IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, *Plaintiff*, v. CITIBANK, N.A., *Defendant*.	Civil Action No. 1:24-cv-00659-JPO

MOTION OF THE CLEARING HOUSE ASSOCIATION L.L.C., THE BANK POLICY INSTITUTE, THE AMERICAN BANKERS ASSOCIATION, THE NEW YORK BANKERS ASSOCIATION, AMERICA'S CREDIT UNIONS, AND THE NEW YORK CREDIT UNION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Clearing House Association L.L.C. ("Association"), the Bank Policy Institute ("BPI"), the American Bankers Association ("ABA"), the New York Bankers Association ("NYBA"), America's Credit Unions, and the New York Credit Union Association (collectively, "Amici") respectfully move this Court for leave to file the accompanying brief as Amici Curiae in support of Defendant Citibank, N.A.'s motion for leave to appeal the Court's January 21, 2025 order. Dkts. 54, 55. Amici previously participated at the motion to dismiss stage and seek leave to participate again now, to explain why there is a substantial ground for difference of opinion as to whether the Electronic Fund Transfer Act ("EFTA") applies to consumer wire transfers and why the uncertainty created by the Court's decision on this issue will have a substantial impact on the banking industry, supporting Citibank's motion for leave to appeal. Amici have conferred with counsel for the parties. Defendant Citibank, N.A. consents to this motion. Plaintiff the New York Attorney General takes no position on this motion.

INTERESTS OF AMICI

TCH, established in 1853, is a nonpartisan advocacy organization that represents the interests of its member banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. TCH's sister company, The Clearing House Payments Company L.L.C. ("PaymentsCo"), owns and operates U.S. payments networks that provide safe, sound, and efficient payment clearing and settlement services to financial institutions. PaymentsCo's CHIPS® wire-transfer system and EPN® automated clearing house ("ACH") network clear and settle more than $2 trillion of payments every business day. TCH regularly participates as an amicus in cases important to the payments industry and financial sector.

BPI is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. BPI

produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues. BPI regularly files amicus briefs on issues that are important to the financial industry.

ABA, established in 1875, is the voice of the nation's $24.1 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard nearly $19.2 trillion in deposits, and extend $12.7 trillion in loans.

NYBA, founded in 1894, comprises more than 100 community, regional and money center commercial banks and thrift institutions operating across the State of New York. NYBA's members have over 200,000 employees and aggregate assets in excess of $10 trillion. NYBA's mission is to be New York State's preeminent provider of legislative and regulatory services to a unified banking industry.

America's Credit Unions represents our nation's nearly 5,000 federally and state-chartered credit unions that collectively serve over 142 million consumers with personal and small business financial service products. America's Credit Unions delivers strong advocacy, resources, and services to protect, empower, and advance credit unions and the people they serve. The organization advocates for responsible legislative policies and regulations so credit unions can efficiently meet the needs of their members and communities.

NYCUA has, for more than 100 years, served as the trade association for the state's credit unions, which collectively hold more than $123 billion in assets and serve 6.8 million members. NYCUA strives to advance the credit union movement by advocating, educating, uniting and supporting the interests of all credit unions statewide.

Amici have an interest in this case because their members provide payment services that are governed by the Electronic Fund Transfer Act ("EFTA") and/or Article 4A of the Uniform Commercial Code ("UCC"), depending on the nature of the particular payment transaction. Amici have considerable experience with consumer wire transfers, which are the focus of the New York Attorney General's Complaint in this case. Indeed, Amici's members facilitate billions of dollars in wire transfers every day, including consumer wire transfers. Amici's members are deeply committed to consumer protection, including by meeting their obligations under EFTA, the UCC, and other applicable laws and regulations, as well as to providing consumers with options for efficient, effective methods for making payments. At the same time, Amici's members have provided consumer wire services for decades under the long-held, undisturbed, uniform view that they are subject to Article 4A and Article 4A's customer protection scheme, and not EFTA. As described in the accompanying brief, this Court's decision fundamentally upends the stability of that legal regime. Amici thus have a strong interest in Defendant's motion for interlocutory review.

Accordingly, Amici respectfully request that their motion for leave to file the accompanying brief be granted.

Dated: February 25, 2025

Respectfully submitted,

By: */s/ Noah A. Levine*

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2025, I filed the foregoing memorandum of law using the Court's CM/ECF system, which will send a notice of the filing to counsel for all parties.

/s/ *Noah A. Levine*
Noah A. Levine

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STATEMENT OF INTEREST

The Clearing House Association L.L.C. ("TCH"). Established in 1853, TCH is a nonpartisan advocacy organization that represents the interests of its member banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. TCH's sister company, The Clearing House Payments Company L.L.C. ("PaymentsCo"), owns and operates U.S. payments networks that provide safe, sound, and efficient payment clearing and settlement services to financial institutions. PaymentsCo's CHIPS® wire-transfer system and EPN® automated clearing house ("ACH") network clear and settle more than $2 trillion of payments every business day.

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[1] The defendant, Citibank, N.A., is a member of TCH, PaymentsCo, BPI, ABA, and NYBA. Both parties were timely notified of the filing of this brief. Further, no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amici and their counsel funded its preparation and submission.

provided consumer wire services for decades under the long-held, undisturbed, uniform view that they are subject to Article 4A and Article 4A's customer protection scheme, and not EFTA. As described more extensively below, *infra* Part II, this Court's decision fundamentally upends the stability of that legal regime. Amici thus have a strong interest in Defendant's motion for interlocutory review and file this brief supporting that motion.

INTRODUCTION

For decades, courts, regulators, Amici, and even the New York legislature have understood that all wire transfers, including all consumer wire transfers, even those initiated online, other than a particular subset of cross-border remittance transfers, are exclusively governed by Article 4A of the UCC, not EFTA. Courts, regulators, and Amici have uniformly understood that 15 U.S.C. § 1693a(7)(B) ("Section 7(B)") expressly exempts all consumer wire transfers from EFTA. And those same entities plus the state legislatures have understood wire transfers to comprise a "*series of transactions*, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order," N.Y. U.C.C. § 4-A-104(1) (emphasis added), which are subject to Article 4A. Until the New York Attorney General ("NYAG") filed her Complaint in this case, there had been no misunderstanding of this statutory framework. Indeed, Amici are aware of no court or legislature that endorsed or recognized the novel theory that only one part of the series of transactions involved in a wire transfer—namely, the interbank transfers between banks handling the wire transfer—was what Section 7(B) exempted from EFTA.

The Court's endorsement of that creative statutory theory thus presents a sea change in long-settled understandings about the legal regime that governs wire transfers. The result in just a few weeks has been to spawn significant uncertainty and confusion over what rules govern, particularly because Article 4A explicitly provides that it "does not apply to a funds transfer *any part of which is governed by* [EFTA]." N.Y. U.C.C. § 4-A-108(1) (emphasis added). The Court's

decision thus has created the potential for a vacuum in the longstanding legal framework governing wire transfers, which will force Amici's members to scramble to determine their legal obligations and to expend a tremendous amount of time and resources to reorganize their operations that had been built on a decades-old doctrinal foundation, only to expend more time and resources if the Second Circuit endorses the long-settled understanding years later in an end-of-case appeal.

There is substantial ground for difference of opinion with the Court's order, including with respect to its analysis of the statutory text and its decision to distinguish or disregard well-established case law and the long history of regulatory guidance that conflict with its holding. Particularly in light of the undisputedly unprecedented nature of the Court's decision and the enormous impact it will have across the banking industry, Amici respectfully urge the Court to certify its order for interlocutory review.

ARGUMENT

This Court may certify an order for interlocutory review where the movant shows that the order "involves a controlling question of law," "there is substantial ground for difference of opinion" on that question, and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Defendant's brief in support of its motion addresses all three prongs. *See* Dkt. 55 at 6-22. Amici expand upon the second prong and respectfully submit that there is ample basis on which to find substantial ground for difference of opinion as to the correct interpretation of Section 7(B).

As the Court acknowledged, MTD Order, Dkt. 49 at 10, it is the first to hold that Section 7(B)—a statutory provision long understood to exclude online consumer-initiated wires from the definition of "electronic funds transfer" in EFTA—applies only to behind-the-scenes interbank transfers undertaken to fulfill a consumer's instruction to transfer funds to a beneficiary. A more holistic and contextual reading of Section 7(B)'s text instead supports the long-held interpretation

that is consistent with the traditional understanding of a consumer wire transfer. Specifically, a consumer wire transfer—like all wire transfers—has long been understood to be a single, end-to-end transfer with the objective of conveying value to another person (typically, though not exclusively, to discharge a debt). This is true even though that end-to-end transfer is accomplished through a series of transactions, most of which are invisible to the consumer who requested the wire.

The Court's novel determination to the contrary parses the statutory text of Section 7(B)—which describes what EFTA's defined term "electronic fund transfer" "does not include," 15 U.S.C. § 1693a(7)(B)—at a granular level, dividing the Section's text into three separate phrases and interpreting each individually, thereby obscuring both the ordinary meaning of Section 7(B)'s full text as well as the critical context that comes from a holistic reading of the statute. The Court's interpretation also, by its own acknowledgment and the NYAG's admission, would render Section 7(B) meaningless surplusage: If Congress had intended EFTA to treat the interbank "transfers of funds from one financial institution to another along a wire network," MTD Order, Dkt. 49 at 9, as a separate "transfer," there would be no reason for Congress to include Section 7(B) because, as the "NYAG alleges, the movement of funds within a wire network does not involve consumer funds or a consumer's account, since only banks—using their institutional accounts—have access to those networks," *id.* at 12, and because EFTA applies only to accounts "established primarily for personal, family, or household purposes," 15 U.S.C. § 1693a(2).

Moreover, though the Court described this case as presenting "a question of first impression," MTD Order, Dkt. 49 at 10—and though the NYAG's creative statutory theory may well be an *argument* of first impression—the question of Section 7(B)'s scope is one that has been repeatedly answered to the contrary by federal courts and regulators intimately familiar with these

issues. These additional authorities provide an independent basis to conclude there is substantial ground for difference of opinion over the central statutory question presented here.

Finally, this case has profound consequences for an industry that has organized around what has been understood for decades to be a settled legal regime. The Court's decision has prompted significant uncertainty and will impose steep costs on Amici's members as they consider whether and how to reorganize their online funds transfer offerings in the face of precedent that now conflicts across jurisdictions. These costs will be compounded if, years from now, the Court's construction of Section 7(B) is reversed in an end-of-case appeal. To avoid these severe consequences, Amici urge the Court to exercise its authority under 28 U.S.C. § 1292(b) to certify interlocutory review.

I. There Is Substantial Ground For Difference Of Opinion As To Whether Online Consumer Wire Transfers Are Subject To EFTA

Amici's members have organized their electronic fund transfer services around the decades-long understanding that consumer wire transfers—from end to end—are exempt from EFTA. This settled understanding is supported both by Section 7(B)'s text and by the repeated guidance from regulators that oversee the banking industry. Each provides substantial ground for difference of opinion with the Court's conclusion here.

A. There Is Substantial Ground For Difference Of Opinion As To The Court's Analysis Of The Statutory Text

The central question here is whether Section 7(B) applies to—and thus exempts from EFTA's coverage—the entirety of a consumer wire transfer. That is, does Section 7(B) exempt the transfer of funds from Person A's account to Person B's bank? Or, as the Court held, does Section 7(B) exempt only the interbank segments of that transfer, which affect only the banks' account balances? The Court held that Section 7(B)'s text demands the latter interpretation. But a closer examination of the premises underlying the Court's conclusion reveals strong arguments

to the contrary. Both the text and surrounding context, not to mention additional canons of construction, strongly support interpreting Section 7(B) to cover the end-to-end transfer and not merely transfers from bank to bank.

The Court rejected Defendant's interpretation of EFTA Section 7(B) because, in its view, it would purportedly create ambiguity over when exactly an online wire transfer begins, and thus over what the excluded transfer is. *See* MTD Order, Dkt. 49 at 13. But EFTA itself resolves any such ambiguity. Specifically, in setting forth the definition of "electronic fund transfer," EFTA Section 7 confirms that "any transfer of funds" begins when it is "initiated through an electronic terminal … so as to order, instruct, or authorize a financial institution to debit or credit an account." 15 U.S.C. § 1693a(7). As this language shows, the beginning of an electronic fund transfer is an instruction (or order or authorization) *to a financial institution*. The Court's hypothetical involving roommates, MTD Order, Dkt. 49 at 13, thus presents no difficult question under the statute. When Roommate A hands cash to Roommate B, there is no instruction—electronic or otherwise—*to a financial institution*. An electronic fund transfer accordingly cannot possibly begin with Roommate A; it is only when Roommate B electronically orders, instructs, or authorizes her bank to transfer funds from her account to her landlord's that a transfer begins.

Section 7(B) uses the same phrase as Section 7—"any transfer of funds"—to describe a subset of those same consumer-initiated transfers that EFTA's definition of "electronic fund transfer" "does not include" (and thus are not subject to EFTA's provisions relating to electronic fund transfers). 15 U.S.C. § 1693a(7)(B). As the Court noted in its order, "[t]here is a presumption that a given term is used to mean the same thing throughout a statute." MTD Order, Dkt. 49 at 12 (quoting *Brown v. Gardner*, 513 U.S. 114, 118 (1994)). Given the commonality of language, that principle *supports* reading Section 7(B) to refer to the same types of transfers ("any transfer of

funds") as Section 7 itself and to then carve out those sent "by means of" wire services. In other words, Congress deliberately chose to exclude consumer-originated electronic fund transfers if they were carried out through wire-transfer networks.

The Court also rejected this more natural reading of Section 7(B) by interpreting separate statutory phrases in isolation. *See* MTD Order, Dkt. 49 at 15-18. That method of statutory interpretation contradicts the well-established principle that statutory text must be read in context, including surrounding language. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a '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.'"). For example, Section 7(B) applies to "any transfer of funds" that is "made by a financial institution on behalf of a consumer." 15 U.S.C. § 1693a(7)(B). Focusing on just the first half of this phrase—"made by a financial institution"—the Court reasoned that if "Congress was legislating with 'consumer wires' in mind, it conspicuously omitted any reference to them." MTD Order, Dkt. 49 at 16. But this reasoning is undermined by the plain text. The language "made by a financial institution" does not stand "on its own." *Id.* Rather, it is part of a larger phrase that plainly and unambiguously requires the wire to be a consumer wire: "made by a financial institution *on behalf of a consumer*." § 1693a(7)(B) (emphasis added). It is only by carving up Section 7(B) into several parts and focusing on each independently that the Court's textual analysis can seem to support its conclusions. Read as a whole, however, the phrase "made by a financial institution on behalf of a consumer" quite comfortably applies to the ordinary understanding of a wire transfer. It is the transfer the financial institution makes on behalf of a consumer, Person A, to make payment to Person B.

This ordinary understanding has long been settled. It was not only captured in Sections 7 and 7(B) of EFTA but also in Regulation E—which implements EFTA—and in Article 4A, which postdates EFTA and was developed to comprehensively treat wire transfers. Regulation E, for example, clarifies that Section 7(B)'s exclusion applies to "Wire or other similar transfers," and describes the sorts of transfers frequently conducted via "Fedwire or through a similar wire transfer system that is used primarily for *transfers* between financial institutions *or between businesses*." 12 C.F.R. § 1005.3(c)(3) (emphasis added); *see also* 44 Fed. Reg. 18,468, 18,471 (Mar. 28, 1979). In other words, a wire transfer is *not* merely an interbank transfer, but also a transfer of funds between one private entity to another *by means of* a wire service. And even more importantly, Article 4A conceives of a singular "funds transfer" as a "*series of transactions*, beginning with the originator's payment order, made for the purpose making payment to the beneficiary of the order." N.Y. U.C.C. § 4-A-104(1) (emphasis added). It is thus only the Court's adoption of the NYAG's creative theory that conceives of interbank transfers as something to be narrowly carved out of a wire transfer and regulated differently.

There are additional contextual reasons, beyond the statutory text, that Section 7(B) should be read to cover the entire transfer rather than solely the "interbank" portion. As both the Court and the NYAG acknowledge, the Court's interpretation of Section 7(B) would render the provision "technically redundant," NYAG Br., Dkt. 25 at 21, "potentially unnecessary," and "nothing of substance," MTD Order, Dkt. 49 at 20. Under the Court's reading, Section 7(B) would serve no purpose, as it would operate to exclude from EFTA's coverage a portion of a wire transfer that would never have been subject to EFTA in the first place because there are no provisions in EFTA that deal with purely interbank matters.

The Court reasoned that 7(B) could nevertheless be mere "clarifying language to ensure that purely interbank wires were beyond the reach of EFTA." MTD Order, Dkt. 49 at 19. But there is no credible reason to believe that banks would have needed this clarification, and it is hard to see how the Court's only proffered suggestion could be correct. The Court speculated that "Congress may have been concerned that the actual bank-to-bank wire … would be subjected to EFTA liability" because it "is a 'transfer of funds,' 'initiated through an electronic terminal,' that 'order[s], instruct[s], or authorize[s] a financial institution to … debit or credit an *account*.'" Dkt. 49 at 20 (citing 15 U.S.C. § 1693a(7)) (emphasis added). But it is unclear what liability Congress could have been concerned with. EFTA is a statute governing the relationship between a consumer and her bank with respect to a certain class of fund transfers. That is evident from the definition of "account" in the statute: that is, it must be an account "established primarily for personal, family, or household purposes." 15 U.S.C. § 1693a(2). But it is also evident in myriad other provisions, including those relating to unauthorized transfers, *id.* § 1693g, documentation of transfers, *id.* § 1693d, and error resolution, *id.* § 1693f. EFTA does not address any matters between banks.

Indeed, the problem is even deeper than the Order acknowledges. EFTA—as all parties agree—is a statute focused on consumer transfers that provides consumers procedural mechanisms to seek relief when things go awry with electronic fund transfers. But consumers have no interest in—and would never be expected to present disputes to their financial institutions about—the purely behind-the-scenes process banks use to help transfer value on behalf of their customers. What matters to the consumer, and thus what consumers would be expected to dispute and request investigations of, is the wire transfer as ordinarily understood: whether the correct amount of money made it to the intended payee or whether the transfer of money out of the consumer's

account had been authorized. The supposition that Congress could have believed it needed to protect financial institutions from consumer disputes about solely interbank transfers is simply not a credible one.

Moreover, even that supposition could not explain why Congress would then, in Section 7(B), expressly preserve a consumer's right to challenge the purely interbank portion of an ACH transfer. Specifically, EFTA provides that an "electronic fund transfer" "does not include … any transfer of funds, *other than those processed by automated clearinghouse*" made by a financial institution on a consumer's behalf using a service specified by Section 7(B). 15 U.S.C. § 1693a(7)(B) (emphasis added). That proviso in Section 7(B) for ACH transfers only makes sense when Section 7(B)'s use of the phrase "any transfer of funds" is read to refer to the wire transfer or ACH transfer in its entirety. Rather than interpreting the statute in a way that suggests Congress was interested in preserving a consumer's right to challenge a portion of an ACH transfer that would not affect her in any way (*i.e.* the interbank transfer), the statute is best read to remove from doubt whether the ACH might be considered a wire-transfer system (*i.e.*, a service "not designed primarily to transfer funds on behalf of a consumer"). This more natural construction ensured EFTA's coverage for end-to-end consumer ACH transfers at a time when the ACH network was still in its infancy. At the very least, there is substantial ground to construe Section 7(B) as carving out from EFTA those transfers "made … by means of a service" used less frequently by consumers (i.e., wire-transfer systems), while ensuring EFTA's application to consumer ACH transfers, which have now come to represent a substantial majority of ACH transaction volume. *See* Nacha, *Overall ACH Network Volume*, https://www.nacha.org/content/ach-network-volume-and-value-statistics (last visited February 25, 2025).

For all the foregoing reasons, Amici respectfully submit that there is substantial ground for a difference of opinion regarding the Court's textual analysis of Section 7(B), which supports certification of an interlocutory appeal.

B. Decades Of Case Law And Regulatory Guidance Contrary To The Court's Decision Confirm There Is Substantial Ground For Difference Of Opinion

A substantial ground for difference of opinion is further apparent from the decades of case law and consistent interpretation of Section 7(B) by important regulatory agencies in the financial industry that conflict with the Court's decision here. Though the Court offered bases for distinguishing, disregarding, or diminishing the importance of these authorities, at the very least they demonstrate that reasonable minds could disagree (and have) with the Court's interpretation. These authorities provide an additional basis for certifying an interlocutory appeal.

1. The Court's interpretation of Section 7(B) is inconsistent with extensive case law.

As both Defendant and Amici argued in support of Defendant's motion to dismiss, numerous judicial decisions provide reason to question the Court's construction of Section 7(B). The Court distinguished these cases because "none considered the precise statutory interpretation question at issue." MTD Order Dkt. 49 at 29. The sheer novelty of NYAG's unprecedented theory of how to understand a wire transfer may render that conclusion technically true, but it is exceedingly difficult to reconcile the Court's interpretation here with the reasoning of those cases. At the very least, this tension, and the NYAG's failure to identify any case law endorsing its theory, constitutes substantial grounds for difference of opinion.

Take, for example, *Stepakoff v. IberiaBank Corp.*, 637 F. Supp. 3d 1309 (S.D. Fla. 2022), in which a plaintiff filed an EFTA claim challenging her bank's failure to execute a wire transfer she directed (both by phone and via email). The Court distinguished this case because (1) it did not consider the specific, novel argument pressed by the NYAG here and (2) it relied on other

cases the Court found unpersuasive. But in *Stepakoff*, the *only* transaction at issue was the electronic payment order the plaintiff gave her bank (not the interbank transfer) because her bank never executed the initial order. And, as this Court acknowledged, *Stepakoff* "concluded that subsection (7)(B) ultimately did bar the claim." MTD Order, Dkt. 49 at 32; *see also Stepakoff*, 637 F. Supp. 3d at 1313. In other words, *Stepakoff* necessarily concluded that the initial payment order—the only "transfer" even conceivably at issue in that case—was sufficient to find Plaintiff's claim was "specifically exclude[d] … from EFTA coverage" because it was a "'[w]ire or other similar transfer[].'" *Id.* at 1312. Under this Court's interpretation, however, the holding in *Stepakoff* could not stand because EFTA would apply *at least* to the customer's request for a wire transfer and the bank's refusal to debit her account, prior to any interbank transfer necessitated by the request. This tension provides substantial grounds for difference of opinion and highlights the difficult position Amici's members now find themselves, with conflicting interpretations of EFTA's exceptions across jurisdictions.

Nor is it possible to so easily dispense with *Nazimuddin v. Wells Fargo Bank N.A.*, 2024 WL 3431347 (S.D. Tex. June 24, 2024), *report and recommendation adopted*, 2024 WL 3559597 (S.D. Tex. July 25, 2024), *aff'd* 2025 WL 33471 (5th Cir. Jan. 6, 2025). Though it is true that the Fifth Circuit declined to consider the arguments raised by the NYAG, the district court below affirmed the magistrate judge's report and recommendation and overruled the plaintiff's objection, which specifically invoked the argument pressed by the NYAG in this Court and even attached the CFPB's statement of interest filed here. *See id.*, Case No. 4:23-cv-04717, Dkts. 33-35 (S.D. Tex.). Thus, while the Fifth Circuit might not have weighed in on this question, it affirmed the decision of the Southern District of Texas, which plainly rejected NYAG's preferred interpretation.

Further substantial ground for difference of opinion is found in *Pope v. Wells Fargo Bank, N.A.*, 2023 WL 9604555, at *2 (D. Utah Dec. 27, 2023). The Court distinguished this case because it purportedly misstated the holding in *Wright v. Citizen's Bank of East Tennessee*, 640 F. App'x 401, 404 (6th Cir. 2016). *See* MTD Order, Dkt. 49 at 31. But this basis for distinction obscures the fact that the *Pope* plaintiff made the very argument NYAG has pressed here: that "there were two transfers[, o]ne initiated by her … and another by Wells Fargo to JP Morgan Chase." *Pope*, 2023 WL 9604555, at *3. In response—and before ever mentioning *Wright*—the *Pope* court held that "[t]he language of EFTA and the regulations support Wells Fargo's position" and that "[t]he fact that there were 'two transfers' … do not allow the wire transfer here to fall with[in] EFTA." *Id.* at *3-4. Though this language could be more precise, it would be a stretch to construe it as anything but a rejection of the very theory pressed by the NYAG and adopted by the Court.

The Court offers various bases on which to distinguish other cases identified by both Defendant and Amici. But there is at least substantial ground for difference of opinion as to whether the Court's conclusion can be reconciled with this wall of precedent treating as uncontroversial the idea that a wire transfer, for purposes of Section 7(B), is the entirety of the transfer, end to end, and not simply the first step. *See Wright*, 640 F. App'x at 404 (affirming dismissal of EFTA claim because Article 4A, not EFTA, applied to claim premised on a consumer funds transfer "through Fedwire"); *Fischer & Mandell LLP v. Citibank, N.A.*, 2009 WL 1767621, at *3-4 (S.D.N.Y. June 22, 2009) ("Regulation E explicitly excludes from the coverage of the EFTA transfers of funds made through checks and wire transfers,"); *McClellon v. Bank of America*, 2018 WL 4852628 (W.D. Wash. Oct. 5, 2018) (rejecting application of EFTA to unauthorized wire transfer); *Trivedi v. Wells Fargo Bank, N.A.*, 609 F. Supp. 3d 628, 633 (N.D. Ill. 2022) (Article 4A, not EFTA, governed wire transfers); *Bodley v. Clark*, 2012 WL 3042175, at *4 (S.D.N.Y. July

23, 2012) ("wire transfers are explicitly excluded from EFTA's definition of 'electronic fund transfers'"); *Bakhitiari v. Comerica Bank, Inc.*, 2024 WL 3405340 (N.D. Cal. July 12, 2024) (similar).

2. The Court's interpretation of Section 7(B) is inconsistent with financial industry regulatory guidance.

The Court disregarded what it referred to as a "slew of regulatory guidance" because of the purported failure of the guidance to "demonstrate[] a contemporaneous understanding of subsection 7(B)" and because it was "extrinsic evidence of legislative intent." MTD Order, Dkt. 49 at 25. Amici disagree with the weight afforded to this regulatory guidance by the Court. But, at a minimum, the existence of uniform guidance that conflicts with the Court's reasoning, issued by regulators familiar with the industry generally and wire transfers specifically, provides substantial ground for difference of opinion.

To start, and notwithstanding its position adopted for the purposes of this litigation, when the CFPB implemented certain amendments to Dodd-Frank regarding regulation of unique, cross-border remittance transfers more than a decade ago, the Bureau stated that "until the Dodd-Frank Act [remittance] provisions become effective, wire transfers are *entirely exempt from the EFTA and Regulation E* and instead are governed by State law through State enactment of Article 4A of the U[CC]," which provides "[c]onsumers" with protections "in connection with an unauthorized [wire] transfer," including "improperly executed payment orders." 77 Fed. Reg. 6,194, 6,211-6,212 (Feb. 7, 2012). And the CFPB agreed that, prior to those amendments, UCC § 4A-108 (which provides that Article 4A does not apply to a transfer "any part of which" is governed by EFTA, *supra* p.3) would operate such that Article 4A "will no longer apply" to the remittance transfers addressed under EFTA pursuant to Dodd-Frank. *Id.* at 6,211.

The Federal Reserve has similarly observed that "Article 4A provides comprehensive rules governing rights and responsibilities arising from wire transfers," 61 Fed. Reg. 19,678, 19,679-19,680 (May 2, 1996), and "[i]n general, Fedwire funds transfers *to or from consumer accounts* are exempt from the EFTA and Regulation E," 12 C.F.R. pt. 210, subpt. B, app. A, cmts. 4-5 to § 210.25(b)(1) (emphasis added); *see also* Fed. Rsrv. Bd., *Consumer Compliance Handbook*, 85 (2016), https://www.federalreserve.gov/boarddocs/supmanual/cch/cch.pdf ("any transfer of funds for a consumer within a system that is used primarily to transfer funds between financial institutions or businesses, e.g., Fedwire or other similar network" is not "covered by the EFTA and Regulation E"). And Regulation J, promulgated by the Federal Reserve Board, incorporates Article 4A, 12 C.F.R. § 210.25(b)(1), which in turn provides that a "funds transfer" is "the *series of transactions*, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order," 12 C.F.R. pt. 210, app. A, § 4A-104(a).

The Federal Deposit Insurance Corporation ("FDIC") agrees too. Its compliance examination manual instructs examiners that "[a]ny transfer of funds for a consumer within a system that is used primarily to transfer funds between financial institutions or businesses, *e.g.*, Fedwire or other similar network" is excluded from EFTA. FDIC, *Consumer Compliance Examination Manual* 809 (2022), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/compliance-examination-manual.pdf. That instruction reiterates FDIC interpretive guidance—issued more than 30 years ago—that consumer-initiated wires are excluded from EFTA and Regulation E. FDIC, *Interpretive Letter: Users' Rights Under EFTA in the Event of Bank Error Regarding an Electronic Wire Transfer*, 1994 WL 393720, at *1 (Apr. 26, 1994).

Also joining this chorus of regulators reaching conclusions contrary to the Court's is the Office of the Comptroller of the Currency ("OCC"). The OCC has stated—recently—that "[w]ire transactions are covered under [Article] 4A of the Uniform Commercial Code." OCC, *Message from the Director–Wire Transfer Scams and Ways to Protect Yourself* (July 2023), https://www.helpwithmybank.gov/about/message-from-director/index-message-from-director.html. And the OCC agrees with Defendant and Amici that "a wire transfer transaction begins when the originator (bank customer) requests the transfer. The originating bank verifies the request then initiates the transaction with the operator (e.g., Federal Reserve Bank or TCH) … . The beneficiary bank then credits the beneficiary account in accordance with the payment instructions." OCC, *Comptroller's Handbook on Payment Systems* 10-11 & Fig. 3 (Oct. 2021), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/payment-sys-funds-transfer-activities/pub-ch-payment-systems.pdf.

Finally, the Financial Crimes Enforcement Network ("FinCEN") agrees that wire transfers are not covered by EFTA. 78 Fed. Reg. 72,813, 72,814 (Dec. 4, 2013). And FinCEN, like Defendants, Amici, other regulators, and the New York Legislature in adopting Article 4A, agrees that a funds transfer is "a series of payment instruction messages, beginning with the originator's (sending customer's) instructions, and including a series of further instructions between the participating institutions, with the purpose of making payment to the beneficiary (receiving customer)." FinCEN, *Feasibility of a Cross-Border Electronic Funds Transfer Reporting System Under the Bank Secrecy Act* 55 (Oct. 2006), https://www.fincen.gov/sites/default/files/shared/CBFTFS_Complete.pdf.

* * *

In short, numerous authorities that have considered this issue—even if they have not specifically considered and rejected the novel argument advanced by the NYAG here—have reached conclusions that are exceedingly difficult, if not impossible, to reconcile with the Court's decision. Put differently, it is indisputable that the question of the scope of EFTA, including Section 7(B), has been frequently addressed and authoritatively answered to the contrary. That more than suffices to demonstrate a substantial ground for difference of opinion justifying interlocutory review.

II. Interlocutory Review Is Particularly Appropriate In Light Of The Dramatic Consequences Of The Court's Admittedly Novel Decision

Given the extensive case law and regulatory guidance above, Amici's members have understood for decades that wire transfers are not electronic fund transfers under EFTA and Regulation E (except for certain cross-border remittance transfers not at issue here) and instead are governed by Article 4A. They have accordingly planned their operations, organized their business, priced their services, and created policies, procedures, and contractual agreements all based on the foundation of what was—until the Court's order—a settled legal regime. As a result, if not reviewed on an interlocutory basis, the Court's decision threatens to inject significant uncertainty, impose substantial costs to fundamentally transform operations (and potentially transform them again following an end-of-case appeal), or lead financial institutions to eliminate or severely restrict the ability of consumers to avail themselves of online wire transfers.

To start, the Court's order injects significant uncertainty into the regime applicable to consumer-initiated wires. As noted above, Article 4A has long been understood to provide a "comprehensive body of law that defines the rights and obligations that arise from wire transfers." *See* Uniform Laws Annotated, U.C.C. Article 4A, Prefatory Note (1989). EFTA and Article 4A are two different, and "mutually exclusive," legal regimes. N.Y. U.C.C. § 4-A-108 Official

Comment. Article 4A is unambiguous on this front—it "does not apply to a funds transfer *any part of which* is governed by [EFTA]." *Id.* § 4-A-108(1) (emphasis added). The Court's determination that a consumer's payment order is subject to EFTA would thus mean that Article 4A ceases to govern online consumer wire transfers even with respect to issues that are wholly unaddressed by EFTA.

Article 4A addresses a host of issues that EFTA does not. It provides rules, for example, if an intermediary bank makes an error while handling the funds transfer, such as modifying the payment amount or changing the account number for the beneficiary. Article 4A also provides the right of the beneficiary to be paid by her bank once the wire transfer is completed. With the Court's decision, the beneficiary is left without a clear statutory right to be paid—a consequence that is decidedly unfriendly for consumer beneficiaries. These issues and many others are addressed by Article 4A but would not be if, as the Court has ruled, the first transaction in the series of transactions that make up an online consumer wire transfer is covered by EFTA.

That uncertainty will be enormously costly. Every business day, the Fedwire Funds Service and CHIPS network process trillions of dollars of wire transfers.[2] To be sure, that includes more than simply online consumer wire transfers, but the sheer volume of transactions demands a clear answer on what rules apply when things go wrong. In the vacuum created by the Court's order, financial institutions will inevitably attempt to recreate Article 4A-style rules via contract. That process will come with significant costs as funds-transfer systems and financial institutions attempt to replace by private contract a statutory regime that has formed the foundation of an

[2] Fed. Rsrv. Bd., *Fedwire Funds Service—Annual Statistics* (Jan. 26, 2024), https://www.frbservices.org/resources/financial-services/wires/volume-value-stats/annual-stats.html; The Clearing House, *CHIPS Annual Statistics From 1970 to 2024* (Mar. 2024), https://media.theclearinghouse.org/-/media/New/TCH/Documents/Payment-Systems/CHIPS_volume_value_YTD_March_2024_v3.pdf?rev=d2dc9ab0676a452cbdc6aa2dd027e9f0.

industry for decades. A regime established by contract—even if achievable—may prove less predictable, particularly as compared to the Article 4A regime on which financial institutions have relied until this Court's decision. Indeed, that was the very purpose of UCC Article 4A and its adoption across the country. *See* Uniform Laws Annotated, U.C.C. Article 4A, Prefatory Note (1989) (Article 4A intended to provide "comprehensive body of law that defines the rights and obligations that arise from wire transfers"); *Levin v. JPMorgan Chase Bank, N.A.*, 751 F. App'x 143, 147 (2d Cir. 2018).

Amici are also extremely concerned that many of the costs described above could recur if, in an end-of-case appeal years later, the Second Circuit agrees with and restores the long-understood meaning of Section 7(B). In that event, it may come to pass that members will undertake substantial, costly changes to their operations only for those changes to be held to be unnecessary by some future court that is more persuaded by the textual arguments, case law, and regulatory guidance described above.

Ultimately, because of costs and risks like these, the decision may lead many financial institutions to severely restrict, or eliminate entirely, the option for their consumer customers to initiate wire transfers through convenient electronic means, whether by telephone, computer, or mobile device. That would be a significant inconvenience for consumers, as many desire the ease of such payment options and regularly use them. Prompt appellate review would serve an important purpose of ensuring that disruption is not needlessly encountered by Amici's members or the consumers they serve.

CONCLUSION

For the foregoing reasons, the Court should certify its order for interlocutory review.

Dated: February 25, 2025

Respectfully submitted,

By: */s/ Noah A. Levine*

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2025, I filed the foregoing memorandum of law using the Court's CM/ECF system, which will send a notice of the filing to counsel for all parties.

/s/ *Noah A. Levine*
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