No. 16-1454

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

REPLY BRIEF FOR THE PETITIONERS AND RESPONDENTS NEBRASKA, TENNESSEE, AND TEXAS

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

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The district court's factual findings show that Amex's anti-steering provisions have harmed consumers on both sides of the credit-card platform. On the merchant side, they have stifled interbrand price competition. Pet. App. 194a-203a. The anti-steering provisions have deterred Amex's rivals from reducing prices because the provisions prevent those price cuts from generating greater market share. Tr. 849 (Hochschild/Discover). As a result, Amex's provisions have raised the prices that the *entire* credit-card industry charges merchants. Pet. App. 207a.

On the cardholder side, these price increases have led merchants to raise retail prices. *Id.* at 210a-12a. And, with the anti-steering provisions in place, merchants generally have charged the same price no matter the payment type, so consumers using high-cost cards unknowingly shift part of their costs to those using cheaper methods. *Id.* Given this "negative externality," consumers do not value rewards from high-cost cards at their full costs (including the costs imposed on others). To prevent consumers from internalizing these costs, moreover, the anti-steering provisions reduce consumer choices. They bar cardholders from receiving, say, an offer for a 1% discount for using a cheaper card (and from accepting that offer if they value it more than any rewards).

As the States' opening brief noted, the Government proved anticompetitive harm because Amex's provisions restrict interbrand price competition and raise the credit-card industry's merchant fees. In response, Amex departs from the Second Circuit's sole reliance on the credit-card platform's two-sided nature. And it disregards the distinct ways to prove "market power" because its ability to affect industrywide prices directly illustrates its power here.

I. AMEX'S DEPARTURE FROM THE SECOND CIRCUIT'S LOGIC CONFIRMS THE COURT'S ERROR

The Second Circuit did not dispute the district court's *factual* findings about the pricing effects of Amex's restraints; it ruled that those findings were *legally* insufficient. Pet. App. 49a-50a. It also did not claim that anti-steering provisions have the same effects as vertical restraints in *one-sided* markets; it relied on the credit-card platform's *multi-sided* nature. *Id.* at 7a-10a, 39a, 49a. In both respects, Amex now departs from the decision it defends.

A. Amex Wrongly Disputes Facts

Amex repeatedly challenges (at 28, 50, 56) the district court's factual findings. Yet it had a duty at the certiorari stage to identify factual disputes that could implicate the question presented—whether the anti-steering provisions' pricing effects met the Government's burden to show anticompetitive harm. Sup. Ct. R. 15.2. Instead, Amex conceded that the decision below rested on the conclusion that the district court's factual findings were legally insufficient, not on any disagreement with them. Br. in Opp. 10 n.1. Its failure to contest the findings "at the certiorari stage waived [its] right to do so at the merits stage." *District of Columbia v. Wesby*, No. 15-1485, slip op., at 4 n.1 (U.S. Jan. 22, 2018).

Besides, Amex's claims lack merit. It must meet a heavy burden to overcome "the deferential 'clear error' standard." *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015); *cf. NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984). It cannot do so.

First, Amex argues (at 28) that "the record contradicts the premise that the nondiscrimination provisions cause merchants to pay higher fees." Yet the district court found as a fact that the "restraints have resulted in higher all-in merchant prices across the network services market." Pet. App. 207a. The evidence supported this finding. Discover's president explained that anti-steering provisions deter price cuts by preventing networks from increasing share through lower prices. Tr. 849 (Hochschild/Discover). That has caused all four networks to raise prices. *Id.* at 854; J.A. 224; Tr. 224 (Thiel/Alaska Airlines); Tr. 1222-23 (Kimmet/Home Depot). As its contrary evidence, Amex claims (at 28) that the prices for merchants that do not accept Amex did not decline after Visa and MasterCard lifted their anti-steering provisions. The district court found the evidentiary value of this alleged "experiment" insignificant given the small size of those particular merchants. Pet. App. 223a-25a. That was not clearly erroneous.

Second, Amex asserts (at 56) that Discover's efforts to inject price competition failed because of Discover's "low cardholder benefits, the ubiquity of Visa and MasterCard, and technical limitations." Yet the district found as a fact that anti-steering provisions doomed Discover's price cuts. Pet. App. 204a-06a. Merchants told Discover that the provisions were the reason they could not shift share to it. Tr. 848-49 (Hochschild/Discover). So, at trial, Amex did "not strenuously dispute the evidence regarding the effect of anti-steering rules on Discover's low-price model." Pet. App. 205a.

Third, Amex claims (at 50) a lack of "proof" that merchants pass on higher prices to customers. Yet the district court found as a fact that higher fees increase retail prices. Pet. App. 210a-12a. That followed from expert testimony. J.A. 224. And it followed from merchant testimony noting that credit-card costs affect retail prices. *E.g.,* Tr. 1278 (Kimmet/Home Depot); Tr. 1406 (Rein/Walgreens); Tr. 1544 (O'Malley/Best Buy); Tr. 3150 (Gibson/Sinclair).

Amex's newfound need to fight the district court's findings is telling. It confirms the weakness of the Second Circuit's holding once the Court accepts those findings (as it must at this stage).

B. Amex Wrongly Equates Its Vertical Restraints With Vertical Restraints From Other Cases

Amex claims (at 24-29) that its provisions have the same efficiency justifications as restraints that a manufacturer imposes on distributors. It misses the key insights from cases about these restraints. And its attempt to fit its provisions into their mold—going so far as referring to merchants as Amex "distributors"—further departs from the decision below.

1. The Court has switched to the rule of reason for resale price maintenance, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007), and divisions of retail territory, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). Amex suggests (at 25) that these cases permit manufacturers to use vertical restraints to limit *interbrand* competition. They stand for no such thing.

The cases recognize that "'the primary purpose of the antitrust laws is to protect'" interbrand competition, and that these restraints limit *only* "intrabrand competition—the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890 (citation omitted). Intrabrand limits fix a "free-rider" problem in which no-frills retailers benefit from the higher demand for a product generated by high-service retailers, but undercut the prices that those retailers charge. *Id.* at 890-91. Left unchecked, free riding could curtail services even if consumers valued them above their costs. *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 369 (7th Cir. 1987). Intrabrand limits thus can increase interbrand competition by allowing consumers to "choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between." *Leegin*, 551 U.S. at 890.

Because these restraints do not restrict interbrand competition, that competition acts as a "check" against any higher prices charged by firms using them. If consumers do not value the services at their price increases, "[i]nterbrand competition would divert [those] consumers to lower priced substitutes." *Id.* at 897. For that reason, manufacturers have no incentive to give retailers unjustified margins. "The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize." *Id.* at 896.

2. Amex's provisions lack these attributes. They have not restricted *intrabrand* competition among downstream sellers of Amex (like issuers or acquirers); they have "frustrated to the point of near irrelevance" *interbrand* price competition between Amex, Visa, MasterCard, and Discover. Pet. App. 195a.

That is why the word "intrabrand" appears nowhere in Amex's brief. Amex's provisions thus implicate the antitrust laws' primary purpose.

Leegin also rebuts Amex's claim (at 27) that it may "enhance[] its ability to compete with" Visa, MasterCard, and Discover by blocking that competition in an area in which it could otherwise occur. That case did not suggest that a high-service manufacturer could use vertical restraints to restrict price competition from *other manufacturers* out of concern that its rivals' low prices would undercut its service "investments." Instead, the rivals' competition ensured that consumers could switch to cheaper brands if they did not value those services. 551 U.S. at 890, 896. Here, by contrast, "[n]o automatic mechanism corrects blunders." *Premier Elec.*, 814 F.2d at 369. Amex has eliminated the safety valve (interbrand competition) that *Leegin* found important by barring rivals from undercutting Amex's prices: Merchants cannot give a credit-card network greater share for lower prices because consumers make payment decisions. Pet. App. 203a-07a. And consumers make those decisions not because they value cardholder rewards at their actual costs, but because others pick up a part of the tab. *Id.* at 212a.

Likewise, Amex mistakenly relies on the claim (at 27) that limits on interbrand price competition on the merchant side of the platform "foster intense competition" on the cardholder side. "This is not the kind of procompetitive virtue contemplated under the Act, but rather [a] mere consequence of limiting price competition." *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993); Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 634 n.25 (2006). Tellingly, Amex ignores the argument that price cartels would "channel" interbrand competition to unrestricted areas (like rewards) in the same way. If such channeling is "valid" here, it should be "valid" there. But, as the States noted (at 41-52), the Court has rejected similar arguments because the "channeling" of *interbrand* competition generally harms consumers. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980); Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 20 (1981).

Amex also incorrectly equates (at 27-29) *steering merchants* with *free-riding retailers*. Merchants do not "free ride" on Amex benefits if they steer customers to cheaper cards. Unlike in *Leegin*—where customers could partake of the high-service retailer's services *and* purchase the product elsewhere—customers receive Amex rewards only by using Amex. Pet. App. 255a-56a. They do not earn Amex frequent flyer miles when using Discover. Indeed, Amex has things backwards. As the States noted (at 49), its anti-steering provisions incorporate "free riding" into its product. If a card's benefits are worth its costs, cardholders would choose Amex over competing merchant offers *even with steering*. Anti-steering provisions ensure that consumers partially make decisions based on cross-subsidies from others.

Amex next mistakenly invokes (at 29) *Leegin*'s recognition that manufacturer and consumer interests are aligned over *retailer* prices. 551 U.S. at 896. *Leegin* did not claim that manufacturer and consumer interests are aligned over *manufacturer* prices. And Amex's provisions raise *credit-card prices* (which are the equivalent of manufacturer prices here). If anything, consumers are generally aligned with merchants over the prices of inputs like credit cards, electricity, or supplies. Keeping costs down keeps prices down. When car companies negotiate for high-volume tire discounts, they "drive[] down the price of tires, to the ultimate benefit of consumers." *Paddock Publ'ns v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996). Similarly, "[e]ager to control the costs associated with running their businesses, merchants routinely seek lower prices for" their inputs. Pet. App. 216a. In this way, direct purchasers often vindicate the interests of downstream consumers. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977).

At day's end, there is an irony in Amex's reliance on *Leegin* and *GTE Sylvania*. Those cases criticized earlier ones for depending "on 'formalistic' legal doctrine rather than 'demonstrable economic effect.'" *Leegin*, 551 U.S. at 888 (citation omitted). Yet Amex asks this Court to favor a legalistic contention (that its restraints are vertical in nature) over real-world effects (that its restraints crush horizontal competition). Instead, the anti-steering provisions' proven horizontal effects should lead "to more careful scrutiny" than would govern restraints limiting only intrabrand competition. *Id.* at 897.

II. AMEX OVERLOOKS THE DIFFERENT WAYS TO PROVE "MARKET POWER"

Amex argues (at 30-41) that the rule of reason requires plaintiffs to show "market power," and that the Government abandoned any market-power claim. While the rule of reason generally requires proof of "market power," Amex conflates the indirect method of proving power with market power itself.

A. *Market Power*. As Amex notes (at 30-36), market power is a "significant consideration" under the rule of reason. *Leegin*, 551 U.S. at 886. *NCAA* defined market power as the ability "to alter the interaction of supply and demand in the market" and to "raise prices above those that would be charged in a competitive market." 468 U.S. at 109 & n.38. The Court has also called it the ability "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). And commentators have referred to it as "the ability to raise price significantly without losing so many sales that the increase is unprofitable." Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 159 (1984).

A firm that lacks market power cannot inflict lasting harm through inefficient restraints. That is because "it cannot affect the price of its product; that price is determined by the market." Posner, *supra*, 48 U. Chi. L. Rev. at 16. If it uses an inefficient restraint that raises its prices, it will lose share as rivals undercut its prices and consumers turn to cheaper brands. *Leegin*, 551 U.S. at 897-98. Without the ability to affect industry prices, the restraint will be "harmless" to consumers, *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988), and "suicidal" to producers, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986).

Generally, therefore, "[t]he process of rivalry is sufficient insurance" to prevent firms lacking market power from adopting inefficient restraints. Easterbrook, *supra*, at 159. Given the administrative concerns that the States identified (at 24-26), a market-power requirement can "filter" out lawsuits challenging restraints that cannot harm consumers. Easterbrook, *supra*, at 159-60. Indeed, in the tying context, the Court has already held that a firm must have market power over the "tying" product for it to be *per se* illegal to require consumers to buy a "tied" product. *Jefferson Parish*, 466 U.S. at 13-14.

That said, "market power" falls along a spectrum. On one end, most firms have some power over price because most goods are not completely homogenous. Richard Posner, *Antitrust Law* 195 (2d ed. 2001). On the other, monopolists have "a high degree" of power. William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981). The key question is whether a firm has "enough market power to make a difference." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 794 (1999) (Breyer, J., concurring in part and dissenting in part).

B. *Proving Power*. Amex asserts (at 36) that the Government abandoned its market-power claim. Not so. This Court "has made it clear that there are two ways of proving market power"—an indirect way and a direct one. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071 (10th Cir. 2013) (Gorsuch, J.). The States' opening brief (at 28, 34-40) relied on the direct way to prove market power by showing *actual* anticompetitive effects.

Under the indirect method, the Government may show that the defendant has market power and that the restraint will limit competition. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998). Courts using this method estimate a defendant's power by considering its share of a properly defined market. *Toys "R" Us*, 221 F.3d at 937. But these "inquiries into market definition and market power" show only a restraint's *potential* effects if evidence of its *actual* effects is absent. *Ind. Fed'n*, 476 U.S. at 460. That evidence is often unavailable because of "the difficulty of isolating the market effects of challenged conduct," *Brown Univ.*, 5 F.3d at 668, or because a restraint has yet to be adopted (as with a merger), Tr. 3825 (Katz). If, however, "there are better ways to estimate market power, the court should use them." *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins. Co., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986).

Under the direct method, "'proof of actual detrimental effects, such as a reduction of output, can obviate'" the need for the indirect inquiry. *Ind. Fed'n*, 476 U.S. at 460-61 (citation omitted). Actual effects are arguably better "evidence of market power than calculations of elusive market share figures." *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) (Sotomayor, J.). The indirect method estimates whether a party *might* affect industry prices; the direct method shows that the party *has* done so. Pet. App. 109a.

Here, the States' opening brief (at 34-40) followed the direct method because Amex's provisions raised industry prices and reduced competition. These findings—by definition—prove its market power. A firm *without power* could not "alter the interaction of supply and demand in the market" by raising the credit-card industry's merchant fees to channel competition to cardholders. *NCAA*, 468 U.S. at 109. If Discover attempted to do so, merchants would simply drop it. Pet. App. 190a-91a. That is why it is a "price taker" that generally sets its prices at or below its rivals'. Tr. 856-57 (Hochschild/Discover). Amex, by contrast, was able to strengthen its restraints to eliminate Visa's and Discover's price competition in the 1990s. Pet. App. 199a-205a. And it was able to repeatedly raise merchant fees in the 2000s without losing many merchants. Pet. App. 166a-67a, 208a.

Although the States relied on the direct method, Amex needlessly spends pages (at 36-41) on the "elusive" indirect one. *Todd*, 275 F.3d at 206. Nevertheless, two points deserve brief mention about that method. One: Amex suggests (at 37 & n.3) that no case has found that its 26% share can prove power. But Amex agrees (at 12 n.1) with *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), which held that MasterCard had market power. *Id.* at 239-40; *Amicus* Br. of Am. Express Co. at *16, *Visa*, 344 F.3d 229, 2002 WL 32828497. Amex "is larger today than MasterCard was" then. Pet. App. 152a.

Two: Amex argues (at 38-39) that it cannot have market power from "cardholder insistence" because it must invest some of its fees in rewards to create that insistence. It incorrectly asserts that this insistence arises from cardholders valuing rewards at their costs. If true, Amex would not need its restraints. The anti-steering provisions instead ensure that insistence partially arises from cross-subsidies. Pet. App. 212a. Regardless, even if insistence did arise from Amex's "superior value," this Court has recognized that the most extreme form of market power—

monopoly power—can arise from "'a superior product.'" *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) (citation omitted). And even monopolists will invest a portion of their higher prices into staying monopolists. Posner, *Antitrust Law*, *supra*, at 13-14; *United States v. Microsoft*, 253 F.3d 34, 57 (D.C. Cir. 2001) (en banc). Because monopoly power (or market power) can result from benign reasons, such power is not itself illegal. Instead, only *anticompetitive restraints* imposed by those with market power raise concerns under Section 1.

III. CONTRARY TO AMEX'S CLAIM, THE EFFECTS OF ITS RESTRAINTS PROVE ITS POWER

Amex asserts (at 41-57) that the Government failed to prove actual anticompetitive effects. Its arguments fall short.

A. Amex Wrongly Claims That The Government Must Prove That Its Restraints Caused Higher Prices *And* Lower Output

Amex argues (at 42-43) that even if its anti-steering provisions raise merchant fees, the Government needed to demonstrate that they also decrease output. It is factually and legally mistaken.

Factually, Amex implies (at 42) that year-to-year increases in credit-card charge volume (as measured in dollars) show that its restraints raise output. Pet. App. 52a (citing 2d Cir. App. A2428 (Nilson Report)). That is mistaken. This statistic does not control for variables—like economic growth, population growth, or inflation—that would increase annual charge volume even in a monopolized market. *Cf.* 11 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*,

¶ 1901, at 230 n.15 (3d ed. 2011). Proving that economic conditions (not Amex's restraints) drive charge volume, an Amex official admitted that Amex's business generally "grows roughly" at the same rate as the "discretionary GDP." Tr. 3544 (Silverman/Amex). And charge volume declined during the great recession. Tr. 4266-67 (Katz). Amex identifies nothing that shows the anti-steering provisions' *causal effects* on charge volume.

Legally, higher prices and lower output are flipsides of the same coin. "'[R]aising price, reducing output, and dividing markets have the same anticompetitive effects.'" *Cal. Dental Ass'n*, 526 U.S. at 777 (citation omitted). In markets with downward-sloping demand curves, restraints that raise prices will reduce output (or vice versa). 11 Areeda & Hovenkamp, *supra*, ¶ 1901, at 229. Thus, courts have repeatedly recognized that plaintiffs may prove that a restraint has caused "increases in price, *or* decreases in output or quality." *Visa*, 344 F.3d at 238 (emphasis added); *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1084-85 (11th Cir. 2016); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *Brown Univ.*, 5 F.3d at 668-69.

This makes sense. Amex's argument that the Government must show that its restraints caused *not just* price hikes *but also* output contractions is merely another way of phrasing the Second Circuit's directive to prove that the price increases were not "offset" by cardholder rewards—a quality (and so) output metric. Pet. App. 51a; 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1503b, at 394 (3d ed. 2010). As the States noted (at 41-50), legal precedent and economic principle both suggest that the higher prices generated by interbrand price restraints will decrease output *more* than any quality changes will increase it. When addressing horizontal restraints, for example, this Court has not required plaintiffs to balance the (decreasing) output effects from higher prices with any (increasing) output effects from higher quality. The price effects sufficed. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694-95 (1978). Economic theory supports that rule. Even if interbrand price restraints shift competition to nonprice factors like quality, the higher quality will not offset the higher price (and output will decline). Posner, *Antitrust Law*, *supra*, at 14.

As the States also noted (at 50-52), administrative concerns suggest that output reductions should not be "'the *only* measure of anticompetitive effect'" due to the difficulty of measuring output. *O'Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (citation omitted). Output is not an "unambiguous" concept; "[s]ometimes identifying the relevant output is difficult." 7 Areeda & Hovenkamp, *supra*, ¶ 1503b, at 394. In *NCAA*, the television plan resulted in an immediate output reduction measured in terms of televised games, but the dissent thought the proper measure should be total viewership. *Compare* 468 U.S. at 105 & n.29, *with id.* at 129 (White, J., dissenting). Here, too, higher merchant fees result in an immediate output reduction measured in terms of the number of merchants that accept credit cards. Tr. 3946-48 (Katz); Pet. App. 186a-87a. Further, broader measures of the anti-steering provisions' effects on charge volume enmesh the judiciary in "evidentiary complexities." *Ill. Brick*, 431 U.S. at 731-32. Courts would need to balance the restraints' clear output-reducing effects (higher merchant fees and retail prices) against any claimed output-increasing effects (cardholder benefits that would allegedly go unprovided). Because of the concrete consumer harms (in the form of higher merchant fees), Amex at least should bear the burden for the alleged output-increasing effects. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

Amex's reliance on charge volume also overlooks the disconnect between those who make consumption decisions (cardholders) and those who pay for them (merchants). Given that disconnect, Amex's provisions make charge-volume output unresponsive to price. Pet. App. 195a-96a. They "distort competitive markets by steering consumers toward using more costly and less efficient payment methods." Frankel & Shampine, *supra*, at 672. Amex asks the Court to ignore this inefficiency, suggesting (at 51, 55) that it is a concern for regulators rather than courts. But antitrust law seeks to protect the competition that promotes allocative efficiency. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). By restricting interbrand price competition, Amex's restraints cause a misallocation of resources.

All of this said, a mere showing that prices have increased over time does not *automatically* prove anticompetitive harm. Services generated by resale price maintenance, for example, often lead to a higher price for *one* manufacturer's brand, but they leave other lower-priced brands available. *Leegin*, 551 U.S. at 895-97. Here, however, Amex's provisions have not just led *Amex* to charge higher prices (to pay for its rewards); they have led *all four* credit-card networks to do so. Pet. App. 207a. And even a showing that market-wide prices have increased may not suffice. Price increases may result from other factors, such as shifting consumer demand. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993). Here, however, Amex's restraints *caused* the higher prices. Pet. App. 207a. Where, as here, the Government shows that a restriction on competition causes prices to rise market-wide, it has met its initial burden.

B. Amex Wrongly Claims That The Higher Merchant Fees Did Not Suffice To Prove Anticompetitive Prices

Amex offers (at 43-50) three reasons why the higher merchant fees did not meet the Government's burden to establish anticompetitive harm: (1) they do not account for cardholder benefits; (2) they do not identify the "sub-prices" for components of the credit-card platform; and (3) they do not prove supracompetitive margins. Each claim lacks merit.

1. *Cardholder Benefits*. Amex suggests (at 43-46) that the Government needed to show a higher "net" price—that higher merchant fees were not offset by higher cardholder benefits. It is wrong for the same reasons that its output argument fails, *supra* Part III.A, and for the precedential, economic, and administrative reasons articulated in the States' opening brief (at 41-52).

In addition, Amex all but concedes (at 44-45) that it departs from the usual test for defining the "relevant market," recognizing that merchant services are not "reasonably interchangeable" with cardholder services. It lumps these complements into one market because they are both necessary for a credit-card transaction. That is analogous to saying that tires and brakes must be treated as part of the same market because they are both necessary inputs for cars. Under Amex's logic, "there [could] never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 463 (1992). While elsewhere agreeing (at 57) that clear antitrust rules are important, Amex's argument here muddies the bright-line market-definition test.

Regardless, Amex wrongly suggests (at 44) that the district court "had no evidence" about the net price. As the States explained (at 57-58), the district court found that Amex's restraints caused higher "net" prices. To be sure, the court noted that it could not quantify two-sided prices. Pet. App. 209a. But it found sufficient evidence to conclude that Amex did *not* shift all of the revenue from its "Value Recapture" price increases to cardholder benefits. *Id.* Instead, merchant-fee increases qualified "as changes to the net price charged across Amex's integrated platform." *Id.* at 166a-67a, 209a-10a.

2. *Separate Sub-Prices*. Amex argues (at 46-48) that the Government needed to divide the higher merchant fees into their three component parts, and show higher "sub-prices" for services provided at the issuer level, network level, and acquirer level. Amex offers neither precedent nor theory explaining why this break-down is required or relevant. Indeed, courts have rejected narrower defenses that a restriction on "one component of an overall price" did not affect that overall price. *O'Bannon*, 802 F.3d at 1070; *Catalano*, 446 U.S. at 649. Here, Amex has affected the *overall* merchant price. Amex also oper-

ates an integrated network, so the way in which it allocates merchant fees to its services represents a mere bookkeeping exercise. Pet. App. 83a-84a.

3. *Supracompetitive Margins*. Amex claims (at 48-50) that the Government bears the burden to prove supracompetitive margins. This is theoretically unsound and conflicts with precedent.

"[T]here is not even a good economic theory that associates monopoly power with a high rate of return." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.). Monopolists invest resources to obtain monopoly profits; cartel members invest resources to obtain greater shares of cartel profits. 2B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 502, at 113 (4th ed. 2014). These efforts increase costs and reduce margins. Posner, *Antitrust Law*, *supra*, at 13-14. Thus, Amex's test would not even invalidate restraints deemed so anticompetitive as to be unlawful *per se*. And while Amex protests (at 51) that courts should not act as central planners, this test converts antitrust law from a scheme to protect competition into one "resembling public utility price regulation"—under which courts examine a defendant's balance sheets, make it justify its costs, and decide if its return is "fair." *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).

Unsurprisingly, Amex cannot ground its test in precedent. It relies (at 48) on *Brooke Group*, which recognized that higher prices *alone* do not prove anticompetitive conduct because they can result from market factors. 509 U.S. at 232. That is why the Court said: "Only if those higher prices are a product of *nonmarket forces* has competition suffered." *Id.* (emphasis added). Plaintiffs must prove that a restraint—not market factors—*caused* higher prices. Here, the district court held that the Government met this causation element because the higher prices *were* a product of Amex's restraints. Pet. App. 207a.

If anything, this Court has repeatedly condemned restraints that interfere with price—the "'central nervous system of the economy.'" *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (citation omitted). It has invalidated restraints when they "disrupt[ed] the proper functioning of the price-setting mechanism of the market," *Ind. Fed'n*, 476 U.S. at 461-62, or created structures "unrelated to the prices that would prevail in a competitive market," *NCAA*, 468 U.S. at 106. This is for good reason. When restraints prevent prices from fluidly adjusting, a firm's costs become "price-determined, not price-determining." George Douglas & James Miller, *Quality Competition, Industry Equilibrium, and Efficiency in the Price-Constrained Airline Market*, 64 Am. Econ. Rev. 657, 668 (1974). But interbrand competition should decide the proper mix of high-reward, high-priced cards and low-reward, low-priced ones. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. During the days of price-regulated airlines, consumer welfare was harmed by controls setting high prices even if airline margins were eaten up by lavish services. States' Br. 48.

C. Amex Wrongly Claims That The Government Relies Only On A "Quick Look"

Amex argues (at 51-53) that the Government relies on the quick-look doctrine. That is mistaken.

The quick-look doctrine allows the Government to rely on economic principles *alone* without real-world evidence confirming economic theory. It 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*, 526 U.S. at 770. When, for example, the NCAA restricted the number of football games aired on television, this Court held that it bore the burden to produce a procompetitive justification for this horizontal restraint "even in the absence of a detailed market analysis." *NCAA*, 468 U.S. at 110. And when dentists agreed not to provide x-rays to insurers, the Court made a similar point. *Ind. Fed'n*, 476 U.S. at 460.

If the States sought to invoke this quick-look doctrine here, they could have relied *exclusively* on the "theoretical claim" that Amex's provisions will limit horizontal competition and raise merchant fees. *Cal. Dental Ass'n*, 526 U.S. at 775 n.12. But the Government did far more. It presented the "detailed market analysis" that this Court called unnecessary in the quick-look context. *NCAA*, 468 U.S. at 110. A lengthy trial with dozens of witnesses proved that Amex's provisions "made a real difference in the marketplace." *Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part). They frustrated price competition "to the point of near irrelevance," Pet. App. 195a, "result[ing] in higher all-in merchant prices," *id.* at 207a.

If Amex suggests that *NCAA* or *Indiana Federation of Dentists* articulate principles *only* for quick-look cases, it is mistaken. As Amex elsewhere admits (at 34), these cases alternatively engaged in a fuller market analysis. In *NCAA*, the Court rejected the NCAA's argument both because the NCAA needed to show a procompetitive justification even if it lacked market power *and* because it had that power. 468 U.S. at 109-13. *Indiana Federation of Dentists* did the same. 476 U.S. at 460-61. Circuit courts thus routinely cite these cases for general rule-of-reason principles. *E.g.*, *Todd*, 275 F.3d at 207.

Amex also claims (at 53) that the States seek to transform Amex's vertical restraints into horizontal ones based on their horizontal effects. The States do no such thing. The rule of *per se* illegality would govern a horizontal agreement between Amex and its competitors barring merchants from steering customers. *Catalano*, 446 U.S. at 649. Here, the rule of reason applies to vertical agreements between Amex and its merchants. The anti-steering provisions' horizontal effects do, however, prove their anticompetitive nature (and Amex's market power) under that case-by-case rule. *Cf. Leegin*, 551 U.S. at 897-99.

IV. AMEX (AND ITS *AMICI*) MISTAKENLY CLAIM THAT A HOLDING FOR THE GOVERNMENT WILL RISK "FALSE POSITIVES" IN FUTURE CASES

Amex and its *amici* lastly raise broader concerns with a ruling for the Government, albeit from different perspectives. They are mistaken.

Amex suggests (at 53-54) that the Government offers no "administrable standard" for rule-of-reason cases, and endangers other vertical restraints. Yet the Government offers a clear, demanding rule: It met its initial burden—and shifted to Amex the burden to show procompetitive rationales—when it proved that Amex's restraints have raised merchant prices by decreasing interbrand price competition. For decades, such stark effects—which show Amex's market power—have proved a *prima facie* case. *See Ind. Fed'n*, 476 U.S. at 460-61. And, contrary to Amex's claim (at 53-54), this rule does not call into doubt exclusive-dealing or output contracts. Those distinct restraints, which are also governed by the rule of reason, would require a similarly demanding showing of market-wide effects. *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring in judgment); *Interface Grp., Inc. v. Mass. Port Auth.*, 816 F.2d 9, 11 (1st Cir. 1987). This argument also ends Amex's brief the way it begins—discussing unrelated restraints that distance Amex even further from the Second Circuit's sole reliance on the credit-card platform's alleged uniqueness.

Meanwhile, Amex's *amici* raise concerns with any decision treating one side of a two-sided platform as the "relevant market" for antitrust purposes. *E.g.*, *Amicus* Br. of David Evans & Richard Schmalensee, at 8-28; *Amicus* Br. of Gregory Sidak & Robert Willig, at 6-21. As the States noted (at 41-42), this Court need not opine on the proper market scope for two-sided platforms. Even if both sides qualify as one market, a restraint with the purpose and effect of eliminating interbrand competition over one product characteristic generally requires some procompetitive justification even if interbrand competition still occurs over other product characteristics. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. That critical insight shows that the Government met its initial burden in this case, which shifted the burden to Amex to offer procompetitive rationales.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
Counsel of Record
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor
HANNAH C. WILSON
Deputy Solicitor
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

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ADDITIONAL COUNSEL

GEORGE JEPSEN
Attorney General
State of Connecticut

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

TOM MILLER
Attorney General
State of Iowa

BRIAN E. FROSH
Attorney General
State of Maryland

BILL SCHUETTE
Attorney General
State of Michigan

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

PETER KILMARTIN
Attorney General
State of Rhode Island

HERBERT H. SLATERY III
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont