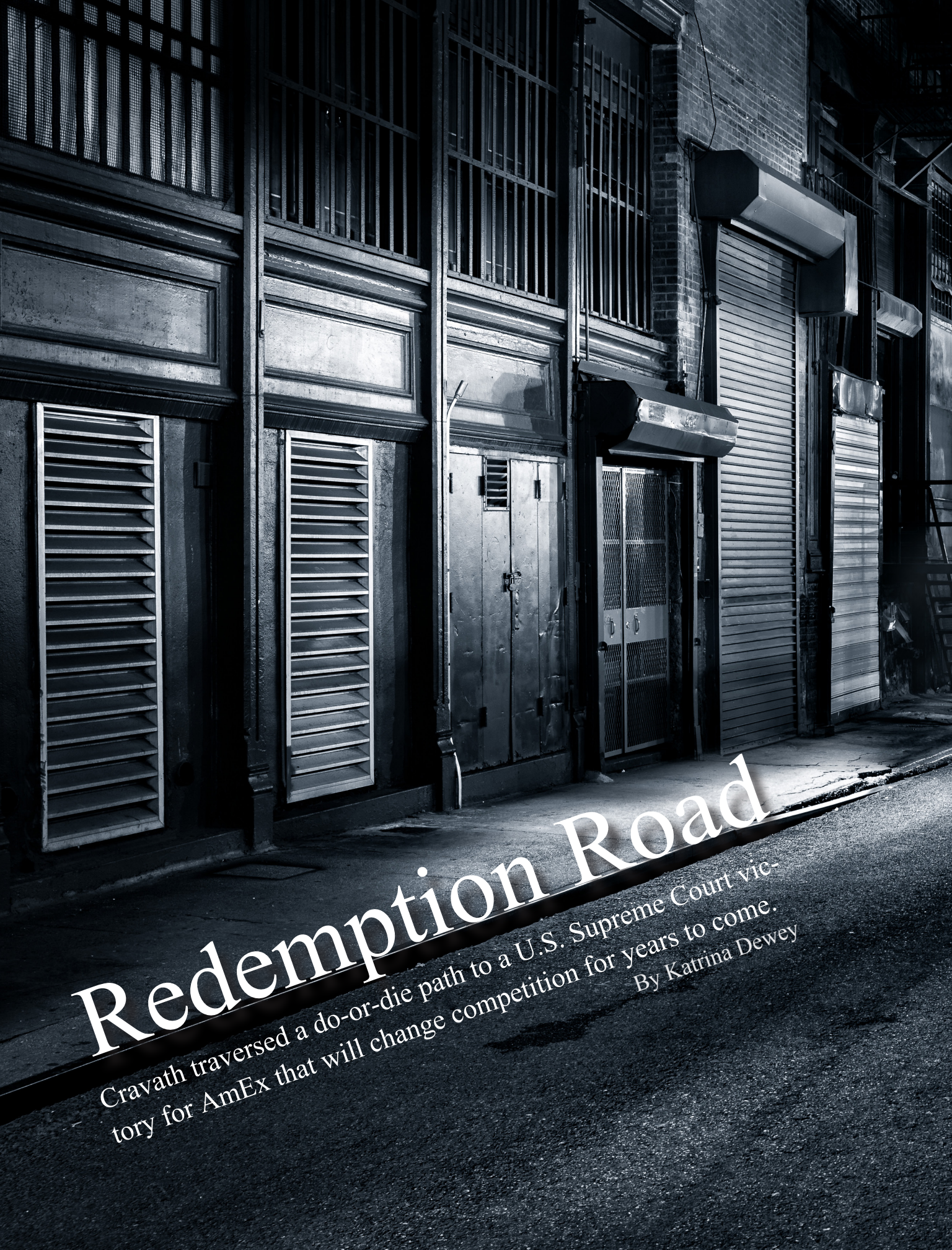


Redemption Road

Cravath traversed a do-or-die path to a U.S. Supreme Court victory for AmEx that will change competition for years to come.

By Katrina Dewey

Redemption is not for the faint of heart. Because to find it means you lost something that mattered.

The U.S. Supreme Court decision in *Ohio v. American Express* offered more than redemption to one of America's iconic companies, as well to the team of trial lawyers from Cravath who took a 10-year journey with their client to taste sweet victory.

For AmEx, the case was a gutsy validation of its business model and of CEO Kenneth Chenault's belief – not only in its exclusive card – but also in his Cravath team.

And for that team – Evan Chesler, Peter Barbur and Kevin Orsini – *Ohio* was the creation of a new body of antitrust law that will likely redefine competitive relationships for decades to come.

For Chesler, who has accomplished nearly everything a lawyer possibly could – Presiding Partner and now Chairman of Cravath; decades of recognition as one of the nation's best trial lawyers – it added that rare, final piece: arguing and winning his first U.S. Supreme Court case.

To understand the measure of redemption exacted by Chesler's team, you need only know this: the week before the Court's decision in *Ohio*, a Wall Street firm issued an advisory to short AmEx.

You rarely see a sure thing like this on Wall Street. The loss will be profound to the AmEx business model … this is probably going to be a 30 or 40 percent impact on the value of the AmEx Corporation.

On June 25, the trio of Chesler, Barbur and Orsini sat in an office at 825 8th Ave. in New York playing Supreme Court Clue as the decisions trickled out toward the term's denouement. They had learned the intricacies of anticipation over the past year as they consulted the top Supreme Court advocates and courtwatchers to prepare – and now await – the court's ruling.

An important rule in divining which justice might be writing your opinion – and thus perhaps whether you've won or lost – is that one justice is assigned one opinion per sitting, and a sitting is a month. Courtwatchers – think of them as the birdwatchers of the judiciary – track who has already published opinions from each month then tick those justices off their list. If Justice Ruth Bader Ginsburg has already written an opinion from the month in which your argument was held, for example, she's not writing your opinion.

"The question becomes who's left?" says Chesler.

"We were driving ourselves insane," says Orsini.

A second rule is that on a day when decisions are announced, the most junior justice who wrote an opinion delivers the first decision; if there are additional decisions they are given in ascending order of seniority.

The prior Friday, June 22, Chesler was flying home from Germany, when the court issued an opinion in *Currier v. Virginia* – a double jeopardy case argued in February, the

same month as *Ohio*. And it was authored by the justice the team hoped would draw *Ohio*, Justice Neil Gorsuch.

"The world goes completely sideways," says Chesler. "There it goes. Gorsuch is gone."

And now it's Monday. Joined in misery and anticipation, Orsini is checking the Supreme Court site, and the Texas gerrymandering case, *Abbott v. Perez*, comes down. Its author is Justice Samuel Alito, whom the team had staked its hopes on after Gorsuch came off the board.

No Alito, no Gorsuch. Five cases to go from the entire nine-month term and only one remaining from February: Theirs. They also now knew – a third rule of Supreme Court gamesmanship – that there was a second decision coming that morning. Not because the Supreme Court announces how many there will be; they don't. But rather because the courtwatchers count the number of boxes carried into the courtroom.

"The rule that it couldn't be Gorsuch didn't apply to those other cases, it only applied to our case," said Chesler. "So we're sitting here saying 'All right. Five cases left, one of which is ours. One more case coming down today. And whoever wrote the other opinion that is about to come out is senior to Justice Alito."

That meant if the second case was *Ohio*, the author would have to be Justice Clarence Thomas for the team to prevail. "Because he's the only justice senior to Alito who is likely to have decided on our side of the case," Chesler said.

The team endured 30 minutes of angst to the tune of Justice Sonia Sotomayor's dissent in *Abbott*. Orsini remembers the background music as simply, "Refresh. Refresh. Refresh."

"And I'm sitting for 30 minutes saying, "Come on, Clarence. Come on, Clarence," says Chesler.

And then the court announced that Justice Thomas would read the decision in *Ohio v. American Express*.

"I leaped out of my chair when it came down. 'It's Thomas,'" says the typically unflappable Chesler, recounting the moment like a World Series victory.

Which, in many ways, it's bigger than. The two-sided markets theory the Cravath team persevered to wed with established antitrust law will likely change antitrust enforcement and competition in ways we can't now envision. It's certain to reverberate far beyond the credit-card industry.

Multibillion-dollar technology platforms like Google and Amazon also operate in two-sided markets, offering services to consumers as well as to businesses seeking to reach consumers. The AmEx decision may better insulate them from intervention by an increasingly skeptical Justice Department. As perhaps a first sign of this, former Attorney General Jeff Sessions held a meeting just three months after the decision with state prosecutors to consider how antitrust law might apply to Silicon Valley giants. Because, in fact, most of the modern economy could be considered two-sided.

Economists had debated the two-sided market theory before Chesler latched onto it as a hail Mary for AmEx's defense against the claims way back in 2010. He realized that it was do or die for AmEx to persuade as many jurists as possible that the only correct way to analyze AmEx – and much of the modern economy – is to not just look at the player, but to look at the game. In other words, markets had moved beyond a player's impact on price, and what modern markets required was an examination of each of the markets in which the player competes. For AmEx, the whole market included both the merchants it charged higher fees to use its cards – while requiring them to not "steer" customers to the cheaper cards – as well as consumers, who have enjoyed huge expansions of benefits and choice, including a bounty of benefits for being AmEx customers. Who doesn't need a titanium card? The team went so far as to construct a new term to describe the impact of a two-sided market: net fees.

"You can't have a market in which only the merchant is included, because without the consumer, there'd be no transaction," said Chesler. "It was that simple. We spent 10 years fighting about it, but it was literally that simple."

Simple to say, not so much to litigate. And the stakes could not have been higher. With only 53 million cards, American Express was a decided underdog to MasterCard and Visa, which together account for 432 million of the credit cards used in the U.S. Soon after the first suit was filed in 2010, MasterCard and Visa settled. AmEx couldn't afford to.

That's because almost all AmEx customers also carry a MasterCard or Visa, but that river doesn't flow both ways. If the market became a steering "free-for-all" with merchants allowed to "prefer" the cheaper cards, AmEx would lose.

Chenault "believed that to his toes, based upon his almost 30 years' experience dealing with these issues," said Orsini, who began working on the case in 2007, when he was an associate assigned to Chesler and the government had begun requesting documents from the companies.

AmEx debuted its two-sided markets case before U.S. District Court Judge Nicholas Garaufis in Brooklyn in October 2010, presenting an amalgamation of caselaw that required judging anticompetitive practices based on their effect on the "market as a whole" and economic literature that characterized payment services as a two-sided market.

While the services that AmEx provides to merchants and to cardholders are not interchangeable, Chesler explained, they are parts of a whole – just as pants and jackets are components of the market for men's suits.

Evan Chesler and Peter Barbur

"This was really an effort to craft a doctrine to serve our client," said Barbur of their inspiration, a little-noticed phrase from a 2nd Circuit decision from 1995, *K.N.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.* "It's fair to say when the court wrote 'market as a whole' it wasn't thinking about a two-sided market. We really had to graft that in."

Garaufis was not persuaded. He accepted the government's position that the deciding factor should be the effect of AmEx's practices on merchant fees.

"The judge concluded that that half was the whole, in fact, and therefore decided against us," said Chesler. He was sure Garaufis' decision marked the end of Cravath's role in the case - that AmEx would hire a new team to handle its appeal, just as numerous firms had retained Cravath's services in similar circumstances over the years.

"I got a call from Ken Chenault," Chesler recalled, "and he said, 'This didn't turn out as we hoped. I need you to come down here and come with me to see the board next week.'"

"We walked into the boardroom and Ken Chenault said, 'I just want to say to everybody that we didn't lose this case because we were outlawyered. Our team completely outlawyered the other side. We lost this case because the judge just didn't understand what the facts were, what the law was. And the people who are going to fix this are sitting right here.' And he pointed to me," Chesler said.

Let the journey down redemption road begin.

Six years later, on Sept. 26, 2016, Cravath took its first hill. The 2nd U.S. Circuit Court of Appeals overturned and stayed Garaufis' decision finding it "does not advance overall consumer satisfaction." The appellate panel found, "Though merchants may desire lower fees, those fees are necessary to maintaining cardholder satisfaction – and if a particular merchant finds that the cost of AmEx fees outweighs the benefit it gains by accepting AmEx cards, it can choose to not accept AmEx cards."

The Cravath team had crafted its appellate argument to be relatable to real-world experience. At the argument, Chesler recalled, the presiding judge joked that he sometimes couldn't open his mailbox because of all the credit card offers.

"Isn't all of that competition?" he asked the government's lawyer.

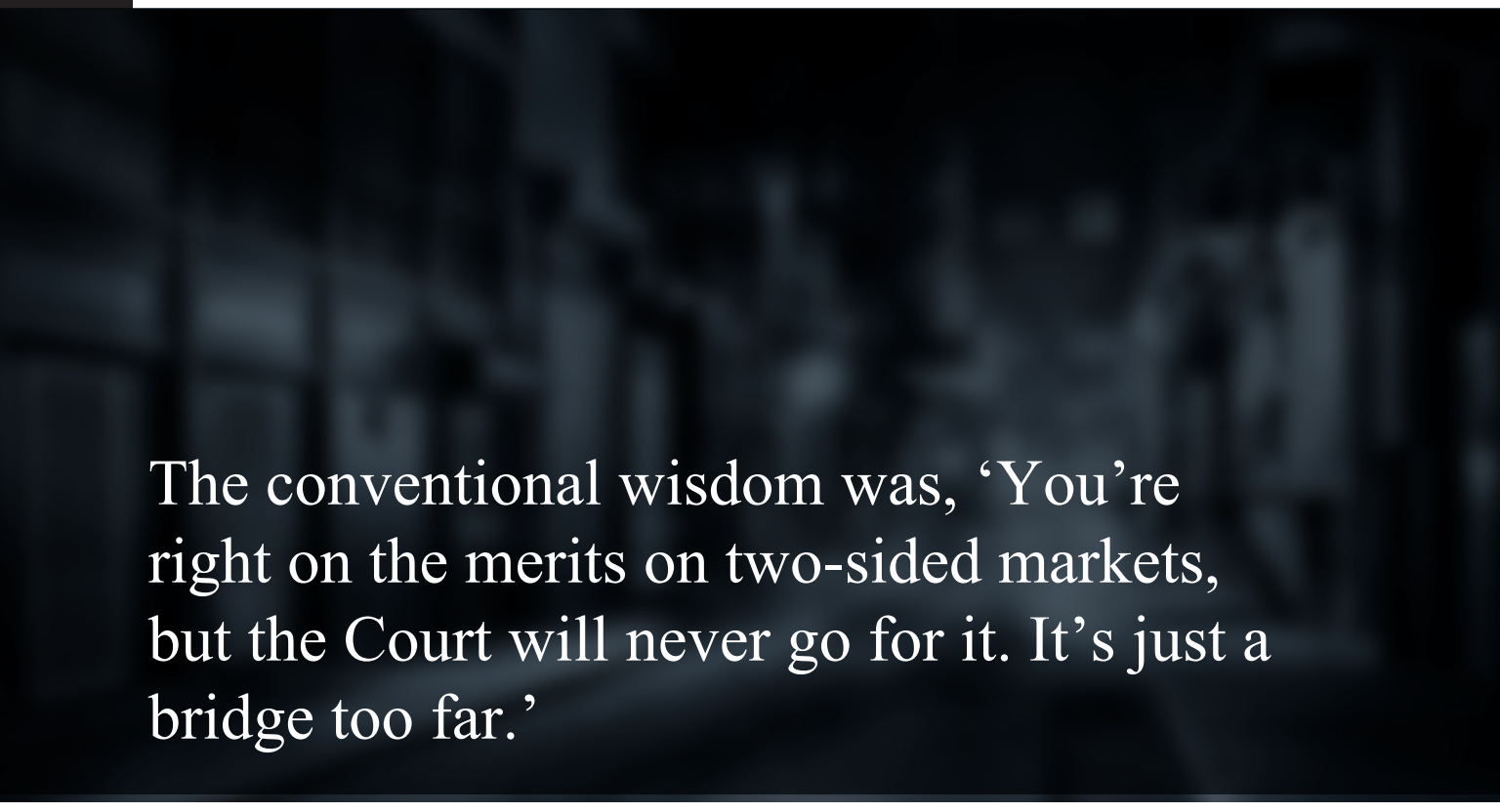
"That's not in the market," the attorney answered. "That's all competition, but it's not in the market."

The appellate court found Garaufis had ignored the benefits AmEx provided cardholders, benefits that had forced card issuers to work harder to win customers attempting to one-up rivals' rewards programs by doubling or tripling points for purchases and, in some cases, issuing metal cards carrying increased cachet.

The next two years - from the appellate victory to the Supreme Court – only felt like 20, or, as Chesler assessed it, "the winning was much better than the preparing."

Digging deep to his days as a schoolteacher, he returned to the ratio between preparation and classroom time. "It took longer to prepare a lesson, frankly, than it did to teach the lesson. That principle was expanded to absurd limits here," he said.

PHOTO BY: LAURA BARISONZI



The conventional wisdom was, 'You're right on the merits on two-sided markets, but the Court will never go for it. It's just a bridge too far.'

Preparing for the Supreme Court requires not only mastery of one's case, but also of all the arcane and peculiar rules of the idiosyncratic institution that's the most powerful court on earth.

Among the most important rules of Supreme Court advocacy are that the client should drop the lawyers who got them there, and hire one of the elite Supreme Court advocates who know one another's social security numbers. That happens to be a well-known irritant among U.S. trial lawyers. Another rule is that in crafting your argument to the justices, you should look for familiar ground in the court's jurisprudence rather than try to sell an entire new theory.

"You need to package this in a package that the Supreme Court will want to open excitedly on Christmas morning to see what's inside the box," says Chesler, whose team was told by the experts that their theory wouldn't win. "When they opened the box and they find a two-sided market inside, they're going to give it to their cousin Elmer like a fruitcake."

Orsini agreed. "We were told to find the path of least resistance, the narrowest holding that can still preserve your ability to either maintain your victory or a path toward victory and the obvious logic to that. But from the day we got the first investigation from the Department of Justice, we felt you could not understand this case without looking at both sides of the marketplace. So trying to go for the narrow win, in our view, was the most likely way to guarantee a loss because it wouldn't match the reality of the facts in the marketplace.

"At the end of the day, whatever court it is is going to be more likely to side with you when you are actually presenting an argument that comports with the facts on the ground, particularly in an antitrust case where it's all about competitive dynamics," he said.

There was a lot of skepticism, said Barbur. "The conventional wisdom was, 'You're right on the merits on two-sided markets, but the Court will never go for it. It's just a bridge too far."

To Chesler, part of what made the preparation so difficult is "we're just trial lawyers. And from our perspective the world was very simple, actually. We either won or lost this case by either winning or losing the two-sided market.

"We all believed in our souls that the only way we had a chance of winning was making the two-sided argument," said Chesler. "Even if it didn't prevail, there wasn't an alternative that was better. There wasn't a Plan B that was superior to Plan A. So we said 'We're staking out our ground and we're going to die on this hill if we have to.'"

During the argument, Justice Elena Kagan challenged Chesler on the two-sided market theory, and asked about the impact on merchant costs. Chesler responded, "Your honor, with respect, you're clapping with one hand," as he waved his left hand. And Justice Thomas turned to Justice Stephen Breyer and laughed.

Four months later, he wrote the decision.

Winning, said Chesler, felt great.