

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-1454

STATE OF OHIO, ET AL., PETITIONERS

v.

AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for a division of petitioners' oral argument time as follows: 15 minutes to petitioners and 15 minutes to the United States, which has filed a brief as a respondent supporting petitioners. Petitioners consent to this motion.

1. This case arises from a civil antitrust enforcement action brought by the United States and a group of States against American Express (Amex). The suit challenges "anti-steering" rules that Amex imposes on merchants that accept its credit cards. Those rules bar merchants from encouraging their customers to use

other credit cards that charge the merchants lower fees -- by, for example, offering a discount, stating a preference, or truthfully disclosing the costs of different cards. Pet. App. 95a-96a.

In 2010, the United States and the States filed suit against Amex, alleging that the anti-steering rules unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. After a bench trial, the district court held that the rules violate Section 1 under the rule of reason. Pet. App. 63a-259a. Among other things, the court found that the United States and the States had carried their initial burden to show that the rules adversely affect competition. That finding rested on evidence that the rules have stifled price competition among the major credit-card networks, blocked low-fee rival networks, raised merchant fees, and inflated retail prices. Id. at 191a-228a.

The court of appeals reversed and directed entry of judgment for Amex. The court did not overturn any of the district court's factual findings as clearly erroneous. Instead, it held that those findings were legally insufficient to establish a prima facie case that the anti-steering rules unreasonably restrain trade. Pet. App. 1a-58a.

2. Ohio and several other States filed a petition for a writ of certiorari, which this Court granted. Although the United States did not seek this Court's review, it has filed a

brief in this Court as a respondent supporting petitioners. The brief explains that the question before this Court is whether the district court's findings that Amex's anti-steering rules have stifled price competition, blocked low-fee rivals, raised merchant fees, and inflated retail prices were sufficient to establish a prima facie case that the rules unreasonably restrain trade. The brief argues that the answer to that question is yes, and that the court of appeals' contrary holding rests on a number of legal errors.

3. We respectfully submit that the proposed division of oral argument time will assist the Court in its consideration of this case. The United States has a substantial interest in the Court's resolution of this case because the Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws. The United States has often participated in oral argument as *amicus curiae* in cases involving the proper interpretation and application of those laws. See, e.g., American Needle, Inc. v. National Football League, 560 U.S. 183 (2010); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). And while the United States did not file its own petition for a writ of certiorari, it litigated this case as a plaintiff and appellee in the courts below, and it accordingly

is a party in this Court. See S. Ct. Rule 12.6. We therefore believe that oral presentation of the views of the United States, in addition to those of the petitioner States, would be of material assistance to the Court.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JANUARY 2018