UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-1672

Caption [use short title]

Motion for: Leave to File Amicus Brief

United States et al.,
Plaintiffs-Appellees,

v.

American Express Co. et al.,
Defendants-Appellants

Set forth below precise, complete statement of relief sought:

Retail Litigation Center, Inc. and National Retail Federation request leave to file an amici curiae brief in support of Plaintiffs-Appellees' petition for panel rehearing and rehearing en banc.

MOVING PARTY: Retail Litigation Center, Inc. and National Retail Federation

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: American Express Co.

MOVING ATTORNEY: Frank M. Lowrey IV

OPPOSING ATTORNEY: Evan R. Chesler

[name of attorney, with firm, address, phone number and e-mail]

Bondurant Mixson & Elmore, LLP
1201 West Peachtree St NW, Ste 3900, Atlanta, GA 30309
lowrey@bmelaw.com; 404-881-4100

Cravath, Swaine & Moore LLP
825 Eighth Ave., Worldwide Plaza, New York, NY 10019
echesler@cravath.com

Court-Judge/Agency appealed from: Hon. Nicholas G. Garaufis, U.S. District Court-Eastern District New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Frank M. Lowrey IV **Date:** 11/14/2016

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

15-1672

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, et al.

Plaintiffs-Appellees,

v.

AMERICAN EXPRESS COMPANY, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Eric Citron
GOLDSTEIN AND RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
Tel: (202)362-0636

Frank M. Lowrey IV
BONDURANT MIXSON
& ELMORE, LLP
1201 West Peachtree St. NW
Suite 3900
Atlanta, GA 30309
Tel: (404) 881-4100

Counsel for Amici Curiae
Retail Litigation Center, Inc. and National Retail Federation

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Pursuant to Federal Rule of Appellate Procedure 29(b), the Retail Litigation Center, Inc. ("RLC") and the National Retail Federation ("NRF") respectfully move this Court for leave to file the attached *amici curiae* brief in support of Plaintiffs-Appellees' petition for rehearing. After conferral, no party to this appeal opposes this motion.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. Members of the RLC and NRF pay billions of dollars a year to accept credit cards as a form of

payment. They believe, as the district court found, that the prices U.S. merchants pay to Amex and other payment card networks have long been sustained at supra-competitive levels by anti-steering rules and that those prices will drop if Amex is enjoined from enforcing those rules.

DESIRABILITY AND RELEVANCE OF *AMICI CURIAE* BRIEF

The panel opinion conflicts with Supreme Court and Second Circuit precedent on core issues of antitrust law. If left in place, the opinion threatens to undermine or distort this Court's well-settled method for applying the rule of reason. Given the importance of this Circuit to antitrust jurisprudence nationwide, the petition for rehearing raises an issue of great importance and one appropriate for participation by interested *amici*. The attached brief seeks to assist the Court in determining the need for rehearing by illustrating the actual market power held by American Express ("Amex"), the manner in which Amex consistently exercised that market power to impose price increases upon retail merchants, and why the panel's analysis—which inaccurately and improperly considered potential benefits to cardholders as a justification for Amex's restraint of interbrand price competition—failed to acknowledge the effect of that market power.

CONCLUSION

For these reasons, and those more fully expressed in their brief, the RLC and NRF respectfully request leave to file their *amici curiae* brief in support of Plaintiffs-Petitioners.

Respectfully submitted this 14th day of November, 2016.

/s/ Frank M. Lowrey IV

Frank M. Lowrey IV
BONDURANT MIXSON & ELMORE, LLP
1201 West Peachtree St. NW
Suite 3900
Atlanta, Georgia 30309
Tel: (404) 881-4100
lowrey@bmelaw.com

Eric Citron
GOLDSTEIN AND RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
Tel: (202)362-0636
ecitron@goldsteinrussell.com

Counsel for Amici Curiae
Retail Litigation Center, Inc. and National Retail Federation

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Plaintiffs-Appellees,

v.

AMERICAN EXPRESS COMPANY, et al.,

Defendants-Appellants

(Full caption commences on following pages)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Eric Citron
GOLDSTEIN AND RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
Tel: (202)362-0636

Frank M. Lowrey IV
BONDURANT MIXSON
& ELMORE, LLP
1201 West Peachtree St. NW
Suite 3900
Atlanta, GA 30309
Tel: (404) 881-4100

Counsel for Amici Curiae
Retail Litigation Center, Inc. and National Retail Federation

(FULL CAPTION)

UNITED STATES OF AMERICA, STATE OF MARYLAND, STATE OF MISSOURI, STATE OF VERMONT, STATE OF UTAH, STATE OF ARIZONA, STATE OF NEW HAMPSHIRE, STATE OF CONNECTICUT, STATE OF IOWA, STATE OF MICHIGAN, STATE OF OHIO, STATE OF TEXAS, STATE OF ILLINOIS, STATE OF TENNESSEE, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF IDAHO, STATE OF RHODE ISLAND,

Plaintiffs-Appellees,

STATE OF HAWAII,

Plaintiff,

v.

AMERICAN EXPRESS COMPANY, AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Defendants,

MASTERCARD INTERNATIONAL INCORPORATED, VISA INC.,

Defendants-Appellants,

CVS Health, Inc., Meijer, Inc., Publix Super Markets, Inc., Raley's, SuperValu, Inc., Ahold U.S.A., Inc., Albertsons LLC, The Great Atlantic & Pacific Tea Company, Inc., H.E. Butt Grocery Co., HyVee, Inc., The Kroger Co., Safeway Inc., Walgreen Co., Rite-Aid Corp., BI-LO LLC, Home Depot USA, Inc., 7-Eleven, Inc., Academy, Ltd., DBA Academy Sports + Outdoors, Alimentation Couche-Tard Inc., Amazon.Com, Inc., American Eagle Outfitters, Inc., Ashley Furniture Industries Inc., Barnes & Noble, Inc., Barnes & Noble College Booksellers, LLC, Beall's, Inc., Best Buy Co., Inc., Boscovs, Inc., Brookshire Grocery Company, Bucee's Ltd, The Buckle, Inc., The Childrens Place Retail Stores, Inc., Coborns Incorporated, Cracker Barrel Old Country Store, Inc., D'Agostino Supermarkets, Inc., Davids Bridal, Inc., DBD, Inc., Davids Bridal Canada Inc., Dillard's, Inc., Drury Hotels Company, LLC, Express LLC, Fleet and Farm of Green Bay, Fleet Wholesale Supply Co. Inc., Foot Locker, Inc., The Gap, Inc., HMSHost Corporation, IKEA North America Services, LLC, Kwik Trip, Inc., Lowe's Companies, Inc., Marathon Petroleum Company LP, Martin's

Super Markets, Inc., Michaels Stores, Inc., Mills E-Commerce Enterprises, Inc., Mills Fleet Farm, Inc., Mills Motor, Inc., Mills Auto Enterprises, Inc., Willmar Motors, LLC, Mills Auto Enterprises, Inc., Mills Auto Center, Inc., Brainerd Lively Auto, LLC, Fleet and Farm of Menomonie, Inc., Fleet and Farm of Manitowoc, Inc., Fleet and Farm of Plymouth, Inc., Fleet and Farm Supply Co. of West Bend, Inc., Fleet and Farm of Waupaca, Inc., Fleet Wholesale Supply of Fergus Falls, Inc., Fleet and Farm of Alexandria, Inc., National Association of Convenience Stores, National Grocers Association, National Restaurant Association, Official Payments Corporation, Pacific Sunwear of California, Inc., P.C. Richard & Son, Inc., Panda Restaurant Group, Inc., Petsmart, Inc., RaceTrac Petroleum, Inc., Recreational Equipment, Inc., Republic Services, Inc., Retail Industry Leaders Association, Sears Holdings Corporation, Speedway LLC, Stein Mart, Inc., Swarovski U.S. Holding Limited, Wal-Mart Stores Inc., Whole Foods Market Group, Inc., Whole Foods Market California, Inc., Mrs. Gooch's Natural Food Markets, Inc., Whole Food Company, Whole Foods Market Pacific Northwest, Inc., WFM-WO, Inc., WFM Northern Nevada, Inc., WFM Hawaii, Inc., WFM Southern Nevada, Inc., Whole Foods Market, Rocky Mountain/Southwest, L.P., The William Carter Company, Yum! Brands, Inc., Southwest Airlines Co.,

Movants.

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Introduction and Interest of *Amici Curiae*

The Retail Litigation Center, Inc. ("RLC") is a public policy organization focusing on legal issues affecting the retail industry.[1] Its members include many of the country's largest and most innovative retailers. The National Retail Federation ("NRF") is the world's largest retail trade association, representing every variety of merchant, from corner grocers to the largest retail chains.

RLC and NRF members pay billions in fees each year to accept credit cards as a form of payment. They believe, as the district court found, that the prices U.S. merchants pay to Amex and the other card networks are kept at supra-competitive levels by Amex's anti-steering rules and that those prices will drop if those rules are enjoined. The retail associations thus respectfully urge panel or en banc rehearing.

Argument and Authorities

I. Amex Exercises Actual Market Power Over Even The Largest Retailers.

After taking testimony from over a dozen retail merchants and weighing that and other evidence, the district court found as a matter of fact that retail merchants—particularly large multi-location retailers—generally cannot refuse to accept Amex without losing an unacceptable portion of sales. Accordingly, retailers must generally tolerate the prices and contract terms that Amex imposes on them in order to accept

[1] Pursuant to Rule 29(c)(5), counsel certify that this brief was authored by counsel for the *amici*. Counsel for a party did not author any part of the brief, nor did any party or its counsel or any person other than the amici contribute any money to fund the preparation or submission of the brief. No party opposes the filing of this brief.

the card; it is ineffective to push back by threatening to accept only Amex's competitors.[2] Indeed, the evidence showed that retailers who do try to drop Amex ultimately capitulate without winning any concessions in the process. SPA76-77. Walgreens, for example—then the nation's ninth largest retailer—dropped Amex in 2004 only to later resume acceptance on the same terms because of a resulting loss of sales. *Id.*

The inability to discipline Amex's prices and/or contract terms by threatening to drop the card leaves merchants in a highly uncompetitive atmosphere because of Amex's anti-steering rules (ASRs). Absent those rules, retailers could still use competition to push back on Amex's prices by steering charge volume at the register to networks that offer lower prices for merchant acceptance. By preventing that tactic, however, the ASRs "reduce American Express's incentive—*as well as* those of Visa, MasterCard, and Discover—to offer merchants lower discount rates and, as a result, they impede a significant avenue of horizontal interbrand competition in the network services market." SPA98 (emphasis added). Indeed, even the Panel acknowledged that Amex's ASRs "affect competition…by protecting the critically important revenue that Amex receives from its relatively high merchant fees." Op. 56. The key point, however, is that the ASRs do so by preventing merchants from generating effective *interbrand price competition* among Amex and its competitors—the primary focus of antitrust law. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

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[2] Trial Transcript ("Tr.") 208-09, 232-48, 389-90, 573-74, 1262-63, 1401, 1606-07, 1687-90, 2159-61, 2183, 2322-23, 2359, 2411-12, 2416, 3146-47, 6126.

None of this is mere economic theory. Amex's ASRs have allowed it to impose a steady succession of *actual* price increases on retailers.[3] As the district court found, Amex has *repeatedly* raised its prices for network services without meaningful merchant attrition and, indeed, without even the fear of such attrition. SPA78-83. That includes 20 separate price increases over the five years of Amex's self-styled "Value Recapture" initiative. *Id.* And when Amex raises its prices, its competitors tend to follow, precisely because the ASRs prevent those competitors from deriving much benefit from price competition. *See infra* p.5. Retailers have responded to these price increases by attempting to negotiate out of the ASRs,[4] by attempting to negotiate price reductions,[5] by threatening to terminate acceptance, and—in a very few cases—by following through on that threat.[6] But because of Amex's leverage over merchants and the effect of its ASRs on the competition between Amex and the other networks, none of those strategies has worked, even for the nation's largest retailers.[7]

The inevitable result is that retailers face ever increasing costs for card ac-

[3] Tr. 244, 363, 395, 569-70, 1400, 1608-09, 2395, 2407-10, 2414-15, 2518.

[4] Tr. 261-66, 270, 402, 1258, 1322, 1612-13.

[5] Tr. 203-08, 218-19, 239, 244, 369, 394-95, 570-72, 1255-57, 1261-62, 1352-56, 1365-97, 1608-09, 1622-23, 1666, 1694-99, 1763, 2169-71, 2183, 2412-16, 2523-24.

[6] Tr. 389-90, 486-94, 570-72, 1365-1392, 1518-19, 1529-36, 1687-90.

[7] *See id.* As the Panel noted, about three million out of nine million U.S. merchants do not accept Amex. Op. 19. But the merchants that do not accept Amex are overwhelmingly small merchants that represent only a small fraction of total charge volume. SPA95-96 & n.40, 124 & n.48. Small, one-location retailers cannot discipline Amex's prices when the nation's largest retailers cannot.

ceptance.[8] For some, these costs are their highest operational costs after real estate, healthcare and payroll. Tr. 386-87, 1222-23. The supra-competitive prices charged to merchants in turn drive up retail prices to consumers across the board, including for those who cannot qualify for Amex reward cards. SPA98, 113-14, 120-22. Accordingly, the reason this case is vital to merchants—and the broader economy—is that the district court's injunction against the ASRs was poised to inject competition into a market relationship between merchants and card companies where it has long been absent. And the panel's essential error lies in failing to recognize that this suppression of competition by Amex's ASRs is *itself* the principal concern of the Sherman Act. The compelling proof of this effect is thus a sufficient reason to enjoin them.

II. Amex's Actual Market Power Moots Any "Two-Sided Market" Issues.

As explained by the government's rehearing petition, the panel reached the opposite conclusion by wrongly holding that the relevant market here includes cardholders. That not only fails to recognize the direct effect of the ASRs, but also ignores why a relevant market is defined in the first place. Courts define markets and calculate market share "as a proxy for market power." *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995). Yet that exercise is not mandatory: Market power may be shown *directly* "by evidence of 'specific conduct indicating the defendant's power to control prices or exclude competition.'" *Id.* (citation omitted); *see also*

[8] Tr. 207-08, 386-87, 392-93, 449-55, 481, 1222-23, 1255-57, 1351-52, 1527-29, 1608-09, 2169, 2182-83, 2234-35, 2398, 2405, 2523, 3155-56.

Todd v. Exxon Corp., 275 F.3d 191, 206-07 (2d Cir. 2001). Direct proof of market power suffices to show that merchants cannot discipline Amex's anticompetitive contract terms through competition itself. And that is all that matters.

That, meanwhile, is precisely what the government proved here—that Amex has been able to raise prices without fear of merchant attrition or attracting entry by a low-cost provider. It can force even major retailers, like Walgreens, to accept terms they would not accept in a competitive market.[9] Meanwhile, low-cost entrants (like Discover) have found that they cannot attract market share even by severely undercutting Amex's prices, precisely because Amex's ASRs leave retailers powerless to steer charge volume to Discover as a reward. SPA107-111. This is market power in action; the effect the law cares about is *evident* in the relationship between merchants and Amex, whether cardholders are also somehow "in" the relevant market or not.

Put otherwise, the undisputed evidence *already shows* that the need to attract and reward cardholders has not empirically precluded Amex from exercising actual market power over merchants. Thus, contrary to the Panel's views, including cardholders in the relevant market would not foreclose the district court's factual findings that Amex has market power and that the ASRs can thus substantially foreclose interbrand competition in the prices merchants pay for card acceptance.

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[9] *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'").

III. Amex Cannot Justify Restraining Interbrand Price Competition by Distributing Some of the Profits to Cardholders.

The Panel concluded that Amex's ASRs "affect competition…by protecting the critically important revenue that Amex receives from its relatively high merchant fees" but that reducing that revenue "may decrease the optimal level of cardholder benefits, which in turn may reduce the intensity of competition among payment-card networks on the cardholder side of the market." Op. 56. In other words, Amex's ASRs protect its high merchant fees *from interbrand price competition by other networks* but that "may" be justified because some portion of those inflated fees fund cardholder benefits. As the government explains, if those cardholder benefits are even relevant here, they would be countervailing pro-competitive effects to be proved *by Amex*, not something that the government must disprove to meet its initial burden. But they are not relevant here; we trust competition—not its suppression—to allocate benefits in the economy.

In fact, the panel's view that the district court ignored the role of cardholder rewards faces two flaws, one factual, the other legal. As a factual matter, Amex's "Value Recapture" price hikes "were *not* paired with offsetting adjustments on the cardholder side of the platform" and so "the resulting increases in merchant pricing are properly viewed as changes to the *net* price charged across Amex's integrated platform." SPA79 (emphasis added). In other words, these price hikes increased Amex's profits, rather than simply keeping pace with the costs of cardholder rewards. *Id.* at 79-80. The panel never explains why that factual finding is erroneous, let alone clearly so.

Moreover, as a legal matter, the panel's analysis embraces a trade-off inquiry not permitted by antitrust law. The opinion cites no case where a restraint shielding the prices paid by one set of customers from interbrand competition was justified because the fruits of that restraint financed a seller's efforts to attract some different set of consumers. Nor would there be any principled way to resolve that inquiry—should a dollar of reward benefits to a cardholder offset a dollar of overcharge paid by a merchant or an overall increase in retail prices paid by all customers? It is futile to search for some common denominator that could convert the harm to merchants, the alleged benefits to cardholders and the higher prices paid by all retail customers into one net value for our economy, be it negative or positive.

In fact, the Supreme Court has long recognized the "inability [of courts] to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972). "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts." *Id.* at 611. In other words, antitrust law does not entertain the rob-Peter-to-pay-Paul analysis urged by Amex. It does not tolerate contractual restraints on interbrand price competition, so long as some of the overcharges paid by some consumers are used to attract others. That standard-less balancing act would be far more complex than tracing an overcharge through a single distribution chain, something that the Supreme

Court refuses to allow. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977). And, worse, it would substitute judicial guesswork for competition as the force we rely upon to ensure that resources are allocated efficiently in the economy.

It is thus ironic that the panel faulted the district court for picking sides. *See* Op. 55. It did no such thing: It merely refused to allow Amex to decide for everyone—via private contractual ordering—that the prices merchants pay for card acceptance should not be subject to horizontal interbrand competition. Our national economic policy does not allow Amex to do that. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978). Rather than picking winners or losers, the district court simply cleared the way for both card acceptance fees and cardholder rewards to be determined by competition. That decision is sound in law and fact and essential to the health of the national economy. This Court should affirm it on rehearing.

Respectfully submitted, this 14th day of November, 2016.

/s/ Eric Citron */s/ Frank M. Lowrey IV*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains a total of 2,086 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with size 14 Garamond font.

Dated this 14th day of November, 2016.

/s/ Frank M. Lowrey IV
Frank M. Lowrey IV
Counsel for The Retail Litigation Center, Inc. and
The National Retail Federation