



Two-Sided Credit Card Markets: The Supreme Court Takes Up Novel Antitrust Issue

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The Supreme Court has [agreed](#) to hear *Ohio v. American Express*, an antitrust case brought by a number of states against the credit card giant that poses the question of how federal antitrust law should treat two-sided markets. (As discussed in more detail below, two-sided markets are platforms in which two distinct user groups operate in an interdependent way.) The states are challenging “anti-steering” provisions in American Express’s contracts with its merchants, provisions that generally prevent the merchants from encouraging customers to use other credit cards. *American Express* is important not only for the practices of the [\\$2.4 trillion credit card industry](#)—with the case having the potential to change the way vendors accept card payments across the country—but the case also provides the Supreme Court with the opportunity to guide the lower courts that are increasingly confronting antitrust issues concerning two-sided markets. As a result, *American Express* raises several issues for Congress that could implicate its legislative and oversight roles with respect to the financial services industry and, more generally, the regulation of two-sided markets.

Antitrust law. [Section 1 of the Sherman Antitrust Act](#) prohibits any “contract” “in restraint of trade.” Because all contracts restrain their parties in some way, however, the Supreme Court has long read this provision to bar [only unreasonable restraints](#) on trade in order to prevent anticompetitive behavior in the relevant market as a whole. The Supreme Court has concluded that some restraints, such as agreeing with competitors to fix prices, are so patently anticompetitive that they are “[per se](#)” unreasonable and violate federal antitrust law. When examining restraints that are not within the narrow category of per se violations of the Sherman Act, however, courts apply a balancing test known as the “[rule of reason](#)” to distinguish between restraints that harm competition and those that merely regulate competition, using a [three-step burden-shifting framework with a final balancing test](#).

When challenging a restraint under the Sherman Act, a plaintiff must first establish the [relevant market](#) in which the restraint operates—in other words, the area in which the defendant faces competition. A fact-intensive inquiry, a product market is [defined](#) as a set of goods or services that are reasonably

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interchangeable (i.e., if one seller were to raise the price of a product, customers would be more likely to purchase other sellers' products in that market). The definition of a market—a question at the heart of the *American Express* litigation—is a critical one in antitrust law, as a broadly defined market is less likely to be one in which a single actor can take anticompetitive action and vice versa. After defining the relevant market, a plaintiff must show that the challenged conduct caused or could cause anticompetitive effects in that market (e.g., reduced output or decreased quality of products)—the first step in the rule of reason analysis. If a plaintiff meets this burden, the burden shifts to the defendant to demonstrate that there is a procompetitive justification for the challenged restraint. If a defendant does this, the plaintiff may yet prevail by establishing that the procompetitive benefits could be achieved by a more narrowly tailored restraint. Ultimately, the court balances the pro- and anticompetitive effects of the defendant's actions, striking down restraints whose anticompetitive effects predominate.

As this brief overview suggests, any particular rule of reason analysis is complex and rife with uncertainty. As the Supreme Court has noted, this uncertainty contributes to “[notoriously high litigation costs and unpredictable results](#)” in antitrust cases, as litigants cannot easily determine beforehand what the court will determine the relevant market to be or how it will measure pro- and anticompetitive effects. *Ohio v. American Express* could provide a vehicle for the Court to clarify how the rule of reason applies in complex cases, especially those involving two-sided markets, an area where case law is scant.

Two-sided markets. [Two-sided markets](#) bring together two different groups of people to facilitate an interaction between them and must set prices on both sides to account for the interdependence of supply and demand between them. This is in contrast to a one-sided market where a vendor sells something directly to a customer without a middleman moderating the exchange. While two-sided markets are not new—newspapers market to both readers and advertisers—they are only becoming more prevalent in today's economy, with eBay, Microsoft, and Google being only a few of the many [modern examples of entities that operate in such markets](#).

Credit card companies are another example of a two-sided market: they bring together merchants and consumers and allow them to easily exchange money for goods or services. Credit card companies [charge merchants a fee](#) each time they accept a credit card for payment. American Express generally [charges higher fees](#) to merchants than do other credit card companies such as Visa and MasterCard and uses these higher fees to offer more benefits to cardholders (e.g., airline miles, cash back rewards, or enhanced security), who in turn tend to use their American Express cards at the select merchants who accept the cards. [In response to increased competition from Visa and MasterCard](#), over the last two decades American Express began inserting and enforcing stricter “anti-steering” provisions in its contracts with merchants that prevent merchants from encouraging customers to use other credit cards, which merchants might otherwise do to keep their costs down. “Steering” can be accomplished by expressing a preference for credit cards other than American Express, or charging lower amounts for goods or services bought with another credit card, in order to incentivize customers not to use their American Express card, thus saving the vendor money in fees. The anti-steering provisions, on the other hand, also potentially allow American Express to fund better benefits for its cardholders.

The central question in *American Express* is whether both sides of a two-sided market together form a single market for rule of reason purposes or whether one side should be analyzed on its own as a distinct market. This is a tricky question because actions affecting one side of a two-sided market by definition impact the other, but neither side of the market is reasonably interchangeable with the other. In other words, with respect to the credit card market, the actions of the merchants and cardholders implicate supply and demand for a given card, but the services provided to merchants are distinct from those provided to cardholders. The states challenging American Express's anti-steering provisions [argue](#) that collapsing both the merchant and customer sides into a single market is inappropriate because it could force the plaintiff, in the first step of the analysis, to take into account both anticompetitive effects on one side of the market as well as procompetitive benefits on the other side of the market in order to arrive at a

net anticompetitive effect in the market. This is in contrast to a traditional rule of reason case, where the plaintiff is [only concerned with showing anticompetitive effects](#) and then lets the burden of showing procompetitive benefits fall to the defendant. American Express, on the other hand, [argues](#) that not considering both sides of the market together makes the procompetitive benefits of its restraint irrelevant because they are manifest on the cardholder side of the market and thus would not come into play in the rule of reason analysis if the market is limited to the merchant side.

The district court at trial [found](#) that only the merchant side of the credit card platform was the relevant market for antitrust purposes, reasoning that a merchant could not substitute American Express's network services with cardholder services, and that the two were, accordingly, not reasonably interchangeable. Further, the trial court applied the rule of reason and found that the anti-steering provisions had contributed to increased merchant fees from all credit card companies—a clear anticompetitive effect. On appeal, [the Second Circuit reversed](#) the district court, holding that both the merchant and customer sides had to be analyzed together as a single market because they were so interdependent. In addition to finding that the district court had used the wrong market for antitrust analysis, the Second Circuit went further and [held](#) that the government had failed to demonstrate that the anti-steering rules had net anticompetitive effects taking into account both sides of the platform. The Second Circuit thus did not simply send the case back for a new trial using the different framework, but rather directed that American Express should win outright based on the evidence already adduced.

Importance of the Case. The importance of the *American Express* case is underscored by the fact that the case is even being heard by the Supreme Court in the first place. The Court [does not often take antitrust cases](#), and it is also unusual for the Supreme Court to hear cases, such as this one, where there is not a “circuit split”—a disagreement among courts of appeals about how to apply a law. In fact, the federal government, which had been a party to the case in the lower court, [urged the Court not to take this case](#) for this very reason, arguing that “[f]urther percolation” in the circuit courts on the underlying legal issues was necessary. The Supreme Court’s general [standard](#) for hearing cases in the absence of a circuit split is that a case must present “an important question of federal law that has not been, but should be, settled by this Court,” suggesting that the Supreme Court thinks *American Express* is of particular import.

More specifically, *American Express* may implicate several issues of interest to Congress. While the legislative branch has for the most part [left to the judiciary](#) the job of giving content to broadly worded antitrust statutes passed decades ago, Congress has [crafted exceptions](#) to the antitrust laws from time to time, and the legislature possesses oversight responsibilities regarding how the Department of Justice’s Antitrust Division and the Federal Trade Commission pursue antitrust enforcement actions. With respect to the financial services industry, Congress has been active in regulating the payment cards industry. The [Durbin Amendment](#), for example, limited fees that banks could charge for debit card processing and has been the subject of legislative debate since its passage in 2010. As a result, *American Express*, which has not yet been scheduled for argument at the Court, may have major effects for Congress’s work on both antitrust matters generally and the financial services industry.