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

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BRIEF FOR *AMICUS CURIAE* AUSTRALIAN RETAILERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Australian Retailers Association ("ARA") has been deeply involved in the reform of the payment card market in Australia and is acutely aware of the effects of the elimination in Australia of the "anti-steering" rules previously imposed on merchants by the credit card networks. Given the similarities between the Australian and American markets, the ARA believes that Australia's experience over the past 15 years confirms the petitioners' position—that the elimination of the anti-steering rules will spur competition, increase output, foster innovation, and significantly reduce prices to both retailers and the ultimate consumer. The ARA is keenly interested in this case because many of its 7,300 member retailers transact business in both Australia and the United States and will be impacted by this Court's decision. The ARA therefore wishes to see the immense benefits to retailers, consumers, and payment card companies that are detailed in this brief expanded to the United States market.

SUMMARY OF ARGUMENT

The Australian experience dispels the Court of Appeals' supposition that American Express's ("Amex") anti-steering rules are necessary to provide rewards to cardholders or to compete with Visa and MasterCard. Between 2003 and 2005, Amex's anti-steering rules were eliminated in Australia. Since that time, Amex's merchant fees have decreased dramatically while its

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[1] No party's counsel authored this brief in whole or in part and no person or entity other than *amicus* or their counsel made a monetary contribution to the preparation or submission of this brief. All counsel of record consented to the filing of this brief.

cardholder rewards have continued to be the most lucrative of all credit cards. Further, innovation has flourished, consumer prices have decreased, credit card output has doubled (outpacing the increase in the United States), and Amex has grown its market share and become a stronger competitor to Visa and MasterCard. The Australian experience is real-world proof that elimination of anti-steering rules fosters the type of pro-growth competition envisioned by the antitrust laws.

ARGUMENT

I. THE ELIMINATION OF THE ANTI-STEERING RULES FOSTERED PRICE COMPETITION AND A DRAMATIC DROP IN AMEX'S MERCHANT FEES

In 2000, the Reserve Bank of Australia ("RBA") and the Australian Competition and Consumer Commission ("ACCC") jointly conducted a study of competition and efficiency in the Australian payment card industry. The RBA was concerned, among other things, that the anti-steering rules forced upon merchants by the payment card networks, including the no-surcharge rule,[2] "prohibited differential pricing by the merchants

[2] Prior to the Australian reforms, the Amex anti-steering rules prohibited a merchant from either granting a discount to a consumer who uses a less-expensive payment card or imposing a charge (i.e., surcharge) on a consumer who uses the more-expensive Amex card. The grant of a discount to the less-expensive card user or the imposition of a charge on the more-expensive card user are merely different ways of expressing "differential pricing"—i.e., the price for using the more-expensive card is higher than the price for using the less-expensive card. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1146, 1151 (2017) ("Merchants who wish to employ differential pricing

of card services that cost the merchants different amounts and suppress[ed] important signals to end-users about the cost of the credit card networks" and "limit[ed] competition, distort[ed] consumer choices and led to a misallocation of resources."[3] As the RBA explained:

> The study's view is that 'no surcharge' rules suppress price signals that guide the efficient allocation of resources. They result in cross-subsidisation of cardholders by consumers who do not use credit cards; they restrict competition between merchants by limiting the range of pricing strategies they can use; and they prevent end-users [from] exerting competitive pressures on merchant service fees and interchange fees.[4]

The study concluded that there were "no convincing reasons" to permit the no-differential-pricing rule.[5] The RBA stated that it had "no view about the 'right' mix of payment methods" and only wanted to "promote efficiency and competition in the payments system to ensure that the market does provide users and providers of payment services with appropriate price

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may do so in two ways . . . impose a surcharge . . . or offer a discount").

[3] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, p. 16 (available at https://goo.gl/m75uVd).

[4] Joint Study by the RBA and ACCC, *Debit and Credit Card Schemes in Australia – A Study of Interchange Fees and Access*, Oct. 2000, p.55 (available at https://goo.gl/wxTPcG).

[5] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, p. 16 (available at https://goo.gl/m75uVd).

signals on which to base their choices."[6] The RBA was concerned by "a number" of anti-steering clauses in the card acceptance agreements signed by the merchants and stated that "the relevant clauses have had the effect of reducing competition between the [payment] schemes by limiting merchants' ability to steer customers to lower-cost means of payment."[7]

In August 2002, as part of a set of comprehensive reforms, the RBA mandated that MasterCard and Visa eliminate their no-surcharge rules as of January 1, 2003. Faced with the prospect of regulatory scrutiny, Amex entered into a voluntary undertaking with the RBA to do the same.[8] Two years later,[9] Amex agreed to remove its other anti-steering rules. As a result of the elimination of the anti-steering rules, merchants in Australia had "the option of asking a customer who offers a charge card whether they would be prepared to pay with another card or another

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[6] Reserve Bank of Australia, *Payments System Board Annual Report 2002*, p.13 (available at https://goo.gl/cLh6Ju).

[7] Reserve Bank of Australia, *Media Release Number 2005-02*, Feb. 24, 2005 (available at https://goo.gl/Jr1mrD).

[8] Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia, IV – Final Reforms and Regulation Impact Statement*, Attachment 4: Undertakings from the Three Party Schemes, Aug. 2002, p.59 (available at https://goo.gl/tMfEaw). Amex updated this undertaking in line with the revised surcharging regulations introduced in March 2013. Undertaking by American Express in favour of Reserve Bank of Australia, March 18, 2013 (available at https://goo.gl/e2mF4G).

[9] Reserve Bank of Australia, *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p.6 (available at https://goo.gl/4BEqeT).

method of payment with a lower cost to the merchant."[10]

A. The elimination of the anti-steering rules quickly resulted in lower merchant fees.[11]

The pro-competitive effects of the elimination of the anti-steering rules were felt immediately. In anticipation of the elimination of the anti-steering rules, Amex dropped its prices to merchants, both large and small, and has continued to price its merchant services more competitively. Prior to the elimination of its anti-steering rules, Amex's average merchant fee in Australia was greater than 2.5%.[12] Today, it is less than 1.5%—a drop in price of more than 40%.[13] Many large merchants pay less than 1%, and sometimes substantially less. And the dramatic drop in Amex's merchant fees is not limited to large merchants. In July 2017, Amex announced that "it

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[10] Reserve Bank of Australia, *Media Release Number 2005-02*, Feb. 24, 2005 (available at https://goo.gl/Jr1mrD).

[11] To aid the Court, a timeline of the events in Australia related to payment card reform and its subsequent effects can be found in Appendix A.

[12] The RBA did not begin publishing Amex's average merchant fee until March 2003, seven months after the announcement that Amex was eliminating its no-surcharge rule. The rate published by the RBA in March 2003 for Amex was 2.48%; however, Amex had already begun dropping its rates by that time. *See* Reserve Bank of Australia, *Payments Data*, *C3 Average Merchant Fees for Debit, Credit and Charge Cards* (available at https://goo.gl/Vs11fo).

[13] *Id.*

would lower fees for small business by [another] 1 percentage point."[14]

These reductions are a direct result of merchants' ability to differentially price credit card services so as to foster price competition.[15] First, as the then-current Governor of the RBA explained in 2005:

> I have heard that the big ones [merchants] have actually managed to negotiate big reductions with Amex. . . . The big ones and

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[14] F. Untalan, *Amex Lowers Fees for Small Businesses in Australia*, International Business Times (July 7, 2017) (explaining that "[t]he move is part of an aggressive expansion plan that seeks to double the credit card giant's Australian footprint in two years") (available at https://goo.gl/rBmKys); *see also* C. Yeates, *American Express Cuts Fees for Small Businesses to Double its Presence*, The Sydney Morning Herald (July 6, 2017) ("As it navigates major shifts in the payment landscape and competition with other providers, the credit card giant [Amex] is eyeing its biggest roll-out in Australia since it arrived in 1954.") (available at https://goo.gl/ThPTPC).

[15] The reductions in Amex's charges are not tied to regulation of interchange fees. The interchange fee is a component of Visa and MasterCard's merchant fees. The RBA regulated the interchange fees, resulting in an average reduction of approximately 45 basis points in interchange, from 95 bps to 50 bps. But the Amex average merchant fee dropped more than 100 bps, and its fees to large merchants dropped even more, even though Amex's fees were not regulated. The trend and timing of the reductions of Amex's merchant fees show no correlation with the timing of the regulated reduction of Visa and MasterCard interchange fees; indeed, Amex merchant fees have continued to substantially decrease in the past few years despite the stabilization of Visa and MasterCard interchange fees more than a decade ago. Furthermore, if merchants could not tell the consumers of the lower-cost MasterCard and Visa cards and steer them to use those cards, no one would switch to the lower-cost cards, and Amex would lose no sales volume and have no reason to compete on price by lowering its merchant fees.

> then the smaller ones have got these powers now to say, 'I will not take your card' or 'I will take your card and I'll surcharge if your fees are too high' or 'I will steer people towards lower cost means of payments.' By giving them that power they have been able to negotiate lower fees. That is how the system is meant to work. I suspect in the long run, when the merchants realise what power they have got, and particularly when they start talking to each other, they will start to exercise it. At the moment they are so defeatist because they have been tied down by 30 years of restricted covenants that have prevented them from using the powers that they really should have had.[16]

Second, a comprehensive review of the Australian payment system by the RBA in 2007-2008 to evaluate the effects of eliminating the anti-steering rules found that the reforms had "met their main objectives" of "improving price signals in the Australian payments system; increasing transparency; improving access; and creating a more soundly based competitive environment."[17] The RBA review found that differential pricing of credit cards according to their cost to the merchant was having the intended result of moving consumers to lower-cost payment methods. For example, "[c]onfidential data from one card scheme

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[16] Ian Macfarlane (Governor of the RBA) to the House of Representatives Standing Committee on Economics, Finance and Public Administration, Official Committee Hansard, Aug. 12, 2005, at p. EFPA 30 (available at https://goo.gl/wsaqwQ).

[17] Reserve Bank of Australia, *Reform of Australia's Payments System – Conclusions of the 2007/08 Review*, Sept. 2008, p.6 (available at https://goo.gl/2BvS4o).

indicate that when surcharges are imposed on a particular type of card, use of that card declines substantially."[18] Moreover, the comprehensive review found that differential pricing by merchants was putting competitive pressure on Amex's rates and that the benefit from the elimination of the anti-steering rules "ha[d] been substantial."[19]

Further, the RBA held a conference as part of the comprehensive review in which representatives from credit card networks, issuers, acquirers, merchants, economists, and industry experts, both local and from around the world, discussed differential pricing and steering. At the conference, "[a] number of participants commented that merchants now have greater bargaining power in negotiations with acquirers. . . . It was also noted that the reforms provide merchants with more freedom to negotiate lower fees with American Express."[20]

B. Studies confirm that the elimination of the anti-steering rules has improved competitive dynamics and the Australian economy overall.

The RBA has continued to study the effects of the elimination of the anti-steering rules and continues to

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[18] Reserve Bank of Australia *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p.18 (noting that "[w]here merchants have imposed a surcharge on one scheme only, or imposed a higher surcharge on one scheme than another, there have been large shifts in payment patterns away from the scheme with higher surcharges") (available at https://goo.gl/4BEqeT).

[19] *Id.* at p.26.

[20] Reserve Bank of Australia, *Proceedings of Payments System Review Conference Held in Sydney on 29 November 2007*, April 2008, p.205 (available at https://goo.gl/x96TmB).

find pro-competitive benefits. In June 2008, the RBA observed that differential pricing by merchants "has clearly promoted better price signals in the payments system."[21] In September 2008, the RBA found that there have been substantial benefits from the removal of the anti-steering rules, including "improving the competitive dynamics and price signals in the payments system."[22]

In June 2011, the RBA again concluded that the pro-competitive benefits from the anti-steering rules reforms "have been substantial."[23] Later that year, the RBA's Payments System Board explained that it was satisfied that differential pricing has been successful in achieving these benefits.[24]

An RBA review in December 2015, seven years after the comprehensive review of 2007-2008, concluded that the changes had "significantly improved competition in the Australian payments system" and "removed

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[21] Reserve Bank of Australia, *The Preliminary Conclusions of the Payments System Review – Address to the Visa Forum 2008, Hamilton Island, Queensland, Philip Lowe – Assistant Governor (Financial System)*, June 4, 2008, p.31 (available at https://goo.gl/s92EpP).

[22] Reserve Bank of Australia, *Reform of Australia's* Payments *System – Conclusions of the 2007/08 Review,* Sept. 2008, p.18 (available at https://goo.gl/2BvS4o).

[23] Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, June 2011, p.3 (available at https://goo.gl/j9XMkt).

[24] Reserve Bank of Australia, *A Variation to the Surcharging Standards – A Consultation Document*, Dec. 2011, p.2 (available at https://goo.gl/Yqc1TP); *see also* Reserve Bank of Australia, *A Variation to the Surcharging Standards – Final Reforms and Regulation Impact Statement*, June 2012, p.3 (available at https://goo.gl/rMBUuk).

restrictions on merchants that had weakened competition in the system."[25] The RBA also concluded that the changes had "contributed to a more efficient and competitive payments system, which has benefited the Australian economy."[26] Last year, the Payments System Board reaffirmed its view that the right of merchants to differentially price "expensive payment methods is important for payments system efficiency and helps to hold down the cost of goods and services to consumers generally."[27] As discussed further below, the RBA and others have found that the costs of goods and services to consumers in Australia have dropped significantly as a result of the more competitive pricing by the credit card networks.

C. Industry participants, including Amex, recognized the pro-competitive benefits of the reforms.

Even Amex recognizes that competition has been spurred by the elimination of the anti-steering rules. In a 2007 submission to the RBA, American Express acknowledged that "many" merchants "use the threat of surcharge to influence consumers' choice of payment method or to negotiate lower prices from a merchant acquirer."[28] The same Amex submission stated that

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[25] Reserve Bank of Australia, *Review of Card Payments Regulation – Consultation Paper*, Dec. 2015, p.2 (available at https://goo.gl/DYutTd).

[26] *Id.*

[27] Reserve Bank of Australia, *Payments System Board Annual Report 2016*, Sept. 2016, p.36 (available at https://goo.gl/RBnuaC).

[28] American Express Australia Limited, *Review of Payments System Reforms – A Submission to the Reserve Bank of Australia*, Aug. 2007, p. 9 (available at https://goo.gl/P4N5RG).

merchants benefit from the elimination of the anti-steering rules through "lower merchant service fees" and "increased bargaining power" from the ability—or the threat—to differentially price.[29]

The four largest banks in Australia have also publicly acknowledged that competition is fostered by the elimination of the anti-steering rules. ANZ Bank stated that differential pricing by merchants "increases the transparency of the costs involved, empowering consumers themselves to choose the most appropriate form of payment."[30] This sentiment was echoed by the National Australia Bank, which found differential pricing vital "in fostering competitive pressure on credit card interchange fees."[31] The Commonwealth Bank agreed, conceding that the ability of merchants to differentially price "allows merchants to impose 'downward pressure on interchange fees' and RBA data shows an increasing propensity for merchants to do this."[32] And Westpac publicly acknowledged the "significant competitive pressures" caused by merchant ability to differentially price.[33]

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[29] *Id.* at p. 21.

[30] Australia and New Zealand Banking Group Limited (ANZ), *Submission to the Reserve Bank of Australia – Reform of Australia's Payment System Issues for the 2007-08 Review*, Sept. 2007, p.4 (available at https://goo.gl/Tzdfo8).

[31] National Australia Bank, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System,* June 2008, p.2 (available at https://goo.gl/MR2QZF).

[32] Commonwealth Bank of Australia, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System,* June 2008, p.4 (available at https://goo.gl/tR7fzL).

[33] Westpac Banking Corporation, *Submission to the Reserve Bank of Australia – Reform of Australia's Payments System,* June 2008, p.1 (available at https://goo.gl/LeyRKN).

MasterCard, too, has acknowledged the pro-competitive results of the reforms, explaining that "it is now clear that merchants do have and do exercise significant power when it comes to the determination of merchant fees" as a result of the "various tools at their disposal" with the elimination of the anti-steering rules.[34] MasterCard noted that "[s]ome merchants have forced down their effective interchange fee to 0.30 per cent [i.e., 30 bps]."[35]

D. Woolworths provides a case study of competition in action.

Woolworths, Australia's largest retailer, is an example of a large merchant that used competitive forces to drive down its credit card fees. By threatening to differentially price more expensive credit cards, Woolworths substantially reduced the prices it pays to all of the major credit card companies. Woolworths explained that this reduction of fees to a competitive level was possible only because of the elimination of Amex's anti-steering rules:

> [T]he intention to surcharge has been one of Woolworths' single most effective pricing negotiation tool[s] for the domestic and international card schemes. This has assisted Woolworths' brands, which undertake 18% of all debit transactions and 12% of all credit card transactions in Australia, in not introducing surcharging currently. In certain brands we have achieved an almost 50%

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[34] Reserve Bank of Australia, *Proceedings of Payments System Review Conference held in Sydney on 29 November 2007*, April 2008, pp.195-196 (available at https://goo.gl/x96TmB).

[35] *Id.* at p.196.

> reduction in pricing, allowing us in the current economic and highly competitive environment to provide our customers with better value.[36]

As the Woolworths example demonstrates, the vast majority of merchants in Australia have not even had to engage in actual differential pricing; just the ability to differentially price has reduced merchant fees to a competitive level.[37]

This competitive dynamic is illustrated by another of the larger Australian retailers who confidentially shared with the ARA the details of how it was able to use the ability to differentially price to negotiate with Amex. This retailer told Amex that it would begin imposing differential pricing on card transactions if Amex did not reduce its rates to competitive levels. On the Thursday before the week the retailer was to begin differential pricing, Amex relented and reduced its rates to competitive levels to avoid differential pricing. This is yet another example of how the mere ability of merchants to differentially price injects price competition into the credit card industry and forces Amex's merchant fees down to competitive levels.

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[36] Ltr. from Dhun Karai (Woolworths Limited) to Chris Kent (Payments Policy Department for the RBA), July 25, 2011 (available at https://goo.gl/ybYNuP).

[37] Because merchants have succeeded in raising the threat of differential pricing to reduce merchant fees to a competitive level, the frequency of surcharges on card transactions is quite low. *See* Reserve Bank of Australia, *Research Discussion Paper: How Australians Pay: Evidence from the 2016 Consumer Payments Survey*, at p.14 (available at https://goo.gl/zBKxkQ). For example, in 2016, consumers paid a surcharge on a mere 3.5% of all card payments, and the median value of surcharges is only 1.0 percent. *Id.*

E. Lower merchant fees have led to hundreds of billions of dollars of savings to merchants (and consumers).

The economic impact of lower merchant fees fostered by competition has been substantial. The RBA has estimated that merchants (and, hence, consumers) saved at least $15 billion AUD ($11 billion USD) from 2004-2015, based on pre-reform merchant rates. Had merchant fees risen at the same rate as they did in the United States over this period, the savings would have been at least $20 billion AUD ($15 billion USD).[38] By comparison, if these same figures were extrapolated to the larger U.S. market, the savings to merchants and consumers would be a staggering $150 billion USD. Factoring in the increased merchant fees in the United States since that time, the savings would be over $210 billion USD.

Further, given the relative starting points of merchant fees in both countries in 2003, these amounts likely *underestimate* the potential savings in the United States—perhaps by several orders of magnitude. Nonetheless, they provide a rough estimate of what could occur in the United States if credit card networks were no longer able to insulate themselves from competition on merchant fees.

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[38] Reserve Bank of Australia, *Review of Card Payments Regulation – Conclusions Paper*, May 2016, pp.8-9 (available at https://goo.gl/fXAQcf).

II. OUTPUT, INNOVATION, CONSUMERS, AND EVEN AMEX HAVE BENEFITED IN AUSTRALIA

The forces of competition spurred by the removal of the anti-steering rules in Australia have not only led to more competitive merchant fees, but also have increased payment card output, spurred innovation, reduced consumer retail prices, and even benefited Amex.

A. Competition has increased output.

Since the anti-steering rules were eliminated, the Australian credit card market has grown substantially. In fact, non-cash payments (of which cards account for more than two-thirds of transactions) have grown more in Australia than in the United States. According to the 2016 World Payments Report, the Compound Annual Growth Rate for the United States was 4.0% for 2010-2013 and 3.3% for 2013-2014. The corresponding growth rates for Australia are 7.3% and 6.4%.[39] Thus, output has grown at almost twice the rate in Australia as it has in the United States.

B. Competition has spurred innovation.

Innovation has also flourished in Australia after the removal of the anti-steering rules and attendant reductions in merchant fees. "For example, MasterCard and Visa have introduced chip cards and PIN authorisation at the [point of sale], and are now rapidly rolling out contactless payments considered to be among the more effective rollouts globally."[40] All of the

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[39] *2016 World Payments Report*, Joint Report by Capgemini and BNP Paribas, p.8 (available at https://goo.gl/sRLY1E).

[40] Bank for International Settlements, *Innovations in Retail Payments, Report of the Working Group on Innovations in Retail*

payment networks have developed innovative ways "to increase incentives for card issuers to promote particular products within their suite of offers," and card issuers "have responded, particularly through new strategies focusing on the premium segment of the market."[41]

One particularly important benefit is how the elimination of the anti-steering rules has allowed merchants to play an increased role in payment innovation. Many of the major innovations have required significant investment by merchants, particularly large merchants, and the payment networks, having realized the role merchants play in innovation, often offer lower merchant fees to encourage merchants to participate in such innovation. Just a few examples of the innovation in the Australian payments market since 2003 include:

- Issuance of Amex "companion" cards;[42]
- No-frills and low-interest credit cards;

Payments, Committee on Payment and Settlement Systems, May 2012, p.45 (available at https://goo.gl/RGJJYa).

[41] I. Chan et al., Reserve Bank of Australia, *The Personal Credit Card Market in Australia: Pricing over the Past Decade,* RBA Bulletin March Quarter 2012, pp.55-56 (available at https://goo.gl/xeVMrV).

[42] In Australia, a companion card is a credit card account issued by a bank that can be run on either the Amex or the Visa/MasterCard networks. A cardholder might choose to run the account as an Amex, for example, to get more points or run the account as a Visa if a merchant imposes a surcharge on Amex or refuses to accept Amex. This is a prime example of an innovative product available in Australia but not in the United States that emerged because Australia removed the anti-steering rules. *See, e.g.*, A. Bradney-George, *Companion Credit Cards*, Finder (Oct. 23, 2017) (available at https://goo.gl/XwYfJW).

- Contactless payment systems, such as Visa PayWave and MasterCard PayPass;
- The Community of Interest Network (COIN);[43]
- Formation of Electronic Funds Transfer at Point of Sale (EFTPOS) as a card scheme in 2009 (EFTPOS Payments Australia Limited, commonly known as EPAL). EPAL has implemented many new innovations such as contactless cards and is currently developing card-not-present and mobile products;
- New online systems such as Payclick by Visa, Paymate,[44] PayPal, and POLi,[45] and
- Many other innovations, some of which are detailed in Appendix B.

In summary, innovation has flourished in Australia after the elimination of the payment networks' anti-steering rules, resulting in the launch of a raft of innovative new products into the Australian market to

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[43] In February 2010, the Australian payments industry established a new communication "network cloud," called the Community of Interest Network (COIN), to facilitate the exchange of low-value payments. COIN replaces the bilateral communication links that supported the exchange of direct entry and other low-value payments between service providers in Australia such as the bilateral EFTPOS links. It is operated by the Australian Payments Clearing Association.

[44] Paymate is an Australian company specializing in providing an online payment gateway system for individuals and small businesses in Australia.

[45] POLi is an online payment system. It enables consumers to pay for goods or services directly from a merchant's website without the need for a credit card, but by using a direct connection to the user's internet banking. It links to all the major Australian and New Zealand banks.

accompany the lower merchant fees, increased payment card output, and lower consumer prices. If the anti-steering rules are removed, many of these same innovations—and the concomitant benefits for merchants and consumers—would likely become available in the United States.

C. Competition has benefited consumers.

Consumers as a whole have benefited from the elimination of the anti-steering rules in Australia. The RBA has consistently concluded that the reforms have led to lower merchant fees, which have in turn led to lower prices for consumers. As early as 2005, Philip Lowe, then-Assistant Governor (and currently Governor) of the RBA, explained that the impact on prices due to lower merchant fees was so significant that it had lowered the country's overall Consumer Price Index.[46]

The Australian House of Representatives Standing Committee on Economics, Finance and Public Administration reached the same conclusion.[47] In 2008, the RBA undertook a comprehensive study of the Australian credit card market and found that "the bulk of these savings [from lower merchant fees] have been, or will eventually be, passed through into

[46] P. Lowe, Assistant Governor (Financial System), Reserve Bank of Australia, *Reform of the Payments System – Address to Visa International Australia and New Zealand Member Forum*, Mar. 2, 2005 (available at https://goo.gl/sybkBc). Mr. Lowe is now Governor of the RBA.

[47] House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia and Payments System Board Annual Reports 2005 (First Report)*, June 2006, p. iv. (available at https://goo.gl/sDHPzd).

savings to consumers."[48] The RBA explained that its judgment was "consistent with standard economic analysis which suggests that, ultimately, changes in business costs are reflected in the prices that businesses charge."[49]

The assessments by the RBA repeatedly show benefits to consumers. "RBA's assessment [in 2008] of the reforms' effects on overall welfare [was] positive and it estimate[d] that welfare gains [were] likely substantial."[50] In 2015, the RBA determined that "the costs involved in providing payment services to households [had] fallen from 0.80 per cent of GDP in 2006 to 0.54 per cent of GDP in 2013."[51] For perspective, household savings of 0.26 percent of GDP in the United States would equate to $48 billion annually.

Importantly, these benefits to consumers have often gone to those most in need. The RBA believes that competition has reduced cross-subsidization of credit cardholders by those using other payment methods, including subsidization of high-end credit cardholders

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[48] Reserve Bank of Australia, *Reform of Australia's Payments System – Preliminary Conclusions of the 2007/08 Review*, April 2008, p. 23 (available at https://goo.gl/2bhuzZ).

[49] *Id.*

[50] Government Accountability Office, USA, *Credit And Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist, GAO-08-558*, May 2008, p. 36 (available at https://goo.gl/vz8WhU).

[51] Reserve Bank of Australia, *Review of Card Payments Regulation – Issues Paper*, March 2015, p.24 (available at https://goo.gl/iQdDNM).

by low-cost credit cardholders.[52] When it reviewed the impact of the card payment regulations in 2016, the RBA concluded that changes caused by the regulations would result in "less cross-subsidisation/price discrimination between different types of cardholders and consumers, as well as between preferred and non-preferred merchants."[53]

As Australia's major consumer group explained, a return to the anti-steering rules "would shift the costs from consumers who choose a specific payment type to all consumers, as costs are absorbed into the overall price of goods and services. Such a change would disadvantage consumers using lower cost payment methods like eftpos [electronic funds transfer at point of sale] or cash while subsidising users of higher cost credit cards."[54]

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[52] The RBA has found it appropriate to ensure that differential pricing reflected actual merchant costs, consistent with the original intent of improving transparency and price signals. Reserve Bank of Australia, *A Variation to the Surcharging Standards – Final Reforms and Regulation Impact Statement*, June 2012 (available at https://goo.gl/rMBUuk); *see also* Reserve Bank of Australia, *Guidance Note – Interpretation of the Surcharging Standards*, Nov. 2012 (providing list of costs for purposes of calculating cost of acceptance) (available at https://goo.gl/JRnfVq).

[53] Reserve Bank of Australia, *Review of Card Payments Regulation – Conclusions Paper*, May 2016, p.47 (available at https://goo.gl/fXAQcf).

[54] Choice (the Australian Consumers' Association), *Review of Card Payments Regulation – Submission to the Reserve Bank of Australia*, May 2015, p.4 (available at https://goo.gl/7fbWKo); *see also* Financial System Inquiry, Commonwealth of Australia, *Final Report*, Nov. 2014, p.175 ("The Inquiry agrees with the RBA that surcharging can improve the efficiency of the payments system by providing accurate price signals to customers. In

D. Competition has even benefited Amex.

Because output has grown so substantially, even Amex has benefited with both increased card spend and an increasing number of transactions. Spend for the overall Australian credit card market has increased approximately 150%, but spend on Amex cards in Australia over the same time period has increased by over 200%.[55] Likewise, the number of Amex transactions in Australia has increased by over 200%, which also outpaced growth in the overall credit card market.[56] Indeed, Amex has grown faster in Australia since the elimination of the anti-steering rules than credit cards have grown in the United States,[57] and because of its increased output, Amex's market share in Australia has increased from 13.8% to 19% between 2002 and 2016.[58] In sum, the Australia experiment's effect on Amex is one of the

addition, some consumer groups, such as Choice, acknowledge that accurate surcharging can provide positive outcomes.") (available at https://goo.gl/h94LWJ).

[55] Reserve Bank of Australia, *Payments Data* (available at https://goo.gl/Vs11fo).

[56] Reserve Bank of Australia, *Payments Data* (available at https://goo.gl/Vs11fo).

[57] Based on the payments data from Australia, *see id.*, total spend increase in Australia on Amex from 2003 to 2012 outpaced the growth in overall credit spend in the United States. *See* Federal Reserve System, *The 2013 Federal Reserve Payments Study – Recent and Long-Term Payment Trends in the United States: 2000–2012, Summary Report and Initial Data Release*, July 2014, pp.14-15 (available at https://goo.gl/XHgTx2).

[58] Reserve Bank of Australia, *Payments Data*, *C2: Market Shares of Credit and Charge Card Schemes* (available at https://goo.gl/Vs11fo).

best real-world examples of how competition benefits all involved, including competitors.

Remarkably, although the rate paid to Amex by merchants decreased by approximately 40%, Amex has been able to achieve this stellar growth while holding constant its cardholder "rewards." In fact, the anecdotal evidence suggests that Amex has actually increased its reward levels in response to differential pricing. Amex's rewards programs remain the most lucrative in Australia. In October 2016, a service called Mozo published its list of the seven most lucrative rewards credit cards of 2016 in Australia. Of the seven cards, three were Amex proprietary cards (three of the four top ranked cards, including the top-ranked card), another two included Amex companion cards, and only two were not connected to Amex.[59]

* * *

The experience of the last fourteen years in Australia demonstrates what can happen when anticompetitive restraints, such as the credit card networks' anti-steering rules, are removed and payment card networks must compete with one another on price and quality. Although we do not profess to know the intricacies of the U.S. market as well as we know the Australian market, similarities between those markets suggest that the Australian experience is an informative benchmark. Both countries are highly dependent on payment cards, as payment cards are the most frequently used payment method in both the United States and Australia, surpassing cash and

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[59] R. Elley, *The 7 Best Rewards Credit Cards of 2016 in Australia*, Mozo (Jan. 2017) (available at https://goo.gl/yu6Fe6). Mozo is an award-winning website that allows consumers to compare banking and insurance products in Australia.

all other payment forms combined.[60] And the mix of credit to debit cards is remarkably similar, with both countries having approximately 24% of non-cash retail payments (on a per capita basis) on credit cards with around 45% on debit cards (46% in Australia vs. 44% in United States).[61]

Likewise, the Australian banking system is very similar to its counterpart in the United States. The major Australian and U.S. banks are ranked first and second among the most profitable banks in global advanced economies according to the 2016 Annual Report of the Bank for International Settlements.[62] Major banks from the United States and Australia were also ranked first and second respectively in 2002, the year before the reforms were introduced in Australia.[63]

In light of the similarities between the countries, it would appear that the Australian experience serves well as a "natural experiment" against which to test various theories and concerns, including those raised by the Court of Appeals, and Amex.

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[60] Australian Payments Network, *Annual Review 2017*, at 4 (available at https://goo.gl/G4NZEk).

[61] Reserve Bank of Australia, *Payments System Board Annual Report 2016*, at 27 (available at https://goo.gl/RBnuaC).

[62] Bank for International Settlements, *86th Annual Report (2016),* June 2016, p.107 (available at https://goo.gl/sRZ8B5). The Bank for International Settlements defines the advanced economies as Australia, Canada, Denmark, the Euro area, Japan, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States.

[63] Bank for International Settlements, *74th Annual Report (2004),* June 2004, p.123 (available at https://goo.gl/EvpcpQ).

CONCLUSION

Australian merchants and consumers have experienced firsthand the pro-competitive benefits of the elimination of credit card anti-steering rules. Today, Australian merchants, consumers, and even credit card networks are substantially better off as a result of the competition spurred by the elimination of the restrictive restraints previously imposed by credit card networks such as Amex. We are not aware of any reason why the U.S. market would not experience similar benefits if this Court affirms the district court's opinion finding Amex's merchant restraints anticompetitive.

Respectfully submitted,

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APPENDIX

APPENDIX A

Timeline of Relevant Events

2000: The Reserve Bank of Australia and Australian Competition and Consumer Commission conduct a study of competition in the payment card industry and determine that there is no pro-competitive basis for permitting continuation of the anti-steering rules.

August 2002: The RBA mandates that Visa and MasterCard eliminate their no-surcharge rules.

2003: Amex voluntarily agrees to remove its no-surcharge rule.

2005: Amex voluntarily agrees to remove its remaining anti-steering rules.

March 2005: Philip Lowe, then-Assistant Governor of the RBA (and now Governor), finds that payment card reforms have led to a reduction in Australia's Consumer Price Index of 0.1 to 0.2 percent.

2008: The four largest banks in Australia acknowledge that reforms to the payment card industry have led to reduced prices.

April 2008: The RBA releases the results of a comprehensive review conducted during 2007 and 2008. The review concludes that the reforms to the payment card industry removing the anti-steering rules have increased competition and led to many positive results, including decreased merchant fees that have in turn been passed to consumers in the form of savings.

June and September 2008: Follow-on studies by the RBA confirm continued improvement in price signals and competition in the payment card industry as a result of the reforms.

2009: The EFTPOS card scheme is formed.

2010: COIN is established.

June and December 2011: Additional studies by the RBA again conclude that payment card reform's "benefits . . . have been substantial" and that consumer prices are falling.

2012: The RBA finds that consumers are responding to payment card reforms by avoiding surcharges.

May 2015: The RBA issues a study concluding that the percentage of GDP comprised of payment card fees was reduced from 0.80 percent to 0.54 percent between 2006 and 2013.

December 2015: Another RBA study again confirms the benefits of payment card reform.

2016: The RBA finds that Amex's spend and number of transactions have increased by over 200% since 2002 and that Amex's market share in Australia has increased from 13.8% to 19% between 2002 and 2016.

May 2016: The RBA concludes that because of payment card reform, there is less cross-subsidization such that consumers with less means are no longer subsidizing the rewards of more affluent consumers.

October 2016: The consumer website Mozo publishes a list of the most lucrative rewards cards in Australia. Five of the seven cards are either Amex exclusive or Amex companion cards.

July 2017: Amex announces that it will reduce fees for small business by an additional full percentage point.

APPENDIX B

In addition to the examples noted in the text of the brief, some other examples of innovation in the payment card industry in Australia following removal of the anti-steering rules include:

- Entry of new payments organizations with innovative programs—for example, Tyro entered the market as the first acquirer-only organization using a new Internet-based processing model. Tyro also developed an innovative approach to Medicare Easyclaim by integrating it with medical practice management systems.
- The New Payments Platform (NPP), which will provide a new national infrastructure allowing the ability to make and receive real-time retail payments, make and receive payments outside normal banking hours, send more explanatory information with a payment, and send payments without having to use full Bank State Branch (BSB) and account number details. The NPP will be open access infrastructure and the intention is that all ADIs will connect to the NPP, either directly or indirectly through another member. The NPP's multi-layered infrastructure has been designed to promote competition and drive innovation in payment services.[1]
- Triple DES security on PIN Pads.
- PCI DSS and PCI PED security programs.

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[1] Reserve Bank of Australia, *Payments System Board Annual Report 2016,* p.1 (available at https://goo.gl/s5GRyk).

- PIN authorization at the point of sale for credit and debit cards.
- Open loop prepaid cards.
- Closed loop prepaid cards, such as gift cards processed over the EFTPOS network.
- Electronic Benefits Transfer (EBT), such as BasicsCard.[2]
- Medicare Easyclaim.[3]
- Mobile payments, including standalone payments apps (such as Apple Pay (launched in conjunction with American Express), Cash by Optus, Samsung Pay and proprietary bank-specific Apps such as ANZ Mobile Pay, Commonwealth Bank's Tap and Pay, NAB Pay and Westpac's Tap and Pay) and integrated payment apps (like Uber and "Beat The Q"[4] that provide a provide a seamless mobile process for ordering, payment and delivery).

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[2] The BasicsCard is a Federal Government program that prevents cardholders from using their welfare payments on certain prohibited goods (such as alcohol, tobacco, pornography, and gambling). It is a PIN-protected card that allows cardholders to access their income-managed money through EFTPOS facilities at approved stores and businesses.

[3] Medicare is Australia's universal health care system, which is operated by the Federal Government. Medicare Easyclaim allows patients to claim their Medicare benefit and have it paid into their bank account through their healthcare provider's EFTPOS terminal and receive immediate reimbursement to their bank account in real time.

[4] "Beat the Q" is a mobile phone app that allows the consumer to find cafes, view menus, order coffee and food, and pay before they arrive.

- Mass-market adoption of Internet banking and Internet bill payment such as BPay.
- Internet Protocol (IP) based card terminals.
- Independent certification body for secure devices.
- Transport ticketing using contactless smart cards.
- Fast Settlement Service (FSS), which was developed by the RBA to facilitate the final and irrevocable settlement of each individual payment arising in the New Payments Platform, 24 hours a day, 7 days a week.

Formation of Australian Payments Council (APC) and the Payments Consultation Group (PCG).[5] The formation of both groups emanated from the RBA's Strategic Review of Innovation in the Payments System in order to facilitate better co-operation in identifying and implementing innovations in the payment industry in Australia.

[5] The APC comprises organizations from the payments industry such as financial institutions, payment networks, and other payment and service providers. The PCG consists of end users such as merchants and consumer groups.