No. 15-50168

In the United States Court of Appeals for the Fifth Circuit

LYNN ROWELL, doing business as Beaumont Greenery; MICAH P. COOKSEY; MPC DATA AND COMMUNICATIONS, INCORPORATED; MARK HARKEN; NXT PROPERTIES, INCORPORATED; PAULA COOK; MONTGOMERY CHANDLER, INCORPORATED; SHONDA TOWNSLEY; TOWNSLEY DESIGNS, L.L.C.,
Plaintiffs-Appellants,

v.

LESLIE L. PETTIJOHN,
in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Texas (The Honorable Lee Yeakel)

PLAINTIFFS-APPELLANTS' CORRECTED OPENING BRIEF

Mark Wendorf
REINHARDT, WENDORF & BLANCHFIELD
332 Minnesota Street
St. Paul, MN 55101
(651) 287-2100

Richard L. Coffman
THE COFFMAN LAW FIRM
First City Building
505 Orleans Street, Suite 505
Beaumont, TX 77701
(409) 833-7700

Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptabeck.com

Attorneys for Plaintiffs-Appellants Lynn Rowell, et al.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of this Court's Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Maria Amelia Calaf, counsel for Defendant-Appellee
2. Montgomery Chandler, Inc., Plaintiff-Appellant
3. Richard L. Coffman, counsel for Plaintiffs-Appellants
4. Paula Cook, Plaintiff-Appellant
5. Micah P. Cooksey, Plaintiff-Appellant
6. Lesli Gattis Ginn, counsel for Defendant-Appellee
7. Deepak Gupta, counsel for Plaintiffs-Appellants
8. Mark Harken, Plaintiff-Appellant
9. H. Melissa Mather, counsel for Defendant-Appellee
10. MPC Data and Communications, Inc., Plaintiff-Appellant
11. NXT Properties, Inc., Plaintiff-Appellant
12. Leslie L. Pettijohn, Consumer Credit Commissioner of the State of Texas, Defendant-Appellee
13. Lynn Rowell, doing business as Beaumont Greenery, Plaintiff-Appellant
14. Erika R. Sams, counsel for Defendant-Appellee

15. Jonathan E. Taylor, counsel for Plaintiffs-Appellants

16. Shonda Townsley, Plaintiff-Appellant

17. Townsley Designs, LLC, Plaintiff-Appellant

18. Mark Wendorf, counsel for Plaintiffs-Appellants

19. Lee Yeakel, U.S. District Judge

/s/ Deepak Gupta
Attorney of record for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument because this appeal involves the constitutionality of a state statute, and the decision below conflicts with multiple decisions from other federal courts.

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INTRODUCTION

Each time a consumer pays with a credit card, a merchant incurs a "swipe fee." These fees are typically passed on to all consumers through higher prices. But, if a merchant chooses, it may instead pass on the cost only to those customers who pay with credit cards. It may accomplish this by charging two prices: a higher price for those who pay with credit and a lower one for those who pay in cash.

In Texas, as in all states, it is legal for merchants to engage in such dual pricing. But a Texas statute enacted at the behest of the credit-card lobby, Tex. Fin. Code § 339.001, seeks to control how merchants may *communicate* the price difference: It allows merchants to offer "discounts" to those who pay in cash but makes it illegal to impose equivalent "surcharges" on those who pay with credit.

A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a "surcharge" as a penalty for using a credit card. Precisely because the "surcharge" label is far more effective at communicating the true cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed. Texas's no-surcharge law in effect says to merchants: If you use dual pricing, you may tell your customers only that they are paying $2 less to pay without credit (a "discount"), not that they are paying $2 more to pay with credit (a "surcharge")—even though they *are* paying $2

more for credit. Liability thus turns on the words used to describe identical conduct—nothing else.

An example illustrates how the law works. Suppose a merchant charges two different prices for widgets depending on how the customer pays—$100 for cash; $102 for credit. If the merchant says that the widget costs $102 and there's a $2 "discount" for paying in cash, the merchant has complied with Texas law. But if the merchant instead says that the widget costs $100 and there's a $2 "surcharge" for using credit to account for the swipe fee, the merchant has violated the law. In both scenarios, the merchant charges the customer the same amounts ($100 for cash or $102 for credit). The only difference is how the merchant communicates that information to customers—that is, the content of the merchant's speech.

The plaintiffs here are Texas merchants who want to use dual pricing and truthfully and prominently inform customers that they will pay *more* for using credit cards, not just *less* for using cash. Beaumont Greenery, for instance, was planning to put up a sign saying that it charges an "extra fee" for credit-card purchases until its owner, Lynn Rowell, learned that this speech violates Texas law. While he now understands that he may lawfully tell customers that he offers a mathematically equivalent cash "discount," he does not want to say that. The plaintiffs thus seek a declaration that Texas's law violates their right to free speech and is void for vagueness, as well as an injunction barring the law's enforcement against them.

This case is not the first to raise these issues. Four other courts have considered the constitutionality of indistinguishable state laws—and all four recognized that the laws regulate semantics. Judge Jed Rakoff, for example, concluded that New York's identical law "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 444 (S.D.N.Y. 2013). Judge Morrison England held the same about California's law, finding that it regulates only how "prices are conveyed to customers, not the prices themselves." *Italian Colors Rest. v. Harris*, — F. Supp. 3d —, 2015 WL 1405507, *6 (E.D. Cal. 2015). And another court, in the earliest reported enforcement of a no-surcharge law, likewise recognized that "precisely the same conduct by an individual may be treated either as a[n] [unlawful] offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). Even the fourth court—which broke with the other three and upheld Florida's law—understood that the law makes liability turn on "semantics, not economics." *Dana's R.R. Supply v. Bondi*, No. 4:14-cv-134, ECF No. 29 at 2 (N.D. Fla. 2014).

The decision below is squarely at odds with this shared understanding. The district court concluded that Texas's law is a "simple and straightforward"

regulation of "economic activity," not speech, ROA.440, 443—the very opposite of the other courts' recognition that the law turns on semantics, *not* economics. Judge Yeakel based his conclusion on a mistaken belief that the statute "proscribes a single activity—charging more for a credit-card payment"—and thus "does not implicate First Amendment speech rights" and is not vague. *Id.*

That was error. Texas's law does not prohibit "charging more for a credit-card payment" than for using cash, nor does it regulate "prices charged." *Id.* To the contrary, as the district court correctly observed, the law "allows a merchant to exact a higher price" (set at whatever amount the merchant wishes) "from a customer who pays with a credit card than from a customer who pays with cash"—but only if the difference is framed as a "discount" rather than a "surcharge." ROA.440. Liability, in other words, turns on speech, not conduct.

When a law makes liability "depend[] on what [people] say," "it regulates speech on the basis of its content" and must satisfy the First Amendment. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). Because the "practical effect" of Texas's law is to ban one disfavored way of truthfully describing lawful conduct, it is a content-based speech restriction—subject to "heightened scrutiny" and "presumptively invalid." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011).

The law cannot survive scrutiny. Texas can put forth no legitimate interest in suppressing merchants' efforts to convey the true cost of credit to consumers,

much less evidence that the law directly advances any legitimate interest. And ready alternatives exist that would be both *less restrictive* of speech and *more effective* in addressing the state's purported consumer-protection aims: Undisclosed surcharges are independently prohibited by false-advertising law, and the danger they pose could be easily addressed by a simple disclosure requirement in any event. *See*, *e.g.*, Minn. Stat. § 325G.051 (allowing merchants to "impose a surcharge" for credit-card use and requiring that surcharges or discounts be "conspicuously" disclosed).

The law is also unconstitutionally vague. As the other courts have properly understood, the purely semantic distinction between a prohibited "surcharge" and a permitted (but mathematically equivalent) "discount" is anything but clear. Indeed, the earliest reported prosecution under a no-surcharge law targeted a gas station owner whose cashier made the mistake of truthfully telling a customer that it would cost "five cents 'extra'" to pay with a credit card instead of saying it would cost a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1010, 1014. Merchants in Texas, just like the targeted gas station, must either operate in constant fear of inadvertently describing a dual-pricing policy in an illegal way or else refrain from dual pricing altogether (as the plaintiffs here have done).

Because Texas's no-surcharge law violates the First Amendment and is unconstitutionally vague, the state should be enjoined from enforcing it. The district court's decision should be reversed in its entirety.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) over the plaintiffs' claims under 42 U.S.C. § 1983, alleging violations of the First Amendment and unconstitutional vagueness. The district court entered its final judgment dismissing plaintiffs' claims on February 4, 2015. The plaintiffs timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on February 26, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The First Amendment. Texas's no-surcharge statute allows merchants to charge different prices for cash versus credit, but requires the merchant to convey the price difference to consumers as a cash "discount" and not a credit "surcharge." Did the district court correctly conclude, contrary to every other court to consider the constitutionality of indistinguishable state laws, that the Texas statute regulates "economic activity" (the "prices charged" by merchants) and does not turn on semantics? ROA.440. If not, can the law survive First Amendment scrutiny even though the state has made no effort to justify it?

2. Void for Vagueness. Did the district court correctly conclude that Texas's no-surcharge statute is not unconstitutionally vague because it is a "simple and straightforward" regulation of economic conduct?

STATEMENT OF THE CASE AND OF THE FACTS

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

This industry-friendly speech code has long been imposed through both private contract and state legislation. But nationwide settlements in two major antitrust class actions caused the credit-card companies to remove their contractual no-surcharge rules in 2014. So state laws like Texas's have now assumed sudden importance: They are the only thing stopping merchants from truthfully saying that they impose a "surcharge" for credit because credit costs more.

Texas's no-surcharge statute makes it illegal for any seller in any "sale of goods or services" to "impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, check, or a similar means of payment." Tex. Fin. Code § 339.001. The law does not, however, outlaw dual pricing. To the contrary,

as the state's Office of Consumer Credit Commissioner (OCCC) has explained, the statute allows a merchant to "offer a cash customer a discount" but forbids the imposition of a mathematically equivalent "surcharge on a credit card customer." ROA.259.

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

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

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence Of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991).

"Consumers react very differently to surcharges and discounts." Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers had a negative or strongly negative reaction to surcharges, while fewer than half had a similar reaction to equivalent cash discounts. *Id.* at 280-81.

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

II. How we got here: the credit-card industry's concerted efforts to prevent merchants from communicating the costs of credit as "surcharges"

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

legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.

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

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

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

The 1974 legislation was initially considered a victory for consumer advocates. But the credit-card industry, seizing on Congress's use of the word "discount," soon shifted its focus to the way merchants could *describe* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing if "surcharges" were outlawed—the credit-card lobby "insist[ed] that any

price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance. Specifically, it preferred that any difference between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

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

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

1981: Opposition to federal surcharge ban mounts. Explaining the Federal Reserve Board's unanimous opposition, one member pointed out "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414*

Before the Senate Banking Comm., 97th Cong., 1st Sess. 9 (Feb. 18, 1981) (reproduced at ROA.266). "If you just change the wording a little bit, one becomes the other." *Id.* at 22 (ROA.269). The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10 (ROA.267).

Every major consumer-advocacy organization agreed. One advocate testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98 (ROA.285). But "the semantic differences are significant," she explained, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* Another advocate put it more pithily: "one person's cash discount may be another person's surcharge." *Id.* at 90. "Removing the ban on surcharges," he explained, "is an important first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Id.* at 92.

On the other side of the debate, American Express and MasterCard "wholeheartedly" and "strongly" supported the ban, even though they understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Id.* at 43, 55 (ROA.274, 277). And the big banks, like the credit-card giants, supported treating "surcharges" and

"discounts" differently because a surcharge "makes a negative statement about the card to the consumer." *Id.* at 32 (ROA.271). Surcharges, a banking lobbyist explained, "talk against the credit industry." *Id.* at 60 (ROA.282).

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

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

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

After the national ban expired, the credit-card industry briefly turned to the states, convincing ten states to enact no-surcharge laws of their own. American Express and Visa went to great lengths to create the illusion of grassroots support for these laws, even going so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges"—an early instance of the phenomenon now known as "astroturfing." ROA.290 (internal memo from Hill &

Knowlton public-relations firm, describing its work in creating the group). In Texas, a mysterious group calling itself the "Association to Ban Surcharges on Credit Cards" suddenly emerged and hired a former Speaker of the Texas House of Representatives, Bill Clayton, to lobby in support of the law. ROA.292. Shortly thereafter, in 1985, the Texas legislature enacted section 339.001. In doing so, the House rejected a proposed amendment that would have limited the law's prohibition to "unposted" surcharges. ROA.298-99.

Two years later, a New York court concluded that, under that state's indistinguishable criminal no-surcharge law, "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Fulvio*, 517 N.Y.S.2d at 1011 (emphasis in original). The court explained: "[W]hat [the law] *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what [the law] *prohibits* is a price differential, in that so long as that differential is characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . [The law] creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

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

E. Visa, MasterCard, and American Express drop their no-surcharge rules

Meanwhile, the issue of swipe fees remained largely in the shadows. Even in the majority of states without no-surcharge laws, contractual no-surcharge rules ensured that consumers were rarely informed of the true cost of credit. In 2005, however, merchants and trade associations began bringing antitrust claims challenging those contractual rules. These claims culminated in a nationwide class-action settlement under which Visa and MasterCard in January 2013 dropped their contractual prohibitions against merchants imposing surcharges on credit

transactions. Silver-Greenberg, *Visa and MasterCard Settle Claims of Antitrust*, N.Y. Times, July 14, 2012, at B1. And in December 2013 American Express agreed to do the same as part of a separate national class-action settlement. Johnson, *American Express to Pay $75 Million in Card Surcharge Settlement*, Wall St. J., Dec. 19, 2013.

As a result, state no-surcharge laws—previously largely irrelevant because of parallel contractual rules—have now gained added importance.

F. Texas ramps up enforcement of its no-surcharge law

After the major credit-card networks were forced to rescind their illegal surcharge bans, Texas took steps to expand enforcement of its own ban. Before 2013, the Texas Finance Commission had exclusive authority to enforce section 339.001 because the legislature amended the statute to eliminate a private cause of action. This was in response to the only reported case thus far enforcing Texas's no-surcharge law: a class action brought by strip-club patrons who complained about extra fees imposed when they paid for their $20 lap dances by credit card. *See Meekey v. Rick's Cabaret Int'l, Inc.*, 171 S.W.3d 394 (Tex. App. 2005).

The Texas Finance Commission, however, is only a governing body that oversees three Texas agencies (including the OCCC); it has no investigative staff or legal department to conduct enforcement proceedings. So, to facilitate active enforcement of the law, the legislature transferred authority to the OCCC, effective September 1, 2013. *See* Tex. Fin. Code § 339.001. With that delegation, the

OCCC is now prepared to enforce the law against merchants across the state who express the costs of credit to their customers in the wrong way. And the OCCC appears to be doing just that. To take just one instance, it recently sent a letter to a merchant who "tells customers if paying with credit card its [sic] 3% more." ROA.294. The OCCC demanded that the merchant "[c]ease this practice for all future services as it appears to be in conflict with [the no-surcharge law]." *Id.*

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

In June 2013, five merchants—supported by several national consumer groups and retailers as amici curiae—brought a constitutional challenge to New York's no-surcharge law, claiming that it violated the First Amendment and was unconstitutionally vague. By making liability "turn[] on the language used to describe identical conduct," they argued, the law is a content-based speech restriction that is subject to heightened scrutiny, which it cannot withstand. They further argued that the law is unconstitutionally vague because it does not define the line between a "surcharge" and a "discount," and "[y]et that line marks the difference between what is [illegal] and what is not."

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

The court began its analysis by recognizing that liability under New York's no-surcharge law turns on a "virtually incomprehensible distinction between what a vendor can and cannot tell its customers," a distinction that ultimately rendered the statute unconstitutional. *Id.* at 436. The statute, the court reasoned, "plainly regulates speech"—not conduct—because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Id.* at 444. The state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" their dual-pricing schemes, while leaving them "'free to set the credit card price at whatever level they wish'"—"turn[ed] the speech-conduct distinction on its head." *Id.* at 445 (quoting state's brief). The court explained the problem with the state's logic:

> [I]n defendants' view, setting prices (which [the no-surcharge law] does not regulate) is speech, but communicating those prices to consumers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

Id.

Applying the traditional commercial-speech framework under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the court found that the law failed intermediate scrutiny: "the speech restricted by [the

no-surcharge law] concerns lawful conduct and is non-misleading"; the law "does not 'directly advance' any interest in protecting consumers"; and the law "is far broader than necessary to serve any asserted anti-fraud purpose." *Expressions*, 975 F. Supp. 2d at 445-48. "It would be perverse," the court reasoned, "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.* at 446.

Finally, the court had "little difficulty concluding" that the law (which carried criminal penalties) was unconstitutionally vague as well. *Id.* at 448. The court quoted the New York trial judge who had reached the same conclusion a quarter-century earlier:

> [it] is intolerable ... that the gasoline station operator careful enough or sophisticated enough to always characterize the lower of [his] prices as a "discount for cash" may enter his automobile at the end of his business day and drive home a free man; however, if the same individual, or his colleague operating the station down the street, or his employee is careless enough to describe the higher price in terms which amount to the "credit price" having been derived from adding a charge to the lower price, he faces the prospect of criminal conviction and possible imprisonment.

Id. at 448 (quoting *Fulvio*, 517 N.Y.S.2d at 1015).

H. Merchants achieve further success in challenging state no-surcharge laws after *Expressions*

Following *Expressions*, a California district court (England, J.) agreed with Judge Rakoff and struck down that state's no-surcharge law as unconstitutional. *Italian Colors*, 2015 WL 1405507. The court explained that the law "is not an

economic regulation that controls what is charged or paid for something," but instead "regulates speech that conveys price information, which is protected by the First Amendment." *Id.* at *6. The court thus held that the law imposes a "content-based restriction" that must satisfy *Central Hudson* scrutiny. *Id.* at *7.

Turning to that scrutiny, the court was not persuaded by the state's professed concerns about consumer protection: "While the Attorney General argues that surprise surcharges would be misleading to consumers," the court remarked, "the State 'may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). The court found that "there are other ways to present the information that is not deceptive. For example, if the retailer displayed information about the surcharge throughout the store and noted that the surcharge was due to merchant fees, this speech would not be misleading, but would actually be informative and accurate." *Id.* at *7. The state could not explain why a disclosure regime would be inadequate.

The court also held that the law was unconstitutionally vague. The court illustrated the law's vagueness through a series of practical questions about what is and what is not illegal under the law. *See id.* at *9-*10. Such questions, the court explained, "represent legitimate concerns that retailers must face when determining whether to impose a legal dual-pricing system. And despite having

access to extensive briefing from the Attorney General on the meaning of this statute and the opportunity to question counsel at the hearing on summary judgment, the answers to these questions are not clear to the Court." *Id.* at *10.

A third district court (Hinkle, J.) recently ruled on the constitutionality of Florida's no-surcharge law. *Dana's R.R. Supply*, No. 4:14-cv-134 (reproduced at ROA.409). That court likewise understood that the difference between prohibited credit "surcharges" and permissible cash "discounts" is "a matter of semantics, not economics." ROA.410. Yet the concluded that the applicable level of scrutiny was rational-basis review. ROA.411. The court took it upon itself to propose three potential justifications for the speech restriction: "ensuring that the customer knows the facts," "preventing unpleasant surprises," and "requiring prices to be listed in the same way." ROA.412. Concluding that "[n]one of these assertions is compelling" and that they "might not even be persuasive," the court nevertheless determined that the law could withstand rational-basis review. ROA.413. In the alternative, the court held without explanation that Florida's no-surcharge law "passes muster under the commercial-speech standards imposed in cases like *Central Hudson.*" *Id*. The court did not explain how, given its rational-basis analysis, it could possibly conclude that the state had put forth evidence to show that its law directly advances a legitimate interest and is no more extensive than necessary to address any such interest—the bare minimum that *Central Hudson* requires.

III. This litigation

In March 2014, after the *Expressions* decision struck down New York's no-surcharge law and not long after Visa and MasterCard agreed to drop their nationwide contractual restrictions, five Texas merchants and their principals brought this lawsuit. Each merchant wants take advantage of the recent antitrust settlements and truthfully tell their customers that paying by credit card costs *more* than paying by cash (not merely that cash costs *less* than credit). But Texas's law makes using that language illegal.

A. The plaintiffs

1. Beaumont Greenery. Beaumont Greenery is a landscape-and-garden business owned and operated by Lynn Rowell. ROA.237. As with most small merchants, when Beaumont Greenery makes a sale on a credit card it incurs a swipe fee of 3% or more per transaction. ROA.237. By contrast, there is no fee for sales made with cash. ROA.237. For large landscaping projects and bulk sales, swipe fees can be an especially significant expense for Beaumont Greenery—totaling hundreds of dollars for a single transaction and sharply cutting into its profit margin. ROA.237.

A few years ago, one large sale prompted Beaumont Greenery to consider how it could better inform its customers of the cost of credit, so they would switch to cheaper payment methods. ROA.238. The company came up with an idea: It

would put up a sign telling customers that it charges an additional fee if they pay with credit. ROA.238. Beaumont Greenery was forced to abandon this idea, however, when an American Express representative explained that the sign would violate the credit-card company's contractual rules, which prohibited credit-card "surcharges." ROA.238. Now that American Express and the other major credit-card companies have agreed to allow surcharges, Beaumont Greenery would like to put up its sign. ROA.238. Yet it cannot do so because of the Texas no-surcharge law. ROA.238.

The company understands that it was and is permitted by Texas law to tell customers that they will pay less for cash rather than more for credit. ROA.238-39. But Beaumont Greenery does not want to describe its prices in that way. ROA.238-39. It does not want to tell its customers that the credit-card price is the "regular" price, and that the cash price is the regular price with a "discount." ROA.238-39. That would make the company's prices look higher than they are without conveying to customers that the price difference is attributable solely to the cost of credit—the very message Beaumont Greenery wants to communicate. ROA.238-39. Beaumont Greenery believes that it would be much more effective to truthfully tell its customers that they will pay *more* for credit, by saying that the cash price is the "regular" price, and the credit price is the regular price with an "extra" charge for using a credit card. ROA.238-39. This way, Beaumont Greenery can

disclose the true cost of accepting credit cards and give customers the chance to make an informed choice. ROA.238-39.

2. Texas Computer Associates. MPC Data and Communications, Inc., better known as Texas Computer Associates, is a computer-networking and telephone-systems company in Beaumont. ROA.241. Many of its sales are paid for by credit card. ROA.241. For each credit-card sale, Texas Computer pays up to 3% of the total amount in swipe fees—a significant cost for a small business. ROA.241.

Seeking to reduce swipe fees, Texas Computer has occasionally experimented with dual pricing. ROA.241. When one customer recently wanted to pay for a large sale with a credit card, Texas Computer explained that the customer would be charged an additional fee for using credit. ROA.241. But the company was forced to stop communicating the cost of credit in this way when it was notified that doing so was a "surcharge" in violation of the credit-card companies' contractual rules. ROA.241.

When those rules began changing, Texas Computer still could not express the cost of credit as an additional fee because of Texas's no-surcharge law. ROA.242. So the company faced a dilemma: It could resume dual pricing, while taking pains to communicate the price difference instead as a "discount" for cash or debit. Or it could refrain from dual pricing altogether, even though that conduct

is lawful in Texas. Texas Computer chose the latter. ROA.242. It did so because it does not want to describe the difference as a "discount." ROA.242-43. Only by using its preferred language—that there is a "surcharge" for credit and "no charge" for cash—would Texas Computer be able to effectively communicate the true cost of credit to its customers. ROA.242-43. Texas Computer also decided to abandon dual pricing because it does not fully understand the distinction between a "discount" and a "surcharge," so it is not sure that it could comply with the law in practice. ROA.242-43.

3. Storage Depot. NXT Properties, Inc., also known as Storage Depot, is a self-storage and truck-rental facility in Orange. ROA.245. It pays roughly 3% per credit-card transaction in swipe fees, totaling thousands of dollars per year in fees. ROA.245. Storage Depot would like to bring these fees to the attention of its customers by telling them that there is an additional charge for paying by credit. ROA.245-46. But it does not do so because of the no-surcharge law. ROA.245-46. Nor does it offer dual pricing: Even though that conduct is legal in Texas, Storage Depot does not want to characterize the cost of credit as a cash "discount," nor is it sure what the precise difference is between a credit "surcharge" and a cash "discount." ROA.246-47.

If it were legal, Storage Depot would tell its customers that it offers a lower cash price for each of its products and a higher price if a customer chooses to pay

with a credit card. ROA.246. Storage Depot believes that this truthful speech would benefit both the company and its customers by giving customers the information they need to make the best decisions about how to pay for their purchases, and by allowing the company to keep prices down for all customers and therefore improve its bottom line. ROA.245-46.

4. Montgomery Chandler. Montgomery Chandler is a coin-and-bullion dealer in Silsbee. ROA.249. About half of its sales are paid for by credit card. ROA.249. On those sales, Montgomery Chandler pays roughly 3% in swipe fees. ROA.249. These fees have steadily increased over time, are not negotiable, and cut into the company's already slim profit margins. ROA.249. Montgomery Chandler would like to communicate the cost of credit to customers by calling it a "surcharge," which the company believes would be effective at getting them to reduce credit use. ROA.250. But Texas's no-surcharge law bars the company from using that label.

Because of that law, Montgomery Chandler does not tell its customers that it will charge extra for credit, nor does it engage in dual pricing (even though it would like to and is allowed to). ROA.251. This means that swipe fees get passed on to all of its customers, cash and credit-card users alike, in the form of higher prices. And because swipe fees are kept hidden, customers have no disincentive to use credit—

just the opposite, in fact, because of the benefits that most credit cards offer—which raises fees even higher.

The reason Montgomery Chandler does not offer dual pricing is because of the law's prohibition on speech and also because of its vagueness. ROA.251. As to the former: The company would like to communicate the price difference as a "surcharge" for credit—not a "discount" for cash, which would make prices look higher than they are—because the company believes that this would most effectively convey the costs of credit to customers. ROA.251. Texas's no-surcharge statute blocks it from doing so. As to the latter: The statute is so vague about what it prohibits that the company is afraid to have any dual pricing at all, lest it accidentally violate the law. ROA.251.

5. Townsley Designs. Townsley Designs is an event-design-and-production company based in Cedar Park. ROA.253. It typically pays around 3% per credit transaction in swipe fees, and sometimes even more. ROA.253. Over the years, an increasing percentage of the company's sales are paid for with a credit card, to the point that nearly half of its gross annual sales now incur a swipe fee. ROA.253.

Because of Texas's law, Townsley Designs does not currently engage in dual pricing. ROA.254. It does not do so for the same reasons as the other merchants: (1) because the law bans the company's most effective way of conveying to its

customers the true cost of credit, and (2) because the law's vagueness leaves the company uncertain as to whether it could implement a dual-pricing system in a lawful way. ROA.255-56. If it were permissible, Montgomery Chandler would call the cash price the "regular" price and say that it charges an additional amount for credit-card purchases to account for swipe fees. ROA.255-56.

B. The district court's decision

Shortly after the plaintiffs filed their complaint, the parties exchanged dispositive motions. The state moved to dismiss the case for failure to state a claim and the plaintiffs moved for a preliminary injunction. The district court (Yeakel, J.) dismissed the case in its entirety and denied the preliminary-injunction motion. ROA.435-44.

Judge Yeakel began his analysis by recognizing that "nothing in the Anti-Surcharge law prohibits dual pricing," meaning that a merchant may charge a higher price to a customer who with pays with a credit card than to one who pays in cash, but only if the price difference is communicated as a cash "discount" and not a credit surcharge. ROA.439 n.3. Nevertheless, he departed from every other court's understanding that no-surcharge laws regulate "semantics, not economics," ROA.410, and concluded that the law "regulates only prices charged"—an "economic activity." ROA.440. The court reasoned that "the law effectively sets the maximum price for credit-card surcharges as the posted price," and that "[n]o

protected speech is implicated in this economic endeavor." ROA.441. The court did not explain how the law constrained any merchant's ability to charge any price for any product (whether paid for with cash or credit). Nor did the court elaborate on why it thought that speech is not implicated by a merchant's decision of how to communicate a lawful dual-pricing policy to its customers after having set the cash and credit prices for each product—the decision, in other words, of which price to frame as the "regular" (or "posted") price on the label, and which to convey prominently and truthfully through a separate sign (*e.g.*, "2% surcharge").

The court upheld the law on rational-basis review, yet it did not identify any basis for the law's distinction between cash discounts and credit surcharges. The court also held that "any burden the Anti-Surcharge law may place on speech does not offend the First Amendment because Texas merchants remain free to discuss and convey otherwise lawful information about their prices and pricing activity in general." ROA.442. Finally, having determined that the law is an "economic regulation," Judge Yeakel reasoned that it is not vague but is instead "simple and straightforward." ROA.442-43. The statute, in his view, "proscribes a single activity—charging more for a credit-card payment." ROA.443.

STANDARD OF REVIEW

This Court reviews de novo the question "whether free speech rights have been infringed." *LLEH, Inc. v. Wichita Cnty., Tex.*, 289 F.3d 358, 364-65 (5th Cir.

2002). Likewise, "[w]hether a statute is unconstitutionally vague is a question of law, which this court reviews de novo." *United States v. Coleman*, 609 F.3d 699, 706 (5th Cir. 2010). And "[a]lthough the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

SUMMARY OF ARGUMENT

I. The Supreme Court has made clear that any law whose "purpose and practical effect" are "to suppress speech" based on content requires "heightened scrutiny" under the First Amendment. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663-64 (2011). The no-surcharge statute is such a law. It does not regulate what merchants may *do*: They may charge different prices for cash and credit, set at whatever amounts they wish. The law regulates only what merchants may *say*: Framing the price difference as a cash "discount" is favored; framing it as a credit "surcharge" is illegal. As every other court to consider these laws has recognized, "the difference between a cash discount and a credit-card surcharge makes no difference in the price a customer must pay when using either cash or a card; it is a matter of semantics, not economics." ROA.410. The law's practical effect, in other words, is to suppress speech.

That was also its purpose: The statute was enacted at the behest of the credit-card lobby (which worried that surcharges "talk against" the industry), while consumer-advocacy groups opposed the law because of its regulation of "semantic differences" and the effect that has on consumers. ROA.282, 285. And the law was openly justified based on the surcharge label's ability, "even if only psychologically," to "encourage[] desired behavior." ROA.310.

It is no answer to say, as the district court did, that the law is just a restriction of a "pricing practice." ROA.441. That ignores the distinction that gave birth to the commercial-speech doctrine in the first place: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers" (through signs, labeling, and advertisements, for example) is "quintessentially expressive." *Expressions*, 975 F. Supp. 2d at 445. If a state wants to restrict the way in which merchants may communicate "price information" to consumers—while not regulating the prices the merchant actually charges—then the state may do so only if it can satisfy First Amendment scrutiny. *Va. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Texas's no-surcharge statute cannot withstand scrutiny under *Central Hudson*. The statute does not directly advance any interest in preventing consumer deception or promoting consumer welfare, is riddled with exceptions that undermine the legitimacy of those aims, and is far broader than necessary to

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

II. Finally, the no-surcharge law is also unconstitutionally vague. It does not clearly define the line between a permissible "discount" and a mathematically equivalent but illegal "surcharge." As a result, merchants must operate in constant fear of inadvertently describing a dual-pricing policy in an unlawful way or refrain from dual pricing altogether.

ARGUMENT

I. Texas's no-surcharge law violates the First Amendment.

A. The statute is a content-based speech restriction subject to heightened First Amendment scrutiny.

The Supreme Court has increasingly insisted that the First Amendment "requires heightened scrutiny" whenever the government creates restrictions that turn on the content of a speaker's words. *Sorrell*, 131 S. Ct. at 2663-64. This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on its content, even if the law "on its face appear[s] neutral." *Id.*; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (applying "First Amendment scrutiny" to a law that restricted speech "even though the Act says nothing about speech on its face"). Thus, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255

(1986). If a law makes liability "depend[] on what [people] say," in other words, it "regulates speech on the basis of its content," and First Amendment scrutiny applies. *Humanitarian Law Project*, 561 U.S. at 27. Content-based speech restrictions are "presumptively invalid," so often "it is all but dispositive to conclude that a law is content-based." *Sorrell*, 131 S. Ct. at 2667.

"Commercial speech is no exception." *Id.* at 2664. The Supreme Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. Bd. of Pharmacy*, 425 U.S. at 770. So if a law's "purpose and practical effect" are to restrict price information or other commercial speech based on its content, as with the Texas no-surcharge statute, then the law must withstand heightened scrutiny to satisfy the First Amendment. *Sorrell*, 131 S. Ct. at 2663.

1. Without grappling with any of this authority, the district court concluded that the law "must be upheld as an economic regulation supported by a rational basis." ROA.441. That is so, the court believed, because the law "proscribes a single activity—charging more for a credit-card payment." ROA.443. The court thus held that the law "regulates only prices charged" and "does not implicate First Amendment speech rights." ROA.440.

If Texas's law actually regulated the prices that merchants may charge for their goods, or prevented merchants from "charging more for a credit-card

payment," ROA.443, then the district court would be right. But that's not what this law does. As both its purpose and practical effect make clear, the law is aimed at "semantics, not economics"—as every other court has recognized. ROA.410.

Practical effect. Texas's no-surcharge law "is not an economic regulation that controls what is charged or paid for something." *Italian Colors*, 2015 WL 1405507, at *6. To the contrary, the law allows merchants to charge different prices depending on whether a customer pays with cash or credit, and to set those prices as they wish. The only thing the law regulates "is how those prices are *conveyed* to customers, not the prices themselves." *Id.* (emphasis added). Characterizing the price difference as a cash "discount" is favored; characterizing it as a credit "surcharge" is outlawed. The statute thus prohibits a certain class of speakers (merchants) from communicating a certain disfavored message (identifying the added cost of credit as a surcharge) and does so to discourage consumers from acting on that message (by deciding not to use a credit card).

A hypothetical illustrates the point. Suppose that a merchant decides to charge two different prices for a product depending on how the customer pays—$100 for cash; $102 for credit. How is the merchant supposed to comply with Texas's no-surcharge statute? If the merchant says that the product costs $102 (for example, by listing that amount on the label) and puts up a sign offering a $2 "discount" to anyone who pays with cash, the merchant has obeyed the law. But if

the merchant instead says that the product costs $100 (by listing that amount on the label) and puts up a sign informing customers that there is a $2 surcharge for paying with a credit card to account for the swipe fee, the merchant has violated the law. In both circumstances—the lawful and the verboten—the "prices charged" are identical: The merchant "charg[es] a customer more for the use of a credit card" ($102 as opposed to $100), and the "additional fee" imposed is the same ($2). ROA.440-41. And in both circumstances the extra amount is truthfully and prominently communicated to customers ahead of time. The only difference is *how* it is communicated—that is, which of the two prices the merchant chooses to frame as the "regular" price on the label, and which the merchant chooses to convey through a separate sign. Put another way, the law does not regulate the setting of prices by merchants, but kicks in only *after* they have been set, by demanding one way of framing them over another. A non-complying merchant can bring itself into compliance simply by changing the way that it frames or communicates its prices to customers, without changing the prices themselves.

One need not think hypothetically, however, to see that the no-surcharge law operates as a content-based speech restriction. Take the first reported enforcement action of a no-surcharge law. A New York gas-station owner was arrested, prosecuted, and convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was

a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1010. "[T]he government clearly prosecuted [the merchant] for his words—for his speech." *United States v. Caronia*, 703 F.3d 149, 161 (2d Cir. 2012). His conviction was set aside, but only because the court found it constitutionally "intolerable" that "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Fulvio*, 517 N.Y.S.2d at 1011, 1015. The court explained:

> [W]hat [the no-surcharge law] *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what [the no-surcharge law] *prohibits* is a price differential, in that so long as that differential is characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . [The no-surcharge law] creates a distinction without a difference; **it is not the *act* which is outlawed, but the *word* given that act.**

Id. at 1015 (bold added).

Or take a more recent enforcement action. A few years back, a New York merchant "quoted the price of oil" to someone over the phone and said that there is "a fee on top of that price for using a credit card." *Expressions*, 975 F. Supp. 2d at 444 n.7. Under New York's indistinguishable surcharge prohibition, using that speech made the merchant a criminal. A New York Assistant Attorney General later told the merchant that he could continue to charge the exact same amounts—with the exact same difference between the cash and credit prices—but that he had

to “characteriz[e] the difference” in the state’s preferred way: “as a cash ‘discount,’ not a credit ‘surcharge.’” *Expressions*, No. 13-cv-3775, ECF No. 40 (Declaration of Michael Parisi ¶ 8). The Assistant Attorney General gave the merchant “a script of what [he] could tell customers when talking to them over the phone,” saying that he “could quote the price as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon ‘discount’ for paying with cash,” but he “could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon ‘surcharge’ to use a credit card.” *Id.* The merchant’s mistake was that he used the wrong words—the same mistake made by a merchant in Texas who was recently targeted by the OCCC because he “tells customers” that the price is “3% more” if they are “paying with credit card.” ROA.294.

Each of these examples (both hypothetical and real) shows that “the content of the retailers’ speech must be scrutinized to determine if the price is framed as a permissible discount or an impermissible surcharge, making this a content-based restriction.” *Italian Colors*, 2015 WL 1405507, at *7. Any law “that requires reference to the content of speech to determine its applicability is inherently content-based.” *Pagan v. Fruchey*, 492 F.3d 766, 779 (6th Cir. 2007); *see also Byrum*, 566 F.3d at 445 (regulation that did not prohibit unlicensed people from engaging in interior-design projects, but merely prohibited them from referring to themselves as “interior designers,” was an impermissible restriction on commercial speech). So

too is a law that "permits an idea to be expressed but disallows the use of certain words in expressing that idea." *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 8 (1st Cir. 1994). That is precisely what Texas's no-surcharge law does: Merchants may avoid liability under the law by changing "what they say" rather than what they charge. *Humanitarian Law Project*, 561 U.S. at 27. "[I]t is a matter of semantics, not economics." ROA.410.

In holding otherwise, the district court determined that the no-surcharge law "effectively sets the maximum price for credit-card purchases as the posted price," suggesting that the law's real effect is to prevent false and deceptive advertising. ROA.407. But Texas's law obviously sweeps far broader than disclosure: Because the legislature rejected an amendment that would have limited the law's reach to "unposted" surcharges, ROA.298-99, the law's prohibition applies even to merchants who truthfully and prominently disclose the amount of the surcharge ahead of time, as the plaintiffs here all wish to do. And because Texas already has laws on the books that independently prohibit false advertising, as explained in Part I.B, the sole "practical effect" of the no-surcharge law is to ban *truthful*, *non-misleading* surcharges. But even if, counterfactually, the law were truly aimed at disclosure, that is just another way of saying that it regulates speech: As Judge Sutton has explained, something cannot simultaneously be non-communicative"

and "yet pose the risk of *communicating* a misleading message." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008).

Purpose. The reason that the law regulates speech is that this was its purpose. When Texas enacted the statute, it sought to fill the gap left by the federal ban's expiration. That ban had lasted for several years thanks to intense lobbying by credit-card companies, which objected to allowing the surcharge label because it would "talk against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414*, at 32, 60 (ROA.271, 282). Those who opposed the ban, like the Federal Reserve Board and the major national consumer groups, also understood that it was aimed at "wording" and "semantics, and not . . . substance." *Id.* at 22, 98 (ROA.269, 285).

Although the legislative history is sparse, there is no reason to believe that the Texas legislature thought differently. Just as Congress knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of their "practical effect and impact . . . on consumers," Texas understood the same. S. Rep. No. 97-23, at 3. Thus, the legislature knew that what it was really regulating was the different effects of the "surcharge" and "discount" labels on consumers' perceptions of credit cards. As a memorandum prepared in support of New York's identical law put it: "Surcharges, *even if only psychologically*, impose penalties on purchasers. . . A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." ROA.310 (emphasis added).

But a behavioral effect that "depend[s] on mental intermediation," like the effect of one label versus another, just "demonstrates the power" of speech. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985). The law affects consumer spending "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. Bd. of Pharmacy*, 425 U.S. at 769. In the context of credit cards, this assumption is well placed: "Because of the framing effect, surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352.

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

harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. Bd. of Pharmacy*, 425 U.S. at 770.

But the law here doesn't even have paternalism on its side. Rather, Texas's no-surcharge law is "giv[ing] one side"—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). A law that "has the effect of preventing" merchants "from communicating with [consumers] in an effective and informative manner," thus hamstringing their "ability to influence [consumer] decisions," is one that "impose[s] a specific, content-based burden on protected speech." *Sorrell*, 131 S. Ct. at 2663-64, 2670. "Attempting to control the outcome of . . . consumer decisions" by restricting truthful speech is just what the First Amendment prohibits the state from doing. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 (5th Cir. 2007).

2. To support its contrary conclusion, the district court relied on a handful of cases about materially different laws—none of which makes liability turn on labeling or otherwise has the purpose or practical effect of regulating semantics.

The first case, *Villas at Parkside Partners v. City of Farmers Branch*, held a city housing ordinance preempted by federal immigration law. 726 F.3d 524, 526 (5th Cir. 2013). The district court twice cited a single passage from the case discussing

state police power. But that passage was from the dissent. And, in any event, the city ordinance there had nothing to do with speech, and no one claimed that it did.

The district court placed equal weight on *Nebbia v. New York*, also a case involving no First Amendment issues. The statute there "fix[ed] minimum and maximum . . . retail prices to be charged" for milk. 291 U.S. 502, 515 (1934). That law clearly regulated conduct (not speech) because it governed how much merchants could actually charge. Texas's law, by contrast, does not regulate how much anyone pays. Merchants are allowed to charge two different prices, a cash price and a credit price, and set those prices at any amount. The only thing the Texas law regulates is how those prices are labeled or communicated to consumers.

The next case is *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), which concerned a Texas law prohibiting auto manufacturers from selling cars directly to consumers. *Id.* at 498. Texas enforced the law against Ford, which was selling cars directly to consumers in the state. *Id.* This Court held that the state's enforcement did not violate the First Amendment because (a) selling a car is commercial activity (*i.e.*, conduct), and (b) advertising an illegal commercial activity (*i.e.*, prohibited conduct) is not protected by the First Amendment. *Id.* at 505-07; *see Cent. Hudson*, 447 U.S. at 566 ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading."). Here, by contrast, there is no conduct that is independently

prohibited; the only thing outlawed is how dual pricing is communicated to consumers. And just as plaintiffs cannot "bootstrap themselves into the heightened scrutiny of the First Amendment" by challenging a prohibition on conduct because it also prohibits advertising that conduct, *Ford Motor,* 264 F.3d at 506, nor can a state evade First Amendment scrutiny by claiming that a law prohibits "conduct" where the legality of that conduct turns solely on how it is characterized.

Reaching further afield, the district court drew support from *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, 547 U.S. 47 (2006)—a challenge to a law denying federal funding to law schools that prohibit military recruiting. But that law "regulates conduct, not speech" because it "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60. Addressing the argument that the law compels speech because "recruiting assistance provided by the schools often includes an element of speech," such as when schools "send e-mails or post notices on bulletin boards on an employer's behalf," the Court upheld this requirement because the law "does not dictate the content of the speech at all" and any compelled speech "is plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62. That is a distant cry from Texas's no-surcharge law, which *only* dictates the content of the merchant's speech (requiring that the price difference be expressed as a "surcharge" rather than a

"discount") and regulates *no* conduct, but instead makes liability turn on semantics—as every other court to consider no-surcharge laws has understood.

Finally, the district court relied on a pair of tobacco cases. The first concerned Providence's tobacco-discount law, which prohibits "reducing prices on tobacco products by means of coupons and certain multi-pack discounts." *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013). After reaffirming that "[p]ricing information concerning lawful transactions" is "protected speech," the court upheld the law because it does not "restrict[] retailers or anyone else from communicating pricing information," but instead regulates economic conduct—*i.e.,* how much merchants may charge. *Id.* at 76. Under the Providence law, merchants may not offer lower prices to those who have coupons, or to those who buy in bulk. That is indeed conduct. *Id.* Under the Texas no-surcharge law, by contrast, merchants may offer lower prices to those who pay in cash, but cannot frame those prices as the "regular" price and the credit prices as the "surcharge" price. That is indeed speech.

The second tobacco case involved an Austin ordinance that "prohibited smoking in enclosed public places, including, restaurants, and workplaces." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 538 (5th Cir. 2008). Rejecting a compelled-speech challenge, this Court followed *FAIR* and upheld the law because it regulates conduct (smoking). *Id.* at 549-50. Even though bar owners would have

to "'verbally' request smokers to extinguish cigarettes or leave the premises," the Court held that "this speech is plainly incidental to the ordinance's regulation of conduct." *Id.* at 550. But again, the no-surcharge law regulates *only* speech and *no* conduct. And while the incidental speech regulation imposed by Austin's ordinance could be justified by the need "to protect the City's population from the harmful effects of second-hand smoke," *id.* at 550, the no-surcharge law has no legitimate justification at all, as we discuss below.

The district court drew from these two tobacco cases the insight that "Texas Merchants remain free to discuss and convey otherwise lawful information about their prices and pricing activity in general"; they just can't express the cost of credit as a "surcharge" on labeling and signs. ROA.442. But that is no basis for declining to apply First Amendment scrutiny. Even assuming that Texas's law were so limited (and how is a merchant to know, when New York's law isn't?), the First Amendment protects more than just conversations. The way in which a merchant chooses to communicate price information to consumers—on labels, signs, advertisements, and the like—*is itself speech*. And it's not just any speech, but speech at the heart of the commercial-speech doctrine. *See Va. Bd. of Pharmacy*, 425 U.S. at 770 (holding that speech conveying "price information" to consumers is "protected by the First Amendment"). As Judge Rakoff 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." *Expressions*, 975 F. Supp. 2d at 445. Because the "Plaintiffs cannot frame their price how they would like, even though they are allowed to speak with their customers generally about the credit card industry and the merchant fees that the industry charges," the law restricts their speech. *Italian Colors*, 2015 WL 1405507, at *6. And because the law regulates nothing but their speech, it must satisfy First Amendment scrutiny.

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

In recent years, the Supreme Court has left open the question of what form of "heightened scrutiny" applies to restrictions on commercial speech. *Sorrell*, 131 S. Ct. 2667. At a minimum, however, commercial-speech restrictions must satisfy intermediate scrutiny under the *Central Hudson* test, *id.*, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

Courts "must review the [state's law] with 'special care,' mindful that speech prohibitions of this type rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504. The state's burden is "heavy," *id.* at 516, requiring actual evidence,

not speculation and conjecture, that each *Central Hudson* factor is satisfied. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see Byrum*, 566 F.3d at 446 (directing entry of preliminary injunction "because the State has not shown its ability to justify" the law under *Central Hudson*). Texas cannot meet its burden here.

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

Dual pricing based on whether consumers pay with cash or credit is legal in Texas. Because the underlying economic conduct is authorized, "speech about the reasons for these price increases does not advance an illegal transaction." *BellSouth*, 542 F.3d at 506; *see also Motor Vehicle Mfrs. Ass'n of the U.S. v. Abrams*, 684 F. Supp. 804, 806 (S.D.N.Y. 1988) (because it is "entirely lawful" for an automobile manufacturer to pass along "the costs of compliance with the Lemon Law," a clearly marked Lemon-Law surcharge "relates to lawful activity").

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

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

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

In the district court, the state relied on little more than a vague and unsubstantiated appeal to "protect[ing] consumers," without explaining (or demonstrating with evidence) how the no-surcharge law might actually further any legitimate consumer-protection interest. ROA.185. This possible rationale, of course, is about speech—not conduct. *See BellSouth*, 542 F.3d at 510 (explaining that something "cannot simultaneously be non-communicative" and yet "pose the risk of *communicating* a misleading message"). But it is also unpersuasive: Only one other court has upheld a state's no-surcharge law, and even that court admitted that "[n]one" of the law's possible consumer-protection justifications is "compelling," and these asserted legislative goals are—to put it generously—hypothetical. ROA.413.

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

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

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

If Texas were really concerned about preventing hidden costs, for example, 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). But Texas rejected just such a

law. ROA.298-99. Instead, the state requires merchants to label the additional cost in the way that best conceals it. By doing so, the no-surcharge law "actually *perpetuates* consumer confusion," as Judge Rakoff noted, "by preventing sellers from using the most effective means at their disposal to educate consumers about the true costs of credit-card usage." *Expressions*, 975 F. Supp. 2d at 446 (emphasis added).

In this way, the no-surcharge law undermines the very interests that the commercial-speech doctrine is designed to protect: the "public interest" in the "free flow of commercial information" to foster "intelligent and well informed" economic decisions by consumers. *Va. Bd. of Pharmacy*, 425 U.S. at 765. When a merchant uses a dual-pricing system, a consumer can reduce the final price paid by paying in cash. Yet the no-surcharge law prohibits the merchant from telling consumers that they will incur an added cost for using credit. "It would be perverse to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of preventing consumer deception." *Expressions*, 975 F. Supp. 2d at 446.

The law is also riddled with "exemptions and inconsistencies [that] bring into question the purpose of the labeling ban." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). The district court failed to grapple with the fact that the state exempts *itself* from the no-surcharge law. Tex. Fin. Code § 339.001(b) (excluding

any "state agency, county, local governmental entity, or other governmental entity" that accepts credit cards). "If this speech is so deceptive and harmful, why is the government allowed to engage in it?" *Italian Colors*, 2015 WL 1405507, at *8; *see* http://bit.ly/UBUOnf (adding "Credit Card Portal Processing Fee" for taxes paid by credit).

The state's self-serving exemptions defeat any interest that it might claim in preventing consumer deception. Texas can "present[] no convincing reason for pegging its speech ban to the identity" of the entity imposing the credit-card surcharge, allowing certain favored entities to use the "surcharge" label while banning its use by others. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999). It is difficult to understand why a consumer confused by surcharges as opposed to discounts would be less confused when paying a bill to a state-run enterprise.

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

The state's biggest problem, however, is that the no-surcharge law is far more extensive than necessary to achieve the state's purported goals, thus failing the final *Central Hudson* prong. *See Byrum*, 566 F.3d at 449, 451 ("Because the State has not demonstrated a reasonable 'fit' between its regulation and the constitutional speech at issue, we reverse and remand for entry of a preliminary injunction."). "[I]f there are numerous and obvious less-burdensome alternatives to

the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Here, "the prohibition against the use of words which could be used to present the information about the surcharge in an accurate and non-misleading manner [is] broader than necessary to prevent the description from being potentially misleading." *Capital Leasing of Ohio, Inc. v. Columbus Municipal Airport Authority,* 13 F. Supp. 2d 640, 669 (S.D. Ohio 1998).

To be clear, we agree that merchants should not impose an undisclosed surcharge or surprise consumers by waiting until the point of sale to inform them of a surcharge. But it is equally clear that the state did not need to enact a new law to prevent that sort of deception. The state "already has laws on the books prohibiting false advertising and deceptive acts and practices." *Expressions*, 975 F. Supp. 2d at 447; *see* Tex. Bus. & Comm. Code § 17.64. 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?").

Even if those laws were not already on the books, the no-surcharge law would still go too far. The statute pointedly "does not limit itself to a prohibition on

false or misleading statements as to the charges imposed." *Abrams*, 684 F. Supp. at 807. It regulates all speech framed as a surcharge, no matter how truthful. "States may not place an absolute prohibition" on information that is merely "potentially misleading . . . if the information also may be presented in a way that is not deceptive," as it can be here. *R.M.J.*, 455 U.S. at 203. "For example, if the retailer displayed information about the surcharge throughout the store and noted that the surcharge was due to merchant fees, this speech would not be misleading, but would actually be informative and accurate." *Italian Colors*, 2015 WL 1405507, at *7. Yet Texas's no-surcharge statute prohibits that speech. Why? The state has never said.

If the state were truly worried about consumers being misled by undisclosed surcharges, then it could enact a law mandating adequate disclosure—just like the one proposed by the Texas Senate Committee on Economic Development in 1985, which the House rejected (*see* ROA.298-99), or just like Minnesota's law. *See* Minn. Stat. § 325G.051(1)(a). That would accomplish the state's purported objective without "offend[ing] the core First Amendment values of promoting efficient exchange of information." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001). Or the state "could have limited its regulation to surcharges that are deceptive and misleading." *Expressions*, 975 F. Supp. 2d at 447; *see also Italian Colors*, 2015 WL 1405507, at *8. But what it cannot do is what Texas did here: ban an

entire category of speech because some of it has the potential to mislead. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990).

II. Texas's no-surcharge law is impermissibly vague.

Given the lack of any legitimate state interest in prohibiting merchants from describing dual pricing as a "surcharge," Texas's law would violate the Constitution even if it were limited to restricting that single word. But the law has been enforced much more broadly—restricting any speech that impermissibly depicts the cost of credit as an added cost above the "regular" (cash) price. Application of the law thus turns on a "subtle semantic distinction" between slightly different ways of describing otherwise indistinguishable economic conduct. *Fulvio*, 517 N.Y.S.2d at 1014. That makes the statute intolerably vague.

We acknowledge that, in this Court, the "void-for-vagueness doctrine has primarily been used to strike down criminal laws" and that "in the civil context . . . the standard for vagueness is more lenient; 'the statute must be so vague and indefinite as really to be no rule at all.'" *Inst. for Creation v. Tex. Higher Educ. Coordinating Bd.*, 2010 WL 2522529, *18 (W.D. Tex. June 18, 2010) (quoting *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000)).

But no matter how strict the standard, Texas's law satisfies it. Although the district court reasoned that the law is "simple and straightforward" because "it proscribes a single activity—charging more for a credit-card payment"

ROA.443—the law actually *allows* a merchant to charge more for a credit-card payment than for a cash payment. It just regulates how the charge is framed. And although the district court determined that the law permits merchants "to discuss and convey otherwise lawful information about their prices and pricing activity in general," it did not elaborate on what this means. ROA.442.

Put yourself in the merchant's shoes. Suppose you offer dual pricing (like the plaintiffs here all want to do) and you decide to 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? Can you list the price as "$100+2% surcharge"? *Italian Colors*, 2015 WL 1405507, at *8. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What if you listed 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 calls and asks for your prices? What do you tell them? If she asks you whether you charge more for paying with a credit card, what do you say? Or what if a consumer asks you why you impose an "added cost" or "surcharge" for credit? Can you answer honestly, or does the law require that you contest the customer's characterization, insisting that the price difference represents a "discount" for cash rather than an "added cost" or "surcharge" for credit?

These are not hypothetical questions. They "represent legitimate concerns that retailers must face when determining whether to impose a legal dual-pricing system." *Id.* Customers will ask questions about it, and merchants need to know how to respond. *Fulvio* shows these fears to be well founded: The merchant there posted a sign that clearly displayed both the cash and credit prices for gas and instructed his employees to tell customers only that he offered a cash discount. 517 N.Y.S.2d at 1010, 1013. Yet he was prosecuted by the state because his cashier told a customer that it was "five cents 'extra'" to use credit rather than a "nickel less" to use cash. *Id.*

That the district court appeared to interpret Texas's law more narrowly than New York's—to cover labeling, signs, and advertising, but not conversations, *see* ROA.442—only underscores its vagueness. The statutory text does not reveal this nuance, and there is no reason why this Court should regard Texas's statute as any different from New York's. Nor did the district court grapple with any of the cases that have addressed the meaning of state no-surcharge laws and grasped their incoherence. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 2013 WL 6510737, at *19-*20 (E.D.N.Y. 2013) ("No-surcharge laws are not only anti-consumer, they are arguably irrational."); *Expressions*, 975 F. Supp. 2d at 435 ("*Alice in Wonderland* has nothing on [New York's no-surcharge law]."); *Fulvio*, 517 N.Y.S.2d at 1012 (holding that the no-surcharge

law, by prohibiting credit surcharges but permitting cash discounts, is "so vague, uncertain and arbitrary of enforcement as to be fatally defective").

As a result of the law's uncertainty, the plaintiffs have been forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2743 (2011) (Alito, J., concurring) (ellipsis and internal quotation marks omitted). They would all like to employ dual pricing, which is perfectly legal in Texas. *See* ROA.237-56. But the no-surcharge law has instilled an extreme "chilling effect," prompting them to abandon both disfavored speech and legal conduct. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Fear of slipping across the thin and largely indiscernible semantic line separating a lawful pricing system from an unlawful one has prompted these plaintiffs to avoid dual pricing entirely, even though they would otherwise prefer it. This chilling effect also injures consumers, who are deprived of the option of patronizing a merchant with a dual-pricing system.

Those charged with enforcing the no-surcharge law are no better able to pin down its meaning than those charged with compliance. As the judge in *Fulvio* noted when defense counsel accidentally referred to the gas station's otherwise lawful pricing system as a "surcharge" policy, even "counsel learned in the law can confuse the two sides of the coin . . . ('cash discounts are allowed, credit card surcharges are impermissible')." 517 N.Y.S.2d at 1014. And even legislators who

have enacted no-surcharge laws seem to have struggled to understand the distinction. During consideration of a similar no-surcharge law in Connecticut, one participant remarked: "[C]onceptually, I would like somebody to someday explain to me the difference between a surcharge and discount." Conn. Joint Standing Committee Hearings, Banks, Pt. 1, 1986 Sess., pp. 48-49. Because Texas can't provide an explanation either, the no-surcharge law is void for vagueness.

CONCLUSION

The district court's judgment should be reversed in its entirety and remanded for entry of a preliminary injunction against enforcement of Texas Finance Code § 339.001.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

Mark Wendorf
REINHARDT, WENDORF &
BLANCHFIELD
332 Minnesota Street
St. Paul, MN 55101
(651) 287-2100

Richard L. Coffman
THE COFFMAN LAW FIRM
First City Building

505 Orleans Street, Suite 505
Beaumont, TX 77701
(409) 833-7700

June 16, 2015

Counsel for Plaintiffs-Appellants Lynn Rowell, et al.

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2015, I electronically filed the foregoing Corrected Brief for Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

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

I hereby certify that my word processing program, Microsoft Word, counted 13,994 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

June 16, 2015

/s/ Deepak Gupta
Deepak Gupta