No. 15-1672

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

AMERICAN EXPRESS CO., *et al.*,
Defendants-Appellants.

(Full caption commences on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
(HONORABLE NICHOLAS G. GARAUFIS)

REDACTED FINAL FORM BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES OF AMERICA, STATE OF MARYLAND, STATE OF MISSOURI, STATE OF VERMONT, STATE OF UTAH, STATE OF ARIZONA, STATE OF NEW HAMPSHIRE, STATE OF CONNECTICUT, STATE OF IOWA, STATE OF MICHIGAN, STATE OF OHIO, STATE OF TEXAS, STATE OF ILLINOIS, STATE OF TENNESSEE, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF IDAHO, and STATE OF RHODE ISLAND,

Plaintiffs-Appellees,

STATE OF HAWAII,

Plaintiff,

v.

AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Defendants-Appellants,

MASTERCARD INTERNATIONAL INCORPORATED and VISA INC.,

Defendants,

CVS HEALTH, INC., MEIJER, INC., PUBLIX SUPER MARKETS, INC., RALEY'S, SUPERVALU, INC., AHOLD U.S.A., INC., ALBERTSONS LLC, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., H.E. BUTT GROCERY CO., HYVEE, INC., THE KROGER CO., SAFEWAY INC., WALGREEN CO., RITE-AID CORP., BI-LO LLC, HOME DEPOT USA, INC., 7-ELEVEN, INC., ACADEMY, LTD., DBA ACADEMY SPORTS + OUTDOORS, ALIMENTATION COUCHE-TARD INC., AMAZON.COM, INC., AMERICAN EAGLE OUTFITTERS, INC., ASHLEY FURNITURE INDUSTRIES INC., BARNES & NOBLE, INC., BARNES & NOBLE COLLEGE BOOKSELLERS, LLC, BEALL'S, INC., BEST BUY CO., INC., BOSCOVS, INC., BROOKSHIRE GROCERY COMPANY, BUC-EE'S LTD, THE BUCKLE, INC., THE CHILDRENS PLACE RETAIL STORES, INC., COBORNS INCORPORATED, CRACKER BARREL OLD COUNTRY STORE, INC., D'AGOSTINO SUPERMARKETS, INC., DAVIDS BRIDAL, INC., DBD, INC., DAVIDS BRIDAL CANADA INC., DILLARD'S, INC., DRURY HOTELS COMPANY, LLC, EXPRESS LLC, FLEET AND FARM OF GREEN BAY, FLEET WHOLESALE SUPPLY CO. INC., FOOT LOCKER, INC., THE GAP, INC., HMSHOST CORPORATION, IKEA NORTH AMERICA SERVICES, LLC, KWIK TRIP, INC., LOWE'S COMPANIES, INC., MARATHON PETROLEUM COMPANY LP, MARTIN'S SUPER MARKETS, INC., MICHAELS STORES, INC., MILLS E-COMMERCE ENTERPRISES, INC., MILLS FLEET FARM, INC., MILLS MOTOR, INC., MILLS AUTO ENTERPRISES, INC., WILLMAR MOTORS, LLC, MILLS AUTO ENTERPRISES, INC., MILLS AUTO CENTER, INC., BRAINERD LIVELY

AUTO, LLC, FLEET AND FARM OF MENOMONIE, INC., FLEET AND FARM OF MANITOWOC, INC., FLEET AND FARM OF PLYMOUTH, INC., FLEET AND FARM SUPPLY CO. OF WEST BEND, INC., FLEET AND FARM OF WAUPACA, INC., FLEET WHOLESALE SUPPLY OF FERGUS FALLS, INC., FLEET AND FARM OF ALEXANDRIA, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION, NATIONAL RESTAURANT ASSOCIATION, OFFICIAL PAYMENTS CORPORATION, PACIFIC SUNWEAR OF CALIFORNIA, INC., P.C. RICHARD & SON, INC., PANDA RESTAURANT GROUP, INC., PETSMART, INC., RACETRAC PETROLEUM, INC., RECREATIONAL EQUIPMENT, INC., REPUBLIC SERVICES, INC., RETAIL INDUSTRY LEADERS ASSOCIATION, SEARS HOLDINGS CORPORATION, SPEEDWAY LLC, STEIN MART, INC., SWAROVSKI U.S. HOLDING LIMITED, WAL-MART STORES INC., WHOLE FOODS MARKET GROUP, INC., WHOLE FOODS MARKET CALIFORNIA, INC., MRS. GOOCH'S NATURAL FOOD MARKETS, INC., WHOLE FOOD COMPANY, WHOLE FOODS MARKET PACIFIC NORTHWEST, INC., WFM-WO, INC., WFM NORTHERN NEVADA, INC., WFM HAWAII, INC., WFM SOUTHERN NEVADA, INC., WHOLE FOODS MARKET, ROCKY MOUNTAIN/SOUTHWEST, L.P., THE WILLIAM CARTER COMPANY, YUM! BRANDS, INC., and SOUTHWEST AIRLINES CO.

Movants.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court properly concluded that Plaintiffs satisfied their initial burden under the rule of reason by proving marketwide anticompetitive effects?

2. Whether the district court properly defined the relevant market as general purpose credit and charge card network services?

3. Whether the district court properly found that Amex had market power in the network services market?

4. Whether the district court's liability analysis and injunction comport with *United States v. Colgate & Co.*, 250 U.S. 300 (1919)?

STATEMENT OF THE CASE

In 2010, the United States and Plaintiff States sued American Express (Amex), Visa, and MasterCard—the three large general purpose credit and charge (GPCC) card networks—for unreasonably restraining trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into agreements containing so-called nondiscrimination

provisions (NDPs) with millions of card-accepting merchants. Compl. ¶¶ 2-4 (A127-28). The NDPs barred merchants from offering customers a discount or a nonmonetary incentive to use a less costly card, from expressing a preference for a card, and from disclosing truthful information about the costs of different cards. *Id.* ¶¶ 2-3, 26-31 (A127-28, 134-36).

Plaintiffs alleged that, absent the NDPs, merchants could use steering "at the point of sale to foster competition on price and terms among sellers of network services" by encouraging customers to use less expensive or otherwise-preferred cards. *Id.* ¶ 31 (A136). But through NDPs, Amex, Visa, and MasterCard suppressed interbrand competition by removing incentives to reduce card fees and blocking low-cost competition. *Id.* ¶¶ 3, 69-70 (A128, 148-49). Consequently, each defendant could "maintain high prices for its network services with confidence that no competitor will take away significant transaction volume," resulting in increased merchant costs and retail prices. *Id.*

In 2011, Visa and MasterCard entered into consent judgments rescinding their NDPs. Amex proceeded to trial. The district court (Hon. Nicholas Garaufis) conducted a seven-week bench trial. After

performing a full rule-of-reason analysis, the court concluded that Amex's NDPs violate Section 1 because they cause "actual anticompetitive effects on interbrand competition." SPA6. The court found that Amex's NDPs stifle price competition among the GPCC networks, block the success of lower-cost GPCC networks, raise merchant costs and retail prices, and impede innovation. SPA98-116. The court further found that Amex failed to establish procompetitive effects that "offset, much less overcome, the more widespread and injurious effects of the NDPs on interbrand competition in the relevant market." SPA128.

Accordingly, the court enjoined Amex from enforcing its NDPs to prevent merchant steering. SPA159-65 (§ IV). The court denied Amex's motion to stay the judgment pending appeal, Doc. 663 ("D. Ct. Stay Op.") (A653-71), and this appeal followed.

This Court likewise denied a stay pending appeal. 2d Cir. Doc. 104 (A675).

A. The Market For GPCC Network Services In The United States Is "Broken" Due To Amex's NDPs

1. Merchants Pay Billions Of Dollars To The GPCC Networks

When a customer buys an item with a GPCC card, the merchant uses the network services of Visa, MasterCard, Amex, or Discover to secure payment. These networks are "two-sided platforms" that act as intermediaries to "facilitate transactions between merchants on one side and their customers on the other." Tr. 3827:15-3829:3 (A838).

GPCC platforms have distinct actors performing different functions. Joint Statement of Undisputed Fact ("Jt. Stmt.") ¶¶ 5-10 (A223-24).

PX2702 at 5 (A1889). Issuers are banks, such as Citibank, that provide cards to cardholders, collect payment, and commonly provide cardholder rewards like cash back or airline miles. Jt. Stmt. ¶ 5 (A223); Tr. 3554:17-22 (A830). Acquirers, such as First Data, connect merchants to the network for transaction verification and processing. Jt. Stmt. ¶ 7 (A224). The network acts as the middleman, bringing merchants and their acquirers together with cardholders and their issuers. *Id.* ¶ 10

(A224); Tr. 3827:23-3828:22 (A838).

Visa and MasterCard use third-party issuers and acquirers. Amex operates as a network, issuer, and acquirer.[1] Jt. Stmt. ¶¶ 8-9, 11 (A224). Discover operates as a network and issuer but uses third-party acquirers for smaller merchants. Tr. 812:21-815:24, 824:7-825:7 (A707-08, 710-11).

In 2013, the GPCC networks charged merchants over $50 billion for facilitating $2.4 trillion in GPCC card spending. The card fees—also known as merchant fees or swipe fees—consist largely of "a percentage discount rate multiplied by the purchase price." SPA15. These fees typically vary by industry and can vary by the merchant's purchase volume. Jt. Stmt. ¶¶ 13-15 (A224-25).

As of 2013, Visa had 45% of the GPCC purchase volume in the United States, Amex 26.4%, MasterCard 23.3%, and Discover 5.3%. *Id.*¶ 20 (A226). Amex cards are accepted by roughly 3.4 million merchants at 6.4 million merchant locations, while rival cards are accepted at over 9 million merchant locations. *Id.* ¶ 22 (A226); SPA3.

[1] Some third-party banks issue Amex cards; they account for roughly 1% of Amex's total U.S. purchase volume. Tr. 4295:16-18, 4326:19-25 (A879, 881). Amex also uses some third-party acquirers to handle small merchants. Tr. 2845:17-2850:2 (A800-01).

But Amex has, on average, higher-spending cardholders, Tr. 4185:9-10 (A876), and the vast majority of merchants that do not accept Amex cards are very small, *see* PX0890 at '353-54 (75% of merchants that accept credit cards but not Amex cards are "probably half the size" of "your local florist") (A1457-58). In 2013, Amex cards were accepted at 98 of the 100 largest U.S. retailers (as measured in 2010), and the other two, Aldi and WinCo Foods, did not accept any credit cards. Doc. 590 ¶¶ 8-12 (stipulation) (A229-30); PX2273 (A1850-52); PX2780 at 1-2 nn.42, 78 (A2004-05). Amex reports in its 10-Ks that its acceptance network covers over 90% of its cardholders' GPCC spending. PX1412 at 8 (A1728); *see also* PX0924 at '809 (internal presentation showing 94% spend coverage in 2010) (A1475); PX0018 at '649 (A938); PX0990 (A1514).

2. Amex Cards Usually Have A Price Premium

Amex "has successfully pursued a premium pricing strategy for decades." SPA86; Tr. 3978:25-3982:8 (A861-62); PX0121 at '458 (A1177). In the "vast majority of cases," Amex charges a premium over other networks. Tr. 3980:15-17 (A862); PX2702 at 85 (A1969). Amex is the most expensive credit card, on average, for Alaska Airlines, IKEA,

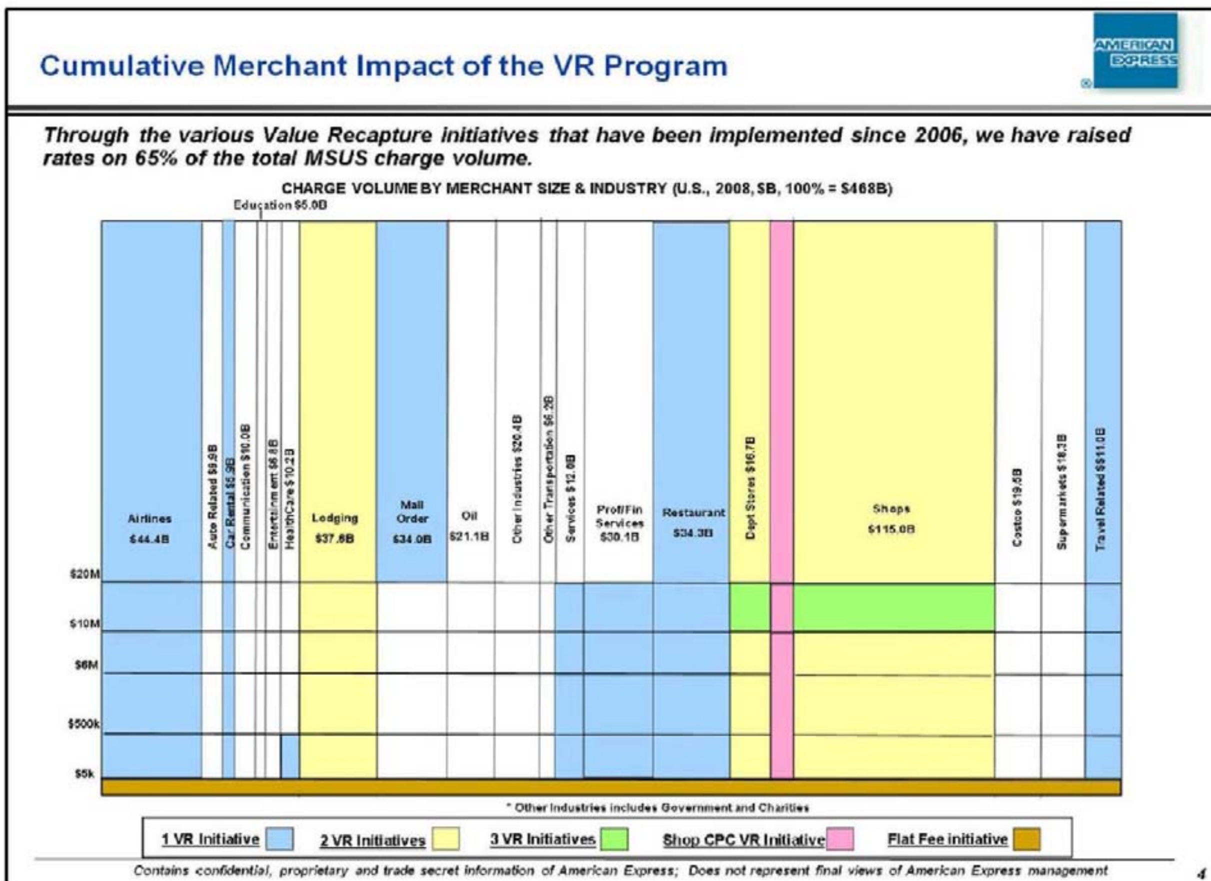
Sprint, Best Buy, Hilton, Sears, and Office Max. *See e.g.*, PX2613 (A1883); Tr. 190:3-197:12 (A678-79); Tr. 384:10-19, 451:20-452:5 (A684, 690); Tr. 1686:20-1687:2, 1764:1-11 (A753, 757); Tr. 1526:7-16; 1527:8-13 (A747); Tr. 1608:14-24 (A751); Tr. 558:6-8 (A696); PX2617 (A1884); Tr. 2161:8-2162:9 (A767).

Amex's price premium can be substantial. In 2013, Alaska Airlines paid ████ to Amex, while paying ████ to Visa and to MasterCard, and ████ to Discover. PX2613 (A1883); Tr. 190:3-197:12 (A678-79). Amex was approximately 20% more expensive for Office Max, Tr. 2161:8-2162:9 (A767), and approximately 15% more expensive for Sprint, Tr. 1764:1-11 (A757).

Amex's higher prices typically are not offset by additional benefits or services to merchants. For example, IKEA received no "new value or services in exchange for the higher cost of accepting Amex." Tr. 395:14-16 (A688); *see also, e.g.*, Tr. 198:6-8 (A680) (Alaska Airlines); Tr. 1687:9-11 (A753) (Sprint). Amex's own merchant satisfaction surveys showed that ██ █████ PX0043 at '963 (2010 survey) (A999); Tr. 1796:25-1800:4 (A758-59). ██

PX0705 at ’702, ’726 (2006 survey) (A1352, 1376); Tr. 1811:23-1814:20 (A762-63); PX1246 at ’526-28 (2012 survey) (A1685-87); Tr. 1804:21-1807:12 (A760-61).

In the late 1990s and early 2000s Visa’s and MasterCard’s fees rose, eroding Amex’s price premium. PX0357 at ’959 (A1311). Amex limited this erosion by raising fees to millions of merchants through “Value Recapture initiatives.” PX0121 at 2-3 (A1177-78). Between 2006 and 2010, Amex undertook “over 20 Value Recapture initiatives.” *Id.* at 3 (A1178). Through these Value Recapture initiatives, Amex “raised rates” on merchants accounting for 65% of its annual U.S. charge volume. PX0975 at ’197 (A1497).



Id. These fee increases resulted in $1.3 billion in incremental pre-tax income for Amex during 2006-10. PX0357 at '949 (showing annual and total "US Value Recapture Benefits") (A1301).

These increases in merchant fees were not fully passed through to cardholders in the form of rewards. Tr. 3853:3-24 (A846). Indeed, Amex typically spends less than half of the discount fees it collects from merchants on cardholder rewards and keeps the rest. *Id.*

3. Merchants Want To Cut Costs But Must Accept Higher Priced Amex Cards Due To Cardholder Insistence

GPCC card fees are a significant cost for many merchants. In 2013, Hilton paid "[b]etween a half a billion and a billion dollars" to accept GPCCs, Tr. 1608:14-18 (A751), and Home Depot paid "roughly half a billion dollars," Tr. 1222:5-17 (A729). Credit card costs for Alaska Airlines are approximately twice the wages for its U.S. airport employees. Tr. 192:14-21 (A678). And credit card costs for Solitude ski resort exceed its costs on fuel to groom its slopes and power to run its lifts. Tr. 2523:7-18 (A778).

Merchants want to cut credit card costs to remain competitive. *E.g.*, Tr. 1522:17-1523:14 (A746). Many merchants nonetheless must accept Amex and its price premium or lose significant business from cardholders who are, in Amex's term, "insistent" on using Amex. *E.g.*, PX1240 at '091, '102-03 (A1629, 1640-41). Approximately 10-20% of Amex cardholders own or regularly carry only Amex cards, PX0815 at '290 (A1432); DX7249 at '207 (A2485), and nearly half consider Amex "their Card of choice," DX7249 at '207 (A2485), often motivated by Amex's rewards program, PX0426 at '649 (A1318). Amex also is "the leading network for corporate cards," Tr. 3962:3-3964:19 (A857-58),

accounting for 64.3% of all corporate card spending in the first quarter of 2013, PX2486 at '051 (A1853). Seventy percent of the holders of Amex's corporate cards must use their Amex cards for significant business expenses when possible. SPA72-73.

When faced with fee increases, many merchants have not even considered terminating Amex for fear of losing these Amex-insistent customers. For example, Sears did not consider dropping Amex after a fee increase because it "would lose an unacceptable amount of sales." Tr. 573:6-574:5 (A697-98). Nor did Crate & Barrel, "[b]ecause our competition accepts [Amex] and we have to compete." Tr. 2322:8-2323:4 (A769-70). And Sinclair Oil thought it would "be crazy to not take" Amex at its hotel properties as Amex constituted "34 percent of the business." Tr. 3146:2-6 (A808).

Several large merchants considered dropping Amex but determined that Amex-insistent customers made that commercially impractical. For example, in 2010 Best Buy conducted "a war game" on dropping Amex by comparing "how much attrition from sales [it] would get" from customers buying elsewhere with how much it would save "based on the cheaper form of payment" remaining customers would use. Tr. 1529:6-

21, 1535:6-13 (A747, 749). It found that the losses exceeded the savings "no matter what mix or what migration to different forms of payment" that its remaining customers used. Tr. 1535:15-22 (A749); Tr. 1536:6-10 (A749). Sprint and IKEA likewise determined that they "couldn't drop [Amex] without suffering a loss in sales." Tr. 389:10-390:10 (A687); *see* Tr. 1687:12-1690:12 (A753-54).

A few merchants decided to drop Amex but ultimately had to reverse course. In 2004 Walgreens, then the ninth-largest U.S. retailer, planned to drop Amex because Amex's new acceptance contract price ( ) was basis points higher than those of Visa and MasterCard (1.75%). DX2143 at '943 (A2244); Tr. 1343:4, 1364:13-17 (A732, 735). Yet, when customers learned of the decision, they "went through the roof." Tr. 1368:7-13 (A736); Tr. 1369:4-5 (customers "would come up to me and say, are you crazy") (A736). They threatened to "tak[e their] business someplace else." Tr. 1369:24-25, 1380:10-1381:23 (A736, 738). Walgreens ultimately "capitulated" to Amex. Tr. 1517:2-11 (A743). As an Amex vice-president explained, its "customers voiced their dissatisfaction with Walgreen[s'] decision and that is what caused them to change their mind. We did not offer them anything additional to

cause them to change their position." PX0142 at '945 (A1272).

Similarly, in 2008 Murphy Oil, a chain of gas stations located adjacent to Wal-Mart stores, stopped accepting Amex cards. PX0031 at '671 (A962). But so many of its Amex customers stopped buying from it that the company resumed accepting Amex cards. *Id.*; Tr. 2703:24-2704:1 (A793).

Amex internally tracks the power that cardholder insistence gives it over merchants, Tr. 2568:4-2573:17 (A780-81), and uses "insistence" calculations when setting merchant fees, PX1240 at '091, '102-04 (A1629, 1640-42); Tr. 2639:14-23, 2819:19-2820:16 (A783, 797); Tr. 3957:20-3961:16 (A856-57). After Murphy Oil terminated Amex in 2008, Amex determined that the number of insistent customers was "double" its previous estimate. PX0031 at '668, '671 (A959, 962). As the head of Amex's pricing unit told his colleagues, this experience "suggests that [cardholder] insistence in Oil is real and strong—we should be able to make use of this data in our merchant negotiations." *Id.*

4. Amex's NDPs Block Merchant Efforts To Steer Customers To Less Expensive Cards

Merchants want the freedom to steer customers to less expensive GPCC cards. In other aspects of their businesses, merchants routinely

promote competition among suppliers, rewarding low-cost suppliers with increased purchase volume or special promotions. For instance, IKEA generally gives low-cost suppliers "more volume." Tr. 382:16-383:9 (A684). And Walgreens frequently "bid[s] competitors against one another [to get] the lowest price," Tr. 1345:17-18 (A732), and promotes preferred products, Tr. 1344:25-1345:20 (A732).

Amex itself engages in steering. Its travel agency business rewards certain airline, hotel, and car-rental vendors with increased travel volume in return for a lower rate or a "preferred supplier" relationship with Amex. Tr. 3460:19-3461:23, 3467:2-3468:15, 3472:4-3473:5 (A822, 824, 825); *see also* PX1685 at '686 (noting "we try to sell and promote only preferred suppliers" and "what keeps our preferreds coming back to us is their fear of how aggressive we actually are against non-preferreds") (A1763); PX1007 at '930-31, '941-42, '947 ([redacted] [redacted]) (A1518-19, 1527-28, 1533).

When it comes to GPCC cards, however, the 3.4 million Amex-accepting merchants are prohibited by Amex's NDPs from encouraging

their customers to use the lowest-cost GPCC network. *See, e.g.,* Tr. 223:9-224:22 (A681); Tr. 381:8-382:18 (A684).

Around 1990, Visa developed several strategies to encourage merchants to steer customers to it. Visa used a Profit Improvement Calculator showing merchants how much they would save by switching from Amex (1.75% vs. 3.25%). PX0132 at ’880 (A1207); Tr. 3318:16-3319:4 (A814-15). Visa also got prominent merchants to express a preference for it during its “We Prefer Visa” campaign. Tr. 3322:8-16 (A815). Many customers were steered to Visa. *See, e.g.*, Tr. 3330:3-8 (“volume gains of 15 percent or more among [travel and entertainment] merchants”) (A817). MasterCard had similar preference programs. Tr. 4509:2-4510:17 (A897-98); PX1103 at ’75-78, ’83-84 (A1563-66, 1571-72).

In 1992, Amex “brainstorm[ed]” “[h]ow to persuade Visa,” other GPCC networks, and merchants not to “engage[] in practices that have the potential to shift share of transactions/spending at point of sale.” PX0163 at ’029 (A1276). Amex considered several options, such as giving financial incentives to key partners not to participate in preference campaigns or offering substantial rate cuts for any merchant pursued by Visa’s campaign. PX0163 at ’030-36 (A1277-83); Tr. 4499:13-

4504:20 (A895-96). Instead of lowering its merchant fees or adopting another competitive response, Amex bolstered its NDPs, which had long existed in some form, "in order to stifle any further steering or preference campaigns." SPA105; Tr. 4492:22-4493:8 (A893). Thereafter, Amex's NDPs in its standard acceptance contracts provided that merchants could not:

- indicate or imply that [it] prefer[s], directly or indirectly, any Other Payment Products over [Amex's] Card,
- try to dissuade Cardmembers from using the Card,
- criticize or mischaracterize the Card or any of [Amex's] services or programs,
- try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check),
- impose any restrictions, conditions, disadvantages or fees when the Card is accepted that are not imposed equally on all Other Payment Products, except for electronic funds transfer, or cash and check,
- engage in activities that harm [Amex's] business or the American Express Brand (or both), or
- promote any Other Payment Products (except [the merchant's] own private label card that [it] issue[s] for use solely at [the merchant's] Establishments) more actively than [it] promote[s]

[Amex's] Card.[2]

PX0002 at 16 (A923).

As enforced by Amex, these provisions prevented merchants from offering discounts or non-monetary incentives (e.g., a designated checkout lane) for using another GPCC card, from expressing a preference for another card, or from truthfully disclosing the relative costs of accepting different cards. Tr. 645:8-647:22 (A699-700); PX0002 at 16 (Regulation 3.2) (A923). And this was true for *every* GPCC transaction at the millions of Amex-accepting merchants, because Amex's NDPs prohibited steering even if a customer did not own an Amex card, did not mention Amex, or intended to use another card. Tr. 671:7-672:5 (A701).

Just 139 Amex-accepting merchants negotiated "non-standard NDPs." SPA27. These agreements, however, "still restrict[ed] nearly all forms of point-of-sale steering, including merchants' ability to express a preference for a particular card brand." *Id.*

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[2] Plaintiffs did not challenge the portions of Amex's NDPs barring merchants from mischaracterizing the Card, engaging in activities that harm Amex's business or brand, or imposing fees on Amex that are not imposed equally on other GPCC cards. SPA25-27; PX2754 (A1989-90).

Amex terminated merchants that did not comply with its NDPs. Tr. 4490:13-4491:18, 4514:14-19 (A893, 900). It terminated Steamboat Ski Area, Laura Ashley, and La Bodega for expressing a preference for Visa. Tr. 3332:22-3335:24 (A818-19). And Amex threatened to terminate Travelocity for steering customers to MasterCard as its "preferred card" until it stopped. Tr. 3246:17-3251:7 (A811-13).

5. Amex's NDPs Harm Competition

a. Amex's NDPs Suppress Price Competition Among GPCC Networks, Raising Merchant Fees and Retail Prices

Absent Amex's NDPs, merchant steering to low-cost cards would put pressure on the GPCC networks to reduce card fees. As Discover's President testified, Discover would "aggressively pursue a strategy of lowering [its] prices" if merchants could steer. Tr. 872:3-17 (A722). Amex itself recognizes that steering "would put discount rate pressure on" it to lower fees. Tr. 702:3-10 (A703); Tr. 2693:20-2694:24 (A792).

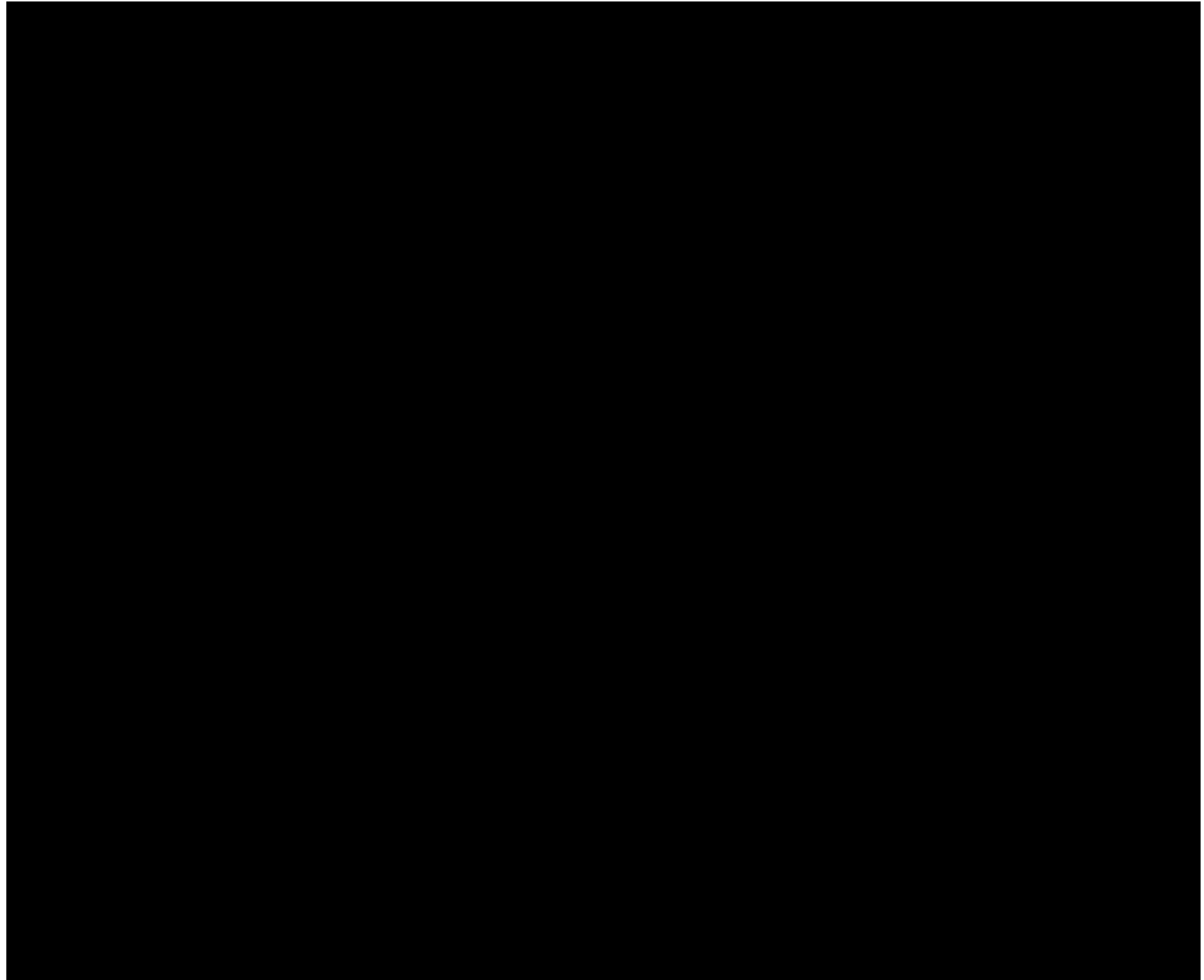
But Amex's NDPs stifle this price competition. As Amex's Senior Vice President for Global Merchant Pricing explained, it is not now "anybody's business strategy" to be "cheaper than the next guy." Tr. 2667:22-2668:8 (A787). By ensuring that cardholders cannot be

influenced in their payment choice by merchants paying the card fees, Amex's NDPs undermine the GPCC networks' incentives to compete for business by lowering those fees. Tr. 3821:11-3822:4, 3841:13-3842:6, 3846:1-15 (A835, 841, 842).

Discover launched in 1986 by offering "breakthrough value proposition[s]" on both sides of the GPCC platform. Tr. 820:11-821:16 (A709-10). It provided innovative cardholder rewards with "no annual fees" and charged low fees to merchants. *Id.* In 1999, Discover initiated a "major campaign" highlighting its lower prices to get merchants "to shift their business to the lower-priced network, Discover." Tr. 833:4-11 (A714). Discover believed that this campaign would be profitable because it would increase purchase volume and help it compete for "issuing business." Tr. 837:19-25, 860:5-15 (A716, 720). Discover suggested that merchants use the savings to reward their customers and build loyalty. Tr. 847:8-848:14 (A717).

Discover's efforts, however, were stymied by NDPs that prevented merchants from steering customers to Discover's lower-priced network. Tr. 848:15-849:15, 852:24-853:15 (A717-19). Recognizing that it could not obtain incremental volume without merchant steering, Discover

raised its merchant fees toward those of Visa and MasterCard "around 2000 or 2001," so that it was not "leaving money on the table." Tr. 854:4-15 (A719). Giving "retailers a discount without getting anything in return didn't make business sense." Tr. 854:13-15 (A719).



PX1285 at '474 (A1718).

By stifling price competition among the GPCC networks, Amex's NDPs have protected its ability to charge high prices. Amex's NDPs blocked "downward pressures on its pricing that would have moderated"

the effect of the Value Recapture price increases. Tr. 3846:1-15, 3850:8-17 (A842, 844). For instance, when Amex increased price to Southwest in 2009, Southwest "would have been able to negotiate on price significantly" by threatening to steer purchase volume to other cards. Tr. 2418:3-17 (A772); *see also* Tr. 3851:1-12 (A846). But Amex's NDPs made that sort of negotiation impossible. Tr. 2418:3-17 (A772).

Amex's NDPs also enabled Amex's competitors to raise their merchant fees by eliminating the fear that other networks would undercut their prices to gain share. From 1997 to 2009, Visa and MasterCard raised their average merchant fees by more than 20%, and Discover raised its fees to their levels. PX0357 at '959 (A1311); Tr. 854:7-15 (A719); Tr. 2663:21-2665:4 (A786-87). Thus, Amex's NDPs result in higher profit-maximizing prices across the network services market. Tr. 3821:11-3822:4, 3846:3-15 (A835, 843).

Because merchants pass on credit-card acceptance costs to their customers, Amex's NDPs also caused an increase in retail prices. As Walgreens' CEO testified, "[t]he customers eventually have to pay." Tr. 1406:14 (A741). Thus, all retail customers—including those that do not use credit cards—pay more. Tr. 3840:10-23 (A841).

b. Amex's NDPs Stifle Innovation

Amex's NDPs also have impeded the development of innovative, low-cost payment platforms. In 2000, Discover pursued Project Monet, a venture offering merchants "equity ownership in the network" and "control" over their costs. Tr. 839:1-6 (A716). But NDPs prevented its success, which depended on merchant partners steering customers to that network. Tr. 838:20-839:11, 956:11-17 (A716, 725).

Likewise, in 2012, a group of 40 large retailers created a joint venture called the Merchant Customer Exchange (MCX) to develop a mobile payment platform that seeks to lower merchant costs through steering. Tr. 2433:6-2435:4, 2436:1-20 (A774-75). But Amex's NDPs "preclude" MCX's platform from gaining sufficient traction in the marketplace. Tr. 2433:6-2436:20 (A774-75).

6. Enjoining Amex's NDPs Will Foster Long-Suppressed Competition, Benefiting Merchants And Their Customers

Although Visa and MasterCard rescinded their NDPs, *see* p. 2, *supra*, Amex's NDPs prohibit the 3.4 million merchants that accept Amex cards from steering. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 234 (E.D.N.Y. 2013)

(calling this “the American Express problem”). These merchants account for the vast majority of GPCC purchase volume. *See* p. 6, *supra*. Absent the injunction in this case, these merchants would be unable to encourage customers to use less costly cards, and the market will—in Southwest Airlines’ words—remain “broken.” Tr. 2440:4-15 (A776).

Enjoining Amex from enforcing its NDPs will reduce merchant costs. Tr. 1276:4-8 (A730). Their customers will also benefit from inducements such as “half a percent less if you pay with your Visa,” Tr. 3150:6-14 (A809), or “an extra [car] rental day free of charge,” Tr. 497:12-498:18 (A693). *See also* Tr. 1703:17-1704:5 (Sprint would consider “statement credits” or a “discount” on accessories) (A755).

Customers also will pay lower prices. Home Depot has a “long standing practice for any cost reduction we get, we pass along, generally about 60 percent of that to customers, typically in the form of a price decrease.” Tr. 1278:1-14 (A731). Best Buy, Enterprise, and Crate & Barrel also seek to return some cost savings to customers. Tr. 1543:23-1544:6 (A750); Tr. 499:8-25 (A693); Tr. 2328:9-2329:4 (A771).

B. The District Court Held Amex's NDPs Unlawful

The district court held a seven-week trial with thirty-four fact witnesses, four expert witnesses, and over 1,000 exhibits. The court held Amex's NDPs unlawful after conducting a full rule-of-reason analysis that accounted for "[t]he two-sided nature of the GPCC card industry." SPA12, 44. The court observed that Amex's NDPs were "vertical restraints" between "the network and its merchant-consumers." SPA33. But it found that Amex's NDPs are "[u]nlike most vertical distribution agreements," because they "have the primary effect of restraining one form of interbrand competition." SPA34.

1. Plaintiffs Carried Their Initial Burden Under The Rule Of Reason

The district court recognized that this Court "utilizes a three-step burden shifting framework" under the rule of reason. SPA35. "Plaintiffs bear an initial burden of demonstrating that the challenged restraints have had an 'adverse effect on competition as a whole in the relevant market.'" *Id.* (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004)). If that burden is satisfied, "the burden then shifts to Defendants 'to offer evidence of the pro-competitive effects of their agreement.'" SPA36 (quoting 386 F.3d at

507). If they do, the burden "shifts back to Plaintiffs to prove that any 'legitimate competitive benefits' proffered by Defendants could have been achieved through less restrictive means." SPA37 (quoting 386 F.3d at 507).

The court concluded that Plaintiffs carried their initial burden in two ways: "indirectly" by showing Amex had sufficient market power to harm competition "and that there are 'other grounds to believe that the defendant's behavior will harm competition market-wide'"; and "directly" by proving that Amex's NDPs had actual anticompetitive effects on interbrand competition. SPA35-36.

a. The District Court Delineated GPCC Network Services As The Relevant Market

Applying established market-definition methods, the court found that GPCC network services in the United States was the relevant market for analyzing the competitive effects of Amex's NDPs. SPA38. The court first found that a network services market was supported by the hypothetical monopolist test, which has "been used routinely by courts in the Second Circuit." SPA47; *see also* SPA47-53.

The court also found that the "competitive realities" of the industry supported a GPCC network services market. SPA41-43, 53-61. The

record established that there were two "distinct yet interrelated" avenues of competition in the GPCC industry: "(1) at the card issuance level, where American Express and Discover compete against each other and against the thousands of Visa- and MasterCard-issuing banks; and (2) at the network services level, where Visa, MasterCard, American Express, and Discover compete." SPA41-42. Each avenue of competition was "distinct," forming its own "constituent product market," because each "involv[ed] different sets of rivals" and different services being sold to separate purchasers. SPA43. For example, "Visa and MasterCard offer only network services but do not issue cards or acquire merchants," while Citibank and Bank of America "act as card issuers but not networks." *Id.* The court also found that other payment products (such as debit) were not in the relevant market, because they were not reasonably interchangeable for GPCC network services from the perspective of the relevant consumers, the merchants. SPA53-61.

The court observed that this market definition was supported by "prior judicial experience." SPA39-40. In *United States v. Visa U.S.A., Inc.*, the government challenged Visa and MasterCard rules prohibiting banks that issued Visa and MasterCard cards from issuing Amex or

Discover cards. This Court concurred with the district court that the GPCC platform encompassed "'two interrelated, but separate, product markets'": (1) "the general purpose card market" and (2) "the network services market for general purpose cards." SPA41 (quoting *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-40 (2d Cir. 2003)). And this Court affirmed the district court's finding that "there are no products reasonably interchangeable . . . with the network services provided by the four major brands." *Id.*

The court rejected Amex's request to "depart from the decisions in *Visa* and to define the relevant product market in terms of 'transactions,'" finding this would impermissibly "collapse" the distinct product markets for network services and for card issuance. SPA41. "[C]onflat[ing] these separate avenues of competition [for network services and for card issuance] into a single product market for 'transactions'" would "unnecessarily frustrate" the court's analysis by combining different avenues of competition involving different competitors, services offered, and purchasers. SPA42-43. The court recognized that it "must account for the two-sided features of the credit card industry in its market definition inquiry," SPA44, and found that

the analysis of Plaintiffs' economic expert, Dr. Michael L. Katz (also plaintiff's expert in *Visa*), properly "accounted for the two-sided features at play in this system." SPA48.

b. The District Court Found That Amex Had Market Power In The GPCC Network Services Market

The district court next found that Amex had market power—"the ability to raise price significantly above the competitive level without losing all of one's business"—in the GPCC network services market. SPA66 (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995)). Following the "roadmap" from *Visa*, the court based this finding on "(1) defendants' market shares and the structural characteristics of the market; (2) cardholder insistence; and (3) the networks' pricing practices and merchants' continued acceptance despite price increases." SPA66-67.

i. The court first found that Amex was the second-largest GPCC network with a 26.4% market share and that this share was "larger" than MasterCard's 26% share of the network services market in *Visa*, in which this Court held that MasterCard had market power. SPA67-68. Amex "is one of only four major suppliers of GPCC card network services, and three of the competitors in this market (Visa, [Amex], and

MasterCard) are significantly larger than the fourth (Discover)." SPA69. Furthermore, there are "inherently high barriers to entry," with no successful entry since Discover in 1986. *Id.*; Tr. 820:9-19 (A709).

ii. The court then explained that Amex's "highly insistent or loyal cardholder base is critical to [its] finding of market power." SPA71. Insistent Amex cardholders give Amex "uncommon leverage" when negotiating with merchants and "severely impede[]" merchants' abilities to counteract "anticompetitive behavior by Amex, including significant price increases." SPA66-67, 71.

During its Value Recapture initiatives, Amex targeted industries "with relatively high rates of cardholder insistence"—including airlines, restaurants, supermarkets and retailers—"for multiple rounds of price hikes." SPA80. Amex "quantifie[d] and leverage[d]" insistence when imposing these price increases. SPA72, 74 (citing Tr. 2567:23-2570:9, 2571:9-2573:15 (A780-81); PX1240 at '091, '102-03 (A1629, 1640-41)). And Walgreens' reversal of its plans to drop Amex and Murphy Oil's failed attempt to drop Amex provided "real world" examples of the "strong" power of cardholder insistence. SPA76-77; pp. 12-13, *supra*.

iii. The court found that Amex's Value Recapture initiatives, "which

increased prices that were already at or above the competitive level" without "offsetting adjustments on the cardholder side of the platform," and resulted in an additional $1.3 billion in pre-tax income to Amex during 2006-10, were "compelling evidence" of its market power. SPA67, 78-79, 82; pp. 8-9*, supra*. Despite the significant fee increases on a "substantial" portion of its acceptance network, no large merchant ceased accepting Amex cards, and "relatively few" small merchants did so. SPA78-81. Amex, thus, "profitably impose[d]" price increases "across a broad swath of its merchant base with little or no meaningful buyer attrition." SPA81.

iv. The court rejected Amex's "market power counterarguments." SPA90-98. First, the court held that the asserted decline over time in Amex's "effective discount rate" across all industries did not disprove its market power. SPA90. The "record indicate[d] that any reduction in Amex's average effective rate is primarily the result of the network's successful efforts to increase its share of spending at so-called 'everyday spend' merchants," like "supermarkets, gas stations, and pharmacies," which "generally pay significantly lower discount rates" than other merchants. *Id.* When Dr. Katz "controlled for the changing composition

of Amex's merchant base, he found that the network's average effective discount rate had, in fact, increased slightly over time." SPA91 (citing Tr. 6654:11-6656:2 (A917-18); PX2778 at 5 (A1995)).

The court determined that the calculations of Amex's expert, Dr. B. Douglas Bernheim, purporting to show that Amex lacked power over price were "flawed" and "unreliable." SPA91-92 & n.37. The court also rejected Amex's argument that it lacked market power because its cards were accepted by fewer merchants than its rivals. SPA94. The "trial record indicates that [Amex's] smaller acceptance network is largely a product of its own business decisions," including "its premium pricing strategy." *Id.* Moreover, Amex was narrowing the "merchant coverage gap." SPA93-95. Thus, the evidence did not "preclude a finding of market power." SPA94.

c. The District Court Found That Amex's NDPs Had Actual Marketwide Anticompetitive Effects

The court found that the NDPs caused actual anticompetitive effects in the GPCC network services market. SPA98-127. Thus, Plaintiffs directly "discharged their initial burden under the rule of reason by proving the challenged restraints have caused 'actual, sustained adverse effects on competition.'" SPA99 (quoting *FTC v. Ind. Fed'n of*

Dentists, 476 U.S. 447, 460-61 (1986)). These findings also "satisf[ied] the indirect avenue of discharging Plaintiffs' initial burden," "in conjunction with the court's finding that [Amex] possesses market power in the network services market," by "establish[ing] the 'other grounds to believe that the defendant's behavior will harm competition market-wide." SPA99-100 (quoting *K.M.B. Warehouse*, 61 F.3d at 129).

The district court found that "[p]rice competition is a critical avenue of horizontal interbrand competition, and yet it is frustrated to the point of near irrelevance" in network services by Amex's NDPs. SPA100. As the court explained, "[s]teering is a lynchpin to inter-network competition on the basis of price." SPA102. Without it, there is no "'competitive reward' for offering merchants lower swipe fees," and thus "there is virtually no check on the networks' incentive or ability to charge higher prices to merchants, so long as the network's pricing is below the level at which a rational merchant would drop acceptance entirely." *Id.*; *see also* pp. 18-21, *supra*.

By precluding merchants from adjusting their "consumption of network services in response to changes in price," Amex's NDPs harmed "the competitive process" by "sever[ing] the essential link between the

price and sales of network services" and "disrupting the price-setting mechanism ordinarily present in competitive markets." SPA98. Amex's NDPs thereby eliminated merchants' leverage to negotiate lower fees with the networks and suppressed interbrand price competition marketwide. SPA118-19, 137.

The court rejected, as a matter of law, Amex's argument that this sort of interbrand price competition "is rightly suppressed by its NDPs." SPA105. "[I]t is not for the court to draw lines between 'good' competition and 'bad' competition in the network services market." *Id.*

The court also found that Amex's NDPs "render it nearly impossible for a firm to enter the relevant market by offering merchants a low-cost alternative to the existing networks." SPA107. The "failure of Discover's low-cost provider strategy in the 1990s provides direct evidence of how anti-steering rules like [Amex's] NDPs impede modes of competition that likely would benefit consumers on both sides of the GPCC platform." *Id.*; *see also* pp. 19-20, *supra*.

The court further found that, over the last two decades, Amex's NDPs "allowed all four networks to raise their swipe fees more easily and more profitably" than if steering were allowed and the networks

actually competed on merchant pricing. SPA111. These fee increases resulted in higher retail prices for all customers, including those "who do not carry or qualify for an Amex card" and thus do not "receive any of the premium rewards or other benefits" Amex offers. SPA113-14; p. 21, *supra*. The court also found that NDPs "stunted innovation" by "inhibiting the development of several proposed merchant-owned payment solutions." SPA115-16; p. 22, *supra*.

2. The District Court Rejected Amex's Proffered Procompetitive Effects

Because Plaintiffs satisfied their initial burden of proving marketwide anticompetitive effects, "the burden shift[ed] to [Amex] to offer evidence of the pro-competitive effects of [its NDPs]." SPA127. The court found that Amex's proffered procompetitive effects did not "offset, much less overcome, the more widespread and injurious effects of the NDPs on interbrand competition in the relevant market." SPA128.

Amex argued that its NDPs are necessary to ensure cardholders "a frictionless and consistent point-of-sale experience," what it calls "'welcome acceptance.'" SPA128-29. Otherwise, Amex argued, "its cardholders will be less likely to use their Amex cards, not only at the steering merchant, but also on subsequent transactions due to the

effects of spillover." SPA129. This would start a "downward spiral" that "invites the demise of its differentiated model." SPA129-30. And without that model, there would be less "overall interbrand competition." SPA131.

The court rejected this argument because the "antitrust laws were enacted for the protection of competition, not competitors." SPA132 (internal quotation marks omitted). To find the NDPs reasonable "because they shield [Amex's] preferred business strategy from a legitimate form of interbrand competition, especially competition on the basis of price, would amount to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'" SPA132-33 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978)). No authority "support[s] the remarkable proposition that a restraint that effectively blocks interbrand competition on price across an entire market may be justified under Section 1 because the defendant firm would be less able to compete effectively in its absence." SPA133.

Moreover, "[t]o the extent Defendants maintain that the NDPs drive interbrand competition in the credit card industry, they focus primarily on the interrelated card issuance market" in which Amex and its rival

issuing banks "fiercely compete to acquire new cardholders and capture share of wallet." SPA131, 134-35. The court observed that, "[a]s a general matter," a "restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market." SPA135 & n.54 (citing cases). And it held that, "even if such cross-market balancing is appropriate under the rule of reason in a two-sided context," Amex failed to show that its NDPs were "reasonably necessary to robust competition on the cardholder side of the GPCC platform" or that any cardholder benefits were sufficient to "offset the harm done in the network services market." SPA135-36.

The court further found that Amex's "dire prediction of how business will be impacted by removal of the NDPs" was "not supported by the evidentiary record." SPA137. Amex "presented no expert testimony, financial analysis, or other direct evidence establishing that without its NDPs it will, in fact, be unable to adapt its business to a more competitive market and will instead cease to be an effective competitor in the GPCC industry." *Id.* To the contrary, the evidence showed that Amex "has a proven track record of transforming itself and adapting its business model to suit changing competitive landscapes," and had

already "identified a range of potential, permissible steps that the company could take in order to protect its ability to deliver a differentiated product if steering is permitted." SPA138-39.

Even if Amex had to reduce fees "to dissuade merchants from steering," the court found a "downward spiral" unlikely. SPA140. "If, as Defendants have strenuously insisted, [Amex] truly offers merchants a differentiated and premium set of services as compared to its competitors," merchants "will take that additional value into account when deciding whether and to what extent to steer customers to other forms of payment." SPA141. Regardless, the law does not permit Amex to decide "on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." SPA136 (citing *Professional Engineers*, 435 U.S. at 695).

Amex also claimed that its NDPs reduce merchants' ability to "free-ride" on its data analytics, cardholder rewards, and brand value. SPA143-49. The court found that Amex's claims were "flawed," SPA145, and that any reduction in free-riding caused by Amex's NDPs "do[es] not offset the significantly more pervasive harms done to interbrand competition by the same restraints," SPA144.

3. The District Court Enjoined Amex From Enforcing Its NDPs

The court enjoined Amex from enforcing the NDPs to prevent merchant steering but did not require specific contractual changes. SPA154-65 (§§ III-IV). The court also required Amex to notify merchants that they could steer and to designate an officer to ensure compliance. SPA162-63, 167 (§§ IV.C, V.E).

SUMMARY OF ARGUMENT

Amex's NDPs did exactly what they were intended to do—stifle price competition in GPCC network services to the point of near irrelevance by preventing merchants from steering to lower-cost or otherwise-preferred cards. In this way, Amex's NDPs left the market broken—enabling all four GPCC networks to raise merchant fees, increasing retail prices, and blocking innovation.

Amex does not meaningfully dispute that its NDPs caused these anticompetitive effects. Instead, it argues that restraining competition in network services for merchants was justified—necessary even—because Amex used revenue from merchant fees to provide rewards to cardholders. But the Sherman Act rests on the premise that

unrestrained competition yields the best allocation of resources. While Amex and its competitors each must balance the fees they charge merchants and the benefits they provide cardholders, those balances should be set in an environment of unfettered competition on both sides of the platform.

Plaintiffs carried their initial burden to prove marketwide anticompetitive effects in two ways. First, Plaintiffs did so directly by showing that Amex's NDPs had actual anticompetitive effects on interbrand competition. By preventing merchants from discounting, expressing a preference for a network, or even truthfully informing customers about a card's cost, Amex's NDPs severed the link between the prices merchants pay for network services and the sales of those services—rendering price and output unresponsive to demand. That effect alone suffices to meet Plaintiffs' initial burden. But Plaintiffs also proved that the NDPs caused actual anticompetitive effects by impeding innovation, blocking low-cost credit card networks, and enabling all four networks to raise merchant fees, which were passed on to their customers in the form of higher retail prices. Second, Plaintiffs carried their initial burden indirectly by showing that Amex had market power

in the GPCC network services market and that there were grounds to believe that its NDPs would harm competition marketwide.

Because Plaintiffs carried their initial burden, the burden shifted to Amex to show that its NDPs had procompetitive effects. But its proffered justifications were not legally cognizable, not supported by the record, or both. Amex first argued that full-fledged competition would cause its demise. But this argument is a frontal assault on the Sherman Act because it is premised on the misguided notion that competition itself is bad. Amex also argued that it must suppress interbrand price competition to enable its product-differentiation strategy of offering greater cardholder rewards and better services. But channeling competition to one arena by suppressing price competition in another is not a procompetitive virtue cognizable under the Sherman Act. Even if it were, this would be an argument for the second step of the burden-shifting framework, not the first. Amex failed to make the requisite showing: the district court determined, as a matter of fact, that Amex's purported proof failed to offset, much less overcome, Plaintiffs' proof of widespread harms.

On appeal, Amex attempts to sidestep its failure of proof by concocting a novel "net adverse effect" approach that would expand Plaintiffs' initial burden from proving that its NDPs had an actual marketwide anticompetitive effect to also include quantifying that effect and proving that it outweighed any potential procompetitive effect. Amex Br. 41-42. But this approach improperly collapses this Court's three-step burden-shifting framework into a single step with no meaningful shift of burden. No court has ever adopted such an approach, and this Court's decisions preclude it.

In arguing for its novel approach, Amex points to this Court's decisions requiring a plaintiff to show an adverse effect "on competition as a whole in the relevant market." Amex Br. 37 (Amex's emphasis). But this requirement means only that a plaintiff cannot make out an antitrust claim by proving harm just to itself because the antitrust laws protect competition, not any particular competitor. It does not mean, as Amex contends, that a plaintiff must disprove potential procompetitive effects to satisfy its initial burden.

Amex's challenges to the district court's determination that Amex possesses market power in a well-defined market for GPCC network

services also fail. The court's determination involves no legal error and rests on well-supported factual findings, which Amex does not challenge on appeal.

The court found that the relevant market was GPCC network services based on a straightforward application of the hypothetical monopolist test and on a pragmatic consideration of competitive realities—methods that are well-established in this Court. In a variation of its "net adverse effect" approach to Plaintiffs' initial burden, Amex claims that the court improperly excluded cardholders from the relevant market. Amex Br. 56. But a relevant product market is composed of reasonably interchangeable products, and network services for merchants are not reasonably interchangeable with cardholder services. As this Court recognized in *Visa*, the GPCC network services market and the GPCC card market, though "interrelated," are "separate[] product markets." 344 F.3d at 238.

In any event, the court's market definition did not, as Amex claims, cause it to ignore cardholders. The court recognized and accounted for the interrelatedness of network services and cardholder services, but

rejected Amex's claim that cardholder benefits offset the harm in the network services market.

The court also properly found that Amex has market power. Plaintiffs' proof of actual adverse effects on competition—much of which Amex does not challenge—firmly establishes Amex's market power. But the court also found market power based on Amex's significant market share in a concentrated market with high barriers to entry, its highly insistent cardholders, and its ability, demonstrated by its Value Recapture price increases, to raise merchant fees above the competitive level without a significant loss of merchant business.

Amex contends that these price increases do not prove that it raised prices to supracompetitive levels—suggesting either that its pre-Value Recapture fees were below the competitive level or that the price increases covered costly service improvements. But the district court properly rejected these contentions. Contrary to Amex's suggestion, these price increases did not merely fund additional cardholder rewards. And while Amex contends that data on costs and margins are required as a matter of law to prove market power, there is no such rigid legal rule. In *Visa*, this Court relied on similar price-increase

evidence, without analyzing costs or margins, when affirming findings that Visa and MasterCard had market power.

Amex incorrectly argues that firms with less than a 30% market share are presumed to lack market power. This Court has never adopted such a presumption, observing instead that the significance of market share depends on the competitive dynamics of the particular market. Here, Amex's market share is amplified by its insistent cardholders, who make it unprofitable for merchants to drop Amex. Comparable evidence of cardholder insistence supported the finding, affirmed in *Visa*, that MasterCard, with a 26% share, had market power in network services. Cardholder insistence gives Amex uncommon leverage over merchants when imposing fee hikes—that is, it gives Amex market power.

Lastly, there is no merit in Amex's argument that the district court's liability analysis and injunction failed to account properly for its right, acknowledged by *United States v. Colgate & Co.*, 250 U.S. 300 (1919), to deal only with merchants of its choosing. Had Amex never imposed its NDPs, it could have terminated some merchants for steering, but it conceded below that there would have been substantially more steering

but for its NDPs. And nothing in *Colgate* required the court to include an express provision in the injunction permitting Amex to terminate merchants that engage in steering. Like any other antitrust violator, Amex must expect some fencing in.

STANDARD OF REVIEW

This Court reviews conclusions of law and the application of law to undisputed facts *de novo*. *See Beck Chevrolet Co. v. Gen. Motors LLC*, 787 F.3d 663, 672 (2d Cir. 2015); *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 617-18 (2d Cir. 2006). This Court reviews factual findings, including those related to market definition, market power, and anticompetitive effect, for clear error. *See* Fed. R. Civ. P. 52(a)(6); *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006); *Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990). This Court reviews the "fashioning of equitable relief" for abuse of discretion. *United States v. Apple, Inc.*, 791 F.3d 290, 313 (2d Cir. 2015).

ARGUMENT

By preventing steering, Amex's NDPs "sever the essential link between the price and sales of network services by denying merchants

the opportunity to influence their customers' payment decisions and thereby shift spending to less expensive cards." SPA98. Because they render "price and output [] not responsive to demand," Amex's NDPs are "inconsistent with the Sherman Act's command." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109-10 (1984).

Amex claims that "the District Court recognized [that] steering 'endangers the cardholder's purchasing experience and therefore endangers the network itself.'" Amex Br. 2 (quoting SPA24). But Amex omits "In Amex's view" from the quotation. SPA24. The court was describing *and rejecting* Amex's position, as the next sentence makes plain: Amex's efforts went "too far in the view of the Sherman Act—the NDPs unreasonably and unjustifiably suppress a critical avenue of interbrand competition in the relevant market." SPA25.

The district court found what everyday shopping confirms: "steering is both pro-competitive and ubiquitous." SPA3. "Merchants routinely attempt to influence customers' purchasing decisions, whether by placing a particular brand of cereal at eye level rather than on a bottom shelf, discounting last year's fashion inventory, or offering promotions such as 'buy one, get one free.'" *Id.* While Amex calls it "discrimination"

for a merchant to offer a discount or nonmonetary incentive to encourage its customers to use a cheaper or otherwise preferred GPCC card (Amex Br. 24), that is normally called "competition."

Amex accuses Plaintiffs of using this litigation to dictate how the GPCC networks compete and thereby to benefit merchants at the expense of cardholders. Amex Br. 4. But it is Amex's NDPs that dictate how all the GPCC networks compete. Plaintiffs have never argued that the GPCC networks must compete in a particular way—just that Amex cannot decide "on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." SPA136.

In finding Amex's NDPs unlawful, the district court did not, as Amex claims, "pick[] winners and losers" (Amex Br. 4) or "deem[] the interests of merchants paramount" to cardholders (Amex Br. 34). Rather, the court protected the competitive process and preserved the ability of competitive forces to do their work. That decision is amply supported by the law and the trial record.

I. Amex's NDPs Impermissibly Block Significant Competition Among Amex And Its Rival GPCC Networks

A. Amex's NDPs Have The Purpose And Effect Of Stifling Interbrand Competition, Including Price Competition

The Sherman Act is "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The "policy unequivocally laid down by the Act is competition." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). This "statutory policy precludes inquiry into the question whether competition is good or bad." *Professional Engineers*, 435 U.S. at 695. Nor does it permit "private citizens" to foreclose competition when they "believe that such foreclosure might promote greater competition in a more important sector of the economy." *Topco Associates*, 405 U.S. at 610.

This case is governed by the rule of reason, under which "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 104. The question is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). "Appropriate factors to take into account" in

addressing this question "include specific information about the relevant business and the restraint's history, nature, and effect." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (internal quotation marks omitted). The district court's assessment of these factors stands largely unchallenged.

There is no dispute that Amex's NDPs stifle competition among the GPCC networks at the point of sale, including price competition. The Sherman Act, however, "was enacted to assure customers the benefits of price competition." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983). Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), and "competitive pricing [is] the free market's means of allocating resources." *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979). Thus, the Supreme Court has not tolerated any "practice [that] threatens . . . competitive pricing." *Id.*

Amex's contention that its NDPs should be "treated as benign" because they are "like other vertical restraints" (Amex Br. 39) is misguided. Amex's NDPs are unlike most other vertical restraints in critical respects.

Amex's NDPs are vertical restraints because Amex and the merchants are at "different levels of distribution," and because the imposition of Amex's NDPs was not alleged to be the product of a "horizontal" agreement with any of its GPCC network rivals. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988). But "horizontal and vertical restraints do not always threaten competition in different ways, or call for different analysis." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1503, at 392 (3d ed. 2010). The "horizontal-vertical distinction" is "relevant only insofar as it helps identify competitive effects." *Id.*

The "primary purpose of the antitrust laws is to protect interbrand competition." *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997). "[V]ertical restraints are generally more defensible than horizontal restraints" because of their potential for stimulating interbrand competition. *Id.* at 14-15. By restricting "intrabrand competition" among distributors of a single brand, vertical restraints can stimulate "interbrand competition" among rival brands. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 (1977). But "[u]nlike most vertical distribution agreements," Amex's NDPs do not purport to restrain intrabrand competition among Amex-

accepting merchants. SPA34. And unlike some vertical restraints, *see Leegin*, 551 U.S. at 890-92, they do not benefit merchants for directing volume to Amex.

Rather, like horizontal restraints, Amex's NDPs restrain "the way in which [the networks] will compete with one another." *NCAA*, 468 U.S. at 99. They eliminate nearly all interbrand competition among the GPCC networks at the point of sale, so that no network can obtain a competitive advantage by reducing its merchant fees or otherwise encouraging merchants to promote it. SPA34, 103-05. Moreover, Amex's NDPs apply not just to Amex transactions at the 3.4 million Amex-accepting merchants, but to all of the merchant's GPCC transactions, even if the merchant's customer does not have an Amex card. Thus, Amex's NDPs "effectively block[] interbrand competition on price across an entire market," SPA133, and raise the same antitrust concerns as a horizontal restraint.

The history of Amex's NDPs shows that they there were intended "to restrain trade" among the GPCC networks and "enhance prices." *Professional Engineers*, 435 U.S. at 690. In the late 1980s and early 1990s, Amex had a significant price premium over Visa (3.25% vs.

1.75%), and Visa was using its lower prices and "We Prefer Visa" campaign to gain share. SPA24, 104-05; p. 15, *supra*. Amex considered responding by cutting its fees to certain merchants. *See* p. 15, *supra*. Instead, Amex tightened its NDPs to eliminate price competition among the GPCC networks at the point of sale. SPA23-24, 103-05.

Moreover, as the court found, Amex's NDPs had "actual anticompetitive effects on interbrand competition," SPA6:

- Stifling price competition among GPCC networks.
- Raising merchant fees for all GPCC networks.
- Raising retail prices for all customers.
- Blocking the success of low-cost GPCC networks.
- Impeding innovative low-cost payment platforms.

See pp. 32-34, *supra*. Thus, judged by their impact on competition, Amex's NDPs unreasonably restrain trade and violate the rule of reason.

B. Amex's Proffered Justifications For Blocking This Interbrand Competition Are Unavailing

Amex has never disputed that its NDPs stifle significant interbrand competition at the point of sale. To the contrary, Amex argued below that this was "bad" competition that its NDPs "rightly suppressed."

SPA105. But, as the district court correctly explained, the Sherman Act protects competition, and "it is not for the court to draw lines between 'good' competition and 'bad' competition." *Id.* While Amex's CEO, Kenneth Chenault, claimed that full-throated competition would cause Amex's demise, SPA137, the Supreme Court has long rejected "the age-old cry of ruinous competition." *Socony-Vacuum*, 310 U.S. at 221-22. The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Moreover, Mr. Chenault's "dire prediction of how business will be impacted by removal of the NDPs" was "not supported by the evidentiary record." SPA137. While he may have "sound[ed] the alarm" about steering long before this case (Amex Br. 24-25), Amex presented "no" expert testimony or other direct evidence "establishing that without its NDPs it will, in fact, be unable to adapt its business to a more competitive market." SPA137. And other Amex witnesses' testimony was "notably inconsistent" with Mr. Chenault's. SPA137-38. In addition, Amex "has survived (and in some ways prospered during) merchant steering reforms in other jurisdictions, and has already

identified ways to mitigate potential merchant steering." D. Ct. Stay Op. 13 (citing SPA138 n.56) (A665).[3]

That its NDPs make Amex more profitable hardly justifies the elimination of price competition among the GPCC networks. A "hold[ing] that the antitrust laws protect competitors from the loss of profits due to . . . price competition" would be a "perverse result." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986). That is true even if Amex shares some of the revenue with cardholders, because the rule of reason focuses on whether "the challenged restraint tend[s] to promote or destroy competition," *Geneva Pharmaceuticals*, 386 F.3d at 507, not on whether that competition is "good or bad" for consumers. *Professional Engineers*, 435 U.S. at 695.

Amex's other defenses fare no better. Amex contends that its NDPs are needed to preserve a positive experience for its customers at the point of sale—i.e., "welcome acceptance." *See* Amex Br. 2, 24-25. In Amex's view, merchant steering is "anticompetitive." Amex Br. 23-24. But it bases this characterization primarily on the fact that it lost

[3] The district court "decline[d] to rely" on examples from other jurisdictions "as evidence of how the company might react in the United States," but found that "such evidence does illustrate Amex's adaptability as an institution." SPA 138 n.56.

market share to Visa during Visa's preference campaigns. *Id.* The antitrust laws, however, "unlike the Marquis of Queensberry rules, are not designed to protect competitors from one another's conduct." *Geneva Pharmaceuticals*, 386 F.3d at 489. That is so even if Visa and MasterCard have "superior market power," as Amex claims (Amex Br. 2, 45 n.12). "[T]he presence of a strong competitor" cannot justify a restraint "eliminat[ing] price competition." *Apple*, 791 F.3d at 298 (emphasis omitted). The antitrust laws protect competition, not "marketplace vigilantism." *Id.*

Moreover, as the district court found, steering is ubiquitous in the economy, SPA3, and Amex itself steers in its travel agency business, SPA117. Thus, Amex is wrong in suggesting that steering away from it is inherently discriminatory. Plus, Amex's NDPs go far beyond controlling its customers' buying experience because they prevent merchants from steering and disclosing truthful information about different cards' costs "even when [Amex] is not mentioned." SPA134.

Amex also argues that it must suppress competition on the prices charged to merchants to effectuate its "product differentiation" strategy of greater rewards and better services. *See* Amex Br. 6, 14, 17-19, 43-44.

But this argument "confirms rather than refutes the anticompetitive purpose and effect of its agreement[s]." *Professional Engineers*, 435 U.S. at 693.

In *Professional Engineers*, an association argued that its rule barring members from competitively bidding for work based on price was justified because it benefited the public "by preventing the production of inferior work and by insuring ethical behavior." *Id.* at 693-94. The Supreme Court rejected this defense because "[t]he logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose." *Id.* The "Court has never accepted such an argument" for restraining price competition. *Id.*

The same is true of Amex's product-differentiation argument here. The "logic of this argument rests on the assumption that" Amex's NDPs will prevent price competition and thereby maintain high merchant fees. *Id.* If they "had no such effect," they would not enable product differentiation. *Id.* If the risk of "inferior [engineering] work" cannot justify suppressing price competition, then surely the risk of lower cardholder rewards cannot. *Cf. Catalano, Inc. v. Target Sales, Inc.*, 446

U.S. 643, 645 (1980) (per curiam) (condemning a horizontal agreement eliminating a form of price competition, even though it "might actually enhance competition" in some ways).

It makes no difference that Amex and its rivals "must account for the interdependence between the demands on" both sides of the GPCC "platform and strike a profit-maximizing balance between the two." Amex Br. 40 (quoting SPA13). That balance should be set in an environment of unsuppressed competition on both sides of the platform, not by Amex's NDPs. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951). The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pacific*, 356 U.S. at 4. Both merchants and cardholders are entitled to the benefits that unrestrained competition yields. *See Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

In any event, the record contradicts Amex's claim that offering attractive rewards requires stifling price competition (Amex Br. 19, 40-

41, 43-44). Discover was offering *both* low fees to merchants and "competitive rewards" to cardholders before those efforts were stymied by NDPs. *See* pp. 19-20, *supra*. As its President explained, "by operating very efficiently we could offer a good value proposition to our merchants['] customers on one side and a good proposition to our cardholders on the other side." Tr. 821:25-822:5 (A710). Discover intends to resume such a two-sided competitive strategy now that merchants can steer. Tr. 872:3-873:15 (A722-23). Amex ignores how NDPs anticompetitively blocked Discover's "low-cost provider strategy," which "likely would benefit consumers on both sides of the GPCC platform." SPA107.

In addition, Amex might provide even more rewards now that steering is allowed. When Amex considered possible responses to merchants' potential freedom to steer among GPCC networks under proposed federal legislation, *see* Amex Br. 25 n.8, it discussed "[a]dd[ing]/enhanc[ing] Card benefits," PX1176 at '385 (A1618); PX0091 at '906-07 (A1141-42), and "[e]nrich[ing] rewards on credit/charge to counteract incentives offered" by merchants to steer, PX0090 at '473 (A1130). As Amex's Senior Vice President for Global Merchant Pricing

recognized, "provid[ing] cardholders with more benefits" could make them "resistant to [merchant] steering." Tr. 2747:3-2748:22 (A795).

The record also undermines Amex's claim that its high fees are necessary to provide better "benefit[s] to merchants as well." Amex Br. 4, 40. Amex long charged merchants more than other GPCC networks without offering additional merchant benefits, and Amex's own merchant satisfaction surveys showed that [REDACTED] PX0043 at '963 (A999); pp. 6-8, *supra*.

Nor does the record support Amex's suggestion that its NDPs made cardholders and merchants collectively better off. *See* Amex Br. 4-6, 26-27, 43-45, 67-68. Shunting competition to the cardholder side of the GPCC platform undoubtedly "changed the industry" and benefited Amex, Amex Br. 26, but there is no record support for the implausible proposition that suppressing competition at the point of sale yielded net benefits to merchants and cardholders combined. The district court properly found that Amex failed to show that cardholder benefits "offset the harm done in the network services market." SPA135-36. Amex does not challenge this factual finding.

Amex asserts for the first time on appeal that its NDPs "led to dramatically increased transaction volume." Amex Br. 43. But this assertion lacks any record support, and Amex cites none. Moreover, there is an obvious alternative explanation for the increase in GPCC volume—the economy grew. Amex observes that GPCC volume roughly doubled from the late 1990s to 2011. Amex Br. 6. But U.S. personal consumption expenditures also roughly doubled over the same time. *See* U.S. Bureau of Economic Analysis, *Personal Consumption Expenditures*, https://research.stlouisfed.org/fred2/data/PCEC.txt. As Amex's President of U.S. Consumer Services testified, "our business grows roughly at the discretionary GDP growth." Tr. 3544:4-5 (A829). In addition, the record shows that GPCC volume increased during this period because more everyday-spend merchants began accepting GPCC cards. Tr. 2650:4-2652:9 (A784).

Amex invokes the Supreme Court's caution that "'mistaken inferences' [in antitrust cases] may be 'especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" Amex Br. 44 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)). But the Court cautioned against inferring

that conduct is anticompetitive when it involves "lowering prices" because that "is the same mechanism by which a firm stimulates competition." *Brooke Group*, 509 U.S. at 226. By contrast, Amex's NDPs stifled price competition, enabling all four GPCC networks to raise merchant fees. Amex's reliance on *Brooke Group* as "a tool for keeping prices high" is "ironic indeed." *Id.* at 226-27.

II. The District Court Properly Held That Plaintiffs Satisfied Their Initial Burden Under The Rule of Reason

Amex argues that the district court erred "[m]ost fundamentally, in concluding that the Government had proven directly that the NDPs had caused competitive harm based only on its effect on merchants," and thus improperly "relieved the Government of its [initial] burden [under the rule of reason] to show that the NDPs harm overall competition." Amex Br. 34, 37-54. Amex insists that it was not enough for Plaintiffs to prove "that merchants would pay lower merchant discount rates absent the NDPs" without also "evaluat[ing] the impact of the NDPs on cardholder benefits." Amex Br. 40, 46. Amex is wrong. As it previously argued to this Court, there is no "requirement that the Government prove harm to competition at *both* the network level and the issuer level." Brief Amicus Curiae of American Express in Support of

Affirmance ("Amex *Visa* Am. Br.") at 7, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), No. 02-6074, *available at* 2002 WL 32828497.

A. Plaintiffs Carried Their Initial Burden Under This Court's Three-Step Burden-Shifting Framework

Under this Court's three-step burden-shifting framework to the rule of reason, "the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market." *Geneva Pharmaceuticals*, 386 F.3d at 506-07 (internal quotation marks and emphasis omitted). If that burden is satisfied, "the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Id.* at 507. If they do, "the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." *Id.*

To satisfy their initial burden, plaintiffs must establish a "'competition-*reducing*' effect." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)). There are "two independent

means" of doing so. *Id.* The direct approach is to show "an actual adverse effect on competition." *Id.* The indirect approach is to show that the defendant possesses "sufficient market power to cause an adverse effect on competition," *id.*, and that there are "other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherent anticompetitive nature of defendant's behavior." *K.M.B. Warehouse*, 61 F.3d at 129. Here, the district court properly found that Plaintiffs satisfied their initial burden under both approaches.

Under the direct approach, Plaintiffs proved that Amex's NDPs had actual marketwide anticompetitive effects. First, the evidence established that Amex's NDPs stifled price competition by "sever[ing] the essential link between the price and sales of network services" to merchants and "disrupting the price-setting mechanism ordinarily present in competitive markets." SPA98. Amex does not dispute these findings. Yet as the Supreme Court stated in *NCAA*, rendering price and output "unresponsive to consumer preference . . . is perhaps the *most significant* " "anticompetitive consequence[]" of a restraint. 468 U.S. at 106-07 (emphasis added). And in *Indiana Federation of Dentists*, the Court condemned a restraint because it "disrupt[ed] the proper

functioning of the price-setting mechanism." 476 U.S. at 461-62. As the Court explained, a restraint that "imped[es] the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason." *Id.* at 459-61 (quoting *Professional Engineers*, 435 U.S. at 692).

The evidence also showed that Amex's NDPs blocked low-cost GPCC networks and led to higher merchant fees by all four networks. SPA107-13. This Court has held that "increased prices" from the suppression of interbrand competition is "an actual adverse effect." *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001). Thus, this evidence also suffices to carry Plaintiffs' initial burden under the direct approach.

Amex argues that the Value Recapture increases are not an anticompetitive effect because there was insufficient evidence that the raised fees were supracompetitive. Amex Br. 58-59. Amex is wrong. *See* Section IV.B, *infra*. But in addition, Amex does not challenge as clearly erroneous the court's broader finding that its NDPs enabled all four networks to raise merchant fees. Rather, Amex argues that this proof does not satisfy Plaintiffs' initial burden as a matter of law because "the trial evidence indisputably showed that output has increased," so that

rising merchant fees "are equally consistent with growing product demand." Amex Br. 42-44 (quoting *Brooke Group*, 509 U.S. at 237) (Amex's emphasis). This Court, however, has never required proof of both increased prices and reduced output to meet the plaintiff's initial burden. *See Virgin Atlantic*, 257 F.3d at 264; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 547 (2d Cir. 1993); *cf. Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (the plaintiff can discharge its "initial burden of showing that the alleged contract produced an adverse, anticompetitive effect" by demonstrating "that its enforcement reduced output, raised prices or reduced quality"). Imposing such a requirement would be particularly inappropriate here because Amex's NDPs delink "merchants' demand for network services and the price charged" and thus prevent output from responding to price changes. SPA101.

And—contrary to Amex's claim that the district court found that Plaintiffs carried their initial burden "based only" on the effect of its NDPs on merchants (Amex Br. 34)—the evidence also showed that Amex's NDPs caused higher retail prices and stifled innovation. *See* pp. 21-22, 34, *supra*. These too are actual anticompetitive effects on which

the court relied in finding that Plaintiffs carried their initial burden. SPA113-16, 127. Amex does not challenge either finding as clearly erroneous.

Amex suggests that the court's findings of adverse effects are undermined by a "natural experiment." Amex Br. 27-28. When merchants not accepting Amex cards were permitted to steer after the Visa and MasterCard consent decrees, few apparently did. But, as the district court found, this experience does not "accurate[ly] predict[] the consequences of eliminating [Amex's] NDPs." SPA124. Discover considered lowering fees to induce steering at these merchants but did not after learning that "its 100 largest merchants remained bound by Amex's NDPs." *Id.* The "vast majority" of merchants freed to steer were "very small," but "large merchants will [likely] be the vanguard of widespread steering in the United States," as they were in other countries following steering reforms. *Id.*

Amex also argues that higher prices for customers who pay with cash or check cannot be considered an adverse effect of its NDPs because they do not prohibit all steering to cash or check. Amex Br. 52-53. But Amex does not dispute that its NDPs raised all four networks'

merchant fees, which merchants passed on to their customers. SPA111-13. While merchants could theoretically have raised prices just to GPCC card users by offering a discount for cash or check, most preferred charging uniform prices to all customers (which were elevated because of Amex's NDPs).

By proving that Amex's NDPs caused "actual adverse effect[s] on competition," Plaintiffs satisfied their "initial burden" under the rule of reason. *Tops Markets*, 142 F.3d at 96. Actual anticompetitive effects are "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." *Indiana Federation of Dentists*, 476 U.S. at 461. There was, thus, "no need" to establish "[market] power in any precisely defined market." *NCAA*, 468 U.S. at 110 n.42; *see Geneva Pharmaceuticals*, 386 F.3d at 509 ("no need to show market power in addition"); *K.M.B. Warehouse*, 61 F.3d at 129 ("we do not require a further showing of market power").

Plaintiffs, however, also satisfied their initial burden under the indirect approach through traditional market analysis. Plaintiffs proved that Amex had market power in a properly defined market for GPCC network services. *See* pp. 25-31, *supra*; Parts III, IV, *infra*. And the

evidence of the actual marketwide anticompetitive effects of Amex's NDPs provided ample "grounds to believe that the defendant's behavior will harm competition market-wide." SPA99.

B. Amex's Proposed "Net Adverse Effect" Standard Nullifies This Court's Three-Step Burden-Shifting Framework

Amex cites no case in which a court has held that such evidence of actual anticompetitive effects was insufficient to carry the plaintiff's initial burden. Rather, Amex uses snippets from cases to concoct an unprecedented and unworkable framework for rule-of-reason analysis. Under its proposed standard, Plaintiffs cannot carry their initial burden unless they prove not only that Amex's NDPs have actual anticompetitive effects on interbrand competition, but also that those effects outweigh any procompetitive effects, and therefore Amex's NDPs caused a "net adverse effect on price and quality." Amex Br. 41-42; *see also* Econ. Am. Br. 10-14.

No case applies anything like this "net adverse effect" standard in determining whether a plaintiff has discharged its initial burden, and the reason for this lack of precedent is apparent. Amex's approach collapses this Court's three-step burden-shifting framework into a single step, making a mockery of burden-*shifting*. Amex refers to the

possibility of shifting the burden back to it (Amex Br. 2-3, 38), but its novel approach leaves nothing of consequence for the other two steps.

It is true that the plaintiff must show an adverse effect "on competition as a whole in the relevant market." Amex Br. 37 (quoting *K.M.B. Warehouse*, 61 F.3d at 127 (Amex's emphasis)). But this requirement means only that the "plaintiff must show more than just that he was harmed by defendants' conduct." *K.M.B. Warehouse*, 61 F.3d at 127. "Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice." *Geneva Pharmaceuticals*, 386 F.3d at 507. Plaintiffs here plainly proved more than harm to an individual competitor. Plaintiffs showed that Amex's NDPs stifled price competition among the GPCC networks at over 3.4 million merchants, including the 98 of the top 100 U.S. retailers that accept GPCC cards, enabling all four networks to raise merchant fees marketwide. *See* pp. 6, 32-34, *supra*.

It is also true that the harm complained of must be to "overall competition." Amex Br. 38 (quoting *K.M.B. Warehouse*, 61 F.3d at 128). But this requirement does not help Amex. As *K.M.B. Warehouse* explains, this Court's point was that a plaintiff must "show more than

just an adverse effect on . . . intrabrand competition" because restricting such competition may "enhance market-wide competition." 61 F.3d at 127-28. The plaintiff in that case failed to satisfy this requirement because it "offered no evidence of an adverse effect on the whole . . . interbrand exhaust-product market." *Id.* at 128. Here, however, Plaintiffs proved that Amex's NDPs had "actual anticompetitive effects on interbrand competition." SPA6.

In Amex's view, the district court erred by not requiring Plaintiffs to quantify these anticompetitive effects on interbrand competition and prove that they outweighed any cardholder benefits—such as greater rewards—to carry their initial burden. Amex Br. 41-42. Amex claims that this error is independent of its attack on the district court's market definition. Amex Br. 54. But the court found that the competition among the GPCC networks "at the network services level" was separate, and in "a distinct product market" from, the competition among Amex and issuing banks "at the card issuance level"—where cardholder rewards are provided. SPA41-43; pp. 25-26, *supra*. No case has required a showing that anticompetitive interbrand effects in one

market outweigh possible procompetitive effects in other markets to meet the plaintiff's initial burden.

This is true even in cases involving two-sided platforms. In *Times-Picayune Publishing Co. v. United States*, the Supreme Court recognized that "every newspaper is a dual trader in separate though interdependent markets" for advertisers and readers. 345 U.S. 594, 610 (1953). The Court noted that "[t]his case concerns solely one of these markets" and focused on just the competition for advertisers when defining the relevant market. *Id.* The Court did not reach competitive effects, *see* Amex Br. 48, but nevertheless made clear that such an analysis would have been based on the restraint's effects on the advertising market. 345 U.S. at 608-09. As the Court explained, the applicable test was whether the challenged restraints "'foreclose[d] competitors from any substantial market.'" *Id.* (quoting *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947)). Amex seeks to contrast newspapers on the basis that Amex "'provides [its] services simultaneously.'" Amex Br. 48 (quoting SPA11-12). But a newspaper simultaneously provides readers to advertisers and content to readers.

Moreover, this claimed factual distinction does not alter the legal analysis.

Likewise, in *Visa*, "[t]he district court determined, and [this Court] agree[d], that [the] case involves two interrelated, but separate, product markets: (1) what the court called the general purpose card market, consisting of the market for [issuing] charge cards and credit cards, and (2) the network services market for general purpose cards." 344 F.3d at 238-39. In affirming, this Court focused on how the challenged restraints harmed the competitive process, stating that "[t]he most persuasive evidence of harm to competition is the total exclusion of [Amex] and Discover from a segment of the market for network services." *Id.* at 240. "While competition among (and within) these networks is robust at the issuing level," at "the network level . . . competition has been seriously damaged by the defendants' exclusionary rules." *Id.* Because of the rules, "only two rival networks are effectively able to compete for the business of issuer banks," so "price and product competition is necessarily limited" and "innovation" curtailed. *Id.* at 240-41. That was the same sort of showing the district

court here found sufficient to carry Plaintiffs' initial burden. *See* pp. 32-34, *supra*.

Amex is wrong to claim that the district court in *Visa* "held the exact opposite" of the district court here. Amex Br. 46. Amex quotes the *Visa* court's statement that "the ultimate impact of any harm to system level competition is felt by cardholders and merchants who use or accept general purpose cards." *Id.* (quoting *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 339 (S.D.N.Y. 2001) (Amex's emphasis removed)). But nothing in *Visa* suggests that the court performed anything like the "net adverse effect" analysis Amex urges. Rather, the violation in *Visa* was predicated on the proof that "the competitive process itself has been harmed." 163 F. Supp. 2d at 344. Plaintiffs here likewise proved that Amex's NDPs harmed the competitive process, resulting in higher merchant fees, higher retail prices, and the loss of innovation. *See* pp. 18-22, 32-34, *supra*.

Moreover, a "restraint that causes anticompetitive harm in one market [generally] may not be justified by greater competition in a different market." SPA135. In *United States v. Brown University*, the court held that "eliminating price competition" among the universities

could not be justified on the ground that it "channeled competition into areas such as curriculum, campus activities, and student-faculty interaction." 5 F.3d 658, 675 (3d Cir. 1993). The court emphasized that "[t]his is not the kind of procompetitive virtue contemplated under the [Sherman] Act, but rather one mere consequence of limiting price competition." *Id.* Amex seeks to distinguish *Brown* because it involves a "horizontal restraint[]." Amex Br. 48-49 & n.13. But this distinction is hollow because Amex's NDPs squelch interbrand competition just as a horizontal restraint would. *See* Section I.A, *supra*.

The Sherman Act does "protect competition for the benefit of all consumers." Amex Br. 4 (Amex's emphasis). But it does so not by weighing harms to consumers in one market against benefits to consumers in another market to determine a "net adverse effect." Amex Br. 42. Rather, the antitrust laws "safeguard consumers by protecting the competitive process." *Geneva Pharmaceuticals*, 386 F.3d at 489. No quantification of the ultimate effect of Amex's NDPs on merchants and cardholders is required. "The antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A

healthy and unimpaired competitive process is presumed to be in the consumer interest." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986) (emphasis omitted). When "competition was actually suppressed" by a restraint, the Supreme Court has declared it unlawful without evidence of higher prices or other consumer injury. *Indiana Federation of Dentists*, 476 U.S. at 455-56, 461-62.

Amex prefers limiting competition to the cardholder side of the platform. But the antitrust laws do not permit Amex to use its NDPs to suppress competition on the merchant side of the platform purportedly to benefit cardholders any more than they would permit a city's newspapers to suppress competition in the sale of advertising to provide better content or cheaper subscriptions for readers.[4] Rather, unfettered competition on both sides of the GPCC platform should set the prices.

Even if enhanced cardholder benefits could qualify as a procompetitive effect of Amex's NDPs, that would be an issue for the second step of the burden-shifting framework, under which it was

[4] *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), held that a joint operating agreement (JOA) between two newspapers that eliminated price competition violated the Sherman Act. Congress passed the Newspaper Preservation Act, making antitrust immunity available to certain newspaper JOAs. 15 U.S.C. §§ 1801-04. Congress has not allowed for such immunity in the GPCC industry.

Amex's burden "to offer evidence of the pro-competitive effects of the[] agreement." *Geneva Pharmaceuticals*, 386 F.3d at 507. Amex attempted to make such a showing but failed. The district court "determined as a factual matter" that even if cross-balancing of effects were allowed, that would not render Amex's NDPs lawful, D. Ct. Stay Op. 6 (A658), because Amex did not show that cardholder benefits "offset the harm done in the network services market." SPA135-36. On appeal, Amex does not challenge this finding as clearly erroneous, arguing only that Plaintiffs bore the initial burden of disproving these procompetitive effects.

In any event, Plaintiffs did prove that Amex's NDPs caused a net price increase to merchants and cardholders. The trial yielded no "reliable measure of [Amex's] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders." SPA112. But the court held that "Plaintiffs have provided sufficient circumstantial evidence and expert testimony" to prove that Amex's NDPs were "integral" to the success of its Value Recapture price increases, which "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted

in a higher net price." *Id.* "Indeed, Amex's Chief Financial Officer told investors in June 2013 that Amex 'drop[s]' part of its premium to the bottom line even as it invests part in creating value for cardholders." *Id.* (quoting PX1475 at 2 (A1730)); *see also* Tr. 3853:3-24 (A846).

In addition, the court found that NDPs enabled Visa and MasterCard to raise their merchant fees "without fear of other networks undercutting their prices in order to gain share" and forced Discover "to abandon" its strategy of competing on both sides of the GPCC platform by offering low fees to merchants and competitive rewards to cardholders. SPA113; pp. 19-20, *supra*. And Amex's NDPs "resulted in increased [retail] prices for consumers"—"Amex cardholders and non-cardholders alike"—so that even customers without Amex cards pay higher prices. SPA99, 112-14. These findings amply satisfy Plaintiffs' initial burden.

III. The District Court Properly Found The Relevant Product Market To Be GPCC Network Services

Amex claims that the district court's inadequate consideration of its NDPs' effects on cardholders "cut[s] across its doctrinal analysis" and invalidates its definition of the relevant product market. *See* Amex Br. 33, 54-58. According to Amex, the relevant product market should have

included "cardholders—who are one half of each GPCC transaction." Amex Br. 54. But "market definition is a deeply fact-intensive inquiry," *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001), and Amex does not challenge any of the court's factual findings as clearly erroneous. Rather, Amex misreads the law on market definition and again proposes an unworkable and unprecedented standard.

The relevant market is the "locus of competition[] within which the anti-competitive effects . . . [are] to be judged." *Brown Shoe*, 370 U.S. at 320-21. It "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). In arguing that the relevant product market should include both card-issuance services to cardholders and network services to merchants, Amex ignores this most fundamental principle of market definition. Services that issuing banks provide to cardholders are not reasonably interchangeable with services that networks provide to merchants, nor does Amex suggest otherwise.

The district court applied standard market-definition methods and found that the relevant market for analyzing the competitive effects of

Amex's NDPs was GPCC network services. Relying on Dr. Katz's analysis, the court first applied the hypothetical monopolist test, which "has been used routinely by courts in the Second Circuit" to determine which products are reasonably interchangeable. SPA47 (citing *Todd*, 275 F.3d at 202, and other cases). This test supported a GPCC network services market: A "hypothetical monopolist" of such services could profitably impose a "small but significant and non-transitory price increase" on the "relevant consumer," the merchants, with no change in the price to cardholders, because few merchants would abandon GPCC cards in response to such a price increase. SPA47-53;[5] *see AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999) (a market "is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level" (emphasis omitted)).

[5] Dr. Katz showed—and the district court found—that a hypothetical monopolist could profitably impose a significant increase in (i) the full merchant discount rate or in (ii) just the network fee portion. SPA47-50; Tr. 3903:19-3904:10, 3922:9-3924:24 (A849, 854-55); PX2702 at 55-56, 59-61 (A1939-40, 1943-45). Amex's accounting does not designate a network portion of its merchant fee, so Dr. Katz relied on an Amex benchmarking study for an estimate of Amex's implicit network fee. Tr. 3914:20-3915:17 (A852-53).

The economist amici claim that the court's application of the hypothetical monopolist test should have considered the impact of an increase in merchant fees on cardholders and any consequent "feedback on the first side of the two-sided market." Econ. Am. Br. 16. Amex has not raised this issue here or below, so it is forfeited. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). Moreover, Dr. Katz "allow[ed] for the possibility" of "cross-platform feedback effects" in his analysis. SPA48-49; Tr. 3904:5-10 (A849). Because few merchants would abandon GPCC cards in response to a price increase, it was implausible that cardholders would materially reduce their usage of GPCC cards. Accordingly, Dr. Katz had no reason to believe there would be significant feedback effects on the cardholder side of the platform.

The district court also took a "pragmatic, factual approach to the definition of the relevant market," *Brown Shoe*, 370 U.S. at 336, and determined that the "competitive realities" established a network services market. *See* pp. 25-26, *supra*. The court found that there are distinct avenues of competition for network services to merchants and for card-issuing services to cardholders—with each involving different competitors, services, and consumers—and that there are no reasonably

interchangeable substitutes for GPCC network services. *See* SPA41-43. Both the Supreme Court and Second Circuit have focused on such differences when defining markets. *See Brown Shoe*, 370 U.S. at 325 (looking to "practical indicia" such as "peculiar characteristics and uses," "distinct prices," "distinct customers," "specialized vendors"); *Geneva Pharmaceuticals*, 386 F.3d at 496-99 (same).

Furthermore, the court found that *Visa* supported a GPCC network services market. The *Visa* district court adopted the two relevant markets that Dr. Katz proposed for analyzing the effect of the challenged restraints: "the general purpose card network services market" and "the general purpose card market." 163 F. Supp. 2d at 331, 334-39. And this Court "agree[d]" that the GPCC platform encompassed "two interrelated, but separate, product markets" for GPCC network services and for GPCC cards. 344 F.3d at 238-40.

Amex does not dispute the relevance or legitimacy of the foregoing methods of market definition, but it insists that the relevant market must encompass the entire "spectrum of competition that is impacted by the challenged restraint." Amex Br. 55. No decision, however, supports

this proposition, which would expand the scope of the relevant product market beyond reasonably interchangeable products.

Amex cites *City of N.Y. v. Group Health Inc.* for this proposition (Amex Br. 55), but *Group Health* holds that the "relevant market must be defined as all products reasonably interchangeable by consumers for the same purposes." 649 F.3d 151, 155 (2d Cir. 2011) (internal quotation marks omitted). Amex relies on this Court's observation that the relevant market is the arena "in which the challenged [restraint] will impair competition," Amex Br. 55 (quoting 649 F.3d at 158), but here that arena is GPCC network services.

Amex cites *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994), for the principle that "the relevant market definition must encompass the realities of competition." Amex Br. 55. The district court embraced this principle, *see* SPA38 (quoting *Balaklaw*), and based its market definition on extensive factual findings about the competitive realities. SPA40-43, 53-61. Amex challenges none of these findings as clearly erroneous.

To be sure, Amex competes at both the network-services level and card-issuance level—unlike Visa and MasterCard, which just provide

network services. But there is no rule of law that the relevant market must "closely resemble Amex's chosen business strategy." SPA43. In *United States v. Eastman Kodak Co.*, the court defined a product market for "amateur color negative photographic film," without considering the camera market in which Kodak also competed. 63 F.3d 95, 98-99, 104 (2d Cir. 1995).

Amex's argument that the court must define a single "transactions" market combining all parts of an industry affected by the challenged restraint is also contradicted by numerous decisions defining multiple distinct markets when conduct affects multiple sets of non-interchangeable products. In *Brown Shoe*, for example, the Supreme Court analyzed the impact of the merger separately in men's shoes, women's shoes, and children's shoes. 370 U.S. at 325-28, 336. Likewise, this Court considered five product markets in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 269 (2d Cir. 1979).

The law is the same when products are "distinct yet interrelated." SPA41. In *Times-Picayune*, the Supreme Court recognized that newspapers operate in two "separate though interdependent markets" for advertising and circulation, but the Court defined only the

advertising market because the government alleged harm only to advertisers. 345 U.S. at 610. Likewise, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, the Supreme Court rejected the argument that "there cannot be separate markets for service and parts" simply because demand for each depends on the other. 504 U.S. 451, 463 (1992). And, of course, this Court did not require a single combined market in *Visa*. 344 F.3d at 238-39.

At trial, Amex "urged the court to depart from the decisions in *Visa* and to define the relevant product market in terms of 'transactions.'" SPA41. On appeal, however, Amex argues that the district court did not follow *Visa* closely enough because it did not also define a market for card-issuing services. Amex Br. 55-56. But no one asked the court to define such a market. Plaintiffs did not because, unlike in *Visa*, they did not allege harm to competition in a card issuance market. And despite arguing that benefits to cardholders were relevant effects, Amex never asked the court to define a card issuance market in which the cardholders are consumers.

In any event, the district court's definition of the market did not, as Amex claims, cause it to "exclude those [cardholder] consumers" from

its analysis of the NDPs' effects. Amex Br. 54. The district court considered but rejected Amex's cardholder-side contentions as insufficient to offset the proved anticompetitive effects, finding that Amex "failed to establish" that any gains in cardholder-side competition "offset the harm done in the network services market." SPA135; *see also* SPA112 ("Amex's Value Recapture price increases were not wholly offset by additional rewards expenditures"). The court also found that all retail customers, "cardholders and non-cardholders," paid higher prices. SPA99.

Amex claims incongruity in defining the relevant market as GPCC network services when activity on the cardholder side of the platform is important to the court's competitive-effects and market-power analyses. Amex Br. 56-58, 76 n.19. Amex observes in particular that cardholder insistence derives from conduct on "the issuing side that the court excluded." *Id*. But services provided to cardholders are not reasonably interchangeable with services provided to merchants, and the relevant market need not be defined to include everything that might be material to competition. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51-54, 58-78 (D.C. Cir. 2001) (exclusionary actions targeting

out-of-market middleware products protected Microsoft's monopoly in the relevant market, Intel-compatible operating systems). The district court correctly concluded that the merchant side of the platform is the relevant "locus of competition," *Brown Shoe*, 370 U.S. at 320-21, and defined the market accordingly.

Amex notes that fees for network services are "just a small fraction of the merchant discount rate," yet the district court focused on the full merchant discount rate. Amex Br. 56. But the court addressed the full merchant discount rate because that is what merchants pay, whereas the fee for just network services was, appropriately, mentioned only in a calculation related to the hypothetical monopolist test. *See* p. 79 n.5, *supra*. Nothing in Amex's brief undermines the court's key finding that merchants and cardholders are "separate avenues of competition." SPA42. The court properly rejected Amex's proposal for a single "transactions" market encompassing both.

Even accepting Amex's proposed market for the chimerical product "transactions," Amex's NDPs cannot be sustained. Plaintiffs satisfied their initial burden directly by proving that the NDPs disrupted the price-setting mechanism in dealings with merchants, "who are one half

of each GPCC transaction," Amex Br. 54; resulted in a "higher net price," SPA112; and blocked innovation, SPA115-16—all of which are still actual anticompetitive effects. *See* pp. 63-66, *supra*. And under the indirect approach, the record demonstrates that Amex would still have market power in this "transactions" market. Amex agrees that purchase volume is the "proper measure of output," Amex Br. 43, so its market share would be the same. *See* Section IV.C, *infra*. And Amex's Value Recapture initiatives, which raised the "net price," SPA79, would remain direct proof of market power. *See* Section IV.B, *infra*.

Finally, Amex suggests in a footnote that the district court improperly excluded debit from the relevant market, because "consumers routinely use debit cards interchangeably with credit and charge cards." Amex Br. 9 n.1 (citing SPA45-61). This issue, however, is not addressed anywhere else in Amex's brief and thus is forfeited, because "an argument made only in a footnote [is] inadequately raised for appellate review." *Norton*, 145 F.3d at 117.

IV. The District Court Properly Found That Amex Has Market Power

Market power is the ability of a seller to "force a purchaser to do something that [it] would not do in a competitive market," *Image*

Technical Services, 504 U.S. at 464, including "the ability to raise price significantly above the competitive level without losing all of one's business," *K.M.B. Warehouse*, 61 F.3d at 129. In a rule-of-reason case, market power denotes "the capacity to harm competition." Amex Br. 33 n.11. It "may be proven directly by evidence of the control of prices" or "may be inferred" from market share and other market characteristics. *Tops Markets*, 142 F.3d at 98; *Todd*, 275 F.3d at 206.

The district court followed the "roadmap" from *Visa* and found that Amex has market power in the GPCC network services market based on its significant market share, the high degree of market concentration, and Amex cardholder insistence. SPA66-77. And it found that Amex's Value Recapture price increases raised fees above the competitive level, generating $1.3 billion in incremental pre-tax income to Amex without significant merchant attrition. SPA78-82.

Amex does not challenge any of the district court's detailed factual findings or argue that the evidence as a whole did not prove market power. While Amex does raise several legal challenges to the court's analysis of the Value Recapture evidence and cardholder insistence, its arguments are meritless.

A. Actual Anticompetitive Effects Establish Market Power

When "a plaintiff can show an actual adverse effect on competition," this Court "do[es] not require a further showing of market power." *K.M.B. Warehouse*, 61 F.3d at 129. "[A]n actual adverse effect on competition . . . is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures." *Todd*, 275 F.3d at 206. This is so in a rule-of-reason case because the market-power inquiry asks whether the defendant had "sufficient market power to inhibit competition market-wide." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008). An actual anticompetitive effect *a fortiori* establishes the "potential for genuine adverse effects on competition," which is the "requisite market power." *Capital Imaging*, 996 F.2d at 546.

Amex argues that the Value Recapture evidence alone cannot establish an anticompetitive effect. Amex Br. 58. But Amex does not challenge the district court's other findings of actual anticompetitive effects on interbrand competition, *see* pp. 32-34, 63-66, *supra*, which establish market power without the Value Recapture evidence. In any event, the court properly analyzed the Value Recapture evidence.

B. Amex's Value Recapture Price Increases Establish Market Power

The district court found that Amex's Value Recapture initiatives "increased prices that were already at or above the competitive level" on millions of merchants that account for 65% of its charge volume, and that this resulted in $1.3 billion in incremental pre-tax income to Amex during 2006-10. SPA79-82. The court further found that no large merchant dropped Amex and "relatively few" small merchants did. SPA78. This evidence was "compelling" proof of Amex's market power, SPA67, because it directly showed that Amex could "raise price significantly above the competitive level without losing all of [its] business," *K.M.B. Warehouse*, 61 F.3d at 129.

Amex's challenges as "pure ipse dixit" the factual finding that its prices "were already at or above the competitive level" before Value Recapture, SPA79. *See* Amex Br. 65. But this finding is amply supported by the record. Dr. Katz testified that Amex started at "prices that were not below the competitive levels." Tr. 3985:5-24 (A863). The industry was "concentrated." *Id.* Visa and MasterCard had "been found to have market power," *id.*, and had increased prices, SPA113 (Visa and MasterCard "increase[d] their average all-in merchant rates" by over

20% during 1997-2009). *See Visa*, 344 F.3d at 239-40. And Amex, Visa, and MasterCard each had "anti-steering rules" that dampened price competition. Tr. 3985:12-13 (A863). In these circumstances, it would have been irrational for a profit-seeking firm such as Amex to set its fees below competitive levels. Dr. Katz's conclusion was not based on the fact that Amex's fees exceeded its competitors'—much less based "sole[ly]" on it, as Amex claims (Amex Br. 65). Amex does not attack his actual reasoning.

Amex mistakenly suggests that the district court found that "Amex's primary justification for the Value Recapture price increases was that its prices had not kept up with [prior product] improvements." Amex Br. 66. The court found, rather, that Amex increased fees to respond to its shrinking price premium over its competitors, SPA79, which was largely attributable "to price increases by Visa and MasterCard." SPA89 (describing PX0357 at '952, '959 (A1304, 1311)). Amex also incorrectly states that the court "did <u>not</u> accept the Government's evidence that Amex charges a premium to Visa and MasterCard." Amex Br. 65 (Amex's emphasis). The court found that Amex had a price premium as of 2013—"the last year for which data was provided." SPA86.

Amex and the economist amici argue that the Value Recapture evidence is insufficient as a matter of law to prove market power because there was no evidence of costs or margins. Amex Br. 58-62, 64-68; Econ. Am. Br. 9. But the district court did not need data on Amex's costs or margins to conclude that it had raised prices to supracompetitive levels. While the court declined to rely on Amex's price premium to establish that its prices were supracompetitive, SPA84-90, it properly found that Amex's Value Recapture initiatives, which increased merchant fees "already at or above the competitive level," established supracompetitive pricing, SPA78-84. As the court found, "these Value Recapture initiatives were not paired with offsetting adjustments on the cardholder side of the platform, [and thus] the resulting increases in merchant pricing are properly viewed as changes to the net price charged across Amex's integrated platform." SPA79. Relying on Amex's internal analyses, the court also found "that Value Recapture was profitable on a return-on-investment basis." SPA82 (citing PX1753-A at '032-33; PX0008 at '487-89; Tr. 2688:12-2689:11 (A1806-07, 927-29, 789-90)).

Amex points to the court's statement that there was no "reliable measure of [Amex's] per transaction margins across its industry groups," SPA84. *See* Amex Br. 58-59. But that statement concerned comparisons across different industry groups at a given time. It has no bearing on changes over time, and thus does not undermine the court's finding that the "net price" increased during the Value Recapture period. SPA79, 112.

Moreover, market power can be proved without data on costs or margins through "evidence of specific conduct undertaken by the defendant that indicates he has the power to affect price." *Visa*, 344 F.3d at 239. Without looking to costs or margins, the *Visa* Court found it highly significant that, "despite recent increases in both networks' interchange fees, no merchant had discontinued acceptance of their cards." 344 F.3d at 240. That is what the Value Recapture evidence established here.

In arguing that data on costs and margins are always required, Amex relies on analyses of monopoly claims under § 2 of the Sherman Act in *Geneva Pharmaceuticals* and *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002). *See* Amex Br. 59-60. But neither is on point

because monopoly power under § 2 requires "something greater than market power under § 1." *Image Technical Services*, 504 U.S. at 481.

Also, the circumstances in *Geneva Pharmaceuticals* and *PepsiCo* are nothing like those here. In *Geneva Pharmaceuticals*, this Court found that, without cost evidence, a price decline following a rival's entry was insufficient to prove the defendant had charged a monopoly price. 386 F.3d at 500. That is not like the proof here that Amex significantly increased prices that were "already at or above the competitive level." SPA79. And *PepsiCo* did not involve pricing evidence at all. Rather, this Court concluded that the unsupported contention that the defendant controlled a low-cost distribution channel did not suffice to show monopoly power. 315 F.3d at 108.

Amex insists that no conclusion can be drawn from its price increases because GPCC purchase volume rose. Amex Br. 67-68. But Amex did not raise this argument below and thus has forfeited it. *Norton*, 145 F.3d at 117. Moreover, the driving force behind this volume increase was growth in the economy. *See* p. 60, *supra*. And the *Visa* Court relied on price-increase evidence without examining any trends in output. 344 F.3d at 240.

C. Amex's Market Share And Cardholder Insistence Establish Market Power

The district court also relied on traditional market analyses to find that Amex has market power. SPA67-78. The court found that Amex has a 26.4% share of the relevant market, which is highly concentrated and has high barriers to entry. SPA67-70. The court noted that "Amex's market share alone likely would not suffice to prove market power," but it found that Amex possesses market power based on "competitive dynamics" in the GPCC network services market, especially "the amplifying effect of cardholder insistence." SPA66, 71. The court also observed that, "in terms of raw percentage share of the relevant market, [Amex] is larger today than MasterCard was at the time of the *Visa* litigation," SPA68, in which this Court held that MasterCard "separately" possessed market power in the network services market. 344 F.3d at 239-40.

Amex seeks to distinguish *Visa* on the ground that MasterCard had "entrenched, durable ubiquity." Amex Br. 78. But there is no mention of MasterCard's ubiquity in the *Visa* Court's discussion of market power. *See* 344 F.3d at 240. This Court cited merchants' testimony "that they could not refuse to accept payment by Visa or MasterCard, even if faced

with significant price increases, because of customer preference." *Id.* The same is true here, even if the reasons some cardholders insist on Amex differ from the reasons others insisted on MasterCard.

There was extensive evidence at trial on how cardholder insistence "affords [Amex] significant power over merchants." SPA73. The head of Amex's pricing unit admitted that "insistence" is "real and strong." SPA76 (citing PX0031 at '668, '671 (A959, 962)). Amex "quantifie[d] and leverage[d]" insistence when dealing with merchants, targeting industries "with relatively high rates of cardholder insistence" for "multiple rounds of price hikes." SPA72-80; p. 29, *supra*. Amex emphasized to airlines the "hundreds of millions in charge volume that would be put 'at risk' by not accepting [a] price increase." SPA75 (citing PX0111 at '806, '814 (A1155, 1163); PX1601 at '263, '271 (A1748, 1756); PX0517 at '026 (A1329)). And it told restaurants that "[a]lmost half [of Amex cardholders] would not return, would return less often, and/or would spend less if they did return if [Amex] was not accepted." PX0957 at '916 (A1491).

Moreover, Walgreens' reversal of its plans to drop Amex and Murphy Oil's failed attempt to drop Amex provided "real world"

examples of the "strong" power of cardholder insistence. SPA76-77; pp. 12-13, *supra*. Amex argues that [redacted]

[redacted]

[redacted] Amex Br. 79 n.20. But far more instructive is what happened afterward: so many customers complained about not being able to use Amex cards that Walgreens "ultimately 'capitulated' to [Amex] and agreed to a new acceptance agreement containing the pricing terms that were substantially similar to those [Walgreens] had previously deemed unacceptable." SPA76; pp. 12-13, *supra*.

Amex argues that cardholder insistence cannot be a source of market power because it derives primarily from its investment in cardholder rewards. Amex Br. 72-73. But rewards are not the only substantial source of cardholder insistence. SPA72. A "significant degree of insistent spending" is driven by Amex's "industry-leading corporate card program." *Id.* "[A]pproximately 70% of Corporate Card consumers are subject to some form of 'mandation' policy," SPA72-73, which means, as Amex has stated, that "MOST of them HAVE TO use their cards when paying for . . . business expenses," PX1689 at '547

(A1781). "Amex captured 64.3% of corporate card spend in first half of 2013." SPA72 (describing PX2486 at '053 (A1855)).

Nor does any authority support Amex's argument that insistence cannot be a source of market power, as a matter of law, because it is maintained through continued investment. Amex Br. 73-74; Econ. Am. Br. 8. Firms rarely enjoy significant market power without making substantial investments and cannot enjoy it for long without continuing investment. As the D.C. Circuit explained in *United States v. Microsoft*, "even monopolists have reason to invest in R&D" because "innovation can increase an already dominant market share and further delay the emergence of competition." 253 F.3d 34, 57 (D.C. Cir. 2001).

Similarly flawed is Amex's claim that cardholder insistence cannot be a source of market power because it "obtains cardholder loyalty by decreasing its price" through offering rewards. Amex Br. 73-74. No firm would enjoy customer loyalty if it charged too high a price. And Amex has not decreased its price in recent years, even accounting for cardholder benefits. Amex's Value Recapture initiatives substantially increased merchant fees without "offsetting adjustments on the

cardholder side of the platform," thus resulting in a higher "net price." SPA79, 112.

Amex claims that "this Circuit and others have held that brand loyalty and consumer preference are insufficient to establish antitrust market power" as a matter of law. Amex Br. 75. But, as the district court found, Amex's cardholder insistence is not "mere 'brand loyalty.'" SPA73-74. In any event, there is no such rule. "[I]t is settled that customer brand loyalty may constitute an impediment to competition and thus an aid in the exercise of market power." *U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 998 (11th Cir. 1993); *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 n.4 (9th Cir. 1993).

Eastman Kodak is in accord. *Contra* Amex Br. 75. *Eastman Kodak* favorably cites *U.S. Anchor* as a case where strong brand loyalty created market power. 63 F.3d at 106. This Court concluded that there was insufficient proof of Kodak's market power because the district court had found that film purchasers are "price sensitive, and will shift between Kodak, Fuji and private label film on the basis of changes in price." *Id.* at 108. The facts found here are precisely the opposite. Merchants—the "relevant consumer[s]" of network services, SPA46—

are *not* price sensitive: "With the NDPs in place, merchants lack any meaningful means of controlling their consumption of network services in response to changes in price, short of dropping acceptance altogether." SPA98. Thus, while Amex's rewards and corporate-card services undoubtedly provide value to cardholders, they also give Amex market power, as they "severely impede[]" merchants' abilities to "resist potential anticompetitive behavior by Amex, including significant price increases." SPA71.

The economist amici emphasize that millions of merchants do not accept Amex cards, arguing that there "is no meaningful economic difference" between dropping the Amex card in the face of a fee increase and not accepting it in the first place. Econ. Am. Br. 7. But they ignore the district court's finding that "Amex affirmatively has elected not to reduce prices in order to expand merchant coverage." SPA94. The record is clear that cardholder insistence gives Amex significant market power over millions of merchants that accept its cards, even if not with respect to many smaller merchants.

Amex suggests that its market share is too low for it to have market power, claiming that "no court in <u>any</u> circuit has <u>ever</u> found that a firm

violated Section 1 with a share of the relevant market below 30 percent absent proof of horizontal collusion." Amex Br. 70 (Amex's emphasis). But in *Eiberger v. Sony Corp. of America*, this Court affirmed a rule-of-reason judgment for plaintiffs in a vertical-restraint case where the defendant had a 12% share. 622 F.2d 1068, 1080-81 n.23 (2d Cir. 1980). And in *Toys 'R' Us, Inc. v. FTC*, the Seventh Circuit upheld a finding that the defendant toy retailer had market power with a 20% share because the FTC had proved actual anticompetitive effects (as an alternative holding on a vertical theory). 221 F.3d 928, 936-37 (7th Cir. 2000).

Amex seeks to distinguish *Toys 'R' Us* on the basis that the court focused not on the 20% share of toy sales but rather the 40% of the upstream market covered by the restraints. Amex Br. 71-72 n.18. But here the district court found that Amex's NDPs "effectively block[] interbrand competition on price across an entire market," SPA133, as they apply to all GPCC transactions at millions of merchants together accounting for the vast majority of GPCC purchase volume. *See* pp. 5-6, *supra*. Thus, Amex's reading of *Toys 'R' Us* undoes its market-share threshold argument.

Amex also is wrong to suggest that firms with less than a 30% market share are presumed to lack market power as a matter of law. Amex Br. 70. “Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.” *Image Technical Services*, 504 U.S. at 466-67. This Court has refused to adopt hard-and-fast market-share thresholds, noting that “the true significance of market share data can be determined only after careful analysis of the particular market.” *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 127-28 (2d Cir. 1981).

The district court in *Commercial Data Servers, Inc. v. IBM Corp.*, 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003), asserted such a presumption, but it relied primarily on *per se* tying cases. In rule-of-reason cases, this Court has rejected a one-size-fits-all approach to market share, holding that a plaintiff need only “show[] that the defendant’s share exceeds whatever threshold is important for the practice in the case.” *Todd*, 275 F.3d at 206 (quoting *Toys ‘R’ Us*, 221 F.3d at 937). What matters is that the defendant has sufficient ability “to inhibit competition market-wide.” *Salvino*, 542 F.3d at 294. The district court properly found that Amex has that ability with a 26.4% share, just as MasterCard did in

Visa with a 26% share. 344 F.3d at 239-40. Even if there were a market-share-based presumption that Amex lacked market power, it would have been overcome by the evidence of the "amplifying effect of cardholder insistence," SPA71, and of the actual marketwide anticompetitive effects, SPA136.

Amex is right that market power is not of antitrust concern when rivals would quickly and cheaply defeat an attempt to exercise it. Amex Br. 74. But the durability of market power is a factual question. *See AD/SAT*, 181 F.3d at 229. The district court found "the durability of Defendants' power is ensured by the sustained high barriers to entry in the network services market" and "the decades-long persistence of the restraints at issue in this case." SPA78. Amex does not challenge this finding as clearly erroneous.

Amex suggests that "competition by existing competitors" could defeat its exercise of market power. Amex Br. 76-77. But the district court did not, as Amex claims, "ignore" that possibility. *Id.* The court found that cardholder insistence "severely impeded" the "ability of merchants to resist potential anticompetitive behavior by Amex, including significant price increases, by shifting customers to less

expensive credit card networks." SPA71. It also found that Amex's NDPs suppress its rivals' incentives to offer merchants "lower priced payment options." SPA100. And it found that Amex's NDPs had, in fact, suppressed competition from all its GPCC network rivals. SPA104-11.

V. The District Court's Liability Analysis And Injunction Comport With *Colgate*

Colgate holds that the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal." *In re Adderall XR Antitrust Litig*, 754 F.3d 128, 134 (2d Cir. 2014). Amex's reliance on *Colgate* to attack the court's liability analysis and injunction is misplaced.

"As to liability," Amex claims that the district court failed to account properly for Amex's "right not to do business with merchants who undermine its brand" when assessing the NDPs' impact. Amex Br. 80-81. "Before it could find that the NDPs' limitations on steering had an anticompetitive effect," Amex argues, the court needed "to determine how competition in fact would have been different in the but-for world absent the NDPs but with Amex taking unilateral action to curb steering." *Id.*

The district court, however, justifiably found that there would have been substantially more steering in the but-for world. SPA99. Amex conceded below that unilaterally terminating merchants that steer was *not* a "feasible alternative" to enforcing its NDPs. Doc. 605, at 19 n.8 (A256). As it explained, "it is far more efficient" for Amex to prevent steering through "contractual provisions" than "attempt to do so through a noncontractual cancellation policy." *Id*. The purported error, thus, goes only to the magnitude of the anticompetitive effect caused by its NDPs, not whether an anticompetitive effect existed. As Amex itself previously told this Court, "[c]onditioning antitrust liability on proof of how much prices have increased or output has been reduced is a concept the Supreme Court has consistently rejected for over 100 years." Amex *Visa* Am. Br. 14-15 (emphasis omitted).

Amex's argument that *Colgate* "vitiates the resulting injunction" (Amex Br. 80) also is unsound. The injunction bars Amex from using its NDPs to prevent merchants from steering by offering a discount or nonmonetary incentive, expressing a preference, or engaging in an equivalent practice. SPA154-56. Amex asked the court for a provision permitting it to terminate merchants who engaged in this steering,

arguing that *Colgate* required it. SPA184. The court refused. SPA185.

As the court explained, "[i]n an antitrust case, 'courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities.'" SPA174 (quoting *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960)); *see* SPA187-88. It would be "absurd" if *Colgate* "authorized Amex to continue, through its market power and a non-contractual 'refusal to deal,' the very practice deemed unlawful in the court's Decision." SPA185.

Amex claims that this determination "unjustifiably trampled" on its *Colgate* right not "to deal with merchants in the first place." Amex Br. 83. But Amex disregards the well-established principle that the "law violator" does not "stand in the same position as an innocent party." *United States v. Paradise*, 480 U.S. 149, 193 n.3 (1987). In antitrust cases, "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests," *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), and antitrust violators "must expect some fencing in," *Otter Tail Power Co. v. United States*, 410 U.S. 366, 381 (1973). The

fact that an injunction impinges upon "rights that would otherwise be . . . protected" does "not prevent [the court] from remedying the antitrust violations." *Professional Engineers*, 435 U.S. at 697-98.

For example, in *Toys 'R' Us*, the court held that *Colgate* was no hurdle to an injunction barring the defendant from refusing to deal with suppliers that sold to discounters. 221 F.3d at 939-40. Amex argued below that *Toys 'R' Us* was distinguishable because refusals to deal were part of the conduct found illegal in that case. Doc. 623, at 29 (A628). But Amex threatened to and did terminate steering merchants. *See* p. 18, *supra*.

Applying this law, *see* SPA185-86, the district court acted within its discretion in denying Amex's request for permission to terminate merchants that steer. As the court recognized, such permission would have rendered "the Government's vindication of the public's rights entirely illusory." SPA186.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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October 21, 2015

CERTIFICATE OF COMPLIANCE

On June 26, 2015, this Court granted Plaintiffs-Appellees leave to file an oversize brief up to 20,000 words. This brief contains 19,895 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

October 21, 2015

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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on October 21, 2015, I electronically filed the foregoing Redacted Final Form Brief for Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent six copies of this brief to the Clerk of the Court by FedEx Overnight Delivery, along with six copies of the Sealed Final Form Brief for Plaintiffs Appellees (for which this Court granted leave to file on September 18, 2015).

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

October 21, 2015 /s/ Nickolai G. Levin
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