No. 15-1391

In the Supreme Court of the United States

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

v.

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; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York's no-surcharge law, N.Y. Gen. Bus. Law § 518, requires merchants to label that price difference as a cash "discount" and makes it a crime—punishable by up to one year in jail—to label it as a credit-card "surcharge." The question presented is whether New York's no-surcharge law unconstitutionally restricts speech.

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

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INTRODUCTION

Despite what the ads may say, credit cards aren't "priceless." Each time a consumer pays by credit card, the merchant incurs a swipe fee. These fees, imposed by the credit-card issuers on every transaction, are typically passed on to *all* consumers through higher prices. But, if a merchant chooses, she may instead pass on the cost only to those who pay by credit card. She may do so by charging two prices: a higher price for those who pay by credit card, a lower one for those who pay in cash.

All states allow such dual pricing. But a New York statute, N.Y. Gen. Bus. Law § 518, seeks to control how merchants may *communicate* the price difference 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 by credit card.

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 for using a card. Precisely because the surcharge label is most effective at communicating the true cost of credit cards, the credit-card industry has long insisted that it be suppressed. As one industry lobbyist put it, a surcharge "makes a negative statement about the card to the consumer" and "talk[s] against the credit industry." In justifying its law, the state openly relied on the effectiveness of the two labels, "even if only psychologically," to encourage or discourage "desired behavior." JA 89.

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")—even though they *are* paying more. Liability thus turns on the speech used to

describe identical conduct—nothing else. Under this regime, a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead says that the widget costs $100 plus a $2 credit-card surcharge, that is a crime—punishable by up to a year in prison.

The first reported criminal prosecution targeted a gas station owner because his cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card, instead of a "nickel less" to use cash. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1013 (N.Y. Crim. Ct. 1987). The court vacated the conviction on constitutional grounds, reasoning that the statute 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." *Id.* at 1011. In recent years, New York's Attorney General has continued to target merchants under this law, calling them up anonymously to test whether they use the right words. JA 106, 124. The state even gave out "a script of what [to] tell customers when talking to them over the phone." JA 107.

The petitioners here are five merchants who challenge this statute under the First Amendment. Until recently, Expressions Hair Design displayed a sign stating that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% "more" for using a credit card. JA 60. It was forced to take down its sign because of New York's law. Expressions still employs dual pricing but worries it may slip up and say the wrong thing—the law is "hard to understand and even harder to follow." JA 62. "If a customer asks us whether we charge more for paying with a credit card," its owner wonders, "[a]re we required to answer falsely?" *Id.*

Because New York's law keeps consumers in the dark by criminalizing truthful speech, it is subject to First Amendment scrutiny. As this Court recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, 764 (1976), merchants have a right to speak about "who is charging what" and consumers have a "reciprocal right to receive" that speech. The "free flow" of this price information drives our "free enterprise system" and fosters the "formation of intelligent opinions as to how that system ought to be regulated." *Id.* at 765. By censoring merchants' preferred and most effective way of delivering this information, the no-surcharge law seeks to prevent "the reactions it is assumed people will have" to the truth about credit cards. *Id.* at 769. *Virginia State Board* was clear: states may not "suppress the dissemination of concededly truthful" speech because of its "effect upon its disseminators and its recipients." *Id.* at 773.

The New York Attorney General dutifully defends the state's law as one that "falls squarely within the heartland" of straightforward "economic regulation." NY CA2 Br. 29-30. But others (whose job is not to defend the law) have seen it differently. A busy criminal-court judge in the Bronx felt compelled to invoke Shakespeare. *Fulvio*, 517 N.Y.S.2d at 1015 ("That which we call a Rose / By any other name would smell as sweet."). For Judge Rakoff, the statute brings to mind Lewis Carroll's word games. Pet. App. 56a ("*Alice in Wonderland* has nothing on Section 518."). And, to others, it smacks of Orwellian language control, treating "discounts as *more equal* than surcharges" and "purging from merchants' vocabularies the *doubleplusungood* surcharge." *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1247, 1251 (11th Cir. 2015).

Because the no-surcharge law "crumbles under any level" of First Amendment scrutiny, *id.* at 1239, and because it is hopelessly vague, this Court should reverse.

OPINIONS BELOW

The Second Circuit's amended opinion (Pet. App. 1a) is reported at 808 F.3d 118. The district court's opinion (Pet. App. 55a) is reported at 975 F. Supp. 2d 430.

JURISDICTION

The Second Circuit denied a petition for rehearing en banc on January 13, 2016, and Justice Ginsburg granted an extension of the time to file a petition for certiorari until May 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York General Business Law § 518 provides:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.
>
> Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom of speech[.]

STATEMENT

The credit-card swipe fees paid by Americans are "among the highest in the world."[1] The typical fee is between 2% and 3% of the purchase amount, while fees are even higher in some cases. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1355 (2008). These fees add up. By processing over two trillion dollars in transactions, credit-card issuers receive over $50 billion in swipe fees annually. 156 Cong. Rec. S4839 (June 10, 2010).

The reason swipe fees are so high is that they have been kept hidden from consumers—the people who decide which payment method to use and thus determine whether a fee is incurred. "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., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010).

Although merchants may charge more for credit-card payments, they cannot communicate the added cost in the most effective way because credit-card companies have succeeded in insisting that any price difference be framed as a cash "discount," not a credit-card "surcharge." This speech code has long been imposed through private contract and state law. But over the last few years, the credit-card companies have removed their contractual no-surcharge rules in response to nationwide

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[1] Bradford & Hayashi, Fed. Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (Apr. 2008); *see also* Fed. Reserve Bank of Kansas City, *Credit and Debit Card Interchange Fees in Various Countries* (Aug. 2015).

antitrust litigation. *See* Stout, *Credit Issuers Lift Rules on Credit Surcharges*, N.Y. Times, Dec. 20, 2013. So state laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from truthfully telling consumers that they impose a surcharge because credit cards cost 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 permits offering cash customers a discount," if so expressed. Pet. App. 14a; *see* JA 82.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

A credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless*, 55 UCLA L. Rev. at 1351. They are equal in every way except one: the label that the merchant uses to communicate that 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*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because people tend 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). "People are averse to losses … [S]imply through inventive terminology, it is possible to manipulate the frame so as

to make a change appear to be a loss rather than a gain, or vice versa"—for example, "a company that says 'cash discount' rather than 'credit card surcharge.'" Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1312 (2003).

"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). They are much more likely to respond to surcharges (perceived as *losses* for using credit) than to discounts (perceived as *gains* for not using credit). *Id.*

The effectiveness of the surcharge label is why merchants, including the petitioners here, seek to employ it. The surcharge informs consumers of the cost of credit and thus creates meaningful competition, which in turn drives down that cost—as price-transparency reforms in other countries show. *Id.* at 312-13. If fees are too high, consumers will use a different payment method, and banks will have to lower their fees to attract business. *Id.*

But when the government bans framing the added cost as a surcharge, as New York has done, merchants lose their most effective means of informing consumers of the cost. And because the dividing line between surcharge and discount is so blurry, many merchants do not even attempt to offer dual pricing, even though the law allows it, to avoid accidentally subjecting themselves to criminal prosecution. JA 43-44, 48. The upshot is that merchants pass on swipe fees to *all* consumers by raising the prices of goods and services across the board. Because they will pay the same price regardless, consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use. As a result, swipe fees soar. JA 42, 46, 55.

Swipe fees thus function as an invisible tax, channeling billions of dollars annually from consumers to banks. The fees are also highly regressive. In a reverse-Robin-Hood effect—criticized by prominent economists and 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, *Who Gains and Who Loses*, at 21. According to Fed 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 subsidize frequent-flier miles. Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules* 1 (2007).

II. How we got here: the credit-card industry's efforts to prevent merchants from communicating the cost of credit

The invisibility of swipe fees is no accident. It is the product of concerted efforts over many decades. Over the years, the credit-card 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 Congress's protection of cash discounts

In the early days of credit cards, any attempt at differential pricing between cash and credit was strictly forbidden by the contractual rules credit-card companies imposed on merchants. 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 (1990). But in 1974, as these rules faced mounting antitrust scrutiny, American Express settled a lawsuit by agreeing to allow merchants to provide consumers

with differential price information. *Id.* at 220; O'Driscoll, *The American Express Case: Public Good or Monopoly?*, 19 J.L. & Econ. 163, 164 (1976). Congress then enacted legislation granting merchants a non-waivable right to "offer[] a discount" to induce consumers "to pay by cash, check, or similar means" rather than by credit card. Pub. L. No. 93-495, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)).

B. The industry shifts its strategy to labels

Consumer advocates initially considered this 1974 legislation a victory. But "the credit card lobby turned its attention to form rather than substance," focusing on the way prices are communicated. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980). Aware that how information is presented can affect consumer behavior, the industry "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).

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

For a while, this lobbying paid off. In 1976, the industry persuaded Congress to enact a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, § 3, 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.").

Congress defined the word "discount" to mean "a reduction made from the regular price," and added that it "shall not mean a surcharge." *Id.* (codified at 15 U.S.C. § 1602). A "surcharge," in turn, meant "any means of increasing the regular price to a cardholder which is not

imposed upon customers paying by cash, check, or similar means." *Id.* This distinction, however, proved difficult to pin down in practice. And it became increasingly clear that the ban served only to obscure the cost of credit.

Opposition to federal surcharge ban mounts. By the early 1980s, opposition to the ban grew as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse. Both opponents and supporters recognized that the ban hinged on semantics. A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "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 S. Banking Comm.*, 97th Cong. 9 (1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. Because "the distinction is, at best, uncertain," many merchants had been forced to "throw[] up [their] hands in frustration" and steer clear of dual pricing altogether, because "compliance [was] simply not worth the merchant's risk or effort." *Id.* at 9. The Board thus proposed that Congress replace the ban with "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 group agreed. A Consumers Union representative testified that the surcharge-discount distinction "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she added, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas a discount "suggests that consumers are getting a bargain,

and downplays the truth." *Id.* The cost of credit is therefore best "expressed in the form of [a] surcharge." *Id.*[2]

The Federal Trade Commission likewise opposed the surcharge ban, explaining that although "a discount and a surcharge are equivalent concepts" in terms of the conduct they describe, "one is hidden in the cash price and the other is not," meaning that the surcharge ban prohibited merchants from disclosing to their customers the true cost of credit. *Cash Discount Act Hearings*, at 127. Like the Fed, the FTC supported "affirmatively allowing surcharges" and "requiring merchants to clearly disclose" the surcharge amount "in any advertisement" of their prices. *Id.* at 126-27.

On the other side of the debate, American Express and MasterCard "strongly" supported the ban, even though they too understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Cash Discount Act Hearings*, at 43, 55; *see* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman stressing the "big psychological … difference" between surcharges and dis-

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[2] "Removing the ban on surcharges," another consumer advocate testified, "is an important first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Cash Discount Act Hearings*, at 92; *see also* 127 Cong. Rec. S2093 ("Consumer Federation of America is totally and unequivocally opposed to the surcharge ban" because it "gives consumers incorrect signals about credit—making it appear to be free when it in fact has substantial costs."). Trade groups also believed that the ban "deceive[d] consumers about the true cost of credit." 127 Cong. Rec. S2093 ("[T]he consumer's right to be informed includes being informed of charges associated with his credit card purchases. The merchant should have the right if he so desires to pass the information along.").

counts). The big banks openly acknowledged their view that the surcharge label hurts their "good image," "makes a negative statement about the card to the consumer," and "talk[s] against the credit industry." *Cash Discount Act Hearings*, at 32, 60. As one banking lobbyist told Congress: A "surcharge creates a negative image of a card transaction," and a "card issuer's ability to create a favorable image for its product will be directly burdened by that negative image." *Id.* at 37-38.

Congress rejects a disclosure requirement. In 1981, Senators Glenn and Proxmire proposed adopting the Fed's disclosure plan. By its terms, their amendment would have allowed merchants to characterize the cost of credit as either a surcharge or a discount, while requiring that "such surcharge or discount [be] clearly and conspicuously disclosed to all prospective buyers." H.R. 31, 97th Cong., 127 Cong. Rec. S2083, S2089 (Mar. 12, 1981). "By allowing cash discounts and credit surcharges," Senator Glenn said, "our amendment will make consumers more aware of the actual cost of credit and hence better able to make informed choices." *Id.* at S2097; *see also id.* at S2101 (proposal would take the cost "out of hiding" and "label the surcharge so people know about it") (Sen. D'Amato); *id.* at S2102 (surcharge "presents users of a card with an explicit addition to the posted price, making the message clear") (Sen. Tsongas).

The Senate ultimately rejected the Fed's disclosure proposal by a 41-56 vote, *id.*, and Congress renewed the ban for three more years. Pub. L. No. 97-25, 95 Stat. 144 (1981). As renewed, the ban maintained the same definitions of "surcharge" and "discount." It also incorporated the Fed's definition of "regular price" as "the tag or posted price charged for the property or service if a single price is tagged or posted," or "the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no

price is tagged or posted, or (2) two prices are tagged or posted." *Cash Discount Act Hearings*, at 5; *see* Pub. L. No. 97-25, § 102(a) (1981) (15 U.S.C. § 1602(y)).[3]

Congress lets federal surcharge ban lapse. But the Fed's definitions only exacerbated the widespread confusion among merchants. In 1984, as the ban was set to lapse, that confusion became central to the debate over the ban's future.[4]

The distinction between two labels for "fundamentally equivalent conduct," the Fed concluded, had "caused confusion among merchants about the difference be-

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[3] Although the Fed had introduced this definition four years earlier, 42 Fed. Reg. 38171, 38172-73 (July 27, 1977), even its drafters couldn't figure out how to apply it. When a gas station, confused about how to advertise its prices, sought guidance, the Fed acknowledged the difficulty of determining "what constitutes a tagged or posted price." 43 Fed. Reg. 3898, 3899 (Jan. 30, 1978). But it refused "to review for content" the "prototype designs of five signs" submitted by the station—explaining that this would be "tantamount to approving a disclosure form." *Id.* It ventured that, in this context, the "staff feels that when the credit card price for gasoline is clearly disclosed on the pump," signs and posters "may state the cash price without also disclosing the credit card price." *Id.*

[4] By 1984, the Fed had made several attempts to fine-tune its definitions of "surcharge," "discount," and "regular price." *See* 42 Fed. Reg. 780, 781 (Jan. 4, 1977); 42 Fed. Reg. 38171, 38173 (July 27, 1977); 45 Fed. Reg. 29702, 29736 (May 5, 1980); 45 Fed. Reg. 80648, 80696 (Dec. 5, 1980). But the confusion persisted. Senator Dodd opined 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." Dodd, *Credit Card Surcharges*, N.Y. Times, Mar. 12, 1984 (letter to editor); *see* Krucoff, *When Cash Pays* ("[T]he regulations have been so complicated. Smaller business people, who are most likely to offer [discounts], may have been intimidated by the fear it could be viewed as an illegal surcharge.").

tween a permissible discount and an illegal surcharge—as evidenced by many inquiries the Board ha[d] received about the distinction." 70 Fed. Res. Bull. 309, 310-11 (Apr. 1984) (Nancy Teeters). In the Fed's view, such "uncertainty about the law" likely "discouraged merchants from offering discounts," out of fear that they could not comply. *Id.* at 311. The Fed thus reiterated its view that "merchants should be free to charge different prices without having to characterize the difference as a cash discount instead of a surcharge." *Id.*

The final federal fight over the surcharge ban split down well-established lines. Senator 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. Conscious of the threat that surcharges would pose to their business model, card issuers responded by unleashing a massive lobbying campaign to oppose ending the ban. *Id.* American Express mailed millions of cardholders "an elaborate appeal urging them to send a card to their Congressman." Kitch, *The Framing Hypothesis*, at 217. It did not work. This time, Congress let the surcharge ban lapse for good, while leaving in place the original statutory protection for cash discounts. Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. Times, Feb. 27, 1984.

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

Sensing that Congress might not revive the ban, the industry also went to the statehouses. It convinced ten states—including the four most populous—to enact surcharge bans of their own. Most were adopted when it

appeared that the federal ban would not be renewed (in 1981) or shortly after it expired (in 1984). Pet. 10 n.1.

This time, the industry's lobbying was largely covert. To give the illusion of grassroots support, American Express and Visa went 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. Memo from Kate Krell, July 24, 1987, *available at* http://bit.ly/2fLyUNB, at 3 (touting work of public-relations firm Hill & Knowlton in "put[ting] together 'Consumers Against Penalty Surcharges' for a coalition of credit card companies"). As with the federal ban, real consumer-advocacy groups opposed the legislation. In California, which considered legislation a year after New York, Consumers Union and Consumer Federation of America both told the legislature that no-surcharge laws inhibit transparency, thereby increasing costs and masking an enormous "invisible subsidy" from low-income cash consumers to high-income credit consumers. JA 63, 65.

Despite heated controversy at the federal level and in other states, the New York legislation passed quickly through Albany within months of the federal ban's expiration—with little debate or public notice, and virtually no opposition. JA 68. What little history there is suggests that the law was seen as a short-term measure "while extension of the Federal ban, which expired in February, is debated by Congress." JA 92. The retailers' lobby didn't oppose the bill, *id.*, and observed that "[f]ederal legislation to authorize surcharges on credit card purchases is being supported by the Consumer Federation of America, Consumers Union, the Federal Reserve Board, and the Federal Trade Commission." JA 96.

Sparse as it is, the New York legislative history does not hide that the ban's proponents aimed to influence

consumers' perceptions of credit cards by controlling the labels used to describe equivalent transactions. A memo justifying the state's support for the law declared: "Surcharges, *even if only psychologically, impose penalties* on purchasers" while a "cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." JA 89 (emphasis added).

Enacted in June of 1984, New York's surcharge ban adopted the text of the federal ban verbatim. N.Y. Gen. Bus. Law § 518. But New York's statute differs in a few respects. First, "the New York legislature chose not to enact [the federal] definitional provisions." Pet. App. 71a. Second, although New York did not expressly permit discounts, the history shows that the intent was to allow merchants to "continue to offer discounts" for cash. JA 89. And, third, New York made violation of its ban a misdemeanor crime—punishable by fines, imprisonment, or both. N.Y. Gen. Bus. Law § 518.

Around the same time that state surcharge bans were enacted, credit-card companies also began including no-surcharge rules in their merchant contracts. The state laws thus function as a legislative extension of the restrictions imposed more overtly by contract.[5]

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[5] American Express's standard contract, for instance, has long contained an elaborate speech code: In a section entitled "treatment of the American Express brand," it provides 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 15 (Oct. 2016), http://bit.ly/2f2phsp.

E. Enforcement of New York's law

New York immediately began enforcing its surcharge ban against merchants. *See*, *e.g.*, *State by Abrams v. Camera Warehouse, Inc.*, 496 N.Y.S.2d 659 (N.Y. Sup. Ct. 1985). In one early case, the state brought criminal charges against a gas-station owner who offered dual pricing and put up signs that "clearly stated the 'cash price' and the 'credit price' for his gasoline," which differed by five cents per gallon. *Fulvio*, 517 N.Y.S.2d at 1010. The owner was convicted because his cashier made the mistake of telling one customer that it cost "five cents extra" to use a credit card instead of saying that it would cost a "nickel less" to use cash. *Id.* at 1013. This conviction was short-lived, however: the court held that the law is unconstitutionally vague because it 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." *Id.* at 1011.

Fulvio may have temporarily dampened enforcement efforts, but it did not end them. In 2008 and 2009, 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, explaining that they charge a certain amount "more" to pay with credit. JA 98-100, 134-35, 137. The Attorney General's office told them that this explanation was illegal and gave specific instructions on how to describe their pricing schemes to customers. JA 107, 115. Two examples—based on uncontested record evidence—show how the law is enforced.

Parkside Fuel, a small heating-oil seller, informed customers of its credit-card surcharge "on the phone, at the same time that [it] informed them of [its] prices." JA 106. 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." *Id.* To the state, that was an illegal "surcharge." *Id.* The state told Parkside's owner that, to comply, he did not have to change any of the amounts that he charged; his employees simply had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" JA 107.

The Assistant Attorney General even gave the owner "a script of what [he] could tell customers when talking to them over the phone." *Id.* He "could quote the price [of heating oil] 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." *Id.* So Parkside gave up on dual pricing entirely. *Id.*

In a similar case—involving another merchant that clearly disclosed its prices over the phone—an Assistant Attorney General said: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." JA 115. The company's employees "had been saying that 'it is a quarter more a gallon,'" and they "were not allowed to say that." *Id.*

By contrast, the Attorney General's office does not rely on § 518 when merchants engage in bait-and-switch tactics. For example, it sent a cease-and-desist letter in 2011 to a gas station that had "been posting gasoline prices which, in small print, are limited to cash sales only." JA 144. The letter explained that "[t]he roadside

listing of a price without equally prominent disclosure of the higher standard price for credit purchases violates" two false-advertising statutes. *Id.* The letter made no mention of the no-surcharge law.

F. Enforcement in other states

More recently, at least two states have used their no-surcharge laws to target merchants' speech after the credit-card networks rescinded their contractual rules in 2013. Texas, for example, sent a cease-and-desist letter to one small merchant because he "tells customers if paying with credit card its [sic] 3% more." R. 294 in *Rowell v. Pettijohn*, 15-50168 (5th Cir.). Saying "less" for cash, by contrast, would have been legal. *Id.* at 259.

Florida's Attorney General also sent a series of cease-and-desist letters to merchants throughout the state, including the husband-and-wife owners of Dana's Railroad Supply—a model-railroad and hobby shop—whose only crime was "posting a sign indicating that its customers would be subject to a fee for using credit cards," instead of expressing the same price difference as a "discount." *Dana's R.R.*, 807 F.3d at 1239.

G. The Durbin Amendment and the recent political controversy over swipe fees

Meanwhile, the push for financial reform in the aftermath of the 2008 crisis brought a renewed focus on swipe fees. Senator Durbin proposed an amendment to the Dodd-Frank Wall Street Reform Act that would have given the Fed authority to regulate credit-card fees. 156 Cong. Rec. S3588 (May 12, 2010). This proposal touched off yet another contentious political debate between retailers and card issuers. Carter & Grim, *Swiped: Banks, Merchants and Why Washington Doesn't Work for You*, Huffington Post, Apr. 28, 2011. Many merchants conveyed their opposition to swipe fees directly to their customers—and voters—at the checkout counter. Fran-

chisees of the 7-Eleven chain, for example, put up signs asking customers to "STOP UNFAIR CREDIT CARD FEES." Morrison, *7-Eleven Claims Millions of Interchange Signatures*, Credit Union Times, Sept. 28, 2009. And they gathered 1.6 million signatures on a petition to support the proposed legislation—a figure the company claimed represented the largest quantity of signatures ever presented to Congress, trumping even the 1.3 million presented to Congress regarding healthcare reform. *Id.* 7-Eleven's franchisees saw the petition drive as an opportunity to educate their customers. "People don't know about these fees and they are shocked," explained one franchisee. Price & Stratford, *Store Owner Takes Petition to Congress*, Fla. Today, Sept. 29, 2009.

III. This litigation

A. The petitioners

In June 2013, not long after the credit-card companies dropped their contractual rules, five New York merchants (and their principals) filed this suit. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

One petitioner, Expressions Hair Design, prominently posted a sign informing its customers that it would charge 3% "more" to pay for a haircut with a credit card. JA 60. But the salon took down the sign after learning of New York's law. JA 61. It now tells customers that it has two prices—a lower price for cash, a higher one for credit. *Id.* It tries "to be as careful as [it] can to avoid characterizing that price difference as a 'surcharge' or an 'extra' charge for paying with a credit card." *Id.* Because of the law, Expressions cannot communicate its prices how it would like—by calling the difference a "surcharge." *Id.*

Like Expressions, the four other petitioners—Brooklyn Farmacy & Soda Fountain, Brite Buy Wines & Spirits, Five Points Academy, and Patio.com—want to charge two different prices and to call the difference a "surcharge" for credit. JA 43, 47, 51, 57. They 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 52.

The merchants are also concerned about the difficulty of complying with state law. Brooklyn Farmacy, for instance, 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." JA 53. The other merchants likewise worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers"—truthfully—"that they are paying more for using credit cards." JA 58.

B. Procedural history

1. ***The state's position in the district court.*** At an initial hearing, the state articulated its interpretation of the statute in a colloquy with Judge Rakoff:

> THE STATE: [W]e think [the statute] gives the plaintiffs and all other reasonable people notice of what is lawful and what is unlawful.
>
> 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 [it as] 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.

Dist. Ct. Hearing Tr. 6/14/13, at 5-6.

The state took the same position in its briefs, insisting that the statute does not prohibit surcharges but is instead "an anti-fraud statute" that bars only the imposition of "additional hidden fee[s]." Dist. Ct. Dkt. 27, at 21, 39. On this false-advertising-only reading, the statute actually *authorizes* merchants to say that they are imposing credit-card surcharges, so long as they do not do so deceptively. The state argued that the statute—when "properly interpreted" as being "directed at misleading commercial speech"—"regulates *conduct*, not speech." Dist. Ct. Dkt. 27, at 36, 39; *see also id.* at 3.

The state's district-court briefing did not attempt to defend the surcharge ban as a surcharge ban. Instead, it maintained that the law, as a flat surcharge ban, would be "untenable" and "illogical" (*id.* at 2, 3, 19, 21 n.6, 32, 40, 41, 42, 45; Dist. Ct. Dkt. 51, at 7, 8 n.7) and "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." Dist. Ct. Dkt. 27, at 24.

The state elected not to introduce any evidence to carry its burden to withstand First Amendment scrutiny under *Central Hudson Gas & Electric Corp., Inc. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

2. *The district court's decision.* The court was unpersuaded by the state's arguments. Pet. App. 55a. It found the state's interpretation "rather convoluted" and at odds with "the plain text of section 518," which "simply bans 'surcharges.'" *Id.* at 69a. "This, on its face, chills any retailer from characterizing its prices as including a surcharge." *Id.* at 69a-70a. The state's reading was also "fatal[ly]" undermined by its "actual history of prosecution." *Id.* at 70a-72a.

Having rejected the state's false-advertising theory, the court "easily conclude[d]" that the law violates the First Amendment and is impermissibly vague. *Id.* at 75a n.8. The court held that, "even as defendants read it, section 518 plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Id.* at 73a. The law's "virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment." *Id.* at 56a.

The court noted that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" dual-pricing schemes, not pricing itself—"turns the speech-conduct distinction on its head." *Id.* at 73a. "Pricing is a routine subject of economic regulation," the court explained, "but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Id.* at 74a. The court next concluded that the law "cannot pass

muster" under the *Central Hudson* test for commercial-speech restrictions. *Id.* at 75a.

Finally, the court had "little difficulty concluding" that the law is unconstitutionally vague. *Id.* at 80a. It noted that the state had made "no attempt to defend the statute" if read as a surcharge ban rather than a disclosure law, "conceding that it is 'untenable'" on that interpretation—a concession that was "well taken." *Id.*

3. *The state's position in the court of appeals.* After stipulating to an order permanently enjoining the state from enforcing the law against the plaintiffs, *id.* at 48a, the state appealed. On appeal, the state abandoned its false-advertising interpretation and instead defended the law as conventionally interpreted—as banning "surcharges" but permitting "discounts." This "surcharge prohibition," the state argued, "is a direct pricing regulation that does not restrict plaintiffs' speech." NY CA2 Br. 24. The state made no attempt to reconcile this position with its diametrically opposite position in the district court—that the law, as interpreted in this way, "would turn solely on the label that a seller used to describe its dual pricing scheme." Dist. Ct. Dkt. 27, at 24. Because the state had made no record below, the state's appellate brief cited only "economic literature" and newspaper articles to justify the law. NY CA2 Br. 6-10.

4. *The Second Circuit's decision.* The court held that New York's law "regulates conduct, not speech." Pet. App. 27a. Though no party suggested it, the court divided the challenge into "two distinct kinds" of dual pricing. *Id.* at 15a. The first concerned "post[ing] only a single price" on the label, while communicating the surcharge amount through a separate sign (*e.g.*, "3% credit-card surcharge"). *Id.* The second was a scheme in which a merchant "posts two different prices" on the label and

"characterize[s] this price differential as a 'surcharge'" (or as costing "more"). *Id.* at 16a.

"As applied to single-sticker-price schemes," the court upheld the law as a regulation of conduct. *Id.* at 18a. It determined that the merchant's decision of which price to frame as the "regular" price on the "sticker," and which to convey through a separate sign, was not "a communicative act." *Id.* at 25a. "[F]or essentially the same reasons," the court held that the law is not unconstitutionally vague. *Id.* at 41a.

Turning to the second part—whether the law unconstitutionally prohibits merchants from posting two different prices for each product and characterizing the difference as a credit "surcharge"—the court declined to "reach the merits" and instead chose to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (a course the state had not even requested). Pet. App. 28a. Disregarding the law's enforcement history and the state's inconsistent interpretations, the court concluded that "[i]t is far from clear that Section 518 prohibits the relevant conduct." *Id.* at 31a. For this reason—the law's lack of clarity—the court abstained from this aspect of petitioners' vagueness challenge as well. *Id.* at 45a.

SUMMARY OF ARGUMENT

I.A. The First Amendment protects the marketplace of ideas as well as ideas in the marketplace—even if the idea "is simply this: 'I will sell you the X [product] at the Y price.'" *Va. State Bd.*, 425 U.S. at 761. Protecting truthful "price information" promotes "intelligent and well informed" decisions—both about the market and how it "ought to be regulated"—and is thus "indispensible" to "a free enterprise system" and "to enlighten[ed] public decisionmaking in a democracy." *Id.* at 765.

New York's no-surcharge law is at war with these principles. It regulates speech, not conduct, because it restricts only what merchants may say about their prices, not what they may charge. Its "purpose and practical effect" make this clear. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). Its effect is to criminalize truthful speech conveying price information. And its purpose is to control "the reactions it is assumed people will have to the free flow of [that] information" by keeping them "in ignorance" of the cost of credit. *Va. State Bd.*, 425 U.S. at 769. A state may not try to "alter [consumer] decisions" by banning the most "effective and informative way" of conveying information—at least not without satisfying First Amendment scrutiny. *Sorrell*, 564 U.S. at 564, 576.

B. This law dissolves upon scrutiny. It flunks the *Central Hudson* test that the Court traditionally applies to commercial-speech restrictions: The law doesn't directly advance any interest in consumer welfare. It is shot through with exceptions and inconsistencies that undermine the credibility of any such aim—including exemptions for state agencies. And it is far broader than necessary to address a risk of deception, which is prohibited by false-advertising laws anyway and could be addressed by a disclosure requirement like Minnesota's, which expressly permits surcharges if conspicuously disclosed. Minn. Stat. § 325G.051(1)(a)(1) (2015).

II. The law's First Amendment problems are made worse by its vagueness. It does not clearly define the line between a permissible "discount" and a mathematically equivalent but criminal "surcharge." Although the Second Circuit used the law's vagueness against the petitioners by invoking *Pullman* abstention, plaintiffs asserting free-speech rights "have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law." *Sorrell*, 564 U.S. at 563. New York's law is so vague that the Attorney Gen-

eral's lawyers—in this very litigation—have been unable to maintain a consistent party line about what the law means. "For the State to change its position is particularly troubling in a First Amendment case." *Id.* As a result, the petitioners are faced with an unenviable choice: operate in constant fear of inadvertently describing legal dual-pricing conduct in a criminal way, or refrain from dual pricing altogether. The Constitution prevents that "chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

ARGUMENT

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

A. Because New York's law keeps consumers in the dark by criminalizing truthful speech, it is subject to First Amendment scrutiny.

This Court has long held that the dissemination of "price information"—"information as to who is producing and selling what product, for what reason, and at what price"—is "protected by the First Amendment." *Va. State Bd.*, 425 U.S. at 765, 770. The "free flow" of this information "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Ariz.,* 433 U.S. 350, 364 (1977). Laws that seek "to deprive consumers of accurate information" about prices are thus constitutionally suspect, and must withstand First Amendment scrutiny. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality).

New York's surcharge ban is such a law. Although the statute may "on its face appear[] neutral," its "purpose and practical effect" are to criminalize truthful, non-misleading speech that best informs consumers

about the cost of credit cards. *Sorrell*, 564 U.S. at 566. By allowing merchants to express the cost of credit only in the least effective way—as a "discount" for cash, not a "surcharge" for credit—the law "keep[s] the public in ignorance" of the true costs of credit. *Va. State Bd.*, 425 U.S. at 770. And that is all that it does. It thus "imposes more than an incidental burden on protected expression," and is subject to scrutiny. *Sorrell*, 564 U.S. at 567.

Practical effect. 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. All that the law regulates is what merchants may *say*: Framing the price difference as a cash discount is favored; framing it as a credit surcharge is verboten. "After all," as the Eleventh Circuit observed, "what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." *Dana's R.R.*, 807 F.3d at 1245.

The enforcement history bears that out. In the first reported criminal prosecution, a gas-station owner was 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 1013. The state court set aside the conviction as constitutionally "intolerable," observing that "it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. Under this 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." *Id.* at 1011.

The state's continued enforcement efforts confirm that the law regulates speech. A few years back, the state targeted dozens of merchants who had described their prices in the wrong way. JA 105-33. The Attorney General's office told one merchant that, to comply with the law, he need not change the amounts he actually charges consumers, but must simply "characteriz[e] the difference" between the cash and credit prices "as a cash 'discount,' not a credit 'surcharge.'" JA 107. The state told other merchants the same. *See, e.g.*, JA 115 ("You can charge more for a credit card all you want, but you have to say that this is the cash discount rate."). The state even gave sellers "a script of what [they] could tell customers." JA 107. Merchants who do not follow this script could be deemed criminals in the eyes of the state—even though the amounts they charge consumers are perfectly lawful, and prominently disclosed.

As these real-world examples illustrate, the law makes liability turn on the speech used to describe identical conduct—not the conduct itself. A non-complying merchant can bring herself into compliance by changing the way that she frames or communicates her prices to customers, without changing the prices themselves—a fact the state acknowledged in its briefing below. *See* Dist. Ct. Dkt. 27, at 37 ("It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it," but "sellers are free to set the credit card price at whatever level they wish."). The Second Circuit was thus fundamentally mistaken when it concluded that New York's no-surcharge law "regulates conduct, not

speech." Pet. App. 27a. To the contrary, this law "targets expression alone." *Dana's R.R.*, 807 F.3d at 1245.[6]

The law's practical effect is thus undeniable: It criminalizes the dissemination of truthful, non-misleading price information, demanding one way of framing dual pricing over another. And the state's favored framing is not "nearly as effective" at drawing attention to the cost of credit—the very message petitioners wish to convey, JA 52—but instead serves to mask that cost.

Purpose. That was also 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 cost of credit to be conveyed as a surcharge because that would "talk against the credit industry." *Cash Discount Act Hearings*, at 60. Those who opposed the ban, like the Fed and the consumer groups, also understood that it was aimed only at "wording" and "semantics." *Id.* at 22, 98. They under-

[6] The surcharge ban diminishes the effectiveness of merchants' speech in another way. Although petitioners wish to inform customers of the cost of credit before they make their purchases, petitioners also seek to highlight that cost again after a person has made the decision to pay by credit, by listing the price difference on the receipt—"the forum most likely to capture [their] attention" once they've paid. *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (Sutton, J.); *see* JA 56. Listing the cost of credit on the receipts of only those customers who pay in cash (through a discount) is ineffective because those customers are *already using cash*. Those who use credit, however—the target audience—are kept "in the dark." *Id.*; *see* 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, 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.").

stood too that "the semantic differences are significant" because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," while the discount label "suggests that consumers are getting a bargain, and downplays the truth." *Id.* at 98.

New York understood this as well. The state openly 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 89 (emphasis added). And the Attorney General embraces this behavioral effect in this litigation, defending the law on the ground that surcharges cause "anger" and "make consumers unhappy because customers view [them] as unjustified penalties." NY CA2 Br. 9.

But that's exactly the point. 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), *aff'd*, 475 U.S. 1001 (1986). The surcharge ban can produce its intended behavioral effect "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. State Bd.*, 425 U.S. at 769. In the context of credit cards, this effect is well recognized: "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 truthful, non-misleading communication because the state has

determined that it is "too persuasive," or "because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 565-66, 580. A law that works to prevent merchants "from communicating with [consumers] in an effective and informative manner," thereby "diminishing [their] ability to influence [consumer] decisions," must satisfy First Amendment scrutiny. *Id.* at 564, 577.[7]

"Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects," *id.* at 577, so this Court is "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," *44 Liquormart*, 517 U.S. at 503 (plurality). That is so whether the regulation restricts "price information," *Va. State Bd.*, 425 U.S. at 770, or even "information on beer labels," *Rubin*, 514 U.S. at 481-82. Fear that "the public will respond 'irrationally' to the truth," *44 Liquormart*, 517 U.S. at 503 (plurality), or "make bad decisions if given truthful information," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002), is no justification for criminalizing speech. 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

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[7] Some Justices have expressed the view that such laws are always unconstitutional. *See 44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring) ("[When] the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," that "is *per se* illegitimate."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[T]he Government's asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context.").

to open the channels of communication rather than to close them." *Va. State Bd.*, 425 U.S. at 770.

And yet New York's surcharge ban doesn't even have paternalism on its side. Instead, the state is "giv[ing] one side" of a contentious debate—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). In this way, New York's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell*, 564 U.S. at 565. And a law criminalizing merchants' efforts to tell their side of the story about the cost of credit cannot possibly be squared with the original purpose of commercial-speech protection: to ensure that consumers can make "intelligent and well informed" marketplace decisions. *Va. State Bd.*, 425 U.S. at 765.

To that end, merchants have a right to inform consumers *why* credit is expensive—"for what reason" they charge more for using a credit card, "and at what price"—and consumers have a "reciprocal right to receive" that information. *Id.* at 757, 764. Merchants also have a right to combat the advertising message conveyed by the credit-card industry: that credit is "priceless." As one credit-card industry lobbyist complained during consideration of the federal ban: "A card issuer spends substantial time and money in developing a good image for its products. The surcharge imposed by a merchant makes a negative statement about the card to the consumer. The card issuer's ability to create a favorable image for its product will be directly burdened by that negative image." *Cash Discount Act Hearings*, at 37; *see also* AdAge Insights, *Financial Services Marketing* 7 (2012) (noting $1.61 billion spent on credit-card advertising in 2011). Merchants have a right to make this "negative statement," and consumers have a right to receive it.

These rights serve a deeper purpose. "[U]nless consumers are kept informed about the operations of the free market system, they cannot form 'intelligent opinions as to how that system ought to be regulated or altered.'" *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring) (quoting *Va. State Bd.*, 425 U.S. at 765). In this way, "commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* at 503 (plurality). That is certainly true with respect to the surcharge ban. Although the petitioners wish to frame the cost of credit as a surcharge so that consumers make better decisions in the short run, "what is going on here is more than just a debate about how best to sell toothpaste." *BellSouth*, 542 F.3d at 505. "Given current debates over swipe fees and financial regulation more generally," the petitioners also want to convey information to aid efforts to reform the market—a concern, the district court recognized, that has a "powerful noncommercial valence." Pet. App. 76a; *see* JA 60 ("If we can do our part to educate people about swipe fees, we are hopeful that they will act on that information—both as consumers and as citizens.").

By adopting the credit-card industry's speech code, the surcharge ban "facilitates keeping consumers (and voters) in the dark" about the cost of credit "and its impact on their wallets." *BellSouth*, 542 F.3d at 505. Because the law criminalizes merchants' most effective way of fighting back—their attempt to bring the cost of credit into the light—it is subject to First Amendment scrutiny, which it cannot survive.

* * *

Before turning to that question, however, we pause to emphasize what this case is *not* about: This is not a case about "*Lochner*-ization." Some Justices have expressed

deep concern about the possibility that the First Amendment will cast a cloud over "ordinary regulatory practices that may only incidentally affect a commercial message," perhaps even returning us "to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905)." *Sorrell*, 564 U.S. at 585, 602-03 (Breyer, J., dissenting). This case does not implicate that concern. As New York concedes, "few if any additional state laws are likely to be affected" by this Court's decision, which may not "have much impact outside the context of credit-card surcharges." BIO 15. And, even within that context, the impact is limited to speech restrictions. If New York decides tomorrow that it wants to regulate the amounts merchants charge for cash versus credit, or eliminate dual pricing altogether, the First Amendment will not stand in its way. This case in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment.

The only proposition this Court need endorse here is that the choice of how best to label dual pricing—without altering the amounts charged—is a choice about *communication*, not conduct. As the district court put it: "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." Pet. App. 74a. That was as true forty years ago as it is today. *See Va. State Bd.*, 425 U.S. at 765; *Motor Vehicle Mfrs. Ass'n v. Abrams*, 684 F. Supp. 804, 805 (S.D.N.Y. 1988) (striking down New York statute prohibiting companies from "impos[ing]" a "surcharge" on auto sales "to reflect the increased cost" of compliance, even though it was legal to pass that cost onto consumers). This Court can easily strike down the no-surcharge law without expanding the category of laws subject to First Amendment scrutiny,

or adopting a more "unforgiving brand" of heightened scrutiny than what has traditionally been applied to commercial-speech restrictions, *Sorrell*, 564 U.S. at 592 (Breyer, J., dissenting), or treating New York's law as a content-based speech restriction that is "automatically subject to strict scrutiny," *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2236 (2015) (Kagan, J., concurring).

If this case harkens back to any of this Court's 20th-century cases, it is *Virginia State Board*—not *Lochner*. That is because New York's surcharge ban achieves its effect by criminalizing the most powerful way of informing consumers of the cost of a widely used product. Such a law is antithetical to a free marketplace—in both a metaphorical and literal sense—and defies this Court's long-held understanding of the First Amendment.

B. The no-surcharge law cannot survive even intermediate scrutiny.

Laws restricting commercial speech must, at a minimum, withstand 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 law "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. In applying this test, 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 state's burden is "heavy," *id.* at 516, and requires actual evidence—not just "speculation or conjecture"—that each factor is satisfied, *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). The state cannot meet its burden here.

1. Dual pricing is legal, and labeling the price difference as a "surcharge" is not inherently misleading.

Dual pricing based on whether consumers pay with cash or credit is lawful. So speech that frames the price difference in the way that best explains "the reason[] for [it] does not advance an illegal transaction." *BellSouth*, 542 F.3d at 506. Nor is it "inherently misleading." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *see Dana's R.R.*, 807 F.3d at 1249 ("Calling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba."). To the contrary, as the district court found, surcharges "actually make consumers more informed rather than less" by "truthfully and effectively conveying the true cost of using credit cards." Pet. App. 76a. That speech is squarely within *Central Hudson*'s protection.

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

Because the state has no legitimate interest in keeping consumers in the dark about the cost of credit, it 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." *Edenfield*, 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 81. But "two price scales" *are* permitted—the law regulates only how they are communicated—and the legislative history never explains how "variable purchase prices" could be harmful or what is "dubious" about truthfully conveying the higher cost as a surcharge on top of the posted price.

Attempting to fill the void, the Attorney General has offered three justifications in this litigation. One: 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 "encourage consumer spending," NY CA2 Br. 9, 11. Two: 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. Three: that "sellers can and often will use surcharges to extract windfall profits." *Id.* at 6.

The first asserted justification (faux paternalism) is not a legitimate reason for banning truthful speech. *Va. State Bd.*, 425 U.S. at 769-70. Even if "some regulations of statements about [the cost of credit] that *increase* consumer awareness would be entirely proper, this statutory provision is nothing more than an attempt to blindfold the public" and enshrine "a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers." *Rubin*, 514 U.S. at 498 (Stevens, J., concurring). That is impermissible.

The second and third asserted justifications (preventing deception and price gouging) are at best hypothetical concerns. A state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" before taking the radical step of banning "truthful and nonmisleading expression." *Edenfield*, 507 U.S. at 768-69, 771. "[A]necdotal evidence and educated guesses" are not enough. *Rubin*, 514 U.S. at 490. But here, New York offered nothing, leaving the state's appellate lawyers to string together cites from "economic literature" and newspaper articles in an attempt to claim a justification that could qualify as substantial. NY CA2 Br. 6-10.

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

Even overlooking the state's failure to substantiate its purported interests in preventing deception and price gouging, those interests cannot "overcome the irrationality of the regulatory scheme and the weight of the record," *Rubin*, 514 U.S. at 490, and so cannot justify the ban under *Central Hudson*. The third prong requires the state to show that the law directly advances its asserted interest—that is, that the government's means and ends align. *Edenfield,* 507 U.S. at 771. Here, too, New York's law comes up short: It does not directly advance either an anti-deception interest or an 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), or as the Federal Reserve Board and the Federal Trade Commission proposed in the early 1980s. Instead, the state requires merchants to

communicate the additional cost in the way that best conceals it. As the district court observed, that requirement 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." Pet. App. 77a. "It would be perverse," the court continued, "to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of preventing consumer deception." *Id.*

The state acknowledged as much in its district-court briefing. In arguing for its erstwhile false-advertising construction, the state conceded that the law as conventionally interpreted—as a surcharge ban—"would not serve the State's anti-deception interest," for liability "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." Dist. Ct. Dkt. 27, at 24.

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. For one thing, the state exempts *itself* and certain "favored utilities" from the law's prohibition. Pet. App. 77a. It expressly authorizes surcharges, "administrative fees," or "convenience fees" for payments made to (among others) the court system, N.Y. Crim. Proc. Law §§ 420.05, 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. *See* N.Y. State Dep't of Taxation and Finance, *Pay personal income tax by Credit Card*, http://on.ny.gov/2fFKBkO. Yet the law doesn't specifically require that surcharges imposed by the state be prominently disclosed to consumers. The state's self-serving exemptions defeat any inter-

est that it might claim in preventing deception. New York can "present[] no convincing reason for pegging its speech ban to the identity" of the speaker, 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).

And although the state "express[es] concern for consumers who may be lured into a transaction they can't complete without incurring additional unannounced charges," the ban "applies to only one particular type of additional charge: credit-card surcharges." Pet. App. 77a. Thus, as the district court put it, the law "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." *Id.*

The state's asserted anti-gouging interest fares no better. 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 framed as a cash discount. This Court has consistently found that bans "target[ing] truthful, nonmisleading commercial messages rarely protect consumers" from "commercial harms." *44 Liquormart*, 517 U.S. at 502-04 (plurality). The surcharge ban is no exception.

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 surcharge ban is far broader than necessary to achieve its 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); *see Rubin*, 514 U.S. at 491 (explaining that unconstitutionality is "highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech"). "The ready availability of such alternatives"—many of "which would far more effectively achieve" the state's "professed goal" of preventing deception and gouging—"demonstrates that the fit between ends and means is not narrowly tailored." *44 Liquormart*, 530 U.S. at 530 (O'Connor, J., concurring).

With respect to deception: We agree, of course, 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 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." Pet. App. 78a-79a; *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. *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?"). And the state has done just that, demanding that merchants who have engaged in bait-and-switch tactics comply with two false-advertising laws—but making no mention of the surcharge ban. JA 144.

Even if those laws were not already on the books, the ban would still sweep too broadly. "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. *See* Minn. Stat. § 325G.051(1)(a). That would accomplish the state's purported aim without "involv[ing] any restriction on [protected] speech." *44 Liquormart*, 517 U.S. at 507 (plurality). 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*, 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. *See 44 Liquormart*, 517 U.S. at 507 (plurality) (explaining that "direct regulation" is preferred to restricting speech); *id.* at 530 (O'Connor, J., concurring) (explaining that state's purported aim "could be accomplished by establishing minimum prices").

But "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *Id.* at 512 (plurality). "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. The Vagueness of the No-Surcharge Law Chills Petitioners' Protected Speech.

The surcharge ban's First Amendment deficiencies are exacerbated by its vagueness—that is, its failure to "provide a person of ordinary intelligence fair notice of what is prohibited," and its risk of "arbitrary or discriminatory" enforcement. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

The law's vagueness "raise[s] special First Amendment concerns" for two reasons. *Reno*, 521 U.S. at 871-72. The first is "its obvious chilling effect on free speech." *Id.* at 872. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). New York's statute "lacks the precision that the First Amendment requires." *Reno*, 521 U.S. at 874. It turns on a "subtle semantic distinction" concerning speech used to describe otherwise legal prices, *Fulvio*, 517 N.Y.S.2d at 1014, forcing petitioners to "steer far wider of the unlawful zone than if boundaries of the forbidden areas were clearly marked," *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (Alito, J., concurring) (ellipses omitted). The second reason is that the law carries criminal penalties, which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno*, 521 U.S. at 872. "[T]his increased deterrent effect, coupled with the 'risk of discriminatory en-

forcement' of vague regulations, poses [even] greater First Amendment concerns." *Id.*

1. Rather than take special care to protect against these chilling effects, the Second Circuit did the opposite: it used the law's vagueness as an excuse to shirk its obligation to fully adjudicate the case. The court acknowledged that New York's law is "unclear"—at least outside of what it called "single-sticker-price sellers." Pet. App. 40a. But then, without briefing or argument on the question, the court abstained under *Pullman*, speculating that New York's highest court might someday interpret the law narrowly. In so doing, the Second Circuit disregarded this Court's holding that First Amendment plaintiffs "have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law." *Sorrell*, 564 U.S. at 563. One of the cases *Sorrell* relied on in support of that holding, *Houston v. Hill*, stressed this Court's "particular[] reluctan[ce] to abstain" in First Amendment cases. 482 U.S. 451, 467 & n.17 (1987) (citing cases).[8]

Abstention is inappropriate because "the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right [a plaintiff] seeks to protect." *Zwicker v. Koota*, 389 U.S. 241, 252 (1967). And it is particularly unwarranted because "ab-

[8] Even in the days before certification displaced *Pullman*'s "protracted and expensive" procedure, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997), this Court almost never allowed abstention in First Amendment cases—especially in "those few cases where vagueness was at issue," *Baggett v. Bullitt*, 377 U.S. 360, 376 (1964). This Court hasn't abstained in a First Amendment case in nearly forty years, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 307 (1979), and has only ever done so in challenges to new laws with no enforcement history.

stention is at war with the purposes of the vagueness doctrine." *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965). The chilling effect on the petitioners' free-speech rights thus does not depend on "speculation" that New York's law could someday be given "an expansive and arguably problematic reading." Pet App. 36a. The statute's failure to clearly define the semantic line between lawful and criminal speech directly chills speech *now*.

2. The Second Circuit also disregarded *Sorrell* in yet another way: it failed to take account of the fact that the Attorney General has advocated two starkly different interpretations of the statute *in this very litigation.* Given the need for "prompt adjudication," the Second Circuit should have recognized that the state's "change [of] position is particularly troubling in a First Amendment case," *Sorrell*, 564 U.S. at 562-63—and doubly and triply troubling in one with a vagueness challenge to a criminal law. When the state's own lawyers can't agree on what the statute means, how can a small merchant have any confidence that she can comply?

But even if the state could keep its story straight, the statute would still be too vague. If it is "an anti-deception statute" "directed at misleading commercial speech," as the Attorney General argued in the district court, Dist. Ct. Dkt. 27, at 3, 39, then the state has conceded that "the statute doesn't give notice of that on its face." Dist. Ct. Hearing Tr. 6/14/13, at 5-6. The district court agreed, finding that this reading "strays markedly from the ordinary plain meaning of the statute's text." Pet. App. 80a. And "a person of ordinary intelligence" could be forgiven for failing to find clearer notice in the enforcement history. *Fox*, 132 S. Ct. at 2317. Although the Attorney General initially argued that "[t]he statute provides sellers of ordinary intelligence fair notice that they

may not impose a hidden fee on credit card users," Dist. Ct. Dkt. 27, at 40-41, that interpretation came as news to the merchants that his office targeted in recent years despite disclosing the surcharge ahead of time. *See* JA 107-08 ("That does not square with our experience."); JA 115 ("That is not what [the Attorney General's office] told me."); JA 119 ("That is news to me."); JA 125 ("[T]hat is not what the Attorney General's Office told us in 2009.").

But if, on the other hand, the law is not a false-advertising statute, and is interpreted consistent with its enforcement history, then the state has conceded that it is "untenable" and "illogical" because liability "turn[s] solely on the 'label' that a seller uses to describe its dual pricing scheme." Dist. Ct. Dkt. 27, at 2-3. The district court agreed, finding this "concession [to be] well taken," and holding (as *Fulvio* did) that it is "intolerable" for criminal liability and "possible imprisonment" to hinge on such an opaque semantic distinction. Pet. App. 80a (quoting *Fulvio*, 517 N.Y.S.2d at 1015).

Yet, on appeal, the Attorney General ignored his earlier concession. After previously asserting that his office had "enforced the statute in accordance with *Fulvio*," so that the law targeted only "hidden costs and charges," Dist. Ct. Dkt. 27, at 28, the Attorney General switched gears in the Second Circuit, claiming that *Fulvio* "was wrongly decided." NY CA2 Br. 62. The Attorney General argued that the statute, far from being a false-advertising law, "falls squarely within the heartland" of "direct regulations of economic conduct," and that "[t]he only thing that plaintiffs cannot say is that their prices include a credit-card surcharge." *Id.* at 2, 29, 35. That hardly clarifies matters. On this interpretation, a dual-pricing merchant (like Expressions Hair Design, or the

merchant in *Fulvio*) "is allowed to offer a *discount* for cash," but "a simple slip of the tongue calling the same price difference a surcharge," or saying that credit costs that much *more*, puts the merchant at "risk of being fined and imprisoned." *Dana's R.R.*, 807 F.3d at 1239. The only thing clear about that interpretation is its unconstitutionality under the First Amendment.

Nor can the statute be rescued from its ambiguity by importing the definitions from the lapsed federal ban, as the state suggested below. *See* NY CA2 Br. 63-64. To begin with, "the New York legislature chose not to enact those definitional provisions," and the state's enforcement actions are "fatal to [any] reliance on the federal definitions." Pet. App. 71a-72a. Under those definitions, the "regular price" is considered the credit-card price if (1) "no price is tagged or posted" or (2) if "two prices are tagged or posted." 15 U.S.C. § 1602(y). If New York used these definitions, neither the recent sweep of enforcement actions (which seem to fall under category one) nor the *Fulvio* prosecution (which seems to fall under category two) likely would have been brought. It is simply unreasonable to expect a merchant to read to page 63 of the state's appellate brief to make out the contours of a criminal speech prohibition, when the text and enforcement history say otherwise.

More importantly, the federal surcharge ban was itself hopelessly unclear. It said "nothing, and provide[d] no warning or guidance, about how prominently prices must be displayed or whether swipe fees must be disclosed in dollars and cents or as a percentage." Pet. App. 69a-70a. Even the drafter of these definitions, the Federal Reserve Board, lamented "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount*

Act Hearings, at 9. Within a few years, the Board came to the unanimous conclusion that "the distinction [was], at best, uncertain," and that its definitions were "so complicated that the public [had thrown] up its hands in frustration," believing that "compliance [was] simply not worth" the "risk or effort." *Id.* By 1984, when the ban lapsed, this "confusion among merchants" about how "to characterize the difference as a cash discount instead of a surcharge" had produced "many inquiries [to] the Board" "about the distinction." 70 Fed. Res. Bull. at 311. This "uncertainty about the law" had "discouraged" dual pricing altogether. *Id.*

3. New York merchants, faced with criminal penalties and no guidance, are even more at sea. *See, e.g.*, JA 125 ("I don't charge differently for cash or credit. The law is too convoluted."). Even those equipped with a law degree, or a seat in the state legislature, have struggled to grasp the surcharge-discount distinction. *See* JA 121-22 (trade-association general counsel: "I have thought a great deal about the topic and I cannot discern any meaningful difference between a surcharge and a discount," but "I have counseled my clients that … [i]t has everything to do with how you say it."); CA2 JA 129-30 (lawmaker who voted for indistinguishable Connecticut law: "[C]onceptually, I would like somebody to someday explain to me the difference between a surcharge and a discount."); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1211-12 (E.D. Cal. 2015) ("The fact that retailers—even large national retailers with teams of in-house attorneys—do not use a dual-pricing system under the current law due to fear of enforcement is proof that the law is not clear.").

Imagine yourself in the merchant's shoes. Suppose you offer dual pricing and sell a product for $100 if the

customer pays in cash and $102 if the customer pays with credit. How do you comply with the law? What can you say? As the court that struck down California's law asked, can you list the price as "$100+2% surcharge"? *Id.* at 1211. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What if you list the price as $100 but put up "large signs displayed throughout the establishment stating that a 2% surcharge will be applied for purchases made with credit cards?" *Id.* And what if one of your customers (or a lawyer for the state pretending to be a customer) calls and asks for your prices? What do you tell them? "How do you disclose to customers who purchase by phone?" *Cash Discount Act Hearings*, at 9. As the California court observed, "despite having access to extensive briefing from the Attorney General," "the answers to these questions are not clear." *Italian Colors*, 99 F. Supp. 3d at 1211.

Instead of answering these questions, the Attorney General dismisses them as "hypotheticals." BIO 12. But they "represent legitimate concerns that retailers must face when determining whether to impose a legal dual-pricing system." *Italian Colors*, 99 F. Supp. 3d at 1211. Take Expressions Hair Design. Its owners confront questions like these constantly, and find the distinction "hard to understand, and even harder to follow in practice." JA 62. "If a customer asks us whether we charge more for paying with a credit card," its owner 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.'" *Id.* Would Expressions' otherwise lawful dual pricing become criminal if the store posted a sign (like

one it had before) saying that "we charge a 'credit price' that is 3% more than the 'cash price' due to the high swipe fees charged by the credit-card industry? JA 103. Expressions isn't willing to take the risk.

The chilling effect on the other petitioners is even more pronounced. Mindful that "possible imprisonment" looms over any merchant whose "*employee* is careless enough to describe the higher price in [the wrong] terms," *Fulvio*, 517 N.Y.S.2d at 1015, they avoid dual pricing entirely. *See, e.g.*, JA 48 ("Monitoring the day-to-day use of such a tortured verbal formulation would be next to impossible."); JA 53 ("This distinction is difficult to understand and we do not feel that our waitstaff would be able to observe that distinction in practice.").

It is hard to deny that "the many ambiguities concerning the scope of [the law's] coverage render it problematic for purposes of the First Amendment." *Reno*, 521 U.S. at 870. That no one can seem to put a finger on just how far the law sweeps only underscores its "obvious chilling effect on free speech." *Id.* at 872.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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