No. 18-20669

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PULSE NETWORK, L.L.C.,
Plaintiff-Appellant,

v.

VISA, INCORPORATED,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas (No. 4:14-cv-3391)

BRIEF FOR RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pulse Network, L.L.C. v. Visa, Incorporated, No. 18-20669

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the brief for Plaintiff-Appellant, have an interest in the outcome of this case.

Amicus Curiae: Retail Litigation Center, Inc.

Counsel for *Amicus Curiae*: Eric F. Citron; Goldstein & Russell, P.C.

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4) and Fifth Circuit Rule 28.2.1, the undersigned counsel certifies that Retail Litigation Center, Inc. is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest.

Respectfully submitted,

s/ Eric F. Citron
Eric F. Citron

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), the Retail Litigation Center, Inc. (RLC) files this *amicus curiae* brief in support of Plaintiff-Appellant Pulse Network, L.L.C. (Pulse).

The RLC is a public policy organization that represents regional and national retailers, including many of the country's largest and most innovative retailers across a breadth of industries. These member retailers employ millions of workers in the United States and account for tens of billions in annual sales. The RLC seeks to present courts with the retail-industry perspective on legal issues that impact its members and to provide insight into the potential consequences of particular outcomes in pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* before state supreme courts, federal district courts, the federal courts of appeals, and the U.S. Supreme Court in nearly 150 cases.

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

The RLC submits this *amicus* brief because retailers pay billions of dollars annually in network fees to Visa, and those fees constitute one of their most substantial costs of doing business. Although RLC members compete with one another for customers, they all agree that the rules Visa enacted in response to the Durbin Amendment, 15 U.S.C. §1693*o*-2, in particular the Fixed Acquirer Network Fee (FANF), inflict significant harm to their businesses and to the national economy. RLC members also agree that the district court's opinion below on antitrust standing undermines their interests as customers for Visa's debit network services. Although RLC members themselves suffer a distinct injury due to Visa's debit network practices, there is no question that Pulse has been injured as well, and that Pulse's suit in this case can achieve structural relief in this market that is likely to redound to the benefit of *both* Visa's competitors (like Pulse) and its customers (like the RLC's members). The Clayton Act, 15 U.S.C. §12 *et seq.*, thus provides Pulse with a valid cause of action under the antitrust laws, and it is in the interest of the RLC's members that Pulse be allowed to vindicate that right.

The district court's opinion undermines, however, this important and legally protected route to challenging Visa's exclusionary conduct.

That legal development harms the RLC's members both as participants in this industry in particular, and as potential plaintiffs under the antitrust laws in future cases as well. Worst of all, the decision on appeal will serve to further entrench Visa's monopolistic practices even though retailers, competitor networks, and Congress itself have all found those practices harmful to the national economy. That makes this a case of vital interest to the RLC's membership.

SUMMARY OF ARGUMENT

This appeal is about the uncontroversial rule that, when a competitor and a customer are both harmed in distinct ways by a monopolist's single course of conduct, both the competitor *and* the customer have standing to sue the monopolist regarding that anticompetitive behavior. This is a long-recognized principle of antitrust law, and it is fully sufficient to decide this case.

The district court had other ideas. Perhaps driven by what appeared to be a general antipathy towards antitrust law, Pulse Br. (Br.) 50-56,[2] the court concluded that Pulse, as a competitor to Visa, suffered

[2] Counsel for Pulse shared a redacted version of the opening brief with counsel for *amicus curiae* in advance of that brief's public filing with

no injury and had no antitrust standing to challenge Visa's exclusionary conduct because only retailers and customers who paid Visa's network fees could do so. *See* Op. 5-7. The court's underlying reasoning for this conclusion was not clearly stated, but it seemed to be based on the view that exclusionary conduct only ever creates antitrust harm by raising downstream prices, and not by fortifying a monopolist's market power against attacks from competitors.

The district court's opinion—with its focus on what retailers pay for Visa's services and their ability to bring suit—might seem to be concerned with or protective of the interests of Visa customers like the RLC's member retailers, but nothing could be further from the truth. To be sure, as consumers in this marketplace, retailers are clearly injured by Visa's conduct and therefore are legally entitled to bring suit themselves. Indeed, as the district court noted, some retailers already have. Op. 7. But recognizing that retailers have valid causes of action under the antitrust laws should in no way prohibit or foreclose suits by Visa's competitors as well. The Clayton Act says that "any person who shall be injured

this Court. As of the filing of this *amicus* brief, the Court had not yet acted on Pulse's Jan. 17, 2019, motion to file its brief under seal, which would also trigger Pulse's public filing of the brief in redacted form.

in his business or property by reason of anything forbidden in the antitrust laws may sue therefor," 15 U.S.C. §15(a), and it unsurprisingly means what it says. Accordingly, *both* Visa customers like retailers *and* Visa competitors like Pulse can sue over conduct that injures them both, and consideration for one group requires no limitation on the causes of action available to the other.

In this case in particular, Pulse and the RLC's member retailers suffered distinct injuries, but their interests are entirely aligned in challenging the FANF and Visa's other network fees in the hope of facilitating greater competitor entry into this market. A proper consideration for Visa's customers thus required the district court to *permit* Pulse's antitrust suit, not the other way around.

Indeed, although both competitors and customers can have antitrust standing to challenge anticompetitive conduct, it is often the case that competitor suits are preferable to customer suits—particularly when the actions at issue are ones that tend to exclude competitors from the market. This brief discusses when and why that can be true in greater detail below. But the short story is that competitors are often uniquely focused on achieving critical *structural* reforms in presently anticompetitive industries. Empowering competitors to bring suit in cases like this one thus serves well the free-market goals of the federal antitrust laws, fostering long-term changes that allow competition itself to correct for the higher customer prices that are the symptom—not the cause—of present market failures.

This is what the district court badly missed below. In today's economy, it is unquestioned that Visa has market power, because retailers (including massive companies like the RLC's members) must accept Visa credit and debit cards as a form of payment in order to flourish commercially. U.S. Fed. Reserve Sys., *The Federal Reserve Payments Study: 2017 Annual Supplement* 1-2 (Dec. 2017), https://www.federalreserve.gov/newsevents/pressreleases/files/2017-payment-systems-study-annual-supplement-20171221.pdf (noting the continued growth of card payments from 2012 through 2017). And so, to the extent that a fee like the FANF raises prices, those price increases are difficult for retailers to resist and represent a serious harm to merchants' bottom line. But the *real* problem for retailers is Visa's market power, which Visa uses to raise prices in general, through the FANF or otherwise. And so the biggest reason that the FANF is problematic is—as Pulse explains—because its design is structured to further cement Visa's market power, protecting Visa from the competition the Durbin Amendment was meant to create.[3] Br. 38-41. The district court's single-minded focus on the level of these fees as the source of injury to retailers ignores how retailers are injured not just by the immediate effect of fee increases, but also when a dominant party excludes potential competition from the market—a harm Pulse was well-suited to complain about and prove up through this suit.

This *amicus* brief proceeds in two parts. Part I below explains how retailers are predominantly interested in avoiding the long-term effects of Visa's anticompetitive conduct—a structural concern that is critical for antitrust law to address. And Part II below explains how and why competitor suits can sometimes be better poised than customer suits to ad-

[3] The FANF requires retailers to pay a significant fixed, monthly fee to accept any debit or credit card transaction using Visa, which Visa then used to fund low per-transaction fees with substantial volume-based discounts. Br. 15-17. In other words, once a retailer accepts a single Visa debit or credit transaction and pays the high upfront fee—a decision no sane retailer can avoid—that retailer is immediately incentivized to use Visa's network for future debit transactions due to the low per-transaction fee and to route all transactions through that network to trigger the volume-based discounts.

dress these kinds of structural harms, and why a competitor suit is particularly likely to be productive from the perspective of the goals of antitrust law in a case like the one at bar.

ARGUMENT

I. RETAILERS ARE SEVERELY INJURED BY PULSE'S EXCLUSION FROM THE MARKET.

One of the fundamental flaws in the district court's opinion is its myopic focus on only the immediate injuries caused by Visa's conduct. In addressing antitrust standing, Op. 5-7, the court is conspicuous in its discussion of only the harm resulting from higher fees. As it explained: "A merchant might pay more or less on Visa's network compared with other PIN networks. … Even assuming that merchants pay more, that is an injury to them, not to Pulse." *Id.* at 6. The court further noted that "[c]hanges in price affect the payer directly and competitors indirectly," *id.* at 7, which it took as a reason to prefer suits by the payers over suits by competitors. In other words, the court focused on one specific injury caused by Visa's anticompetitive practices—immediate higher fees for retailers—and made its legal conclusion by limiting the possible plaintiffs to the parties who directly suffered *that* injury. That analysis was incorrect: It confuses one type of competitive injury with the whole universe of possible anticompetitive effects, and in so doing, ironically neglects what is most dangerous about the FANF from retailers' own perspective.

Although merchants, including the RLC's member retailers, are undoubtedly concerned about the immediate price effects of the FANF, those are not their exclusive concerns. Both Pulse and retailers face another form of injury whose serious and anticompetitive effects will be felt over the longer run—namely, actions by Visa designed to exclude potential competitors, whose competition could remake the marketplace to the benefit of customers like *amicus* RLC's member retailers here. That injury falls directly on *both* Pulse and Visa's customers, and so it harms Visa's customers to prevent Pulse from seeking to redress that market exclusion, as the district court did here.

1. At bottom, the district court seems to misunderstand that different types of harm to distinct groups can result from a single course of action by a monopolist. But that is undoubtedly the case. Br. 48-49 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶339d (4th ed.) (Areeda) and *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 816 (D.C. Cir. 2001)). For example, say that a monopolist acquires or enters into an exclusive contract with the only source for a component

used in a product that is manufactured by multiple producers. *See, e.g.*, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Two distinct harms will occur. First, competitors will be harmed because they will no longer have access to the raw material necessary to make their competing products, excluding them from this market. Second, customers will be harmed because, having excluded its existing or potential rivals, the monopolist will be free to restrict output and/or raise prices to levels far above those that free-market competition would have produced. Although the competitors are not buying the product itself—and so not directly injured by the price increase—they certainly are harmed under the antitrust laws by being excluded from the market due to the arrangement established by the monopolist. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488-89 (1992) (Scalia, J., dissenting). And in that event, higher consumer prices would still be relevant not as the *source* of competitors' antitrust injury, but as *evidence* that the competitors' exclusion tended to harm competition in the market for the manufactured product by driving up prices to end users. The district court, however, would say that no antitrust injury occurred to the competitors. And that is clearly wrong.

The fact pattern of this case is just a variation on this straightforward hypothetical. Pulse, as a competitor to Visa, seeks to make further competitive inroads into the market for debit network services by providing a competing PIN-based network and by innovating in the field of signature debit transactions and PINless transactions. Br. 11-13. Prior to the FANF, its primary method of competition would have been to offer lower per-transaction fees than Visa for the same services. That direct competition between Pulse and Visa should either force Visa to lower its pricing for those services to keep its market share, or instead to innovate to provide better or more expansive services to justify its higher prices. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

The allegation here, however, is that Visa was able to use its existing market power to impose a new fee structure, whereby merchants would have to pay a large up-front fee to make *any* Visa transactions, after which they would benefit from lower per-transaction fees. Because a less-essential network like Pulse cannot demand an equally large up-front fee (because merchants can go without Pulse) and cannot compete with Visa's new, lower, per-transaction fees (because Visa is subsidized by the new, large, upfront fee), Pulse is effectively excluded from price competing for more debit-card transactions. *See* Br. 16. The FANF thus excludes Pulse from providing market price competition in much the way that the acquisition of the only upstream supplier did in the hypothetical above. Accordingly, as Pulse itself argues, *id.* at 48-49, its injury had nothing to do with higher overall fees, but instead with its exclusion from the market.

2. On the other hand, merchants like RLC's retailers suffered two distinct forms of injury. First was the immediate increase in overall price caused by the FANF, which was the sole focus of the district court's analysis. Op. 5-7. This is obviously an important form of injury. But it is nonetheless a serious error for the district court to place *exclusive* focus there, because it confuses a symptom and a cause. If Visa is able to increase overall costs through the FANF, it is only because Visa has market power. Thus, the bigger-picture anticompetitive concern with the FANF is the long-run problem of how it cements Visa's market power, rather than Visa's immediate use of that power to drive up merchant fees.

The reason that the creation and entrenchment of Visa's market power is so important is that, in the absence of durable market power, markets should be able to police against anticompetitive fee increases through competition itself. In a competitive market with low entry barriers, any fee increase by Visa should induce competitors like Pulse to enter the market and offer lower prices to poach business from Visa, or induce existing competitors to keep their prices low and syphon off market share from the company that is raising prices. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 n.15 (1986) (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 26-27 (1984)). Indeed, prior to the FANF, Pulse played exactly that role in the market, seeking to poach market share from Visa by undercutting its fees. In this sense, any harm caused to retailers from the immediate fee increase associated with the FANF is of course serious and compensable under the antitrust laws, but it is also contingent on current market conditions. The principal concern of the antitrust laws should be on changing those market conditions—or on monopolistic behavior aimed at preventing those conditions from changing—and not solely on price increases that are symptomatic of those underlying conditions themselves.

As explained in part above, what makes the FANF so insidious is that it uses Visa's *existing* market power to make it more difficult for competitors to attack Visa's high fees in the future. Because of Visa's present, dominant position for both credit and debit cards, it is utterly impractical for any regional or national retailer to reject *all* Visa transactions, especially as transactions are increasingly done using debit and credit cards. *See supra* at 6-7 & n.3. Thus, retailers are essentially forced to pay the up-front FANF fee, and once that fee has been paid, it would be illogical for retailers to choose to pay higher per-transaction fees through rival networks. That dynamic is then further reinforced by Visa's substantial volume-based discounts, which create an even greater incentive for merchants to route more and more debit transactions through Visa once they have already been forced to pay the large up-front fee. Br. 16-18. And this is exactly how the transaction data has played out since Visa developed the FANF. *Id.* at 19. Although the Durbin Amendment should have created greater opportunities for rival debit network processors and should have decreased Visa's market power, Visa's market share has actually *increased* since it implemented its post-Durbin Amendment strategy. *Id.*

Thus, even if the FANF structure imposed a small *decrease* in fees (which it emphatically did not, *see* Br. 19), it would still be a source of serious long-term concern for retail merchants, and for antitrust law as well. The fact that the FANF already represents a fee increase only makes matters worse—it is evidence that Visa is already effectively restraining competition in a way that makes it possible for Visa to raise prices without losing market share. And from retailers' own perspective, while that fee increase is very bad, the further entrenchment of Visa's market power is worse.

This further entrenchment of a monopolist's market power, even in light of Congress's actions to prevent such conduct *by this defendant*, Br. 13-15, is also the primary concern of the antitrust laws, and a place where the interests of Visa's customers and competitors unambiguously overlap. *Id.* at 48-49. Retailers are perfectly aligned with competitors like Pulse regarding this type of injury—both would prefer that there be long-term changes to the market that permit rivals to compete more effectively against Visa by undercutting its supracompetitive fees. For competitors, entry to the market presents the opportunity to grow their own business and increase profit. For merchants, greater competition will exert long-term downward pressure on prices. But Pulse's allegation is that Visa's leverage of its power in both the credit and debit card markets allowed it to impose a fee structure that undermined the very competitive dynamics that can create long-term downward pressure on prices. And redressing that anticompetitive conduct through this suit would help both Visa's competitors and its customers alike.

Ultimately, the simple point is that the district court's apparent focus on the injury to retailers in the form of higher prices was doubly misplaced: The court was wrong to focus exclusively on prices, and perhaps for that reason, was wrong to focus exclusively on retailers as well. Basic antitrust law recognizes that exclusionary conduct can harm both customers and competitors—often, in different ways—and that both are therefore able to sue. *See, e.g.*, *Blue Shield of Va. v. McCready*, 457 U.S. 465, 484 & n.21 (1982) (describing how a single course of conduct can injure distinct groups of market participants). It is thus unsurprising that Visa itself did not dispute standing or injury on the grounds that exclusion of a competitor is not itself a form of harm under the antitrust laws. *See* Br. 27-28, 31, 34, 45 (quoting Areeda ¶348d for proposition that antitrust standing is "seldom challenged" when a competitor plaintiff alleges "its rival engaged in an exclusionary practice designed to rid the market of the plaintiff"). Here, however, the district court's error was especially bad: Its myopic focus on immediate price effects as the *only* injury that can result from exclusion of a competitor from a highly concentrated market ignores one of the principal ways that the FANF harms retailers themselves.

II. COMPETITOR SUITS LIKE THIS ONE CAN AVOID PRACTICAL CONCERNS THAT SOMETIMES DERAIL CUSTOMER SUITS.

The district court's other erroneous conclusion that is of particular concern for the RLC's member retailers is the court's analysis of "remoteness." Op. 7. In the court's view, "[i]ssuers, acquirers, and merchants are directly affected by Visa's changes in pricing" because "they are the payers" of the increased routing and transaction fees. *Id.* Competitors, on the other hand, are only "indirectly" affected by the "[c]hanges in price" implemented by Visa after the Durbin Amendment. *Id.* Because merchants pay the fees themselves, the court reasoned, merchants are the "better and more directly positioned [party] to challenge Visa if they think that this conduct violates the antitrust law." *Id.* Visa did not argue below that Pulse was an inappropriate party to bring suit, Br. 48, but, in the district court's opinion, only those parties that suffer from the short-term harm tied to an immediate increase in fees are properly situated to bring suit.

In addition to ignoring the ways in which Pulse itself was injured, and the overlapping injuries that Pulse and retailers suffer from Visa's entrenched market power, this analysis also shows an undue preference for customer suits. Of course, as the district court at least implicitly recognized, effects on direct customers are the ultimate concern of the antitrust laws and there is no doctrine that can prevent those direct customers from having standing to sue. *See, e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487-94 (1968). But sometimes, as here, a monopolist's competitors can also be well-positioned to complain about and prove up a particular form of monopolistic conduct, even when the most proximate victims of that conduct are the customers themselves.

1. As an initial matter, this seems especially likely to be true when the anticompetitive conduct at issue is allegedly exclusionary conduct. Pulse, as an *excluded participant* in the market, is an ideal plaintiff to challenge Visa's *exclusionary conduct* under the antitrust law. *Andrx*,

256 F.3d at 806 ("When competitors violate the antitrust laws and another competitor is forced from a market, the latter suffers an injury-in-fact."). Exclusion through anticompetitive tactics is clearly the sort of harm the antitrust laws are intended to prevent. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983). Indeed, the main purpose of antitrust law is to foster competition in the marketplace. *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("Our analysis is … guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition."). No party would be better positioned than a competitor like Pulse to explain and prove up the ways in which Visa's conduct excludes competitors from the marketplace. In that sense, customers complaining about higher prices could be considered more remote from the core injury than Pulse is here.

Pulse, as a competitor, may also be a particularly good plaintiff in this case because—unlike many retailers—it need not fear retaliation from suing Visa. Network fees like Visa's are often set differently for different retailers based on retailer-specific factors.[4] Because Visa is the

[4] Economists sometimes call this a "negotiation market," although any "negotiations" in this market would not be colloquially referred to

dominant party for both credit and debit card transactions, and retailers are thus quite dependent on the outcome of their negotiations with Visa, they do not like to get crosswise with Visa—in court, or otherwise—if they can avoid it. Indeed, if Visa decided to penalize retailer plaintiffs for suing over anticompetitive conduct, it could cause lasting detrimental effects to those businesses. Competitors like Pulse do not face that deterrent to suit, and so may be particularly good plaintiffs for antitrust actions that, like this one, involve negotiation markets where customers are dependent on direct and long-term interactions with the alleged monopolist.

Merchants, retailers, and customers also suffer from a collective action problem in suits against suppliers or service providers like Visa. Although FANF and other related fees resulted in a fee increase on merchants and retailers, the same long-term structural problems discussed

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that way, given Visa's overwhelming market power. Elizabeth Hoffman & Matthew L. Spitzer, *Experimental Law & Economics: An Introduction*, 85 Colum. L. Rev. 991, 1008 (1985) (discussing example of negotiation market); Guhan Subramanian, *Negotiation? Auction? A Deal Maker's Guide*, Harv. Bus. Rev., Dec. 2009, https://hbr.org/2009/12/negotiation-auction-a-deal-makers-guide (distinguishing pricing by negotiation from pricing by auction).

supra at 12-17, would exist even if the merchants saw a fee decrease (which, again, they clearly did not). In situations where an anticompetitive action causes either a price decrease or a slight price increase to customers, customers are essentially required to accept the supplier's deal because it is cheaper in the short-run as compared to switching to a competitor supplier. Similarly, once the merchant is forced to accept the up-front FANF fee, the profit-maximizing approach would be to route all transactions through Visa because of its low per-transaction fee as compared to other networks and to try to take advantage of the sizable volume-based discounts that are funded by the up-front fee that has already been paid. *See supra* at 6-7 & n.3. Thus, if the immediate injury is relatively modest, and there are substantial downsides to bringing suit against such a dominant market force, retailers and merchants (especially smaller ones) might have little incentive to bring suit individually, and in fact have a motive to continue using Visa's network as much as possible once the FANF has already been paid.

2. When, for some, the cost-benefit analysis tips against individual customer suits to challenge long-term anticompetitive conduct, it leaves only two options: competitor suits or class action customer suits.

Competitor suits, like Pulse's here, do not suffer from either the collective-action or incentive problems that may face individual customer suits. *See generally* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 26-34 (1989) (discussing benefits of competitor suits as compared to consumer suits). Pulse has every incentive to challenge anticompetitive conduct that excludes it from a profitable market, and has no concerns that such a suit will create long-term tension with Visa. Pulse has undoubtedly suffered an injury through its exclusion from the market, and as described *supra* Part I, its desire to correct the long-term structural harm created by Visa's conduct is perfectly aligned with the interests of the RLC's member retailers. Further, it may be quite difficult to prove an immediate antitrust injury on consumers when the problem involves exclusion of *potential* competition. Conversely, the injury to Pulse is quite straightforward and easy to prove—it was excluded from the market. And that makes it an ideal plaintiff to vindicate the interests of the antitrust laws in having free markets that are policed by entry and competition.

Competitors are also more likely to seek forward-looking remedies that will achieve the long-term restructuring of the market necessary to counteract Visa's anticompetitive conduct. To be sure, many customer suits are interested in structural relief as well—particularly if those customers are themselves large-scale businesses that expect to have to deal with the alleged monopolist for a long time going forward. But many customer suits are consumer class actions brought on behalf of isolated individuals, and because those actions must be brought by risk-bearing plaintiffs' attorneys, their focus tends to be on pursuing treble damages rather than structural relief. Indeed, these cases are often destined to settle for cash, without any judgment passed on whether the monopolist's behavior violates the antitrust laws or not. *See generally* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991, 1041 (2002); *see also* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971).

In most cases, competitors are less interested in backwards-looking relief. For example, when it comes to an exclusionary conduct case, a competitor's goal is simply to enter the market, which is where they see the true opportunity for profit. Although the excluded competitor may be able to prove some damages due to prior exclusion, the focus of the competitor suit is an injunction preventing the dominant party from taking the anticompetitive action in the future. That is exactly what Pulse seeks here, DE1 at 92 (Nov. 25, 2014), and so this sort of suit is important for the forward-looking structural change necessary to fix anticompetitive conduct targeted at entrenching monopolistic power.

Surprisingly, the district court ignored all of these factors. It instead took the simplistic approach that the customer that pays the increased fees is the only proper antitrust plaintiff. Op. 7. But limiting suits contesting anticompetitive conduct to only customers would tamp down the ability and incentives of parties to challenge anticompetitive and exclusionary conduct. That is anathema to the goals of the antitrust laws, and is plainly incorrect.

The RLC's member retailers are exactly the sort of potential plaintiffs that benefit from the existence of competitor suits. Regional and national retailers must have a beneficial continuing relationship with Visa that could be imperiled by bringing individual suits. Pulse's competitor suit is an important vehicle for providing the RLC's member retailers with the long-term relief necessary to correct the market imbalance created by Visa. The district court's opinion forecloses this integral approach to upholding the antitrust laws. The Retail Litigation Center thus respectfully asks this Court to reverse.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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January 24, 2019

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,023 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

January 24, 2019

s/ Eric F. Citron
Eric F. Citron

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 24, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

January 24, 2019

s/ Eric F. Citron
Eric F. Citron