

In the

Supreme Court of the State of Montana

No. DA 19-0357

CHERYL BRATTON,
individually and on behalf of a class of similarly situated Montanans,

Plaintiff and Appellant,

v.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.
d/b/a SCL HEALTH,

Defendants and Appellees.

**BRIEF ON BEHALF OF *AMICI CURIAE* MONTANA BANKERS
ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND
CONSUMER BANKERS ASSOCIATION**

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County

Kenneth K. Lay
CROWLEY FLECK, PLLP
900 North Last Chance Gulch
Helena, Montana 59601
(406) 457-2037
klay@crowleyfleck.com

*Counsel for Amici Curiae Montana
Bankers Association, American
Bankers Association, and Consumer
Bankers Association*

Robert C. Lukes
Garlington, Lohn & Robinson, PLLP
350 Ryman Street
Missoula, Montana 59807
(406) 523-2500
relukes@garlington.com

Counsel for Appellee

Kathryn Ann Reilly
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, Colorado 80202
(303) 244-1983
reilly@wtotrial.com

Counsel for Appellee

John Heenan
Joe Cook
HEENAN & COOK
1631 Zimmerman Trail, Suite 1
Billings, Montana 59102
(406) 839-9091
john@lawmontana.com
joe@lawmontana.com

Counsel for Appellant

Michael P. Manning
RITCHIE MANNING KAUTZ, PLLP
175 North 27th Street Suite 1206
Billings, Montana 59101
(406) 601-1400
mmanning@rmkfirm.com

Counsel for Appellant

David K. W. Wilson, Jr.
MORRISON, SHERWOOD,
WILSON & DEOLA, PLLP
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261
kwilson@mswdlaw.com

*Counsel for Amicus Curiae Montana
Legal Services, National Consumer
Law Center and National Association
of Consumer Advocates*

Mark Elliot Budnitz
Georgia State University College of Law
1765 Morris Landers Drive
Atlanta, Georgia 30345
Mbudnitz@gsu.edu

*Counsel Pro Hac Vice for Amicus
Curiae Montana Legal Services,
National Consumer Law Center and
National Association of Consumer
Advocates*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
INTEREST OF AMICI CURIAE.....	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. Appellant’s Case Rests on a Misunderstanding of How Check and Card Payments Work.....	5
II. Debit Cards Are an Important Tool of Modern Finance and Beneficial to Consumers.	9
III. Unfounded, Speculative Fears of Misuse Can Be (and Are) Addressed by Laws and Regulations.....	18

TABLE OF AUTHORITIES

Page(s)

Cases

Citizens Bank of Md. v. Strumpf,
516 U.S. 16 (1995).....7–8

Hayes v. Autocorp, LLC,
No. 326349, 2011 Md. Cir. Ct. LEXIS 1 (Md. Cir. Ct. July 13, 2011).....6

Rogers v. Durant,
140 U.S. 298 (1891).....6

Smith v. Farmers Union Mut. Ins. Co.,
2011 MT 216, 361 Mont. 516, 260 P.3d 163 (2011).....6

United States v. Thomas,
319 F.3d 640 (3d Cir. 2003)8–9

Statutes and Regulations

Mont. Code Ann. § 28-1-1002 (West).....9

Mont. Code Ann. § 30-3-102 (West).....6

12 U.S.C. § 4118–9

42 U.S.C. § 1320d-8.....7 n.2

12 C.F.R. § 235.120

12 C.F.R. § 1005.220

12 C.F.R. § 1005.420

12 C.F.R. § 1005.520, 21

12 C.F.R. § 1005.720

12 C.F.R. § 1005.1620

12 C.F.R. § 1005.1820

12 C.F.R. § 1005.19	20
12 C.F.R. § 1026.12	21
Prepaid Accounts Under the Electronic Fund Transfer Act (Reg. E) and the Truth in Lending Act (Reg. Z), 81 FED. REG. 83934 (Nov. 22, 2016).....	10, 16, 17
Restatements and Treatises	
RESTATEMENT (SECOND) OF CONTRACTS	4, 17
JOHN W. DANIEL, A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS (1913)	6
STEVE H. NICKLES & MARY BETH MATTHEWS, PAYMENTS LAW IN A NUTSHELL (Thomson West 2005).....	6
Official Publications	
Bd. of Gov. of the Fed. Reserve Sys., REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS (July 2012), available at https://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201207.pdf	13
Bd. of Governors of the Fed. Reserve Sys., REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS (Sept. 2019), available at https://www.federalreserve.gov/publications/files/government-prepaid-report-201909.pdf	13
THE FEDERAL RESERVE PAYMENTS STUDY: 2018 ANNUAL SUPPLEMENT (2018), available at https://www.federalreserve.gov/newsevents/pressreleases/files/2018-payment-systems-study-annual-supplement-20181220.pdf	10
Official State Website, Montana.Gov, <i>Montana SNAP/TANF EBT Card</i> , https://dphhs.mt.gov/ebt	14
Office of the Comptroller of the Currency, <i>Prepaid Access Programs: Risk Management Guidance and Sound Practices</i> , OCC Bulletin 2011-27 (June 28, 2011), available at https://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-27.html	20

U.S. Dep’t of Treasury, Press Release, Financial Crimes Enforcement Network (FinCEN), *FinCEN Issues Prepaid Access Final Rule Balancing the Needs of Law Enforcement and Industry* (July 26, 2011), available at <https://www.fincen.gov/sites/default/files/shared/20110726b.pdf>20

U.S. Dep’t of Treasury, Press Release, *Treasury Extends Direct Deposit to Millions of Americans, Phasing Out Paper Checks for Federal Benefits Payments* (Dec. 21, 2010), available at <https://www.prnewswire.com/news-releases/treasury-extends-direct-deposit-to-millions-of-americans-phasing-out-paper-checks-for-federal-benefit-payments-112228949.html> 13, 14

U.S. Dep’t of Treasury, Press Release, *U.S. Treasury Introduces Direct Express® Debit Card for Social Security Payments* (June 10, 2018), available at <https://fiscal.treasury.gov/GoDirect/media/release/us-treasury-introduces-direct-express-debit-card/index.html> 12

U.S. Dep’t of Treasury, *Direct Express® Debit Card Program Financial Agent Selection Process Questions and Answers* (May 22, 2019), available at <https://www.fiscal.treasury.gov/files/directexpress/DirectExpressFASPQandAs.pdf>.....12–13

Other Publications

Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004)..... 16

Janna Herron, *Best Places to Cash a Check, If You Don’t Have a Bank*, ValuePenguin (Oct. 19, 2017), available at <https://www.valuepenguin.com/2017/10/best-places-cash-check-if-you-dont-have-bank> 16

Tom Murse, *The End of Social Security Paper Checks: What You Should Know About Your Social Security Benefits*, ThoughtCo.com (Mar. 2, 2019), available at <https://www.thoughtco.com/end-of-social-security-paper-checks-3321402>.....12–13, 17, 19

Nat’l Consumer Law Center & Consumer Fed. of America, *The High Cost of Quick Tax Money: Tax Preparation, ‘Instant Refund’ Loans, and Check Cashing Fees Target the Working Poor* (Jan. 2003), available at https://consumerfed.org/pdfs/2003_RAL_report.pdf 15

Pew Charitable Trusts, *Why Americans Use Prepaid Cards: A Survey of Cardholders' Motivations and Views* (Feb. 2014), available at https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardssurveyreportpdf.pdf 12, 15–16

Prepaid card and gift card statistics (Dec. 1, 2015), <https://www.nasdaq.com/articles/prepaid-card-and-gift-card-statistics-2015-12-01> 12

Caroline Ratcliffe *et al.*, Urban Institute, *Prepaid Cards at Tax Time and Beyond: Findings from the MyAccountCard Pilot* (Mar. 2014), available at <https://www.urban.org/sites/default/files/publication/22476/413082-Prepaid-Cards-at-Tax-Time-and-Beyond-Findings-from-the-MyAccountCard-Pilot.PDF> 14, 15

Leonard Sloane, *When the Check Is Not in the Mail*, N.Y. TIMES, Feb. 29, 1992, available at <https://www.nytimes.com/1992/02/29/news/when-the-check-is-not-in-the-mail.html> 19

Swipe fee Q and A: How does money flow in this complex transaction?, HELENA INDEP. RECORD (July 10, 2011), available at https://helenair.com/news/swipe-fee-q-and-a-how-does-money-flow-in/article_f51023d8-aabc-11e0-8b79-001cc4c002e0.html..... 11

Geoff Williams & Simon Zhen, *How to Cash a Check Without a Bank Account*, U.S. NEWS & WORLD REPORT (Mar. 8, 2019), available at <https://money.usnews.com/banking/articles/how-to-cash-a-check-without-a-bank-account> 16

INTRODUCTION

This case arises from a \$27.75 refund that Appellee Sisters of Charity of Leavenworth Health System, Inc. (SCL Health) paid Appellant Cheryl Bratton by prepaid debit card. Appellant claims that receiving the card instead of a paper check injured her, although she admits she was paid what she was owed and that she could have requested a check if she wanted one. The basis for her claim of injury is that she was supposedly “force[d]” “to obtain her refund from Bank of America” (the card issuer), instead of from Appellee directly, which is what she thinks would have happened with a check. Appellant’s Br. 47. Her stated reason for refusing the paper-check option is that she would have had to request it from Bank of America, and she did not want to “deal with Bank of America.” *Id.* at 21.

The District Court rejected Appellant’s theories and entered summary judgment against her on all of her claims, reasoning that there is no material, legal difference between refunding money on a debit card and refunding it by check.¹

The undersigned *amici curiae* do not believe Appellant’s preference for a paper check satisfies the elements of her causes of action, but will leave it to the parties to address those legal issues. The broader point, on which the District Court was undoubtedly correct, is that every feature of the transaction to which Appellant

¹ Order Granting Defendant’s Motion/Supplemental Motion for Summary Judgment and Denying Plaintiff’s Cross-Motion for Summary Judgment (Mont. 13th Dist. Jun. 18, 2019) (“Order”).

objects is, in fact, no different from what would occur in a check transaction. As noted, the premise of Appellant's case is that the debit card "forced" her to obtain her refund from a bank. Whatever the merits of that claim, it is no different from what happens when cashing a check. A person presenting a check for cashing is *also* obtaining the money from a bank, not the party writing the check. That is how negotiable instruments have worked since time immemorial.

In modern times, however, businesses and consumers demand more efficient payment methods than paper notes that have evolved only minimally in form and function since antiquity. Federal Reserve data show a steady trendline since 2000 of consumers switching to debit cards and checks falling into disuse. Prepaid cards like the one at issue here are, indeed, the fastest-growing payment method in the United States—used not only by businesses and non-profits (like the Appellee hospital network) but also by the federal government and literally thousands of state and local governments for benefits programs large and small (including the largest—Social Security and SNAP). That is not only because they are cheaper and more efficient to issue than paper checks (a fact from which Appellant attempts to infer nefarious intent), but also because they are more efficient and convenient to consumers, too. Consumers prefer them because they offer protection from unanticipated costs (such as overdraft fees or check-cashing fees), are widely accepted (spendable wherever

credit cards are accepted, including online—unlike checks or cash), and are safe and secure (protected by modern fraud- and theft-protection techniques).

The *amici curiae*'s member institutions rely on such innovations to remain competitive in a modern marketplace where cost is critical and consumers demand fast, easy, and secure access to their money. That is what the Appellant was given here. The *amici* respectfully submit that her idiosyncratic preference for something different should not impair the ability of financial institutions to offer Montanans services that have become standard nationwide.

INTEREST OF AMICI CURIAE

The *amici curiae* are trade organizations in the financial-services field representing a broad array of institutions, locally and nationally, whose businesses could be affected by this case. The *amici* devote significant resources to appearing as *amici curiae* in matters significant to the consumer-financial-services industry, its employees, and its customers. This Court granted leave for the *amici* to appear here to share their perspective on how the Appellant's challenge to modern payment technologies will affect the industry and its consumers, and to provide further support for the District Court's holding that there is no practical or legal difference between authorizing a bank to transfer money in the form of a prepaid debit card and authorizing the same bank to transfer the same money by check.

SUMMARY OF ARGUMENT

1. The District Court correctly ruled that “SCL Health’s authorization for Bank of America to withdraw money from SCL Health’s account to send to Bratton in the form of a [prepaid debit card] is similar to the authorization of a wire transfer or cashier’s check.” Order at 10. Every aspect of the debit-card transaction to which Appellant objects is also true of a check transaction, as both rely on intermediary banks between payer and payee.

2. Debit cards offer tangible benefits to consumers in cost and convenience and are a standard form of payment in a modern economy—indeed, the most widely adopted non-cash payment method in the United States, while paper-check usage is in steady decline. The District Court was therefore correct to uphold the debit-card payment as a manner of payment “current in the ordinary course of business.” *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 249).

3. Debit cards are subject to multiple legal, regulatory, and rulemaking schemes—and neither Appellant nor her *amici* cite any law or regulatory provision actually violated here. Regardless, if there were any genuine risk of harm based on the numerous speculative scenarios they imagine (none of which are evidenced in, or even outside, the record of this case), those concerns are more appropriately raised with Congress or the regulatory agencies, not by seeking a blanket judicial decree that this standard form of payment is somehow tortious.

ARGUMENT

I.

Appellant’s Case Rests on a Misunderstanding of How Check and Card Payments Work.

Appellant’s arguments are premised on a fundamental misunderstanding of how banks facilitate payments to third parties. Appellant argues that by paying her with a Bank of America–issued prepaid debit card in lieu of a check, SCL Health “transferr[ed] its refund obligation to Bank of America,” “paid Bank of America, not Bratton, the amount of her refund,” and “force[d] Bratton to accept payment from Bank of America” instead of a payment “directly from SCL Health.” *Id.* at 22–23, 25 n.4. She claims an “ascertainable loss of money or property” in the form of “the \$27.75 she cannot obtain from SCL Health,” notwithstanding her belief that she received the same \$27.75 “from Bank of America.” *Id.* at 46.

Appellant maintains that none of these complaints would apply if SCL Health had paid her by check. *Id.* at 9–10. That is where her position falls apart, because it rests on the premise that there is a material *difference* between a debit card and a check in terms of who is paying whom, and whether any payment obligation is “transferr[ed].” This is false—the same arguments Bratton makes against debit cards could, just as validly (or, rather, just as invalidly), be used to argue that payments by check—or even cash—are impermissible. The District Court’s “analogy of prepaid debit cards” to “cashier’s checks” (*id.* at 8) was thus entirely appropriate.

The U.S. Supreme Court “comprehensively define[d]” a check as “a draft or order upon a bank ... , purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, ... and payable instantly on demand.” *Rogers v. Durant*, 140 U.S. 298, 301 (1891) (quoting 2 JOHN W. DANIEL, A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS § 1566 (1913)). This Court’s precedents and Montana’s statutes similarly recognize that “[a]n order, such as a bank check or money order, is ‘a written instruction to pay money signed by the person giving the instruction.’” *Smith v. Farmers Union Mut. Ins. Co.*, 2011 MT 216, ¶ 32, 361 Mont. 516, 260 P.3d 163 (quoting Mont. Code Ann. § 30-3-102 (West)). “The bank ordered in the draft to make payment”—the “drawee”—“is primarily liable on the order,” and it is the drawee bank that “commits to the customer to pay the check.” *Id.*, ¶ 33 (quoting STEVE H. NICKLES & MARY BETH MATTHEWS, PAYMENTS LAW IN A NUTSHELL 282 (Thomson West 2005)). In practice, the transaction involves multiple banks because “[t]he bank that cashes a check ... sends the check through one or more intermediary banks, which are ‘collecting banks,’ with the check eventually ending in the possession of the bank upon which the check is drawn.” *Hayes v. Autocorp, LLC*, No. 326349, 2011 Md. Cir. Ct. LEXIS 1, at *9–11 (Md. Cir. Ct. July 13, 2011).

These principles undermine Appellant’s belief that a bank has somehow interceded in a debit-card transaction in a manner in which it has *not* interceded in a

check transaction. For example, it is false that when SCL Health issued its refunds by check, it “controlled the entire process” just because it “manually created” and mailed those checks. *Id.* at 9. SCL Health “controlled” the process only in the sense that the banks were following its payment orders, no different from the “control” it exercises by having a bank issue prepaid cards at its direction. (Further, it is not an inherent feature of checks that SCL “manually created” and mailed its own checks: SCL could have instructed its bank to do so.) Likewise, it is false that paying refunds by debit card “disclos[ed]” to Bank of America any “individually identifiable healthcare information” that would *not* have been disclosed in a check payment. Appellant’s Br. 11. The so-called “healthcare information” consists of Appellant’s name and “the amount of her refunds.” *Id.* at 11-12. One cannot cash a check without supplying banks with the same information.²

And while it is nominally true that debit-card funds “remain[] in Bank of America’s possession” until the card is used (*id.* at 12), the same is true of funds payable by check. Checks are paid from the bank’s money, not the depositor’s. *See Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 21 (1995) (noting that a bank account

² Appellant’s assertion that providing this basic information violates the Health Insurance Portability and Accountability Act of 1996 (HIPAA) is legally baseless. HIPAA does not apply to activities of a financial institution, including “[t]he use or disclosure of information by the entity for authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting, a payment ... where such payment is made by any means, including a credit, debit, or other payment card, an account, check, or electronic funds transfer.” 42 U.S.C. § 1320d-8.

does not “consist[] of money belonging to the depositor and held by the bank. In fact ... it consists of nothing more or less than a promise to pay, from the bank to the depositor.”).

Even Appellant’s *amici curiae* recognize this. They argue: “If the bank were to pay the consumer with a cashier’s check, SCL would pay the bank the amount of the refund. The bank would issue the check as the drawer of the check. That same bank is also the drawee because the check is drawn on its own funds.” *Amici Curiae Montana Legal Servs. et al. Br. (“Amici Br.”)* 10. This is functionally indistinguishable from the structure of the debit-card transactions Appellant objects to, in which the cards are funded by “an account SCL Health maintains at Bank of America.” Appellant’s Br. 11. Thus, notwithstanding Appellant’s concession that she would have no complaint if only she had been paid by check, every feature she complains about is common to both debit-card and check transactions.

Taking Appellant’s theories at face value, one is almost forced to conclude that the only way to avoid her complaints would have been to mail her an envelope full of cash. But Appellant’s theories would preclude that, too, because “[p]aper currency ... is defined as an ‘obligation[] of the United States’ that may be ‘redeemed in lawful money on demand.’ These bills are not ‘money’ *per se* but promissory notes supported by the monetary reserves of the United States.” *United States v. Thomas*, 319 F.3d 640, 644–45 (3d Cir. 2003) (Alito, J.) (quoting 12 U.S.C.

§ 411). Thus, even if SCL Health had paid Appellant in cash, she could just as easily argue that it had “transferr[ed] its refund obligation” to the United States Treasury as she argues presently that it “transferr[ed] its refund obligation” to a bank.

The absurdity of that proposition confirms the obvious: the \$27.75 Appellant received from “Bank of America” *was* “obtain[ed] from SCL Health.” Appellant’s Br. 46. And that remains so regardless how SCL Health moved the payment from Point A to Point B. That also undermines Appellant’s reliance on Mont. Code Ann. § 28-1-1002 (West), as purportedly prohibiting debit-card payments because they supposedly “transfer[.]” “[t]he burden of an obligation” to another party. Appellant’s Br. 3 (citing Mont. Code Ann. § 28-1-1002 (West)). The “obligation” was never transferred. *See* Order at 9 (citing Appellee’s recognition that “it remained liable for any breach that may have resulted”). Bank of America was never obligated to Appellant on the underlying refund. The obligations it assumed were the obligations of a financial institution instructed to tender funds—the same obligations it would have had if presented with a check.

II.

Debit Cards Are an Important Tool of Modern Finance and Beneficial to Consumers.

The Consumer Financial Protection Bureau recognized in 2016 that debit cards and other “prepaid products are ... taking the place of distributions to the

consumer via paper check.”³ According to data maintained by the Federal Reserve, “[p]repaid debit card payments had the highest growth rate” among all non-cash payment methods on a year-to-year basis.⁴ Prepaid and non-prepaid debit cards together accounted for over 82 billion financial transactions totaling \$2.88 trillion nationally in the year 2017—more than twice the number of credit-card transactions and dwarfing the number of check transactions.⁵ Meanwhile, check payments are in “an accelerated decline.”⁶ They are down “3.0 percent per year from 2012 to 2015 compared with steeper declines from 2000 to 2012,” going from more than 40 billion transactions annually in 2000 to fewer than 20 billion in 2017.⁷ In brief, consumers are using checks less and less, and cards more and more:⁸

³ Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 FED. REG. 83934, 83940 (Nov. 22, 2016).

⁴ THE FEDERAL RESERVE PAYMENTS STUDY: 2018 ANNUAL SUPPLEMENT 2 (2018), *available at* <https://www.federalreserve.gov/newsevents/pressreleases/files/2018-payment-systems-study-annual-supplement-20181220.pdf>.

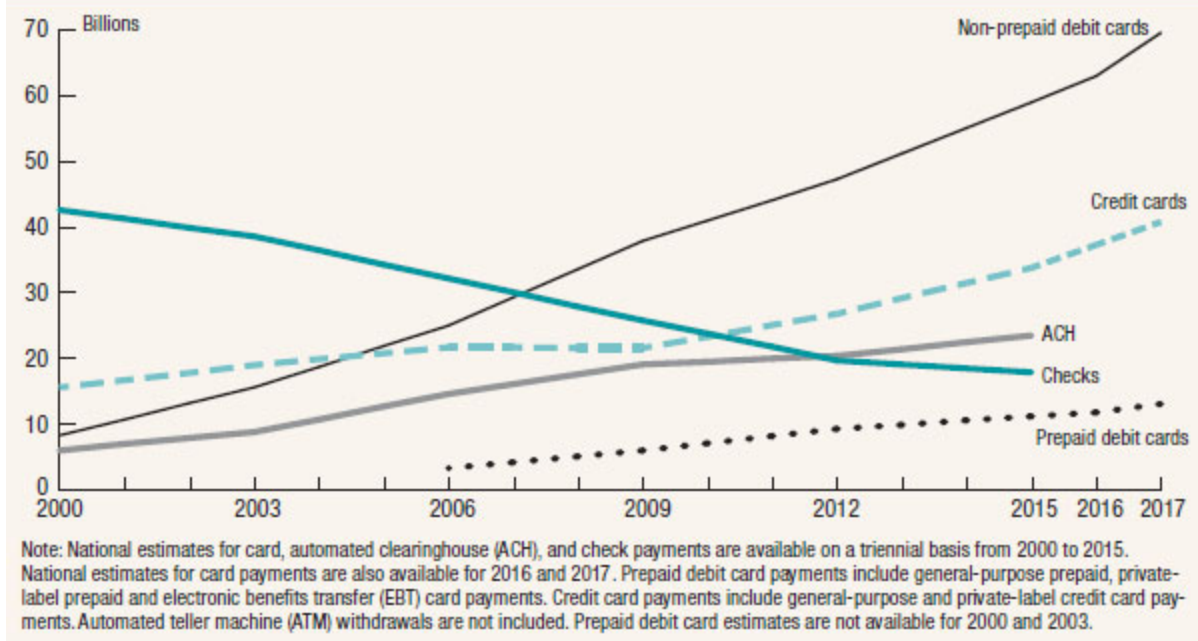
⁵ *Id.* at 1–3.

⁶ *Id.* at 1.

⁷ *Id.* at 1, 3.

⁸ *Id.* at 3.

Figure 1. Trends in noncash payments, by number, 2000–17



In Montana alone, consumers transact as much as \$4 billion a year through debit cards.⁹

Independent market research tells a similar story. “Prepaid debit cards are widespread in the U.S. and they continue to grow in popularity.... A 2014 survey by Mercator Advisory Group found that 56 percent of U.S. adults had bought some kind of prepaid card in the previous year.... The number of payments made with prepaid cards rose 18.5 percent per year between 2006 and 2012—the fastest growth rate of

⁹ *Swipe fee Q and A: How does money flow in this complex transaction?*, HELENA INDEP. RECORD (July 10, 2011), available at https://helenair.com/news/swipe-fee-q-and-a-how-does-money-flow-in/article_f51023d8-aabc-11e0-8b79-001cc4c002e0.html.

all types of payments in that timeframe.”¹⁰ The same analysts found that the cash value “loaded onto prepaid cards in 2012” was “more than double the amount loaded onto the cards in 2009.”¹¹

Among the satisfied adopters is the U.S. Treasury Department itself. In 2008, it announced “a prepaid debit card for Social Security payments and other federal benefits,” touting it as “a safe, convenient alternative to paper checks.”¹² Now, the Social Security check is a thing of the past. “The U.S. Department of Treasury began phasing out paper Social Security checks and other federal benefit checks on May 1, 2011,” and now makes payments exclusively by electronic funds transfer or prepaid debit card.¹³ March 1, 2013 was the deadline by which “[c]heck recipients must

¹⁰ *Prepaid card and gift card statistics* (Dec. 1, 2015), <https://www.nasdaq.com/articles/prepaid-card-and-gift-card-statistics-2015-12-01>.

¹¹ Pew Charitable Trusts, *Why Americans Use Prepaid Cards: A Survey of Cardholders’ Motivations and Views* 13 (Feb. 2014) (hereinafter “Pew”), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pes_assets/2014/prepaidcardssurveyreportpdf.pdf (citing Mercator Advisory Group, *Program Manager Market Share Estimates* (2013)).

¹² Press Release, U.S. Dep’t of Treasury, *U.S. Treasury Introduces Direct Express® Debit Card for Social Security Payments* (June 10, 2018), available at <https://fiscal.treasury.gov/GoDirect/media/release/us-treasury-introduces-direct-express-debit-card/index.html>.

¹³ Tom Murse, *The End of Social Security Paper Checks: What You Should Know About Your Social Security Benefits*, ThoughtCo.com (Mar. 2, 2019) (hereinafter “Murse”), available at <https://www.thoughtco.com/end-of-social-security-paper-checks-3321402>; see also U.S. Dep’t of Treasury, *Direct Express® Debit Card Program Financial Agent Selection Process Questions and Answers Q4* (May 22, 2019), available at <https://www.fiscal.treasury.gov/files/directexpress/>

switch to electronic payments” through direct deposit or the “Direct Express® Debit MasterCard® card.”¹⁴ Today, more than 4.5 million Social Security recipients receive their benefits by prepaid debit card.¹⁵

For the year 2018, the Federal Reserve counted “roughly 3,100” other “federal, state, and local government-administered payment programs that used prepaid cards as a method to disburse funds,”¹⁶ up from just 158 in 2011.¹⁷ In 2018, “government offices disbursed \$137 billion through prepaid cards” across these programs.¹⁸ Over 993 million transactions were conducted in 2018 using these

DirectExpressFASPQandAs.pdf.

¹⁴ Press Release, U.S. Dep’t of Treasury, *Treasury Extends Direct Deposit to Millions of Americans, Phasing Out Paper Checks for Federal Benefits Payments* (Dec. 21, 2010), available at <https://www.prnewswire.com/news-releases/treasury-extends-direct-deposit-to-millions-of-americans-phasing-out-paper-checks-for-federal-benefit-payments-112228949.html>.

¹⁵ *Direct Express® Debit Card Program Financial Agent Selection Process Questions and Answers*, *supra* note 13, at Q9.

¹⁶ Bd. of Governors of the Fed. Reserve Sys., REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS 1 (Sept. 2019), available at <https://www.federalreserve.gov/publications/files/government-prepaid-report-201909.pdf>.

¹⁷ Bd. of Gov. of the Fed. Reserve Sys., REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS 1 (July 2012), available at <https://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201207.pdf>.

¹⁸ REPORT TO THE CONGRESS ON GOVERNMENT-ADMINISTERED, GENERAL-USE PREPAID CARDS (Sept. 2019), *supra* note 16, at 1.

government-issued prepaid debit cards.¹⁹ These programs include Montana’s. For example, Montana “distributes Supplemental Nutrition Assistance Program (SNAP) ... benefits and cash assistance from the Temporary Assistance for Needy Families (TANF) program using an electronic benefit transfer (EBT) system,” a “[c]ard [that] is similar to a debit card” which “[c]ardholders can use [] to authorize the transfer of money from a government account ... to pay for products.”²⁰

There is a reason for these trends: Prepaid debit cards are beneficial to consumers, and highly popular, for reasons of convenience, security, and cost. Before the shift to debit cards, “9 in 10 problems with Social Security payments [were] linked to paper checks.”²¹ Now, “[n]inety-four percent of cardholders say they are satisfied with the [Social Security debit] card.”²² Like a check, they can be cashed at an ATM, but *unlike* a check, they can be used wherever credit cards are accepted, without the cost or inconvenience of having to cash the check through a

¹⁹ *Id.* at 3.

²⁰ Official State Website, Montana.Gov, *Montana SNAP/TANF EBT Card*, <https://dphhs.mt.gov/ebt>.

²¹ Caroline Ratcliffe *et al.*, Urban Institute, *Prepaid Cards at Tax Time and Beyond: Findings from the MyAccountCard Pilot 2* (Mar. 2014) (hereinafter “Urban Institute”), available at <https://www.urban.org/sites/default/files/publication/22476/413082-Prepaid-Cards-at-Tax-Time-and-Beyond-Findings-from-the-MyAccountCard-Pilot.PDF>.

²² *Treasury Extends Direct Deposit to Millions of Americans*, *supra* note 14.

bank or check-cashing service.²³ According to focus-group research by the Pew Charitable Trusts, the convenience of “[m]aking purchases online and other places that don’t accept cash”—an increasingly prevalent form of commerce—is one of the “reasons that customers cite most often for using prepaid cards.”²⁴

For some consumers, having access to their money without having to cash a check is not merely a matter of convenience, but affordability. “Approximately 17 million adults in nearly 10 million households in America lack checking and savings accounts,” according to recent FDIC data, and “[a]nother 51 million ... rely on nonbank financial services such as ... check-cashing services.”²⁵ These services are costly and a frequent target of criticism by consumer-advocacy organizations—including at least one of the *amici* supporting the Appellant—because those fees fall almost entirely on the low-income Americans least able to afford them. *Amicus* the National Consumer Law Center, for example, produced a report on how “[c]heck cashing fees add to the cost of getting tax refunds ... , especially for those consumers who do not have bank accounts.”²⁶ Check-cashing fees typically run in the

²³ *Id.*

²⁴ Pew, *supra* note 11, at 13–14.

²⁵ Urban Institute, *supra* note 21, at 1.

²⁶ See, e.g., National Consumer Law Center & Consumer Federation of America, *The High Cost of Quick Tax Money: Tax Preparation, ‘Instant Refund’ Loans, and Check Cashing Fees Target the Working Poor* 9 (Jan. 2003), available at https://consumerfed.org/pdfs/2003_RAL_report.pdf.

neighborhood of 2 to 3 percent of the value of the check.²⁷ That percentage can be significantly higher for low-dollar checks, which, instead of a percentage, are often subject to a flat fee as much as \$8 (*i.e.*, nearly a third the value of the \$27.75 check at issue here).²⁸ “Avoiding check-cashing fees” was a “[m]ajor reason” for using prepaid debit cards for 38% of card users, according to Pew.²⁹ The CFPB took note of this research in concluding that “many prepaid consumers have a strong understanding of the potential benefits of prepaid accounts and the features that are important to them.”³⁰

Appellant and her *amici* object to the debit-card payment because it supposedly “force[s]” her “to deal with the bank.” Appellant’s Br. 2; *see also Amici* Br. 21 (complaining that consumers “were required to activate a card issued by a bank ... with which they likely had never dealt before”). But in practice, prepaid cards *spare* consumers from dealing with a bank—or a non-bank check-cashing service they likewise may have “never dealt [with] before.” *Id.* The *de minimis*

²⁷ Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004).

²⁸ *See, e.g.*, Janna Herron, *Best Places to Cash a Check, If You Don’t Have a Bank*, ValuePenguin (Oct. 19, 2017), *available at* <https://www.valuepenguin.com/2017/10/best-places-cash-check-if-you-dont-have-bank>; Geoff Williams & Simon Zhen, *How to Cash a Check Without a Bank Account*, U.S. NEWS & WORLD REPORT (Mar. 8, 2019), *available at* <https://money.usnews.com/banking/articles/how-to-cash-a-check-without-a-bank-account>.

²⁹ Pew, *supra* note 11, at 14.

³⁰ 81 Fed. Reg. at 84279 (footnote omitted; citing Pew, *supra* note 11).

burden of having to dial a number to “activate [a] prepaid debit card[] through [an] automated system” (Appellant’s Br. 5) does not outweigh the well-documented burdens on other consumers that would follow from turning the clock backwards on modern payment methods.

Appellant suggests that the shift from paper checks to cards is motivated by simple cost savings, not any benefit to consumers. *Id.* at 9–10. But those cost savings *are* a benefit to consumers. In the public context, the CFPB estimated “that the cost of all prepaid benefits recipients switching to paper checks would total approximately \$60 million per year,” borne by taxpayers.³¹ In the private sector, cost savings keep consumer prices down. Across both sectors, they mitigate environmental waste to the tune of millions of pounds of paper.³²

Appellant’s *amici* take issue with the District Court’s reliance on the Restatement of Contracts for the proposition that “payment or offer of payment in any manner current in the ordinary course of business satisfies the requirement” to pay. RESTATEMENT (SECOND) OF CONTRACTS § 249. But as shown above, payment by debit card *is* one of the predominant methods of payment “current in the ordinary course of business” in the United States.

³¹ 81 Fed. Reg. at 84284 n.789.

³² Murse, *supra* note 13.

III.

Unfounded, Speculative Fears of Misuse Can Be (and Are) Addressed by Laws and Regulations.

Appellant and her *amici* employ the full powers of their respective imaginations trying to concoct scenarios where a debit-card refund could inflict some roundabout harms or inconveniences. None withstand scrutiny.

For example, the *amici* speculate that “[o]ne reason consumers may not want” debit cards “is that SCL provides the bank with the names and contact information of [consumers] owed a refund. The bank could use that information to create a detailed personal profile of the consumer when combined with other publicly and non-publicly available data.” *Amici* Br. 5. Perhaps a bank *could* do so, but there is no evidence any bank ever did—and the same hypothetical possibility applies to banks presented with checks. By the same token, the *amici* fret that “Bank of America’s information about those consumers may not be secure” because of the hypothetical possibility it could be a victim of “cybertheft.” *Id.* at 6. The same possibility applies to banks cashing checks. (Alternatively, anybody interested in stealing information concededly limited to names and addresses need not resort to “cybertheft”: they can simply consult the phone book.)

Grasping at ever-finer straws, the *amici* proceed to argue that the “prepaid debit cards ... pose risks to consumers unlike those of other payment methods”—for example, “they may contain the wrong amount.” *Id.* at 7. Checks can also be

written for the wrong amount. A recipient may try to cash the card at an ATM that “malfunction[s]” and “fail[s] to provide a receipt or the correct amount of cash.” *Id.* The same thing can happen to someone cashing a check at an ATM. “[T]he consumer may not get the card if the bank sends the card to the wrong address or it is stolen from the mail.” *Id.* at 8. But checks are no less vulnerable to being lost in the mail. Before their displacement by electronic alternatives, official estimates were that “four million checks of all kinds disappear each year.”³³

Appellant, for her part, speculates that the card is vulnerable to being “revoked” for no good reason. Appellant’s Br. 14. That purely speculative scenario is no different from the purely speculative possibility that someone might arbitrarily order a stop-payment on a check, and Appellant’s remedy in both cases is the same: to seek redress from the party owing her the funds. *See* Order at 9.

To hear Appellant’s account, one might be forgiven for surmising that debit cards are wholly unregulated, the Wild West frontier of the financial services industry. In reality, debit cards are highly regulated. Depending on the specific product at issue, they can be subject to, among other frameworks, (i) the CFPB’s Regulation E, referenced in the *amici*’s brief (at 8–9), imposing disclosure

³³ Leonard Sloane, *When the Check Is Not in the Mail*, N.Y. TIMES, Feb. 29, 1992, at A52, available at <https://www.nytimes.com/1992/02/29/news/when-the-check-is-not-in-the-mail.html>; see also Murse, *supra* note 13 (“In 2010, more than 540,000 Social Security ... paper checks were reported lost or stolen”).

requirements (*e.g.*, 12 C.F.R. §§ 1005.2, 1005.4, 1005.7, 1005.16, 1005.18), reporting requirements (*id.* § 1005.19), and prerequisites for unsolicited issuances (§ 1005.5); (ii) Electronic Funds Transfer Act regulations limiting transaction fees, prohibiting routing restrictions, and imposing fraud-prevention requirements (12 C.F.R. § 235.1); (iii) rules promulgated by the Treasury Department under the Bank Secrecy Act to police “illicit transactions through the financial system while preserving innovation and the many legitimate uses and societal benefits offered by prepaid access”;³⁴ and (iv) guidance issued by the Office of the Comptroller of the Currency for banks managing fraud risks.³⁵ None of these regulators share Appellant’s or her *amici*’s view that the payment program at issue here is detrimental to consumers.

Appellant’s *amici* try to argue otherwise, but the point does not stand even on its own terms. They say that the CFPB regulation “does not apply to the type of card issued by Bank of America for SCL refunds,” then say the card nevertheless “goes against” its “principles”—in particular, regulations governing “[u]nsolicited credit

³⁴ Press Release, U.S. Dep’t of Treasury, Financial Crimes Enforcement Network (FinCEN), *FinCEN Issues Prepaid Access Final Rule Balancing the Needs of Law Enforcement and Industry* (July 26, 2011), available at <https://www.fincen.gov/sites/default/files/shared/20110726b.pdf>.

³⁵ Office of the Comptroller of the Currency, *Prepaid Access Programs: Risk Management Guidance and Sound Practices*, OCC Bulletin 2011-27 (June 28, 2011), available at <https://www.occ.treas.gov/news-issuances/bulletins/2011/bulletin-2011-27.html>.

cards” and debit cards. *Amici* Br. 8–9. Both cannot be true, of course—if the regulation “does not apply” here, then it is not transgressed here. Insofar as the *amici* are making a more nebulous argument that the card transgresses the regulation’s spirit even if not the letter, that does not hold up, either. Unsolicited *credit* cards are “prohibited” by 12 C.F.R. § 1026.12 for the obvious reason that credit cards are a credit product, with attendant repayment obligations and interest charges which can only arise from a contractual relationship—not so with prepaid debit cards. When the *amici* cite 12 C.F.R. § 1005.5(b) for the proposition that “[t]he issuance of unsolicited debit cards is restricted” (*Amici* Br. 9), a more accurate summary of § 1005.5(b) would be that the issuance of unsolicited debit cards is expressly authorized, subject to basic security requirements such as not being usable until oral or written verification of “the consumer’s identity.” (Thus, the activation procedure Appellant complains about, *see* Appellant’s Br. 11–12, 16, 35 n.5, is actually a regulatory *requirement*.)

In any event, if Appellant or her *amici* prefer a different regulatory regime, nothing precludes them from participating in the established notice-and-comment processes or otherwise petitioning their government for redress of grievances. They should not ask this Court to act as legislator and regulator and impose their ill-considered views on businesses and consumers doing their best to navigate an increasingly paperless modern economy.

Respectfully submitted this 25th day of November, 2019,

By: /s/ Kenneth K. Lay
Kenneth K. Lay
CROWLEY FLECK, P.L.L.P.
900 North Last Chance Gulch
Helena, Montana 59601
(406) 457-2037
klay@crowleyfleck.com

*Counsel for Amici Curiae Montana
Bankers Association, American
Bankers Association, and Consumer
Bankers Association*

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(4)(b) and 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief (i) is printed in a proportionately spaced, 14-point Times New Roman typeface, (ii) is double-spaced, except for footnotes and indented quotations, and (iii) has a word count of 4,945 words, as calculated by Microsoft Word, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

Dated this 25th day of November, 2019.

/s/ Kenneth K. Lay
Kenneth K. Lay

CERTIFICATE OF SERVICE

I, Kenneth K. Lay, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 11-25-2019:

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Cheryl Bratton
Service Method: eService

Robert C. Lukes (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: Sisters of Charity of Leavenworth Health Systems,
Service Method: eService

Michael Manning (Attorney)
175 N. 27th St., Suite 1206
Billings MT 59101
Representing: Cheryl Bratton
Service Method: eService

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601
Representing: National Consumer Law Center, National Association of Consumer Advocates,
Montana Legal Services Association
Service Method: eService

Kathryn Ann Reilly (Attorney)
370 Seventeenth Street, Ste 4500
Denver CO 80202-5647
Representing: Sisters of Charity of Leavenworth Health Systems,
Service Method: Conventional

Joseph Patrick Cook (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Cheryl Bratton

Service Method: Conventional

Mark E. Budnitz (Attorney)
1765 Morris Landers Dr.
Alanta GA 30345
Representing: Mark E. Budnitz
Service Method: Conventional

Electronically signed by Cathy Uda on behalf of Kenneth K. Lay
Dated: 11-25-2019