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*Ohio v. American Express Co.*, No. 16-1454

As part of its standard contractual agreement, AmEx prohibits the merchants in its network from incentivizing their customers to use credit cards that charge lower processing fees. A dozen states challenged the practice under federal antitrust law. After the district court found a violation of Section 1 of the Sherman Act, the Second Circuit reversed. Applying the so-called “rule of reason,” a burden-shifting scheme that requires the plaintiff to make a prima facie showing that a practice is anticompetitive before affording the defendant an opportunity to demonstrate the pro-competitive benefits, the Second Circuit held that the plaintiff States could not shift the burden to AmEx merely by showing by that the anti-steering rules inhibited price competition among credit-card networks; in the view of the Second Circuit, the States needed to show, more globally, that the merchant-side anticompetitive effects (i.e., the absence of benefits from merchants) were not outweighed by any cardholder-side pro-competitive effects (like the prospects of obtaining cash-back and point rewards). The Supreme Court has granted the States’ petition and is expected to clarify the application of the antitrust rule of reason.