No. 16-1454

In the Supreme Court of the United States

STATE OF OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

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

BRIEF FOR DISCOVER FINANCIAL SERVICES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case asks how Section 1 of the Sherman Act, which bans unreasonable restraints of trade, applies to "two-sided" platforms that unite distinct customer groups. Such platforms are ubiquitous, ranging from eBay (serving buyers and sellers), to newspapers (serving readers and advertisers). Here, credit-card networks bring cardholder customers together with merchant customers for ordinary transactions. When doing so, Respondents American Express Company and American Express Travel Related Services Company ("Amex") contractually bar merchant customers from steering cardholder customers to credit cards that charge merchants lower prices. Applying the "rule of reason," the district court held that: (1) the Government proved that Amex's anti-steering provisions were anticompetitive because they stifled competition among credit-card companies for the prices charged to merchants, and (2) Amex failed to establish any procompetitive benefits. The Second Circuit reversed. It held that, to prove that the anti-steering provisions were anticompetitive (and so to transfer the burden of establishing procompetitive benefits to Amex), the Government bore the burden to show not just that the provisions had anticompetitive pricing effects on the merchant side, but also that those anticompetitive effects outweighed any benefits on the cardholder side. The question presented is:

Under the "rule of reason," did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?

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INTEREST OF *AMICUS CURIAE*[*]

Discover Financial Services operates the Discover payment network and, along with certain affiliates and third parties, issues Discover-branded payment cards to consumers. As detailed in the district court's opinion, *e.g.*, Pet. App. 70a-86a, Discover competes directly with Respondents American Express Company and American Express Travel Related Services (collectively, "Amex") on both sides of the "two-sided" (merchant-cardholder) payment platform described in the decisions below. Pet. App. 39a-40a. Discover competes with Amex, Visa, and MasterCard in selling network services to merchants and acquiring banks. Pet. App. 70a, 117a. And Discover competes with Amex and numerous Visa- and MasterCard-affiliated banks in issuing payment cards to cardholders. *Ibid.*

Discover has a direct interest in this action because the opinion below reinstates Amex network rules—known as "nondiscriminatory provisions" ("NDPs") or "anti-steering rules"—that bar merchants from steering transactions to Discover or other payment card networks that offer merchants lower transaction fees. *E.g.*, Pet. App. 100a-101a, 203a-207a. Discover's unrebutted trial testimony that the NDPs thwarted Discover's attempt to compete for merchant business on the basis of price was central to the district court's conclusion that the NDPs violated Section 1 of the Sherman Act. Pet. App. 197a, 203a-205a. As Petitioners and the United States explain

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[*] Pursuant to Rule 37.3(a), Discover has received consent for its filing from all parties. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than Discover has made a monetary contribution to the preparation or submission of this brief.

in their briefs, Discover's experience "vividly illustrates" how the NDPs "block[] price competition" and stifle "innovat[ion]" in payment systems. Brief for the United States as Respondent Supporting Petitioners at 32 ("U.S. Br.") (citing Pet. App. 203a)); Brief for Petitioners ("Pet. Br.") at 46.

The opinion below does not contest these findings. It reinstates the NDPs on the basis that the "District Court's erroneous market definition caused its anticompetitive effects finding to come up short." Pet. App. 49a. The opinion below begins by emphasizing that "cardholders and merchants * * * comprise distinct yet equally important and interdependent sets of consumers sitting on either side of the payment-card platform." Pet. App. 50a. It then holds that the district court "erred" in "declin[ing] to * * * collaps[e] the [cardholder] issuance and [merchant] network services markets into a single platform-wide market for transactions" on payment card networks. Pet. App. 32a (internal quotation marks omitted). Adopting this new market definition, the court of appeals held that the NDPs' undisputed interference with network price competition for merchant business did not satisfy Plaintiffs' "initial burden" of showing "an actual adverse effect on competition as a whole in the relevant market," Pet. App. 49a-50a (internal quotation marks omitted), because it did not "show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a.

Discover has an obvious interest in this Court's review of the legal analysis the court of appeals employed to disregard the NDPs' admitted interference with Discover's attempt at price competition. See Pet. App. 197a, 206a; U.S. Br. 32-24. Discover also

has a direct interest in the economically sound and predictable application of antitrust law to the distinct but related markets and competitive processes involved in the successful operation of payment networks. As the court of appeals observed, Discover operates the same type of "two-sided" credit and charge-card platform that Amex does, Pet. App. 23a, and provides network services to "separate, yet deeply interrelated, markets" on either side of this platform, *ibid* (internal quotation marks omitted). Accordingly, Discover is acutely aware of the need to "balance the two sides of its platform" by, among other things, pricing its services to "reflect the unique demands of the consumers on each side." Pet. App. 9a.

This Court's approach to the market definition and burden-shifting issues in this case could significantly affect this competitive balancing process in many different contexts. Accordingly, Discover respectfully submits this brief in the hope that it will aid the Court in resolving the question presented in accordance with business and market realities relevant to advancing the "primary" antitrust aim of "protect[ing] interbrand competition" within and across payment networks. *State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997).

STATEMENT

The history of the NDPs (or "anti-steering" rules) at issue in this case is addressed in the government briefs. See Pet. Br. 6-9; U.S. Br. 5-7. In general, these rules "bar[] merchants from (1) offering customers any discounts or nonmonetary incentives to use credit cards less costly for merchants to accept, (2) expressing preferences for any card, or (3) disclosing information about the costs of different cards to merchants who accept them." Pet. App. 4a. This en-

forcement action was originally brought against Visa and MasterCard anti-steering rules as well as the Amex NDPs addressed below. Pet. App. 66a. But Visa and MasterCard resolved the claims against them in a 2012 consent decree, so the case proceeded to trial only on the Amex rules. Pet. App. 66a-67a.

Discover—the smallest major payment network by charge volume and only successful new network entrant in decades, Pet. App. 151a, 154a—testified as a government witness about the NDPs' competitive effects, Pet. App. 154a, 203a-207a, 212a-214a, 219a-220a, notably in thwarting Discover's strategy to gain market share "by pricing its network services 'very aggressively for merchants,'" Pet. App. 203a (quoting Tr. 821:8–16[1]).

A. Discover Offers Breakthrough Value Propositions to Cardholders and Merchants

"Discover was initially owned and operated by one of the nation's largest retailers, Sears, which marketed Discover's cards to its already significant population of private label cardholders." Pet. App. 154a n.24. Leveraging this initial platform, Discover was able to gain a foothold in the broader payment card industry by offering "breakthrough value propositions" to both cardholders and merchants. *Id.* at 203a. The value proposition on the cardholder side was that, "in 1986, most credit cards had annual fees," but "Discover had no annual fees," offered "24 by 7 customer experience," and "was the first card to

[1] Unless otherwise indicated, all transcript references in this brief are to the trial testimony of Discover's President, Roger Hochschild.

have any form of rewards with providing cash back on every transaction." Tr. 821:9-13. Discover complemented these cardholder incentives with a value proposition to merchants. Discover "pric[ed] its network services 'very aggressively for merchants[,] setting all-in discount rates significantly below those of its competitors." Pet. App. 203a-204a (quoting *id*. at 821:14). Discover was able to do this through a "very focused effort on keeping [its] expenses as low as possible." Tr. 821:24-25. "[B]y operating very efficiently" in a market in which other networks were "charging a lot to merchants and charging a lot to cardholders," *id*. at 821:22-25, Discover could offer "a good value proposition to [its] merchant customers on one side and a good proposition to [its] cardholders on the other side," *id*. at 822:1-3.

B. Discover Attempts to Compete By Offering Merchants Lower Prices

Although Discover is accepted at over nine million merchant locations (roughly the same number as Visa and MasterCard and more than Amex), see Pet. App. 184a-185a, Discover's network has by far the smallest share of U.S. credit and charge card volume. See Pet. App. 151a (estimating 2013 shares of total charge volume at Visa 45%, Amex 26.4%, MasterCard 23.3% and Discover 5.3%). As Discover explained at trial, it also trails rivals in certain categories of card issuance, as well as in volume of loan amounts outstanding. See Tr. 816:24-817:1.

The evidence in the trial record identifies the battle for share of charge volume in the market for network services to merchants, as well as the battle for share of consumer spending or loans in the market for branded card-issuance to consumers, as the focal

points of horizontal competition among payment card networks and the banks that issue network-branded credit and charge cards. See Tr. 814:14-16 (Discover "competes against Visa, MasterCard and American Express" in the provision of network services to merchants and banks, and "measures its market share as a credit card network in terms of percent of total sales volume for general purpose credit cards"); Tr. 816:5-18 (Discover also competes with Amex and "well over a hundred banks" in issuing credit cards to consumers and measures its share of that market based on "two metrics * * * share of credit card loans outstanding * * * and share of credit card sales"); J.A. 129-30 (Visa document stating that "every share point that is shifted in the market to the bankcards' advantage -- to the advantage of Visa and MasterCard -- shifts almost $80 million in pre-tax profit away from American Express"); *id.* at 190 (Amex presentation stating that "the only real way to prove that our customers prefer us is to measure market share" in each of the various "business[s]" Amex serves).

Networks can "increase consumer preference for using" their brand and affiliated services, J.A. at 129, by competing on either or both "sides" (merchant or cardholder) of the "two-sided" platform described in the opinions below. Merchants and cardholders are "distinct yet interrelated" groups of consumers who purchase "distinct yet interrelated" products from payment card networks. Pet. App. 117a-119a; Tr. 814-816. This "interrelatedness"—which gives rise to the so-called "chicken and egg problem" of merchant acceptance turning on cardholder acceptance and vice-versa, Tr. 821:4—means that a network can improve its competitive position across the entire pay-

ment platform by competing for market share in the product markets on either side of it. Tr. 828-831.

"Sensing an increase in merchant dissatisfaction in the late 1990s amidst a series of price increases by its competitors, Discover saw an opportunity to leverage its position as the lowest-priced network to gain share." Pet. App. 204a (citations omitted). Accordingly, in "1999, the network launched a 'major campaign' aimed at highlighting the pricing disparity between it and its competitors in order to persuade merchants to 'shift their business to [Discover's] lower-priced network.'" *Ibid.* (quoting Tr. 833:4–11). As Discover's then-President explained: "Discover intend[s] to partner with merchants in helping them control payment costs and propose[s] that they steer customers to the lower-cost Discover cards." Pet. App. 204a (citing Tr. 834:13–20; PX1277 at '090, '094–95 (noting that Discover wanted "to help [merchants] save money by encouraging their customers to pay with Discover Card").)

To kickstart the campaign, Discover "sent a letter to every merchant on its network, alerting them to [its] competitors' recent price increases and inviting the merchant to save money by shifting volume to Discover." Pet. App. 204a (citing Tr. 836:6–837:18). Discover also "met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover." *Ibid.* In these meetings Discover "suggested a number of means by which merchants could achieve this share shift, including point-of-sale signage," Pet. App. 204a-205a (citing Tr. 839:22–842:3; PX1292 at '991–94), and the use of pass-through pricing that would convert the network fee reductions into lower retail prices that generate customer loyalty to mer-

chants, Pet. App. 205a (citing Tr. 847:8–848:14).) Discover believed that over the long term, this strategy and "offering further discounts to large merchants would be profitable for the network" because it would generate "greater transaction volume, and resulting increases in discount and interest revenue." Pet. App. 205a (citing Tr. 837:19-25).

The district court found that Discover's merchant discount campaign was a paradigmatic example of horizontal price competition that would have influenced consumer behavior in an unrestrained market. Discover testified that it was willing to "sacrifice some revenue per transaction" in order to "grow[] the number of transactions and get[] other revenues on those transactions." Tr. 837:21-24. And several "merchants testified that they would, in fact, steer if given the opportunity." Pet. App. 222a (citations omitted). But Discover's efforts at price competition "failed to produce 'any significant movement in share' due to the anti-steering rules maintained at the time by Visa, MasterCard, and American Express." Pet. App. 205a (quoting Tr. 848:15–849:15).

Several merchants advised Discover that they could not "express a preference for Discover" or otherwise "steer share to Discover's lower-priced network" without violating the anti-steering rules "imposed by the other payment networks." (Pet. App. 205a (citing Tr. 848:15–849:15, 852:24–853:15).[2] As

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[2] For example, the record contains unrefuted evidence that the NDPs preclude merchants from:

- "[o]ffering a 10% discount off the posted purchase price, free shipping, free checked bags, gift cards, or any other monetary incentive for using their Discover card";
- "[p]osting a sign saying 'We Prefer Discover' at the point

the district court observed, merchant "steering" is in other industries "both procompetitive and ubiquitous"—indeed as "routine[]" as "placing a particular brand of cereal at eye level." Pet. App. 67a. But it is "absent in the credit card industry because the NDPs eliminate merchants' ability to "attempt to influence customers' purchasing decisions" in favor of a particular network's lower-priced services. *Ibid.*; see also *id.* at 204a-205a.

In the face of this competitive restraint, Discover "abandoned" its low-price campaign because giving merchants a "'discount without getting anything in return didn't make business sense'" for Discover. Pet. App. 206a (quoting Tr. 854:7-15) ("'To the extent that offering a lower price was not going to give [Discover] any business benefits, it was leaving money on the table'" that it could channel into other competitive endeavors.). Accordingly, Discover refocused its strategy on closing the "[c]ompetitive [g]ap" with rivals by "raising [its] discount rates" to "more closely align" with Visa and MasterCard. *Ibid.*

C. The District Court Finds the NDPs Unreasonably Restrain Trade

After a seven-week bench trial, the district court issued a 150-page opinion holding that Amex's NDPs unreasonably restrained trade in violation of the Sherman Act. Pet. App. 69a-71a, 112a, 114-122a, 259a. Applying this Court's precedents on market

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of sale"; and

- "[a]nswering the phone by saying 'Thank you for calling us, we proudly accept the Discover card' or posting a sign that says 'Thank You For Using Discover.'"

Pet. App. 100a-101a.

definition and the "three-step burden shifting framework" that governs "rule of reason" review,[3] see Pet. App. 108a, 111a-112 (citing *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Eastman Kodak Co.* v. *Image Tech. Svcs., Inc.,* 504 U.S. 451, 482 (1992); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962)), the district court weighed all the trial evidence and found that the NDPs unreasonably restrained trade because they "block[ed]" inter-network price competition, "stifle[d]" innovation, and resulted in higher costs for both "merchants and cardholders." Pet. App. 193a, 203a-222a (finding that "inflated merchant discount rates are passed on to all customers—Amex cardholders and non-cardholders alike—in the form of higher retail prices").

1. In defining the product market relevant to its analysis, the district court recognized that a "payment-card network sits at the center of a two-sided platform that 'comprises at least two separate, yet deeply interrelated, markets: a market for card issuance, in which Amex and Discover compete with thousands of Visa- and MasterCard-issuing banks; and a network services market, in which Visa, MasterCard, Amex, and Discover compete to sell ac-

[3] The first step of this framework required the government plaintiffs to establish that the NDPs were "*prima facie* anticompetitive." *Cal. Dental Ass'n* v. *F.T.C.*, 526 U.S. 756, 771 (1999). Because the district court found that the government made such a showing, the burden shifted to Amex to identify any "procompetitive justification[s]" for the challenged rules. *Ibid.*; see Pet. App. 110a. And because Amex did so, the third step of the inquiry shifted the burden back to the government to show that the competitive benefits "could have been achieved through less restrictive means." Pet. App. 110a (citation omitted).

ceptance services" to merchants and their affiliates. Pet. App. 23a (quoting Pet. App. 70a). The NDPs, however, reside only in contracts governing the provision of network services to merchants. Pet. App. 19a, 95a. And the record contains no evidence that such services are interchangeable with the services that networks provide to issuers and their cardholders. Accordingly, and "[d]espite the two-sided nature of the platform" that comprises Amex's overall payment network, Pet. App. 23a, the district court concluded that the "relevant product market for purposes of its analysis of Amex's NDPs is the market for general purpose credit and charge card network services" to merchants. Pet. App. 121a.

In reaching this conclusion the district court expressly recognized the relationship between the market for network services to merchants and the market for network services to issuing banks and their cardholders. See Pet. App. 121a. The district court's analysis simply tracks record evidence of the services the NDPs contractually restrain—network services governed by "merchant agreements," Pet. App. 22a, 95a—in identifying the primary product market relevant to its analysis of the NDPs' competitive effects. It then defines the boundaries of that market in keeping with this Court's direction that antitrust product markets should generally encompass only "'products that have reasonable interchangeability" and "cross-elasticity of demand between the product itself and substitutes for it." *E.I. du Pont*, 351 U.S. at 404; see also *Brown Shoe*, 370 U.S. at 325; see Pet. App. 111a-112a.

This analysis did not foreclose consideration of Amex's arguments about the NDPs' competitive impact on the market for cardholder services. Pet. App.

71a, 121a-122a. It merely recognized the "reality," Pet. App. 118a, that the services Amex provides to merchants and cardholders are *not* interchangeable within the meaning of this Court's market-definition precedents, and thus deferred to the latter stages of its rule-of-reason analysis full consideration of the NDPs' competitive effects on markets beyond the one for the merchant services the NDPs contractually restrain. See Pet. App. 22a, 71a, 239a-240a.

2. Applying the first step of the rule-of-reason analysis, the district court concluded that the government had met its initial burden of showing that the NDP's were *prima facie* anticompetitive because, among other things, unrefuted trial evidence established that the rules actually and adversely affected competition by "effectively deny[ing]" other networks the ability to "offer[] merchants a low price in return for greater volume." Pet. App. 203a.

Like its analysis of market definition, the district court's analysis of the government's *prima facie* case did not foreclose consideration of the NDPs' proffered procompetitive effects in the market for network services to issuers and their cardholders, or of the NDPs' role in mediating network competition across the "two-sided" payment platform Amex operates. It simply shifted the burden to Amex to address procompetitive justifications for the NDPs, including and specifically the justification that the "NDPs enhance overall competition in the credit and charge card industry * * * by inhibiting competition in the network services market for merchants—thereby ensuring that Amex's spend-centric model continues to be fueled by high merchant discount fees—in favor of greater competition in the interrelated but distinct issuing market." Pet. App. 238a-239a.

Weighing all the evidence, the district court found that the NDPs' admitted restraint on network price competition for merchant business was not justified by the foregoing or other purported benefits to issuers, their cardholders, or overall platform competition. Pet. App. 71a, 229a, 239a-240a; see also *id*. at 228a-258a. Notably, the district court found that Amex's NDPs actually precluded other networks (and specifically Discover) from reaping a "competitive reward for offering merchants lower swipe fees" and "thereby *suppress[ed] an important avenue of horizontal interbrand competition*." *E.g*., Pet. App. 197a (internal quotation marks and citations omitted; emphasis added). Based on this and other evidence, the district court found that "the failure of Discover's low-price value proposition is emblematic of the harm done to the *competitive process* by Amex's rules against merchant steering," Pet. App. 206a (emphasis added), and that this harm resulted in "higher prices for merchants *and* their customers," Pet. App. 228a. Accordingly, the district court concluded that the NDPs unreasonably restrained trade in violation of the Sherman Act and enjoined their enforcement. Pet. App. 71a, 2 59a.

D. The Court of Appeals Reinstates the NDPs

The court of appeals reversed and reinstated the NDPs on the grounds that the district court's erroneous "definition of the relevant market in this case is fatal to its conclusion that Amex violated § 1." Pet. App. 31a. According to the panel, the district court "erred in excluding the market for cardholders from its relevant market definition," and specifically in "'declin[ing] to * * * collaps[e] the issuance and network services markets into a single platform-wide

market for [payment card] transactions.'" Pet. App. 32a.

Applying this new market definition, *id.* at 32a-40a, the court of appeals held that even direct evidence that the NDPs "blocked" network price competition for merchant business was insufficient to meet the government's initial burden of showing that the NDPs are *prima facie* anticompetitive. See Pet. App. 31a, 39a-40a, 49a-53a. The reason, the panel stated, is that even this undisputed evidence did not prove "*net*" anticompetitive effects across both "sides" (merchant and cardholder) of Amex's "two-sided platform." Pet. App. 49a, 51-53a.

In reaching this conclusion, the court of appeals did not contest Discover's trial testimony or purport to disturb the district court's finding that the NDPs "block Amex-accepting merchants from encouraging their customers to use any * * * card other than an American Express card, even where that card is less expensive for the merchant." Pet. App. 100a-101a. It simply redefined the "relevant market" to include network services to cardholders because such services are "necessarily affected" by (though not interchangeable with) network services to merchants, and then disregarded the NDPs' restraint on competition for the latter as inadequate to show that the "NDPs made all Amex consumers on both sides of the platform—i.e., both merchants and cardholders—worse off overall." Pet. App. 51a; see also *id.* at 39a-54a.

The court of appeals' market definition and ensuing assessment of the government's *prima facie* case depart from this Court's precedents because the record contains no evidence that network services to merchants are interchangeable with, or in any sense

substitutes for, network services to cardholders. The opinion below grounds this departure in competition policy concerns purportedly unique to "two-sided" platforms and the particulars of Amex's business model. See Pet. App. 49a-53a. Specifically, the court of appeals reasoned that because the "NDPs simultaneously affect competition for merchants and cardholders by protecting the critically important revenue that Amex receives from its relatively high merchant fees," a "reduction in revenue that Amex earns from merchant fees may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks on the cardholder side of the market." Pet. App. 50a. The court of appeals then held that the government's failure to rebut this potential competitive benefit in its *prima facie* case—and specifically its failure to identify a "net price affecting consumers on both sides of the platform"—required reversal of the district court's judgment and reinstatement of the NDPs. Pet. App. 53a-54a.

SUMMARY OF ARGUMENT

"[T]he primary purpose of the antitrust laws is to protect interbrand competition." *State Oil*, 522 U.S. at 15 (citation omitted). To compete for market share against other brands, a payment card network must "balance the two sides of its platform" by, among other things, pricing its services to "reflect the unique demands of the consumers on each side." Pet. App. 9a. Such balancing must be responsive to market forces on all sides of the platform, because competition at the platform level depends on the competitiveness of each network's offerings in each product market the platform serves. This phenomenon is not unique to payment-card platforms. It applies equally

to any platform (a newspaper serving advertisers and readers, or a travel booking business serving hotels and guests) in which platform-level competition turns on rivals' ability to offer a dynamic range of "different price pairs" to the markets the platform serves in the hope of finding one that "best satisf[ies] consumer preferences." Economists' Cert. Amicus Br. 11.

Amex successfully competes with other networks by offering the price pair described in the opinions below. *E.g.*, Pet. App. 50a. The problem with the NDPs is that they protect Amex's competitive model by restraining other networks from using their own price pairs to compete freely with Amex.

The antitrust laws dictate that "*competition* should choose the optimal mix of revenue between the two sides" of the platform. Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶562(e), at 101 (Supp. 2017) (Areeda & Hovenkamp). Accordingly, in this case as in others, the central aim of the antitrust laws is best served by adhering to this Court's precedents respecting the economic boundaries of product markets, and allowing sufficient evidence of anticompetitive effects in any such market—including those that are part of a broader network or platform—to trigger antitrust scrutiny under the burden-shifting framework this Court has long applied to rule-of-reason analysis. Any other approach—and particularly one that excuses direct and undisputed evidence of anticompetitive restraints in one or more product markets comprising a network platform—will inhibit competition both within and across the platform precisely because the product markets it serves are related.

The opinion below disregards these principles in order to protect Amex's chosen method of competing with MasterCard and Visa over competition more broadly. The record here provides no reason to endorse this approach, and many reasons to reject it.

1. The court of appeals' departure from this Court's longstanding definition of an antitrust product market is not supported by the law or record, and is not necessary to protect competition among operators of "two-sided" payment card networks. Although the markets for network services to merchants and cardholders are related, the record shows—and Amex concedes, Br. in Opp. 16—that a network cannot "substitute" its competitive offerings to one group with its competitive offerings to the other. In such circumstances, this Court's precedents counsel that the threshold question whether a challenged practice—here, a contractual restraint that networks impose on *merchants*—has "anticompetitive effects" is properly assessed in the market for the restrained service and its substitutes.

This Court's precedents further counsel that where, as here, there is direct evidence that a challenged practice restrains horizontal price competition in the market for a particular service and its reasonable substitutes, a district court may rely on it to find anticompetitive effects necessary to satisfy the first step of the rule-of-reason analysis and shift the burden to the defendant to address any procompetitive justifications for the restraint. That is because on such a record, a district court may fairly conclude that questions about how the challenged practice "affect" competition in "related" but distinct product markets are properly addressed to the reasonableness—not the existence—of the practice's anticompet-

itive effects.

There was no need to alter or dispense with the foregoing approach in this case merely because the NDPs restrain competition in a service market that sits on one side of a "two-sided" platform. Indeed, market definition is particularly important where a challenged practice applies only to customers in one of several distinct product markets served by a broader platform (here, NDPs in merchant but not cardholder contracts), because an overbroad market definition will short-circuit the antitrust inquiry and excuse at the outset practices that undeniably restrain competition in product markets that must be competitive in their own right to foster free and fair competition across the platform.

Discover's trial testimony again illustrates the point. In an effort to compete with Visa, MasterCard and Amex both within and across the network platform at issue here, Discover attempted to engage in price competition for merchant business that the NDPs admittedly "block[ed]." Pet. App. 100a. But the court of appeals' unprecedented approach to market definition caused the court to disregard this competitive restraint as legally irrelevant. Pet. App. 49a-53a. In so doing, the court of appeals immunized from antitrust scrutiny a conceded restraint not just on network competition for merchant business, but also—because that market is part of a broader platform—on the competitive pairings networks can offer across the platform.

2. The danger inherent in the court of appeals' market definition is evident in the court's articulation of the proof required to establish that the NDPs are "*prima facie* anticompetitive." *Cal. Dental Ass'n* v.

FTC, 526 U.S. 756, 771 (1999); Pet. App. 32a, 39a-40a, 49a-53a. The court of appeals held that undisputed evidence of price restraints this Court has long recognized as sufficient to satisfy step one of the rule-of-reason analysis did not suffice here, Pet. App. 205a-207a, 227a-228a, because the "two-sided" nature of Amex's network "platform" required *prima facie* evidence that the "NDPs made *all* Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *Ibid.*

This Court should reject that approach and advance the "primary" antitrust aim of "protect[ing] interbrand competition," *State Oil*, 522 U.S. at 15, by reaffirming the application of settled antitrust principles to the district court's undisturbed factual findings. Applying those principles, the district court correctly began its analysis of the challenged practice here (Amex's NDPs) by identifying the service market they contractually restrain (network services to merchants), and then defining the boundaries of that market based on the economic substitution test in this Court's precedents. The district court then correctly focused on proof of anticompetitive effects within that market to determine whether the NDPs were *prima facie* anticompetitive for purposes of step one of the rule-of-reason analysis.

The record evidence that the NDPs restrain price competition in a core product market served by Amex's platform was under this Court's precedents sufficient to support the district court's finding that the NDPs were *prima facie* anticompetitive, and to shift the burden to Amex to identify any procompetitive justifications for them.

3. The district court's adherence to this settled

burden shifting approach on the record here did not condemn the Amex business model the court of appeals sought to protect in the opinion below. It simply refused to protect it at the expense of restraining competition by Discover or other networks willing to offer different price or service combinations consumers might find more attractive. In short, the district court's analysis would allow "competition," not courts or particular competitors, to drive network price and service offerings both within and across the payment card platform at issue here. That is the right result, and the Court should reject the court of appeals' contrary analysis, which uses the "rule of reason" to do exactly what this Court has held it should not: namely, treat "competition itself [a]s unreasonable." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 696 (1978).

ARGUMENT

I. The Opinion Below Unjustifiably Departs From This Court's Approach to Market Definition

Although the text of Section 1 of the Sherman Act prohibits "[e]very contract * * * in restraint of [interstate] trade or commerce," 15 U.S.C. § 1, this Court has long held that the statute "prohibit[s] only *unreasonable* restraints of trade." *E.g., Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (*NCAA*) (emphasis added). Market definition is important in assessing whether a challenged practice "unreasonabl[y]" restrains competition, because the competitive impact of a challenged practice depends, among other things, on the availability of substitutes for the product or service it allegedly restrains.

Accordingly, this Court has long held that the "relevant market for antitrust purposes is determined by the choices available to" consumers of the restrained product or service, *e.g.*, *Kodak*, 504 U.S. at 481–482, and is therefore defined by "products that have reasonable interchangeability" with it. *Id*. at 482 (quoting *du Pont*, 351 U.S. at 404). Interchangeability requires similar products or services as well as similar customer needs and preferences that result in "cross-elasticity of demand between the product itself and substitutes for it." *E.I. du* Pont, 351 U.S. at 404; see also Pet. App. 111a-112a; *Brown Shoe*, 370 U.S. at 325.

The court of appeals purported to acknowledge this definition of a product market. Pet. App. 32a. But it abandoned it in defining the market in this case to include *any* product, service, or customer for which the "NDPs *affect* competition." Pet. App. 51a. The legal precedents the court cites, Pet. App. 32a, focus on product substitutes, not "affect[ed]" markets. See *id*. And the record contains no evidence that the services Amex provides to cardholders are in any way "substitutes" for the services Amex provides to merchants. *E.g.*, *Kodak,* 504 U.S. at 482. Indeed, the district court found exactly the opposite. See Pet. App. 114a-122a, 127a.

Lacking any relevant precedent for defining a product market to include services or products that are not interchangeable, the court of appeals simply asserted that its novel market definition was necessary to protect "critically important revenue" Amex needed to compete against Visa and MasterCard. Pet. App. 50a. But that is not enough under the antitrust laws, which protect "'competition, not competitors.'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495

U.S. 328, 338 (1990). As Discover's experience illustrates, the court of appeals' market definition undermines both product-market and platform-level competition by excusing a clear impediment to price rivalry in the product market the NDPs directly restrain, and that must be competitive in order to foster competitive offerings across the platform.

1. As the district court correctly observed, the services that Amex and other networks provide to merchants and cardholders are part of a broader platform, but are nonetheless "distinct [and] involve[e] different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a.[4] The district court was thus fully justified in relying on record evidence that the NDPs appear only in contracts for network services to merchants to define the services they contractually restrain, and then defining the market for those services in keeping with the product substitution analysis in this Court's precedents in order to assess whether the NDPs had anticompetitive effects sufficient to satisfy the first step of the rule-of-reason inquiry. Pet. App. 119a-120a.

This Court's analysis in *Times–Picayune* illustrates the point. The plaintiff in that case challenged (as an anticompetitive tying arrangement) a newspa-

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[4] Similarly in *Brown Shoe Co.* v. *United States*, 370 U.S 294 (1962), this Court held that although all the defendants produced some form of shoes, "the record supports the district court's finding that the relevant lines of commerce are men's, women's, and children's shoes. These product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers." *Id*. at 326.

per requirement that all advertisers who wished to run content in the paper's morning publication would also have to run content in the paper's (distinct but related) evening publication. *Times-Picayune Publ'g Co.* v. *United States*, 345 U.S. 594, 596-597 (1953). In assessing the product market relevant to its antitrust analysis of the challenged restraint, this Court recognized that "every newspaper is a dual trader in separate though interdependent markets" serving both advertisers and readers. *Id.* at 610. But because the restraint in issue "concern[ed] solely one of these markets" (because it applied only to advertisers, not readers), the Court defined the relevant market solely in terms of competition for advertisers. *Ibid.*

The record here is similar. See Pet. App. 119a-120a. Although "merchants and their customers jointly make the decision of which method of payment is used for any given transaction," Pet. App. 127a, the NDPs appear only in network contracts with merchants. Accordingly, the "'relevant consumer' for purposes of assessing price sensitivity" impacted by the NDPs "is the merchant," *ibid.*, and the network services market is the proper market for assessing whether the NDPs have anticompetitive effects sufficient to establish a *prima facie* case under step one of the rule of reason.

2. The court of appeals did not apply *Times–Picayune* (or *du Pont, Kodak*, or *Brown Shoe*), in defining the relevant market in this case. Pet. App. 118a. Nor did it explain how a network—much less a plaintiff—would go about calculating the "net price affecting consumers on both sides of the platform" it describes. Pet. App. 53a. That is not surprising, because as noted, its analysis sweeps in distinct and complex markets, customers, and services that are

not interchangeable, and are the subject of proposed innovations (like Discover's proposal to "offer[] merchants equity ownership in the network," Tr. 839:3-4), that would complicate any meaningful or reliable attempt to measure what the court of appeals termed a "net price." Pet. App. 53a. Accordingly, the court of appeals was left to defend its analysis as necessary to protect Amex's ability to compete against Visa and MasterCard. Pet. App. 48a-49a & n.51.

Again that is not a reason for insulating the NDPs from antitrust scrutiny, particularly by collapsing two distinct service markets with very different customers and competitive conditions, see Pet. App. 117a-119a; Tr. 814-16, into a sweeping "platform" market that will unnecessarily and intractably complicate the question whether a challenged practice is *prima facie* anticompetitive, and if so in what regard. The court of appeals identified no reason to introduce such uncertainty into the analysis on the record here, which concerns a contractual restraint that appears only in network agreements with merchants, and that supported the district court's initial assessment of the NDPs' competitive effects in the market for those services.

This traditional approach to market definition did not foreclose consideration of Amex's justifications for the rule. See Pet. App. 71a, 111a-122a. It simply left them to a later stage of rule-of-reason analysis. See *id*. at 71a, 239a-240a. In contrast, the court of appeals' unprecedented approach to market definition short-circuited antitrust review of the NDPs notwithstanding their admitted restraint on price competition in a product market the Sherman Act dictates must be open to competition in its own right.

II. The Court of Appeals' Market Definition Distorts the Rule-of-Reason Inquiry and Insulates an Admitted Restraint on Price Competition from Antitrust Scrutiny

The significance of the court of appeals' novel market definition is apparent from the court's description of the evidence required to establish a *prima facie* case that the NDPs had an anticompetitive effect in that market "as a whole." Pet. App. 49a-50a. The district court found on the record here that the NDPs' admitted restraint on horizontal price competition in the market for network services resulted in increased prices and reduced choice for *both* merchants *and* cardholders. *E.g.*, Pet. App. 39a-40a, 67a, 100a-101a, 203a-207a, 219a-220a. Yet the court of appeals held that even this extraordinary evidence was insufficient to establish a *prima facie* case that the NDPs had an anticompetitive in the "relevant market" because the evidence did not "show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." Pet. App. 51a.

This analysis is difficult to square with this Court's precedents condemning competitive restraints that "impede[] the ordinary give and take of the marketplace and substantially deprive[] customer[s]" of the chance "to utilize and compare prices." *Prof'l Eng'rs* , 435 U.S. at 692-93; *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648-649 (1980) (holding that because credit terms "must be characterized as an inseparable part of price," restraining credit terms constituted an unlawful restraint on price competition under the Sherman Act). Because "price is the 'central nervous system' of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150,

224-26 & n.59 (1940), price competition is "an object of special solicitude under the antitrust laws." *United States* v. *Gen. Motors Corp.*, 384 U.S. 127, 148 (1966); *NCAA*, 468 U.S. at 106 & n.30 ("[a] restraint that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with th[e] fundamental goal of antitrust law"). Accordingly, this Court's precedents support the district court's conclusion that the record evidence here was sufficient to establish a *prima facie* case that the NDPs unreasonably restrain trade, and thus to shift the burden to Amex to identify procompetitive justifications for the rules.

The court of appeals' contrary conclusion does not serve the purpose of the antitrust laws it purports to apply, because it preemptively terminates the antitrust analysis out of concern for procompetitive justifications that could be (and in the district court were) addressed in the second and third stages of the burden shifting analysis. See Pet. App. 239a-240a (finding that "even if * * * cross-market balancing is appropriate under the rule of reason in a two-sided context, here Defendants have failed to establish that the NDPs are reasonably necessary to robust competition on the cardholder side of the GPCC platform, or that any such gains offset the harm done in the network services market").

Given the district court's undisturbed findings on "cross-market balancing," see Pet. App. 239a-240a, this case does not require the Court to resolve precisely when or to what extent the "two-sided" nature of a payment network permits a defendant to justify an anticompetitive practice in one market by refer-

ence to its procompetitive effect in a related market.[5] Reversal is warranted under the settled principle that "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." *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958).

Scrutinizing competitive restraints on either side of the "two-sided" platform the court of appeals described is critical to ensuring competition both within and across the platform. Yet that is precisely what the court of appeals' analysis precludes. There is no basis in the law or record for affirming this approach.

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[5] This Court has in some contexts discouraged such cross-market defenses on the ground that courts have an "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *United States* v. *Topco Association, Inc.*, 405 U.S. 596, 609-10 (1972); cf. *United States* v. *Phila. Nat. Bank*, 374 U.S. 321, 370 (1963) ("If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."). That said, this Court has entertained such arguments in cases where the challenged practice impacts multiple related markets, see, e.g., *NCAA*, 468 U.S. at 117-19, and some lower courts have likewise recognized the need in some circumstances to "balance the anticompetitive effects on competition in one market with certain procompetitive benefits in other markets." *Sullivan* v. *NFL*, 34 F.3d 1091, 1112 52 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

III. The Decision Below Justifies Its Departure from Settled Antitrust Principles on Grounds That Violate the Sherman Act's Central Tenet

The court of appeals' departure from the law and record is particularly troubling because it is grounded in precisely the type of policy judgment the Sherman Act forbids. The court of appeals' decision turns on the conclusion that protecting Amex's "unique" method of competing with Visa and MasterCard, Pet. App. 87a, is more important than allowing Discover's low-price version or, for that matter, any inter-network price competition on merchant network fees at all. *Id*. at 39a-40a, 48a-53a. As noted, "the primary purpose of the antitrust laws is to protect interbrand competition." *State Oil*, 522 U.S. at 15. In upholding a "restraint that effectively blocks interbrand competition on price" because Amex could compete better without such price pressure, Pet. App. 235a, the panel opinion endorses exactly the "frontal assault on the basic policy of the Sherman Act" this Court has admonished against. *Prof'l Eng'rs*, 435 U.S. at 695; Pet. App. 235a, 240a-241a.

The antitrust laws do not authorize courts "to draw lines between 'good' competition and 'bad' competition," Pet. App. 201a, but rather "reflect a steadfast 'legislative judgment that ultimately [all forms of] competition will produce not only lower prices, but also better goods and services.'" *Ibid.* (quoting *F.T.C.* v. *Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990)). Any line-drawing among types of competition is a task reserved exclusively for Congress. See *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater com-

petition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."). And to date Congress's judgment has been to protect "'*competition*, not *competitors*.'" *Atl. Richfield*, 495 U.S. at 338 (quoting *Brown Shoe*, 370 U.S. at 320 and explaining that "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share") (alteration in original) (citation omitted)).

The panel opinion disregards these fundamental principles in holding that the NDPs and Amex business model are more important than price competition, including the interbrand price competition the NDPs admittedly precluded Discover from successfully pursuing. Pet. App. 203a-207a, 219a. See *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116-117 (1986) (describing the "perverse result" that would accompany a "hold[ing] that the antitrust laws protect competitors from the loss of profits due to * * * price competition"). As the district court's opinion illustrates, such a stark departure from this Court's precedents was not necessary to ensure proper consideration of the NDPs' impact on competition within and across the "two-sided" platform at issue here.

Based on the seven-week trial record, the district court found the failure of Discover's low-price campaign "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." Pet. App. 206a. And it found that enjoining the NDPs would redress this harm by allowing Discover and other networks "aggressively [to] pursue a strategy of lowering [their merchant] prices" in exchange for volume while still robustly competing for card-

holders through rewards and steering benefits. Pet. App. 219a-220a.

On this record, the district court did not "err[]" in "declin[ing] 'to define the relevant product market to encompass the entire multi-sided platform.'" Pet. App. 39a (quoting Pet. App. 119a). It simply (and correctly) recognized that the merchant "side" of the platform constitutes a distinct product market under this Court's precedents, Pet. App. 114a-122a, and engaged in a rule-of-reason analysis that credited price restraints in this market as sufficient to establish a *prima facie* case before shifting the burden to Amex to identify procompetitive justifications that ultimately failed to carry the day. After weighing all the evidence, the court concluded that competition, rather than Amex's rules, should decide the "optimal mix of revenue as between the two sides." Areeda & Hovenkamp ¶562(e), at 101 (Supp. 2017). That is what the Sherman Act contemplates, and what the panel opinion disregards in conflict with the statute and this Court's decisions.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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December 2017