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

BRIEF FOR AMICI CURIAE AHOLD U.S.A., INC., ALBERTSONS LLC, H.E. BUTT GROCERY CO., HY-VEE, INC., THE KROGER CO., SAFEWAY INC., SPIRIT AIRLINES, INC., AND WALGREEN CO. IN SUPPORT OF PETITIONERS

RICHARD A. ARNOLD
WILLIAM J. BLECHMAN
JAMES T. ALMON
KENNY NACHWALTER, P.A.
1441 Brickell Avenue
Suite 1100
Miami, FL 33131
(305) 373-1000

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
ROBERT M. BERNSTEIN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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, ten states 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.

Ahold U.S.A., Inc. operates more than 770 supermarkets in 13 states and the District of Columbia. Its brands include Giant, Stop & Shop, and the Peapod online grocery-delivery service.

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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 37.3, counsel of record for all parties have consented to this filing.

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

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, it is the primary food retailer in south and central Texas, operating in more than 150 communities across the Lone Star State.

Hy-Vee, Inc. is an employee-owned chain of more than 240 supermarkets and drugstores. Operating in eight Midwestern states, Hy-Vee is located in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin. Founded as a small general store in 1930, Hy-Vee now ranks among the top 25 supermarket chains in the United States.

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.

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.

INTRODUCTION AND SUMMARY OF ARGUMENT

No-surcharge laws such as New York's violate the First Amendment because they impose criminal penalties based on the words used to convey a particular message: namely, that credit-card transactions cost more than cash transactions. If a merchant sells a product for $103 but offers a $3 "discount" to consumers who pay with cash, nobody bats an eye. But if that same merchant sells that same product for $100 and imposes a $3 "surcharge" on consumers who pay with credit cards, it has committed a crime and could face a $500 fine and a year in prison. It is difficult to imagine a more basic violation of the First Amendment, as the legality of the speech in question turns solely on the *particular words* used to describe whether the customer is receiving a cash "discount" or being assessed a credit-card "surcharge."

The Second Circuit nonetheless held that New York's law need not be subject to *any* First Amendment scrutiny because it did not address "speech" at all, and was instead analogous to "price-control laws, which … have never been thought to implicate the First Amendment." Pet.App.19a. That reasoning fails at every step. Price-control laws fall outside the First Amendment because the government has authority to make certain *prices* or *transactions* unlawful—*i.e.*, if a state caps certain interest rates at 4%, a bank could not advertise a rate of 5% and then claim that this is speech protected by the First Amendment. But the New York law at issue here emphatically does not regulate prices or transactions. New York does not prohibit merchants from charging different prices to cash customers and credit-card customers, and no one disputes that a merchant could charge \$103 to credit-card customers and \$100 to cash customers. New York's law has nothing to do with the regulation of the actual *prices* being charged and everything to do with the *characterization* of those prices.

Once it is clear that New York's law implicates the First Amendment, the law's invalidity should be manifest. The lower courts that have invalidated state no-surcharge laws have assumed without deciding that intermediate scrutiny is the appropriate framework in which to analyze such laws, and Petitioners ably explain why New York's law flunks that test. *See* Pet.Br.36-44. To the extent the Court wishes to provide additional guidance about the relevant First Amendment principles, however, it should hold that no-surcharge laws impose content-based and, indeed, viewpoint-based restrictions on speech and thus are subject to strict scrutiny. This Court recently held in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), that 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.* at 2228.

Here, the challenged New York statute, on its face, prohibits merchants from accurately characterizing as a "credit-card surcharge" a pricing structure that could lawfully, but less accurately, be labeled a "cash discount." That plainly triggers strict scrutiny under *Reed*. Those two formulations convey different messages about the nature and responsibility for the difference in cash and credit-card prices. It may be that one person's freedom fighter is another person's terrorist, but speakers who choose one formulation over the other clearly intend to convey very different messages, and a government effort to forbid labeling a particular group as freedom fighters would be the most obvious example of impermissible content and viewpoint regulation. Just so here. A discount and a surcharge convey different messages about who is responsible for the price difference and what the default price of the article really is. Forbidding reference to "credit-card surcharges" while allowing "cash discounts" is impermissible government regulation of content and viewpoint.

An extensive body of scientific research about consumer behavior confirms that state no-surcharge laws are content-based prohibitions on merchants' ability to convey a particular *message* and have real-world consequences. This research shows that the manner 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, which economists call "loss aversion," explains why the credit-card industry has tolerated "discounts" but has fought tooth-and-nail to prevent merchants from imposing "surcharges." It also shows that *words* and *labels* matter to consumers, and that New York blinks reality by suggesting that its no-surcharge law is an expression-neutral means of regulating prices.

Finally, in addition to violating the First Amendment, state no-surcharge laws have a massive negative impact on the national economy. Credit card networks charge America's merchants *tens of billions of dollars* every year in "swipe fees" on consumer purchases.[2] Yet ten states, including New York, California, Texas, and Florida, 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 wealthier credit-paying

[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 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.

consumers. Such is the economic system that no-surcharge laws perpetuate.

No-surcharge laws also create 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.

At bottom, no-surcharge laws prohibit merchants from using particular *words* to convey a particular *message* at the precise time and place where consumers would be *most receptive* to that message—namely, the point of sale. Absent reversal of the judgment below, no-surcharge laws will continue to deprive consumers of accurate information about the relative cost of payment methods, thereby skewing purchasing decisions in irrational ways, to the detriment of merchants and consumers alike.

ARGUMENT

I. No-Surcharge Laws Impose Content-Based Restrictions On Speech In Violation Of The First Amendment.

A. No-Surcharge Laws Implicate the First Amendment Because Regulation of Communication About Prices Is Regulation of Speech.

Merchant speech conveying truthful information about pricing to consumers is expression covered and protected by the First Amendment. *See*, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976). Yet the Second Circuit held in the decision below that New York's no-surcharge law falls wholly outside the ambit of the First Amendment because it merely addresses "prices" and "certain relationships between prices" and thus "does not implicate the First Amendment" at all. Pet.App.20a; *accord* Pet.App.27a (asserting that New York law merely regulates "conduct"). That reasoning—which allowed the challenged statute to evade *any* First Amendment scrutiny—badly misses the mark and rests on a misunderstanding of the New York law and an untenable interpretation of this Court's First Amendment jurisprudence.

The Second Circuit was certainly correct that the First Amendment does not "cover" all speech. For example, the First Amendment does not protect communications or statements used to commit fraud, treason, perjury, or conspiracy. *See*, *e.g.*, *United States v. Williams*, 553 U.S. 285, 297 (2008) (offers "to engage in illegal transactions" are "categorically excluded from First Amendment protection"). On the other hand, this Court has repeatedly recognized that nonverbal, expressive communications enjoy First Amendment coverage even if the acts in question could potentially be characterized as "conduct" rather than "speech." *See, e.g.*, *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (nude dancing); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing a black armband).

The Second Circuit concluded that New York's no-surcharge law is nothing more than an economic regulation of prices that "does not implicate the First Amendment." Pet.App.18a-21a. The court's reasoning proceeded as follows: prices are not speech; therefore a prohibition on certain prices is not a regulation of speech; therefore a prohibition on certain relationships between prices is not a regulation of speech; therefore a state can regulate the relationship between a merchant's cash price and credit-card price without regulating speech protected by the First Amendment.

That syllogism breaks down, however, for the simple reason that New York's law *does not regulate the prices that merchants may charge*, but regulates instead how those prices are characterized. New York does not, and cannot, dispute that a merchant may charge $100 to its cash-paying customers and $103 to credit-card-paying customers who buy the very same product. The no-surcharge law thus has nothing to do with "prohibiting certain prices" or "prohibiting certain relationships between prices." Pet.App.20a. Instead, the sole purpose and effect of this statute is to regulate the manner in which a merchant may *characterize* or *describe* an entirely lawful price differential between cash and credit customers.

This Court's decision in *44 Liquormart* is highly instructive. In that case, Rhode Island prohibited merchants from advertising the retail price of alcoholic beverages on the theory that this prohibition would promote "temperance" by raising the price of alcohol and thereby decreasing consumption. 517 U.S. at 504-08 (plurality op.). The Court readily acknowledged that Rhode Island could seek to achieve that objective without violating the First Amendment through "direct regulation" of alcohol prices (*i.e.*, by setting minimum prices for alcohol sales). *Id.* at 507. What Rhode Island could not do, however, was to seek to raise prices by "censor[ing] all advertisements that contain accurate and nonmisleading information about the price of the product." *Id.* at 513; *see id.* at 504 ("speech prohibitions of this type rarely survive constitutional review").

The Second Circuit purported to distinguish *44 Liquormart* on the ground that this Court's holding was limited to "the advertising of *lawful* prices." Pet.App.19a. But that is no distinction at all. New York has never disputed that it is "lawful" for a merchant to charge a higher price to credit-card customers than to cash customers.[3] The merchant's conduct becomes unlawful only if it frames its (lawful) differential pricing as a (verboten) credit-card surcharge rather than a (permissible) cash discount. Either way, this distinction has nothing to do with the legality of the *prices themselves* and everything to do with the manner in which those lawful prices are *communicated* to consumers.

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[3] Indeed, merchants' ability to engage in such differential pricing is protected by federal law. *See* 15 U.S.C. §1666f(a) (credit-card issuers "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").

Put differently, New York takes no issue with the underlying price differential (credit cards cost more than cash), but using the wrong words to impart that message to consumers makes a merchant a criminal. As the Eleventh Circuit explained (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 v. Florida*, 807 F.3d 1235, 1247 (11th Cir. 2015).

In sum, the Second Circuit's attempt to shield New York's no-surcharge law from *any* degree of First Amendment scrutiny fundamentally misconstrues this Court's precedents and cannot be squared with the basic reality of how no-surcharge laws operate. And, for the reasons set forth below, once it is established that no-surcharge laws implicate the First Amendment, there is no remotely plausible basis on which they can be upheld.

B. New York's Criminal No-Surcharge Law Imposes a Content-Based Restriction on Speech That Merits Strict Scrutiny Under *Reed v. Town of Gilbert*.

The lower courts that have invalidated state no-surcharge laws have assumed without deciding that intermediate scrutiny is the appropriate framework for analyzing such laws, and Petitioners ably explain why New York's law fails under even that less-demanding standard of review. *See* Pet.Br.36-44. But, in reality, the no-surcharge laws are content-based—and, indeed, viewpoint-based—restrictions on speech that are subject to (and fail) strict scrutiny, as underscored by *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

1. 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).

Two Terms ago, 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]

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[4] In the year-and-a-half since *Reed* was decided, the decision has already had a significant impact on First Amendment jurisprudence in nearly every federal appeals court. *See Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, n.12 (5th Cir. 2016) (distinguishing precedent that "was decided before *Reed*"); *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 509 (D.C. Cir. 2016) ("*Reed* forbids us from following [our prior decision's] course here"); *O'Boyle v. Town of Gulf Stream*, No. 15-13964, 2016 WL 4056394, at *1 (11th Cir. 2016) (remanding case after

2. Applying *Reed* here, state no-surcharge laws are unquestionably not content-neutral. 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 v. Pettijohn*, 816 F.3d 73, 85-86 (5th Cir. 2016) (Dennis., J., dissenting); *accord Dana's R.R. Supply*, 807 F.3d at 1247 (no-surcharge statute "effectively purg[es] from merchants' vocabularies" the word "surcharge" and "replac[es] it with the State's preferred term, discount"). The no-surcharge laws are thus plainly content-based and "presumptively unconstitutional" under *Reed*. 135 S. Ct. at 2226.

Indeed, by prohibiting one characterization of the price differential (which focuses attention on the cash price and places responsibility for the excess on

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Reed reworked constitutional framework); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 364 (3d Cir. 2016) ("*Reed* has altered the applicable analysis of content neutrality"); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (*Reed* "clarif[ied] the level of review due to certain speech prohibitions"); *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.").

the credit-card companies) but permitting another characterization of the same differential (which focuses attention on the credit price and places responsibility for asking for a particular payment form on the merchant), the no-surcharge laws amount to viewpoint discrimination. As with a hypothetical law prohibiting the description of a group as freedom fighters, but allowing them to be labeled terrorists, the no-surcharge laws fundamentally skew the debate and prohibit one viewpoint about the responsibility for and nature of the price differential from being expressed.

New York will inevitably argue that because its no-surcharge statute is directed at muzzling merchants, that law addresses only so-called "commercial speech" and should be evaluated under a less-demanding standard such as intermediate scrutiny or "heightened scrutiny." That argument should be rejected 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 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 triggers strict scrutiny.

3. New York's criminal speech-control statute does not stand a chance under strict scrutiny. *See Dana's R.R. Supply*, 807 F.3d at 1249 (surcharging

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[5] The particular speech at issue in *Reed* was not commercial speech, but the Court's analysis of what renders a law content-based did not turn on whether the speech is commercial or non-commercial, as Justice Breyer pointed out in his concurrence in the judgment. *See* 135 S. Ct. at 2234-36 (Breyer, J.). Equally telling, both the majority and Justice Alito's concurrence emphasized the many options available to cities for constitutional sign regulation, *see id.* at 2232 (majority op.); *id.* at 2233 (Alito, J.), and neither suggested that content-based regulation of commercial signs was among the permissible options.

bans "likewise fail" when "subject to strict scrutiny"). That standard requires the Attorney General "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. At the outset, the government has made almost no serious effort throughout this litigation to articulate its interests with particularity, to explain why those interests are compelling, or to show how criminalizing merchant speech actually "furthers" those interests—let alone satisfies the narrow-tailoring requirement.

New York belatedly invokes three "policy rationales" in support of the no-surcharge law: preventing "unfair profiteering, consumer anger, and deceptive sales tactics." BIO.3. Assuming *arguendo*, as the Court did in *Reed*, that those nebulous interests are indeed "compelling" ones, New York cannot show that its surcharging ban "actually further[s]" its asserted interests. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). New York cannot simply recite interests, even if legitimate; the state must establish that its interests "would be seriously compromised" by permitting the speech in question. *Id.* at 863.

The government has not shown *how* its speech-control law prevents unfair profiteering or consumer anger. If anything, New York's law *enables* unfair profiteering by banks and credit-card companies, which can impose swipe fees that can exceed 3% of the purchase price, while merchants are prohibited from effectively communicating with their customers about those fees. And, if anything, New York's law foments—not prevents—consumer anger by forcing merchants to raise prices across-the-board rather than passing the costs of swipe fees onto only those consumers who choose to pay with credit cards. Moreover, to the extent no-surcharge laws direct "consumer anger" over the price differential toward merchants (who may appear to be charging an artificially high price) and away from credit-card companies (who are the ones that dictate the price differential), that just underscores that the laws are impermissibly content- and viewpoint-based. Finally, if there is any "deceptive tactic" involved in the swipe-fee scheme, it is allowing the banks and credit-card companies to extract a windfall at the expense of cash-paying customers who are disproportionately poor—all the while concealing this system from consumers by preventing merchants from truthfully conveying the cost of credit.

New York also cannot show that its criminal speech-control law "is narrowly tailored" to further its interests. *Reed*, 135 S. Ct. at 2231. Strict scrutiny's narrow-tailoring requirement presents an "exceptionally demanding" hurdle that the government cannot readily surmount. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2780 (2014); *accord United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000) ("if a less restrictive means is available for the Government to achieve its goals, the Government must use it"). Seeking to prevent "consumer anger" by banning truthful speech, rather than requiring complete disclosure, is the antithesis of narrow tailoring.

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

An extensive body of scientific research about consumer behavior further underscores that state no-surcharge laws restrict merchants' ability to convey a particular *message*. 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." Pet.App.14a; *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 both the messages they convey (about responsibility for the price difference and the nature of the default price) and 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 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 recommend taking 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, *see* Pet.Br.14-16) 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 more concise and 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 confirms what this Court's First Amendment doctrine already makes 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 Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015) (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").

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

Given that no-surcharge laws directly regulate the message that merchants can convey to their customers, it is hardly surprising that such laws have significantly skewed the incentives facing merchants and consumers alike.

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 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").[6]

In the wake of a 2013 settlement of antitrust claims, Visa and MasterCard ceased imposing *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).[7] But ten states continue to ban the imposition

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[6] 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.

[7] The Second Circuit recently reversed the district court's approval of the settlement, *see In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 240 (2d Cir. 2016), but Visa and MasterCard have not taken any steps to reinstate their network-level surcharging bans and the Second

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

Absent reversal of the lower-court judgment, 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

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Circuit's decision was based in part on the court's view that the existence of state surcharging bans limited the value of the anti-surcharging injunctive relief obtained in the settlement.

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 November 14, 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 supra*, 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 cannot withstand any method of First Amendment 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, it is especially imperative for this Court to reverse the decision below and reaffirm that states have no authority whatsoever to "criminaliz[e] speech that is neither false nor misleading" about the true costs of credit-card usage. *Dana's R.R. Supply,* 807 F.3d at 1251.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

RICHARD A. ARNOLD	PAUL D. CLEMENT
WILLIAM J. BLECHMAN	*Counsel of Record*
JAMES T. ALMON	JEFFREY M. HARRIS
KENNY	ROBERT M. BERNSTEIN
NACHWALTER, P.A.	KIRKLAND & ELLIS LLP
1441 Brickell Avenue	655 Fifteenth Street, NW
Suite 1100	Washington, DC 20005
Miami, FL 33131	(202) 879-5000
(305) 373-1000	paul.clement@kirkland.com

Counsel for Amici Curiae

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