No. 18-20669

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PULSE NETWORK, LLC,
Plaintiff-Appellant,

v.

VISA, INCORPORATED,
Defendant-Appellee.

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

BRIEF OF RICHARD A. EPSTEIN, GEOFFREY A. MANNE, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

Cory L. Andrews
Corbin K. Barthold
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

April 12, 2019 *Counsel for Amici Curiae*

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pulse Network, LLC v. Visa, Incorporated, No. 18-20669

Under Fifth Circuit Rule 29.2, I certify that the following listed persons and entities have "an interest in the *amicus* brief":

Amici Curiae: Richard A. Epstein; Geoffrey A. Manne; Washington Legal Foundation.

Counsel for *Amici Curiae*: Cory L. Andrews and Corbin K. Barthold, Washington Legal Foundation.

Under Federal Rule of Appellate Procedure 26.1(a) and 29(a)(4) and Fifth Circuit Rule 28.2.1, I certify that Washington Legal Foundation (WLF) is a not-for-profit corporation created under § 501(c)(3) of the Internal Revenue Code. WLF has no parent company, issues no stock, and no publicly held company owns a ten percent or greater ownership interest in it.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY & INTEREST OF *AMICI CURIAE* 1

INTRODUCTION & SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. PULSE'S THEORY OF ANTITRUST INJURY FLOUTS BEDROCK TENETS OF ANTITRUST LAW. 6

A. Pulse's Alleged Injury Flows from *Increased* Competition. 6

B. Pulse Admits that Its Injury Stems from Visa's Non-Predatory Per-Transaction Fees. 9

C. Even Assuming an Antitrust Violation, Pulse Cannot Prove Anti-Competitive Harm. 11

II. ADOPTING PULSE'S THEORY OF ANTITRUST INJURY WOULD INCENTIVIZE LITIGATION AS A BUSINESS STRATEGY AND INVITE RENT-SEEKING BY RIVALS. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.,
735 F.2d 884 (5th Cir. 1984) 19

Apple Inc. v. Pepper,
No. 17-204 (U.S. argued Nov. 26, 2018)... 2

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 3, 4, 5, 101, 11, 12, 14, 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.,
509 U.S. 209 (1993) 10, 11

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 3

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 3, 4, 14, 15

Cargill, Inc. v. Monfort of Colo., Inc.,
479 U.S. 104 (1986) 6, 9, 10, 11

Den Norske Stats Oljeselskap As v. HeereMac Vof,
241 F.3d 420 (5th Cir. 2001) 13

Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.,
123 F.3d 301 (5th Cir. 1997) 4, 12, 13

FTC v. Actavis, Inc.,
570 U.S. 136 (2013) 2

Page(s)

Hawaii v. Standard Oil of Cal.,
405 U.S. 251 (1972) 12

Ill. Transp. Trade. Trade Ass'n v. City of Chicago,
839 F.3d 594 (7th Cir. 2016) 19, 20

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 9, 18

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 18

Norris v. Hearts Trust,
500 F.3d 454 (5th Cir. 2007) 13

Ohio v. American Express Co.,
138 S. Ct. 2274 (2018) 14

Phototron Corp. v. Eastman Kodak Co.,
842 F.2d 95 (5th Cir. 1988) 4, 15

Taylor Publ'g Co. v. Jostens, Inc.,
216 F.3d 465 (5th Cir. 2000) 4

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 16

OTHER AUTHORITY:

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law (1989 Supp.) 5, 16

Roger D. Blair & Jeffrey L. Harrison,
Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539 (1989) 11

Page(s)

Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439 (2007) 8, 9

Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (Aug. 1984) 16, 17

Johnathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273 (1998) 8, 12, 17, 19

Michael Porter, *Competitive Strategy* (1980) 19

IDENTITY & INTEREST OF *AMICI CURIAE*[*]

Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law; the James Parker Hall Distinguished Service Professor Emeritus of Law and senior lecturer at the University of Chicago Law School; and the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution. He has taught on many subjects including antitrust law, constitutional law, and law and economics. His published scholarship includes more than a dozen books and countless articles.

Geoffrey A. Manne is president and founder of the International Center of Law and Economics, a nonprofit, nonpartisan research center in Portland, Oregon. He is also a distinguished fellow at Northwestern Law School's Searle Center on Law, Regulation & Economic Growth. A widely recognized expert in the economic analysis of law, he is co-founder of Truth on the Market (www.truthonthemarket.com), an online forum for scholarly commentary on law and economics. He routinely lectures and publishes on antitrust law and policy.

[*] All parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No person or entity, other than *amici* or their counsel, helped pay for the brief's preparation or submission.

Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center with supporters in all 50 States. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, it often appears as *amicus curiae* in federal courts in important antitrust cases. *See, e.g., Apple Inc. v. Pepper*, No. 17-204 (U.S. argued Nov. 26, 2018); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Amici agree that the central aim of antitrust law is to ensure free-market competition, providing consumers with better goods and services at lower prices. The decision below furthers that laudable goal. It ensures that private antitrust plaintiffs have standing to sue only if they can prove an injury that naturally flows from the defendant's alleged harm to competition. Diluting that requirement, as the Appellant urges here, would undermine antitrust law's pro-competitive goals and encourage rent-seeking by rivals. *Amici* urge the Court to reject the Appellant's attempt to upend settled and sound antitrust law.

INTRODUCTION & SUMMARY OF ARGUMENT

To establish antitrust standing, Pulse must show not only "injury causally linked to an illegal presence in the market" but also antitrust injury "attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977)). Put differently, Pulse must prove the existence of an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Brunswick Corp.*, 429 U.S. at 489). As the district court rightly decided, Pulse has failed to meet its burden.

Antitrust law does not punish firms for succeeding even if they become dominant. Congress enacted the Sherman Act for "the protection of *competition*, not *competitors*." *Id.* at 338 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Yet Pulse's injury flows from *increased* competition due to Visa's innovation in the debit-network industry. Pulse freely admits that it lacks the "scale and market relevance" needed to compete with Visa's challenged business strategies. (Appellant's Br. 34) That Pulse's PIN product has (so far, anyway) failed to gain traction in the marketplace, however, is not proof of antitrust injury. On the contrary, mere injury to a competitor, rather than to competition, is not an injury "of the type the antitrust laws were intended to prevent." *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 99 (5th Cir. 1988) (quoting *Brunswick Corp.*, 429 U.S. at 489).

What's more, Pulse has sued Visa for conduct that Pulse admits *lowered* merchants' per-transaction fees, contending that those lower fees caused Pulse to obtain fewer transactions and generate less revenue. Pulse complains that it cannot "undercut" Visa's new pricing structure. (Appellant's Br. 40) But non-predatory price competition is no basis for antitrust injury. "When a firm … lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation." *Atl. Richfield*, 495 U.S. at 337. So even if it harms Pulse, Visa's charging low, but not below-cost, per-transaction fees to win market share is not harm to *competition*. Instead, both Visa's conduct and its effects are "fully consistent with competition on the merits." *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 477 (5th Cir. 2000).

True, when assessing standing, this Court will assume that an antitrust violation exists. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 306 (5th Cir. 1997). But that is not enough. "[P]roof of a[n antitrust] violation and of antitrust injury are distinct matters that must be shown independently." *Atl. Richfield*, 495 U.S. at 344 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.2c, at 330 (1989 Supp.)). Unable to show how Visa's conduct harmed competition in any way, Pulse seeks to wag the dog of antitrust injury with the tail of an assumed violation. But a competitor has standing only if it proves that *its* "loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield*, 495 U.S. at 344. Pulse has proven nothing of the sort.

Antitrust is about unleashing the forces of competition, not throttling them. Accepting Pulse's watered-down approach to antitrust injury, however, would have just the opposite effect. It would invite struggling firms to use antitrust law as a sword rather than a shield. It would deter innovation in highly competitive markets. And it would permit competitors to seek treble damages for *pro*-competitive harms that antitrust law does not reach. Rather than ensure vigorous competition, reversing the judgment below would harm competition and consumers alike.

ARGUMENT

I. PULSE'S THEORY OF ANTITRUST INJURY FLOUTS BEDROCK TENETS OF ANTITRUST LAW.

Pulse's depiction of itself as a victim of Visa's anti-competitive conduct collides with core antitrust principles. Pulse complains that it "lack[s] the market power" to compete on Visa's terms. (Appellant's Br. 6) As it told the district court, Pulse lacks the "scale and market relevance" needed to compete with Visa's innovative offerings. (Appellant's Br. 34) But none of this suggests—much less *proves* for standing purposes—that Visa has unfairly excluded Pulse from competing.

The question here of antitrust standing is not a close one. Simply put, Pulse has failed to prove that it has suffered *any* antitrust injury; it has proven only that it cannot compete on the merits.

A. Pulse's Alleged Injury Flows from *Increased* Competition.

"It is in the interest of competition to permit dominant firms to engage in vigorous competition." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (internal quotation marks and citation omitted). Yet Pulse asks this Court for permission to sue Visa for engaging in the very competition that the antitrust laws foster—expanding market choices and reducing prices. Pulse complains that Visa lowered merchants' per-transaction fees and expanded merchants' choices for PIN networks. "Pulse is harmed," it contends, "because Pulse does not obtain exclusive placement" on Visa-brand debit cards. (Appellant's Br. 42-43)

But Pulse freely admits that "[i]ssuers decide which networks to enable on their debit cards, and merchants decide which networks to accept and prioritize." (Appellant's Br. 6) That is the free market at work. If more issuers and merchants prefer Visa's debit network to Pulse's, that does not reflect an antitrust injury. At bottom, Pulse's chief complaint is that it "lack[s] the market power" to keep up with Visa. (Appellant's Br. 16) But so what?

By offering banks and merchants an alternative network for routing PIN debit transactions, Visa caused Pulse to "have to compete" for business. (Appellee's Br. 12-16) Among other things, Visa's innovation in the market disrupted Pulse's own plan to obtain exclusivity for PIN debit transactions. ROA.3226-30. Under these circumstances, Visa's conduct "could be called 'anticompetitive' only because judges and litigants have misunderstood its effects." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 442 (2007) [hereinafter, Easterbrook, *Exclusionary Conduct*].

"Competition is a gale of creative destruction … and it is by weeding out the weakest firms that the economy as a whole receives the greatest boost." *Id.* at 440. In other words, "Antitrust law and bankruptcy law go hand in hand." *Id.* Yet it is impossible to promote competition and consumer welfare with an antitrust standing rule that requires a firm to ensure its rival's profitability.

No surprise, then, that the claims of competitors like Pulse "are frequently inconsistent with the most basic objectives of the antitrust law." Johnathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 Antitrust L.J. 273, 286 (1998). "Competitors' interests are generally served if competition is reduced. They prefer fewer rivals and less aggressive competitive tactics; the less the competition, the greater the competitor's ability to increase prices and profits." *Id.*

Pulse might well feel frustrated about the unremitting competitiveness of the debit-network industry. It may even have a valid gripe about Visa's vastly superior economies of scale. What it does *not* have, however, is standing to bring a legitimate claim, under the antitrust laws, for relief from the difficulties of competition. Antitrust law should "never, ever, [be] about the promotion of producers' welfare. What is good for small dealers and worthy men, in Justice Peckham's phrase, usually is bad for everyone else." Easterbrook, *Exclusionary Conduct*, at 440.

The kind of conduct that Pulse complains about here—competition for market share in a highly rivalrous market—is not "activity forbidden by antitrust laws." *Cargill*, 479 U.S. at 116. No matter how Pulse tries to frame it, Visa's success in the marketplace is no basis for antitrust injury.

B. Pulse Admits that Its Injury Stems from Visa's Non-Predatory Per-Transaction Fees.

Pulse also admits that its injury stems from its inability to earn more transactions and revenue due to Visa's low per-transaction fees. (Appellant's Br. 40) But "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 594 (1986). To establish anti-competitive injury resulting from Visa's low per-transaction fees, Pulse "must prove that the prices complained of are below an appropriate measure of [Visa's] costs." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 222 (1993). Pulse does not even attempt such a showing.

While "price cutting" is simply "aimed at increasing market share," predatory, below-cost pricing "has as its aim the elimination of competition." *Cargill*, 479 U.S. at 118. So when, as here, a firm lowers prices but keeps them above cost, "the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation." *Atl. Richfield*, 495 U.S. at 337. Only predatory pricing is "capable of inflicting antitrust injury." *Cargill*, 479 U.S. at 118.

In contrast, non-predatory price competition has the salutary effect of lowering prices for goods and services, increasing output, decreasing deadweight losses, and benefitting consumers. *Atl. Richfield*, 495 U.S. at 340 ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."). Yet by "complaining about the harm it suffers from nonpredatory price competition," Pulse "'is really claiming that it [is] unable to raise prices.'" *Id.* at 337-38 (quoting Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1554 (1989)). Too bad.

It would be "ironic indeed" if the threshold for proving antitrust injury "were so low that antitrust suits themselves became a tool for keeping prices high." *Brooke Grp.*, 509 U.S. at 226-27. To hold that Pulse has standing to sue under the antitrust laws for lost profits due to price competition "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." *Cargill*, 479 U.S. at 116.

Accepting Pulse's theory of antitrust injury would allow it (and other struggling competitors) to seek damages for rival conduct that *lowered* per-transaction fees for merchants. But that relief is inimical to antitrust. Visa's charging low but non-predatory prices to win market share simply cannot support Pulse's claim of antitrust injury.

C. Even Assuming an Antitrust Violation, Pulse Cannot Prove Anti-Competitive Harm.

As Pulse reminds the Court a dozen times (Appellant's Br. at 1, 2, 26, 37, 38, 39, 42, 43, 44, 47 & 50), when assessing antitrust injury this

Court assumes that an antitrust violation exists. *See Doctor's Hosp.*, 123 F.3d at 306. The district court assumed a violation here. ROA.8558 ("Assuming but not deciding that Visa's conduct violated the antitrust laws, the court must decide whether Pulse was injured."). But that legal fiction cannot bear the inordinate weight that Pulse places on it.

Visa has acted competitively at all times. But even a defendant who may have skirted the antitrust laws is not liable to every firm that has suffered a loss "that might conceivably be traced" to the defendant's conduct. *Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 263 n.14 (1972). That is why "proof of a[n antitrust] violation and of antitrust injury are distinct matters that must be shown independently." *Atl. Richfield*, 495 U.S. at 344 (internal quotation marks and citation omitted).

This requires "courts to focus on the 'why' and the 'what'—the type of injury and its relationship to the alleged violation—in addition to the 'who.'" Jacobson & Greer, *supra*, at 285. If accepted, Pulse's approach to standing would render the antitrust-injury inquiry redundant; merely assuming an antitrust violation and proving an injury-in-fact would simultaneously prove antitrust standing. But that is not the law.

Pulse's opening brief is riddled with confusion on this point. In critiquing the "Antitrust Injury" section of the district court's opinion, Pulse finds it "most problematic" that the court's "only conclusions are about harm to competition … rather than antitrust injury." (Appellant's Br. 26) But that criticism is wide of the mark. As this Court has repeatedly explained, mere injury to a competitor cannot prove antitrust injury without accompanying proof of injury to *competition*.

"That an injury that 'gives rise to' an antitrust claim must be an injury caused by harm *to competition* is no light notion. It is a well-established and fundamental tenet of antitrust law." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 432-33 (5th Cir. 2001) (emphasis added); s*ee also Norris v. Hearts Trust*, 500 F.3d 454, 466 (5th Cir. 2007) (finding no antitrust injury because plaintiffs were not "directly injured by the harm *to competition* caused or posed by the asserted antitrust violations") (emphasis added); *Doctor's Hosp.*, 123 F.3d at 306 (confirming that "the antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat *to competition* that underlies the alleged violation") (emphasis added).

When Pulse complains that Visa's volume agreements with merchants and issuers discouraged investment in Pulse's new products, it insists that this Court assume those agreements violated the antitrust laws. But even conduct that violates the antitrust laws may anti-competitively injure some firms but pro-competitively injure others, and these effects are "often interwoven." *Atl. Richfield*, 495 U.S at 344. This is especially true in a two-sided market like this one. *Cf. Ohio v. American Express Co.*, 138 S. Ct. 2274, 2287 (2018) ("[F]ocusing on one dimension of … competition tends to distort the competition that actually exists among [two-sided markets].") (internal quotation marks and citation omitted).

Rather than rely on an assumed violation, Pulse must prove that *its* loss "stems from" an *anti*-competitive "aspect or effect of [Visa's] behavior." *Atl. Richfield*, 495 U.S. at 344. But Pulse's overriding theory of injury is that it has been "depriv[ed] … of the benefits of increased concentration." *Brunswick Corp.*, 429 U.S. at 488. Any resulting damages from that deprivation would be "the profits [Pulse] would have realized had competition been reduced." *Id.* Granting Pulse standing to recoup *pro*-competitive "damages" would be "inimical to the purposes" of the antitrust laws. *Id.*

Requiring antitrust injury is vital to ensuring that private antitrust plaintiffs' claims have some logical nexus to the competitive harm allegedly caused by the challenged conduct. Yet Pulse has never satisfactorily explained how any of Visa's conduct violates the federal antitrust laws, much less causes an *anti-competitive* injury to Pulse. Mere injury to Pulse, rather than injury to competition, is not an injury "of the type the antitrust laws were intended to prevent." *Phototron Corp.*, 842 F.2d at 99 (quoting *Brunswick Corp.*, 429 U.S. at 489).

* * *

Though Pulse tries to portray itself as an excluded rival, its theories of antitrust injury rest on either the pro-competitive effects of Visa's conduct or untenable theories of antitrust harm. Given these deficiencies, allowing a disgruntled rival to bring antitrust claims would be an unprecedented and unwise erosion of the antitrust-injury requirement.

II. ADOPTING PULSE'S THEORY OF ANTITRUST INJURY WOULD INCENTIVIZE LITIGATION AS A BUSINESS STRATEGY AND INVITE RENT-SEEKING BY RIVALS.

Companies unable to compete with rivals' lower prices and innovative products will always be tempted to turn to the courts to recoup lost profits and hamstring their competitors. "The books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34 (Aug. 1984) [hereinafter Easterbrook, *Limits of Antitrust*]; s*ee* 2A Areeda & Hovenkamp, *supra*, ¶ 335a, at 231-32 (describing the "incentive to use an antitrust suit to delay [competitors'] operations or to induce them to moderate their competition").

Even "salutary and procompetitive conduct" is often "shunned by businessmen who chose to be excessively cautious in the face of uncertainty." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978). Because the "plaintiff's costs of litigation will be smaller than the defendants," antitrust law "may be a cheaper (and more effective) means of imposing costs on one's rivals than is resort to the political and administrative process." Easterbrook, *Limits of Antitrust*, at 34.

Even if the competitor-plaintiff's likelihood of success is low, the threat of a treble-damages antitrust verdict can discourage firms from aggressive competition.

While "[j]udicial errors that tolerate baleful practices are self-correcting," "erroneous condemnations are not." *Id.* at 3. The Supreme Court created the antitrust-injury requirement to lower the risk that courts mistakenly will condemn pro-competitive business strategies. *Atl. Richfield*, 495 U.S. at 342 (explaining that the "purpose of the antitrust injury requirement" is to "prevent losses that stem from competition from supporting suits by private plaintiffs").

Indeed, by forcing the plaintiff to prove how and why its injury reflects actual harm to competition, the antitrust-injury requirement is "a powerful weapon to prevent plaintiffs from using the antitrust laws for improper and anticompetitive purposes." Jacobson & Greer, *supra*, at 286. Not only has the antitrust-standing inquiry "helped in preventing firms from using the antitrust laws strategically to subvert competition"; it "has reduced the ability of quick strike artists to extort nuisance settlements." *Id*. at 274.

But Pulse's interests here run the other way. Pulse invites the Court to dismantle the antitrust-standing requirement by permitting this suit to go forward with no meaningful showing of anti-competitive harm. Rather than have to persuade thousands of merchants and scores of issuers to choose Pulse's PIN network over Visa's, Pulse would prefer to persuade only two of three judges on a panel of this Court that it has standing to sue. Achieving that result may benefit Pulse, but it would harm everyone else.

A diluted antitrust-injury requirement would effectively weaponize antitrust law as a tool for strategic antitrust-litigation abuse. It would permit rent-seeking rivals to subject pro-competitive firms to the formidable threat of antitrust discovery, "chill[ing] the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. And it would create "irrational dislocations in the market." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

This threat of over-deterrence is not merely ironic; it is corrosive to the vital workings of our economy. It risks returning antitrust standing to a time when leading business-school textbooks promoted "antitrust litigation as a strategic device to halt competitors' growth and discipline competitive behavior." Jacobson & Greer, *supra*, at 277 (citing Michael Porter, *Competitive Strategy* 85-86 (1980)).

Pulse's preferred approach to antitrust standing not only threatens to deter robust competition, but it also potentially could raise the prices of goods and services for consumers. After all, Pulse insists that Visa charges merchants *too little* in per-transaction fees and seeks relief calculated to *raise* those fees. But merchants' resulting losses from higher fees are often borne by consumers. Again, antitrust law is a shield, not a sword. It should never be used to force firms to refrain from deploying the most efficient systems or adopting the lowest, above-cost prices solely to avoid the threat of litigation.

Above all, Congress did not enact the Sherman Act to mollycoddle Pulse just because it may have lost market share to a competitor. *See Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir. 1984) ("[V]igorous competition is precisely what the antitrust laws are designed to foster"). If rivals can prevent new products and services from competing because they fear a loss of profits, "economic progress might grind to a halt." *Ill. Transp. Trade. Trade*

Ass'n v. City of Chicago, 839 F.3d 594, 596-97 (7th Cir. 2016) (Posner, J.). That is an approach to antitrust that no one should embrace.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

/s/ Cory L. Andrews
Cory L. Andrews
Corbin K. Barthold
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,631 words under Fed. R. App. P. 32(a)(7)(B), excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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 it has been prepared in a proportionally spaced serif typeface (Century Schoolbook) in 14-point font.

3. This brief includes any required privacy redactions have under 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and a virus-detection program (VIPRE Business, Version 5.0.4464) scanned this document and detected no virus.

Dated: April 12, 2019

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify under Fed. R. App. P. 25(c)(2) that on the Twelfth day of April, 2019, I filed a copy of the preceding document with the Clerk of Court for the Fifth Circuit through the Court's CM/ECF system, which will send notice of the filing to all participants in the case who are registered CM/ECF users.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amici Curiae