

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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OHIO, ET AL., )  
                  Petitioners, )  
                  v. ) No. 16-1454  
AMERICAN EXPRESS COMPANY, ET AL., )  
                  Respondents. )  
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Pages: 1 through 69

Place: Washington, D.C.

Date: February 26, 2018

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## HERITAGE REPORTING CORPORATION

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-1454, Ohio, et al.,  
5 versus American Express Company.

6 MR. MURPHY: Mr. --

7 CHIEF JUSTICE ROBERTS: Mr. Murphy.

8 ORAL ARGUMENT OF ERIC E. MURPHY  
9 ON BEHALF OF THE PETITIONERS AND  
10 THE STATE RESPONDENTS IN SUPPORT

11 MR. MURPHY: Mr. Chief Justice, and  
12 may it please the Court:

13 The government met its initial burden  
14 to show anticompetitive harm in this case under  
15 the rule of reason by proving that American  
16 Express's anti-steering provisions have stifled  
17 interbrand price competition and raised the  
18 prices that all four credit card companies  
19 charge merchants. The restraints have these  
20 horizontal effects because they bar merchants  
21 from accurately informing their retail  
22 customers about the different costs of credit  
23 cards and from offering them incentives such as  
24 price discounts to use cheaper cards.

25 As a result, retail customers make

1 decisions about which card to use in the dark  
2 about the relative costs, and merchants cannot  
3 reward credit card companies with greater  
4 market share by lowering their prices. As a  
5 result, that eliminates any incentive for  
6 credit card companies to do so. As Discover's  
7 president testified about its failed  
8 price-cutting strategy in the late 1990s, price  
9 cuts simply gave away money in the form of a  
10 lower price --

11 JUSTICE GORSUCH: We're not here to  
12 protect competitors, right, Mr. Murphy?

13 MR. MURPHY: Correct.

14 JUSTICE GORSUCH: Or -- or necessarily  
15 even merchants. The antitrust laws are aimed  
16 at protecting consumers; you'd agree with that?

17 MR. MURPHY: Correct, although in  
18 this --

19 JUSTICE GORSUCH: Okay. So, given  
20 that, there's no evidence of restricted output  
21 in this case, correct?

22 MR. MURPHY: I -- I would agree that  
23 it's -- there's -- it's ambiguous. There's no  
24 one way or the other about whether -- whether  
25 it has restricted output.

1 JUSTICE GORSUCH: And that's normally  
2 what the antitrust laws care about, is  
3 deadweight loss. That's the primary concern of  
4 antitrust activity, wouldn't you agree?

5 MR. MURPHY: Correct, although I think  
6 the --

7 JUSTICE GORSUCH: Okay. All right.  
8 So you're left with this price question. And  
9 you have an increase in price to merchants, but  
10 do we have any evidence that consumers, at the  
11 end of the day, including the rewards aspect of  
12 what they get back, actually pay a net price  
13 increase?

14 MR. MURPHY: Absolutely, we have  
15 evidence of restrictive competition --

16 JUSTICE GORSUCH: What evidence do you  
17 have of that?

18 MR. MURPHY: -- that the other --

19 JUSTICE GORSUCH: No, no. No, no.  
20 Evidence of price -- net price increase to  
21 consumers.

22 MR. MURPHY: Well, so we don't think  
23 that we legally have to meet that, but --

24 JUSTICE GORSUCH: I know you don't.  
25 I'm just asking --

1 MR. MURPHY: So, factually --

2 JUSTICE GORSUCH: -- if you have any  
3 evidence of that.

4 MR. MURPHY: -- factually, the  
5 district court held at -- district court --  
6 Petition Appendix pages 166 to 167, that the  
7 higher net prices were not offset by higher  
8 card --

9 JUSTICE GORSUCH: Well, you have proof  
10 that not all of the increased price that  
11 American Express extracts gets to the consumer.  
12 That's not my question, however.

13 My question is, do you have any  
14 evidence that, on a net basis, consumers pay  
15 more? And I don't believe you have.

16 MR. MURPHY: Well, if we're just  
17 talking -- first off, I think merchants are  
18 consumers in this context.

19 JUSTICE GORSUCH: I'm asking about  
20 consumers.

21 MR. MURPHY: For the cardholder  
22 consumers, I think that there is evidence that  
23 they have restricted options on that -- that  
24 side.

25 JUSTICE GORSUCH: But I --

1 JUSTICE SOTOMAYOR: Isn't that true,  
2 given American Express's tying or -- or  
3 restriction that no merchant can offer a  
4 consumer a 5 or 10 or other discount for using  
5 Visa, MasterCard, or Discover, correct?

6 MR. MURPHY: Absolutely correct. It  
7 has restricted competition on that side of the  
8 market in the sense of they have less options.  
9 An Amex cardholder who would prefer to have a  
10 1 percent discount, if the Amex cardholder uses  
11 a Discover card, merchants aren't allowed to  
12 offer that option. So all consumers, including  
13 cardholder consumers, have less options than  
14 they would if these anti-steering rules were  
15 not in place.

16 They have -- essentially, Amex has  
17 channeled --

18 JUSTICE GORSUCH: Isn't that true with  
19 every vertical restraint? Anytime I say I'm  
20 only going to service Cadillacs at a Cadillac  
21 dealership, I can't buy a Volvo at a Cadillac  
22 dealership.

23 All vertical restraints have the  
24 impact of restricting interbrand competition in  
25 that respect, but we learned through painful

1 experience and many, many years that they're  
2 generally pro-competitive, right?

3 MR. MURPHY: So it's not all  
4 interbrand restraints. So the classic  
5 manufacturer/distributor restrictions only  
6 affect interbrand competition in order to  
7 promote interbrand competition. Your  
8 hypothetical is about exclusive dealing, which  
9 I would admit affects interbrand competition.

10 JUSTICE GORSUCH: Right.

11 MR. MURPHY: That's why the Court has  
12 suggested, generally speaking, they -- they are  
13 problematic if they tie up too many buyers or  
14 sellers.

15 JUSTICE SOTOMAYOR: We have a  
16 wonderful amicus brief that explains that when  
17 you have exclusive dealing, the competition  
18 doesn't become a competition for selling that  
19 product but for selling all the competing  
20 products, correct?

21 MR. MURPHY: Correct. So --

22 JUSTICE SOTOMAYOR: So that if this  
23 car dealership raises its prices too high,  
24 other car manufacturers are going to be able to  
25 give you a lower price car, perhaps of equal

1 quality, correct?

2 MR. MURPHY: Absolutely correct.  
3 That's why this is so fundamentally different  
4 from the manufacturer/distributor restraints  
5 that the Court addressed in Leegin. Those  
6 restraints, the Court made quite clear, that  
7 resale price maintenance, for example,  
8 interbrand competition acted as a critical  
9 check to make sure that the additional services  
10 being provided by resale price maintenance were  
11 worth their costs.

12 That's the problem with this  
13 restraint. Most vertical restraints only  
14 affect intrabrand competition.

15 JUSTICE GORSUCH: So you'd just have  
16 us ignore the fact that Visa and MasterCard  
17 have 74 percent of the market.

18 MR. MURPHY: No. I think --

19 JUSTICE GORSUCH: Or that they  
20 exercise no restraint in this marketplace?

21 MR. MURPHY: I do think that -- that  
22 this marketplace is entirely highly  
23 concentrated where all the main competitors  
24 were using these types of restraints. As the  
25 Court said in Leegin, if lease --

1 JUSTICE GORSUCH: That -- that's gone,  
2 though, right? I mean, any notion of  
3 horizontal agreement in this case is out of the  
4 case.

5 MR. MURPHY: So I agree that there's  
6 no -- there's no allegations of horizontal  
7 agreement, but there -- there's clear evidence  
8 of horizontal effect. And when a vertical  
9 restraint has a horizontal effect, that is when  
10 the vertical restraint becomes problematic.

11 And here it's just conclusive that the  
12 purpose and effect of this provision is to cut  
13 off price discounts from American Express's  
14 competitors --

15 JUSTICE KENNEDY: Can you tell me --

16 MR. MURPHY: -- and to raise --

17 JUSTICE KENNEDY: Please, don't let me  
18 interrupt.

19 MR. MURPHY: I was just going to say  
20 and to raise the prices that all four credit  
21 card companies charge, which I think makes it  
22 problematic because it's market-wide.

23 JUSTICE KENNEDY: Could you -- could  
24 you comment on the brief of the antitrust law  
25 and economic scholars in favor of Respondents?

1 They said for us to focus on output. I know  
2 you disagree with their conclusion. Do you  
3 agree with their starting analysis, that we  
4 should think of this in terms of output, which  
5 is a multi-sided platform exercise?

6 MR. MURPHY: I generally think that  
7 output is very significant, but in this case, I  
8 think the higher prices go hand in hand with  
9 the restricted output. The Court has said in  
10 the California Dental case that higher prices,  
11 reduced output, divided markets all have the  
12 same anticompetitive effect.

13 And I want to make something clear:  
14 It's not that we --

15 JUSTICE KENNEDY: Although their  
16 conclusion was that the output -- that this is  
17 -- that this is a market that's, frankly,  
18 phenomenal in terms of its -- of its size.

19 MR. MURPHY: That's what -- that's  
20 what I want to make clear, that we have clear  
21 evidence of direct causation that the  
22 restraints cause higher merchant prices.

23 With respect to the restraints' effect  
24 on output, there is just no evidence one way or  
25 the other. Output has been expanding, but that

1 doesn't control for -- for factors in this huge  
2 economy, such as GDP growth, inflation, or any  
3 other thing that's going to drive transactions  
4 here.

5 JUSTICE KENNEDY: Does output include  
6 premiums or rewards to customers?

7 MR. MURPHY: Yeah. Output would  
8 include quality considerations as well. But --  
9 so we're talking about just the government's  
10 initial case here, and as this Court said,  
11 higher prices restrict output in any -- any  
12 market with downward-sloping demand curves.

13 That's why all the circuit courts say  
14 -- say that the government can prove its  
15 initial burden under the rule of reason by  
16 showing either higher prices or restricted  
17 output. They're flip sides of the same coin in  
18 that respect.

19 JUSTICE GINSBURG: Do you --

20 MR. MURPHY: And I still think that  
21 the -- this Court's vertical restraint --  
22 vertical restraint cases --

23 JUSTICE SOTOMAYOR: I think Justice  
24 Kennedy's question was, given the uniqueness of  
25 this market where you don't have proof of

1 greater output, does that make the price  
2 increase irrelevant?

3 MR. MURPHY: No, I don't --

4 JUSTICE SOTOMAYOR: I think that that  
5 was the nature of his question.

6 MR. MURPHY: I -- I --

7 JUSTICE SOTOMAYOR: He can correct me  
8 if I'm wrong.

9 MR. MURPHY: I don't -- I don't think  
10 it does whatsoever, because I think this  
11 Court's cases, Catalano, National Professional  
12 Society of Engineers, all suggest that a  
13 competitor cannot impose a price restraint or  
14 restraint on one product attribute in order to  
15 channel it to other product attributes. Here,  
16 it would be merchant fees and cardholder  
17 rewards.

18 The Court -- the Court's cases clearly  
19 suggest that competition itself should  
20 determine the appropriate ratio between quality  
21 and price considerations in -- in the Court's  
22 prior cases, Indiana Dentist, or in this case,  
23 merchant fees and cardholder rewards. It's  
24 competition --

25 JUSTICE GINSBURG: Could you please

1 comment on the Second Circuit's view that  
2 what's involved is a credit card transaction  
3 and that includes both services to merchants  
4 and services to cardholders and you can't just  
5 deal with one and ignore the other.

6 MR. MURPHY: So I still think that  
7 even if under the -- taking the Second  
8 Circuit's premise as a given, which is this is  
9 just one market. We disagree. We think that  
10 that market analysis should be divided  
11 separately.

12 But even taking their argument as a  
13 premise, their argument is that they can  
14 restrict competition with respect to one  
15 product attribute in order to channel it to  
16 other product attributes.

17 And I think that's fundamentally  
18 inconsistent with this Court's cases under  
19 Section 1, which say that competition should  
20 provide what is the appropriate ratio between  
21 these things. I'll give you an example.

22 In the Indiana Dental case, a dentist  
23 refused to provide X-rays to insurers and the  
24 dentist's argument was that this restriction on  
25 the provision of X-rays would improve quality

1 of patient care.

2 The Court rejected that argument. It  
3 said you cannot restrict competition with  
4 respect to that category because competition  
5 should provide what is the appropriate balance  
6 between these competing things.

7 That's our central point. Even if  
8 this is one market, competition should decide  
9 what is the appropriate ratio between merchant  
10 fees and cardholder rewards.

11 Amex is perfectly -- we have no  
12 problem with Amex's approach of having a high  
13 reward/high cost card. The problem is that  
14 they're trying to insulate that product because  
15 they think under the full spectrum of  
16 competition it could not survive from a  
17 competing argument, such as low cost/low reward  
18 cards.

19 And so that's simply inconsistent with  
20 the basic policies of the Sherman Act, which is  
21 that not just price but quality considerations  
22 and all other considerations are best satisfied  
23 through competition.

24 And I still think that it's  
25 fundamentally inconsistent with this Court's

1 rule of reason cases in the vertical context.  
2 In -- in the resale price maintenance context,  
3 the Court made quite clear that, even though  
4 resale price maintenance might lead to higher  
5 prices for the higher services being imposed,  
6 if consumers didn't like those higher services,  
7 they can always switch to cheaper goods, a  
8 cheaper manufacturer's good.

9 That is the fundamental problem that  
10 we have with this restraint. Unlike resale  
11 price maintenance, it has restricted interbrand  
12 competition, and so it's affected all  
13 competitors, relieving them of the ability to  
14 provide the low cost -- low cost product that  
15 consumers might want.

16 So, if there are no further questions,  
17 I'd like to reserve the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Stewart.

21 ORAL ARGUMENT OF MALCOLM L. STEWART  
22 ON BEHALF OF THE RESPONDENT UNITED STATES IN  
23 SUPPORT OF THE PETITIONERS

24 MR. STEWART: Mr. Chief Justice, and  
25 may it please the Court:

1           The purpose and effect of Amex's  
2 anti-steering rules is to eliminate price  
3 competition across an entire market. Yet the  
4 Second Circuit held that the plaintiffs had not  
5 even established a prima facie case of  
6 anticompetitive effect.

7           In our view, the court of appeals made  
8 two fundamental errors. The first was that for  
9 purposes of the plaintiff's prima facie case,  
10 the court collapsed into one what should have  
11 been regarded as distinct markets. And at the  
12 first stage of the analysis, the court should  
13 have focused entirely on the effects on the  
14 market for provision of network services to  
15 merchants.

16           The second and I think perhaps the  
17 more fundamental error, and goes to some of the  
18 questions that the Court has been asking, is  
19 that even when looking at the cardholder side  
20 of the market, the Second Circuit erred by  
21 conflating the question, have reward -- have  
22 cardholder rewards become more generous, with  
23 the appropriate question, has competition on  
24 the cardholder side been enhanced?

25           And I'd like to echo one of the things

1 that Mr. Murphy was saying, that from our point  
2 of view, it's entirely legitimate for Amex to  
3 pursue a strategy where it produces higher  
4 rewards for cardholders and charges a premium  
5 and it's fully free to attempt to persuade its  
6 cardholders that the extra value is worth the  
7 extra cost.

8 And in all sorts of markets --

9 JUSTICE GORSUCH: Mr. Stewart, what  
10 would you say, though, I mean, you -- you argue  
11 to us that this is a very unique situation and  
12 new -- new to antitrust law, the two-sided  
13 market issue, and assuming all that's true --  
14 I'm not sure it is, but taking it as true --  
15 why shouldn't we take Judge Easterbrook's  
16 admonition seriously, that judicial errors are  
17 a lot harder to correct than an occasional  
18 monopoly where you can hope and assume that the  
19 market will eventually correct it. Judicial  
20 errors are very difficult to correct.

21 And we've had a long and painful  
22 experience with vertical restraints in this  
23 Court going back to Dr. Miles that it took  
24 decades to correct, in Leegin; Albrecht, which  
25 took decades to correct in State Oil.

1           Why should we disregard those  
2           admonitions in this case? I assume you'd like  
3           us to.

4           MR. STEWART: Well, we certainly -- I  
5           mean, we filed a brief in opposition arguing  
6           that the Court shouldn't grant cert because  
7           these issues were fairly new. They hadn't --

8           JUSTICE GORSUCH: For just these  
9           reasons.

10          MR. STEWART: But I think given that  
11          the Court has taken the case, we -- we  
12          certainly would take the point that the Court  
13          should not speak more broadly than is  
14          necessary. It shouldn't attempt to articulate  
15          a sort of unified field theorem that would  
16          cover all two-sided markets. It should  
17          approach the case cautiously.

18          We do think that there are a couple of  
19          principles that the Court can articulate that  
20          would be very deeply rooted in precedent and in  
21          established ways of looking at the -- at the  
22          antitrust world.

23          The first is that for purposes of  
24          market definition, for the first step of the  
25          analysis, has the defendant impeded competition

1 in the relevant market? The market has always  
2 been defined by reference to substitutability.  
3 What alternative sources of goods or services  
4 are out there?

5 JUSTICE KAGAN: Mr. Stewart, you  
6 admit, as does General Murphy, that at the  
7 second stage it's appropriate for the courts to  
8 take into account how this all plays out on the  
9 cardholder side of the market.

10 MR. STEWART: That's correct.

11 JUSTICE KAGAN: If that's the case,  
12 why doesn't that enter into the question of how  
13 you define the market in the first instance?

14 MR. STEWART: Well, I think it's -- it  
15 would be hard to determine, for instance, or  
16 really conceptually impossible to determine  
17 whether Amex had market power in a hypothetical  
18 market consisting of both the merchant side and  
19 the cardholder side.

20 On the merchant side, Amex competes  
21 with three other networks. On the cardholder  
22 side, at least with respect to the issuance of  
23 cards, it competes with thousands of issuing  
24 banks.

25 And the point of using

1       substitutability as a criterion for defining  
2       the market and ascertaining market power is to  
3       answer the question, if somebody who is dealing  
4       with the defendant was dissatisfied with the  
5       bargain it was being offered, would it have  
6       appropriate alternative sources of supply that  
7       it would go to, or --

8                 JUSTICE KENNEDY: Does -- does -- does  
9       -- does -- does that mean -- I don't want to  
10       interrupt this line of questioning -- but does  
11       -- does that mean that, at step 1, the value to  
12       the cardholders shouldn't be part of the  
13       analysis?

14                MR. STEWART: I think you would still  
15       say has -- yes, competition has been --

16                JUSTICE KENNEDY: But that's -- that's  
17       -- that's a very dangerous step for this Court  
18       to take to analyze the market that way, this  
19       two-sided market, to say that we're going to at  
20       step 1 look at just one side. That -- that's  
21       -- that's where I need help.

22                MR. STEWART: Well, I think it's --  
23       it's kind of inherent in the -- in the  
24       three-step approach that the Court has taken to  
25       resolving rule of reason cases where first the

1 plaintiff attempts to establish an  
2 anticompetitive effect. Then the defendant  
3 attempts to establish a procompetitive  
4 justification. And then the third step is the  
5 plaintiff can show either that the  
6 justification could have been achieved in a  
7 different way or that it wasn't really  
8 necessary.

9           It's inherent in that formula that  
10 practices that can ultimately be justified at  
11 the second step may still have anticompetitive  
12 effects and those can be isolated and analyzed  
13 separately from the procompetitive effects.  
14 But I guess --

15           JUSTICE BREYER: It's a two-sided  
16 market. I mean, I -- I -- I've never seen such  
17 jargon. In -- in my own mind, I can think of  
18 joint costs, oil and gas in a well. I can  
19 think of complementary products, nuts and  
20 bolts, can't have a nut without a bolt, and I  
21 can think of combining the two, nuts and bolts  
22 made out of a special thing called titanium  
23 uranium. Okay?

24           Now there we are. And I can think of  
25 different uses for the notion that you have two

1 different products. Some people might say that  
2 shows that this agreement had no effect. Ah,  
3 if that's the use, I wonder why they entered  
4 into it. Okay?

5 Then, second, I can imagine them  
6 saying: The reason that we have this agreement  
7 is because it creates a new, wonderful titanium  
8 uranium bolt that never would have been  
9 produced otherwise. That's like the  
10 manufacturers getting together and saying we  
11 have price fixing in order to stop poison toys.  
12 Okay. It's never been used as an antitrust  
13 flag justification, but I guess it could be.

14 And then maybe there's 3 and 4 and 5.  
15 It's just that I can't find any of them  
16 relevant here, at least not yet.

17 MR. STEWART: Well, this market is --  
18 and we take the point that's made on -- by some  
19 of the briefs on the other side. This market  
20 is distinct in the sense that at the time that  
21 a transaction is accomplished at the -- a  
22 merchant location, services are simultaneously  
23 being provided both to the merchant and to the  
24 cardholder. And that --

25 JUSTICE BREYER: We do the same thing,

1 don't we, with nuts and bolts? We give the  
2 people nuts and we give them bolts.

3 MR. STEWART: But --

4 JUSTICE BREYER: And -- and maybe  
5 it -- I mean, you know, there are loads of --  
6 there are a lot of products like that.

7 MR. STEWART: I -- I guess what I  
8 would say from this standpoint is Mr. Murphy,  
9 the federal government, and the Respondents all  
10 agree that benefits to cardholders should be  
11 considered as part of the antitrust analysis.

12 JUSTICE BREYER: Should really?  
13 Because -- and you agree with that? For  
14 example, we have an agreement among toy  
15 manufacturers that we won't sell poisoned toys.  
16 That's always been an absolute mystery to put  
17 to the class, from Phil Areeda on, because they  
18 want to stop the poison toys, but you say, hey,  
19 that isn't the job of the antitrust law.  
20 That's the job of the consumer protection  
21 agency. And so we have a debate. And I didn't  
22 know that that issue had been solved in this  
23 Court.

24 MR. STEWART: No, I -- I take your  
25 point, that perhaps I was imprecise when I said

1 benefits to cardholders, because the Court has  
2 made clear in different Sherman Act contexts  
3 that, in kind of balancing pro-competitive and  
4 anticompetitive justifications, you're not just  
5 looking at anything that could be characterized  
6 as beneficial or harmful. You're looking at  
7 harms to or benefits to competition.

8 And our point about the cardholder  
9 side is that the Second Circuit may have been  
10 right when it said the effect of this -- the  
11 anti-steering rules was that, on the whole,  
12 cardholder benefits may have become more  
13 generous. But the --

14 JUSTICE SOTOMAYOR: Mr. Stewart, could  
15 I just ask you to finish your second response  
16 to Justice Gorsuch? You said the market issue  
17 was number 1, that was fundamental. What's the  
18 second principle that you think is important?  
19 And, number 3, borrowing from Justice -- or  
20 going to Justice Breyer's point, I can -- I  
21 understand the argument why in this case on  
22 step 1 the two markets should not be joined,  
23 but I -- it's possible that in some other  
24 two-sided market that it might be a step 1.

25 Do we have to rule and say that in no

1 market is it?

2 MR. STEWART: No. To take -- to take  
3 that part of the question first, I think the  
4 Court should proceed cautiously about  
5 announcing categorical rules and can say that,  
6 for purposes of this case, it is sufficient  
7 to -- the fact that there is four-way  
8 competition on the merchant side and  
9 thousands-way competition on the cardholder  
10 side is by itself a sufficient ground for  
11 treating the existing markets.

12 But to take the other part of your  
13 question and Justice Gorsuch's question, the  
14 reason that we think that the court of appeals  
15 analyzed benefits to cardholders incorrectly  
16 was that it doesn't focus on benefits to  
17 competition. That is, if you imagine  
18 MasterCard executives strategizing how can we  
19 get more people to use their MasterCards more  
20 often, one thing that they might say is let's  
21 beef up our rewards program. But the other  
22 thing that they might say is let's cut our  
23 merchant fees because if the merchants come --  
24 in a world where there was no steering, they  
25 could say let's cut our merchant fees because

1 if the merchant comes to regard our card as its  
2 preferred card --

3 JUSTICE GORSUCH: And they're free to  
4 do that, right? I mean, American Express's  
5 agreements don't affect MasterCard or Visa's  
6 opportunity to cut their fees, their own fees,  
7 or to advertise that American Express's are  
8 higher. There is room for all of that kind of  
9 competition here.

10 It's just the difference between  
11 Cadillacs and Kias. People can choose. Do  
12 they want a high cost, high reward, a low-cost,  
13 cheaper alternative? And the two sides can  
14 compete with one another.

15 MR. STEWART: That's exactly right,  
16 except that as long as the -- and that -- that  
17 is the type of environment that we believe the  
18 antitrust laws are intended to encourage. And  
19 then --

20 JUSTICE GORSUCH: Absent a horizontal  
21 agreement, we have that, don't we?

22 MR. STEWART: Usually, we would. And  
23 this is a rare vertical agreement in the sense  
24 that it was a vertical agreement that  
25 ultimately had effects that would more commonly

1 be associated with horizontal agreements --

2 JUSTICE GORSUCH: Well, that was part  
3 of the case originally, but that's gone now,  
4 right?

5 MR. STEWART: No --

6 JUSTICE GORSUCH: Because those  
7 agreements have been dropped by -- by Visa and  
8 MasterCard. I completely understand and accept  
9 that if that were part of the case, we'd have a  
10 very different case.

11 MR. STEWART: No, even without the  
12 Visa and MasterCard having their own  
13 anti-steering provisions, so long as American  
14 Express imposes the anti-steering rules on the  
15 merchants that are part of its network and so  
16 long --

17 JUSTICE GORSUCH: Right. I understand  
18 the merchants can't, but the competitors can  
19 advertise all of these issues and they can  
20 point out their lower merchant fees to  
21 consumers as they do.

22 MR. STEWART: Visa and MasterCard  
23 could advertise in that respect. Now the ad --  
24 the advertisements that they might be run would  
25 probably be taken with more of a grain of salt

1 than if the -- the merchant was telling her own  
2 customer Visa actually does charge me less than  
3 American Express.

4 But even -- even leaving that aside,  
5 Visa and -- I mean, I'm sorry, Visa and  
6 MasterCard can advertise that people in a  
7 spirit of public -- in a public-spirited way  
8 should use their cards, not because they'll  
9 gain any tangible advantage but because the  
10 cost to merchants in the aggregate will be  
11 lower --

12 JUSTICE GORSUCH: So, Mr. Stewart, I'm  
13 sorry, I apologize. I just want to make sure I  
14 understand the argument then. Is it that the  
15 consumer welfare here is measured by the  
16 relative effectiveness of advertising by  
17 merchants as compared to by Visa and  
18 MasterCard?

19 MR. STEWART: No, it's -- I mean, it's  
20 -- it's the -- in your Mercedes and Kia  
21 example, it is the difference between Kia  
22 saying -- running advertisements and saying buy  
23 our cars because they have been produced in a  
24 more responsible way and you should contribute  
25 to the public good by encouraging these

1 practices, even though you will pay no less for  
2 a Kia than for a Mercedes. It's one way of  
3 advertising. It's one way of trying to  
4 compete, but it's obviously a lot more  
5 effective if Kia can say, yes, our cars are not  
6 as good, but you pay a lot less for them.

7 And, similarly, MasterCard and Visa  
8 would like to be able -- would like consumers  
9 to feel that maybe they're -- if they wanted to  
10 compete on -- on the basis of price, they would  
11 want consumers to feel, yes, maybe the rewards  
12 will not be extensive, but you will get a  
13 discount at the cash register or you will get  
14 some other tangible benefit from using our  
15 card.

16 And Discover, for instance, when it  
17 was trying to implement its low-cost strategy,  
18 didn't just propose to lower its merchant fees  
19 in the hopes that would -- it would cause this  
20 train -- chain reaction. Discover went to  
21 individual merchants and was trying to  
22 negotiate agreements where Discover would tell  
23 the particular merchant: We will give you the  
24 following discount on your merchant fee in  
25 return for your commitment to engage in the

1 following steering practices.

2 And that is a form of competition on  
3 the cardholder side in which the networks could  
4 otherwise have engaged. And at least so long  
5 as the large merchants feel that dropping Amex  
6 entirely isn't an economically feasible  
7 alternative, that form of competition is -- is  
8 entirely foreclosed.

9 Yes, Visa and MasterCard can cut their  
10 own merchant rates unilaterally, but if the  
11 merchants can't give their own customers any  
12 advantage for using a card that has that  
13 effect, then it's a shot in the dark. It's  
14 unlikely to be a competitive -- a successful  
15 competitive strategy.

16 And so I guess the --

17 JUSTICE SOTOMAYOR: I'm sorry, what  
18 was the second general principle? I --

19 MR. STEWART: That is the second  
20 general principle, that not only should the  
21 court of appeals not have collapsed the two  
22 sides of the markets, but that in asking  
23 whether the -- indeed, the non-discrimination  
24 provisions, the anti-steering rules were  
25 beneficial or harmful to consumers, it should

1 have focused specifically on the effects on  
2 competition. It shouldn't have --

3 JUSTICE SOTOMAYOR: The court below  
4 didn't do step 2 here?

5 MR. STEWART: That's correct.

6 JUSTICE SOTOMAYOR: You're saying do  
7 we have to accept that it's always looking at  
8 both sides of the market, is always  
9 appropriate, or is it only in this case that it  
10 might be appropriate, and how would it be  
11 appropriate, if we looked at it under step 2?

12 MR. STEWART: I -- I guess I would --  
13 with respect to two-sided platforms generally,  
14 I would simply -- I guess the only rule we  
15 would urge the Court to adopt is the fact that  
16 two interrelated markets are distinct for  
17 purposes of the first side of the analysis, the  
18 market power inquiry, should not preclude the  
19 Court from considering benefits on the other  
20 interrelated market at the second stage of the  
21 analysis.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Chesler.

25

1 ORAL ARGUMENT OF EVAN R. CHESLER  
2 ON BEHALF OF THE RESPONDENTS

3 MR. CHESLER: Mr. Chief Justice, and  
4 may it please the Court:

5 The district court described  
6 competition for credit card transactions as  
7 fierce. There is no transaction without a  
8 cardholder and a merchant simultaneously  
9 executing one.

10 To compete for that business against  
11 ubiquitous and, frankly, larger rivals, Amex  
12 offers consumers what they want, and  
13 transaction volume has, in fact, increased  
14 dramatically and accordingly.

15 Amex requires merchants not to  
16 undermine its cardholder relationship and its  
17 investment, not to work against Amex if it's  
18 going to be Amex's representative to consumers.

19 And millions of merchants --

20 JUSTICE SOTOMAYOR: Isn't that the  
21 essence of competition, to have somebody  
22 working against you? I mean, I always thought  
23 that that was the essence of competition, that  
24 someone will come in and -- and offer the  
25 people involved in the transaction something

1 better.

2 MR. CHESLER: Your Honor, that is the

3 --

4 JUSTICE SOTOMAYOR: Better or that  
5 they may not know they want but that they may  
6 want.

7 I -- I have to say if I go to a cash  
8 register and the merchant says to me, I'll give  
9 you a 1 percent discount today if you don't use  
10 Amex, I sit there and think to myself, do I  
11 need the airplane rewards or the train rewards,  
12 or do I want the 1 percent? And I do it -- and  
13 I choose differently each time depending on the  
14 nature of the transaction.

15 But you -- this anti-steering removes  
16 that competition.

17 MR. CHESLER: Your Honor, the product  
18 here, we need to start the analysis with the  
19 question of what is the product.

20 JUSTICE SOTOMAYOR: You haven't told  
21 me why it doesn't remove competition.

22 MR. CHESLER: Because, in fact, it  
23 enhances competition between the brands, and  
24 that's what happened here.

25 The competition between the brands --

1 JUSTICE SOTOMAYOR: But I don't care  
2 about the brands. I care about my price.  
3 That's what price competition is about.

4 MR. CHESLER: Exactly, Your Honor.

5 JUSTICE SOTOMAYOR: I care about  
6 whether today I want to pay the 1 percent more  
7 or not.

8 MR. CHESLER: And, Your Honor --

9 JUSTICE SOTOMAYOR: And this vertical  
10 restraint is stopping horizontal competition.

11 MR. CHESLER: Your Honor, I disagree  
12 with that. In fact, the district court here  
13 said no one had proved what the price of the  
14 product is. So we can't, in fact, conclude --

15 JUSTICE SOTOMAYOR: I don't really  
16 care. All I know is that the merchant is  
17 offering me this at \$90 or \$100, and I have a  
18 choice between paying \$100 or \$99.

19 At this moment, I'm paying a higher  
20 price to use American Express than I want to  
21 pay.

22 MR. CHESLER: But what you don't know,  
23 Your Honor, in that hypothetical and what the  
24 district court found was never proven is what  
25 the effect on the other side of the same price

1 is. Every time your rewards are reduced,  
2 that's a price increase to you. And the  
3 district court explicitly found --

4 JUSTICE SOTOMAYOR: No. Only if I'm  
5 going to use the rewards.

6 MR. CHESLER: Whether you --

7 JUSTICE SOTOMAYOR: No, because if I'm  
8 not going to use the rewards, the \$99 is still  
9 more valuable to me.

10 MR. CHESLER: But, Your Honor, you may  
11 want to use the rewards on the next  
12 transaction. And when you aggregate those  
13 rewards, if you've collected fewer rewards,  
14 you've paid a price increase. And the district  
15 court found --

16 JUSTICE SOTOMAYOR: You're making my  
17 choice for me. You're not giving me the  
18 choice. And that's what price competition is  
19 about, my choice, not your choice about what's  
20 more valuable to me.

21 MR. CHESLER: Your Honor, I think one  
22 of --

23 JUSTICE SOTOMAYOR: Some people, it's  
24 hard to believe, but there are credit card  
25 users who will never use their reward points.

1 Your system depends on that.

2 MR. CHESLER: And there are -- Your  
3 Honor, I agree with you, they may not choose to  
4 use the rewards, but when you look at the  
5 market -- market aggregated here, the fact is  
6 there was no proof at the end of the day of  
7 what the price for the product at issue is.

8 The product at issue here are credit  
9 card transactions. You cannot have a credit  
10 card transaction unless a consumer and a  
11 merchant come together. And the question is,  
12 what's happened to the output of those  
13 transactions, what's happened to the quality of  
14 those transactions, and what's happened to the  
15 price of those transactions?

16 JUSTICE BREYER: That's one question.  
17 Now I'm beginning to understand this. I do  
18 sometimes learn something, as I just did from  
19 Mr. Stewart and the others in this oral  
20 argument. And my problem is that I grew up in  
21 antitrust at a time when people didn't use  
22 phrases like platforms and two-sided markets.  
23 So I have to translate things into a language  
24 that I've been using for 40 years, but okay.

25 So now, as I see your argument, and I

1 -- I didn't -- I started out not seeing what it  
2 was -- tell me if I'm right, and don't just  
3 agree if I'm not -- I really analogize this to  
4 a -- a firm that makes things and sells through  
5 dealers.

6 Now it used to be, correct, that you  
7 couldn't tell the dealer he had to fix his  
8 prices because that stopped intrabrand  
9 competition, and you couldn't tell the dealer  
10 he had to divide markets. You couldn't divide  
11 them.

12 And that's changed because sometimes  
13 those are justified. And usually the argument  
14 they are justified is that by fixing the  
15 dealer's prices among themselves or giving him  
16 exclusive territories, we will encourage him to  
17 work harder to sell our brand. And that  
18 sometimes is a justification.

19 And it seems to me you are simply  
20 making a variation on that theme. You are  
21 saying by engaging in this agreement among  
22 dealers, which is, after all, agreement that  
23 does not directly but indirectly has a tendency  
24 to fix -- to raise prices, therefore, in a  
25 sense, there's an anticompetitive aspect.

1           But by doing that -- by doing that, we  
2           are better able to get a product through to the  
3           consumer that, in fact, they will prefer more.

4           Now have I correctly stated at least  
5           in general terms the form of your argument?

6           MR. CHESLER: In general terms, you  
7           have, Your Honor. And may I add, and by our  
8           providing those rewards to consumers, Visa and  
9           MasterCard, who control 70 odd percent of the  
10          market --

11          JUSTICE BREYER: Right.

12          MR. CHESLER: -- were required to  
13          respond in kind, and the result is that output  
14          has increased.

15          JUSTICE BREYER: Better for everyone.

16          MR. CHESLER: Output has increased.

17          JUSTICE BREYER: Just as a person says  
18          let me tell the dealer of the car that he has  
19          to fix prices with the others, resale price  
20          maintenance, because I'll get my new gizmo car  
21          through and that'll improve everybody's life.  
22          Okay?

23          Now, if that's the form of the  
24          argument, then isn't the way I can be a little  
25          traditional, say step 1, is there an

1 anticompetitive aspect? Then we go to step 2,  
2 what is the justification and does it  
3 out-balance, et cetera? Okay.

4 So far we're at step 1, is there an  
5 anticompetitive aspect? Well, of course. It  
6 seems to me obvious, of course, there is.

7 When you tell the dealer that he can't  
8 tell the customer that he's charging a lower  
9 price, that's anticompetitive right then and  
10 there, and I don't see any other argument.

11 I mean, what it could -- how could  
12 that be procompetitive? I mean, maybe there's  
13 a justification for it in terms of what you're  
14 going to do eventually, but how can that not be  
15 anticompetitive?

16 MR. CHESLER: Because, Your Honor, you  
17 must ask that question with respect to the  
18 product at issue. And with respect, your  
19 hypothetical only related to part of the  
20 product.

21 The product is the transaction.  
22 Indeed, the government contended at trial that  
23 American Express had 26 percent of the market.  
24 That's 26 percent of the dollar volume of  
25 transactions.

1                   And if I changed Your Honor's  
2     hypothetical to ask, is there an  
3     anticompetitive prima facie case with respect  
4     to the product, the transaction, the answer is  
5     absolutely not. Output of the product has  
6     soared. Quality which the government admitted  
7     in front of the Second Circuit at their  
8     argument has improved dramatically.

9                   And as the district court found, the  
10    price of that product was never proved --

11                  CHIEF JUSTICE ROBERTS: Well, output  
12    --

13                  MR. CHESLER: -- so no one can say it  
14    was super competitive.

15                  CHIEF JUSTICE ROBERTS: Output of the  
16    product has increased, that has so many factors  
17    that go into that besides the nature of the  
18    particular product, right?

19                  I mean, if the economy grows, then the  
20    output of your product, credit card  
21    transactions, grows, right?

22                  MR. CHESLER: It could, Your Honor.  
23    But the evidence here was that what was driving  
24    it was the fierce competition that the district  
25    court found between the card providers, which

1 was driven by the rewards that Visa and  
2 MasterCard were forced to match because of  
3 American Express's rewards.

4 There could be exogenous reasons why  
5 output increases. But the government's  
6 speculation that it had to do with other  
7 factors is just that, it's speculation.

8 CHIEF JUSTICE ROBERTS: When you say  
9 the product, what are you talking about? The  
10 number of credit card transactions or the  
11 dollar volume?

12 MR. CHESLER: Dollar volume. And  
13 that's what the government and the district  
14 court both said was the best metric for the  
15 trial.

16 JUSTICE BREYER: Then what worries me  
17 about that, I have just the same -- look, you  
18 -- you both have put your finger, it seems to  
19 me, on one of the most, as you know, I think,  
20 unless it's changed, one of the most difficult  
21 problems in antitrust law: How to define a  
22 market.

23 And, by and large, the answer to that  
24 differs depending on a lot of different  
25 circumstances and what you're up to. And so,

1 with an agreement that has an anticompetitive  
2 impact of some kind, it's easier and, you know,  
3 you get away from this, if you can identify an  
4 anticompetitive impact.

5           Think of the new gizmo car which has  
6 18 dealers. We give each an exclusive area.  
7 And for analysis purposes, I don't think you  
8 have to worry about a market. You say, look,  
9 that fact of exclusive areas stops these  
10 dealers from competing with each other. End of  
11 the matter. Right then and there you have an  
12 anticompetitive impact.

13           And then we go on to question 2, is it  
14 nonetheless worthwhile? Now maybe you -- I've  
15 read the Second Circuit. I know some of those  
16 judges know antitrust law pretty well and so  
17 forth and -- but I just don't see something  
18 that improves on that basic thing.

19           And unless you want to come in and  
20 say, oh, this had no impact, you know, because  
21 he only had 2 percent of the relevant market,  
22 in which case why did he enter into it? You  
23 know, I mean, I can imagine variations. But --  
24 but do you see how I'm thinking?

25           MR. CHESLER: I do, Your Honor. And

1 -- and if I may, the point in your  
2 hypothetical, which I want to embrace because  
3 it really does make the point I'm trying to  
4 make, is the product was the new card with  
5 these gizmos on it.

6 JUSTICE BREYER: Yeah.

7 MR. CHESLER: And you found in your  
8 hypothetical, I believe, that there was an  
9 anticompetitive effect at the first stage with  
10 respect to that product. And what I'm here to  
11 tell you is, with respect to the product at  
12 issue here, which is credit card transactions,  
13 the government did not prove that there was an  
14 anticompetitive effect because output was up,  
15 quality was up, and they didn't prove what the  
16 price of that product was.

17 So you couldn't possibly conclude that  
18 the price was super-competitive.

19 JUSTICE KAGAN: Mr. Chesler --

20 JUSTICE BREYER: It may have been  
21 anticompetitive in one way. In one way.

22 JUSTICE KAGAN: Mr. Chesler --

23 JUSTICE BREYER: You cannot get  
24 through to the dealer -- to the customer, the  
25 fact that these different companies, some

1 charge lower, some charge higher prices. The  
2 product you're buying, some will be lower, some  
3 will be higher. That is a fairly key element,  
4 which --

5 MR. CHESLER: But --

6 JUSTICE BREYER: -- this prevents you  
7 from getting through in terms of information to  
8 the person who's going to be buying.

9 MR. CHESLER: Respectfully, Your Honor  
10 --

11 JUSTICE BREYER: No?

12 MR. CHESLER: -- it does not. The  
13 credit card companies are perfectly free, as  
14 Justice Gorsuch's questions asked before, to  
15 tell the consumers what their charges are.

16 JUSTICE BREYER: But the merchant is  
17 not. And, indeed, were we to start down that  
18 road and say don't worry when you get a promise  
19 among merchants not to tell people what prices  
20 are, because, after all, the person who sells  
21 through you could always advertise, that, I  
22 think, would have a pretty strong  
23 anticompetitive impact across the country.

24 MR. CHELSER: If there --

25 JUSTICE SOTOMAYOR: I'm sorry, the --

1 the advertising mechanism failed completely.  
2 Discover tried it and said I'm just leaving  
3 money on the table because the restrictions are  
4 not just don't tell them the price difference,  
5 but don't steer them away from American Express  
6 by giving them a better deal in some other way.

7 So you're not talking about a  
8 restriction just on what you tell them, but  
9 it's a restriction on what you do. And so that  
10 anticompetitive effect is broader than just  
11 don't talk.

12 MR. CHESLER: No, Your Honor. In fact  
13 --

14 JUSTICE SOTOMAYOR: I mean, Discover  
15 couldn't tell them to -- or as they tried, very  
16 hard, to have the merchant agree to try to pass  
17 off the price saving to the customer. They  
18 couldn't do it under American Express's  
19 conditions.

20 MR. CHESLER: Your Honor, Discover had  
21 5 percent, give or take, of the market before  
22 these provisions were enforced. They had  
23 5 percent after these provisions were enforced.

24 And when I asked the president of  
25 Discover what about the millions and millions

1 of merchants in America which do not accept  
2 American Express cards and therefore have none  
3 of these provisions; have you, in fact, adopted  
4 those strategy at those merchants? He said no.

5 So what we're talking about with  
6 respect to Discover is the issue of protecting  
7 a particular competitor, not protecting  
8 competition.

9 JUSTICE KAGAN: I don't think that  
10 that's right, Mr. Chesler. I mean, I think  
11 that the Discover issue is about protecting  
12 low-cost products because the reason that we've  
13 -- that we've said vertical restraints are  
14 often perfectly fine -- indeed better for  
15 competition -- is because it allows us to have  
16 some high-cost products and some low-cost  
17 products. High cost/high service, low cost/low  
18 service.

19 The problem here is that the effect of  
20 these anti-steering provisions means a market  
21 where we will only have high cost/high service  
22 products. And any competitor that wants to  
23 come in and says, you know what, we want to  
24 compete in a different way, we want to compete  
25 in terms of cost, is going to find itself

1 unable to do so.

2 And that's the thing that makes this  
3 vertical restraint, it seems to me, different.  
4 Different from others.

5 MR. CHESLER: Your Honor, in fact,  
6 there are many low cost/low reward options on  
7 the market today. They're advertised all the  
8 time. I saw an ad for one on TV this morning  
9 as I was putting my tie on. There is no  
10 inability to offer a wide range of low-cost --

11 JUSTICE KAGAN: Mr. Chesler, if I am a  
12 consumer -- I mean, it might be that I'm very  
13 altruistic and I just care about my local  
14 coffee shop and the kind of deal that the  
15 proprietors are getting, but more to the point,  
16 what I really care about is if that local  
17 coffee shop can pass on -- pass on its decrease  
18 in price to me.

19 And that's exactly what the  
20 anti-steering provisions prevent. It prevents  
21 the vendor from passing on the lower merchant  
22 fees to the consumer. And as long as that's  
23 the case, you're just not going to be able to  
24 construct a business strategy based on a  
25 low-cost card.

1 MR. CHESLER: Well, Your Honor,  
2 again --

3 JUSTICE KAGAN: And this is exactly --  
4 I mean, this is not me making this up. I mean,  
5 there was a seven-week trial. And that's  
6 exactly what the district court found. And  
7 these are findings of fact about Discover,  
8 about the effect of -- of -- of this  
9 anti-steering provision on the actual state of  
10 competition in the market, meaning on the  
11 ability of low-cost cards to compete.

12 MR. CHESLER: If I may respond, Your  
13 Honor.

14 The district court also found that  
15 this two-sided market was, as he said,  
16 different from virtually all others because  
17 here the two sides were inextricably linked and  
18 intertwined.

19 And here, Your Honor, I would submit,  
20 the product, which is the transaction, is a  
21 product that has a cost and a price associated  
22 with both of the parties to it, the consumer  
23 and the merchant.

24 And under Your Honor's hypothetical,  
25 if, in fact, that price is lowered, the

1 merchant cost is lowered, the rewards are  
2 lowered, and that's a price increase to the  
3 consumer --

4 JUSTICE SOTOMAYOR: Ah, but we don't  
5 know --

6 MR. CHESLER: -- which was never  
7 proved on this record.

8 JUSTICE SOTOMAYOR: But we don't know  
9 that because we don't know -- and American  
10 Express is the only one who does know. We do  
11 know that the entire price increase is not  
12 passed on to consumers. So there is a profit  
13 margin in there that can be distributed or one  
14 profit margin lowered to the benefit of the  
15 customers or -- of not, but that's what  
16 competition is about.

17 Every competitor will decide what mix  
18 of profit, what mix will go to the consumer,  
19 won't go to the consumer, and the consumer --  
20 finding of fact by the seven-week trial judge  
21 -- will benefit with lower prices.

22 MR. CHESLER: Your Honor, in fact, as  
23 the -- as the court of appeals pointed out, the  
24 fact that not every penny of the merchant fee  
25 is passed on in rewards to the consumer tells

1 you nothing about the other costs that the card  
2 company is incurring.

3 And the government did not prove what  
4 those costs are. It could well be that, in  
5 fact, the --

6 JUSTICE SOTOMAYOR: Well, isn't that  
7 what the rule of reason does by putting this at  
8 step 2? The government is never going to know  
9 that. It doesn't know your business model.

10 MR. CHESLER: Well --

11 JUSTICE SOTOMAYOR: If you want to  
12 argue pro-competitive effects, you show it.  
13 It's not up to the government to show on a --  
14 in a different market that there's a benefit  
15 that outweighs the price stifling in the main  
16 market. I mean, I've never heard of such a  
17 thing.

18 If you think there's pro-competitive  
19 effects, you prove it.

20 MR. CHESLER: Your Honor, it is the --  
21 it is the defendant's obligation or burden to  
22 prove pro-competitive effects when the  
23 plaintiff proves a prima facie case of  
24 anticompetitive effect --

25 JUSTICE GORSUCH: Mr. Chesler --

1           MR. CHESLER:  -- with respect to a  
2 product at issue.

3           JUSTICE GORSUCH:  -- with respect to  
4 that, and in response to Justice Breyer, we  
5 talked about the fact that the agreement does  
6 limit the merchant's ability to do certain  
7 things and -- and whether that might meet step  
8 1, but I would have thought under -- under  
9 Section 1, you might have responded, yes, if  
10 there's market power.

11           But market power, absent market power  
12 -- an agreement with a merchant to do anything  
13 that restricts anything is not in the  
14 cognizance of the antitrust laws.  And a  
15 26 percent player, absent some proof, other  
16 proof, is not -- does not have market power.

17           MR. CHESLER:  Your Honor, I -- I -- I  
18 could have and should have added that to my  
19 answer and it's more than that here.  It is --

20           JUSTICE SOTOMAYOR:  I thought we had  
21 two ways of proving market power, direct and  
22 indirect.  You need to show a certain control  
23 of the market in indirect, but I think case  
24 after case have said if you can control prices,  
25 you have market power.

1 MR. CHESLER: If I may respond. Let  
2 me talk about the indirect first.

3 Twenty-six percent of the market,  
4 never been a decision in this Court that I'm  
5 aware of that has found market power in that  
6 case. One out of every ten cards in America,  
7 only one out of ten is an American Express  
8 card; 3 million merchants do not accept  
9 American Express cards. They chose not to do  
10 business with us. They all do business with  
11 Visa and MasterCard.

12 This company has no power, and the  
13 district -- the court of appeals found it had  
14 no power, and the states did not raise those  
15 issues here.

16 JUSTICE SOTOMAYOR: But every  
17 competitor raised their price to match American  
18 Express's merchant price.

19 MR. CHESLER: To fuel --

20 JUSTICE SOTOMAYOR: So this vertical  
21 restraint had a complete horizontal effect, so  
22 it has market power to control the merchant  
23 market.

24 MR. CHESLER: Respectfully, Your  
25 Honor, I don't think that's what happened here.

1 The increases by the card companies were, as  
2 the district court found, to fuel the intense  
3 competition for cardholders, without whom there  
4 will be no transactions. That's what the  
5 findings are.

6 And if prices go up because the costs  
7 of providing a competitive option to consumers  
8 go up, that's not anticompetitive. That's  
9 procompetitive.

10 JUSTICE BREYER: On that point, you  
11 know, it looks to me like market power is a  
12 gremlin that you are going to throw, if we  
13 accept that, throw into the -- into the gears  
14 of antitrust law as it has been under Section 1  
15 across the country everywhere.

16 I mean, I thought -- and perhaps there  
17 have been changes, but I haven't seen them in  
18 this Court -- I thought that if, in fact, three  
19 people agree upon their prices, or forget price  
20 fixing, three people who are competitors agree  
21 that they will have a convention where they  
22 will hire Mr. Smith, who will lecture to them  
23 about the benefits of all charging the same  
24 price, I would have thought you just said  
25 that's anticompetitive. That's

1 anticompetitive. There's no need to look at  
2 this gizmo called market power, which is a  
3 nightmare.

4 Now, if the defendant wants to come  
5 along and says, I'll tell you something, Judge,  
6 because nobody had any market power, this  
7 couldn't do anything, then you would wonder why  
8 they did it. But I would leave you that  
9 option, you know, if you're the defendant.

10 So where is this thing you have to  
11 prove in every Section 1 case, market power? I  
12 have not seen it. Is it in a case I haven't  
13 read, which is quite possible?

14 MR. CHESLER: Your Honor, if we were  
15 talking about a horizontal restraint, which was  
16 what your comment was directed at, I would be  
17 in complete agreement with you, because the  
18 error costs of a horizontal restraint are very  
19 low. It's almost always to get people to  
20 charge more for less.

21 JUSTICE BREYER: What's the vertical  
22 case? Even Leegin didn't say that. I mean,  
23 you know, I say even because I dissented, but  
24 nonetheless --

25 MR. CHESLER: I recall that, Your

1 Honor.

2 (Laughter.)

3 JUSTICE BREYER: None the --  
4 nonetheless --

5 MR. CHESLER: I recall that.

6 JUSTICE BREYER: Nonetheless, I've not  
7 seen a Section 1 case. Now I'm not saying  
8 there couldn't be one, but I -- but I am saying  
9 I don't think it's a universal requirement.  
10 And I think if you have an anticompetitive  
11 agreement which looks anticompetitive, seems  
12 anticompetitive, et cetera, why go into market  
13 power?

14 MR. CHESLER: Because, Your Honor, in  
15 a vertical restraint, as this Court has said  
16 repeatedly over the last 40 years, the error  
17 costs are very low, because when a -- when a  
18 company, particularly a company without power,  
19 imposes a vertical restraint, it is to enhance  
20 its ability to compete against other brands.

21 And as Justice Kennedy said in the  
22 Brooke case, a price increase in the face of  
23 increasing demand tells the trier of fact  
24 nothing about whether it's anticompetitive.  
25 One needs to determine if excess profits are

1 being extracted, monopoly rents are being  
2 extracted. And the plaintiff here didn't even  
3 prove what our costs were, let alone our  
4 margins.

5           If this -- if the standard that this  
6 Court articulates, Your Honor, is a standard in  
7 which a price increase without proof of a  
8 restriction of output, without proof of a harm  
9 to quality, without proof that excess profits  
10 have been extracted, if that's enough to  
11 satisfy a prima facie case, then what will  
12 happen in the lower courts -- and I speak from  
13 42 years of experience of trying antitrust  
14 cases -- there will be a wave, a tsunami of  
15 false positives in the lower courts.

16           JUSTICE BREYER: I only have 42 years  
17 of teaching antitrust.

18           (Laughter.)

19           JUSTICE BREYER: And I would say in  
20 that -- in that experience, which is not as  
21 good as yours, actually, because you actually  
22 have practical experience, but it seems to me  
23 there have been a lot of cases where you  
24 wouldn't -- you would not see price increases,  
25 the main one being Alcoa.

1           I mean, Alcoa, which used to be  
2           thought to be the best case ever written in  
3           antitrust, Learned Hand. It has no price  
4           increase. It was --

5           MR. CHESLER: But --

6           JUSTICE BREYER: There it was only  
7           market power. I know. You're going to say  
8           that, but that's a different point.

9           MR. CHESLER: I was about to say  
10          that's a different point. I think I heard that  
11          from someplace at the time.

12          (Laughter.)

13          MR. CHESLER: But, Your -- Your Honor,  
14          in a vertical restraint case, if output is  
15          going up, if costs are going up because they're  
16          investing in rewards that are benefitting the  
17          consumer, that's the way a competitive market  
18          is supposed to act.

19          And all I'm saying to Your Honor is,  
20          if the test that this Court articulates is the  
21          test that's suggested by the folks to my right,  
22          then we are going to have a wave of positives  
23          that are false where real competition is taking  
24          place because price increases occur for all  
25          sorts of reasons, many of which are perfectly

1 benign, which is exactly what happened here  
2 with respect to the merchant fees because they  
3 were fueling price decreases to the consumers.

4 Every reward, every seat on a plane to  
5 Aruba, every ticket to a Billy Joel concert,  
6 every cash back reward that's given, is a price  
7 discount to the consumer. And what the  
8 district court found here is nobody proved to  
9 me what that price is for the product at issue.

10 So the result that we're trying to  
11 avoid here is a situation in which a plaintiff  
12 can fail to prove what the price of the product  
13 is, merely that there's been an increase to  
14 part of that price, and that that's enough to  
15 satisfy the first leg of the rule of reason.  
16 And the burden then falls to the defendant to  
17 disprove what the plaintiff has failed to  
18 prove. That will create mischief.

19 Professor Katz, the government's only  
20 expert here, from Berkeley, testified that in a  
21 two-sided platform, if you don't completely and  
22 accurately assess the impact on both sides of  
23 the platform, you will get misleading  
24 conclusions.

25 And with respect, Your Honor, that's

1 what will happen if this Court only looks at  
2 the activity vis-à-vis the merchant, when there  
3 is a consumer standing opposite her without  
4 whom the product doesn't exist. And that's  
5 what --

6 JUSTICE SOTOMAYOR: Counsel, that's  
7 step 2.

8 MR. CHESLER: No, Your Honor. That's  
9 step 1. There is no case that I am aware of in  
10 which a plaintiff has satisfied its burden on  
11 step 1 by proving an impact on competition on  
12 something other than the product that is at  
13 issue here. And they didn't prove step 1.

14 JUSTICE SOTOMAYOR: But we've had  
15 two-sided markets --

16 JUSTICE KAGAN: Well, Mr. Chesler,  
17 what the --

18 JUSTICE SOTOMAYOR: -- we've had  
19 two-sided markets that we've looked at in  
20 antitrust law. Justice Breyer just mentioned  
21 one. How about the newspaper advertisers and  
22 the newspaper readers?

23 MR. CHESLER: Can we take that one?  
24 I'd like to take that one. That's the Picayune  
25 case.

1 JUSTICE SOTOMAYOR: Picayune.

2 MR. CHESLER: The transaction in that  
3 case, again, my -- my request to this Court is  
4 always start with the same question: What's  
5 the product at issue?

6 The product at issue in Times-Picayune  
7 was advertising sales between the advertisers  
8 and the newspapers. While there were  
9 subscribers to those newspapers, they had  
10 nothing to do with that transaction.

11 JUSTICE SOTOMAYOR: Oh, yes, they did,  
12 because the number of subscribers affected the  
13 price that the advertisers were going to use,  
14 and their inducement to use the -- to subsidize  
15 both morning and afternoon advertisements.

16 MR. CHESLER: And that distinction is  
17 exactly why this Court need not decide in this  
18 case a rule for all time for every two-sided  
19 platform. This case is a situation in which  
20 there is no transaction unless those two  
21 parties, the consumer and the merchant, come  
22 together at the same moment in time and  
23 complete the transaction.

24 That was not true in Times-Picayune.  
25 Ultimately, over the course of time, if the --

1 if the advertisers didn't put their ads in the  
2 paper, maybe it would have an impact on  
3 consumers, and vice versa, but you could have a  
4 completed transaction in Times-Picayune without  
5 the consumer, the subscriber, being involved in  
6 that transaction.

7 JUSTICE KAGAN: Mr. Chesler, I don't  
8 -- I don't have 42 years of antitrust  
9 experience, teaching or practicing, but --

10 MR. CHESLER: It just requires a  
11 little time, Your Honor.

12 JUSTICE KAGAN: So I just think of  
13 this in sort of simple-minded ways. Here's  
14 what the district court found. The district  
15 court found that merchants cannot steer  
16 customers to cheaper forms of payment. The  
17 district court found that all of the credit  
18 card firms have consistently raised their  
19 prices.

20 Even when you look at these two-sided  
21 prices, the district court found that these  
22 price increases were not being passed on to  
23 consumers. And the district court found that  
24 it was impossible for a credit card company  
25 that wanted to offer a low cost/low price

1 product to enter the market.

2 So you put all of those things  
3 together, that sounds like a market that is not  
4 working in the way it's supposed to, at least  
5 sufficiently to get on to the second step where  
6 you can make all your arguments about why it is  
7 that a market where the prices only go up and  
8 where no low-price competition can emerge is,  
9 nonetheless, a good market.

10 MR. CHESLER: Your Honor, my answer to  
11 that is that every one of those findings dealt  
12 only with the merchant relationship. They had  
13 nothing to do with the consumers.

14 And, again, here, without that  
15 consumer presenting her card to the merchant,  
16 the transactions that were being debated in  
17 this case wouldn't even exist.

18 The district court itself found that  
19 there was no proof of the actual price to the  
20 two sides of that transaction.

21 The government had failed to prove  
22 that. The government had failed to prove what  
23 the costs were for the -- for the services  
24 provided to the merchant, and it failed to  
25 prove what the -- what the consumer's side of

1 the price was.

2 So every -- we didn't challenge any of  
3 those findings in the court of appeals, nor do  
4 we challenge them here, because they are all  
5 clapping with one hand. They're only talking  
6 about what happens on one side of the counter  
7 when you present your card for that -- to buy  
8 that sweater.

9 JUSTICE KAGAN: Well, it's the one  
10 hand where the government has the burden. And  
11 now, if you want to come in and you can say,  
12 look, there are all these great benefits that  
13 go beyond -- I mean, some of your benefits sort  
14 of seem to me to be benefits for American  
15 Express only.

16 But if you want to say, no, that there  
17 are great benefits for the market generally,  
18 that's what step 2 is about.

19 MR. CHESLER: May I?

20 CHIEF JUSTICE ROBERTS: Please.

21 MR. CHESLER: You only get to step 2,  
22 respectfully, Your Honor, if the government  
23 proves that competition for the product has  
24 been impaired at step 1.

25 And what I've said over and over again

1 here is the product is the transaction, and  
2 none of those findings related to the  
3 transaction.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 MR. CHESLER: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Murphy,  
8 you have three minutes remaining.

9 REBUTTAL ARGUMENT OF ERIC E. MURPHY  
10 ON BEHALF OF THE PETITIONERS AND  
11 THE STATE RESPONDENTS IN SUPPORT

12 MR. MURPHY: Mr. Chief Justice, just a  
13 few points in rebuttal. The first of those is  
14 I think the most important point for this Court  
15 to take from this case is that certainly the  
16 Court has lessened the scrutiny with respect to  
17 vertical restraints in recent -- recent years,  
18 but this particular vertical restraint, the one  
19 at issue here, has the same effects that we  
20 would anticipate happening with a horizontal  
21 cartel.

22 If all of the credit card companies  
23 got together and said we're going to not allow  
24 steering, that would cut off price competition  
25 on the merchant side, it would still allow for

1 quality reward competition on the other side,  
2 but that rule would be per se illegal.

3 That rule would be per se illegal,  
4 despite the alleged benefits on the cardholder  
5 side, just as this Court said in the engineers'  
6 case, the engineers can't get together, fix  
7 prices, and then justify that on the basis of  
8 the allegedly improved quality. It's per se  
9 illegal.

10 We're not in the per se illegal rule  
11 here because this is a rule of reason case, but  
12 what the evidence shows under the rule of  
13 reason, the full market analysis, is that it  
14 has the same exact effects that one would  
15 anticipate with a horizontal cartel --

16 JUSTICE GINSBURG: Mr. Murphy --

17 MR. MURPHY: -- and that's why the  
18 government has --

19 JUSTICE GINSBURG: -- what is -- what  
20 is the relief that you're seeking? Are you  
21 seeking to say the Second Circuit was wrong in  
22 saying you didn't -- the government didn't  
23 prove step 1, and now he goes back for a step 2  
24 examination? Is that what you're --

25 MR. MURPHY: Absolutely. Just to

1 answer the question presented, which was  
2 whether the government met its prima facie case  
3 based on the effects that we showed at the  
4 trial. And then on -- on remand, they can  
5 preserve -- any -- any arguments that they have  
6 preserved, they can present to the Second  
7 Circuit.

8           And then with respect to price, we --  
9 we would readily agree that higher price can  
10 oftentimes arise from different reasons.  
11 That's why the Court in Brooke Group said that  
12 the government should prove that the higher  
13 prices arise from non-market forces.

14           Here, the -- the district court found,  
15 as a fact, that higher prices weren't rising  
16 because of the cardholder rewards. They were  
17 rising because of these restraints.

18           And the Discover example of that  
19 phenomenon is quite powerful. Discover saw the  
20 higher prices, saw the discontent in the  
21 merchants, and responded with its  
22 low-cutting -- price-cutting option. And all  
23 of merchants came to Discover and said, sorry,  
24 we'd love to shift share to you but there's  
25 nothing we can do about it because of these

1 restraints. That quite powerfully shows the  
2 horizontal effects.

3 With respect to market power, I think  
4 that we would be fine with a rule that market  
5 power needed to be shown; we just think that  
6 the evidence overwhelmingly shows --

7 JUSTICE GORSUCH: I -- I want to pause  
8 right there. You -- you accept that to show an  
9 anticompetitive effect, you have to show not  
10 just an agreement --

11 MR. MURPHY: We would --

12 JUSTICE GORSUCH: -- but also that  
13 it -- market power in some way, shape, or form?

14 MR. MURPHY: So we would readily -- we  
15 just disagree on the manner it need be shown.

16 JUSTICE GORSUCH: Right, but you agree  
17 it need be shown?

18 MR. MURPHY: Yes. So we showed market  
19 power, but we showed it quite powerfully in  
20 this case with this restraint affecting  
21 merchants making up some 90 percent of the  
22 market. And nobody without market power could  
23 actually affect industry-wide prices and that's  
24 what --

25 JUSTICE GORSUCH: Right --

1 MR. MURPHY: -- we have going on here.

2 JUSTICE GORSUCH: -- if there were no  
3 market power, an agreement would have no  
4 anticompetitive effect?

5 MR. MURPHY: Absolutely. As Judge  
6 Bork said in the -- in the D.C. Circuit case,  
7 it would be suicidal for an -- a producer to  
8 adopt a restraint without market power.

9 But here, obviously, it wasn't  
10 suicidal.

11 JUSTICE SOTOMAYOR: This is the Leegin  
12 situation. This is a vertical restraint that  
13 controls -- that has a horizontal effect?

14 MR. MURPHY: It's not like Leegin.  
15 Leegin was only a restriction on --

16 JUSTICE SOTOMAYOR: No, not like it,  
17 but it was the exception Leegin talked about.

18 MR. MURPHY: Absolutely. Leegin  
19 allowed for room for this analysis. Thank you,  
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel. The case is submitted.

23 (Whereupon, at 12:12 p.m., the case in  
24 the above entitled matter was submitted.)

25

## Official - Subject to Final Review

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