No. 14-200

In The Supreme Court of the United States

NACS (FORMERLY KNOWN AS NATIONAL ASSOCIATION OF CONVENIENCE STORES), NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, MILLER OIL CO., INC., BOSCOV'S DEPARTMENT STORE, LLC, and NATIONAL RESTAURANT ASSOCIATION,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF AHOLD U.S.A., INC. IN SUPPORT OF PETITIONERS

RICHARD ALAN ARNOLD, ESQUIRE
(*Counsel of Record*)
WILLIAM J. BLECHMAN, ESQUIRE
KENNY NACHWALTER, P.A.
201 S. Biscayne Boulevard
Suite 1100
Miami, Florida 33131-4327
(305) 373-1000
rarnold@knpa.com
wblechman@knpa.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF AHOLD U.S.A., INC. IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Ahold U.S.A., Inc. ("Ahold") respectfully submits this amicus curiae brief in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

Ahold is the parent company of several operating companies that operate 767 stores in the northeast United States under the banners Stop & Shop, Giant, Martin's and Peapod. In 2013, more than 187 million PIN debit transactions occurred at Ahold stores. This year, Ahold projects that it will pay approximately $51 million in debit card interchange fees.

As a supermarket chain, Ahold is especially sensitive to its costs of accepting debit cards. Debit card transactions constitute a very high share of Ahold's sales volume, as is common among supermarkets. With such high volume, even what appear to be minor price changes on debit card transactions can add up

[1] No counsel for any party authored this brief in whole or in part. No party, or counsel for any party, has made a monetary contribution intended to fund the preparation or submission of this brief. Ahold U.S.A. has notified the parties of its intent to file this brief, and both Petitioner and Respondent have consented to its filing.

quickly to millions of dollars. In addition, the supermarket industry is extremely competitive, and net margins for large supermarket chains are typically in the low single digits. As a matter of commercial reality, Ahold and other supermarkets have no choice but to pass on increases in debit card acceptance costs to their customers in the form of higher retail prices.

Ahold also can offer a unique global perspective on this case because it is a wholly-owned subsidiary of Koninklijke Ahold N.V., an international supermarket group with operations in several countries including the Netherlands, Belgium, and Germany. Ahold can assist the Court by providing information about debit card fee levels abroad, particularly in the Netherlands, where its average debit interchange rate is approximately 3 cents per transaction.

The D.C. Circuit approved the Board's decision to increase its original proposed cap for cost-based debit interchange fees by more than 75%. The resulting higher debit card fees are a significant expense to Ahold and merchants across the United States, and ultimately result in higher prices to consumers. Because payment card acceptance is an integral part of its business, Ahold has an extremely strong interest in this case.

SUMMARY OF THE ARGUMENT

Debit cards today represent the largest share of non-cash payments in the United States, and that percentage continues to grow steadily.[2] Between 2003 and 2012, the number of debit card transactions tripled, increasing from 15.6 billion to 47 billion annually.[3] Even from 2009 to 2012, the number of transactions grew at an average annual rate of nearly 8 percent.[4] Debit card usage continues to grow especially as check usage declines.

As debit usage has grown, so has the expense to merchants of accepting debit cards. In the mid-1990s, some issuing banks charged no interchange fee at all to incentivize merchants to accept debit cards, because debit cards were less expensive to process than checks.[5] By 1999, many networks' PIN debit rates remained under $0.10 per transaction, but the steady march upward in debit fees had already begun.[6] In 2010, the average debit interchange rate across all merchants was found to be as high as $0.48 per

---

[2] *See* Federal Reserve, *2013 Federal Reserve Payments Study* 7, 12 (Dec. 19, 2013), http://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf [hereinafter 2013 Federal Reserve Payments Study].

[3] *See id.* at 13.

[4] *See id.* at 13 & Ex. 5.

[5] Fumiko Hayashi, Richard J. Sullivan & Stuart E. Weiner, Federal Reserve Bank of Kansas City, *A Guide to the ATM and Debit Card Industry* at 77 (2003), *available at* https://www.kansascityfed.org/publicat/PSR/BksJournArticles/ATMPaper.pdf.

[6] *See* Tim Sablik & Zhu Wang, Fed. Reserve Bank of Richmond, *Welfare Analysis of Debit Card Interchange Fee Regulation* at 2 (Oct. 2013), https://www.richmondfed.org/publications/research/economic_brief/2013/eb_13-10.cfm.

transaction.[7] In particular, Visa, in obtaining its position as market leader, instituted a series of price increases on its Interlink PIN debit product from 1998 to 2010.[8] These stark price increases were not attributable to any increase in costs of processing debit card transactions, which by any measure were decreasing over the same time period.

Against this backdrop, Congress enacted the Durbin Amendment in Section 920 of the 2010 Dodd-Frank legislation. *See* 15 U.S.C. § 1693o-2. In the Durbin Amendment, Congress directed the Board of Directors of the Federal Reserve to establish a debit interchange fee that is "reasonable and proportional to the costs incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(2). Congress even identified the specific costs that the Board could consider in establishing the rate cap, namely, the marginal costs of authorizing, clearing, and settling a debit transaction, but not "other costs incurred by an issuer which are not specific to a particular debit transaction." *Id.* § 1693o-2(a)(4)(B)(i)-(ii). In addition to the plain language of the statute, the Durbin Amendment's sponsor, Senator Richard Durbin, explained on the floor of Congress and again in an

---

[7] Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees* at 1 (Oct. 2013), *available at* http://www.sonecon.com/docs/studies/Report_on_Interchange_Fees-RShapiro-October_2013.pdf.

[8] *See* Sablik & Wang, *supra* note 6, at 2.

amicus curiae brief filed with the District Court that the intent of the law was to reduce debit interchange fees to a level commensurate with the marginal costs of processing debit card transactions for merchants.[9]

While there is substantial evidence to support an even lower rate cap for debit transactions, the Board's initial decision to establish a cap of 12 cents per transaction could be considered justifiably consistent with Congress' directive to bring rates back to their previous cost-based levels. The Board's subsequent decision to revise the cap upwards by at least 75%, however, abandoned any relationship to the marginal costs of providing debit card services to merchants.

The complete disconnect between the Board's new rate cap and the cost touchstone created by Congress is evident in several ways. First, the Board's supposedly cost-based new rate cap was significantly higher than rates charged on debit transactions in the 1990s, before technological advances and economies of scale occurred that reduced the marginal costs of processing a debit card transaction. In fact, the Board's revised rate cap disregarded the findings of the Federal Reserve's own studies regarding the

---

[9] *See* 156 CONG. REC. S5925 (daily ed. July 15, 2010) (statement of Sen. Richard Durbin); Brief of Senator Richard J. Durbin as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 13, *NACS v. Board of Governors of the Fed. Reserve System*, Case No. 1:11-cv-02075 (RJL) (May 9, 2012).

declining marginal costs of processing a debit transaction.

Second, unlike its initial action, the Board's revised rate cap actually exceeded the PIN debit rates that large supermarkets like Ahold already had been paying throughout the 2000s up to the enactment of the Durbin Amendment. As the Board has not contended that all of the PIN debit networks were engaging in below-cost pricing before the Durbin Amendment, the decision to establish a cost-based rate that was higher than rates prevailing in the market at the time makes no sense.

Third, evidence from other countries where Ahold's parent company operates, such as the Netherlands, proves that debit networks are able to operate with much lower interchange rates than the Board's revised cap. There is no cost-based justification for why merchants in the United States should pay debit fees that are multiples higher than rates paid by merchants abroad.

ARGUMENT

I. THE PERVASIVE ECONOMIC IMPACT OF THE BOARD'S DECISION ON MERCHANTS AND CONSUMERS NATIONWIDE REQUIRES THIS COURT'S IMMEDIATE REVIEW.

Every day, consumers in the United States swipe their debit cards at merchants 100 million times.[10] On those transactions, merchants collectively paid approximately $20 billion per year in debit interchange fees.[11] The United States "maintains the highest interchange fees in the world, yet its costs should be among the lowest, given economies of scale and declining cost trends for processing, fraud, and credit."[12] This case directly affects the conduct of 9 million merchants, the conduct of every large bank in the country, and it affects every consumer in this country, regardless of how that consumer pays for her transactions, because merchants must build the costs of interchange into their retail pricing.

Today, debit cards represent the largest share of non-cash payments in the country, and that percentage

---

[10] *See, e.g., NACS* petition for writ of certiorari (Aug. 18, 2014) at i.

[11] *NACS v. Bd. of Governors*, 746 F.3d 474, 477 (D.C. Cir. 2014) (citing data for 2009).

[12] Discussion Paper, Barbara Pachero & Richard Sullivan, Reserve Bank of Kansas City, *Interchange Fees in Credit and Debit Card Markets: What Role for Public Authorities?* at 101 (2006), *available at* http://www.kc.frb.org/Publicat/Econrev/PDF/1q06pach.pdf.

share continues to grow steadily.[13] Between 2003 and 2012, the number of debit card transactions tripled, increasing from 15.6 billion per year to 47 billion.[14] Even from 2009 to 2012, the number of transactions grew at an average annual rate of nearly 8 percent.[15] The Board's actions, therefore, carry very real consequences affecting the United States economy, and those consequences grow daily.

Congress passed and heralded the Durbin Amendment as a pro-merchant and pro-consumer measure to address a dysfunctional payments market which saw debit interchange fees spiral upward since the late 1990s despite technological innovation and scale economics that should have reduced price levels. The per-transaction price of debit cards rose to the point where, for Ahold and most retailers, payment card fees have become one of their largest operating expenses.[16] Against this backdrop, Congress passed the Durbin Amendment to give merchants and consumers relief from the billions of dollars paid in debit interchange each year.

---

[13] *See* 2013 Federal Reserve Payments Study, *supra* note 2, at 7, 12.

[14] *Id*. at 13 & Ex. 5.

[15] *Id.*

[16] *See, e.g.*, Peter Eichenbaum, *Visa Clashes with Wal-Mart on $48 Billion Card Fee* (*Update 1*), BLOOMBERG, Jun. 17, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBA97yq1Zkos (reporting that for national retailer Target, interchange is the company's "second-biggest cost after payroll").

The original 12-cent cap proposed by the Board before the notice-and-comment period would have saved merchants and consumers about $10 billion in its first year.[17] However, the Board's eventual decision to increase the fee cap by more than 75% gutted those savings. The per-transaction costs of accepting debit cards add up quickly and find their way into everything that consumers spend. Indeed, Senator Durbin recognized that "the National Retail Federation estimates that each American family pays an extra $427 per year as a result of inflated prices due to interchange fees."[18]

As a large supermarket, Ahold is especially familiar with the connection between payment card acceptance costs and the prices that consumers pay. The supermarket industry is intensely competitive, with net margins in the low single digits.[19] With these tight margins, the commercial reality is that supermarkets like Ahold cannot absorb debit fee increases; their only option is to pass them through to customers in the form of higher retail prices. In highly competitive

---

[17] 156 CONG. REC. S10996 (daily ed. Dec. 22, 2010) (statement of Sen. Richard Durbin).

[18] 156 CONG. REC. S10997 (daily ed. Dec. 22, 2010) (statement of Sen. Richard Durbin); *see also* J. Craig Sherman, *Retailers and Customers Saving as Debit Swipe Reform Anniversary Approaches,* NATIONAL RETAIL FEDERATION, Sep. 26, 2012, *available at* https://nrf.com/news/public-policy/retailers-and-customers-saving-debit-swipe-reform-anniversary-approaches.

[19] *See, e.g.*, Ahold N.V. 2013 Annual Report at 4, *available at* https://www.ahold.com/Financial-information/Annual-Reports.htm.

industries like the supermarket business, the converse is also true: reductions in operating costs translate into lower retail prices.[20] A 2009 study of input costs in various industries, including supermarkets, found that when a merchant's costs were reduced by $1.00, they responded by cutting prices for customers by $0.69 on average.[21] Beyond lower prices, savings on debit interchange can benefit consumers in other ways as merchants reinvest the savings into enhancing and growing their businesses.

The final rule that the Board passed ensures that debit interchange fees will continue to be a drag on the United States economy as a whole. Contrary to the pro-merchant and pro-consumer purpose of the Durbin Amendment, the Board's decision unnecessarily adds billions of dollars to the burden that merchants and consumers collectively pay for the use of debit cards.

---

[20] Vincent Nijs et al., *Channel Pass-Through of Trade Promotions*, MARKETING SCIENCE, *articles in advance,* at 3, Jul. 23, 2009, *available at* http://www.kellogg.northwestern.edu/faculty/anderson_e/htm/personalpage_files/Papers/Pass%20Through%20Final.pdf.

[21] Shapiro, *supra* note 7, at 20 (citing Nijs, *supra* note 20, at 8).

II. THE BOARD'S REVISED RATE CAP BEARS NO REASONABLE RELATIONSHIP TO THE DEBIT CARD PROCESSING COSTS IDENTIFIED IN THE DURBIN AMENDMENT.

A. The Durbin Amendment Requires the Board to Set a Cap Based on the Marginal Costs of Processing a Debit Card Transaction.

In the Durbin Amendment, Congress granted the Board limited rulemaking authority "to determine the standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(3)(A). In determining what is "reasonable and proportional" to the issuer's costs, Congress explicitly directed the Board to distinguish between two different types of costs. The statute specifically states that "the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction" are to be considered in setting the interchange fee. 15 U.S.C. § 1693o-2(a)(4)(A)(i). Congress also stated what costs are *not* to be considered in determining the debit interchange fee going forward: "other costs incurred by an issuer which are *not specific to a particular debit transaction.*" 15 U.S.C. § 1693o-2(a)(4)(A)(ii) (emphasis added). The plain language of the statute reflects that Congress directed the Board to implement a cap tied to the marginal costs of processing debit card transactions, *i.e.*, authorization, clearance, and settlement.

The legislative history of the Durbin Amendment confirms that Congress limited the Board's consideration of issuer costs only to those specific marginal costs associated with processing debit card transactions. Senator Durbin himself explained on the floor of Congress that Paragraph (a)(4) of the Durbin Amendment was intended to restrict the Board's consideration of costs to authorization, clearance, and settlement, and not any other costs:

> Paragraph (a)(4) makes clear that the cost to be considered by the Board in conducting its reasonable and proportional analysis is the incremental cost incurred by the issuer for its role in the authorization, clearance, or settlement of a particular electronic debit transaction, as opposed to other costs incurred by an issuer which are not specific to the authorization, clearance, or settlement of a particular electronic debit transaction.[22]

Senator Durbin also submitted a comment letter to the Board that confirmed this legislative intent underlying the Durbin Amendment, as well as an amicus curiae brief to the District Court that reinforced the same point. In his comment letter, Senator Durbin explained further that Congress' intent in

[22] 156 CONG. REC. S5925 (daily ed. Jul. 15, 2010) (statement of Sen. Richard Durbin).

limiting the Board to considering the marginal costs of processing debit card transactions was to reduce debit card interchange fees to a level approaching checks, which clear "at par," or stated differently, with no fee at all:

> In determining the appropriate cost considerations for the Board to keep in mind when crafting its standards, Congress limited the Board's consideration to the "incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction" because Congress intended to create a closer equivalency between the debit card system and the checking system in which transactions are regulated to clear at par. In so limiting network-established debit interchange fees to those incremental authorization, clearance, and settlement costs, the new law will incentivize issuers to manage all other costs of their debit card operations efficiently. This stands in stark contrast to the current system of unregulated network-established fees, in which inefficient and efficient issuers receive the same high fees.[23]

---

[23] 156 CONG. REC. S5925 (daily ed. Jul. 15, 2010) (statement of Sen. Richard J. Durbin); *see also* Brief of Senator Richard J. Durbin as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment at 13, *NACS v. Board of Governors of the Fed. Reserve System*, Case No. 1:11-cv-02075 (RJL) (May 9, 2012) (accord).

As explained below, the Board's decision to revise the cap upwards by more than 75% contravenes this clear legislative intent to limit debit interchange fees to an amount proportional to the marginal costs of processing debit transactions.

B. The Board's Revised Rate Cap is Not Reasonable and Proportional to the Marginal Costs of Processing Debit Transactions.

There are a number of ways to show that there is no reasonable connection between the Board's revised rate cap and the marginal costs of processing debit card transactions. This section explains three ways that demonstrate the unreasonableness of the Board's revised decision. First, the Board's revised rate cap exceeds debit interchange rates from the 1990s, even though there have been technological advances that should have decreased the marginal cost of processing debit card transactions since then. Second, the Board's revised rate cap is considerably higher than debit interchange rates that Ahold and other large supermarkets were paying in the years leading up to the Durbin Amendment. Third, the Board's revised rate cap is far above the rates charged by debit networks in other countries where Ahold operates, and the Board has offered no justification why the cost of operating a debit network in the United States should be so much higher than in the Netherlands or elsewhere.

1. The Board's Revised Rate Cap Significantly Exceeds Historical Debit Pricing Levels.

At the advent of debit card transactions in the early 1990s, issuers commonly offered large retailers an interchange rate of zero in order to incentivize merchants to accept and promote the growth of debit.[24] From the issuer's perspective, a debit card transaction was less expensive to process than a check. In the long run, replacing costly check transactions with debit cards would result in an overall cost reduction for issuing banks, which justified the initial zero-interchange pricing.

By the late 1990s, debit had already grown sufficiently that zero-interchange rates were no longer necessary to convince merchants to accept it. According to the Federal Reserve Bank of Richmond, the most common price that merchants paid to accept a debit card transaction in 1999 was approximately 10 cents per transaction.[25]

Over the next decade, the average cost to accept debit cards across all merchants more than quadrupled to $0.48 per transaction.[26] However, the evidence shows that the cost to process debit cards was decreasing from its levels in 1999 because of technological improvements and economies of scale. These

[24] *See* Hayashi, *supra* note 5, at 77.

[25] *See* Sablik & Wang, *supra* note 6, at 2-3.

[26] Shapiro, *supra* note 7, at 26.

decreasing costs contrast sharply with the Board's revised cap, which represents a more than 100% increase over the average debit interchange fee in 1999.

Cost savings for debit networks from technological advances were apparent as early as 2003. That year, the Board published a report concluding that "[c]ost studies of electronic payments processing are consistent with the notion that IT improvements in back-office processing of electronic payments resulted in productivity gains and scale economies that reduced costs dramatically over time."[27] The Federal Reserve's two main types of electronic payments, ACH and Fedwire, experienced reductions in per-transaction costs of approximately 83% and 59% from 1990 to 2000, respectively.[28] The Board concluded that it was reasonable to presume that similar "remarkable declines" had occurred in private-sector debit processing networks as well.[29]

Consistent with the Board's early findings regarding the reduced costs of operating an electronic payments network, the United States Department of Labor has collected data that likewise show that the costs of operating a debit card network have been declining since 1999. The Bureau of Labor Statistics'

---

[27] Board of Governors of the Federal Reserve System, *The Economic Effects of Technological Progress: Evidence from the Banking Industry,* at 7-8, *available at* http://www.federalreserve.gov/Pubs/FEDS/2002/200250/200250pap.pdf.

[28] *Id.* at 8.

[29] *Id.*

Producer Price Indices ("PPI") track the average change over time in prices charged by sellers in various industries.[30] The PPI for three industries that are relevant to the construction, maintenance, and operation of a payment card network each show declining costs between 1999 and the Board's announcement of the revised cap in 2011. The PPI for communications equipment manufacturing decreased by 14.7%;[31] the PPI for computer terminals and other computer peripheral equipment decreased by 9.2%;[32] and the PPI specifically for point of sale terminals decreased by 10.7%.[33]

Further, in 2010, the debit issuing banks themselves reported to the Federal Reserve in 2010 that their total costs related to authorization, settlement,

[30] U.S. Dept. of Labor, Bureau of Labor Statistics, Producer Price Indexes, http://www.bls.gov/ppi.

[31] U.S. Dept. of Labor, Bureau of Labor Statistics, Producer Price Index Industry Data, http://data.bls.gov/pdf/querytool.jsp?survey=pc (industry query: "3342 – a Communications equipment mfg" from 1999 to 2011) (last accessed Sep. 16, 2014).

[32] *Id.* (industry query: "334118 – Computer terminal and other computer peripheral equipment," product query: "334118334118 – Computer terminal and other computer peripheral equipment") (last accessed Sep. 8, 2014).

[33] *Id.* (industry query: "334118 – Computer terminal and other computer peripheral equipment," product query: "334118334118B1 – POS terminals, fund-transfer devices, and all other miscellaneous computer peripheral equipment" from 1999 to 2011) (last accessed Sep. 8, 2014).

and clearance amount to 7.1 cents for PIN debit and 13.7 cents for signature debit, respectively.[34]

In accordance with the Board's early findings, the PPI data, and the issuers' own reporting, in March 2013 the Board published another report that found that just between 2009 and 2011, authorization, clearing, and settlement costs on PIN debit transactions decreased by 38% and by 34.5% on signature debit transactions.[35] The Board's analysis concluded that authorization, clearing, and settlement costs for debit card issuers regulated under the Durbin Amendment averaged only *5* cents per transaction in 2011, a far cry from the revised 21-cent-plus cap.[36]

The purpose of the Durbin Amendment was to ensure that debit interchange rates would be reasonably related to the costs of processing debit transactions. Any cap setting the effective rate at more than double the 10-cent pricing that prevailed 15 years ago cannot be reasonable in light of the payment

---

[34] 75 Fed. Reg. 81,725 (Dec. 28, 2010); *id*. at n.25.

[35] Board of Governors of the Federal Reserve System, 2013A, *2011 Interchange Fee Revenue, Covered Issuer and Merchant Fraud Losses to Debit Card Transactions*, at 31, *available at* http://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf. In 2009, average authorization, clearing, and settlement costs for PIN and signature debit were 5 cents and 8.4 cents, respectively. In 2011, authorization, clearing, and settlement costs for PIN and signature debit were 3.1 cents and 5.5 cents, respectively. *Id.*

[36] *Id.* at 4, 31 & Table 13.

industry's unanimous recognition of falling processing costs for debit transactions.

2. The Board's Revised Rate Cap Exceeds Certain Market Pricing Levels that Existed when the Durbin Amendment Was Enacted.

The Board hardly had to look back 15 years to see that its revised cap of at least 21 cents per transaction was well above the specific cost-based level specified by Congress. Debit pricing in the market for large supermarkets at the time Congress passed the Durbin Amendment was actually *lower* than the Board's revised cap. The average PIN debit rate for large supermarkets in 2010 was about 17 cents on a $40 transaction.[37] For Ahold, depending on the network, PIN debit interchange rates were as low as 12 cents per transaction – half of the Board's revised cap on the average debit transaction – in the years leading up to the passage of the Durbin Amendment.

There is no evidence, nor does the Board suggest, that debit networks were pricing below cost in the years leading up to the Durbin Amendment. On the contrary, the stated goal of the Durbin Amendment

---

[37] Federal Reserve Bank of Kansas City Payments System Research Department, *Credit and Debit Card Interchange Fees in the United States: August 2013 Update* at p. 11, *available at* http://www.kansascityfed.org/publicat/psr/dataset/US_IF_August2013.pdf.

was to correct a market failure in which debit interchange fees had increased to levels far in excess of the debit networks' actual operating costs.[38] How can the Board's revised cap be reasonably related to the costs of operating a debit network when it is *higher* than the supracompetitive pricing that Congress sought to correct?

The Board's original proposal of 12 cents would have reduced interchange across all industries, including supermarkets.[39] However, today's revised cap results in no cost savings at all for PIN debit transactions at large supermarkets such as Ahold – a far cry from the once-anticipated rate relief promised by the Durbin Amendment. Senator Durbin himself explained on the Senate floor that the Amendment was meant to reduce debit interchange costs for all merchants, "which is a savings they can pass on to their consumers. Every grocery store, every convenience store . . . will be able to reduce the fees they paid to the big banks. . . ."[40] Ahold and other grocery stores were intended beneficiaries of the regulation,

---

[38] *See* 156 CONG. REC. S10996 (daily ed. Dec. 22, 2010) (statement of Sen. Richard J. Durbin) ("But there is literally no competition. That is why the government has to step in. . . . The current interchange system is a price-fixing scheme.").

[39] *See* Federal Reserve Bank of Kansas City Payments System Research Department, *Credit and Debit Card Interchange Fees in the United States: August 2013 Update* at 5-13, *available at* http://www.kansascityfed.org/publicat/psr/dataset/US_IF_August 2013.pdf.

[40] 156 CONG. REC. S4839 (daily ed. Jun. 10, 2010) (statement of Sen. Richard Durbin).

but the Board's decision has eviscerated the benefits for this industry.

3. Debit Pricing in Other Countries Where Ahold Operates Highlights the Unreasonableness of the Board's Revised Rate Cap.

The Netherlands, Belgium, and Germany, countries in which Ahold's parent company operates, all have debit card networks whose interchange rates are well below the Board's revised cap.

In the Netherlands, Ahold enjoys significant cost savings on debit interchange relative to the Board's revised rate cap. At current exchange rates, Ahold supermarkets pay approximately three cents per transaction in the Netherlands. On a $40 transaction (Ahold's average debit transaction size), a United States merchant would pay an 87% higher debit interchange fee than a merchant in the Netherlands.[41]

Similarly, in Belgium, Ahold pays 0.34% for debit transactions processed through Visa and MasterCard. On a $40 debit transaction, Ahold's Belgian stores would only pay an interchange rate of 13.6 cents.[42]

---

[41] The revised rate cap is 21 cents plus 0.05% of the transaction size, with an additional adjustment upwards for fraud of 1 cent. On a $40 transaction, the cap would be 24 cents (21 cents + 1 cent for fraud + (40 x .0005)).

[42] To assist the Court in making an "apples-to-apples" comparison, Ahold has used prevailing currency rates to convert

(Continued on following page)

Using Belgium's local Banontact/Mister Cash network, the rate is even lower at approximately 9 cents per transaction.

Germany's local debit provider, the Giro network, charges Ahold only 12 cents on a $40 transaction. For transaction sizes under $30, the rate decreases to 10 cents per transaction. As with Belgium and the Netherlands, Germany provides further evidence that debit networks can and do operate with pricing that is considerably below the Board's supposed cost-based cap.

What's more, the European Union has pending legislation that will likely go into effect later this year capping debit interchange rates at 0.2% per transaction.[43] Applying this rate to the average $40 debit transaction, the interchange fee would only be 8 cents per transaction. Indeed, this pending legislation would lead to further reductions in debit interchange for Ahold for its German and Belgian operations.

However, while the European Union recognizes that the costs of operating a debit card network continue to fall, the Board has unreasonably reached the opposite conclusion. Both the historical and the current empirical data prove that debit costs have been decreasing, and that debit card networks can and do

---

its debit interchange rates in the Netherlands, Germany, and Belgium, which are paid in euros, into U.S. dollars.

[43] The European Parliament voted in favor of the resolution in April 2014. Implementation is currently pending.

operate with costs that are significantly less than the Board's revised cap. The Board has no valid explanation for why its revised cap is higher than historical pricing in the United States, nor can it justify why merchants in the United States should pay debit interchange rates that are multiples higher than what merchants pay in the Netherlands, Belgium, and Germany.

CONCLUSION

Ahold respectfully requests that this Court take the opportunity to review the Board's decision and direct it to implement a rate cap that is consistent with the plain language and legislative history of the Durbin Amendment. The petition for a writ of certiorari should be granted.

Dated this 19th day of September 2014.

Respectfully submitted,

RICHARD ALAN ARNOLD, ESQUIRE
(*Counsel of Record*)
WILLIAM J. BLECHMAN, ESQUIRE
KENNY NACHWALTER, P.A.
201 S. Biscayne Boulevard
Suite 1100
Miami, Florida 33131-4327
(305) 373-1000
rarnold@knpa.com
wblechman@knpa.com

Attorneys for Amicus Curiae