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; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County, *Respondents*.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Suppose you own a small deli in New York. You accept credit cards, but that comes at a cost: swipe fees. You could pass these fees on to all your customers, by setting higher prices across the board. Or you could charge more for purchases made by credit card. You opt for the latter. You decide to charge two prices for a pastrami sandwich: $10 in cash, $10.20 with a credit card.

So far, so good. Dual pricing of this sort is legal everywhere. But now you need to inform your customers of the two prices. You consider the options:

A.	Pastrami sandwich: $10 cash price / $10.20 credit-card price
B.	Pastrami sandwich: $10 cash price $0.20 surcharge per item added to credit-card purchases
C.	Pastrami sandwich: $10 cash price 2% surcharge added to credit-card purchases
D.	Pastrami sandwich: $10.20 credit-card price $0.20 discount per item off cash purchases

In forty states, any of these options is a permissible way to truthfully advertise your prices. But not in New York. The state permits merchants to characterize the price difference as a cash discount but makes it a crime to characterize it as a credit-card surcharge.

How do you proceed? Choose option B or C, and you could find yourself in the crosshairs of New York's Attorney General, as happened to dozens of small merchants in recent years. They told customers that a product cost, for example, $3.45 and $0.05 extra for using credit, rather than $3.50 and $0.05 less for cash. JA 107, 115, 124. Even though they told their customers both the cash and credit-card prices, and did so at the same time, an Assistant Attorney General told the merchants that this was illegal. He made them pay fines and gave them a "script," saying: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." JA 107, 115.

Choose option A and you could still find yourself arrested, prosecuted, and convicted—as happened to a gas-station owner shortly after the law's enactment. Although the station had signs clearly advertising both prices, the cashier let slip (in a conversation with a customer) that gas cost "five cents extra" with a credit card, instead of saying that it was a "nickel less" in cash. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1013 (N.Y. Crim. Ct. 1987). That made the owner a criminal.

As a result, only option D—which you believe to be by far the least effective way of highlighting the cost of credit to consumers—appears somewhat safe. Some merchants choose this option, and "try to be as careful as [they] can to avoid characterizing the price difference as a 'surcharge.'" JA 61. Others refrain from dual pricing altogether because they are "concerned about the difficulty of controlling the language [their] employees would use" and are unwilling to "take the risk" of prosecution. JA 48, 53, 58.

The threshold question in this case is whether this law regulates speech or conduct. Everyone agrees that a law restricting only the prices merchants may charge is a regulation of conduct. And everyone agrees that a law restricting only the way those prices may be communicated is a regulation of speech. The question is: On which side of the line does New York's law fall?

New York takes the position that its law is a "direct price regulation that controls how sellers set prices and collect money from their consumers, not what they may or may not say about their prices." Resp. Br. 22. But its law does *not* control "how sellers set prices and collect money." The price of a sandwich is the amount that is charged for it. That is what makes a price-control law a regulation of economic conduct: it regulates the amount of money a merchant may charge for an item (or to whom). New York's law doesn't do that. The deli owner may charge $10 for cash and $10.20 for credit. Those prices (read: amounts) are legal. So too were the prices charged by the gas station in *Fulvio* and all the mom-and-pop merchants targeted by the state in recent years.

The state's brief says virtually nothing about its recent enforcement efforts. It is no surprise why: Those merchants were told that they could bring themselves into compliance by changing only how they *communicated* their prices—not the amounts of the prices themselves. Any law that makes criminal liability turn solely on words used to convey truthful, lawful prices is a regulation of speech, subject to scrutiny.

This law does not come close to surviving First Amendment scrutiny. The state claims that the law serves consumer-protection aims. But the state introduced no supporting evidence below, and no consumer group agrees. And the law is both too broad and too narrow to achieve such aims—too broad because it bans truthful speech; too narrow because it exempts the state and allows large price differentials if characterized as discounts. If New York is really concerned about gouging and bait-and-switch tactics, there is an easy solution: Let merchants characterize the price difference however they please but cap the amount and require disclosure (or just enforce false-advertising laws).

The United States, for its part, agrees that New York's law regulates only speech. U.S. Br. 19-20. Yet it proposes a remand to allow the state to press an argument it abandoned below: that the law is a disclosure requirement—not a *conduct ban*, as the state says, but a *speech mandate*. Nobody makes an attempt to show that New York's law is actually such a law. The hallmark of a disclosure requirement is clarity about what speech is being mandated. Even the lapsed federal precursor was hopelessly unclear; it was apparently never enforced and caused widespread confusion before it was scrapped.

New York's law is, if anything, even more vague. Armed with only the statutory text and enforcement history, no merchant could be confident that she can communicate dual pricing in a lawful way. And instead of clearing up the confusion by answering the questions we posed in our opening brief (at 49-50)—questions that *every* dual-pricing merchant will confront—the Attorney General dismisses them (at 57) as "speculation." That is no way to defend a law that criminalizes speech.

ARGUMENT

I. New York's no-surcharge law makes liability turn on how prices are communicated to consumers—not the prices themselves—and thus regulates speech, not economic conduct.

A. The law regulates *only* speech.

New York stakes its defense primarily on its argument that the criminal no-surcharge statute is a "classic form of price regulation that implicates no First Amendment concerns." Resp. Br. 1. That argument, in turn, rests on the state's claim that the law "regulates the economic conduct of increasing prices on account of a customer's credit-card use," making the law (in the state's view) "similar to a price ceiling." *Id.* at 1-2.

But, as the state later concedes, the law is not at all like a price ceiling because it "does not restrict the final prices that sellers may charge" for *any* product—either for cash or credit, or for the difference between them. *Id.* at 31. To the contrary, the law allows a merchant to charge two different amounts for cash versus credit, set at whatever amounts the merchant wishes, *see id.* at 36—but only if the difference between them is framed as a cash "discount" rather than a credit-card "surcharge." Liability thus turns entirely on speech, not conduct—as the law's "purpose and practical effect" make clear. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

1. Practical effect. As a practical matter, what does the law regulate if not speech? The state says that it "prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card." Resp. Br. 22. "The relevant conduct," as the state sees it, "is not simply the final price charged to credit-card customers, but rather the relationship between that price and the regular price," which (it insists) provides an "objectively ascertainable baseline" as the "usual or normal price." *Id.* at 29-30.

The first court to confront that argument recognized it for what it is: "semantic gyration." *Fulvio*, 517 N.Y.S.2d at 1015. To see why, return to the deli owner who charges two prices for a pastrami sandwich: $10 for cash, $10.20 for credit. Which one is the normal price? The answer—and criminal liability—hinges on how the prices are *communicated*. *See* Resp. Br. 28 (defining regular price based on what is "conveyed to buyers," not what is charged).

Say that the sandwich costs $10 with a $0.20 credit-card surcharge, and the answer is $10. Say that it costs $10.20 with a $0.20 cash discount, and the answer is $10.20. Say that it costs $10 for cash and $10.20 for credit, and the answer (maybe?) depends on how an employee characterizes the difference in a conversation. *Com-*

pare Fulvio, 517 N.Y.S.2d at 1010 (involving criminal conviction of gas-station owner whose cashier said that credit-card purchases "cost more") *with* Resp. Br. 38-39 (claiming that "a seller is free to 'tell [its] customers' that a credit-card user ultimately pays 'more'").

There is "no real-world difference between [these] formulations" in terms of the economic conduct they describe. *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1245 (11th Cir. 2015). And yet the first is a crime, the second is not, and the third is anyone's guess. Because liability "depends on what [merchants] say," the law "regulates speech," and only speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010); *see* U.S. Br. 19 ("Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech."). Put another way, the law does not regulate the setting of prices by merchants, but kicks in only *after* they have been set, by preferring one way of labeling them over another.

The state's own lawyers have demonstrated as much in their efforts to enforce the law. When one of them placed an anonymous phone call to a small heating-oil company, pretending to be a customer, the owner said that oil cost $3.45/gallon if paying in cash, with a $0.05/gallon "surcharge" for paying by credit. JA 106. The Attorney General's office told the merchant that he had violated the law, made him sign an agreement to stop characterizing the cost of credit as a surcharge, and gave him "a script of what [he] could tell customers." JA 106-07. The state further told the merchant that he could keep charging the same amounts, but he "could not say that [h]e charge[s] more for using a credit card." *Id.* at 108. He had to say that oil cost $3.50/gallon if paying by credit, with a $0.05/gallon cash "discount." *Id.* at 107. A slew of other merchants had similar experiences, and were told the same thing. JA 115, 117-33.

The state's brief barely mentions these recent enforcement efforts, devoting a total of two sentences to them. In the first sentence, the state alludes to bait-and-switch tactics: It claims that these merchants had quoted a single price for their products and "*only later*" informed customers of the surcharge when they "sought to pay with a credit card." Resp. Br. 26-27. That is not what the record says. The unrebutted evidence makes clear that these merchants were targeted for violating the law even though they conveyed the cash and credit-card prices "*at the same time*"—before the customer was set to pay. JA 106; *see also* JA 114-15, 124. And the Attorney General's office told them they could not frame the price difference as a surcharge—regardless of when it was disclosed. JA 108, 119, 125. The petitioners here likewise wish to communicate their prices ahead of time, "before a payment method has been identified." Resp. Br. 28; *see* JA 41-62, 101-04. Their goal is to fully *inform* consumers in the hopes that they will then use a *cheaper* payment method, not to hoodwink them into using a credit card.

The second sentence appears in a footnote: "Contrary to petitioners' mischaracterization, it was the companies' imposition of an additional fee on top of the usual or regular price that triggered enforcement of Section 518—not their failure to follow a 'script' to describe their pricing." Resp. Br. 27 n.4 (citation omitted). This is more wordplay. For starters, the description of the Attorney General's enforcement efforts is neither a mischaracterization nor is it even ours; it is based on the firsthand experience of merchants (none of whom are parties to this litigation) as contained in sworn, unrebutted declarations. *See* JA 105-33. And, more to the point, what constitutes "an additional fee on top of the usual or regular price" is entirely dependent on how the prices are communicated. As the United States puts it: The law "prescribes not the commercial practices a merchant must follow, but the way in which the merchant may communicate those practices to the public." U.S. Br. 19.

New York's attempt to explain away its criminal prosecution in *Fulvio* is even more strained. The state says that the case is "best understood as falling within [a] category of cases" in which there is "no occasion to apply" the law because "there is no meaningful basis to determine whether a seller has imposed a 'surcharge,'" given the "absence" of a usual or normal price. Resp. Br. 30. Later, it says that the same case is actually "best understood" as something else: "a failure by the prosecution to satisfy" the "requirement of proof beyond a reasonable doubt." *Id.* at 57.

But *Fulvio* is not hard to understand. The "actual problem" in the case wasn't the "prosecution's inability" to meet its burden of proof. *Id.* at 58. The prosecution *successfully* obtained a conviction. *See* 517 N.Y.S.2d at 1009. The problem, rather, was that the conviction had to be set aside as unconstitutional because, under the statute, "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." *Id.* at 1011. New York has identified no instance of its law ever being enforced in a way that *doesn't* present this problem.

Instead of facing up to its enforcement history, the state asks this Court to shield its law from scrutiny because merchants "remain free to communicate their views about credit-card costs," in conversations with customers, "in any way they see fit." Resp. Br. 20. The state even claims that merchants may tell customers that it costs "more" to use a credit card, *id.* at 38—the opposite of what it told merchants a few years ago. *See* JA

108 ("The Attorney General always told us that we could not say that we charge more for using a credit card."). The law, the state now contends, simply prevents merchants from "convey[ing]" their prices—"by tag or sign or other means"—in the wrong way. Resp. Br. 24, 28.

This is no defense to a First Amendment challenge. "The Government's assurance[s]" are "pertinent only as an implicit acknowledgment" of the statute's "constitutional problems." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Even assuming the law is so limited (and the enforcement history shows that it is not), the First Amendment protects more than just conversations. The way a merchant chooses to communicate price information to consumers—on labels, signs, advertisements, and the like—is *itself* speech. And it's not just any speech, but speech at the heart of the commercial-speech doctrine. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976). As Judge Rakoff put the point: "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." Pet. App. 74a. The state has no response.

2. Purpose. The state also offers no response to the history demonstrating that both supporters and opponents of a surcharge ban understood its purpose as targeting speech. Pet. Br. 8-16, 30-31. Consumer advocates opposed it because "the term 'surcharge' makes credit card customers particularly aware" of the cost while "discount" "downplays the truth." *Id.* at 10-11. Banks favored it for this very reason: a surcharge "talk[s] against the credit industry." *Id.* at 12. Ignoring this history, New York now claims that the law was designed to protect consumers from various risks—the "risk that [merchants] will mislead consumers by posting their regular prices to attract customers and then imposing surprise credit-card surcharges"; the "risk" that allowing surcharges as well as discounts could cause "consumer confusion"; and the risk of "lur[ing] customers" with "bait and switch." Resp. Br. 7, 8, 43, 49. We say more about these justifications in Part II, but for now it is enough to see that each is about *speech*, not conduct. 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).

B. New York and its amici cannot save the law from scrutiny by comparing it to different laws that actually regulate economic conduct.

Because the law cannot survive scrutiny, the Attorney General spends much of his brief resisting it. But rather than confront the purpose or practical effect of the no-surcharge law, the state and its amici rely on cases and hypotheticals about very different laws—none of which makes liability turn on labeling or otherwise has the purpose or practical effect of regulating semantics.

Take price-control laws. Resp. Br. 23-24. They regulate conduct because they prohibit charging more or less than a certain amount for a good or service. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (law "fix[ing] a maximum [] charge"). The no-surcharge law, by contrast, does not regulate what anyone may charge for anything.

Now take the requirement that telecommunications carriers charge schools and libraries "rates less than the amounts charged for similar services to other parties," with the difference set by a federal agency. 47 U.S.C. § 254(h)(1)(B); *see* Resp. Br. 24. That law regulates conduct because it dictates the relationship of the "amounts charged" to one group of people versus another. The no-surcharge law does no such thing.

Next up is *National Association of Tobacco Outlets, Inc. v. City of Providence*, which involved a prohibition on "reducing prices" for cigarettes through "coupons and certain multi-pack discounts." 731 F.3d 71, 74 (1st Cir. 2013). The First Circuit upheld the law because it does not "restrict[] retailers or anyone else from communicating pricing information." *Id.* at 77. Instead, it bans differential pricing—a regulation of conduct—by requiring retailers to charge all consumers the same amount for every pack of cigarettes, regardless of whether the consumer uses a coupon or buys multiple packs. That is nothing like the no-surcharge law, which *allows* differential pricing based on how the consumer pays but regulates only how the difference is communicated.

Then there is the law banning credit-card companies from charging fees to cardholders who pay their bills electronically. 15 U.S.C. § 1637(*l*). That law regulates conduct because it forbids charging different amounts to consumers based on their payment method. The no-surcharge law does the opposite. And unlike "a consumer's credit balance," Resp. Br. 25, which reflects how much money the consumer owes to date, a dual-pricing merchant's "regular price" is solely a function of how the merchant conveys its prices to consumers.

Anti-gouging laws are even further afield. They regulate conduct because they prevent merchants from "charging grossly excessive prices" during market disruptions, N.Y. Gen Bus. Law § 396-r(1), requiring merchants to "adhere to [their usual] prices even when market conditions would allow for sharp price increases." Resp. Br. 32. A merchant who violates this law charges consumers too much money; she cannot bring herself into compliance just by changing how she characterizes her prices. Not so with the no-surcharge law.

The state also hypothesizes an anti-gouging law that would cap credit-card surcharges at 5%. *Id.* at 25. If this law were to apply regardless of how the price difference were conveyed (whether as a credit-card surcharge or cash discount), then it would be a regulation of conduct. But if the state were instead to *permit* large price differentials if conveyed as a cash discount, *see id.* at 48-49, then the law would regulate speech and the state would have to justify it if challenged by a merchant.

The state's amicus, Florida, adds a couple of alcohol laws to the list. *See* Fla. Br. 32-34. But neither is like the no-surcharge law. As to the first: It is true that, in some states, "bartenders may not offer 'free' alcoholic drinks, but they may sell discounted drink-and-food combinations and offer free food and entertainment." *Id.* at 32-33. But that is not the same conduct. In the latter scenario, customers have to *spend money* to receive drinks (by buying meals that include drinks). In the former, customers may receive drinks for *free*. Under the no-surcharge law, however, customers spend the same amount of money for the same thing in every scenario; the only difference is the merchant's speech.

As to the second: Florida suggests that laws prohibiting happy-hour discounts would be threatened. *Id.* at 33 n.19. It is hard to see how. The conduct those laws seek to prohibit is lowering alcohol prices for a short period of time, however communicated. But if a state were to interpret its law (oddly) to *permit* this conduct so long as the bar does not characterize its lower prices as "happy hour" prices but as new, one-hour-long "regular prices"—the way that New York permits merchants to charge more for credit so long as they do not characterize the additional amount as a surcharge—then the law would regulate speech and would have to satisfy scrutiny. The key question is whether liability turns on labeling: If so, scrutiny applies. If not, it doesn't.

As this discussion illustrates, our position does not threaten the basic proposition that price restrictions are regulations of economic conduct, or somehow "erase[] the line between protected speech and commercial conduct." Public Citizen Br. 3. Nor is it our position that "surcharges and discounts are always identical"—in every context—as New York repeatedly suggests. Resp. Br. 16; *see, e.g.*, *id.* at 1, 5, 27. Of course they're not. A credit-card discount is not the same thing as a credit-card surcharge. In *this* specific context, however, credit-card surcharges and cash discounts describe the same conduct: charging a higher price for using a credit card than for using cash. Allowing one but criminalizing the other is thus a regulation of speech, not conduct.

II. New York's consumer-protection rationales are meritless.

New York has not come close to meeting its "heavy burden" of satisfying *Central Hudson* scrutiny. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (plurality). To start, the state introduced no evidence below. That alone is fatal because, even assuming that the state's purported aims are "substantial in the abstract," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), "anecdot[es] and educated guesses" are not enough. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).

Evidence aside, the state's problem runs deeper: Ready alternatives exist that would be both *less restrictive* of speech and *more effective* in addressing the state's supposed consumer-protection aims. The state could cap the amount of the price difference (regardless of how it is characterized), require clear disclosure, or enforce existing false-advertising laws. Instead, the state went straight to criminalizing truthful speech.

1. Profiteering. New York's first rationale (preventing profiteering) illustrates the point. A law that capped the price difference between cash and credit—however expressed—would "far more effectively achieve" any anti-profiteering interest, without restricting protected speech. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring). Indeed, the state already authorizes "reasonable" fees "not to exceed the costs incurred" for state water or sewer bills paid by credit card. *See* N.Y. Pub. Auth. Law § 1045-j(4-a)(b). If profiteering were really the concern, why not follow this model instead of criminalizing speech?

The state offers no response except to claim that a "surcharge cap would trench on just as much, if not more, speech." Resp. Br. 48. But as long as the cap regulated the price difference no matter how it was characterized, the law would restrict *no* protected speech. The no-surcharge law, however, allows an unlimited price difference, but regulates only how it is characterized. "Before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick." *BellSouth*, 542 F.3d at 508; *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("regulating speech must be a last—not first—resort"). The state has not made this showing.

Nor has it explained why it permits a merchant to charge, for example, $100 for cash and $200 for credit if communicated as a discount. It cites two recent articles extoling the benefits of credit cards as a policy matter, but nothing that would support its decision to allow merchants to charge an excessive price difference if framed in a certain way. Resp. Br. 48.

The state also attempts to carry its burden by relying on Australia's experience with price-transparency reforms beginning in 2003. Resp. Br. 45. But that argument cites "outdated sources" that "predate" reforms "limit[ing] surcharges to 'the reasonable cost of acceptance'"—precisely the sort of narrowly tailored alternative that would more effectively address any profiteering concerns. Samuel Merchant, *Merchant Restraints*, 68 Okla. L. Rev. 327, 375 (2016); *see* Levitin Br. 17-20. These more recent reforms have reduced the cost of swipe fees in Australia by nearly half—and hence reduced the amount consumers pay to use credit. Levitin Br. 21; Frankel Br. 9-10.

2. Preventing deceptive tactics. The state's anti-deception interest similarly fails to overcome the obvious objection: If New York were really concerned about deception, why wouldn't a targeted false-advertising or disclosure regime *better* serve that interest—and do so without restricting truthful speech?

On this question, too, the state has no good answer. It says (at 49) that credit-card surcharges (unlike cash discounts) pose a greater "risk that they will mislead customers." But "[s]tates may not place an absolute prohibition" on information that is merely "potentially misleading … if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The state also repeatedly tries to convey the impression that its law targets only "bait-and-switch tactics," Resp. Br. 49—"upward adjustment[s] relative to a *previously conveyed* regular price," *id.* at 26-27. But merchants targeted by the state had notified customers of *both* cash and credit prices "at the same time," JA 106, and were "up front" about the additional cost. JA 114-15,

124. The petitioners likewise want to "clearly and transparently" disclose truthful information about lawful dual pricing. JA 60-61. Because "conviction may be had under [New York's law] regardless" or whether merchants' speech is deceptive, *Fulvio*, 517 N.Y.S.2d at 1011, the law "sacrifices an intolerable amount of truthful speech about lawful conduct," *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999).

So "why not first enforce existing state law"? *BellSouth*, 542 F.3d at 508. The state's response seems to be that the no-surcharge law supplements existing false-advertising laws with "criminal sanctions." Resp. Br. 51-52. As a defense of a statute that reaches *truthful speech*, that is hardly a point in the state's favor. Criminal statutes demand more—not less—scrutiny. And to the extent that the state wants to enforce this law to criminalize only false advertising, its ability to do so is not affected by petitioners' as-applied challenge.

3. Stimulating the retail economy. Finally, the states claims that its law "stimulat[es] its retail economy" by reducing the "confusion" that would arise from allowing merchants to frame the price difference as a surcharge. *Id.* at 52-53. But suppressing speech that highlights the cost of credit because it would "deter credit card use," *id.*, is just another way of rationalizing keeping consumers "uninformed for their own protection," *Rubin*, 514 U.S. at 497 (Stevens, J., concurring). That interest "does not suffice to justify restrictions of protected speech in *any* context," *id.*, and is "*per se* illegitimate," *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring). The First Amendment does not permit the state to criminalize speech to "keep[] the public in ignorance." *Va. State Bd.*, 425 U.S. at 770.

III. Because it prohibits rather than mandates speech, New York's law is not a disclosure requirement.

The United States agrees that, because liability under New York's law turns on "the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech." U.S. Br. 19. But its brief then takes an unexpected turn. It proposes a remand to allow New York another shot at an argument it abandoned below: that its surcharge ban is in fact a disclosure requirement.

The United States, however, takes no position on whether New York's ban really *is* a disclosure law, and instead offers reasons why New York's law may be materially different from the short-lived (and apparently never-enforced) federal precursor. *Id.* at 34. Nevertheless, the United States asks this Court to opine, in the abstract, that "a *sufficiently specific* law requiring only that a merchant display a credit-card price alongside the cash price *would* be a valid consumer-disclosure regulation." *Id.* (emphasis added); *see also id.* at 15-16 (stating that "[i]t is unclear" whether section 518 is such a law).

New York, for its part, says a "[r]emand is unnecessary" because its "surcharge prohibition"—the same prohibition it contends is a *ban on conduct*—may be viewed as a *speech mandate* and hence upheld as "a valid disclosure requirement" under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985), "for the reasons set forth by the United States." Resp. Br. 54-55.

The short answer to both the United States and New York is that there is no need for a remand or a *Zauderer* analysis because New York's law is not a disclosure requirement. This Court's cases recognize the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650.

Because "disclosure requirements trench much more narrowly on an advertiser's interests," they pass muster if "reasonably related" to a state interest. *Id.* at 651. By contrast, commercial-speech *prohibitions* are traditionally subject to intermediate scrutiny. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

New York's surcharge prohibition is just that—a prohibition. It tells merchants what they *may not* say ("[N]o seller ... may ..."), not what they *must* say. *See* N.Y. CA2 Br. 35 ("The only thing that plaintiffs cannot say is that their prices include a credit-card surcharge."); *Fulvio*, 517 N.Y.S.2d at 1015 ("[W]hat GBL § 518 *prohibits* is a price differential [if] characterized as an additional charge for payment by use of credit card."); JA 118 ("The law prevents [merchants] from saying that there is a 2% or 3% surcharge on heating oil, even if they disclose the surcharge prominently."). When the Attorney General's office tells merchants what to say, it advises them to use the state's preferred "discount" framing, not to disclose the total credit-card price in dollars and cents. JA 107-08, 115, 119, 125. And, from the start, supporters and defenders of the surcharge ban understood that it was the *opposite* of a disclosure rule, while its opponents (the Fed, the FTC, and consumer groups) advocated *replacing* it with a disclosure rule. Pet. Br. 11-14.

The hallmark of disclosure requirements is clarity. They mandate precisely what must be disclosed and how—often down to layout and font size. (Food manufacturers need not guess about what goes on the Nutrition Facts panel; mortgage lenders are not left in the dark about how to disclose interest rates.) As this Court explained in *Zauderer*, imposing serious penalties based on a disclosure law that fails to "specify precisely what disclosures [are] required" "would raise significant due process concerns." 471 U.S. at 653 n.15. To comply with the Due Process Clause and the First Amendment, a state must "articulate its disclosure rules" to give a "sure guide" to those tasked with following those rules. *Id.*

IV. New York's law is unconstitutionally vague.

Whatever else may be said about it, New York's no-surcharge law has not offered merchants a "sure guide." *Id.* "[I]nsofar as the vagueness doctrine is concerned," the law's validity "depend[s] as much on [its] enforcement history as [its] literal terms." *Smith v. Goguen*, 415 U.S. 566, 582 n.31 (1974). Yet, disregarding this history, the state dismisses our vagueness challenge as resting on mere "hypotheticals," and assures the Court that the statute's text gives merchants "more than enough" notice of its "obvious" reach. Resp. Br. 56-57.

The statute's nebulous reach is neither "obvious" nor of "hypothetical" concern to the petitioners, who face practical questions that the state refuses to answer. One petitioner, Expressions, engages in dual pricing but is "very concerned about how [it is] supposed to ensure [] compliance." JA 62. The other four forgo dual pricing, even though they would prefer it, because of the "real-world difficulty" of ensuring that the price difference would be lawfully communicated. JA 48; *see* JA 43-44, 52-53, 58. These practical problems are unavoidable: Customers will ask questions, and petitioners need to know how to respond. Though Expressions takes pains to frame the price difference as a discount, what if a customer calls asking for its prices—just as the Attorney General's office called scores of small merchants in recent years? JA 62. What is Expressions supposed to say?

Rather than answer, the state only compounds these difficulties. Even though a state prosecutor and a state judge agreed that the law prohibits telling customers that "it would cost more for a credit card purchase," *Fulvio*, 517 N.Y.S.2d at 1010, and a criminal conviction was secured on that basis, the state now assures this Court that "a seller is free to tell its customers that a credit card user ultimately pays more than a cash user." Resp. Br. 38-39. But the very fact that New York now claims to read the law more restrictively than it has been enforced—to cover labeling, signs, and advertising, but apparently not conversations—underscores its vagueness. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) (statute's "implementation" and "practice" revealed lack of clear standards). The text does not explain this difference, and merchants cannot be expected to read the Attorney General's brief in this case to learn what the law means.[1]

The state's "assurance it will elect not" to take the very positions it has taken in the past "is insufficient to remedy the constitutional violation." *F.C.C. v. Fox*, 132 S. Ct. 2307, 2318 (2012). "Just as in the First Amendment context, the due process protection against vague regulations does not leave regulated parties at the mercy of *noblesse oblige*." *Id.* (alteration omitted). The law's entire enforcement history—from *Fulvio* to recent sweeps—"is itself evidence of the danger in putting faith in government representations of prosecutorial restraint." *Stevens*, 559 U.S. at 480.

[1] "This Court's case law makes clear that [the Court is] not to give the Attorney General's interpretative views controlling weight." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). His view "does not bind the state courts or local law enforcement authorities," *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988), and he may change his mind or be replaced in office.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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