No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

December 14, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] AAI submits this brief because the Second Circuit's rule requiring plaintiffs to show "overall harm" to both sides of a two-sided platform to establish a prima facie case is inconsistent with basic antitrust principles and, if adopted, would significantly impair the enforcement of the antitrust laws.

---

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of the Advisory Board who represent (or whose firms represent) parties in related private litigation against American Express were recused from any involvement in this brief. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Are two-sided platforms sufficiently unique to require an exemption from the normal rules for defining relevant markets and assigning the burdens of proof in a rule of reason case? Until the court of appeals' decision below, no court had so held. And neither the Second Circuit nor American Express (Amex) has made the legal or economic case for adopting a more demanding rule of reason for markets involving two-sided platforms than for other markets. While two-sided platforms may involve feedback effects between the two sides, such effects do not warrant special antitrust rules. Feedback effects are common in the economy and so are two-sided platforms. Precedent and good antitrust policy favor the application of ordinary, well-established antitrust principles to two-sided platforms. *Cf. United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (applying traditional antitrust principles to monopolization of technologically dynamic operating system market which involved a two-sided platform characterized by substantial network effects).

The district court held that Amex's anti-steering restrictions on merchants violate the rule of reason. The anti-steering provisions (which Amex refers to as "non-discrimination provisions," or NDPs) prevent merchants that accept Amex cards from offering inducements to consumers to use other credit cards or payment methods (except cash or the like) that have lower merchant fees, or even from truthfully inform-

ing consumers of the comparative costs of using an Amex card.

The district court found that the United States and several States (plaintiffs) had made out a prima facie case that the anti-steering provisions were anti-competitive interbrand restraints because they eliminated incentives for any of the credit card platforms (Amex, Visa, MasterCard and Discover) to compete for merchants on the basis of lower merchant fees. The court found that this had the effect of raising merchant fees across the market, which merchants passed on to *all* consumers (regardless of the form of payment used) in the form of higher prices for their goods and services. Moreover, the restraints deterred entry of new, low-cost business models and thereby impaired innovation and consumer choice. On factual and legal grounds, the district court rejected the pro-competitive justifications proffered by Amex that the restraints enabled Amex to provide its cardholders with high rewards and thereby to preserve its differentiated business model and that the restraints were needed to prevent free riding by merchants.

The Second Circuit reversed, concluding that plaintiffs had failed to establish a prima facie case. The court of appeals held that plaintiffs had not met their burden of showing anticompetitive harm because they purportedly failed to account for the benefits to Amex cardholders from the restraint. According to the court, plaintiffs were required to show "an actual adverse effect on competition in the market *as a whole*," which meant showing that "*all* Amex consumers on both sides of the platform" were

harmed. Pet. App. 49a, 51a (internal quotation marks omitted).

This ruling should be reversed for several reasons.

1. A prima facie case does not require showing harm to both sides of a two-sided platform. The court of appeals' conclusion to the contrary is flawed, as an initial matter, because the relevant harms and benefits are those to the market(s) and consumers as a whole; even if higher benefits to Amex cardholders fully offset the higher fees charged to Amex merchants, anticompetitive harm would remain. In any event, an overall harm requirement is not legally supportable. The case law involving two-sided platforms does not impose such a requirement. Nor can such a requirement rest on plaintiffs' supposedly erroneous market definition, for two reasons. First, as explained in the next part, a relevant market may comprise one side of a two-sided platform. And second, a showing of actual detrimental effects, which the district court found here, obviates the need for plaintiffs to define a relevant market.

An "overall harm" requirement is not supported by a danger of "false positives." Assuming *arguendo* that increased benefits to Amex cardholders may properly be considered to be a procompetitive benefit, rather than part of the distortion of the competitive process, separating the cardholder and merchant sides of the platform means only that establishing anticompetitive harm on the merchant side shifts the burden to the defendant to establish offsetting benefits on the cardholder side. Neither Amex nor the

court of appeals has suggested that the government was in a better position to *disprove* offsetting benefits to Amex cardholders than Amex was to prove them as normally required under the rule of reason. Nor does the likelihood of *some* offsetting benefits logically imply that the burden should be on the plaintiffs to show overall harm in the first place. And since only a portion of Amex's higher merchant fees were passed along to cardholders in the form of rewards, it is plain that plaintiffs did establish overall harm, at least sufficiently to shift the burden to Amex to show otherwise.

Other considerations do not warrant a heightened burden to make out a prima facie case. The fact that the restraint is vertical rather than horizontal makes no difference. In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), this Court held that a vertical *intrabrand* price restraint is subject to the conventional rule of reason. A vertical restraint that impedes *interbrand* competition, as here, certainly warrants no more favorable treatment. If anything, it warrants less favorable treatment. *Leegin* identified circumstances analogous to those here as requiring "careful scrutiny." Nor is it appropriate to raise plaintiffs' initial burden based on a court's *impression* that the defendant has legitimate procompetitive justifications, as the court of appeals appear to have done here.

2. A relevant market may comprise one side of a two-sided platform. Indeed, combining two complementary sides of credit card platforms violates basic principles of market definition, which focus solely on demand substitution factors. That there are feedback

effects between two sides of the platform is not a ground for combining the two complementary services in a single relevant market. Feedback effects can be taken into account even if the market is defined as one side, as the plaintiffs did in this case. Nor is it appropriate to combine the two sides on the theory that they are part of the same product, or have no functionality without the other. Functionally linked products may be in separate product markets even when they are sold to the same consumers; when they involve completely different groups of consumers involving different market circumstances they are necessarily in different product markets.

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953), supports applying standard market-definition principles to two-sided platforms. In that case, which involved tying sales of advertising in one newspaper edition to sales in another edition, this Court recognized the interdependence of the subscriber and advertiser markets and found error in conflating the two markets. Amex's grounds for distinguishing *Times-Picayune* lack merit.

While this Court has recognized that complementary products may sometimes be combined in "cluster" markets, the conditions for such clustering, namely administrative convenience or the recognition that the cost of a basket of products *sold to the same consumers* is lower than the cost of providing the products separately, are not applicable here.

3. Raising the burden of production on plaintiffs to make out a prima facie case in cases involving two-sided platforms would harm competition by discour-

aging some meritorious claims and encouraging anti-competitive conduct, i.e., raising the risk of "false negatives." This is particularly of concern because, as all agree, two-sided platforms are increasingly common. And the economics of internet platforms often lead to successful firms dominating their markets because of significant barriers to entry from network effects, among other things. Accepting the logic of the court of appeals would raise the burden on plaintiffs to show unlawful monopolization by a dominant platform even when the firm engages in exclusion for the sole purpose of raising prices or deterring innovation. Moreover, it may call into question the applicability of the per se rule to price fixing on one side of a two-sided platform.

The Second Circuit's special rules would add undue complexity, cost, and uncertainty to already complicated and lengthy litigation under the rule of reason. Even without the extra burden, it is difficult for plaintiffs to win a rule of reason case. Given the existing hurdles, it makes no sense to raise the bar even higher to prove a rule of reason violation in markets involving two-sided platforms.

ARGUMENT

I. A PRIMA FACIE CASE DOES NOT REQUIRE SHOWING HARM TO BOTH SIDES OF A TWO-SIDED PLATFORM

"The rule of reason is designed and used to eliminate anticompetitive transactions from the market." *Leegin*, 551 U.S. at 898. All parties and the courts below agree that under the rule of reason, if plaintiffs

establish that a restraint is "*prima facie* anticompetitive," then the burden shifts to the defendant to show a "procompetitive justification." *California Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 771 (1999); *accord Fed. Trade Comm'n v. Actavis, Inc.*, 133 S. Ct. 2223, 2236 (2013) ("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.").

The law places the burden of establishing procompetitive benefits on the defendant largely because "[t]he defendant, being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1505, at 432 (4th ed. 2017); *see* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 10 (2010) (*Horizontal Merger Guidelines*) (merging firms must substantiate efficiency claims because "much of the information relating to efficiencies is uniquely in the possession of the merging firms"); *see generally Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof.").

The court of appeals essentially reversed the burden of proving procompetitive benefits. The court held that in a market involving a two-sided platform like credit cards, it was insufficient for plaintiffs merely to establish anticompetitive harm on one side of the platform. Rather, the court held that plaintiffs

must also *disprove* that *benefits* on the cardholder side equal or exceed those harms. According to the court, "Plaintiffs' initial burden was to show that the NDPs made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a; *id.* at 53a ("Without evidence of the net price affecting consumers on both sides of the platform, the District Court could not have properly concluded that a reduction in the merchant-discount fee would benefit the two-sided platform overall.").

The Second Circuit's "overall harm" requirement is without foundation.

A. An "Overall Harm" Requirement Is Not Legally Supportable

As an initial matter, the court of appeals' reasoning is flawed because the benefits the district court purportedly failed to take into account do not offset (or correspond to) all the harms that the district court found. That is, even if the benefits to *Amex* cardholders exactly offset the higher *Amex* merchant fees, there remains the disruption of the price-setting mechanism and channeling of competition away from the merchant side of the platform, which raises merchant fees on *all other* credit cards and harms *non-Amex* consumers and innovation. *See* U.S. Br. 40-43, 47, 49; Pet'rs Br. 41-46. The court's exclusive focus on the Amex platform was erroneous.[2]

---

[2] The court of appeals criticized the district court's reliance on its (unchallenged) finding that *all* consumers that shop with merchants that accept Amex credit cards are harmed because higher merchant fees are passed on in the form of higher retail

In any event, there is no requirement that an antitrust plaintiff show net harm to *both* sides of a two-sided platform to establish a prima facie case. *See, e.g., Times-Picayune*, 345 U.S. 594 (harm to advertisers; no showing of harm to readers); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (same); *Realcomp II Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815 (6th Cir. 2011) (anticompetitive harm to home sellers using multiple listing service; potential benefit to certain home buyers raised and rejected as a defense).

The court of appeals' holding to the contrary hinges on its conclusion that the relevant market must be defined to include both sides of a two-sided market. Pet. App. 49a ("District Court's erroneous market definition caused its anticompetitive effects analysis to come up short"). But that reasoning is doubly wrong. It is wrong because a relevant market may comprise of one side of a two-sided platform, as explained in part II. And it is wrong because it is well settled that proving anticompetitive harm directly, by showing actual detrimental effects, is an *alternative* to proving anticompetitive harm indirectly by showing market power in a relevant market. *See Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to de-

---

prices. According to the Second Circuit, this "fails to take into account the offsetting benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52. But this criticism is backwards. The most relevant anticompetitive harms and procompetitive benefits are *market-wide* effects, which the court of appeals ignored, not those specific to *Amex* cardholders or merchants.

termine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986))). Relying on a supposed market-definition flaw to defeat actual detrimental effects is bootstrapping. *Cf. Horizontal Merger Guidelines* § 4 ("Evidence of competitive effects can inform market definition . . . .").

B. An "Overall Harm" Requirement Is Not Supported by a Danger of "False Positives"

The Second Circuit's "overall harm" requirement is not justified by policy concerns over "false positives," to the extent such concerns are relevant. The court reasoned erroneously that "[s]eparating the two markets allows legitimate competitive activities in the [cardholder side of the] market for general purposes to be penalized no matter how output expanding such activities may be." Pet. App. 35a. But the district court's ruling does no such thing.

Assuming *arguendo* that increased benefits to Amex cardholders may properly be considered as offsetting "procompetitive benefits," rather than part of the distortion of the competitive process, separating the two markets means only that establishing anticompetitive harm on the merchant side shifts the burden to the defendant to establish those offsetting

benefits.[3] Amex does not and could not reasonably argue that the government was somehow in a better position to *disprove* offsetting benefits to Amex's cardholders than Amex was to prove such benefits. *Cf.* Herbert Hovenkamp, *The Rule of Reason*, Fla. L. Rev. (forthcoming 2018) (manuscript at 22), http://ssrn.com/abstract=2885916 ("To the extent that the defendants' expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.").

Nor does the likelihood of *some* offsetting benefits logically imply that the burden should be on the plaintiffs to show overall harm in the first place. *See* Cert. Op. 24-25 (arguing that "[e]vidence about the

---

[3] Given the distortion of the competitive process, the Solicitor General properly questions whether enhanced Amex cardholder rewards would be a legitimate procompetitive benefit even if higher merchant fees were completely passed on to Amex cardholders. *See* U.S. Br. at 41-42. At the same time, the Solicitor General proposes a rule that "legitimate procompetitive benefits in a closely related and interdependent market" should be considered at the second step of the rule of reason analysis if, but only if, the defendant shows that the challenged restraint is reasonably necessary to achieve those benefits. *Id.* at 52.

This Court has held that, as a general matter, anticompetitive harm in one market may not be offset by benefits that may accrue in other markets. *See, e.g., United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963). Since this case does not turn on whether an exception to the out-of-market benefits rule is appropriate, the Court need not reach the Solicitor General's proposal. To the extent the Court does address it, any exception to the out-of-market benefits rule under the rule of reason must be predicated on benefits to the competitive process and *consumers generally*.

NDPs' effect on merchant fees does not support a confident inference of harm to competition overall because such effects necessarily will [a]ffect cardholders"). Two-sided platforms typically involve "balancing the prices on two sides of the market." Pet. App. 9a (citation and internal quotation marks omitted). But a two-sided platform is not like a scale on which every weight on one side must be offset by an equal weight on the other side. On the contrary, price effects on one side are *not* perfect substitutes for price effects on the other; that is a defining characteristic of two-sided markets. *See* Dennis W. Carlton & Ralph A. Winter, *Vertical MFN's and the Credit Card No-surcharge Rule* 25-28, 34 n.41 (June 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982115.

This case demonstrates the point. The Second Circuit recognized, as Amex conceded, "not all of Amex's gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. Accordingly, evidence of higher merchant fees *did* suggest a net harm to Amex merchants and cardholders, at least with sufficient confidence to shift the burden to Amex to show otherwise.[4]

In short, even accepting that offsetting benefits to Amex cardholders constitute a legitimate procom-

[4] The Solicitor General correctly observes that the court of appeals did not question the district court's conclusion that the anti-steering rules increased Amex's two-sided price, but simply faulted plaintiffs for failing to calculate a reliable *measure* of its two-sided price. U.S. Br. 48.

petitive benefit to place into the balance, applying the standard burden-shifting rules does not threaten to chill procompetitive conduct. On the contrary, as explained in part III, adopting the Second Circuit's "overall harm" requirement would create a substantial risk of "false negatives," thereby encouraging *anticompetitive* conduct.

C. Other Considerations Do Not Warrant Raising Plaintiffs' Burden of Production

That the restraint at issue is vertical rather than horizontal provides no basis for raising the burden on plaintiffs to demonstrate a prima facie case, particularly where, as here, the restraint restricts *interbrand* competition.

In *Leegin*, the Court stated that *intrabrand* resale price restraints were not necessarily anticompetitive because they might be accompanied by increased services, which would benefit *interbrand* competition. 551 U.S. at 895. But notwithstanding the potential procompetitive benefits, the "standard" rule of reason applied. *Id.* at 898; *see also McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 836 (11th Cir. 2015) (rejecting argument that, "given the high likelihood that an exclusive dealing arrangement is actually procompetitive, a plaintiff alleging illegal exclusive dealing must show 'clear evidence of anticompetitive effect'") (citation omitted). Amex's anti-steering restraints, although vertical in nature, restrict *interbrand* competition and thus cannot warrant more favorable treatment. On the contrary, *Leegin* suggests stricter scrutiny is appropriate for a vertical restraint on *interbrand* competition. Indeed, one of

the harms caused by the restraints—channeling competition to a high (merchant) price, high (cardholder) rewards equilibrium—is analogous to one of the "economic dangers" *Leegin* identified. 551 U.S. at 897 ("careful scrutiny" required when "'resale price maintenance spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets'" (quoting F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990))) (brackets in original omitted).

Nor is it appropriate to raise plaintiffs' initial burden to show anticompetitive harm based on a court's *impression* that defendants have a legitimate procompetitive justification, which the defendant must establish at the second stage. *See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 48-50 (2016) (criticizing courts' nontransparent "conflation of pro- and anticompetitive effects at the initial stage [which] undermines the 'structure' claimed for burden-shifting and requires the balancing of incommensurate values in an implicit—and thus opaque—manner"); Hovenkamp, *Rule of Reason* at 20 ("[T]he prima facie case should focus on one question: does the restraint before the court require an explanation, or should the complaint be dismissed without further query?"). The court of appeals appears to have done just that.[5]

---

[5] The Second Circuit appears to have accepted that Amex had legitimate procompetitive justifications beyond enhanced cardholder benefits. *See, e.g.,* Pet. App. 48a ("The NDPs prevent a merchant from seeking high-end clientele by advertising acceptance of Amex cards but then, at the critical point of sale, offering that clientele a discounted price for not using the Amex

II. A RELEVANT MARKET MAY COMPRISE ONE SIDE OF A TWO-SIDED PLATFORM

A. The Interdependence of Markets Does Not Warrant Abandoning Fundamental Legal and Economic Principles Governing Market Definition

The court of appeals acknowledged and Amex concedes that a relevant market is defined in terms of demand substitutability. Pet. App. 31a; Cert. Op. 15-16. That is, the "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Horizontal Merger Guidelines* § 4 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."). Services provided by credit card platforms to merchants and

---

card. In this case, we see no monopolistic danger in this purpose. Amex has a legitimate interest in seeing that cardholders who take advantage of amenities offered to Amex cardholders simply by virtue of owning the card are not enticed to use their Visa or MasterCard by card-connected discounts from merchants."); *id.* (NDPs protect Amex's rewards program, prestige and decrease industry concentration); *see also id*. at 30a-31a & n.43. It was particularly inappropriate for the court to credit Amex's proffered procompetitive justifications, even if only implicitly, given that the district court *found* the procompetitive justifications insufficient, *see* Pet. App. 227a-258a (rejecting "preservation of business model" and free-rider justifications), and Amex did not challenge those findings on appeal. *See* U.S. Br. 54.

services provided to cardholders are not substitutes, as Amex readily acknowledges. Cert. Op. 16.

Nonetheless, the Second Circuit held that the "District Court erred in excluding the market for cardholders from its relevant market definition" "because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)." Pet. App. 32a, 39a. That is a non-sequitur. The failure to consider feedback effects could erroneously lead to defining too narrow a relevant market.[6] But it is not a ground for including two, complementary sides of a platform in the same relevant market. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 562e, at 102-03 (Supp. 2017) (the Second Circuit correctly concluded that "'feedback' effects are properly considered in delineating a market," but erred in including both sides of two-sided platform in a single relevant market); *cf. Microsoft*, 253 F.3d at 54, 60, 81 (explaining that "market share in the browser market affects market power in the operating system market," but browser market is "an entirely different market" because

[6] For example, an analyst may find that a hypothetical credit-card monopolist could impose a small but significant, non-transitory increase in price (SSNIP) because the number of merchants that would switch to debit cards is small, taking into account only first-order effects. But the number might be greater insofar as attrition of merchants reduces consumers' demand for credit cards, which further reduces the demand by merchants, and so forth. The district court found that plaintiffs' expert had accounted for "the possibility that the SSNIP might result in cross-platform feedback effects." Pet. App. 126a.

browsers are not "reasonably interchangeable" with operating systems).[7]

Amex has argued that separate sides of a credit card platform cannot be in separate relevant markets because they are part of the same product, like matching left and right shoes. Cert. Op. 16. Of course left and right shoes are sold to the same customer and used by that customer for the same purpose, unlike the services provided to the separate sides of a credit card platform. In any event, even with respect to products sold to the same groups of consumers, this Court has "often found arrangements involving functionally linked products at least one of which is useless without the other" to involve "two separate product markets." *Jefferson Parish Hosp. District No. 2 v. Hyde,* 466 U.S. 2, 19 n.30, 21, 28 (1984) (holding that anesthesiology and surgical services sold to patients are in separate product markets notwithstanding that "[i]t is safe to assume that every patient

---

[7] The Second Circuit was wrong to suggest that the district court "ignore[d] the two markets' interdependence" and "focus[ed] entirely on the interests of merchants while discounting the interests of cardholders." Pet. App. 35a, 54a. Although the district court defined the relevant market as network services provided to merchants, the court stressed throughout its thorough opinion that the interrelatedness of the merchant and cardholder markets must be considered. *See, e.g.,* Pet. App. 70a ("deeply interrelated"); 79a ("symbiotic relationship"); 81a ("due consideration must be given to competitive dynamics on the other side"); 118a ("markets are inextricably interlinked"); 119a ("the court recognizes and accounts for the fact that such conduct may indirectly affect competition at another level within the GPCC platform"); 121a ("court must account for the two-sided features of the credit card industry in its market definition inquiry, as well as elsewhere in its antitrust analysis").

undergoing a surgical operation needs the services of an anesthesiologist"); *accord Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 463 (1992) (parts and service in separate markets even if "there is no demand for parts separate from service").

And when functionally linked products involve *different* services sold to *different* groups at *different* prices in competition with *different* rivals, they are necessarily in different relevant markets. *Cf. Brown Shoe*, 370 U.S. at 325 ("practical indicia" of relevant "submarket" include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

B. Case Law Supports Applying Standard Market Definition Rules to Two-Sided Platforms

Times-Picayune strongly militates against exempting two-sided platforms from the well-established law on market definition.[8] The district

[8] The Second Circuit's adoption of an exception to the basic rules of market definition and burdens of proof to account for the importance of feedback effects in two-sided markets is akin to the Seventh Circuit's creation of a single-entity defense for sports leagues to accommodate the need for teams to cooperate—which this Court emphatically rejected. *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 199 & n.6 (2010) (holding that "necessity of cooperation" is a factor relevant to the rule of reason analysis, but it "is not relevant to whether that cooperation is concerted or independent action").

court in *Times-Picayune* had ruled that the defendant newspaper unlawfully tied sales of advertising in its morning paper to the purchase of advertising in its evening paper, based largely on the morning paper's dominance in circulation. *See United States v. Times-Picayune Pub'g Co.*, 105 F. Supp. 670, 674 (E.D. La. 1952). This Court reversed because the district court erroneously *conflated* the subscriber and advertiser sides of the newspaper market.

The Court observed:

> The District Court found that the Times-Picayune occupied a "dominant position" in New Orleans; the sole morning daily in the area, it led its competitors in circulation, number of pages and advertising linage. *But every newspaper is a dual trader in separate though interdependent markets*; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. *This case concerns solely one of these markets.*

Times-Picayune, 345 U.S. at 610 (emphasis added). The Court reversed the district court's liability determination because the morning paper was not dominant in the *newspaper advertising* market, and the morning and evening newspapers were not separate products *in the eyes of advertisers*.[9] *Id.* at 611-13.

---

[9] Notably, the Court stressed that the defendant's dominance must be determined by reference to "the *whole* and not part of a relevant market," *Times-Picayune*, 345 U.S. at 611 (emphasis

Quite obviously, the two interdependent markets (advertising and subscriptions) involved separate products, as here. *Cf. Jefferson Parrish*, 466 U.S. at 18, 29 (where vertical restraint affected both patient and anesthesiologist sides of hospital services market, Court held that those effects should be analyzed separately).

Amex has sought to distinguish *Times-Picayune* by arguing that credit cards are different from newspapers because, unlike newspaper subscriptions and newspaper advertising, credit-card services offered by Amex to cardholders and merchants are consumed in "fixed proportions." Cert. Op. 18. This premise is dubious. *See, e.g.,* Pet. App. 250a-254a (discussing Amex's free-rider argument based on services it provides other than facilitating transactions with cardholders). In any event, products used in "fixed proportions" are not necessarily in the same product market, even when sold to the same group of customers, as the Court's tying cases demonstrate. *See, e.g., Jefferson Parrish*, 466 U.S. at 28 n.47; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 667 (1944) (tying patented heating system and unpatented stoker switch unlawful; "it makes no difference that the unpatented device is part of the patented whole"); *see also Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1141-42 (8th Cir. 1981) (finding that a cemetery lot and the preparation of the foundation for grave memorials are two separate products).

---

added), by which the Court was referring to only the advertising market.

Amex also sought to distinguish *Times Picayune* on the ground that it involved exclusion, whereas the restraints here do not exclude competing credit card networks. Cert. Op. 19. In fact, however, the district court found that the anti-steering restraints *did* have an exclusionary effect by restricting competition from competing credit cards as well as entry of new business models. *See* Pet. App. 203a-207a, 212a-214a. In any event, the rule that product markets are defined by interchangeability of use and demand substitution factors does not change depending on whether exclusion, collusion, or mergers are at issue.

To be sure, this Court has recognized "cluster" markets, in which complementary products are sometimes combined to analyze the competitive effects of challenged conduct. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571-73 (1966); *Philadelphia Nat'l Bank*, 374 U.S. at 356. A cluster market is appropriate in one of two circumstances, neither of which is applicable here. A cluster market may be used for administrative convenience—where the market conditions are similar for the products at issue. *See Promedica Health System, Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 565 (6th Cir. 2014). Or it must be used to account for the fact that the cost of offering a bundle of complementary products *to the same group of consumers* is lower than offering the products separately such that providers of the separate products do not constrain providers of the bundle. *See id.* at 567*;* 2B Phillip E. Areeda, Herbert Hovenkamp, & John Solow, *Antitrust Law* ¶ 565c, at 433-34 (4th ed. 2014). Neither rationale is inconsistent with defining markets in accordance with demand-substitution principles.

III. RAISING THE BURDEN ON PLAINTIFFS TO MAKE OUT A PRIMA FACIE CASE WOULD HARM COMPETITION

Upholding the Second Circuit's special rules for defining markets and allocating the burden of proof in markets involving two-sided platforms would have far-reaching implications. All sides agree: "'Two-sided platforms are increasingly common' as 'modern technologies have led to rapid growth in the number, size, and importance of such firms.' Today, some of the most innovative firms and industries now consist of platforms that have some two-sided characteristics—including search engines, ride-sharing, e-commerce, rental exchanges, and electronic payments." Cert. Op. 30-31 (quoting cert amicus brief of 25 law professors) (brackets omitted).

At the same time, the economics of internet platforms often lead successful firms to dominate their markets because of significant barriers to entry from network effects, among other things. *See* Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. Econ. Perspectives 117, 122 (1994) ("[N]etwork markets tend to display inertia—that is, once a technology is known to have a substantial lead in its installed base, it is difficult for it to be displaced even by a technically superior and cheaper alternative."); Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1676-84 (2013) (citing potential amplification of market power of digital platforms resulting from informational advantages, network effects, and switching costs).

In this vast swath of commerce, the Second Circuit's rules would raise the burden of proving a rule of reason violation, thereby discouraging some meritorious claims and encouraging anticompetitive conduct. *See* Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 *Issues in Competition Law and Policy* 125, 130-31 (ABA Section of Antitrust Law 2008) (noting risk of "significant instances of false negatives" in antitrust cases resulting from excessive information demands on plaintiffs). In fact, under the court of appeals' logic, a dominant platform operator could exclude rivals for the *sole purpose* of raising prices on one side of the market, but because this enables the dominant firm to increase benefits to some limited number of consumers on the other side of the platform, plaintiffs would have to prove that "net" prices have been elevated in order to establish a prima facie case. Or a consortium of internet firms could agree to a privacy standard that adversely affects consumers, but any rule of reason claim would have to show, as a threshold matter, that the harm to consumers was not outweighed by benefits to advertisers.

More ominously, the appeals court's reasoning calls into question the applicability of the *per se* rule against price fixing to markets involving two-sided platforms. This Court has said that the *per se* rule is appropriate only for restraints "'that would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). But defendants could always argue, as Amex does here, that collusion to generate higher

prices on the restrained side of the market "does not support a confident inference of harm to competition overall, because such effects necessarily will [a]ffect" the other side. Cert. Op. 24-25.

The Second Circuit's rules also would add undue complexity and cost to already complicated and lengthy litigation under the rule of reason. It is a commonplace that "litigating a rule of reason case is 'one of the most costly procedures in antitrust practice.'" *Leegin*, 551 U.S. at 917 (Breyer, J., dissenting) (quoting Herbert Hovenkamp, *The Antitrust Enterprise* 105 (2005)). "The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982); *accord Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). The four economic expert witnesses, 30 fact witnesses, 7,000 pages of testimony, and 1,000 exhibits introduced during the seven-week trial of this case exemplify those high costs. *See* Pet. App. 72a.

Requiring both sides of a two-sided platform to be combined raises those costs and a host of uncertainties. For example, how are separate sides of the platform, involving different services sold to different groups, to be combined and under what common metric? And if the price on one side of the platform is negative, how is that price to be calculated? The Second Circuit insisted that a "two-sided price" be shown, but Amex attempted such a showing and the district court found it unreliable. Pet. App. 182a-184a (questioning Amex's expert's "discount" on the mer-

chant side for payments made to merchants to market co-branded cards as well as his methods for accounting for cardholder benefits).[10]

Even without the Second Circuit's new rules, "it is very difficult for a plaintiff (either the government or a private party) to win a rule of reason case." Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 Geo. L. J. 1487, 1489 (1983). It was difficult in the early 1980s, and the level of difficulty has only increased since then. *See* Hovenkamp, *Rule of Reason* at 16 ("The requirements for a rule of reason case—market power and anticompetitive effects—can be very difficult to prove."); Allensworth at 48-49 (review of cases indicates that judges "seek out rules and doctrines that make it especially difficult for the plaintiff to carry its initial burden"). Indeed, Professor Carrier's surveys found that from 1977-2009, plaintiffs won few rule of reason cases to reach a judgment. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect,* 1999 B.Y.U. L. Rev. 1265; Michael A. Carrier, *The Rule of Reason: An Empirical*

[10] The unreliability finding was not questioned by the court of appeals nor challenged as clearly erroneous by Amex. Notably, the court of appeals demonstrated its own confusion over the proper measure of a two-sided price by suggesting that the "price" should essentially be a measure of Amex's profits. *See* Pet. App. 51a (acknowledging that Amex's higher merchant fees were not completely offset by higher rewards, but finding it insufficient to show net harm because it "says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high.").

Update for the 21st Century, 16 Geo. Mason L. Rev. 827 (2009).[11]

Given the existing hurdles, it makes no sense to raise the bar to proving a rule of reason violation even higher in markets involving two-sided platforms. *See*, *e.g.*, *Leegin*, 551 U.S. at 897 (rule of reason must be applied "diligent[ly] in eliminating . . . anticompetitive uses from the market").

---

[11] To be sure, Professor Carrier's surveys do not take into account settlements, which have been notable in the credit card industry. Judge Ginsburg also found very low success rates for reported cases challenging vertical non-price restraints following the Court's adoption of the rule of reason in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67 (1991); *see also* Theodore Voorhees, Jr., *Reasoning Through the Rule of Reason for RPM, Antitrust*, Fall 2013, 58, 60 (noting paucity of resale price maintenance cases after *Leegin*'s adoption of rule of reason).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Dated: Dec. 14, 2017