No. 16-1454

IN THE

Supreme Court of the United States

OHIO, *et al.*,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF VERIZON COMMUNICATIONS INC. IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Verizon Communications Inc., through its subsidiaries, (collectively, "Verizon") is a global leader in delivering innovative communications and technology solutions to consumer, business, government, and wholesale customers and provides integrated business solutions to customers in more than 150 countries.

Verizon regularly appears before the Court, both as a party and as an *amicus curiae*, including in cases involving antitrust law issues. *See, e.g.*, *Pac. Bell Tel. Co. v. LinkLine Communications, Inc.*, No. 07-512 (2009); *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (2007); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (2004); *NYNEX Corp. v. Discon, Inc.*, 96-1570 (1998).

Verizon participates in multi-sided markets both as a provider of connective platforms and as a market participant relying on a platform for connection. Verizon businesses rely on platform services from the credit card payment systems in Verizon-owned stores to the operating systems that run on mobile devices and connect Verizon subsidiaries' applications to consumers. Consumers access third-party content over Verizon's Fios and mobile services. Verizon's applications from its Oath subsidiary (such as Yahoo! Sports) act as an intermediary between

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

content providers and consumers in the digital world. Verizon is also itself a platform provider. ThingSpace is Verizon's web-based Internet of Things platform that provides a workspace for developers to create applications and services for customers with connected IoT devices that are served by Verizon's network. BrightRoll by Yahoo! provides programmatic tools to help buyers and sellers connect with consumers across ad formats and devices, and ONE by AOL provides a mobile monetization platform that connects publishers, advertisers, and consumers to enable these groups to connect. In short, platforms support Verizon's business, and in many instances, they are Verizon's business.

Verizon thus has a strong interest in the proper application of the antitrust laws and the Court's antitrust jurisprudence and, most relevant here, a heightened interest in how the Court applies those laws and precedent to multi-sided markets. Although some markets with two or more sides have existed for some time now (*e.g.*, newspapers), our modern economy has seen an explosion in the development of multi-sided markets. It is only recently that economic theory has focused on these complex markets; likewise, it is only recently that courts have considered their antitrust implications. Not surprisingly, then, there is no generally accepted guidance in the law or economic theory about how they should be treated under the antitrust laws. The Court thus should proceed cautiously here to avoid impairing pro-competitive behavior and harming consumer welfare in the process.

Verizon expresses no opinion on the merits of the case. Rather, Verizon writes to respectfully request that the Court refrain from issuing any broad pronouncements on

novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case requires the Court to apply the Sherman Act to the two-sided market in the credit-card industry. Given the diversity and complexity of two-sided markets, that is a daunting task—especially since neither the law nor economic theory provides any meaningful guidance on the issue. Other than in this case, no federal appellate court has squarely considered the application of the antitrust laws to two-sided platforms (much less, even more complicated multi-sided markets). For all practical purposes, then, this Court will be writing on a blank slate. This is a risky proposition in the antitrust arena, because "[m]uch of the time … it is unclear whether particular business conduct will promote consumer welfare, harm it, or leave it undisturbed." Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 Wm. & Mary L. Rev. 75, 82 (2010).

In the absence of guidance and practical experience in dealing with two-sided markets, the risk of error—false positives or false negatives—is great. And the cost of such errors is substantial; they "are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review." Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 5 (2015). Moreover, multi-sided markets vary wildly in their structures and in how their interdependent markets relate to each other. They thus are not susceptible to one-size-fits-all economic analysis.

Accordingly, the Court should proceed cautiously here, deciding only the case before it on the facts presented, so as to minimize the possibility of error and avoid impairing the development of multi-sided markets.

The Two-Sided Market For Credit Cards. This case concerns the credit-card industry, a highly "complex industry involving various commercial structures performing various essential functions." Pet. App. 5a. Each of the millions and millions of daily credit-card transactions "necessarily involves a multitude of economic acts and actors," *id.*, that are perhaps best illustrated by a simple example offered by the court below:

> Take, for example, a cardholder who pulls into a gas station to refuel her car. The cardholder takes out her credit card—for which she pays an annual fee while also receiving frequent flyer miles on her favorite airline for every dollar spent—inserts the card into the credit-card slot on the gas pump, and fills her tank with gas. Her credit card is immediately charged for the transaction, and the station owner receives payment quickly—minus a fee.

Id.

This transaction requires economic actors to undertake the various responsibilities of issuing the credit card that is inserted into the pump; extending credit to the cardholder filling her gas tank; paying the gas station retailer who accepts the card; and collecting payment from the cardholder. Those responsibilities "can be vested in one firm or in a multiplicity of firms engaged in a division

of specified functions and connected in a network by contractual arrangements." Pet. App. 5a-6a. And each time a customer engages in a transaction like this, the merchant (in some way or another) pays a fee—commonly known as a "discount rate" or "merchant discount rate"—for the privilege of accepting the credit card used by the customer. Pet. App. 13a-14a.

These interdependent economic acts and actors result in what economists and scholars have termed a "two-sided market." *See, e.g.*, Lapo Filistrucchi *et al.*, *Market Definition in Two-Sided Markets: Theory and Practice*, Tilburg Law School Legal Studies Research Paper Series 5 (2013), https://goo.gl/rXabfC.[2] Cardholders benefit from holding a credit card that is accepted by a wide range of merchants, and merchants benefit from accepting a credit card that is used by a large number of cardholders. The two sides—cardholders and merchants—thus depend upon each other and upon widespread acceptance of a credit card. Pet. App. 69a ("[C]redit card networks cater to the needs of two distinct sets of consumers, merchants and

2. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. Econ. 645, 664-65 (2006) ("[A] market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board."). Two-sided markets are sometimes referred to as "two-sided platforms" or by the shorthand "2SPs."

Some markets may have more than two sides; the term "multi-sided markets" is often used to describe these complex markets more generally. *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 Yale J. on Reg. 325, 328 (2003).

cardholders. Their very function is to bring these two sides together to consummate value-generating transactions.").

Proceedings Below. This case began in 2010, when the United States and seventeen States brought an enforcement action against Respondent American Express ("Amex") in the Southern District of New York alleging anti-competitive behavior in violation of the Sherman Antitrust Act. Pet. App. 66a-67a.[3] The complaint attacked contractual provisions in Amex's merchant agreements that prevent merchants who accept its credit cards from steering customers to alternative card brands (sometimes characterized as "anti-steering" or "non-discrimination" provisions).[4] After a seven-week bench trial, the district court held that these provisions were an unlawful restraint on trade and issued a permanent injunction barring Amex from using them in its merchant card agreement. Pet. App. 63a-320a.

In reaching that result, the district court found that the credit-card industry's "two-sided platform comprises at least two separate, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex, and Discover compete to sell acceptance services." Pet. App. 70a. For antitrust purposes, the court found the relevant market to be only the market for "network services," that is, the merchant

3. Visa and MasterCard were also sued as defendants in this action, but they settled.

4. Amex typically charges merchants higher discount rates than other credit-card companies. Pet. App. 19a.

side of the two-sided platform. Pet. App. 122a. The district court found that Amex had market power in this market in part because of "the insistence of [its] cardholder base on using their [Amex] cards" when purchasing goods and services, and found that the provision caused anticompetitive injury to merchants in the form of higher merchant discount fees. Pet. App. 71a. In light of these findings, the district court placed the burden on Amex to establish procompetitive benefits, and further found that Amex had not met that burden. Pet. App. 228a-258a.

In making these findings, the district court "recognize[d] that it does not possess the experience or expertise necessary to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns." Pet. App. 69a. Highlighting the "complex[ity]" of the credit-card industry and the fact that "it is a critical component of commerce in this United States," the district court expressed its "concerns about disrupting the competitive landscape in such a concentrated, complex market" and emphasized that it "d[id] not come to its decision in this case eagerly or easily." Pet. App. 68a-69a, 248a.

Amex appealed to the Second Circuit. The case received significant attention on appeal, as numerous economists and antitrust professors (among others) filed *amicus curiae* briefs on both sides of the case. After briefing and argument, the Second Circuit reversed and directed the entry of judgment in favor of Amex. The Second Circuit held that the district court "erred in excluding the market for cardholders from its relevant market definition." Pet. App. 32a. The Second Circuit criticized the district court for "ignor[ing] the two

markets' interdependence," thereby "allow[ing] legitimate competitive activities in the market … to be penalized no matter how output-expanding such activities may be." Pet. App. 35a. To the appellate court, the relevant market encompasses both sides of the two-sided market for credit-card payments. Pet. App. 32a-35a.

The Second Circuit likewise disagreed with the district court regarding market power. Pet. App. 40a-48a. Specifically, the Second Circuit concluded that the district court erred in premising its market power finding on "cardholder insistence." Pet. App. 45a-48a. To the appellate court, "[c]ardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." Pet. App. 45a; *id.* at 45a-46a ("Cardholder insistence is exactly what makes it worthwhile for merchants to accept Amex cards—and thus cardholder insistence is exactly what makes it worthwhile for merchants to pay the relatively high fees that Amex charges.").

The appellate court further concluded that the plaintiffs had failed to make a prima facie case under the rule of reason because their proof had only accounted for the competitive effect on one side of the market—merchants—and not on cardholder side of the market. Pet. App. 49a-53a; *id.* at 49a ("The District Court's erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders.").

The State of Ohio, along with ten other States, filed a petition for certiorari in this Court. That petition presented the question whether, under the "rule of reason," the governments' showing that Amex's anti-steering provisions stifle price competition on the merchant side of the credit-card platform suffices to prove anti-competitive effects and thereby shifts to Amex the burden of establishing any pro-competitive benefits from the provisions.

The United States filed a brief in opposition to the petition ("USA BIO"). The United States agreed with Ohio that the Second Circuit had erred, but it urged the Court to deny the petition. The United States highlighted the complexity of the market structure and explained that "the Court has not squarely considered questions of market-definition or proof of anticompetitive effects in cases involving two-sided platforms." USA BIO at 19. It added that "no other court of appeals has specifically considered the application of the Sherman Act to two-sided platforms either" and argued that "percolation in the lower courts" would aid the Court "in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here." *Id.* at 19-21. The Court nevertheless granted the petition.

ARGUMENT

Amicus shares many of the concerns expressed by the United States in its brief in opposition to the petition. In particular, given that both economic theory and the law relating to two-sided markets are underdeveloped, *Amicus* has serious concerns about the Court taking any action in this case broader than necessary to reach a decision regarding the parties and facts before the Court.

Judicial evaluation of market behavior to determine whether it is pro- or anti-competitive is a complex and difficult enterprise. There thus is a substantial risk of error in this arena. And the costs of such errors can be great. *See* Baker, *supra*, at 5-6; Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435, 449 (2006).

The stakes are particularly high in this Court, as any ruling that extends past the conduct and parties in this case will endorse or restrain economic behavior across the country and preclude helpful percolation on those issues in the lower courts. *See* Popofsky, *supra*, at 449 ("Error costs can cause deviations from optimal deterrence because 'a decision by a court will not only bind the litigating parties, but will also serve as precedent by which future conduct will be judged.'") (quoting C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41, 51 (1999)). Accordingly, the Court should proceed with caution. *Amicus* respectfully requests that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

I. Consistent With Antitrust Law's Protection Of Competition, The Court Should Follow A Policy Of Nonintervention When It Is Unclear Whether Challenged Conduct Is Pro- Or Anti-Competitive.

When enforcing the antitrust laws, the Court should take care to do "as little injury as possible to the interest

of the general public." *United States v. E. I. du Pont De Nemours & Co.*, 366 U.S. 316, 327-28 (1961); *cf. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Such a cautionary approach is warranted because it is often difficult to determine whether "particular business conduct will promote consumer welfare, harm it, or leave it undisturbed." Devlin & Jacobs, *supra*, at 82.

The costs of erroneous judicial decisions are substantial: "False positives and false negatives are harmful to the economy as a whole for reasons that go beyond the conduct in the case under review: False positives and false negatives may chill beneficial conduct by other economic actors (potentially in other industries) that must comply with the rule; these errors may also fail to deter harmful conduct by other economic actors to which the same rule would apply." Baker, *supra*, at 5-6.

Because erroneous decisions "can deter conduct that may be desirable, or prevent challenges to undesirable conduct," Popofsky, *supra*, at 449, when enforcing the Sherman Act, the Court should rule on the basis of the facts in a given case rather than make broad pronouncements on novel issues of antitrust law that may proscribe (or endorse) categories of activity for all time. The Court's gradual move away from *per se* liability with regard to vertical restraints reflects just such a cautionary approach. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) ("In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."); *see also State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Business Electronics Corp. v.*

Sharp Electronics Corp., 485 U.S. 717 (1988); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

In order to avoid harming the consumer public, the Court should follow a policy of "nonintervention" when it is unclear whether particular market activity is pro- or anti-competitive. Robert H. Bork, *The Antitrust Paradox* 133 (1978). This is especially true in the context of novel markets and business arrangements where courts "are forced to formulate doctrine in the dark." Devlin & Jacobs, *supra*, at 83.

II. The Court Should Proceed Cautiously Here Given That Two-Sided Markets Are Complex, Without Clear Legal Or Economic Guidance, And Not Susceptible To One-Size-Fits-All Analysis.

"The concept of two-sided markets in economics is relatively new." *US Airways, Inc. v. Sabre Holdings Corp.*, 11-cv-2725, 2017 WL 1064709, at *8 (S.D.N.Y. Mar. 21, 2017). As the Second Circuit noted in this case, two-sided markets were not even clearly identified in academic literature until the 2000s. Pet. App. 7a-8a n.3. More attention has been paid to two-sided markets (and more complex multi-sided markets) in recent years. *See* David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 679 (2005) ("The body of theoretical economics literature on 2SPs is relatively new."); Daniel M. Tracer, *Overcharge But Don't Overestimate: Calculating Damages for Antitrust Injuries in Two-Sided Markets*, 33 Cardozo L. Rev. 807, 814-15 (2011) (noting the uptick in "legal-scholarly attention given to the unique economic nature of the topic").

But scholarly work in this area has not yielded any clear guidance on their antitrust implications. "Many of the theoretical results in the literature to date are … based on quite abstract models of how industries operate and on special assumptions regarding demand and cost," and there has been "little rigorous empirical research on 2SPs or competition among them." Evans & Noel, *supra*, at 701. On top of that, the scholarly work that has been done in this area "suggest[s] that 2SP businesses are highly dependent on the specific institutions and technologies within an industry," *id.*, making it risky to make broad generalizations across those institutions and technologies.

One thing scholars can agree on, however, is that analyzing two-sided markets is a complicated endeavor. *See, e.g.*, D. Daniel Sokol, *Troubled Waters Between U.S. and European Antitrust*, 115 Mich. L. Rev. 955, 966 (2017) ("This market structure complicates traditional antitrust analysis."); Evans & Noel, *supra*, at 668 ("Economists have shown that the economic principles that govern the diverse industries based on 2SPs differ from those that govern traditional industries in several important ways."). In particular, "[m]arket definition analysis in situations involving 2SPs can be quite complicated." Jith Jayaratne, Janusz A. Ordover, *Economics and Competition Policy: A Two-Sided Market?*, Antitrust, Fall 2012, at 78.

Not surprisingly, then, the law is thin and unsettled in this area. *See* Andrew Langford, *Gmonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?*, 88 Ind. L.J. 1559, 1570 (2013) ("[C]ase law has yet to grapple squarely with current thinking on two-sided markets."). Very few courts have ever even encountered two-sided markets (much less more complicated multi-sided markets). This case is one of the first. *See US Airways*,

2017 WL 1064709, at *10 ("[*Ohio v.*] *Amex* is one of the few cases that explicitly addresses two-sided markets."). In fact, it is the first at the appellate level. *See* USA BIO at 10 ("[N]either this Court nor any other circuit has squarely considered the application of the antitrust laws to two-sided platforms."). And the few cases that waded into these complex issues have had mixed results at best. *See* Evans & Noel, *supra*, at 669 (noting that the few cases that "have touched on two-sided issues" are "not analytically correct").

All of this counsels in favor of a cautionary approach. Sorting pro-competitive and anti-competitive behavior is hard enough in the typical antitrust case. The novelty and complexity of multi-sided markets makes the task all the more difficult. *See* Devlin & Jacobs, *supra*, at 83.

A careful approach is especially appropriate here. As both lower courts acknowledged, the credit-card industry is a critical component of commerce in the United States in that credit cards have become "a principal means by which consumers in the United States purchase goods and services from the nation's millions of merchants." Pet. App. 73a-74a; *Id.* at 5a ("[T]he credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers."). Given that credit card transactions are responsible for trillions of dollars in economic activity each year, Pet. App. 52a, the district court thus was right to be wary in deciding this case, Pet. App. 68a ("The court does not come to its decision in this case eagerly or easily."). Even after a seven-week trial in an industry more developed than many other multi-sided platforms, that court struggled with its decision. Recognizing that it "does not possess the experience or expertise necessary

to advise, much less dictate to, the firms in this industry how they must conduct their affairs as going concerns," the court "repeatedly urged the parties in this case to negotiate a mutually agreeable settlement," only reluctantly deciding the case after "the parties having failed to do so." Pet. App. 69a; *id.* ("[T]he court is left with no alternative but to discharge its duty by deciding the question before it."). The district court's wariness should be taken as a warning against making any sweeping pronouncements in this case.

And the stakes are much higher now. Because this Court's decisions are binding across the entire country and on every lower court, *see* Frank J. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev 1, 2 (1984) ("A fundamental difficulty facing the court is the incommensurability of the stakes."), any ruling that extends past the conduct and parties before the Court risks restraining or endorsing economic behavior in other industries throughout the nation.

Especially given the recent explosion in the development of multi-sided markets in our modern economy, the Court should proceed carefully here. Multi-sided markets vary wildly with regard to structure, number of interdependent markets, and how those markets interact with each other. And they continue to develop and evolve in different ways. Put simply, they are not susceptible to one-size-fits-all analysis—either in economic theory or in the application of antitrust law. Thus, any broad proclamation on the application of the Sherman Act to multi-sided markets—even if it were correct as applied to the parties before the Court in this case—could cause great harm to these dynamic markets and impair their development for years to come. Accordingly, the Court should decide this case on

as narrow grounds as possible based on the specific facts before it. Broader issues regarding market definition and consumer welfare should be left for further percolation in the courts where they will have the benefit of further developments in economic theory aided by rigorous empirical research. *Cf. GTE Sylvania Inc.*, 433 U.S. 48-49 ("[T]he experience of the past 10 years should be brought to bear on this subject of considerable commercial importance."). And however the Court rules, it should strive to do "as little injury as possible to the interest of the general public." *E.I du Pont De Nemours*, 366 U.S. at 327-28.

CONCLUSION

Amicus curiae respectfully requests that the Court refrain from issuing any broad pronouncements on novel issues of antitrust law in this case and instead decide only the particular dispute between these parties based on the specific facts and circumstances presented here.

Respectfully submitted,

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