserve account); Press Release, FED. RSRV. BANK OF KAN. CITY (Feb. 7, 2022), https://www.kansascityfed.org/documents/8617/Statement_02_07_2022.pdf [https://perma.cc/A94G-34NS] (explaining that the Kansas City Fed had initially denied an account request from a Colorado nondepository trust company); Campbell, *supra* note 12 (reporting that the Kansas City Fed had denied an account request from Custodia Bank).

333. Kyle Campbell, *Toomey: Fed "Wildly Mischaracterized" Master Account Law for Own Gain*, AM. BANKER (Apr. 3, 2023, 9:00 PM), https://www.americanbanker.com/news/toomey-fed-wildly-mischaracterized-master-account-law-for-own-gain (on file with the *Iowa Law Review*) (quoting former Senator Patrick Toomey).

334. In addition, the Federal Reserve's reading of the statute here seems at odds with its preferred reading of the Monetary Control Act. Like Section 11A(c), the disclosure law begins with the introductory language: "The Board shall create and maintain a public, online, and searchable database that contains . . . ." Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419. It then contains a list of disclosures requiring, among other things, disclosure of account rejections. *Id.* If the introductory sentence must be read as a limiting principle, it applies only to disclosures and has no substantive bearing on whether the Federal Reserve Banks may approve or refuse account and payments services requests. *Cf. supra* notes 247–51 (explaining the Federal Reserve's arguments that Section 11A(c) pertains only to pricing and not to the availability of accounts).

335. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 (1994) (using legislative history to confirm the Court's statutory interpretation); Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968) (stating that statutory interpretation "frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objective Congress sought to achieve").

explained: "A fair reading of legislation demands a fair understanding of the legislative plan."[336] Here the legislative history of the 1913 Federal Reserve Act supports the conclusion that Congress intended that member banks would have Federal Reserve accounts. The legislative history of the Monetary Control Act shows that Congress wanted to extend this right to accounts and payments to all depository institutions. And the history of the law requiring disclosure of information about Federal Reserve accounts shows that it was not intended to grant the Federal Reserve discretionary authority.

1. Federal Reserve Act

It was a fundamental tenant of the Federal Reserve Act that Reserve Banks would provide accounts for their member banks. Congressman Carter Glass, one of the principal authors of the Federal Reserve Act,[337] explained that for fifty years prior to the Act, the United States had suffered from "a fictitious reserve system."[338] Others described pre-1913 bank reserves as "scattered"[339] or "immobile"[340] rather than "fictitious," but the idea was the same. Before the Act, banks kept reserves as vault cash or as deposits with correspondent banks spread across fifty reserve cities.[341] This system did not always deliver money when bank customers needed it. Coordinated withdrawals of money, either due to seasonal fluctuations in demand or economic downturns, could set off a cascade of banks withdrawing money from correspondents.[342] In some instances, New York City correspondents suspended withdrawals, triggering similar suspensions elsewhere.[343] The result was a series of bank panics.[344]

336. King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (explaining that "[i]f at all possible" courts should interpret statutes in a manner consistent with congressional intent).

337. V. GILMORE IDEN, THE FEDERAL RESERVE ACT OF 1913: HISTORY AND DIGEST 15–17 (1914).

338. CARTER GLASS, AN ADVENTURE IN CONSTRUCTIVE FINANCE 60–61 (1927).

339. NAT'L MONETARY COMM'N, REPORT OF THE NATIONAL MONETARY COMMISSION 6–7 (1912); Paul M. Warburg, *A United Reserve Bank of the United States*, 4 PROC. OF THE ACAD. OF POL. SCI. IN THE CITY OF N.Y., Oct. 1913, at 74, 90; Arthur Reynolds, *Centralization of Banking and Mobilization of Reserves*, 4 PROC. OF THE ACAD. OF POL. SCI. IN THE CITY OF N.Y., Oct. 1913, at 118, 122.

340. EDWIN WALTER KEMMERER, THE A B C OF THE FEDERAL RESERVE SYSTEM 35 (4th ed. 1920) (describing "the old evils of scattered and immobile reserves").

341. H.R. DOC. NO. 63-69, at 19 (1913); Mark Carlson & David C. Wheelock, *Furnishing an "Elastic Currency": The Founding of the Fed and the Liquidity of the U.S. Banking System*, 100 FED. RSRV. BANK ST. LOUIS REV., no. 1, 2018, at 17, 21.

342. *See generally* EDWIN WALTER KEMMERER, SEASONAL VARIATIONS IN THE RELATIVE DEMAND FOR MONEY AND CAPITAL IN THE UNITED STATES: A STATISTICAL STUDY, S. DOC. NO. 61-588 (1910) (studying the impact of seasonal variations on the finance market); O.M.W. SPRAGUE, HISTORY OF CRISES UNDER THE NATIONAL BANKING SYSTEM, S. DOC. NO. 61-538 (1910) (detailing major crises in American banking history).

343. *See* SPRAGUE, *supra* note 342, at 180–98, 260–77 (explaining that New York City correspondents suspended withdrawals during the 1893 and 1907 banking panics).

344. *Id.*

The Federal Reserve Act sought to solve the problem of fictitious reserves by instead "concentrat[ing]" reserves in the Federal Reserve Banks.[345] As the House Committee on Banking and Currency's report explained:

> The committee believes that the only way to correct this condition of affairs is to provide for the holding of reserves by [Reserve Banks] . . . . To meet this end it proposes that every bank which shall become a stockholder in the new [R]eserve [B]anks shall place with the Federal [R]eserve [B]ank of its district a portion of its own reserve . . . .[346]

This legislative history, combined with the Federal Reserve Act's clear mandate that member banks keep reserves in Federal Reserve Banks,[347] leaves no room to argue that in 1913 Congress intended to allow Reserve Banks discretion to refuse to open accounts for some (or all) member banks.

The legislative history also demonstrates that when the Federal Reserve provided payment services, Congress intended that those services be available to all member banks. The Federal Reserve Act was partly motivated by concerns about the fragmented and inefficient payment systems in the United States.[348] Before creation of the Federal Reserve, check collection was a sometimes-time-consuming and expensive process.[349] If a bank received a check drawn on a bank that it did not regularly do business with, it might have to send that check through several other banks to collect it.[350] In times of financial turmoil, banks feared that some checks were worthless and would refuse to even attempt to collect them.[351] As the National Monetary Commission summarized: "We have no effective agency covering the entire country which affords necessary facilities for making domestic exchanges between different localities and sections, or which can prevent disastrous disruption of all such exchanges in times of serious trouble."[352]

Although check clearing concerns were well understood, provisions related to check clearing were added to the Federal Reserve Act late in the legislative process.[353] They were added to ensure passage of the Act and to

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345. 50 CONG. REC. 5,994 (1913) (statement of Sen. Robert L. Owen, Jr.).

346. H.R. DOC. NO. 63-69, at 19 (1913).

347. Federal Reserve Act, Pub. L. No. 63-43, § 19, 38 Stat. 251, 270 (1913) (codified at 12 U.S.C. § 321).

348. O.M.W. Sprague, *Proposals for Strengthening the National Banking System*, 25 Q.J. ECON. 67, 82 (1910); Connolly & Eisenmenger, *supra* note 45, at 134.

349. Sprague, *supra* note 348, at 82.

350. *See* CARL H. MOORE, THE FEDERAL RESERVE SYSTEM: A HISTORY OF THE FIRST 75 YEARS 5 (1990); Connolly & Eisenmenger, *supra* note 45, at 132.

351. Alice M. Rivlin, *Statements to Congress*, 83 FED. RSRV. BULL. 878, 879 (1997); *see also* O.M.W. Sprague, *The Federal Reserve Act of 1913*, 28 Q.J. ECON. 213, 215 (1914).

352. NAT'L MONETARY COMM'N, *supra* note 339, at 7–8.

353. Edward J. Stevens, *The Founders' Intentions: Sources of the Payment Services Franchise of the Federal Reserve Banks* 21 (Fed. Rsrv. Fin. Servs., Working Paper No. 03-96, 1996), https://www.cl

preserve the viability of the Federal Reserve Banks.[354] The Act required that national banks become members of the Federal Reserve.[355] Among other things, this forced national banks to purchase stock in their district Reserve Bank and hold non-interest-bearing deposits at the Reserve Bank.[356] What did these banks get in return? If the answer had been nothing, federally chartered banks might have relinquished their national charters and rechartered as state banks (which were not required to be members of the Federal Reserve System).[357] Without member banks, there would be no regional Federal Reserve Banks. To prevent this result, membership needed to offer something. Access to the Federal Reserve's payment services was the right that membership in the Federal Reserve System conferred. Writers of the time described Federal Reserve membership in this manner.[358] The history does not suggest that Congress intended that the Reserve Banks be able to pick and choose which member banks received the benefits of its payment services.

2. Monetary Control Act

In 1980, Congress passed the Monetary Control Act to give depository institutions access to the Federal Reserve payment services that had previously been available only to member banks.[359] The legislative history shows that Congress intended that the Reserve Banks treat all depository institutions as they had previously treated all member banks. Depository institutions would be able to use the Federal Reserve's payment services and the Federal Reserve would charge members and nonmembers the same price for those services.

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evelandfed.org/publications/financial-services-research-group-working-papers/1996/wp-fsrg-o396-founders-intentions-sources-of-payment-services-franchise [https://perma.cc/2EH2-4ZWW] ("Only in the last week of the legislative process did the Senate version of the bill provide the basis for nationwide check collection service.").

354. *Id.* at 23 ("Check collection service was added to the bill's original exchange provisions to make membership in the Federal Reserve System, par remittance, and the potential elimination of exchange charges more palatable to banks and more probable to legislative leaders."); *see also* Connolly & Eisenmenger, *supra* note 45, at 133 ("The Congress may also have wished to encourage national banks to support the passage of the Federal Reserve Act. Their support was more likely if national banks received a valuable service such as check collection.").

355. Federal Reserve Act, Pub. L. No. 63-43, § 2, 38 Stat. 251, 252 (1913).

356. *Id.* §§ 2, 19, 38 Stat. at 252, 270.

357. Stevens, *supra* note 353, at 22.

358. *See, e.g.*, Gordon B. Anderson, *Some Phases of the New Check Collection System*, 63 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 123 (1916) ("All members of the Federal [R]eserve [S]ystem are eligible to membership in the collection system of their respective [R]eserve [B]anks."); Breckenridge Jones, *Consideration of the Federal Reserve System from the Standpoint of the Trust Company or State Bank: Legal and Practical Aspects*, 25 TR. COS. 307, 314 (1917) ("A member is not required to use these [payment] facilities, but has the privilege.").

359. Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132.

The Monetary Control Act was partly a response to unique bank charters. Federal and state laws had created thrifts and credit unions.[360] These banks could access the Federal Reserve's payment rails only indirectly. For example, thrifts could send checks to the Federal Reserve for collection and clearing, but only if they settled the transactions through a correspondent bank's Federal Reserve account.[361] Correspondent banks often charged thrifts and credit unions for providing this service.[362] In contrast, the Federal Reserve did not charge its members for payment services.[363] This led to complaints about the Federal Reserve's "free" pricing for members.[364] Of course, membership in the Federal Reserve System was not free—members had to maintain non-interest-bearing reserve balances at the Federal Reserve Banks.[365] Nevertheless, the Federal Reserve felt pressure to rethink access and pricing for payment services.[366]

At the same time, however, the Federal Reserve was facing a membership crisis precipitated by rising interest rates.[367] The Federal Reserve required member banks to maintain relatively large reserves, but it did not pay interest on those reserves. In contrast, nonmember banks and thrifts had lower reserve requirements and could keep their reserves in interest bearing accounts.[368] When the high interest rates of the 1970s hit, "the cost to banks of maintaining required reserves rose and banks began to withdraw from the

360. *Monetary Control: Hearings on H.R. 7 Before the H. Comm. on Banking, Fin. & Urban Affairs*, 96th Cong. 67 (1979) [hereinafter *Monetary Control Hearing*] (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.).

361. Bruce J. Summers, *Correspondent Services, Federal Reserve Services, and Bank Cash Management Policy*, ECON. REV., Nov.–Dec. 1978, at 29, 33.

362. Anatoli Kuprianov, *The Monetary Control Act and the Role of the Federal Reserve in the Interbank Clearing Market*, ECON. REV., July–Aug. 1985, at 23–24.

363. Connolly et al., *supra* note 45, at 141.

364. DONALD I. BAKER & ROLAND E. BRANDEL, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS § 23.2 (2011).

365. Connolly et al., *supra* note 45, at 141.

366. Prior to the passage of the Monetary Control Act, the Department of Justice's Antitrust Division sued private ACH clearinghouses arguing that the clearinghouses were behaving as monopolies when they refused to admit thrifts as clearinghouse members. United States v. Cal. Automated Clearing House Ass'n, No. 77-1634 (C.D. Cal. Oct. 28, 1977); United States v. Rocky Mountain Automated Clearing House Ass'n, No. 77-391 (D. Colo. Nov. 17, 1977). Although the suits were dismissed after the clearinghouses agreed to allow thrifts access, the controversy over ACH led to scrutiny of access to the Federal Reserve's payment services. Kuprianov, *supra* note 362, at 30.

367. *See Federal Reserve Requirements: Hearings on S. 353 and Proposed Amendments, S. 85, and H.R. 7 Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 96th Cong. 5–6 (1980) [hereinafter *Federal Reserve Requirements Hearing*] (statement of Paul A. Volcker, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) (describing an "avalanche in loss of members").

368. *Monetary Control and the Membership Problem: Hearings on H.R. 13476, H.R. 13477, H.R. 12706, and H.R. 14072 Before the H. Comm. on Banking, Fin. & Urb. Affs.*, 95th Cong. 80 (1978) [hereinafter *Monetary Control and the Membership Problem Hearing*] (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.); Richard H. Timberlake, Jr., *Legislative Construction of the Monetary Control Act of 1980*, 75 AM. ECON. REV. 97, 98 (1985).

System."[369] The Federal Reserve worried that with fewer members, it would have less influence on the money supply.[370] It also worried that if it charged member banks for payment services, as the thrifts and credit unions suggested, even more banks would choose to forgo Federal Reserve membership.[371] Instead, the Federal Reserve recommended universal reserve requirements.[372] Unsurprisingly, nonmember banks and thrifts were not enthusiastic about the possibility of higher reserve requirements, especially if those reserves had to be held in non-interest-bearing accounts.[373]

Congress struck a compromise in the Monetary Control Act of 1980: All depository institutions would be subject to federally established reserve requirements and in return all depository institutions would get access to the Federal Reserve's payment services.[374] Congress clearly embraced a quid pro quo arrangement. There is little doubt that Congress intended that all depository institutions would be able to use the Federal Reserve's payment systems. The legislative history of the Monetary Control Act is littered with references to "open access" to "all depository institutions."[375] For example, the

369. Kuprianov, *supra* note 362, at 28.

370. *Federal Reserve Requirements Act of 1978: Hearings on S.3304 Before S. Comm. on Banking, Hous., & Urb. Affs.*, 95th Cong. 14 (1978) [hereinafter *Federal Reserve Requirements Act of 1978 Hearing*] (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.).

371. *Monetary Control and the Membership Problem Hearing*, *supra* note 368, at 87 (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.).

372. 65 BD. OF GOVERNORS OF THE FED. RSRV. SYS. ANN. REP. 317 (1978), https://fraser.stlouisfed.org/title/annual-report-board-governors-federal-reserve-system-117/1978-2433 [https://perma.cc/8NJH-QM9E]; Timberlake, *supra* note 368, at 99.

373. Marvin Goodfriend & Monica Hargraves, *A Historical Assessment of the Rationales and Functions of Reserve Requirements*, ECON. REV., Mar.–Apr. 1983, at 3, 17.

374. Monetary Control Act of 1980, Pub. L. No. 96-221, § 103, 94 Stat. 132, 133–34 (codified at 12 U.S.C. § 461(b)(2)(A)) ("Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation . . . ."); *id.* § 105, 94 Stat. at 139 (codified at 12 U.S.C. § 342) (stating the Reserve Banks "may receive" deposits from "depository institutions"); *id.* § 107, 94 Stat. at 140–41 (codified at 12 U.S.C. § 248a(c)(2)) (stating that payment services "shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks"); *see also* 126 CONG. REC. 6897 (1980) (statement of Sen. William Proxmire) ("[S]ince nonmember institutions will be required to hold reserves under the act it is reasonable that they should be provided access to Fed services.").

375. *See, e.g.*, 126 CONG. REC. 21,280 (1980) (legislative achievements document prepared by Democratic committee staff) (stating that the Monetary Control Act "gives open access to price services provided by the Federal Reserve Banks to all depository institutions on the same terms and conditions as member banks"); 126 CONG. REC. 19,663 (statement of Rep. Trent Lott) (stating that under the proposed legislation Federal Reserve services "will be provided to all depository institutions for a fee, regardless of membership"); *Federal Reserve Requirements Act of 1978 Hearing*, *supra* note 370, at 2 (statement of Sen. William Proxmire) ("Federal Reserve services are now basically available only to members. Open access to all depository institutions willing to pay should be sought."); *id.* at 195 (statement of Robert Carswell, Deputy Sec'y, Dep't of the Treas.) ("The administration is, in principle, in favor of open access to Federal Reserve services for all nonmembers at nondiscriminatory prices."); *Monetary Policy Improvement Act of 1979: Hearing on S. 85 and S. 353 Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 96th Cong. 611 (1979) [hereinafter *Monetary Policy Improvement Act of 1979 Hearing*] (written statement of

House Conference Report explains that the Act provides "*open access* to [Federal Reserve] payment services to *all* depository institutions on the same terms and conditions as member banks."[376] One of the legislation's main sponsors, Senator William Proxmire, summarized that after passage of the Act "access to services will be open to all depository institutions willing to pay the established fees on the same basis as members."[377] Even G. William Miller, then Chairman of the Federal Reserve Board, said that the Monetary Control Act "gives *all* depository institutions access to Federal Reserve services."[378] He explained that "[t]he growth of transactions balances at institutions that do not have access to Federal Reserve clearing services . . . could lead to a deterioration of the quality of the nation's payments system."[379]

No evidence exists anywhere in the legislative history that Congress intended for the Reserve Banks to pick and choose which depository institutions would receive access to Federal Reserve payments. When Congress passed the Monetary Control Act, it understood that some types of depository institutions presented different risks. At the time, thrifts faced more risk from rising interest rates because, by law, their assets were largely fixed-rate mortgages.[380] In spite of this risk, Congress gave thrift institutions access to the Federal Reserve payment systems.

Congress discussed, but rejected, the possibility of mandatory Federal Reserve membership for all depository institutions—a move that would have brought all banks under Federal Reserve supervision.[381] Congress was apparently persuaded by arguments raised by state regulators that there was no need to

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John Perkins, Pres., Am. Bankers Ass'n) ("The Reuss, Proxmire, and Fed proposals call for mandatory Reserves and open access to Fed services.").

376. H.R. REP. NO. 96-842 (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 298, 301 (emphasis added).

377. 126 CONG. REC. 6894 (1980) (statement of Sen. William Proxmire).

378. *Monetary Control Hearing*, *supra* note 360, at 8 (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) (emphasis added) (speaking in favor of the Monetary Control Act). The subsequent Fed Chairman Paul Volker also spoke in favor of the Monetary Control Act providing open access to all depository institutions. *Federal Reserve Requirements Hearing*, *supra* note 367, at 6 (statement of Paul A. Volcker, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.).

379. *Monetary Control Hearing*, *supra* note 360, at 74 (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) (explaining that balances held outside the Federal Reserve raise the risk of payment disruption in the event of a large correspondent bank failure).

380. *Id.* at 305 (noting that thrifts "have found themselves vulnerable to the cycles of housing and interest rates"); Elijah Brewer III, *The Depository Institutions Deregulation and Monetary Control Act of 1980*, ECON. PERSPS., Sept. 1980, at 3, 3 (stating that "the viability of thrift institutions was seriously threatened by the imbalance between the cost of funds and the return on long-term mortgage portfolios"); *see also* Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1788–92 (2011) (describing the historical difference between the thrift charter and other bank charters).

381. *Monetary Policy Improvement Act of 1979 Hearing*, *supra* note 375, at 448.

"entangle thrift institutions with yet another federal regulator."[382] Proponents of the Act explained that they wanted to preserve the dual banking system. Treasury and Federal Reserve officials said the legislation was not intended to drive institutions to federal supervision and examination.[383] To preserve banks' ability to choose state supervision, Congress enacted legislation that allowed state-chartered banks access to Federal Reserve accounts and payments without becoming members of the Federal Reserve and without obtaining federal deposit insurance.[384] Notwithstanding this history, the Federal Reserve's new Account Access Guidelines adopt a framework that prefers banks with federal deposit insurance and federal supervision.[385] This approach cannot be reconciled with the legislative history of the Monetary Control Act.

The Federal Reserve argues "that Congress enacted the [Monetary Control Act], including [S]ection [11A], out of concern over the Federal Reserve's growing lack of control over the money supply, and its ramification for the national economy not . . . to ensure access to master accounts."[386] Certainly it is true that Congress was concerned that the dwindling Federal Reserve membership would leave the Federal Reserve with less control over the money supply and that this concern sparked Congress's decision to require that nonmember banks subject to reserve requirements.[387] The Federal Reserve argues that given this concern about monetary policy, "[i]t would be anomalous . . . to conclude that the [Monetary Control Act], . . . mandates a right of access to master accounts even to institutions . . . that could complicate the Federal Reserve's ability to implement monetary policy effectively and negatively affect . . . financial stability."[388]

The Federal Reserve's argument takes concerns about monetary policy and financial stability too far. Although Congress wanted the Federal Reserve

382. *Monetary Control Hearing*, *supra* note 360, at 713 (written statement of Kenneth E. Pickering, Nat'l Ass'n of State Savs. & Loan Supervisors).

383. *Id.* at 22 (statement of Robert Carswell, Deputy Sec'y, Dep't of the Treas.) ("The strength of the dual banking system comes from the choice it offers on supervision and examination. That choice remains unchanged by this bill. Moreover, the availability of Federal Reserve services to all banks at nondiscriminatory rates will make it easier for a larger bank to be a nonmember."); *id.* at 69 (statement of G. William Miller, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) ("As to the other constituencies, I think there is a concern among State bank supervisors that such a change in the System might in some way impair upon their responsibilities within the dual banking system. I would be happy to discuss this at length, but it seems to me that is not a likely course of events.").

384. *See* 12 U.S.C. §§ 342, 461(b)(1)(A).

385. *See supra* Section I.C.

386. Board Amicus Brief, TNB, *supra* note 120, at 13; *see also* S.F. Fed's Motion to Dismiss, *supra* note 178, at 17 ("Payservices' construction of Section [11A] would undermine the Federal Reserve System's ability to carry out its statutory mandate to regulate the money supply to promote maximum stability.").

387. *See id.* at 13–14; *see also supra* notes 318–22 and accompanying text (discussing the Federal Reserve's membership crisis).

388. Board Amicus Brief, TNB, *supra* note 120, at 14.

to have robust monetary policy tools, Congress did not impliedly give the Federal Reserve every tool that might support monetary policy or promote financial stability. For example, the Federal Reserve might have been better able to implement monetary policy and promote financial stability if it had the authority to pay interest on money held in Federal Reserve accounts.[389] But Congress did not pass legislation granting the Federal Reserve authority to pay interest until 2006.[390] If the Federal Reserve wants additional monetary policy tools, such as the ability to restrict access to Federal Reserve accounts and payments, it could ask Congress to amend the law.

Moreover, the Monetary Control Act was not focused exclusively on enhancing the Fed's monetary policy power. Rather, the Act was compromise legislation intended to ensure that thrifts, credit union, and other depository institutions all had access to Federal Reserve payment services.[391] To accomplish this, Section 11A states that "Federal Reserve bank services covered by the fee schedule *shall be available* to nonmember depository institutions."[392] The Fed's singular focus on the monetary policy goals of the Act amounts little more than "looking over a crowd and picking out [its] friends."[393] In these

389. *See, e.g.*, *Business Checking Freedom Act of 2003: Hearing on H.R. 758 & H.R. 859 Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 108th Cong. 5–6 (2003) (testimony of Donald L. Kohn, Governor, Fed. Rsrv. Bd. of Governors); Jonathan R. Macey & Geoffrey P. Miller, *Nondeposit Deposits and the Future of Bank Regulation*, 91 MICH. L. REV. 237, 269 (1992). *But see* Robert D. Auerbach, *The Fed's Backroom Bailout Policy*, 12 CHAP. L. REV. 525, 544 (2009) (arguing that because the Fed would have little competition, "the interest payments on reserves would, in large part, pass through to bank stock holders not the deposit holders, as some academics have theorized").

390. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, §§ 201–03, 120 Stat. 1966, 1968–69 (codified at 12 U.S.C. § 462(b)(12)). Unsurprisingly, the Federal Reserve considered claiming authority to pay interest without congressional authorization. Prior to the passage of the Monetary Control Act, Federal Reserve Board Chairman G. William Miller "informed the chairmen of House and Senate banking committees that the Federal Reserve would begin paying interest to its member banks." WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 154–55 (1987). The proposal was short-lived. Representative Henry S. Reuss let Chairman Miller know that if the Fed began paying interest, Representative Reuss would seek to impeach him. *Id.* at 155. Chairman Miller relented. *Id.* The Fed later conceded legislation was required for it to pay interest on account balances. *See, e.g.*, *Greenspan Asks that Fed Be Allowed to Pay Interest*, WALL ST. J., Mar. 11, 1992, at C9 (reporting that Fed Chairman Alan Greenspan wrote to members of a House Banking subcommittee acknowledging that the Fed lacked congressional authorization to pay interest on reserves and requesting that Congress consider changing the law).

391. *See supra* notes 373–85 and accompanying text.

392. 12 U.S.C. § 248a (emphasis added); *see supra* Section IV.A.3 (describing the language of the Monetary Control Act).

393. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting the late Harold Leventhal, Judge, U.S. Court of the Appeals for the District of Columbia).

circumstances it would be wrong to conclude the Monetary Control Act impliedly granted the Federal Reserve power to limit access to payments.[394]

3. Disclosure Statute

Finally, the legislative history of the 2022 account disclosure law provides no support for the Federal Reserve's supposed discretionary authority. The disclosure law requires that the Federal Reserve release information about applicants and accountholders.[395] As former Senator Patrick Toomey (R-PA), the "principal sponsor" of the law, explained "[t]he purpose of the [law] was . . . exclusively to increas[e] transparency surrounding the master account application process, and not to augment or otherwise comment on the substantive authority or discretion of the Board, or the regional Federal Reserve Banks . . . to approve or reject master account applications."[396]

Senator Toomey proposed the disclosure law after the Kansas City Fed rebuffed his efforts to learn about an account that it had granted to the Colorado-based Reserve Trust.[397] Because Reserve Trust was an uninsured non–depository trust company rather than a depository institution, its account prompted questions about why the Kansas City Fed had opened Reserve Trust's account while other novel bank account requests languished.[398] Some worried that Reserve Trust's account was the product of corruption: One of Reserve Trust's directors had previously served on the Federal Reserve Board.[399] Amid the controversy, the Kansas City Fed explained that it initially denied Reserve Trust's account request "[b]ecause [Reserve

394. Courts analyzing legislative history should consider *all* the congressional purposes that prompted the statute. *See* Bowsher v. Merck & Co., 460 U.S. 824, 834 (1983) ("[O]ur task in construing the statutes . . . is to give effect to both of [the] congressional aims."); *see also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 688 (2013) (Sotomayor, J., dissenting) ("We may not . . . give effect only to congressional goals we designate 'primary' while casting aside others classed as 'secondary' . . . ."). Courts should be especially hesitant to elevate a single congressional purpose above the language of the statute itself. *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 306 (2017) (explaining that when legislation is the product of compromise, "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators").

395. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419–20 (Dec. 23, 2022) (to be codified at 12 U.S.C. § 248(c)).

396. Brief of Amicus Curiae Former Senator Patrick J. Toomey in Support of Neither Party at 1–2, Custodia Bank, Inc. v. Fed. Rsrv. Bd., No. 22-cv-00125, 2022 WL 16901942 (D. Wyo. Nov. 11, 2022) [hereinafter Toomey Amicus Brief].

397. *Id.* at 2, 4–7.

398. *See, e.g.*, James McAndrews, Chairman & CEO, TNB USA Inc., Comment Letter on Proposed Guidelines for Evaluating Account and Services Requests 2 (June 11, 2021), https://www.federalreserve.gov/SECRS/2021/July/20210708/OP-1747/OP-1747_061121_138143_448935872132_1.pdf [https://perma.cc/8UE5-YJDA].

399. Jeanna Smialek, Emily Cochrane & Lananh Nguyen, *Biden's Pick for Top Bank Cop Faces Narrow Path to Confirmation*, N.Y. TIMES (Feb. 3, 2022), https://www.nytimes.com/2022/02/03/business/economy/federal-reserve-sarah-bloom-raskin.html (on file with the *Iowa Law Review*).

Trust] did not meet the definition of a depository institution."[400] According to the Kansas City Fed, "[a]fter this denial, [Reserve Trust] changed its business model and the Colorado Division of Banking reinterpreted the state's law in a manner that meant [Reserve Trust] met the definition of a depository institution."[401] The Colorado Division of Banking, however, said that it had not reinterpreted state law.[402] Later Senator Toomey learned that the Kansas City Fed had closed Reserve Trust's account because Reserve Trust was "no longer eligible" for an account.[403] Senator Toomey requested information about the Kansas City Fed's handling of Reserve Trust's account, but his requests were largely fruitless.[404] Frustrated, Senator Toomey introduced legislation to "provide the American people with the information about master account applications that they deserve, but which the Fed has refused to provide."[405] This history does not support reading the disclosure law to grant the Federal Reserve Ban broad discretion over access to accounts and services.

The Federal Reserve Board, however, is coy about the reason that Congress adopted the disclosure law. It argues that because Congress adopted the disclosure law shortly after the Federal Reserve Board enacted its Account Access Guidelines, Congress must have been "confirming the Board's position" that the Reserve Banks have wide discretion.[406]

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400. Press Release, Fed. Rsrv. Bank of Kan. City (Feb. 7, 2022), https://www.kansascityfed.org/documents/8617/Statement_02_07_2022.pdf [https://perma.cc/3ELK-9FNV].

401. *Id.*

402. Letter from Kenneth Boldt, State Bank Comm'r, Colo. Div. of Banking, to author 1 (Feb. 15, 2022) (on file with author) ("We consider the statement that the Division 'reinterpreted' state law as a misrepresentation of our practice. . . . [T]he Division does not, nor has the authority to, change, modify or reinterpret any law without engaging in the rulemaking process.").

403. Letter from Sen. Pat Toomey, Ranking Member, S. Comm. on Banking, Hous., & Urb. Affs., to Esther George, Pres., Fed. Rsrv. Bank of Kan. City 1 (June 9, 2022), https://www.banking.senate.gov/imo/media/doc/toomey_letter_to_george_on_master_account_revocation.pdf [https://perma.cc/8UF7-CXAD].

404. *See* Toomey Amicus Brief, *supra* note 396, at 2, 5 (stating that "[e]ven after several follow-up inquiries, the Board and Kansas City Fed largely refused to provide any relevant information"); Letter from Esther George, Pres., Fed. Rsrv. Bank of Kan. City, to Sen. Patrick Toomey, Ranking Member, S. Comm. on Banking, Hous. & Urb. Affs. 1 (June 15, 2022), https://www.kansascityfed.org/AboutUs/documents/8854/06-16-22_Toomey_Letter_from_Esther_George.pdf (claiming that information sought by Senator Toomey was "highly sensitive confidential supervisory information belonging to the Federal Reserve Bank of Kansas City" even though the Kansas City Fed was not a supervisor of Reserve Trust).

405. Press Release, U.S. Senate Comm. on Banking, Hous., & Urb. Affs., Annual Defense Bill Includes Toomey Provision to Require Federal Reserve Transparency on Master Accounts (Dec. 8, 2022), https://www.banking.senate.gov/newsroom/minority/annual-defense-bill-includes-toomey-provision-to-require-federal-reserve-transparency-on-master-accounts [https://perma.cc/23M4-X936]; *see also* Toomey Amicus Brief, *supra* note 396, at 2.

406. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 24; *see also* S.F. Fed's Motion to Dismiss, *supra* note 178, at 11–12 (arguing that "Congress recently confirmed that Reserve Banks can deny requests for master accounts" when it passed a law requiring the Federal Reserve Board to create a public database of Federal Reserve accountholders).

Senator Toomey says that the Federal Reserve's suppositions "wildly mischaracterize[]" the disclosure law.[407] He explains that in crafting the legislation, he and his staff met with Federal Reserve Board staff (including Board attorneys now arguing about the meaning of the law)[408] and there was never any suggestion that the disclosure law "was intended to, or could be interpreted as, opining on either the Board's, or the Reserve Bank's, substantive authority and discretion (or lack thereof) to grant or reject master account applications."[409] In addition, the disclosure legislation was supported by seven members of Congress who had earlier offered an amici curiae brief arguing that the Federal Reserve has no discretion to deny account requests from legally eligible entities.[410] These members of Congress would not have supported the disclosure law if they thought it was granting or acknowledging Federal Reserve discretion. Considering this legislative history, it would be wrong to warp the statutory language to imply Federal Reserve discretion.

C. FEDERAL RESERVE INTERPRETATIONS

The Fed has not always claimed such broad discretion over access to accounts and payments. For more than a century, Reserve Banks provided account and payment services to all legally eligible banks. Or at least the Federal Reserve said they did.[411] From 1913 through 1980, the Federal Reserve regularly touted its payment services as a benefit available to all member banks.[412] After 1980, the Federal Reserve pivoted to provide these same services to any depository institution that wanted them.[413] Nevertheless, the Federal Reserve Board now says that courts should defer to its current position "that decisions to grant a master account or make services available to any particular depository institution are within the discretion of [the] Reserve Banks."[414] Of course, deference to the Federal Reserve's position is only appropriate if the Federal Reserve Act is ambiguous.[415] Section IV.A

407. Campbell, *supra* note 333.

408. Toomey Amicus Brief, *supra* note 396, at 3 (stating that legislative staff met with Federal Reserve Board staff when drafting the legislation); Campbell, *supra* note 333 (quoting a Toomey staffer as saying that "[t]he same [Federal Reserve Board] lawyers who were part of that conversation with us are now part of" the Custodia lawsuit).

409. Toomey Amicus Brief, *supra* note 396, at 9.

410. *Id.* at 10; Brief of Amici Curiae Members of the U.S. Senate Banking Comm. & U.S. House of Representatives Fin. Servs. Comm. in Opposition to Defendants' Motions to Dismiss at 5, Custodia Bank, Inc. v. Fed. Rsrv. Bd., No. 22-cv-00125, 2022 WL 16901942 (D. Wyo. Nov. 11, 2022).

411. Since 1980, the Federal Reserve has been secretive about which banks have Federal Reserve accounts. *See* Account Access Guidelines, *supra* note 9, at 51,102 (declining to implement "avenues for increased communication from Reserve Banks about their decisions to grant or deny account requests, including . . . maintaining an up-to-date list of all institutions that have been granted access").

412. *See infra* Section IV.C.1.

413. *See infra* Section IV.C.2.

414. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 25–26.

415. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

explains why the statute here forecloses the Federal Reserve's interpretation. But even if the statute was ambiguous, the Federal Reserve's position should carry no weight because it ignores more than a century of its own interpretations and was not adopted through formal rulemaking.[416]

1. Federal Reserve Act

The Federal Reserve's early years were marked by efforts to get member banks to use its payment services—not by efforts to refuse services to some member banks.[417] In 1916, the Federal Reserve Board described the Reserve Banks' check clearing and collection as services "in which member banks might or might not participate as they[, the member banks,] chose."[418] If there was any ambiguity about whether Reserve Banks were required to provide some account and payment services to all member banks, the Federal Reserve resolved it in 1919. Amidst the struggles with par clearing that led to *Farmers & Merchants Bank of Monroe*,[419] the Board provided the Reserve Banks with an interpretation that required the Reserve Banks to receive deposits from all member banks. The Board wrote:

> Even though the Federal Reserve Board has heretofore ruled that [Section 13's] permissive "may" as used in the foregoing paragraph should not be construed to mean the mandatory "shall" nevertheless it is clear that a Federal Reserve Bank in order to do any business whatever must exercise some of the permissive powers authorized by law. It would be impossible otherwise for a Federal Reserve Bank to afford to its member banks many of the privileges which the law clearly contemplates and to which the member banks are clearly entitled. But independently of a discussion of this phase of the situation, it seems to the Board that doubts upon this question are resolved upon a consideration of the provisions of section 16: "Every Federal Reserve Bank shall receive on deposit at par from member banks or from Federal Reserve Banks checks and drafts drawn upon any of its depositors." In this case, the obligatory "shall" is used so that there is no option in the Federal Reserve Bank so far as checks and drafts upon its depositors are concerned.[420]

416. *See infra* Section IV.C.3.

417. For example, in 1918, the Federal Reserve's annual report began its discussion of check clearing and collection by proudly proclaiming that "[t]he member banks are availing themselves more and more of the clearing and collection facilities afforded by the Federal Reserve System." FED. RSRV. BD. ANN. REP. 74 (1918).

418. 3 FED. RSRV. BD. ANN. REP. 9 (1916).

419. Farmers & Merchs. Bank of Monroe v. Fed. Rsrv. Bank of Richmond, 262 U.S. 649, 652 (1923).

420. 6 FED. RSRV. BD. ANN. REP. 41 (1919).

Following this pronouncement, the Richmond Fed argued that Section 13's "may" language was not discretionary at all.[421]

Indeed, from the early days of its existence through 1980, the Federal Reserve Board and Reserve Banks routinely touted access to Federal Reserve payment services as one of the benefits that came with Federal Reserve membership.[422] For example, in 1974 the Federal Reserve Board explained that one of the "privileges of membership in the System" was that "member banks" could "use Federal Reserve facilities for collecting checks, settling clearing balances, and transferring funds by wire to other cities."[423] The Federal Reserve did not suggest that member banks' right to use these services was subject to additional qualifications or limitations.[424] Indeed, it would have been quite a bait and switch for a state-chartered bank to purchase stock in the local Reserve Bank, maintain required reserves, and subject itself to Federal Reserve supervision, only to be told it could not have one of the main benefits of Federal Reserve membership: access to a Federal Reserve account and payment services.[425]

The Federal Reserve Board did, on a couple of occasions, state that Reserve Banks had some discretion over whether to open clearing accounts for nonmember banks and trust companies.[426] But unlike the general accounts available to member banks and the United States, clearing accounts had important legal limitations. Clearing accounts had to be used "solely for the purposes of exchange or collection" and the accountholder was required to "maintain[] with the Federal [R]eserve [B]ank of its district a balance

421. *See supra* notes 264–67.

422. *See, e.g.*, FED. RSRV. BANK OF ST. LOUIS, ADVANTAGES OF MEMBERSHIP IN THE FEDERAL RESERVE SYSTEM 2–3 (1922) (explaining that "membership in the System gives a bank specific privileges and advantages" including the ability "[t]o participate in the check clearing facilities of the Federal Reserve System" and the ability "[t]o use the Federal Reserve Bank for the transfer of funds" (emphasis omitted)); BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 66 (4th ed. 1961) (stating that "member banks are entitled . . . to use Federal Reserve facilities for collecting checks, settling clearing balances, and transferring funds to other cities").

423. BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 20 (6th ed. 1974).

424. *See id.* (stating that member banks' right to borrow money from Reserve Banks was "subject to criteria for borrowing . . . set by statute and regulation," but not indicating that member banks' right to payment services were subject to any criteria or limitations).

425. *See id.* at 19–20 (describing the responsibilities and privileges of Federal Reserve membership).

426. Letter from Chester Morrill, Sec'y, Fed. Rsrv. Bd., to E.M. Stevens, Chairman, Fed. Rsrv. Bank of Chi. 3 (Apr. 26, 1935), https://fraser.stlouisfed.org/archival/4957/item/505912 [https://perma.cc/Y5XZ-57UW] (stating "that requests for the establishment of clearing accounts by nonmember banks should be passed upon by [Reserve Bank] directors in light of all the circumstances surrounding each application"); Bd. of Governors of the Fed. Rsrv. Sys., *Domestic Branches of Foreign Banks and Private Banks as "Banks,"* 50 FED. RSRV. BULL. 168, 168–69 (1964) (explaining that branches of foreign banks were "nonmember banks" for the purposes of Section 13 and Reserve Banks could "in [their] discretion" make clearing accounts available to them).

sufficient to offset the items in transit held for its account by the Federal [R]eserve [B]ank."[427] The Board's acknowledgement that Reserve Banks had to make judgments about which clearing accounts could be offered in compliance with these legal limits does not suggest that the Reserve Board or Banks extended this same review to full-service member bank accounts. From 1913 through 1980 the Federal Reserve provided its account and payment services to all member banks.[428]

2. Monetary Control Act

Of course, the Monetary Control Act changed the Federal Reserve's approach to accounts and payment services. As explained in Section IV.A.3, the Monetary Control Act amended the list of entities from which the Reserve Banks "may receive" deposits. And, as explained in Section IV.B.2, this change was intended to allow all "depository institutions" the access that member banks had previously enjoyed. Over the years, the Federal Reserve (both the Board and the Reserve Banks) made statements confirming that payment services were now available to any depository institution that wanted them.

As the Federal Reserve set about implementing the Monetary Control Act, the Board explained that the law required that payment "[s]ervices covered . . . are to be made available to *all* depository institutions."[429] The Reserve Banks followed suit, announcing that payment services were now available to all depository institutions.[430] There were no mentions of extensive

427. Act of June 21, 1917, Pub. L. No. 65-25, § 4, 40 Stat. 232, 235.

428. In litigation with Fourth Corner Credit Union, TNB, Custodia Bank, PayServices, and BSJI, the Federal Reserve has not provided any examples of Federal Reserve member banks that have been denied access to accounts or payment services.

429. Adoption of Fee Schedules and Pricing Principles for Federal Reserve Bank Services, 46 Fed. Reg. 1338, 1338 (Jan. 6, 1981) (emphasis added); *see also* Federal Reserve Bank Services; Proposed Fee Schedules and Pricing Principles, 45 Fed. Reg. 58,689, 58,690 (Sept. 4, 1980) ("The Monetary Control Act of 1980 requires the Board of Governors of the Federal Reserve System to begin putting into effect a schedule of fees for services no later than September 1, 1981 and to make such services covered by the fee schedule available to all depository institutions.").

430. *See, e.g.*, Circular from William H. Wallace, First Vice Pres., Fed. Rsrv. Bank of Dall., to All Depository Institutions in the Eleventh Federal Reserve District 1 (July 30, 1981), https://fraser.stlouisfed.org/title/district-notices-federal-reserve-bank-dallas-5569/new-bulletin-11-541337 [https://perma.cc/95GC-XHCL] ("On August 1, 1981, the automated clearing house service now being provided by this Reserve Bank will be made available to all depository institutions in this District."); *Clearing Accounts Allow Access to Services*, DALL. FED ROUNDUP, Jan. 1983, at 2 (explaining that although in the past not all Reserve Banks had provided clearing accounts for nonmember banks, the Monetary Control Act "permits any depository institution desiring [an] account to have one"); *Fed Proposes Fees for Cash Transportation*, FED. RSRV. NOTES (Fed. Rsrv. Bank of S.F.), July 1981, at 2, https://fraser.stlouisfed.org/title/federal-reserve-notes-5186/july-1981-527563 [https://perma.cc/9NE2-97ML] ("The Monetary Control Act of 1980 requires the Federal Reserve to charge for its services and make them available to all financial institutions that maintain reserves with the Fed."); 1981 FED. RSRV. BANK OF MINNEAPOLIS ANN. REP. PRICED SERVS. 2 (explaining that the Minneapolis Fed had "[s]hift[ed] from a framework of providing services only to member banks at no explicit charge to offering services to all depository institutions at an explicit price"); 1980 FED. RSRV. BANK OF CLEVELAND ANN. REP. 2 ("Our services will now be

risk-vetting processes. The Dallas Fed said that banks intending to begin using its ACH service should "notify the Federal Reserve office."[431]

Over the years, the Federal Reserve Board and Reserve Banks repeatedly stated that Federal Reserve Bank services were available to all depository institutions.[432] For example, in 1990, the Board explained that "Federal Reserve payment services are available to all depository institutions, including smaller institutions in remote locations that other providers might choose not to serve."[433] And in 2010, the Philadelphia Fed explained that the Monetary Control Act "mandated that the Federal Reserve offer priced services not only to member banks but also to any depository institution that wanted to use them."[434] There was little evidence that Reserve Banks performed any sort of risk vetting until, in 2015, the Kansas City Fed denied Fourth Corner's account request over concerns about the credit union's marijuana-focused business model.[435]

3. New Claims of Discretion

Despite this history, the Federal Reserve Board argues that "the Board and Reserve Banks have long viewed . . . deposit-taking authority as discretionary."[436] As evidence of this supposed "long" view, the Board points to Operating Circular 1's statements that Federal Reserve accounts are "subject to approval"

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available to all depository institutions, on an equal basis, regardless of membership in the Federal Reserve System.").

431. *See* Circular from William H. Wallace, *supra* note 430, at 1.

432. *See, e.g.*, Reserve Requirements of Depository Institutions Policy on Payment System Risk, 75 Fed. Reg. 24,384, 24,386 (May 5, 2010) (to be codified at 12 C.F.R. pt. 204) ("Section 11A of the [Federal Reserve] Act was added by the Monetary Control Act of 1980 . . . to promote competitive equality between member and nonmember banks and to improve the efficiency of the nation's payments mechanism by making specific Reserve Bank services, known as 'priced services,' available to all depository institutions at a competitive price."); GEORGE BOOTH, FED. RSRV. BANK OF CLEVELAND, CURRENCY AND COIN RESPONSIBILITIES OF THE FEDERAL RESERVE: A HISTORICAL PERSPECTIVE 1 (2d ed. 1992) ("In 1980 the Monetary Control Act required Federal Reserve Banks to provide currency and coin services to all 'depository institutions'—not just commercial banks—and provided for the pricing of Federal Reserve services.").

433. Policy Statement—The Federal Reserve in the Payments System, 55 Fed. Reg. 11,648, 11,650 (Mar. 29, 1990) (noting that "[s]ince implementation of the Act, the Reserve Banks have provided access to Federal Reserve services to nonmember banks, mutual savings banks, savings and loan associations, and credit unions").

434. 2010 FED. RSRV. BANK OF PHILA. ANN. REP. 7.

435. *See* Reporter's Transcript of Oral Argument at 37–39, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 154 F. Supp. 3d 1185 (D. Colo. 2016) (No. 15-cv-01633) (explaining that in the previous ten years, the Kansas City Fed had not denied any applications for accounts); Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 861 F.3d 1052, 1071 (10th Cir. 2017) (per curiam) (concluding that the Federal Reserve's claims of discretionary authority were nothing more than a "litigation position").

436. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 18; *see also* Board Amicus Brief, TNB, *supra* note 120, at 5 ("The Board and the Federal Reserve Banks have long interpreted [the] authority [to accept depository and open accounts] to be discretionary . . . .").

of the Reserve Banks and can be terminated "at any time."[437] Operating Circular 1 was first adopted by the Federal Reserve Banks in 1998.[438] By that time, the Federal Reserve Banks had been opening accounts and providing payment services for more than eighty years.[439] The Monetary Control Act had been around for eighteen years. The Federal Reserve's argument ignores that history.

Operating Circular 1 itself provided little indication that the Reserve Banks were claiming discretion to conduct extensive risk assessments and deny account requests. The Circular did, as the Federal Reserve notes, state that accounts were subject to the approval and termination by the Reserve Banks.[440] The Federal Reserve Banks were, after all, prohibited from opening an account for just anyone. Only member banks and depository institutions were legally eligible.[441] However, Operating Circular 1 did not suggest that the Reserve Banks would conduct extensive risk vetting before approving account requests.[442] Indeed, the circular did not provide any way for account applicants to submit information related to risk. Instead, Operating Circular 1 offered a one-page form for the requesting bank to provide its contact information.[443] For many years that form stated that "[p]rocessing may take

437. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 18 (citing OPERATING CIRCULAR 1 (2021), *supra* note 38, §§ 2.6, 2.10); Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 22 n.14 (stating that "even though the Board's Guidelines are recent, they reinforce the Board's longstanding practice . . . [d]ating back at least to 1998, when uniform Operating Circulars applicable across all Reserve Banks were first issued").

438. FED. RSRV. BANK OF DALL., OPERATING CIRCULAR 1 (1998) [hereinafter OPERATING CIRCULAR 1 (1998)], https://fraser.stlouisfed.org/title/district-notices-federal-reserve-bank-dallas-5569/federal-reserve-standardized-operating-circulars-546823 [https://perma.cc/R3X5-2EQ2].

439. *See* 2 FED. RSRV. BD. ANN. REP. 16 (1915) (discussing the Federal Reserve Banks' check clearing services).

440. OPERATING CIRCULAR 1 (1998), *supra* note 438, §§ 2.3, 2.8.

441. 12 U.S.C. § 342 (noting that Reserve Banks may also hold clearing accounts for nonmember banks, trust companies, and "other depository institutions").

442. The Federal Reserve Board claims that other Federal Reserve operating circulars establish risk vetting by allowing accounts to be terminate for certain risks. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 26 n.24. For example, Operating Circular 5 states that "a Reserve Bank immediately may terminate [a bank's] [e]lectronic [c]onnection if the Reserve Bank, in its sole discretion, determines that continued use of the [e]lectronic [c]onnection poses a risk to the Reserve Bank or others." FED. RSRV. FIN. SERVS., OPERATING CIRCULAR NO. 5 § 7.1 (Feb. 1, 2023), https://www.frbservices.org/binaries/content/assets/crsocms/resources/rules-regulations/020123-operating-circular-5.pdf [https://perma.cc/W4RR-RE55]. Like Operating Circular 1, these circulars were first adopted in 1998, decades after the Federal Reserve began providing accounts and payment services. Moreover, the Federal Reserve's imposition of certain conditions on services is not necessarily inconsistent with their statutory mandate. The Monetary Control Act states that in providing payment services "nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks." 12 U.S.C. § 248a(b)(2). Presumably, it is allowable for the Federal Reserve to require that member and nonmember banks have computer software and hardware sufficient to safely connect to the Federal Reserve payments technology.

443. OPERATING CIRCULAR 1 (1998), *supra* note 438, at app. 1.

5-7 business days."[444] In litigation with Fourth Corner Credit Union in 2016, the Kansas City Fed's attorney said that he was not aware of any denied account applications in the previous ten years.[445] This all suggests that the Reserve Banks saw opening accounts as a ministerial action handled for each requesting member bank or depository institution. Consequently, Operating Circular 1 can hardly be taken as a pronouncement of sweeping Reserve Bank discretion over accounts and payments access.

Of course, whether Operating Circular 1 indicated it or not, the Federal Reserve did eventually claim discretion over access to accounts and payment services. In 2015, the Kansas City Fed denied Fourth Corner Credit Union's account request,[446] and more litigation over accounts emerged.[447] And eventually, in 2022, the Reserve Board adopted a sweeping risk-vetting process in its Account Access Guidelines.[448]

The Federal Reserve Board argues that courts should defer to "the Board's published interpretation of the relevant [Federal Reserve Act] provisions in the . . . Account Access Guidelines" because the Guidelines were "issued after notice and comment."[449] Under the *Chevron* doctrine, courts defer to reasonable agency interpretations of ambiguous statutes adopted through notice-and-comment rulemaking.[450] But the Account Access Guidelines here are not the equivalent of rulemaking. The Federal Reserve has elsewhere clarified: "Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law."[451] Accordingly, the Guidelines should not receive *Chevron* deference.[452]

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444. *See* FED. RSRV. BANK OF DALL., OPERATING CIRCULAR NO. 1: ACCOUNT RELATIONSHIPS, app. 1 (2002), https://fraser.stlouisfed.org/title/5569/item/547312?start_page=3 [https://perma.cc/B2UT-MWTN] [hereinafter OPERATING CIRCULAR 1 (2002)] (providing a form master account agreement that noted: "Processing may take 5-7 business days"); FED. RSRV. FIN. SERVS., OPERATING CIRCULAR NO. 1: ACCOUNT RELATIONSHIPS, app. 1 (effective Sept. 2011), https://www.frbservices.org/binaries/content/assets/crsocms/forms/accounting/master-account-agreement-oc1-app1-rv.pdf [https://perma.cc/DX6M-VGSR] ("Processing may take 5-7 business days.").

445. Reporter's Transcript of Oral Argument at 37–39, Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kan. City, 154 F. Supp. 3d 1185 (D. Colo. 2016) (No. 15-cv-01633).

446. *See supra* Section II.A.

447. *See supra* Part II.

448. Guidelines for Evaluating Account and Services Requests, 87 Fed. Reg. 51,099 (Aug. 19, 2022).

449. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 22–23, 25.

450. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

451. Statement Clarifying the Role of Supervisory Guidance, 12 C.F.R. pt. 262, app. A.

452. Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." (citing Reno v. Koray, 515 U.S. 50, 61 (1995); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256–58 (1991); Martin v. Occupational Safety & Health Rev. Comm'n, 199 U.S. 144, 157 (1991); KENNETH CULP DAVIS & RICHARD J. PIERCE, 1 ADMINISTRATIVE LAW TREATISE § 3.5 (3d ed. 1994)); United States v. Mead Corp., 533 U.S. 218, 230–35 (2001).

In addition, the Supreme Court in *State Farm*, held that when an agency changes its interpretation of a statute, it is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[453] This requirement of a "reasoned explanation" "ordinarily demand[s] that [the agency] display awareness that it *is* changing position."[454] Acknowledgment and explanation of agency changes is especially important when the people have relied on the agency's prior interpretation.[455] For example, in *Encino Motorcars, LLC v. Navarro*, the Supreme Court held that an agency's promulgated rule was unlawful when that rule was adopted without explaining why the agency was departing from the policy espoused by the agency for the prior three decades.[456]

So far, neither the Federal Reserve Board nor the Reserve Banks have acknowledged that their claims of discretion abandon their century-long interpretation of the Federal Reserve Act. In adopting Operating Circular 1 in 1998, the Reserve Banks did not signal that its claims of discretion were new.[457] Similarly, when the Reserve Board adopted the Account Access Guidelines, the Board did not say that its risk vetting was new. It said that Guidelines were "maintaining the discretion granted to the Reserve Banks under the Federal Reserve Act to grant or deny access requests."[458] Even in litigation, the Federal Reserve does not acknowledge its claims of discretion are new.[459]

In reliance on the Federal Reserve's long practice of granting accounts to eligible financial institutions, states have crafted bank charters to make their institutions eligible for Federal Reserve accounts and payment services.[460] Institutions have spent years pursuing bank charters and Federal Reserve accounts only for the Federal Reserve to suddenly claim discretion to

453. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

454. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); *see also* FCC v. Fox Television Stations, Inc., 566 U.S. 239, 250 (2012) (stating that an agency "should acknowledge that it is in fact changing its position").

455. *Fox Television Stations, Inc.*, 556 U.S. at 515; Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

456. *Encino Motorcars, LLC*, 579 U.S. at 220–24.

457. *See generally* OPERATING CIRCULAR 1 (1998), *supra* note 438 (providing terms and conditions for Federal Reserve accounts).

458. Account Access Guidelines, *supra* note 9, at 51,100.

459. Fed. Rsrv. Bd.'s Motion to Dismiss Custodia's Complaint (Mar. 2023), *supra* note 158, at 22 n.14; Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 18; Board Amicus Brief, TNB, *supra* note 120, at 5.

460. For example, in crafting its special purpose depository institution charter, Wyoming was careful to ensure that the SPDIs were depository institutions. WYO. STAT. ANN. §§ 13-12-101, 13-12-103(b)(vii)(E), 13-12-104 (West 2023). In addition, Wyoming officials held "more than 100 meetings with the Board of Governors and the [Kansas City Fed]." Cynthia Lummis, Opinion, *The Fed Battles Wyoming on Cryptocurrency*, WALL ST. J. (Nov. 30, 2021, 6:24 PM), https://www.wsj.com/articles/the-fed-battles-wyoming-cryptocurrency-powell-brainard-bitcoin-digital-assets-spdi-fintech-11638308314 [https://perma.cc/RG2C-CHHR].

deny their accounts.[461] Given this reliance, the Federal Reserve cannot simply change its approach without providing a reason. Because the Federal Reserve has not "display[ed] awareness"[462] that it has changed its position and explained its reasons for that change, its new claims of discretion should not be permitted.

Absent *Chevron* deference,[463] courts sometimes still afford "respect" to agency positions under *Skidmore*.[464] But *Skidmore* deference "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasons, its consistency with earlier and later pronouncement, and all those factors which give it power to persuade."[465] Here the Federal Reserve's claims of discretion are not persuasive because they are contrary to language in the Federal Reserve Act, contrary to the legislative history, and contrary to more than one hundred years of its own interpretations.

V. MANAGING RISK

But what about risk? Will requiring the Federal Reserve Banks to open accounts for all member banks and depository institutions introduce new excessive risk in the U.S. financial system? Do courts need to adopt the Federal Reserve's new, tortured reading of the Federal Reserve Act to avoid a horrible result? I think not.

The risks presented by new business models and novel state charters are not markedly different from the risks presented by banking innovations in decades past and are addressed by the existing risk-supervisory framework that includes state bank regulators. Moreover, even without the right to deny account requests, the Federal Reserve has significant authority over the way it

461. *See supra* Part II (discussing the organizing efforts of Fourth Corner Credit Union, TNB, Custodia Bank, and PayServices).

462. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

463. For the reasons expressed throughout Part IV, *Chevron* does not require deference to the Federal Reserve's interpretation of the Federal Reserve Act here. Moreover, it is possible that in the future, the Supreme Court will limit or overturn *Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 837 (1984). During the October 2023 Term, the Supreme Court is set to hear arguments in *Loper Bright Enterprises v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 2023 WL 3158352 (2023). There the petitioner argues that courts should not give an administrative agency's interpretation of a statute deference under *Chevron* unless the statute explicitly gives the agency power to act. In other words, "silence is not ambiguity." Petition for Writ of Certiorari at 28–29, Loper Bright Enters., 45 F.4th 359 (No. 21-5166). If the Supreme Court agrees, this could provide further grounds to disregard the Federal Reserve's new claims of authority to limit access to accounts and payment services. *See supra* Section IV.A.4 (explaining that Congress's failure to create a supervisory framework for Federal Reserve accounts suggests that it did not intend the Federal Reserve to have supervisory authority).

464. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944); United States v. Mead Corp., 553 U.S. 218, 234–35 (2001).

465. *Skidmore*, 323 U.S. at 140; Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) (finding consistency of agency interpretations relevant in *Skidmore* deference analysis).

runs its payment systems. For example, it can require that nonmember banks maintain account balances sufficient for the size, type, frequency, and risk of payments it sends and receives. None of this suggests a problem so urgent that the financial system will falter unless courts allow the Federal Reserve to exceed its statutory authority.

Importantly, there is a mechanism available to exclude risky banks: The Federal Reserve could convince Congress to amend the law. Congress could narrow the list of institutions eligible for accounts and services. Congress could grant the Federal Reserve supervisory authority over institutions without a federal regulator. Congress could give the Federal Reserve the wide discretion it now claims. In the past, Congress has adjusted the legal framework for accounts and services. It could do it again.

However, absent congressional action, the Federal Reserve's illegitimate claims of power do not decrease risk; they increase risk by harming the Federal Reserve's reputation.

A. MANAGING PAYMENT RISK

The Federal Reserve Board says that Reserve Banks need to "perform thorough reviews of [account] requestors" because "new financial products" and "novel charter" types present new risks.[466] But these risks are not as new as the Federal Reserve claims. Certainly, banks without federal deposit insurance are not new. From 1913 until 1933 all Federal Reserve accountholders operated without federal deposit insurance.[467] Having banks with unique powers and limitations is not new either. National banks have always been subject to different laws than their state-chartered counterparts.[468] State banking laws vary considerably from state to state.[469] Among state-chartered banks, the regulatory rules and supervision differ depending on whether the bank has chosen to be a member of the Federal Reserve.[470] Specialized banking charters are not new. For example, at the time Congress passed the Monetary Control Act, thrifts were regulated and supervised differently than other banks.[471] Over the years, Reserve Banks have handled accounts and payments for "risky" banks that offered new financial products. Since the Reserve Banks began providing accounts and payment services to all

466. Fed. Rsrv. Bd. Motion to Dismiss Custodia's Complaint (2022), *supra* note 146, at 13 n.18; Account Access Guidelines, *supra* note 9, at 51,099.

467. Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168.

468. *See* Howard H. Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 582–87 (1966).

469. *See id.* at 580–82.

470. *See, e.g.*, Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, The Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1166 (1990) (explaining that "the FDIC's regulations permit state nonmember banks to engage indirectly through a subsidiary or affiliate in a broad range of securities activities that are not allowed to national and state member banks").

471. Donelson & Zaring, *supra* note 380; Carl Felsenfeld, *The Savings & Loan Crisis*, 59 FORDHAM L. REV. S7, S20 (1991).

depository institutions, the Federal Reserve's payment systems have survived both the savings and loan crisis of the 1980s and the 2008 financial crisis.[472] In sum, the Federal Reserve's payment systems have survived a lack of federal deposit insurance, supervisory differences inherent in the dual banking system, nonstandard bank charters, risky business plans, and numerous bank failures. Viewed in this light, novel banks are just the most recent in a long line of banking innovations.

The risks presented by new business types and novel banking charters are not left unregulated. To be a bank, an entity must be chartered and supervised by either a federal or a state agency. The Federal Reserve's Account Access Guidelines suggest that state bank supervisors cannot be trusted. Hence, Reserve Banks must scrutinize access requests from institutions without federal deposit insurance and a federal supervisor.[473] This approach pushes state-charted institutions to pursue Federal Reserve membership in hopes of gaining access to the Fed's payment systems.[474] This same skepticism of state regulators is evident in legal filings. For example, the San Francisco Fed argues that Congress must have intended the Reserve Banks to have discretion because "[p]ermitting every single state and territory to dictate which entities can directly access the Federal Reserve System—with no room for federal oversight—would remove a vital tool for the Reserve Banks to guard against money laundering, contain cybersecurity breaches, or address a myriad of other risks."[475]

Although people can reasonably debate whether there is a quality difference between federal and state supervisors,[476] evaluation of risk should not overshadow consideration of benefits that come with multiple supervisory systems. Congress has chosen to preserve the dual banking system, in part because

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472. For brief Federal Reserve summaries of these crisis, see Kenneth J. Robinson, *Savings and Loan Crisis*, FED. RSRV. HIST. (Nov. 12, 2013), https://www.federalreservehistory.org/essays/savings-and-loan-crisis [https://perma.cc/X769-JAYZ]; John Weinberg, *The Great Recession and Its Aftermath*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath [https://perma.cc/N4E6-VDL3].

473. Account Access Guidelines, *supra* note 9, at 51,109–10.

474. Custodia Bank applied for Federal Reserve membership in hopes that it would "bolster its case for access to the central bank's payment systems." Andrew Ackerman, *Crypto Firms Want Fed Payment Systems Access—and Banks Are Resisting*, WALL ST. J. (Aug. 28, 2021, 5:30 AM), https://www.wsj.com/articles/crypto-firms-want-fed-payment-systems-accessand-banks-are-resisting-11630143002 [https://perma.cc/5H5C-HU98].

475. S.F. Fed's Motion to Dismiss, *supra* note 178, at 11. Apparently, the San Francisco Fed has no concerns that this "vital tool" of "federal oversight" is supposed to be provided by the Reserve Banks, which the San Francisco Fed describes as "[n]ot the Federal Government." *Id.* at 11, 15.

476. *Compare, e.g.*, Sumit Agarwal, David Lucca, Amit Seru & Francesco Trebbi, *Inconsistent Regulators: Evidence from Banking*, 129 Q.J. ECON. 889, 892 (2014) ("Federal supervisors are twice as likely to downgrade relative to state supervisors, who in turn counteract federal downgrades to some degree by upgrading more frequently."), *with* Richard Rose, *Switching Primary Federal Regulators: Is It Beneficial for U.S. Banks?*, ECON. PERSPS., Aug. 2005, at 16 (finding no increase in risk of failure after a bank switches regulator).

it believes that the system fosters innovation.[477] This belief is not unfounded. In the past, state regulatory authorities have pioneered important banking innovations including "free banking laws, checking accounts, branch banking, real estate lending, trust services, reserve requirements, and deposit insurance, all concepts that Congress later incorporated in laws governing national banks."[478] Yet the Federal Reserve's Account Access Guidelines take direct aim at "novel charter types" and "new financial products and services."[479] The Federal Reserve should not, under the stolen cloak of discretion, deprive the public of the benefits that come with state banking innovation.

At any rate, state banking regulators will not be left to manage payment risk by themselves. The Federal Reserve has power to manage payment system risk. It can decide what sort of payment services to offer and the terms under which those services are offered. The Reserve Banks can limit what kinds of deposits they accept.[480] They can refuse to process some payments. The Reserve Banks need not launder money.[481] The Board can make nonmember banks "subject to any other terms including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks."[482] Accountholders need not be allowed large overdrafts. Reserve Banks can monitor accounts of troubled institutions and relay concerns to banks' supervisory authorities.

Finally, if the Federal Reserve wants additional risk management tools, it can ask Congress for them. Congress could grant the Federal Reserve authority to conduct risk vetting. Congress could also narrow the scope of institutions with access to accounts and payment services.

B. OVERREACH RISK

Acting without Congress's imprimatur, however, could damage the Federal Reserve's legitimacy. Over the years, the Federal Reserve has tried to cultivate a reputation as a technocratic expert that acts independently from political pressures.[483] By acting in ways that foster legitimacy, the Federal Reserve preserves its ability to implement monetary policy, supervise member

477. *See Monetary Control and the Membership Problem Hearing*, *supra* note 368, at 504–05 (justifying dual banking on the grounds that it fosters innovation and prevents the centralization of power).

478. Wilmarth, *supra* note 470, at 1156.

479. Account Access Guidelines, *supra* note 9, at 51,099.

480. Farmers & Merchs. Bank of Monroe v. Fed. Rsrv. Bank of Richmond, 262 U.S. 649, 663–65 (1923); *see also* Section IV.A.1 (discussing the meaning of 12 U.S.C. § 342's "may receive . . . deposits" language).

481. *See* 18 U.S.C. §§ 1956(a)(1)(B), 1957(a).

482. 12 U.S.C. § 248a.

483. *See* Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS. 65, 82–87 (2015) (discussing the ways reputation considerations serve as a constraint on Federal Reserve actions).

banks, and even offer payment services.[484] Without legitimacy, the Fed loses its ability to act as a trusted economic backstop.[485] Even the Federal Reserve recognizes its need for legitimacy.[486]

Ordinarily, legitimacy depends on the Federal Reserve acting within the scope of its legal authority.[487] Here, the Federal Reserve's claims of discretion in its Account Access Guidelines exceed its statutory authority. Legitimacy is also aided by an agency's "consistency over time."[488] Here, the Federal Reserve has adopted a new approach without acknowledging that it is a new approach. This, along with the secretive way the Reserve Banks handle accounts,[489] fuels accusations that the Federal Reserve lawlessly discriminates against some institutions and favors others.[490] These are unnecessary blows to the Federal Reserve's legitimacy.

Nevertheless, scholars recognize that the Federal Reserve can sometimes exceed the bounds of its statutory authority when responding to emergency conditions. For example, Phillip Wallach argues that during the 2008 financial crisis, the public tolerated emergency actions that stretched the Federal Reserve's legal authority thin.[491] Carola Binder and Christina Skinner explain that although these measures were controversial, "the Fed has managed to

484. *See* LAWRENCE R. JACOBS & DESMOND KING, FED POWER: HOW FINANCE WINS 131–32 (2016) (describing the importance of Fed legitimacy in implementing monetary policy); Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 592–97 (2020) (describing the importance an agency's reputation when acting as a banking supervisor).

485. JACOBS & KING, *supra* note 484, at 13.

486. *See, e.g.*, Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Economic Club of New York on the Federal Reserve's Framework for Monitoring Financial Stability 1 (Nov. 28, 2018), https://www.federalreserve.gov/newsevents/speech/files/powell20181128a.pdf [https://perma.cc/C52D-XDYX] ("By clearly and transparently explaining our policies, we aim to strengthen the foundation of democratic legitimacy that enables the Fed to serve the needs of the American public.").

487. Carola C. Binder & Christina P. Skinner, *The Legitimacy of the Federal Reserve*, 28 STAN. J. L., BUS. & FIN. 1, 7–8, 10 (2023) (describing legitimacy as "a mixed question of laws and norms, together with social opinion" and explaining that "legal authority is a condition of legitimacy"); Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 653 (2021) (stating that "in the face of changing circumstances" the Fed should "look muscularly at congressional authorizations and limitations").

488. Emily Hammond, Chevron*'s Generality Principles*, 83 FORDHAM L. REV. 655, 673 (2014).

489. Hill, *supra* note 117, at 457 n.20 (explaining that the Reserve Banks regularly deny any information requests related to particular Federal Reserve accounts).

490. *See* Smialek et al., *supra* note 399 (reporting that Senators questioned whether the Kansas City Fed opened an account after lobbying from a former member of the Federal Reserve Board); Kyle Campbell, *Fed, Custodia Clash Over Discovery Requirements in Master Account Lawsuit*, AM. BANKER (Dec. 5, 2022, 1:48 PM), https://www.americanbanker.com/news/fed-custodia-clash-over-discovery-requirements-in-master-account-lawsuit (on file with the *Iowa Law Review*) (raising questions about whether the Federal Reserve was "applying a staggering double-standard" by allowing Bank of New York Mellon and Farmington State Bank (also known as Moonstone Bank) to provide crypto custody services).

491. PHILIP A. WALLACH, TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS 119–57 (2015).

keep its legitimacy intact by demonstrating that these powers—though greatly enlarged for a time—will be de-escalated at the proper time."[492] As previously explained, the Federal Reserve is not facing a payment systems risk crisis. Moreover, its self-coronation as gatekeeper of the payment systems is not an emergency measure that will be rolled back in the future. Payment systems access today is a "predictable problem[]" at a "conventional time[]."[493] Accordingly it should be addressed within the confines of the Federal Reserve Act.[494] If the Federal Reserve thinks it needs discretion, it should ask Congress to address the issue.

Courts should not be hesitant to require that the Federal Reserve stay within the confines of the Federal Reserve Act and make accounts and payment services available to all member banks and depository institutions. The Federal Reserve is an agency with wide discretion in many areas.[495] It is insulated from the executive branch.[496] In addition, as a practical matter, many of the Federal Reserve's actions will never be reviewed in court.[497] If the Fed is always left unchecked, it can breed an undemocratic lawlessness that erodes the Fed's legitimacy over time.[498] This situation is one in which the courts can provide a check. In doing so, "courts can confer legitimacy on the Fed" by bringing the Fed's actions into compliance with the law.[499] "[B]y engaging more explicitly with the scope of Fed authority, courts can prompt the Agency to proactively seek authorization from Congress" not just on access to Federal Reserve accounts and payment systems, but on a wider range of Fed policies.[500]

CONCLUSION

Financial and regulatory innovation does not happen without risk. In some cases, those risks may be greater than the benefits of innovation. The point of this Article is not to argue that crypto banks, cannabis banks, fintechs, narrow banks, public banks, and offshore banks, and others can all be safely integrated into the U.S. financial system. Rather, this Article is about who gets to be the gatekeeper. The proper gatekeeper here is Congress.

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492. Binder & Skinner, *supra* note 487, at 24–25.

493. Conti-Brown & Wishnick, *supra* note 487, at 644.

494. *See id.*

495. *See id.* at 654 ("The Federal Reserve Act is a mix of highly discretionary instructions and highly specific ones.").

496. Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 292–304 (2015); Salib & Skinner, *supra* note 278, at 945–72.

497. Binder & Skinner, *supra* note 487, at 12 ("The Fed's actions are rarely (if ever) reviewed in court."); Steffi Ostrowski, Note, *Judging the Fed*, 131 YALE L.J. 726, 740–45 (2021) (discussing "de facto" barriers to judicial review of Federal Reserve actions).

498. *See* Ostrowski, *supra* note 497, at 770 ("When 'sheer power' prevails, legitimacy wanes—the public may have reason to think, for example, that underrepresentative interest groups, such as financiers or asset holders, control the Fed's decision-making.").

499. *Id.* at 778.

500. *Id.* at 771.

Since the founding of the Federal Reserve in 1913, Congress has specified which financial institutions get access to the Federal Reserve's accounts and payment services. For more than a century, the twelve Federal Reserve Banks dutifully provided accounts and payment services to the congressionally specified banks, including state-chartered banks. Risk vetting was done by banking supervisors at the federal or state level.

But now the Fed has abruptly and without acknowledgment changed course. It now claims that "new financial products" and "novel charter types" require that Federal Reserve Banks conduct extensive risk vetting before allowing innovative banks access to its payment systems.[501] Under this newly claimed discretion, the Federal Reserve has denied account requests and closed accounts.

Congress, however, never gave the Fed discretion to deny eligible banks access to accounts and payment services. The Federal Reserve Act states that "[a]ll Federal Reserve bank services . . . shall be available to nonmember depository institutions."[502] The Federal Reserve Act's structure, purpose, and legislative history confirm that Congress intended that all eligible banks would have access. In claiming discretion that Congress did not give, the Federal Reserve has overstepped its legal bounds. The Fed cannot just decide to cut off banks it dislikes. It should abandon its claims of discretion unless it can persuade Congress to amend the law. If the Fed persists in account denials, courts should not hesitate to enforce the law.

501. Account Access Guidelines, *supra* note 9, at 51,099.

502. 12 U.S.C. § 248a(c)(2).