

**Breaking the Visa-Mastercard Duopoly:  
Bringing Competition and Lower Fees to the Credit Card System  
Answers in Response to Questions for the Record**

Before the Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and  
Consumer Rights

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In response to a letter dated November 26, 2024, from Senator Richard Durbin (D-IL) following my Senate Testimony<sup>1</sup> at a hearing held on November 19, 2024 entitled “Breaking the Visa-Mastercard Duopoly: Bringing Competition and Lower Fees to the Credit Card System,”<sup>2</sup> I am writing to provide answers in response to questions for the record from Committee members of the Senate Judiciary Committee.

**Questions from Senator Amy Klobuchar**

You testified that the Supreme Court’s ruling in *Ohio v. American Express* has made it more difficult for antitrust enforcers to prosecute anticompetitive conduct in two-sided markets.

- Why is it important that enforcers have tools necessary to protect consumers on both sides of a two-sided platform?
- What steps, if any, should Congress take to clarify or amend the holding in *Ohio v. American Express* to ensure enforcers can stop anticompetitive conduct in two-sided markets and how would doing so help create more competition in credit card network services markets?

**Answer from Professor Roger Alford**

In *Ohio v. American Express*, the Supreme Court required certain two-sided platforms be defined as a single market. The Court determined that, to establish *prima facie* evidence of uncompetitive practices, there must be anticompetitive effects on the “two-sided market . . . as a whole,” and effects on one side of the platform are insufficient.<sup>3</sup>

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<sup>1</sup> Roger Alford, *Breaking the Visa-Mastercard Duopoly: Bringing Competition and Lower Fees to the Credit Card System*, [https://www.judiciary.senate.gov/imo/media/doc/2024-11-19\\_-\\_testimony\\_-\\_alford.pdf](https://www.judiciary.senate.gov/imo/media/doc/2024-11-19_-_testimony_-_alford.pdf).

<sup>2</sup> *Breaking the Visa-Mastercard Duopoly: Bringing Competition and Lower Fees to the Credit Card System*, (Nov. 19, 2024), <https://www.judiciary.senate.gov/committee-activity/hearings/breaking-the-visa-mastercard-duopoly-bringing-competition-and-lower-fees-to-the-credit-card-system>.

<sup>3</sup> *Ohio v. American Express*, 585 U.S. 529, 547 (2018).

The Court narrowly defined a two-sided market, limiting it to instances where there actually is a two-sided platform in which an intermediary facilitates one-on-one simultaneous transactions with participants on both sides of the platform. As the Court held, “[t]he key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”<sup>4</sup> To determine whether a platform is a transactional one, the Court suggests inquiries into whether either side can purchase the service individually.<sup>5</sup> It also suggests inquiring whether a competitor is offering services to both sides, because “[o]nly other two-sided platforms can compete with a two-sided platform for transactions.”<sup>6</sup>

As I have argued elsewhere,<sup>7</sup> one of the critical problems with *Amex* is that defendants now argue that virtually every possible market is a two-sided *Amex* market. Defendants will ignore the requirement to show a one-to-one simultaneous consumption of a single product only in a market with strong direct network effects, and argue that with all two-sided platforms, plaintiffs have a *prima facie* obligation to show harm to the whole market. As one prominent scholar noted, “we can expect an outpouring of defendants emphatically claiming to be two-sided . . . . It will thus become necessary to filter out the pretext.”<sup>8</sup>

As Senator Klobuchar’s question suggests, for those markets that truly are two-sided the Court’s opinion in *Amex* burdens plaintiffs with not only showing harm, but to somehow preemptively disprove that there are benefits anywhere else on the platform. This is contrary to the typical rule of reason legal standard, in which plaintiffs must prove harm to only one side of the platform and then defendants bear the burden of proving offsetting benefits on the other side.<sup>9</sup>

My testimony at the hearing made clear,<sup>10</sup> in the current environment of economic anxiety, everyday Americans are expecting solutions from Washington to address inflation and the high prices of goods and services. The CCCA should be reviewed from that perspective. A reduction in the cost of swipe fees as a result of introducing competition due to the CCCA increases the likelihood of a savings pass through to consumers. To the extent there may be consumer harm in the form of reduced credit card reward benefits, the tradeoff of reducing the price of groceries for every American may be worth fewer benefits to premium cardholders at the airport lounge.<sup>11</sup>

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<sup>4</sup> *Am. Express, Co.*, 585 U.S. at 535.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 546.

<sup>7</sup> Roger P. Alford, *How to Approach Market Definition After Ohio v. American Express*, American Antitrust Institute (2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/06/alford.pdf>.

<sup>8</sup> Erik Hovenkamp, *Platform Antitrust*, 44 J. Corp. L. 713, 752 (2019).

<sup>9</sup> Makan Delrahim, “*A Whole New World*”: *An Antitrust Entreaty for a Digital Age*, (Jan. 19, 2021), <https://www.justice.gov/opa/speech/file/1356766/dl>.

<sup>10</sup> Roger Alford, *Breaking the Visa-Mastercard Duopoly: Bringing Competition and Lower Fees to the Credit Card System*, [https://www.judiciary.senate.gov/imo/media/doc/2024-11-19\\_-\\_testimony\\_-\\_alford.pdf](https://www.judiciary.senate.gov/imo/media/doc/2024-11-19_-_testimony_-_alford.pdf).

<sup>11</sup> *Id.*

Regarding possible legislative measures to respond to the confusion created by *Amex*, in the first Trump Administration, Assistant Attorney General Makan Delrahim shared Senator Klobuchar’s concerns. He argued that,

Legislation should codify the approach to two-sided markets as reflected in the Department’s briefs and largely adopted by Justice Breyer in his dissent. Specifically, Congress should consider allowing a plaintiff to establish a prima facie violation by proving harm on only one side of a multi-sided platform, and importantly, allowing procompetitive benefits on either side of the market, but place the burden of showing such benefits on the defendant.<sup>12</sup>

Such legislation would be particularly helpful with respect to litigation against Mastercard and Visa and the banks that are engaging in anticompetitive conduct that harms consumers. Of course, this would be in addition to, not in lieu of, introducing competition in the market through measures such as the CCCA.

### **Question from Senator Charles Grassley**

1. Through Dodd Frank, Congress passed debit card competition mandates similar to those included in the Credit Card Competition Act. Recently, we’ve seen cases filed by both the DOJ and the Federal Trade Commission enforcing these competition requirements, however, I’ve also heard concerns that the caps limited benefits for consumers. How should the implementation of the original Durbin Amendment inform today’s discussions about the credit card market?

### **Answer from Professor Roger Alford**

Despite the best efforts of the Durbin Amendment, Visa’s abuse of its monopoly position in the debit market has dramatically limited competition. The DOJ’s complaint regarding Visa’s monopoly abuse of the debit market should inform Congress as it considers the merits of the CCCA.<sup>13</sup> Notwithstanding efforts to introduce price competition in the debit market through the Durbin Amendment, Visa has continued to dominate the market and limit price competition. A substantial number of debit transactions are not subject to any competition, as the DOJ complaint puts it, “[f]or these non-contestable transactions, Visa does not face meaningful competitive constraints and can threaten merchants with high rates that merchants would have to accept.”<sup>14</sup> Visa has a monopoly on these debit transactions and can charge exorbitant rates.<sup>15</sup> Through contractual restrictions, Visa uses its monopoly power with these non-contestable

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<sup>12</sup> Makan Delrahim, “*A Whole New World*”: *An Antitrust Entreaty for a Digital Age*, (Jan. 19, 2021), <https://www.justice.gov/opa/speech/file/1356766/dl>.

<sup>13</sup> United States v. Visa, Complaint, Case 1:24-cv-07214, (Sept. 24, 2024), <https://www.justice.gov/opa/media/1370421/dl>.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> Felix Salmon, *Visa’s Debit Juggernaut*, *Axios* (Sept. 25, 2024), <https://www.axios.com/2024/09/25/visas-debit-juggernaut>.

transactions to limit merchant choice with respect to debit networks for contestable transactions. The DOJ Complaint requests that the court enjoin Visa from its anticompetitive practices, including bundling its credit services with debit, imposing cliff pricing structures, referencing rivals for debit transactions in its contracts, imposing fees on debit transactions routed through non-Visa networks, limiting the number of back-of-card networks on Visa branded cards, agreeing not to compete, imposing contractual limitations on the use of payment methods and payments rails (alternative debit networks), and imposing contractual limitations on the ability of customers to offer their own payment networks or methods or adopt technologies that disintermediate Visa.<sup>16</sup> Any efforts to introduce competition in the CCCA should be informed by the difficult experience of introducing competition in the debit market.

What is remarkable is that despite Visa's abuse of its monopoly power in the debit market, swipe fees in the debit card market are still significantly lower than the swipe fees in the credit card market. As I noted in my written testimony, 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.<sup>17</sup> By comparison, the average cost to process all debit transactions (exempt and covered) is 0.73 percent, but a covered transaction (subject to regulation) is much lower, approximately 0.48 percent.<sup>18</sup> Thus, even with increased prices in the debit market from Visa's monopoly abuse, the introduction of procompetitive regulations such as the Durbin Amendment has had a salutary effect of reducing debit card swipe fees.

### **Question from Senator Charles Grassley**

2. In the hearing, several questions focused on the possibility of fee negotiation between the various parties, rather than mandates from Congress. Are there obstacles that prevent such negotiation under the current system?

### **Answer from Professor Roger Alford**

The possibility of fee negotiation assumes that Visa and Mastercard do not have market power. With a few exceptions, merchants do not have any negotiating power to renegotiate swipe fees. The largest merchants, such as Costco (the third largest retailer in the United States), may be able to negotiate lower fees, but they do so by significantly

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<sup>16</sup> United States v. Visa, Complaint, Case 1:24-cv-07214, at 8 (Sept. 24, 2024), <https://www.justice.gov/opa/media/1370421/dl>.

<sup>17</sup> 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).

<sup>18</sup> 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](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/>.

limiting consumer choice, i.e., they only accept Visa credit cards.<sup>19</sup> For everyone else, Visa and Mastercard set the swipe fees and punish smaller merchants by offering volume discounts to the largest retailers that have credit card transactions in the billions of dollars.<sup>20</sup> If competition were introduced into the market through the CCCA, networks would introduce price competition for businesses with lower volumes. As the Congressional Research Service report put it, “[c]ompetition puts downward pressure on prices, as retailers could opt for cheaper options, incentivizing banks to issue cards enabled for those networks, ultimately compelling networks to consider lower interchange fees to keep demand.”<sup>21</sup>

### **Question from Senator Charles Grassley**

3. The original Durbin Amendment required both dual routing as well as direct caps on debit card fees. Would the debit card market be different today if Dodd Frank required only dual routing?

### **Answer from Professor Roger Alford**

It is difficult to answer this counterfactual question given Visa’s abuse of its monopoly power in the debit card market. One of the consequences of monopoly power is the ability to charge monopoly prices. The Durbin Amendment introduced direct caps on covered debit transactions, but not on exempt debit transactions. Visa’s ability to charge monopoly prices was limited with respect to covered transactions, but as noted above, it used contractual restrictions to limit competition throughout the debit card market and increase prices for exempt transactions. One should assume that absent direct caps on debit card fees, Visa would use its monopoly power to increase prices on all debit transactions, not simply the exempt debit transactions.

As noted in my written testimony, 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.<sup>22</sup> The CCCA is a less intrusive regulatory approach because it only requires dual routing and not direct caps.

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<sup>19</sup> Marissa Laliberte, *This is Why Costco Only Accepts Visa Cards*, Reader’s Digest, (July 21, 2021), <https://www.rd.com/article/why-costco-only-accepts-visa/>; Sean McQuay, *Sean Talks Credit: Why Costco Accepts Only Visa—And Everything Else You Wanted to Know about Payment Networks*, (July 7, 2016), <https://www.linkedin.com/pulse/sean-talks-credit-why-costco-accepts-only-visa-else-you-sean-mcquay/>.

<sup>20</sup> Congressional Research Service, *Credit Card Swipe Fees and Routing Restrictions*, at 1, 9 (Oct. 8, 2024), <https://crsreports.congress.gov/product/pdf/R/R48216>, (Interchange fees reflects a combination of factors, including the merchant’s volume of sales using the network”); Visa USA Interchange Reimbursement Fees, Visa Supplemental Requirements, (Oct. 19, 2024), <https://usa.visa.com/content/dam/VCOM/download/merchants/visa-usa-interchange-reimbursement-fees.pdf> (listing interchange fees by category and volume).

<sup>21</sup> Congressional Research Service, *Credit Card Swipe Fees and Routing Restrictions*, at 13 (Oct. 8, 2024), <https://crsreports.congress.gov/product/pdf/R/R48216>.

<sup>22</sup> 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>.