No. ___

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM, and DAVID ROSS,

Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; KENNETH P. THOMPSON, in his official capacity as District Attorney of Kings County,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
RACHEL S. BLOOMEKATZ
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Counsel for Petitioners

May 12, 2016

QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate economic conduct (as the Second and Fifth Circuits have held)?

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

TABLE OF CONTENTS

Question presented i

Corporate disclosure statement ii

Table of authorities v

Introduction 1

Opinions below 3

Jurisdiction 4

Constitutional and statutory provisions involved 4

Statement 4

I. Why labels matter: the communicative difference between "surcharges" and "discounts" 5

II. The credit-card industry's efforts to prevent merchants from communicating the costs of credit as "surcharges" 6

III. This litigation 12

Reasons for granting the petition 16

I. The circuits are split over whether no-surcharge laws unconstitutionally restrict speech. 16

II. The question presented is one of exceptional national importance. 19

III. This case presents an ideal vehicle to address the question presented. 21

IV. The decision below is wrongly decided under this Court's commercial-speech cases. 22

Conclusion 30

Appendix A Amended Opinion of the United States Court of Appeals for the Second Circuit (December 11, 2015) ..... App. 1a

Appendix B Errata Sheet for Opinion of the United States Court of Appeals for the Second Circuit (November 20, 2015) ..... App. 46a

Appendix C Stipulated Final Judgment and Permanent Injunction of the United States District Court for the Southern District of New York (November 4, 2013) ..... App. 48a

Appendix D Order of the United States District Court for the Southern District of New York on Motion for Preliminary Injunction (October 3, 2013) ..... App. 55a

Appendix E Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc (January 13, 2016) ..... App. 86a

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 25

Baggett v. Bullitt,
377 U.S. 360 (1964) 29

BellSouth Telecommunications, Inc. v. Farris,
542 F.3d 499 (6th Cir. 2008) 23

Brown v. Entertainment Merchants Association,
564 U.S. 786 (2011) 28

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980) 14, 26

City of Houston v. Hill,
482 U.S. 451 (1987) 28

Courthouse News Service v. Planet,
750 F.3d 776 (9th Cir. 2014) 29

Dana's Railroad Supply v. Attorney General, Florida,
807 F.3d 1235 (11th Cir. 2015) ..... *passim*

Dombrowski v. Pfister,
380 U.S. 479 (1965) 28, 29

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 22

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 26

Hill v. Colorado,
530 U.S. 703 (2000) 27

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 22

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,
986 F. Supp. 2d 207 (E.D.N.Y. 2013) 5

Italian Colors Restaurant v. Harris,
99 F. Supp. 3d 1199 (E.D. Cal. 2015) 19, 27, 28

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 22

People v. Fulvio,
517 N.Y.S.2d 1008 (N.Y. Crim. Ct. 1987) ... 2, 11, 24, 27

Porter v. Jones,
319 F.3d 483 (9th Cir. 2003) 29

Procunier v. Martinez,
416 U.S. 396 (1974) 28

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) 15

Ripplinger v. Collins,
868 F.2d 1043 (9th Cir. 1989) 29, 30

Rowell v. Pettijohn,
816 F.3d 73 (5th Cir. 2016) 3, 16, 17, 18

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 27

Sorrell v. IMS Health, Inc.,
564 U.S. 552 (2011) 22, 25

Sprint Communications, Inc. v. Jacobs,
134 S. Ct. 584 (2013) 29

Thompson v. Western States Medical Center,
535 U.S. 357 (2002) 25

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) ..... *passim*

Wolfson v. Brammer,
616 F.3d 1045 (9th Cir. 2010) 29

Zwickler v. Koota,
389 U.S. 241 (1967) 29

Statutes

15 U.S.C. § 1666f(a) 7

Cal. Civ. Code § 1748.1(a) 10

Colo. Rev. Stat. § 5-2-212 10

Conn. Gen. Stat. § 42-133ff 10

Fla. Stat. § 501.0117 10

Ga. Code § 13-1-15 27

Kan. Stat. Ann. § 16a-2-403 10

Mass. Gen. Laws Ann. ch. 140D, § 28A(a)(1)-(2) 10

Me. Rev. Stat. Ann. tit. 9-A, § 8-509 10

Minn. Stat. § 325G.051(1)(a)(1) 27

N.Y. Gen. Bus. Law § 518 ..... 4, 5

Okla. Stat. tit. 14a, § 2-211(A) 10

P.R. Code tit. 10, §§ 11, 12.....10

Tex. Fin. Code § 339.001 10

Utah Code Ann. § 13-38a-202 10

Utah Code Ann. § 63I-1-213.....10

Legislative materials

156 Cong. Rec. S4839 (June 10, 2010).....20

Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm., 97th Cong. (1981) 8, 9, 25

Pub. L. No. 93-495, 88 Stat. 1500 (1974).....7

Pub. L. No. 94-222, 90 Stat. 197 (1976).....8

Pub. L. No. 97-25, 95 Stat. 144 (1981).....9

S. Rep. No. 97-23 (1981) 25

Other authorities

Ballard Spahr, *Fifth Circuit Rejects Constitutional Challenge to Texas "No Credit Card Surcharge" Law*, Consumer Financial Services Group (Mar. 10, 2016).....18

Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999).....6

David Hudson, *Federal appeals courts split over law on credit card surcharges*, ABA Journal (Mar. 1, 2016) 18

Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193 (1991).....6

Edmund Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217 (1990).....7

Carol Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 9

Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265 (2006).....6

Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321 (2008).....5, 9, 25

Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12 9

Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981 (2016) 19

Scott Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* (2010).....4, 21

Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39 (1980).....7

Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251 (1986) 7

Stuart Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants* (Fed. Reserve Bank, Working Paper 05-01, Sept. 6, 2005).....21

INTRODUCTION

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

All states allow such dual pricing. But ten states have enacted laws that seek to control how merchants may *communicate* the price difference to consumers. New York's law is illustrative: It allows merchants to offer "discounts" to those who pay in cash, but makes it a crime (punishable by up to one year in jail) to impose equivalent "surcharges" on those who pay by credit card.

A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. But consumers react very differently to the two labels, perceiving a surcharge as a penalty for using a credit card. Precisely because the surcharge label is more effective at communicating the true cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed. No-surcharge laws in effect say to merchants: If you use dual pricing, you may tell your customers only that they are paying *less* to pay without credit (a "discount"), not that they are paying *more* to pay with credit (a "surcharge")—even though they *are* paying more for credit. Liability thus turns on the words used to describe identical conduct—nothing else.

Under these laws, a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead

says that the widget costs $100 and there is a $2 surcharge for using credit to account for the swipe fee, the merchant has committed a crime.

The earliest reported prosecution of a state no-surcharge law targeted a New York gas station whose cashier made the mistake of truthfully telling a customer that it would cost "five cents extra" to pay with a credit card instead of saying that it would cost a "nickel less" to use cash. A court later vacated the conviction, however, because the law treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *People v. Fulvio*, 517 N.Y.S.2d 1008, 1011 (N.Y. Crim. Ct. 1987). "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. In recent years, New York has continued to target merchants for truthfully informing their customers that they impose a "surcharge" for credit, even giving scripts with specific language so merchants could reframe the same information as a cash "discount."

The question presented is whether such a law comports with the First Amendment. Judge Rakoff answered no, holding that New York's law regulates only "the manner in which price information is conveyed to buyers," which is "protected by the First Amendment," and fails to withstand the requisite scrutiny. App. 74a. The Second Circuit reversed, concluding that the law regulates "merely prices," not speech. App. 21a.

Not long after the Second Circuit's decision, the Eleventh Circuit reached the opposite conclusion. It held that Florida's virtually identical law—under which a merchant may "offer a discount for cash," but "calling the same price difference a surcharge" could land the merchant in jail—"targets expression alone," and cannot survive scrutiny. *Dana's R.R. Supply v. Attorney Gen.*,

Fla., 807 F.3d 1235, 1239, 1245 (11th Cir. 2015). In so holding, the Eleventh Circuit joined Judge Rakoff and a California district court (which struck down that state's law as unconstitutional), setting up a "direct conflict" in the circuits. *Id.* at 1257 (Carnes, C.J., dissenting).

That conflict has only grown. More recently, a divided Fifth Circuit panel acknowledged the "circuit split" and upheld Texas's no-surcharge law. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016). The majority found the Second Circuit's reasoning "persuasive"—and the Eleventh Circuit's "unavailing"—and concluded that the law "regulates conduct, not speech." *Id.* at 80, 83.

A square split on such a fundamental constitutional question is reason enough to grant certiorari. But the conflict here is particularly undesirable because merchants need one clear answer to a question that affects the nation's economy: how they may present their prices to consumers. And until they get an answer, many merchants will refrain from dual pricing altogether, even though it is legal, because they cannot convey the cost of credit how they would like—as a credit-card surcharge.

The decision below also cannot be reconciled with this Court's precedent. A law that makes liability turn on how a merchant conveys truthful "price information" to consumers regulates speech, and must satisfy First Amendment scrutiny. *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Because this law "crumbles under any level" of scrutiny, *Dana's R.R. Supply*, 807 F.3d at 1239, the Court should grant certiorari and reverse.

OPINIONS BELOW

The Second Circuit's amended opinion is reported at 808 F.3d 118 and reproduced at 1a. The district court's decision is reported at 975 F. Supp. 2d 430 and reproduced at 55a.

JURISDICTION

The court of appeals entered judgment on September 29, 2015. App. 46a. On January 13, 2016, the court of appeals denied a timely petition for rehearing en banc. App. 88a. On April 5, 2016, Justice Ginsburg granted an extension of the time to file a petition for certiorari until May 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." New York's no-surcharge law provides: "No 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. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both." N.Y. Gen. Bus. Law § 518.

STATEMENT

"What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (2010). A prime reason for this is that the cost of credit has been kept hidden from consumers: Although merchants may charge consumers more for using a credit card, they cannot effec-

tively communicate that added cost because the credit-card companies have succeeded in insisting that any price difference be framed as a cash discount, rather than a credit-card surcharge.

This industry-friendly speech code has long been imposed through both private contract and state legislation. But a nationwide settlement in an antitrust class action required the credit-card companies to remove their contractual no-surcharge rules in early 2013. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). So state laws like New York's have now assumed sudden importance: They are the only thing stopping merchants from truthfully saying that they impose a credit-card "surcharge" because credit costs more.

New York's no-surcharge law makes it a crime, punishable by a $500 fine and up to one year in prison, for any "seller in any sales transaction [to] 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 law does not, however, outlaw dual pricing; "it permits offering cash customers a discount" if so expressed. App. 14a.

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

A credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351 (2008). They are equal in every way except one: the label that the merchant uses to communicate that difference.

But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can per-

ceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This difference in perception occurs because of people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991).

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

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

II. The credit-card industry's efforts to prevent merchants from communicating the costs of credit as "surcharges"

The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades. Over the years, the industry has succeeded, both through contractual provisions and

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

A. The industry's early ban on dual pricing and Congress's protection of cash "discounts"

In the early days of credit cards, credit-card companies banned any attempt at differential pricing between credit and cash by specific clauses in their contracts with merchants. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990). But in 1974, Congress enacted legislation granting merchants a non-waivable right to "offer[] a discount" to induce consumers "to pay by cash, check, or similar means" other than a credit card. Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)).

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

Consumer advocates initially considered the 1974 legislation a victory. But the credit-card industry, seizing on Congress's use of the word "discount," and the arguable ambiguity over whether the law allowed surcharges, soon shifted its focus to the way merchants could *communicate* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing if surcharges were outlawed—the credit-card lobby "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance. Specifically, it preferred that any difference

between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

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

For a while, this lobbying paid off. In 1976, Congress passed a temporary ban on "surcharges," despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197. But by the early 1980s, opposition to the ban grew as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse.

Both opponents and supporters of the ban recognized that it hinged on semantics. A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong. 9 (1981). "If you just change the wording a little bit, one becomes the other." *Id.* at 22. The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10.

Every major consumer-advocacy group agreed. One advocate testified that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," she explained, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* The cost of credit is thus best "expressed in the form of [a] surcharge." *Id.* Another advocate put it more pithily: "one person's cash discount may be another person's surcharge." *Id.* at 90. "Removing the ban on surcharges," he said, "is an im-

portant first step" to "disclos[ing] to consumers the full" cost of credit so they can "make informed judgments." *Id.* at 92. President Reagan's Federal Trade Commission chairman also opposed the ban, saying that "a discount and a surcharge are equivalent concepts." *Id.* at 127.

By contrast, American Express and MasterCard "strongly" supported the ban, even though they too understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." *Id.* at 43, 55. And the big banks likewise supported treating "surcharges" and "discounts" differently because a surcharge "makes a negative statement about the card to the consumer" and "talk[s] against the credit industry." *Id.* at 32, 60. *See also* Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (quoting American Express spokesman emphasizing the "big psychological . . . difference" between surcharges and discounts). Congress ultimately renewed the ban for an additional three years. Pub. L. No. 97-25, 95 Stat. 144 (1981).

Over the next few years, opposition to the ban intensified. In 1984, when it was again set to expire, Senator William Proxmire cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. This time, the ban lapsed. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

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

After the national ban expired in 1984, the credit-card industry convinced ten states (including New York)

to enact no-surcharge laws of their own.[1] New York's law took effect later that year.

Its legislative history does not hide the fact that it aimed to influence consumers' perceptions of credit cards by controlling the labels that merchants could use to describe mathematically equivalent transactions. A memorandum justifying the state's support for the law declared: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." CA2 J.A. 114.

Around the same time that New York's law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in New York and other states thus function as a legislative extension of the restrictions that credit-card issuers previously imposed more overtly by contract.

E. Enforcement of New York's law

Despite these parallel contractual rules, New York has policed its law with vigor. In the first reported prosecution, the state brought criminal charges against a gas-station owner who offered dual pricing and put up signs that "clearly stated the 'cash price' and the 'credit

---

[1] *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws Ann. ch. 140D, § 28A(a)(1)-(2); Okla. Stat. tit. 14a, § 2-211(A); Tex. Fin. Code § 339.001; *see also* P.R. Code tit. 10, §§ 11, 12. An eleventh state, Utah, passed a similar law in 2013, only to repeal it a year later, after the district court's decision in this case striking down New York's law. Utah Code Ann. § 13-38a-202 (2013), *repealed by* § 63I-1-213 (2014).

price' for his gasoline," which differed by five cents per gallon. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010 (N.Y. Crim. Ct. 1987). The owner was convicted because his cashier made the mistake of telling a customer that it would cost "five cents extra" to use a credit card instead of saying that it would cost a "nickel less" to use cash. *Id.* at 1009-14. The conviction was short-lived, however, because the court held that the law was unconstitutionally vague, for it treats "precisely the same conduct . . . either as a criminal offense or as lawfully permissible behavior, depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011.

Fulvio may have temporarily dampened enforcement efforts, but it did not end them. In 2008 and 2009, the Attorney General brought a series of sweeps against more than 50 merchants, many of whom were targeted even though they clearly disclosed their prices, explaining that they charge a certain amount "more" to pay with credit. The Attorney General's office told them that this explanation was illegal and gave specific instructions on how to describe their pricing schemes to customers.

To take one example, Parkside Fuel, a small heating-oil seller, used to impose a credit-card fee, which it informed customers of "on the phone, at the same time that [it] informed them of [its] prices." CA2 J.A. 153. In 2009, someone from the Attorney General's office called "pretending to be a customer ordering oil," and an employee "quoted the price of oil and said that [Parkside] charge[s] a fee on top of that price for using a credit card." *Id.* at 154. An Assistant Attorney General told Parkside's owner that, to comply with the law, he did not have to change any of the amounts that he charged, but his employees had to "characteriz[e] the difference between paying with cash and paying with credit as a cash 'discount,' not a credit 'surcharge.'" *Id.* The Assistant Attorney General then gave the owner "a script of what

[he] could tell customers when talking to them over the phone," saying that he "could quote the price [of heating oil] as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon 'discount' for paying with cash," but he "could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon 'surcharge' to use a credit card." *Id.*

In another case, the Assistant Attorney General told the merchant: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." *Id.* at 162.

III. This litigation

A. In June 2013, not long after Visa and MasterCard dropped their contractual no-surcharge rules as part of the nationwide antitrust settlement, five merchants brought this case. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

Expressions Hair Design, for example, posted a sign informing customers that, "due to the high swipe fees charged by the credit-card industry," it would charge 3% more for paying by credit. CA2 J.A. 98. But, in 2012, Expressions took down the sign after it learned of New York's law. *Id.* The salon now tells customers that it has two different prices—a lower price for cash and a higher one for credit. *Id.* But because of the law, Expressions cannot communicate its price difference how it would like—by calling the difference a "surcharge." It "would like to be able to put [its] sign back up." *Id.* at 151.

Like Expressions, the other four plaintiffs want to charge their customers two different prices depending on whether they pay with cash or credit and to call the difference a "surcharge" for credit. *Id.* at 79, 83, 88, 93.

These merchants do not offer cash discounts because they believe that "[l]abeling the difference as a 'discount' . . . would not be nearly as effective as calling it a 'surcharge.'" *Id.* at 88.

Just as important, the merchants are also concerned about complying with state law. Plaintiff Brooklyn Farmacy, for instance, is "not willing to take the risk that [it] might be prosecuted by the state simply for conveying truthful information to [its] customers about the higher cost of using a credit card." *Id.* at 89. The other merchants likewise worry that they could accidentally subject themselves to criminal liability if an employee makes "the mistake of telling customers"—truthfully—"that they are paying more for using credit cards." *Id.* at 94.

B. After filing suit, the plaintiffs moved for a preliminary injunction, arguing that the law violates the First Amendment and is unconstitutionally vague. In opposition, the state admitted that there is no difference between the two labels "in terms of the underlying economic value" of what they describe. Dist. Ct. Hearing Tr. 6/14/13, at 5-6. Yet the state took the view that the law "regulates conduct, not speech." Dist. Ct. Dkt. 27, at 36. The state elaborated: "It is true that if sellers want to use dual pricing, § 518 affects *how* they may communicate it[.] . . . But § 518 does not dictate the *content* of that communication at all; sellers are free to set the credit card price at whatever level they wish." *Id.* at 37.

The district court was not persuaded. It held that the law "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." App. 73a. Under the law, the district court explained, "if a vendor is willing to sell a product for $100 cash but charges $102 when the purchaser pays with a credit card, the vendor risks prosecution if it tells

the purchaser that the vendor is adding a 2% surcharge because the credit card companies charge the vendor a 2% 'swipe fee.' But if, instead, the vendor tells the purchaser that its regular price for the product is $102, but that it is willing to give the purchaser a $2 discount if the purchaser pays cash, compliance with section 518 is achieved." App. 56a. "[T]his virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment." *Id.*

The court noted that the state's "suggestion to the contrary"—that the law regulates conduct because it only "'affects *how* [merchants] may communicate'" dual-pricing schemes, not pricing itself—"turns the speech-conduct distinction on its head." App. 73a. The court highlighted the flaw in the state's logic:

> [I]n defendants' view, setting prices (which section 518 does not regulate) is speech, but communicating those prices to consumers (which the statute, on defendants' own analysis, does regulate) is conduct. That is precisely backwards. Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment.

App. 74a. The court then found that the law "cannot past muster" under the four-part *Central Hudson* test for commercial-speech restrictions, and had "little difficulty concluding" that it is too vague. App. 75a, 80a. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

C. After stipulating to a final judgment in the plaintiffs' favor, the state appealed and the Second Circuit reversed. It held that the law regulates "merely prices," not speech, and thus need not satisfy scrutiny. App. 21a.

The court began its analysis by dividing up the plaintiffs' challenge into two parts, based on a belief that they were "claiming First Amendment protection for two distinct kinds" of dual-pricing schemes. The first was the core of the plaintiffs' challenge—their preferred way of communicating their prices: a scheme in which the merchants "post only a single price" on the label for each product, while communicating the surcharge amount through a separate sign (*e.g.*, "3% credit-card surcharge"). App. 15a. The second was a scheme in which a merchant "posts two different prices" on the label for each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 16a.

"As applied to single-sticker-price schemes," the court upheld the law as a regulation of conduct. App. 18a. The court determined that the merchant's decision of which price to frame as the "regular" price on the "sticker," and which to convey through a separate sign, was not itself "a communicative act." App. 25a. If it were, the court reasoned, that would "amount[] to the position" that "prices are themselves speech." App. 25a-26a.

Turning to the second part—whether the law unconstitutionally prohibits merchants from posting two different prices for each product and characterizing the difference as a credit "surcharge"—the court declined to "reach the merits" and instead chose to abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). App. 28a. Disregarding the law's enforcement history, the court concluded that "[i]t is far from clear that Section 518 prohibits the relevant conduct." App. 31a. The court also held that the law is not unconstitutionally vague "for essentially the same reasons" that it rejected the First Amendment challenges. App. 41a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over whether no-surcharge laws unconstitutionally restrict speech.

In the decision below, the Second Circuit held that New York's no-surcharge law regulates "merely prices" and thus "does not implicate the First Amendment." App. 20a-21a. Since then, two other circuits have addressed whether indistinguishable state laws violate the First Amendment. One answered yes, in "direct conflict" with the decision below. *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1257 (11th Cir. 2015) (Carnes, C.J., dissenting). The other answered no. Both produced dissents. The result is an acknowledged and deepening "circuit split" that only this Court can resolve. *Rowell v. Pettijohn*, 816 F.3d 73, 78 (5th Cir. 2016).

A. On one side of the split is the Eleventh Circuit, which declared Florida's virtually identical law "an unconstitutional abridgment of free speech." *Dana's R.R. Supply*, 807 F.3d at 1251. Unlike the Second Circuit, the Eleventh Circuit rejected the state's argument that the law regulates pricing, not speech. "After all," the court explained, "what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." *Id.* at 1245.

Applying intermediate scrutiny, the Eleventh Circuit made "short shrift" of the law, finding that it "founders at every step." *Id.* at 1249. It "does not target false or misleading speech," the court explained, because "[c]alling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading

than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Id.* The court "struggle[d] to identify a plausible governmental interest" served by the law, "much less one that could be considered substantial." *Id.* And even assuming such an interest existed, the law would "prove[] too broad and too blunt a means to its end." *Id.* at 1250. "By holding out *discounts* as more equal than *surcharges*," the court concluded, the law "overreaches to police speech well beyond the State's constitutionally prescribed bailiwick." *Id.* at 1251.

Chief Judge Carnes dissented, expressing his view that the statute should be read to prohibit only undisclosed surcharges (akin to a false-advertising law), to save it "from a fatal constitutional flaw" and "a great big First Amendment bullseye." *Dana's R.R. Supply*, 807 F.3d at 1252-53. He noted that, by rejecting that reading, the majority had created a "direct conflict with our sister circuit on this issue." *Id.* at 1257.

B. That conflict has since deepened. On the side opposite the Eleventh Circuit, the Second Circuit has now been joined by a divided Fifth Circuit panel, further entrenching the "circuit split." *Rowell*, 816 F.3d at 78.

Finding the Second Circuit's reasoning "persuasive"—and rejecting the Eleventh Circuit's reasoning as "unavailing"—the Fifth Circuit held that Texas's no-surcharge law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment." *Id.* at 80, 83. The majority acknowledged that Texas's law (like Florida's and New York's) allows a merchant to "dual-price as it wishes," so a merchant may achieve the "same ultimate economic result" whether expressed as a cash discount or credit-card surcharge. *Id.* at 81. Yet the majority thought that the Eleventh Circuit "overlook[ed]

differences in the economy activity" between surcharges and discounts. *Id.* at 83.

In dissent, Judge Dennis set forth his view that the law implicates the First Amendment because it "does not regulate the difference between [the cash and credit] prices," only how that difference is expressed. *Id.* at 86. "A merchant who describes the difference between these prices as a surcharge," Judge Dennis elaborated, "is not assessing 'additional' fees above a 'regular' price; he is only characterizing a perfectly legal price differential in a chosen way. If he violates the Anti–Surcharge Law it is because of the content of his speech, not because of the nature of his conduct." *Id.* at 85. Because the law "makes the legality of a price differential turn on the language used to describe it," Judge Dennis would have held that the law restricts "protected commercial speech" and "cannot survive" *Central Hudson* scrutiny. *Id.* at 86.[2]

C. This "growing circuit court split" has already led commentators to speculate that it "could prompt the U.S. Supreme Court to take up the issue." Ballard Spahr, *Fifth Circuit Rejects Constitutional Challenge to Texas "No Credit Card Surcharge" Law*, Consumer Fin. Servs. Grp. (Mar. 10, 2016), http://bit.ly/24vwupG; *see, e.g.*, Hudson, *Federal appeals courts split over law on credit card surcharges*, ABA Journal (Mar. 1, 2016), http://bit.ly/1QBC01x (observing that no-surcharge laws "have fared differently in federal appeals courts, setting the stage for possible future review by the U.S. Supreme

[2] The Florida Attorney General has filed an application with Justice Thomas, requesting an extension of the time to file a petition for certiorari from the Eleventh Circuit's decision. *See Bondi v. Dana's R.R. Supply*, No. 15A1021. Justice Thomas granted the application, making the petition due on June 6. The plaintiffs in *Rowell* will also file a petition for certiorari, which is due on May 31.

Court"); Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1989 (2016) (discussing "the conflict between the Second and Eleventh Circuits"). That is especially true because the "conflicting cases" concern a fundamental constitutional question: they "illustrate the importance of the threshold determination of whether a regulation governs speech or conduct." Note, *Free Speech*, 129 Harv. L. Rev. at 1988.

Absent this Court's intervention, the split will only deepen. A California district court has declared that state's no-surcharge law unconstitutional, finding that it regulates only how "prices are conveyed to customers, not the prices themselves." *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.). Although that decision is currently on appeal to the Ninth Circuit, that circuit can only take sides on the split; it cannot resolve the split. So there is no reason for the Court to await further percolation in the lower courts. Three circuits and four district courts have already issued opinions thoroughly grappling with the First Amendment issues presented here. And two of those opinions produced reasoned and thoughtful dissents. The time is ripe for this Court's review.

II. The question presented is one of exceptional national importance.

A growing circuit split is undesirable under any circumstances, but it is intolerable here given the need for national uniformity and the implications of the decision below.

A. The need for uniformity is undeniable. Thousands of merchants do business in different states (and across state lines) every day. That is why Congress long ago erected a national rule protecting the right of merchants to offer cash discounts. Now, after the recent landmark

$7.25 billion antitrust settlement with Visa and MasterCard, merchants are presented with the opportunity to truthfully convey the cost of credit as a surcharge. But because of the conflict, New York and Texas merchants—unlike those in Florida, California, and the 40 states without a no-surcharge law—cannot reap that benefit. And many merchants, like petitioner Patio.com, which has stores in both New York and Florida, are in a particularly difficult position. They can now communicate the cost of credit as a surcharge in some locations, but doing so in others could result in criminal liability.

All that is bad enough as it is. But, given the size and importance of the economies of New York and Texas, and the need for uniform pricing schemes, the reality is that national retailers are unlikely to use surcharging *at all*, even where it is permissible, as long as the split endures. This Court should grant certiorari to make clear that state no-surcharge laws violate the First Amendment, and thus ensure that merchants throughout the country operate under a single rule.

B. Even setting aside the need for uniformity, the question presented has enormous stakes for our economy. Because credit-card companies have been so successful in hiding the cost of credit from consumers, U.S. merchants pay some of the highest swipe fees in the world—around 3% of every credit-card purchase, or over $50 billion a year in fees. *See* 156 Cong. Rec. S4839 (June 10, 2010). This means that New York merchants alone pay several billion dollars in fees every year, which are passed on to customers in the form of higher prices. And these swipe fees have increased dramatically in recent years—even as they have decreased in countries that permit surcharges. Weiner & Wright, *Interchange Fees in Various Countries: Developments and Determinants*

14 (Fed. Reserve Bank, Working Paper 05-01, Sept. 6, 2005).

Allowing merchants to truthfully inform consumers of the cost of credit will not just lead to lower fees (and hence lower retail prices), but also reduce the "regressive transfer of income from low-income to high-income consumers." Schuh, *Who Gains and Who Loses from Credit Card Payments?*, at 2. Because no-surcharge laws bar merchants from communicating the cost of credit in the most effective way possible, most merchants instead simply increase sticker prices for all customers to recoup the cost of swipe fees. This creates a pervasive, "non-trivial" cross-subsidy: an annual "total transfer of $1,282 from the average cash payer to the average card payer." *Id.* at 3, 21. Rather than leave in place a circuit split that has the effect of prolonging an anticompetitive and regressive regime, this Court should grant certiorari and reverse the Second Circuit's decision.

III. This case presents an ideal vehicle to address the question presented.

This case is an ideal vehicle for resolving the circuit split and deciding whether state no-surcharge laws violate the First Amendment. There are no factual disputes. The case is not in an interlocutory posture. The state had an opportunity below to try to defend the law under *Central Hudson*. There is a robust record on enforcement of the statute—including declarations from merchants who were recently targeted by the Attorney General for violating the law (declarations that the state has not challenged)—so this Court need not speculate about how the law works on the ground. And although the Second Circuit abstained under *Pullman* from a subsidiary aspect of the plaintiffs' challenge, it directly addressed (and rejected) their core argument that New York's law unconstitutionally prevents them from ex-

pressing the cost of credit how they would like: as a "surcharge" (or "additional fee") on top of their "sticker" price.

That question—to which the circuits have given conflicting answers—is thus cleanly teed up by this petition. This Court should answer it.

IV. The decision below is wrongly decided under this Court's commercial-speech cases.

This Court has held that the First Amendment "requires heightened scrutiny" whenever the government creates restrictions that turn on the content of a speaker's words. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565-66 (2011). This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on content, even if the law "on its face appear[s] neutral." *Id.*; *see McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (applying scrutiny "even though the Act says nothing about speech on its face"). Thus, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986). If a law makes liability "depend[] on what [people] say," in other words, it "regulates speech on the basis of its content." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

"Commercial speech is no exception." *Sorrell*, 564 U.S. at 566. The Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770. So if a law's "purpose and practical effect" are to restrict price information or other commercial speech based on its content, then the law must withstand scrutiny. *Sorrell*, 564 U.S. at 565.

A. Without grappling with any of this authority, the Second Circuit concluded that New York's no-surcharge law "regulates conduct, not speech." App. 27a. But the law does not regulate *any* conduct: It does not regulate the amounts that merchants may charge for their goods, nor does it regulate the difference between the cash and credit prices. To the contrary, the law "targets expression alone." *Dana's R.R. Supply*, 807 F.3d at 1245.

The Second Circuit's own hypothetical proves the point. Here is what the court said:

> If a consumer thinks, based on a seller's sticker price, that she will be paying $100 for the seller's goods or services, then she will be annoyed if it turns out that she actually has to pay $103 simply because she has chosen to use a credit card; by contrast, if the sticker price is $103, she will be less annoyed by having to pay $103, even if cash customers only have to pay $100.

App. 23a. Although the Second Circuit drew from this hypothetical the conclusion that "[n]othing about the consumer's reaction in either situation turns on any words uttered by the seller," *id.*, that is mistaken. The consumer is "annoyed" in the first instance because she was misled by the sticker price (what the seller *said* the price was). As Judge Sutton has explained, something "cannot simultaneously be non-communicative" and "yet pose the risk of *communicating* a misleading message." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008). Even if the hypothetical seller said nothing aloud, the First Amendment protects more than just conversations. The way in which a merchant chooses to communicate price information to consumers—on stickers, signs, advertisements, and the like—is itself speech. *Va. St. Bd. of Pharmac*y, 425 U.S. at 770.

Misleading commercial speech can of course be regulated. But that is because it gets no First Amendment protection—not because it isn't speech. The petitioners, however, wish to communicate truthful, *non*-misleading information: They want to frame the cash price as the "sticker" price and the price difference as a "surcharge." That "is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba." *Dana's R.R. Supply*, 807 F.3d at 1249.

The enforcement history of New York's law confirms that it regulates speech. In the first reported prosecution under the statute, a gas-station owner was prosecuted and convicted because his cashier truthfully informed a customer that it cost "five cents 'extra'" to use credit rather than saying that it was a "nickel less" to use cash. *Fulvio*, 517 N.Y.S.2d at 1013. The state court set aside the conviction as constitutionally "intolerable," observing that the law "creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015. And the state's continued enforcement efforts bear this out: The Attorney General's office recently told a heating-oil seller that, to comply with the law, he need not change the amounts he actually charges consumers, but must convey the difference between the cash and credit prices "as a cash 'discount,' not a credit 'surcharge.'" CA2 J.A. 154. The state even gave the seller "a script of what [he] could tell customers." *Id.*

These examples demonstrate that the no-surcharge law operates as a content-based speech restriction. As the Eleventh Circuit observed, "there is no real-world difference between the two formulations." *Dana's R.R. Supply*, 807 F.3d at 1245. The only difference is speech.

And regulating that speech was the law's purpose. It was enacted to fill the gap left by the federal ban's expi-

ration—a ban resulting from years of lobbying by credit-card companies who understood that the surcharge label "talk[s] against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414*, at 32, 60. Like Congress, New York knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of their "practical effect and impact . . . on consumers." S. Rep. No. 97-23, at 3 (1981). Indeed, the state justified the law based on the different psychological effects that the two words have on consumers' understanding and behavior: "Surcharges, *even if only psychologically*, impose penalties on purchasers . . . . A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." CA2 J.A. 114 (emphasis added).

The law affects consumer spending, in other words, "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. St. Bd. of Pharmacy*, 425 U.S. at 769. There is no doubt that this assumption is well placed in the credit-card context. *See* Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352. But states may not pass laws that seek to "diminish the effectiveness" of communication simply because they think certain speech is too powerful. *Sorrell*, 564 U.S. at 565. Courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Fear that "the public will respond 'irrationally' to the truth," *id.*, or "would make bad decisions if given truthful information," is no justification for banning speech, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Hence, states should "assume that . . . information is not in itself harmful, that people will perceive their own best interests if only they are well enough

informed, and that the best means to that end is to open the channels of communication rather than to close them." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770.

New York's no-surcharge law does just the opposite. It hides the true cost of credit from customers to prevent negative reactions by "consumers [who] dislike being charged extra." App. 23a. And it does so not because of paternalism, but to "give one side"—the credit-card industry—"an advantage" by muzzling merchants. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

B. Because New York's law regulates speech, it must satisfy First Amendment scrutiny. This Court has traditionally subjected commercial-speech restrictions to intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the challenged law "is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

This Court should "easily conclude[]," App. 75a n.8, as Judge Rakoff did, that the law flunks every part of this test—and, indeed, that it "crumbles under *any level* of heightened First Amendment scrutiny," *Dana's R.R. Supply*, 807 F.3d at 1239 (emphasis added).

First, all parties agree that dual-pricing practices are lawful, and the district court found that surcharges "actually make consumers more informed rather than less" by "truthfully and effectively conveying the true costs of using credit cards." App. 76a. *Second*, the law does not "directly advance[]" any governmental interest; to the contrary, it "perpetuates consumer confusion by

preventing sellers from . . . educat[ing] consumers about the true costs of credit-card usage." App. 77a. And the law is "riddled with numerous 'exemptions and inconsistencies [that] bring into question the purpose' of the statute." *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). For one thing, the state exempts *itself* and "certain favored utilities" from the law's prohibition. *Id. Third*, the law "is far broader than necessary to serve any asserted antifraud purpose." App. 78a. As the district court observed, the state "easily could have limited its regulation to surcharges that are deceptive or misleading." *Id.* Or it could have enacted a law like those in Georgia or Minnesota, which permit surcharges so long as they are conspicuously disclosed. *See* Ga. Code § 13-1-15 (2015); Minn. Stat. § 325G.051(1)(a)(1) (2015).

The law's First Amendment deficiencies are exacerbated by its vagueness—that is, its failure "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and its encouragement of "arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Indeed, the district court (echoing the state court in *Fulvio*) had "little difficulty" concluding that the law is "impermissibly vague." App. 80a; *see Fulvio*, 517 N.Y.S.2d at 1012 (holding the law to be "so vague, uncertain and arbitrary of enforcement as to be fatally defective"). To see the law's vagueness, imagine that you are a merchant who offers dual pricing and decides to sell a product for $100 if the customer pays in cash and $102 if the customer pays with credit. How do you comply with the law? What can you say? As the court that struck down California's law asked: Can you list the price as "$100+2% surcharge"? *Italian Colors*, 99 F. Supp. 3d at 1211. "Does that scenario constitute an unlawful surcharge since the percentage is calculated at the cash register?" *Id.* What

if you listed the price as $100 but put up "large signs displayed throughout the establishment stating that a 2% surcharge will be applied for purchases made with credit cards?" *Id.* And what if one of your customers calls and asks for your prices? What do you tell them?

As a result of the law's uncertainty, the petitioners have been forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," thus making the law's speech restriction even worse. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (quotation marks and ellipsis omitted).

C. Rather than see the law's vagueness as another sign of its unconstitutionality, the Second Circuit compounded its errors by wrongly invoking *Pullman* abstention. After addressing the core of the plaintiffs' challenge—whether they can convey the cash price as the "regular" sticker price, and the credit-card price as an "additional" fee (or "surcharge") on a separate sign—the court determined that a secondary aspect of their challenge "turns on an unsettled question of state law." App. 28a. Specifically, the court abstained as to whether the law may be constitutionally applied to a merchant who, like the gas-station owner in *Fulvio*, "posts two different prices" on each product and "characterize[s] this price differential as a 'surcharge'" (or as costing "more"). App. 15a-16a.

But this Court has repeatedly emphasized that "the abstention doctrine is inappropriate for cases" in which "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965); *see City of Houston v. Hill*, 482 U.S. 451, 467 (1987); *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). "[A] federal court's 'obligation' to hear and

decide" cases within its jurisdiction "is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (internal quotation marks omitted). And that principle has "particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

That is because, as this Court long ago explained, abstaining in a First Amendment challenge may "well result in the denial of any effective safeguards against the loss of protected freedoms of expression," which "cannot be justified." *Dombrowski*, 380 U.S. at 492. Put differently, "forc[ing] the plaintiff who has commenced a federal action to suffer the delay of state court proceedings" in a First Amendment challenge "might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252. That is why the Ninth Circuit has adopted effectively a categorical "rule that federal courts should not invoke *Pullman* abstention in cases implicating First Amendment rights." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014); *see, e.g.*, *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010); *Porter v. Jones*, 319 F.3d 483, 491-94 (9th Cir. 2003); *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989).

The Second Circuit's endorsement of *Pullman* cannot be reconciled with these precedents, and is further proof that the court failed to safeguard the petitioners' First Amendment rights. The court dismissed out of hand any possibility that those rights will be chilled by forcing the petitioners to litigate part of their claims in state court. App. 40a. It even suggested that federal courts can be "an unwise choice of forum" for such challenges, *id.*—a statement that misunderstands that First Amendment rights are "*always* an area of particular

federal concern," *Ripplinger*, 868 F.2d at 1048 (emphasis added). This Court should intervene to protect them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
RACHEL S. BLOOMEKATZ
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

May 12, 2016