IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DANA'S RAILROAD SUPPLY, DANA JACKSON, TM JEWELRY LLC, TIFFANY BALLARD, TALLAHASSEE DISCOUNT FURNITURE, DUANA PALMER, COOK'S SPORTLAND, and ERIC COOK,
Plaintiffs,

v.

PAMELA JO BONDI, in her official capacity as Attorney General of the State of Florida,
Defendants.

No. 4:14cv134-RH/CAS

Plaintiffs' Combined Memorandum In Support of their Motion for Summary Judgment and In Opposition to the Attorney General's Motion to Dismiss

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INTRODUCTION[1]

Each time a merchant swipes a credit card, the merchant incurs a "swipe fee." These fees are typically passed on to all consumers through higher prices. Merchants who want to pass on the cost of swipe fees only to customers who pay with credit cards, however, may lawfully do so by charging two different prices depending on how the consumer pays: a higher price for using a credit card and a lower one for using cash, a check, or a debit card.

But a Florida statute, Fla. Stat. § 501.0117, seeks to control how merchants may *communicate* that dual pricing to consumers: It expressly allows them to offer "discounts" to those who pay in cash, but makes it a crime to impose mathematically 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. Experience, however, shows that consumers react differently to the two labels, perceiving a "surcharge" as a penalty. Precisely because the "surcharge" label is thus 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 even criminalized.

Florida's no-surcharge law, enacted at the behest of the credit-card lobby, in effect says to merchants: If you employ dual pricing, you may tell your customers only that they are paying "$3 less" for paying without credit (a "discount"). But you may not tell them that they are paying "$3 more" for using credit (a "surcharge")—even though they *are* paying more for using credit.

[1] For the convenience of the Court, and by agreement of the parties, we are filing this single 40-page memorandum rather than two separate 25-page memoranda addressing the motions to dismiss and for summary judgment. We have also filed an amended complaint, solely for the purpose of substituting one plaintiff (Lee Harper of TM Jewelry LLC) for another (Tiffany Ballard, also of TM Jewelry LLC). We stipulate that the Attorney General's motion to dismiss the original complaint applies equally to the amended complaint.

Liability thus turns on the language used to describe identical conduct, and nothing else. A Florida merchant who uses the wrong words may face a $10,000 fine or even imprisonment.

The plaintiffs here are Florida merchants who want to employ dual pricing and truthfully and prominently inform their customers that they will pay *more* for using a credit card, not just *less* for using cash. For instance, the husband-and-wife owners of plaintiff Dana's Railroad Supply, a model-railroad hobby shop, put a sign up telling customers that they would pay an additional cost if they used credit. But after receiving a cease-and-desist letter from the Attorney General, Dana's was forced to take down its sign. Dana's would like to put its sign back up—and thereby convey its message in the most effective way—without having to fear criminal prosecution.

Only one other state, New York, has adopted a criminal no-surcharge law like Florida's. Both statutes turn on this same "virtually incomprehensible distinction between what a vendor can and cannot tell its customers." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436 (S.D.N.Y. 2013) (reproduced at Gupta Decl., Ex. A). For that reason, one of the nation's most distinguished judges struck down New York's no-surcharge law as an impermissible speech restriction and as unconstitutionally vague. *Id.* The Attorney General's brief never attempts to grapple with Judge Rakoff's careful opinion.

Nor is Judge Rakoff alone. The only other federal court to discuss these statutes' constitutionality recently expressed agreement, pronouncing them "anti-consumer" and "irrational," and finding "good reason to believe" that they will not survive constitutional scrutiny. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, --- F. Supp. 2d ---, 2013 WL 6510737, *19-*20 (E.D.N.Y. 2013) (Gleeson, J.) (reproduced at Gupta Decl., Ex. B).

This recognition is not new. The earliest reported prosecution under a no-surcharge law targeted a cashier who 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.

People v. Fulvio, 517 N.Y.S.2d 1008, 1010, 1014 (N.Y. Crim. Ct. 1987) (reproduced at Gupta Decl., Ex. C). That case yielded the same judicial assessment—that "precisely the same conduct" is "treated either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011. "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

In the Florida Attorney General's view, however, all these judges are wrong and the no-surcharge law is just "a straightforward pricing statute that does not implicate the First Amendment at all." AG's Mot. 5. That argument ignores a basic distinction at the heart of the commercial-speech doctrine: "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." *Expressions*, 975 F. Supp. 2d at 445. Because the no-surcharge law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," it "clearly regulates speech, not conduct, and does so by banning disfavored expression." *Id.* at 444.

The Attorney General likewise ignores the U.S. Supreme Court's most recent treatment of the speech-conduct distinction, which makes clear that courts should not blindly accept a state's characterization of a law as regulating merely conduct rather than speech. Where, as here, the law's "practical effect" is to outlaw a disfavored way of truthfully describing lawful conduct, it is a content-based speech restriction—subject to "heightened scrutiny" and "presumptively invalid." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

The state makes only a halfhearted effort to show that the law could survive scrutiny, based on an unsubstantiated interest in "consumer protection." But Florida has no legitimate interest in suppressing merchants' efforts to convey the true cost of credit to consumers. Indeed, the statute is riddled with exemptions that undermine its purported aims. And it is far more

extensive than necessary to address a risk of deception, which is prohibited by false-advertising laws anyway and could be easily addressed by a simple disclosure requirement in any event.

The no-surcharge law is also unconstitutionally vague. It does not clearly define the line between a permissible "surcharge" and a mathematically equivalent but illegal "discount." Yet that fuzzy semantic line marks the difference between what is criminal and what is not. The law is so vague that merchants either operate in constant fear of inadvertently describing a dual-pricing policy in a criminal way or refrain from dual pricing altogether (as the plaintiffs here have done). Because the Florida no-surcharge law violates the First Amendment and is unconstitutionally vague, the state should be enjoined from enforcing it.

BACKGROUND AND STATEMENT OF FACTS

Americans pay some of the highest swipe fees in the world—as much as eight times what Europeans pay.[2] The typical fee in the United States is between 2% and 3% of the purchase amount, and in some cases even higher. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1355 (2008). These fees add up. Processing more than two trillion dollars in credit-card transactions every year, banks and credit-card networks receive well over $50 billion in swipe fees. 156 Cong. Rec. S4839 (daily ed. June 10, 2010).

The main reason these fees are so high is that they have been kept hidden from consumers—the very people who decide which payment method to use and thus determine whether a fee will be incurred in the first place. "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, Shy, & Stavins, *Who Gains and Who Loses from Credit Card Payments?*,

[2] *See* Oliver Tree, *The Great Plastic Robbery Continues: Visa, MasterCard Still 'Ripping Off' US Consumers*, Int'l Bus. Times, Aug. 3, 2012, *available at* http://bit.ly/1saDobb.

Federal Reserve Bank of Boston, at 1 (2010). Although merchants are allowed to charge consumers more for using credit, merchants 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.[3]

This industry-friendly speech code has long been imposed through both private contract and state legislation. But in 2013, federal antitrust litigation caused the three dominant credit-card companies (Visa, MasterCard, and American Express) to remove their contractual no-surcharge rules. So laws like Florida's and New York's, until now largely dormant, have assumed sudden importance: They are the only thing stopping merchants from truthfully saying that they impose a "surcharge" for credit because credit costs more.

Florida's no-surcharge law makes it a crime, punishable by imprisonment or a fine of up to $10,000, for any "seller or lessor in a sales or lease transaction [to] impose a *surcharge* on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card." Fla. Stat. § 501.0117 (emphasis added). The law does not, however, outlaw dual pricing; to the contrary, the prohibition "does not apply to the offering of a *discount* for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers." *Id.* (emphasis added).

In other words, "[c]ash discounts are allowed, credit card surcharges are impermissible." *Fulvio*, 517 N.Y.S.2d at 1014 (internal quotation marks omitted). Thus, a gas-station owner can be prosecuted under the law because the station's cashier truthfully has told a customer that it

[3] Unless otherwise specified, this brief uses "cash" as shorthand for ordinary means of payment other than credit cards—namely, cash, personal checks, and debit cards.

would cost "five cents 'extra'" to pay with a credit card rather than saying that it would cost a "nickel less" to use cash. *Id.* at 1010, 1014.

A. 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?*, 55 UCLA L. Rev. at 1351. 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," as with the price difference between using cash and using credit. Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence Of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of a well-established cognitive phenomenon: the tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman, Knetsch, & Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). Put more simply, "people have stronger reactions to losses and penalties than to gains." 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 react very differently to surcharges and discounts," even though they present the same pricing information. *Id.* 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.* Research shows just how wide this gap is. In one study, 74% of consumers had a negative or strongly negative reaction to credit surcharges, while fewer than half had a similar

reaction to mathematically equivalent cash discounts. *Id.* at 280-81. That difference—the difference in how the same pricing information is understood by consumers—influences their behavior, making "surcharges" a much more effective way to communicate the costs of credit to consumers.

The effectiveness of surcharges is why the plaintiffs in this case seek to impose them. Surcharges inform consumers of the costs of credit, letting consumers decide for themselves whether the benefits of credit outweigh its costs. That exchange of information creates meaningful competition, which in turn drives down costs—as price-transparency reforms in Europe and Australia have shown. *Id.* at 312-313. 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. Indeed, in Australia, where regulators in 2003 allowed complete transparency of price information and merchants have responded with surcharges, swipe fees have greatly declined. *Id.*

But when the government criminalizes framing the added cost of credit as a "surcharge," as New York and Florida have done, merchants lose their most effective means of informing consumers of the high costs of credit. Moreover, because the dividing line between what constitutes a "surcharge" and what constitutes a "discount" is so blurry, many merchants (like the plaintiffs in this case) do not even attempt to offer dual pricing, even though the law allows it, to avoid accidentally subjecting themselves to criminal punishment. And many other merchants falsely believe that they may not offer any dual pricing at all. The upshot, then, is that merchants end up passing on swipe fees to *all* consumers by raising the prices of goods and services across the board. This means that consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use because they will pay the same price regardless. As a result, swipe fees have soared.

Swipe fees thus function as an invisible tax, channeling vast amounts of money from consumers to some of the nation's largest banks and credit-card companies. Because cash and credit purchasers both pay this tax, swipe fees are also highly regressive. In a "reverse Robin Hood" effect—criticized by prominent economists and consumer advocates from Joseph Stiglitz to Elizabeth Warren—low-income cash purchasers subsidize the cost of credit cards, while enjoying none of their benefits or convenience. Schuh, Shy, & Stavins, *Who Gains and Who Loses from Credit Card Payments?*, at 21 ("The average cash-paying household transfers $149 . . . annually to card users," each of whom on average "receives a subsidy of $1,333 . . . annually from cash users."). According to Federal Reserve economists, "[b]y far, the bulk of [this subsidy] is enjoyed by high-income credit card buyers," who receive an average of $2,188 every year, paid disproportionately by poor households. *Id.* The result is a regime in which food-stamp recipients are subsidizing frequent-flier miles.

B. 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, to silence merchants' attempts to call consumers' attention to the true costs of credit.

1. The industry's early ban on differential pricing and its demise

In the early days of credit cards, any attempt at differential pricing between credit and cash was strictly forbidden by rules imposed on merchants in their contracts with credit-card companies. *See* 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 two

key developments. *First*, Consumers Union sued American Express, contending that its contractual ban on differential pricing was an illegal restraint on trade. *Linda Blitz & Consumers Union of United States, Inc. v. Am. Express Co.*, Civ. No. 74-314 (D.D.C. filed Feb. 30, 1974). Rather than face the prospect that federal courts would mandate full price transparency, American Express almost immediately settled, agreeing to allow merchants to provide consumers with differential price information. *See* Kitch, *The Framing Hypothesis*, 6 J.L. Econ. & Org. at 225; O'Driscoll, Jr., *The American Express Case: Public Good or Monopoly?*, 19 J.L. & Econ. 163 (1976).

Second, Congress then enacted legislation protecting the right of merchants to have dual-pricing systems. Congress amended the Truth in Lending Act to provide 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)).

2. 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 *label* and *describe* 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 altogether 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. Specifically, it preferred that any difference

between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

3. 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." *See* 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 in the 1980s in which the Reagan Administration, consumer groups, and retailers were all aligned against the credit-card industry.

1981: Opposition to federal surcharge ban mounts. Every major consumer advocacy organization urged Congress to let the ban lapse and allow surcharges. An advocate from Consumers Union testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Cash Discount Act: Hearings Before the Consumer Affairs Subcomm., Senate Banking Comm.*, 97th Cong., 1st Sess. 9 (Feb. 18, 1981), 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 (Jim Boyle, Consumer Federal of America). "Removing the ban on surcharges," he explained, "is an important first step" to "disclos[ing] to consumers the full" cost of credit so that 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 (Hugh H. Smith, American Express); *id.* at 55 (Amy Topiel, MasterCard). 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 (Peter Hood, American Bankers Association). Surcharges, a banking lobbyist openly explained, "talk against the credit industry." *Id.* at 60.

Congress ultimately gave in to industry lobbying and renewed the ban for three more years. Cash Discount Act, Pub. L. 97–25, § 201, 95 Stat. 144, 144 (1981). In doing so, the Senate Banking Committee recognized what both sides already knew: "while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different." S. Rep. No. 97-23, at 3.

1984: Congress lets the temporary surcharge ban lapse. Over the next few years, consumer opposition only intensified. In 1984, when the ban was again set to expire, Senator William Proxmire of Wisconsin 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 (quoting Proxmire). Despite a massive lobbying campaign, the industry's efforts ultimately failed, and the ban lapsed in 1984. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

The temporary ban had accomplished the industry's objective not through direct economic regulation but by requiring merchants to label their prices in the way that best hid the costs of credit. Further, the vague distinction between "discounts" and "surcharges," and the risk

of inadvertently describing a dual-pricing system in an unlawful way, led merchants to steer clear of those systems entirely. In an editorial in *The New York Times*, Senator Christopher Dodd of Connecticut noted that "many merchants are not sure what the difference between a discount and a surcharge is and thus do not offer different cash and credit prices for fear they will violate the ban on surcharges." Sen. Dodd, *Credit Card Surcharges*, N.Y. Times, Mar. 12, 1984, at A16. Thus, although the surcharge ban did not outlaw dual pricing outright—the credit-card companies' first preference—it achieved much the same by regulating speech.

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

After the controversial national ban expired, the credit-card industry briefly turned to the states, convincing fewer than a dozen—including New York and Florida, both of which adopted criminal penalties—to enact no-surcharge laws of their own. In an early instance of the phenomenon now known as "astroturfing," American Express and Visa went to great lengths to create the illusion of grassroots support for such laws, even going so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges" to lend ostensible consumer support to the laws. Indeed, the group was created for the credit-card industry by the renowned public-affairs firm Hill & Knowlton. *See* Gupta Decl., Ex. E (internal memo touting the firm's work "put[ting] together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies"); AP, *Consumers Gain Friends in Credit Card Fight*, Ocala Star-Banner, Apr. 2, 1984 (noting that the group was "bankrolled by American Express and Visa").

But the overwhelming majority of the real consumer groups—including Consumers Union and Consumer Federation of America—opposed state no-surcharge laws because they discouraged merchants from making the costs of credit transparent, which resulted in an enormous hidden tax paid by all consumers whenever they made a purchase. *See* Gupta Decl.,

Ex. F.

Florida's law took effect in 1987, after expiration of the federal ban. Fla. Stat. § 501.0117. That same year, a New York court concluded that, under that state's criminal no-surcharge law, "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 (emphasis in original). The court explained: "[W]hat [the law] *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 [the law] *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. . . . [The law] creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

Similarly, the legislative history of Florida's no-surcharge law recognizes "that from an economic standpoint there is no difference between a cash discount, as permitted by [Florida law], and a credit surcharge, as would be prohibited by this bill." Gutpa Decl., Ex. G (Senate Staff Analysis and Economic Impact Statement (Apr. 17, 1987))

Around the same time that Florida's no-surcharge law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in Florida and other states thus function as a legislative extension of the restrictions that credit-card issuers previously imposed more overtly by contract. For instance, American Express's contracts with merchants included an elaborate speech code. The contracts 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 programs"; or "try to persuade or prompt

Cardmembers to use any Other Payment Products or any other method of payment (*e.g.*, payment by check).[4]

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

In May 2005, merchants sued Visa, seeking a declaration that its no-surcharge rule violated federal antitrust law by preventing them from assessing a discrete, denominated charge on customers using credit cards. *Animal Land, Inc. v. Visa USA, Inc.*, No. 05-CV-1210 (N.D. Ga.). In the ensuing months, numerous U.S. merchants and trade associations brought similar claims against the dominant credit-card companies, alleging that they impermissibly banned merchants from encouraging customers to use less expensive payment methods.

Under the terms of a settlement with the merchant class, Visa and MasterCard in January 2013 dropped their contractual prohibitions against merchants imposing surcharges on credit transactions. *See* Silver-Greenberg, *Visa and MasterCard Settle Claims of Antitrust*, N.Y. Times, July 14, 2012, at B1. And in December 2013—in response to a separate antitrust lawsuit—American Express agreed to do the same. *See.* Johnson, *American Express to Pay $75 Million in Card Surcharge Settlement*, Wall Street Journal, Dec. 19, 2013, *available at* http://on.wsj.com/QmkmCq; Smythe, *American Express Merchant Fee Accord Wins Court Approval*, Bloomberg, Feb. 6, 2014, *available at* http://bloom.bg/1j3JhaP.

As a result, state no-surcharge laws like New York's and Florida's—previously largely irrelevant because of parallel contractual rules—have suddenly sprung to life. 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 can use for such systems. *See* Sherman, *Credit Card Surcharge 'Propaganda' Leads to State Legislation*, Washington Retail Insight, Feb. 1, 2013,

[4] American Express, *Merchant Reference Guide–U.S.*, at 16 (Oct. 2013), *available at* http://amex.co/1iwWJ5j.

available at http://bit.ly/1kSpgAR.

6. New York's no-surcharge law is declared unconstitutional

In June 2013, five merchants—supported by several national consumer groups and retailers as amici curiae—brought a constitutional challenge to New York's no-surcharge law in federal district court, claiming that it violated the First Amendment and was unconstitutionally vague. *See* Gupta Decl., Ex J (Brief of Consumer Action, National Association of Consumer Advocates, The National Consumers League, and U.S. Public Interest Research Group as amici curiae). By making liability "turn[] on the language used to describe identical conduct," they argued, the law is a content-based speech restriction that is subject to heightened scrutiny, which it cannot withstand. They further argued that the law is unconstitutionally vague because it does not define the line between a "surcharge" and a "discount," and "[y]et that line marks the difference between what is criminal and what is not."

The court (Rakoff, *J.*) agreed. In October 2013, the court declared the law unconstitutional and granted a preliminary injunction against its enforcement. *See Expressions*, 975 F. Supp. 2d 430. One month later, the parties stipulated to a final judgment, including a permanent injunction.

B. The Plaintiffs

In March, after the *Expressions* decision struck down New York's no-surcharge law, four Florida merchants and their principals brought this lawsuit challenging the constitutionality of Florida's indistinguishable statute. Each merchant has recently received a letter from the Florida Attorney General's office threatening prosecution under Florida's no-surcharge law. And each wants the same thing: to take advantage of the recent antitrust settlements and truthfully tell their customers that paying by credit card costs *more* than paying by cash (not merely that cash costs *less* than credit). But Florida's no-surcharge law makes using that language a crime.

1. Dana's Railroad Supply. Dana's Railroad Supply is a family-run model-railroad-and-hobby shop in Spring Hill. Jackson Decl. ¶ 1. As with most small merchants, when Dana's makes a sale on a credit card it incurs a swipe fee of 3% or more per transaction. *Id.* ¶ 3. By contrast, there is no fee for sales made with cash. *Id.* For a small business like Dana's, swipe fees are a major cost. *Id.* Dana's has experimented with ways to alleviate this burden. *Id.* ¶ 4. One year, Dana's dropped credit cards and accepted only cash. *Id.* While this avoided fees, it was not a sustainable practice because some customers demanded the ability to use credit. *Id.* Another year, Dana's offered customers a discount for cash. *Id.* But Dana's gave this up too because customers who wanted to use credit did not react to the discount by switching payment methods, and so Dana's was essentially giving money away to customers who wanted to pay with cash in the first place. *Id.*

Dana's finally hit upon a solution: The husband-and-wife owners posted a sign in the shop explaining that Dana's would tack on a small additional fee for transactions paid for with credit cards. *Id.* In other words, Dana's made clear to customers that they would be paying *more* for using a credit card—not just *less* for using cash. This solution worked for a while, but one day a customer came into the shop and told the owners that the sign was illegal under Florida law. *Id.* After that, Dana's received an official letter from the Florida Attorney General informing the shop that it was in violation of Florida's no-surcharge law, which makes it illegal to impose a surcharge on a customer electing to use a credit card (even though it is legal to label the identical price difference as a "discount" for cash). *Id.*

Not wanting to face prosecution, Dana's took its sign down and stopped describing the price difference as an additional fee. *Id.* Dana's would like to put its sign back up. *Id.* ¶ 7.

The store understands that it was and is permitted by Florida law to tell customers that they will pay less for cash rather than more for credit. *Id.* ¶ 6. In Dana's experience, however,

framing the transaction as a discount was not an effective way to generate a reaction from customers. *Id.* Dana's believes it would be much more effective to truthfully tell its customers that it will pay *more* for credit. *Id.* ¶ 7. This way, Dana's can disclose the true cost of accepting credit cards and give customers the chance to make an informed choice. *Id.*

2. TM Jewelry. TM Jewelry LLC is a store in Key West that designs and makes its own jewelry. Ballard Decl. ¶ 1. The vast majority of its sales are paid for by credit card. For each of its sales, TM Jewelry pays roughly 3% of the total amount in swipe fees—a significant cost for a small business. *Id.* ¶ 3.

A few years ago, TM Jewelry took steps to cut down on that cost and to inform its customers of the high price of credit. It started charging two different prices for its products and services—a lower price to customers paying in cash and a higher price to customers paying with a credit card. *Id.* at ¶ 4. TM Jewelry expressed the difference between these prices as an additional charge (or "surcharge") for credit, which the company made all customers aware of so that they could decide for themselves whether to use a credit card. *Id.*

By engaging in dual pricing, TM Jewelry increased its prices to account for the cost of credit (which Florida permits) and did so only for those who use credit cards (which Florida also permits). *Id.* But because TM Jewelry characterized the price difference as an "extra" fee for credit, the Florida Attorney General determined that the company was violating the state's no-surcharge law. In 2013, the Attorney General sent TM Jewelry a letter notifying the company that "surcharges" are unlawful in Florida—even though merchants may provide a "discount" for using cash. *Id.* The letter further demanded that TM Jewelry "suspend this practice immediately to avoid the possibility of further action by our office." Not wanting to risk criminal liability, TM Jewelry did just that: It stopped communicating the cost of credit to its customers as a "surcharge." *Id.*

At that point, the company faced a dilemma. It could continue to engage in dual pricing, while taking pains to communicate the price difference instead as a "discount" for cash or debit. Or it could do away with dual pricing altogether, even though that conduct is lawful in Florida. TM Jewelry chose the latter. It did so because it does not want to describe the difference as a "discount"; it wants to tell its customers that they are paying *more* for credit, not *less* for cash. *Id.* Only by using its preferred language—that there is a "surcharge" for credit and "no charge" for cash—would TM Jewelry be able to effectively communicate the true cost of credit to its customers. TM Jewelry also decided to abandon dual pricing because it does not fully understand the distinction between a "discount" and a "surcharge," so it is not sure that it could comply with the law in practice. *Id.* The company would rather play it safe than risk paying a criminal fine or having its owner go to jail. *Id.*

3. Tallahassee Discount Furniture. Tallahassee Discount Furniture (TDF) is a discount furniture store in Tallahassee. Palmer Decl. ¶ 1. Seeking to reduce the thousands of dollars it pays each year in swipe fees, TDF decided to experiment with dual pricing. *Id.* ¶¶ 3-4. Like TM Jewelry, it communicated the price difference to its customers as a "surcharge," telling them that—due to the high swipe fees charged by the credit-card industry—they would be charged 2% more for using a credit card. *Id.* ¶ 4.

Like TM Jewelry, TDF received a letter from the Attorney General telling the company that it was violating Florida law and must "suspend this practice immediately to avoid the possibility of further action by our office." *Id.* TDF is concerned about the law's effect on how it communicates its prices to customers. TDF would like to describe its policy as a "surcharge" because it believes that is the most effective way to inform its customers of the true costs of credit. *Id.* ¶ 5. But TDF worries that describing its prices in this way would expose the company to criminal liability. *Id.* ¶ 6. Although TDF understands that it may lawfully communicate the price

difference as a "discount" for cash, that is not how it wants to characterize its prices to its customers. *Id.* ¶ 5. When TDF told customers that there was a 2% charge on credit cards, it was effective: The vast majority switched to cash or debit. *Id.* The word "discount," by contrast, makes it sound like TDF's prices are higher than they are and does not give customers the same incentive to avoid using credit. *Id.* Moreover, the blurry distinction between "surcharge" and "discount" leaves the company uncertain that it can implement a dual-pricing system in a lawful way.

4. Cook's Sportland. Cook's Sportland is an outdoor-sporting-goods store in Venice. A few years ago, Cook's decided to bring swipe fees to the attention of its customers. Cook Decl. ¶ 4. It began telling customers that they would pay an additional charge if they used a credit card. *Id.* Cook's did this for about six weeks before it too received a letter from the Florida Attorney General notifying the company that it was violating Florida's no-surcharge law and could be prosecuted. *Id.*

Afraid the Attorney General would follow through on its enforcement threat—potentially subjecting the company and its owner to criminal penalties—Cook's stopped telling customers that it would charge extra for credit and also abandoned dual pricing altogether. *Id.* This means that swipe fees now get passed on to all of its customers, cash and credit users alike, in the form of higher prices. And because swipe fees are kept hidden, customers have no disincentive to use credit—just the opposite, in fact, because of the benefits that most credit cards offer—which raises fees even higher.

The reason Cook's no longer has dual pricing is because of the law's prohibition on speech and also because of its vagueness. As to the former: Cook's would like to communicate the price difference as a "surcharge" for credit—not a "discount" for cash, which would make prices look higher than they are—because the company believes that this would most effectively convey

the costs of credit to its customers. *Id.* ¶¶ 6-7. Florida's no-surcharge law blocks it from doing so. As to the latter: The law is so vague about what it prohibits that Cook's is afraid to have any dual pricing at all, lest it accidentally subject itself to criminal prosecution. *Id.* ¶ 5.

If it were legal, Cook's would tell its customers that it offers one low base price for each of its products and that there is an additional fee if a customer chooses to pay with a credit card. *Id.* ¶ 6. Cook's believes that this truthful speech is easy to understand and would benefit both the company and its customers by giving them the information they need to make the best decisions about how to pay for their purchases. *Id.* ¶ 7. But Florida's no-surcharge law makes that speech a crime.

ARGUMENT

I. Florida'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.

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" is "to suppress speech" based on its content, even if the law "on its face appear[s] neutral." *Id.* In other words, "[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) (plurality). Content-based speech restrictions are "presumptively invalid," and in many cases "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 (internal quotation marks omitted); *see United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012) ("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 v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). 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. Here, both the "purpose and practical effect" of Florida's no-surcharge law show that it is a content-based (and speaker-based) restriction on speech.

1. Practical effect. The Attorney General does not deny that Florida's law is functionally identical to New York's no-surcharge law, which likewise bans merchants from imposing a surcharge on customers for electing to use a credit card but permits the offering of a discount for paying by means not involving the use of a credit card. By drawing a distinction between two mathematically equivalent terms, Florida'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). *Id.* This is all that is needed to demonstrate that the law is not "a mere commercial regulation," as the Attorney General argues, but is instead "directed at certain content and is aimed at particular speakers." *Id.* at 2665.

A hypothetical example helps illustrate the point. Suppose that 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 a credit card, the merchant has violated the law. In both scenarios, the merchant charges the customer the same amounts ($100 for cash or $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. Take the first recorded criminal prosecution under a state no-surcharge statute. The gas-station owner there was arrested, prosecuted, and convicted under the no-surcharge law because his cashier truthfully informed a customer that it cost "five cents 'extra'" to pay with a credit card rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1010, 1014. "[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 [the no-surcharge law] *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 [the no-surcharge law] *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. . . . [The law] 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; italics in original). It is impossible to square this actual prosecution, which turned entirely on communications, with the Attorney General's assurance that the law "regulates no communications at all." AG's Mot. 9.

Or take a more recent enforcement action. A few years back, a New York merchant "quoted the price of oil" to someone over the phone and said that there is "a fee on top of that price for using a credit card." Gupta Decl., Ex. D at ¶ 6 (Declaration of Michael Parisi, filed in *Expressions*). Under New York's identical no-surcharge law, using that speech made the merchant a criminal. A New York Assistant Attorney General later told the merchant that he could continue to charge the exact same amounts—with the exact same difference between the cash and credit prices—but that he had to "characteriz[e] the difference" in the state's preferred way: "as a cash 'discount,' not a credit 'surcharge.'" *Id.* ¶ 8. The Assistant Attorney General gave the merchant "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.* The merchant's mistake was that he used the wrong words.

These examples (both hypothetical and real) show that the no-surcharge 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) (en banc). 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 is precisely what Florida's no-surcharge law does: Merchants may avoid liability under the law by changing what they *say* rather than what they *charge*.

2. Purpose. The reason the law does so is that this was its purpose. When Florida 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 the credit-card companies and major banks, which objected to merchants characterizing the cost of credit as a surcharge because that would "talk

against the credit industry" and "make[] a negative statement about the card to the consumer"—open appeals for the suppression of unwanted speech. *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.

Florida 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," Florida understood the same. S. Rep. No. 97-23, at 3. Indeed, the legislative history of Florida's no-surcharge law recognizes "that from an economic standpoint there is no difference between a cash discount, as permitted by [Florida law], and a credit surcharge, as would be prohibited by this bill." Gupta Decl., Ex. G. Thus, the legislature understood that what it was really regulating was the different effects of the "surcharge" and "discount" labels on consumers' perceptions of credit cards. As a memorandum prepared in support of New York's identical law put it: "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*." *See* Gupta Decl., Ex. H at 10 (emphasis added).

But a behavioral effect that "depend[s] on mental intermediation" just "demonstrates the power" of speech. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The no-surcharge 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) (plurality). 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). That is so whether the regulation "relates to advertising . . . the price" of a product, *Va. Bd. of Pharmacy*, 425 U.S. at 752, or even to "information on beer labels," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995). 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. It is for "the speaker and the audience, not the government, [to] assess the value of the information provided." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

Moreover, the law here does not even have paternalism on its side because it is not looking out for the consumer's own good. Rather, the state is "giv[ing] one side"—the credit-card industry—"an advantage" by muzzling merchants who want to discourage credit-card use and thereby reduce the cost of credit over time. *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 burden 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).[5]

3. Pricing versus price information. Rather than confront the actual purpose and effect of the statute, as *Sorrell* requires, the Attorney General (at 5-9) instead makes the very argument the Supreme Court rejected. *See Sorrell*, 131 S. Ct. at 2664 ("The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation.").

To this end, the State explains that commercial regulations are subject to rational-basis review and that "States and the federal government often limit sellers' ability to impose additional charges without implicating the First Amendment." AG's Mot. 7. That's true enough, so far as it goes. But the reason that direct regulations of pricing and other forms 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, without more. *Munn v. Illinois*, 94 U.S. 113, 125 (1876); *see, e.g.*, *Nebbia v. New York*, 291 U.S. 502, 515 (1934) ("fix[ing] minimum and maximum . . . retail prices to be charged" for milk). Florida's law does not. It does not actually regulate what merchants may charge for a product or

[5] The no-surcharge law also in effect blocks merchants from communicating the cost of credit to credit-card customers "in the forum most likely to capture [their] attention"—the receipt. *BellSouth v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008). Communicating the cost of credit on the receipts of only those customers who pay in cash (which is what conveying the cost as a "discount" would do) is ineffective because those customers are *already* using cash. Customers who use credit—the target of the merchants' message—are kept "in the dark" because their receipts say nothing about how much of their purchase was the result of their decision to pay with a credit card. *Id.*; *see* Betsy Horkovich, *The Cash Discount Act: More Than Just a Matter of Semantics?*, 8 U. Dayton L. Rev. 137, 154 (1982) ("If the merchant offers [a] discount [as opposed to a surcharge], the credit customer may not fully appreciate the consequential impact on his true cost of credit or may not be able to make an informed choice."). It is therefore no answer to say 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 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 receipts—triggers First Amendment scrutiny "even if other, but less satisfactory, methods of communication exist." *Id.*

service. 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 commercial price-control law. And it would not trigger First Amendment scrutiny.

But under the no-surcharge law, merchants may set their prices at whatever level they wish; the law regulates only how they *communicate* their prices to consumers. That feature makes the no-surcharge law fundamentally different from every law the Attorney General cites, including Florida's price-gouging law (which prohibits charging an "unconscionable" excessive price during market disruptions, Fla. Stat. § 501.160) 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 the way that differential pricing is labeled). Because the no-surcharge law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," it "regulates speech, not conduct." *Expressions*, 975 F. Supp. 2d at 444.[6]

States have broad authority to regulate the prices charged to consumers, and such "regulation of prices, without more," is not protected by the First Amendment. *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 78. We do not contend otherwise. But the choice of how best to communicate or frame a dual-pricing system—without changing the amounts charged to consumers—*is* expressive. "*Pricing* is a routine subject of economic regulation, but *the manner in*

[6] Because the no-surcharge law regulates only speech, *United States v. O'Brien* is irrelevant. 391 U.S. 367 (1968); *see* AG's Mot. 10-11. 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.

which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Expressions*, 975 F. Supp. 2d at 445 (emphasis added). Because Florida's no-surcharge law, in both its purpose and practical effect, falls on the speech side of the line, it must satisfy heightened First Amendment scrutiny.

B. The no-surcharge law fails heightened 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." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

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 (plurality). "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983). This burden is a "heavy" one, requiring actual evidence, not just speculation and conjecture, that each *Central Hudson* factor is satisfied. *44 Liquormart*, 517 U.S. at 516; *see Edenfield*, 507 U.S. at 770-71. The Attorney General cannot carry that 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 in Florida. That much is clear. *See Expressions*, 975 F. Supp. 2d at 446 ("The regulated speech pertains solely to dual pricing, which all parties agree is lawful in itself.").

Yet, in a profoundly circular bit of logic, the Attorney General contends (at 13) that the plaintiffs are wrong to contend that "two-tier pricing is legal" because Florida has made "surcharges" for credit illegal while permitting "discounts" for cash. 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*, 542 F.3d at 506. 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.*

Nor is it "inherently misleading" for the merchant to label the difference between the cash price and the credit price a "surcharge." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *see BellSouth*, 542 F.3d at 506 ("[T]ruthfully telling customers why a company has raised prices simply by listing a new tax on a bill . . . is not the kind of false, inherently misleading speech that the First Amendment does not protect."). Indeed, the Attorney General does not even attempt to argue to the contrary. And for good reason: When a merchant has a dual-pricing system, customers pay more to use a credit card. The merchant does not mislead its customers when it informs them of this fact by truthfully describing the price difference as a credit "surcharge."

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

Because Florida has no legitimate interest in keeping consumers in the dark about the cost of credit, the state cannot satisfy the second *Central Hudson* prong. Indeed, the Attorney General relies on little more than a vague and unsubstantiated appeal to "consumer protection," without explaining (or demonstrating with evidence) how the no-surcharge law might actually further any

legitimate consumer-protection interest.[7] Read most charitably, the Attorney General (at 14) offers two speculative justifications: (1) the "possibility" that consumers might "be subject to a bait-and-switch tactic, under which they are lured by the promise of a low rock-bottom price but then charged a higher price at the register," and (2) the "danger" that "merchants will do more than pass on the cost of credit to their customers" and instead use surcharges "in a misleading way."

But such purely hypothetical concerns are insufficient under *Central Hudson*. The state's burden cannot be "satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 507 at 770-71; *see also Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 146 (1994) ("[R]ote invocation of the words 'potentially misleading' does not relieve the state's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."). Here, Florida has offered nothing.

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. Here, too, Florida's law comes up short. It does not directly advance either the state's asserted bait-and-switch or anti-deception rationales. Indeed, the state's brief (at 15) makes so little effort on this prong that it is difficult to know how to respond.

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[7] The legislative history relies most heavily on "Consumers Against Penalty Surcharges"—a group surreptitiously created by a Washington public-relations firm paid by the credit-card industry and designed to appear like a legitimate "grassroots" consumer organization. *See* Gupta Decl., Ex. E.

If Florida were really concerned about preventing hidden costs, it should 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). It shouldn't require merchants to label the additional cost in the way that best conceals it. By doing so, the no-surcharge law "actually *perpetuates* consumer confusion," as Judge Rakoff noted, "by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." *Expressions*, 975 F. Supp. 2d at 446 (emphasis added).

In this way, the no-surcharge law undermines the very interests that the commercial-speech doctrine is designed to protect. The Supreme Court extended First Amendment protection to commercial speech because it recognized a "public interest" in the "free flow of commercial information" to foster "intelligent and well informed" economic decisions by consumers, specifically with respect to "price information." *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 conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of consumer deception." *Expressions*, 975 F. Supp. 2d at 446.

Moreover, if Florida were truly focused on "bait-and-switch tactic[s]" when it enacted the no-surcharge law (AG's Mot 14), then why doesn't the law do anything to stop those practices with respect to cash discounts, like Minnesota's law does? *See* Minn. Stat. § 325G.051(1)(c) (requiring that a cash discount be "conspicuously" disclosed). Why doesn't Florida's law actually prohibit merchants from luring customers with a falsely or deceptively advertised discount and then surprising them at the register by not applying it (say, because the system is subject to undisclosed exceptions) or by applying a different discount amount? The Attorney General does

not say. But a state "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *R.M.J.*, 455 U.S. at 203.

The law is also riddled with "exemptions and inconsistencies [that] bring into question the purpose of the labeling ban." *Rubin*, 514 U.S. at 489. The Attorney General makes little effort to explain why the State of Florida exempts *itself* from the no-surcharge law—and yet doesn't always require that the surcharges it imposes be prominently disclosed to consumers ahead of time. *See* Fla. Stat. § 215.322(3)(b) (permitting state's Chief Financial Officer to adopt "[p]rocedures which permit an agency or officer accepting payment by credit card, charge card, or debit card to impose a convenience fee upon the person making the payment"); *id.* § 215.322(5) (permitting local governmental units to surcharge "an amount sufficient to pay the service fee charges by the financial institution, vending service company, or credit card company for such services").

The state's self-serving exemptions defeat any interest that it might claim in preventing consumer deception. Florida 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 "danger" of "consumer confusion" or "likelihood" that sellers will "recoup more than their cost." AG Mot. 15. But, again, the Attorney General cites no evidence of this. And it is difficult to understand why a consumer confused by surcharges as opposed to discounts would be less confused when paying a bill to a state-run enterprise.

The Attorney General's asserted deception interest fares no better. If Florida were really concerned about the use of surcharges to "obtain additional profits" when enacting the no-

surcharge law, AG Mot. 14, then the law should regulate the amount charged between the cash price and credit price. 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. This strongly suggests that the real purpose of the statute—its only purpose—is to use the law to enact the credit-card companies' preferred speech code by disfavoring one label (surcharge) and preferring another (discount).

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 bait-and-switch tactics. *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 669 (S.D. Ohio 1998).

The Attorney General's only argument is that the no-surcharge law, to the extent it restricts speech, is a "narrow prohibition on what a merchant can speak to a customer about the price of an item" that only prevents "harms that the legislature sought to prevent." AG's Mot. 15. But 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 merely speculates that merchants might "use surcharges, in a misleading way, to obtain additional

profits." AG's Mot. 14. Yet the law bans *all* attempts to communicate the cost of credit as a surcharge—even those that are truthful and non-misleading.

To be clear, the plaintiffs accept that merchants should not impose an undisclosed surcharge on a credit transaction or attempt to surprise consumers by waiting until the point of sale to inform them of the additional cost. But it is equally clear that the state did not need to enact a new law to prevent that sort of deceptive conduct. Florida, like most states, "already has laws on the books prohibiting false advertising and deceptive acts and practices." *Expressions*, 975 F. Supp. at 447; *see* Fla. Sta. 501.201-501.213; *see also* 15 U.S.C. § 1666f(b) (requiring price difference to be "disclosed clearly and conspicuously"). Because Florida could address any legitimate concern about consumer confusion or deception simply by enforcing its own existing laws, the no-surcharge law is unnecessary. The Attorney General offers no argument on 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?").[8]

Even if those laws were not already on the books, the no-surcharge law would still sweep too broadly. The state 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. As already noted, "States may not place an absolute prohibition" on information that is merely "potentially misleading . . . if the information also may

[8] In addition, the recent national settlement agreements with the credit-card companies require merchants to "provide clear disclosure to the merchant's customers at the point of store entry"; additional "clear disclosure … at the point of interaction or sale with the customer" of (a) the amount of the surcharge, (b) a statement that the surcharge is being imposed by the merchant, and (c) a statement that the surcharge is not greater than the applicable swipe fees; and "clear disclosure of the dollar amount of the surcharge on the transaction receipt provided by the merchant to the customer." Settlement Agreement, ¶ 42(c), *available at* https://www.paymentcardsettlement.com.

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. *See* Minn. Stat. § 325G.051(1)(a) (allowing merchants to "impose a surcharge on a purchaser who elects to use a credit card," provided that the merchant "informs the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller's premises"). 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." *Expressions*, 975 F. Supp. 2d at 447. But what the state cannot do is what it has done 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). "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. Florida'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," Florida's law would violate the First Amendment even if it were limited to restricting that single word. But the law sweeps more broadly than that, and turns entirely 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 provide people of ordinary intelligence a reasonable opportunity to know what conduct it prohibits" and allows for "arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The law's vagueness violates the plaintiffs' right to due process.[9]

[9] The Attorney General (at 17) assumes that this case is a "facial challenge" to the law rather than an as-applied challenge. The simplest response is that this case is an as-applied

The no-surcharge law is subject to the "heightened vagueness standard applicable to criminal statutes implicating First Amendment liberties." *United States v. Di Pietro*, 615 F.3d 1369, 1371 (11th Cir. 2010). *First*, the law carries criminal penalties of imprisonment and up to a $10,000 fine. Because those penalties come in the "absence of a scienter requirement," the law sets up "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Nor is it possible to cure this problem by reading a *mens rea* requirement into the law. All that separates an illegal "surcharge" from a permissible cash "discount" are the words themselves, so an implied intent requirement would mean that merchants would violate the law merely by *thinking* about the difference between the cash price and the credit price as a "surcharge." Transforming a word ban into a thought ban is no way to address the law's constitutional infirmities.

Second, because prosecution under the law turns on the words merchants use in connection with 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 Florida's labeling restriction chills speech. For instance, although TM Jewelry previously engaged in dual pricing, it no longer does so because it doesn't "want to get into trouble with the law based on how [it] describe[s] the price difference" to customers, and it is "not confident that [it] can communicate this distinction properly in compliance with the law." Ballard Decl. ¶ 4. *Fulvio* shows these fears to be well founded: Three words mistakenly spoken by a gas-station cashier transformed a lawful pricing system into a criminal surcharge. The station's owner posted a sign that clearly displayed both a cash price and a credit price for gas and instructed his employees to tell customers only that he

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challenge—just like the as-applied challenge the court sustained in *Fulvio*, and just like the as-applied challenge Judge Rakoff sustained in *Expressions*.

offered a discount for cash. 517 N.Y.S.2d at 1010, 1013. Yet he was prosecuted because his cashier told a customer that using a credit card was "five cents 'extra'" instead of saying that it was a "nickel less" to use cash. *Id.*; *see also* Gupta Decl., Ex. D.

When liability turns on semantics, it can be difficult to find the line between what is legal and what is not. So here is a 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?

Or return to TM Jewelry's predicament. The company was engaging in dual pricing, expressing the cost of credit as "an extra charge on top of the regular price," and then it got a letter from the Attorney General saying that this violates the no-surcharge law. Ballard Decl. ¶ 4. At that point, TM Jewelry faced many difficult questions if it wanted to continue dual pricing. Consider just a few from the company's perspective: If one of your customers asks you whether you charge more for paying with a credit card, what do you do? Do you ignore or dodge the question? Are you required to answer falsely? Or should you 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"? Or what if a consumer asks you why you impose an "added cost" or "surcharge" for credit? Can you answer honestly, or does the law require that you contest the customer's characterization, insisting that the price difference represents a "discount" for cash rather than an "added cost" or "surcharge" for credit? Would your otherwise lawful dual pricing become criminal if you 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.'" (Recall that, until the Attorney General's letter forced them to take it down, the husband-and-wife owners of Dana's Railroad Supply posted just such a sign.)

That none of these questions can be answered with certainty is an indication of 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 prohibits a merchant from employing a dual-pricing system and labeling the added cost for credit transactions a "surcharge," beyond that its meaning is nebulous. As soon as a customer asks about the merchant's pricing scheme, the merchant 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 (emphasis in original). 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) (internal quotation marks omitted).

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." *Entm't Merchs. Ass'n*, 131 S. Ct. at 2743 (ellipsis and internal quotation marks omitted). Dana's Railroad, TM Jewelry, Tallahassee Discount Furniture, and Cook's Sportland would all like to employ dual pricing, which is perfectly legal in Florida. But the no-surcharge law has instilled an extreme "chilling effect," prompting them to abandon both disfavored speech and legal conduct. *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, even though they would otherwise prefer it. This chilling effect also injures consumers, who are deprived of the option of patronizing a merchant with a dual-pricing system.

Those charged with enforcing the no-surcharge law are no better able to pin down its meaning than those charged with compliance. As the judge in *Fulvio* noted when defense counsel accidentally referred to the gas station's otherwise lawful pricing system as a "surcharge" policy, even "counsel learned in the law can confuse the two sides of the coin . . . ('cash discounts are allowed, credit card surcharges are impermissible')." 517 N.Y.S.2d at 1014. And even legislators who have enacted no-surcharge laws seem to have struggled to understand the distinction. During consideration of a similar no-surcharge law in Connecticut, one participant remarked: "[C]onceptually, I would like somebody to someday explain to me the difference between a surcharge and discount." Gupta Decl., Ex. I (Conn. Joint Standing Committee Hearings, Banks, Pt. 1, 1986 Sess., pp. 48-49). Because the Florida Attorney General hasn't provided an explanation either, the no-surcharge law is void for vagueness.

CONCLUSION

This Court should issue an order denying the Attorney General's motion to dismiss, granting the plaintiffs' motion for summary judgment, declaring Florida's no-surcharge statute unconstitutional, and permanently enjoining the Attorney General (or any other person acting in the name of the State of Florida) from enforcing the no-surcharge statute.

Respectfully submitted,

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June 11, 2014

CERTIFICATE OF SERVICE

I certify that I filed a copy of the foregoing via the Court's CM/ECF system on June 11, 2014, which will automatically serve a copy on counsel for the defendants.

/s / Deepak Gupta
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