No. 15-1391

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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

New York, like all states, allows merchants to charge higher prices to consumers who pay with a credit card instead of cash. But New York's no-surcharge law, N.Y. Gen. Bus. Law § 518, requires merchants to label that price difference as a cash "discount" and makes it a crime—punishable by up to one year in jail—to label it as a credit-card "surcharge." The question presented is whether New York's no-surcharge law unconstitutionally restricts speech.

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Pacific Legal Foundation (PLF) is a public interest legal foundation established in 1973 to litigate cases that advance the principles of limited government and economic freedom. Towards these ends, PLF has participated as *amicus* in many cases involving the speech rights of businesses and entrepreneurs. PLF attorneys have also published extensively on the need for full First Amendment protection for commercial speech.

This case concerns *amici* because it involves the freedom of speech of both retailers and consumers.

[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The greatest trick the devil ever pulled was convincing the world he did not exist." The Usual Suspects (MGM Entertainment 1995). This movie line sums up how credit-card companies—here through the New York legislature—are insulating themselves from consumer knowledge about the "swipe fees" they charge merchants. *See* N.Y. Gen. Bus. Law § 518. While Visa and MasterCard are certainly not the devil, they have lobbied legislatures to compel business owners to speak in certain ways about how they price goods—essentially shielding themselves from market-forces at the expense of individual rights—and leading to regressive economic effects on poor and minority consumers.

The Framers drafted the Constitution in part to prevent such special-interest legislation. Indeed, the idea of such factions affecting the public interest was addressed by James Madison in Federalist 10. While Madison conceded that such interests could not be erased, he acknowledged that certain steps could be taken to mitigate the effects of these groups, and the damage that they can do.

As part of the Bill of Rights, the First Amendment also protects against such special-interest legislation. The right of the people to speak is protected by the fullest extent of judicial review—even if the speech is about matters of economic concern. When New York passed a law restricting how merchants were to speak—at the direction of the credit-card lobby—it abridged merchants' right to convey their pricing schemes, as well as the public's right to know about them.

ARGUMENT

I. CREDIT CARD COMPANIES AND STATE LEGISLATURES COLLUDED TO VIOLATE FIRST AMENDMENT RIGHTS, TO THE DETRIMENT OF POORER CITIZENS

A. The Framers Sought to Protect Citizens from the Type of Cronyism the New York Statute Manifests

At the heart of this case is the practice known as "cronyism:" a system that has been broadly described as interest groups' seeking favors from government. *See* Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagnation, and Social Rigidities* (1985). Cronyism is a form of corporatism, "a system where businesses are privately owned, but there is a comprehensive inter-tangling of government and private industry, such that the success of various firms or industries is closely tied to government and government frequently uses private industry to directly or indirectly accomplished preferred political goals." Todd J. Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 Sup. Ct. Econ. Rev. 77, 78 (2015).

No matter what label you give this practice, one of the main methods for carrying it out involves rent-seeking—where interest groups spend resources pursuing favorable legislation and regulation rather than competing in the marketplace. *See id*; *see also*, Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 Western Econ J 224 (1967). Rent-seeking—as pervasive as it is—is not a modern phenomenon. Indeed, the Framers recognized the problem of regulatory capture at the hands of private interests—known to them as the problem of "factions"—as one of the main evils to be guarded against. Indeed, neutralizing this hazard was a major consideration in drafting a constitution that protects individual liberty. *See id*. James Madison described factions as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community." The Federalist No. 10, at 77-78 (Madison) (Clinton Rossiter ed., 1961).

Madison, when acknowledging the problem of factions, however, recognized that there was no satisfactory way to completely cure the problem:

> There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests. It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. *But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.* The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at lib-

> erty to exercise it, different opinions will be formed.

Id. (emphasis added). Madison and his colleagues sought to combat these evils by "controlling the effects" of what factions can do through a number of protections built into the Constitution. *See id*.; *see also*, Zywicki, *supra*, at 79 ("The Framers' obsession with the concern that factions might divert the government to the advancement of their own interests, rather than the public interest, is reflected in their elaborate system of separation of powers, checks and balances, federalism, enumerated powers, and even the Bill of Rights itself.") (citations omitted).

Moreover, the Framers were well aware that factions would seek to control the economic rights of citizens through majoritarian bullying or backroom deals. *See* Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 37, 39-46 (2012) ("The Framers designed the Constitution to further certain core principles of Enlightenment economic thought: protecting private property, enforcing contracts, preventing monopolies, and encouraging free trade among states and nations. In some clauses these principles are explicit. In others, the Framers allocated powers and arranged procedures to further these principles indirectly.") (citations omitted).

The First Amendment's protection of the people's ability to speak free from governmental interference as to economic matters fits directly into this mold. Indeed, the Court has recognized time and again the importance of protecting economic speech from majoritarian control. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764–65 (1976) ("Though inextricably linked to underlying economic conduct, commercial speech has long been given First Amendment protection based on society's strong interest in the free flow of commercial information, which is an 'indispensable' prerequisite for creating the 'intelligent and well informed' consumers needed to 'preserve a predominantly free enterprise economy.'") (citations omitted).

B. New York's Legislature Was Lobbied by the Credit-Card "Faction" to Insulate These Companies from Consumer Knowledge

In circumvention of the Framers' design, the New York legislature passed a law that directly abridges the freedom of business owners to convey their prices. *See* N.Y. Gen. Bus. Law § 518. The credit-card companies' lobbying effort, however, did not begin in Albany. Indeed, there is a long history of this industry's attempts to insulate "swipe fees" from consumer knowledge. Before any such laws were passed, these companies included contractual clauses forbidding merchants from charging different prices when a consumer used a credit card as opposed to cash. *See* Edmund W. 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 & n.4 (1990). This practice was addressed by Congress in a 1974 amendment to the Truth in Lending Act (TILA). *See* Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)) ("[A] card issuer may not, by contract or otherwise, prohibit any . . . seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.").

With the foreclosure of the credit card companies' ability to insulate their profits from consumer knowledge through private contract, they diverted their efforts to masking their costs by regulating how businesses could communicate their pricing. Congress was happy to oblige. In legislation that mirrors New York's Section 518, Congress passed another amendment to the TILA in 1976. This amendment temporarily banned "surcharges," on the use of credit cards, despite the authorization for "discounts." Pub. L. No. 94-222, 90 Stat. 197. From the outset, however, many—including government officials and consumer-advocacy groups—saw the legislation as a semantic distinction without a difference. *See Cash Discount Act, 1981: Hearings on S. 414 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, & Urban Affairs*, 97th Cong., 1st Sess. 10, at 97 (Feb. 18, 1981) (testimony of Ellen Broadman for Consumers Union). ("[The] ban constitutes special interest legislation that serves the interest of only one special interest group, the credit card industry.") And "[n]ot only that, but it serves this one special interest group at the expense of the American public, to the tune of billions of dollars each year." *Id.* "The surcharge ban is special interest legislation advocated by groups who push the overutilization of credit cards." *Id.* at 91 (testimony of Jim Boyle for Consumer Federation of America). By 1984, lobbying efforts to hide swipe fees wore thin, and Congress let the 1976 amendment lapse.

Not to be deterred, the credit-card faction turned to the states, and was successful in 10 states. Indeed, N.Y. Gen. Bus. Law § 518 was modeled after the 1976 amendment to the TILA. See *Expressions Hair Design v. Schneiderman*, 975 F. Supp.2d 430, 439 (S.D.N.Y. 2013) ("New York's no-surcharge provision . . . copied the operative text of the then-lapsed federal provision prohibiting surcharges, but did not include the federal definitions, or any other definitions, of 'discount,' 'surcharge,' or 'regular price.'").[2]

The district court, when drawing that conclusion, relied on a previous case in a state trial court that dealt with the law's constitutionality. *See People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. 1987). In *Fulvio*, the court found—based on plain statutory text and the federal legislative history—"that precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Id*. at 1011 (emphasis in original). The court pointed out that:

> The memorandum in support of Assembly Bill 10189 (S 836) of 1984 which enacted General Business Law § 518 notes that its purpose was to fill the gap created by the expiration of the Federal ban on surcharges on credit card users and that the provision permitting a merchant to offer a discount for cash would still be permitted.

Id. at 1012.

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[2] As the district court observed, at the time the credit-card companies began their state lobbying efforts, they also began inserting no-surcharge clauses in their merchant agreements. But in January 2013, the two biggest companies, Visa and MasterCard, dropped these contractual restrictions to settle an antitrust action. *See Expressions Hair Design*, 975 F. Supp.2d at 439.

New York's legislature thus instituted the same unconstitutional labeling requirements that the card companies lobbied for at the federal level.

C. By Suppressing Speech, New York's Law Creates a Regressive Subsidy from Lower-Income to Higher-Income Consumers

As often happens when legislatures pass regulations that favor corporate factions, there are secondary regressive effects that disproportionately hurt the poor. *See* Diana Thomas, *Regressive Effects of Regulation*, Mercatus Center George Mason U., 20-22 (Nov. 2012),https://www.mercatus.org/system/files/RegressiveEffects_Thomas_v1-0.pdf (noting that regulatory burdens often represent preferences of the wealthy, driving up prices for all—regressively costing as much as six to eight times as much for low-income households compared to higher-income households).

N.Y. Gen. Bus. Law § 518 unconstitutional labeling requirement is no exception. Indeed, the labeling restriction on surcharges prevents retailers from effectively relaying to consumers the price differences between cash and credit. This, in turn, leads to retailers charging a higher baseline price for both cash and credit users—affecting a regressive subsidy from the customer who uses cash to those that use credit. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1, 35-36 (2008) ("[a]s a social matter, the subsidization of credit consumers by cash consumers caused by no-surcharge rules is highly regressive… only about 40% of the lowest quintile of Americans in terms of income have a credit card. Thus, the poorest Americans tend to be cash-only consumers.").

This regressive subsidy on poor and minority consumers should not be understated. The ban on surcharge labeling significantly places the burden of the regulatory cost squarely on the poor. *See* Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments?* at 21, Fed. Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03, (2010) ("The average cash-paying household transfers $149 . . . annually to card users," each of whom on average "receives a subsidy of $1,333 . . . annually from cash users.").

Thus, no-surcharge laws are not only unconstitutional restrictions on the words and labels merchants communicate their consumers, but they also have real world regressive effects on our poorer citizens.

II. NEW YORK'S LAW SUPPRESSES SPEECH BASED ON ITS CONTENT AND SO FAILS ANY FORM OF HEIGHTENED SCRUTINY

This case presents the opportunity to confirm that the First Amendment provides the same protection to commercial speech as to any speech that has been abridged based solely on its content. If such content-based restrictions are allowed here, legislatures will continue abridging the speech of their citizens to further the economic goals of particular interests.

A. The First Amendment Protects Against Content Restrictions on Speech, Regardless Whether It Is Commercial in Nature

The First Amendment requires heightened scrutiny when government creates "a regulation of speech because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 566 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United*

States v. Stevens, 130 S. Ct. 1577, 1584-85 (2010) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (internal citations omitted). Last term, the Court held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Under *Reed*, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228. Further, even if the content-based restriction is not facially content-restrictive, it will be treated as content-based if it is not "justified without reference to the content of the regulated speech" *Id.* (citations omitted). This test gives bright line rules as to when speech restrictions are subject to strict scrutiny—and the test should be applied to both commercial and non-commercial speech.

As has been recognized by members of this Court, the distinction between commercial and non-commercial speech has no constitutional basis. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring in judgment); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 510–14 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and in judgment);

Florida Bar v. Went For It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). Placing truthful speech about commercial matters in a "subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), finds no support in the text of the First Amendment or in our nation's history. *See* 44 *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and in judgment). Indeed, precedents justifying a second-class treatment of commercial speech appeal more to the *ipse dixit* of "commonsense" than to any constitutional grounding. *See Va. State Bd.*, 425 U.S. at 771 n.24.

That there is no clear textual or historical rationale for why commercial speech is treated differently has, inevitably, produced an unstable and unworkable doctrine. *See generally,* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 Harv. L. Rev. 1892 (2007). The unworkable nature of the doctrine cries out for a bright line analysis that enables lower courts to determine when legislatures have violated people's First Amendment rights. Indeed, this Court has acknowledged on several occasions that the definition of "commercial speech" is itself confusing and vague. *See, e.g.*, *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184 (1999); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985). Furthermore, commercial speech is often, and increasingly, "inextricably intertwined" with noncommercial speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). The district court below noted that hybrid speech is at issue here. *Expressions Hair Design*, 975 F. Supp.2d at 446 n. 8 ("In this case, while price information no doubt proposes a transaction and relates to economic interests, 'what is going on here is more than just a debate about how best to sell toothpaste.'") (quoting *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (Sutton, J.)).

The Court should end this confusion and provide guidance to the lower courts that have struggled to apply the commercial-speech doctrine. It should clarify that state actions abridging speech based on its content—whether or not dollar signs are involved—will be given the highest degree of judicial scrutiny.

B. N.Y. Gen. Bus. Law § 518 Facially Regulates the Content of Retailers' Speech and Fails Any Form of Heightened Scrutiny

Gen. Bus. Law § 518 is a facial content restriction on how merchants can present their prices. It is not a mere restriction on their conduct. It cannot survive strict scrutiny, much less any other form of heightened judicial review.

The district court below, and other courts that have dealt with similar statutes, came to the same conclusion. In striking down the law, the court pointed to the fact it "plainly regulates speech" because it "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities." *Expressions Hair Design*, 975 F. Supp.2d at 444. Further, the court explained the *Alice in Wonderland* dynamic:

> [I]f 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 . . . this virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment.

Id. at 435-436.

The Eleventh Circuit came to the same conclusion in striking down a nearly identical Florida statute as a content-based restriction, calling it a "plain old-fashioned speech suppression." *Dana's Railroad Supply v. Att'y Gen., Florida,* 807 F.3d 1235, 1247. (11th Cir. 2015). The court found that the law violates merchants' speech rights and "purg[es] from the merchants' vocabularies the doubleplusungood surcharge . . . replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law has been deprived of its full rhetorical toolkit." *Id.* (emphasis in original). Like the district court below, the Eleventh Circuit illustrated the distinction without a difference:

> After all, 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.

This Court should find that speech restrictions of this kind are subject to the highest form of scrutiny, and strike down the law as an unconstitutional suppression of the right to convey prices to customers.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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