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 OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

* Counsel of Record

December 21, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

Books, Articles, and Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The following scholars are experts in the First Amendment, each of whom has published a book or law review article on the subject. *Amici* law professors teach or have taught courses in constitutional law or the First Amendment and have devoted significant attention—in some cases, for several decades—to studying the First Amendment:

Micah Berman, Assistant Professor of Public Health and Law, The Ohio State University Moritz College of Law and College of Public Health

Charlotte Garden, Associate Professor of Law, Seattle University School of Law

James Grimmelmann, Professor of Law, Cornell Tech and Cornell Law School

Leslie Kendrick, Albert Clark Tate, Jr., Professor of Law, University of Virginia School of Law

Genevieve Lakier, Assistant Professor of Law, University of Chicago Law School

Tamara Piety, Professor of Law, University of Tulsa College of Law

Rebecca Tushnet, Professor of Law, Georgetown University Law Center[2]

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] Institution names are provided for purposes of affiliation only.

INTRODUCTION

This Court's decisions interpreting the First Amendment have given robust protection to commercial speech, requiring courts to carefully review government regulation of commercial advertising and other forms of speech to ensure consistency with vital free speech principles. At the same time, these decisions have also insisted—in line with this Court's repudiation of the economic substantive due process cases of the early twentieth century—that federal, state, and local governments have wide leeway to regulate the sale and pricing of commercial goods. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (observing that "direct regulation" of alcohol pricing "would not involve any restriction on speech"); *id.* at 524 (Thomas, J., concurring) (recognizing that "direct regulation" of pricing "involve[s] no restriction on speech regarding lawful activity at all"). In this case, Petitioners confound this clear line, urging the Court to strike down as a violation of the First Amendment a state law that regulates the prices a merchant may charge to those who pay for goods and services using a credit card. Because this law regulates the pricing of goods and services and has, at most, an incidental impact on speech, Petitioners' First Amendment attack should be rejected.

In New York, it is illegal for a merchant to charge customers who use credit cards more for an item than its posted price. The Petitioners in this case, five New York businesses and their owners and managers, contend that this law unconstitutionally violates their freedom of speech simply because it does not also prevent them from charging *less* than an item's posted price. This unprecedented view of the First Amendment should be rejected and the decision below affirmed. Even on the broadest reading of this Court's

decisions, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

New York's ban on credit-card surcharges regulates a particular type of economic transaction, not the manner of describing that transaction. It thus regulates conduct rather than speech. Interpreted consistently with the expired federal surcharge ban it replaced, the law has a simple meaning: when merchants post a single price for an item or service, they must allow individuals to use a credit card when purchasing the item or service for that price. The First Amendment does not prohibit this rule.

Although merchants theoretically can achieve the same price difference between cash and credit transactions by increasing their posted prices, and then offering discounts for cash, this does not convert the statute into a regulation of speech. It simply means that merchants can buy back the consumer's right, provided by the New York law, to use a credit card when making his purchase. Indeed, the New York legislature had good reason to focus its statutory prohibition on credit-card surcharges, rather than cash discounts. Despite the mathematical equivalence of imposing surcharges and offering discounts, there are real and meaningful differences between the rival systems. Where surcharges are permitted, for instance, merchants can induce customers to initiate a purchase with the promise of one price, only to raise that price after the customer has invested time and effort pursing the transaction.

While New York's surcharge ban regulates economic conduct rather than speech, this does not mean the law has *no* effect on the speech interests of mer-

chants and customers. The inability to impose surcharges may foreclose at least some communicative opportunities that might otherwise arise, through speech facilitating a surcharge addition, or because surprising consumers with an increase in price draws their attention to the higher cost being demanded for the use of credit. But those lost opportunities are merely the incidental byproduct of a "restriction[] directed at commerce," *Sorrell*, 564 U.S. at 567, and the "effect is no greater than is necessary to accomplish the State's legitimate purposes," *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). The law leaves merchants free to express any idea, on any topic, through any means, with one exception: they simply may not communicate to customers that persons using credit cards are being charged more for an item than its tagged price. This illustrates that the law is aimed at the "commercial aspect" of surcharges, not at the "substance of [any] information communicated" about those charges, about swipe fees, or about the credit-card industry. *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 96 (1977).

Moreover, the communicative value of imposing a prohibited surcharge is "attenuated at best." *Roberts*, 468 U.S. at 627. New York's law does not prevent a merchant from establishing a price difference between cash and credit purchases, advertising the relevant prices, calling attention to the cash/credit difference, or explaining how that difference is a response to the costs of industry-inflicted swipe fees. The sole act that it does prevent—charging more than a posted price—communicates nothing by itself about *why* the seller requires a fee for credit payments. If an explanation is provided, it "is not created by the conduct itself but by the speech that accompanies it." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 66

(2006). And the act of imposing a surcharge does not become protected speech merely because it may be a useful tactic for drawing attention to the higher cost of credit purchases. This Court has consistently rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

Petitioners' First Amendment challenge threatens to upend settled understandings of the line between constitutionally protected speech, which this Court has protected against unjustified abridgement, and economic conduct, which federal, state, and local governments may regulate with a freer hand. Subjecting laws like New York's to the heightened scrutiny that governs restrictions on speech, commercial or otherwise, risks enmeshing the nation's courts in assessing the wisdom of a vast range of regulatory measures. For good reason, "[i]t cannot reasonably be demanded . . . that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring).

Importantly, it is far from clear how the "speech" sought to be protected here can be firmly separated from various other forms of economic conduct regulated outside the First Amendment. Compromising the speech/non-speech distinction, as Petitioners urge, would detract from the elected branches' ability to legislate in areas traditionally subject to government regulation. Apart from aggrandizing the role of the judiciary, the ultimate consequence may be a watering

down of the standards that apply to genuine speech restrictions, as courts might come to demand less compelling showings of a governmental interest or less precision in the means used to advance it. "[O]veruse of First Amendment scrutiny" could thus "trivialize the significance of applying First Amendment protections" in the mine-run of commercial speech cases. *See* Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court Jurisprudence*, 12 Const. Comment. 401, 406 (1995). That "devitalization" of "the force of the Amendment's guarantee," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), would jeopardize—not help realize—the Constitution's protection of freedom of speech.

ARGUMENT

I. NEW YORK'S SURCHARGE LAW REGULATES ECONOMIC TRANSACTIONS, NOT THE MANNER OF DESCRIBING THOSE TRANSACTIONS

A. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (alteration in original)). "Commercial speech is no exception," this Court has held, for a "'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" *Sorrell*, 564 U.S. at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)); *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) ("It is a matter of public interest that [economic] decisions, in the aggregate, be intelligent and well-informed. To this end, the free

flow of commercial information is indispensable." (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (alteration in original)). Because commercial speech doctrine vindicates the rights of listeners to receive accurate information, the Amendment does not protect a business's desire to keep consumers in the dark about its goods or services. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("commercial speech that is false, deceptive, or misleading" is unprotected).

As this Court has explained, the First Amendment thus limits the power of the government to restrict truthful, nonmisleading speech by businesses advertising their goods and services, forbidding a state from enacting paternalistic 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. However, the First Amendment has never been read to limit the government's power to regulate the terms and conditions for selling goods and services, such as the prices that may be charged. "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U.S. 113, 125 (1876).

Accordingly, "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell*, 564 U.S. at 567. "[A] State's regulation of the sale of goods differs in kind from a State's regulation of accurate information about those goods," therefore, and

this Court's decisions "have consistently drawn" a "distinction . . . between these two types of governmental action." *44 Liquormart*, 517 U.S. at 512. In light of that distinction, the "heightened standard appropriate for the review of First Amendment issues" is not applicable to a mere "review of economic regulation." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469 (1997).

Of course, commercial transactions are "linked inextricably" with commercial speech proposing them. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). But the enduring distinction the Court has drawn between commercial transactions, on the one hand, and commercial speech, on the other, reflects the Court's consistent recognition that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld*, 547 U.S. at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). "[W]ords can in some circumstances violate laws directed not against speech but against conduct." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992). Thus, the mere fact that a law prevents a business from engaging in speech that accompanies an illegal transaction "hardly means that the law should be analyzed as one regulating the [business's] speech rather than conduct." *Rumsfeld*, 547 U.S. at 62; *see United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."). In sum, although states generally may not criminalize truthful speech about lawful economic transactions, *Va. State Bd.*, 425 U.S. at 773, they may, without triggering heightened

First Amendment scrutiny, criminalize the transactions themselves. *Sorrell*, 564 U.S. at 567.

B. New York's surcharge ban regulates a type of economic transaction, not the manner of describing that transaction. It provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. The "core meaning" of this measure is simple: "sellers who post single sticker prices for their goods and services may not charge credit-card customers an additional amount above the sticker price that is not also charged to cash customers." Pet. App. 42a. In other words, once a merchant has communicated to a customer, "I will sell you the X [product] at the Y price," *Va. State Bd.*, 425 U.S. at 761, the merchant may not charge the higher Z price instead.

On its face, Section 518 unmistakably prohibits conduct—the completion of a "sales transaction." The law does not purport to prohibit speech, compel speech, or constrain in any way the dissemination of information or the words used by merchants. *Compare Sorrell*, 564 U.S. at 564 ("The law on its face burdens disfavored speech by disfavored speakers."), *with Rumsfeld*, 547 U.S. at 60 (the law "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*"). Instead of purporting to regulate speech, Section 518 criminalizes transactions based on the price charged—singling out prices higher than the "usual or normal amount" for the item or service. Pet. App. 13a (quoting definition of "surcharge" in *Webster's Third New International Dictionary* 2299 (2002)). Thus, just like its federal predecessor, New York's law prohibits the act of charging customers more for an item or service than

the price already posted by the merchant. *Id*. at 42a. "[T]he conduct triggering coverage under the statute consists of" ringing up a sale, not "communicating a message," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), and any burden on speech is plainly incidental to that regulation of conduct.

Indeed, the New York law is essentially a bundling requirement, no different than if New York required that any battery-powered appliance be sold with a battery. Section 518 requires that any good or service be bundled with the right to use a credit card. The merchant may be able to buy back that right by offering a discount for using cash, but when he offers to sell X product at Y price, that offer must include the right to use a credit card without a separate fee. Whatever the merits of New York's policy judgment that credit-card use should be free of hindrances like unpredictable price increases, that is the type of commerce-related judgment that states traditionally have made. *See Giboney*, 336 U.S. at 504, 497 (noting the "paramount" power that states historically have held over "their domestic economy").[3]

Section 518 is not somehow transformed into a regulation of speech merely because merchants may in-

---

[3] Whether a seller has violated the surcharge law does hinge, of course, on what that seller previously represented an item's price to be. Identifying a violation therefore requires examining a seller's "speech," to the extent that an item's marked price qualifies as speech. But so do most efforts to determine whether a person offered or consummated an illegal sale. For instance, determining whether a person illegally offered to sell human organs or legally offered to sell human blood, *see* 42 U.S.C. § 274e(a), requires examining the language of the offer. That does not mean the law is a speech restriction.

crease the initial posted price of an item, while providing discounts from that increased price to cash-paying customers. It is true, of course, that a discount system can be structured to produce the same price difference between cash and credit—pricing an item at $103 with a $3 cash discount, for instance, instead of $100 with a $3 credit surcharge. But in practice these rival approaches can be regarded as "identical" only if the customer in each situation is provided with both the cash and credit price at the outset. Petitioners' claim to the contrary requires equating two very different chains of events: (1) a customer sees a product advertised for $103, decides to purchase it, and does so; (2) a customer sees a product advertised for $100, decides to purchase it, takes steps toward purchasing it, learns at the point of sale that the price will actually be $103, and then decides to finish the transaction by purchasing it for $103. According to Petitioners, "there is no real-world difference" between these two situations. Pet'r Br. 28. But the real world includes more than the ultimate price paid for an item. While two different merchant-customer interactions can culminate in a credit-card user paying $103 for a product, the equivalence in price does not make the transactions identical.

To make this point concrete, imagine a person considering the purchase of a new household appliance. Having inspected several alternatives and considered his needs and finances, he settles on a model and resolves to purchase it, proceeding to the register and waiting in line. When it is his turn, an employee informs him that a 3% surcharge will be added if he pays by credit, which happens to be his only option. With other customers waiting, he now must make a decision: Does he change his mind and call off the purchase on the chance that a different store sells the item

for less? Does he risk signaling to other patrons or to the store employee that he cannot afford the surcharge? Or does he simply pay the higher price? Varying the scenario, imagine that the customer, engrossed in conversation, fails to notice a posted sign stating that a 3% surcharge will be added to credit-card purchases (the store employee says nothing about it) and realizes only later that several dollars, or perhaps more, were added to the price of his item. Or consider another variant in which a customer chooses to visit an establishment—say, a gas station—because of an advertised price, only to find that the price is actually higher than a competitor's because the posted amount did not include a surcharge.

As these examples highlight, one real-world difference between surcharge and discount systems is *when the higher credit-card price may be revealed to the customer*. Surcharges allow merchants to delay sharing that information until a customer has invested time and effort pursuing a transaction, making him less likely to back out even if the terms of the deal become less attractive at the point of sale. Put another way, a surcharge system allows merchants to raise prices in the middle of a transaction. Section 518 was enacted to prevent the harms that flow from such "unannounced price increases." J.A. 89; *see* Resp't Br. 13 (legislation was intended to prohibit "'dubious' tactics that place consumers at an 'unfair disadvantage'" (quoting J.A. 82-83)).

The significance of these harms is more than a commonsense intuition. Economists have long recognized that "[t]he total effective price for any good" includes not just "the pure price of the good itself" but also "the marginal cost of shopping for it," including "transportation costs" and "the purchaser's valuation

of time and inconvenience associated with the shopping trip." Richard P. Brief, *Measuring Shopping Costs*, 15 J. of Indus. Econ. 237, 237 (1967).[4] Increasing a price, after a consumer has expended energy pursuing the item, can exploit the irrational "tendency to continue an endeavor once an investment in money, effort, or time has been made." Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 Org. Behav. & Hum. Decision Process 124, 124 (1985). While the consumer "is not imprisoned on site," the merchant "has some control over the consumer's physical presence and attention," and "[t]ime, the ultimate scarce resource, may constrain the consumer's choices." David Adam Friedman, *Explaining "Bait-and-Switch" Regulation*, 4 Wm. & Mary Bus. L. Rev. 575, 587 (2013); *see id*. at 583 ("Bait-and-switch practices can . . . tamper with the information flow and exploit the structure of the market.").

To be sure, Petitioners themselves disclaim any intent to "surprise consumers by waiting until the point of sale to inform them of the surcharge," Pet'r Br. 42, averring that they will, for instance, post a prominent sign indicating the existence of a credit-card surcharge. Pet. App. 15a-16a. But the implication of their argument is that the state cannot compel them to do so. The difference between a cash and credit price is the same regardless of whether a merchant surprises customers with its surcharge, and that mathematical

---

[4] *See also* Dmitri Kuksov, *Buyer Search Costs and Endogenous Product Design*, 23 Marketing Sci. 490, 490-91 (2004) ("in the real world," buyers "must incur search costs to find the price of a product"); J. Yannis Bakos, *Reducing Buyer Search Costs*, 43 Management Sci. 1676, 1678-79 (1997) ("a buyer is required to pay a search cost to find the location [and] the price offered by some seller, and then decide[] whether to purchase one of the products already identified or keep searching").

equivalence, on Petitioners' theory, means that the situations are "equal in every way," Pet'r Br. 6, both to each other and to a system involving cash discounts.[5]

Thus, New York's surcharge ban is not about—or not *exclusively* about—how a price difference is "framed." Like its federal model, the law seeks to ensure, among other things, that "consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." S. Rep. No. 23, 97th Cong., 1st Sess. 4 (1981); *see* Resp't Br. 7-8, 12-13, 49-52. And it does so by regulating "a specific relationship between two prices," Pet. App. 21a, not by restricting speech.

II. THE SURCHARGE LAW CREATES, AT MOST, THE TYPE OF INCIDENTAL BURDEN ON SPEECH THAT IS TYPICAL OF MANY CONDUCT REGULATIONS

A. Although New York's surcharge ban regulates economic transactions rather than speech, this does not mean the law has *no* impact on the speech interests of merchants and customers, because "speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *R.A.V.*, 505

---

[5] Petitioners make much of the psychological bias that causes people to respond more favorably to discount systems than to identically priced surcharge systems. This discussion is beside the point. That such a bias exists, and that credit-card companies prefer discounts for that reason, does not mean that it accounts for the *only* difference between the two systems. *See* Resp't Br. 34-35; *cf. Va. State Bd.*, 425 U.S. at 769 ("The advertising ban . . . affect[s] professional standards . . . *only* through the reactions it is assumed people will have to the . . . information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined." (emphasis added)).

U.S. at 389. Indeed, nearly every prohibition on conduct has the conceivable side effect of burdening speech in some way. But without more, the heightened judicial scrutiny appropriate for speech regulations is not triggered, for "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567.

If a merchant may not charge credit-card users more than the amount of an item's posted price, the merchant naturally will have no opportunity to tell customers that he or she is doing so, or why. *Cf. Williams*, 553 U.S. at 297 (the First Amendment does not protect "[o]ffers to engage in illegal transactions"); *Bates*, 433 U.S. at 384 ("Advertising concerning transactions that are themselves illegal obviously may be suppressed."). Arguably, therefore, merchants lose a communicative opportunity, a chance to "tell their side of the story about the cost of credit." Pet'r Br. 33. But the mere loss of that opportunity, resulting from a prohibition on economic conduct, does not call for treating the prohibition as a speech restriction. If it did, a vast range of laws limiting conduct would be subject to heightened First Amendment review. "Where the government does not target conduct on the basis of its expressive content," however, "acts are not shielded from regulation merely because they express [an] idea or philosophy." *R.A.V.*, 505 U.S. at 390. "That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, why 'an ordinance against outdoor fires' might forbid 'burning a flag,' and why antitrust laws can prohibit 'agreements in restraint of trade.'" *Sorrell*, 564 U.S. at 567 (internal citations omitted) (quoting *Rumsfeld*, 547 U.S. at 62; *R.A.V.*, 505 U.S. at 385; and *Giboney*, 336 U.S. at 502).

In other words, restrictions on conduct do not require heightened First Amendment review "whenever the person engaging in the conduct intends thereby to express an idea." *Mitchell*, 508 U.S. at 484 (quoting *O'Brien*, 391 U.S. at 376). Without implicating the First Amendment, therefore, a person can be prohibited from committing an assault, notwithstanding that he loses an opportunity to express his social attitudes through his choice of target. *Id*. And a person can be compelled to pay income taxes, notwithstanding that he loses an opportunity to "express his disapproval of the Internal Revenue Service by refusing to pay." *Rumsfeld*, 547 U.S. at 66. Here, it is doubtful that collecting a surcharge expresses any idea at all. *See* Section II.B.

Because surprising customers with a higher price at the point of sale "produce[s] special harms distinct from [any] communicative impact" it may have, *Roberts*, 468 U.S. at 628, the minor curtailment of merchants' speech opportunities that results from banning this practice "is plainly incidental to the [law]'s regulation of conduct." *Rumsfeld*, 547 U.S. at 62. And "even if enforcement of the Act causes some incidental abridgment of [Petitioners'] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Roberts*, 468 U.S. at 628. Section 518 is concerned with the "commercial aspect" of surcharges, *i.e.*, "with offerors communicating offers to offerees," not with the "substance of [any] information communicated" regarding the costs of credit payments or the evils of swipe fees. *44 Liquormart*, 517 U.S. at 499 (quoting *Linmark Assocs.*, 431 U.S. at 96); *cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (height restriction on indoor advertisements for tobacco products "is an attempt to regulate

directly the communicative impact of indoor advertising" because it aims at limiting who can see and be influenced by the advertiser's message).

That is why Section 518, interpreted consistently with its federal predecessor, leaves merchants entirely free "to express whatever views they may have" on surcharges, discounts, swipe fees, the credit-card industry, or any other topic. *Rumsfeld*, 547 U.S. at 60. The law "neither limits what [merchants] may say nor requires them to say anything." *Id*. Merchants may post signs throughout their establishments calling attention to the evils of swipe fees; they may orally explain to each customer why those fees hurt businesses or cause them to raise prices; they may hand out slips of paper with every purchase setting forth their views on this score. Sellers that charge different prices for cash and credit transactions are not prevented from characterizing that difference in any way or with any label. Pet. App. 15a (the federal surcharge ban "could never be violated unless the seller 'tagged or posted' *a single price*" (emphasis added)). Thus, employees may refer to this price difference as a "surcharge," signs listing prices may do the same, and purchase receipts may even identify the precise amount of every surcharge, labeling it as such. There simply is "no basis," therefore, for concluding that Section 518 impedes any merchant's "ability . . . to disseminate its preferred views." *Roberts*, 468 U.S. at 627; *cf. Holder*, 561 U.S. at 25-26 ("plaintiffs may say anything they wish on any topic. They may speak and write freely . . . . Congress has not, therefore, sought to suppress ideas or opinions").

In sum, New York's law leaves merchants free to express any idea, on any topic, through any means, with one exception: they simply may not communicate to customers that persons using credit cards are being charged more for an item than its tagged price. There

are "no other restraints," Resp't Br. 20, and this lone impediment to merchants' expressive autonomy is incidental to the law's regulation of economic conduct.

B. Further, the communicative value of what Section 518 prohibits—imposing a surcharge—is "attenuated at best." *Roberts*, 468 U.S. at 627.

What message is actually conveyed when a merchant adds a surcharge to a credit-card purchase? Petitioners say that this "informs consumers about the cost of credit cards." Pet'r Br. 27-28. But what exactly does that mean?

At times, Petitioners suggest that the law prevents them from communicating "the price difference" between cash and credit purchases, *i.e.*, the fact that customers "are paying *more* to pay with credit." Pet'r Br. 1; *see id*. at 20 (Petitioners "all want the same thing: to truthfully tell their customers that there is an 'additional fee' or 'surcharge' for using credit"). That suggestion is wrong, at least when Section 518 is interpreted like its federal counterpart. A seller offering different cash and credit prices is not prohibited from informing customers what those prices are; the law in no way restricts disseminating "information as to who is charging what." *Va. State Bd.*, 425 U.S. at 764.

Moreover, a seller may characterize the cash/credit price difference "as whatever it wants," including as a "surcharge," and still "would *not* be violating Section 518." Pet. App. 22a. A violation occurs, rather, only if the price charged to a customer is higher than the item's single tagged price. So long as that does not happen, "Section 518 does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges." *Id*. at 20a.

Elsewhere, Petitioners suggest that they need to impose surcharges in order "to inform consumers *why* credit is expensive—for what reason they charge more for using a credit card." Pet'r Br. 33 (emphasis added and quotation marks omitted). Again, this is not true. Imposing a surcharge on credit-paying customers informs them of one thing only—that the merchant has decided to charge more for credit payments. It says nothing about *why*. It provides no information about the nature or even existence of credit-card swipe fees, nor does it explain that sellers impose surcharges on customers to recoup the costs of those fees—as opposed to, say, the costs of maintaining equipment that can process the payments. If any of this is conveyed to customers, it is conveyed separately, through actual speech by merchants—like a sign posted at the counter informing customers that, "due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card." J.A. 60 (declaration of Linda Fiacco, co-owner of Expressions Hair Design). Thus, any expressive component of a surcharge, insofar as it relates to why merchants charge more for credit, "is not created by the conduct itself but by the speech that accompanies it." *Rumsfeld*, 547 U.S. at 66; *see* Resp't Br. 36-38.

As this Court has explained, "[t]he fact that such explanatory speech is necessary is strong evidence" that an act "is not so inherently expressive that it warrants protection," even as expressive *conduct*. *Rumsfeld*, 547 U.S. at 66 (citing *O'Brien*, 391 U.S. 367). Moreover, the same explanatory speech—including the information and sentiments contained in the sign referenced above—may be freely provided without violating the surcharge ban. Nothing "prevents the speaker from conveying, or the audience from hearing, these . . . messages, and nothing in the nature of

things requires them to be combined" with the act of charging more than a posted price. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

C. What, then, of Petitioners' claim that surcharges are the "most effective means" of drawing customers' attention to "the cost of credit"? Pet'r Br. 7. Given the surprise and anger that customers may experience when they are charged more for an item than the amount posted, imposing a surcharge might indeed be a powerful method of highlighting the price difference between cash and credit, encouraging customers to switch payment methods. But even if that is true, foreclosing this particular mode of raising awareness remains an incidental burden of a regulation on conduct.

Sometimes the most effective way to draw attention to a message is not through speech at all, but rather through action calculated to obstruct, annoy, harass, or even injure. But this Court's decisions reject the "view that an apparently limitless variety of conduct can be labeled 'speech,'" or protected as such, whenever an underlying goal of the conduct is to "express an idea." *Mitchell*, 508 U.S. at 484 (quoting *O'Brien*, 391 U.S. at 376).

A powerful way to demonstrate one's opposition to traffic laws, for instance, would be to terrorize pedestrians and motorists by recklessly violating those laws, but "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest." *Cox v. State of La.*, 379 U.S. 536, 554 (1965). Ensuring a captive audience for one's speech through physical restraint would be an effective means of making oneself heard, but "demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Id.*

at 555. For the prejudiced businessman, there could be few more powerful means of making others aware of his views than flouting civil rights laws by discriminating in employment, but this "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld*, 547 U.S. at 62.[6]

The potency of such actions in calling attention to the actor's grievance does not transform them into protected speech, nor insulate them from laws that guard against the harms they cause. Just as a protestor may carry a sign but not hit passersby on the head with it to get their attention, merchants may advocate to customers regarding the costs of credit but may not inflict the harm of imposing a surcharge to drive the point home.

III. PETITIONERS' ARGUMENT WOULD INVITE A HOST OF LEGAL CHALLENGES TO BUSINESS REGULATIONS THAT HAVE ONLY AN INCIDENTAL EFFECT ON SPEECH, IMPROPERLY SUBJECTING A LARGE SWATH OF LAWS TO HEIGHTENED FIRST AMENDMENT SCRUTINY

A. Petitioners' theory of the First Amendment, if accepted, threatens to upend settled understandings of

---

[6] The courts have seen attempts to misuse the First Amendment in ways that mirror these illustrative examples. For instance, the owner of a California restaurant defied a state ban on the sale of foie gras by serving it at his restaurant, accompanied by a "protest card" that explained his "criticism of and opposition to" the ban. After being sued for unfair competition, he argued that his conduct was "in furtherance of the exercise of . . . the constitutional right of free speech," because it demonstrated his "public opposition to the foie gras ban." *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1275-77 (2015).

the distinction between constitutionally protected speech and unprotected conduct, requiring courts to apply heightened scrutiny to laws that impose only incidental burdens on speech. Compromising that distinction would diminish the elected branches' ability to legislate in areas "traditionally subject to government regulation," *Lorillard Tobacco*, 533 U.S. at 554, eroding the "paramount" power they historically have held over "their domestic economy." *Giboney*, 336 U.S. at 504, 497. "[S]ubject[ing] every incidental restraint to First Amendment scrutiny . . . would require subjecting an enormous range of laws to a constitutional balancing analysis. . . . [O]veruse of First Amendment scrutiny would trivialize the significance of applying First Amendment protections." Srinivasan, *supra*, at 405, 406.

As discussed below, subjecting laws like Section 518 to the heightened scrutiny that governs restrictions on speech, commercial or otherwise, risks enmeshing the nation's courts in assessing the wisdom of a vast range of regulatory measures. Apart from aggrandizing the role of the judiciary, the consequence may be a watering down of the standards that apply to genuine commercial speech restrictions, jeopardizing the protections of the First Amendment.

Attempting to dispel these concerns, Petitioners assert that their effort "in no way threatens the bedrock proposition that states have broad authority to regulate economic conduct, unencumbered by the First Amendment." Pet'r Br. 35. Their assurances, however, boil down to a declaration that states like New York remain free to enact more drastic economic regulations than the ones they have selected (such as "eliminat[ing] dual pricing altogether"), and an unsupported claim that their victory would have little impact beyond the realm of credit-card surcharges. *Id.*

Despite these protests, it is unclear how the "speech" sought to be protected here can be meaningfully distinguished from various other forms of economic conduct regulated outside the First Amendment. Indeed, Petitioners' arguments introduce shaky and potentially unsustainable boundaries between the allegedly protected speech for which they seek protection and conduct that they concede the government may proscribe.

Petitioners' theory, for instance, calls into question laws that regulate prices in relative terms. As explained earlier, New York's surcharge ban is drafted as an economic regulation governing the prices charged in sales transactions. But Petitioners argue that the ban lacks any significance beyond labels (and thus restricts speech) because merchants can vary the price against which a surcharge is defined. In essence, because a sticker price theoretically can be adjusted at will, Petitioners argue that New York may not define the amount of an illegal surcharge by reference to a sticker price.

At the same time, however, Petitioners offer reassurance that under their theory the First Amendment still allows states to "regulate the amounts merchants charge for cash versus credit." *Id*. In other words, they say a state can limit the amount by which a credit price is higher than a cash price, for instance by declaring that the difference may not exceed 2%, or even by "eliminat[ing] dual pricing altogether." *Id.* But if a state can limit the relative difference between two prices in that way, what stops it from doing what New York has done here—declaring that when an item has a sticker price, the amount by which this price may be increased for credit purchases is 0%? As this illustrates, there is a shaky line, at best, between the activity that Petitioners argue is safeguarded by the

First Amendment and the "economic conduct" that they aver may be freely restricted. *Id*.

Nor are the implications of this theory limited to credit-card surcharges; they seemingly threaten any price regulation that functions in relative, as opposed to absolute, terms. An obvious example is noted in the decision below: Based on a history of episodes in which businesses price-gouged citizens for needed goods during shortage crises, New York has outlawed the practice, declaring that "[d]uring any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party . . . shall sell . . . any such goods or services . . . for an amount which represents an unconscionably excessive price." N.Y. Gen. Bus. Law § 396-r. Before the Second Circuit, Petitioners "appear[ed] to concede that laws against price-gouging . . . do not implicate the First Amendment." Pet. App. 27a n.10. But such laws depend on the existence of a standard price for an item or service, against which an "excessive" price is measured—and it is difficult to see "how a seller's normal price for the purpose of anti-price-gouging laws is meaningfully different from its sticker price for the purpose of Section 518." *Id*.; *see* Resp't Br. 24-25 (citing other economic regulations that "us[e] a seller's regular price as a benchmark, and dictat[e] how a seller may adjust that price").

Or as another example, consider recent federal legislation meant to prevent abuses by credit-card companies. One part of this legislation prohibits "increas[ing] any annual percentage rate" on a credit-card account except under specified conditions. 15 U.S.C. § 1666i-1(a). Under this provision, bumping a customer's annual interest rate from 5% to 20% could be illegal, notwithstanding that the company was free to charge a 20% interest rate when it first issued the

card, or that it remains free to charge a 20% rate to new customers. The legality of a 20% interest rate is thus determined relative to the original rate offered by the company, not in isolation. New York's surcharge law regulates prices in the same manner.

The potential implications of Petitioners' argument are broader still, suggesting that even contract enforcement and promissory estoppel rules implicate First Amendment concerns and are subject to challenge on that basis. A person can be legally sanctioned for conduct that violates a contractual obligation, notwithstanding that the obligation exists in the first place only because of an earlier promise that was communicated through speech. That situation resembles the one here: liability is triggered by charging customers a particular amount—an act, not speech—but the obligation not to charge that amount arises only because of an earlier "promise" made to customers in the form of a posted price.

The Solicitor General sees things this way: Although Section 518 "nominally" prohibits transactions that exceed a posted sticker price, the Solicitor General's brief argues, the law has the effect of reaching back to influence the "manner in which the 'sticker price' conveys the merchant's pricing scheme" in the first place. U.S. Br. 19. The brief then hastens to add, without elaboration, that Section 518 nevertheless is not like "a law that temporarily prohibited a merchant from altering previously offered prices," which could "be analogized to contract law." U.S. Br. 20. As discussed above, though, this is *exactly* the role of the surcharge ban—prohibiting merchants from increasing previously offered prices. This attempt to portray Section 518 as inhabiting a world unto itself actually shows just how difficult that endeavor is, highlighting

the formidable line-drawing challenges that would follow from treating it as a speech regulation.

B. In numerous contexts, legal consequences flow from statements, promises, offers, or disclosures of information, but that alone has never been held to require First Amendment scrutiny. Settled law in those areas could be called into doubt by what Petitioners seek—a pronouncement that surcharge bans demand heightened scrutiny merely because the manner in which a merchant advertises its prices can be the reason a subsequent transaction is deemed illegal. The unmooring of that settled law could vastly expand judicial second-guessing of legislative choices.

Laws against fraud, for instance, are not analyzed under the First Amendment merely because fraud is accomplished through speech. *See Alvarez*, 132 S. Ct. at 2547 ("Where false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment."); *Va. State Bd.*, 425 U.S. at 771 (same). Antitrust laws "can prohibit 'agreements in restraint of trade'" without being deemed speech restrictions. *Sorrell*, 564 U.S. at 567 (quoting *Giboney*, 336 U.S. at 502). The "exchange of information about securities" may be regulated without provoking First Amendment scrutiny, *see Ohralik*, 436 U.S. at 456, as can "employers' threats of retaliation for the labor activities of employees." *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). Unauthorized sharing of classified information may be punished, *cf. R.A.V.*, 505 U.S. at 389 ("a law against treason . . . is violated by telling the enemy the Nation's defense secrets"), and the government may enforce the confidentiality of grand jury records, *see Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand

jury system depends upon the secrecy of grand jury proceedings."). As these examples illustrate, many human endeavors are accomplished through speech or information sharing, yet "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456.

If courts are called upon to begin scrutinizing such regulations under heightened First Amendment review, the result could be a wholesale shift in the judiciary's capacity to second-guess the decisions of elected representatives. The fact that economic transactions are "linked inextricably" to related commercial speech, *Edenfield*, 507 U.S. at 767, means that regulation of those transactions, in particular, will often be subject to creative recasting as speech restrictions.

In such cases, moreover, courts may increasingly be asked to predicate First Amendment doctrine on contested theories of economic reality. Here, for instance, the argument that New York's law is a covert speech restriction hinges entirely on the proposition that there are no meaningful economic differences between surcharge and discount systems, and that "[l]iability thus turns on the speech used to describe identical conduct." Pet'r Br. 1-2. That proposition, at a minimum, is debatable: only surcharge systems enable mid-transaction price increases, which exploit the intuition that a customer who has sunk time and effort pursuing a transaction is less likely to back out and begin anew, even if terms become less favorable. And indeed, one can find literature affirming the reality of the "search costs" that shoppers inevitably incur, and the economic significance of their efforts to reduce those costs. *See supra* at 12-13. Which appraisal of economic reality is more compelling, therefore—one

that accounts for these search costs and consumers' attempts to minimize them, or one that instead emphasizes the mathematical equivalence of surcharges and discounts? Such judgments are within the province of the legislative branches, and not meant to be constitutionalized as a matter of First Amendment doctrine.

Calls to indulge in legislative second-guessing are also evident in the efforts of Petitioners' *amici* to persuade this Court that surcharge bans are simply bad policy—harming consumers, favoring the well-off over the poor, allocating costs inefficiently, or draining the national economy. But these *policy* considerations are irrelevant to the *constitutional* question, for "it is not [this Court's] function to weigh the policy arguments on either side of the nationwide debate" over the merits of credit-card surcharges. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999); *see Glickman*, 521 U.S. at 474 (the debatable "wisdom of such a program" is "insufficient to warrant special First Amendment scrutiny"). While opponents of New York's surcharge ban decry its alleged paternalism, "it would also be paternalism for [this Court] to prevent the people of the States from enacting laws that [it] considers paternalistic, unless [the Court] ha[d] good reason to believe that the Constitution itself forbids them." *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part and concurring in the judgment).

C. In the end, one casualty of these developments may be the "the force of the Amendment's guarantee," *Ohralik*, 436 U.S. at 456, with respect to speech of all kinds.

If a decision here has the effect of muddying the distinctions long thought to separate restrictions on speech from regulations of economic conduct, then—as noted—courts may find themselves compelled to apply heightened First Amendment scrutiny to all manner

of economic regulations that incidentally affect speech in some way. But in the process of upholding innocuous regulatory measures that only minimally bear on traditional free speech values, these courts might come to require less robust showings from the government in justification of those measures. Consciously or not, courts might come to demand less compelling showings of a governmental interest, for example, or less precision in the means used to advance it. And thus, by diminishing the standards that apply more broadly to protect many types of vital speech, the result could be a "dilution, simply by a leveling process, of the force of the Amendment's guarantee." *Bd. of Trs.*, 492 U.S. at 481.

This risk is particularly acute given the uncertain future of the distinction between commercial and non-commercial speech. The approach of "accord[ing] less protection to commercial speech than to other expression . . . . has been subject to some criticism," *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001), and certain *amici* urge the Court to use this case to reject that distinction. Indeed, if Petitioners' arguments are taken seriously, there seems no principled basis to conclude that New York's law should not be required to survive the highest form of First Amendment scrutiny. *Compare Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) ("Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . . ."), *with* Pet'r Br. 33 ("New York's law goes even beyond mere content discrimination, to actual viewpoint discrimination." (quotation marks omitted)). If such arguments prevail, laws that have as minor and incidental an effect on speech interests as this one would be required to withstand strict

scrutiny—a result that "trivializes the freedom" vindicated by this Court's commercial speech cases. *See Rumsfeld*, 547 U.S. at 62.

In that world, where commonplace economic regulations are held up to the most stringent form of First Amendment scrutiny, a dilution of the standards applied to speech restrictions is all the more conceivable. The ironic result would be a diminishment of the First Amendment as a genuine source of liberty.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

December 21, 2016 * Counsel of Record