No. 13-4533(L)

No. 13-4537(CON)

In the United States Court of Appeals for the Second Circuit

EXPRESSIONS HAIR DESIGN; LINDA FIACCO; THE BROOKLYN FARMACY & SODA FOUNTAIN, INC.; PETER FREEMAN; BUNDA STARR CORP.; DONNA PABST; FIVE POINTS ACADEMY; STEVE MILLES; PATIO.COM LLC; DAVID ROSS,

Plaintiffs-Appellees,

v.

GERALD MOLLEN, in his official capacity as District Attorney of Broome County,

Defendant,

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; District Attorney CHARLES J. HYNES, in his official capacity as District Attorney of Kings County,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York (The Honorable Jed S. Rakoff)

CORRECTED BRIEF FOR PLAINTIFFS-APPELLEES EXPRESSIONS HAIR DESIGN, ET AL.

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CORPORATE DISCLOSURE STATEMENT

None of the appellees has a corporate parent, and no publicly held corporation owns any stock in any of the appellees.

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INTRODUCTION

Each time a merchant swipes a credit card, the merchant incurs a "swipe fee." Although these fees are typically passed on to all consumers through higher prices, merchants may pass on the cost of swipe fees to only those customers who pay with credit cards by charging two different prices: a higher price for using a credit card and a lower one for paying by other means.

But a New York statute enacted at the behest of the credit-card lobby, N.Y. Gen. Bus. Law § 518, seeks to control how merchants may *communicate* those prices to consumers: It allows merchants to offer "discounts" to those who pay in cash but makes it a crime to impose equivalent "surcharges" on those who pay with credit. A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a "surcharge" as a penalty. Precisely because the "surcharge" label is far more effective at communicating the cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed. And New York, in justifying its adoption of the industry's speech code, openly relied on the different effect of the two words, "even if only psychologically," to produce "desired behavior."

New York's no-surcharge law in effect says to merchants: If you use dual pricing, you may tell your customers only that they are paying *less* to pay without

credit (a "discount"), not that they are paying *more* to pay with credit (a "surcharge"). That is how the Attorney General has enforced the law in recent years—first targeting merchants for informing customers that they impose a "surcharge" for using credit, then giving the merchants scripts with specific language so they could reframe the same information as a cash "discount." A merchant who uses the wrong words faces criminal prosecution and up to a year in prison.

The plaintiffs are New York merchants who want to employ dual pricing and truthfully inform their customers that they will pay *more* for using a credit card, not just *less* for using cash. Until recently, Expressions Hair Design prominently displayed a sign telling customers that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% "more" for using a credit card. But after learning of the no-surcharge law, Expressions was forced to take down its sign. It would like to put the sign back up. Expressions still employs dual pricing, but fears that it could accidentally subject itself to criminal prosecution if an employee describes its prices using the wrong words.

Because the no-surcharge law turns on a "virtually incomprehensible distinction between what a vendor can and cannot tell its customers," the district court (Rakoff, *J.*) correctly held that the law offends the First Amendment and is unconstitutionally vague. JA 21. Its "practical effect" is to outlaw one disfavored way of truthfully describing lawful conduct—making it a content-based speech restriction,

subject to "heightened scrutiny" and "presumptively invalid." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011). It cannot withstand scrutiny: the state has put forth no evidence that the law directly advances a legitimate interest in consumer protection, and it is far more extensive than necessary to address any such interest.

The only other federal court to discuss the constitutionality of no-surcharge laws recently expressed agreement, pronouncing them "anti-consumer" and "irrational," and finding "good reason to believe" that they will not survive scrutiny. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, --- F. Supp. 2d ---, 2013 WL 6510737, *19-*20 (E.D.N.Y. 2013). This insight is not new. The earliest reported prosecution targeted a gas station whose cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card instead of saying it would cost a "nickel less" to use cash. That case yielded the same assessment—that the law treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015.

Despite all this, the Attorney General argues that the law "falls squarely within the heartland" of "direct regulations of economic conduct" that "do not implicate the First Amendment" at all. AG Br. 2, 29. But that ignores the distinction

that gave birth to the commercial-speech doctrine in the first place. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). "Pricing," as Judge Rakoff explained, "is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." JA 41.

The Attorney General also ignores its own position below, where it contended that the law is "an anti-deception statute"—"directed at misleading commercial speech"—that only "affects *how* [merchants] may communicate" their prices, not what those prices should be. The state even conceded below that the law as conventionally interpreted (as a surcharge ban, not a false-advertising law) does "not serve the State's anti-deception interest" because liability "turn[s] solely on the label that a seller use[s] to describe its dual pricing scheme."

Now the Attorney General has silently deserted that position. But the fact that the Attorney General's office cannot keep its story straight about what the statute means—even within the four corners of this litigation—is proof enough that the district court was correct: The law not only violates the First Amendment but is unconstitutionally vague. Just as the Constitution forbids a state from criminalizing disfavored speech, so too does it forbid a state from imposing criminal liability on the basis of semantic distinctions that even the officials entrusted with enforcement cannot understand.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that New York's no-surcharge law is, in practical effect, a content-based speech restriction?

2. Did the district court correctly conclude that New York's no-surcharge law cannot survive First Amendment scrutiny?

3. Did the district court correctly conclude that New York's no-surcharge law is unconstitutionally vague?

STATEMENT OF THE CASE AND OF THE FACTS

"What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, et al., *Who Gains and Who Loses from Credit Card Payments?*, Federal Reserve Bank of Boston, at 1 (2010). Although merchants are allowed to charge consumers more for using a credit card, they cannot effectively communicate that added cost because the credit-card companies have succeeded in insisting that any price difference be labeled as a "discount" for cash rather than a "surcharge" for credit.

This industry-friendly speech code has long been imposed through both private contract and state legislation. But federal antitrust litigation caused the credit-card companies to remove their contractual no-surcharge rules in 2013. So state

laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from saying that they impose a "surcharge" for credit because credit costs more.

New York's no-surcharge law makes it a crime, punishable by a $500 fine and up to one year in prison, for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The law does not, however, outlaw dual pricing; it "permit[s] sellers to offer discounts to cash users" if so expressed. AG Br. 5. The state has applied this distinction to allow merchants to say, for example, that they charge $102 for a product, with a $2 "discount" for using cash, but to ban them from saying that they charge $100 for that same product, plus $2 "extra" for using credit.

I. Why Labels Matter: The Communicative Difference Between "Surcharges" and "Discounts"

A "surcharge" for paying with credit and a "discount" for paying without credit "are different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1351 (2008). They are equivalent in every way except one: the *label* that the merchant uses to communicate that price difference.

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence Of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). "Consumers react very differently to surcharges and discounts." Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to discounts (which are perceived as *gains* for not using credit). *Id.* In one study, 74% of consumers had a negative or strongly negative reaction to surcharges, while fewer than half had a similar reaction to equivalent cash discounts. *Id.* at 280-81.

The effectiveness of surcharges is why the plaintiffs here seek to impose them: Surcharges inform consumers of the cost of credit and thus create meaningful competition, which in turn drives down that cost. If swipe fees are too high, consumers will use a different payment method, and banks and credit-card companies will have to lower their fees to attract more business.

II. How We Got Here: The Credit-Card Industry's Concerted Efforts to Prevent Merchants from Communicating the Costs of Credit as "Surcharges"

The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades to ensure that merchants cannot communicate to consumers the added price they pay for using credit. Over the years, the industry has succeeded, both through contractual provisions and legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.

A. The industry's early ban on dual pricing and its demise

In the early days of credit cards, any attempt at differential pricing between credit and non-credit transactions was forbidden by rules imposed on merchants in credit-card-company contracts. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1991). That changed in 1974 after Congress enacted legislation protecting the right of merchants to have dual-pricing systems, providing that "a card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Pub. L. No. 93, § 495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)).

B. The credit-card industry shifts its strategy to labels

The 1974 amendment was initially considered a victory for consumer advocates. But the credit-card industry, seizing on Congress's use of the word "discount," soon shifted its focus to the way merchants could *communicate* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing if "surcharges" were outlawed—the credit-card lobby "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance.").

C. The industry's labeling strategy achieves short-lived success at the federal level

In 1976, after two years of lobbying Congress to impose its preferred speech code, the credit-card industry succeeded in getting Congress to enact a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197 ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means."). This set the stage for a series of battles over extending the ban in the 1980s.

1981: Opposition to federal surcharge ban mounts. Explaining the Federal Reserve Board's unanimous opposition, one member pointed out "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong., 1st Sess. 9 (Feb. 18, 1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10.

Every major consumer-advocacy organization agreed. One advocate testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she explained, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* Another advocate put it more pithily: "one person's cash discount may be another person's surcharge." *Id.* at 90. "Removing the ban on surcharges," he explained, "is an important first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Id.* at 92.

On the other side of the debate, American Express and MasterCard "wholeheartedly" and "strongly" supported the ban, even though they understood that,

from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Id.* at 43, 55. And the big banks, like the credit-card giants, supported treating "surcharges" and "discounts" differently because a surcharge "makes a negative statement about the card to the consumer." *Id.* at 32. Surcharges, a banking lobbyist explained, "talk against the credit industry." *Id.* at 60.

Congress ultimately gave in to industry lobbying and renewed the ban for an additional three years. Pub. L. No. 97-25, 95 Stat. 144 (1981).

1984: Congress lets federal surcharge ban lapse. Over the next few years, consumer opposition to the ban only intensified. In 1984, when it was again set to expire, Senator William Proxmire cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. Ultimately, despite a massive lobbying campaign, the industry's efforts failed, and the ban lapsed in 1984. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

D. The credit-card industry lobbies states to enact no-surcharge laws and adopts contractual no-surcharge rules

After the national ban expired, the credit-card industry briefly turned to the states, convincing ten states to enact no-surcharge laws of their own. New York's law took effect in 1984, just after the federal ban's expiration. N.Y. Gen. Bus. Law

§ 518. American Express and Visa went to great lengths to create the illusion of grassroots support for these laws, even going so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges"—an early instance of the phenomenon now known as "astroturfing."[1] But the real consumer groups, including Consumers Union and Consumer Federation of America, opposed state no-surcharge laws because they inhibit transparency, thereby increasing costs and masking an enormous "invisible subsidy" from low-income cash consumers to high-income credit consumers. JA 103-04.

The New York law's legislative history does not hide the fact that it was intended to influence consumers' perceptions of credit cards by controlling the labels that merchants could use to describe mathematically equivalent transactions. A memorandum justifying the state's support for the law declared: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." JA 114; *see also* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman emphasizing the "big psychological . . . difference" between surcharges and discounts).

[1] Associated Press, *Consumers Gain Friends in Credit Card Fight*, Ocala Star-Banner, Apr. 2, 1984 (describing "consumer coalition bankrolled by American Express and Visa"); Memo from K. Krell, July 24, 1987, *available at* http://bit.ly/1nCufIP (memo touting work of public-relations firm Hill & Knowlton in "put[ting] together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies").

Around the same time that New York's no-surcharge law was enacted, the major credit-card companies changed their contracts with merchants to impose no-surcharge rules. State no-surcharge laws thus function as a legislative extension of restrictions that card issuers imposed more overtly by contract. American Express's contracts, for instance, contained an elaborate speech code: They provided that merchants may not "indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card"; "try to dissuade Cardmembers from using the Card"; "criticize . . . the Card or any of our services"; or "try to persuade or prompt Cardmembers to use . . . any other method of payment." American Express, *Merchant Reference Guide – U.S.*, at 16 (Oct. 2013), *available at* http://amex.co/1iwWJ5j.

E. New York's Enforcement of Its No-Surcharge Law

Although these private speech codes reduced the need for robust public enforcement, New York has nevertheless policed its own speech code with vigor, pursuing many enforcement actions against merchants for using the wrong words.

People v. Fulvio. In the first reported prosecution, the state brought criminal charges against a gas-station owner. *Fulvio*, 517 N.Y.S.2d 1008. The owner had decided to offer dual pricing and put up "signs in his station" that "clearly stated the 'cash price' and the 'credit price' for his gasoline," which differed by five cents per gallon. *Id.* at 1010. He thought he had instructed his employees "to tell custom-

ers that the differential was a discount for cash" and not a surcharge for credit. *Id.* But his cashier told one customer "that it would cost an 'extra nickel,' or five cents 'extra,' to use a credit card." *Id.* Based on that speech, the owner was arrested for violating the no-surcharge law. He was later found guilty at trial after witnesses "testified as to the phraseology used" during the conversation with the customer. *Id.* at 1009-14.

The verdict was short-lived, however, because the court held that the no-surcharge law—by allowing cash discounts but criminalizing credit surcharges—was "impermissibly vague." *Id.* at 1009. The court noted that the law would be constitutional "if it simply prohibited the imposition of a surcharge upon a credit card user. But however laudatory the cash discount objectives of the framers of this legislation, the two-tier price system created and permitted here results in a mode of application of the statute so vague, uncertain and arbitrary of enforcement as to be fatally defective." *Id.* at 1012.

Recent enforcement actions. *Fulvio* may have temporarily dampened the state's enforcement efforts, but it did not end them. In 2008 and 2009, for example, the Attorney General brought a series of sweeps against more than fifty merchants, many of whom were targeted even though they clearly disclosed their prices to everyone, explaining that they charge a certain amount "more" to pay with credit. The Attorney General's office told them that this explanation was illegal and gave

them specific instructions on how to describe their pricing schemes so as to comply with the no-surcharge law. Two examples illustrate how the law is enforced.

Parkside Fuel. Parkside used to impose a credit-card fee, which it informed customers of "on the phone, at the same time that [it] informed them of [its] prices." JA 153. In 2009, someone from the Attorney General's office called "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [Parkside] charge[s] a fee on top of that price for using a credit card," much like the cashier in *Fulvio*. JA 154. To the Attorney General, that was an illegal "surcharge." *Id.* An Assistant Attorney General told Parkside's owner that, to comply with the law, his employees had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" *Id.* The Assistant Attorney General went so far as to give the owner "a script of what [he] could tell customers when talking to them over the phone"—saying that he "could quote the price as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash," but he "could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon 'surcharge' to use a credit card." *Id.* Parkside tried following the script for a bit, but customers found it "confusing," and it was "not the message that [Parkside] meant to convey." JA 154-55. So Parkside gave up on dual pricing entirely. JA 155.

K Skee Oil. K Skee had a similar run in with the Attorney General. Like Parkside, it imposed a credit-card surcharge and was "up front with [its] customers about this charge, telling them about it over the phone when informing them of [K Skee's] prices." JA 162. The state informed K Skee that it was imposing an illegal "surcharge" and demanded that it stop. *Id.* When K Skee's owner spoke with the Assistant Attorney General handling the case, he said: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." *Id.* K Skee's employees "had been saying that 'it is a quarter more a gallon'" and they "were not allowed to say that." *Id.*

F. Visa, MasterCard, and American Express Drop Their No-Surcharge Rules

Meanwhile, the issue of swipe fees remained largely in the shadows. Even in the majority of states without no-surcharge laws, contractual no-surcharge rules ensured that consumers were rarely informed of the true cost of credit. In 2005, however, merchants and trade associations began bringing antitrust claims challenging those contractual rules. These claims culminated in a nationwide class-action settlement under which Visa and MasterCard in January 2013 dropped their contractual prohibitions against merchants imposing surcharges on credit transactions. Silver-Greenberg, *Visa and MasterCard Settle Claims of Antitrust*, N.Y. Times, July 14, 2012, at B1. And in December 2013 American Express agreed to do the same.

Johnson, *American Express to Pay $75 Million in Card Surcharge Settlement*, Wall St. J., Dec. 19, 2004.

As a result, state no-surcharge laws—previously largely irrelevant because of parallel contractual rules—have now gained added importance. And as they did in the 1980s, credit-card companies are once again seeking to discourage dual pricing by pushing state legislation that dictates the labels that merchants may use for such systems. Sherman, *Credit Card Surcharge 'Propaganda' Leads to State Legislation*, Washington Retail Insight, Feb. 1, 2013, *available at* http://bit.ly/1kSpgAR.

III. This Litigation

In June 2013, not long after Visa and MasterCard changed their contracts, five merchants brought this lawsuit. Although their circumstances differ slightly, they all want the same thing: to take advantage of the recent settlements and tell their customers that there is an "additional fee" or "surcharge" for using a credit card. But New York's no-surcharge law makes using that language a crime.

A. The Plaintiffs

Plaintiff Expressions Hair Design, a hair salon, posted a sign at its front counter informing customers that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% more for using a credit card. JA 98. But, in 2012, Expressions took down the sign after it learned of New York's no-surcharge law. *Id.* The salon's policy now is to tell customers that it has two different prices

for haircuts—a lower price for cash and a higher price for credit. *Id.* But because of the no-surcharge law, Expressions cannot communicate its price difference in the way that it would like—by calling the difference a "surcharge" for credit. Expressions "would like to be able to put [its] sign back up." JA 151.

Expressions is also concerned that even its current, less effective way of conveying its prices could violate the law. JA 99. Expressions tries "to be as careful as [it] can to avoid characterizing [the] price difference as a 'surcharge' or an 'extra' charge for paying with a credit card, even though it is obvious that customers *do* effectively pay more for using a credit card whenever a store offers a 'discount' for using cash." JA 99. But if even one staff member inadvertently refers to the difference as a "surcharge" for credit, or says that credit is "extra" or "more," Expressions is afraid that its truthful speech could subject it to criminal prosecution.

Like Expressions, the other four merchant plaintiffs—Brooklyn Farmacy & Soda Fountain, Brite Buy Wines & Spirits, Five Points Academy, and Patio.com—would like to charge their customers two different prices depending on whether they pay with cash or credit and to call the price difference a "surcharge" for credit, which they all believe "is the most effective way" to convey the true cost of credit. JA 79, 83, 88, 93. These merchants do not offer cash discounts because they believe that "[l]abeling the difference as a 'discount' . . . would not be nearly as effective as calling it 'a surcharge.'" JA 88. Just as important, the merchants are con-

cerned about ensuring compliance. As Brooklyn Farmacy puts it, the distinction between "tell[ing] customers that they will pay *less* if they don't use credit cards" and telling "customers that they are effectively paying *more* by using a credit card" is "difficult to understand." JA 89. Brooklyn Farmacy is "not willing to take the risk that [it] might be prosecuted by the state simply for conveying truthful information to [its] customers about the higher cost of using a credit card." *Id.* The other merchants share that fear. They worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers that they are paying more for using credit cards"— even though that's the truth. JA 94.

B. Procedural History

1. *The parties' arguments*. After filing suit, the plaintiffs—supported by several national consumer groups and retailers as amici curiae (ECF No. 23 & 25)—moved for a preliminary injunction preventing the state from enforcing the no-surcharge law against them. ECF No. 11 & 18. By making liability turn on the language used to describe identical conduct, they argued, the no-surcharge law is a content-based speech restriction that is subject to heightened scrutiny, which it cannot withstand. And it is unconstitutionally vague because it does not define the line between a "surcharge" and a "discount," yet that line marks the difference between what is criminal and what is not.

In opposing the preliminary injunction, the state could not identify any substantive difference between the conduct described by these two words. At the initial pretrial conference, the state articulated its understanding of the law:

> THE COURT: So the statute allows . . . merchants to offer discounts for using cash or a debit card, but makes it a criminal offense to impose surcharges for using a credit card. What's the difference?
>
> THE STATE: **We don't think there is a difference in terms of the underlying economic value.** The way our office interprets the statute is that it doesn't—we are going after merchants who entice consumers to commence an economic transaction by advertising one price and then, once they arrive at the register, informing them when they pull out their credit card that they are going to be subject to a surcharge above and beyond that….
>
> THE COURT: So you are interpreting a false advertising statute.
>
> THE STATE: Essentially, yes, that's how our office enforces it.
>
> THE COURT: Does the statute say that?
>
> THE STATE: We think the statute doesn't give notice of that on its face, but . . . we think that's the most reasonable interpretation of it.

Hearing Tr. 6/14/13, at 5:14-6:11 (emphasis added).

The state took the same position in its briefs. It focused on standing and ripeness arguments—both premised on this same idiosyncratic interpretation, which the state has now abandoned. The state insisted that the no-surcharge law does not in fact prohibit surcharges but is instead "an anti-fraud statute" that "imposes a disclosure requirement" and thus bars only the imposition of "additional hidden fee[s]," just like New York's consumer-protection and false-advertising laws.

ECF No. 27, at 21, 39. On this (now-discarded) interpretation, the law actually *authorizes* merchants to say that they are imposing credit-card surcharges, so long as they make the proper disclosures—which, according to the state's briefing below, means that "they must display the credit card price at least as prominently as the cash price." *Id.* at 39. Moreover, the state initially refused to take a position on whether a prominently disclosed surcharge would violate the law if expressed as a discrete amount or percentage ($100 with a $2 surcharge) rather than a total credit-card price ($102). *Id.* at 35 n.19. But the state eventually conceded that it would and that at least some plaintiffs had standing as a result. ECF No. 51, at 14.

The state's response on the merits also relied heavily on its disclosure-only interpretation. It argued, paradoxically, that the law—when "properly interpreted" as being "directed at misleading commercial speech"—"regulates *conduct*, not speech." ECF No. 27, at 36, 39; *see also id.* at 3 ("Properly interpreted as an anti-deception statute, § 518 regulates *conduct*."). The state elaborated: "It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it[.] . . . But § 518 does not dictate the *content* of that communication at all; sellers are free to set the credit card price at whatever level they wish." *Id.* at 37. The state said nothing more about why it thought the law regulates conduct.

On vagueness, the state's explanation was similarly thin. It believed that the no-surcharge law "provides sellers of ordinary intelligence fair notice that they may

not impose a hidden fee on credit card users over and above their normal cash price"—even though no plaintiff wants to impose a "hidden fee." *Id.* at 40-41. That was the extent of the argument. The state did not grapple with *Fulvio* except to assert that it has not interpreted the law in that way since. *Id.* at 27-28 ("[T]he attorney general has enforced the statute in accordance with *Fulvio*.").

Notably, the state did not even try to defend the constitutionality of the no-surcharge law as conventionally interpreted (as a surcharge ban, not a disclosure requirement). Quite the contrary, the state repeatedly called this conventional understanding of the law "untenable" and "illogical" (*id.* at 2, 3, 19, 21 n.6, 32, 40, 41, 42, 45; ECF No. 51, at 7, 8 n.7) and conceded that it "would not serve the State's anti-deception interest" because liability "would turn solely on the label that a seller used to describe its dual pricing scheme." ECF No. 27, at 24.

2. The district court's decision. The district court was not persuaded by the state's arguments. It first held that the plaintiffs' claims are "clearly ripe" because the "gravamen of the suit" is that the no-surcharge law "presently burdens and chills plaintiffs' fundamental right of free speech." JA 33-34. The court then turned to the state's interpretation, finding it "rather convoluted" and inconsistent with "the plain text of section 518 itself," which "simply bans 'surcharges.'" JA 36. The state's reading was also "fatal[ly]" undermined by its "actual history of prose-

cution" against merchants who truthfully disclosed the amount of the surcharge while describing their prices to customers. JA 37-39.

Having rejected the state's false-advertising-only theory, the court "easily conclude[d]" that the law violates the First Amendment and is impermissibly vague. JA 43 n.8. As for the First Amendment: The court concluded that, "even as defendants read it, section 518 plainly regulates speech"—not conduct—because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." JA 40-41. The court held that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" their dual-pricing schemes, while leaving them "'free to set the credit card price at whatever level they wish'"—"turns the speech-conduct distinction on its head." JA 41 (quoting state's brief). The court explained the problem with the state's logic:

> [I]n defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to consumers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. *Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.*

Id. (emphasis added). Applying the traditional *Central Hudson* commercial-speech framework, the court found that the law failed intermediate scrutiny: "the speech restricted by section 518 concerns lawful conduct and is non-misleading"; "section 518 does not 'directly advance' any interest in protecting consumers"; and the law

"is far broader than necessary to serve any asserted anti-fraud purpose." JA 43-47; *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

As for vagueness: The court had "little difficulty concluding" that the law is unconstitutional on that score as well. JA 48. The court noted that the state made "no attempt to defend the statute" if interpreted as a surcharge ban rather than a disclosure law, "conceding that it is 'untenable'" on that interpretation—a concession the court noted to be "well taken." *Id.*[2]

Because the court held that the no-surcharge law is unconstitutional and the other factors cut in favor of granting a preliminary injunction, it enjoined the state from enforcing the law against the plaintiffs. JA 51-54. A month later, the parties stipulated to a final judgment in the plaintiffs' favor, and the court entered a permanent injunction. JA 213.

SUMMARY OF ARGUMENT

I. Any law whose "purpose and practical effect" are "to suppress speech" based on content requires "heightened" First Amendment scrutiny. *Sorrell*, 131 S. Ct. at 2663-64. The no-surcharge statute is such a law. It does not regulate what merchants may *do*: They may charge different prices for cash and credit. The law regulates only what merchants may *say*: Calling the price difference a cash "dis-

[2] The plaintiffs also challenged the no-surcharge law as anti-competitive and preempted by federal antitrust law. That claim survived the state's motion to dismiss, *see* JA 49-51, but is not at issue on appeal.

count" is favored; calling it a credit "surcharge" is illegal. So the law's practical effect is to suppress speech. That's also its purpose: It was enacted at the behest of the credit-card lobby (which worried that surcharges "talk against" the industry) and was openly justified based on the surcharge label's ability, "even if only psychologically," to "encourage[] desired behavior." It is no answer to say, as the state does, that the law is just a pricing regulation. "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive." JA 41.

The state law cannot survive scrutiny under *Central Hudson*. The statute does not directly advance any interest in preventing consumer deception or price-gouging, is riddled with exceptions that undermine the legitimacy of those aims, and is far broader than necessary to address any risk of deception, which is prohibited by false-advertising laws anyway and could be easily addressed by a simple disclosure requirement.

II. The no-surcharge law is also unconstitutionally vague. It does not clearly define the line between a permissible "discount" and a mathematically equivalent but criminal "surcharge." The law is so vague that the Attorney General has been unable to keep its story straight about what the law means *in this very litigation*. As a result, merchants must operate in constant fear of inadvertently describing a dual-pricing policy in a criminal way or refrain from dual pricing altogether.

ARGUMENT

I. New York's No-Surcharge Law Violates the First Amendment.

A. The no-surcharge law is a content-based speech restriction subject to heightened First Amendment scrutiny.

The First Amendment protects the people from attempts by the state to censor speech "on account of its content." *United States v. Caronia*, 703 F.3d 149, 162-63 (2d Cir. 2012). Whenever the government creates restrictions that turn on the content of a speaker's words, the First Amendment "requires heightened scrutiny." *Sorrell*, 131 S. Ct. at 2663-64. This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on its content, even if the law "on its face appear[s] neutral." *Id.* Thus, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). Content-based speech restrictions are "presumptively invalid," so often "it is all but dispositive to conclude that a law is content-based"—especially if it carries criminal penalties. *Sorrell*, 131 S. Ct. at 2667; *Caronia*, 703 F.3d at 163 ("Criminal regulatory schemes . . . warrant even more careful scrutiny.").

"Commercial speech is no exception." *Sorrell*, 131 S. Ct. at 2664. The Supreme Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. Bd. of Pharmacy*, 425 U.S. at 770. So if a law's "purpose and practical effect" are to restrict

commercial speech based on its content, the law must withstand heightened scrutiny to satisfy the First Amendment. *Sorrell*, 131 S. Ct. at 2663.

1. Both the "purpose and practical effect" of New York's no-surcharge law show that it is a content-based (and speaker-based) restriction on speech.

Practical effect. By drawing a distinction between two mathematically equivalent terms, New York's law does not in any way regulate what merchants may do: They are allowed to charge different prices depending on whether a customer pays with cash or credit, and to set those prices as they wish. What the law regulates—all that it regulates—is what merchants may say: Characterizing the price difference as a cash "discount" is favored; characterizing it as a credit "surcharge" is a crime. The law thus prohibits a certain class of speakers (merchants) from communicating a certain disfavored message (identifying the added cost of credit as a surcharge) and does so to discourage consumers from acting on that message (by deciding not to use a credit card).

A hypothetical illustrates the point. Suppose a merchant charges two different prices for a product depending on how the customer pays—$100 for cash; $102 for credit. If the merchant says that the product costs $102 and there's a $2 "discount" for paying in cash, the merchant has complied with the law. But if the merchant instead says that the product costs $100 and there's a $2 "surcharge" for using credit to account for the swipe fee, the merchant has violated the law. In both

scenarios, the merchant charges the customer the same amounts ($100 for cash and $102 for credit). The only difference is how the merchant communicates that information to customers—that is, the content of the merchant's speech.

One need not think hypothetically, however, to see that the no-surcharge law operates as a content-based speech restriction. Many real-world examples show the same—from the time of the statute's enactment to the recent sweeps against small businesses throughout the state. In each one, merchants were targeted for using the wrong words to describe otherwise legal conduct.

Consider the first reported prosecution under the statute. A gas-station owner was arrested, prosecuted, and convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1010. "[T]he government clearly prosecuted [the merchant] for his words—for his speech." *Caronia*, 703 F.3d at 161. His conviction was set aside, but only because the court found it constitutionally "intolerable" that "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Fulvio*, 517 N.Y.S.2d at 1011, 1015. The court explained:

> [W]hat General Business Law § 518 *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what General Business Law § 518 *prohibits* is a price differential, in that so long as that differential is

> characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . General Business Law § 518 creates a distinction without a difference; **it is not the *act* which is outlawed, but the *word* given that act.**

Id. at 1015 (bold added).

Now take a more recent example. A few years back, a Parkside employee "quoted the price of oil" to someone over the phone and said that there's "a fee on top of that price for using a credit card." JA 154 Under New York law, that speech made Parkside a criminal. An Assistant Attorney General told the company's owner that he could continue to charge the exact same amounts—with the exact same difference between the cash and credit prices—but that he and his employees had to "characteriz[e] the difference" in the state's preferred way: "as a cash 'discount,' not a credit 'surcharge.'" *Id.* The Attorney General's office gave the owner "a script of what [he] could tell customers when talking to them over the phone." *Id.* Parkside's mistake—a mistake made by numerous other merchants around the same time, *see, e.g.*, JA 161-73—was that it had used the wrong words.

Each of these examples (both hypothetical and real) shows that the law operates as a content-based speech restriction. Any law "that requires reference to the content of speech to determine its applicability is inherently content-based." *Pagan v. Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007). So too is a law that "permits an idea to be expressed but disallows the use of certain words in expressing that idea." *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 8 (1st Cir. 1994).

That's the no-surcharge law. Merchants may avoid liability under the law by changing what they say rather than what they charge—a fact the state acknowledged in its briefing below. Here is what the state said: "It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it[.] . . . But § 518 does not dictate the *content* of that communication at all; sellers are free to set the credit card price at whatever level they wish." ECF No. 27, at 37. That statement is almost entirely correct. What the state meant by "content," however, is "substance"; everything else is right. Because the no-surcharge law makes liability turn on whether merchants use certain words to describe the same substance, it imposes a content-based speech restriction.

Purpose. The reason it does so is that this was its purpose. When New York enacted the law, it sought to fill the gap left by the federal ban's expiration. That ban had lasted for several years thanks to intense lobbying by credit-card companies, which objected to allowing the surcharge label because it would "talk against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414*, at 32, 60. Those who opposed the ban, like the Federal Reserve Board and the major national consumer groups, also understood that it was aimed at "wording" and "semantics, and not . . . substance." *Id.* at 22, 98.

New York did too. Just as Congress knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of

their "practical effect and impact . . . on consumers," New York understood the same. S. Rep. No. 97-23, at 3 (1981). Indeed, the state justified the law based on the different psychological effects that the two words have on consumers' understanding and behavior: "Surcharges, *even if only psychologically*, impose penalties on purchasers . . . . A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." JA 114 (emphasis added). Even now, the Attorney General embraces this behavioral effect, defending the law on the ground that surcharges cause "anger" and "make consumers unhappy because customers view [them] as unjustified penalties." AG Br. 9.

But the whole point of the First Amendment is that the state may not prohibit expression simply because people might find it objectionable. Nor may it censor words to control people's minds. A behavioral effect that "depend[s] on mental intermediation," like the effect of one label versus another, just "demonstrates the power" of speech. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985). The law affects consumer spending "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. Bd. of Pharmacy*, 425 U.S. at 769. In the context of credit cards, this assumption is well placed: "Because of the framing effect, surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352.

States, however, may not pass laws that seek to "diminish the effectiveness" of communication because the state has determined that certain speech is too powerful. *Sorrell*, 131 S. Ct. at 2663. "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects," *id.* at 2670, so courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Fear that "the public will respond 'irrationally' to the truth" or "would make bad decisions if given truthful information," is no justification for banning speech. *Id.*; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Rather than decree such a "highly paternalistic approach," states must "assume that [accurate pricing] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. Bd. of Pharmacy*, 425 U.S. at 770.

Moreover, the law here doesn't even have paternalism on its side. Rather, the state is "giv[ing] one side"—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). A law that "has the effect of preventing" merchants "from communicating with [consumers] in an effective and informative manner," thus hamstringing their "ability to influence [consumer] decisions," is one that "impose[s] a specific, content-based bur-

den on protected speech." *Sorrell*, 131 S. Ct. at 2663-64, 2670. "Attempting to control the outcome of . . . consumer decisions" by restricting truthful speech is just what the First Amendment prohibits the state from doing. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 (5th Cir. 2007).[3]

2. In its brief to this Court, the Attorney General shuts its eyes to this all. It spends nearly 20 pages (at 27-45) arguing that the law does not regulate speech, yet in doing so:

- It does not respond to the hypothetical example given above—which the district court put on the first page of its opinion—or make any attempt to articulate what exactly the law regulates in that example besides speech.
- It does explain why the law was enforced the way it was in *Fulvio*, nor does it ever disavow the prosecution's interpretation of the law in that case.
- It does not discuss the Attorney General's own recent enforcement actions or the uncontested evidence establishing that one Assistant Attorney General gave out "scripts" to those who violated the law so they could comply.

[3] It is no answer to say, as the state does, that merchants "may express [their] views in some other forum or by some other means. Here, the speech is prohibited in the most logical and relevant place for it to occur." *Motor Vehicle Mfrs. Ass'n of the U.S. v. Abrams*, 684 F. Supp. 804, 807 (S.D.N.Y. 1988). The no-surcharge law's "prohibition on the use of a particular method of communication"—conveying the cost of credit as a surcharge on signs and "as a line item" on customer "receipt[s]," JA 93—triggers First Amendment scrutiny "even if other, but less satisfactory, methods of communication exist." *Id.*

- It does not acknowledge the Attorney General's prior position in this case—that the law is "directed at misleading commercial speech" and regulates only "*how* [merchants] may communicate" their prices, while leaving them "free to set [their prices] at whatever level they wish." ECF No. 27, at 37, 39.
- It does not grapple with the core distinction drawn by the district court: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." JA 41.
- And it does not discuss any of the congressional testimony, cited in our briefs below, showing that the federal law was intended to regulate "semantics."

That is an odd way to defend against a First Amendment challenge.

Rather than confront these specifics, the Attorney General seeks to hide behind a general rule: "that direct regulations of economic conduct—including price controls and other price regulations—do not implicate the First Amendment" because they "target what sellers may *do* about setting prices, rather than what seller may *say* about otherwise lawful prices." AG Br. 2, 31. And that is true as far as it goes. But the reason direct regulations of economic conduct do not implicate the First Amendment is that they actually regulate conduct—they "fix a maximum of charge to be made," for example, or otherwise regulate what is charged or paid for something. *Munn v. Illinois*, 94 U.S. 113, 125 (1876). New York's law doesn't.

To see the difference, consider the authorities the Attorney General cites at the beginning of its argument (at 27-28). They involve laws (1) setting "maximum of charges for the storage of grain," *id.* at 123; (2) "fix[ing] minimum and maximum . . . retail prices to be charged" for milk, *Nebbia v. New York*, 291 U.S. 502, 515 (1934); (3) setting a "maximum price for old gas," *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 221 (1991); (4) banning insurance commissions "in excess of a reasonable amount," *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 255 (1931); (5) capping the interest rate, *Griffith v. Connecticut*, 218 U.S. 563, 567 (1910); (6) "authoriz[ing] the fixing of minimum wages," *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386 (1937); (7) prohibiting unapproved "rent increases," *Yee v. City of Escondido*, 503 U.S. 519, 524 (1992); (8) forbidding price fixing and other agreements "in restraint of trade," 15 U.S.C. § 1; and (9) outlawing certain price discrimination, 15 U.S.C. § 13(a). Although the Attorney General asserts that the no-surcharge law "falls squarely within the heartland of such price regulations," AG Br. 29, each of these laws directly regulates the total amount charged or paid for something—unlike New York's no-surcharge law.

The Attorney General never confronts this critical distinction but instead tries to conceal it: "Price-control laws," the Attorney General argues, "set maximum or minimum prices at which goods or services can be sold—thus constraining the amount of money sellers can collect from their customers, *as GBL § 518 does*."

AG Br. 28 (emphasis added). But the no-surcharge law does not "constrain[] the amount of money sellers can collect from their customers" for using credit. If it did—if it capped the difference between the cash and credit prices, say, or banned dual pricing outright—then it would be a price-control law of the kind that appears throughout the Attorney General's brief. And it surely would not trigger First Amendment scrutiny.

But that's not this law. As the Attorney General recognized below, "sellers are free to set the credit card price at whatever level they wish"; the law regulates only "*how* they may communicate" their prices to customers. ECF No. 27, at 37. That feature makes the no-surcharge law fundamentally different than nearly every law the Attorney General cites, including New York's price-gouging law (which prohibits charging "an unconscionably excessive price" during market disruptions, N.Y. Gen. Bus. Law § 396-r) and Providence's tobacco-discount law (which prohibits "reducing prices on tobacco products by means of coupons and certain multi-pack discounts," *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013)). Unlike the price-gouging law, the no-surcharge law allows merchants to set the difference between the cash and credit prices at any level they wish. Unlike the tobacco-discount law, the no-surcharge law allows differential pricing (and regulates only how it is labeled). Because the law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and la-

bels, rather than economic realities," the district court correctly concluded that it "regulates speech, not conduct." JA 40-41.

That conclusion is bolstered by one of the laws relied on by the Attorney General—the "longstanding prohibition against false discounts." AG Br. 41. As the Attorney General notes, the FTC "has long policed deceptive discounting" without running afoul of the First Amendment. *Id.* That's because false and misleading commercial speech isn't entitled to First Amendment protection—not because it's not speech. *See Central Hudson*, 447 U.S. at 564-66; *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965) ("It has long been considered a deceptive practice to *state falsely* that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price." (emphasis added)). As will soon be discussed, a law banning only false or misleading commercial speech (like the FTC's deceptive-discounting law) is a constitutional speech restriction under *Central Hudson*; a law banning truthful commercial speech concerning lawful conduct because the state dislikes its message (like New York's no-surcharge law) is not. Both laws, however, are subject to First Amendment scrutiny.

That is true even though "the existence of deceptive discounting . . . depends on objective facts about a merchant's pricing practices." AG Br. 41. Those facts help determine whether the merchant's speech is true or false. They do not make the law a regulation of conduct. A merchant who advertises a "sale" from a "regu-

lar price" that is never actually charged has engaged in false or misleading speech. But what exactly is misleading about a merchant who advertises his prices as "$102 and a $2 cash discount" rather than "$100 plus a $2 credit surcharge"? More to the point, what is being regulated in that scenario other than speech?[4]

One final point: The Attorney General raises the specter of "the *Lochner* era," claiming that the district court's decision "block[s] legislatures from making *any* rational policy decision regarding whether and how sellers can set prices using surcharges or discounts," and in doing so "transform[s] [the First Amendment] from a free-speech protection into a weapon for market players to attack price regulations with which they disagree." AG Br. 32, 33, 44. That's nonsense. This constitutional challenge—supported by leading national consumer organizations as amici curiae—casts doubt on *none* of the consumer-protection laws relied on by the Attorney General. Nor does it implicate the current debate over attempts to use the First Amendment as a corporate and political deregulatory tool. *See, e.g.*, Wu, *The Right to Evade Regulation*, The New Republic, June 3, 2013; Purdy, *The Roberts Court v. America*, Democracy, Winter 2012.

States have broad authority to regulate the prices charged to consumers, and such "'regulation of prices, without more, does not rise to the level of regulation of

[4] Because the no-surcharge law regulates only speech, *United States v. O'Brien* is irrelevant. 391 U.S. 367 (1968); *see* AG Br. 46-48. As already discussed, there is no "nonspeech element" regulated by the law—and thus none that can justify its "limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376.

inherently expressive conduct.'" AG Br. 36. We don't contend otherwise. And the district court's decision doesn't require otherwise. All we contend is that the choice of how best to frame a dual-pricing system—without changing the amounts charged—*is* expressive. As the district court held: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." JA 41. Because New York's no-surcharge law, in both its purpose and practical effect, falls on the speech side of the line, it must satisfy heightened scrutiny.

This leaves the question what form of heightened scrutiny applies. *See Sorrell*, 131 S. Ct. at 2667. At a minimum, the law is subject to a "special commercial speech inquiry," under which the state must "justify its content-based law as consistent with the First Amendment." *Id.*

B. The no-surcharge law fails intermediate scrutiny.

Commercial speech is traditionally subject to intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Courts "must review the [state's law] with 'special care,' mindful that

speech prohibitions of this type rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504. The state's burden is "heavy," *id.* at 516, requiring actual evidence, not speculation and conjecture, that each *Central Hudson* factor is satisfied. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The state cannot meet its burden here.

1. Dual pricing is legal, and calling the price difference a credit-card "surcharge" is not inherently misleading.

Dual pricing based on whether consumers pay with cash or credit is legal. That much is clear. Yet the Attorney General contends (at 50) that dual pricing "is not invariably legal" because the no-surcharge law "prohibits a specific form of dual pricing" in which merchants frame the price difference as a credit surcharge rather than a cash discount. That contention, however, "simply chases [the Attorney General's] tail. The lawfulness of the activity does not turn on the existence of the speech ban itself; otherwise, all commercial speech bans would all be constitutional." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir. 2008). The question is whether the economic conduct—dual pricing—is authorized. It is. So speech that frames the price difference in the way that best explains "the reason[] for [it] does not advance an illegal transaction," *id.*, and is not "inherently misleading." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

2. The state has no legitimate interest in obscuring the cost of credit-card transactions from consumers.

Because New York has no legitimate interest in keeping consumers in the dark about the cost of credit, the state cannot satisfy the second *Central Hudson* prong. "Unlike rational-basis review, the *Central Hudson* standard does not permit [courts] to supplant the precise interests put forward by the State with other suppositions," or to "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfeld*, 507 U.S. at 768. The Court's analysis, therefore, must be confined to interests actually offered by the state.

On its face, the no-surcharge law articulates no state interest, and the legislative history fails to make up for this deficiency. The memorandum introducing the bill indicates that it sought to prevent a situation where "two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment," subjecting consumers to "dubious marketing practices and variable purchase prices." JA 109. But "two price scales" *are* permitted—the law regulates only how they are labeled—and the legislative history does not explain how "variable purchase prices" might be harmful or what is "dubious" about truthfully conveying the higher cost of credit.

Attempting to fill the void, the Attorney General offers three justifications in its brief: (1) that "customers view [credit] surcharges as unjustified penalties," which "can cause consumer anger and 'dampen retail sales,'" while "customers view cash

discounts more positively," which "can actually encourage consumer spending," AG Br. 9, 11; (2) that "surcharges are much more strongly associated than discounts are with 'dubious' and fraudulent sales practices" because they "make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale," *id.* at 9-10, 43; and (3) that "sellers can and often will use surcharges to extract windfall profits from their customers," *id.* at 6.

The first (faux paternalism) is not a legitimate reason for banning speech. *See Va. Bd. of Pharmacy*, 425 U.S. at 769-70. The second (preventing "surprise") is at best a hypothetical concern, and hypothetical concerns aren't good enough. A state must "ensure that its fear of consumer confusion is real" before taking the radical step of enacting a speech ban. *BellSouth*, 542 F.3d at 509. The state's failure to "provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the . . . regulation." *N.Y. State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994). Here, New York has offered nothing. (And the recent nationwide settlement agreements with the credit-card companies require that any surcharges be truthfully and prominently disclosed to consumers. *See In re Payment Card Interchange Fee Litig.*, 2013 WL 6510737, at *21.) The same goes for the third justification (preventing price gouging): New York has failed to back up that concern with evidence, and price gouging is prohibited by the settlement agreements anyway. *Id.*

3. The no-surcharge law does not directly advance any legitimate state interest.

The third prong requires the state to show that the law directly advances the state's asserted interest—that is, that the government's means and ends align. *Edenfield*, 507 U.S. at 771. This prong "seeks to ferret out whether a law ostensibly premised on legitimate public policy objectives in truth serves those objectives." *BellSouth*, 542 F.3d at 507. Here, too, New York's law comes up short. It does not directly advance either the state's asserted anti-deception interest or its asserted anti-gouging interest.

Start with deception. If New York were really concerned about preventing hidden costs then it could allow merchants to highlight the extra cost of credit by labeling it a "surcharge" and insist that it be prominently disclosed to consumers, much like Minnesota does. *See* Minn. Stat. § 325G.051(1)(a). Instead, the state requires merchants to label the additional cost in the way that best conceals it. That only "perpetuates consumer confusion by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." JA 44.

In that way, the no-surcharge law undermines the very interests that the commercial-speech doctrine is designed to protect: the "public interest" in the "free flow of commercial information" to foster "intelligent and well informed" economic decisions by consumers. *Va. Bd. of Pharmacy*, 425 U.S. at 765. When a merchant

uses a dual-pricing system, a consumer can reduce the final price paid by paying in cash. Yet the no-surcharge law prohibits the merchant from telling consumers that they will incur an added cost for using credit. "It would be perverse," to use the district court's words, "to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of preventing consumer deception." JA 44-45. The state has no meaningful response.

Nor does the state acknowledge its position below. In arguing for its now-abandoned "false-advertising only" construction, the state conceded that the law as conventionally interpreted—as a surcharge ban—would not directly advance an interest in preventing deception: "The plaintiffs' interpretation of § 518," the state admitted, "would not serve the State's anti-deception interest, as liability under their interpretation would turn solely on the label that a seller used to describe its dual pricing scheme—not whether that scheme was adequately disclosed to consumers." ECF No. 27, at 24. The state now embraces that conventional interpretation. It no longer argues that liability under the law turns on whether a dual-pricing scheme is "adequately disclosed to consumers," and it is right to do so. But abandoning its prior construction means accepting its prior concession: The law—as interpreted by the plaintiffs, by the district court, and now by the state on appeal—does "not serve the State's anti-deception interest." *Id.*

The law is also riddled with "exemptions and inconsistencies [that] bring into question the purpose of the labeling ban." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). As the district court explained:

> While defendants express concern for consumers who may be lured into a transaction they cannot complete without incurring additional unannounced charges, section 518 applies to only one particular type of additional charge: credit-card surcharges. The statute thus does not actually ensure that the most prominently displayed price consumers encounter will reflect the highest price they will have to pay, since handling charges, shipping costs, service fees, processing fees, "suggested tips," and any number of other types of additional charges—which consumers may or may not be able to take steps to avoid—may still be added on top.

JA 45. The Attorney General's only response is to say that consumer deception is a "specific harm[] associated with credit-card surcharges." AG Br. 52. But the Attorney General does not explain why that is so, let alone point to any evidence showing that consumers are "more likely to be confused" or deceived by credit-card surcharges than each of the other additional charges. *BellSouth*, 542 F.3d at 507-08.

Nor does the Attorney General explain why New York exempts *itself* from the no-surcharge law—and yet doesn't specifically require that the surcharges it imposes be prominently disclosed to consumers ahead of time.[5] The state's self-

[5] For example, New York expressly authorizes surcharges, "administrative fees," or "convenience fees" for payments made to: the court system, N.Y. Crim. Proc. Law § 420.05, and *id.* § 520.10(1)(i); the Water Board, N.Y. Pub. Auth. Law § 1045-j(4-a)(b); and the State Department of Taxation and Finance, among others. *See* N.Y. State Dep't of Taxation and Finance, Pay by Credit Card, *available at* http://bit.ly/1mGShAc.

serving exemptions defeat any interest that it might claim in preventing consumer deception. New York can "present[] no convincing reason for pegging its speech ban to the identity" of the entity imposing the credit-card surcharge, allowing certain favored entities to use the "surcharge" label while banning its use by others. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999).

The best the Attorney General can do is assert that these exemptions do not present the same "risk of consumer confusion" because the consumer "is legally required to make a payment to a governmental entity." AG Br. 53. But again the Attorney General cites no evidence of this.

The Attorney General's asserted anti-gouging interest fares no better. If New York were really concerned about "windfall profits" when enacting the no-surcharge law, AG Br. 6, then the law should regulate the level of permissible difference between the cash and credit prices. It does not. The law permits a merchant, for instance, to charge $100 for a product if paying in cash and $200 if paying with credit—but only if the difference is characterized as a cash discount. Now, it is conceivable, as the Attorney General claims, that "[s]urcharges but not discounts motivate sellers to extract 'windfall profits' from credit-card consumers." AG Br. 42-43. But the only record evidence the Attorney General cites is a single conclusory statement from a single legislator: "[T]o allow imposition of a surcharge

now will only result in a windfall for some retailers with no concomittant benefit for consumers." JA 112. That is insufficient to satisfy *Central Hudson*.

4. The no-surcharge law is far more extensive than necessary to serve any legitimate state interest.

The state's biggest problem, however, is that the no-surcharge law is far more extensive than necessary to achieve the state's purported goals, thus failing the final *Central Hudson* prong. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Here, "the prohibition against the use of words which could be used to present the information about the surcharge in an accurate and non-misleading manner [is] broader than necessary to prevent the description from being potentially misleading" or to prevent gouging. *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 669 (S.D. Ohio 1998).

With respect to deception: The Attorney General does not contend that there is anything inherently deceptive about framing the additional cost of credit as an additional cost for credit (*i.e.*, a "surcharge). It just thinks that "[s]urcharges make it easier for sellers to advertise a low regular price and then impose surprise credit-card fees at the point of sale." AG Br. 9-10. So it bans all attempts to com-

municate the cost of credit as a surcharge—even those that are truthful and non-misleading.

To be clear, we agree that merchants should not impose an undisclosed surcharge or surprise consumers by waiting until the point of sale to inform them of the surcharge. But it is equally clear that the state did not need to enact a new law to prevent that sort of deception. As the district court explained, "New York already has laws on the books prohibiting false advertising and deceptive acts and practices." JA 46; *see* N.Y. Gen. Bus. Law § 349; *id.* § 350 & 350-a. Because the state could address any legitimate concern about consumer deception simply by enforcing its own existing laws, the no-surcharge law is unnecessary. The Attorney General offers no rebuttal to this point, badly undermining its *Central Hudson* case. *See BellSouth*, 542 F.3d at 508 ("Even granting the Commonwealth's assumption that [consumer deception] was a potential problem, . . . why not first enforce existing state law on the point?").

Even if those laws were not already on the books, the no-surcharge law would still sweep too broadly. The statute pointedly "does not limit itself to a prohibition on false or misleading statements as to the charges imposed." *Abrams*, 684 F. Supp. at 807. It regulates all speech framed as a surcharge, no matter how truthful. "States may not place an absolute prohibition" on information that is merely "potentially misleading . . . if the information also may be presented in a way that is

not deceptive." *R.M.J.*, 455 U.S. at 203. If the state were truly worried about consumers being misled by undisclosed surcharges, it could solve that problem by requiring clear disclosure of dual pricing, as Minnesota does. *See* Minn. Stat. § 325G.051(1)(a). That would accomplish the state's purported objective without "offend[ing] the core First Amendment values of promoting efficient exchange of information." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001). Or the state "could have limited its regulation to surcharges that are deceptive and misleading." JA 46. But what it cannot do is what New York did here: ban an entire category of speech because some of it has the potential to mislead. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990).

With respect to gouging: New York could have taken a narrower path here as well. All it had to do was regulate the difference charged between the credit amount and cash amount—by banning only excessive surcharges, for example, or by expressly authorizing merchants to impose "reasonable" surcharges, as New York does when it plays the role of merchant. *See, e.g.*, N.Y. Pub. Auth. Law § 1045-j(4-a)(b). Either would be a permissible regulation of conduct. "Before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick." *BellSouth*, 542 F.3d at 508. New York can't do that. "If

the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373.

II. New York's No-Surcharge Law Is Impermissibly Vague.

Given the lack of any legitimate state interest in prohibiting merchants from describing dual pricing as a "surcharge," New York's law would violate the Constitution even if it were limited to restricting that single word. But the law has been enforced much more broadly—restricting any speech that impermissibly depicts the cost of credit as an added cost above the "regular" price. Application of the law thus turns on a "subtle semantic distinction" between slightly different ways of describing otherwise indistinguishable economic conduct. *Fulvio*, 517 N.Y.S.2d at 1014. As a result, the law both fails to "give[] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and does not "provide[] explicit standards for those who apply it." *Chatin v. Coombe*, 186 F.3d 82, 87 (2d Cir. 1999). That violates due process.

The no-surcharge law has two elements that subject it to "the strictest [vagueness test] of all." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). *First*, it carries criminal penalties, including up to a year in prison. *Id.* *Second*, because it turns on the words merchants use to describe otherwise valid dual-pricing systems, the no-surcharge law threatens to destroy the "breathing space" that First Amendment freedoms need to survive. *NAACP v. Button*, 371 U.S. 415,

433 (1963). The plaintiffs' declarations show how much New York's labeling restriction chills speech. For instance, although Expressions discloses both the cash and credit prices for a haircut, it worries about inadvertently violating the law when describing its prices to customers. JA 99. *Fulvio* shows these fears to be well founded: The merchant there posted a sign that clearly displayed both the cash and credit prices for gas and instructed his employees to tell customers only that he offered a cash discount. 517 N.Y.S.2d at 1010, 1013. Yet he was prosecuted by the state because his cashier told a customer that it was "five cents 'extra'" to use credit rather than a "nickel less" to use cash. *Id.*

The state's response is not to contest *Fulvio*'s reading of the statue or to disavow the state's prosecution in that case, but to say that *Fulvio* "was wrongly decided." AG Br. 62. To the Attorney General, the problem with *Fulvio* was that "the prosecution failed to prove its case beyond a reasonable doubt, not that the statute is unconstitutionally vague." *Id.* But what if the cashier there had *always* told customers that it was "five cents 'extra'" to use credit? Would that have made it illegal? If not, then why was the merchant arrested and prosecuted in the first place?

More importantly, why did the Attorney General below "attempt to dismiss [*Fulvio*] as a kind of aberration" by distancing itself from the prosecution's interpretation of the law? JA 38. Why did the Attorney General repeatedly describe that interpretation (the same one it now embraces) as "untenable" and "illogical," and

concede that it makes "liability turn[] solely on the 'label' that a defendant uses to describe its dual pricing scheme"? ECF No. 27, at 27. The district court found this "concession [to be] well taken," yet the state's brief to this Court simply ignores it. JA 48.

That the Attorney General has advocated two starkly different interpretations of the statute *in this very litigation*—one saying that the law is "directed at misleading commercial speech" and regulates only "*how* [merchants] may communicate" dual pricing, ECF No. 27, at 37, 39; the other saying that it "target[s] what sellers may *do* about setting prices, rather than what seller may *say*," AG Br. 30-31; one running away from the *Fulvio* prosecution; the other running back toward it—is proof enough that this law is impermissibly vague. Indeed, the state said below that the law "provides sellers or ordinary intelligence fair notice that they may not impose a *hidden* fee on credit card users." ECF No. 27, at 40-41 (emphasis added). But, now in this Court, the state contends that the law is not limited to hidden or undisclosed fees.

This inconsistency is not surprising. When liability turns on semantics, it can be difficult to find the line between what is legal and what is not. But the whole point of vagueness doctrine is to ensure that this line is reasonably clear, particularly when First Amendment rights and criminal liability are at stake, so that people can conform their activity to the law. So here is a simple question for the state: A

merchant wants to charge two different prices for a good depending on how the customer pays: $100 for cash, $102 for credit. How is the merchant supposed to comply with the no-surcharge law?

Expressions Hair Design, for one, isn't sure. "If a customer asks us whether we charge more for paying with a credit card," one of Expressions' owners wonders, "should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? 'State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card.'" JA 99. Or what if a consumer asks *why* Expressions imposes an "added cost" or "surcharge" for credit? Can Expressions answer honestly, or does the law require that the employee contest the customer's characterization, insisting that the price difference represents a cash "discount" rather than an "added cost" for credit? Would Expressions' otherwise lawful dual pricing become criminal if the store posted a sign (like those reproduced on the next page) protesting swipe fees, and added a line stating that "unfair swipe fees are the reason we charge a 'credit price' that is 3% more than the 'cash price'"? *See* JA 98 (until Expressions learned of the no-surcharge law, it told customers it would charge more for credit "due to the high swipe fees charged by the credit-card industry").

That none of these questions can be answered with certainty demonstrates the no-surcharge law's failure to provide "actual notice" of what is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Although the law clearly bars a merchant from labeling any price difference between cash and credit a "surcharge," beyond that its meaning is nebulous. As soon as a customer asks about Expressions' properly labeled pricing system, the company finds itself entangled in a semantic briar patch. It "is intolerable" that a merchant "careful enough or sophisticated enough to always characterize the lower . . . prices as a 'discount for cash' may enter his automobile at the end of his business day and drive home a free man; however, if the same individual, or his colleague operating the station down the street, *or* his *employee* is careless enough to describe the higher price in terms which amount to the 'credit price' having been derived from *adding* a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment." *Fulvio*, 517 N.Y.S.2d at 1015. And the law's inscrutability arouses especially grave concerns because it "sweep[s] within [its] coverage the everyday acts of average citizens"—

merchants and employees, carrying out transactions in corner shops and other businesses throughout the state—rather than only "govern[ing] the activities of relatively sophisticated individuals who are deliberately engaged in" some highly technical field. *United States v. Amirnazmi*, 645 F.3d 564, 589 n.34 (3d Cir. 2011).

The Attorney General dismisses these concerns as "hypothetical." AG Br. 60. It argues that the law's "application is sufficiently clear in the ordinary case," even if there are "marginal" "cases in which the distinction between a surcharge and a discount is less than clear." AG Br. 60-61. But Expressions' concerns are not "marginal"—they are concerns that *any* merchant who employs a dual-pricing system must face. Customers will ask questions about it, and merchants need to know how to respond. For example, what if someone calls Expressions on the phone and asks for its prices, the way someone from the Attorney General's office called Parkside and asked for its prices? *See* JA 154. What is Expressions supposed to say? That is a situation that any dual-pricing merchant will eventually confront.

Thus, as a result of the law's uncertainty, the plaintiffs have been forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2743 (2011). Expressions, unsure of the law's boundaries, goes out of its way to avoid truthfully informing its customers that they are paying more for using credit. JA 98-99. For the other plaintiffs, the no-surcharge law produces a still more extreme "chilling

effect." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Fear of slipping across the thin and largely indiscernible semantic line separating a lawful pricing system from a criminal one has prompted these plaintiffs to avoid dual pricing entirely. JA 80, 84, 88, 94. The law's vagueness violates each of the plaintiffs' due-process rights.

In a last-ditch attempt to avoid that conclusion, the Attorney General asks this Court to narrow the law's scope. It asserts that the Court is "obligated to adopt 'any narrowing construction or practice to which the law is *fairly susceptible*.'" AG Br. 65 (quoting *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 177 (2d Cir. 2006)). But a federal court has no authority to "rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Federal courts may give state laws only their "readily apparent" meaning. *Stenberg v. Carhart*, 530 U.S. 914, 944-45 (2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). And even if that weren't true, and federal courts had the power to adopt any "fairly susceptible" meaning of a state law, that would be true only "[i]n the absence of state interpretation.'" *Field Day, LLC*, 463 F.3d at 177. Here, there is no such absence: The state has prosecuted a gas station owner who "post[ed] both cash and credit-card prices" (which the state says (at 65) is a "safe harbor") and the state court determined that "it is clear that conviction may be had under the literal terms of GBL § 518 regardless of sign displays" if the merchant

characterizes the price difference in the wrong way to customers. *Fulvio*, 517 N.Y.S.2d at 1011-12. That state interpretation is fatal to the Attorney General's plea for a narrowing construction.

The same is true of the Attorney General's own recent enforcement actions, as the district court correctly noted. *See* JA 38-39. The state—in the last paragraph of its nearly 70-page brief, when it finally acknowledges their existence—claims that these enforcement actions are "perfectly consistent with the federal definitions." AG Br. 66. The main problem with these actions, of course, isn't the federal definitions; it's the First Amendment. But even setting that aside, the state is wrong when it says that the federal definitions "specified that sellers with no prices must set their regular price as the credit-card price." *Id.* Under the federal definitions, the "regular price" is *automatically* deemed to be the credit-card price if (1) "no price is tagged or posted" or (2) if "two prices are tagged or posted." Pub. L. No. 97-25, 95 Stat. 144 (1981). If New York used these definitions, neither the recent enforcement actions (which fall under category one) nor the *Fulvio* prosecution (which falls under category two) would have been brought. But they were. That shows that the law not only infringes the First Amendment; it is hopelessly vague to boot.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 13,988 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

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June 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I electronically filed the foregoing Corrected Brief for Appellees with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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