Breaking the Visa-Mastercard Duopoly:
Bringing Competition and Lower Fees to the Credit Card System

Before the Senate Judiciary Committee

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Chairman Durbin, Ranking Member Graham, and Members of the Committee, thank you for inviting me to testify today. I look forward to discussing with you the topic of the Credit Card Competition Act ("CCCA").[1] I am here as a conservative antitrust scholar currently at Notre Dame Law School and formerly at the Department of Justice's Antitrust Division, where I served as a Deputy Assistant Attorney General in the first Trump Administration. I am here to present my views as a neutral and independent competition expert on behalf of no client and with no financial stake in the outcome of this legislation.

Credit Card Fees in the Shadow of Economic Anxiety

This hearing comes just two weeks after a presidential election in which voters expressed extraordinary anxiety about the state of the economy. The economy was one of the most important issues, if not the most important issue, impacting the outcome of the election. Forty-one percent of voters in the seven swing states ranked the economy as their top concern, far higher than any other concern.[2] The specific economic issues that were most important to swing state voters were inflation (40%) and household expenses (35%).[3] According to national exit polls, of the 32 percent of voters who identified the economy as their most important issue, 80 percent voted for President-elect Trump over Vice President Harris.[4]

Consistent with these economic concerns, the official party platforms of both political parties express a commitment to reduce the cost of goods and services. The 2024 Democratic Party Platform states that "lowering costs is Democrats' number one economic priority…. We're using

[1] Credit Card Competition Act, S. 1838. 118th Congress (June 7, 2023), https://www.congress.gov/118/bills/s1838/BILLS-118s1838is.pdf.
[2] New Swing State Voter Study: Economy Takes Center Stage as Top Factor Shaping Election Decisions, Business Wire, (Oct. 15, 2024), https://www.businesswire.com/news/home/20241015970937/en/New-Swing-State-Voter-Study-Economy-Takes-Center-Stage-as-Top-Factor-Shaping-Election-Decisions ("when asked which of the biggest issues in this year's election was the most important, swing state voters ranked their top concerns: economy (41%), healthcare (23%), abortion/reproductive rights (16%), immigration (13%), climate change (7%)"); Swing State Voter Survey 2024: The Economy is Top Priority (Oct. 14, 2024), https://www.doxo.com/w/insights/swing-state-voter-survey-2024-the-economy-is-top-priority/ (same).
[3] New Swing State Voter Study: Economy Takes Center Stage as Top Factor Shaping Election Decisions, Business Wire, (Oct. 15, 2024), https://www.businesswire.com/news/home/20241015970937/en/New-Swing-State-Voter-Study-Economy-Takes-Center-Stage-as-Top-Factor-Shaping-Election-Decisions; Swing State Voter Survey 2024: The Economy is Top Priority (Oct. 14, 2024), https://www.doxo.com/w/insights/swing-state-voter-survey-2024-the-economy-is-top-priority/.
[4] Election 2024: Exit Polls (Nov. 6, 2024), https://www.cnn.com/election/2024/exit-polls/national-results/general/president/0.

every tool to bring prices down on … banking, credit cards, and more."[5] Likewise, the 2024 Republican Party Platform has committed to "reduce the regulatory burden, lower energy costs, and promote economic policies that drive down the cost of living and prices for everyday goods and services…. The Republican Party … will defeat inflation, tackle the cost-of-living crisis, … and quickly bring down prices."[6] It seems that both Democrats and Republicans are competing to be the party of the working class.

It is clear that almost everyone is concerned about the rising price of goods and services, and leaders in Washington want to find appropriate ways to reduce those prices. The question is how? When we think of consumer spending, credit card swipe fees are not the first thing that comes to mind.[7] Yet swipe fees are a surprisingly large part of consumer expenditures. Last year the average American paid $1,102 in swipe fees, more than they spent on pets, coffee, or alcohol.[8] Surveys have not revealed whether paying a hidden fee to swipe a credit card brings greater consumer satisfaction than owning a pet, drinking morning coffee, or consuming alcohol, but one can surmise the answer.

My message today is simple. Given the importance of the current state of the economy to American voters in the last election, my recommendation to this Committee is to review this legislation based primarily on whether it will facilitate the shared political goal of reducing the cost of goods and services for everyday Americans. By that metric, the CCCA is interesting if it truly has the potential to reduce the price of almost every good and service that everyone in the United States purchases with a credit card.

Antitrust Enforcement versus Regulation

The other background point worth highlighting is the relationship between antitrust enforcement and procompetitive regulation in free market economies. Generally speaking, the United States is a free-market economy that is controlled by market forces of supply and demand. As the Supreme Court has noted, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[9] But even the best free market economies suffer from market failure. In instances of market failure such as collusion or monopoly abuse, the Supreme Court

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[5] 2024 Democratic Party Platform, at 17, https://democrats.org/wp-content/uploads/2024/08/FINAL-MASTER-PLATFORM.pdf.

[6] 2024 Republican Party Platform, at 11, 15 https://prod-static.gop.com/media/RNC2024-Platform.pdf?_gl=1*1snhpk9*_gcl_au*MTcyMDI0ODg1MC4xNzIxMDcxMjYy&_ga=2.204336400.1800680583.1721071263-1830010249.1721071262.

[7] Swipe fees are the fees that merchants pay to payment processors, banks, and card networks for facilitating transactions. Interchange fees are a subset of swipe fees and are the fees paid to cover the costs of the consumer's bank associated with approving and handling the transaction. Congressional Research Service, Credit Card Swipe Fees and Routing Restrictions, at 1, 9 (Oct. 8, 2024), https://crsreports.congress.gov/product/pdf/R/R48216. Because interchange fees are the overwhelming majority of swipe fees, I will use the two terms interchangeably in this testimony. *Interchange Fees 101: What They Are, How They Work, and How to Cut Costs*, Stripe, (Mar. 12, 2024), https://stripe.com/resources/more/interchange-fees-101-what-they-are-how-they-work-and-how-to-cut-costs.

[8] Jack Caporal, *Average Credit Card Processing Fees and Costs in 2024,* Motley Fool Money, (Nov. 8, 2024), https://www.fool.com/money/research/average-credit-card-processing-fees-costs-america/ ("Families paid an average of $1,102 in swipe fees in 2023"); Press Release, Credit Card 'Swipe' Fees Could Cost Consumers over $500 Million for Father's Day, Merchant Payment Coalition (June 10, 2024), https://merchantspaymentscoalition.com/credit-card-swipe-fees-could-cost-consumers-over-500-million-fathers-day (For the year as a whole, the average family paid $1,102 to cover swipe fees last year"); Economic News Release, Bureau of Labor Statistics, (Sept. 25, 2024), https://www.bls.gov/news.release/cesan.nr0.htm (expenditures in 2023 for pets, toys, hobbies, and playground equipment ($1,057), alcoholic beverages ($637)); *How Much is That Iced Coffee Costing You?*, (Oct. 6, 2022), https://www.security-banks.com/blog/how-much-is-that-iced-coffee-costing-you (the average American spends $1,097 on coffee each year).

[9] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

has declared that the antitrust laws are "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition."[10]

Conservatives generally prefer *ex post* litigation over *ex ante* regulation. But the antitrust laws are not, and have never been, a *comprehensive* charter for preserving competition. As I have argued in previous testimony here,[11] sometimes procompetitive legislation is complementary to antitrust litigation, such as Senator Lee's proposed AMERICA Act to complement litigation against Google's abuse of its ad tech monopoly.[12] And occasionally there are instances of market failure that the antitrust laws do not readily reach. For example, in an anticompetitive duopoly market, two companies may actively engage in behaviors that limit competition, raise prices, and offer less consumer choice. Absent collusion or monopoly abuse, antitrust laws will have difficulty addressing such anticompetitive conduct. As the United States has argued, while "competition enforcement is a highly effective tool for addressing anticompetitive conduct … in nearly all industries … [r]egulation can be appropriate … where legitimate market failures impede competitive markets."[13] If regulation is necessary to restore competition, the use of the least restrictive regulatory method is encouraged to meet legitimate objectives while preserving as much competition as possible.[14]

In short, the general approach in the United States is to trust the markets. When markets fail intervention may be necessary, preferably through antitrust enforcement but, if necessary, through narrowly targeted procompetitive regulation.

Market Failure in Credit Card Swipe Fees

It is hard to argue that the market for credit card swipe fees is working effectively. The interchange fees for credit card transactions in the United States are the highest of any industrialized nation.[15] In the United States such fees are unregulated and are exponentially higher than in Europe. Europe has capped interchange fees for credit card transactions at 0.3 percent, while in the United States the average swipe fees for Visa and Mastercard are around 2 percent, while some peg the average fee as high as 2.26 percent.[16]

It is also noteworthy that in the United States swipe fees for credit card transactions are dramatically higher than the fees for debit card transactions. The average cost to process all debit

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[10] Id.

[11] Roger P. Alford, Competition in The Digital Advertising Ecosystem, (May 3, 2023), https://www.judiciary.senate.gov/imo/media/doc/2023-05-03%20-%20Testimony%20-%20Alford.pdf.

[12] AMERICA Act, S.1073, 118th Cong. (Mar 30, 2023).

[13] Competition Enforcement and Regulatory Alternatives—Note by the United States, at 3, DAF/COMP/WP2/WD(2021)12 (May 12, 2021), https://www.justice.gov/atr/media/1347631/dl?inline.

[14] Id. at 14.

[15] Credit and Debit Card Interchange Fees in Various Countries, Federal Reserve Bank of Kansas City, (Aug. 2021), https://www.kansascityfed.org/documents/8288/CreditDebitCardInterchangeFeesVariousCountries_August2021Update.pdf; Adam McCann, Credit Card Interchange Fees by Country, WalletHub (Sept. 9, 2024), https://wallethub.com/edu/credit-card-interchange-fees-by-country/129627; Interchange Fees by Country, Clearly Payments (Oct. 25, 2022), https://www.clearlypayments.com/blog/interchange-fees-by-country/.

[16] Adam McCann, Credit Card Interchange Fees by Country, WalletHub (Sept. 9, 2024), https://wallethub.com/edu/credit-card-interchange-fees-by-country/129627 (average credit card interchange fee in the United States is 1.97% (Visa) and $1.79% (Mastercard); average credit card interchange fee in European countries is 0.30% (Visa and Mastercard)); Press Release, Credit Card 'Swipe' Fees Could Cost Consumers over $500 Million for Father's Day, Merchant Payment Coalition (June 10, 2024), https://merchantspaymentscoalition.com/credit-card-swipe-fees-could-cost-consumers-over-500-million-fathers-day (2.26 average swipe fee for Visa and Mastercard credit cards).

transactions (exempt and covered) is 0.73 percent, but a covered transaction (subject to regulation) is much lower, approximately 0.48 percent.[17]

As for antitrust litigation, it has not solved the problems of credit card swipe fees in the United States. The Department of Justice recently sued Visa for abusing its monopoly power in the debit network markets, alleging that with more than 60 percent of debit transactions in the United States … Visa wields its dominance, enormous scale, and centrality to the debit ecosystem to impose a web of exclusionary agreements on merchants and banks."[18] Presumably the Department of Justice did not take similar action against Visa for almost identical conduct in the credit network markets because Visa controls 50 percent of credit transactions in the United States, just below the typical market share threshold required for monopoly power in the United States.[19]

There is a private class action litigation in the United States alleging that credit card interchange fees are a massive price fixing scheme between Visa, Mastercard and the major banks.[20] That litigation has been ongoing for almost two decades, with some of the plaintiffs settling with the defendants for over $5 billion,[21] and many of the largest retailers opting out of the settlement and continuing to trial in pursuit of billions more in damages.[22]

In sum, we can say that regulation in Europe has dramatically reduced the cost of interchange fees, as has regulation in the United States with respect to debit interchange fees. These regulations offer natural experiments of what similar measures might do in the United States with respect to credit card interchange fees. By contrast, antitrust litigation of credit card interchange fees in the United States has been extraordinarily slow, expensive, and remains unresolved. As Charles Dickens said of similar litigation in *Bleak House*, "Jarndyce and Jarndyce drones on… dragg[ing] its dreary length before the court, perennially hopeless."[23]

The CCCA Response to Market Failure

The other witnesses at this hearing can explain in great detail the nature of this market and the potential impact of the CCCA on their clients and members. Objective sources such as the Congressional Research Service are available to summarize the nature of credit card swipe fees and proposed regulatory changes that could be introduced by the CCCA.[24]

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[17] Regulation II (Debit Card Interchange Fees and Routing), https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm; Average Debit Card Interchange Fee by Payment Card Network, https://www.federalreserve.gov/paymentsystems/files/Avg_IF_by_PCN.pdf; Matt Rej, *Debit Processing Fees* (2024), Merchant Cost Consulting (Jan. 15, 2024), https://merchantcostconsulting.com/lower-credit-card-processing-fees/debit-card-processing-fees-explained/.

[18] Press Release, Justice Department Sues Visa for Monopolizing Debit Markets, (Sept. 24, 2024), https://www.justice.gov/opa/pr/justice-department-sues-visa-monopolizing-debit-markets; United States v. Visa, Complaint, Case 1:24-cv-07214 (Sept. 24, 2024), https://www.justice.gov/opa/media/1370421/dl.

[19] AnnaMaria Andriotis, *Visa Wanted a Vast Empire. First, It Had to Beat Back its Foes,* Wall St. Journal (Oct. 19, 2024), https://www.wsj.com/finance/banking/visa-wanted-a-vast-empire-first-it-had-to-beat-back-its-foes-3b3067f3; Department of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 the Sherman Act, https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2; Federal Trade Commission, Monopolization Define, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined.

[20] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL 1720 (MKB) (JO).

[21] See Payment Card Interchange Fee Settlement, https://www.paymentcardsettlement.com/en.

[22] Craig Clough, *2 Cases in Visa, Mastercard MDL Ready for Trial, Judge Says*, Law360 (July 9, 2024), https://www.law360.com/articles/1856111/2-cases-in-visa-mastercard-mdl-ready-for-trial-judge-says.

[23] CHARLES DICKENS, BLEAK HOUSE, at 3 (1852).

[24] Congressional Research Service, Credit Card Swipe Fees and Routing Restrictions, (Oct. 8, 2024), https://crsreports.congress.gov/product/pdf/R/R48216.

The problem in short is as follows. Merchants pay issuing banks an interchange fee to cover the costs of approving and handling the transaction. The level of that fee is set by the card network—Visa and Mastercard—not the issuing bank. Because of regulation, the interchange fee is higher for credit card transactions than debit card transactions.[25] Mastercard and Visa impose contractual restrictions on banks and merchants to use their network for completing credit card transactions. This creates a bottleneck that routes transactions through a single network in a manner that minimizes price competition for interchange fees.

The proposed solution is relatively simple. The idea is to use regulation to override certain contractual routing restrictions. The CCCA attempts to introduce price competition in the market for interchange fees by prohibiting banks and card networks from restricting the network over which a credit card transaction is processed. The CCCA does not propose setting fee caps similar to regulations on debit transactions, but instead it requires routing alternatives, so that merchants can route payments through competing networks that could charge lower interchange fees, saving merchants transaction costs. The law also stipulates that national security concerns may limit certain networks (such as China's UnionPay)[26] from operating as part of the United States credit card system.

Similar to debit card interchange fee regulation, the CCCA has enlisted the Federal Reserve to promulgate regulations implementing these requirements, together with the Secretary of Treasury with respect to the national security provisions. In light of the recent Supreme Court ruling in *Loper Bright*[27] modifying the standard for judicial review of agency interpretations, one can expect that the Federal Reserve would enact regulations pursuant to the CCCA without any expectation of interpretative deference from the courts.[28]

Consumer Benefits and Harms from the CCCA

While the CCCA is presented as a battle between Big Banks and Big Box Stores,[29] the legislation is written with a $100 billion safe harbor that effectively would impose regulatory burdens on a very limited number of banks—approximately thirty of the largest banks and one credit union. On the other side, the benefits of the CCCA would accrue to every merchant that accepts credit card payments, from the smallest food truck or family-owned storefront to the largest retailer.

Other witnesses at this hearing represent the opposing sides of this debate and are better equipped to discuss the impact of the CCCA on big banks and retailers. I will highlight just a few key points on the likely impact that the CCCA would have on consumers. As mentioned above, in the current environment of economic anxiety, everyday Americans are expecting solutions from Washington

[25] Federal Reserve Board, Regulation II (Debit Card Interchange Fees and Routing), https://www.federalreserve.gov/paymentsystems/regii-about.htm.

[26] Press Release, New Ad Warns Credit Card Competition Act is Needed to Block China UnionPay from U.S. Credit Cards, Merchant Payments Coalition (Apr. 23, 2024), https://merchantspaymentscoalition.com/new-ad-warns-credit-card-competition-act-needed-block-china-unionpay-us-credit-cards.

[27] Loper Bright Enterprises v. Raimondo, 144 S.Ct. 2244 (2024).

[28] Bryan Bashur, *How Loper Bright Will Impact Debit Cards and Other Financial Products in the United States, Americans for Tax Reform* (Sept. 24, 2024), https://atr.org/how-loper-bright-will-impact-debit-cards-and-other-financial-products-in-the-u-s/.

[29] Letter from American Bankers Association, et. al. to The Honorable Charles Schumer, (July 14, 2023), https://bpi.com/wp-content/uploads/2023/07/2023-Joint-Financial-Sector-Letter-Opposing-Marshall-Durbin-NDAA-07.14.2023.pdf. ; David Boyer, Big-Box Banks: Congress' Plan to Lower Credit-Card Swipe Fees Pits Retailers Against Banks, Washington Times (July 21, 2023), https://www.washingtontimes.com/news/2023/jul/21/big-box-banks-congress-plan-lower-credit-card-swip/.

to address inflation and the high prices of goods and services. The CCCA should be reviewed from that perspective.

Merchants argue that high swipe fees hurt the average consumer because these costs are passed on to them in the form of higher prices for goods and services. For many retailers there is reason to assume that pass through of these costs will occur. Net profit margins are approximately 3 percent for general retailers and just over 1 percent for grocers and other food retailers.[30] Such narrow profit margins suggests fierce price competition, increasing the likelihood that swipe fees are passed on to the consumer. That is certainly plausible. Likewise, a reduction in those fees as a result of the CCCA may result in higher net profit margins for some merchants, but again, where there is significant price competition the likelihood of a savings pass through to consumers is high. Independent studies in Europe and the United States of the pass-through effect of regulation on interchange fees found that approximately 70 percent of merchant savings from reduced interchange fees were passed on to consumers.[31]

The credit card industry argues that consumers will suffer if the CCCA is enacted because credit card companies will reduce the benefits of rewards programs. It is estimated that enactment of the CCCA would result in $16 billion in reduced swipe fees.[32] It also is estimated that card holders earned $41.1 billion in rewards in 2022, with majority of that ($21 billion) in the form of non-pecuniary rewards (concierge services, lounge access, free bag checking, etc.). The logic of the credit card industry's position is that losses from interchange fees will be passed on to the consumer in the form of reduced reward benefits.

It is not obvious that lower swipe fees will significantly reduce credit card rewards. One study found that based on experience from interchange regulation in Australia, if merchants saved approximately $15 billion in swipe fees (as is estimated), then consumers would incur less than 0.1 percent drop in rewards.[33] The net profit margins for banks are approximately 30 percent, among the highest of any industry in the country.[34] And banks have multiple sources of income. Based on the most recent available data, United States merchants paid $172 billion in fees to accept card payments,[35] and United States cardholders paid over $25 billion in fees, including over $6 billion in annual fees, over $14 billion in late fees, and over $4 billion in other fees.[36] The pass through argument of consumer harm from reduced reward programs assumes that banks will not reduce their high net profit margins or find alternative ways to increase revenue to offset lower swipe fees.

Moreover, if banks are correct that the CCCA will harm consumers because reduced revenue from lower swipe fees will be passed on to consumers, then they should also concede the possibility that

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[30] New York University, Margins by Sector, (Jan. 2024), https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.
[31] CMSPI, Global Review of Interchange Fee Regulation, at 35 (Nov. 2020), https://cmspi.com/publication/cmspi-global-interchange-report-available-now/, (Ernst & Young Interchange Fee Regulation Review found merchant-to-consumer pass through in Europe was 72%; Shapiro Study found merchant-to-consumer pass through in the United States was 69%).
[32] Credit Card Competition Act Could Result in Annual Savings Upward of $16.4 Billion, CMSPI, (Oct. 18, 2024), https://cmspi.com/credit-card-competition-act-could-result-in-annual-savings-upward-of-16-4-billion/.
[33] Reward Margins are High Enough to Withstand Competition, CMSPI, (July 21, 2023), https://cmspi.com/aus/en/rewards-margins-are-high-enough-to-withstand-competition/.
[34] New York University, Margins by Sector, (Jan. 2024), https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.
[35] Nilson Report, Issue 1259.
[36] The Consumer Credit Card Market, Consumer Financial Protection Bureau, at 63 (Oct. 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf.

consumers will benefit from lower swipe fees because merchants will pass on to consumers savings in the form of lower fees for goods or services. Yet the banking industry routinely argues the opposite.[37] Why would banks with high margins pass through the harms but merchants with low margins not pass through the benefits? Assuming pass through occurs on both sides results in a different calculation of net harms or benefits to consumers.

Taking at face value that there may be consumer harm in the form of reduced reward benefits, this argument is not responsive to the core concern outlined above of lowering the price of goods and services for the working class. Precisely who benefits from reward programs? I certainly do, and I suspect every person in this room does too. The Federal Reserve recently studied that question and found that "credit card rewards transfer income from less to more educated, from poorer to richer, and from high- to low-minority areas, thereby widening existing spatial disparities."[38] Using swipe fees to pay for reward programs is a regressive wealth transfer from the many to the few. Consumer benefits and harms are not all alike, and increasing reward programs does not have the same broad distributional economic benefit as reducing the cost of goods and services across the board. In short, the tradeoff of reducing the price of groceries for every American may be worth fewer benefits to premium cardholders at the airport lounge.

If there are further congressional studies on the CCCA, I recommend that the net harm or benefit to consumers should be the focus of attention.

I look forward to taking your questions. Thank you.

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[37] See, e.g., Peter Lucas, *Why Banks Say Sellers Are Unlikely to Pass Savings from the CCCA on the Consumers,* Digital Transactions, (May 21, 2024), https://www.digitaltransactions.net/why-banks-say-sellers-are-unlikely-to-pass-savings-from-the-ccca-on-to-consumers/; Peter Lucas, *The MPC Fires Back at Claims Merchants Wont' Pass Along CCCA Savings to Consumers,* (May 24, 2024), https://www.digitaltransactions.net/the-mpc-fires-back-at-claims-merchants-wont-pass-along-ccca-savings-to-consumers/.

[38] Agarwal, Sumit, Andrea Presbitero, André F. Silva, and Carlo Wix (2023). *"Who Pays For Your Rewards? Redistribution in the Credit Card Market,"* at 30, Finance and Economics Discussion Series 2023-007. Washington: Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/econres/feds/files/2023007pap.pdf.