No. 15-1391

In The
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, 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 OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS & FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

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- Enrique Armijo, Associate Professor of Law, Elon University School of Law.
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[1] This brief is filed with the parties' consent. No counsel for a party wrote this brief in whole or in part; and no person or entity, other than the Amici and their counsel, has contributed money intended to fund the preparation or submission of this brief.

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of about 200 attorneys across the United States, Canada, and elsewhere who routinely represent businesses and individuals engaged in free expression protected by the First Amendment. FALA has a tradition of submitting amicus briefs in cases where First Amendment speech rights are endangered.

This case interests the Scholars and FALA because of how it stands to impact the effective protection of commercial speech under the First Amendment. Under the decision below, laws with a main purpose or effect of limiting truthful commercial speech may evade First Amendment review so long as these laws are sufficiently disguised as mere regulations of economic conduct. This amicus brief explains how the Court's general First Amendment jurisprudence concerning the speech/conduct divide can be applied in the commercial arena to overcome this problem.

SUMMARY OF THE ARGUMENT

In 1934, the State of Louisiana passed a new law taxing the sale of newspapers with a circulation of more than 20,000 copies per week. *Am. Press Co. v. Grosjean*, 10 F. Supp. 161, 162 (E.D. La. 1935). A federal district court subsequently ruled that the law was an arbitrary business regulation and otherwise refused to consider if the law also violated the First

Amendment. *See id.* at 163. This Court saw things differently, finding the First Amendment challenge to be one of the "utmost gravity." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936). Then, after noting the oppressive effect of Louisiana's law on both newspaper advertising and circulation, the Court pronounced the following judgment: the law was "a deliberate and calculated device **in the guise of a tax** to limit the circulation of information" protected by the First Amendment. *Id.* at 250 (bold added).

Eighty years later, this Court has before it another disguised effort to limit the circulation of information protected by the First Amendment—this time, the real cost of paying with a credit card. New York General Business Law § 518 provides that "[n]o seller in any sales transaction may impose a surcharge" on those customers who pay with a credit card rather than cash. On face, this law seems like a mere business regulation: sellers must charge identical prices for credit-card sales and cash sales alike. But that is not how New York interprets or enforces this law. *See People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987).

In practice, New York allows sellers to impose higher prices on credit-card users—so long as the seller does so by inflating his usual sticker prices and then announcing a "discount" from these prices for cash users. *See* Pet'rs' Br. 17-19. A seller's liability under New York's surcharge ban thus depends entirely on what he says to a customer. *See id*. If a seller labels a television with a price tag of "$100 plus $2 for credit

card sales" or "$102, which includes $2 for credit card sales," the seller risks jail time. *See id.* But if the price tag reads "$102, with a $2 discount for cash sales," then the seller is in the clear. *See id.*

This Court has found that the First Amendment is implicated whenever "the conduct triggering coverage under [a] statute consists of communicating a message"—be it publishing a newspaper or announcing a sticker price. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Yet, in reviewing New York's surcharge ban, the Second Circuit found that the ban "regulates conduct, not speech." Cert. App. 27a. Much like the district court in *Grosjean*, the Second Circuit settled for appearances, enabling a significant limit on free speech disguised as a mere business regulation to evade First Amendment review.

The Court should not allow this myopia to persist. The First Amendment protects "the consumer's interest in the free flow of truthful commercial information." *United States v. United Foods, Inc.*, 533 U.S. 405, 426 (2001). But not every government limit on the flow of commercial information "comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Some of these limits come disguised as mere business regulations, and penetrating this disguise requires "careful and perceptive" application of the Court's standard in *Holder* for distinguishing limits on speech from limits on conduct. *Id.* Applying such analysis to New York's surcharge ban, it becomes clear that this ban is no mere regulation of pricing but rather a

limit on truthful commercial speech about prices that merits meaningful First Amendment scrutiny.

ARGUMENT

I. Lower courts need help identifying limits on commercial speech when disguised as mere regulations of economic conduct.

Lower courts often must decide whether a given business regulation merits First Amendment scrutiny. This decision turns on whether the business regulation is targeted at commercial speech or mere economic conduct. "It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999). For good reason: the "free flow of commercial information is indispensable" in our nation, where numerous economic decisions are made privately and "[i]t is a matter of public interest that those decisions . . . be intelligent and well informed." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

Some restrictions on commercial speech are easy to spot. State bans on advertising, for example, present a quintessential limit on commercial speech. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (plurality op.) (First Amendment applies to ban on advertising of alcoholic content); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (First Amendment applies

to ban on drug-price advertising). Limits on commercial speech are also easily identifiable when a business regulation uses speech-based terminology like "solicit" or "promote." *E.g.*, *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 506 (6th Cir. 2008) ("[T]his provision regulates speech, not conduct, as it prohibits providers from 'stat[ing]' the tax on the bill."); *De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 611 (E.D.N.Y. 2015) ("[T]he Ordinance does not simply prohibit conduct, i.e. stopping or attempting to stop a motor vehicle. Rather, it prohibits stopping . . . a motor vehicle for the purpose of soliciting employment of any kind.").

In the above-described cases, courts have little difficulty seeing through government efforts to evade First Amendment review by claiming that a challenged business regulation limits only economic conduct. As one district court has observed in a case where the government made such a claim in describing limits on certain marketing materials, "the activities at issue in this case are only 'conduct' to the extent that moving one's lips is 'conduct,' or to the extent that affixing a stamp and distributing information through the mails is 'conduct.'" *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 59 (D.D.C. 1998)*, order vacated on jurisdictional grounds sub nom. Wash. Legal Found. v. Henney*, 202 F.3d 331, 336–37 (D.C. Cir. 2000). But matters become less clear when commercial speech is regulated through conduct-based terminology like "sale" or "transfer" or "use."

The Court encountered this reality most recently in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). At issue was a state law that banned the sale of pharmacy records to drug companies that revealed the prescribing practices of individual doctors. *See id.* at 557. The state argued that the law was exempt from First Amendment review "because sales, transfer, and use of prescriber-identifying information are conduct, not speech." *Id.* at 570. The First Circuit provided support for this view. *See IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008). The panel explained in regard to a similar state law that because the law targeted the conduct of "harvesting, refining, and selling" certain information, the First Amendment did not apply. *Id.* The panel also found it irrelevant that this conduct was directed at "information instead of, say, beef jerky." *Id.*

This Court disagreed. *See Sorrell*, 564 U.S. at 570. The Court noted that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* The dissemination of speech through the conduct of a sale did not alter this conclusion. *See id*. What mattered was that "prescriber-identifying information is speech" and the state sale ban denied drug companies access to this speech. *Id.* This led the Court to liken the ban to "a law prohibiting trade magazines from purchasing or using ink." *Id.*

Sorrell ultimately reflects how easy it is for lower courts to overlook limits on commercial speech when these limits are disguised in conduct-based terms. Lower courts need guidance to see through this kind

of facade, and the ongoing protection of commercial speech under the First Amendment depends on it. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 498 (1995) (Stevens, J., concurring). The Court has already noted that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct." *Greater New Orleans*, 527 U.S. at 193. And in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court articulated a standard for respecting this speech/conduct distinction that merits application in the commercial arena.

II. This Court's analysis of the speech/conduct distinction in *Holder* should be applied in the commercial arena.

In *Holder v. Humanitarian Law Project*, this Court considered a First Amendment challenge to a federal law banning the provision of "material support or resources" to designated terror groups. 561 U.S. at 7. The government argued the First Amendment did not apply to the ban because it only regulated conduct—i.e., "the fact of plaintiffs' interaction" with the groups at issue. *Id.* at 26. The Court found that this argument went "too far" because the ban's force still turned on a review of what the plaintiffs wanted to say. *Id.* at 26–27. The ban would only apply if the plaintiffs imparted a specific skill or specialized knowledge, versus general or unspecialized knowledge. *See id.* Hence, while the ban could "be described as directed at conduct," it actually was a limit on the plaintiffs' speech since "the

conduct triggering coverage" under the ban "consist[ed] of communicating a message." *Id.* at 28.

This analysis of speech versus conduct furnishes a useful test for vetting First Amendment challenges to business regulations. Such regulations will often be cast in conduct-based terms. Yet, as *Holder* reveals, this does not mean that these regulations limit conduct alone. The question is whether the specific conduct that triggers the regulation "consists of communicating a message." *Holder*, 561 U.S. at 28. And in answering this question, courts should pay close attention to the purpose and the effect of the conduct being regulated. If either concerns the communication of a message, then the regulation should be found to govern speech, not conduct. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[While] the delivery of a tape recording might be regarded as conduct . . . the purpose of such a delivery is to provide the [tape] recipient with the text of recorded statements. . . . [A]s such, it is the kind of 'speech' that the First Amendment protects."); *Grosjean*, 297 U.S. at 244–45 (emphasizing the propriety of First Amendment review where a tax had the direct effect of suppressing newspaper circulation).

The following hypothetical illustrates this point. Imagine a town is trying to convince a popular juice bar to open a franchise, but the bar dislikes having to compete with child-run lemonade stands. The town council debates a blanket ban on lemonade stands but fears the bad press and citizen backlash that would follow. So, the council instead enacts the following

ordinance, with an eye toward discouraging consumers from patronizing child-run lemonade stands. Section 1 *bans* children from setting up lemonade stands and defines lemonade as "any mixture of lemon juice, water, and sugar." Section 2 *allows* children to set up lemon-drink stands and defines "lemon drink" as "any mixture of lemon juice, water, and sugar." A group of parents then challenges the law under the First Amendment. The council responds that the law merely regulates the economic conduct of selling lemonade.

Applying *Holder* to this hypothetical establishes why the council is wrong. Even if a given law "may be described as a regulation of conduct," the law may still be deemed to regulate speech when it is apparent that "the conduct triggering coverage under the statute consists of communicating a message." *Holder*, 561 U.S. at 28. If a town police officer comes across a child who is selling drinks from a pitcher filled with a mixture of lemon juice, water, and sugar, the officer cannot stop the child based on that conduct alone. Instead, the police officer can stop the child only if the child uses the term "lemonade" rather than "lemon drink" to describe the mixture being sold. The ordinance therefore merits First Amendment review under *Holder* because "the conduct triggering coverage" under this law consists of communicating a message—i.e., describing a mixture of lemon juice, water, and sugar as "lemonade" rather than as "lemon drink."

It is easy to imagine other evidence that could be offered to show that this hypothetical law regulates speech, not conduct—for example, a letter from the

town council to the juice bar explaining that "lemon drink" is a term that has a negative effect on the minds of consumers. The bottom line, however, is that the law is a labeling restriction in the guise of a sales ban, and applying *Holder* ensures that this law does not evade proper First Amendment review. Lower courts have unfortunately overlooked the value of *Holder* in navigating the speech/conduct divide in the commercial arena. As a result, these courts have failed to recognize why state credit-card surcharge bans warrant First Amendment review to the extent these same bans allow sellers to offer "discounts" on surcharge-boosted prices to customers who decide to pay by cash.

III. Applying *Holder* here reveals that New York's credit-card surcharge ban is a limit on commercial speech, not conduct.

This case concerns a First Amendment challenge to a New York law banning sellers from "impos[ing] a surcharge" on consumers who pay by credit card rather than by cash. N.Y. Gen. Bus. Law § 518; *see* Pet'rs' Br. 20–21. At first glance, this ban seems only to prohibit sellers from charging different prices based on mode-of-payment. In short, the ban "may be described as directed at conduct." *Holder*, 561 U.S. at 28.

The way that New York enforces this ban tells a different story. As far as New York is concerned, sellers *may* use mode-of-payment to vary the ultimate price that customers pay. *See* Pet'rs' Br. 17–19. The ban only

affects how sellers explain this price variance. *See id.* A stark example of this can be seen in directions given by the New York Attorney General's Office to one seller in enforcing the ban: "You can charge more for a credit card all you want, but **you have to say** that this is the cash discount rate." J.A. 115 (bold added). The Attorney General's Office gave this direction because of how the seller had been previously explaining the cost of paying by credit card to customers. *See id*.

New York has thus established that "the conduct triggering coverage" under its surcharge ban "consists of communicating a message"—namely, the message that it costs more to pay with a credit card than to pay with cash. *Holder*, 561 U.S. at 28. Or as the district court put it, the ban "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." Cert. App. 73a. Hence, under *Holder*, New York's surcharge ban merits First Amendment review. While prices may be "a routine subject of economic regulation," the manner in which "price information is conveyed to buyers is quintessentially expressive." Cert. App. 74a.

The Second Circuit, however, found that New York's surcharge ban "regulates conduct, not speech." Cert. App. 27a. The panel reached this conclusion by deeming the ban to limit just "the difference between a seller's sticker price and the ultimate price that it charges to credit-card customers." Cert. App. 21a–22a. This analysis presumes that a "surcharge" exists only when a seller requires a credit-card user to pay more

than a given sticker price (e.g., "$100 plus $2 for credit-card users"). But a surcharge exists in equal measure when a seller requires a credit-card user to pay more than a cash user (e.g., "$102 minus $2 for cash users"). In both instances, the consumer pays more for using a credit card (i.e., $102)—the only difference is how the seller explains this excess charge to the consumer (i.e., by using the term "surcharge" versus "discount").

The Eleventh Circuit recognized this in reviewing Florida's credit-card surcharge ban under the First Amendment: "[t]autologically speaking, surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a 'negative' discount, and a discount is a 'negative' surcharge." *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015). The panel thus recognized that the "sole effect" of Florida's surcharge ban was to keep sellers "from uttering the word surcharge, criminalizing speech that [was] neither false nor misleading." *Id.* at 1251; *see id.* at 1245 (describing the ban as a "surcharges-are-fine-just-don't-call-them-that law").

In the end, had the Second Circuit factored *Holder* into its analysis of New York's surcharge ban, it would have been able to recognize that this ban is a regulation of speech disguised as a regulation of conduct. But the panel overlooked *Holder* and instead drew upon this Court's holding in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, that a law "regulates conduct" when the law dictates what a person "must

do . . . not what they may or may not *say*." 547 U.S. 47, 60 (2006) (italics in original); *see* Cert. App. 20a. The problem with this reasoning is that New York's surcharge ban (i.e., as enforced by New York) does not dictate what sellers must do *except by reference* to what sellers may or may not say. *See* Pet'rs' Br. 17–19.

Of course, the First Amendment would not prevent New York from enforcing its surcharge ban as a true ban by requiring sellers to charge the same price to everyone no matter how anyone pays. This fits with the "First Amendment's preference for resolving policy problems by regulating conduct rather than speech." *BellSouth Telecomms., Inc.*, 542 F.3d at 509. At present, however, New York allows differential pricing based on mode-of-payment so long as the extra charge for credit-card users is hidden in a sticker price and then framed as a "discount" for cash sales. *Cf. De La Comunidad Hispana De Locust Valley*, 128 F. Supp. 3d at 611 ("The Ordinance does not prohibit just any stopping or attempting to stop a vehicle. Its prohibition reaches that conduct only when accompanied by an expression of the availability of a job or of a person for employment. . . .").

There lies the importance of recognizing that New York's surcharge ban regulates speech, not conduct—the opposite view risks "unleash[ing] a principle of constitutional law that would have no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016) (plurality op.). This danger may be seen in a law that Kentucky passed to limit the circulation of

information about a new telecom tax. *See BellSouth Telecomm.*, 542 F.3d at 500–01. The law contained two key provisions: (1) a "no-direct-collection clause," that banned telecom providers from "collect[ing] the tax directly from" customers; and (2) a "no-stating-the-tax clause," that banned telecom providers from "separately stat[ing] the tax on the bill" to customers. *Id.* at 501, 504. Given the plain language of the no-stating-the-tax clause, the Sixth Circuit easily found that Kentucky's law warranted First Amendment review. *See id.* at 506 ("[T]his provision regulates speech, not conduct, as it prohibits providers from 'stat[ing]' the tax on the bill.").

Under the Second Circuit's view, however, Kentucky could have omitted the no-stating-the-tax clause and enforced the no-direct-collection clause in the same manner that New York enforces its surcharge ban: by letting telecom providers increase their prices to cover the tax and then barring providers "from using their invoices to say why." *Id.* at 500. This would leave the providers with no First Amendment claim because the no-direct-collection clause appears only to regulate the conduct of tax collection. This outcome then opens the door to a new universe of censorship in which the First Amendment is toothless so long as the government regulates commercial speech by using the terminology of economic conduct.

All of this runs counter to the First Amendment's purpose and design, which directs courts to be on guard for "regulations that seek to keep people in the dark for what the government perceives to be their

own good." *44 Liquormart*, 517 U.S. at 503 (opinion joined by Stevens, Kennedy, & Ginsburg, JJ.). It is therefore vital for this Court to make it clear that the First Amendment always applies when "the conduct triggering coverage under [a law] consists of communicating a message"—even in the commercial arena. *Holder*, 561 U.S. at 28. Applying that standard here, New York's surcharge ban regulates speech and is subject to First Amendment review. Whether the ban survives First Amendment review by being properly tailored to an important government purpose is a separate question beyond the scope of this brief. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). The point is that the ban must be subjected to First Amendment review, even though it may appear on face only to regulate economic conduct.

CONCLUSION

New York Yankees catcher Yogi Berra is well known for having once said: "When you come to a fork in the road, take it." Less well known is why Berra said this. He was explaining that his house could be reached by taking either side of a forked road leading to it.[2] The same idea applies to New York's surcharge ban. As with Berra's forked road, both paths of the ban

[2] *See* Mary-Jayne McKay & Bob Simon, *The Wisdom of Yogiisms: Did He Really Say That?*, 60 MINUTES (CBS NEWS), Mar. 6, 2002, http://cbsn.ws/2fZ3vEY.

("surcharge" or "discount") lead to the same end: credit-card users pay more while cash users are free to pay less.

The only difference between the paths is the words used to describe them, and that is all that New York has sought to regulate in requiring sellers to use the discount path rather than the surcharge path in stating prices to consumers. That inescapable reality brings the First Amendment into play, as this Court recognized in *Holder v. Humanitarian Law Project*. The Court should therefore reverse the Second Circuit and hold that New York's surcharge ban merits First Amendment review as a disguised limit on commercial speech.

Respectfully submitted,

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