No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,
Petitioners,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* AHOLD U.S.A., INC.; ALBERTSONS LLC; BI-LO LLC; CVS PHARMACY, INC.; THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.; H.E. BUTT GROCERY CO.; HY-VEE, INC.; THE KROGER CO.; MEIJER, INC.; PUBLIX SUPER MARKETS, INC.; RITE AID CORPORATION; SAFEWAY INC.; SUPERVALU, INC.; AND WALGREEN CO. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are some of the largest supermarket and drugstore chains in the United States. All of the *Amici* purchase Amex merchant services.[1] Credit card fees are among the largest and fastest-growing expenses for *Amici*. The source of those high fees is the total lack of horizontal price competition for credit card merchant services.

SUMMARY OF ARGUMENT

While this case presents important issues of antitrust jurisprudence warranting the States' appeal, it also presents a critical issue as to the fundamental responsibility of appellate courts with respect to the consideration of extra-record factual assertions and economic assumptions introduced for the first time on appeal. In this antitrust case of national import affecting millions of merchants and consumers, and encompassing billions of transactions totaling trillions of dollars, the Second Circuit panel ignored the findings of fact in the district court's 150-page opinion without determining that they were clearly erroneous.

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[1] Counsel for *Amici* provided counsel for the parties timely notice of intent to file this brief, and the parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

Instead, as demonstrated below, the appellate panel relied almost exclusively on factual assertions from an amicus brief and secondary sources funded by—and in some instances actually written and edited by—the payment industry. These assertions were in direct contradiction to the facts as found by the district court after 24 days of trial.

Amici are among the millions of U.S. merchants who, as found by the district court, "cannot inject price competition into the network services industry by encouraging their customers to use their lowest cost supplier, as they can in other aspects of their business." Pet. App. 198a. "Amex's NDPs deny its competitors the ability to recognize a 'competitive reward' for offering merchants lower swipe fees, and thereby suppress an important avenue of horizontal interbrand price competition." *Id.* 197a. The Amex restraints even prevent new entrants from competing through a differentiated, low-merchant fee business model. *Id.* 204a-206a.

On appeal, the appellate panel did **not** find erroneous or even address the district court's findings on the effect of the Amex rules on competition for merchant services. It only held that these findings did not show an anticompetitive effect because merchants and cardholders are each consumers of services on Amex's two-sided platform. Pet. App. 49a-50a. Even under the panel's logic, this means that a firm can eliminate horizontal price competition for services to millions of its customers without producing any anticompetitive effects. The panel's opinion is the first

antitrust case in history to so hold. Further, it conflicts with cases involving two-sided platforms—like newspapers, radios, and telephone services—where courts have found an anticompetitive effect based only on restraints in the relevant antitrust market on one side of the platform.[2]

As Professor Hovenkamp explains in his just-released supplement to his treatise, "the court failed to see…that under antitrust policy *competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the incorrect finding that these two elements of revenue were within the same antitrust market." P. Areeda & H. Hovenkamp, Antitrust Law § 562e (Supp. 2017). Professor Hovenkamp surmises that the appellate panel "was apparently misled by the fact that Amex obtained revenue from sources, merchant fees and consumers, but the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same market." *Id.* § 565.

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[2] *See Times Picayune Publ'g Co. v. United States*, 345 U.S. 594 (1953) (newspaper's restraint affecting advertisers, not readers, had anticompetitive effect); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951) (same); *Telecor Commc'ns, Inc. v. S.W. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002) (telephone company's restraint affecting pay phone operators, but not telephone users, had anticompetitive effect); *United States v. Microsoft Corp.*, 253 F.3d 34, 60-62, 65-72 (D.C. Cir. 2001) (analysis of Microsoft's monopolization of operating system market focused on anticompetitive effects with respect to software developers).

Amici believe that they have unique insights by virtue of their prior litigation against Visa and MasterCard and their parallel litigation against Amex—which was filed years before the Government's case but consolidated with it for purposes of discovery—to share with this Court how the appellate panel below "reached [its] troubling conclusion." *Id.* § 1505.

This brief details the lengths to which the appellate panel relied upon non-record sources (Part I), establishes how such reliance contravenes the standard of review and adversarial system (Part II), and then reveals the undisclosed involvement of and links between Amex (and the payment industry in general) with the amicus brief and secondary sources relied on by the panel (Part III) to demonstrate why this case warrants review.

ARGUMENT

I. THE APPELLATE COURT PANEL WAS LED ASTRAY BY INCORRECT FACTUAL ASSERTIONS AND BIASED ECONOMIC THEORY FROM AN AMICUS BRIEF AND OTHER SECONDARY SOURCES.

A review of the appellate court proceedings reveals how the panel was "apparently misled," to borrow Professor Hovenkamp's characterization. It also demonstrates why review is warranted by this Court to address the increasing frequency of the breakdown of the adversarial system in the

intermediate appellate courts. This case shows how reliance on extra-record materials presented for the first time on appeal from untested sources containing unknown biases can result in extraordinary conclusions with far-reaching implications for both antitrust jurisprudence and $5 trillion of the U.S. economy.

The record in this case was well-developed in the district court. The pre-trial proceedings involved millions of pages of documents and over 200 depositions that filled over 40,000 pages of testimony. Amex identified five testifying experts whose deposition testimony filled over 3,500 pages. The Government identified five of its own experts whose deposition testimony filled over 2,600 pages. At trial, the district court heard live testimony from four of the experts and more than 30 fact witnesses while admitting over 500 exhibits.

Pursuant to Fed. R. App. P. 10(a), these materials constituted the record on appeal. "The importance of Rule 10(a)'s definition lies largely in the fact that, as a general matter, the court of appeals will not consider matter that is not part of the record on appeal." 16A Wright & Miller, Federal Practice & Procedure § 3956.1 (4th ed.). Rather than look to the factual record, the appellate court panel relied extensively on factual assertions and economic assumptions contained in an amicus brief and eight secondary sources that had not been subjected to the adversarial process. While amicus briefs and secondary sources can serve important functions in

American jurisprudence, the process in the appellate court below demonstrates what happens when such materials fail to disclose biases and manipulate the very courts that turn to such materials in their search for truth.

For several foundational factual assumptions on which the appellate court panel based its ultimate—and unprecedented—legal conclusions, the panel tracked language directly from the amicus brief submitted by Robert Willig and three other individuals (the "Willig brief"):

- *Compare* Willig brief at 9 ("increases in merchant discounts are a concomitant of a successful investment in creating output and value"), *with* Pet. App. 43a ("increases in merchant fees are a concomitant of a successful investment in creating output and value");

- *Compare* Willig brief at 7 ("[t]here is no meaningful economic difference between 'dropping American Express'…and a decision not to accept American Express in the first place"), *with* Pet. App. 46a-47a ("[t]here is no meaningful economic difference between 'dropping American Express'…and a decision not to accept American Express in the first place");

- *Compare* Willig brief at 7 ("A merchant chooses whether or not to accept a card based on its assessment of the costs and benefits of doing so."), *with* Pet. App. 47a ("A merchant chooses whether or not to accept a particular credit card based on an

individualized assessment of the various costs and benefits associated with accepting that card.");

- *Compare* Willig brief at 8 ("Cardholder insistence on using American Express's cards is a part of what makes accepting American Express's cards (and paying the merchant discount) a worthwhile business for the merchants that accept them."), *with* Pet. App. 45a-46a ("Cardholder insistence is exactly what makes it worthwhile for merchants to accept Amex cards—and thus cardholder insistence is exactly what makes it worthwhile for merchants to pay the relatively high fees that Amex charges.");

- *Compare* Willig brief at 9 ("When demand for American Express's product expands on the cardholder side, value also expands on the merchant side…."), *with* Pet. App. 43a ("Increased demand on the cardholder side of the platform expands value on the merchant side");

- *Compare* Willig brief at 7-8 ("[C]ardholder insistence…does not indicate market power but instead indicates the competitive benefits on the cardholder side of the two-sided market and the concomitant resulting competitive benefits to merchants that accept American Express cards."), *with* Pet. App. 45a ("Cardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards.");

- *Compare* Willig brief at 12 ("Given a reduction in merchant revenue, American Express's optimal level of cardholder benefits would decrease, which in turn would reduce the intensity of competition among credit card networks on the cardholder side of the market."), *with* Pet. App. 50a ("A reduction in revenue that Amex earns from merchant fees 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."); and

- *Compare* Willig brief at 13 ("considering both the effects on network services to merchants and the effects on credit card services to cardholders"), *with* Pet. App. 49a ("consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders").

Likewise, the appellate court panel relied on eight secondary sources for many of its other foundational factual findings and economic suppositions that gave rise to its legal conclusions. For example, the panel opinion relied extensively upon a 2006 article by Benjamin Klein, Andres V. Lerner, Kevin M. Murphy, and Lacey L. Plache entitled *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 Antitrust L.J. 571, 574 (2006) (the "Klein article"). *See* Pet. App. 8a n.5, 9a n.9, 14a n.24, 15a n.30, and 31a n.43. The panel opinion cited the Klein article for the proposition that merchant discounting or surcharging is the equivalent of merchants not purchasing Amex's

merchant services. It also cited the Klein article for the contention that using such price signals to steer cardholders to lower-cost forms of payment imposes a significant cost on the payment system's brand and an "externality on the entire payment card system," which would "eventually lead some merchants to drop acceptance of the payment system's cards." *Id.* 31a n. 43.[3]

These are but a sampling of the many factual assumptions contained in the appellate court panel decision, the bases for which are not found in the record but instead supplied by either the Willig brief or the eight secondary sources. Unfortunately, many of the factual and economic assumptions from these sources either were found to be untrue by the district court in its 150-page memorandum decision or are otherwise unsupported by the actual record.

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[3] In addition, and more generally, the appellate court panel cited the Klein article to support the statement that "legal and economic scholars often view *vertical* restraints as having pro-competitive effects." Pet. App. 31a (italics added). Yet, the district court specifically found that Amex's restraint had the anticompetitive effect of preventing *horizontal* price competition among credit card networks. *Id.* 194a-203a.

II. THE APPELLATE COURT PANEL'S DISREGARD OF THE FACTUAL RECORD IN FAVOR OF THE WILLIG BRIEF AND SECONDARY SOURCES CONTRAVENES THE STANDARD OF REVIEW AND CIRCUMVENTS THE ADVERSARIAL PROCESS.

This Court has emphasized that appellate courts must not "decide factual issues de novo" and that this "is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); *see also Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836–37 (2015) ("[W]hen reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."); *Mickens v. Taylor*, 535 U.S. 162, 177 (2002) (Kennedy, J., concurring) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous.").[4] A district court's "[f]indings

[4] Likewise, this Court has held that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell,* 499 U.S. 225, 233 (1991).

of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous…." Fed. R. Civ. P. 52(a)(6).

Importantly, this clearly erroneous standard applies regardless of the nature of the fact, whether it be ultimate or subsidiary, or grounded in economic theory or actual observation:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The "considerations underlying Rule 52(a)" include "the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation." *Maine v. Taylor*, 477 U.S. 131, 145 (1986).

This is especially true for expert testimony, which can be at the heart of many antitrust cases. FRE 702 "imposes a special obligation" upon a trial judge to ensure that "all expert testimony" is both

relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). "[T]he trial judge must determine at the outset…whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). Even the dissent in *Daubert* recognized that "scientific knowledge, scientific method, scientific validity, and peer review" are "matters far afield from the expertise of judges." *Id.* at 598–99 (Rehnquist, J., dissenting). Yet, that is exactly what the appellate court panel did by adopting the untested expert opinions expressed in the Willig brief to the exclusion of the actual expert testimony vetted in the trial court.

By relying on extra-judicial (and incorrect) factual assertions and economic theory on two-sided markets—including theories unraised and facts not presented by Amex—the appellate court panel cast aside the very essence of our "party-directed adversarial system." *United States v. Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016) (Gorsuch, J.).[5] "For two centuries past, the policy of the Anglo–American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the

[5] Federal judges are, of course, permitted to obtain facts independently (without admission into the record) if they are "not subject to reasonable dispute." Fed. R. Evid. 201(b). These facts must be "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.*

law." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989). This Court has extolled cross-examination as "the greatest legal engine ever invented for the discovery of truth." *White v. Illinois*, 502 U.S. 346, 356 (1992). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The appellate court panel's acceptance of new facts and theory "on appeal in order to reverse the trial court marks the greatest affront to the policy restrictions on appellate review." 21B Wright & Miller, Federal Practice & Procedure § 5110.1 (2d ed.).

The near-exclusive reliance by the appellate court panel on the Willig brief and eight secondary sources—to the exclusion of the actual factual record and prior antitrust jurisprudence—constitutes reason itself for this Court to grant certiorari.

III. THIS CASE PRESENTS AN IDEAL CANDIDATE TO ADDRESS THE ISSUE OF APPELLATE COURT FACT-FINDING IN LIGHT OF THE UNDISCLOSED BIASES AND FINANCIAL CONNECTIONS IN THE SOURCES EXTENSIVELY RELIED ON BY THE APPELLATE COURT PANEL.

The undisclosed biases in the Willing brief and secondary sources demonstrate the dangers of

circumventing the adversarial system. Both the Willig brief and the secondary sources *all* included authors that have been paid by or otherwise connected to Amex or the payment industry.[6]

For example, undisclosed in the Willig brief and apparently unbeknownst to the appellate court panel, Willig has had historical financial ties to and involvement with Amex. He has been paid by Amex for his testimony and services.[7] In fact, Willig's prior paid expert work for Amex was used below by Amex's testifying expert, with whom Willig works and has co-published approximately twenty times.[8] Willig has

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[6] Such connection to a party would normally disqualify such sources from any reliance by this Court. *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 n.17 (2008) ("Because this research was funded in part by [a party], we decline to rely on it.").

[7] *See, e.g.*, Newsletter by Compass Lexecon, LLC, *Historic Settlement in American Express v. Visa/MasterCard Antitrust Suit*, July 23, 2008 (available at https://goo.gl/UrTN4A) (last visited June 28, 2017) (promoting Compass Lexecon's team of experts, including Willig, for helping to produce a "historic final settlement" on behalf of its client Amex). The fact that *Amici* must introduce this newsletter (and other materials cited in the footnotes below) through citations to websites underscores the problem: the Willig brief and the secondary sources were not a part of the trial-court record, so the parties did not have the opportunity to present this or other proof through the adversarial process.

[8] *See* Amex's Pretrial Memorandum at n. 28, Dkt. No. 514 (available at http://goo.gl/QpTWiH) (last visited June 28, 2017) (stating that data used by Amex's expert in this litigation, Janusz

also been retained by Amex in other capacities, including to author a paper for the Federal Reserve Bank on Amex's behalf.[9] And Willig was—and is currently—employed by the very economic consulting firm that was retained by Amex below to provide expert testimony and even issued a press release taking credit for the appellate court panel's decision.[10] None of these connections were disclosed to the Second Circuit.[11]

Ordover, "was first used by Professor Willig in his analysis in the Exclusionary Rules case against Visa and MasterCard"); Curriculum Vitae of Janusz Ordover (available for download at https://goo.gl/UaJ4qW) (last visited June 28, 2017) (citing twenty-four publications that Ordover co-authored with Willig).

[9] *See* Robert D. Willig, *Avoiding Misapplication to American Express of the Proposed Debit Card Interchange Fee Rules: An Economic Assessment*, Feb. 22, 2011 (available at https://goo.gl/p5NREH) (last visited June 28, 2017) (stating on the cover page that the article was "Prepared at the Request of Counsel for American Express Company").

[10] Press Release by Compass Lexecon, LLC, *U.S. Second Circuit Court of Appeals finds in favor of American Express in U.S. et al. v. American Express Co. et al.*, Sept. 26, 2016 (available at https://goo.gl/hLfmvo) (last visited June 28, 2017).

[11] The lack of disclosure in the Willig brief may be compared to another economist amicus brief filed in the Second Circuit by Dr. Alan Frankel, who spent several pages disclosing his past work, research, testimony, and interests related to payment card litigation. Of course, despite these disclosures, it would have been no more correct for the panel to rely on Dr. Frankel for extra-record factual assertions than the Willig brief because the panel was not the fact finder. That was the province of the district court based on the record before it, and it ruled for the Government as

This appeal illustrates why "it is important to consider what is lost when the Court chooses to move away from the adjudicative model." Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs A New Deal*, 89 Tex. L. Rev. 1247, 1268 (2011). As one commentator notes:

> Without being able to ask of an amicus "what's it to you?," the Court may not be able to discount amici's economic arguments according to how closely they serve their author's self-interest. It is true that the disclosure statement and the convention of declaring support for one side or the other give the Justices a hint as to a party's interest in a suit. But without a cognizable legal interest at stake, an amicus's bias may not be clear even from these disclosures.
>
> This is especially true in the context of amici such as antitrust and economics professors.

Id. "Although it is perhaps unsurprising that courts sometimes rely on extra-record facts, it is surprising that the phenomenon has received so little attention, given that it results in important factual disputes being decided by appellate courts, without the benefit

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to the essential economic facts in the case after considering all of the evidence and expert testimony. As noted, the panel decision did not disturb the district court's fact findings.

of meaningful adversarial testing." Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 8 (2011) (hereinafter, "The Adversarial Myth"). The reality is that the Willig brief was not an amicus brief at all. "The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.).

Likewise, of the eight secondary sources relied upon by the appellate court panel,[12] *all* were written by at least one author with financial connections to the payment industry. Five of the secondary sources were authored by David Evans. For over thirty (30) years, Evans has repeatedly served as a paid expert for Visa, "for whom he has made public submissions and appearances."[13] Evans has testified on behalf of Visa, MasterCard, and other payment card industry clients both in litigation and numerous other proceedings.

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[12] The panel decision briefly mentions a ninth article by Lapo Filistrucchi, *et al*., in a single instance at the beginning of its opinion (Pet. App. 7a n.3) when it first references the term "two-sided" market but never relies on the article subsequently and never draws any factual assumptions about the payment card industry from the article.

[13] *See* Web Biography of David S. Evans for Global Economics Group (available at https://goo.gl/14FccP) (last visited June 28, 2017); *see also* David S. Evans & Richard L. Schmalensee, *Joint Venture Membership: Visa and Discover Card (1993)* (available at https://goo.gl/qWcQwX) (last visited June 28, 2017) (acknowledging that Evans was "retained by Visa, USA in this litigation").

Two of Evans' articles were co-authored by Richard Schmalensee, who has also repeatedly served as a paid expert for Visa.[14] Numerous courts have referenced Schmalensee as a paid Visa expert.[15] As one court recited, "Schmalensee and Evans built an ongoing relationship with Visa that resulted in [the expert consulting firm] NERA performing work for Visa in at least 18 projects between 1995 and 2004, resulting in NERA billings to Visa of over $14.5 million….Evans served as the NERA director and group leader for all of them." *Nat'l Econ. Research Assocs., Inc. v. Evans*, No. CIV.A. 04-2618-BLS1, 2008 WL 4352600 at *1 (Mass. Super. Ct. Sept. 10, 2008). Schmalensee has also testified on behalf of other payment industry members.[16]

Even the pioneering and well-respected Jean-Charles Rochet and Jean Tirole, who authored the

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[14] *See* Curriculum Vitae of Richard Schmalensee (available at https://goo.gl/NGnKzW) (last visited June 28, 2017) (detailing numerous instances of testifying and submitting expert reports for Visa dating back to the early 1990s).

[15] *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 331 (S.D.N.Y. 2001); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 74 (E.D.N.Y. 2000); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 131 (2d Cir. 2001); *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 984 (D. Utah 1993); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 968 n.13 (10th Cir. 1994); *United States v. Visa U.S.A., Inc.*, 183 F. Supp. 2d 613, 616 (S.D.N.Y. 2001).

[16] *See, e.g.*, *Capital One Fin. Corp. v. Comm'r*, 133 T.C. 136 (T.C. 2009).

2003 and 2006 articles cited by the appellate court panel, have received funding from the payment industry and/or also worked with Evans and Schmalensee.[17]

The last of the eight secondary sources, the Klein article, deserves special attention, and not just because both Klein and co-author Lerner have repeatedly served as paid consulting and testifying experts for Visa and other members of the payment industry.[18] The Klein article provides an inside look

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[17] *See, e.g.*, David S. Evans, Jean-Charles Rochet & Richard Schmalensee, *The European Commission's Interim Report on Payment Cards: Some Comments and Suggestions*, June 21, 2006 (available at https://goo.gl/HFq3fM) (last visited June 28, 2017) (disclosing funding for paper while also "consult[ing] for other members of the payment card industry"); Hélène Bourguignon, Renato Gomes & Jean Tirole, *Shrouded Transaction Costs*, Sept. 2014 (available at https://goo.gl/aAMNCy) (last visited June 28, 2017) (disclosing membership in IDEI, which receives financial support from payment industry member); Curriculum Vitae of Jean Tirole (available at https://goo.gl/68ueCG) (last visited June 28, 2017) (listing co-publications with Schmalensee); David S. Evans & Richard Schmalensee, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (acknowledging contributions from Rochet and Tirole along with "several employees of MasterCard and Visa" and "financial support" from Visa).

[18] *See, e.g.*, Curriculum Vitae of Benjamin Klein (available at https://goo.gl/StVuUa) (last visited June 28, 2017) (noting numerous paid expert reports and testimony on behalf of Visa); Curriculum Vitae of Andrew V. Lerner (available at https://goo.gl/5S3ZES) (last visited June 28, 2017) (detailing numerous paid expert engagements on behalf of Visa).

into how much of a guiding hand the payment industry has had in the economic literature in this area. By virtue of their involvement in the parallel antitrust litigation involving Visa and MasterCard, *Amici* discovered that Klein sent drafts of the article to Visa's inside counsel, who in turn sent the draft to Visa executives for comment, explaining that "[b]ecause of our long time relationship with him (and because we are subsidizing this paper), he [Klein] has been kind enough to share a draft with us." Visa executives provided handwritten or track change edits to the article.[19] Klein also sent the draft article to Visa's outside lawyers, who also responded with edits and deletions.[20] Furthermore, Klein's deposition

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[19] The track changes from Visa included edits, comments, and questions (i) seeking to bolster the stated rationales for the honor all cards rule; (ii) asking for "any thoughts about how we could debate whether this 'usage externality' even exists? I don't see a way around it, but was hoping someone else might"; and (iii) suggesting "why state it this way" in response to wording in the original draft explaining "even if a payment system may have some market power." Additional handwritten notes from Visa included underlining for emphasis, margin comments, edits, and the following comment: "'usage externality' – lets expand – I'd like to argue that it is debatable whether it exists."

[20] The edits and feedback included comments (i) emphasizing the importance of fixed interchange fees and the impact of surcharging on a two-sided market; (ii) articulating the two-sided issue and network effects; (iii) deleting a footnote regarding demand pricing, elasticity and network effects; (iv) criticizing and arguing against a statement in the text that "American Express and Diners Club unregulated Australian merchant discount rates fell by 13 basis points as a competitive reaction to the lower regulated Visa and MasterCard interchange

testimony established that but for Visa having "paid for some of the research assistants and some of [co-authors] Mr. Lerner and Ms. Plache's time," Klein would have "turned down the job of writing this article."

Visa's involvement is nowhere disclosed in the Klein article, leaving the reader (and the appellate court panel that relied on the article) in the dark as to Visa's role in the published version. Indeed, the paper trail contained in the drafts reflect an initial effort to disclose Visa's role only for it to be deleted. The January 2005 draft included the disclosure: "We are indebted to [Visa's outside litigation counsel],[21] [Visa's inside counsel], and [Visa's antitrust counsel]…for their helpful comments." It also included the disclaimer: "The opinions expressed in this paper are not necessarily the opinions of Visa U.S.A. Inc." Remarkably, the final version of the article *deleted the reference to Visa's involvement in its entirety* and stated only that the "authors have served at various times as consultants to Visa U.S.A. Inc."

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fees"; (v) asking "can we suggest here" an explanation for the networks' market-share shifts in Australia; (vi) stating "we don't want to leave an impression that merchants pay the costs of rewards programs"; (vii) commenting on higher interchange fees and market power; (viii) discussing merchant surcharging in Australia; and (ix) making suggestions to address cross subsidization and externalities issues.

[21] We have omitted the names.

This case presents an opportunity for the entire Court to declare what many individual Justices have separately lamented: appellate courts are "an inappropriate place to develop the key facts in a case." *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) (writing that appellate courts should leave "important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery"); *see also Kansas v. Hendricks*, 521 U.S. 346, 391–92 (1997) (Breyer, J., dissenting) ("The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court."); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 472 (2001) (Thomas, J., dissenting) ("[T]he record evidence that the parties have developed" should be both "more convincing" and "more relevant" than "an amicus brief.").

Although the practice of extra-record appellate factfinding is not unique to this case, this appeal provides an ideal vehicle for it to be addressed by this Court, which as a body has never "answered the more fundamental question of why it is even appropriate for the Court to look to [amicus] briefs—presented by nonparties, after all—for factual claims." *The Adversarial Myth*, 61 Duke L.J at 9; *cf.* Richard B. Cappalli, *Bringing Internet Information to Court: Of "Legislative Facts*," 75 Temp. L. Rev. 99, 103 (2002) ("No rules circumscribe how judges may receive legislative facts, it being a matter of their absolute discretion whether and how to consult them.");

Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 Duke L.J. 1263, 1290 (2007) ("Judicial notice of legislative facts ... is basically unregulated.").

To paraphrase Judge Friendly's warning from forty years ago: "if a court wishes to rely on evidence of the type illustrated by [the Willig brief or the eight secondary sources], it must give the [opposing party] a fair opportunity to controvert this evidence." Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Miami L. Rev. 21, 39 (1978). "No such opportunity is afforded when the materials are first presented in brief to the [appellate court] because of the time and space constraints imposed by the Court's rules with respect to briefs and argument." *Id.*; *see also* Carl A. Auerbach, *Legislative Facts in* Grutter v. Bollinger, 45 San Diego L. Rev. 33, 37–38 (2008) ("Judge Friendly concluded, whenever a court intends to take judicial notice of data outside the record…, it should, as a matter of fairness and to prevent egregious error, submit the data to the parties for examination, cross-examination, and rebuttal.").

Amicus briefs and other secondary sources can and do serve important roles in our judicial system. However, the system is predicated upon disclosure and honesty. The appellate court panel presumably thought it was relying on unbiased sources and vetted economic theory; in so doing, it disregarded Judge

Friendly's warning, bearing out the inherent dangers of circumventing the adversarial process.[22]

The appellate court panel's reliance on the Willig brief and the eight secondary sources presented, "at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system." *The Adversarial Myth*, 61 Duke L.J. at 60-61; *see also id.* at 9 ("[I]t is problematic when such 'facts' are 'found' by ad hoc

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[22] *See generally The Adversarial Myth*, 61 Duke L.J. at 5 (lamenting that "page limitations on briefs, time constraints on oral argument, and the general opacity of the appellate process may prevent thorough adversarial testing of the factual claims presented in amicus briefs"); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1292 (2012) (explaining danger of "the unnoticed introduction of bias that occurs when factual sources are not tested by the adversary system" but instead introduced "late in litigation" in appellate briefs). At the very least, the appellate court panel should not have relied upon extra-record materials without knowing the background of the authors and the bias inherent in the materials. *See, e.g.*, Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 157 (1993) ("We would require more detailed disclosures when social science is submitted by amici. Information should be provided to the Court about the qualifications of the principal investigators, the funding sources for the studies, and possible conflicts-of-interest."); Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Pa. L. Rev. 1409, 1418 (2013) (recommending that "courts rely upon social science research that has 'survived the critical review of the scientific community,' and that is based upon valid methodology, generalizable to the case at hand, and confirmed by a larger body of research").

methods without the benefit of rigorous testing and then provide the basis for consequential legal decisions."). The appellate panel was "misled" by biased, extra-record sources of information, resulting in the court substituting facts found by the district court with untested factual assertions outside the record. This case presents an ideal vehicle for this Court to address not only the underlying issues of antitrust jurisprudence, but also the inherent dangers of appellate court extra-record fact-finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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