No. 26-62

IN THE

Supreme Court of the United States

CUSTODIA BANK, INC.,

Petitioner,

v.

FEDERAL RESERVE BOARD OF GOVERNORS AND
FEDERAL RESERVE BANK OF KANSAS CITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF SENATOR CYNTHIA M. LUMMIS AND FORMER SENATOR PATRICK J. TOOMEY AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The decision below converts a congressional disclosure mandate into a source of agency power, and that reasoning imperils oversight legislation far beyond this case	6
A. Section 248c is a reporting provision containing no operative language about account access	6
B. Two courts of appeals have inferred substantive authority from Congress's demand for disclosure	8
C. That inference penalizes Congress for legislating transparency, and it is not confined to this statute	10
II. Amici's oversight experience shows that neither the Board nor Congress will resolve the question presented	13
A. The database Section 248c compelled documents a settled two-track system	13
B. Oversight has moved the Fed's policies while leaving its claim of legal authority untouched	15

TABLE OF CONTENTS—Continued

	Page
C. Congress cannot supply the answer that only this Court can give	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page(s)

Banco San Juan Internacional, Inc. v. Federal Reserve Bank of New York, 176 F.4th 163 (2d Cir. 2026) 2, 6, 9, 13

Bostock v. Clayton County, 590 U.S. 644 (2020) 6

Cox Communications, Inc. v. Sony Music Entertainment, 146 S. Ct. 959 (2026) 10

Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, 157 F.4th 1235 (10th Cir. 2025) 2, 8, 9

Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, 728 F. Supp. 3d 1227 (D. Wyo. 2024) 10

Custodia Bank, Inc. v. Federal Reserve Board of Governors, No. 22-CV-125-SWS, 2023 U.S. Dist. LEXIS 237452 (D. Wyo. June 8, 2023) 8

Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City, 861 F.3d 1052 (10th Cir. 2017) 9, 10

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 9, 10

LEGISLATIVE MATERIALS

Hearing on Investigating the Real Impacts of Debanking in America Before the S. Comm. on Banking, Housing, & Urban Affairs, 119th Cong. (Feb. 5, 2025) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Hearing on the Semiannual Monetary Policy Report to the Congress Before the S. Comm. on Banking, Housing, & Urban Affairs, 119th Cong. (Feb. 11, 2025) 16

STATUTES

5 U.S.C. § 3349(b) 11

5 U.S.C. § 404(a)(3) 12

5 U.S.C. § 405(b)(1) 12

12 U.S.C. § 248a(c)(2) 9, 12, 19

12 U.S.C. § 248c 2-4, 6-10, 13, 16

12 U.S.C. § 248c(b)(1) 6

12 U.S.C. § 248c(b)(1)(B)(ii) 2, 3

12 U.S.C. § 248c(b)(1)(C) 3

12 U.S.C. § 461(b)(1)(A) 12, 19

31 U.S.C. § 1351 11

Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419 (2022) 1, 2, 8, 13

REGULATIONS

87 Fed. Reg. 51,099 (Aug. 19, 2022) 14

88 Fed. Reg. 7,848 (Feb. 7, 2023) 16

90 Fed. Reg. 59,731 (Dec. 22, 2025) 16, 17

91 Fed. Reg. 9,499 (proposed Feb. 26, 2026) 16

91 Fed. Reg. 30,627 (May 26, 2026)... 5, 14, 16, 18

TABLE OF AUTHORITIES—Continued

COURT FILINGS — Page

Brief of *amicus curiae* former Senator Patrick J. Toomey in support of neither party, *Custodia Bank, Inc. v. Federal Reserve Board of Governors*, No.22-CV-125-SWS (D. Wyo. April 20, 2023), https://www.courtlistener.com/docket/63366375/151/custodia-bank-inc-v-federal-reserve-board-of-governors/ 8

OTHER AUTHORITIES

Board of Governors of the Federal Reserve System, *Master Account and Services Database*, https://www.federalreserve.gov/paymentsystems/master-account-and-services-database-about.htm (last visited Aug. 12, 2026) 13

Letter from Sen. Patrick J. Toomey to Fed. Rsrv. Bank of Kansas City (Feb. 1, 2022) 7, 16

Letter from Sen. Patrick J. Toomey to The Reserve Trust Co. (Feb. 11, 2022) 7, 16

Letter from Sens. Patrick J. Toomey, Cynthia M. Lummis, et al. to Chair Jerome H. Powell (Aug. 9, 2022) 7, 16

Press Release, Toomey Statement on Sarah Bloom Raskin Withdrawing Her Nomination (Mar. 15, 2022) 16

S.A. 6019, 168 Cong. Rec. S5495 (daily ed. Sept. 28, 2022).. 7, 16

INTEREST OF AMICI CURIAE[1]

Senator Toomey was the author of the federal statute (the "Toomey Amendment") requiring the Federal Reserve Board of Governors ("Federal Reserve Board" or "Board") to disclose, in 2022, what it does with master-account applications. Senator Lummis pressed the oversight inquiry that prompted it and has pursued the subject in the Senate since. Two courts of appeals have now treated the Toomey Amendment as evidence that Congress authorized the very conduct it was enacted to expose, which is false.

Senator Cynthia M. Lummis of Wyoming serves on the Senate Committee on Banking, Housing, and Urban Affairs and chairs its Subcommittee on Digital Assets, which holds oversight jurisdiction over the Federal Reserve System's digital-asset and payment-system activities. Since entering the Senate in 2020, she has made Federal Reserve transparency and accountability a principal focus of her committee work, with particular attention to master-account access and the Federal Reserve payment system.

Former Senator Patrick J. Toomey of Pennsylvania served eighteen years in Congress, including as Ranking Member of the Senate Banking, Housing, and Urban Affairs Committee from 2021 to 2023. He was the principal author and drafter of the Toomey Amendment, Section 5708 of the James M. Inhofe National Defense Authorization Act for Fiscal Year

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of amici's intention to file this brief under Rule 37.2.

2023, Pub. L. No. 117-263, § 5708, 136 Stat. 2395, 3419 (2022), codified at 12 U.S.C. § 248c.

Senator Lummis and former Senator Toomey both appeared individually as amici in the district court and in the court of appeals, and amici appeared jointly in support of rehearing en banc. Judge Tymkovich drew on their submissions in both of his dissents. Pet. App. 64a, 109a n.1. Their interest here is institutional rather than partisan, and it is twofold.

First, amici authored the provision in question and have been responsible for carrying out oversight of the Federal Reserve's master-account practices. Section 248c requires the Board to publish a database listing every master-account request and whether it was "approved, rejected, pending, or withdrawn." 12 U.S.C. § 248c(b)(1)(B)(ii). It confers no statutory authority and prescribes no criteria for master-account approval or rejection.

Yet the panel majority held that "[t]he Toomey Amendment confirms" the Reserve Banks' discretion, because in "requiring the Board to report on master account application rejections while simultaneously addressing only those entities that are eligible for master accounts, the Toomey Amendment clearly contemplates that Reserve Banks may reject applications for master accounts from eligible entities." *Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors*, 157 F.4th 1235, 1242 (10th Cir. 2025). The Second Circuit has since reasoned the same way. *Banco San Juan Internacional, Inc. v. Federal Reserve Bank of New York*, 176 F.4th 163, 179–180 (2d Cir. 2026). The result is a rule under which Congress, simply by requiring an agency to report its conduct, is taken to have authorized it.

Second, amici have spent four years conducting oversight of master-account access. They can report what that effort has produced, what the disclosure regime Section 248c compelled now shows, and why neither administrative nor congressional action can cure the error below.

SUMMARY OF ARGUMENT

Section 248c directs the Board to "create and maintain a public, online, and searchable database" listing every entity that requests a master account, "whether, and the dates on which, a request . . . was approved, rejected, pending, or withdrawn," and whether each requester is "an insured depository institution," "an insured credit union," or "a depository institution that is not an insured depository institution or an insured credit union." 12 U.S.C. § 248c(b)(1)(B)(ii), (C). From that reporting obligation the courts below inferred that Congress authorized the Reserve Banks to reject applications from eligible institutions. The provision contains no operative language about who may obtain an account, on what terms, or subject to whose judgment. A provision that tells an agency to report cannot supply the authority being reported on.

That inference matters beyond this case. Congress writes reporting mandates constantly, and it writes them precisely when it distrusts what an agency is doing. A reporting mandate must name the conduct to be reported, so it cannot be drafted neutrally: a statute requiring disclosure of whether requests were "rejected" cannot omit the word. If naming the conduct ratifies it, Congress must choose between legislating transparency and preserving its interpretive position. The reasoning is a canon of general application, and two circuits have now applied it.

The petition explains why further decisions from the courts of appeals would add little. Pet. 31–33. Amici supply the other half of the showing, from a vantage the parties do not share: correction by the Board or by Congress will not come either.

The database Section 248c compelled documents a settled two-track system. Among applicants that are federally insured—Tier 1 under the Board's own guidelines—the Fed approved 92 of 111 requests, ninety-four percent of the 98 it has resolved, at a median of fifty-four days. It rejected one. Among applicants that are not federally insured, it approved three of fifty-six, nine percent of those resolved, at a median of 648 days. Eighty-two percent of non-insured requests are either still pending or were withdrawn. Of 358 access relationships held today by institutions that are not federally insured, 333 were established before 2015 and only three since the database began reporting. *See* note 4, *infra*. These are not close cases resolved differently by different Reserve Banks; they reflect a single, settled position. And because the characteristic outcome for an eligible uninsured applicant is not an appealable denial but a withdrawal or years of pendency, the practice affects many institutions while rarely producing a decision a court can review.

Oversight has produced real change, but none of it has reached the Fed's legal position. A Federal Reserve Board nominee withdrew after master-account irregularities surfaced in the Senate Banking Committee. After Senator Lummis pressed the point at a Committee hearing, the Board's Chair testified in February 2025 that the Board was removing reputational considerations from the internal manual the Reserve Banks use to evaluate master-account requests, and the Board removed reputation risk from its bank examinations later that year. In December 2025 it rescinded in its entirety the 2023 policy statement that had declared crypto-asset activity presumptively inconsistent with safe and sound banking—the supervisory position it announced on the same day it and the Kansas City Fed denied petitioner's applications. Every one of those changes was a policy concession, revocable at will, and not one touched the Fed's claim of legal authority.

The Board has since made that claim again, and has responded to the disparity the database documents by suspending decisions rather than resolving the question. In May 2026 the Federal Reserve Board proposed a new type of payment account—with fewer services than a full master account—while continuing to assert discretion under the Federal Reserve Act to deny an applicant an account. The Board encouraged the Reserve Banks to pause decisions on access requests from Tier 3 institutions—petitioner's category—pending an open-ended policy process; proposed review timelines of forty-five days for insured institutions and ninety days for uninsured institutions seeking the new account, while proposing no timeline at all for uninsured institutions seeking a master account; and reaffirmed that Reserve Banks "maintain discretion whether to provide these accounts and services." 91 Fed. Reg. 30,627, 30,635, 30,642, 30,645 (May 26, 2026).

Oversight can compel disclosure and can move an agency's policy. It cannot tell a court what a statute means. Only this Court can.

ARGUMENT

I. The decision below converts a congressional disclosure mandate into a source of agency power, and that reasoning imperils oversight legislation far beyond this case

A. Section 248c is a reporting provision containing no operative language about account access

Section 248c directs the Board to "create and maintain a public, online, and searchable database" identifying every entity that holds access and every entity that has requested it, with the status and dates of each request. 12 U.S.C. § 248c(b)(1). Its operative verbs run to publication and do not bear on the decision-making process for an application.[2] It does not confer authority, define eligibility, establish criteria, allocate decisional power between the Board and the Reserve Banks, or specify any ground on which a request may be granted or denied. Its subject is what the Federal Reserve must disclose, not what the Federal Reserve must or may do.

The provision's occasion is consistent with its text and is a matter of public record. In early 2022, the Senate Banking Committee could not determine which institutions held master accounts, which had applied, or what had become of their applications. Its immediate concern was a single application: that of a Colorado trust company whose request respondent

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[2]Both courts below declined to give weight to post-enactment statements by the provision's sponsor. *Banco San Juan*, 176 F.4th at 180 n.18 (citing *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020)); *see* Pet. App. 40a n.23. Amici's argument rests on the text and structure of Section 248c and does not depend on that question.

(the Kansas City Fed) had initially rejected as statutorily ineligible, then granted, then revoked after a public controversy. The Committee sought information about that sequence from the Board and from the Kansas City Fed; both declined to provide it. Amici and nine colleagues ultimately advised the Board that its refusal had "impeded the Senate's ability to perform two of its core functions," and that they were left with "no choice but to pursue legislation that will compel these public institutions to be more transparent and accountable to Congress."[3] The amendment was offered on the Senate floor seven weeks later and enacted that December. It compelled publication of the information the Fed had withheld.

That history bears on the inference drawn below. The episode that produced Section 248c was a rejection for ineligibility—the one ground on which, as all agree, a Reserve Bank may lawfully refuse a request. A statute enacted to compel disclosure of such rejections says nothing about whether a Reserve Bank may reject an applicant who is otherwise legally eligible.

At the Tenth Circuit, Judge Tymkovich read the provision the same way, and expressly "based solely on the statutory text." Pet. App. 109a n.1. So did the district court at the pleading stage, which observed that the Reserve Banks' practice of rejecting ineligible applicants was already public before Section 248c was enacted, and concluded that "§ 248c cannot be read as

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[3] Letter from Sens. Patrick J. Toomey, Cynthia M. Lummis, et al. to Chair Jerome H. Powell 1–2 (Aug. 9, 2022). The underlying requests are set out in Letter from Sen. Patrick J. Toomey to Fed. Rsrv. Bank of Kansas City (Feb. 1, 2022), and Letter from Sen. Patrick J. Toomey to The Reserve Trust Co. (Feb. 11, 2022). The amendment was offered as S.A. 6019, 168 Cong. Rec. S5495 (daily ed. Sept. 28, 2022).

Congress' imprimatur on Federal Reserve Banks holding carte blanche to grant or deny master account applications." *Custodia Bank, Inc. v. Federal Reserve Board of Governors*, No. 22-CV-125-SWS, 2023 U.S. Dist. LEXIS 237452, at *21 (D. Wyo. June 8, 2023) (citing amicus brief of former Senator Toomey) (also concluding that the Amendment "does not, expressly or impliedly, carry the statutory construction load the Board of Governors asserts it does," *id.* at *12).

B. Two courts of appeals have inferred substantive authority from Congress's demand for disclosure

After finding at the motion-to-dismiss stage that Section 248c did not alter the Fed's legal authority, the district court reversed itself on this question at summary judgment, without notice, oral argument, or supplemental briefing. Section 248c, it then held, made the Fed's discretion "harmonious with recent federal legislation," because "[i]f Congress intended the [Monetary Control Act] to remove a Federal Reserve Bank's discretion to deny a master account application, there would be no reason for Congress to now require a public database indicating which master account applications have been granted and which have been denied." Pet. App. 95a–96a. The panel majority adopted that reasoning: Section 248c "clearly contemplates that Reserve Banks may reject applications for master accounts from eligible entities." 157 F.4th at 1242, 1255.

The Second Circuit has since gone further, treating the provision as affirmative confirmation of authority located elsewhere. The "discretionary nature of the authority conferred by § 342 was most recently confirmed in 2022," it held, because "the text of the Toomey Amendment confirms that Reserve Banks are not required to accept all access requests from statutorily eligible applicants[.]" *Banco San Juan*, 176 F.4th at 179–180.

Judge Tymkovich has explained why the inference fails. It "ignores the very good nondiscretionary reason a Reserve Bank can deny an application—the applicant is not statutorily eligible for an account." Pet. App. 109a. And it "neglects the transparency function the database plays by forcing the Reserve Banks to identify applications they reject for any reason, permissible or not." *Ibid.* Read on its text alone, the provision supports "that transparency objective through the database requirement, nothing more." *Ibid.*

One feature of the panel's reasoning deserves note. The majority invoked the mousehole canon against petitioner in the same passage, reasoning that reading Section 248a(c)(2)'s "shall be available" command to confer an entitlement would find "an elephant in a mousehole." 157 F.4th at 1242 (citing *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

Whatever the better reading of Section 248a(c)(2), that provision at least contains a mandatory verb addressed to the availability of services. Section 248c contains no operative language about access at all. Between the two, the reporting requirement is the less likely place to find the power to determine which lawfully chartered banks may participate in the national payment system—and to grant the Reserve Banks an effective veto over state chartering decisions. The canon the majority invoked thus cuts against the conclusion it reached. It was the construction adopted below, not the statutory text, that altered "the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—as the district court all but acknowledged in departing from *Fourth Corner*

Credit Union v. Federal Reserve Bank of Kansas City, 861 F.3d 1052 (10th Cir. 2017), on the strength of Section 248c. *See Whitman*, 531 U.S. at 468; *Custodia Bank, Inc. v. Fed. Rsrv. Bd.*, 728 F. Supp. 3d 1227, 1241 (D. Wyo. 2024) ("The Court respectfully deviates from Judge Bacharach's opinion in *Fourth Corner* based in large part on certain legislation enacted by Congress since then, which was not available for Judge Bacharach's consideration in 2017.").

C. That inference penalizes Congress for legislating transparency, and it is not confined to this statute

Congress enacts reporting and disclosure mandates by the hundreds. It does so most often precisely when it suspects that an agency is exercising authority it may not possess, or exercising authority it does possess in ways Congress has not sanctioned. The disclosure mandate is the ordinary first step of oversight: before Congress can decide whether to legislate substantively, it must learn what the agency is doing.

The decisions below invert that sequence. A statute directing an agency to report its exercise of a contested power becomes evidence that Congress recognized the power. The oversight tool becomes the authorization. *Cf. Cox Communications, Inc. v. Sony Music Entertainment*, 146 S. Ct. 959, 969 (2026).

The inference also operates asymmetrically against Congress, because a reporting mandate must describe the conduct to be reported. A statute requiring the Fed to disclose whether requests were "approved, rejected, pending, or withdrawn" cannot avoid the word "rejected." A statute requiring an agency to report enforcement actions taken under a disputed theory cannot avoid naming the theory. The mandate cannot be drafted neutrally. The very specificity that makes a disclosure mandate useful is what the courts below treated as ratification.

The consequence is a dilemma. Congress may legislate transparency and accept the risk that a court will later read the statute as conferring the authority under examination. Or it may withhold the transparency mandate to protect its interpretive position and legislate blind. Members will weigh that risk in drafting every oversight provision. Amici can attest that the calculation has already changed.

Nothing in the reasoning is specific to the Federal Reserve or to master accounts. The move—from "Congress required you to report X" to "Congress therefore accepted that you may do X"—functions as a canon of general application. Any agency defending a contested assertion of power can now point to whatever reporting obligation Congress has attached to the exercise of that power and argue acquiescence. The exposed class of statutes is large: transaction and licensing reports, denial and revocation logs, waiver and exemption registries, enforcement statistics, adverse-action disclosures. Each was enacted to let Congress and the public see something an agency preferred to keep from them, and each is now available as an argument for the agency's authority to do it.

Concrete examples are not hard to find. The Antideficiency Act directs an agency head who discovers a prohibited obligation to "report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351. The Federal Vacancies Reform Act directs the Comptroller General to report to Congress whenever an acting officer serves beyond the period the Act allows. 5 U.S.C. § 3349(b). The Inspector General Act requires semiannual reports to Congress cataloging an agency's "significant problems, abuses, and deficiencies." 5 U.S.C. §§ 404(a)(3), 405(b)(1). Each of these provisions compels an agency to surface conduct Congress meant to police, and in the first two the reported conduct is conduct the same statute forbids. On the reasoning below, each would supply the very authority it was enacted to expose.

That consequence bears on certworthiness in a way the petition does not address. Petitioner is a bank seeking a master account, and it presses the interpretive question its own case presents. The injury amici describe runs to the legislative branch and to the drafting of oversight statutes across the administrative state. It will not be raised by the parties in the next master-account case, or in a case about export licenses or drug approvals, because it belongs to no private litigant. It is the kind of institutional harm that ordinarily reaches this Court only through the Members whose authority it diminishes. The Court need not adopt any view of the canon's proper scope to grant review. It is enough that the decision below rests on it, that the reasoning is not confined to the statute at issue, and that the question presented can be resolved without leaving the canon in place.

The courts below also gave no effect to the mandatory command that supplies the other half of the picture. Once eligibility is established, the Fed's services "shall be available to nonmember depository institutions[,]" 12 U.S.C. § 248a(c)(2)—a category defined to include "any bank which is eligible to make application to become an insured bank," *id.* § 461(b)(1)(A). A reporting statute cannot be read to authorize the denial of what a mandatory statute requires the Fed to make available.

II. Amici's oversight experience shows that neither the Board nor Congress will resolve the question presented

The petition explains why additional appellate decisions would add little. Pet. 31–33. Amici address the corollary question a court might reasonably ask before granting review in an area of active regulatory change: whether the political branches will resolve this themselves. Amici have spent four years attempting exactly that.

A. The database Section 248c compelled documents a settled two-track system

Before Section 248c, no one outside the Federal Reserve could describe its master-account practice with confidence. The Second Circuit acknowledged as much: the Reserve Banks' "history of denying master account requests was not a matter of public record until the passage of the Toomey Amendment[.]" *Banco San Juan*, 176 F.4th at 182 n.22. What that record now shows is set out below.[4]

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[4] Amici's counsel tabulated the figures in this section from the two components of the Section 248c database, Board of Governors of the Federal Reserve System, Master Account and Services Database, https://www.federalreserve.gov/paymentsystems/master-account-and-services-database-about.htm (data current as of May 31, 2026) (last visited Aug. 12, 2026): the Access Requests table (169 requests) and the Existing Access table (8,460 access relationships). "Resolved" requests exclude those still pending; for pending requests, elapsed time is measured from the submission date to May 31, 2026. Amici classify requests by the database's own "Federal Deposit Insurance" field. The 111 requests from institutions insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration comprise exactly the Tier 1 category under the Board's Account Access Guidelines; the 56 requests marked "Not Federally

Among applicants that are federally insured—Tier 1 under the Board's Account Access Guidelines—the Fed approved 92 of 111 requests, ninety-four percent of the 98 it has resolved, at a median of fifty-four days from submission to approval. The longest approval took 377 days. It rejected one.

Among applicants that are not federally insured, the Fed approved three of 56 requests, nine percent of the 33 it has resolved. The median approval took 648 days; the longest took 1,940 days, or five years and four months. It rejected seven, and even those rejections took a median of 1.9 years to issue, one of them 6.3 years.

The disparity in outcomes understates the disparity in practice, because for non-insured applicants the characteristic response is neither approval nor rejection. Forty-six of 56 non-insured requests—eighty-two percent—are either still pending or were withdrawn. The twenty-three applicants who withdrew had waited a median of just over two years; thirteen waited more than two years and one waited seven. Of the twenty-three still pending, thirteen have been outstanding more than a year, four more than three years, and two more than five: requests submitted in May 2020 and January 2021 remain unresolved. A withdrawal is recorded in the database as a withdrawal. Functionally it is a denial that produces no reviewable decision, no adverse letter, and no occasion for judicial review.

Insured" fall within Tier 2 and Tier 3, which receive an "intermediate level of review" and "the strictest level of review," respectively. 87 Fed. Reg. 51,099, 51,109–51,110 (Aug. 19, 2022); *see* 91 Fed. Reg. 30,651 (May 26, 2026). Two requests for which the database lists insurance status as undetermined are excluded from both groups.

The three approvals confirm rather than qualify that pattern. The most recent of them went to a Wyoming institution that is not federally insured, in the Kansas City Fed district, which filed three weeks before petitioner and received its account in January 2026—five years and four months later, and three months after the decision below. The practice at issue is not categorical refusal. It is delay of a duration that only an applicant able to survive five years without access to the payment system can outlast.

The Existing Access component of the database supplies the historical baseline. Of 8,460 access relationships, 358 are held by institutions that are not federally insured. But 333 of those 358—ninety-three percent—were established before 2015, and 254 during the 1990s. Only three have been granted since the database began reporting. The Fed extended access to hundreds of non-insured institutions in earlier decades and has almost entirely stopped, a change its own disclosures now document.

What the record does not show is variation. Non-insured requests appear in nine of the twelve districts, and no district has approved more than two. These are not close cases resolved differently by different Reserve Banks. They reflect a single, settled position, and no additional court of appeals will illuminate it.

B. Oversight has moved the Fed's policies while leaving its claim of legal authority untouched

Congressional oversight of master-account access has not been ineffectual. In 2022, Banking Committee scrutiny of a nominee's role in a master-account rejection-turned-approval-turned-rejection contributed to the withdrawal of a Federal Reserve nominee.[5] Section 248c followed later that year. In February 2025, after Senator Lummis pressed the question at a Committee hearing on debanking, Chair Powell testified that the concept of reputation risk appeared in "the one manual that we've been using for account access for master accounts," and that the Board was removing it.[6] In June 2025 the Board announced that reputation risk would no longer be a component of its bank examination programs, and in February 2026 it proposed to codify that removal.

Most consequentially here, on December 17, 2025, the Board rescinded in its entirety its 2023 policy statement on Section 9(13) of the Federal Reserve Act, replacing it with a new statement. *See Policy Statement on Section 9(13) of the Federal Reserve Act*, 90 Fed. Reg. 59,731 (Dec. 22, 2025); 88 Fed. Reg. 7,848 (Feb. 7, 2023). The Board explained that its former

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[5] *See* Press Release, Toomey Statement on Sarah Bloom Raskin Withdrawing Her Nomination (Mar. 15, 2022); note 3, *supra*.

[6] Hearing on the Semiannual Monetary Policy Report to the Congress Before the S. Comm. on Banking, Housing, & Urban Affairs, 119th Cong. (Feb. 11, 2025) (testimony of Chair Jerome H. Powell). Chair Powell attributed the change to Senator Lummis's questioning at the Committee's hearing on debanking the previous week. See Hearing on Investigating the Real Impacts of Debanking in America Before the S. Comm. on Banking, Housing, & Urban Affairs, 119th Cong. (Feb. 5, 2025). The Board announced in June 2025 that reputation risk would no longer be a component of its examination programs, and in February 2026 proposed to codify that removal together with a policy against encouraging supervised banks to deny service based on protected beliefs or on lawful but politically disfavored business activity. See 91 Fed. Reg. 9,499 (proposed Feb. 26, 2026). Each of those changes was a change in policy; none altered the Board's position on the legal authority at issue here, which it reaffirmed in May 2026. See 91 Fed. Reg. at 30,645.

position was "no longer appropriate" in light of its "evolving understanding of the risks of the crypto-asset sector," and withdrew from the record the accompanying discussion of specific crypto-asset activities. 90 Fed. Reg. at 59,732. The replacement statement announces that the Board will apply its authority under Section 9(13) differently to insured and to uninsured state member banks.

The rescinded statement was not collateral to this case. The Board issued it on January 27, 2023—the same day it denied petitioner's application for Federal Reserve membership, and the same day the Kansas City Fed denied petitioner's master-account application on the ground that a business model "narrowly focused on crypto-asset activities" presented risks "highly likely [to be] inconsistent with safe and sound banking practices." Pet. App. 11a. The supervisory position the Board announced that day has now been withdrawn by the Board. Petitioner brought the rescission to the court of appeals' attention while rehearing was pending. C.A. Dkt. 175 (Dec. 22, 2025). Rehearing was denied in March 2026, over three votes to grant, without the majority addressing it.

Amici draw a narrow conclusion, and it is not that the Fed has acted in bad faith. It is that every gain oversight produced was a gain in policy, and policy is revocable. The Fed's assessment of digital-asset risk may evolve yet again after the political winds shift; the Board said as much in describing its understanding as evolving. Reputation risk may return under another name, which is why the Board is now proposing to convert an announcement into a rule. What has not changed—what oversight has never been able to reach—is the Fed's legal claim that Reserve Bank presidents may withhold master accounts from eligible institutions for whatever reasons they find persuasive.

The Board renewed that claim five months after the rescission. In a notice proposing a new special-purpose "Payment Account" for institutions that are not federally insured, it stated that Reserve Banks "maintain discretion whether to provide these accounts and services and whether to impose additional, more restrictive terms." 91 Fed. Reg. 30,627, 30,645 (May 26, 2026).

Three features of that notice bear on whether the Board will resolve the question presented. First, the Board proposed review timelines that write the two-track system into prospective policy: forty-five days for access requests from Tier 1 institutions, ninety days for Payment Account requests from Tier 2 and Tier 3 institutions, and no timeline at all for master-account requests from Tier 2 and Tier 3 institutions. *Id.* at 30,642, 30,651. Second, the Board "encourage[d] Reserve Banks to pause decisions on access requests from Tier 3 institutions"—petitioner's category—"until the Board has completed its policy development process on the Payment Account proposal." *Id.* at 30,635. The Board added that it "currently expects the pause to end on or before December 31, 2026." *Ibid.* n.27. Third, the Board recorded that Tier 2 and Tier 3 institutions "have voiced concern about the length of time that Reserve Banks take to review access requests and the high likelihood of denial," and that commenters described master-account review as "opaque." *Id.* at 30,628, 30,634.

The Board's own account of the problem thus matches amici's. Its response is to suspend decisions rather than to resolve the legal question, and an expectation that a pause will lift is not a construction of the statute. Meanwhile the asymmetry sharpens.

The Board has withdrawn reputational considerations from the manual by which the Reserve Banks evaluate master-account requests, while leaving intact its claim of authority to deny those requests altogether. An institution's access turns not on whether it is a legally eligible depository institution, but on an agency's current and admittedly evolving view of its business—with no court empowered to ask whether the statute permits that inquiry at all. That is the arrangement Congress foreclosed in 1980 when it provided that the Fed's services "*shall* be available to nonmember depository institutions," 12 U.S.C. § 248a(c)(2), and that "nonmember depository institutions" means "*any* bank which is eligible to make application to become an insured bank," *id.* § 461(b)(1)(A) (emphases added).

C. Congress cannot supply the answer that only this Court can give

The tools available to amici are hearings, nomination leverage, correspondence, appropriations, and legislation. The first four can compel disclosure and can influence how an agency exercises a power it claims. None can determine what a statute means once a court of appeals has construed it. The Fed today operates under published appellate holdings in two circuits that it possesses the discretion at issue. No hearing dislodges those holdings, and no letter does either.

Legislation is the remaining tool, and this case is a cautionary account of it. Congress has legislated in this area twice. In 1980, it enacted the command that services "shall be available" to "any bank," and the courts below today read that command as addressed to pricing. In 2022 it enacted a disclosure requirement, and the courts below today read it as confirming a long-dormant power the agency had not claimed for decades. Amici cannot draft around an interpretive method that treats a mandatory verb as precatory and a reporting obligation as an authorization.

The costs of the interval fall on identifiable institutions. Judge Tymkovich stated the consequence for each: denial of a master account is "akin to a death sentence," because "[w]ithout a master account, a bank cannot operate in the modern banking system." Pet. App. 104a–105a. He stated the consequence for the federal structure in urging rehearing: "[b]y endorsing unreviewable discretion to deny accounts, we effectively hand the Reserve Banks a veto over states' chartering power," and "[t]his case's implications for the continuing viability of our state-federal dual banking system carry exceptional importance." *Id.* at 104a. Three judges voted to rehear the case on that basis. *Id.* at 103a.

Each quarter the decision below stands, the database records further requests entering indefinite pendency. States continue to charter institutions that a Reserve Bank president may render inoperative without explanation and without review. And the reasoning described in Part I remains available to any agency seeking to convert a reporting obligation into a source of power.

The question presented is one of statutory interpretation, fully developed in two opinions below and squarely dispositive. The institutions best positioned to correct the error without this Court have tried, and have reached the limit of what they can do.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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