No. 21-_____

In the Supreme Court of the United States

MELVIN SALVESON, EDWARD LAWRENCE, DIANNA LAWRENCE, WENDY M. WILLIAMS,
Petitioners,

v.

JPMORGAN CHASE & CO.; JPMORGAN CHASE BANK, N.A.; BANK OF AMERICA CORPORATION; BANK OF AMERICA N.A.; CAPITAL ONE, F.S.B.; CAPITAL ONE FINANCIAL CORPORATION; CAPITAL ONE BANK; HSBC FINANCE CORPORATION; HSBC BANK USA, N.A.; HSBC NORTH AMERICA HOLDINGS INC.; HSBC HOLDINGS PLC,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) holds that plaintiffs who *directly* purchase products from an antitrust violator may sue to recover unlawful price overcharges; whereas, *indirect* purchasers may not sue. In traditional vertical distribution chains, where the product is resold down the chain, the doctrine is straightforward. But, *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018) presents a novel twist on *Illinois Brick*'s rule that has enormous implications for the antitrust laws and the national economy. It holds that "two-sided transaction platforms" – *i.e.*, business models (like credit cards) that facilitate transactions between consumers and merchants on either side of the platform – sell transactions directly to *both* consumers and merchants at the same time.

In direct conflict with *American Express* and well-established antitrust precedents, the Second Circuit in this credit card transaction fee price-fixing case held that the petitioner cardholders do *not* purchase transactions from the payment card banks. In conflict with *Apple Inc. v. Pepper*, 139 S.Ct. 1514 (2019), it further held that cardholders are not direct payors of the transaction fee, even though the banks take the fee directly from the cardholders' payments to merchants.

The question presented is:

Whether a consumer in a two-sided transaction platform is a direct purchaser of transactions, where the platform operator takes the transaction fee directly from the consumer.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals. They are Melvin Salveson, Edward Lawrence, Dianna Lawrence, and Wendy M. Williams. Dr. Salveson died during the pendency of this case, and the court of appeals denied as moot petitioners' request to substitute Dr. Salveson for his son. Appendix ("App.") 5. Petitioners will renew that request before this Court.

Respondents were appellees in the court of appeals. They are: JPMorgan Chase & Co.; JPMorgan Chase Bank, N.A.; Bank of America Corporation; Bank of America N.A.; Capital One, F.S.B.; Capital One Financial Corporation; Capital One Bank; HSBC Finance Corporation; HSBC Bank USA, N.A.; HSBC North America Holdings Inc.; and HSBC Holdings PLC.

RELATED PROCEEDINGS

The following proceedings are directly related within the meaning of Rule 14(b)(iii):

Salveson, et al. v. JPMorgan Chase & Co., et al., No. 20-2658 (2d Cir.) (opinion issued and judgment entered June 29, 2021; petition for rehearing denied August 13, 2021);

Salveson, et al. v. JPMorgan Chase & Co., et al., No. 14-cv-3529 (E.D.N.Y.) (memorandum and order denying plaintiffs' motion to vacate judgment issued July 16, 2020);

Salveson, et al. v. JPMorgan Chase & Co., et al., No. 16-1104, 137 S.Ct. 1826 (2017) (petition for writ of certiorari denied April 24, 2017);

Salveson, et al. v. JPMorgan Chase & Co., et al., No. 15-0015 (2d Cir.) (opinion issued and judgment entered October 17, 2016).

Salveson, et al. v. JPMorgan Chase & Co., et al., No. 14-cv-3529 (E.D.N.Y.) (memorandum and order dismissing complaint for failure to state a claim November 26, 2014; judgment entered December 4, 2014; memorandum and order granting defendants' motion for reconsideration and denying plaintiffs' motion for reconsideration February 24, 2016).

In addition, petitioners' case was transferred from California to a multidistrict litigation that included cases brought by payment card merchants alleging the same price fixing conspiracy as the instant case. *In re*

Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 05-md-1720 (E.D.N.Y.).

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JURISDICTION

The judgment of the court of appeals was entered on June 29, 2021. App.5. That court denied petitioners' timely petition for rehearing on August 13, 2021. App.42. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover

> threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

This case presents recurring issues of exceptional importance to the antitrust laws and the nation's economy. Since *Illinois Brick*'s "direct-purchaser" rule was announced in 1977, this Court has repeatedly guaranteed the right of antitrust plaintiffs to sue when they are the "immediate buyers from the alleged antitrust violators." *Apple*, 139 S.Ct. at 1520 *quoting Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 207 (1990).

But, this Court's decision in *American Express* presents a novel twist on the direct-purchaser rule. That case established the "two-sided transaction platform," a business model that facilitates transactions between consumers and merchants on either side of the platform. The peculiar aspect of these platforms is that they *sell* "only one product – transactions" to *both sides* of the platform – consumers and merchants – at the same time. *American Express*, 138 S.Ct. at 2286. Historically, the *Illinois Brick* direct purchaser doctrine has been applied to traditional vertical distribution chains, where its application has been straightforward: "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator." *Apple*, 139 S.Ct. at 1521. But, two-sided transaction platforms sell transactions to two groups simultaneously, both of which may claim they are

direct-purchasers of transactions. Resolving whether the consumer in a two-sided transaction platform may sue as the direct purchaser presents a recurring and urgent issue with national economic implications: two-sided transaction platforms have proliferated the modern electronic economy and affect hundreds of millions of American consumers. The two-sided transaction platform model does not just describe credit-card markets, like the one in this case, that impact some 100 million cardholders and *trillions* of transaction dollars annually. It also describes modern electronic marketplaces like eBay, Amazon, Uber, and Lyft, to name just a few.

The manner in which consumers pay for transactions in two-sided transaction platforms is also of significant importance. When a platform facilitates a transaction between a consumer and a merchant, it pays itself by extracting a fee from the consumer's payment to the merchant. *Apple* holds, albeit outside of the two-sided transaction platform paradigm, that in this type of commission payment structure, the *consumer* is the payor of the fee and is the direct purchaser. *Apple*, 139 S.Ct. at 1521, 1523 (consumer direct purchaser where retailer "collect[s] the price of the product from consumers and remit[s] only a fraction of that price to the supplier"). *Apple* holds that "[w]hen there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue." *Apple*, 139 S.Ct. 1522. "The absence of an intermediary is dispositive." *Id*. at 1521.

Petitioners, on behalf of a putative class of all Visa and MasterCard debit and credit-card holders

("cardholders"), sued the banks that issued their cards ("issuing banks"), alleging the banks fixed artificially high "interchange fees," *i.e.*, transaction fees. They alleged the cardholder pays the interchange fee when the issuing bank takes money from the cardholder's account, extracts and keeps the interchange fee for itself, and then remits the remainder to the merchant.

The Second Circuit's decision affirming denial of cardholders' motion to vacate the judgment directly conflicts with *American Express* and *Apple* and violates hornbook antitrust principles established by this Court and followed by nearly every circuit for the past half-century. Whereas *American Express* held that "courts must" conclude that credit-card companies sell "only one product – transactions" to cardholders and merchants simultaneously, and "*not* [distinct] services to merchants" and cardholders, 138 S.Ct. at 2286-2287; the lower court held to the contrary, "we do not understand [*American Express*] to bar courts from treating participants in these markets as purchasers of distinct goods" for purposes of the *Illinois Brick* doctrine. App.8. That holding flouts this Court's unambiguous instruction that "courts must" consider cardholders "consumers" of transactions in the relevant market. 138 S.Ct. at 2286, 2284.

The court of appeals' decision further conflicts with *Apple*. In assessing whether a plaintiff is a direct purchaser, *Apple* holds that "[w]hen there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue." *Apple*, 139 S.Ct. at 1522. It emphasized that "the absence of an intermediary is dispositive." *Id.* at 1521. That

unambiguous language leaves no room for lower court interpretation. Yet, the Second Circuit disregarded this Court's clear directive, holding that cardholders' direct purchaser allegations were "implausible" as a matter of law, *even though* it is undisputed here that the cardholder has a direct relationship – indeed a contractual one – with the issuing bank. No intermediary stands between the cardholder and issuing bank, either with respect to the sale of the transaction or the payment for it. App.9. The lower court adopted an unprincipled narrowing of *Apple*'s holding, creating a new rule that requires a plaintiff to show more than *Apple* requires.

Section 4 of the Clayton Act was enacted by Congress in 1914 to encourage civil plaintiffs to act as "private attorneys general," *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 262 (1972), and "serve … the high purpose of enforcing the antitrust laws," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130131 (1969). The court of appeals' decision contravenes Congress's "longstanding goal of effective private enforcement and consumer protection in antitrust cases." *Apple*, 139 S.Ct. at 1524. It eliminates the ability of consumers in *any* two-sided transaction platform to sue the platform operator for antitrust violations that increase the cost of transactions.

This case presents a clean vehicle to address important antitrust questions with widespread implications for the national economy. This case alone involves $54 *billion* in annual transaction fees on $2.5 *trillion* in Visa and MasterCard transactions annually. App.47. The Second Circuit is home to the world's

leading financial institutions, including some of the world's largest credit card companies and banks. It hears a disproportionate number of credit-card cases. It is therefore appropriate to correct the lower court's intolerable contravention of this Court's precedents without further percolation. The Court should resolve these important issues now.

STATEMENT

A. The Operation of a Payment Card Transaction

A typical transaction involving a credit card or debit card (jointly "payment card") involves four parties: (a) the cardholder, (b) the bank that issued the card ("issuing bank" or "issuer"), (c) the merchant, and (d) the merchant's bank ("acquiring bank" or "acquirer"). App.63 (¶ 38). When a cardholder uses a payment card to purchase a product or service from a merchant, the merchant relays the transaction information to its acquiring bank, which sends the information to the issuing bank via the Visa or MasterCard network. App.68-67 (¶¶48, 49).

If the issuing bank approves the transaction, *i.e.* the cardholder has sufficient funds in its bank account (in the case of a debit card) or its credit is worthy (in the case of a credit card), the issuer then settles the transaction. The issuer's first step during settlement is to extract the full amount of the purchase price directly from the cardholder's account. App.68 (¶ 48). As payment for completing the transaction, the issuing bank takes a percentage (about 2.95%) of the cardholder's payment. *Id.* This amount is called the

"interchange fee," *id.*, and the percentage rate was fixed at artificially high rates through a conspiracy among the banks. App.64-68. The issuing bank takes the interchange fee directly from the cardholder's account on every transaction. App.47, 63, 68, 85 (¶¶ 1, 38, 47, 48, 81). Only after it takes the unlawful fee does the issuing bank send the remaining amount of the cardholder's payment to the merchant's bank, which takes its own fee from the cardholder's payment before remitting the rest to the merchant. *Id.* Notably, the cardholder is the only entity in the entire chain that actually pays any money.

The banks and merchants specifically agreed not to disclose the existence of the interchange fees to the cardholders, App.93 (¶ 102), a fact that led the district court to characterize the interchange fee as a "hidden tax imposed on consumers." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 234 (E.D.N.Y. 2013).

B. Dismissal of Cardholders' Complaint

In 2013, on behalf of a putative class of Visa and MasterCard cardholders, petitioners sued the issuing banks for conspiring to fix the interchange rate at supracompetitive levels in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 16720 of the California Business & Professions Code. App.44.

Cardholders' case was transferred from the Northern District of California to the multidistrict litigation in the Eastern District of New York where merchants had brought similar antitrust actions

alleging *they* paid the interchange fee because their revenues were reduced in the amount of the fee.

On November 26, 2014, the district court dismissed the cardholders' complaint on the grounds it was precluded by *Illinois Brick*. App.104, 107. The decision was premised on then-controlling circuit law, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003), which held that the credit card market consists of two separate markets: "general purpose payment cards" and "payment card network services." App.111-112. It found that cardholders did not "participate" as consumers in the "payment card network services" market in which the interchange fee is exchanged and therefore could not be considered direct-purchasers under *Illinois Brick*. *Id*. The district court also found cardholders' allegations that they paid the interchange fee implausible, because the payment card "transaction structure" showed that "merchants … pay interchange fees," not cardholders. App.112.

Judgment was entered on December 4, 2014. App.114. In 2016, the district court denied cardholders' timely motion for reconsideration. App.116. The court of appeals affirmed, App.161, and this Court denied cardholders' petition for a writ of certiorari, 137 S.Ct. 1826 (2017). Fourteen months later, the Court decided *American Express* and two years later, it decided *Apple*.

C. The *American Express* and *Apple* Decisions

American Express rejected the two-market concept in *Visa* and thus nullified the district court's legal basis for dismissing the cardholders' complaint. App.111-112.

American Express held that the credit-card industry is not made up of two separate markets, but rather a single market in which credit-card companies "sell" only one product – transactions – to cardholders and merchants simultaneously, who are the "consumers" of the sold transaction. *American Express*, 138 S.Ct. at 2286. *American Express* clarified that "the product that credit-card companies sell is transactions, not services to merchants" or cardholders separately. *Id*. at 2287. By defining the market, *American Express* sought to identify the "consumers in the relevant market" so the impact of the alleged antitrust violation on those consumers could be assessed. *Id*. at 2284. "[C]ourts must," it instructs, "include both sides of the platform – cardholders and merchants – when defining the credit-card market." *Id*.

The merchants, who were in the same multidistrict litigation as the cardholders, moved the district court to amend their complaints to conform to the new two-sided transaction platform concept. App.172, 176. The district court granted the motion and allowed the merchants to "include allegations of harm to cardholders in a two-sided market." App.196. That decision was contrary to the reasoning of the district court's dismissal of the cardholders' complaint because the district court had previously ruled that cardholders did not "participate" in the relevant market. App.111-112. The district court conceded its decision granting the merchants leave to amend was in "tension" with its dismissal of the cardholders' complaint. App.239. It therefore "invited" the cardholders to seek "relief" from the judgment:

> The Court is cognizant that this Memorandum and Order [granting the merchants leave to amend] may be in tension with its decision in *Salveson* [dismissing the cardholders' complaint]. The plaintiffs in *Salveson* are invited to brief whether they are entitled to any relief in light of the Supreme Court's decision in [*American Express*], and this decision.

Id.

Shortly thereafter, this Court issued the *Apple* decision. *Apple* directly undermined the district court's conclusion that the "structure" of the payments demonstrated as a matter of law that the merchants, and not the cardholders, were the payors of the interchange fee. App.112. Analyzing a functionally identical payment structure as this case, *Apple* held that iPhone users were the direct purchasers and paid the unlawful fee when Apple took that fee, as a commission, from the iPhone users' payments for apps built by third-parties. *Apple*, 139 S.Ct. at 1519, 1521. Emphasizing the lack of intermediary between the iPhone user and Apple in the sale of the app and payment for it, *Apple* held that "the absence of an intermediary is dispositive" of a plaintiff's standing to sue under *Illinois Brick*. *Apple*, 139 S.Ct. at 1521.

D. Cardholders' Motion To Vacate The Judgment

In light of the intervening change in decisional law created by *American Express* and *Apple*, combined with the district court's conflicting legal conclusions for the cardholders and merchants and its invitation to the

cardholders to seek relief, the cardholders moved to vacate the judgment under Federal Rule of Civil Procedure 60. Relying on this Court's decision in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) and the Second Circuit decision *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353 (2d Cir. 2013), *cert denied*, 134 S.Ct. 2875 (2014), the cardholders argued that the changes in decisional law combined with the unequal application of those laws to two plaintiff groups injured by the same tort constituted "extraordinary circumstances" meriting vacatur of the judgment. *See, In re Terrorist Attacks*, 741 F.3d at 357 ("the interest in finality is outweighed by the interest in treating victims of the same tort consistently").

Cardholders also argued that because *Apple* requires that no intermediary stand between the plaintiff and the antitrust violator, *Apple* appears to preclude the merchants' suit. That is because an intermediary – the acquiring bank – stands between the merchants and the issuing banks that took the unlawful interchange fees. The respondent banks have pressed that argument at the district court in their motions for summary judgment against the merchants. *See, In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, No. 05-md-1720, ECF no. 8365 at 13 (E.D.N.Y. Feb. 19, 2021).The cardholders' Rule 60 motion thus argued that absent vacating their judgment, *no plaintiff* would be poised to prosecute the banks' illicit conspiracy, an intolerable result that would do violence to Congress's central goal in enacting Section 4 of the Clayton Act.

The district court denied the motion. Its decision was based solely on the legal conclusion that cardholders are not direct purchasers of transactions in light of *American Express* and *Apple*. App.27, 38. Disregarding *American Express*'s holding that credit-card companies only sell transactions, *American Express*, 138 S.Ct. at 2286 and that "the product credit-card companies sell is transactions, not services to merchants," *id.* at 2287, the district court concluded to the contrary that cardholders and merchants purchase "separate and distinct" services from the credit-card network. App.33-35. It ruled that credit-card companies sell cardholders "card-payment services" – not transactions – which "do not implicate the interchange fee." App.35. It found that "although [*American Express*] represents a change in law" its "prior reasoning … that Plaintiffs lack standing under *Illinois Brick* is undisturbed by [*American Express*]." App.40-41. The district court dedicated two sentences to analyzing *Apple*, summarily concluding that cardholders' reliance on that case was "misplaced." App.39.

Importantly, the district court's ruling expressly "decline[d] to address" the "arguments as to why there are extraordinary circumstances" meriting vacatur of the judgment under Federal Rule of Civil Procedure 60. App.41. The decision is based exclusively on the legal conclusion that cardholders are not direct purchasers in light of *American Express* and *Apple*, as a matter of law.

That pure legal question was squarely presented to the court of appeals.

E. The Decision Below

The Second Circuit affirmed in an unpublished summary order.[1] Like the district court, it did not address any of the cardholders' "extraordinary circumstances" arguments under Federal Rule of Civil Procedure 60. Rather, its holding relies solely on the legal conclusion that cardholders do not "purchase transactions" under *American Express* and do not "pay the interchange fee" under *Apple*. App.8, 9.

It concluded that "plaintiffs overstate the scope of the Supreme Court's decision" in *American Express* and that cardholders "confuse[] the issue of market definition … with the issue of who may be a proper plaintiff under *Illinois Brick*." App.8. It held, "[a]fter *American Express*, courts must use a two-sided market definition when analyzing market power in the credit card market, but we do not understand that decision to bar courts from treating participants in these markets as purchasers of distinct goods for purposes of the *Illinois Brick* doctrine." App.8.

It also confirmed its prior holding, that pre-dated *American Express* and *Apple* by two years, that "cardholders do not directly pay the heightened interchange fees" because "the structure of these

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[1] As explained below, a decisional rule unique to the Second Circuit holds that the court does not "consider itself free" to deviate from prior unpublished summary orders when adjudicating "similar cases." *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009). As a result, unpublished summary orders in Second Circuit practice are generally treated as though authoritative. District courts consider them binding.

transactions demonstrates that cardholders do not directly pay interchange fees." App.7. Never analyzing *Apple*'s impact on the legal interpretation of the payment structure in this case, the Second Circuit held that cardholders' contention that they were the payors of the interchange fee was "implausible" as a matter of law. App.9.

The cardholders filed a timely petition for rehearing or hearing *en banc*, which was denied on August 13, 2021. App.42.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *AMERICAN EXPRESS* AND *APPLE*, AND IS AT ODDS WITH WELL-ESTABLISHED ANTITRUST PRINCIPLES

A. The Lower Court's Decision Directly Conflicts With *American Express* and Cannot Be Reconciled With Hornbook Law

1. American Express analyzed whether a credit-card company's antisteering provisions, which prohibit merchants from discouraging customers from using their credit card at the point of sale, violated the antitrust laws. *American Express*, 138 S.Ct. at 2280. Applying the "rule of reason," the plaintiff was required to show the restraint had an anticompetitive effect "that harms consumers in the relevant market." *Id*. at 2284. As a result, the first step in this Court's analysis was to define the relevant market so as to *identify the consumers* of the product sold. *Id*.

American Express defined the market as a "two-sided transaction platform." The "key feature" of such platforms is that "they cannot make a sale to one side of the platform without simultaneously making a sale to the other." *American Express*, 138 S.Ct. at 2280. As a result, transaction platforms are "better understood as supplying only one product – transactions" to both sides of the platform simultaneously. *Id*. at 2286 (internal citation, quotation marks, and brackets omitted). It concluded – as a matter of law – that cardholders (and merchants) are consumers of transactions. *Id*. at 2286 (credit card companies "sell transaction services" to cardholders and merchants, who "jointly consume[]" them.) The Court thus held, "courts *must* include both sides of the platform – merchants and cardholders – when defining the credit-card market." *Id*. at 2286 (emphasis added). "[T]he credit-card market *must* be defined to include both merchants and cardholders." *Id*. at 2287 (emphasis added).

The Second Circuit disregarded this Court's explicit direction. Instead, it held:

> After *American Express*, courts must use a two-sided market definition when analyzing market power in the credit-card market, *but we do not understand the decision to bar courts from treating participants in these markets as purchasers of distinct goods* for the purposes of the *Illinois Brick* doctrine.

App.8 (emphasis added).

American Express already rejected precisely that conclusion when it clarified that "the product that credit-card companies sell is transactions, *not* services to merchants" or cardholders separately. *American Express*, 138 S.Ct. at 2287 (emphasis added). The lower court treated that clarification with indifference. When this Court held that "courts must" include cardholders as consumers of transactions in the relevant market, it left no room for interpretation. *Id.* at 2286.

The Second Circuit's new rule, untethered by logic or precedent, converts *American Express*'s mandate into a permissive discretionary rule whereby lower courts may *sometimes* define credit card markets as a two-sided platform, and *sometimes* define them as two separate markets of "distinct goods." Review is warranted because "the [lower] court did exactly what [this Court] barred." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) (granting certiorari and reversing state supreme court's decision adopting legal rule in conflict with this Court's precedent).

2. The conflict created by the lower court's decision cannot be argued away with the false distinction that *American Express* employed the market definition to analyze market power, while the lower court employed it to assess cardholder standing under *Illinois Brick*.

First, the stated purpose of *American Express*'s market definition was to identify the "consumers in the relevant market." *American Express*, 138 S.Ct. at 2284. Only then could the Court assess whether the restraint "harms consumers" in that market. *Id.* Thus, when it defined the credit-card market in *American Express*,

this Court held as a matter of law that cardholders are consumers of transactions, not "distinct goods."

Moreover, *American Express* never cabined its definition of the credit-card market to apply only when analyzing market power, because that approach would run counter to hornbook antitrust law. *American Express*'s relevant market definition – like *all* properly formulated relevant market definitions – was based on the "commercial realities" of the industry, a framework that has guided relevant market definitions for a half-century. "'[T]he definition of the relevant market' *must* 'correspond to the commercial realities' of the industry." *American Express*, 138 S.Ct. at 2285 *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 336-337 (1962)) (emphasis added). "[C]ourts should 'combine' different products or services into 'a single market' when 'that combination reflects commercial realities.'" *American Express*, 138 S.Ct. at 2285 *quoting United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)). Market definitions must be based on "the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482, (1992).

Because *American Express* holds that the "commercial realities" of the credit-card industry require treating cardholders as purchasers of *transactions*, the Second Circuit's contradictory conclusion that cardholders and merchants purchase "distinct goods" *separate* from transactions necessarily disregards "commercial realities." Courts must define relevant markets based on commercial realities alone. "Any other analysis would lead to 'mistaken inferences.'" *American Express*, 138 S.Ct. at 2287

quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993). Thus, the Second Circuit's erroneous holding not only conflicts with *American Express*, it is at odds with the framework that has guided relevant market definitions for 50 years.

In fact, the necessary implication of the Second Circuit's decision is that lower courts can sculpt two incongruous definitions of the *same* market depending exclusively on whether they are analyzing market power, anticompetitive effects, standing, or any other antitrust legal issue that requires scrutinizing the market. That reasoning is *sui generis* in the law. The decision below establishes an arbitrary and unprincipled basis for defining the products sold in the relevant market, unbounded by "commercial reality" guardrails.

3. Finally, the lower court's conclusion that "the issue of market definition" is irrelevant to the "issue of who may be a proper plaintiff under *Illinois Brick*," App.8, is at odds with the underlying premise of *American Express*'s holding: that "a credit-card network sells … transaction services to … cardholders." *American Express*, 138 S.Ct. at 2286. Because *American Express*'s market definition identifies the consumers of the product in the market, that definition is directly relevant to whether the consumer is a direct purchaser of that product. *See, e.g.,* Michael L. Katz & A. Douglas Melamed, *Competition Law As Common Law: American Express and the Evolution of Antitrust*, 168 U. Pa. L. Rev. 2061, 2104 (2020) ("[U]nder

American Express, users on both sides of a transaction platform are direct purchasers").[2]

Nor can the lower court's conclusion that relevant market definitions are irrelevant to a plaintiff's standing be reconciled with the decisions of this Court and seven circuits. Whether a plaintiff is a "consumer" in the "relevant market" is directly probative of the plaintiff's ability to sue in antitrust cases. *Assoc. Gen'l Contractors of Calif. v. Calif. State Council of Carpenters*, 459 U.S. 519, 539 (1983) (whether a plaintiff is "a consumer [or] a competitor in the market in which trade was restrained" relevant to the plaintiff's ability to sue); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 *citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) ("[A] consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy"). Seven circuits likewise hold. *See, e.g., Southaven Land Co. v. Malone & Hyde, Inc.*,

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[2] *See also*, Garry A. Gabison, *A Platform Paradox: Two Sides, Three Markets*, 17 DePaul Bus. & Com. L. J. 65, 65 (2019) ("For antitrust purposes, both sides [of a two-sided transaction platform] should be considered direct purchasers"); Brief of *Amicus Curiae* Verizon Communications, Inc. in Support of Neither Party, *Apple v. Pepper*, No. 17-204 at 5 (Aug. 17, 2018) ("[A]s *Amex* makes clear, these purchasers … are best understood as purchasing the same item – transactions … with direct purchasers on both sides"); Geoffrey A. Manne, Kristian Stout, *The Evolution of Antitrust Doctrine After Ohio v. Amex and the Apple v. Pepper Decision That Should Have Been*, 98 Neb. L. Rev. 425, 454 (2019) ("a crucial implication of the *Amex* decision is that participants on both sides of a transactional platform are part of the same relevant market … it is difficult to maintain that either side does not have standing to sue").

715 F.2d 1079, 1086 (6th Cir. 1983) *quoting Assoc. Gen'l Contractors*, 459 U.S. at 538) ("A *significant element* of the § 4 'standing' inquiry is the nature of the plaintiff's alleged injury either as a 'customer' or 'participant' in the 'relevant market.'")[3] Thus, directly contrary to the lower court's conclusion, the plaintiff's status as a consumer within the relevant market has for decades informed the analysis of an antitrust plaintiff's ability to sue.

B. The Lower Court's Decision Conflicts With *Apple*

1. *Apple* employed a functionally identical payment structure as in this case. In *Apple*, independent app developers made their apps available to iPhone users through Apple's App Store. *Id*. at 1519. Apple sold the apps to iPhone users. *Id*. Apple then took an unlawful 30% commission from the iPhone user's payment to the

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[3] *See also, SAS of Puerto Rico v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) ("competitors and consumers are favored plaintiffs in antitrust cases"); *Ethypharm S.A. France v. Abbott Lab'ys*, 707 F.3d 223, 233 (3d Cir. 2013) (antitrust injury established by "consumers and competitors in the restrained market"); *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1065 (7th Cir. 2019) ("We usually presume that competitors and consumers in the relevant market are the only parties who suffer antitrust injuries"); *South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 47 (8th Cir. 1989) ("standing has been generally limited to the actual participants in the relevant market: competitors and consumers"); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("injured party [must] be a participant in the same market as the alleged malefactors"); *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) ("a plaintiff must show that it is a customer or competitor in the relevant antitrust market").

app developer. *Id*. The iPhone users alleged they were "lock[ed]" into "paying Apple's 30% fee." *Id*. The Court agreed, holding "[t]he iPhone owners pay the alleged overcharge directly to Apple." *Id*. at 1521. That was so, even though the app developer's revenues were *reduced* by the 30% commission and Apple argued that only the app developers could sue. *Id*. at 1524.

Similar to this case, *Apple* was a "commission case." *Apple*, 139 S.Ct. at 1524. That is, Apple took a percentage commission from the consumer's payment to the app merchant. Here, the issuing banks take the interchange fee from the cardholder's payment to the merchant. *Apple* holds that the commission structure is irrelevant to whether the consumer paid the unlawful fee and is the direct purchaser. *Apple*, 139 S.Ct. at 1522-1523. Consumers pay the overcharge even where "the retailer … collect[s] the price of the product from consumers and remit[s] only a fraction of that price to the supplier." *Id*. at 1523. To hold otherwise would "allow a monopolistic retailer to insulate itself from antitrust suits by consumers," *id*. at 1524, and this Court "refuse[d] to rubber-stamp such a blatant evasion of statutory text and judicial precedent." *Id*. at 1524-1525.

This case involves a similar, if not functionally identical, payment structure as *Apple*. The district court, whose factual recitation the lower court relied on, summarized the undisputed payment structure as follows:

- "Plaintiffs contend that a cardholder 'pays the gross amount of the transaction, including fees, directly to the issuing bank, which keeps the

interchange fee and passes on a separate transaction fee to the acquiring bank and the net amount to the merchant via the Visa and MasterCard network.'" App.15 (brackets omitted).

- "Plaintiffs specifically allege that the initial payment in the transaction is made by cardholders, [and] that the issuing bank 'keeps' the interchange fee from that payment." *Id.* (brackets omitted).

The Second Circuit held that "the structure of these transactions" rendered "implausible" cardholders' allegation "that [they] pay the interchange fee directly to the defendant banks." App.9. That holding cannot be reconciled with *Apple*; the plausibility of the iPhone users' allegations that they paid the unlawful commission when Apple took it from their payments for third-party apps cannot be debated. The lower court's opinion relied instead on decisions that pre-date *Apple* by three years. App.7.

This is not a fact-bound issue. There is no dispute about the facts; the allegations in the complaint are taken as true. Whether an allegation is "plausible" is purely a question of law. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Applied here, "[t]he plausibility standard" is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference" that the cardholders paid the unlawful fee. *Id.* Cardholders' allegations that they paid the unlawful fee is plausible as a matter of law after *Apple*, because *Apple* held that functionally identical

allegations regarding the payment of the unlawful fee rendered the iPhone plaintiffs direct purchasers.

2. The Second Circuit's decision conflicts with *Apple*'s unambiguous directive that "[w]hen there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue." *Apple*, 139 S.Ct. at 1522. It is undisputed in this case that no intermediary stands between the cardholder and the issuing bank, either in supplying the transaction or the payment for it. App.68-70 (¶¶ 47-49). In fact, cardholders have a direct and indeed contractual relationship with the issuing banks. *Apple* holds that this fact alone is controlling. "The absence of an intermediary is dispositive." *Id.* at 1521. This Court's use of the word "dispositive" is itself dispositive, and the Second Circuit ignored it. The decision below conflicts with *Apple*, flouts this Court's unambiguous directive, and establishes a narrow rule that requires a plaintiff to show more than *Apple* requires.

3. Under *Illinois Brick*, only "*indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue." *Apple*, 139 S.Ct. at 1520. The cardholders are not "two or more steps removed" from the issuing bank; therefore, the *Illinois Brick* doctrine cannot prohibit them from suing. Under *American Express*, cardholders purchase transactions directly from the banks. As in *Apple*, "[t]his is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain." *Id.* at 1524. By barring a suit from plaintiffs that are undisputedly not

"two or more steps removed" from the issuing bank, the Second Circuit's decision not only conflicts with *Apple*, it conflicts with *Illinois Brick* itself.

4. The payment structure in this case is emblematic of payment structures in many two-sided transaction platforms – the platform operator takes a fee from the consumer's payment to the merchant. Uber and Lyft, to take two examples, collect trip payments from riders, extract a percentage as a fee for facilitating the transaction, and remit the remainder to the driver. Henry H. Perritt, Jr., *Don't Burn the Looms-Regulation of Uber and Other Gig Labor Markets*, 22 SMU Sci. & Tech. L. Rev. 51, 59 (2019). Given the ubiquity of two-sided transaction platforms in the modern economy, clarity about consumers' ability to sue in such platforms is of paramount importance.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN IMPORTANT ANTITRUST QUESTION THAT THREATENS THE CONGRESSIONAL PURPOSE OF THE ANTITRUST LAWS AND SIGNIFICANTLY IMPACTS THE NATIONAL ECONOMY

The Court has often granted review on important antitrust questions in cases that impact Congress's enforcement goals or a substantial sector of the national economy. The challenged decision in this case does both.

1. Section 4 of the Clayton Act authorizes "any person" injured by an antitrust violation to sue for treble damages. 15 U.S.C. § 15. For over 50 years, this

Court has emphasized that "the [Congressional] purpose" of Section 4 "was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith*, 395 U.S. at 130-131; *Hawaii v. Standard Oil*, 405 U.S. at 262 ("Congress encouraged these persons to serve as 'private attorneys general'"); *Reiter*, 442 U.S. at 344 ("Congress created the treble-damages remedy of § 4" to "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"); *Illinois Brick*, 431 U.S. at 746 ("legislative purpose in creating a group of 'private attorneys general'" was "to enforce the antitrust laws under § 4"); *McCready*, 457 U.S. at 467 (through "'expansive remedial purpose' in enacting § 4[,] Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions"); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds, Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) ("the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws").

Given Section 4's principal Congressional objective, this Court "[has] maintained, throughout [its] cases, that [its] interpretation of § 4 *must* promote the vigorous enforcement of the antitrust laws." *UtiliCorp*, 497 U.S. at 214 (emphasis added). As a result, "[c]onsistent with the congressional purpose, [this Court] [has] refused to engraft artificial limitations on the § 4 remedy." *McCready*, 457 U.S. at 472; *see also*,

Perma Life Mufflers, 392 U.S. at 134 ("We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes"); *Apple*, 139 S.Ct. at 1524 (any proposed rule must not "contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases").

Thus, this Court has granted certiorari as necessary to correct decisions that undermine Congress's mandated goal of antitrust enforcement. In *Perma Life Mufflers*, 392 U.S. at 136, the Court concluded that "[b]ecause the[] rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari."

The same was true in *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978), which concerned a foreign sovereign's ability to sue for antitrust violations under Section 4. *Id.* at 311. The Court granted certiorari to consider that "important and novel question in the administration of the antitrust laws," which ultimately turned on whether denying the right to sue would conflict with the "two purposes" of Section 4: "to deter violators and deprive them of 'the fruits of their illegality,' and to 'to compensate victims of antitrust violations." *Id.* at 314 *citing Illinois Brick*, 431 U.S. at 746 (other citations omitted).

In fact, all of this Court's principal direct-purchaser cases have sought to ensure Section 4's legislative goal of robust private antitrust enforcement. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (prohibiting the pass-on defense because

"[t]reble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness" if the defense were permitted); *Illinois Brick*, 431 U.S. at 746 (direct purchaser rule ensures "the long standing policy of encouraging vigorous private enforcement of the antitrust laws"); *UtiliCorp*, 497 U.S. at 214 ("our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws"); *Apple*, 139 S.Ct. at 1524 (rejecting Apple's primary argument because it "would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases").

The Second Circuit's decision is an affront to the Congressional goals in enacting Section 4, eliminating the ability of cardholders to sue credit-card companies for this or any future price fixing violation, jeopardizing the ability of consumers to sue in *any* two-sided transaction platform, and negatively impacting a substantial sector of the American economy.

The impact of the Second Circuit's decision will be felt nationwide and over a large swath of the American economy. In 2016 alone, cardholders in the United States made over 110 billion payments worth nearly $6 trillion. Stephen Wilks, *Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks*, 123 Dick. L. Rev. 307, 316 (2019). In 2017, Visa and MasterCard generated $54.69 billion in fees while processing more than $2.5 trillion in transactions. *Id.* at 318. None of the millions of American cardholders impacted by a future conspiracy among credit-card companies or banks to fix

transaction fees at unlawful levels would have any recourse if the decision below were permitted to stand.

While the staggering impact of the above-cited figures reflect the enormity of the Second Circuit's decision on cardholders in this and future credit card cases, its decision has broader reach still. It will impact consumers' ability to sue platform operators in *any* two-sided transaction platform. Such platforms are ubiquitous in modern commerce and include "electronic marketplaces, auction houses, and computer operating systems," Filistrucchi, Geradin, Van Damme, & Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 301 n.15 (2014). Examples include businesses like Uber, Lyft, eBay, and Amazon. The holding below may impact "cloud computing, customer relationship management platforms, and healthcare systems." Brief of *Amicus Curiae* Verizon Communications, Inc. in Support of Neither Party, *Apple v. Pepper*, No. 17-204 at 2 (Aug. 17, 2018). Countless other firms that rely on transaction platforms will similarly be impacted by the decision below.

This Court often grants certiorari to resolve important antitrust questions that impact the national economy, as this case does. For example, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 94 (1984) considered whether the NCAA violated the Sherman Act by unreasonably limiting the number of football games that any of hundreds of universities across the country could televise. Granting the universities' application to stay the judgment pending their petition for a writ of

certiorari, Justice White explained that review was clearly merited because "[t]he judgment below would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 463 U.S. 1311, 1313 (1983) (White, J., in chambers).

Antitrust questions that have impacted significantly smaller portions of the economy have warranted review. In *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 818 (1978) the Court considered whether a producer of broiler chickens is considered a "farmer" within the meaning of the Capper-Volstead Act, an "issue apparently … of importance to the broiler industry." The Court granted review "[b]ecause of the importance of the issue for the agricultural community and for the administration of the antitrust laws." *Id*. at 820.

In *Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 441 U.S. 1 (1979), the Court considered whether the use of "blanket licenses" to sell music copyrights was *per se* unlawful. The Court granted certiorari "because of the importance of the issues to the antitrust and copyright laws." *Id*. at 7.

In this case, a court of appeals in the state of New York has issued a decision that impacts some 100 million cardholders spread across all 50 states. It presents an issue of national economic importance that rivals, if not exceeds, the impacts in *NCAA*, *Nat'l Broilers*, or *Broadcast Music*. New York is the leading financial and banking center of the world, and a large number of the globe's leading corporations are

headquartered there. As a result, the Second Circuit hears a disproportionate number of credit card cases, decreasing the possibility of other circuits weighing in on the issues presented. The need to correct the lower court's intolerable rule is urgent – not just for the millions of American consumers in the putative class of cardholders, but for the millions more who participate in two-sided transaction markets across the nation. For all these reasons, the issue presented should not be permitted to percolate further.

III. THIS CASE PRESENTS A CLEAN VEHICLE

1. This case presents a clean vehicle for resolving whether consumers are direct purchasers of transactions in a two-sided transaction market. There are no factual disputes. The facts in the complaint are taken as true. The questions presented are purely ones of law: whether the cardholders are direct purchasers of transactions in light of *American Express* and *Apple*. That purely legal question was squarely presented to and decided by both the court of appeals and the district court. Resolution of that issue was outcome-dispositive; the court of appeals affirmed denial of the motion solely on the ground that cardholders are not direct purchasers of transactions under *American Express* and *Apple* as a matter of law. The facts here are emblematic of how this issue generally arises: two-sided transaction platforms sell transactions directly to consumers and extract transaction fees directly from consumers' payments to merchants.

2. That this case comes to the Court in a Rule 60 posture does not impact the quality of this case as a vehicle to resolve the question presented. Neither the district court nor the court of appeals based its decisions on any of the cardholders' Rule 60 "extraordinary circumstances" arguments. App.41. Both decisions are based solely on the legal question presented.

3. This case remains an ideal vehicle even though the Second Circuit refused to publish its decision, issuing a summary order instead. According to the Second Circuit's local rules, "summary order[s] do not have precedential effect," Second Cir. L.R. 32.1.1, but that is not how summary orders are treated in Second Circuit practice.

The unique decisional law within the Second Circuit holds that "[d]enying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases." *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009). The large majority of Second Circuit decisions citing the rule have applied the unpublished decision as authoritative. *Irving* was the first case to employ this rule, in 2008. It applied the holding of an unpublished summary order, *United States v. Anson*, 304 Fed.Appx.1 (2d Cir. 2008), because "this case is similar to *Anson*" – both concerned a defendant's double jeopardy challenge to his convictions on separate counts for "receiving" and "possessing" child pornography. *Irving*, 554 F.3d at 78. The *Irving* decision was then published. Thus, the published *Irving* decision applied the unpublished *Anson* holding because the court was "[not] free to rule

differently in similar cases," and then bootstrapped *Anson* into precedent through *Irving*'s publication.

That pattern of Second Circuit published decisions relying on unpublished holdings as authoritative can be seen over the past decade and continues to the present. *See, e.g.*, *United States v. White*, 7 F.4th 90, 101-02 (2d Cir. 2021) (published racketeering case citing the rule that courts are not free to depart from holdings in prior summary orders "in similar cases" and relying on the holding of an unpublished racketeering decision on an important legal issue concerning intent in racketeering crimes); *Agosto v. New York City Dep't of Educ.*, 982 F.3d 86, 101 & n.8 (2d Cir. 2020) (published decision finding unpublished decision "especially instructive" and applying its holding because "the facts of [the unpublished case] are particularly apposite"); *L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 123 & n.17 (2d Cir. 2016) (published decision applying holding of unpublished decision where both cases involved same defendant); *Gupta v. United States*, 913 F.3d 81, 85 (2d Cir. 2019) (published decision relying on the conclusion of an unpublished summary order because it was "another insider trading case"). Even in the few instances in which Second Circuit decisions departed from a prior panel's unpublished summary order, it "do[es] not break from that panel's decision lightly." *United States v. Villafane-Lozada*, 973 F.3d 147, 152 (2d Cir. 2020).

As for the trial courts in the Second Circuit, "a district judge is not at liberty to disregard, let alone contradict, a Second Circuit ruling squarely on point merely because it was rendered in a summary order."

Accent Delight Int'l Ltd. v. Sotheby's, 505 F. Supp. 3d 281, 286 n.3 (S.D.N.Y. 2020); *see also*, *United States v. Smith*, 489 F. Supp. 3d 167, 172 (E.D.N.Y. 2020) (same); *U.S. v. Tejeda*, 824 F. Supp. 2d 473, 475 (S.D.N.Y. 2010) (same); *335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 329 & n.7 (S.D.N.Y. 2021) (citing rule that "courts are not free to rule differently in similar cases" and – over party's objection – applying unpublished decision's legal interpretation on the effect of an amendment on the rent stabilization laws).

Thus, notwithstanding the stated rule that "summary order[s] do not have precedential effect," idiosyncratic Second Circuit practice is to the contrary. The challenged decision's holding will be treated in the Second Circuit as authoritative, or "especially instructive," or – at the most generous – will not be "lightly" broken from, in all "similar cases," *i.e.*, all credit-card cases and indeed in all two-sided transaction platform cases. Trial courts will treat it as binding. The respondents in this case are all the major payment card issuing banks, and the decision below will be considered authoritative circuit law in any future cases in which they are defendants. *See L.O.*, 822 F.3d at 123 (relying on unpublished summary order because case involved same defendant). Cardholders will be denied the benefit of this Court's decisions in any case brought against a financial institution headquartered in New York.

Plainly, the decision below should have been published. "Summary orders are issued in cases in which a precedential opinion would serve no jurisprudential purpose *because the result is dictated by*

pre-existing precedent." *In re Global Crossing, Ltd.*, 385 B.R. 52, 75 (S.D.N.Y. Apr. 8, 2008) *quoting* Second Cir. L.R. 32.1, cmt (emphasis added). The decision challenged here was not decided by preexisting precedent. On the contrary, it establishes a novel "understand[ing]" of *American Express*, App.8, that contradicts *American Express*'s holding; it is at odds with hornbook antitrust principles; and it is not "dictated by pre-existing precedent" because its relevant portions cite no precedent *other than American Express* and *Apple*.

"Nonpublication must not be a convenient means to prevent review." *Smith*, 502 U.S. at 1020, n. (Blackmun, O'Connor, Souter, JJ., dissenting from denial of certiorari). The use of non-publication by the court of appeals to avoid this Court's review has been described as "itself … yet another disturbing aspect of the … decision, and yet another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 135 S. Ct. 828, 831, 190 L. Ed. 2d 923 (2015) (Thomas, Scalia, JJ. dissenting from denial of certiorari) (noting "[i]t is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit"). In *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993), this Court reversed an unpublished decision of the Fourth Circuit, commenting, "[w]e deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion."

Nevertheless, the fact of nonpublication has never been a bar to this Court's review, and it should not be a bar here. From 1974 to the present, this Court has granted certiorari to review at least 76 unpublished opinions.[4] Given the important issues addressed in the Second Circuit's order, it should not be a bar here. "The fact that the Court of Appeals' opinion is unpublished is irrelevant. … An unpublished opinion may have a lingering effect in the Circuit." *Smith v. United States*, 502 U.S. 1017, 1020, n. (1991) (Blackmun, O'Connor, Souter, JJ., dissenting from denial of certiorari). Justice Blackmun's sentiment is particularly apt in this case, given the deference the Second Circuit pays to unpublished summary orders. Similarly, reversing the unpublished opinion of the Sixth Circuit in *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per

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[4] Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 228 & Appendix (2001) (listing cases granting certiorari to review 57 unpublished decisions from 1974 to 2000); *Dunn v. Reeves*, 141 S.Ct. 2405 (2021); *Andrus v. Texas*, 140 S.Ct. 1875 (2020); *Shapiro v. McManus*, 577 U.S. 39 (2015); *Trevino v. Thaler*, 569 U.S. 413 (2013); *Miller v. Alabama*, 567 U.S. 460 (2012); *Felkner v. Jackson*, 562 U.S. 594 (2011); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Los Angeles Co. v. Rettele*, 550 U.S. 609 (2007); *Nat'l Archives and Rec. Admin. v. Favish*, 541 U.S. 157 (2004); *Banks v. Dretke*, 540 U.S. 668 (2004); *Kaupp v. Texas*, 538 U.S. 626 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Buckhannon Bd. And Care Home, Inc. v. W.V. Dept. of Health*, 532 U.S. 598 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *Cooper Indust., Inc. v. Leatherman Tool Grp, Inc.*, 532 U.S. 424 (2001); *Clark Co. School Dist. V. Breeden*, 532 U.S. 268 (2001); *Bockting v. Nevada*, 497 U.S. 1021 (1990).

curiam), the Court noted that "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case" since the lower court exceeded its jurisdiction "regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."

This case presents a clean vehicle to address an important antitrust question with national implication. The lower court's erroneous decision is directly contrary to this Court's precedents and well-established law. Prompt correction is needed to ensure the vitality of Congress's central goals in promoting the vigorous private enforcement of the antitrust laws in two-sided transaction platforms that are ubiquitous in the modern digital economy.

CONCLUSION

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

Respectfully submitted,

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