

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

OHIO, ET AL.,)
 Petitioners,)
 v.) No. 16-1454
AMERICAN EXPRESS COMPANY, ET AL.,)
 Respondents.)

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

2 (11:09 a.m.)

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

6 MR. MURPHY: Mr. --

7 CHIEF JUSTICE ROBERTS: Mr. Murphy.

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

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

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

25 As a result, retail customers make

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

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

13 MR. MURPHY: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. MURPHY: So, factually --

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

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

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

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

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

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

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

25 JUSTICE GORSUCH: But I --

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

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

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

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

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

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

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

10 JUSTICE GORSUCH: Right.

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

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

21 MR. MURPHY: Correct. So --

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

1 quality, correct?

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

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

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

18 MR. MURPHY: No. I think --

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

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

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

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

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

15 JUSTICE KENNEDY: Can you tell me --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE GINSBURG: Do you --

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

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

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

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

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

6 MR. MURPHY: I -- I --

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

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

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

25 JUSTICE GINSBURG: Could you please

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

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

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

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

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

1 of patient care.

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Stewart.

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

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

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

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

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

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

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

8 And in all sorts of markets --

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

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

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

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

8 JUSTICE GORSUCH: For just these
9 reasons.

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

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

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

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

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

10 MR. STEWART: That's correct.

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

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

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

25 And the point of using

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

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

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

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

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

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

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

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

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

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

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

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

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

1 JUSTICE BREYER: We do the same thing,
2 don't we, with nuts and bolts? We give the
3 people nuts and we give them bolts.

4 MR. STEWART: But --

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

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

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

25 MR. STEWART: No, I -- I take your

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

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

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

1 Do we have to rule and say that in no
2 market is it?

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

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

1 could say let's cut our merchant fees because
2 if the merchant comes to regard our card as its
3 preferred card --

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

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

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

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

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

1 ultimately had effects that would more commonly
2 be associated with horizontal agreements --

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

6 MR. STEWART: No --

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

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

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

23 MR. STEWART: Visa and MasterCard
24 could advertise in that respect. Now the ad --
25 the advertisements that they might be run would

1 probably be taken with more of a grain of salt
2 than if the -- the merchant was telling her own
3 customer Visa actually does charge me less than
4 American Express.

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

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

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

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

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

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

1 following steering practices.

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

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

16 And so -- so I guess the --

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

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

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

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

5 MR. STEWART: That's correct.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Chesler.

25

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

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

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

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

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

19 And millions of merchants --

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

1 better.

2 MR. CHESLER: Your Honor, that is the

3 --

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

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

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

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

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

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

25 The competition between the brands --

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

4 MR. CHESLER: Exactly, Your Honor.

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

8 MR. CHESLER: And, Your Honor --

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

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

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

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

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

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

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

6 MR. CHESLER: Whether you --

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

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

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

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

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

1 Your system depends on that.

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE BREYER: Right.

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

15 JUSTICE BREYER: Better for everyone.

16 MR. CHESLER: Output has increased.

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

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

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

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

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Well, output
12 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 JUSTICE BREYER: Yeah.

7 MR. CHESLER: And you found in your
8 hypothetical, I believe, that there was an
9 anticompetitive effect at the first stage with
10 respect to that product.

11 JUSTICE BREYER: Uh-huh.

12 MR. CHESLER: And what I'm here to
13 tell you is, with respect to the product at
14 issue here, which is credit card transactions,
15 the government did not prove that there was an
16 anticompetitive effect because output was up,
17 quality was up, and they didn't prove what the
18 price of that product was.

19 So you couldn't possibly conclude that
20 the price was super-competitive.

21 JUSTICE KAGAN: Mr. Chesler --

22 JUSTICE BREYER: It may have been
23 anticompetitive in one way. In one way.

24 JUSTICE KAGAN: Mr. Chesler --

25 JUSTICE BREYER: You cannot get

1 through to the dealer -- to the customer, the
2 fact that these different companies, some
3 charge lower, some charge higher prices. The
4 product you're buying, some will be lower, some
5 will be higher. That is a fairly key element
6 --

7 MR. CHESLER: Which the credit --

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

12 MR. CHESLER: Respectfully, Your Honor

13 --

14 JUSTICE BREYER: No?

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

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

1 anticompetitive impact across the country.

2 MR. CHELSER: If there --

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

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

15 MR. CHESLER: No, Your Honor. In fact
16 --

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

23 MR. CHESLER: Your Honor, Discover had
24 5 percent, give or take, of the market before
25 these provisions were enforced. They had

1 5 percent after these provisions were enforced.

2 And when I asked the president of
3 Discover what about the millions and millions
4 of merchants in America which do not accept
5 American Express cards and therefore have none
6 of these provisions; have you, in fact, adopted
7 that strategy at those merchants? He said no.

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

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

22 The problem here is that the effect of
23 these anti-steering provisions means a market
24 where we will only have high cost/high service
25 products. And any competitor that wants to

1 come in and says, you know what, we want to
2 compete in a different way, we want to compete
3 in terms of cost, is going to find itself
4 unable to do so.

5 And that's the thing that makes this
6 vertical restraint, it seems to me,
7 different -- different from others.

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

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

22 And that's exactly what the
23 anti-steering provisions prevent. It prevents
24 the vendor from passing on the lower merchant
25 fees to the consumer. And as long as that's

1 the case, you're just not going to be able to
2 construct a business strategy based on a
3 low-cost card.

4 MR. CHESLER: Well, Your Honor,
5 again --

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

15 MR. CHESLER: If I may respond, Your
16 Honor.

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

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

1 and the merchant.

2 And under Your Honor's hypothetical,
3 if, in fact, that price is lowered, the
4 merchant cost is lowered, the rewards are
5 lowered, and that's a price increase to the
6 consumer --

7 JUSTICE SOTOMAYOR: Ah, but we don't
8 know --

9 MR. CHESLER: -- which was never
10 proved on this record.

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

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

25 MR. CHESLER: Your Honor, in fact, as

1 the -- as the court of appeals pointed out, the
2 fact that not every penny of the merchant fee
3 is passed on in rewards to the consumer tells
4 you nothing about the other costs that the card
5 company is incurring.

6 And the government did not prove what
7 those costs are. It could well be that, in
8 fact, the --

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

13 MR. CHESLER: Well --

14 JUSTICE SOTOMAYOR: If you want to
15 argue procompetitive effects, you show it.
16 It's not up to the government to show on a --
17 in a different market that there's a benefit
18 that outweighs the price stifling in the main
19 market. I mean, I've never heard of such a
20 thing. If you think there's procompetitive
21 effects, you prove it.

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

1 effect --

2 JUSTICE GORSUCH: Mr. Chesler --

3 MR. CHESLER: -- with respect to the
4 product at issue.

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

13 But market power, absent market power
14 -- an agreement with a merchant to do anything
15 that restricts anything is not in the
16 cognizance of the antitrust laws. And a
17 26 percent player, absent some proof, other
18 proof, is not -- does not have market power.

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

22 JUSTICE SOTOMAYOR: I thought we had
23 two ways of proving market power, direct and
24 indirect. You need to show a certain control
25 of the market in indirect, but I think case

1 after case have said if you can control prices,
2 you have market power.

3 MR. CHESLER: If I may respond. Let
4 me talk about the indirect first.

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

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

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

21 MR. CHESLER: To fuel --

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

1 MR. CHESLER: Respectfully, Your
2 Honor, I don't think that's what happened here.
3 The increases by the card companies were, as
4 the district court found, to fuel the intense
5 competition for cardholders, without whom there
6 will be no transactions. That's what the
7 findings are.

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

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

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

1 price, I would have thought you just said
2 that's anticompetitive. That's
3 anticompetitive. There's no need to look at
4 this gizmo called market power, which is a
5 nightmare.

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

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

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

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

1 noneththeless --

2 MR. CHESLER: I recall that, Your
3 Honor.

4 (Laughter.)

5 JUSTICE BREYER: None the --
6 noneththeless --

7 MR. CHESLER: I recall that.

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

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

23 And as Justice Kennedy said in the
24 Brooke case, a price increase in the face of
25 increasing demand tells the trier of fact

1 nothing about whether it's anticompetitive.
2 One needs to determine if excess profits are
3 being extracted, monopoly rents are being
4 extracted. And the plaintiff here didn't even
5 prove what our costs were, let alone our
6 margins.

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

18 JUSTICE BREYER: I only have 42 years
19 of teaching antitrust.

20 (Laughter.)

21 JUSTICE BREYER: And I would say in
22 that -- in that experience, which is not as
23 good as yours, actually, because you actually
24 have practical experience, but it seems to me
25 there have been a lot of cases where you

1 wouldn't -- you would not see price increases,
2 the main one being Alcoa.

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

7 MR. CHESLER: But --

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

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

14 (Laughter.)

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

21 And all I'm saying to Your Honor is,
22 if the test that this Court articulates is the
23 test that's suggested by the folks to my right,
24 then we are going to have a wave of positives
25 that are false where real competition is taking

1 place because price increases occur for all
2 sorts of reasons, many of which are perfectly
3 benign, which is exactly what happened here
4 with respect to the merchant fees because they
5 were fueling price decreases to the consumers.

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

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

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

1 conclusions.

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

8 JUSTICE SOTOMAYOR: Counsel, that's
9 step 2.

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

16 JUSTICE SOTOMAYOR: But we've had
17 two-sided markets --

18 JUSTICE KAGAN: Well, Mr. Chesler,
19 what the --

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

25 MR. CHESLER: Can we take that one?

1 I'd like to take that one. That's the Picayune
2 case.

3 JUSTICE SOTOMAYOR: Picayune.

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

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

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

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

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

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

12 MR. CHESLER: It just requires a
13 little time, Your Honor.

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

22 Even when you look at these two-sided
23 prices, the district court found that these
24 price increases were not being passed on to
25 consumers. And the district court found that

1 it was impossible for a credit card company
2 that wanted to offer a low cost/low price
3 product to enter the market.

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

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

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

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

23 The government had failed to prove
24 that. The government had failed to prove what
25 the costs were for the -- for the services

1 provided to the merchant, and it failed to
2 prove what the -- what the consumer's side of
3 the price was.

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

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

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

21 MR. CHESLER: May I?

22 CHIEF JUSTICE ROBERTS: Please.

23 MR. CHESLER: You only get to step 2,
24 respectfully, Your Honor, if the government
25 proves that competition for the product has

1 been impaired at step 1.

2 And what I've said over and over again
3 here is the product is the transaction, and
4 none of those findings related to the
5 transaction.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. CHESLER: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Murphy,
10 you have three minutes remaining.

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

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

24 If all of the credit card companies
25 got together and said we're going to not allow

1 steering, that would cut off price competition
2 on the merchant side, it would still allow for
3 quality reward competition on the other side,
4 but that rule would be per se illegal.

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

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

18 JUSTICE GINSBURG: Mr. Murphy --

19 MR. MURPHY: -- and that's why the
20 government has --

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

1 examination? Is that what you're --

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

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

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

20 And the Discover example of that
21 phenomenon is quite powerful. Discover saw the
22 higher prices, saw the discontent in the
23 merchants, and responded with its
24 low-cutting -- price-cutting option. And --
25 and all of the merchants came to Discover and

1 said, sorry, we'd love to shift shares to you,
2 but there's nothing we can do about it because
3 of these restraints. That quite powerfully
4 shows the horizontal effects.

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

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

13 MR. MURPHY: We would --

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

16 MR. MURPHY: So we would readily -- we
17 just disagree on the manner in which it need be
18 shown.

19 JUSTICE GORSUCH: Right, but you agree
20 it need be shown?

21 MR. MURPHY: Yes. So we showed market
22 power, but we showed it quite powerfully in
23 this case with this restraint affecting
24 merchants making up some 90 percent of the
25 market. And nobody without market power could

1 actually affect industry-wide prices, and
2 that's what --

3 JUSTICE GORSUCH: Right --

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

5 JUSTICE GORSUCH: -- if there were no
6 market power, an agreement would have no
7 anticompetitive effect?

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

12 But here, obviously, it wasn't
13 suicidal.

14 JUSTICE SOTOMAYOR: This is the Leegin
15 situation. This is a vertical restraint that
16 controls -- that has a horizontal effect?

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

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

21 MR. MURPHY: Absolutely. Leegin
22 allowed for room for this analysis.

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

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