

1 But the other point is I do think there is a --
2 to use a problematic cliché -- is that it actually is
3 different this time and different in the context of
4 being able to scale to literally billions of users,
5 that is a -- and then to add the transformative effect
6 of not just data from the users directly but data from
7 multiple sources.

8 And this is where I kind of push back on the,
9 like, well, how much is your data worth at Facebook?
10 That's actually very difficult, because Facebook, from
11 an economic perspective, adds tremendous value to user
12 data. The data that Facebook gets from you is worth
13 very little if you could give that to another company,
14 but once Facebook combines that with all the other data
15 they get, and then has the scale on the advertising
16 side to take advantage of that, it is a massive,
17 meaningful economic difference, where Facebook is
18 really adding tremendous value and is appropriately
19 valued because of that.

20 And so I do think there is an aspect here --
21 and, again, I totally agree with the theory of -- the
22 issue of defining the theory of harm and the issue of
23 just saying it's different, and my hope is, with all
24 the folks in this room, to see if this can be
25 calculated. And freely admitting that, I'm not the one

1 to do that.

2 MR. MCNAMEE: There is a second element -- I
3 very strongly agree with Ben's framing of those points.
4 The one thing I would observe is that these issues at
5 the scale these companies operate at cannot be viewed
6 as only about markets and only about economics.
7 Facebook operates 2.2 billion Truman Shows, and between
8 Facebook and Google and the use of filter bubbles, they
9 have changed the public square really dramatically. So
10 their form of market power has implications that we
11 have never seen previously.

12 So my observation is the issue isn't just how
13 big they are. It's what they do with that scale and
14 how they change the public square, how they change the
15 economy, and what -- you know, when you look at this as
16 a regulator, one of the questions you're asking in this
17 whole thing is, is the economy better or worse off for
18 the changes that have come with the success of this
19 company?

20 And to my mind, from the FTC's perspective, the
21 scale isn't the problem, per se. It's what they're
22 doing with it, and it's how they got there. Again,
23 it's not just about antitrust. There is also material
24 misrepresentations to almost every constituency they
25 deal with.

1 You know, so there's a lot of harm -- from the
2 FTC's point of view, this is like the beginning of a
3 whole new era, because you've never previously had, I
4 believe, a case which hit both of the FTC's mandates in
5 the same companies at the same time, and these things
6 are intrinsically baked together.

7 Again, I'm a capitalist. I would normally not
8 be sitting here arguing against the success of
9 companies in the industry that I invest in, companies
10 that I have personally been invested in, but the harm
11 that's taking place to the public square, the harm
12 that's taking place to the structure of the economy is
13 real.

14 And with all due respect to the crypto guys, I
15 mean, that is -- that is not the same -- you know, that
16 to me doesn't feel like as good a use of capital from
17 the point of view of the country as, you know, putting
18 people to work, creating jobs, creating infrastructure,
19 and that's not what these companies do.

20 MS. RYBNICEK: So on that point I'd be
21 interested in hearing from Scott and Roger about what
22 has happened to venture capital funding over the last
23 ten years, five years, two years, what we're seeing.
24 Are we seeing money -- are funds being diverted from
25 these areas?

1 I mean, obviously, there was this -- *The*
2 *Economist* article that talks about kill zones around
3 these major platforms. There have been other studies
4 and discussions in that space. Can you speak from your
5 experience, what you're seeing on the ground with
6 respect to funding and whether or not it's being
7 diminished, diverted, and if that's actually a good or
8 bad thing?

9 MR. KUPOR: Sure, I'll start, and I'll give
10 Roger an opportunity as well.

11 So if you look at it from a raw numbers
12 perspective, venture capital funding this year actually
13 will hit kind of a -- at least a ten-year, if not an
14 almost 20-year high, so we're on pace to invest more
15 than \$100 billion in the industry.

16 Now, a lot of that money, to be fair, is
17 happening kind of in the later stages, so it's a little
18 bit related to the comment I made earlier about the
19 elongation of companies staying private and effectively
20 kind of later-stage private money really supplanting
21 what would otherwise be public money, but in terms of,
22 you know, overall dollars investment, if you look at
23 dollars into the industry in terms of the amount of
24 money that LPs are funding, we will probably eclipse,
25 you know, 40, 45 billion dollars this year in the U.S.,

1 which is also certainly a ten-year high.

2 So I think from a macro perspective, it's very
3 healthy at least in terms of kind of dollar flows. I
4 do agree -- and I think I referenced it earlier -- that
5 there are -- you know, there are -- there are
6 implications obviously of the success of the platforms
7 that do impact venture financing. So, you know, it's
8 unlikely that you would find a lot of early-stage
9 venture capitalists who would fund a purely
10 ad-supported, you know, consumer social business today,
11 just given that obviously they understand certainly the
12 kind of reliance and the market power that some of
13 these other organizations have.

14 On the other hand, as I mentioned, I think if
15 you look at the growth of other platforms and other
16 marketplaces, a lot of them were jump-started or
17 bootstrapped based on kind of the existence of those
18 platforms as relatively cost-effective ways of getting
19 customer acquisition, so in that respect I think it's
20 actually been a very positive beneficiary in terms of
21 new company formation.

22 MR. MCNAMEE: So the observation I would make
23 is that traditionally we've measured the success of an
24 industry by growth in jobs, growth in economic output
25 in the sense of building infrastructure and building

1 out the economy, and the big change in Silicon Valley
2 since the millennium is that now Silicon Valley on a
3 net basis reduces employment in the economy and
4 reduces, as a consequence, investments in
5 infrastructure. And so from a policy point of view, I
6 don't want us to confuse a bull market in venture
7 capital with an economic success.

8 And, you know, again, the history will be
9 written. I think it's too early to know which way this
10 comes down. I think Scott's points are dead on, okay,
11 and I don't disagree with a single thing he just said.
12 I just think that the issues we're facing here are
13 broader and that we have to -- you know, we need a
14 Moore's law in Silicon Valley about investing in
15 industries that create jobs.

16 We really need the next big thing to be
17 human-driven technology, you know, things that actually
18 protect privacy, protect security. You know, you need
19 different models than advertising, because the problem
20 here is that, at the scale these guys operate, it's
21 about really behavior modification more than anything
22 else, and that's just not healthy for the citizens or
23 the economy, and that's the concern that really drives
24 me.

25 The interesting thing is, because I believe

1 these guys violate antitrust law, that is the most
2 pro-growth way of addressing the problems that I see
3 across the broad set of things these companies are
4 doing.

5 MR. THOMPSON: The one other thing I would note
6 is -- I'm going to sit in the middle figuratively
7 between Scott and Roger -- I do see value in the
8 advertising that these companies provide. I am a huge
9 believer and a personal beneficiary of the possibility
10 of the internet to enable very narrow, niche businesses
11 that can reach all over the world. That's literally
12 what my business is, and I think that Facebook ads, in
13 particular, and Google ads as well allow companies that
14 could not have existed previously, that are great for
15 the businesses and also great for consumers, that get
16 products that are actually tailored to what they want.

17 I think the thing that I would push back on
18 with Scott is he correctly articulated the value that
19 these provide. The problem is that there's only two of
20 them. I don't think that these channels would fail to
21 exist had Facebook not acquired Instagram, for example.
22 I think there would -- instead of being two, I actually
23 think there would be four, because if Instagram was an
24 independent entity, advertisers would be forced to
25 diversify and would also go to Snapchat, for example.

1 My concern is I believe in the model, I think it's
2 important for the economy, but I worry about the fact
3 that there's only two places to go.

4 MS. RYBNICEK: Yeah, well said. Well said.

5 So, Steve, I think this is kind of to your
6 point about multihoming and there's nothing new under
7 the sun and that we've seen all this before and it's a
8 cycle, you're going to get it again. How do you react
9 to the idea that, you know, we have had Google for a
10 while, and we haven't seen something different, you
11 know, and people kind of may smirk at the alternatives
12 as not being realistic, but how do you square that kind
13 of actual experience with your comments about
14 multihoming actually being a source of allowing other
15 platforms to become developed?

16 MR. TADELIS: So, you know, using the search
17 engine as an example, I think it was about five or six
18 years ago that I made a bona fide attempt to play with
19 Bing, and it was inferior. So I don't care that
20 there's only Google, because 99 out of 100 times, when
21 I'm searching for something, I find it on page 1, and
22 that's all I care about as a consumer of search.

23 Now, let me go to the other side of
24 advertising. There seems to be a lot of concern that,
25 you know, there are only two. Well, there's the theory

1 of Bertrand competition where two is enough to get
2 perfect competition under certain circumstances, but
3 more importantly, remember the pricing model of ads on
4 Facebook and Google. Facebook and Google do not set
5 prices for advertising. Advertisers bid on advertising
6 space, and we know that in markets where people have
7 somewhat rational expectations and an understanding of
8 the market they participate in, then when multiple
9 people bid on a certain item, it will go to the person
10 or the entity that bids the highest value. So we are
11 achieving economic efficiency.

12 Now, I want to make it very clear that I agree
13 with Roger that the world is not just about efficiency,
14 right? I live in San Francisco. I would happily have
15 my taxes go up by 5 or 10 percent, which is a lot of
16 money, if government would promise me they are going to
17 solve the homeless problem, because it aches me every
18 time I see that, okay? That's not an antitrust issue.
19 Employment is not an antitrust issue. And I think it's
20 very important that, as policymakers and regulators, we
21 understand that there are a lot of things we would like
22 to see in the world made better. Antitrust is not the
23 panacea of solving all problems.

24 MS. RYBNICEK: Roger, I don't know if you want
25 to respond to this kind of idea that, you know, the

1 antitrust laws are dedicated to ensuring that
2 competition is strong to the benefit of consumers, and
3 there might be a whole host of other social ills that
4 need to be protected, but is that a separate issue, one
5 that --

6 MR. MCNAMEE: So my point is I think no matter
7 how you look at it, I believe there are antitrust
8 violations here, and I happen to have -- while I
9 believe it would be really helpful to control the
10 growth of these companies, my preference would be, of
11 the myriad ways you could regulate them, I would like
12 to start with antitrust and run that thread through,
13 because I believe for the economy as a whole, for
14 venture capital, for startup formation, it is by far
15 the most attractive option, and the set of issues that
16 we see on the antitrust side are very easy to
17 understand once you look at data as a currency.

18 So my work now is attempting to create that
19 into a unified model that we can apply to antitrust.
20 So, you know, I strongly agree with what everybody
21 said, you know, what Steve just said a moment ago,
22 because that's demonstrably true, but I don't think it
23 eliminates the antitrust issues that are here, and the
24 reason I'm here and not at some other agency right now
25 is because I think this is the place I'd like to start

1 of the ten places where I think they are in violation
2 of the public interest.

3 MS. RYBNICEK: So a question from the audience.
4 How do cryptonetworks -- this is, I think, for Ben --
5 how do cryptonetworks -- or anybody on the panel -- fit
6 into the aggregator platform framework? Do you think
7 they can challenge the incumbent networks?

8 MR. THOMPSON: Ah, from a theoretical
9 perspective, they are absolutely the antidote to
10 aggregators. I completely agree with Scott. I think
11 the challenge -- and it remains to be seen, and
12 Andreessen Horowitz has certainly led the way on this
13 -- is figuring out what use cases will arise from that.

14 I suspect that to the extent Blockchain
15 companies succeed, they're going to be entirely new use
16 cases. I have difficulty seeing a social network built
17 on the Blockchain or a search engine built on the
18 Blockchain, but from a theoretical perspective, it's
19 absolutely -- I mean, I agree with Scott.

20 MS. RYBNICEK: Another question. How should
21 the FTC identify future competitors to existing
22 dominant firms? How do they know -- how can they know
23 what they're looking for? I think, Ben, you mentioned
24 that this was pretty obvious in Silicon Valley or in
25 the VC world, that Facebook and Instagram were going to

1 be competitors. Should we just be looking at the
2 models of doing business or are there other features
3 that we should be focusing on?

4 MR. THOMPSON: Well, I think you have to
5 start -- oh, sorry, go ahead.

6 MR. TADELIS: No, go ahead.

7 MR. THOMPSON: No, I have been talking a lot.
8 Please.

9 MR. TADELIS: So I want to echo something that
10 Scott said that I think is really important, and that
11 is what is the optimal path of expansion of a potential
12 competitor or some nascent technology? Because coming
13 up with good ideas is one thing, and then executing on
14 them is a completely different story. One of the huge
15 benefits that large platforms bring to the table is
16 execution, because they've already learned how to do
17 that.

18 So when we think about this kind of, you know,
19 M&As of potential competitors, right, if a company
20 would buy them and then execute on that technology to
21 the consumer's benefit, then you have the end result
22 happening a lot faster. If the company would buy them
23 and then take that technology and shelve it, right,
24 because they don't want to invest in, you know,
25 promoting that competition, then there's that theory of

1 consumer harm.

2 However, given this technology, if that's what,
3 say, Facebook would do with each one of their
4 acquisitions, it would take four weeks for someone else
5 to come up with that same idea, because it was out
6 there, get VC funding, wait for Facebook to buy them
7 and shelve them, and then the next one would come up
8 and do that again, right?

9 So I think the end result should be what's
10 happening to consumer welfare, and I think that's the
11 measure stick that we should be using.

12 MS. RYBNICEK: Anybody else have any final
13 comments?

14 All right, I think that concludes our panel.
15 Thanks again to the entire panel for being here and for
16 sharing your thoughts.

17 (Applause.)

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1 **PANEL 3: DEFINING RELEVANT MARKETS**
2 **AND ESTABLISHING MARKET POWER**
3 **IN CASES INVOLVING MULTI-SIDED PLATFORMS**

4 MR. FRANCIS: All right. Well, good afternoon,
5 everybody. We move now to Panel Number 3 on Defining
6 Relevant Markets and Establishing Market Power in Cases
7 Involving Multi-Sided Markets. My name is Daniel
8 Francis. I am senior counsel in the Bureau of
9 Competition at the FTC, and it's now my pleasure to
10 introduce our panel.

11 So introducing folks very briefly in the order
12 in which they'll be speaking, Michael Salinger is the
13 Jacqueline and Arthur Bahf Professor of Management and
14 Economics at Boston University and a Senior Academic
15 Advisor at Charles River.

16 Tasneem Chipty, here on my right, is the
17 Founder and Managing Principal of Matrix Economics.

18 Joseph Farrell is a Professor of Economics at
19 UC Berkeley, and he's a partner at Bates White.

20 Eric Citron is a Partner at Goldstein Russell.

21 Darren Tucker is a Partner and the Co-head of
22 the Antitrust Group at Vinson & Elkins.

23 And Joanna Tsai is Vice President and an
24 Economist in the competition practice at Charles River.

25 So the way we're going to proceed is each of

1 our panelists will give a short affirmative
2 presentation for between five and ten minutes, and then
3 we'll have some Q&A.

4 So with no further ado, we start with Michael
5 Salinger.

6 MR. SALINGER: Well, thank you. So economists
7 don't like market definition that much. It's kind of
8 ironic, but -- you know, and they don't like it because
9 it requires drawing this sharp distinction between
10 being entirely in, being entirely out, whereas in
11 reality there's a range of substitutes. But I think in
12 evaluating the antitrust allegations against companies
13 in these platform businesses, the market definition
14 exercise is actually, you know, a quite important one,
15 and it's important to be clear who the companies are
16 competing with on each side of the market.

17 So we had a long discussion today about what is
18 a two-sided market or a multi-sided market and what
19 isn't, but, you know, roughly, if you're a multi-sided
20 market, you have multiple sets of customers that you
21 are competing for, and it's important when you do this
22 that you not do what often happens in antitrust
23 markets, which is you take a company and you say, okay,
24 what are the companies that are most like that company,
25 and that's necessarily the closest competition, because

1 if you do that, you're going to miss an essential part
2 of the competition.

3 So the best example of this is with respect to
4 the allegations -- considering the allegations against
5 Google, where there's a temptation to say, okay, well,
6 Bing is what looks most like Google, and maybe Yahoo
7 looks a little bit like Google, and no one else looks
8 very much like Google, and so that's the relevant
9 market. And if you do that, you miss a huge amount of
10 the competition that a company like Google faces.

11 So, for example, if you consider shopping
12 search and ask the question who's the competition to
13 Google in shopping search, it's not Bing; it's Amazon.
14 And if you evaluate, you know, allegations about Google
15 Shopping without recognizing the competitive constraint
16 from Amazon, then you're missing the most important
17 competitive constraint.

18 And similarly with -- if you focus on the
19 companies that just look like the company that you're
20 evaluating and you say, okay, we're going to look at
21 Bing and it's a general search engine, you make the
22 mistake of thinking that the relevant market is for
23 general search. So there's basically -- there's no
24 such thing as a general search. Every search has a
25 particular intent behind it. So the relevant markets

1 there are for classes of search, right?

2 And so if you're doing a travel search, Expedia
3 is an option for doing a travel search. If you want to
4 find out what happened in the great games involving the
5 Boston teams last night, you can go to ESPN rather than
6 going to a general search engine.

7 Now, the fact that you wouldn't go to Expedia
8 to find out whether the Patriots beat the Chiefs
9 doesn't change the fact that Expedia is a competitive
10 constraint for travel search, and, similarly, the fact
11 that you wouldn't book a flight on ESPN doesn't change
12 the fact that ESPN is a competitor on sports searches.

13 So, you know, it's very important when we look
14 at these antitrust cases that we do the market analysis
15 in a way that captures the true competitive constraints
16 on the firms.

17 MR. FRANCIS: All right. Well, thank you.

18 We turn now to Tasneem Chipty.

19 MS. CHIPTY: Thanks very much. So I thought I
20 would kick off by talking a bit about the Court's
21 ruling in *American Express* in regards to market power
22 and the question of whether, from an economics
23 perspective, market definition is necessary to assess
24 market power, okay?

25 So let me jump to the majority's opinion. For

1 anyone who's read the Court's decision, no doubt you
2 were struck, like I was, by the emphasis on the need to
3 define a market. The Court says in multiple places
4 that applying the rule of reason generally requires an
5 accurate definition of the relevant market.

6 Now, in this context, there is a very long
7 footnote. The Court tries to distinguish between
8 horizontal and vertical cases, okay? And in horizontal
9 cases, it explains that one need not precisely define a
10 market in horizontal cases that involve agreements
11 among competitors not to compete in some way, but it
12 goes on to contrast these horizontal cases with
13 vertical restraint cases, like the antisteering
14 provisions used by American Express, and says that
15 because vertical restraints often pose no risk to
16 competition, unless the entity imposing them has market
17 power, one has to begin with an analysis of the
18 relevant market.

19 Okay, so there were -- actually, I want to
20 pause on two aspects of what is in this decision here
21 surrounding the need to define markets in vertical
22 cases. The first for me has to do with the distinction
23 between vertical and horizontal cases. Now, I don't
24 think many economists would say that the distinction
25 creates a differential need for market definition,

1 okay, that depends on the case-specific evidence.
2 There's nothing inherent, at least from my perspective,
3 about the conduct that necessarily creates the need for
4 formal market definition, but, rather, given the fact
5 that vertical restraints can often have procompetitive
6 justifications, one needs to do some kind of balancing
7 in vertical cases, okay?

8 So I think on first read, one's left with this
9 impression, but I think a closer read suggests that the
10 Court's not actually distinguishing between horizontal
11 and vertical cases just generically; rather, the Court
12 has distinguished between horizontal per se cases
13 versus vertical cases.

14 So I think it's not entirely clear to me, at
15 least, what the Court would say about the need for
16 market definition in nonhorizontal -- excuse me, in
17 non-per se horizontal cases. I think that's my first
18 observation.

19 The second to me really has to do with the
20 distinction the Court made with regard to direct
21 evidence versus indirect evidence and the need for
22 market definition in those two circumstances. I think
23 many economists would describe direct evidence as
24 evidence that bypasses the need for formal market
25 definition. It doesn't bypass the need to do the kind

1 of work that Michael was talking about, but it
2 certainly, I think, can in some circumstances bypass
3 the need to formally define and identify what's in and
4 what's out in some kind of bright-line way and that
5 indirect evidence is usually what we describe as work
6 that sort of is built on a more rigid approach towards
7 market definition.

8 Now, taken literally, the majority on the Court
9 here in *American Express* would seem to be saying that
10 market definition is necessary for both approaches, and
11 to me this strikes me as odd and contrary to how we
12 normally practice, and, in fact, it's notable that the
13 dissent, in its written opinion, expresses the opinion
14 that market definition analyses are beside the point,
15 they say, when there is an actual finding of
16 anticompetitive harm. So, anyway, those two things
17 really sort of struck me.

18 The other thing that struck me is what the
19 issue was of market definition that the Court actually
20 raised and took on. Most economists, I think, would
21 agree that the work of market definition involves
22 thinking about the substitution possibilities of the
23 type that Michael was just talking about from the
24 perspective of consumers, which in the *AmEx* case
25 involved two groups of consumers, merchants and

1 cardholders, both of whom consume card services.

2 Now, traditional market definition work would
3 involve tackling the questions like is a debit
4 transaction a substitute for a credit transaction?
5 What about cash? What about check? And so forth.
6 These are not the issues that were debated in the
7 *American Express* decision.

8 In *American Express*, the work of market
9 definition involved deciding whether to analyze
10 *American Express*' antisteering provisions in a single
11 market where the product is jointly and ultimately
12 consumed or in two complementary markets involving, on
13 the one hand, speedy payments to merchants and on the
14 other credit for shoppers, right? The majority was of
15 the view that in order to assess competitive effects
16 here, one needed to describe the market as a single
17 market as opposed to two complementary markets.

18 Now, from my perspective, I think probably many
19 economists would agree, it really doesn't matter what
20 label you attach to how you describe the nature of the
21 competitive interactions and the competitive discipline
22 facing the firm. As long as the economic analysis
23 accounts for the linkages and the interdependencies,
24 right, I don't necessarily see the need to define a
25 formal market, even though here we find ourselves in a

1 vertical case with a two-sided platform.

2 So I guess I leave it at that. I still think
3 it's an open question as a matter of economics about
4 whether or not one needs to define the market.

5 MR. FRANCIS: Wonderful.

6 Let's turn to Joe Farrell.

7 MR. FARRELL: Thank you.

8 So our assignment, I think, or the title of our
9 panel is "Defining Relevant Markets and Establishing
10 Market Power in Cases Involving Multi-Sided Platforms."

11 I think it's useful to go back to first principles,
12 somewhat echoing what Tasneem said, and say why? What?

13 So first of all establishing or establishing
14 the opposite of market power, why are we doing that?
15 It's not a simple question, actually, because having
16 market power is not an antitrust offense, so why is an
17 enforcement agency trying to diagnose market power?

18 It's because a syllogism that we use in
19 antitrust is if you have no market power, then you
20 can't unilaterally do anything bad. "Anything" has to
21 be caveated a little bit, but roughly speaking, that's
22 the syllogism.

23 So going back to some things that I said this
24 morning but saying them at a little more length, okay,
25 so then I think the techniques for diagnosing market

1 power ought to be techniques such that the answers to
2 the questions you're asking help you diagnose what
3 would happen if this firm or these firms collectively
4 did something bad.

5 And so you need to have some way of modeling or
6 gauging or telling what would happen -- trying to stick
7 with the active verbs here rather than the abstract
8 nouns -- and I think from what we've heard and from
9 what we know, the answer depends on what's something
10 bad.

11 So I don't think there's an *a priori* way to
12 establish or not establish market power necessarily
13 without thinking about the what's something bad. There
14 may be a particular way of diagnosing it that would
15 apply to multiple kinds of hypothetical bad actions,
16 but you can't count on it advance, partly because there
17 are a lot of moving pieces in multi-sided platforms.
18 So that's kind of my first observation.

19 My second observation, a little more
20 constructively perhaps, is, you know, we talked this
21 morning about some of the things that you would
22 probably want to look at in trying to diagnose market
23 power, and a lot it has to do with both the strength of
24 the complementarities and the stickiness of one or
25 another group of users, switching costs, single versus

1 multihoming, and so on.

2 All right. And so then the second half of our
3 title is "Defining Relevant Markets," and it's strange
4 that that came first, but, again, that's the
5 economist's perspective. So why define relevant
6 markets? Well, one answer is because a court said so,
7 but that's perhaps not a very interesting answer to the
8 economists.

9 I would say the right answer is to help
10 illuminate market power and associated questions,
11 ideally using the same techniques that we use in
12 one-sided markets, to use market definition to help
13 diagnose market power, which is, roughly speaking, if
14 you're small, then chances are your customers are not
15 all that committed to you, because if your customers
16 were all that committed to you, then there'd be more
17 customers who were willing to go with you. And so if
18 your customers are not all that committed to you, then
19 if you did something bad, they would leave.

20 There are various refinements and nuances to
21 that. You might have just a few customers who are very
22 committed to you and then how do you think about it,
23 but loosely thinking, I think that's the intuition.
24 Question: Can you extend that intuition and that
25 technique to the case of multi-sided markets?

1 Well, maybe, but it's kind of awkward,
2 actually, because by definition there are different
3 kinds of customers who differ from each other not in
4 how attached or mobile they are as between competing
5 firms, but they differ from each other in the very
6 roles that they play, and they may be very different in
7 the roles that they play depending on how the two-sided
8 structure works.

9 And so I think one thing to keep in mind is
10 just, sure, go ahead and think about alternatives,
11 absolutely. If that's what we mean by defining a
12 relevant market, then go for it. If you're trying to
13 come up with some group of products such that measuring
14 share within that group of products or customers is
15 going to take you to market power, I think it's going
16 to be a lot more challenging.

17 And I'm happy to say that there is a footnote,
18 a short footnote in the Merger Guidelines that kind of
19 makes that point in a very brief and cryptic sort of
20 way. So eight years ago, the Division and the
21 Commission had already thought about that. So I
22 suggest that instead of holding these hearings, we just
23 look back at the notes from drafting the Merger
24 Guidelines, because probably the answer is going to be
25 there.

1 MR. FRANCIS: Wonderful.

2 Eric?

3 MR. CITRON: Yeah, I'm going to speak pretty
4 briefly with the hope of illuminating more during
5 question and answer. I think from my perspective the
6 thing that Tasneem and Joe are saying politely is that
7 *AmEx* is more or less economically illiterate. The
8 Supreme Court just does not understand how economists
9 assess market power, why they do so, what role market
10 definition plays in that, and that's unfortunate, but
11 when the Supreme Court was on an economically
12 illiterate pathway 50 years, 60 years ago, antitrust
13 scholars and students took it as their job to more or
14 less relentlessly shame judges into understanding the
15 economics that underlie antitrust practice, and just
16 because the side of the aisle to which current judges
17 tilt has changed, there's no reason why antitrust
18 scholars should abandon the same view of what their
19 role is in this particular legal space.

20 Judges are not antitrust experts. This is hard
21 for them. Justices of the Supreme Court are actually
22 even less likely to know the antitrust economics
23 because they have to be generalists. What we need to
24 do is try to teach more and more judges and justices
25 how to do their work in ways that are productive.

1 I think, honestly, the best way to do that is
2 to -- picking up on something that Joe said -- is to
3 try to demystify the practice of market definition and
4 market power analysis to the greatest extent possible.
5 It's not that complicated. You just start by asking,
6 why do I care? Why do I care if this company has
7 market power or if these merged companies will have
8 market power?

9 In the merger space, it is frequently, though
10 not always, well, are these merged companies going to
11 be able to raise price? In the conduct space, it's
12 often, what will happen if this company does something
13 bad to the people on one side of the market or the
14 other? In other spaces, you know, market definition or
15 price definition has totally different purposes. A lot
16 of the two-sided market scholarship that underlies *AmEx*
17 is actually just about whether you count the price on
18 both sides of the platform for purposes of analyzing
19 whether price exceeds marginal cost for purposes of
20 predatory pricing analysis. That might make sense; it
21 has nothing to do with two-sided markets, or whatever.

22 This is -- in a way, it's a conceit of
23 antitrust attorneys that antitrust is so complicated.
24 Maybe it is, I don't know, but I don't think antitrust
25 economists think of market power analysis and the role

1 that it plays in any given case as being particularly
2 mystical, and it would be easier, actually, if we just
3 started teaching, to the greatest extent possible,
4 through vehicles like the FTC and the Antitrust
5 Division and their Guidelines, why it is we're engaged
6 in these practices.

7 So I guess what I'm saying is I don't want to
8 relent on the *AmEx* battle. Even though it's been lost
9 once, you know, it's our role I think here to try to
10 explain to the Court how we can do better, and until we
11 abandon the sort of mystical view of defining markets
12 and assessing market power, we are not going to make a
13 lot of progress.

14 MR. FRANCIS: Eric, thank you.

15 MR. FARRELL: Do you mind if I just interrupt
16 briefly and say you may have noticed I haven't
17 commented on *AmEx* specifically, and I don't intend to.
18 I'm a partner at Bates White, and one of my partners
19 was deeply involved, so I'm not going to say anything
20 about the case specifically.

21 MR. FRANCIS: Great.

22 Let's turn now to Darren.

23 MR. TUCKER: Thanks very much. I want to thank
24 the Commission for holding these hearings and, in
25 particular, to the panel organizers for inviting me to

1 speak here today.

2 So Tasneem spoke a bit about the *AmEx* decision,
3 which, of course, offers some potential guidance to the
4 courts in terms of how to look at two-sided platform
5 markets, so let me sort of start there and share my
6 thoughts as to what the big-picture takeaway is from
7 that decision.

8 So I think that really one of the fundamental
9 insights from that case is that courts need to include
10 all sides of a platform when defining markets involving
11 two-sided platforms, except when indirect network
12 effects and relative pricing effects are minor. As an
13 example of that, where there's a two-sided market but
14 minor indirect network effects, according to the Court,
15 as in traditional newspaper ads, where the indirect
16 network effects operate in only one direction because
17 readers tend not to like to see more advertising, all
18 things being equal.

19 The decision also says that plaintiffs need to
20 demonstrate anticompetitive effects in the two-sided
21 market as a whole, and in a direct evidence case, which
22 the *AmEx* case was, plaintiffs can do this in a number
23 of different places. They can show prices increased
24 above a competitive level, output dropped, or quality
25 decreased due to the restraint, but all of these need

1 to be measured in the overall market, the overall
2 two-sided market.

3 I don't read the decision as saying that a
4 reduction in output is necessarily required, as some
5 have read the decision to say. In fact, the Court says
6 repeatedly that an increase in prices combined with a
7 showing that prices were above a competitive level in
8 the overall market would be sufficient to establish a
9 *prima facie* case.

10 So, in sum, really, I think what the key
11 take-away is, the decision makes clear that in a
12 two-sided market, establishing harm to just one group
13 of participants is insufficient for a plaintiff to
14 establish a *prima facie* case.

15 So an important question raised by the
16 decision, kind of an obvious question but important, is
17 what markets fall within the decision's holding? So
18 what markets, going forward, will be treated as a
19 two-sided platform market subject to *AmEx*?

20 So I don't think it's particularly surprising
21 or concerning that the Court really didn't flesh out
22 the answer to that question in any detail. Leaving
23 courts to fill in the details is really the typical
24 approach of the Roberts Court, not only in antitrust
25 cases but in most other types of cases before the

1 Court.

2 For example, in the *Actavis* antitrust decision,
3 the Court held that large, unjustified payments from a
4 patentholder to an alleged infringer could be
5 anticompetitive without actually explaining what
6 "large" meant. So it will be the work of the lower
7 courts and the U.S. antitrust agencies to help flesh
8 out exactly what markets fall within the decision, but
9 in doing so, they should avoid the temptation of
10 reading the decision narrowly.

11 For example, the case in *AmEx* focused on what
12 it called a special type of two-sided market, called a
13 transaction market, which it called or described as
14 having simultaneous sales, but the Court's holding was
15 not limited to that particular type of platform market.
16 And I will say that I'm skeptical of claims that I've
17 heard that the courts or agencies are ill-suited to
18 identify two-sided markets. These markets are usually
19 straightforward to identify, and enforcers can observe
20 the degree to which the effect of a challenged practice
21 affects each side of the market.

22 No one can seriously dispute that credit cards
23 are not a two-sided market, for example, and there's a
24 number of other markets that are discussed at length in
25 the economic literature that would seem to fall within

1 the scope of the decision because they're two-sided
2 markets; shopping malls, operating systems, app stores,
3 video game platforms, auction marketplaces, job boards,
4 ride-sharing platforms, stock markets, ad exchanges,
5 and so forth.

6 Likewise, markets where buyers and sellers
7 transact directly will generally fall outside the scope
8 of the decision. And in my view, proper implementation
9 of the *AmEx* decision by the lower courts and the
10 antitrust agencies will lead to more accurate and
11 effective antitrust enforcement.

12 Although it didn't use the terminology, the
13 Court noted that the decision would help reduce Type I
14 error. In fact, it should also reduce Type II error.
15 Consider conduct that directly affects users on only
16 one side of a platform, some kind of a restraint or
17 pricing effect. Analyzing conduct in just one side
18 could reach a false-negative by ignoring harms on the
19 other side, and a false-positive by ignoring benefits
20 on the other side.

21 Likewise, applying the hypothetical monopolist
22 test or critical loss analysis to a single side of a
23 two-sided market could lead to markets being drawn
24 either too broadly or too narrowly. There is no
25 particular reason to believe that application of

1 correct two-sided analysis should reduce overall
2 antitrust enforcement levels or increase
3 false-negatives relative to reducing false-positives.

4 The dissent's approach in the *AmEx* decision
5 would make it more difficult to attack platforms in
6 which conduct on one side inflicts harm on the other;
7 in other words, a false-negative.

8 For example, to go back to the *AmEx* case,
9 assume instead of increasing merchant fees, as was
10 alleged in the *AmEx* case, what if AmEx had
11 substantially reduced merchant fees but kept the fees
12 above marginal cost and managed to continue its
13 generous rewards program? So AmEx loses huge amounts
14 of money but manages to drive some of its competitors
15 out of business.

16 A single-sided analysis would focus on the
17 conduct on the merchant side since that's where prices
18 are being lowered, but since prices are greater than
19 marginal cost, there would be no basis for a *Brooke*
20 *Group* claim.

21 A two-sided analysis, on the other hand,
22 accounting for prices and costs on both sides, would
23 identify this predatory behavior and avoid the error.
24 In short, considering the effects on all platform
25 participants, it's far more likely to lead a court or

1 regulator to understand what's really happening in the
2 marketplace and reach the correct result.

3 For these reasons, claims that the Court's
4 decision will give big tech companies a free pass to
5 engage in anticompetitive conduct are off the mark. In
6 fact, application of *AmEx* will make some potential
7 claims against platforms easier and some more
8 difficult. More importantly, the goal should be to
9 conduct the proper analysis regardless of where the
10 results take us. To be sure, it will often be more
11 difficult to assess price and output effects in
12 multi-sided markets than in traditional markets, but
13 difficult and right is superior to easy and wrong.

14 Finally, with these hearings and in its
15 day-to-day enforcement and policy efforts, I think the
16 FTC has a real opportunity here to play a valuable
17 leadership role in expanding and advancing two-sided
18 market analysis with other competition enforcers. The
19 economics of two-sided platforms is well established in
20 the industrial organization literature, but in my
21 experience representing U.S. companies before non-U.S.
22 competition agencies, I've observed that exceedingly
23 few have attempted to incorporate these insights into
24 their enforcement and policy missions.

25 Simply put, the notion that a platform operator

1 might impose a restraint on one group to benefit
2 another group is a novel concept to many regulators and
3 enforcers outside the United States. Particularly with
4 the attention drawn to this issue by the *AmEx* decision,
5 the FTC and DOJ have an opportunity to play a
6 leadership role on the global stage in explaining when
7 and how to define markets involving platforms, which
8 could have the potential of improving the quality of
9 enforcement and achieving more consistent outcomes.

10 MR. FRANCIS: Thank you, Darren.

11 Finally, we will turn to Joanna.

12 MS. TSAI: Thank you, Daniel.

13 So I'm at a slight disadvantage here because
14 I'm going last today and all of my very distinguished
15 panelists here today have said -- made all the very
16 brilliant comments already. On the other hand, I have
17 a slight advantage in the sense that I've had the
18 benefit of hearing what everyone else had to say. As
19 an economist, I always look at both pros and cons on
20 every issue.

21 So I thought I would start off with sort of the
22 key relevant -- you know, before diving into relevant
23 markets and market power, to go back to first
24 principles and to talk about whether the key relevant
25 characteristics of multi-sided markets before getting

1 to relevant markets.

2 I think a lot of us agree that multi-sided
3 platforms has the presence of -- exhibit the presence
4 of indirect network effects, meaning you have network
5 effects across various sides of the platform, and as a
6 result, you have interdependent demand, and the
7 strength of the linkages in the platform for the
8 different sides may be stronger in some platforms and
9 weaker in others.

10 Because of the feedbacks and their
11 interdependencies of the different sides, the
12 multi-sided platforms ultimately need thriving levels
13 of customers and activities on all sides, and then
14 profit-maximization requires taking into account
15 demands and costs of each of the sides and the
16 interdependencies of the demands on the different sides
17 and indirect network effects. These characteristics, I
18 think, necessitate the need to implement economic
19 analysis with additional considerations.

20 Another additional characteristic that I wonder
21 if it's -- that is less commonly talked about out there
22 in, for example, decisions like *AmEx* is whether we need
23 a formal economic definition of two-sided markets. I
24 think for a period of time, a lot of people would talk
25 about, you know, multi-sided markets and, you know, per

1 the -- you know, we see a definition of it in the *AmEx*
2 decision, but economists have also long known a
3 definition that's been proposed by very respected
4 economists, like Rochet and Tirole, which add something
5 in addition to indirect network effects, which is that,
6 you know, a multi-sided market is when the overall
7 volume is dependent on the price structure in addition
8 to the overall level of the fees charged by the
9 platform.

10 And so I just want to throw that out there for
11 now for everyone to, you know, sort of think about
12 whether this is something that, you know, in the
13 analysis of multi-sided markets, it's important to have
14 that as a key, relevant characteristic.

15 Now, with that out of the way, market
16 definition, what is the key differences between
17 defining relevant markets, you know, on multi -- in
18 businesses involving multi-sided platforms as opposed
19 to single-sided platforms? I think the traditional
20 techniques for defining relevant antitrust markets
21 still apply. They just need to incorporate and account
22 for the multi-sided nature of the business.

23 Another complication is, you know, not all
24 multi-sided markets are alike. There are different
25 categories. I think we started to see categories such

1 as transaction platforms versus nontransaction
2 platforms that's, you know, sort of surfaced or evolved
3 or been highlighted by the *AmEx* decision.

4 So traditionally we will look at market
5 definition and define it to -- define it by, you know,
6 asking the hypothetical monopolist test, a SSNIP test.
7 So where do we begin and where to end with that, right?
8 So let me just talk through, you know, sort of this is
9 how I would think about it.

10 So the test, again, identifies constraints on
11 pricing and other businesses, business decisions to
12 maximize profits. There is a need to identify
13 competition on the different sides of the business,
14 which may include other multi-sided businesses that
15 compete for the same customer groups on the different
16 sides, as well as single-sided or other multi-sided
17 businesses that compete with just one of the sides,
18 okay?

19 We start with identifying a multi-sided
20 platform's distinct group of customers and the various
21 businesses of the single-sided/multi-sided platforms
22 that serve each groups of these customers, and there
23 are potential competitors in the multi-sided platform
24 that may constrain their pricing or other business
25 decisions.

1 So, so far all very similar to single-sided
2 analysis, except we are looking at things on the
3 different sides. A SSNIP for one side of the customers
4 affects the demand of the customers on the other side
5 because of, as we talked about, the indirect network
6 effects and the interdependent demands, and in turn has
7 the impact on the demand of the first side, the
8 customers.

9 And then a small increase in price on one side
10 reduces the quality demanded on that side, as well as
11 quantity demanded on the other sides, which, in turn,
12 further reduces the quantity demanded on the first
13 side. So there is a loop effect.

14 Because of the interdependencies across the
15 different sides of customers, a hypothetical monopolist
16 that only considers one side of its platform might
17 increase price on that side and actually lowers its
18 overall profits once the effect on the other side is
19 accounted for, okay? Ignoring -- I think it's
20 important to consider all these sides, because ignoring
21 the effects on the other sides could cause one to
22 arrive at a relevant market that is too narrowly
23 defined.

24 Okay. For transaction platforms, meaning a
25 simultaneous transaction takes place and it's

1 proportional, one on each side, one might modify the
2 SSNIP test to use an overall price, an output, like
3 number of transactions for all similar platforms, and
4 allowing the hypothetical monopolist to maximize
5 profits across all sides, taking into account network
6 externalities. I think this gets a little more
7 complicated when we're talking about nontransactional
8 platforms, but I think that's something that maybe
9 you'll cover a little later on with the Q&A.

10 Well, I think I have used up my time, so I will
11 stop at that. Thank you.

12 MR. FRANCIS: All right, Joanna, thank you.

13 So before we move to the Q&A, I want to give
14 our panelists an opportunity, if they want to do so, to
15 respond to any of the affirmative presentations, if
16 they would like to do so.

17 MR. SALINGER: Yeah, I would.

18 MR. FRANCIS: Please do.

19 MR. SALINGER: So I agree with Tasneem that if
20 you identify effects, there must be some market in
21 which -- that was relevant for antitrust purposes, and
22 whether it was precisely the one the Department of
23 Justice defined or not should be irrelevant.

24 And I agree with Joe that if the reason you're
25 defining a market is to then measure share and infer

1 market power from a high share, that that's completely
2 right.

3 What -- you know, this morning we had a lot of
4 discussion about whether -- you know, what is a
5 two-sided market, and there's -- you know, sort of one
6 view is that, well, it's obvious, and then, you know,
7 we try to define it, and it's -- you know, and Joanna
8 mentioned the Rochet and Tirole definition, which is
9 interesting, but it's not obvious that that's the right
10 definition.

11 And I'm sort of troubled by this -- by the
12 contrast between it's obvious and we can't really
13 define it because of casual comments that I've heard.
14 So I think three times today I've heard the assertion
15 that Google is a three-sided market and not a two-sided
16 market, and so the argument is that the websites that
17 would like to get placement in Google's results are one
18 side of the market.

19 And David Evans isn't here, but I've argued
20 with him about this before, and I think the argument he
21 would say is, look, there are websites out there that
22 want viewers, and there are viewers out there that want
23 to see websites, and Google is bringing them together,
24 and that means that the websites are a side of the
25 market.

1 But the problem is that when you -- the essence
2 of a two-sided market is that you have two sets of
3 customers that you're competing for, and Google's not
4 competing for the websites that want to show up in its
5 results. I mean, at some technical level, they have to
6 agree to be -- to have the sites crawled, but, you
7 know, they're competing for people who search, and
8 they're competing for advertisers, but the relationship
9 with respect to the websites is much more complicated,
10 and it's not a customer kind of relationship.

11 And so, you know, if we're not able to define
12 what these markets are, there is this risk that there's
13 going to be this casual assertion, you know, that here
14 is a side of the market, and by the way, if someone on
15 this side of the market is harmed, that that's customer
16 harm and, therefore, the sort of harm that the
17 antitrust laws are concerned about. You know, if we do
18 that, we are going to make some very bad decisions.

19 MR. FRANCIS: Michael, thank you.

20 All right. We are going to turn now to a
21 little Q&A. Let me just point out to you there are
22 two -- I think two or three FTC folks who will be
23 walking up and down with index cards, which is our 21st
24 century tech-focused way of encouraging you to be
25 interactive with our panel and ask your questions. So

1 they will be up and down. Flag them down, send us a
2 question, and I will ask it.

3 All right. So why don't we turn, while that
4 happens, to a couple of more general questions, and I'm
5 going to start with one for Joe and Michael and then
6 anyone else who wants to respond as well, and that's
7 the foundational one.

8 Why is it that two-sided or multi-sided
9 platforms merit distinctive or special antitrust
10 treatment, to the extent that they do at all? So we
11 know that intermarket externalities, whether indirect
12 network effects or of other kinds, are pretty common
13 throughout the economy, and it is more generally not
14 rare that price and demand in one market will have
15 effect on price and demand in other markets. We see
16 this when markets are upstream or downstream or
17 complementary of one another.

18 Two-sided markets are obviously distinctive in
19 that buyers don't internalize or may not internalize
20 those effects, but is that enough to warrant sort of
21 special antitrust rules of the kind that the Court
22 seems to signal in *AmEx*? And if so, why? Why are
23 two-sided markets or multi-sided markets special for
24 antitrust purposes?

25 Let's start with Joe.

1 MR. FARRELL: Well, as I said, I'm not going to
2 comment on *AmEx* specifically. I think actually the
3 answer to the question is they don't really merit
4 distinctive antitrust treatment. In all cases in
5 antitrust, I think, maybe except for naked
6 price-fixing, you want to know what's going on, what
7 protections do customers and others have against it
8 being harmful, and that gets to this market power
9 question, what sort of harm can be expected to result,
10 what sort of efficiencies might arise.

11 It's all the same questions. It's different
12 details, but we know, you know, and the agencies have
13 often said that antitrust always is fact-specific,
14 again, perhaps except for naked price-fixing, and so
15 you're always trying to wrestle with fundamentally the
16 same set of issues.

17 I think what we're discussing here today is not
18 how to categorize some markets or some businesses in a
19 way that puts them into a different box. I think we're
20 really discussing what are some things that you need to
21 keep in mind in dealing with what turn out to be an
22 awful lot of different businesses and markets in the
23 modern economy, to some extent, and so if you take it
24 that way, then I'm not convinced that they either merit
25 or will get distinctive antitrust treatment if the

1 antitrust treatment can be defined not in terms of, you
2 know, rules and boxes to check but in terms of
3 intelligently analyzing the fundamental questions.

4 MR. FRANCIS: Michael?

5 MR. SALINGER: So I agree with what Joe just
6 said. The only thing I would add is I think part of
7 the reason that we're interested in multi-sided
8 markets -- I mean, in part, it's the *AmEx* decision, but
9 if the *AmEx* decision hadn't occurred, we would still be
10 talking about it. But the reason really isn't the
11 multi-sidedness of it. It is that there are these very
12 successful business platforms that have two-sided
13 strategies, and they are very innovative businesses,
14 and, you know, really the big issue with these
15 businesses is not the two-sidedness. It's how do we do
16 antitrust with innovation?

17 And, of course, that's not a new issue, we have
18 been wrestling with it for a long time, but I think
19 that it's an issue that we haven't nailed down quite as
20 well as how to do -- you know, how do you evaluate a
21 merger between two grocery stores? And, you know, the
22 companies for which this is -- you know, these
23 innovation issues are relevant is not limited to
24 companies with two-sided platforms.

25 I mean, you can -- and I guess the question --

1 you know, do you view Apple as being a two-sided
2 business? There are elements of it, but -- you know,
3 but in many ways, you know, it's designed its business
4 differently from some of these other companies that are
5 being talked about, and it's more one-sided, you know,
6 in its business model.

7 MR. FRANCIS: Would anyone like to respond?

8 MS. CHIPTY: Sure. I would actually like to
9 add something on top, which is that I think in part,
10 given the nature of certain businesses that involve two
11 sides or multiple sides, the firms necessarily need to
12 be big. So, for example, early on Joe said, well, you
13 might have a situation where you could say, well, this
14 firm is small, if you were able to measure the share
15 properly, and look at it, you might say, well, this
16 firm is small, so we can move along; nothing here to
17 see.

18 But the fact here is in many of the types of
19 businesses that I think have already been described or
20 suggested today, and that you can think about in your
21 own world, these businesses tend to be big, and the
22 fact is that the network effects -- the need to create
23 these platforms is not just a coincidence. It's
24 because of the nature of the business that they're
25 selling.

1 So I think that perhaps means that we're not
2 going to necessarily find small firms. Maybe
3 newspapers, some local daily newspapers, but by and
4 large, all of the examples even spoken here today are
5 large firms, because they, in essence, have to be.

6 MR. FARRELL: Yeah, and can I jump in on that?

7 I mean, of course, we're very familiar in
8 modern antitrust with the fact that the link between
9 size or market share and market power is not a tight
10 link, not as tight as perhaps people used to believe,
11 and I think this is an example of that. So it might be
12 that in a particular market with strong network
13 effects, you've got to be big, and that might be true
14 with or without effective market power.

15 MS. CHIPTY: That's right.

16 MR. FARRELL: I think that's right. It can be
17 taken too far, but basically right.

18 MR. FRANCIS: So speaking of taking things too
19 far, let me ask you about the kind of more kind of
20 complicated or troubling side of the concept of
21 two-sidedness as a zone of special pleading in
22 antitrust, to the extent that that's what we're going
23 to see as a legal matter, even if as an economic matter
24 that might not be intuitive.

25 I am going to start here with Eric and Tasneem.

1 My question is, what do you see as the principal risks
2 of misuse of this concept? So we now have a Supreme
3 Court decision out there, right, that's sort of popular
4 and exciting and we're all talking about it and
5 engaging in sort of exegesis of the text, but one thing
6 that is pretty clear is the Supreme Court is telling us
7 that there is something different about antitrust in
8 these markets, in these contexts, and it's going to be
9 for lower courts and for agencies and to some extent
10 for the bar to operationalize that and to figure out
11 how far this distinctive treatment, this special set of
12 rules is going to extend.

13 So my question is this: Do you worry about
14 misuse of the concept of two-sidedness? Do you have
15 some concerns that it will be inappropriately extended
16 or deployed by courts or enforcers or the bar? And if
17 so, what warnings would you want to give against that
18 kind of misuse?

19 Let's start with Tasneem.

20 MS. CHIPTY: Okay. So I guess one of the
21 things that worries me about courts thinking about
22 multi-sided markets, it was said earlier -- I think
23 Darren said it -- that it's relatively easy. I
24 actually don't think it's that easy because you have
25 economists struggling with it and struggling to explain

1 it to each other, let alone to noneconomists.

2 I'll give you a for-example, something that I
3 think is a difficult question, and I don't think
4 there's a clear answer, and I certainly don't think
5 there's a one-answer-fits-all, and that is the issue of
6 price structure, okay? There was a lot of discussion,
7 even in the *American Express* decision, about the net
8 price, and let's look at the all-in price on all sides,
9 both sides of the platform.

10 Well, so, does price structure matter? What
11 would we think about a setting in which a firm raised
12 prices on one side and essentially gave it all to the
13 other side? Do we not care about the different
14 experiences and the welfare consequences for different
15 segments of consumer groups? Is the economic
16 consequence of the net price the same across all
17 different sort of paths by which that net price came to
18 be?

19 I think that's a really hard question to
20 answer, and I do worry a little bit that one of the
21 sort of easy ways to take the *American Express* decision
22 is to look at the net price, and I think that could be
23 a mistake. I think that the decision is very open, and
24 I think Darren mentioned that this was perhaps sort of
25 the way it should be and perhaps the way all Supreme

1 Court decisions go, but, you know, reading it as an
2 economist, I found little guidance in how to weigh the
3 benefits to one group or the harm to the other or
4 perhaps to weigh externalities to consumers that were
5 on either side of the platform that might also be
6 affected. So I think there was -- that it's -- the
7 decision doesn't contain a clear guideline on how to
8 proceed, and in many ways, I suppose that's a good
9 thing.

10 And then finally I just close it with the
11 mantra that I started with, which is that I sure hope
12 sort of lawyers and courts don't look at this decision
13 and think that, oh, multi-sided platform must define a
14 market, you know, I kind of -- maybe yes, maybe no. It
15 kind of depends on whether that's a useful exercise.

16 MR. FRANCIS: Thank you.

17 Eric?

18 MR. CITRON: So I tend to be a somewhat
19 Pollyanna-ish person, so I hope to give the, like,
20 hopeful answer, but here's the real one. We have an
21 adversarial system. So what's going to happen is the
22 defendants are going to say I have a two-sided market
23 defense. They are going to put on an economic expert
24 that they are allowed to pay for who will say this is a
25 two-sided market, so it is impossible that this person

1 has market power or could violate the antitrust laws.

2 Judges who have no economic training are then
3 going to try to analyze that defense, and that is a
4 disaster, okay? So I think almost all uses of the *AmEx*
5 decision are likely to be mixed uses for reasons that I
6 think Joe was saying -- probably in less incendiary
7 terms and a better accent -- which is to say what we're
8 trying to do is intelligently answer a pretty
9 straightforward antitrust question, and if the question
10 is of the kind in *AmEx*, then the proper use of the *AmEx*
11 decision is pretty straightforward.

12 The prosecution is saying this company has the
13 power to make merchants do what they want, and AmEx is
14 trying to defend that proposition by saying, well, no,
15 because there are consequences on the other side of our
16 business model or our market or our platform or
17 something that are going to somehow constrain what I'm
18 able to make merchants do. And if that's true, if AmEx
19 can show that or if the prosecution can't show it, then
20 great. We've identified the correct question and the
21 right way to answer it.

22 If it devolves into a kind of abstract question
23 about the two-sidedness or eight-sidedness of AmEx or
24 whatever, then it will be pointless and very likely to
25 confuse. I just think the more likely thing is,

1 unfortunately, the latter rather than the former, and
2 so the thing that we ought to keep trying to encourage
3 courts to do is to do something more like the former.
4 Correctly identify the question, understand why we care
5 about market power or market definition in this
6 context, and then try to tackle the question in the
7 least mystical and most straightforward way that you
8 can.

9 MR. FRANCIS: Eric, thank you.

10 Would anyone else like to take up the theme of
11 misuse of the concept of two-sidedness? I think
12 Joanna.

13 MS. TSAI: I would just like to add a small
14 comment to something that Tasneem had said earlier. I
15 agree that it's an important question. It's important
16 to consider whether structure is important in addition
17 to the net price level, but I do want to point out
18 that, you know, it's important to not make it too
19 important as well, because at the same time as AmEx had
20 recognized -- you know, American Express versus other
21 payment cards, you know, decided to charge -- to have a
22 different allocation and split, you know, between the
23 two sides, and that was -- that's procompetitive, it's
24 innovation.

25 So trying to decide sort of what should be the

1 right allocation, you know, one or the other, I think
2 there could be a danger, and I think pointing to
3 something that, you know, maybe is allocated
4 differently and, you know, calling that, you know,
5 potentially harmful. That's all.

6 MR. FRANCIS: So one of the themes that has
7 emerged from a number of the comments is the space
8 between antitrust law and antitrust economics, which we
9 may confront more often than we would like in this
10 space, in particular. So I'd like to ask to what
11 extent the Supreme Court was successful in reflecting
12 in legal terms the economic scholarship on which it was
13 relying. And I am going to start here with Tasneem
14 again and Michael.

15 So in *AmEx*, the Court purported to rely quite
16 heavily on the Filistrucchi paper dealing with market
17 power and market definition in two-sided markets, but
18 when the Court came to explain or express in legal
19 reasoning the grounds for its conclusion, it emphasized
20 two or three things quite distinctively.

21 So one was the joint and simultaneous nature of
22 activity in the credit card market on the cardholder
23 side on the one hand and on the merchant side on the
24 other, which strikes me at least as pretty consistent
25 with the Filistrucchi discussion of transactional

1 markets.

2 The Court also emphasized, you know, point two,
3 that the significant bidirectional externalities,
4 which, of course, we'd expect, and point three, the
5 prominence or preeminence of competition at the
6 inter-platform level among credit card providers.

7 So recognizing that some of those factors are
8 pretty common, approaching ubiquity in some cases, was
9 the Court right? Did the Court do a good job here of
10 expressing in, you know, legal reasoning terms that us
11 lawyers without a background in economics can go out
12 and apply, the economic work on which it was relying,
13 or has the Court set out a set of factors that don't
14 accurately capture the economic scholarship on which
15 it's relying?

16 Why don't we start with Tasneem?

17 MS. CHIPTY: Sure. I would say in part, yes,
18 it did a great job, and, in fact, a surprisingly
19 transparent discussion of the business models and the
20 economics; and in part, you know, no, for some of the
21 reasons we've already talked about, at least in my
22 view.

23 But one of the things that I think is missing
24 from the list of things that you just went through is
25 the fact that in this particular case, there was the

1 nature of the conduct which was at the heart of why I
2 think the Court thought about the transaction market.
3 It was the nature -- so, for example, if you had a
4 two-sided platform that was happening -- that was
5 accused to have done something nefarious in some place
6 in its supply chain, I don't know necessarily that we'd
7 be focusing on this. It was the nature of the conduct
8 specifically worked at the nexus of the -- the bringing
9 together of the two sides of the platform.

10 And so I think that the literature actually
11 that the Court cited talks about this quite a bit, and
12 it is one of the themes. I don't think the decision
13 uses the same language as the literature, so perhaps it
14 got left off the list, but I think that is something
15 that the Court identified well and appropriately, and
16 so I do think that in many ways they accurately
17 described the literature.

18 I will say, though, that on the subject of
19 market definition, the very papers -- the literature
20 that the Court cites raises a concern about getting
21 stuck unnecessarily in dealing with the complexities of
22 two-sided platforms and the concern that to do it
23 rigidly and mechanistically could lead to sort of a
24 distraction from the important issues. So in that
25 sense, I don't think that the Court hit the nail right

1 on the head.

2 MR. FRANCIS: So just to follow up very briefly
3 before we turn to Michael, I think some of that
4 literature, even when talking about credit card
5 markets, emphasizes the difference between the
6 transaction level, where activity is joint and
7 simultaneous, and the membership level, where it really
8 isn't, right?

9 So the services that a credit card company
10 provides to a cardholder, you know, rewards and, you
11 know, whatever else are neither joint nor simultaneous
12 with what it provides to merchants.

13 Do you think it's possible that the approach to
14 market definition we've seen the Court take here in the
15 context, as you say, of transactional conduct might
16 actually, you know, lead to the opposite conclusion in
17 antitrust cases where the conduct in question is about
18 membership, is about dealing with customers in a way
19 where activity is not joint and simultaneous, even
20 though we're in the credit card space?

21 MS. CHIPTY: Oh, it would depend, I would
22 think, on the nature of the conduct and then tracing
23 through the role of that interconnectedness, you know,
24 so I don't think we can answer the question without
25 recognizing the two-sided platform, but I don't know

1 unambiguously, in a hypothetical, whether it would
2 necessarily go one way or the other.

3 MR. FRANCIS: That makes sense.

4 Michael?

5 MR. SALINGER: So the Court got right that,
6 when you're looking at the credit card market, you
7 can't just look at the merchant fee and say, oh, the
8 merchant fee is high, therefore, there is an
9 anticompetitive effect, and that you've got to look at
10 the other side of the market and, you know, consider
11 the incentives that the credit card company is giving.

12 It got wrong, at least as I read it, that it
13 would seem to suggest, well, all you have to do -- what
14 you should be looking at is the combined price, you
15 know, the merchant discount but minus the incentives,
16 but, you know, but if you take the Rochet and Tirole
17 article that Joanna talked about, she said, you know,
18 it says it's only a two-sided market if how you divide
19 up that total price matters, and this is something that
20 Justice Breyer pointed out in his dissent.

21 You know, and then I think, you know, the
22 question is, you know, even though the Court got it
23 right, that you have to look at the -- you have to look
24 at both sides of the market, the question is, was
25 market definition the stage where you should do that or

1 would you -- when you're evaluating conduct like a
2 no-steering clause, do you look at -- do you look at --
3 do you evaluate that and take account of the two sides
4 of the market at the second stage where the company
5 puts forward its justification for why it thinks its
6 behavior is reasonable?

7 MR. FRANCIS: Would anyone else like to
8 respond?

9 All right. So let's bring Joe and Joanna back
10 in with a question that touches on some of the things
11 that we've heard raising their heads a few times.

12 So a number of folks have referred to combined
13 price, overall price, net price, price structure.
14 There are a series of ways of talking about price and
15 output across a platform as a whole, and I'd love to
16 hear what you think about how we can usefully measure
17 overall price or overall output in nontransactional
18 multi-sided contexts.

19 So when activity isn't joint and simultaneous
20 or isn't even directly proportional on the two sides,
21 it can be very hard to tell, at least in the abstract,
22 sort of whether overall output in some relevant sense
23 has increased or decreased. So we will see that, for
24 example, if price and output change on one side and
25 change perhaps in the other way on the other, *AmEx*

1 encourages us, at least in the course of proving
2 anticompetitive effects, to try to answer the
3 question -- it might not require us to do this, but at
4 least encourages us to do so -- to answer the question
5 of whether overall output has been reduced or overall
6 quality-adjusted price has been increased, but how can
7 we do that in cases where we've got a nontransactional
8 platform and activities aren't directly commensurate
9 with one another?

10 Let's start with Joe.

11 MR. FARRELL: Well, I think this is a hard
12 question. So in the traditional single-sided, nothing
13 subtle type context, quantity is often a good measure
14 for consumer welfare, but one of the conditions for
15 that, which is not always true, is that there's no
16 price discrimination. So the fact that the marginal
17 customers are getting a good deal and caused to become
18 actual customers rather than potential customers is a
19 good indication of what's happening to the other
20 customers.

21 When there's price discrimination, then you
22 can't necessarily make that leap, and you have to worry
23 about that. And I think you could say that in a
24 multi-sided context, with different prices to the
25 different sides, as you'd normally expect, that is kind

1 of like price discrimination from the point of view
2 that proxy for customer welfare.

3 I would also say the extent to which we --
4 particularly in conduct cases -- really set out to
5 evaluate customer welfare, in a way it's supposed to be
6 the focus, but in a way not. I mean, it's really more
7 about whether you're getting in the way of somebody
8 potentially making a better offer than you're making,
9 and how good an offer you're making compared to some
10 other benchmark is not exactly, I think, in all cases
11 the right focus.

12 So I think you raise a good and difficult
13 question. I think it is present in more traditional
14 contexts, although in a slightly different form, and I
15 also think, you know, if we focus on the competitive
16 process, I'm not saying you won't get to that question,
17 but it's not as obvious that it's as central as you
18 might think.

19 MR. FRANCIS: Joe, thank you.

20 Joanna?

21 MS. TSAI: I think this is a very difficult
22 question but a very good one. So in transaction
23 markets, such as in AmEx, you know, you have one
24 transaction on one side, one transaction on the other,
25 simultaneously. We see other platforms like this,

1 like, you know, perhaps ride-sharing, like Uber, you
2 know, a ride, you know, is the transaction.

3 In the nontransaction platforms, they don't
4 equal both sides, and even more importantly, they are
5 not measured by the same unit of measure, right? So
6 that makes it tricky. So examples include content
7 advertising models or social networking media, okay?
8 So when they are not directly proportional or the same
9 transactions, then, you know, in the content
10 advertising model, for example, on the one side we
11 could observe a hundred subscribers, and each paid a
12 dollar. On the other side, we might observe ten
13 advertisers and each paid \$10. Then what do we do with
14 them, right? It's not possible to measure an overall
15 price or output, because such measurements are just not
16 meaningful.

17 So on the one side, the unit of measure for
18 output is number of articles of relevant information
19 for the subscribers. On the other side, it could be
20 what's -- and that's what the subscribers are paying
21 for. On the other side, the unit of measure could be
22 number of eyeballs or number of click-throughs in your
23 advertising model, and that's what the advertisers are
24 paying for. Again, that doesn't help in terms of
25 conceptually finding that aggregate price.

1 So we have a problem, and I think there are a
2 couple of ways to tackle this that we could consider
3 and maybe think about, begin to think about. So *AmEx*
4 recognizes that decisions -- in the decision, my
5 reading of it is that it specifically is applicable to
6 transaction platforms, and other multi-sided platforms
7 may be different, and in situations when we have
8 nontransaction platforms, since our antitrust laws are
9 implemented with a consumer welfare standard, one
10 possibility is to treat each side as separate groups of
11 consumers and evaluate the effect of a merger or
12 conduct on each side, taking into account the
13 cross-platform network effects without trying to
14 aggregate and put them together and calling it this one
15 thing or unit of measure.

16 So, for example, if assessing whether a
17 proposed merger between two social networking platforms
18 harmed consumers, we assess whether consumers on each
19 side would end up paying higher, you know,
20 quality-adjusted prices, okay? Now, by implementing
21 this analysis, I recognize that there are a few things
22 that would be tricky and would require extra care when
23 implementing.

24 One is that such analysis must take into
25 account, I think, the increase in value from the

1 customers, from greater network effects resulting from
2 a greater network and finding a way to measure that and
3 incorporating it into a quality-adjusted price that the
4 consumers face.

5 Second, you know, cost efficiencies from a
6 merger like that and how to allocate them across sides.
7 And then thirdly, a really difficult question is how
8 should the welfare of the different sides of customers
9 be weighed when we reach a result in which one side is
10 better off while another side is worse off?

11 MR. FRANCIS: Wonderful.

12 MR. CITRON: Can I --

13 MR. FRANCIS: Please do, Eric.

14 MR. CITRON: I want to try something, which is
15 going to be a live experiment on the demystification of
16 the question, because this is not something where I
17 understand the economics really well, but I'll give you
18 the following example.

19 The reason that quantity is a really good
20 measure of consumer welfare, like in the traditional
21 manufacturing market for widgets or whatever, is that
22 if the person that makes the widgets puts more widgets
23 out there in the market, that's typically good for
24 consumers. It will drive the price down. It will mean
25 that more transactions can happen. The marginal

1 consumer is able to afford widgets when they weren't
2 before, or the like.

3 But AmEx or credit card companies, they don't
4 manufacture transactions and offer them for sale. AmEx
5 is -- essentially wants all the transactions to go
6 across AmEx's platform. They aren't increasing the
7 queue of transactions or the like.

8 But if you look at a more traditional
9 relationship that AmEx does have, you do see the normal
10 relationship between price and quantity. Merchant
11 acceptance of AmEx is constrained by how much AmEx asks
12 merchants to pay, and so there's a large chunk of
13 people who don't take American Express but do take Visa
14 and MasterCard, because the price is higher there.

15 That's a real example where you see that higher
16 prices are driving quantity down and that if AmEx
17 wanted to have more merchants who took American
18 Express, it would have to lower prices as a result.

19 What you see there is that output really is
20 constrained in meaningful ways by AmEx's practices, but
21 you can't get that by trying to see how many
22 transactions AmEx has in total, because AmEx, like I
23 said, isn't manufacturing transactions. It's not
24 trying to create transactions. It's just trying to
25 capture as much of GDP as it can in AmEx transactions

1 rather than, you know, dollar transactions or check
2 transactions or the like.

3 And so, you know, I think there are times when
4 focus on quantity makes sense, but it's not going to be
5 in these circumstances where, you know, it's not
6 something that the company actually makes or produces.

7 MR. FRANCIS: Would anyone care to respond?
8 Okay.

9 All right. So let's turn to a related subject,
10 and this will be for Darren and then for Joanna and
11 then others if they would like to, and this is the
12 question of what *AmEx* might tell us about the treatment
13 of efficiencies in antitrust doctrine or the economic
14 analysis that underlies it.

15 So we ordinarily take the view when we're out
16 there engaged in the antitrust thing that efficiencies
17 in one market, procompetitive benefits in one market,
18 don't offset, shouldn't offset, aren't adequate or
19 relevant to offset harms to competition in another.

20 Now, in *AmEx* itself, that question or that
21 issue wasn't presented, because the Court defined a
22 single market in which both merchants and cardholders
23 were purchasers, but let's set that aside and let's
24 focus on multi-sided platforms that really are selling
25 into different markets. I don't know, you know, maybe

1 social networking on the one side and online
2 advertisers on the other, for example.

3 In contexts that are multi-sided in that way,
4 where you have two relevant antitrust markets or even
5 more potentially, should courts weigh efficiencies in
6 one market against harms in another? And if so, is it
7 because of the two-sided nature of the platform or is
8 it just because that would be better economics and we
9 should be doing that throughout antitrust law anyway?

10 Let's start with Darren.

11 MR. TUCKER: Sure. So you've mentioned the
12 principle that you should not use efficiencies in one
13 market to offset concerns in another. That, of course,
14 refers to *Philadelphia National Bank*, which just as an
15 aside is a holding I've always been sort of dubious of.
16 But putting that aside, I don't really read *AmEx* or
17 really sound economics as saying, you know, whether the
18 market at issue is transactional in nature really
19 should answer that question.

20 As long as the market is multi-sided and there
21 are sufficient externalities between the different
22 groups of participants, I think courts and agencies
23 should consider the harms and benefits to all sides of
24 the platform regardless, again, of whether you would
25 characterize it as a transactional platform or not.

1 Only then will the reviewer be able to correctly
2 determine whether the conduct at issue is
3 anticompetitive.

4 You know, I mentioned this in my opening
5 comments. I don't read *AmEx* as being limited to
6 transaction platforms. I think it would have been odd
7 to read the decision in that way given the many cites
8 that we were talking about before to the economic
9 literature, which, of course, is much broader in terms
10 of the way it characterizes two-sided markets.

11 MR. FRANCIS: Joanna?

12 MS. TSAI: So I understand, you know, from my
13 antitrust lawyer friends and people I have worked with
14 that we do not consider out-of-market efficiencies in
15 antitrust analysis. So as a simple example, suppose a
16 retail merger benefits consumers in one state but harms
17 consumers in another state. The two effects are not
18 combined to say the effect is zero. That's the state
19 of things.

20 So what is different about multi-sided markets
21 that would warrant different treatment? Perhaps in
22 some markets we have -- you know, this is just a
23 proposition, but perhaps in some markets we have end
24 user consumers on one side and providers on another
25 side, say a travel website with rental car, hotel,

1 flights providers on one side and then consumers on the
2 other side, and if the merger resulted in efficiencies
3 on the provider side, arguably with some pass-through,
4 okay, if one were to recognize pass-through of lower
5 costs, they may lower prices to end users, and some
6 harm on the end user side may be countered, okay?

7 But it would need to be thought through very
8 carefully, obviously. Just like in antitrust analysis,
9 we always think through efficiencies very carefully.
10 What are the circumstances and what are the examples
11 of -- you know, as an example of a merger that would
12 result in harm to one side and really efficiencies to
13 the other side?

14 MR. FRANCIS: Thank you.

15 Would anyone else like to respond on the
16 treatment of efficiencies? Tasneem?

17 MS. CHIPTY: Yeah. I think that this is where
18 multi-sided markets I think is different and tougher in
19 so many ways than merger work, because if, you know,
20 you were presented with the merger example you gave,
21 that in one geographic market, no problem, in another
22 geographic market, there's some concern, we could talk
23 about a divestiture plan and retain the good and
24 jettison the not so good.

25 But it's quite possible that -- again, it's

1 fact-specific, and I don't have a specific example in
2 mind -- but it's quite possible that certain mergers or
3 certain types of conduct with multi-sided markets only
4 work because they intrinsically make the platform
5 bigger, and so I don't know that a remedy would be
6 nearly as convenient or even feasible in that context.

7 MR. SALINGER: Well, so it's inherent in many
8 two-sided business models that companies make tradeoffs
9 between the interests of one set of consumers and
10 another set of consumers, and so just consider a
11 television network. You know, suppose it does
12 something that -- you know, it increases the number of
13 ads that it shows in ways that irritate the viewers.
14 Is that -- if they haven't shown -- if they're not
15 broadcasting what the viewers most want, could that be
16 the exercise of market power or an antitrust violation?

17 Well, it's inherent in the business model
18 that -- you know, that you have to show the ads even if
19 consumers don't like them. So I think, you know, that
20 that is a complication that you don't see in some
21 one-sided markets.

22 MR. CITRON: Yeah. I would just say this is
23 one of those areas like you asked before, are you
24 concerned about the possible misuse? You know, I think
25 price-fixers like to say that they can save jobs in

1 their industry or whatever by fixing prices. There's
2 always the chance that you can redirect the rents that
3 you extract on one side of a market to another side of
4 your platform or business model or the like, and so you
5 just want to be extraordinarily careful about
6 permitting that kind of analysis, because it leads to
7 bad things.

8 And, you know, in general this is the thing
9 that we're supposed to be trusting to the markets; that
10 is, we try to set up a well-functioning game, and then
11 we let where the -- where the benefits and costs flow
12 according to competition and not from judges trying to
13 say, well, it's true Bob got really hurt, but Joe seems
14 better off, and using incommensurate prices or
15 whatever, we will try to balance that out.

16 So, you know, I think in general that's a
17 dangerous direction, so it's better if it's as limited
18 as possible, and, you know, I think -- but you will see
19 companies argue, well, we're a two-sided business and
20 there are benefits from this anticompetitive behavior
21 somewhere else in our business, and so all should be
22 good.

23 MR. FRANCIS: All right. I'd like now to
24 introduce some of the questions that we have had from
25 the audience, and I am going to start with the first

1 one we received.

2 So the question is, can you talk about the
3 inherent conflicts of interest found when platforms
4 operate multi-sided markets? Often platforms directly
5 compete with those also competing on their own
6 platforms.

7 So I read this as a question about essentially
8 vertical integration, right? We often find ourselves
9 in a situation where a platform is effectively
10 integrated in a way that puts it into competition with
11 its customers on one side of the market.

12 For example, if I was running an online retail
13 website where merchants or manufacturers offered their
14 products through to consumers, I might, in addition,
15 have a merchant or a manufacturing business in which I
16 was in competition on one side with some of my own
17 merchant customers.

18 And so the question I think would be, how, if
19 at all, should that fact -- that fact of vertical
20 integration on one side -- change the analysis of
21 market definition or market power?

22 And this I throw open to the whole panel.

23 MR. CITRON: Well, I mean, I'll just start with
24 a concrete example because it's probably easier to wrap
25 our heads around one. Take Amazon, right? Amazon is a

1 marketplace. It functions as a marketplace. It has
2 lots of third-party sellers. It's for buyers and
3 sellers to find each other in large part. It's also a
4 gigantic retailer and sells a lot of stuff.

5 Is there a potential conflict of interest
6 there? Sure. Of course, there is. AmEx is a
7 profit-maximizing entity. It's probably interested in
8 doing whatever it makes the most money doing. How do
9 we figure out if there's a potential problem here?

10 We would do it probably by starting with an
11 analysis of whether market power exists; that is, the
12 sellers who offer things across Amazon -- and, look, I
13 am going to do this in a way that isn't particularly
14 two-sided, because I'm just attending to the question
15 I'm trying to answer, right?

16 The competitive constraint on Amazon monkeying
17 around -- what we're concerned about is Amazon
18 monkeying with the people who sell things on the Amazon
19 platform, and the constraint on Amazon doing that is
20 those sellers being able to take their business
21 elsewhere. So we just ask a really straightforward
22 question. Are people who sell through Amazon able to
23 do otherwise? Can they find other outlets for their
24 businesses?

25 And you can interview them and find out if they

1 feel comfortable not offering for sale through Amazon
2 even though Amazon is monkeying with them, for example,
3 and you can see what are the alternatives to Amazon.
4 How else can they offer their products?

5 Someone was up here on the last panel saying
6 how, you know, the ability to market through these
7 marketplaces has actually led a lot of people to come
8 to market who couldn't have otherwise. Well, that's
9 great. That is a good thing in the world, but it's
10 also evidence that, you know, they need these markets
11 in order to operate and they may be at their mercy.

12 So, you know, I think you have that conflict
13 that the questioner identifies exists. It doesn't
14 require special multi-sided analysis to figure out, I
15 think, what it is we care about.

16 MR. TUCKER: I guess one thing I would add, I
17 think Eric's example of Amazon and third-party sellers
18 is a good one. I think that illustrates, I think
19 pretty effectively, that for most types of multi-sided
20 platform markets, the platforms compete not only
21 against other platforms but also sometimes against more
22 traditional sellers.

23 So in the Amazon example, some of the other
24 sellers on its platform are, you know, more traditional
25 sellers. They are not themselves necessarily

1 platforms, as well as Amazon also competes against
2 traditional brick and mortar retailers, such as a
3 Walmart. So I think it's important to not only
4 consider -- I think going back to I think Michael's
5 comments from the very beginning -- not only to look at
6 other companies that look similar to whatever company
7 that is under scrutiny, but to look a little bit
8 further, not only at other -- not other platforms, but
9 other companies that are offering very different
10 business models, because they may offer a constraining
11 effect on the company at issue.

12 MR. FARRELL: So I think this is in essence the
13 very traditional economic antitrust question of
14 leverage, and, you know, if I control a platform, do I
15 feel tempted to take over one of the complementary
16 sectors where it gets me money and makes my customers
17 worse off?

18 And I think if David were here, he would
19 probably say, no, then you wouldn't really be being a
20 platform, but being a platform is about appealing to
21 all sides. I think the hard-core economics that
22 perhaps echos that is, of course, there's a downside to
23 a platform sponsor in turning one of its sides into a
24 chore rather than a pleasure.

25 Whether that downside is heavy enough to

1 outweigh the upside turns out to be a fairly detailed
2 and nuanced analysis. It's something that's been
3 analyzed in a fair amount of detail in the aftermarket
4 context, which is one illustration. We don't tend to
5 think of an aftermarket as a platform, but it sort of
6 is. The one monopoly rent theorem is about that, and
7 the main thing to remember about the one monopoly rent
8 theorem is it's a very important observation, but it's
9 not a theorem.

10 MR. FRANCIS: All right. I would like to turn
11 now to the second of the questions I have here from the
12 audience, and the question here is --

13 MR. SALINGER: I'm sorry, could I answer that?

14 MR. FRANCIS: Oh, please. Sure.

15 MR. SALINGER: So the Amazon case is an
16 interesting case because, of course, Amazon started out
17 as a one-sided business. It was a traditional
18 retailer, right? It wasn't a brick and mortar
19 business, but it was buying books and it was -- and
20 then it was selling them.

21 Of course, it was so efficient that it then
22 opened up its platform to other sellers, and so, like,
23 does it matter which direction this went? You know, if
24 they had started out as a platform and then moved into
25 their own selling, would that have changed the

1 analysis?

2 I hate to keep coming back to Google, but this
3 was precisely the issue in the FTC's investigation into
4 Google and has been the issue with respect to the
5 European investigation into Google, and if you frame --
6 if you say, look, Google is somehow leveraging its
7 position as a general search engine into thematic
8 search, then you're completely misunderstanding the
9 nature of the product, you know, that the problem a
10 general search engine faces is that, you know,
11 different searches -- you can have the identical search
12 with much different intent, right?

13 So if you're a thematic search engine, you
14 know, if you go to Expedia, Expedia knows you're doing
15 a travel search, but if you enter -- if I, sitting in
16 Boston, entered "Washington, D.C." into Google, they
17 wouldn't know that I was doing a travel search as
18 opposed to being an eighth-grader doing my social
19 studies project.

20 And so the way a general search engine works is
21 it runs multiple thematic searches simultaneously and
22 then has some sort of algorithm to determine, you know,
23 what the search was likely to be, and there are often
24 different possibilities. And so then, you know, when
25 you do a particular search into Google, you're getting

1 their search results, and, you know, and people are
2 saying, well, these different pieces of Google are --
3 you know, those are separate products that Google is
4 somehow leveraging its market power into, but it's --
5 they're not separate products. They're a single
6 product. You know, so these -- you know, there are
7 often these assertions of vertical foreclosure that I
8 think are misplaced.

9 MR. FRANCIS: Before we finish the detour on to
10 vertical integration, Joanna, Darren, Tasneem, any
11 further questions? Okay.

12 So the next question from the audience that I
13 have here is this: How can plaintiffs and prosecutors
14 disprove efficiencies in the affirmative case? So one
15 of the things that *AmEx* tells us or at least very
16 strongly implies is that a showing of *prima facie*
17 anticompetitive effects under the rule of reason
18 requires a plaintiff to evaluate in that context not
19 just sort of harms to merchants but also and
20 simultaneously benefits to cardholders, or at least
21 that's one way of reading the decision.

22 So on one view at least, *AmEx* implies that just
23 to get off the mark in a rule of reason case in a
24 two-sided market, particularly in a transactional
25 context, a plaintiff, whether it's a government

1 plaintiff or a private plaintiff, not only needs to
2 prove some harm but also needs to engage affirmatively
3 with any evidence of benefit, whether in the form of
4 lower prices for some customers or increased quality.

5 As a practical matter, how significant do you
6 think that burden should be and how do you think
7 plaintiffs should go about engaging with it,
8 recognizing that it looks like an increase in the
9 barrier that a plaintiff has to get over at the
10 beginning of the rule of reason analysis?

11 And, again, this is to anyone on the panel who
12 would like it.

13 MR. TUCKER: So I guess I would dispute the
14 premise of the question. You know, to establish a
15 *prima facie* case under *AmEx*, one thing a plaintiff
16 could do, after properly defining the market, is to
17 show output had declined due to the restraint, for
18 example. In that case, there's no weighing of benefits
19 versus losses. We have a drop in output.

20 Likewise, you could show a decline in quality
21 of services across the two sides. That would also be
22 potentially sufficient. I think it's only where you
23 get into a pricing effect is perhaps where maybe this
24 question is really aimed, of looking at potentially
25 higher prices on one side versus lower prices on the

1 other.

2 In that case, I think you -- if that was your
3 case, if you were bringing a direct effects evidence
4 case based on prices, which is not how you'd have to
5 bring one of these cases, in that case, you would have
6 to look at both sides and show net effect on prices
7 across the two sides, which obviously is going to be
8 challenging.

9 MR. FRANCIS: Thanks, Darren.

10 Anyone else? All right.

11 Then the third of the questions I've received
12 from the floor is a specific one about health
13 insurance, and so the question is, are health insurers
14 two-sided markets under *AmEx*? And if so, does that
15 affect how a court should define the market in an
16 insurance merger? So this is an open question.

17 MR. CITRON: Ah, I am going to take the second
18 part of the question first, because it's really useful,
19 because the first part of the question is too inchoate
20 to answer, right? Like, without knowing why you care
21 about health insurers, I can't really tell you if
22 they're two-sided or three-sided or eight-sided or
23 twelve-sided die, but when you say, well, I'm worried
24 about a health insurance merger, then I think their
25 "two-sidedness" becomes kind of straightforward.

1 If you take the ordinary consumer welfare
2 standard, where the purchasers of health insurance are
3 our primary concern, you would say, well, no, this
4 isn't two-sided at all. I'm curious whether the price
5 of health insurance to people who purchase it will go
6 up and the increased market power that this entity
7 might have over doctors or hospitals in the area, say,
8 will now present as a good thing rather than a bad
9 thing, because it will allow it to negotiate for lower
10 prices.

11 Now, I mean, you can quarrel with whether that
12 consumer welfare model is the best in the end and
13 whether we should be concerned with buyer power in
14 those markets or the like, but, you know, I think it
15 resolves away concerns about its two-sidedness when you
16 see it through the lens of the antitrust question that
17 you're trying to answer.

18 MR. FRANCIS: Thank you.

19 I just received another question from the floor
20 which I think -- well, let's put it this way, so can a
21 platform firm have market power on one side and be in
22 perfect competition on the other? I think the answer
23 may be no, but let's put it to a member of our panel.

24 MS. TSAI: I'm sorry. Can you repeat that
25 question again?

1 MR. FRANCIS: Sure. The question is, can a
2 platform firm have market power on one side and be in
3 perfect competition on the other?

4 MR. FARRELL: So I think -- let me rephrase the
5 question. Part A, can a firm have market power, let's
6 say an output, and be a price taker on its inputs? Of
7 course. In fact, that's the standard way that we model
8 a firm with market power.

9 So I think the only sensible version of the
10 question would have to be, if we're thinking about a
11 firm like that, would we not call it a platform firm?

12 MR. FRANCIS: Right.

13 MR. FARRELL: And so I think that becomes a
14 question of definition and I think not very
15 interesting.

16 MR. CITRON: So, I hope so. I will just say
17 taking credit cards as an example is a really
18 interesting way of looking at this question, right?
19 One of the striking things about credit card markets is
20 that the credit card companies have a very, very narrow
21 set of competitors on the merchant side. There are
22 basically four credit cards that you can agree to
23 accept that are useful, AmEx, Visa, MasterCard and
24 Discover, and Discover has a very small share of the
25 market.

1 On the cardholder side, Visa, MasterCard and
2 American Express -- actually, Visa and MasterCard
3 aren't even themselves properly understood to be the
4 competitors, because you can pick as a cardholder among
5 all of the banks that offer credit cards. You can get
6 a credit card from Chase, Capital One, your local
7 credit union. It's tens of thousands of competitors.

8 So this is a one very straightforward way of
9 understanding why things are really good in this market
10 for card members and not so good in this market for
11 merchants, right? Merchants have to pick among three
12 card companies that have a lot of market power, and
13 card members get to pick among a huge number of
14 competitors who are viciously fighting with each other
15 for cardholders, mostly so that they can get the rents
16 available --

17 MR. SALINGER: Wait. Aren't there a lot of
18 acquirers, too?

19 MR. CITRON: Well, it's more complicated, I
20 guess, than I'm saying.

21 MR. SALINGER: Yeah, I think it is.

22 MR. CITRON: But you can see, I think, why you
23 can have a different set of competitors on both sides
24 of your business model, which I think is all I'm trying
25 to get at. You can't really look at a platform firm

1 and say, well, they're going to have a -- because
2 you're not looking at -- this is what Michael was
3 saying. You're not looking for people who have the
4 same business model. That's not how you identify
5 whether you have a competitive market or not. You
6 could have a different set of competitors on one side
7 than the other, and that's very true in the credit card
8 context, in particular.

9 MR. FRANCIS: Would anyone like to respond?
10 All right.

11 Then we've talked quite a lot about conduct and
12 conduct implications, particularly sort of vertical
13 agreements. One thing we haven't talked very much
14 about is merger cases. So let me ask this first to
15 Tasneem and then to anyone else.

16 In your view, does *AmEx* have anything to teach
17 us in merger cases beyond the kind of things we've
18 talked about here? And if so, what do you think it is?

19 MS. CHIPTY: So I think that in many ways the
20 answer is no, because it comes back to the primitives.
21 I think that what we've been talking about are things
22 about really understanding the competitive forces that
23 discipline firms. Whether it's in a single-sided or
24 multi-sided context, I think we just have to do the
25 hard work and understand the facts and understand the

1 competitive dynamics. So in many ways, I would say no.

2 I think that the fact of the *American Express*
3 decision has inevitably heightened awareness on
4 transactions that involve multiple sides, and I think
5 we are all going to have to do some mindfulness to make
6 sure we don't trigger either the buzzwords or the buzz
7 principles, what have you. So in many ways,
8 substantively, no, but I do think this will make us
9 more cautious going forward.

10 And then lastly, on the issue of efficiencies,
11 I've already said a little bit about this, but I don't
12 think *American Express*, at least the fact pattern in
13 *American Express* helps us think hard about
14 efficiencies. It doesn't. It doesn't give us a
15 roadmap. So at most I hope that it doesn't get misused
16 to suggest that we can offset, you know, harm on one
17 side, to one consumer group, because of benefits to
18 another consumer group. If that happens, it would have
19 to be because of a very stylized set of facts.

20 MR. FRANCIS: Anyone else on the topic of
21 mergers? All right.

22 Well, I know we have just a couple of minutes
23 left, so I am going to ask a final question, and then
24 anyone who would like to do so would be welcome to add
25 any closing remarks or a couple of sentences just to

1 wrap things up.

2 So the final question I have -- and we'll start
3 with Eric and Darren -- is about the meaning of the
4 *AmEx* decision for antitrust law sort of more generally.
5 So we know that the meaning of a Supreme Court case, of
6 any important precedent, really isn't so much to do
7 with the text of the decision. It's really a function
8 of how it's used and how it comes to be understood in
9 the period that follows.

10 So my question is whether *AmEx* will come to
11 stand for a broad proposition or a narrow one. So on
12 the narrow view, right, *AmEx* could be read to suggest
13 that, in its least controversial form, if you as a
14 plaintiff show only an increase in nominal price to a
15 subset of purchasers in a relevant market, you have not
16 cleared the hurdle of showing a *prima facie* case of
17 anticompetitive effects. That does not seem
18 controversial. That does not even seem specific to
19 two-sided markets.

20 On a much broader view, *AmEx* might suggest that
21 in cases where intermarket externalities are
22 significant, cases of multi-sided platforms, whether
23 it's one relevant market or two or even three, a
24 plaintiff has to show an overall loss of output,
25 considering all sides of the platform at once, in order

1 to clear that first hurdle.

2 So my question is, which of those two readings,
3 the broad or the narrow, do you think is more appealing
4 and which do you think *AmEx* will come to symbolize?

5 Why don't we start with Darren.

6 MR. TUCKER: Sure. So I think I touched on
7 this in my opening comments, so I'll be sort of brief
8 and just say I think the reading of the cases is
9 unmistakable that in a two-sided market, establishing
10 harm to just one group of participants, you know, is
11 not enough for a plaintiff to make a *prima facie* case.
12 I think that's a very straightforward reading of the
13 case. I think the narrow reading that you put forward
14 is just not consistent with the plain language of the
15 decision.

16 Let me also just make one other quick point,
17 which is that the *AmEx* decision really didn't come out
18 of nowhere. There actually were prior cases,
19 significant antitrust cases, that announced similar
20 principles. Joe actually touched on one of these
21 before, although he didn't mention the name, which is
22 the *Eastman-Kodak* case from '92. This was the
23 aftermarkets case, and in that case, the Court said
24 that if there had been evidence that equipment sales
25 disciplined aftermarkets, it would have been

1 appropriate to define a single market for the original
2 equipment sales and the aftermarkets and that
3 plaintiffs would have had to show harm in that overall
4 systems market.

5 Another case, *U.S. vs. Microsoft*, D.C. Circuit
6 decision. The D.C. Circuit found the applications
7 barrier to entry existed because consumers wanted to
8 buy operating systems that had lots of applications.
9 Developers wanted to develop only on operating systems
10 that had lots of users. They called that the
11 applications barrier to entry, another way of saying a
12 two-sided market with indirect network effects.

13 In the same case, the Court defined a single
14 market for operating systems. It could have defined a
15 market for operating systems licensed to end users,
16 operating systems made available for developers,
17 operating systems made available for peripheral makers.
18 Since it was a multi-sided market, it didn't do that.
19 It defined a single market for operating systems.

20 I think this is a good example of how
21 incorporating multi-sided market analysis into
22 decisions could actually strengthen antitrust
23 enforcement, not weaken it. There's lots of other
24 cases -- I won't go through them -- but if you go back
25 in the last ten years, there are probably half a dozen

1 or more district court cases that have wrestled with
2 multi-sided markets and indirect network effects.

3 Courts have not really struggled, as far as I
4 can tell, with managing with these concepts. You might
5 quibble with whether they got these decisions right or
6 wrong, but the fact is lower courts are actually
7 addressing these issues on a regular basis and so far
8 don't seem to be having to devote an excessive amount
9 of effort to do that.

10 MR. FRANCIS: Thank you.

11 Eric?

12 MR. CITRON: I mean, I have already revealed
13 myself as an *AmEx* skeptic, so I guess I should say that
14 I hope that the application of it is narrow in some
15 respects, but I will say also that I don't disagree
16 with Darren, that, you know, there is a way that *AmEx*
17 can be applied that is consistent with things that
18 courts have already been doing, which is in a generic
19 kind of way considering indirect network effects and
20 other things that discipline one side of the market
21 through the other side of the market as relevant to
22 either establishing a *prima facie* case or a defense
23 that you don't, in fact, have market power.

24 If it's applied in that way, it will do minimal
25 damage. I think the thing that we ought to be

1 concerned about is the sort of on/off switch where a
2 defendant tries to show that they're a two-sided market
3 and, having flipped the two-sided market switch, then
4 has available to it a bunch of defenses that make it
5 essentially impossible for a government regulator or a
6 plaintiff to prevail.

7 If that latter thing happens, that's an
8 unfortunate use of the decision. It will sow a lot of
9 mischief in the law, and unfortunately, I think for the
10 reasons I said at the very beginning, that that's as
11 likely an outcome I think as the more, what I'll say,
12 narrow one that Darren describes. Although it might be
13 a broader use of the decision, it would be one that's
14 much more constrained to ordinary antitrust doctrine,
15 and that would be good.

16 MR. FRANCIS: Thank you, Eric.

17 Any final reactions from our panel members?

18 All right. Well, it's one minute past 5:00. I
19 think it's been a terrific discussion. Thank you so
20 much to our very distinguished panel. Thank you for
21 your attention and your questions. It's end of the
22 panel, it's end of the day, and I wish you a good
23 evening.

24 **(End of hearing.)**

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