

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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OHIO, ET AL., )  
                  Petitioners, )  
                  v. ) No. 16-1454  
AMERICAN EXPRESS COMPANY, ET AL., )  
                  Respondents. )  
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Pages: 1 through 70

Place: Washington, D.C.

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3       OHIO, ET AL.,   )  
4                                        Petitioners,                     )  
5                                        v.                                     ) No. 16-1454  
6       AMERICAN EXPRESS COMPANY, ET AL.,     )  
7                                        Respondents.                     )  
8       - - - - -

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10                               Washington, D.C.  
11                             Monday, February 26, 2018

12                     The above-entitled matter came on for oral  
13     argument before the Supreme Court of the United States  
14     at 11:09 a.m.

15  
16     APPEARANCES:  
17     ERIC E. MURPHY, State Solicitor, Columbus, Ohio;  
18         on behalf of the Petitioners and the State  
19         Respondents in support.  
20     MALCOLM L. STEWART, Deputy Solicitor General,  
21         Department of Justice, Washington, D.C.; on behalf  
22         of the Respondent United States, in support of the  
23         Petitioners.  
24     EVAN R. CHESLER, ESQ., New York, New York; on  
25         behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ERIC E. MURPHY	
4	On behalf of the Petitioners	
5	and the State Respondents in support	3
6	ORAL ARGUMENT OF:	
7	MALCOLM L. STEWART	
8	On behalf of the Respondent United	
9	States, in support of the Petitioners	17
10	ORAL ARGUMENT OF:	
11	EVAN R. CHESLER, ESQ.	
12	On behalf of the Respondents	33
13	REBUTTAL ARGUMENT OF:	
14	ERIC E. MURPHY	
15	On behalf of the Petitioners and	
16	the State Respondents in support	65
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-1454, Ohio, et al.,  
5 versus American Express Company.

6 MR. MURPHY: Mr. --

7 CHIEF JUSTICE ROBERTS: Mr. Murphy.

8 ORAL ARGUMENT OF ERIC E. MURPHY  
9 ON BEHALF OF THE PETITIONERS AND  
10 THE STATE RESPONDENTS IN SUPPORT

11 MR. MURPHY: Mr. Chief Justice, and  
12 may it please the Court:

13 The government met its initial burden  
14 to show anticompetitive harm in this case under  
15 the rule of reason by proving that American  
16 Express's anti-steering provisions have stifled  
17 interbrand price competition and raised the  
18 prices that all four credit card companies  
19 charge merchants. The restraints have these  
20 horizontal effects because they bar merchants  
21 from accurately informing their retail  
22 customers about the different costs of credit  
23 cards and from offering them incentives, such  
24 as price discounts, to use cheaper cards.

25 As a result, retail customers make

1 decisions about which card to use in the dark  
2 about the relative costs, and merchants cannot  
3 reward credit card companies with greater  
4 market share by lowering their prices. As a  
5 result, that eliminates any incentive for  
6 credit card companies to do so. As Discover's  
7 president testified about its failed  
8 price-cutting strategy in the late 1990s, price  
9 cuts simply gave away money in the form of a  
10 lower price --

11 JUSTICE GORSUCH: We're not here to  
12 protect competitors, right, Mr. Murphy?

13 MR. MURPHY: Correct.

14 JUSTICE GORSUCH: Or -- or necessarily  
15 even merchants. The antitrust laws are aimed  
16 at protecting consumers; you'd agree with that?

17 MR. MURPHY: Correct, although in  
18 this --

19 JUSTICE GORSUCH: Okay. So, given  
20 that, there's no evidence of restricted output  
21 in this case, correct?

22 MR. MURPHY: I -- I would agree that  
23 it's -- there's -- it's ambiguous. There's no  
24 one way or the other about whether -- whether  
25 it has restricted output.

1 JUSTICE GORSUCH: And that's normally  
2 what the antitrust laws care about, is  
3 deadweight loss. That's the primary concern of  
4 antitrust activity, wouldn't you agree?

5 MR. MURPHY: Correct, although I think  
6 the part that --

7 JUSTICE GORSUCH: Okay. All right.  
8 So you're left with this price question. And  
9 you have an increase in price to merchants, but  
10 do we have any evidence that consumers, at the  
11 end of the day, including the rewards aspect of  
12 what they get back, actually pay a net price  
13 increase?

14 MR. MURPHY: Absolutely, we have  
15 evidence of restricted competition --

16 JUSTICE GORSUCH: What evidence do you  
17 have of that?

18 MR. MURPHY: -- that the other --

19 JUSTICE GORSUCH: No, no. No, no.  
20 Evidence of price -- net price increase to  
21 consumers.

22 MR. MURPHY: Well, so we don't think  
23 that we legally have to meet that, but --

24 JUSTICE GORSUCH: I know you don't.  
25 I'm just asking --

1 MR. MURPHY: So, factually --

2 JUSTICE GORSUCH: -- if you have any  
3 evidence of it.

4 MR. MURPHY: -- factually, the  
5 district court held at -- district court --  
6 Petition Appendix pages 166 to 167, that the  
7 higher net prices were not offset by higher  
8 card --

9 JUSTICE GORSUCH: Well, you have proof  
10 that not all of the increased price that  
11 American Express extracts gets to the consumer.  
12 That's not my question, however.

13 My question is, do you have any  
14 evidence that, on a net basis, consumers pay  
15 more? And I don't believe you have.

16 MR. MURPHY: Well, if we're just  
17 talking -- first off, I think merchants are  
18 consumers in this context.

19 JUSTICE GORSUCH: I'm asking about  
20 consumers.

21 MR. MURPHY: For the cardholder  
22 consumers, I think that there is evidence that  
23 they have restricted options on that -- that  
24 side.

25 JUSTICE GORSUCH: But I --

1 JUSTICE SOTOMAYOR: Isn't that true,  
2 given American Express's tying or -- or  
3 restriction that no merchant can offer a  
4 consumer a 5 or 10 or other discount for using  
5 Visa, MasterCard, or Discover, correct?

6 MR. MURPHY: Absolutely correct. It  
7 has restricted competition on that side of the  
8 market in the sense of they have less options.  
9 An Amex cardholder who would prefer to have a  
10 1 percent discount, if the Amex cardholder uses  
11 a Discover card, merchants aren't allowed to  
12 offer that option. So all consumers, including  
13 cardholder consumers, have less options than  
14 they would if these anti-steering rules were  
15 not in place.

16 They have -- essentially, Amex has  
17 channeled --

18 JUSTICE GORSUCH: Isn't that true with  
19 every vertical restraint? Anytime I say I'm  
20 only going to service Cadillacs at a Cadillac  
21 dealership, I -- I can't buy a Volvo at a  
22 Cadillac dealership.

23 All vertical restraints have the  
24 impact of restricting intrabrand competition in  
25 that respect, but we learned through painful



1 experience and many, many years that they're  
2 generally pro-competitive, right?

3 MR. MURPHY: So it's not all  
4 interbrand restraints. So the classic  
5 manufacturer/distributor restrictions only  
6 affect interbrand competition in order to  
7 promote interbrand competition. Your  
8 hypothetical was about exclusive dealing, which  
9 I would admit affects interbrand competition.

10 JUSTICE GORSUCH: Right.

11 MR. MURPHY: That's why the Court has  
12 suggested, generally speaking, they -- they are  
13 problematic if they tie up too many buyers or  
14 sellers.

15 JUSTICE SOTOMAYOR: We have a  
16 wonderful amicus brief that explains that when  
17 you have exclusive dealing, the competition  
18 doesn't become a competition for selling that  
19 product but for selling all the competing  
20 products, correct?

21 MR. MURPHY: Correct. So --

22 JUSTICE SOTOMAYOR: So that if this  
23 car dealership raises its prices too high,  
24 other car manufacturers are going to be able to  
25 give you a lower price car, perhaps of equal

1 quality, correct?

2 MR. MURPHY: Absolutely correct.  
3 That's why this is so fundamentally different  
4 from the manufacturer/distributor restraints  
5 that the Court addressed in Leegin. Those  
6 restraints, the Court made quite clear, that  
7 resale price maintenance, for example,  
8 interbrand competition acted as a critical  
9 check to make sure that the additional services  
10 being provided by resale price maintenance were  
11 worth their costs.

12 That's the problem with this  
13 restraint. Most vertical restraints only  
14 affect intrabrand competition.

15 JUSTICE GORSUCH: So you'd just have  
16 us ignore the fact that Visa and MasterCard  
17 have 74 percent of the market?

18 MR. MURPHY: No. I think --

19 JUSTICE GORSUCH: Or that they  
20 exercise no restraint in this marketplace?

21 MR. MURPHY: I do think that -- it --  
22 this marketplace is entirely highly  
23 concentrated where all the main competitors  
24 were using these types of restraints. As the  
25 Court said in Leegin, if lease --

1 JUSTICE GORSUCH: That -- that's gone,  
2 though, right? I mean, any notion of  
3 horizontal agreement in this case is out of the  
4 case.

5 MR. MURPHY: So I agree that there's  
6 no -- there's no allegations of horizontal  
7 agreement, but there -- there's clear evidence  
8 of horizontal effect. And when a vertical --  
9 vertical restraint has a horizontal effect,  
10 that is when the vertical restraint becomes  
11 problematic.

12 And here it's just conclusive that the  
13 purpose and effect of this provision is to cut  
14 off price discounts from American Express's  
15 competitors --

16 JUSTICE KENNEDY: Can you tell me --

17 MR. MURPHY: -- and to raise --

18 JUSTICE KENNEDY: Please, don't let me  
19 interrupt, Mr. Murphy.

20 MR. MURPHY: I was just going to say  
21 and to raise the prices that all four credit  
22 card companies charge, which I think makes it  
23 problematic because it's market-wide.

24 JUSTICE KENNEDY: Could you -- could  
25 you comment on the brief of the antitrust law

1 and economic scholars in favor of Respondents?  
2 They said for us to focus on output. I know  
3 you disagree with their conclusion. Do you  
4 agree with their starting analysis, that we  
5 should think of this in terms of output, which  
6 is a multi-sided platform exercise?

7 MR. MURPHY: I generally think that  
8 output is very significant, but in this case, I  
9 think the higher prices go hand in hand with  
10 the restricted output. The Court has said in  
11 the California Dental case that higher prices,  
12 reduced output, divided markets all have the  
13 same anticompetitive effect.

14 And I want to make something clear:  
15 It's not that we --

16 JUSTICE KENNEDY: Although their  
17 conclusion was that the output -- that this is  
18 -- this is a market that's, frankly, phenomenal  
19 in terms of its -- of its size.

20 MR. MURPHY: That's what -- that's  
21 what I want to make clear, that we have clear  
22 evidence of direct causation that the  
23 restraints cause higher merchant prices.

24 With respect to the restraints' effect  
25 on output, there is just no evidence one way or

1 the other. Output has been expanding, but that  
2 doesn't control for -- for factors in this huge  
3 economy, such as GDP growth, inflation, or any  
4 other thing that's going to drive transactions  
5 here.

6 JUSTICE KENNEDY: Does output include  
7 premiums to -- or rewards to customers?

8 MR. MURPHY: Yeah. Out -- output  
9 would include quality considerations as well.  
10 But -- so we're talking about just the  
11 government's initial case here, and as this  
12 Court said, higher prices restrict output in  
13 any -- any market with downward-sloping demand  
14 curves.

15 That's why all the circuit courts say  
16 -- say that the government can prove its  
17 initial burden under the rule of reason by  
18 showing either higher prices or restricted  
19 output. They're flip sides of the same -- same  
20 coin in that respect.

21 JUSTICE GINSBURG: Do you --

22 MR. MURPHY: And I still think that --  
23 that -- the -- this Court's vertical restraint  
24 -- vertical restraint cases --

25 JUSTICE SOTOMAYOR: I think Justice

1 Kennedy's question was, given the uniqueness of  
2 this market where you don't have proof of  
3 greater output, does that make the price  
4 increase irrelevant?

5 MR. MURPHY: No, I don't --

6 JUSTICE SOTOMAYOR: I think that that  
7 was the nature of his question.

8 MR. MURPHY: I -- I --

9 JUSTICE SOTOMAYOR: He can correct me  
10 if I'm wrong.

11 MR. MURPHY: I don't -- I don't think  
12 it does whatsoever, because I think this  
13 Court's cases, Catalano, National Professional  
14 Society of Engineers, all suggest that a  
15 competitor cannot impose a price restraint or  
16 restraint on one product attribute in order to  
17 channel it to other product attributes. Here,  
18 it would be merchant fees and cardholder  
19 rewards.

20 The Court -- the Court's cases clearly  
21 suggest that competition itself should  
22 determine the appropriate ratio between quality  
23 and price considerations in -- in the Court's  
24 prior cases, Indiana Dentist, or in this case,  
25 merchant fees and cardholder rewards. It's

1 competition --

2 JUSTICE GINSBURG: Could -- could you  
3 please comment on the Second Circuit's view  
4 that what's involved is a credit card  
5 transaction and that includes both services to  
6 merchants and services to cardholders and you  
7 can't just deal with one and ignore the other.

8 MR. MURPHY: So I still think that  
9 even if under the -- taking the Second  
10 Circuit's premise as a given, which is this is  
11 just one market, we disagree. We think that  
12 that market analysis should be divided  
13 separately.

14 But even taking their argument as a  
15 premise, their argument is that they can  
16 restrict competition with respect to one  
17 product attribute in order to channel it to  
18 other product attributes.

19 And I think that's fundamentally  
20 inconsistent with this Court's cases under  
21 Section 1, which say that competition should  
22 provide what is the appropriate ratio between  
23 these things. I'll give you an example.

24 In the Indiana Dental case, a dentist  
25 refused to provide X-rays to insurers and the

1 dentist's argument was that this restriction on  
2 the provision of X-rays would improve quality  
3 of patient care.

4           The Court rejected that argument. It  
5 said you cannot restrict competition with  
6 respect to that cat -- category because  
7 competition should provide what is the  
8 appropriate balance between these competing  
9 things.

10           That's our central point. Even if  
11 this is one market, competition should decide  
12 what is the appropriate ratio between merchant  
13 fees and cardholder rewards.

14           Amex is perfectly -- we have no  
15 problem with Amex's approach of having a high  
16 reward/high cost card. The problem is that  
17 they're trying to insulate that product because  
18 they think under the full spectrum of  
19 competition it could not survive from a  
20 competing argument, such as low cost/low reward  
21 cards.

22           And so that's simply inconsistent with  
23 the basic policies of the Sherman Act, which is  
24 that not just price but quality considerations  
25 and all other considerations are best satisfied



1 through competition.

2           And I still think that it's  
3 fundamentally inconsistent with this Court's  
4 rule of reason cases in the vertical context.  
5 In -- in the resale price maintenance context,  
6 the Court made quite clear that, even though  
7 resale price maintenance might lead to higher  
8 prices for the higher services being imposed,  
9 if consumers didn't like those higher services,  
10 they could always switch to cheaper goods, a  
11 cheaper manufacturer's good.

12           That is the fundamental problem that  
13 we have with this restraint. Unlike resale  
14 price maintenance, it has restricted interbrand  
15 competition, and so it's affected all  
16 competitors, relieving them of the ability to  
17 provide the low cost -- low cost product that  
18 consumers might want.

19           So, if there are no further questions,  
20 I'd like to reserve the remainder of my time.

21           CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23           Mr. Stewart.

24

25

1                   ORAL ARGUMENT OF MALCOLM L. STEWART  
2           ON BEHALF OF THE RESPONDENT UNITED STATES IN  
3                   SUPPORT OF THE PETITIONERS

4           MR. STEWART: Mr. Chief Justice, and  
5 may it please the Court:

6           The purpose and effect of Amex's  
7 anti-steering rules is to eliminate price  
8 competition across an entire market. Yet the  
9 Second Circuit held that the plaintiffs had not  
10 even established a prima facie case of  
11 anticompetitive effect.

12           In our view -- our view, the court of  
13 appeals made two fundamental errors. The first  
14 was that for purposes of the -- the plaintiff's  
15 prima facie case, the court collapsed into one  
16 what should have been regarded as distinct  
17 markets. And at the first stage of the  
18 analysis, the court should have focused  
19 entirely on the effects on the market for  
20 provision of network services to merchants.

21           The second and I think perhaps the  
22 more fundamental error, and -- and goes to some  
23 of the questions that the Court has been  
24 asking, is that even when looking at the  
25 cardholder side of the market, the Second

1 Circuit erred by conflating the question, have  
2 reward -- have cardholder rewards become more  
3 generous, with the appropriate question, has  
4 competition on the cardholder side been  
5 enhanced?

6 And I'd like to echo one of the things  
7 that Mr. Murphy was saying, that from our point  
8 of view, it's entirely legitimate for Amex to  
9 pursue a strategy where it produces higher  
10 rewards for cardholders and charges a premium  
11 and it's fully free to attempt to persuade its  
12 cardholders that the extra value is worth the  
13 extra cost.

14 And in all sorts of markets --

15 JUSTICE GORSUCH: Mr. Stewart, what  
16 would you say, though, I mean, you -- you argue  
17 to us that this is a very unique situation and  
18 new -- new to antitrust law, the two-sided  
19 market issue, and assuming all that's true --  
20 I'm not sure it is, but taking it as true --  
21 why shouldn't we take Judge Easterbrook's  
22 admonition seriously, that judicial errors are  
23 a lot harder to correct than an occasional  
24 monopoly where you can hope and assume that the  
25 market will eventually correct it. Judicial

1 errors are very difficult to correct.

2 And we've had a long and painful  
3 experience with vertical restraints in this  
4 Court going back to Dr. Miles that it took  
5 decades to correct, in Leegin; Albrecht, which  
6 took decades to correct in State Oil.

7 Why -- why should we disregard those  
8 admonitions in this case? I assume you'd like  
9 us to.

10 MR. STEWART: Well, we certainly -- I  
11 mean, we filed a brief in opposition arguing  
12 that the Court shouldn't grant cert because  
13 these issues were fairly new. They hadn't --

14 JUSTICE GORSUCH: For just these  
15 reasons.

16 MR. STEWART: But I think given that  
17 the Court has taken the case, we -- we  
18 certainly would take the point that the Court  
19 should not speak more broadly than is  
20 necessary. It shouldn't attempt to articulate  
21 a sort of unified field theorem that would  
22 cover all two-sided markets. It should  
23 approach the -- the case cautiously.

24 We do think that there are a couple of  
25 principles that the Court can articulate that

1 would be very deeply rooted in precedent and in  
2 established ways of looking at the -- at the  
3 antitrust world.

4 The -- the first is that for purposes  
5 of market definition, for the first step of the  
6 analysis, has the defendant impeded competition  
7 in the relevant market? The market has always  
8 been defined by reference to substitutability.  
9 What alternative sources of goods or services  
10 are out there?

11 JUSTICE KAGAN: Mr. Stewart, you  
12 admit, as does General Murphy, that at the  
13 second stage it's appropriate for the courts to  
14 take into account how this all plays out on the  
15 cardholder side of the market.

16 MR. STEWART: That's correct.

17 JUSTICE KAGAN: If that's the case,  
18 why doesn't that enter into the question of how  
19 you define the market in the first instance?

20 MR. STEWART: Well, I think it's -- it  
21 would be hard to determine, for instance, or  
22 really conceptually impossible determine -- to  
23 determine whether Amex had market power in a  
24 hypothetical market consisting of both the  
25 merchant side and the cardholder side.

1           On the merchant side, Amex competes  
2 with three other networks. On the cardholder  
3 side, at least with respect to the issuance of  
4 cards, it competes with thousands of issuing  
5 banks.

6           And the point of using  
7 substitutability as a criterion for defining  
8 the market and ascertaining market power is to  
9 answer the question, if somebody who is dealing  
10 with the defendant was dissatisfied with the  
11 bargain it was being offered, would it have  
12 appropriate alternative sources of supply that  
13 it would go to, or --

14           JUSTICE KENNEDY: Does -- does -- does  
15 that mean -- I don't want to interrupt this  
16 line of questioning -- but does -- does that  
17 mean that, at step 1, the value to the  
18 cardholders shouldn't be part of the analysis?

19           MR. STEWART: I think you would still  
20 say has -- yes, competition has been --

21           JUSTICE KENNEDY: But that's -- that's  
22 -- that's a very dangerous step for this Court  
23 to take to analyze the market that way, this  
24 two-sided market, to say that we're going to,  
25 at step 1, look at just one side. That --

1 that's -- that's where I need help.

2 MR. STEWART: Well, I think it's --  
3 it's kind of inherent in the -- in the  
4 three-step approach that the Court has taken to  
5 resolving rule of reason cases where first the  
6 plaintiff attempts to establish an  
7 anticompetitive effect. Then the defendant  
8 attempts to establish a procompetitive  
9 justification. And then the third step is the  
10 plaintiff can show either that the  
11 justification could have been achieved in a  
12 different way or that it wasn't really  
13 necessary.

14 It's inherent in that formula that  
15 practices that can ultimately be justified at  
16 the second step may still have anticompetitive  
17 effects and those can be isolated and analyzed  
18 separately from the procompetitive effects.  
19 But I guess --

20 JUSTICE BREYER: It's a two-sided  
21 market. I mean, I -- I -- I've never seen such  
22 jargon. In -- in my own mind, I can think of  
23 joint costs, oil and gas in a well. I can  
24 think of complementary products, nuts and  
25 bolts, can't have a nut without a bolt, and I

1 can think of combining the two, nuts and bolts  
2 made out of a special thing called titanium  
3 uranium. Okay?

4 Now there we are. And I can think of  
5 different uses for the notion that you have two  
6 different products. Some people might say that  
7 shows that this agreement had no effect. Ah,  
8 if that's the use, I wonder why they entered  
9 into it. Okay?

10 Then, second, I can imagine them  
11 saying: The reason that we have this agreement  
12 is because it creates a new, wonderful titanium  
13 uranium bolt that never would have been  
14 produced otherwise. That's like the  
15 manufacturers getting together and saying we  
16 have price fixing in order to stop poisoned  
17 toys. Okay. It's never been used as an  
18 antitrust flag justification, but I guess it  
19 could be.

20 And then maybe there's 3 and 4 and 5.  
21 It's just that I can't find any of them  
22 relevant here, at least not yet.

23 MR. STEWART: Well, this market is --  
24 and we take the point that's made on -- by some  
25 of the briefs on the other side. This market



1 is distinct in the sense that at the time that  
2 a transaction is accomplished at the -- a  
3 merchant location, services are simultaneously  
4 being provided both to the merchant and to the  
5 cardholder. And that --

6 JUSTICE BREYER: We do the same thing,  
7 don't we, with nuts and bolts? We give the  
8 people nuts and we give them bolts.

9 MR. STEWART: But --

10 JUSTICE BREYER: And -- and maybe  
11 it -- I mean, you know, there are loads of --  
12 there are a lot of products like that.

13 MR. STEWART: I -- I guess what I  
14 would say from this standpoint is Mr. Murphy,  
15 the federal government, and the Respondents all  
16 agree that benefits to cardholders should be  
17 considered as part of the antitrust analysis.

18 JUSTICE BREYER: Should really?  
19 Because -- you -- and you agree with that? For  
20 example, we have an agreement among toy  
21 manufacturers that we won't sell poisoned toys.  
22 That's always been an absolute mystery to put  
23 to the class, from Phil Areeda on, because they  
24 want to stop the poisoned toys, but you say,  
25 hey, that isn't the job of the antitrust law.

1 That's the job of the consumer protection  
2 agency. And so we have a debate. And I didn't  
3 know that that issue had been solved in this  
4 Court.

5 MR. STEWART: No, I -- I take your  
6 point, that perhaps I was imprecise when I said  
7 benefits to cardholders, because the Court has  
8 made clear in different Sherman Act contexts  
9 that, in kind of balancing procompetitive and  
10 anticompetitive justifications, you're not just  
11 looking at anything that could be characterized  
12 as beneficial or harmful. You're looking at  
13 harms to or benefits to competition.

14 And our point about the cardholder  
15 side is that the Second Circuit may have been  
16 right when it said the effect of this -- the  
17 anti-steering rules was that, on the whole,  
18 cardholder benefits may have become more  
19 generous. But the court --

20 JUSTICE SOTOMAYOR: Mr. Stewart, could  
21 I just ask you to finish your second response  
22 to Justice Gorsuch? You said the market issue  
23 was number 1, that was fundamental. What's the  
24 second principle that you think is important?  
25 And, number 3, borrowing from Justice -- or

1 going to Justice Breyer's point, I can -- I  
2 understand the argument why in this case on  
3 step 1 the two markets should not be joined,  
4 but I -- it's possible that in some other  
5 two-sided market that it might be a step 1.

6 Do we have to rule and say that in no  
7 market is it?

8 MR. STEWART: No -- no. To take -- to  
9 take that part of the question first, I think  
10 the Court should proceed cautiously about  
11 announcing categorical rules and can say that,  
12 for purposes of this case, it is sufficient  
13 to -- the fact that there is four-way  
14 competition on the merchant side and  
15 thousands-way competition on the cardholder  
16 side is by itself a sufficient ground for  
17 treating these as distinct markets.

18 But to take the other part of your  
19 question and Justice Gorsuch's question, the  
20 reason that we think that the court of appeals  
21 analyzed benefits to cardholders incorrectly  
22 was that it doesn't focus on benefits to  
23 competition. That is, if you imagine  
24 MasterCard executives strategizing how can we  
25 get more people to use their MasterCards more

1 often, one thing that they might say is let's  
2 beef up our rewards program. But the other  
3 thing that they might say is let's cut our  
4 merchant fees because if the merchants come --  
5 in a world where there was no steering, they  
6 could say let's cut our merchant fees because  
7 if the merchant comes to regard our card as its  
8 preferred card --

9 JUSTICE GORSUCH: And they're free to  
10 do that, right? I mean, American Express's  
11 agreements don't affect MasterCard or Visa's  
12 opportunity to cut their fees, their own fees,  
13 or to advertise that American Express's are  
14 higher. There is room for all of that kind of  
15 competition here.

16 It's just the difference between  
17 Cadillacs and Kias. People can choose. Do  
18 they want a high cost, high reward, a low-cost,  
19 cheaper alternative? And the two sides can  
20 compete with one another.

21 MR. STEWART: That's exactly right,  
22 except that as long as the -- and that -- that  
23 is the type of environment that we believe the  
24 antitrust laws are intended to encourage. And  
25 then --

1 JUSTICE GORSUCH: Absent a horizontal  
2 agreement, we have that, don't we?

3 MR. STEWART: Usually, we would. And  
4 this is a rare vertical agreement in the sense  
5 that it was a vertical agreement that  
6 ultimately had effects that would more commonly  
7 be associated with horizontal agreements --

8 JUSTICE GORSUCH: Well, that was part  
9 of the case originally, but that's gone now,  
10 right?

11 MR. STEWART: No --

12 JUSTICE GORSUCH: Because those  
13 agreements have been dropped by -- by Visa and  
14 MasterCard. I completely understand and accept  
15 that if that were part of the case, we'd have a  
16 very different case.

17 MR. STEWART: No, even without the  
18 Visa and MasterCard having their own  
19 anti-steering provisions, so long as American  
20 Express imposes the anti-steering rules on the  
21 merchants that are part of its network and so  
22 long --

23 JUSTICE GORSUCH: Right. I understand  
24 the merchants can't, but the competitors can  
25 advertise all of these issues and they can

1 point out their lower merchant fees to  
2 consumers, as they do.

3 MR. STEWART: Visa and MasterCard  
4 could advertise in that respect. Now the ad --  
5 the advertisements that they might be run would  
6 probably be taken with more of a grain of salt  
7 than if the -- the merchant was telling her own  
8 customer: Visa actually does charge me less  
9 than American Express.

10 But even -- even leaving that aside,  
11 Visa and -- I mean, I'm sorry, Visa and  
12 MasterCard can advertise that people in a  
13 spirit of public -- in a public-spirited way  
14 should use their cards not because they'll gain  
15 any tangible advantage but because the cost to  
16 merchants in the aggregate will be lower --

17 JUSTICE GORSUCH: So, Mr. Malcolm --  
18 Stewart, I'm sorry, I apologize. I just want  
19 to make sure I understand the argument then.  
20 Is it that the consumer welfare here is  
21 measured by the relative effectiveness of  
22 advertising by merchants as compared to by Visa  
23 and MasterCard?

24 MR. STEWART: No, it's -- I mean, it's  
25 -- it's the -- in your Mercedes and Kia

1 example, it is the difference between Kia  
2 saying -- running advertisements and saying:  
3 Buy our cars because they have been produced in  
4 a more responsible way and you should  
5 contribute to the public good by encouraging  
6 these practices, even though you will pay no  
7 less for a Kia than for a Mercedes. It's one  
8 way of advertising. It's one way of trying to  
9 compete, but it's obviously a lot more  
10 effective if Kia -- Kia can say, yes, our cars  
11 are not as good, but you pay a lot less for  
12 them.

13 And, similarly, MasterCard and Visa  
14 would like to be able -- would like consumers  
15 to feel that maybe they're -- if they wanted to  
16 compete on -- on the basis of price, they would  
17 want consumers to feel, yes, maybe the rewards  
18 will not be extensive, but you will get a  
19 discount at the cash register or you will get  
20 some other tangible benefit from using our  
21 card.

22 And Discover, for instance, when it  
23 was trying to implement its low-cost strategy,  
24 didn't just propose to lower its merchant fees  
25 in the hopes that would -- it would cause this

1 train react -- chain reaction. Discover went  
2 to individual merchants and was trying to  
3 negotiate agreements where Discover would tell  
4 the particular merchant: We will give you the  
5 following discount on your merchant fee in  
6 return for your commitment to engage in the  
7 following steering practices.

8 And that is a form of competition on  
9 the cardholder side in which the -- the  
10 networks could otherwise have engaged. And at  
11 least so long as the large merchant --  
12 merchants feel that dropping Amex entirely  
13 isn't an economically feasible alternative,  
14 that form of competition is -- is entirely  
15 foreclosed.

16 Yes, Visa and MasterCard can cut their  
17 own merchant rates unilaterally, but if the  
18 merchants can't give their own customers any  
19 advantage for using a card that has that  
20 effect, then it's a shot in the dark. It's  
21 unlikely to be a competitive -- a successful  
22 competitive strategy.

23 And so -- so I guess the --

24 JUSTICE SOTOMAYOR: I'm sorry, what  
25 was the second general principle? I --



1           MR. STEWART: That is the second  
2 general principle, that not only should the  
3 court of appeals not have collapsed the two  
4 sides of the markets, but that in asking  
5 whether the -- indeed, the non-discrimination  
6 provisions, the anti-steering rules were  
7 beneficial or harmful to consumers, it should  
8 have focused specifically on the effects on  
9 competition. It shouldn't have --

10           JUSTICE SOTOMAYOR: The court below  
11 didn't do step 2 here?

12           MR. STEWART: That's correct.

13           JUSTICE SOTOMAYOR: You're saying do  
14 we have to accept that it's always -- looking  
15 at both sides of the market is always  
16 appropriate, or is it only in this case that it  
17 might be appropriate, and how would it be  
18 appropriate if we looked at it under step 2?

19           MR. STEWART: I -- I guess I would --  
20 with respect to two-sided platforms generally,  
21 I -- I would simply -- I guess the only rule we  
22 would urge the Court to adopt is the fact that  
23 two interrelated markets are distinct for  
24 purposes of the first side of the analysis, the  
25 market power inquiry, should not preclude the

1 Court from considering benefits on the other  
2 interrelated market at the second stage of the  
3 analysis.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Chesler.

7 ORAL ARGUMENT OF EVAN R. CHESLER

8 ON BEHALF OF THE RESPONDENTS

9 MR. CHESLER: Mr. Chief Justice, and  
10 may it please the Court:

11 The district court described  
12 competition for credit card transactions as  
13 fierce. There is no transaction without a  
14 cardholder and a merchant simultaneously  
15 executing one.

16 To compete for that business against  
17 ubiquitous and, frankly, larger rivals, Amex  
18 offers consumers what they want, and  
19 transaction volume has, in fact, increased  
20 dramatically and accordingly.

21 Amex requires merchants not to  
22 undermine its cardholder relationship and its  
23 investment, not to work against Amex if it's  
24 going to be Amex's representative to consumers.

25 And millions of merchants --

1 JUSTICE SOTOMAYOR: Isn't that the  
2 essence of competition, to have somebody  
3 working against you? I mean, I always thought  
4 that that was the essence of competition, that  
5 someone will come in and -- and offer the  
6 people involved in the transaction something  
7 better.

8 MR. CHESLER: Your Honor, that is the  
9 --

10 JUSTICE SOTOMAYOR: Better or that  
11 they may not know they want but that they may  
12 want.

13 I -- I have to say if I go to a cash  
14 register and the merchant says to me, I'll give  
15 you a 1 percent discount today if you don't use  
16 Amex, I sit there and think to myself, do I  
17 need the airplane rewards or the train rewards,  
18 or do I want the 1 percent? And I do -- it --  
19 and I choose differently each time depending on  
20 the nature of the transaction.

21 But you -- this anti-steering removes  
22 that competition.

23 MR. CHESLER: Your Honor, the product  
24 here, we need to start the analysis with the  
25 question of what is the product.

1 JUSTICE SOTOMAYOR: You haven't told  
2 me why it doesn't remove competition.

3 MR. CHESLER: Because, in fact, it  
4 enhances competition between the brands, and  
5 that's what happened here.

6 The competition between the brands --

7 JUSTICE SOTOMAYOR: But I don't care  
8 about the brands. I care about my price.  
9 That's what price competition is about.

10 MR. CHESLER: Exactly, Your Honor.

11 JUSTICE SOTOMAYOR: I care about  
12 whether today I want to pay the 1 percent more  
13 or not.

14 MR. CHESLER: And, Your Honor --

15 JUSTICE SOTOMAYOR: And this vertical  
16 restraint is stopping horizontal competition.

17 MR. CHESLER: Your Honor, I disagree  
18 with that. In fact, the district court here  
19 said no one had proved what the price of the  
20 product is. So we can't, in fact, conclude --

21 JUSTICE SOTOMAYOR: I don't really  
22 care. All I know is that the merchant is  
23 offering me this at \$90 or \$100, and I have a  
24 choice between paying \$100 or \$99.

25 At this moment, I'm paying a higher

1 price to use American Express than I want to  
2 pay.

3 MR. CHESLER: But what you don't know,  
4 Your Honor, in that hypothetical and what the  
5 district court found was never proven is what  
6 the effect on the other side of the same price  
7 is. Every time your rewards are reduced,  
8 that's a price increase to you. And the  
9 district court explicitly found --

10 JUSTICE SOTOMAYOR: No. Only if I'm  
11 going to use the rewards.

12 MR. CHESLER: Whether you --

13 JUSTICE SOTOMAYOR: No, because if I'm  
14 not going to use the rewards, the \$99 is still  
15 more valuable to me.

16 MR. CHESLER: But, Your Honor, you may  
17 want to use the rewards on the next  
18 transaction. And when you aggregate those  
19 rewards, if you've collected fewer rewards,  
20 you've paid a price increase. And the district  
21 court found --

22 JUSTICE SOTOMAYOR: You're making my  
23 choice for me. You're not giving me the  
24 choice. And that's what price competition is  
25 about, my choice, not your choice about what's

1 more valuable to me.

2 MR. CHESLER: Your Honor, I think one  
3 of --

4 JUSTICE SOTOMAYOR: Some people, it's  
5 hard to believe, but there are credit card  
6 users who will never use their reward points.  
7 Your system depends on that.

8 MR. CHESLER: And there are -- Your  
9 Honor, I agree with you, they may not choose to  
10 use the rewards, but when you look at the  
11 market -- market aggregated here, the fact is  
12 there was no proof at the end of the day of  
13 what the price for the product at issue is.

14 The product at issue here are credit  
15 card transactions. You cannot have a credit  
16 card transaction unless a consumer and a  
17 merchant come together. And the question is,  
18 what's happened to the output of those  
19 transactions, what's happened to the quality of  
20 those transactions, and what's happened to the  
21 price of those transactions?

22 JUSTICE BREYER: That's one question.  
23 Now I'm beginning to understand this. I do  
24 sometimes learn something, as I just did from  
25 Mr. Stewart and the others in this oral

1 argument. And my problem is that I grew up in  
2 antitrust at a time when people didn't use  
3 phrases like platforms and two-sided markets.  
4 So I have to translate things into a language  
5 that I've been using for 40 years, but okay.

6 So now, as I see your argument, and I  
7 -- I didn't -- I started out not seeing what it  
8 was -- tell me if I'm right, and don't just  
9 agree if I'm not -- I really analogize this to  
10 a -- a firm that makes things and sells through  
11 dealers.

12 Now it used to be, correct, that you  
13 couldn't tell the dealer he had to fix his  
14 prices because that stopped intrabrand  
15 competition, and you couldn't tell the dealer  
16 he had to divide markets. You couldn't divide  
17 them.

18 And that's changed because sometimes  
19 those are justified. And usually the argument  
20 they are justified is that by fixing the  
21 dealer's prices among themselves or giving him  
22 exclusive territories, we will encourage him to  
23 work harder to sell our brand. And that  
24 sometimes is a justification.

25 And it seems to me you are simply

1 making a variation on that theme. You are  
2 saying by engaging in this agreement among  
3 dealers, which is, after all, agreement that  
4 does not directly but indirectly has a tendency  
5 to fix -- to -- to raise prices, therefore, in  
6 a sense, there's an anticompetitive aspect.

7 But by doing that -- by doing that, we  
8 are better able to get a product through to the  
9 consumer that, in fact, they will prefer more.

10 Now have I correctly stated, at least  
11 in general terms, the form of your argument?

12 MR. CHESLER: In general terms, you  
13 have, Your Honor. And may I add, and by our  
14 providing those rewards to consumers, Visa and  
15 MasterCard, who control -- control 70  
16 odd percent of the market --

17 JUSTICE BREYER: Right.

18 MR. CHESLER: -- were required to  
19 respond in kind, and the result is that output  
20 has increased.

21 JUSTICE BREYER: Better for everyone.

22 MR. CHESLER: Output has increased.

23 JUSTICE BREYER: Just as a person  
24 says: Let me tell the dealer of the car that  
25 he has to fix prices with the others, resale



1 price maintenance, because I'll get my new  
2 gizmo car through and that'll improve  
3 everybody's life. Okay?

4 Now, if that's the form of the  
5 argument, then isn't the way I -- I can be a  
6 little traditional, say step 1, is there an  
7 anticompetitive aspect? Then we go to step 2,  
8 what is the justification and does it  
9 out-balance, et cetera? Okay.

10 So far we're at step 1, is there an  
11 anticompetitive aspect? Well, of course. It  
12 seems to me obvious, of course, there is.

13 When you tell the dealer that he can't  
14 tell the customer that he's charging a lower  
15 price, that's anticompetitive right then and  
16 there, and I don't see any other argument.

17 I mean, what it could -- how could  
18 that be procompetitive? I mean, maybe there's  
19 a justification for it in terms of what you're  
20 going to do eventually, but how can that not be  
21 anticompetitive?

22 MR. CHESLER: Because, Your Honor, you  
23 must ask that question with respect to the  
24 product at issue. And with respect, your  
25 hypothetical only related to part of the

1 product.

2 The product is the transaction.

3 Indeed, the government contended at trial that  
4 American Express had 26 percent of the market.  
5 That's 26 percent of the dollar volume of  
6 transactions.

7 And if I changed Your Honor's  
8 hypothetical to ask, is there an  
9 anticompetitive prima facie case with respect  
10 to the product, the transaction, the answer is  
11 absolutely not. Output of the product has  
12 soared. Quality, which the government admitted  
13 in front of the Second Circuit at their  
14 argument, has improved dramatically.

15 And as the district court found, the  
16 price of that product was never proved --

17 CHIEF JUSTICE ROBERTS: Well, output  
18 --

19 MR. CHESLER: -- so no one can say it  
20 was super competitive.

21 CHIEF JUSTICE ROBERTS: Output of the  
22 product has increased, that has so many factors  
23 that go into that besides the nature of the --  
24 the particular product, right?

25 I mean, if the economy grows, then the

1 output of your product, credit card  
2 transactions, grows, right?

3 MR. CHESLER: It -- it could, Your  
4 Honor. But the evidence here was that what was  
5 driving it was the fierce competition that the  
6 district court found between the card  
7 providers, which was driven by the rewards that  
8 Visa and MasterCard were forced to match  
9 because of American Express's rewards.

10 There could be exogenous reasons why  
11 output increases. But the government's  
12 speculation that it had to do with other  
13 factors is just that, it's speculation.

14 CHIEF JUSTICE ROBERTS: When you say  
15 the product, what are you talking about? The  
16 number of credit card transactions or the  
17 dollar volume?

18 MR. CHESLER: Dollar volume. And  
19 that's what the government and the district  
20 court both said was the best metric for the  
21 trial.

22 JUSTICE BREYER: Then what worries me  
23 about that, I have just the same -- look, you  
24 -- you both have put your finger, it seems to  
25 me, on one of the most, as you know, I think,

1 unless it's changed, one of the most difficult  
2 problems in antitrust law: How to define a  
3 market.

4 And, by and large, the answer to that  
5 differs in -- depending on a lot of different  
6 circumstances and what you're up to. And so,  
7 with an agreement that has an anticompetitive  
8 impact of some kind, it's easier and, you know,  
9 you get away from this, if you can identify an  
10 anticompetitive impact.

11 Think of the new gizmo car which has  
12 18 dealers. We give each an exclusive area.  
13 And for analysis purposes, I don't think you  
14 have to worry about a market. You say, look,  
15 that fact of exclusive areas stops these  
16 dealers from competing with each other. End of  
17 the matter. Right then and there you have an  
18 anticompetitive impact.

19 And then we go on to question 2, is it  
20 nonetheless worthwhile? Now maybe you -- I've  
21 read the Second Circuit. I know some of those  
22 judges know antitrust law pretty well and so  
23 forth and -- -- and -- but I just don't see  
24 something that improves on that basic thing.

25 Unless you want to come in and say,

1 oh, this had no impact, you know, because he  
2 only had 2 percent of the relevant market, in  
3 which case why did he enter into it? You know,  
4 I mean, I can imagine variations. But -- but  
5 do you see how I'm thinking?

6 MR. CHESLER: I do, Your Honor. And  
7 -- and if I may, the point in your  
8 hypothetical, which I want to embrace because  
9 it really does make the point I'm trying to  
10 make, is the product was the new car with these  
11 gizmos on it.

12 JUSTICE BREYER: Yeah.

13 MR. CHESLER: And you found in your  
14 hypothetical, I believe, that there was an  
15 anticompetitive effect at the first stage with  
16 respect to that product.

17 JUSTICE BREYER: Uh-huh.

18 MR. CHESLER: And what I'm here to  
19 tell you is, with respect to the product at  
20 issue here, which is credit card transactions,  
21 the government did not prove that there was an  
22 anticompetitive effect because output was up,  
23 quality was up, and they didn't prove what the  
24 price of that product was.

25 So you couldn't possibly conclude that

1 the price was super-competitive.

2 JUSTICE KAGAN: Mr. Chesler --

3 JUSTICE BREYER: It may have been  
4 anticompetitive in one way. In one way.

5 JUSTICE KAGAN: Mr. Chelser --

6 JUSTICE BREYER: You cannot get  
7 through to the dealer -- to the customer, the  
8 fact that these different companies, some  
9 charge lower, some charge higher prices. The  
10 product you're buying, some will be lower, some  
11 will be higher. That is a fairly key element  
12 --

13 MR. CHESLER: Which the credit --

14 JUSTICE BREYER: -- which this  
15 prevents you from getting through in terms of  
16 information to the person who's going to be  
17 buying.

18 MR. CHESLER: Respectfully, Your Honor

19 --

20 JUSTICE BREYER: No?

21 MR. CHESLER: -- it does not. The  
22 credit card companies are perfectly free, as  
23 Justice Gorsuch's questions asked before, to  
24 tell the consumers what their charges are.

25 JUSTICE BREYER: But the merchant is

1 not. And, indeed, were we to start down that  
2 road and say don't worry when you get a promise  
3 among merchants not to tell people what prices  
4 are, because, after all, the person who sells  
5 through you could always advertise, that, I  
6 think, would have a pretty strong  
7 anticompetitive impact across the country.

8 MR. CHELSER: If there --

9 JUSTICE SOTOMAYOR: I'm sorry, the --  
10 the advertising mechanism failed completely.  
11 Discover tried it and said I'm just leaving  
12 money on the table because the restrictions are  
13 not just don't tell them the price difference,  
14 but don't steer them away from American Express  
15 by giving them a better deal in some other way.

16 So you're not talking about a  
17 restriction just on what you tell them, but  
18 it's a restriction on what you do. And so that  
19 anticompetitive effect is broader than just  
20 don't talk.

21 MR. CHESLER: No, Your Honor. In fact  
22 --

23 JUSTICE SOTOMAYOR: I mean, Discover  
24 couldn't tell them to -- or as they tried, very  
25 hard, to have the merchant agree to try to pass

1 off the price saving to the customer. They  
2 couldn't do it under American Express's  
3 conditions.

4 MR. CHESLER: Your Honor, Discover had  
5 5 percent, give or take, of the market before  
6 these provisions were enforced. They had  
7 5 percent after these provisions were enforced.

8 And when I asked the president of  
9 Discover: What about the millions and millions  
10 of merchants in America which do not accept  
11 American Express cards and therefore have none  
12 of these provisions; have you, in fact, adopted  
13 that strategy at those merchants? He said no.

14 So what we're talking about with  
15 respect to Discover is the issue of protecting  
16 a particular competitor, not protecting  
17 competition.

18 JUSTICE KAGAN: I don't think that  
19 that's right, Mr. Chesler. I mean, I think  
20 that the Discover issue is about protecting  
21 low-cost products because the reason that we've  
22 -- that we've said vertical restraints are  
23 often perfectly fine -- indeed, better for  
24 competition -- is because it allows us to have  
25 some high-cost products and some low-cost



1 products. High cost/high service, low cost/low  
2 service.

3 The problem here is that the effect of  
4 these anti-steering provisions means a market  
5 where we will only have high cost/high service  
6 products. And any competitor that wants to  
7 come in and says, you know what, we want to  
8 compete in a different way, we want to compete  
9 in terms of cost, is going to find itself  
10 unable to do so.

11 And that's the thing that makes this  
12 vertical restraint, it seems to me,  
13 different -- different from others.

14 MR. CHESLER: Your Honor, in fact,  
15 there are many low cost/low reward options on  
16 the market today. They're advertised all the  
17 time. I saw an ad for one on TV this morning  
18 as I was putting my tie on. There is no  
19 inability to offer a wide range of low-cost --

20 JUSTICE KAGAN: Mr. Chesler, if I'm a  
21 consumer -- I mean, it might be that I'm very  
22 altruistic and I just care about my local  
23 coffee shop and the kind of deal that the  
24 proprietors are getting, but more to the point,  
25 what I really care about is if that local

1 coffee shop can pass on -- pass on its decrease  
2 in price to me.

3 And that's exactly what the  
4 anti-steering provisions prevent. It prevents  
5 the vendor from passing on the lower merchant  
6 fees to the consumer. And as long as that's  
7 the case, you're just not going to be able to  
8 construct a business strategy based on a  
9 low-cost card.

10 MR. CHESLER: Well, Your Honor,  
11 again --

12 JUSTICE KAGAN: And this is exactly --  
13 I mean, this is not me making this up. I mean,  
14 there was a seven-week trial. And that's  
15 exactly what the district court found. And  
16 these are findings of fact about Discover,  
17 about the effect of -- of -- of -- of this  
18 anti-steering provision on the actual state of  
19 competition in the market, meaning on the  
20 ability of low-cost cards to compete.

21 MR. CHESLER: If I may respond, Your  
22 Honor.

23 The district court also found that  
24 this two-sided market was, as he said,  
25 different from virtually all others because

1 here the two sides were inextricably linked and  
2 intertwined.

3 And here, Your Honor, I would submit,  
4 the product, which is the transaction, is a  
5 product that has a cost and a price associated  
6 with both of the parties to it, the consumer  
7 and the merchant.

8 And under Your Honor's hypothetical,  
9 if, in fact, that price is lowered, the  
10 merchant cost is lowered, the rewards are  
11 lowered, and that's a price increase to the  
12 consumer --

13 JUSTICE SOTOMAYOR: Ah, but we don't  
14 know --

15 MR. CHESLER: -- which was never  
16 proved on this record.

17 JUSTICE SOTOMAYOR: But we don't know  
18 that because we don't know -- and American  
19 Express is the only one who does know. We do  
20 know that the entire price increase is not  
21 passed on to consumers. So there is a profit  
22 margin in there that can be distributed or one  
23 profit margin lowered to the benefit of the  
24 customers or -- or not, but that's what  
25 competition is about.

1           Every competitor will decide what mix  
2 of profit, what mix will go to the consumer,  
3 won't go to the consumer, and the consumer --  
4 finding of fact by the seven-week trial judge  
5 -- will benefit with lower prices.

6           MR. CHESLER: Your Honor, in fact, as  
7 the -- as the court of appeals pointed out, the  
8 fact that not every penny of the merchant fee  
9 is passed on in rewards to the consumer tells  
10 you nothing about the other costs that the card  
11 company is incurring.

12           And the government did not prove what  
13 those costs are. It could well be that, in  
14 fact, the --

15           JUSTICE SOTOMAYOR: Well, isn't that  
16 what the rule of reason does by putting this at  
17 step 2? The government's never going to know  
18 that. It doesn't know your business model.

19           MR. CHESLER: Well --

20           JUSTICE SOTOMAYOR: If you want to  
21 argue procompetitive effects, you show it.  
22 It's not up to the government to show on a --  
23 in a different market that there's a benefit  
24 that outweighs the price stifling in the main  
25 market. I mean, I've never heard of such a

1 thing. If you think there's procompetitive  
2 effects, you prove it.

3 MR. CHESLER: Your Honor, it is the --  
4 it is the defendant's obligation or burden to  
5 prove procompetitive effects when the plaintiff  
6 proves a prima facie case of anticompetitive  
7 effect --

8 JUSTICE GORSUCH: And, Mr. Chesler, on  
9 that --

10 MR. CHESLER: -- with respect to the  
11 product at issue.

12 JUSTICE GORSUCH: -- with respect to  
13 that, and -- and in response to Justice Breyer,  
14 we talked about the fact that the agreement  
15 does limit the merchant's ability to do certain  
16 things and -- and whether that might meet step  
17 1, but I would have thought under -- under  
18 Section 1, you might have responded, yes, if  
19 there's market power.

20 But market power, absent market power  
21 -- an agreement with a merchant to do anything  
22 that restricts anything is not in the  
23 cognizance of the antitrust laws. And a  
24 26 percent player, absent some proof, other  
25 proof, is not -- does not have market power.

1           MR. CHESLER: Your Honor, I -- I -- I  
2 could and should have added that to my answer  
3 and it's more than that here. It is --

4           JUSTICE SOTOMAYOR: I thought we had  
5 two ways of proving market power, direct and  
6 indirect. You need to show a certain control  
7 of the market in indirect, but I think case  
8 after case have said if you can control prices,  
9 you have market power.

10          MR. CHESLER: If I may respond. Let  
11 me talk about the indirect first.

12                 Twenty-six percent of the market,  
13 never been a -- a decision in this Court that  
14 I'm aware of that's found market power in that  
15 case. One out of every 10 cards in America,  
16 only one out of 10 is an American Express card;  
17 3 million merchants do not accept American  
18 Express cards. They chose not to do business  
19 with us. They all do business with Visa and  
20 MasterCard.

21                 This company has no power, and the  
22 district -- the court of appeals found it had  
23 no power, and the states did not raise those  
24 issues here.

25                 JUSTICE SOTOMAYOR: But every

1 competitor raised their price to match American  
2 Express's merchant price.

3 MR. CHESLER: To fuel --

4 JUSTICE SOTOMAYOR: So this vertical  
5 restraint had a complete horizontal effect, so  
6 it has market power to control the merchant  
7 market.

8 MR. CHESLER: Respectfully, Your  
9 Honor, I don't think that's what happened here.  
10 The increases by the card companies were, as  
11 the district court found, to fuel the intense  
12 competition for cardholders, without whom there  
13 will be no transactions. That's what the  
14 findings are.

15 And if prices go up because the costs  
16 of providing a competitive option to consumers  
17 go up, that's not anticompetitive. That's  
18 procompetitive.

19 JUSTICE BREYER: On that point, you  
20 know, it looks to me like market power is a  
21 gremlin that you are going to throw, if we  
22 accept that, throw into the -- into the gears  
23 of antitrust law as it has been under Section 1  
24 across the country, everywhere.

25 I mean, I thought -- and perhaps there

1 have been changes, but I haven't seen them in  
2 this Court -- I thought that if, in fact, three  
3 people agree upon their prices, or forget price  
4 fixing, three people who are competitors agree  
5 that they will have a convention where they  
6 will hire Mr. Smith, who will lecture to them  
7 about the benefits of all charging the same  
8 price, I would have thought you just said  
9 that's anticompetitive. That's  
10 anticompetitive. There's no need to look at  
11 this gizmo called market power, which is a  
12 nightmare.

13 Now, if the defendant wants to come  
14 along and says, I'll tell you something, judge,  
15 because nobody had any market power, this  
16 couldn't do anything, then you would wonder why  
17 they did it. But I would leave you that  
18 option, you know, if you're the defendant.

19 So where is this thing you have to  
20 prove in every Section 1 case, market power? I  
21 have not seen it. Is it in a case I haven't  
22 read, which is quite possible?

23 MR. CHESLER: Your Honor, if we were  
24 talking about a horizontal restraint, which was  
25 what your comment was directed at, I would be



1 in complete agreement with you, because the  
2 error costs of a horizontal restraint are very  
3 low. It's almost always to get people to  
4 charge more for less.

5 JUSTICE BREYER: What -- what's the  
6 vertical case? Even Leegin didn't say that. I  
7 mean, you know, I say even because I dissented,  
8 but nonetheless --

9 MR. CHESLER: I recall that, Your  
10 Honor.

11 (Laughter.)

12 JUSTICE BREYER: None the --  
13 nonetheless --

14 MR. CHESLER: I recall that.

15 JUSTICE BREYER: Nonetheless, I've not  
16 seen a Section 1 case. Now I'm not saying  
17 there couldn't be one, but I -- but I am saying  
18 I don't think it's a universal requirement.  
19 And I think if you have an anticompetitive  
20 agreement which looks anticompetitive, seems  
21 anticompetitive, et cetera, why go into market  
22 power?

23 MR. CHESLER: Because, Your Honor, in  
24 a vertical restraint, as this Court has said  
25 repeatedly over the last 40 years, the error

1 costs are very low, because when a -- when a  
2 company, particularly a company without power,  
3 imposes a vertical restraint, it is to enhance  
4 its ability to compete against other brands.

5 And as Justice Kennedy said in the  
6 Brooke case, a price increase in the face of  
7 increasing demand tells the trier of fact  
8 nothing about whether it's anticompetitive.  
9 One needs to determine if excess profits are  
10 being extracted, monopoly rents are being  
11 extracted. And the plaintiff here didn't even  
12 prove what our costs were, let alone our  
13 margins.

14 If this -- if the standard that this  
15 Court articulates, Your Honor, is a standard in  
16 which a price increase without proof of a  
17 restriction of output, without proof of a harm  
18 to quality, without proof that excess profits  
19 have been extracted, if that's enough to  
20 satisfy a prima facie case, then what will  
21 happen in the lower courts -- and I speak from  
22 42 years of experience of trying antitrust  
23 cases -- there will be a wave, a tsunami of  
24 false positives in the lower courts.

25 JUSTICE BREYER: I only have 42 years

1 of teaching antitrust.

2 (Laughter.)

3 JUSTICE BREYER: And I would say in  
4 that -- in that experience, which is not as  
5 good as yours, actually, because you actually  
6 have practical experience, but it seems to me  
7 there have been a lot of cases where you  
8 wouldn't -- you would not see price increases,  
9 the main one being Alcoa.

10 I mean, Alcoa, which used to be  
11 thought to be the best case in -- ever written  
12 in antitrust, Learned Hand. It has no price  
13 increase. It was --

14 MR. CHESLER: But --

15 JUSTICE BREYER: There it was only  
16 market power. I know. You're going to say  
17 that, but that's a different point.

18 MR. CHESLER: I was about to say  
19 that's a different point. I think I heard that  
20 from someplace at the time.

21 (Laughter.)

22 MR. CHESLER: But, Your -- Your Honor,  
23 in a vertical restraint case, if output is  
24 going up, if costs are going up because they're  
25 investing in rewards that are benefitting the

1 consumer, that's the way a competitive market  
2 is supposed to act.

3 And all I'm saying to Your Honor is,  
4 if the test that this Court articulates is the  
5 test that's suggested by the folks to my right,  
6 then we are going to have a wave of positives  
7 that are false where real competition is taking  
8 place because price increases occur for all  
9 sorts of reasons, many of which are perfectly  
10 benign, which is exactly what happened here  
11 with respect to the merchant fees because they  
12 were fueling price decreases to the consumers.

13 Every reward, every seat on a plane to  
14 Aruba, every ticket to a Billy Joel concert,  
15 every cash back reward that's given, is a price  
16 discount to the consumer. And what the  
17 district court found here is nobody proved to  
18 me what that price is for the product at issue.

19 So the result that we're trying to  
20 avoid here is a situation in which a plaintiff  
21 can fail to prove what the price of the product  
22 is, merely that there's been an increase to  
23 part of that price, and that that's enough to  
24 satisfy the first leg of the rule of reason.  
25 And the burden then falls to the defendant to

1 disprove what the plaintiff has failed to  
2 prove. That will create mischief.

3 Professor Katz, the government's only  
4 expert here, from Berkeley, testified that in a  
5 two-sided platform, if you don't completely and  
6 accurately assess the impact on both sides of  
7 the platform, you will get misleading  
8 conclusions.

9 And with respect, Your Honor, that's  
10 what will happen if this Court only looks at  
11 the activity vis-a-vis the merchant, when there  
12 is a consumer standing opposite her without  
13 whom the product doesn't exist. And that's  
14 what --

15 JUSTICE SOTOMAYOR: Counsel, that's  
16 step 2.

17 MR. CHESLER: No, Your Honor. That's  
18 step 1. There is no case that I am aware of in  
19 which a plaintiff has satisfied its burden on  
20 step 1 by proving an impact on competition on  
21 something other than the product that at is --  
22 that is at issue here. And they didn't prove  
23 step 1.

24 JUSTICE SOTOMAYOR: But we've had  
25 two-sided markets --

1 JUSTICE KAGAN: Well, Mr. Chesler,  
2 what the --

3 JUSTICE SOTOMAYOR: -- we've had  
4 two-sided markets in -- that we've looked at in  
5 antitrust law. Justice Breyer just mentioned  
6 one. How about the newspaper advertisers and  
7 the newspaper readers?

8 MR. CHESLER: Can we take that one?  
9 I'd --

10 JUSTICE SOTOMAYOR: Go ahead.

11 MR. CHESLER: I'd like to take that  
12 one. That's the Picayune case.

13 JUSTICE SOTOMAYOR: Picayune.

14 MR. CHESLER: The transaction in that  
15 case, again, my -- my request to this Court is  
16 always start with the same question: What's  
17 the product at issue?

18 The product at issue in Times-Picayune  
19 was advertising sales between the advertisers  
20 and the newspapers. While there were  
21 subscribers to those newspapers, they had  
22 nothing to do with that transaction.

23 JUSTICE SOTOMAYOR: Oh, yes, they did,  
24 because the number of subscribers affected the  
25 price that the advertisers were going to use,

1 and their inducement to use the -- to subsidize  
2 both morning and afternoon advertisements.

3 MR. CHESLER: And that distinction is  
4 exactly why this Court need not decide in this  
5 case a rule for all time for every two-sided  
6 platform. This case is a situation in which  
7 there is no transaction unless those two  
8 parties, the consumer and the merchant, come  
9 together at the same moment in time and  
10 complete the transaction.

11 That was not true in Times-Picayune.  
12 Ultimately, over the course of time, if the --  
13 if the advertisers didn't put their ads in the  
14 paper, maybe it would have an impact on  
15 consumers, and vice versa, but you could have a  
16 completed transaction in Times-Picayune without  
17 the consumer, the subscriber, being involved in  
18 that transaction.

19 JUSTICE KAGAN: Mr. Chesler, I don't  
20 -- I don't have 42 years of antitrust  
21 experience, teaching or practicing, but --

22 MR. CHESLER: It just requires a  
23 little time, Your Honor.

24 JUSTICE KAGAN: So I just think of  
25 this in sort of simple-minded ways. Here's

1 what the district court found. The district  
2 court found that merchants cannot steer  
3 customers to cheaper forms of payment. The  
4 district court found that all of the credit  
5 card firms have consistently raised their  
6 prices.

7 Even when you look at these two-sided  
8 prices, the district court found that these  
9 price increases were not being passed on to  
10 consumers. And the district court found that  
11 it was impossible for a credit card company  
12 that wanted to offer a low cost/low price  
13 product to enter the market.

14 So you put all of those things  
15 together, that sounds like a market that is not  
16 working in the way it's supposed to, at least  
17 sufficiently to get on to the second step where  
18 you can make all your arguments about why it is  
19 that a market where the prices only go up and  
20 where no low-price competition can emerge is,  
21 nonetheless, a good market.

22 MR. CHESLER: Your Honor, my answer to  
23 that is that every one of those findings dealt  
24 only with the merchant relationship. They had  
25 nothing to do with the consumers.



1           And, again, here, without that  
2           consumer presenting her card to the merchant,  
3           the transactions that were being debated in  
4           this case wouldn't even exist.

5           The district court itself found that  
6           there was no proof of the actual price to the  
7           two sides of that transaction.

8           The government had failed to prove  
9           that. The government had failed to prove what  
10          the costs were for the -- for the services  
11          provided to the merchant, and it failed to  
12          prove what the -- what the consumer's side of  
13          the price was.

14          So every -- we didn't challenge any of  
15          those findings in the court of appeals, nor do  
16          we challenge them here, because they are all  
17          clapping with one hand. They're only talking  
18          about what happens on one side of the counter  
19          when you present your card for that -- to buy  
20          that sweater.

21          JUSTICE KAGAN: Well, it's the one  
22          hand where the government has the burden. And  
23          now, if you want to come in and you can say,  
24          look, there are all these great benefits that  
25          go beyond -- I mean, some of your benefits sort

1 of seem to me to be benefits for American  
2 Express only.

3 But if you want to say, no, that there  
4 are great benefits for the market generally,  
5 that's what step 2 is about.

6 MR. CHESLER: May I?

7 CHIEF JUSTICE ROBERTS: Please.

8 MR. CHESLER: You only get to step 2,  
9 respectfully, Your Honor, if the government  
10 proves that competition for the product has  
11 been impaired at step 1.

12 And what I've said over and over again  
13 here is the product is the transaction, and  
14 none of those findings related to the  
15 transaction.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. CHESLER: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Murphy,  
20 you have three minutes remaining.

21 REBUTTAL ARGUMENT OF ERIC E. MURPHY  
22 ON BEHALF OF THE PETITIONERS AND  
23 THE STATE RESPONDENTS IN SUPPORT

24 MR. MURPHY: Mr. Chief Justice, just a  
25 few points in rebuttal. The first of those is

1 I think the most important point for this Court  
2 to take from this case is that certainly the  
3 Court has lessened the scrutiny with respect to  
4 vertical restraints in recent -- recent years,  
5 but this particular vertical restraint, the one  
6 at issue here, has the same effects that we  
7 would anticipate happening with a horizontal  
8 cartel.

9 If all of the credit card companies  
10 got together and said we're going to not allow  
11 steering, that would cut off price competition  
12 on the merchant side, it would still allow for  
13 quality reward competition on the other side,  
14 but that rule would be per se illegal.

15 That rule would be per se illegal,  
16 despite the alleged benefits on the cardholder  
17 side, just as this Court said in the engineers'  
18 case, the engineers can't get together, fix  
19 prices, and then justify that on the basis of  
20 the allegedly improved quality. It's per se  
21 illegal.

22 We're not in the per se illegal world  
23 here because this is a rule of reason case, but  
24 what the evidence shows under the rule of  
25 reason, the full market analysis, is that it

1 has the same exact effects that one would  
2 anticipate with a horizontal cartel --

3 JUSTICE GINSBURG: Mr. Murphy --

4 MR. MURPHY: -- and that's why the  
5 government has --

6 JUSTICE GINSBURG: -- what is -- what  
7 is the relief that you're seeking? Are you  
8 seeking to say the Second Circuit was wrong in  
9 saying you didn't -- the government didn't  
10 prove step 1, and now he goes back for a step 2  
11 examination? Is that what you're --

12 MR. MURPHY: Absolutely. Just to  
13 answer the question presented, which was  
14 whether the government met its prima facie case  
15 based on the effects that we showed at the  
16 trial. And then, on -- on remand, they can  
17 preserve -- any -- any arguments that they have  
18 preserved, they can present to the Second  
19 Circuit.

20 And then, with respect to price, we --  
21 we would readily agree that higher price can  
22 oftentimes arise from different reasons.  
23 That's why the Court in Brooke Group said that  
24 the government should prove that the higher  
25 prices arise from non-market forces.

1           Here, the -- the district court found  
2           as a fact that higher prices weren't rising  
3           because of the cardholder rewards. They were  
4           rising because of these restraints.

5           And the Discover example of that  
6           phenomenon is quite powerful. Discover saw the  
7           higher prices, saw the discontent in the  
8           merchants, and responded with its  
9           low-cutting -- price-cutting option. And --  
10          and all of the merchants came to Discover and  
11          said, sorry, we'd love to shift shares to you,  
12          but there's nothing we can do about it because  
13          of these restraints. That quite powerfully  
14          shows the horizontal effects.

15          With respect to market power, I think  
16          that we would be fine with a rule that market  
17          power needed to be shown; we just think that  
18          the evidence overwhelmingly shows --

19          JUSTICE GORSUCH: I -- I just want to  
20          pause right there. You -- you accept that to  
21          show an anticompetitive effect, you have to  
22          show not just an agreement --

23          MR. MURPHY: We would --

24          JUSTICE GORSUCH: -- but also that  
25          it -- market power in some way, shape, or form?

1           MR. MURPHY: So we would readily -- we  
2 just disagree on the manner in which it need be  
3 shown.

4           JUSTICE GORSUCH: Right, but you agree  
5 it need be shown?

6           MR. MURPHY: Yes. So we showed market  
7 power, but we showed it quite powerfully in  
8 this case with this restraint affecting  
9 merchants making up some 90 percent of the  
10 market. And nobody without market power could  
11 actually affect industry-wide prices, and  
12 that's what --

13          JUSTICE GORSUCH: Right --

14          MR. MURPHY: -- we have going on here.

15          JUSTICE GORSUCH: -- if there were no  
16 market power, an agreement would have no  
17 anticompetitive effect?

18          MR. MURPHY: Absolutely. There -- as  
19 Judge Bork said in the -- in the D.C. Circuit  
20 case, it would be suicidal for an -- a producer  
21 to adopt a restraint without market power.

22                 But here, obviously, it wasn't  
23 suicidal.

24          JUSTICE SOTOMAYOR: This is the Leegin  
25 situation. This is a vertical restraint that

1 controls -- that has a horizontal effect?

2 MR. MURPHY: It's not like Leegin.

3 Leegin was only a restriction on --

4 JUSTICE SOTOMAYOR: No, not like it,  
5 but it was the exception Leegin talked about.

6 CHIEF JUSTICE ROBERTS: Please.

7 MR. MURPHY: Absolutely. Leegin  
8 allowed for room for this analysis.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel. The case is submitted.

12 (Whereupon, at 12:12 p.m., the case in  
13 the above entitled matter was submitted.)

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<b>\$100</b> <sup>[2]</sup> 35:23,24 <b>\$90</b> <sup>[1]</sup> 35:23 <b>\$99</b> <sup>[2]</sup> 35:24 36:14	<b>acted</b> <sup>[1]</sup> 9:8 <b>activity</b> <sup>[2]</sup> 5:4 60:11 <b>actual</b> <sup>[2]</sup> 49:18 64:6 <b>actually</b> <sup>[5]</sup> 5:12 29:8 58:5,5 69:11 <b>ad</b> <sup>[2]</sup> 29:4 48:17 <b>add</b> <sup>[1]</sup> 39:13 <b>added</b> <sup>[1]</sup> 53:2 <b>additional</b> <sup>[1]</sup> 9:9 <b>addressed</b> <sup>[1]</sup> 9:5 <b>admit</b> <sup>[2]</sup> 8:9 20:12 <b>admitted</b> <sup>[1]</sup> 41:12 <b>admonition</b> <sup>[1]</sup> 18:22 <b>admonitions</b> <sup>[1]</sup> 19:8 <b>adopt</b> <sup>[2]</sup> 32:22 69:21 <b>adopted</b> <sup>[1]</sup> 47:12 <b>ads</b> <sup>[1]</sup> 62:13 <b>advantage</b> <sup>[2]</sup> 29:15 31:19 <b>advertise</b> <sup>[5]</sup> 27:13 28:25 29:4,12 46:5 <b>advertised</b> <sup>[1]</sup> 48:16 <b>advertisements</b> <sup>[3]</sup> 29:5 30:2 62: 2 <b>advertisers</b> <sup>[4]</sup> 61:6,19,25 62:13 <b>advertising</b> <sup>[4]</sup> 29:22 30:8 46:10 61:19 <b>affect</b> <sup>[4]</sup> 8:6 9:14 27:11 69:11 <b>affected</b> <sup>[2]</sup> 16:15 61:24 <b>affecting</b> <sup>[1]</sup> 69:8 <b>affects</b> <sup>[1]</sup> 8:9 <b>afternoon</b> <sup>[1]</sup> 62:2 <b>agency</b> <sup>[1]</sup> 25:2 <b>aggregate</b> <sup>[2]</sup> 29:16 36:18 <b>aggregated</b> <sup>[1]</sup> 37:11 <b>agree</b> <sup>[14]</sup> 4:16,22 5:4 10:5 11:4 24:16,19 37:9 38:9 46:25 55:3,4 67:21 69:4 <b>agreement</b> <sup>[17]</sup> 10:3,7 23:7,11 24: 20 28:2,4,5 39:2,3 43:7 52:14,21 56:1,20 68:22 69:16 <b>agreements</b> <sup>[4]</sup> 27:11 28:7,13 31: 3 <b>Ah</b> <sup>[2]</sup> 23:7 50:13 <b>ahead</b> <sup>[1]</sup> 61:10 <b>aimed</b> <sup>[1]</sup> 4:15 <b>airplane</b> <sup>[1]</sup> 34:17 <b>AL</b> <sup>[3]</sup> 1:3,6 3:4 <b>Albrecht</b> <sup>[1]</sup> 19:5 <b>Alcoa</b> <sup>[2]</sup> 58:9,10 <b>allegations</b> <sup>[1]</sup> 10:6 <b>alleged</b> <sup>[1]</sup> 66:16 <b>allegedly</b> <sup>[1]</sup> 66:20 <b>allow</b> <sup>[2]</sup> 66:10,12 <b>allowed</b> <sup>[2]</sup> 7:11 70:8 <b>allows</b> <sup>[1]</sup> 47:24 <b>almost</b> <sup>[1]</sup> 56:3 <b>alone</b> <sup>[1]</sup> 57:12 <b>alternative</b> <sup>[4]</sup> 20:9 21:12 27:19 31:13 <b>although</b> <sup>[3]</sup> 4:17 5:5 11:16 <b>altruistic</b> <sup>[1]</sup> 48:22 <b>ambiguous</b> <sup>[1]</sup> 4:23 <b>America</b> <sup>[2]</sup> 47:10 53:15 <b>AMERICAN</b> <sup>[2]</sup> 1:6 3:5,15 6:11 7:	<b>Amex</b> <sup>[12]</sup> 7:9,10,16 15:14 18:8 20: 23 21:1 31:12 33:17,21,23 34:16 <b>Amex's</b> <sup>[3]</sup> 15:15 17:6 33:24 <b>amicus</b> <sup>[1]</sup> 8:16 <b>among</b> <sup>[4]</sup> 24:20 38:21 39:2 46:3 <b>analogize</b> <sup>[1]</sup> 38:9 <b>analysis</b> <sup>[12]</sup> 11:4 14:12 17:18 20: 6 21:18 24:17 32:24 33:3 34:24 43:13 66:25 70:8 <b>analyze</b> <sup>[1]</sup> 21:23 <b>analyzed</b> <sup>[2]</sup> 22:17 26:21 <b>announcing</b> <sup>[1]</sup> 26:11 <b>another</b> <sup>[1]</sup> 27:20 <b>answer</b> <sup>[6]</sup> 21:9 41:10 43:4 53:2 63:22 67:13 <b>anti-steering</b> <sup>[1]</sup> 3:16 7:14 17:7 25:17 28:19,20 32:6 34:21 48:4 49:4,18 <b>anticipate</b> <sup>[2]</sup> 66:7 67:2 <b>anticompetitive</b> <sup>[30]</sup> 3:14 11:13 17:11 22:7,16 25:10 39:6 40:7,11, 15,21 41:9 43:7,10,18 44:15,22 45:4 46:7,19 52:6 54:17 55:9,10 56:19,20,21 57:8 68:21 69:17 <b>antitrust</b> <sup>[20]</sup> 4:15 5:2,4 10:25 18: 18 20:3 23:18 24:17,25 27:24 38: 2 43:2,22 52:23 54:23 57:22 58:1, 12 61:5 62:20 <b>Anytime</b> <sup>[1]</sup> 7:19 <b>apologize</b> <sup>[1]</sup> 29:18 <b>appeals</b> <sup>[6]</sup> 17:13 26:20 32:3 51:7 53:22 64:15 <b>APPEARANCES</b> <sup>[1]</sup> 1:16 <b>Appendix</b> <sup>[1]</sup> 6:6 <b>approach</b> <sup>[3]</sup> 15:15 19:23 22:4 <b>appropriate</b> <sup>[10]</sup> 13:22 14:22 15:8, 12 18:3 20:13 21:12 32:16,17,18 <b>area</b> <sup>[1]</sup> 43:12 <b>areas</b> <sup>[1]</sup> 43:15 <b>Areeda</b> <sup>[1]</sup> 24:23 <b>aren't</b> <sup>[1]</sup> 7:11 <b>argue</b> <sup>[2]</sup> 18:16 51:21 <b>arguing</b> <sup>[1]</sup> 19:11 <b>argument</b> <sup>[24]</sup> 1:13 2:2,6,10,13 3: 4,8 14:14,15 15:1,4,20 17:1 26:2 29:19 33:7 38:1,6,19 39:11 40:5, 16 41:14 65:21 <b>arguments</b> <sup>[2]</sup> 63:18 67:17 <b>arise</b> <sup>[2]</sup> 67:22,25 <b>articulate</b> <sup>[2]</sup> 19:20,25 <b>articulates</b> <sup>[2]</sup> 57:15 59:4 <b>Aruba</b> <sup>[1]</sup> 59:14 <b>ascertaining</b> <sup>[1]</sup> 21:8 <b>aside</b> <sup>[1]</sup> 29:10 <b>aspect</b> <sup>[4]</sup> 5:11 39:6 40:7,11 <b>assess</b> <sup>[1]</sup> 60:6 <b>associated</b> <sup>[2]</sup> 28:7 50:5 <b>assume</b> <sup>[2]</sup> 18:24 19:8 <b>assuming</b> <sup>[1]</sup> 18:19 <b>attempt</b> <sup>[2]</sup> 18:11 19:20 <b>attempts</b> <sup>[2]</sup> 22:6,8	<b>back</b> <sup>[4]</sup> 5:12 19:4 59:15 67:10 <b>balance</b> <sup>[1]</sup> 15:8 <b>balancing</b> <sup>[1]</sup> 25:9 <b>banks</b> <sup>[1]</sup> 21:5 <b>bar</b> <sup>[1]</sup> 3:20 <b>bargain</b> <sup>[1]</sup> 21:11 <b>based</b> <sup>[2]</sup> 49:8 67:15 <b>basic</b> <sup>[2]</sup> 15:23 43:24 <b>basis</b> <sup>[3]</sup> 6:14 30:16 66:19 <b>become</b> <sup>[3]</sup> 8:18 18:2 25:18 <b>becomes</b> <sup>[1]</sup> 10:10 <b>beef</b> <sup>[1]</sup> 27:2 <b>beginning</b> <sup>[1]</sup> 37:23 <b>behalf</b> <sup>[11]</sup> 1:18,21,25 2:4,8,12,15 3:9 17:2 33:8 65:22 <b>believe</b> <sup>[4]</sup> 6:15 27:23 37:5 44:14 <b>below</b> <sup>[1]</sup> 32:10 <b>beneficial</b> <sup>[2]</sup> 25:12 32:7 <b>benefit</b> <sup>[4]</sup> 30:20 50:23 51:5,23 <b>benefits</b> <sup>[13]</sup> 24:16 25:7,13,18 26: 21,22 33:1 55:7 64:24,25 65:1,4 66:16 <b>benefitting</b> <sup>[1]</sup> 58:25 <b>benign</b> <sup>[1]</sup> 59:10 <b>Berkeley</b> <sup>[1]</sup> 60:4 <b>besides</b> <sup>[1]</sup> 41:23 <b>best</b> <sup>[3]</sup> 15:25 42:20 58:11 <b>better</b> <sup>[6]</sup> 34:7,10 39:8,21 46:15 47: 23 <b>between</b> <sup>[11]</sup> 13:22 14:22 15:8,12 27:16 30:1 35:4,6,24 42:6 61:19 <b>beyond</b> <sup>[1]</sup> 64:25 <b>Billy</b> <sup>[1]</sup> 59:14 <b>bolt</b> <sup>[2]</sup> 22:25 23:13 <b>bolts</b> <sup>[4]</sup> 22:25 23:1 24:7,8 <b>Bork</b> <sup>[1]</sup> 69:19 <b>borrowing</b> <sup>[1]</sup> 25:25 <b>both</b> <sup>[9]</sup> 14:5 20:24 24:4 32:15 42: 20,24 50:6 60:6 62:2 <b>brand</b> <sup>[1]</sup> 38:23 <b>brands</b> <sup>[4]</sup> 35:4,6,8 57:4 <b>BREYER</b> <sup>[25]</sup> 22:20 24:6,10,18 37: 22 39:17,21,23 42:22 44:12,17 45: 3,6,14,20,25 52:13 54:19 56:5,12, 15 57:25 58:3,15 61:5 <b>Breyer's</b> <sup>[1]</sup> 26:1 <b>brief</b> <sup>[3]</sup> 8:16 10:25 19:11 <b>briefs</b> <sup>[1]</sup> 23:25 <b>broader</b> <sup>[1]</sup> 46:19 <b>broadly</b> <sup>[1]</sup> 19:19 <b>Brooke</b> <sup>[2]</sup> 57:6 67:23 <b>burden</b> <sup>[6]</sup> 3:13 12:17 52:4 59:25 60:19 64:22 <b>business</b> <sup>[5]</sup> 33:16 49:8 51:18 53: 18,19 <b>buy</b> <sup>[3]</sup> 7:21 30:3 64:19 <b>buyers</b> <sup>[1]</sup> 8:13
<b>1</b>			<b>B</b>
1 <sup>[22]</sup> 7:10 14:21 21:17,25 25:23 26: 3,5 34:15,18 35:12 40:6,10 52:17, 18 54:23 55:20 56:16 60:18,20,23 65:11 67:10 10 <sup>[3]</sup> 7:4 53:15,16 11:09 <sup>[2]</sup> 1:14 3:2 12:12 <sup>[1]</sup> 70:12 16-1454 <sup>[1]</sup> 3:4 166 <sup>[1]</sup> 6:6 167 <sup>[1]</sup> 6:6 17 <sup>[1]</sup> 2:9 18 <sup>[1]</sup> 43:12 1990s <sup>[1]</sup> 4:8			
<b>2</b>			
2 <sup>[10]</sup> 32:11,18 40:7 43:19 44:2 51: 17 60:16 65:5,8 67:10 2018 <sup>[1]</sup> 1:11 26 <sup>[4]</sup> 1:11 41:4,5 52:24			
<b>3</b>			
3 <sup>[4]</sup> 2:5 23:20 25:25 53:17 33 <sup>[1]</sup> 2:12			
<b>4</b>			
4 <sup>[1]</sup> 23:20 40 <sup>[2]</sup> 38:5 56:25 42 <sup>[3]</sup> 57:22,25 62:20			
<b>5</b>			
5 <sup>[4]</sup> 7:4 23:20 47:5,7			
<b>6</b>			
65 <sup>[1]</sup> 2:16			
<b>7</b>			
70 <sup>[1]</sup> 39:15 74 <sup>[1]</sup> 9:17			
<b>9</b>			
90 <sup>[1]</sup> 69:9			
<b>A</b>			
a.m. <sup>[2]</sup> 1:14 3:2 <b>ability</b> <sup>[4]</sup> 16:16 49:20 52:15 57:4 <b>able</b> <sup>[4]</sup> 8:24 30:14 39:8 49:7 <b>above</b> <sup>[1]</sup> 70:13 <b>above-entitled</b> <sup>[1]</sup> 1:12 <b>Absent</b> <sup>[3]</sup> 28:1 52:20,24 <b>absolute</b> <sup>[1]</sup> 24:22 <b>Absolutely</b> <sup>[7]</sup> 5:14 7:6 9:2 41:11 67:12 69:18 70:7 <b>accept</b> <sup>[6]</sup> 28:14 32:14 47:10 53: 17 54:22 68:20 <b>accomplished</b> <sup>[1]</sup> 24:2 <b>accordingly</b> <sup>[1]</sup> 33:20 <b>account</b> <sup>[1]</sup> 20:14 <b>accurately</b> <sup>[2]</sup> 3:21 60:6 <b>achieved</b> <sup>[1]</sup> 22:11 <b>across</b> <sup>[3]</sup> 17:8 46:7 54:24			



<p><b>buying</b> <sup>[2]</sup> 45:10,17</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>Cadillac</b> <sup>[2]</sup> 7:20,22  <b>Cadillacs</b> <sup>[2]</sup> 7:20 27:17  <b>California</b> <sup>[1]</sup> 11:11  <b>called</b> <sup>[2]</sup> 23:2 55:11  <b>came</b> <sup>[3]</sup> 1:12 12:19 68:10  <b>cannot</b> <sup>[6]</sup> 4:2 13:15 15:5 37:15  45:6 63:2  <b>car</b> <sup>[7]</sup> 8:23,24,25 39:24 40:2 43:11  44:10  <b>card</b> <sup>[31]</sup> 3:18 4:1,3,6 6:8 7:11 10:  22 14:4 15:16 27:7,8 30:21 31:19  33:12 37:5,15,16 42:1,6,16 44:20  45:22 49:9 51:10 53:16 54:10 63:  5,11 64:2,19 66:9  <b>cardholder</b> <sup>[22]</sup> 6:21 7:9,10,13 13:  18,25 15:13 17:25 18:2,4 20:15,  25 21:2 24:5 25:14,18 26:15 31:9  33:14,22 66:16 68:3  <b>cardholders</b> <sup>[8]</sup> 14:6 18:10,12 21:  18 24:16 25:7 26:21 54:12  <b>cards</b> <sup>[9]</sup> 3:23,24 15:21 21:4 29:14  47:11 49:20 53:15,18  <b>care</b> <sup>[8]</sup> 5:2 15:3 35:7,8,11,22 48:  22,25  <b>cars</b> <sup>[2]</sup> 30:3,10  <b>cartel</b> <sup>[2]</sup> 66:8 67:2  <b>Case</b> <sup>[51]</sup> 3:4,14 4:21 10:3,4 11:8,  11 12:11 13:24 14:24 17:10,15 19:  8,17,23 20:17 26:2,12 28:9,15,16  32:16 41:9 44:3 49:7 52:6 53:7,8,  15 55:20,21 56:6,16 57:6,20 58:  11,23 60:18 61:12,15 62:5,6 64:4  66:2,18,23 67:14 69:8,20 70:11,  12  <b>cases</b> <sup>[9]</sup> 12:24 13:13,20,24 14:20  16:4 22:5 57:23 58:7  <b>cash</b> <sup>[3]</sup> 30:19 34:13 59:15  <b>cat</b> <sup>[1]</sup> 15:6  <b>Catalano</b> <sup>[1]</sup> 13:13  <b>categorical</b> <sup>[1]</sup> 26:11  <b>category</b> <sup>[1]</sup> 15:6  <b>causation</b> <sup>[1]</sup> 11:22  <b>cause</b> <sup>[2]</sup> 11:23 30:25  <b>cautiously</b> <sup>[2]</sup> 19:23 26:10  <b>central</b> <sup>[1]</sup> 15:10  <b>cert</b> <sup>[1]</sup> 19:12  <b>certain</b> <sup>[2]</sup> 52:15 53:6  <b>certainly</b> <sup>[3]</sup> 19:10,18 66:2  <b>cetera</b> <sup>[2]</sup> 40:9 56:21  <b>chain</b> <sup>[1]</sup> 31:1  <b>challenge</b> <sup>[2]</sup> 64:14,16  <b>changed</b> <sup>[3]</sup> 38:18 41:7 43:1  <b>changes</b> <sup>[1]</sup> 55:1  <b>channel</b> <sup>[2]</sup> 13:17 14:17  <b>channeled</b> <sup>[1]</sup> 7:17  <b>characterized</b> <sup>[1]</sup> 25:11  <b>charge</b> <sup>[6]</sup> 3:19 10:22 29:8 45:9,9  56:4  <b>charges</b> <sup>[2]</sup> 18:10 45:24  <b>charging</b> <sup>[2]</sup> 40:14 55:7  <b>cheaper</b> <sup>[5]</sup> 3:24 16:10,11 27:19</p>	<p>63:3  <b>check</b> <sup>[1]</sup> 9:9  <b>Chelser</b> <sup>[2]</sup> 45:5 46:8  <b>CHESLER</b> <sup>[66]</sup> 1:24 2:11 33:6,7,9  34:8,23 35:3,10,14,17 36:3,12,16  37:2,8 39:12,18,22 40:22 41:19  42:3,18 44:6,13,18 45:2,13,18,21  46:21 47:4,19 48:14,20 49:10,21  50:15 51:6,19 52:3,8,10 53:1,10  54:3,8 55:23 56:9,14,23 58:14,18,  22 60:17 61:1,8,11,14 62:3,19,22  63:22 65:6,8,18  <b>CHIEF</b> <sup>[16]</sup> 3:3,7,11 16:21 17:4 33:  4,9 41:17,21 42:14 65:7,16,19,24  70:6,10  <b>choice</b> <sup>[5]</sup> 35:24 36:23,24,25,25  <b>choose</b> <sup>[3]</sup> 27:17 34:19 37:9  <b>chose</b> <sup>[1]</sup> 53:18  <b>circuit</b> <sup>[9]</sup> 12:15 17:9 18:1 25:15  41:13 43:21 67:8,19 69:19  <b>Circuit's</b> <sup>[2]</sup> 14:3,10  <b>circumstances</b> <sup>[1]</sup> 43:6  <b>clapping</b> <sup>[1]</sup> 64:17  <b>class</b> <sup>[1]</sup> 24:23  <b>classic</b> <sup>[1]</sup> 8:4  <b>clear</b> <sup>[7]</sup> 9:6 10:7 11:14,21,21 16:6  25:8  <b>clearly</b> <sup>[1]</sup> 13:20  <b>coffee</b> <sup>[2]</sup> 48:23 49:1  <b>cognizance</b> <sup>[1]</sup> 52:23  <b>coin</b> <sup>[1]</sup> 12:20  <b>collapsed</b> <sup>[2]</sup> 17:15 32:3  <b>collected</b> <sup>[1]</sup> 36:19  <b>Columbus</b> <sup>[1]</sup> 1:17  <b>combining</b> <sup>[1]</sup> 23:1  <b>come</b> <sup>[8]</sup> 27:4 34:5 37:17 43:25 48:  7 55:13 62:8 64:23  <b>comes</b> <sup>[1]</sup> 27:7  <b>comment</b> <sup>[3]</sup> 10:25 14:3 55:25  <b>commitment</b> <sup>[1]</sup> 31:6  <b>commonly</b> <sup>[1]</sup> 28:6  <b>companies</b> <sup>[8]</sup> 3:18 4:3,6 10:22  45:8,22 54:10 66:9  <b>COMPANY</b> <sup>[7]</sup> 1:6 3:5 51:11 53:  21 57:2,2 63:11  <b>compared</b> <sup>[1]</sup> 29:22  <b>compete</b> <sup>[8]</sup> 27:20 30:9,16 33:16  48:8,8 49:20 57:4  <b>competes</b> <sup>[2]</sup> 21:1,4  <b>competing</b> <sup>[4]</sup> 8:19 15:8,20 43:16  <b>competition</b> <sup>[56]</sup> 3:17 5:15 7:7,24  8:6,7,9,17,18 9:8,14 13:21 14:1,  16,21 15:5,7,11,19 16:1,15 17:8  18:4 20:6 21:20 25:13 26:14,15,  23 27:15 31:8,14 32:9 33:12 34:2,  4,22 35:2,4,6,9,16 36:24 38:15 42:  5 47:17,24 49:19 50:25 54:12 59:  7 60:20 63:20 65:10 66:11,13  <b>competitive</b> <sup>[5]</sup> 31:21,22 41:20 54:  16 59:1  <b>competitor</b> <sup>[5]</sup> 13:15 47:16 48:6  51:1 54:1  <b>competitors</b> <sup>[6]</sup> 4:12 9:23 10:15  16:16 28:24 55:4</p>	<p><b>complementary</b> <sup>[1]</sup> 22:24  <b>complete</b> <sup>[3]</sup> 54:5 56:1 62:10  <b>completed</b> <sup>[1]</sup> 62:16  <b>completely</b> <sup>[3]</sup> 28:14 46:10 60:5  <b>concentrated</b> <sup>[1]</sup> 9:23  <b>conceptually</b> <sup>[1]</sup> 20:22  <b>concern</b> <sup>[1]</sup> 5:3  <b>concert</b> <sup>[1]</sup> 59:14  <b>conclude</b> <sup>[2]</sup> 35:20 44:25  <b>conclusion</b> <sup>[2]</sup> 11:3,17  <b>conclusions</b> <sup>[1]</sup> 60:8  <b>conclusive</b> <sup>[1]</sup> 10:12  <b>conditions</b> <sup>[1]</sup> 47:3  <b>conflating</b> <sup>[1]</sup> 18:1  <b>considerations</b> <sup>[4]</sup> 12:9 13:23 15:  24,25  <b>considered</b> <sup>[1]</sup> 24:17  <b>considering</b> <sup>[1]</sup> 33:1  <b>consistently</b> <sup>[1]</sup> 63:5  <b>consisting</b> <sup>[1]</sup> 20:24  <b>construct</b> <sup>[1]</sup> 49:8  <b>consumer</b> <sup>[20]</sup> 6:11 7:4 25:1 29:  20 37:16 39:9 48:21 49:6 50:6,12  51:2,3,3,9 59:1,16 60:12 62:8,17  64:2  <b>consumer's</b> <sup>[1]</sup> 64:12  <b>consumers</b> <sup>[25]</sup> 4:16 5:10,21 6:14,  18,20,22 7:12,13 16:9,18 29:2 30:  14,17 32:7 33:18,24 39:14 45:24  50:21 54:16 59:12 62:15 63:10,25  <b>contended</b> <sup>[1]</sup> 41:3  <b>context</b> <sup>[3]</sup> 6:18 16:4,5  <b>contexts</b> <sup>[1]</sup> 25:8  <b>contribute</b> <sup>[1]</sup> 30:5  <b>control</b> <sup>[6]</sup> 12:2 39:15,15 53:6,8  54:6  <b>controls</b> <sup>[1]</sup> 70:1  <b>convention</b> <sup>[1]</sup> 55:5  <b>Correct</b> <sup>[19]</sup> 4:13,17,21 5:5 7:5,6 8:  20,21 9:1,2 13:9 18:23,25 19:1,5,  6 20:16 32:12 38:12  <b>correctly</b> <sup>[1]</sup> 39:10  <b>cost</b> <sup>[9]</sup> 15:16 16:17,17 18:13 27:  18 29:15 48:9 50:5,10  <b>cost/high</b> <sup>[2]</sup> 48:1,5  <b>cost/low</b> <sup>[4]</sup> 15:20 48:1,15 63:12  <b>costs</b> <sup>[12]</sup> 3:22 4:2 9:11 22:23 51:  10,13 54:15 56:2 57:1,12 58:24  64:10  <b>couldn't</b> <sup>[8]</sup> 38:13,15,16 44:25 46:  24 47:2 55:16 56:17  <b>counsel</b> <sup>[5]</sup> 16:22 33:5 60:15 65:  17 70:11  <b>counter</b> <sup>[1]</sup> 64:18  <b>country</b> <sup>[2]</sup> 46:7 54:24  <b>couple</b> <sup>[1]</sup> 19:24  <b>course</b> <sup>[3]</sup> 40:11,12 62:12  <b>COURT</b> <sup>[70]</sup> 1:1,13 3:12 6:5,5 8:11  9:5,6,25 11:10 12:12 13:20 15:4  16:6 17:5,12,15,18,23 19:4,12,17,  18,25 21:22 22:4 25:4,7,19 26:10,  20 32:3,10,22 33:1,10,11 35:18  36:5,9,21 41:15 42:6,20 49:15,23  51:7 53:13,22 54:11 55:2 56:24</p>	<p>57:15 59:4,17 60:10 61:15 62:4  63:1,2,4,8,10 64:5,15 66:1,3,17  67:23 68:1  <b>Court's</b> <sup>[6]</sup> 12:23 13:13,20,23 14:  20 16:3  <b>courts</b> <sup>[4]</sup> 12:15 20:13 57:21,24  <b>cover</b> <sup>[1]</sup> 19:22  <b>create</b> <sup>[1]</sup> 60:2  <b>creates</b> <sup>[1]</sup> 23:12  <b>credit</b> <sup>[18]</sup> 3:18,22 4:3,6 10:21 14:  4 33:12 37:5,14,15 42:1,16 44:20  45:13,22 63:4,11 66:9  <b>criterion</b> <sup>[1]</sup> 21:7  <b>critical</b> <sup>[1]</sup> 9:8  <b>curves</b> <sup>[1]</sup> 12:14  <b>customer</b> <sup>[4]</sup> 29:8 40:14 45:7 47:1  <b>customers</b> <sup>[6]</sup> 3:22,25 12:7 31:18  50:24 63:3  <b>cut</b> <sup>[6]</sup> 10:13 27:3,6,12 31:16 66:11  <b>cuts</b> <sup>[1]</sup> 4:9</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[3]</sup> 1:10,21 69:19  <b>dangerous</b> <sup>[1]</sup> 21:22  <b>dark</b> <sup>[2]</sup> 4:1 31:20  <b>day</b> <sup>[2]</sup> 5:11 37:12  <b>deadweight</b> <sup>[1]</sup> 5:3  <b>deal</b> <sup>[3]</sup> 14:7 46:15 48:23  <b>dealer</b> <sup>[5]</sup> 38:13,15 39:24 40:13 45:  7  <b>dealer's</b> <sup>[1]</sup> 38:21  <b>dealers</b> <sup>[4]</sup> 38:11 39:3 43:12,16  <b>dealership</b> <sup>[3]</sup> 7:21,22 8:23  <b>dealing</b> <sup>[3]</sup> 8:8,17 21:9  <b>dealt</b> <sup>[1]</sup> 63:23  <b>debate</b> <sup>[1]</sup> 25:2  <b>debated</b> <sup>[1]</sup> 64:3  <b>decades</b> <sup>[2]</sup> 19:5,6  <b>decide</b> <sup>[3]</sup> 15:11 51:1 62:4  <b>decision</b> <sup>[1]</sup> 53:13  <b>decisions</b> <sup>[1]</sup> 4:1  <b>decrease</b> <sup>[1]</sup> 49:1  <b>decreases</b> <sup>[1]</sup> 59:12  <b>deeply</b> <sup>[1]</sup> 20:1  <b>defendant</b> <sup>[6]</sup> 20:6 21:10 22:7 55:  13,18 59:25  <b>defendant's</b> <sup>[1]</sup> 52:4  <b>define</b> <sup>[2]</sup> 20:19 43:2  <b>defined</b> <sup>[1]</sup> 20:8  <b>defining</b> <sup>[1]</sup> 21:7  <b>definition</b> <sup>[1]</sup> 20:5  <b>demand</b> <sup>[2]</sup> 12:13 57:7  <b>Dental</b> <sup>[2]</sup> 11:11 14:24  <b>Dentist</b> <sup>[2]</sup> 13:24 14:24  <b>dentist's</b> <sup>[1]</sup> 15:1  <b>Department</b> <sup>[1]</sup> 1:1,21  <b>depending</b> <sup>[2]</sup> 34:19 43:5  <b>depends</b> <sup>[1]</sup> 37:7  <b>Deputy</b> <sup>[1]</sup> 1:20  <b>described</b> <sup>[1]</sup> 33:11  <b>despite</b> <sup>[1]</sup> 66:16  <b>determine</b> <sup>[5]</sup> 13:22 20:21,22,23  57:9  <b>difference</b> <sup>[3]</sup> 27:16 30:1 46:13</p>
--	---	--	---

<p><b>different</b> <sup>[17]</sup> 3:22 9:3 22:12 23:5, 6 25:8 28:16 43:5 45:8 48:8,13,13 49:25 51:23 58:17,19 67:22</p> <p><b>differently</b> <sup>[1]</sup> 34:19</p> <p><b>differs</b> <sup>[1]</sup> 43:5</p> <p><b>difficult</b> <sup>[2]</sup> 19:1 43:1</p> <p><b>direct</b> <sup>[2]</sup> 11:22 53:5</p> <p><b>directed</b> <sup>[1]</sup> 55:25</p> <p><b>directly</b> <sup>[1]</sup> 39:4</p> <p><b>disagree</b> <sup>[4]</sup> 11:3 14:11 35:17 69:2</p> <p><b>discontent</b> <sup>[1]</sup> 68:7</p> <p><b>discount</b> <sup>[6]</sup> 7:4,10 30:19 31:5 34:15 59:16</p> <p><b>discounts</b> <sup>[2]</sup> 3:24 10:14</p> <p><b>Discover</b> <sup>[15]</sup> 7:5,11 30:22 31:1,3 46:11,23 47:4,9,15,20 49:16 68:5,6,10</p> <p><b>Discover's</b> <sup>[1]</sup> 4:6</p> <p><b>disprove</b> <sup>[1]</sup> 60:1</p> <p><b>disregard</b> <sup>[1]</sup> 19:7</p> <p><b>dissatisfied</b> <sup>[1]</sup> 21:10</p> <p><b>dissented</b> <sup>[1]</sup> 56:7</p> <p><b>distinct</b> <sup>[4]</sup> 17:16 24:1 26:17 32:23</p> <p><b>distinction</b> <sup>[1]</sup> 62:3</p> <p><b>distributed</b> <sup>[1]</sup> 50:22</p> <p><b>district</b> <sup>[22]</sup> 6:5,5 33:11 35:18 36:5,9,20 41:15 42:6,19 49:15,23 53:22 54:11 59:17 63:1,1,4,8,10 64:5 68:1</p> <p><b>divide</b> <sup>[2]</sup> 38:16,16</p> <p><b>divided</b> <sup>[2]</sup> 11:12 14:12</p> <p><b>doing</b> <sup>[2]</sup> 39:7,7</p> <p><b>dollar</b> <sup>[3]</sup> 41:5 42:17,18</p> <p><b>down</b> <sup>[1]</sup> 46:1</p> <p><b>downward-sloping</b> <sup>[1]</sup> 12:13</p> <p><b>dramatically</b> <sup>[2]</sup> 33:20 41:14</p> <p><b>drive</b> <sup>[1]</sup> 12:4</p> <p><b>driven</b> <sup>[1]</sup> 42:7</p> <p><b>driving</b> <sup>[1]</sup> 42:5</p> <p><b>dropped</b> <sup>[1]</sup> 28:13</p> <p><b>dropping</b> <sup>[1]</sup> 31:12</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[3]</sup> 34:19 43:12,16</p> <p><b>easier</b> <sup>[1]</sup> 43:8</p> <p><b>Easterbrook's</b> <sup>[1]</sup> 18:21</p> <p><b>echo</b> <sup>[1]</sup> 18:6</p> <p><b>economic</b> <sup>[1]</sup> 11:1</p> <p><b>economically</b> <sup>[1]</sup> 31:13</p> <p><b>economy</b> <sup>[2]</sup> 12:3 41:25</p> <p><b>effect</b> <sup>[22]</sup> 10:8,9,13 11:13,24 17:6,11 22:7 23:7 25:16 31:20 36:6 44:15,22 46:19 48:3 49:17 52:7 54:5 68:21 69:17 70:1</p> <p><b>effective</b> <sup>[1]</sup> 30:10</p> <p><b>effectiveness</b> <sup>[1]</sup> 29:21</p> <p><b>effects</b> <sup>[13]</sup> 3:20 17:19 22:17,18 28:6 32:8 51:21 52:2,5 66:6 67:1,15 68:14</p> <p><b>either</b> <sup>[2]</sup> 12:18 22:10</p> <p><b>element</b> <sup>[1]</sup> 45:11</p> <p><b>eliminate</b> <sup>[1]</sup> 17:7</p>	<p><b>eliminates</b> <sup>[1]</sup> 4:5</p> <p><b>embrace</b> <sup>[1]</sup> 44:8</p> <p><b>emerge</b> <sup>[1]</sup> 63:20</p> <p><b>encourage</b> <sup>[2]</sup> 27:24 38:22</p> <p><b>encouraging</b> <sup>[1]</sup> 30:5</p> <p><b>end</b> <sup>[3]</sup> 5:11 37:12 43:16</p> <p><b>enforced</b> <sup>[2]</sup> 47:6,7</p> <p><b>engage</b> <sup>[1]</sup> 31:6</p> <p><b>engaged</b> <sup>[1]</sup> 31:10</p> <p><b>engaging</b> <sup>[1]</sup> 39:2</p> <p><b>Engineers</b> <sup>[2]</sup> 13:14 66:18</p> <p><b>engineers'</b> <sup>[1]</sup> 66:17</p> <p><b>enhance</b> <sup>[1]</sup> 57:3</p> <p><b>enhanced</b> <sup>[1]</sup> 18:5</p> <p><b>enhances</b> <sup>[1]</sup> 35:4</p> <p><b>enough</b> <sup>[2]</sup> 57:19 59:23</p> <p><b>enter</b> <sup>[3]</sup> 20:18 44:3 63:13</p> <p><b>entered</b> <sup>[1]</sup> 23:8</p> <p><b>entire</b> <sup>[2]</sup> 17:8 50:20</p> <p><b>entirely</b> <sup>[5]</sup> 9:22 17:19 18:8 31:12,14</p> <p><b>entitled</b> <sup>[1]</sup> 70:13</p> <p><b>environment</b> <sup>[1]</sup> 27:23</p> <p><b>equal</b> <sup>[1]</sup> 8:25</p> <p><b>ERIC</b> <sup>[5]</sup> 1:17 2:3,14 3:8 65:21</p> <p><b>erred</b> <sup>[1]</sup> 18:1</p> <p><b>error</b> <sup>[3]</sup> 17:22 56:2,25</p> <p><b>errors</b> <sup>[3]</sup> 17:13 18:22 19:1</p> <p><b>ESQ</b> <sup>[2]</sup> 1:24 2:11</p> <p><b>essence</b> <sup>[2]</sup> 34:2,4</p> <p><b>essentially</b> <sup>[1]</sup> 7:16</p> <p><b>establish</b> <sup>[2]</sup> 22:6,8</p> <p><b>established</b> <sup>[2]</sup> 17:10 20:2</p> <p><b>ET</b> <sup>[5]</sup> 1:3,6 3:4 40:9 56:21</p> <p><b>EVAN</b> <sup>[3]</sup> 1:24 2:11 33:7</p> <p><b>even</b> <sup>[16]</sup> 4:15 14:9,14 15:10 16:6 17:10,24 28:17 29:10,10 30:6 56:6,7 57:11 63:7 64:4</p> <p><b>eventually</b> <sup>[2]</sup> 18:25 40:20</p> <p><b>everybody's</b> <sup>[1]</sup> 40:3</p> <p><b>everyone</b> <sup>[1]</sup> 39:21</p> <p><b>everywhere</b> <sup>[1]</sup> 54:24</p> <p><b>evidence</b> <sup>[14]</sup> 4:20 5:10,15,16,20 6:3,14,22 10:7 11:22,25 42:4 66:24 68:18</p> <p><b>exact</b> <sup>[1]</sup> 67:1</p> <p><b>exactly</b> <sup>[7]</sup> 27:21 35:10 49:3,12,15 59:10 62:4</p> <p><b>examination</b> <sup>[1]</sup> 67:11</p> <p><b>example</b> <sup>[5]</sup> 9:7 14:23 24:20 30:1 68:5</p> <p><b>except</b> <sup>[1]</sup> 27:22</p> <p><b>exception</b> <sup>[1]</sup> 70:5</p> <p><b>excess</b> <sup>[2]</sup> 57:9,18</p> <p><b>exclusive</b> <sup>[5]</sup> 8:8,17 38:22 43:12,15</p> <p><b>executing</b> <sup>[1]</sup> 33:15</p> <p><b>executives</b> <sup>[1]</sup> 26:24</p> <p><b>exercise</b> <sup>[2]</sup> 9:20 11:6</p> <p><b>exist</b> <sup>[2]</sup> 60:13 64:4</p> <p><b>exogenous</b> <sup>[1]</sup> 42:10</p> <p><b>expanding</b> <sup>[1]</sup> 12:1</p> <p><b>experience</b> <sup>[6]</sup> 8:1 19:3 57:22 58:4,6 62:21</p>	<p><b>expert</b> <sup>[1]</sup> 60:4</p> <p><b>explains</b> <sup>[1]</sup> 8:16</p> <p><b>explicitly</b> <sup>[1]</sup> 36:9</p> <p><b>EXPRESS</b> <sup>[13]</sup> 1:6 3:5 6:11 28:20 29:9 36:1 41:4 46:14 47:11 50:19 53:16,18 65:2</p> <p><b>Express's</b> <sup>[8]</sup> 3:16 7:2 10:14 27:10,13 42:9 47:2 54:2</p> <p><b>extensive</b> <sup>[1]</sup> 30:18</p> <p><b>extra</b> <sup>[2]</sup> 18:12,13</p> <p><b>extracted</b> <sup>[3]</sup> 57:10,11,19</p> <p><b>extracts</b> <sup>[1]</sup> 6:11</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> <sup>[1]</sup> 57:6</p> <p><b>facie</b> <sup>[6]</sup> 17:10,15 41:9 52:6 57:20 67:14</p> <p><b>fact</b> <sup>[24]</sup> 9:16 26:13 32:22 33:19 35:3,18,20 37:11 39:9 43:15 45:8 46:21 47:12 48:14 49:16 50:9 51:4,6,8,14 52:14 55:2 57:7 68:2</p> <p><b>factors</b> <sup>[3]</sup> 12:2 41:22 42:13</p> <p><b>factually</b> <sup>[2]</sup> 6:1,4</p> <p><b>fail</b> <sup>[1]</sup> 59:21</p> <p><b>failed</b> <sup>[6]</sup> 4:7 46:10 60:1 64:8,9,11</p> <p><b>fairly</b> <sup>[2]</sup> 19:13 45:11</p> <p><b>falls</b> <sup>[1]</sup> 59:25</p> <p><b>false</b> <sup>[2]</sup> 57:24 59:7</p> <p><b>far</b> <sup>[1]</sup> 40:10</p> <p><b>favor</b> <sup>[1]</sup> 11:1</p> <p><b>feasible</b> <sup>[1]</sup> 31:13</p> <p><b>February</b> <sup>[1]</sup> 1:11</p> <p><b>federal</b> <sup>[1]</sup> 24:15</p> <p><b>fee</b> <sup>[2]</sup> 31:5 51:8</p> <p><b>feel</b> <sup>[3]</sup> 30:15,17 31:12</p> <p><b>fees</b> <sup>[11]</sup> 13:18,25 15:13 27:4,6,12,12 29:1 30:24 49:6 59:11</p> <p><b>few</b> <sup>[1]</sup> 65:25</p> <p><b>fewer</b> <sup>[1]</sup> 36:19</p> <p><b>field</b> <sup>[1]</sup> 19:21</p> <p><b>fierce</b> <sup>[2]</sup> 33:13 42:5</p> <p><b>filed</b> <sup>[1]</sup> 19:11</p> <p><b>find</b> <sup>[2]</sup> 23:21 48:9</p> <p><b>finding</b> <sup>[1]</sup> 51:4</p> <p><b>findings</b> <sup>[5]</sup> 49:16 54:14 63:23 64:15 65:14</p> <p><b>fine</b> <sup>[2]</sup> 47:23 68:16</p> <p><b>finger</b> <sup>[1]</sup> 42:24</p> <p><b>finish</b> <sup>[1]</sup> 25:21</p> <p><b>firm</b> <sup>[1]</sup> 38:10</p> <p><b>firms</b> <sup>[1]</sup> 63:5</p> <p><b>first</b> <sup>[13]</sup> 6:17 17:13,17 20:4,5,19 22:5 26:9 32:24 44:15 53:11 59:24 65:25</p> <p><b>fix</b> <sup>[4]</sup> 38:13 39:5,25 66:18</p> <p><b>fixing</b> <sup>[3]</sup> 23:16 38:20 55:4</p> <p><b>flag</b> <sup>[1]</sup> 23:18</p> <p><b>flip</b> <sup>[1]</sup> 12:19</p> <p><b>focus</b> <sup>[2]</sup> 11:2 26:22</p> <p><b>focused</b> <sup>[2]</sup> 17:18 32:8</p> <p><b>folks</b> <sup>[1]</sup> 59:5</p> <p><b>following</b> <sup>[2]</sup> 31:5,7</p> <p><b>forced</b> <sup>[1]</sup> 42:8</p> <p><b>forces</b> <sup>[1]</sup> 67:25</p>	<p><b>foreclosed</b> <sup>[1]</sup> 31:15</p> <p><b>forget</b> <sup>[1]</sup> 55:3</p> <p><b>form</b> <sup>[6]</sup> 4:9 31:8,14 39:11 40:4 68:25</p> <p><b>forms</b> <sup>[1]</sup> 63:3</p> <p><b>formula</b> <sup>[1]</sup> 22:14</p> <p><b>forth</b> <sup>[1]</sup> 43:23</p> <p><b>found</b> <sup>[19]</sup> 36:5,9,21 41:15 42:6 44:13 49:15,23 53:14,22 54:11 59:17 63:1,2,4,8,10 64:5 68:1</p> <p><b>four</b> <sup>[2]</sup> 3:18 10:21</p> <p><b>four-way</b> <sup>[1]</sup> 26:13</p> <p><b>frankly</b> <sup>[2]</sup> 11:18 33:17</p> <p><b>free</b> <sup>[3]</sup> 18:11 27:9 45:22</p> <p><b>front</b> <sup>[1]</sup> 41:13</p> <p><b>fuel</b> <sup>[2]</sup> 54:3,11</p> <p><b>fueling</b> <sup>[1]</sup> 59:12</p> <p><b>full</b> <sup>[2]</sup> 15:18 66:25</p> <p><b>fully</b> <sup>[1]</sup> 18:11</p> <p><b>fundamental</b> <sup>[4]</sup> 16:12 17:13,22 25:23</p> <p><b>fundamentally</b> <sup>[3]</sup> 9:3 14:19 16:3</p> <p><b>further</b> <sup>[1]</sup> 16:19</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gain</b> <sup>[1]</sup> 29:14</p> <p><b>gas</b> <sup>[1]</sup> 22:23</p> <p><b>gave</b> <sup>[1]</sup> 4:9</p> <p><b>GDP</b> <sup>[1]</sup> 12:3</p> <p><b>gears</b> <sup>[1]</sup> 54:22</p> <p><b>General</b> <sup>[6]</sup> 1:20 20:12 31:25 32:2 39:11,12</p> <p><b>generally</b> <sup>[5]</sup> 8:2,12 11:7 32:20 65:4</p> <p><b>generous</b> <sup>[2]</sup> 18:3 25:19</p> <p><b>gets</b> <sup>[1]</sup> 6:11</p> <p><b>getting</b> <sup>[3]</sup> 23:15 45:15 48:24</p> <p><b>GINSBURG</b> <sup>[4]</sup> 12:21 14:2 67:3,6</p> <p><b>give</b> <sup>[9]</sup> 8:25 14:23 24:7,8 31:4,18 34:14 43:12 47:5</p> <p><b>given</b> <sup>[6]</sup> 4:19 7:2 13:1 14:10 19:16 59:15</p> <p><b>giving</b> <sup>[3]</sup> 36:23 38:21 46:15</p> <p><b>gizmo</b> <sup>[3]</sup> 40:2 43:11 55:11</p> <p><b>gizmos</b> <sup>[1]</sup> 44:11</p> <p><b>goods</b> <sup>[2]</sup> 16:10 20:9</p> <p><b>GORSUCH</b> <sup>[33]</sup> 4:11,14,19 5:1,7,16,19,24 6:2,9,19,25 7:18 8:10 9:15,19 10:1 18:15 19:14 25:22 27:9 28:1,8,12,23 29:17 52:8,12 68:19,24 69:4,13,15</p> <p><b>Gorsuch's</b> <sup>[2]</sup> 26:19 45:23</p> <p><b>got</b> <sup>[1]</sup> 66:10</p> <p><b>government</b> <sup>[17]</sup> 3:13 12:16 24:15 41:3,12 42:19 44:21 51:12,22 64:8,9,22 65:9 67:5,9,14,24</p> <p><b>government's</b> <sup>[4]</sup> 12:11 42:11 51:17 60:3</p> <p><b>grain</b> <sup>[1]</sup> 29:6</p> <p><b>grant</b> <sup>[1]</sup> 19:12</p> <p><b>great</b> <sup>[2]</sup> 64:24 65:4</p> <p><b>greater</b> <sup>[2]</sup> 4:3 13:3</p> <p><b>gremlin</b> <sup>[1]</sup> 54:21</p> <p><b>grew</b> <sup>[1]</sup> 38:1</p>
---	---	---	--

<p><b>ground</b> <sup>[1]</sup> 26:16  <b>Group</b> <sup>[1]</sup> 67:23  <b>grows</b> <sup>[2]</sup> 41:25 42:2  <b>growth</b> <sup>[1]</sup> 12:3  <b>guess</b> <sup>[6]</sup> 22:19 23:18 24:13 31:23 32:19,21</p>	<p><b>improve</b> <sup>[2]</sup> 15:2 40:2  <b>improved</b> <sup>[2]</sup> 41:14 66:20  <b>improves</b> <sup>[1]</sup> 43:24  <b>inability</b> <sup>[1]</sup> 48:19  <b>incentive</b> <sup>[1]</sup> 4:5  <b>incentives</b> <sup>[1]</sup> 3:23  <b>include</b> <sup>[2]</sup> 12:6,9  <b>includes</b> <sup>[1]</sup> 14:5  <b>including</b> <sup>[2]</sup> 5:11 7:12  <b>inconsistent</b> <sup>[3]</sup> 14:20 15:22 16:3  <b>incorrectly</b> <sup>[1]</sup> 26:21  <b>increase</b> <sup>[12]</sup> 5:9,13,20 13:4 36:8, 20 50:11,20 57:6,16 58:13 59:22  <b>increased</b> <sup>[5]</sup> 6:10 33:19 39:20,22 41:22  <b>increases</b> <sup>[5]</sup> 42:11 54:10 58:8 59:8 63:9  <b>increasing</b> <sup>[1]</sup> 57:7  <b>incurring</b> <sup>[1]</sup> 51:11  <b>indeed</b> <sup>[4]</sup> 32:5 41:3 46:1 47:23  <b>Indiana</b> <sup>[2]</sup> 13:24 14:24  <b>indirect</b> <sup>[3]</sup> 53:6,7,11  <b>indirectly</b> <sup>[1]</sup> 39:4  <b>individual</b> <sup>[1]</sup> 31:2  <b>inducement</b> <sup>[1]</sup> 62:1  <b>industry-wide</b> <sup>[1]</sup> 69:11  <b>inextricably</b> <sup>[1]</sup> 50:1  <b>inflation</b> <sup>[1]</sup> 12:3  <b>information</b> <sup>[1]</sup> 45:16  <b>informing</b> <sup>[1]</sup> 3:21  <b>inherent</b> <sup>[2]</sup> 22:3,14  <b>initial</b> <sup>[3]</sup> 3:13 12:11,17  <b>inquiry</b> <sup>[1]</sup> 32:25  <b>instance</b> <sup>[3]</sup> 20:19,21 30:22  <b>insulate</b> <sup>[1]</sup> 15:17  <b>insurers</b> <sup>[1]</sup> 14:25  <b>intended</b> <sup>[1]</sup> 27:24  <b>intense</b> <sup>[1]</sup> 54:11  <b>interbrand</b> <sup>[7]</sup> 3:17 8:4,6,7,9 9:8 16:14  <b>interrelated</b> <sup>[2]</sup> 32:23 33:2  <b>interrupt</b> <sup>[2]</sup> 10:19 21:15  <b>intertwined</b> <sup>[1]</sup> 50:2  <b>intrabrand</b> <sup>[3]</sup> 7:24 9:14 38:14  <b>investing</b> <sup>[1]</sup> 58:25  <b>investment</b> <sup>[1]</sup> 33:23  <b>involved</b> <sup>[3]</sup> 14:4 34:6 62:17  <b>irrelevant</b> <sup>[1]</sup> 13:4  <b>Isn't</b> <sup>[7]</sup> 7:1,18 24:25 31:13 34:1 40:5 51:15  <b>isolated</b> <sup>[1]</sup> 22:17  <b>issuance</b> <sup>[1]</sup> 21:3  <b>issue</b> <sup>[15]</sup> 18:19 25:3,22 37:13,14 40:24 44:20 47:15,20 52:11 59:18 60:22 61:17,18 66:6  <b>issues</b> <sup>[3]</sup> 19:13 28:25 53:24  <b>issuing</b> <sup>[1]</sup> 21:4  <b>itself</b> <sup>[4]</sup> 13:21 26:16 48:9 64:5</p>	<p><b>joint</b> <sup>[1]</sup> 22:23  <b>Judge</b> <sup>[4]</sup> 18:21 51:4 55:14 69:19  <b>judges</b> <sup>[1]</sup> 43:22  <b>judicial</b> <sup>[2]</sup> 18:22,25  <b>Justice</b> <sup>[141]</sup> 1:21 3:3,7,11 4:11,14, 19 5:1,7,16,19,24 6:2,9,19,25 7:1, 18 8:10,15,22 9:15,19 10:1,16,18, 24 11:16 12:6,21,25,25 13:6,9 14: 2 16:21 17:4 18:15 19:14 20:11, 17 21:14,21 22:20 24:6,10,18 25: 20,22,25 26:1,19 27:9 28:1,8,12, 23 29:17 31:24 32:10,13 33:4,9 34:1,10 35:1,7,11,15,21 36:10,13, 22 37:4,22 39:17,21,23 41:17,21 42:14,22 44:12,17 45:2,3,5,6,14, 20,23,25 46:9,23 47:18 48:20 49: 12 50:13,17 51:15,20 52:8,12,13 53:4,25 54:4,19 56:5,12,15 57:5, 25 58:3,15 60:15,24 61:1,3,5,10, 13,23 62:19,24 64:21 65:7,16,19, 24 67:3,6 68:19,24 69:4,13,15,24 70:4,6,10  <b>justification</b> <sup>[6]</sup> 22:9,11 23:18 38: 24 40:8,19  <b>justifications</b> <sup>[1]</sup> 25:10  <b>justified</b> <sup>[3]</sup> 22:15 38:19,20  <b>justify</b> <sup>[1]</sup> 66:19</p>	<p><b>legally</b> <sup>[1]</sup> 5:23  <b>legitimate</b> <sup>[1]</sup> 18:8  <b>less</b> <sup>[6]</sup> 7:8,13 29:8 30:7,11 56:4  <b>lessened</b> <sup>[1]</sup> 66:3  <b>life</b> <sup>[1]</sup> 40:3  <b>limit</b> <sup>[1]</sup> 52:15  <b>line</b> <sup>[1]</sup> 21:16  <b>linked</b> <sup>[1]</sup> 50:1  <b>little</b> <sup>[2]</sup> 40:6 62:23  <b>loads</b> <sup>[1]</sup> 24:11  <b>local</b> <sup>[2]</sup> 48:22,25  <b>location</b> <sup>[1]</sup> 24:3  <b>long</b> <sup>[6]</sup> 19:2 27:22 28:19,22 31:11 49:6  <b>look</b> <sup>[7]</sup> 21:25 37:10 42:23 43:14 55:10 63:7 64:24  <b>looked</b> <sup>[2]</sup> 32:18 61:4  <b>looking</b> <sup>[5]</sup> 17:24 20:2 25:11,12 32:14  <b>looks</b> <sup>[3]</sup> 54:20 56:20 60:10  <b>loss</b> <sup>[1]</sup> 5:3  <b>lot</b> <sup>[6]</sup> 18:23 24:12 30:9,11 43:5 58: 7  <b>love</b> <sup>[1]</sup> 68:11  <b>low</b> <sup>[8]</sup> 15:20 16:17,17 48:1,15 56: 3 57:1 63:12  <b>low-cost</b> <sup>[7]</sup> 27:18 30:23 47:21,25 48:19 49:9,20  <b>low-cutting</b> <sup>[1]</sup> 68:9  <b>low-price</b> <sup>[1]</sup> 63:20  <b>lower</b> <sup>[12]</sup> 4:10 8:25 29:1,16 30:24 40:14 45:9,10 49:5 51:5 57:21,24  <b>lowered</b> <sup>[4]</sup> 50:9,10,11,23  <b>lowering</b> <sup>[1]</sup> 4:4</p>
<p style="text-align: center;"><b>H</b></p> <p><b>hand</b> <sup>[5]</sup> 11:9,9 58:12 64:17,22  <b>happen</b> <sup>[2]</sup> 57:21 60:10  <b>happened</b> <sup>[6]</sup> 35:5 37:18,19,20 54: 9 59:10  <b>happening</b> <sup>[1]</sup> 66:7  <b>happens</b> <sup>[1]</sup> 64:18  <b>hard</b> <sup>[3]</sup> 20:21 37:5 46:25  <b>harder</b> <sup>[2]</sup> 18:23 38:23  <b>harm</b> <sup>[2]</sup> 3:14 57:17  <b>harmful</b> <sup>[2]</sup> 25:12 32:7  <b>harms</b> <sup>[1]</sup> 25:13  <b>hear</b> <sup>[1]</sup> 3:3  <b>heard</b> <sup>[2]</sup> 51:25 58:19  <b>held</b> <sup>[2]</sup> 6:5 17:9  <b>help</b> <sup>[1]</sup> 22:1  <b>high</b> <sup>[6]</sup> 8:23 15:15 27:18,18 48:1, 5  <b>high-cost</b> <sup>[1]</sup> 47:25  <b>higher</b> <sup>[19]</sup> 6:7,7 11:9,11,23 12:12, 18 16:7,8,9 18:9 27:14 35:25 45:9, 11 67:21,24 68:2,7  <b>highly</b> <sup>[1]</sup> 9:22  <b>hire</b> <sup>[1]</sup> 55:6  <b>Honor</b> <sup>[36]</sup> 34:8,23 35:10,14,17 36: 4,16 37:2,9 39:13 40:22 42:4 44:6 45:18 46:21 47:4 48:14 49:10,22 50:3 51:6 52:3 53:1 54:9 55:23 56: 10,23 57:15 58:22 59:3 60:9,17 62:23 63:22 65:9 70:9  <b>Honor's</b> <sup>[2]</sup> 41:7 50:8  <b>hope</b> <sup>[1]</sup> 18:24  <b>hopes</b> <sup>[1]</sup> 30:25  <b>horizontal</b> <sup>[15]</sup> 3:20 10:3,6,8,9 28: 1,7 35:16 54:5 55:24 56:2 66:7 67: 2 68:14 70:1  <b>however</b> <sup>[1]</sup> 6:12  <b>huge</b> <sup>[1]</sup> 12:2  <b>hypothetical</b> <sup>[8]</sup> 8:8 20:24 36:4 40:25 41:8 44:8,14 50:8</p>	<p style="text-align: center;"><b>I</b></p> <p><b>identify</b> <sup>[1]</sup> 43:9  <b>ignore</b> <sup>[2]</sup> 9:16 14:7  <b>illegal</b> <sup>[4]</sup> 66:14,15,21,22  <b>imagine</b> <sup>[3]</sup> 23:10 26:23 44:4  <b>impact</b> <sup>[9]</sup> 7:24 43:8,10,18 44:1 46: 7 60:6,20 62:14  <b>impaired</b> <sup>[1]</sup> 65:11  <b>impeded</b> <sup>[1]</sup> 20:6  <b>implement</b> <sup>[1]</sup> 30:23  <b>important</b> <sup>[2]</sup> 25:24 66:1  <b>impose</b> <sup>[1]</sup> 13:15  <b>imposed</b> <sup>[1]</sup> 16:8  <b>imposes</b> <sup>[2]</sup> 28:20 57:3  <b>impossible</b> <sup>[2]</sup> 20:22 63:11  <b>imprecise</b> <sup>[1]</sup> 25:6</p>	<p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> <sup>[11]</sup> 20:11,17 45:2,5 47:18 48:20 49:12 61:1 62:19,24 64:21  <b>Katz</b> <sup>[1]</sup> 60:3  <b>KENNEDY</b> <sup>[8]</sup> 10:16,18,24 11:16 12:6 21:14,21 57:5  <b>Kennedy's</b> <sup>[1]</sup> 13:1  <b>key</b> <sup>[1]</sup> 45:11  <b>Kia</b> <sup>[5]</sup> 29:25 30:1,7,10,10  <b>Kias</b> <sup>[1]</sup> 27:17  <b>kind</b> <sup>[6]</sup> 22:3 25:9 27:14 39:19 43: 8 48:23</p> <p style="text-align: center;"><b>L</b></p> <p><b>language</b> <sup>[1]</sup> 38:4  <b>large</b> <sup>[2]</sup> 31:11 43:4  <b>larger</b> <sup>[1]</sup> 33:17  <b>last</b> <sup>[1]</sup> 56:25  <b>late</b> <sup>[1]</sup> 4:8  <b>Laughter</b> <sup>[3]</sup> 56:11 58:2,21  <b>law</b> <sup>[7]</sup> 10:25 18:18 24:25 43:2,22 54:23 61:5  <b>laws</b> <sup>[4]</sup> 4:15 5:2 27:24 52:23  <b>lead</b> <sup>[1]</sup> 16:7  <b>learn</b> <sup>[1]</sup> 37:24  <b>learned</b> <sup>[2]</sup> 7:25 58:12  <b>lease</b> <sup>[1]</sup> 9:25  <b>least</b> <sup>[5]</sup> 21:3 23:22 31:11 39:10 63:16  <b>leave</b> <sup>[1]</sup> 55:17  <b>leaving</b> <sup>[2]</sup> 29:10 46:11  <b>lecture</b> <sup>[1]</sup> 55:6  <b>Leegin</b> <sup>[9]</sup> 9:5,25 19:5 56:6 69:24 70:2,3,5,7  <b>left</b> <sup>[1]</sup> 5:8  <b>leg</b> <sup>[1]</sup> 59:24</p>	<p style="text-align: center;"><b>M</b></p> <p><b>made</b> <sup>[6]</sup> 9:6 16:6 17:13 23:2,24 25:8  <b>main</b> <sup>[3]</sup> 9:23 51:24 58:9  <b>maintenance</b> <sup>[6]</sup> 9:7,10 16:5,7,14 40:1  <b>MALCOLM</b> <sup>[4]</sup> 1:20 2:7 17:1 29: 17  <b>manner</b> <sup>[1]</sup> 69:2  <b>manufacturer's</b> <sup>[1]</sup> 16:11  <b>manufacturer/distributor</b> <sup>[2]</sup> 8: 5 9:4  <b>manufacturers</b> <sup>[3]</sup> 8:24 23:15 24: 21  <b>many</b> <sup>[6]</sup> 8:1,1,13 41:22 48:15 59: 9  <b>margin</b> <sup>[2]</sup> 50:22,23  <b>margins</b> <sup>[1]</sup> 57:13  <b>market</b> <sup>[80]</sup> 4:4 7:8 9:17 11:18 12: 13 13:2 14:11,12 15:11 17:8,19, 25 18:19,25 20:5,7,7,15,19,23,24 21:8,8,23,24 22:21 23:23,25 25: 22 26:5,7 32:15,25 33:2 37:11,11 39:16 41:4 43:3,14 44:2 47:5 48:4, 16 49:19,24 51:23,25 52:19,20,20, 25 53:5,7,9,12,14 54:6,7,20 55:11, 15,20 56:21 58:16 59:1 63:13,15, 19,21 65:4 66:25 68:15,16,25 69: 6,10,10,16,21</p>

<p><b>market-wide</b> <sup>[1]</sup> 10:23  <b>marketplace</b> <sup>[2]</sup> 9:20,22  <b>markets</b> <sup>[12]</sup> 11:12 17:17 18:14 19:22 26:3,17 32:4,23 38:3,16 60:25 61:4  <b>MasterCard</b> <sup>[14]</sup> 7:5 9:16 26:24 27:11 28:14,18 29:3,12,23 30:13 31:16 39:15 42:8 53:20  <b>MasterCards</b> <sup>[1]</sup> 26:25  <b>match</b> <sup>[2]</sup> 42:8 54:1  <b>matter</b> <sup>[3]</sup> 1:12 43:17 70:13  <b>mean</b> <sup>[25]</sup> 10:2 18:16 19:11 21:15, 17 22:21 24:11 27:10 29:11,24 34:3 40:17,18 41:25 44:4 46:23 47:19 48:21 49:13,13 51:25 54:25 56:7 58:10 64:25  <b>meaning</b> <sup>[1]</sup> 49:19  <b>means</b> <sup>[1]</sup> 48:4  <b>measured</b> <sup>[1]</sup> 29:21  <b>mechanism</b> <sup>[1]</sup> 46:10  <b>meet</b> <sup>[2]</sup> 5:23 52:16  <b>mentioned</b> <sup>[1]</sup> 61:5  <b>Mercedes</b> <sup>[2]</sup> 29:25 30:7  <b>merchant</b> <sup>[40]</sup> 7:3 11:23 13:18,25 15:12 20:25 21:1 24:3,4 26:14 27:4,6,7 29:1,7 30:24 31:4,5,11,17 33:14 34:14 35:22 37:17 45:25 46:25 49:5 50:7,10 51:8 52:21 54:2,6 59:11 60:11 62:8 63:24 64:2,11 66:12  <b>merchant's</b> <sup>[1]</sup> 52:15  <b>merchants</b> <sup>[27]</sup> 3:19,20 4:2,15 5:9 6:17 7:11 14:6 17:20 27:4 28:21, 24 29:16,22 31:2,12,18 33:21,25 46:3 47:10,13 53:17 63:2 68:8,10 69:9  <b>merely</b> <sup>[1]</sup> 59:22  <b>met</b> <sup>[2]</sup> 3:13 67:14  <b>metric</b> <sup>[1]</sup> 42:20  <b>might</b> <sup>[11]</sup> 16:7,18 23:6 26:5 27:1, 3 29:5 32:17 48:21 52:16,18  <b>Miles</b> <sup>[1]</sup> 19:4  <b>million</b> <sup>[1]</sup> 53:17  <b>millions</b> <sup>[3]</sup> 33:25 47:9,9  <b>mind</b> <sup>[1]</sup> 22:22  <b>minutes</b> <sup>[1]</sup> 65:20  <b>mischief</b> <sup>[1]</sup> 60:2  <b>misleading</b> <sup>[1]</sup> 60:7  <b>mix</b> <sup>[2]</sup> 51:1,2  <b>model</b> <sup>[1]</sup> 51:18  <b>moment</b> <sup>[2]</sup> 35:25 62:9  <b>Monday</b> <sup>[1]</sup> 1:11  <b>money</b> <sup>[2]</sup> 4:9 46:12  <b>monopoly</b> <sup>[2]</sup> 18:24 57:10  <b>morning</b> <sup>[2]</sup> 48:17 62:2  <b>Most</b> <sup>[4]</sup> 9:13 42:25 43:1 66:1  <b>multi-sided</b> <sup>[1]</sup> 11:6  <b>MURPHY</b> <sup>[54]</sup> 1:17 2:3,14 3:6,7,8, 11 4:12,13,17,22 5:5,14,18,22 6:1, 4,16,21 7:6 8:3,11,21 9:2,18,21 10:5,17,19,20 11:7,20 12:8,22 13:5,8,11 14:8 18:7 20:12 24:14 65:19,21,24 67:3,4,12 68:23 69:1,6, 14,18 70:2,7</p>	<p><b>must</b> <sup>[1]</sup> 40:23  <b>myself</b> <sup>[1]</sup> 34:16  <b>mystery</b> <sup>[1]</sup> 24:22</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>National</b> <sup>[1]</sup> 13:13  <b>nature</b> <sup>[3]</sup> 13:7 34:20 41:23  <b>necessarily</b> <sup>[1]</sup> 4:14  <b>necessary</b> <sup>[2]</sup> 19:20 22:13  <b>need</b> <sup>[8]</sup> 22:1 34:17,24 53:6 55:10 62:4 69:2,5  <b>needed</b> <sup>[1]</sup> 68:17  <b>needs</b> <sup>[1]</sup> 57:9  <b>negotiate</b> <sup>[1]</sup> 31:3  <b>net</b> <sup>[4]</sup> 5:12,20 6:7,14  <b>network</b> <sup>[2]</sup> 17:20 28:21  <b>networks</b> <sup>[2]</sup> 21:2 31:10  <b>never</b> <sup>[10]</sup> 22:21 23:13,17 36:5 37:6 41:16 50:15 51:17,25 53:13  <b>New</b> <sup>[9]</sup> 1:24,24 18:18,18 19:13 23:12 40:1 43:11 44:10  <b>newspaper</b> <sup>[2]</sup> 61:6,7  <b>newspapers</b> <sup>[2]</sup> 61:20,21  <b>next</b> <sup>[2]</sup> 3:4 36:17  <b>nightmare</b> <sup>[1]</sup> 55:12  <b>nobody</b> <sup>[3]</sup> 55:15 59:17 69:10  <b>non-discrimination</b> <sup>[1]</sup> 32:5  <b>non-market</b> <sup>[1]</sup> 67:25  <b>none</b> <sup>[3]</sup> 47:11 56:12 65:14  <b>nonetheless</b> <sup>[5]</sup> 43:20 56:8,13,15 63:21  <b>nor</b> <sup>[1]</sup> 64:15  <b>normally</b> <sup>[1]</sup> 5:1  <b>nothing</b> <sup>[5]</sup> 51:10 57:8 61:22 63:25 68:12  <b>notion</b> <sup>[2]</sup> 10:2 23:5  <b>number</b> <sup>[4]</sup> 25:23,25 42:16 61:24  <b>nut</b> <sup>[1]</sup> 22:25  <b>nuts</b> <sup>[4]</sup> 22:24 23:1 24:7,8</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obligation</b> <sup>[1]</sup> 52:4  <b>obvious</b> <sup>[1]</sup> 40:12  <b>obviously</b> <sup>[2]</sup> 30:9 69:22  <b>occasional</b> <sup>[1]</sup> 18:23  <b>occur</b> <sup>[1]</sup> 59:8  <b>odd</b> <sup>[1]</sup> 39:16  <b>offer</b> <sup>[5]</sup> 7:3,12 34:5 48:19 63:12  <b>offered</b> <sup>[1]</sup> 21:11  <b>offering</b> <sup>[2]</sup> 3:23 35:23  <b>offers</b> <sup>[1]</sup> 33:18  <b>offset</b> <sup>[1]</sup> 6:7  <b>often</b> <sup>[2]</sup> 27:1 47:23  <b>oftentimes</b> <sup>[1]</sup> 67:22  <b>OHIO</b> <sup>[3]</sup> 1:3,17 3:4  <b>Oil</b> <sup>[2]</sup> 19:6 22:23  <b>Okay</b> <sup>[8]</sup> 4:19 5:7 23:3,9,17 38:5 40:3,9  <b>one</b> <sup>[40]</sup> 4:24 11:25 13:16 14:7,11, 16 15:11 17:15 18:6 21:25 27:1, 20 30:7,8 33:15 35:19 37:2,22 41:19 42:25 43:1 45:4,4 48:17 50:19, 22 53:15,16 56:17 57:9 58:9 61:6, 8,12 63:23 64:17,18,21 66:5 67:1</p>	<p><b>only</b> <sup>[22]</sup> 7:20 8:5 9:13 32:2,16,21 36:10 40:25 44:2 48:5 50:19 53:16 57:25 58:15 60:3,10 63:19,24 64:17 65:2,8 70:3  <b>opportunity</b> <sup>[1]</sup> 27:12  <b>opposite</b> <sup>[1]</sup> 60:12  <b>opposition</b> <sup>[1]</sup> 19:11  <b>option</b> <sup>[4]</sup> 7:12 54:16 55:18 68:9  <b>options</b> <sup>[4]</sup> 6:23 7:8,13 48:15  <b>oral</b> <sup>[8]</sup> 1:12 2:2,6,10 3:8 17:1 33:7 37:25  <b>order</b> <sup>[4]</sup> 8:6 13:16 14:17 23:16  <b>originally</b> <sup>[1]</sup> 28:9  <b>other</b> <sup>[27]</sup> 4:24 5:18 7:4 8:24 12:1, 4 13:17 14:7,18 15:25 21:2 23:25 26:4,18 27:2 30:20 33:1 36:6 40:16 42:12 43:16 46:15 51:10 52:24 57:4 60:21 66:13  <b>others</b> <sup>[4]</sup> 37:25 39:25 48:13 49:25  <b>otherwise</b> <sup>[2]</sup> 23:14 31:10  <b>out</b> <sup>[10]</sup> 10:3 12:8 20:10,14 23:2 29:1 38:7 51:7 53:15,16  <b>out-balance</b> <sup>[1]</sup> 40:9  <b>output</b> <sup>[26]</sup> 4:20,25 11:2,5,8,10,12, 17,25 12:1,6,8,12,19 13:3 37:18 39:19,22 41:11,17,21 42:1,11 44:22 57:17 58:23  <b>outweighs</b> <sup>[1]</sup> 51:24  <b>over</b> <sup>[4]</sup> 56:25 62:12 65:12,12  <b>overwhelmingly</b> <sup>[1]</sup> 68:18  <b>own</b> <sup>[6]</sup> 22:22 27:12 28:18 29:7 31:17,18</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> <sup>[1]</sup> 70:12  <b>PAGE</b> <sup>[1]</sup> 2:2  <b>pages</b> <sup>[1]</sup> 6:6  <b>paid</b> <sup>[1]</sup> 36:20  <b>painful</b> <sup>[2]</sup> 7:25 19:2  <b>paper</b> <sup>[1]</sup> 62:14  <b>part</b> <sup>[10]</sup> 5:6 21:18 24:17 26:9,18 28:8,15,21 40:25 59:23  <b>particular</b> <sup>[4]</sup> 31:4 41:24 47:16 66:5  <b>particularly</b> <sup>[1]</sup> 57:2  <b>parties</b> <sup>[2]</sup> 50:6 62:8  <b>pass</b> <sup>[2]</sup> 46:25 49:1  <b>passed</b> <sup>[3]</sup> 50:21 51:9 63:9  <b>passing</b> <sup>[1]</sup> 49:5  <b>past</b> <sup>[1]</sup> 49:1  <b>patient</b> <sup>[1]</sup> 15:3  <b>pause</b> <sup>[1]</sup> 68:20  <b>pay</b> <sup>[6]</sup> 5:12 6:14 30:6,11 35:12 36:2  <b>paying</b> <sup>[2]</sup> 35:24,25  <b>payment</b> <sup>[1]</sup> 63:3  <b>penny</b> <sup>[1]</sup> 51:8  <b>people</b> <sup>[12]</sup> 23:6 24:8 26:25 27:17 29:12 34:6 37:4 38:2 46:3 55:3,4 56:3  <b>per</b> <sup>[4]</sup> 66:14,15,20,22  <b>percent</b> <sup>[14]</sup> 7:10 9:17 34:15,18 35:12 39:16 41:4,5 44:2 47:5,7 52:24</p>	<p>53:12 69:9  <b>perfectly</b> <sup>[4]</sup> 15:14 45:22 47:23 59:9  <b>perhaps</b> <sup>[4]</sup> 8:25 17:21 25:6 54:25  <b>person</b> <sup>[3]</sup> 39:23 45:16 46:4  <b>persuade</b> <sup>[1]</sup> 18:11  <b>Petition</b> <sup>[1]</sup> 6:6  <b>Petitioners</b> <sup>[9]</sup> 1:4,18,23 2:4,9,15 3:9 17:3 65:22  <b>phenomenal</b> <sup>[1]</sup> 11:18  <b>phenomenon</b> <sup>[1]</sup> 68:6  <b>Phil</b> <sup>[1]</sup> 24:23  <b>phrases</b> <sup>[1]</sup> 38:3  <b>Picayune</b> <sup>[2]</sup> 61:12,13  <b>place</b> <sup>[2]</sup> 7:15 59:8  <b>plaintiff</b> <sup>[7]</sup> 22:6,10 52:5 57:11 59:20 60:1,19  <b>plaintiff's</b> <sup>[1]</sup> 17:14  <b>plaintiffs</b> <sup>[1]</sup> 17:9  <b>plane</b> <sup>[1]</sup> 59:13  <b>platform</b> <sup>[4]</sup> 11:6 60:5,7 62:6  <b>platforms</b> <sup>[2]</sup> 32:20 38:3  <b>player</b> <sup>[1]</sup> 52:24  <b>plays</b> <sup>[1]</sup> 20:14  <b>please</b> <sup>[7]</sup> 3:12 10:18 14:3 17:5 33:10 65:7 70:6  <b>point</b> <sup>[16]</sup> 15:10 18:7 19:18 21:6 23:24 25:6,14 26:1 29:1 44:7,9 48:24 54:19 58:17,19 66:1  <b>pointed</b> <sup>[1]</sup> 51:7  <b>points</b> <sup>[2]</sup> 37:6 65:25  <b>poisoned</b> <sup>[3]</sup> 23:16 24:21,24  <b>policies</b> <sup>[1]</sup> 15:23  <b>positives</b> <sup>[2]</sup> 57:24 59:6  <b>possible</b> <sup>[2]</sup> 26:4 55:22  <b>possibly</b> <sup>[1]</sup> 44:25  <b>power</b> <sup>[27]</sup> 20:23 21:8 32:25 52:19, 20,20,25 53:5,9,14,21,23 54:6,20 55:11,15,20 56:22 57:2 58:16 68:15,17,25 69:7,10,16,21  <b>powerful</b> <sup>[1]</sup> 68:6  <b>powerfully</b> <sup>[2]</sup> 68:13 69:7  <b>practical</b> <sup>[1]</sup> 58:6  <b>practices</b> <sup>[3]</sup> 22:15 30:6 31:7  <b>practicing</b> <sup>[1]</sup> 62:21  <b>precedent</b> <sup>[1]</sup> 20:1  <b>preclude</b> <sup>[1]</sup> 32:25  <b>prefer</b> <sup>[2]</sup> 7:9 39:9  <b>preferred</b> <sup>[1]</sup> 27:8  <b>premise</b> <sup>[2]</sup> 14:10,15  <b>premium</b> <sup>[1]</sup> 18:10  <b>premiums</b> <sup>[1]</sup> 12:7  <b>present</b> <sup>[2]</sup> 64:19 67:18  <b>presented</b> <sup>[1]</sup> 67:13  <b>presenting</b> <sup>[1]</sup> 64:2  <b>preserve</b> <sup>[1]</sup> 67:17  <b>preserved</b> <sup>[1]</sup> 67:18  <b>president</b> <sup>[2]</sup> 4:7 47:8  <b>pretty</b> <sup>[2]</sup> 43:22 46:6  <b>prevent</b> <sup>[1]</sup> 49:4  <b>prevents</b> <sup>[2]</sup> 45:15 49:4  <b>price</b> <sup>[69]</sup> 3:17,24 4:8,10 5:8,9,12, 20,20 6:10 8:25 9:7,10 10:14 13:3, 15,23 15:24 16:5,7,14 17:7 23:16</p>
---	--	---	--

<p><b>30:16 35:8,9,19 36:1,6,8,20,24 37:13,21 40:1,15 41:16 44:24 45:1 46:13 47:1 49:2 50:5,9,11,20 51:24 54:1,2 55:3,8 57:6,16 58:8,12 59:8,12,15,18,21,23 61:25 63:9,12 64:6,13 66:11 67:20,21</b></p> <p><b>price-cutting</b> [2] 4:8 68:9</p> <p><b>prices</b> [29] 3:18 4:4 6:7 8:23 10:21 11:9,11,23 12:12,18 16:8 38:14, 21 39:5,25 45:9 46:3 51:5 53:8 54:15 55:3 63:6,8,19 66:19 67:25 68:2,7 69:11</p> <p><b>prima</b> [6] 17:10,15 41:9 52:6 57:20 67:14</p> <p><b>primary</b> [1] 5:3</p> <p><b>principles</b> [3] 25:24 31:25 32:2</p> <p><b>principles</b> [1] 19:25</p> <p><b>prior</b> [1] 13:24</p> <p><b>pro-competitive</b> [1] 8:2</p> <p><b>probably</b> [1] 29:6</p> <p><b>problem</b> [6] 9:12 15:15,16 16:12 38:1 48:3</p> <p><b>problematic</b> [3] 8:13 10:11,23</p> <p><b>problems</b> [1] 43:2</p> <p><b>proceed</b> [1] 26:10</p> <p><b>procompetitive</b> [8] 22:8,18 25:9 40:18 51:21 52:1,5 54:18</p> <p><b>produced</b> [2] 23:14 30:3</p> <p><b>producer</b> [1] 69:20</p> <p><b>produces</b> [1] 18:9</p> <p><b>product</b> [40] 8:19 13:16,17 14:17, 18 15:17 16:17 34:23,25 35:20 37:13,14 39:8 40:24 41:1,2,10,11,16, 22,24 42:1,15 44:10,16,19,24 45:10 50:4,5 52:11 59:18,21 60:13, 21 61:17,18 63:13 65:10,13</p> <p><b>products</b> [8] 8:20 22:24 23:6 24:12 47:21,25 48:1,6</p> <p><b>Professional</b> [1] 13:13</p> <p><b>Professor</b> [1] 60:3</p> <p><b>profit</b> [3] 50:21,23 51:2</p> <p><b>profits</b> [2] 57:9,18</p> <p><b>program</b> [1] 27:2</p> <p><b>promise</b> [1] 46:2</p> <p><b>promote</b> [1] 8:7</p> <p><b>proof</b> [9] 6:9 13:2 37:12 52:24,25 57:16,17,18 64:6</p> <p><b>propose</b> [1] 30:24</p> <p><b>proprietors</b> [1] 48:24</p> <p><b>protect</b> [1] 4:12</p> <p><b>protecting</b> [4] 4:16 47:15,16,20</p> <p><b>protection</b> [1] 25:1</p> <p><b>prove</b> [16] 12:16 44:21,23 51:12 52:2,5 55:20 57:12 59:21 60:2,22 64:8,9,12 67:10,24</p> <p><b>proved</b> [4] 35:19 41:16 50:16 59:17</p> <p><b>proven</b> [1] 36:5</p> <p><b>proves</b> [2] 52:6 65:10</p> <p><b>provide</b> [4] 14:22,25 15:7 16:17</p> <p><b>provided</b> [3] 9:10 24:4 64:11</p> <p><b>providers</b> [1] 42:7</p> <p><b>providing</b> [2] 39:14 54:16</p> <p><b>proving</b> [3] 3:15 53:5 60:20</p>	<p><b>provision</b> [4] 10:13 15:2 17:20 49:18</p> <p><b>provisions</b> [8] 3:16 28:19 32:6 47:6,7,12 48:4 49:4</p> <p><b>public</b> [2] 29:13 30:5</p> <p><b>public-spirited</b> [1] 29:13</p> <p><b>purpose</b> [2] 10:13 17:6</p> <p><b>purposes</b> [5] 17:14 20:4 26:12 32:24 43:13</p> <p><b>pursue</b> [1] 18:9</p> <p><b>put</b> [4] 24:22 42:24 62:13 63:14</p> <p><b>putting</b> [2] 48:18 51:16</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quality</b> [11] 9:1 12:9 13:22 15:2,24 37:19 41:12 44:23 57:18 66:13,20</p> <p><b>question</b> [19] 5:8 6:12,13 13:1,7 18:1,3 20:18 21:9 26:9,19,19 34:25 37:17,22 40:23 43:19 61:16 67:13</p> <p><b>questioning</b> [1] 21:16</p> <p><b>questions</b> [3] 16:19 17:23 45:23</p> <p><b>quite</b> [6] 9:6 16:6 55:22 68:6,13 69:7</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raise</b> [4] 10:17,21 39:5 53:23</p> <p><b>raised</b> [3] 3:17 54:1 63:5</p> <p><b>raises</b> [1] 8:23</p> <p><b>range</b> [1] 48:19</p> <p><b>rare</b> [1] 28:4</p> <p><b>rates</b> [1] 31:17</p> <p><b>ratio</b> [3] 13:22 14:22 15:12</p> <p><b>react</b> [1] 31:1</p> <p><b>reaction</b> [1] 31:1</p> <p><b>read</b> [2] 43:21 55:22</p> <p><b>readers</b> [1] 61:7</p> <p><b>readily</b> [2] 67:21 69:1</p> <p><b>real</b> [1] 59:7</p> <p><b>really</b> [7] 20:22 22:12 24:18 35:21 38:9 44:9 48:25</p> <p><b>reason</b> [11] 3:15 12:17 16:4 22:5 23:11 26:20 47:21 51:16 59:24 66:23,25</p> <p><b>reasons</b> [4] 19:15 42:10 59:9 67:22</p> <p><b>REBUTTAL</b> [3] 2:13 65:21,25</p> <p><b>recall</b> [2] 56:9,14</p> <p><b>recent</b> [2] 66:4,4</p> <p><b>record</b> [1] 50:16</p> <p><b>reduced</b> [2] 11:12 36:7</p> <p><b>reference</b> [1] 20:8</p> <p><b>refused</b> [1] 14:25</p> <p><b>regard</b> [1] 27:7</p> <p><b>regarded</b> [1] 17:16</p> <p><b>register</b> [2] 30:19 34:14</p> <p><b>rejected</b> [1] 15:4</p> <p><b>related</b> [2] 40:25 65:14</p> <p><b>relationship</b> [2] 33:22 63:24</p> <p><b>relative</b> [2] 4:2 29:21</p> <p><b>relevant</b> [3] 20:7 23:22 44:2</p> <p><b>relief</b> [1] 67:7</p> <p><b>relieving</b> [1] 16:16</p> <p><b>remainder</b> [1] 16:20</p>	<p><b>remaining</b> [1] 65:20</p> <p><b>remand</b> [1] 67:16</p> <p><b>remove</b> [1] 35:2</p> <p><b>removes</b> [1] 34:21</p> <p><b>rents</b> [1] 57:10</p> <p><b>repeatedly</b> [1] 56:25</p> <p><b>representative</b> [1] 33:24</p> <p><b>request</b> [1] 61:15</p> <p><b>required</b> [1] 39:18</p> <p><b>requirement</b> [1] 56:18</p> <p><b>requires</b> [2] 33:21 62:22</p> <p><b>resale</b> [6] 9:7,10 16:5,7,13 39:25</p> <p><b>reserve</b> [1] 16:20</p> <p><b>resolving</b> [1] 22:5</p> <p><b>respect</b> [21] 7:25 11:24 12:20 14:16 15:6 21:3 29:4 32:20 40:23,24 41:9 44:16,19 47:15 52:10,12 59:11 60:9 66:3 67:20 68:15</p> <p><b>Respectfully</b> [3] 45:18 54:8 65:9</p> <p><b>respond</b> [3] 39:19 49:21 53:10</p> <p><b>responded</b> [2] 52:18 68:8</p> <p><b>Respondent</b> [3] 1:22 2:8 17:2</p> <p><b>Respondents</b> [11] 1:7,19,25 2:5, 12,16 3:10 11:1 24:15 33:8 65:23</p> <p><b>response</b> [2] 25:21 52:13</p> <p><b>responsible</b> [1] 30:4</p> <p><b>restraint</b> [22] 7:19 9:13,20 10:9,10 12:23,24 13:15,16 16:13 35:16 48:12 54:5 55:24 56:2,24 57:3 58:23 66:5 69:8,21,25</p> <p><b>restraints</b> [13] 3:19 7:23 8:4 9:4,6, 13,24 11:23 19:3 47:22 66:4 68:4, 13</p> <p><b>restraints'</b> [1] 11:24</p> <p><b>restrict</b> [3] 12:12 14:16 15:5</p> <p><b>restricted</b> [8] 4:20,25 5:15 6:23 7:7 11:10 12:18 16:14</p> <p><b>restricting</b> [1] 7:24</p> <p><b>restriction</b> [6] 7:3 15:1 46:17,18 57:17 70:3</p> <p><b>restrictions</b> [2] 8:5 46:12</p> <p><b>restricts</b> [1] 52:22</p> <p><b>result</b> [4] 3:25 4:5 39:19 59:19</p> <p><b>retail</b> [2] 3:21,25</p> <p><b>return</b> [1] 31:6</p> <p><b>reward</b> [9] 4:3 15:20 18:2 27:18 37:6 48:15 59:13,15 66:13</p> <p><b>reward/high</b> [1] 15:16</p> <p><b>rewards</b> [25] 5:11 12:7 13:19,25 15:13 18:2,10 27:2 30:17 34:17, 17 36:7,11,14,17,19,19 37:10 39:14 42:7,9 50:10 51:9 58:25 68:3</p> <p><b>rising</b> [2] 68:2,4</p> <p><b>rivals</b> [1] 33:17</p> <p><b>road</b> [1] 46:2</p> <p><b>ROBERTS</b> [12] 3:3,7 16:21 33:4 41:17,21 42:14 65:7,16,19 70:6, 10</p> <p><b>room</b> [2] 27:14 70:8</p> <p><b>rooted</b> [1] 20:1</p> <p><b>rule</b> [14] 3:15 12:17 16:4 22:5 26:6 32:21 51:16 59:24 62:5 66:14,15, 23,24 68:16</p> <p><b>rules</b> [6] 7:14 17:7 25:17 26:11 28:</p>	<p>20 32:6</p> <p><b>run</b> [1] 29:5</p> <p><b>running</b> [1] 30:2</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>sales</b> [1] 61:19</p> <p><b>salt</b> [1] 29:6</p> <p><b>same</b> [10] 11:13 12:19 24:6 36:6 42:23 55:7 61:16 62:9 66:6 67:1</p> <p><b>satisfied</b> [2] 15:25 60:19</p> <p><b>satisfy</b> [2] 57:20 59:24</p> <p><b>saving</b> [1] 47:1</p> <p><b>saw</b> [3] 48:17 68:6,7</p> <p><b>saying</b> [11] 18:7 23:11,15 30:2,2 32:13 39:2 56:16,17 59:3 67:9</p> <p><b>says</b> [4] 34:14 39:24 48:7 55:14</p> <p><b>scholars</b> [1] 11:1</p> <p><b>scrutiny</b> [1] 66:3</p> <p><b>se</b> [4] 66:14,15,20,22</p> <p><b>seat</b> [1] 59:13</p> <p><b>Second</b> [19] 14:3,9 17:9,21,25 20:13 22:16 23:10 25:15,21,24 31:25 32:1 33:2 41:13 43:21 63:17 67:8, 18</p> <p><b>Section</b> [5] 14:21 52:18 54:23 55:20 56:16</p> <p><b>see</b> [5] 38:6 40:16 43:23 44:5 58:8</p> <p><b>seeing</b> [1] 38:7</p> <p><b>seeking</b> [2] 67:7,8</p> <p><b>seem</b> [1] 65:1</p> <p><b>seems</b> [6] 38:25 40:12 42:24 48:12 56:20 58:6</p> <p><b>seen</b> [4] 22:21 55:1,21 56:16</p> <p><b>sell</b> [2] 24:21 38:23</p> <p><b>sellers</b> [1] 8:14</p> <p><b>selling</b> [2] 8:18,19</p> <p><b>sells</b> [2] 38:10 46:4</p> <p><b>sense</b> [4] 7:8 24:1 28:4 39:6</p> <p><b>separately</b> [2] 14:13 22:18</p> <p><b>seriously</b> [1] 18:22</p> <p><b>service</b> [4] 7:20 48:1,2,5</p> <p><b>services</b> [9] 9:9 14:5,6 16:8,9 17:20 20:9 24:3 64:10</p> <p><b>seven-week</b> [2] 49:14 51:4</p> <p><b>shape</b> [1] 68:25</p> <p><b>share</b> [1] 4:4</p> <p><b>shares</b> [1] 68:11</p> <p><b>Sherman</b> [2] 15:23 25:8</p> <p><b>shift</b> [1] 68:11</p> <p><b>shop</b> [2] 48:23 49:1</p> <p><b>shot</b> [1] 31:20</p> <p><b>shouldn't</b> [5] 18:21 19:12,20 21:18 32:9</p> <p><b>show</b> [7] 3:14 22:10 51:21,22 53:6 68:21,22</p> <p><b>showed</b> [3] 67:15 69:6,7</p> <p><b>showing</b> [1] 12:18</p> <p><b>shown</b> [3] 68:17 69:3,5</p> <p><b>shows</b> [4] 23:7 66:24 68:14,18</p> <p><b>side</b> [22] 6:24 7:7 17:25 18:4 20:15, 25,25 21:1,3,25 23:25 25:15 26:14,16 31:9 32:24 36:6 64:12,18 66:12,13,17</p> <p><b>sides</b> [7] 12:19 27:19 32:4,15 50:1</p>
---	--	--	---

<p>60:6 64:7  <b>significant</b> <sup>[1]</sup> 11:8  <b>similarly</b> <sup>[1]</sup> 30:13  <b>simple-minded</b> <sup>[1]</sup> 62:25  <b>simply</b> <sup>[4]</sup> 4:9 15:22 32:21 38:25  <b>simultaneously</b> <sup>[2]</sup> 24:3 33:14  <b>sit</b> <sup>[1]</sup> 34:16  <b>situation</b> <sup>[4]</sup> 18:17 59:20 62:6 69:25  <b>size</b> <sup>[1]</sup> 11:19  <b>Smith</b> <sup>[1]</sup> 55:6  <b>soared</b> <sup>[1]</sup> 41:12  <b>Society</b> <sup>[1]</sup> 13:14  <b>Solicitor</b> <sup>[2]</sup> 1:17,20  <b>solved</b> <sup>[1]</sup> 25:3  <b>somebody</b> <sup>[2]</sup> 21:9 34:2  <b>someone</b> <sup>[1]</sup> 34:5  <b>someplace</b> <sup>[1]</sup> 58:20  <b>sometimes</b> <sup>[3]</sup> 37:24 38:18,24  <b>sorry</b> <sup>[5]</sup> 29:11,18 31:24 46:9 68:11  <b>sort</b> <sup>[3]</sup> 19:21 62:25 64:25  <b>sorts</b> <sup>[2]</sup> 18:14 59:9  <b>SOTOMAYOR</b> <sup>[38]</sup> 7:1 8:15,22 12:25 13:6,9 25:20 31:24 32:10,13 34:1,10 35:1,7,11,15,21 36:10,13,22 37:4 46:9,23 50:13,17 51:15,20 53:4,25 54:4 60:15,24 61:3,10,13,23 69:24 70:4  <b>sounds</b> <sup>[1]</sup> 63:15  <b>sources</b> <sup>[2]</sup> 20:9 21:12  <b>speaking</b> <sup>[1]</sup> 8:12  <b>special</b> <sup>[1]</sup> 23:2  <b>specifically</b> <sup>[1]</sup> 32:8  <b>spectrum</b> <sup>[1]</sup> 15:18  <b>speculation</b> <sup>[2]</sup> 42:12,13  <b>spirit</b> <sup>[1]</sup> 29:13  <b>stage</b> <sup>[4]</sup> 17:17 20:13 33:2 44:15  <b>standard</b> <sup>[2]</sup> 57:14,15  <b>standing</b> <sup>[1]</sup> 60:12  <b>standpoint</b> <sup>[1]</sup> 24:14  <b>start</b> <sup>[3]</sup> 34:24 46:1 61:16  <b>started</b> <sup>[1]</sup> 38:7  <b>starting</b> <sup>[1]</sup> 11:4  <b>State</b> <sup>[8]</sup> 1:17,18 2:5,16 3:10 19:6 49:18 65:23  <b>stated</b> <sup>[1]</sup> 39:10  <b>STATES</b> <sup>[6]</sup> 1:1,13,22 2:9 17:2 53:23  <b>steer</b> <sup>[2]</sup> 46:14 63:2  <b>steering</b> <sup>[3]</sup> 27:5 31:7 66:11  <b>step</b> <sup>[25]</sup> 20:5 21:17,22,25 22:9,16 26:3,5 32:11,18 40:6,7,10 51:17 52:16 60:16,18,20,23 63:17 65:5,8,11 67:10,10  <b>STEWART</b> <sup>[30]</sup> 1:20 2:7 16:23 17:1,4 18:15 19:10,16 20:11,16,20 21:19 22:2 23:23 24:9,13 25:5,20 26:8 27:21 28:3,11,17 29:3,18,24 32:1,12,19 37:25  <b>stifled</b> <sup>[1]</sup> 3:16  <b>stifling</b> <sup>[1]</sup> 51:24  <b>still</b> <sup>[7]</sup> 12:22 14:8 16:2 21:19 22:16 36:14 66:12</p>	<p><b>stop</b> <sup>[2]</sup> 23:16 24:24  <b>stopped</b> <sup>[1]</sup> 38:14  <b>stopping</b> <sup>[1]</sup> 35:16  <b>stops</b> <sup>[1]</sup> 43:15  <b>strategizing</b> <sup>[1]</sup> 26:24  <b>strategy</b> <sup>[6]</sup> 4:8 18:9 30:23 31:22 47:13 49:8  <b>strong</b> <sup>[1]</sup> 46:6  <b>submit</b> <sup>[1]</sup> 50:3  <b>submitted</b> <sup>[2]</sup> 70:11,13  <b>subscriber</b> <sup>[1]</sup> 62:17  <b>subscribers</b> <sup>[2]</sup> 61:21,24  <b>subsidize</b> <sup>[1]</sup> 62:1  <b>substitutability</b> <sup>[2]</sup> 20:8 21:7  <b>successful</b> <sup>[1]</sup> 31:21  <b>sufficient</b> <sup>[2]</sup> 26:12,16  <b>sufficiently</b> <sup>[1]</sup> 63:17  <b>suggest</b> <sup>[2]</sup> 13:14,21  <b>suggested</b> <sup>[2]</sup> 8:12 59:5  <b>suicidal</b> <sup>[2]</sup> 69:20,23  <b>super</b> <sup>[1]</sup> 41:20  <b>super-competitive</b> <sup>[1]</sup> 45:1  <b>supply</b> <sup>[1]</sup> 21:12  <b>support</b> <sup>[8]</sup> 1:19,22 2:5,9,16 3:10 17:3 65:23  <b>supposed</b> <sup>[2]</sup> 59:2 63:16  <b>SUPREME</b> <sup>[2]</sup> 1:1,13  <b>survive</b> <sup>[1]</sup> 15:19  <b>sweater</b> <sup>[1]</sup> 64:20  <b>switch</b> <sup>[1]</sup> 16:10  <b>system</b> <sup>[1]</sup> 37:7</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> <sup>[1]</sup> 46:12  <b>talked</b> <sup>[2]</sup> 52:14 70:5  <b>tangible</b> <sup>[2]</sup> 29:15 30:20  <b>teaching</b> <sup>[2]</sup> 58:1 62:21  <b>tells</b> <sup>[2]</sup> 51:9 57:7  <b>tendency</b> <sup>[1]</sup> 39:4  <b>terms</b> <sup>[7]</sup> 11:5,19 39:11,12 40:19 45:15 48:9  <b>territories</b> <sup>[1]</sup> 38:22  <b>test</b> <sup>[2]</sup> 59:4,5  <b>testified</b> <sup>[2]</sup> 4:7 60:4  <b>that'll</b> <sup>[1]</sup> 40:2  <b>theme</b> <sup>[1]</sup> 39:1  <b>themselves</b> <sup>[1]</sup> 38:21  <b>theorem</b> <sup>[1]</sup> 19:21  <b>there's</b> <sup>[15]</sup> 4:20,23,23 10:5,6,7 23:20 39:6 40:18 51:23 52:1,19 55:10 59:22 68:12  <b>therefore</b> <sup>[2]</sup> 39:5 47:11  <b>they'll</b> <sup>[1]</sup> 29:14  <b>thinking</b> <sup>[1]</sup> 44:5  <b>third</b> <sup>[1]</sup> 22:9  <b>though</b> <sup>[4]</sup> 10:2 16:6 18:16 30:6  <b>thousands</b> <sup>[1]</sup> 21:4  <b>thousands-way</b> <sup>[1]</sup> 26:15  <b>three</b> <sup>[4]</sup> 21:2 55:2,4 65:20  <b>three-step</b> <sup>[1]</sup> 22:4  <b>throw</b> <sup>[2]</sup> 54:21,22  <b>ticket</b> <sup>[1]</sup> 59:14  <b>tie</b> <sup>[2]</sup> 8:13 48:18  <b>Times-Picayune</b> <sup>[3]</sup> 61:18 62:11,</p>	<p>16  <b>titanium</b> <sup>[2]</sup> 23:2,12  <b>today</b> <sup>[3]</sup> 34:15 35:12 48:16  <b>together</b> <sup>[6]</sup> 23:15 37:17 62:9 63:15 66:10,18  <b>took</b> <sup>[2]</sup> 19:4,6  <b>toy</b> <sup>[1]</sup> 24:20  <b>toys</b> <sup>[3]</sup> 23:17 24:21,24  <b>traditional</b> <sup>[1]</sup> 40:6  <b>train</b> <sup>[2]</sup> 31:1 34:17  <b>transaction</b> <sup>[20]</sup> 14:5 24:2 33:13,19 34:6,20 36:18 37:16 41:2,10 50:4 61:14,22 62:7,10,16,18 64:7 65:13,15  <b>transactions</b> <sup>[12]</sup> 12:4 33:12 37:15,19,20,21 41:6 42:2,16 44:20 54:13 64:3  <b>translate</b> <sup>[1]</sup> 38:4  <b>treating</b> <sup>[1]</sup> 26:17  <b>trial</b> <sup>[5]</sup> 41:3 42:21 49:14 51:4 67:16  <b>tried</b> <sup>[2]</sup> 46:11,24  <b>trier</b> <sup>[1]</sup> 57:7  <b>true</b> <sup>[5]</sup> 7:1,18 18:19,20 62:11  <b>try</b> <sup>[1]</sup> 46:25  <b>trying</b> <sup>[7]</sup> 15:17 30:8,23 31:2 44:9 57:22 59:19  <b>tsunami</b> <sup>[1]</sup> 57:23  <b>TV</b> <sup>[1]</sup> 48:17  <b>Twenty-six</b> <sup>[1]</sup> 53:12  <b>two</b> <sup>[11]</sup> 17:13 23:1,5 26:3 27:19 32:3,23 50:1 53:5 62:7 64:7  <b>two-sided</b> <sup>[13]</sup> 18:18 19:22 21:24 22:20 26:5 32:20 38:3 49:24 60:5,25 61:4 62:5 63:7  <b>tying</b> <sup>[1]</sup> 7:2  <b>type</b> <sup>[1]</sup> 27:23  <b>types</b> <sup>[1]</sup> 9:24</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ubiquitous</b> <sup>[1]</sup> 33:17  <b>ultimately</b> <sup>[3]</sup> 22:15 28:6 62:12  <b>unable</b> <sup>[1]</sup> 48:10  <b>under</b> <sup>[12]</sup> 3:14 12:17 14:9,20 15:18 32:18 47:2 50:8 52:17,17 54:23 66:24  <b>undermine</b> <sup>[1]</sup> 33:22  <b>understand</b> <sup>[5]</sup> 26:2 28:14,23 29:19 37:23  <b>unified</b> <sup>[1]</sup> 19:21  <b>unilaterally</b> <sup>[1]</sup> 31:17  <b>unique</b> <sup>[1]</sup> 18:17  <b>uniqueness</b> <sup>[1]</sup> 13:1  <b>UNITED</b> <sup>[5]</sup> 1:1,13,22 2:8 17:2  <b>universal</b> <sup>[1]</sup> 56:18  <b>unless</b> <sup>[4]</sup> 37:16 43:1,25 62:7  <b>Unlike</b> <sup>[1]</sup> 16:13  <b>unlikely</b> <sup>[1]</sup> 31:21  <b>up</b> <sup>[14]</sup> 8:13 27:2 38:1 43:6 44:22,23 49:13 51:22 54:15,17 58:24,24 63:19 69:9  <b>uranium</b> <sup>[2]</sup> 23:3,13  <b>urge</b> <sup>[1]</sup> 32:22  <b>users</b> <sup>[1]</sup> 37:6</p>	<p><b>uses</b> <sup>[7]</sup> 10 23:5  <b>using</b> <sup>[6]</sup> 7:4 9:24 21:6 30:20 31:19 38:5</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>valuable</b> <sup>[2]</sup> 36:15 37:1  <b>value</b> <sup>[2]</sup> 18:12 21:17  <b>variation</b> <sup>[1]</sup> 39:1  <b>variations</b> <sup>[1]</sup> 44:4  <b>vendor</b> <sup>[1]</sup> 49:5  <b>versa</b> <sup>[1]</sup> 62:15  <b>versus</b> <sup>[1]</sup> 3:5  <b>vertical</b> <sup>[23]</sup> 7:19,23 9:13 10:8,9,10 12:23,24 16:4 19:3 28:4,5 35:15 47:22 48:12 54:4 56:6,24 57:3 58:23 66:4,5 69:25  <b>vice</b> <sup>[1]</sup> 62:15  <b>view</b> <sup>[4]</sup> 14:3 17:12,12 18:8  <b>virtually</b> <sup>[1]</sup> 49:25  <b>vis-a-vis</b> <sup>[1]</sup> 60:11  <b>Visa</b> <sup>[14]</sup> 7:5 9:16 28:13,18 29:3,8,11,11,22 30:13 31:16 39:14 42:8 53:19  <b>Visa's</b> <sup>[1]</sup> 27:11  <b>volume</b> <sup>[4]</sup> 33:19 41:5 42:17,18  <b>Volvo</b> <sup>[1]</sup> 7:21</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wanted</b> <sup>[2]</sup> 30:15 63:12  <b>wants</b> <sup>[2]</sup> 48:6 55:13  <b>Washington</b> <sup>[2]</sup> 1:10,21  <b>wave</b> <sup>[2]</sup> 57:23 59:6  <b>way</b> <sup>[16]</sup> 4:24 11:25 21:23 22:12 29:13 30:4,8,8 40:5 45:4,4 46:15 48:8 59:1 63:16 68:25  <b>ways</b> <sup>[3]</sup> 20:2 53:5 62:25  <b>welfare</b> <sup>[1]</sup> 29:20  <b>whatsoever</b> <sup>[1]</sup> 13:12  <b>Whereupon</b> <sup>[1]</sup> 70:12  <b>whether</b> <sup>[9]</sup> 4:24,24 20:23 32:5 35:12 36:12 52:16 57:8 67:14  <b>who's</b> <sup>[1]</sup> 45:16  <b>whole</b> <sup>[1]</sup> 25:17  <b>whom</b> <sup>[2]</sup> 54:12 60:13  <b>wide</b> <sup>[1]</sup> 48:19  <b>will</b> <sup>[26]</sup> 18:25 29:16 30:6,18,18,19 31:4 34:5 37:6 38:22 39:9 45:10,11 48:5 51:1,2,5 54:13 55:5,6,6 57:20,23 60:2,7,10  <b>without</b> <sup>[13]</sup> 22:25 28:17 33:13 54:12 57:2,16,17,18 60:12 62:16 64:1 69:10,21  <b>wonder</b> <sup>[2]</sup> 23:8 55:16  <b>wonderful</b> <sup>[2]</sup> 8:16 23:12  <b>work</b> <sup>[2]</sup> 33:23 38:23  <b>working</b> <sup>[2]</sup> 34:3 63:16  <b>world</b> <sup>[3]</sup> 20:3 27:5 66:22  <b>worries</b> <sup>[1]</sup> 42:22  <b>worry</b> <sup>[2]</sup> 43:14 46:2  <b>worth</b> <sup>[2]</sup> 9:11 18:12  <b>worthwhile</b> <sup>[1]</sup> 43:20  <b>written</b> <sup>[1]</sup> 58:11</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>X-rays</b> <sup>[2]</sup> 14:25 15:2</p>
---	--	---	---

**Y**

**years** [7] 8:1 38:5 56:25 57:22,25

62:20 66:4

**York** [2] 1:24,24