and unproductive inquiries that will only sow greater confusion into a difficult area of law.

Simply put, this case represents a critical opportunity for the Court to clarify the appropriate application of the Rule of Reason in cases where the defendant claims to inhabit a "two-sided market," and the Court should take it. It will find that special rules like the Second Circuit's are unnecessary: So-called two-sided markets may be of growing importance in the modern economy, but they are nothing new, and ordinary antitrust principles still clearly dictate the right approach. *Amici* thus strongly believe that, to ensure that antitrust doctrine does not evolve in fundamentally unsound directions, the Second Circuit's errant approach should be weeded out before it takes root. The Court should grant certiorari, and reverse.

SUMMARY OF ARGUMENT

After an extensive trial, the district court in this case correctly held that the Non-Discrimination Provisions (NDPs) imposed on merchants by American Express (Amex) violate the Sherman Act under the Rule of Reason because they eliminate horizontal price competition between the four credit card networks for the sale of services to merchants—"dramatically" increasing the prices merchants pay to accept credit cards. The Second Circuit nonetheless reversed. It held that the plaintiffs failed to make a *prima facie* case under the Rule of Reason because they had not shown that the injury to merchants in their market for credit-card services outweighed any potential procompetitive effects in the market where card companies compete to obtain cardholders. The court

justified this holding by concluding that both merchants and card members consume Amex's credit-card services in a "two-sided market," and that the plaintiffs thus had to show a "net" anticompetitive effect embracing both sides of the platform to make out a *prima facie* case.

That holding raises two fundamental questions regarding the proper application of the Rule of Reason, and answers both incorrectly. First, it raises the question of what constitutes a *prima facie* showing of an adverse effect on competition, sufficient to shift the burden to the defendant to come forward with evidence of a procompetitive justification for its conduct. *See, e.g.*, *Actavis,* 133 S. Ct. at 2236; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 788, 792 (1999) (Breyer, J., concurring in part); *infra* pp.13-15 (explaining recognized burden-shifting framework). The plaintiffs demonstrated that Amex's NDPs obstructed price competition by preventing merchants from either communicating true cost information to consumers or granting them price discounts or other benefits for using lower-cost payment cards. But the Second Circuit believed that, because Amex *might* use the revenue from its elevated merchant prices to grant reward points (*i.e.*, discounts) to its cardholders, and that potential benefit to competition for cardholders *might* offset the injury to price competition in the sale of services to merchants, the plaintiffs had not yet shown "an adverse effect on competition in the relevant market" for purposes of the Rule of Reason's burden-shifting framework.

This holding misses the very point of the burden-shifting, Rule-of-Reason approach. This Court has long held that the protection of price competition is the

paramount goal of the antitrust laws, and that eliminating that competition with respect to any component of price formation is an adverse effect on competition. Even if Amex operates a two-sided platform—a point whose significance is quite misunderstood, as discussed below, *see infra* pp.16-21—the obstruction of price competition in any part of the prices paid is an adverse effect on competition, which must be justified by procompetitive effects to avoid condemnation under the Rule of Reason. Accordingly, the burden was *on Amex* to come forward with evidence of procompetitive effects stemming from its suppression of price competition; the plaintiffs had already done their part.

The second, related question is whether a plaintiff must show a "net" harm to competition, embracing both sides of a two-sided platform, to prevail. The Second Circuit said "yes," but the answer should be no. This Court has considered cases involving so-called "two-sided markets" and never imposed such a requirement.[2] *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 598, 610 (1953). Contrary to the Second Circuit's view, the very

[2] A firm that operates a two-sided platform sells different services to two different sets of purchasers. A firm operating such a platform is often referred to as inhabiting a "two-sided market." But "the economic concept of two-sided platforms or markets is not the same as the legal concept of the *relevant market* in antitrust law, a distinction that economists and lawyers alike recognize." *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 2017 WL 1064709, *8 (S.D.N.Y. 2017) (citing Evans and Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Policy Int'l 151, 153 & n.5 (2007)).

different services that payment card companies offer to merchants and cardholders respectively are not substitute products, and so do not belong in the same relevant market from the standpoint of antitrust law and economics. Treating products that cannot be substituted for each other as part of one relevant market is not even intelligible; it prevents the relevant-market inquiry from accurately answering the questions for which it is asked. And, relatedly, netting harms among different consumers buying different products in different relevant markets essentially inverts a core premise of antitrust law—namely, that so long as price signals are not distorted by anticompetitive behavior, the efficient allocation of resources is best achieved by the free market itself, not judicial balancing.

The Second Circuit's approach to these issues conflicts with rulings of this Court and fundamental antitrust principles. Given the importance of this case and the increasing importance in the modern economy of firms operating two-sided platforms, the Second Circuit opinion presents a significant threat to effective antitrust enforcement and to the sound development of antitrust doctrine. In fact, because the special "two-sided market" rules and netting analysis called for by the Second Circuit are so hard to fit within existing law, the only result of leaving the decision in place will be to damage the doctrine and the development of proper antitrust analysis going forward. The interim effect will be to put parties and courts through expensive and unproductive inquiries, while doing potentially irremediable harm to a set of legal principles that are already difficult for some courts to accurately apply. In this particular instance,

amici believe that it is essential that the Court act swiftly to clarify the doctrine and avoid deepening confusion on these important issues.

BACKGROUND

I. The Conduct At Issue

Merchants who purchase Amex credit card services account for approximately 95% of all retail sales in America. Each of those merchants enters into an agreement with Amex that contains Amex's NDPs. The NDPs prohibit merchants from using price discounts or any other inducement to influence a consumer to use a payment card that charges the merchant a lower fee than Amex. Pet. App. 19a-20a, 94a-96a, 100a-101a. The NDPs also prohibit any Amex-accepting merchant from conveying its own preference for alternative credit cards or debit cards—which cost much less to accept. Merchants cannot even truthfully advise consumers that Amex charges them more than other networks, and that the merchant increases its retail prices to cover the added expense. Pet. App. 91a-96a. These provisions are, essentially, a vastly more restrictive form of the anti-surcharging laws this Court recently considered in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), creating commensurately more dramatic effects on effective price competition.

II. The District Court's Findings

After a long trial involving voluminous evidence and expert testimony, the district court found that Amex's NDPs (1) obstruct price competition between Amex, Visa, MasterCard and Discover for the sale of credit-card services to merchants (Pet. App. 23a-24a, 71a, 191a-200a), and (2) increase "dramatically" the

prices merchants pay to all four networks. Pet. App. 71a; *see also id*. 68a, 195a-196a, 203a, 240a-241a. The district court also found that merchants increase their retail prices to cover the elevated credit-card fees, meaning that *all* consumers pay higher retail prices because of Amex's anticompetitive behavior. Pet. App. 68a, 191a-193a, 210a-212a, 221a n.46.

More specifically, the district court found that, if merchants could steer consumers to lower-cost credit cards by offering them lower prices or discounts, then consumers would switch to the lower-cost cards and the higher-priced cards would lose market share (Pet. App. 192a, 195a-197a, 217a-219a, 227a-228a)—as should happen in a competitive market. The NDPs prevent that price competition, however, because they eliminate any competitive incentive a card network would have to cut prices to merchants, who have no power to reward lower-cost networks with more charge volume at the register. In the district court's words "the NDPs short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive 'reward' for networks offering merchants a lower price for acceptance services." Pet. App. 71a. And the result is higher prices charged not only by Amex, but by all the networks. Pet. App. 192a.

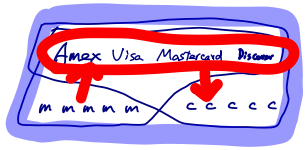
III. The Decision Below

The Second Circuit did not overturn any of the district court's factfinding. It nonetheless reversed the ruling that Amex had violated the Sherman Act under the Rule of Reason. It reasoned that the proven restraint on price competition in the market for services to merchants did not constitute a *prima facie* showing of an adverse effect on competition because

supracompetitive merchant prices might be used to increase the rewards that Amex gives to cardholders. Pet. App. 39a-40a, 43a-44a, 49a-54a. Holding that the injury to "merchant pricing is only one half of the pertinent equation," it ruled that a *prima facie* case of an adverse effect on competition would require *the plaintiffs* to show that higher merchant fees were not offset by higher cardholder rewards and that the "net" two-sided price had gone up. Pet. App. 44a, 49a-50a, 51a-52a ("Plaintiffs' initial burden was to show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall.").

Notably, the Court of Appeals did not find that Amex had presented evidence of a procompetitive justification for the injury its NDPs cause to merchant price competition. Nor did it find that Amex had in fact increased rewards to cardholders by as much as it increased prices to the merchants.[3] Instead, the Second Circuit held that under the Rule of Reason, Amex had no obligation to present evidence of

[3] Amex admitted "that not all of [its] gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. In fact, as the district court found, part of the increase "drops to [Amex's] bottom line," and Amex "spends less than half of its discount fees it collects from merchants on cardholder rewards." Pet. App. 209a-210a. But that is not the key point: Even if Amex passed on to cardholders all the excess revenue it collects from merchants, that would not constitute an efficient net price. Merchants pass the added Amex fees on to all their customers, including those who do not use Amex cards. Those customers, in effect, pay higher retail prices to cover the cost of rewards that go only to Amex cardholders. There is nothing efficient about person A paying for rewards that go only to person B.



procompetitive effects because the plaintiffs had failed to meet their initial burden of showing that competition had been injured, on balance, for both sets of Amex's customers—what it described as "the relevant market 'as a whole.'" Pet. App. 51a-52a.

This followed from the court's conclusion that the relevant market for evaluating Amex's conduct had to include the services sold by Amex to *both* merchants and cardholders and that the district court thus erred by finding a relevant market for (and anticompetitive effect in) the sale of network services to merchants alone. Pet. App. 32a-33a. Having defined the market that way, the court required the plaintiffs to prove that the injury to price competition on the merchant side of the platform was not outweighed by any hypothetical benefit to competition on the cardholder side. Pet. App. 43a-44a, 49a-54a. Absent this "net" injury, there would be no violation. *Id.*

REASONS FOR GRANTING THE WRIT

The Second Circuit made two critical errors in applying the Rule of Reason to the "two-sided market" it purported to identify below. We begin by explaining those errors, and then turn to the pernicious effects they will have on the development of antitrust doctrine, and the reasons this Court should grant immediate plenary review.

I. Proof Of Adverse Effects On Horizontal Price Competition Must Suffice To Shift The Burden To Defendants To Prove Any Alleged Procompetitive Justifications.

The Second Circuit did not dispute that Amex's NDPs prevent merchants from communicating truthful price information or offering lower prices to