NO. 15-1391

In the
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,
Respondents.

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

BRIEF FOR AMICI CURIAE ALBERTSONS LLC, CVS HEALTH CORPORATION, H.E. BUTT GROCERY COMPANY, THE KROGER CO., PUBLIX SUPER MARKETS, INC., RITE AID CORPORATION, SAFEWAY INC., SPIRIT AIRLINES, INC., AND WALGREEN CO. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are some of the largest merchants in the United States, and they process millions of credit card transactions every day. They wish to provide truthful information to their customers at the point of sale about the real cost of paying by credit card. No-surcharge laws, like the one challenged in this case, prohibit them from doing so. Even though amici incur a concrete, out-of-pocket cost each time a customer pays with a credit card, state laws such as the one challenged here make it unlawful to tell customers using credit cards that they are being "surcharged" for this expense. Instead, amici and other merchants have little choice but to raise prices to all consumers in order to recover fees charged by the credit card networks. Amici believe that New York's no-surcharge law not only offends the First Amendment, but also suppresses business, harms the economy, and disproportionately burdens low-income consumers. Amici thus have a direct and significant interest in the outcome of this case.

Albertsons LLC and Safeway Inc. comprise the second-largest traditional food and drug retailer in the United States, operating more than 2,220 stores nationwide under 18 well-known banners, including Albertsons, Carrs, Pavilions, Randalls, Safeway,

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have consented to this filing.

Shaw's, Star Market, Tom Thumb, and United Supermarkets.

CVS Health Corporation and its subsidiaries provide integrated pharmacy health care services. Its retail business sells prescription and over-the-counter drugs, as well as a variety of health and beauty products and other merchandise. CVS Health operates over 9,000 retail stores in 49 states, the District of Columbia, and Puerto Rico. In 2016, the company was ranked seventh on the Fortune 500 list of the largest public companies in the U.S.

H.E. Butt Grocery Company is one of the largest independent food retailers in the nation and the largest private company in Texas. Founded in 1905, H.E. Butt is the primary food retailer in south and central Texas, operating in more than 150 communities across the Lone Star State.

The Kroger Co. is the largest traditional grocer in the United States, operating in 34 states and the District of Columbia. The Kroger Co., its franchisees, and its subsidiaries operate some 3,800 stores nationwide, including more than 2,600 supermarkets and multi-department stores, 780-plus convenience stores, and 330 fine jewelry stores.

Publix Super Markets, Inc. is the largest employee-owned retail grocery chain in the United States. It operates more than 1,100 stores in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee.

Rite Aid Corporation is the largest drugstore chain on the east coast and the third-largest in the

United States. It operates approximately 4,600 stores in 31 states and the District of Columbia.

Spirit Airlines, Inc. is the leading low-cost airline in the United States, the Bahamas, the Caribbean, and Latin America. Spirit operates more than 375 daily flights to more than 50 destinations. One of the youngest-flying fleets in the industry, Spirit is ranked among Fortune's fastest growing companies.

Walgreen Co. is the largest drug retail chain in the United States and ranks thirty-fifth among Fortune 500 companies. Walgreens serves 8 million consumers each day and operates more than 8,300 stores in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. In fiscal year 2015, Walgreens provided its customers with approximately 894 million prescriptions and immunizations.

SUMMARY OF ARGUMENT

American consumers know that there is no such thing as a free lunch. But many do not understand that there is also no such thing as a free credit-card transaction. And the consumers do not understand that basic fact because a number of states actively suppress speech about it at the time and place at which consumers would be most receptive to the message—namely, the point of sale.

In reality, credit card networks charge America's merchants *tens of billions of dollars* every year in "swipe fees" on consumer purchases.[2] Yet ten states,

[2] Although the mechanics of a credit-card transaction are complicated, we use the term "swipe fee" or "interchange fee" to refer to the full bundle of fees imposed on the merchant and collected by various entities, including merchants' banks, the

including New York, California, Texas, and Florida, have laws that prohibit merchants from passing through these fees by accurately labeling them as "surcharges" on customers who opt to use credit cards. As a result, merchants—many of which operate on razor-thin margins—have little choice but to charge higher prices to *all* consumers in order to recoup the credit networks' hefty fees. Cash-paying customers, who are disproportionately lower-income, wind up subsidizing the credit transactions—rewards programs and all—of credit-paying consumers. Such is the economic system that no-surcharge laws perpetuate.

This Court's review of the constitutionality of these provisions is urgently needed. No-surcharge laws directly impact the movement of huge sums of money in the American economy every day. Those protectionist provisions have created a massive market inefficiency by incentivizing far more credit-card transactions than would occur in a free market with accurate information available to consumers about the true cost of credit. Although not all states have no-surcharge laws, the four largest states do, and those laws unsurprisingly exert outsized influence on the national economy; indeed, the ten states with no-surcharge laws collectively include 40% of the country's population. Given that the lower-court split over the constitutionality of no-surcharge laws already encompasses the four largest states (New York, Florida, Texas, and California), the issue is

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credit-card networks, and the banks issuing credit to consumers. Those fees typically amount to 1.5% to 3% of the purchase price on credit-card transactions.

unquestionably ripe for this Court's immediate review.

New York and other states have tried to downplay the importance of this issue by noting that even though they prohibit "surcharges," they nonetheless allow "discounts" for customers who pay with cash. A cash discount and a credit-card surcharge may be the same as a matter of basic arithmetic, but an extensive body of scientific research has shown that the way in which the price difference is *communicated* has a powerful impact on consumer behavior: Shoppers perceive a $1 surcharge as far more undesirable than they perceive a $1 discount as beneficial. This central principle of human cognition, called "loss aversion" by economists, explains why the credit-card industry has tolerated "discounts" but has fought tooth-and-nail to prevent merchants from imposing "surcharges." Absent this Court's intervention, no-surcharge laws—which prohibit merchants from using particular *words* to convey a particular *message*—will continue to skew consumer behavior in irrational ways, to the detriment of merchants and consumers alike.

Certiorari is also warranted because no-surcharge laws fundamentally conflict with this Court's precedents regarding content-based restrictions on speech. The lower courts assumed without deciding that intermediate scrutiny was the appropriate framework in which to analyze no-surcharge laws. But under this Court's decision last Term in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), no-surcharge laws impose content-based restrictions on speech and should accordingly be subject to strict scrutiny—a demanding standard that these laws cannot remotely satisfy. *Reed* further underscores the profound constitutional infirmities of laws that do nothing but prohibit the truthful dissemination of information to consumers.

ARGUMENT

I. No-Surcharge Laws Have A Massive And Unwarranted Impact On The National Economy.

A. No-Surcharge Laws Harm Merchants by Prohibiting Truthful Communications About the Cost of Credit.

Every sale between a merchant and a consumer carries some cost for the merchant—the quintessential transaction cost. A purchase for which the consumer pays with a credit card costs a merchant approximately six times as much as a cash transaction. *See* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1321 (2008). America's merchants pay nearly $40 billion in swipe fees each year—more than three times Hollywood's total annual box-office receipts. *See id.* at 1323-24. Those fees are then used in part to fund lavish rewards programs—such as cash-back offers and airline and hotel rewards—that banks and credit-card companies use to promote the use of credit and attract high-income customers. According to one recent study, nearly *half* of credit-card interchange fees are spent on customer rewards programs. *See* Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 Okla. L. Rev.

327, 336-37 (2016) ("*Merchant Restraints*") (44% of interchange fees used for rewards programs).

None of this would be objectionable if customers who choose to pay with credit cards were required to bear the marginal cost of their expensive payment method. Just as online shoppers pay more for overnight shipping than for 5-day ground shipping, credit card customers would be required to pay an additional fee to offset the high costs of processing their transactions. Yet ten states, including New York, California, Texas, and Florida, prohibit merchants from surcharging credit transactions at the point of sale. In other words, merchants in those states are prohibited from conveying truthful information to consumers about credit-card costs at the precise moment when that speech would be *most likely* to influence the consumer's decision. As a result, "consumers never internalize the costs of their choice of payment system." *Economic Costs*, *supra*, at 1324. This government-compelled asymmetry of information among credit-card companies, merchants, and consumers "results in more credit card transactions at higher prices than would occur in a perfectly efficient market." *Id.*

The Government Accountability Office conducted an extensive study of the impact of swipe fees on economic growth, and determined that—contrary to the claims of the credit industry—swipe fees are *not* offset by any increase in sales from credit-card use. *See* U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009). The GAO interviewed leaders from large merchants, small businesses, and merchant associations, and found that both state laws and contractual restraints imposed by credit card companies "preclude merchants from adding surcharges for credit card payments" and, thus, from offsetting "their increased payment costs" from rising swipe fees. *Id.* at 2, 29. Those merchants were especially frustrated by their inability to impose surcharges on consumers who use rewards-program cards that carry the highest swipe fees (sometimes exceeding 3% of the purchase price). *See id.* at 15-16 (noting that "interchange fee costs for Visa's and MasterCard's premium cards have increased about 24 percent since they were introduced in 2005").[3]

In the wake of a 2013 settlement of antitrust claims, Visa and MasterCard no longer impose *contractual* rules that prohibit surcharging. *See In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). But ten states continue to ban the imposition of credit-card surcharges, thereby prohibiting the truthful dissemination of cost information and preventing consumers from making fully informed decisions about whether to use credit or another form of payment. *See Merchant Restraints*, *supra*, at 378-80 (collecting state laws). As a result, consumers are

[3] This increase in swipe fees was by no means inevitable. Even as those fees were increasing sharply in the United States, they were declining in other countries that allowed surcharging. For example, the average swipe fee in Australia on American Express transactions fell from 2.48% to 1.67% after the Reserve Bank of Australia removed a ban on surcharging. *See* Reserve Bank of Australia, *Payments Data*, File C3, http://bit.ly/1ZPvOVv.

forced to "choose among payment systems without factoring in point-of-sale costs." *Economic Costs*, *supra*, at 1336.

Absent this Court's intervention, no-surcharge laws will continue to artificially (and unconstitutionally) skew the relationship between merchants and consumers. If no-surcharge laws are found unconstitutional, however, merchants would finally be given "the ability to send signals to cardholders" about which types of credit cards impose high swipe fees that drive up retail prices. *See Rising Interchange Fees*, *supra*, at 47. Protecting merchants' First Amendment right to communicate truthful information about credit-card fees would also "cause cardholders using rewards cards to be more aware of and to bear more of the cost of the rewards from which they currently benefit." *Id.* at 47-48.

Moreover, no-surcharge laws impose an especially severe burden on merchants that are committed to providing consumers with "unbundled" prices. Amicus Spirit Airlines, for instance, proudly touts on its website that its "secret" is "unbundled awesomeness"—a payment system where consumers pay for *only the specific services that they actually use*. Unlike full-service legacy air carriers, a ticket for air travel on Spirit does not include the cost of "drinks, bags, outdated magazines, and even that tiny bag of peanuts." Spirit Airlines, *This is Spirit 101*, http://bit.ly/1XKIYV2 (last visited June 13, 2016). Spirit's business model is simple: "You only pay for what you want." *Id.*

But the one thing that Spirit and other amici cannot do in states with no-surcharge laws is to unbundle prices such that only card-paying customers pay for the expenses associated with credit payments. The end result is that *all* customers are compelled to subsidize the subset of customers who opt for the convenience of using a credit card rather than a less-expensive method of payment. In addition to violating the First Amendment, *see infra*, these laws are inefficient as a matter of basic economics and impose significant and unwarranted costs on the national economy.

In short, no-surcharge laws artificially skew purchasing decisions and perpetuate a massive market inefficiency. They are bad for merchants, bad for business, and bad for the economy as a whole.

B. No-Surcharge Laws Harm Consumers by Forcing Merchants To Raise Prices Across-the-Board.

No-surcharge laws also harm consumers. They "force[] the merchant into a troubling dichotomy: either accept less profit on a sale or increase prices on all products to account for the interchange fees incurred from credit-card users." *Merchant Restraints*, *supra*, at 328. "The former option harms the merchant, while the latter harms non-credit-card users like customers paying with cash, check, or debit card[s]." *Id.* Many retailers and other merchants operate on razor-thin margins, and their only realistic option when faced with hefty swipe fees is to raise prices across-the-board for all customers, regardless of their method of payment. *See* Scott Schuh, Oz Shy, & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, Fed. Reserve Bank of Boston, No. 10-03, at 1 (2010) (no-surcharge laws force merchants to "mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales").

As a result, a low-income customer who buys groceries using cash or food stamps is forced to subsidize the transactions of a wealthy customer who pays with a 2%-cash-back rewards card. *See Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 450 (S.D.N.Y. 2013) (Rakoff, J.) ("sellers' inability to effectively inform consumers of the true costs of credit has the effect of artificially subsidizing credit at the expense of cash"); Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. Legis. 1, 1 (2008). The social costs of this system of cross-subsidization are enormous. The negative welfare effects precipitated by no-surcharge laws include "inflation, decreased consumer purchasing power because of greater debt service, lower savings rates, more consumer bankruptcies, inequitable subsidization of credit consumers by non-credit consumers, and unnecessary subsidization of the entire credit card industry." Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 265 (2005).

Worse still, this system is deeply regressive and disproportionately harms poor and minority consumers. According to the Government Accountability Office, consumers who do not use credit cards are "made worse off" by the bundling of the cost of payment with the cost of goods. *See Rising Interchange Fees*, *supra*, at 25. Because credit-card use correlates strongly with income, the subsidization of credit cards by cash payers entails a significant "regressive transfer of income from low-income to high-income consumers." *Who Gains and Who Loses*, *supra*, at 2. In fact, in a given year, the average cash payer transfers *over $1,200* in wealth to the average credit card payer. *Id.* at 3.

Unsurprisingly, the consumers who benefit the most from no-surcharge laws are affluent shoppers who use premium rewards cards that carry the highest swipe fees. Although merchants must accept all credit cards within a particular brand network, the swipe fees on rewards cards are significantly higher than on non-rewards cards. But rewards cards do not incentivize customers to spend more money with merchants. Rather, "rewards cards are simply shifting transactions to more expensive payment systems for merchants." *Economic Costs*, *supra*, at 1347. Because of no-surcharge laws, "[m]erchants pay the price of accepting rewards credit cards *but see no benefit from doing so*." *Id.* at 1348 (emphasis added). And "since cash users do not receive rewards" at all, the system perpetuated by no-surcharge laws is doubly regressive. *Who Gains and Who Loses*, *supra*, at 2. Merchants, as well as consumers, would benefit greatly if merchants could truthfully communicate the costs associated with various payment systems and thereby cause consumers to internalize the true cost of their chosen payment method.

Moreover, merchants' inability to communicate truthfully about the cost of credit transactions leads consumers to use credit cards much more frequently than would occur in an efficient market with full information about the cost of credit. Because credit cards are both transacting instruments and *borrowing* instruments, the overuse of credit cards as a transacting instrument also leads to their overuse as a borrowing instrument. *Social Costs*, *supra*, at 37. Empirical research has linked no-surcharge laws to increased "credit defaults, reduced consumer savings and purchasing power, inflation, and consumer bankruptcy filings." *Id.* at 1-4.

In short, no-surcharge laws not only restrict the words merchants may use to communicate a particular message but also generate "significant effects on consumer behavior and exacerbat[e] a variety of social problems." *Id.* at 43. A prohibition on truthful speech that ultimately suppresses the purchasing power of America's poorest consumers is an issue of paramount importance that unquestionably warrants this Court's review.

C. No-Surcharge Laws Allow a Minority of States To Disproportionately Affect Merchants' Communications About Pricing.

Although only ten states currently have no-surcharge laws, those laws have an outsized impact on pricing in the remaining forty states. Many merchants operate nationwide and pursue nationwide pricing strategies, making it impractical or infeasible for them to charge different prices in different jurisdictions. Although amici are able to shoulder the cost and inefficiency of employing different pricing strategies in different states, many other merchants are not. And, even for amici, the ten states that prohibit surcharging contain 40% of the country's population. Indeed, the four largest states in terms of population (California, Texas, Florida, and New York), all have no-surcharge laws. "Since most national merchants are generally located in the most populous cities in these states, these national merchants see a significant number of transactions subject to state no-surcharge prohibitions." *Merchant Restraints*, *supra*, at 354.

Given the disproportionate influence on the national marketplace of the small minority of states that have adopted no-surcharge laws, this Court's immediate intervention is needed. The circuit split is as square as it will ever get. All ten of the no-surcharge laws have the same basic contours and impose the same basic prohibitions. *See id.* at 378-79 (listing text of each state statute). Yet the statutes in Florida and California have been found unconstitutional, while the statutes in New York and Texas have been upheld. *Compare Dana's R.R. Supply v. Attorney Gen.,* 807 F.3d 1235, 1251 (11th Cir. 2015) (Florida statute unconstitutionally "criminaliz[es] speech that is neither false nor misleading"), *and Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1209 (E.D. Cal. 2015) (California law "has the effect of preventing one class (retailers) from speaking 'in an effective and informative manner' to their customers"), *with Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 135 (2d Cir. 2015) (New York law "regulate[s] prices" and therefore "do[es] not implicate the First Amendment"), *and Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th Cir. 2016) (upholding Texas statute because "the speech is merely incidental to the regulated economic conduct").

Given that courts have now addressed the constitutionality of no-surcharge laws in *all four* of the largest states in the country—and have reached diametrically opposed results about whether those laws are consistent with the First Amendment—further delay would do nothing to assist this Court's review. The constitutionality of these anticompetitive laws is squarely presented and warrants immediate review.

II. The Specific Words Used To Communicate Prices Have A Powerful Effect On Consumer Behavior.

It is undisputed that New York and the other states that prohibit "surcharging" credit-card transactions nonetheless allow merchants to offer "discounts" to customers who pay with cash. As the Second Circuit noted in the decision below, New York's no-surcharge law "does not prohibit all differentials between the price ultimately charged to cash customers and the price ultimately charged to credit-card customers" because "it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers." *Expressions Hair Design*, 808 F.3d at 128; *accord Rowell*, 816 F.3d at 81 ("Texas' law allows a merchant to discount and dual-price as it wishes").

One may then wonder why it makes a dime's worth of difference whether a merchant "surcharges" credit transactions or "discounts" cash transactions; either way, the merchant can charge different prices based on the method of payment in a manner that results in credit-card customers paying more than cash customers. But, although a credit-card "surcharge" and a cash "discount" may be the same as a matter of basic arithmetic, they are quite different in terms of their *effect* on consumer behavior. A robust body of scientific research on the phenomenon of "loss aversion" shows the importance of the way in which price differences are *communicated*, and further underscores that no-surcharge laws are impermissible content-based restrictions on the *message* that merchants are allowed to convey to their customers. *See Rowell*, 816 F.3d at 85 (Dennis, J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message").

Suppose someone offers you a gamble on a coin toss: if tails, you lose $100; if heads, you win $150. Any statistician would tell individuals to take this highly favorable bet. Yet many people irrationally reject this bet because "the fear of losing $100 is more intense than the hope of gaining $150." Daniel Kahneman, *Thinking, Fast and Slow* 283-84 (2011). This hard-wired instinct of human cognition—known as "loss aversion"—explains why the credit industry (assisted by friendly state legislatures) has fought to prevent merchants from communicating that they are imposing a "surcharge," while maintaining indifference as to whether merchants provide equivalent "discounts" for cash or other non-credit transactions.

The basic premise of loss aversion is that "the disutility of giving up an object is greater tha[n] the utility associated with acquiring it." Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, Vo.5, No.1 J. Econ. Perspectives 193, 194 (1991). In other words, "changes that make things worse (losses) loom larger than improvements or gains." *Id.* at 199; *see also Thinking, Fast and Slow*, *supra*, at 282-83 (for consumers, "the response to losses is stronger than the response to corresponding gains"). For wine lovers, research has shown that "giving up a bottle of nice wine is more painful than getting an equally good bottle is pleasurable." *Id.* at 293. And loss aversion explains why professional golfers consistently putt better when trying to avoid a bogey than when trying to make a birdie putt of equal difficulty. *Id.* at 303.

This fundamental principle of human cognition also explains why the credit industry prefers to "refer to the cash price as a discount rather than to the credit card price as a surcharge." *Anomalies*, *supra*, at 204. In the context of merchants and consumers, "[i]mposing a surcharge (which is likely to be judged a loss) is considered more unfair than eliminating a discount (a reduction of a gain)." *Id.* Because consumers are inherently loss averse, a 3% "surcharge" for a credit transaction will have a much more powerful impact on consumer behavior than an identical 3% "discount" for cash transactions. One study showed that 74% of consumers had a negative reaction to surcharges, whereas only 22% had a positive reaction to cash discounts. *Social Costs, supra,* at 19-20.

This Court's First Amendment jurisprudence has long recognized the importance of the *specific words* used to convey a particular message and the fact that audiences may react very differently depending on the way in which the message is conveyed. Paul Cohen's jacket would have conveyed a significantly different message if it had said "Please Oppose Military Conscription" rather than the profane anti-draft message he actually chose. Even though both phrases convey the same substantive point, the specific words on the jacket were essential to inducing the intended effect on the audience. *See also* Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 Wash. U. L. Rev. 279, 280 (2012) (arguing that Cohen's attorney "won the case the moment he uttered the offending word" at oral argument). The government may not "prescribe the form or content of individual expression," and has no legitimate interest in making speech "grammatically palatable." *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

Just so here. No-surcharge laws "exploit a cognitive bias that causes consumers to react differently to mathematically equivalent surcharges and discounts." *Social Costs*, *supra*, at 2. In this way, a "large chang[e] of preferences" is caused by seemingly "inconsequential variations in the wording of a choice problem." *Thinking, Fast and Slow*, *supra*, at 272.

The phenomenon of loss aversion thus makes crystal clear that state-imposed restrictions on whether merchants can "surcharge" credit transactions or "discount" cash transactions are tantamount to direct regulations on the *message* being conveyed to consumers. *See Italian Colors*, 99 F. Supp. 3d at 1207 (no-surcharge law "regulates speech that conveys price information, which is protected by the First Amendment"); *Rowell*, 816 F.3d at 85

(Dennis, J., dissenting) (no-surcharge laws "prohibit[] the use of words to convey a particular message"). As the Eleventh Circuit concluded (with an apt reference to Orwell): "By effectively purging from merchants' vocabularies the doubleplusungood *surcharge* and replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law [merchants] has been deprived of its full rhetorical toolkit." *Dana's R.R. Supply*, 807 F.3d at 1247.

III. No-Surcharge Laws Impose Content-Based Restrictions On Speech That Merit Strict Scrutiny Under This Court's Recent Decision In *Reed v. Town of Gilbert*.

For all the reasons set forth above and in the Petition, no-surcharge laws unquestionably regulate speech—not conduct—and therefore implicate the First Amendment. Pet.22-28. And, as the Eleventh Circuit and Judge Rakoff correctly concluded, those statutes "crumbl[e] under even [the] lower form of heightened scrutiny" set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564-66 (1980). *See Dana's R.R. Supply*, 807 F.3d at 1248-49; *accord Expressions Hair Design*, 975 F. Supp. 2d at 445-46 (New York surcharge ban "cannot pass muster" under *Central Hudson*). As Judge Rakoff explained, New York's no-surcharge law flunks *Central Hudson* review because it is a "plainly overbroad" statute that restricts "lawful" and "non-misleading" speech, and "perpetuates consumer confusion" by "keep[ing] consumers in the dark about avoidable additional costs." *Id.* at 446-47 & n.8. The Eleventh Circuit similarly concluded that Florida's no-surcharge law "founders at every step" of the *Central Hudson* analysis. *Dana's R.R. Supply*, 807 F.3d at 1249.

But, if anything, the First Amendment defects with no-surcharge laws are even worse than that. A faithful application of this Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), requires the application of strict scrutiny—an exacting standard that no-surcharge statutes do not come close to satisfying. *See Dana's R.R. Supply*, 807 F.3d at 1249 (surcharging bans "likewise fail" when "subject to strict scrutiny").

This Court has long differentiated between content-based and content-neutral restrictions on speech. *See, e.g.*, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). The "normal inquiry" under this Court's precedents is "first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). A content-based regulation triggers a strict-scrutiny test, whereas a content-neutral regulation triggers intermediate scrutiny. But for many years, "[d]eciding whether a particular regulation [wa]s content based or content neutral wa[s] not always a simple task." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

A deep circuit split eventually developed about how courts should determine whether a regulation of speech was content-based or content-neutral. Three circuits adopted an "absolutist" test under which a regulation of speech was content-based if it distinguished at all among the content expressed, regardless of the regulation's motivating purpose. *See Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (11th Cir. 2005). In contrast, five other circuits adopted a "practical" test, under which a regulation was content-based only if it distinguished *because of* content, even if it facially differentiated between types of speech. *Brown v. Town of Cary*, 706 F.3d 294, 302-04 (4th Cir. 2013); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

Last Term, this Court definitively resolved this dispute in favor of the "absolutist" test. *Reed*, 135 S. Ct. at 2227-29, 2232. The Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. In other words, a regulation is content-based if it "draws distinctions" based on the "communicative content" of speech, *regardless* of whether those distinctions "can be justified without reference to the content of the regulated speech." *Id.* at 2228. Thus, under *Reed*, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.*[4]

Applying *Reed* here, no-surcharge laws are unquestionably content-based restrictions on speech. A no-surcharge law "prohibits the use of words to convey a particular message" and "makes the legality of a price differential turn on the language used to describe it." *Rowell*, 816 F.3d at 85-86 (Dennis., J., dissenting). Such content-based restrictions are "presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226.

Analyzing no-surcharge laws through some lesser framework such as intermediate scrutiny or "heightened scrutiny" is inappropriate for several reasons. First, this Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), applied what the Court called "heightened judicial scrutiny" to a state law restricting the disclosure of certain pharmacy records. *Id.* at 565. But *Sorrell* never held that content-based restrictions on commercial speech are

[4] *Reed* has already had a perceptible impact in the lower courts. *See Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (the "practical" test "is no longer valid due to the Supreme Court's decision in *Reed*"); *United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (en banc) (*Reed* "provided authoritative direction for differentiating between content-neutral and content-based enactments."); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) ("The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (*Reed* "abrogate[s] our previous descriptions of content neutrality.").

less suspect than other types of content-based restrictions. It is thus a mistake to read *Sorrell* as permitting the use of something other than strict scrutiny for certain forms of content-based restrictions on speech. If anything, *Sorrell* suggests that when it comes to First Amendment doctrine, "[c]ommercial speech is no exception." *Id.* at 566.

Moreover, *Reed* itself is inconsistent with the notion that different kinds of content-based restrictions on speech may be subject to different kinds of judicial review or different tiers of scrutiny. *Reed* says nothing about favoring some content-based laws over others. Not only was the Court in *Reed* aware of *Sorrell*, but it expressly relied on that decision. If *Sorrell* meant that content-based restrictions on commercial speech were less deserving of strict scrutiny than other content-based regulations, then the Court surely would have said as much in *Reed*.[5] But the Court instead held, *without qualification*, that "content-based restrictions on speech … can stand only if they survive strict scrutiny." *Reed* 135 S. Ct. at 2231.

In sum, although Petitioners should easily prevail under any standard of First Amendment scrutiny, *Reed* further underscores that the no-surcharge law challenged here is a content-based restriction of speech that is anathema to the First Amendment.

[5] *Reed* was not a case about commercial speech, but its willingness to rely heavily on *Sorrell*, a commercial-speech case, further suggests that the commercial/non-commercial distinction is irrelevant when it comes to content-based restrictions.

CONCLUSION

The Court should grant the petition for certiorari.

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June 15, 2016