No. 16-___

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring *cardholder* customers together with *merchant* customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar *merchant* customers from steering *cardholder* customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show *not just* that the provisions had anticompetitive pricing effects on the merchant side, *but also* that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

LIST OF PARTIES

The Petitioners in this Court and the Appellees in the Second Circuit are the States of Ohio, Connecticut, Idaho, Illinois, Iowa, Maryland, Michigan, Montana, Rhode Island, Utah, and Vermont.

The Appellees in the Second Circuit (and the Respondents in this Court) also included the United States, and the States of Arizona, Missouri, Nebraska, New Hampshire, Tennessee, and Texas.

The Respondents in this Court and the Appellants in the Second Circuit are American Express Company and American Express Travel Related Services Company, Inc.

In the district court, the State of Hawaii was also originally a plaintiff, and MasterCard International Inc., and Visa Inc. were also originally defendants.

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JURISDICTIONAL STATEMENT

The Second Circuit entered its judgment on September 26, 2016. It denied en banc review on January 5, 2017. Justice Ginsburg granted the States two extensions of time to file a petition for a writ of certiorari up to and including June 2, 2017. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

STATEMENT

A. Consumers Use Credit Cards For Trillions Of Dollars In Transactions Annually

Credit cards "have become a principal means by which consumers . . . purchase goods and services from the nation's millions of merchants." Pet. App. 73a-74a. The four dominant credit-card networks—Visa, MasterCard, Discover, and Respondents American Express Company and American Express Travel Related Services Company, Inc. ("Amex")—processed about $2.399 trillion in spending in 2013. Pet. App. 74a.

When a consumer uses a credit card at a merchant's business, "a multitude of economic acts and actors" kick into gear. Pet. App. 5a. The consumer accesses credit extended by the particular card issuer. *Id.* The merchant "receives payment quickly—minus a fee" charged for the transaction. *Id.* By uniting cardholders and merchants in this way, credit-card companies operate what is known in economics terms as a "multi-sided" or "two-sided" platform. Pet. App. 7a-10a, 77a-79a. "In a two-sided platform, a single firm or collection of firms sells different products or services to two separate yet interrelated groups of customers who, in turn, rely on the platform to intermediate some type of interaction between them." Pet. App. 77a.

"[I]n order to succeed," a company operating a two-sided platform often "must 'find an effective method for balancing the prices on the two sides of the market.'" Pet. App. 9a (citation omitted). For credit-card platforms, cardholder demand for card use is more elastic than merchant demand for card acceptance, so "a network may charge its cardholders a lower fee than it charges merchants." *Id.* Amex cardholders, for example, "effectively pay a 'negative' price for acceptance services . . . in the form of rewards earned on a per transaction basis." Pet. App. 182a n.36. Such "rewards" can include items like cash back, airline miles, or gift cards. Pet. App. 14a, 89a. Merchants, by contrast, must pay "merchant discount fees" on a per-transaction basis to be able to accept cards from a particular credit-card network. Pet. App. 13a. The fees that merchants face to accept credit cards are "among many merchants' highest" costs. Pet. App. 221a; *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1148 (2017).

The total credit-card industry is both "highly concentrated" and "remarkably static." Pet. App. 154a. Four networks account for nearly all of the credit-card transactions that occur in the United States: Visa (45% market share, as of 2013), Amex (26.4%), MasterCard (23.3%), and Discover (5.3%). Pet. App. 13a. The most recent market entrant, Discover, arrived in 1985. Pet. App. 154a.

These credit-card companies administer structurally distinct networks. Visa and MasterCard operate "open-loop" networks. Pet. App. 13a; Pet. App. 55a-56a. In an open-loop network, distinct actors known as "issuers" (primarily banks) issue cards and credit, while other actors known as "acquirers" cover cardholder obligations by paying merchants under reimbursement contracts with the issuers. Pet. App. 13a. The price charged to the merchant in this system is "determined in large part by the interchange fee, which is paid by the acquirer to the issuer as the price for handling its transactions with the cardholder." Pet. App. 13a-14a.

Amex primarily operates a "closed-loop" network. It "acts not only as the middleman network but also as both the issuer and acquirer for the vast majority of transactions involving its cards." Pet. App. 14a-15a; Pet. App. 56a-57a. Without the umbrella network, Amex typically (but not always) has a direct relationship with both cardholders and merchants. Pet. App. 15a. It directly sets both the fees that merchants pay and the benefits that cardholders receive.

Id. Amex charges relatively higher merchant discount fees (and generates relatively more revenue from those fees) than the other credit-card networks. Pet. App. 16a, 19a, 87a-89a.

B. Amex's Standard Merchant Agreements Bar Merchants From Steering Their Retail Customers Toward Lower-Cost Cards

"Throughout the 1960s and 1970s, Visa, MasterCard, and Amex competed fiercely with one another for consumers on both sides of their platforms." Pet. App. 18a. In the 1980s, Visa and MasterCard began running advertising campaigns (such as "It's Everywhere You Want To Be") that questioned "the utility and value of Amex's card products" by targeting Amex's smaller acceptance network and higher merchant fees. Pet. App. 18a-19a. These campaigns encouraged cardholders and merchants to steer transactions toward cheaper cards. Pet. App. 19a, 92a. Facing a loss in market share from these campaigns and other exclusionary conduct, Amex responded by "strengthening contractual restraints designed to control how merchants treat Amex cardholders at the point of sale." Pet. App. 19a. These restraints worked to "ensure that merchants could not state a preference for any payment-card network other than Amex" once the merchants decided to accept Amex's network. *Id.*

The results of these efforts are found in Amex's present-day merchant agreements. Under Amex's standard anti-steering provisions, a merchant that decides to accept Amex cards may not, among other things, "indicate or imply" a preference for a non-Amex form of payment; "dissuade" a customer from using an Amex card; "persuade or prompt . . . any other method of payment"; "impose any restrictions, conditions, disadvantages or fees" on an Amex card "that are not imposed equally on" other payment products, "except for electronic funds transfer, or cash and check"; or "promote" other forms of payment, other than a merchant's private-label card, "more actively than [it] promote[s]" Amex. Pet. App. 19a-20a.

Amex "actively monitors" and "vigorously enforces" these anti-steering provisions. Pet. App. 102a-104a. "In practice," therefore, the provisions "operate to block Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept." Pet. App. 100a. Although Visa and MasterCard previously maintained their own anti-steering provisions, Pet. App. 206a n.43, Amex's provisions apply even when a merchant does not reference Amex at all—such as if a merchant encourages use of a competing card. Pet. App. 101a-102a. This "result[s] in the restraints' effects being inflicted across the . . . industry." Pet. App. 102a.

C. The District Court Held That Amex's Anti-Steering Provisions Restrained Trade Under Section 1

The United States and seventeen States (collectively, "the Government") filed suit against Visa, MasterCard, and Amex, alleging that each company's anti-steering provisions (with limited exceptions) violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they stifled competition in the prices charged to merchants. Pet. App. 21a-22a. Visa and MasterCard voluntarily rescinded their anti-steering provisions. Pet. App. 22a. Amex proceeded to trial. *Id.*

After a seven-week bench trial, the district court held that Amex's anti-steering provisions violated Section 1 by "creat[ing] an environment in which there is nothing to offset credit card networks' incentives . . . to charge merchants inflated prices for their services. This, in turn, results in higher costs to all consumers who purchase goods and services from these merchants." Pet. App. 68a. The district court determined that the anti-steering provisions are vertical restraints analyzed under the rule of reason. Pet. App. 105a-106a. Three aspects of its ruling are particularly relevant: (1) its definition of the relevant market; (2) its finding of anticompetitive effects; and (3) its rejection of procompetitive benefits.

1. *Relevant Market.* To determine whether the anti-steering provisions have anticompetitive effects, the court defined the relevant market as "the market for general purpose credit and charge card network services" provided to *merchants*. Pet. App. 112a. Those "services include the core enabling functions provided by networks, which allow merchants to capture, authorize, and settle transactions for customers who elect to pay with their credit or charge card." Pet. App. 113a. The court thus rejected Amex's argument that, for antitrust purposes, the relevant market should include both the credit-card companies' market for *merchant* customers and their market for *cardholder* customers. Pet. App. 116a-118a.

2. *Anticompetitive Effects.* The district court held that the Government met its burden to show that the

anti-steering provisions "adversely affected competition in the" relevant market. Pet. App. 148a. It relied on two grounds: (1) that Amex had market power, and (2) that the provisions have had actual anticompetitive effects in the merchant-services market.

First, the court held that Amex possesses "significant market share in a highly concentrated market with high barriers to entry, and [is] able to exercise uncommon leverage over [its] merchant-consumers due to the amplifying effect of cardholder insistence and derived demand." Pet. App. 150a. Amex accounts for 26.4% of a market with only four key players. Pet. App. 151a. The court also found that the market contained significant barriers to entry, including "sizable setup costs" as well as a "'chicken and the egg problem'" in which potential entrants "would struggle to convince merchants to join a network without a significant population of cardholders and, in turn, would also struggle to convince cardholders to carry a card associated with a network that is accepted at few merchants." Pet. App. 154a. And "critical to the court's finding of market power" was Amex's "highly insistent or loyal cardholder base." Pet. App. 156a. Finally, the court found "direct evidence" of market power in Amex's historical pricing practices. Pet. App. 165a.

Second, the district court held that Amex's anti-steering provisions had caused actual harm to competition in the market for merchant services. Pet. App. 191a-228a. Given the multi-sided nature of the platform, the court found that the anti-steering provisions "frustrated" price competition among credit-card companies for merchants "to the point of near irrelevance." Pet. App. 195a. The provisions prevented *merchants* from reacting to price increases by steering cardholders to lower-cost cards, and cardholders had no incentive to react to those price increases on their own because the increases were imposed on the merchants (and were essentially unseen to cardholders). *Id.* Without steering, therefore, "the record demonstrate[d] that . . . there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." Pet. App. 197a.

The court next found that these anti-steering provisions "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." Pet. App. 203a. As evidence, it cited Discover's failed effort to switch to a low-cost business model in the 1990s. Pet. App. 203a-207a. That model sought to gain market share by lowering merchant fees. *Id.* Discover's project failed because the anti-steering provisions "denied merchants the ability to . . . steer share to Discover's lower-priced network." Pet. App. 205a.

The court also determined that Amex's anti-steering provisions had generated higher prices for merchants and consumers. Pet. App. 207a-212a. The provisions enabled Amex *and* its competitors to charge higher merchant fees "without fear of other networks undercutting their prices." *See* Pet. App. 210a. Merchants on the receiving end of these price increases would, in turn, "pass most, if not all, of their additional costs along to their customers in the form of higher retail prices." Pet. App. 210a-211a. While Amex cardholders may reap rewards that offset some of these costs, the same could not be said for those who pay in cash or with cheaper cards. Those other consumers subsidize "the cost of the premium rewards conferred by [Amex] on its relatively small, affluent cardholder base in the form of higher retail prices." Pet. App. 211a-212a. "The court view[ed] this externality as another anticompetitive effect" of Amex's anti-steering provisions. Pet. App. 212a.

3. *Procompetitive Benefits*. After concluding that the Government had met its burden of proving anticompetitive effects, the district court next considered whether the anti-steering provisions were justified by the procompetitive benefits proffered by Amex. Pet. App. 228a-258a. Amex argued that the provisions were necessary: (1) to preserve its business model and thus its ability to compete in the credit-card market; and (2) to prevent merchants from free-riding on the Amex brand. Pet. App. 229a.

The district court held that neither justification satisfied Amex's burden. It rejected arguments that the anti-steering provisions promote competition by "safeguard[ing]" Amex's business model. Pet. App. 230a. The court found this argument—i.e., that "Amex's current business model could not survive if exposed to the full spectrum of interbrand competition"—fundamentally inconsistent with the Sherman Act's goal of promoting competition. Pet. App. 235a. The court also held that Amex's free-riding arguments, to the extent they had evidentiary support, were insufficient to "offset the significantly more pervasive harms done to interbrand competition by the same restraints." Pet. App. 251a-252a.

After the district court found a violation, it largely adopted the Government's proposed remedy and entered a permanent injunction. Pet. App. 260a (remedial opinion), 294a (injunction).

D. The Second Circuit Reversed

The Second Circuit reversed the district court's injunction. It held that "[t]he District Court's definition of the relevant market . . . is fatal to its conclusion that Amex violated § 1." Pet. App. 31a. Whereas the district court had defined the market to include only "network services" provided to *merchants*, the circuit court held that the relevant market must also include the market for credit provided to *cardholders*. Pet. App. 32a. "Separating the two markets," the Second Circuit held, "allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities may be." Pet. App. 35a. For two-sided markets, the court reasoned, the antitrust law "must consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" from higher prices. Pet. App. 39a.

The Second Circuit next held that the district court's market-power conclusion was error. Pet. App. 40a-48a. The district court focused on Amex's ability to increase prices to merchants, but, in the Second Circuit's view, "merchant pricing is only one half of the pertinent equation." Pet. App. 44a. A proper analysis would focus additionally on the effects in the cardholder market. Pet. App. 44a. The Second Circuit also concluded that the district court's finding of market power was marred by its reliance on "cardholder insistence." Pet. App 45a-48a. It reasoned that that phenomenon was indicative of "cardholder satisfaction," Pet. App. 48a, which is what "makes it worthwhile for merchants to pay the relatively high fees that Amex charges," Pet. App. 45a-46a.

Finally, the Second Circuit ruled that the district court's findings on anticompetitive effects were erroneous, again because its analysis did not account for cardholder benefits. Pet. App. 49a-53a. In its view, the Government's burden was to show that both merchants *and* cardholders were "worse off overall." Pet. App. 51a. It likewise dismissed the finding that higher retail prices for all consumers were an anticompetitive harm because the district court had not accounted for the rewards enjoyed by *Amex cardholders*. Pet. App. 49a n.52. Without "'a reliable measure of American Express's two-sided price,'" the Second Circuit held, "the District Court could not have properly concluded that a reduction in the merchant-discount fee would benefit the two-sided platform overall." Pet. App. 53a (citation omitted).

Because the Government had not proved "net harm to . . . both cardholders and merchants," the Second Circuit reversed. Pet. App. 54a. It directed the district court to enter a judgment for Amex. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW BECAUSE OF THE INCREASING NEED FOR GUIDANCE ON THE RULE OF REASON AND BECAUSE THE DECISION BELOW CONFLICTS WITH ITS CASES

The Court should grant review initially because this case provides a good opportunity for the Court to clarify how the rule of reason should operate in practice. And it should grant review because the Second Circuit's reasoning conflicts with the guidance that the Court has provided.

A. The Court Has Not Had A Recent Opportunity To Provide Concrete Guidance Over The Rule Of Reason's Structure

1. Section 1 prevents any "contract" "in restraint of trade." 15 U.S.C. § 1. Since all contracts restrain what the parties may accomplish, the Court has always read this language to bar only *unreasonable* restraints. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). To be "unreasonable," moreover, a particular restraint must have anticompetitive effects that "outweigh" any procompetitive justifications. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). The Court has established various "methods" to answer that ultimate balancing question. *Id.*

The Court treats a few restraints—most notably, an agreement among competitors to raise prices or restrict output—as illegal *per se*. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). These restraints are "'always or almost always'" anticompetitive, in that they "'tend to restrict competition and decrease output.'" *Id.* (citation omitted). By "eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work," this *per se* rule also "give[s] clear guidance for certain conduct" to the business community and governmental regulators alike. *Leegin*, 551 U.S. at 886.

The Court subjects most other restraints to the "rule of reason." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). This rule applies on a restraint-by-restraint basis to distinguish those that "may suppress or even destroy competition" from those that "merely regulate[] and perhaps thereby promote[] competition." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin*, 551 U.S. at 886.

Within this general rule of reason, moreover, the Court has adopted an "abbreviated or 'quick-look' analysis" that applies if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *e.g.*, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (*NCAA*); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986). This quick-look analysis reduces the burdens imposed on governments to show anticompetitive harms before shifting to the defendant the burden of establishing procompetitive benefits. *See Cal. Dental Ass'n*, 526 U.S. at 770; *cf. Chi. Prof'l Sports Ltd.*

P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992) (Easterbrook, J.).

2. The Court should grant review because this case provides an important opportunity to clarify how the lower courts should structure the rule of reason in practice. For several reasons, that guidance would serve a needed function.

To begin with, most of this Court's recent cases interpreting Section 1 have asked a different question: whether a restraint falls within the *per se* rule of illegality, the quick-look doctrine, or the full rule of reason. Most recently, for example, the Court held that the rule of reason applies to "reverse payment settlements" in which a patent holder settles with an alleged infringer on terms that require the patent holder to pay the alleged infringer *not* to produce the purportedly patented product. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237-38 (2013). Similarly, in *Leegin*, the Court held that the rule of reason, not the *per se* rule, applies to a manufacturer's decision to impose resale price maintenance on its distributors. 551 U.S. at 882. And, in *California Dental Association*, the Court held that the rule of reason, not the quick-look doctrine, applies to advertising restrictions imposed on California dentists by a nonprofit professional association. 526 U.S. at 780-81; *see also, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006). As these cases prove, this Court has recently shown a clear preference for the rule of reason, and thereby increased the rule's importance.

At the same time, none of the Court's recent cases has explained how the rule of reason should *operate in practice* once the Court decides that the rule applies. The Court has offered only generalities: The "essential inquiry," the Court has said, asks "whether or not the challenged restraint enhances competition." *NCAA*, 468 U.S. at 104. To resolve that inquiry, the Court has added, "the factfinder weighs all of the circumstances of a case." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The rule thus takes "into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10. Yet the Court has also cautioned that the rule of reason does not always require a "plenary market examination," and that the amount of scrutiny depends on the particular restraint at issue. *Cal. Dental Ass'n*, 526 U.S. at 779 (noting that "our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear").

Aside from these generalities, the Court has provided almost no specifics to assist in deciding concrete cases, "leaving lower courts with no clear standards." Jesse Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 Fordham J. Corp. & Fin. L. 591, 594 (2012). For the government to prove anticompetitive effects, for example, "how much needs to be shown and how much can be assumed" from basic economic principles? 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* 403 (3d ed. 2010). Conversely, what must a defendant prove to establish countervailing benefits? How should a court balance the two? *Cf.* Herbert Hovenkamp, *Antitrust Balancing*, 12 NYU

J.L. & Bus. 369, 371-72 (2016) (noting that many lower courts "balance" pro- and anticompetitive effects, but that this Court has "never actually conducted any balancing"). This Court has "not produced many rulings that offer practical instruction" on these questions. Theodore Voorhees, Jr., *Reasoning Through the Rule of Reason for RPM,* 28 Antitrust 58, 62 (2013). This lack of guidance over the rule-of-reason framework engenders uncertainty for all sides, making a rule-of-reason case "one of the most costly procedures in antitrust practice." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 105 (2005). Further, "the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982). This case presents a good vehicle for the Court to provide greater clarity over the rule of reason.

Notably, members of this Court have themselves recognized the need for such clarity. One recent case highlighted how the rule of reason's "'elaborate inquiry'" "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (citation omitted). The rule has also been characterized as "amorphous." *Actavis*, 133 S. Ct. at 2238 (Roberts, C.J., dissenting). And it has been said to be prone to "mistakes" that can impose "serious costs." *Leegin*, 551 U.S. at 917 (Breyer, J., dissenting). This lack of clarity is especially problematic in the antitrust context, as the Court has "emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). Yet this

Court has admittedly left the primary rule governing most restraints anything but clear.

This case proves the problems posed by uncertainty. Before the decision below, the Second Circuit had recognized that the credit-card industry contains more than one market for antitrust purposes, including a market for cards with cardholders as the customers and a market for networks with merchants and card issuers as the customers. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003). This view guided a discovery period in this case that extended many years and a trial that extended "over a seven-week period . . . and featured over thirty fact witnesses and four expert witnesses." Pet. App. 69a. Only after this costly litigation did the Government learn from the Second Circuit that it had allegedly focused on the wrong "market." Pet. App. 31a-40a. To reach that result, moreover, the Second Circuit had to make subtle legal distinctions between this case and *Visa*. Pet. App. 33a-36a. And rather than remand for further proceedings under the revised market definition, the court directed a verdict for Amex based on the Government's alleged failure of proof. Pet. App. 54a. This case confirms that "nowhere" is the combination of "vague rules" and "high stakes" "more deadly than in antitrust litigation under the rule of reason." Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 155 (1984). Years of litigation that were financed through taxpayer dollars were wasted by the rule of reason's uncertainties.

B. The Second Circuit's Holding Conflicts With General Guidance That The Court Has Provided Under The Antitrust Laws

The Court should also grant review because the Second Circuit's legal reasoning conflicts with general antitrust guidance that this Court has provided. The Second Circuit did not dispute two of the district court's key *factual* findings. One: Amex's anti-steering provisions have had the actual market effect of raising the prices that the credit-card industry charges *merchants*. Pet. App. 207a. Two: This price increase has had the corresponding effect of raising the prices that those merchants charge the ultimate consumers for the merchants' goods and services. Pet. App. 210a-211a. Instead, the Second Circuit held that the district court erred *as a matter of law* by ruling that these price increases on merchants and consumers sufficed to show anticompetitive effects under the rule of reason. Pet. App. 49a-50a & n.52. According to the Second Circuit, the Government had to show—additionally—that these price increases were not countered by "offsetting benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52. And because there was no "reliable evidence" accounting for the pricing effects on *both* sides of the credit-card platform, the Second Circuit held that the Government failed to carry its burden of proof. Pet. App. 54a.

The Second Circuit's legal analysis conflicts with this Court's guidance in at least two respects: (1) its broad market definition for assessing anticompetitive harm conflicts with the manner in which this Court has defined the relevant market; and (2) its mandate that the Government affirmatively *dis*prove any allegedly offsetting procompetitive cardholder benefits conflicts with the Court's cases indicating that an antitrust defendant bears the burden of establishing procompetitive justifications for restraints of trade.

1. *Market Definition*. Because of the two-sided nature of the credit-card industry (with both cardholder and merchant customers), the Second Circuit held that the Government bore the burden to prove that anticompetitive harm on merchants (in the form of higher prices on merchants and their ultimate consumers) was not offset by allegedly procompetitive benefits on cardholders (in the form of rewards and services). Pet. App. 51a. In other words, the Second Circuit charged the Government to prove the "net effect," accounting for both sides of the credit-card platform in its initial proof of an anticompetitive effect. This analysis conflicts with this Court's *general* test to identify the "relevant market," and with the Court's *specific* application of that test to multi-sided platforms like credit-card networks.

As a *general* matter, the Second Circuit's approach departs from the test that the Court has long used to identify the applicable market for antitrust purposes. To decide that question, the Court asks whether a product or service is "reasonably interchangeable" with the product or service that is at issue in the specific antitrust case. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (applying this test for monopolization claims under Section 2); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250-51 (1959) (applying this test under Sections 1 and 2).

The credit-card industry's services to *cardholders* cannot meet this test because they are not "reasonably interchangeable" with the industry's distinct services to *merchants*. *Grinnell*, 384 U.S. at 571. If the credit-card industry raised prices on merchants (as the district court found, Pet. App. 207a), those merchants could not simply switch from the merchant services that they purchase to the cardholder services that cardholder customers purchase. While interrelated, the services offered to customers on one side of the platform are fundamentally different "products" from those offered on the other side. And simply because the same company, by virtue of its business model, provides different services to different customers does not mean that those services are somehow in the same relevant market.

Rather than apply the established market-definition test, the Second Circuit adopted a new one. Because the price in the market for merchant services *affects* the price in the market for cardholder services, the Second Circuit held that the cardholder and merchant markets should be consolidated into a single market for antitrust purposes. Pet. App. 39a-40a. It is often the case that pricing in one market affects pricing in another, but that interdependency has never collapsed the two markets into one for antitrust purposes. Take *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). That case considered the market for Kodak *replacement parts and services* for photocopiers. *Id.* at 456. The Court held that the market for replacement parts could be considered a distinct market, *id.* at 481-82, even though the price of replacement parts would have some pricing effects on the market for Kodak photocopiers, *cf. id.* at 495 (Scalia, J., dissenting). Similarly, pricing in the market for components often affects pricing in the market for final goods. This case proves the point in that the higher costs from credit-card transactions incurred by merchants pass on to consumers in the form of higher retail prices. Pet. App. 210a-211a. But this Court has never said that all of these distinct markets should be treated as a single one for that reason. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741-42 (1977).

As a *specific* matter, the Second Circuit's decision departs from this Court's cases regarding two-sided platforms. Those platforms are nothing new. Newspapers, which bring together readers and advertisers, predate the Sherman Act. Notably, the Court has treated the readership market as separate from the advertising market under the antitrust laws. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). In *Times-Picayune*, a corporation required advertisers seeking to advertise in its "Times-Picayune" newspaper (the only morning paper in New Orleans) to advertise additionally in its "States" newspaper (an evening paper competing with another evening paper, the "Item"). *Id.* at 597-600. The United States asserted that the corporation had adopted an unlawful tying scheme by requiring those who wanted to advertise in the dominant Times-Picayune to advertise in the evening States. The district court ruled for the United States. *Id.* at 600-01.

This Court disagreed. To do so, it recognized that a newspaper "is a dual trader in *separate* though interdependent markets." *Id.* at 610 (emphasis added). A newspaper "sells the paper's news and advertising content to its *readers*," and then "that readership is in turn sold to the *buyers of advertising space*." *Id.* (emphases added). The case, however, "concern[ed] solely one of these markets." *Id.* The corporation did not require *readers* to purchase both the States and the Times-Picayune; it required only *advertisers* to do so. *Id.* The Court thus reversed initially because the Times-Picayune did not have a dominant position in the *advertising* market in New Orleans. *Id.* at 611-12. It then held that, while *readers* distinguished between the corporation's two papers, the *advertisers* would have viewed the papers as the same product—readership. *Id.* at 613. Thus, the Court ruled that the corporation had not tied distinct products together when assessed from the advertiser perspective; the products were identical to advertisers. *Id.* at 613-14; *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951) (upholding finding that a newspaper unlawfully monopolized advertising market without considering effects on readership prices); *Beryln Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576, 582-83 (4th Cir. 2003) (distinguishing markets for readers and advertisers).

Even though *Times-Picayune* involved a two-sided platform and even though the Court held that each side of that platform was a "separate" market for antitrust purposes, 345 U.S. at 610, the Second Circuit did not cite, let alone distinguish, that case. Yet the decisions are irreconcilable. If the court thought that *Times-Picayune* was outdated based on emerging literature concerning two-sided platforms, it should have done what Judge Posner did with respect to maximum resale price maintenance: The court should have followed *Times-Picayune*'s market analysis despite its disagreement with the analysis because "it is this Court's prerogative alone to overrule one of its precedents." *Khan*, 522 U.S. at 19; *cf. Kimble*, 135 S. Ct. at 2406.

The Second Circuit's decision also conflicts with the way *NCAA* defined the relevant market for purposes of identifying anticompetitive effects. There, the Court considered whether the NCAA had unreasonably restrained trade by restricting the number of college football games that broadcasters aired on television. 468 U.S. at 91-96. It, too, implicated a multi-sided platform with television broadcasters joining advertisers, viewers, and content providers. The NCAA argued that, rather than examine only the higher prices on broadcasters (and advertisers) caused by its restraint, the Court should consider the other side of the platform—namely, how the NCAA's television restrictions affected *total viewership* of football games (both live and via television). *See* Br. for the Petitioner at 8-9, 11, *NCAA*, 468 U.S. 85 (No. 83-271). The Court did not do so when determining anticompetitive effects, finding that the plaintiff had met its burden to show those effects based on the higher broadcaster prices (and lower number of televised games) alone. *NCAA*, 468 U.S. at 105-06.

Indeed, the Second Circuit's view—that the district court should have considered the effects on all sides of the platform—adopted arguments here that were accepted only by the dissent in *NCAA*. The *NCAA* dissent criticized the district court because "[i]t made no explicit findings concerning the effect of the plan on *viewership* and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing the market penetration of NCAA football." *Id.* at 133 (White, J., dissenting) (emphasis added). And the dissent criticized the majority's reliance on a rise in prices on broadcasters and advertisers because those rising prices "more properly should be attributed to an increase in output, measured in terms of viewership." *Id.* at 130; *cf.* 7 Areeda & Hovenkamp, *supra*, at 394-95 (discussing different views of "output" in *NCAA*); *Chi. Prof'l Sports*, 961 F.2d at 673-74 (same).

2. *Burden of Proof*. The Second Circuit's market definition led it astray in another way: It effectively shifted to the Government the burden of *disproving* any procompetitive benefits for the anti-steering provisions when identifying their anticompetitive effects. With the market defined to include cardholders, the Second Circuit held, the Government bore the initial burden to prove that any anticompetitive effects caused on the prices for merchants (and their consumers) were not offset by any alleged countervailing benefits to Amex cardholders. *E.g.*, Pet. App. 49a (noting that district court failed to consider the "two-sided net price"); Pet. App. 51a-52a (noting that the Government was required to show anticompetitive effects on the market as a whole, including Amex cardholders). This reasoning effectively collapsed the staggered rule-of-reason framework into a single, all-encompassing step.

That analysis, too, conflicts with the Court's cases. The Court has noted that a defendant—not the Government—bears the burden of establishing the procompetitive justifications for a restraint. "An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." *Actavis*, 133 S. Ct. at 2236; *see Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part) ("In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification."). This Court has also limited what can qualify as a "procompetitive" justification. Competition generally "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

II. THE COURT HAS OFTEN GRANTED REVIEW WHERE, AS HERE, THE QUESTION PRESENTED IS IMPORTANT TO THE NATIONAL ECONOMY

A. The Court has often granted certiorari when cases have raised issues that were important to the national economy. That makes sense. Here, for example, a circuit in New York should not have the final say over the prices of everyday retail transactions across the whole country.

NCAA provides a case in point. As noted, the Court granted review over whether the NCAA had unreasonably restricted the amount of college football games that television stations could air. 468 U.S. at 91-96. Notwithstanding the "uniqueness of this product," *id.* at 111, the issue affected the entire country—ranging from fans of the University of Oklahoma to potential advertisers for games played by the University of Georgia, *id.* at 88; *cf. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of*

Okla., 463 U.S. 1311, 1313 (1983) (White, J., in chambers) (noting that the decision below "would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws").

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), provides another example. That case addressed the antitrust implications of blanket licenses for copyrighted musical compositions that two organizations sold. *Id.* at 4-7. While this product was again a unique one, the blanket licenses contained the rights to "*[a]lmost every* domestic copyrighted composition." *Id.* at 5 (emphasis added). The Court thus granted review "because of the importance of the issues to the antitrust and copyright laws." *Id.* at 7.

Similar cases are not hard to find. *E.g.*, *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 663 (1975) (granting review to consider whether investors could challenge the system of fixed commissions imposed by the major stock markets); *Nat'l Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 820 (1978) (granting review over antitrust-immunity question "[b]ecause of the importance of the issue for the agricultural community and for the administration of the antitrust laws"); *Sylvania*, 433 U.S. at 42 (granting review "to resolve [an] important question of antitrust law" for manufacturers and retailers).

B. This case fits that mold because it affects an astronomical number of retail transactions in the United States. The U.S. credit-card market is the world's second largest pool of unsecured consumer debt in the world (after student loans). Victor Stango

& Jonathan Zinman, *Borrowing High versus Borrowing Higher: Price Dispersion and Shopping Behavior in the U.S. Credit Card Market*, 29 The Review of Financial Studies 979, 980 (2016). In 2011, there were 22.2 billion transactions on credit cards with a total purchase volume of $2.05 trillion. Jack Soll, et al., *Consumer Misunderstanding of Credit Card Use, Payments, and Debt: Causes and Solutions*, 32 Journal of Public Policy and Marketing 65, 66 (2013). By 2013, the total purchase volume had grown to about $2.399 trillion. Pet. App. 74a. Thus, "[a]n inefficient or monopolized payment system . . . can distort consumer and merchant choices and make underlying markets in goods and services less efficient"—on a very large scale. Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 627 (2006). Whether assessed from the perspective of consumers or from that of merchants, this case's importance cannot be overstated.

Consumers. The question affects all American consumers. "Credit cards have become a major factor in the economic life of American households." Sarah Jiang and Lucia Dunn, *New Evidence on Credit Card Borrowing and Repayment Patterns*, 51 Economic Inquiry 394, 394 (2013). By one estimate, "among all households with incomes over $30,000, 92 percent hold at least one card." Douglas Akers, et al., *Overview of Recent Developments in the Credit Card Industry*, FDIC Banking Review 23, 24 (2005). The average for all households is 6.3 credit cards. *Id.*

Even for consumers without credit cards, the question is important. Because (1) credit-card transactions cost more than cash transactions and (2) merchants often charge the same price for their goods and services no matter the type of payment used, credit-card use leads to a "nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Res. Bank of Boston 1 (Pub. Pol'y Discussion Paper No. 10-03, Aug. 31, 2010), https://goo.gl/o6BYUH. Any consumer paying by cash, check, debit card, or other cash equivalent subsidizes a consumer paying by credit card. Pet. App. 210a-211a. One estimate finds that the lowest-income households transfer $21 out per year, and the highest-income households receive $750 each year. Schuh, *supra*, at 1. This subsidy arises from the fact that, overall, credit-card use "induces" a price markup of 0.82% for *all* prices for all goods, regardless of how a particular consumer pays for the particular good. *Id.* at 27.

These subsidies arise from many factors, including, as noted, merchant "reluctant[ance] to price differentially at the point of sale." Frankel & Shampine, *supra*, at 672. But "modern retail payment technology makes [differential pricing] easier than ever and there is no reason to impede one of the few ways merchants have to align their interests with those of their customers." *Id.* The anti-steering provisions bar that aligning.

Merchants. The question likewise affects millions of merchants. Today, credit cards are accepted at "nearly all retail establishments." Akers, *supra*, at 24. About 3.4 million merchants take Amex, which is accepted by far fewer merchants than Visa and MasterCard. Pet App. 184a. Collectively, merchants paid more than $52 billion in credit-card transaction fees in a recent year. *Merchant Processing Fees in the U.S.*, Nilson Rep. 12 (HSN Consultants Inc., Carpinteria, Cal., May 2014). Total fees paid by merchants add up to more than the entire value of the U.S. music industry and more than all domestic Hollywood box office sales. Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1323-24 (2008).

These fees are "the ultimate transaction cost." *Id.* at 1324. "[S]everal studies have concluded that credit cards currently cost merchants substantially more than" other payment methods. Frankel & Shampine, *supra*, at 672. These costs are "six times as much as cash," Levitin, *supra*, at 1322-23, and three times as much as debit-cards, *Merchant Processing Fees*, *supra*, at 12. Testimony in the trial showed, for example, that one airline paid twice in *credit-card* costs what it paid in *labor* costs. Pet. App. 221a-222a. Whether these pervasive fees are optimal is "the central issue in the economics of credit card networks." Dennis Carlton and Ralph Winter, *Competition Policy & Regulation in Credit Card Markets: Insights from Single-Sided Market Analysis* 4 (2014), https://goo.gl/n4ssN7. Merchants have already proved their deep interest in this case. Many of the best-known names in the country filed statements about the scope of relief in the district court. Pet. App. 1a-3a, 262a-263a.

In short, because the Court "selects its docketed cases on the basis of the general importance of the issues they present," *K Mart Corp. v. Cartier, Inc.,* 485 U.S. 176, 191 (1988) (Scalia, J., dissenting), the Court should grant review in this case. "Given the pervasive significance of" credit cards to the national economy, the question here is "of undoubted importance." *Boggs v. Boggs*, 520 U.S. 833, 836 (1997); *see Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (reviewing question with "broad impact . . . on the national economy").

III. THE SHERMAN ACT'S CENTRAL PURPOSE—TO ENHANCE CONSUMER WELFARE THROUGH ALLOCATIVE EFFICIENCY—SUPPORTS REVIEW

A. Since the late 1970s, this Court has recognized that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)). "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986) (Posner, J.). At bottom, this efficiency focus directs courts to consider whether a particular restraint has "impair[ed] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *Ind. Fed'n of Dentists*, 476 U.S. at 459.

Two well-known examples show this Court's modern efficiency focus. On the one hand, the Court has continued to identify "[r]estrictions on price and output" as "the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA*, 468 U.S. at 107-08; *Leegin*, 551 U.S. at 886. Those restrictions represent the "core case for antitrust regulation" because they generate an inefficient "externality." Douglas Ginsburg, *Rationalizing Antitrust*, 35 Antitrust Bull. 329, 331 (1990). *Private* cartels impose *societal* costs in the form of "a transfer of wealth from consumers to producers as well as a deadweight loss to society" from the lost transactions that do not occur as a result of the higher prices. *Id.*; *see* Bork, *supra*, at 66-67, 98-101.

On the other hand, the Court has gradually changed its position toward vertical restraints that a manufacturer imposes on its retailers or distributors—moving away from *per se* rules and toward the rule of reason for those restraints. *Leegin*, 551 U.S. at 901-02 (describing history). The Court has done so because of the efficiency-enhancing potential that the restraints have. While they reduce *intrabrand* competition (competition among retailers selling the same brand of a product), they may ultimately enhance *interbrand* competition (competition among different brands of the same product). *Id.* at 890.

A manufacturer, for example, may impose resale price maintenance—barring its retailers from pricing its product below a certain price—to fix a "free rider" problem. *Chi. Prof'l Sports*, 961 F.2d at 674 ("Control of free-riding is . . . an accepted justification for cooperation."). Retailers who furnish services with respect to the manufacturer's product may generate greater demand for that product (but have to price the product at a higher amount that accounts for the costs of those services). If "discounting retailers" who do not furnish the services could undercut the service providers, it could lead to an elimination of the services that consumers would otherwise demand. *Leegin*, 551 U.S. at 890-91; *cf. Rothery Stor-*

age & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 212-13 (D.C. Cir. 1986) (Bork, J.).

B. These efficiency concerns further justify the Court's review in this case. At bottom, Amex's anti-steering provisions distort allocative efficiency because they impose costs on one side of the platform (the merchants) that are not *internalized* by those making the ultimate decision about how to pay for the transaction on the other side (the cardholders). Because the Government's case seeks to correct this "externality" problem, it, too, falls within "the core case of antitrust regulation." *See* Ginsburg, *supra*, 35 Antitrust Bull. at 331; Pet. App. 212a. This point is confirmed by comparing the clear anticompetitive effects on one side of the platform with the murky procompetitive justifications on the other.

1. *Anticompetitive Effects On Merchant Side*. The Second Circuit nowhere disputed the district court's holding that the anti-steering provisions have stifled interbrand competition among credit-card companies with respect to the prices that they charge merchants to use their credit cards. *Compare* Pet. App. 49a-53a (Second Circuit's analysis), *with* Pet. App. 191a-228a (district court's analysis). The Second Circuit's ruling instead hinged on the conclusion that the alleged benefits to Amex cardholders might offset these anticompetitive pricing effects. That was for good reason: *Both* economic theory *and* actual practice illustrate that the anti-steering provisions would have, and have had, anticompetitive effects on merchant prices. Indeed, those effects arise precisely because of the nature of the two-sided platform.

As for economic theory, if merchants cannot steer cardholders from high-cost cards to low-cost cards, it will make little sense for competing credit-card companies to lower the prices that they charge to merchants because that price decrease will not result in a higher market share. That is because, short of not accepting a particular credit card *altogether* for *all* transactions, the merchants do not make the ultimate decision about which credit card will be used for any given transaction. The cardholders do. Without steering, then, merchants have no ability to respond to a credit-card company's lower prices by shifting transactions to the price-cutting company. *See Amicus* Br. of John M. Connor et al. in support of Government's Pet. for Reh'g, at 5-6, *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016) (R.454, No. 15-1672); *see also* Pet. App. 194a-203a.

As for actual practice, the district court found, as a fact, that the anti-steering provisions have allowed "all four networks to raise their swipe fees more easily and more profitably than would have been possible were merchants permitted to influence their customers' payment decisions." Pet. App. 207a. Not only that, it determined that one credit-card company, Discover, "saw an opportunity to leverage its position as the lowest-priced network to gain share." Pet. App. 204a. But that opportunity failed precisely because of the anti-steering provisions. Pet. App. 205a. Those provisions "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id.*

Critically for antitrust purposes, Amex's anti-steering provisions have restricted horizontal *inter-*

brand competition among competing credit-card companies. This reduction of "interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" *Leegin*, 551 U.S. at 890 (quoting *Khan*, 522 U.S. at 15). Indeed, the reduction of *interbrand* competition distinguishes Amex's anti-steering provisions from other vertical restraints that this Court's recent cases have considered; the primary effect of those restraints was theoretically to limit only *intrabrand* competition. *E.g.*, *id.* This reduction instead makes Amex's anti-steering provisions similar in economic effect to horizontal restraints. By hindering the ability of merchants to share information with cardholders about whether a cardholder's use of a card is "cost justified," the provisions have "disrupt[ed] the proper functioning of the price-setting mechanism of the market." *Ind. Fed'n of Dentists*, 476 U.S. at 461-62; *see also* Frankel & Shampine, *supra*, at 672 ("Vertical restrictions on merchants prevent direct competition between the networks from occurring at the point of sale.").

2. *Procompetitive Effects On Cardholder Side*. The Second Circuit believed that the rewards and services that Amex offers to Amex *cardholders* could offset any economic harm from reduced price competition for *merchants*, Pet. App. 49a-53a, and that the Government had not met its burden to prove the "net harm to Amex consumers as a whole," Pet. App. 54a. But the Second Circuit's assumption that these benefits and services to certain cardholders were *automatically* procompetitive was misplaced. To be procompetitive, the rewards and services must arise from Amex's *efficiencies*, not from the overall mar-

ket's pricing *inefficiencies*. And the fact that Amex must resort to the anti-steering provisions is itself compelling evidence that they arise from the latter.

As the district court explained, merchants pass along any higher credit-card prices that arise from the anti-steering provision's anticompetitive effects to *all* of their consumers in the form of higher retail prices for their goods or services. Pet. App. 207a-212a; *cf.* Pet. App. 49a n.52. Thus, with the anti-steering provisions in place, Amex's "customers do not internalize the full cost of their payment choice," Pet. App. 195a, and instead receive a subsidy from other retail customers. This subsidy leads the anti-steering provisions to "distort competitive markets by steering consumers toward more costly and less efficient payment methods." Frankel & Shampine, *supra*, at 672 (discussing interchange fees). In this respect, this case has flipped *Leegin* on its head. The restraint in that case sought to *eliminate* a free-rider problem, 551 U.S. at 890-91; the restraint in this case has *exacerbated* a free-rider problem.

At day's end, it cannot be called an "efficiency" justification for a Visa holder to pay higher prices at the gas station in order to subsidize an Amex holder's frequent flyer miles. Or in the language of economics: "[I]f the effect of the restraint is to increase the cross-subsidization of the users of other platforms to use the given platform, it is to be expected that usage of the platform will increase." *Amicus* Br. of John M. Connor, *supra*, at 8 n.9. But this is "only evidence of distortion in the competitive process, not that the restraint is pro-competitive." *Id.*

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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