No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, and VERMONT,
Petitioners,

v.

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

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

BRIEF OF AMICI CURIAE FORMER FEDERAL ANTITRUST OFFICALS

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TABLE OF CONTENTS

Table of authorities ii

Interest of amici curiae 1

Introduction and summary of argument 2

Argument 3

I. In light of this Court's special role in shaping antitrust doctrine, and the fundamental and economically important questions concerning the rule of reason presented here, certiorari is warranted. 3

II. This Court should grant certiorari despite the federal government's failure to join the petition—especially given the role of the states in this litigation. 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

Albrecht v. Herald Co.,
390 U.S. 145 (1968) 6

California Dental Ass'n v. F.T.C.,
526 U.S. 756 (1999) 7, 8

California v. American Stores Co.,
495 U.S. 271 (1990) 8

Chicago Board of Trade v. United States,
246 U.S. 231 (1918) 6

F.T.C. v. Actavis, Inc.,
133 S. Ct. 2223 (2013) 5, 7

F.T.C. v. Indiana Federation of Dentists,
476 U.S. 447 (1986) 8

F.T.C. v. Superior Court Trial Lawyers Ass'n,
493 U.S. 411 (1990) 8

Hartford Fire Insurance Co. v. California,
509 U.S. 764 (1993) 8

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 2, 5

National Society of Professional Engineers v. United States,
435 U.S. 679 (1978) 5, 7

Pacific Bell Telephone Co. v. Linkline Communications, Inc.,
555 U.S. 438 (2009) 4

Standard Oil Co. v. United States,
221 U.S. 1 (1911) 5

State Oil Co. v. Khan,
522 U.S. 3 (1997) 6

Texaco Inc. v. Dagher,
547 U.S. 1 (2006) 7

Times-Picayune Publishing Co. v. United States,
345 U.S. 594 (1953) 7

United States v. American Telephone & Telegraph Co.,
714 F.2d 178 (D.C. Cir. 1983) 4

United States v. American Tobacco Co.,
221 U.S. 106 (1911) 6

Statutes

15 U.S.C. § 1 5

15 U.S.C. § 15c 8

15 U.S.C. § 29(b) 4

Other authorities

Donald I. Baker, *The DOJ's regrettable 'no appeal' decision in Amex*, Global Competition Rev. (June 13, 2017) 4, 10

William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*,
60 Tex. L. Rev. 661 (1982) 5

Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673 (2003) 9

David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667 (2005).....7

Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983) 5

Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004 (2001) 9

Pamela Jones Harbour, *The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?*, The Antitrust Source (Dec. 2007).....4

Herbert Hovenkamp, *The AntiTrust Enterprise: Principle and Execution* (2005).....4

Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. Rev. 871 (2011).....4

Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks Before the New York State Bar: Antitrust and Federalism (Jan. 23, 2002) 9

R. Hewitt Pate, Assistant Attorney General, U.S. Department of Justice, Address to the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004).....4, 6

Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DePaul Bus. & Com. L.J. 1 (2013).....6

INTEREST OF AMICI CURIAE[1]

The amici curiae are former federal antitrust officials. They submit this brief to lend their expertise on the development and enforcement of antitrust law. This brief explains why this Court should grant certiorari to clarify the burden of proof under the rule of reason in cases involving "two-sided platforms." It also explains why the Acting Solicitor General's failure to join the states' petition should not dissuade the Court from addressing this important issue.

Donald Baker served as Assistant Attorney General in the Antitrust Division of the United States Department of Justice during the Ford and Carter Administrations. Baker served for nearly a decade on the Antitrust Division career staff, and he was the Deputy Assistant Attorney General responsible for overseeing the appellate, economic, and policy planning staffs of the Division (1972–75). He was a Professor of Law at the Cornell Law School (1975–78), and is now an Adjunct Professor at the George Washington University School of Law.

Albert A. Foer served in various capacities in the Federal Trade Commission's Bureau of Competition, including as Acting Deputy Director (1975–81). He was a Commissioner on the National Commission on Electronic Fund Transfers in the mid-1970s. After departing government service, Foer was CEO of a retail company and in 1998 founded the American Antitrust Institute (AAI), which he led until his retirement in 2014. Under Foer's leadership, the AAI grew to be the nation's leading public-interest organization principally dedicated

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

to the well-informed yet aggressive enforcement of the antitrust laws. Foer currently serves as a Senior Fellow at AAI, although he speaks only for himself through this brief.

Don Allen Resnikoff served for twenty years as an antitrust litigator with the Antitrust Division of the United States Department of Justice, and eight years as Senior Assistant Attorney General with the District of Columbia Office of the Attorney General, specializing in affirmative antitrust litigation. He has been active in private litigation involving electronic payment issues.

Maurice E. Stucke served for over a decade as an antitrust litigator with the Antitrust Division of the United States Department of Justice. He is a law professor at the University of Tennessee, and serves as one of the United States' non-governmental advisors to the International Competition Network, as a Senior Fellow at the American Antitrust Institute, and on the board of the Institute for Consumer Antitrust Studies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This petition involves an antitrust issue of exceptional importance to the modern economy: the application of the rule of reason to industries that function as two-sided platforms. "In a two-sided platform," a firm "sells different products or services to two separate yet interrelated groups of customers"—like merchants and consumers in the credit-card industry. Pet. App. 77a. The district court and court of appeals disagreed on what burden of proof antitrust plaintiffs must bear in such circumstances.

Clarity about this key element of the antitrust-enforcement regime is necessary for the law to "evolve to meet the dynamics of present economic conditions." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). And this Court's central role in

shaping the common law of antitrust makes its review of this discrete legal issue both timely and appropriate in this case, especially because this Court has had few opportunities to weigh in on cases brought by government antitrust authorities over the last forty years.

The Acting Solicitor General's failure to join this petition—at a time when both the Antitrust Division and the Solicitor General's office lack Senate-confirmed leadership—does not diminish the importance of clarifying the proper burden of proof in two-sided platform antitrust cases. The government plaintiffs are ably represented by eleven sovereign states. And, of course, the federal government's voice need not go unheard. The Court may call for the views of the Solicitor General, both as to this petition and on the merits.

ARGUMENT

I. In light of this Court's special role in shaping antitrust doctrine, and the fundamental and economically important questions concerning the rule of reason presented here, certiorari is warranted.

This case presents exceptionally important issues of antitrust law—issues that are both critical to the functioning of our economy and necessary to ensure that federal courts have sufficient guidance in antitrust litigation. In the decision below, the Second Circuit reasoned that the district court should have treated the merchant and consumer markets together, and that the government had failed to carry its burden to show, in the first instance, that both sides of the platform were "worse off overall." Pet. App. 51a. The states now seek this Court's review to clarify the proper burden of proof for antitrust plaintiffs in two-sided platforms like the credit-card industry.

Clarifying the burden of proof for two-sided platforms under the rule of reason is a prudent and timely use of the Court's limited docket. "[I]n the last quarter of the twentieth Century" the Court's antitrust docket did not keep pace with an increasingly complex economy. R. Hewitt Pate, Assistant Att'y Gen., U.S. Dep't of Justice, Address to the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004). Instead, the Court "began hearing fewer antitrust cases." *Id.* The shift especially affected government-initiated antitrust litigation after the 1974 amendments to the Expediting Act, 15 U.S.C. § 29(b), which "dramatically altered appellate procedure" by effectively terminating direct Supreme Court review of these appeals. *United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178, 181 (D.C. Cir. 1983). As a result, "disputes . . . between private parties" predominate, and "the cases finding their way to the Court no longer reflect the [government's] enforcement agenda." Pamela Jones Harbour, *The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?*, The Antitrust Source (Dec. 2007), at 2.

This trend has begun to reverse in recent years. Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. Rev. 871, 872 & n.2 (2011) (citing Herbert Hovenkamp, *The AntiTrust Enterprise: Principle and Execution* 6 (2005)). But this Court's review of cases pursued by antitrust authorities remains exceedingly rare. Donald I. Baker, *The DOJ's regrettable 'no appeal' decision in Amex*, Global Competition Rev. (June 13, 2017), http://bit.ly/2sNSLxx. Given the importance of "clear rules" to business and consumers, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 452 (2009), and the dilemma of sometimes "amorphous" rule-of-reason analysis, *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013) (Roberts, J.,

dissenting), the Court should step in to decide an issue of immense importance to the modern economy.

Congress enacted the Sherman Act to protect consumers and promote competition by prohibiting business practices "in restraint of trade." 15 U.S.C. § 1. Section 1 of the Act is the "kernel" of antitrust law, "embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 662–63 (1982). Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). As a consequence, the antitrust framework "effectively authorize[s]"—and requires—"courts to create new lines of common law." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983). And "[f]rom the beginning," the Court has taken this responsibility seriously, stepping in to adapt antitrust law to "new circumstances and new wisdom," *Leegin*, 551 U.S. at 899–900 (internal quotations omitted), to keep pace with evolving business strategies that "short-circuit the ordinary price-setting mechanism," Pet. App. 71a.

This Court established the contours of the modern antitrust framework in two landmark 1911 opinions announcing the "rule of reason"— the same analysis that the courts below endeavored to apply to American Express's contractual anti-steering provisions in this case. *See* Pet. App. 26a; *id.* at 105a–106a. The guiding principal of antitrust, the Court explained, was the prohibition of "all contracts or acts which were unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). The Act's bar against "restraint of trade," in other words, was not absolute. It only prohibited business practices that

"operated to the prejudice of the public interests by unduly restricting competition." *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911). Seven years later, the Court elaborated, explaining that rule-of-reason analysis requires consideration of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect." *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

In the intervening century, the Court has sought to refine the rule-of-reason framework, addressing changing business models, firm strategies, and economic structures, as well as political, intellectual, and theoretical developments. In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), for example, the Court held that vertical maximum pricing fixing is per se unlawful under the Sherman Act. But, three decades later, it reconsidered and overruled that approach on the basis of "a considerable body of scholarship discussing the effects of vertical restraints" and the "general view that the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

The continued evolution of antitrust law depends on this Court's elaboration of basic legal questions in novel and economically important areas. "[A]t every stage of the journey the most significant mileposts have been decisions of [the] Supreme Court." Pate, *supra*. As a former attorney in the Antitrust Division recently observed, "it is appropriate and often necessary for courts to update the law in order to make sure it continues to serve its function in ever-changing social and commercial realities." Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DePaul Bus. & Com. L.J. 1, 39 (2013). And more recently the Court has continued to elaborate on the scope and application of the rule of reason. *See*

Actavis, 133 S. Ct. at 2237 (holding that rule of reason applies to "reverse payment settlements" by patent holders to infringers); *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999) (applying rule of reason to advertising restrictions imposed by professional association); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (applying rule of reason to joint venture).

The question of what burden of proof to impose on antitrust litigants—in a $2.4 trillion credit-card industry operating on a two-sided platform model, Pet. App. 74a—is a basic issue critical to the operation of the rule of reason, and is thus an appropriate issue for resolution by this Court. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (explaining that defendants bear the burden of justification "under the Rule of Reason."); *Cal. Dental Ass'n*, 526 U.S. at 788 (Breyer, J., concurring in part and dissenting in part) (plaintiff's burden is to show that restraint is *prima facie* anticompetitive; and "the defendant bears the burden of establishing a procompetitive justification").

Indeed, this case offers the Court its first opportunity in over sixty years to consider how the rule of reason should be applied to two-sided platforms. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953) (distinguishing a newspaper's market in readers and advertisers). Whatever the Court's conclusion with respect to the distribution of burdens under rule-of-reason analysis, certiorari is warranted to resolve the issue for the "dominant form of business organization in a wide variety of industries, including many economically significant ones." David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 668 (2005) (citing American Express, Google, the New York Stock Exchange, and Microsoft software platforms).

II. This Court should grant certiorari despite the federal government's failure to join the petition—especially given the role of the states in this litigation.

The fact that the federal government has failed to join the states' petition for certiorari should in no way dissuade this Court from granting review.

From the inception of this litigation in the district court through the petition for en banc review in the Second Circuit, the state petitioners and the U.S. Department of Justice worked hand in glove as co-plaintiffs. This cooperative effort is not unique. The states have long enforced the Sherman Act in their capacity as *parens patriae*—a role statutorily recognized by Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 15c. And the authority of multiple parties—including states—to enforce antitrust law is "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). In addition to antitrust actions brought by private plaintiffs, for example, the Court has ruled on important legal issues in the Federal Trade Commission's enforcement actions. *See, e.g., Cal. Dental Ass'n*, 526 U.S. at 788; *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *F.T.C. v. Indep. Fed'n of Dentists*, 476 U.S. 447 (1986). And state attorneys general have appeared—and prevailed—in the Court more recently than the Antitrust Division. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993) (in a suit brought by nineteen states, applying the Sherman Act to domestic and foreign insurers who conspired to affect the domestic market). The states' petition for certiorari in this Court is perfectly consistent with these precedents.

For the same reasons, concerns regarding the supposed parochialism of state-led antitrust actions are inapposite here, where petitioners have vigorously litigated this case—and the appeal—alongside the Department of Justice. Some critics of state antitrust enforcement raise a variety of concerns: "uncertainty" and "over-deterrence" due to overlapping enforcement authority, the use of "discarded" or rejected antitrust theories, and the improper influence of lobbyists representing "businesses within [the] states." Deborah Platt Majoras, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Remarks Before the New York State Bar: Antitrust and Federalism (Jan. 23, 2002), http://bit.ly/2sHrJg6 (collecting and describing criticism). But, whatever merits these critiques may have for piecemeal state antitrust enforcement, they have no purchase where states have litigated a case alongside federal antitrust authorities from the outset. *See* Complaint, *United States of America v. American Express Co.*, No. 10-4496 (E.D.N.Y. Oct. 4, 2010); Amended Complaint, *United States of America v. American Express Co.*, No. 10-4496 (E.D.N.Y. Dec. 21, 2010); *see also* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1024 (2001) (describing advantages of state-federal cooperation in antitrust enforcement). Indeed, Congress "anticipated that federal and state enforcers would work together"—as they have here—to enforce antitrust laws. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 683 (2003).

The Acting Solicitor General's failure to join the states' petition can be explained by the unusual circumstances in which the decision was made. It likely reflects "the interregnum in the [Antitrust] Division's leadership resulting from the change in administration," rather than the considered judgment of the Department or the

Solicitor General. Baker, *supra*. Indeed, the Antitrust Division has had two acting heads since January, and the Solicitor General's Office still lacks Senate-confirmed leadership. In these circumstances, the petition for rehearing in the court of appeals, filed by state plaintiffs and the Department of Justice, is a better indication of the federal authorities' considered position with respect to this litigation—and the legal question presented. Pet. of the United States and Plaintiff States for Panel Rehearing and Rehearing En Banc, *United States v. American Express Co.*, No. 15-1672 (2d. Cir. Nov. 10, 2016).

In any event, the federal government's voice need not go unheard. As it frequently does, this Court may well wish to call for the Solicitor General's views with respect to this petition and on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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