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### Supreme Court Term Spotlight: Ohio v. American Express Company

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## SUPREME COURT TERM SPOTLIGHT: *OHIO V. AMERICAN EXPRESS COMPANY*

*Thomas J.K. Schick, News Editor*

In addition to the prominent cases addressing First Amendment,<sup>1</sup> searches and seizures,<sup>2</sup> and immigration<sup>3</sup> issues presented in the 2017–18 term docket, the Supreme Court will also hear two important consumer law disputes with potentially major commercial implications.<sup>4</sup> Not to be lost in the widespread media attention at-

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<sup>1</sup> See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017) (granting certiorari to address whether disclosures required by a California reproductive rights law violate free speech protections); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (granting certiorari to address whether Colorado's public accommodations law which compels a baker to design and make a cake that violates his religious beliefs about same-sex marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.).

<sup>2</sup> See, e.g., *Collins v. Virginia*, 138 S. Ct. 53 (2017) (granting certiorari to address whether the Fourth Amendment automobile exception permits a police officer to enter private property to search a vehicle parked a few feet from a residence without a warrant); *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (granting certiorari to address whether the warrantless search and seizure of cell phone location and movement data violates the Fourth Amendment.).

<sup>3</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 34 (2018) (granting certiorari to address, *inter alia*, the constitutionality of President Donald Trump's 2017 proclamation restricting travel to the United States by citizens from eight countries.).

<sup>4</sup> See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017) (granting certiorari to address whether American Express's anti-steering provisions unreasonably restrain trade in violation of the Sherman Act); *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2017) (granting certiorari to address whether the National Labor Relations Act prohibits enforcement of an agreement requiring employees to resolve disputes with

tracted by other pending Supreme Court cases, the Court's decision in *Ohio v. American Express Company*<sup>5</sup> is poised to have great effects on the cardholder, merchant, and lender sides the consumer credit card industry. In *American Express Company*, the Court will review a decision by the United States Court of Appeals for the Second Circuit holding that the anti-steering provisions contained in merchant agreements with American Express—the second highest volume credit card network—do not unreasonably restrain trade in violation of § 1 of the Sherman Act.<sup>6</sup>

To grasp the context of the legal dispute before the Court in *American Express Company*, it is important to understand the basic mechanics of the credit card industry, specifically, anti-steering provisions. American Express and other credit card networks charge merchants a fee each time a consumer uses their card to make a transaction.<sup>7</sup> Merchant fees vary by merchant and credit card network.<sup>8</sup> To control how merchants treat American Express cardholders, American Express adopted anti-steering or “non-discriminatory provisions” in their contracts with merchants.<sup>9</sup> Anti-steering provisions seek to prevent merchants from directing consumers toward less expensive payment methods, namely, payment methods that charge the merchant a lower fee to process the transaction.<sup>10</sup> American Express's anti-steering provision prevents merchants from, *inter alia*, indicating that it prefers other payment

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the employer through individual arbitration under the Federal Arbitration Act.).

<sup>5</sup> 138 S. Ct. 355 (2017).

<sup>6</sup> *United States v. Am. Express Co.*, 838 F.3d 179, 188, 207 (2d Cir. 2016), *cert. granted sub nom.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017). Specifically, § 1 of the Sherman Act provides in relevant part that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States, or with foreign nations, is hereby declared to be illegal.” 15 U.S.C. § 1 (2004) (emphasis added).

<sup>7</sup> *See id.* at 188–89.

<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 190–91.

<sup>10</sup> *See id.* at 191–92; *see also* Steven Semerano, *Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action*, 2015 COLUM. BUS. L. REV. 186, 204 (2015).

methods over American Express, dissuading cardholders from using American Express, and persuading American Express cardholders to use another form of payment.<sup>11</sup> Use of anti-steering provisions seeks to benefit both American Express and consumers because “[c]ertainty that [American Express] cards will be accepted makes the network more attractive to cardholders—and, in turn, cardholders’ use of the [American Express] network makes its cards more attractive for merchants to accept.”<sup>12</sup>

In 2010, the United States and seventeen states sued American Express, Visa, and MasterCard in a New York District Court for their use of anti-steering provisions that the plaintiffs argued unreasonably restrained trade in violation of § 1 of the Sherman Act.<sup>13</sup> In 2014, American Express proceeded to trial after Visa and MasterCard entered into consent judgments and voluntarily withdrew their anti-steering provisions.<sup>14</sup> Following a seven week bench trial before District Judge Nicholas Garaufis, the District Court found that American Express violated antitrust laws.<sup>15</sup> Notably, the District Court also found that American Express’s anti-steering provisions “resulted in increased prices for consumers . . . [because] [m]erchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices.”<sup>16</sup> The District Court permanently enjoined American Express from enforcing its anti-steering provision for ten years.<sup>17</sup>

On September 26, 2016, the Second Circuit reversed the injunction against American Express and held that the anti-steering provisions did not violate § 1 of the Sherman Act.<sup>18</sup> In applying the “rule of reason” burden-shifting test, the Second Circuit held that the relevant market included both the market for general purpose

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<sup>11</sup> *See Am. Express Co.*, 838 F.3d at 191.

<sup>12</sup> *Id.* at 192.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 216 (E.D.N.Y. 2015), *rev’d*, 838 F.3d 179 (2d Cir. 2016), *cert. granted sub nom.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017).

<sup>17</sup> *See Am. Express Co.*, 838 F.3d at 193.

<sup>18</sup> *See id.* at 183.

credit and charge card network services, *as well as the market for cardholders*.<sup>19</sup> The Second Circuit noted that the District Court erred in not sufficiently embracing the “two-sided market” features of the credit card industry in its market definition, and held that “[t]his was error because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants).”<sup>20</sup> Additionally, the Second Circuit held that eliminating American Express’s anti-steering provisions would likely increase the market shares of Visa and MasterCard.<sup>21</sup> Lastly, the Second Circuit held that “[t]he District Court’s erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the [anti-steering provisions] on both merchants and cardholders.”<sup>22</sup> The Supreme Court granted certiorari on October 16, 2017.<sup>23</sup>

The Court’s anticipated *American Express Company* decision will have significant financial implications to consumers and merchants. Petitioners and merchants hope that a victory at the Supreme Court will allow them to chip away at the \$50 billion amount of fees paid to credit card companies annually.<sup>24</sup> Consumers will be similarly affected as concerns about the impact of anti-

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<sup>19</sup> *See id.* at 194, 196–97. Stated another way, the Second Court concluded by holding that “[t]he District Court erred here in focusing entirely on the interests of merchants while discounting the interests of cardholders.” *Id.* at 206.

<sup>20</sup> *Id.* at 200. The Second Circuit noted that the credit card industry is a “two-sided market” because “cardholders benefit from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it.” *Id.* at 185–86.

<sup>21</sup> *See id.* at 204. As of 2013, the Second Circuit stated that the credit card transaction volume was shared as follows: Visa (45%), American Express (26.4%), MasterCard (23.3%), and Discover (5.3%). *See id.* at 188.

<sup>22</sup> *Id.* at 204.

<sup>23</sup> *See Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017).

<sup>24</sup> *See* Greg Stohr, *American Express Fee Accusations Get U.S. High Court Hearing*, BLOOMBERG (Oct. 16, 2016), <https://www.bloomberg.com/news/articles/2017-10-16/american-express-fee-accusations-get-u-s-supreme-court-hearing>.

steering provisions on raising prices remain.<sup>25</sup> The ubiquity of credit cards as a primary payment method in the consumer economy raises the stakes further, especially considering that approximately twenty-two billion credit card transactions are made each year totaling more than \$2 trillion.<sup>26</sup> On the other hand, American Express will continue to rely on the Second Circuit's holding that the relevant market includes both merchants *and* cardholders, and that Petitioners' reliance on evidence of price increases caused by anti-steering provisions "does not show competitive harm," but rather "is perfectly consistent with vibrant competition."<sup>27</sup> Notably, while a party to the case before the Second Circuit, the United States did not join the appeal to the Supreme Court; however, the United States did file a brief in support of the Petitioners.<sup>28</sup>

At the end of the day, the largest concern for consumers regarding the *American Express Company* case is presumably the potential impact lawful anti-steering provisions may have on prices of goods and services.<sup>29</sup> This case illustrates the intersection

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<sup>25</sup> See *Am. Express Co.*, 88 F. Supp. 3d at 216 (holding that American Express's anti-steering provisions "resulted in increased prices for consumers"); see also Brief for The American Antitrust Institute as Amicus Curiae Supporting Petitioners at 7, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. Dec. 14, 2017) ("Accepting the logic of the court of appeals would raise the burden on plaintiffs to show unlawful monopolization by a dominant platform even when the firm engages in exclusion for the sole purpose of raising prices or deterring innovation."); Brief for The Merchant Advisory Group as Amicus Curiae Supporting Petitioners at 2, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. Dec. 14, 2017) ("If Amex is successful in exempting its anticompetitive practices from antitrust liability, it will be the merchants, their employees, and American consumers who literally pay the price."); Brief for the United States Supporting Petitioners at 31, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. Dec. 7, 2017) ("Retail consumers bear the ultimate economic burden of the anti-steering rules.").

<sup>26</sup> See Stohr, *supra* note 24.

<sup>27</sup> Brief for Respondents at 3, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. Jan. 16, 2018).

<sup>28</sup> See Stohr, *supra* note 24 (noting that the "Trump administration said that, while the appeals court ruling was wrong, the case didn't meet the Supreme Court's usual standards for review."); see also Brief for the United States, *supra* note 25.

<sup>29</sup> See Brief for The Merchant Advisory Group, *supra* note 25; Brief for the

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of law and economics and their respective evaluations of what is just and equitable in the American credit card market. Focusing on the Court's canon of antitrust analysis, the Court's decision will likely clarify the proper market definition for the credit card industry and other two-sided markets.<sup>30</sup> Because this case will likely determine whether credit card companies can use anti-steering provisions in their merchant agreements, particular attention should be paid to measuring the actual effect of the Court's decision on competition and prices.

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United States, *supra* note 25.

<sup>30</sup> See *supra* note 20; see also United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 754 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part) (noting that the market for broadband internet access may be two-sided, and that "[t]he answer to the question may well shed light on the reasonableness of the [Federal Communications Commission] regulations" at issue in that case), *petition for cert. filed*, Sept. 28, 2017.