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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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June 15, 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)?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited 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*. This case concerns Cato because it restricts the freedom of speech of both retailers and consumers.

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 line from a popular movie sums up what credit card companies—through the New York State legislature—are doing by insulating themselves from consumer knowledge about the "swipe fees" they charge merchants to use their cards. *See* N.Y. Gen. Bus. Law § 518. While credit-card companies are certainly not the devil, they have used crony-capitalist tactics to persuade legislatures to use the power of government in order compel business owners to speak in a certain ways about how they price their goods—essentially hiding

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[1] Rule 37 statement: All parties received timely notice of *amicus*'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 that no person or entity other than *amicus* funded its preparation or submission.

themselves from market-forces at the expense of people's individual rights.

The Framers, however, drafted the Constitution with prevention of special-interest legislation—whether the credit card lobby or any other—in mind. Indeed, the idea of "factions" affecting the public interest was addressed by James Madison in Federalist 10. While Madison conceded that such interests could not be stopped completely, he acknowledged that certain steps could be taken to mitigate the "effects" of these groups, and the damage that they can do.

The First Amendment is one such protection. The right of the people to speak—even as to matters of economic concern—are to be protected by the fullest extent of judicial review. 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. COLLUSION BETWEEN CREDIT CARD COMPANIES AND STATE LEGISLATURES CANNOT BE USED TO CIRCUMVENT PROTECTED SPEECH

A. The Framers Sought to Protect Speech from the Type of Crony Capitalism the New York Statute Manifests

At the heart of this case is the practice known as "crony capitalism:" 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). But in reality, the term as a de-

scription is "misleading, as crony-capitalism is really not capitalism at all, but a distinct form of 'corporatism.'" Todd J. Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, Sup. Ct. Econ. Rev. 1, 2 (forthcoming) (draft of Aug. 26, 2015 available at http://bit.ly/28qJpsl). Corporatism "is 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." *Id.*

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.* at 3; *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 in our system of government—is not a modern phenomenon. Indeed, the Framers recognized the problem of government 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 how the Constitution would be drafted to protect 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 liberty 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 3 ("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 concern for the ability of factions to affect the economic rights of citizens through majoritarian bullying did not escape the Framers' effort to control factional mischief. *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 freely from governmental interference as to economic matters fits directly into this mold. Indeed, this Court has recognized time and again the importance of protecting economic speech from majoritarian control in favor of the public interest. *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 Has Been Lobbied to Insulate Credit Card Companies from Consumer Knowledge in the Market

In direct 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 market accountability. 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, however, 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 through private contract, they diverted their efforts to masking their presence in the cost of products 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 generally, Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong. 9 (1981). By 1984, lobbying efforts to hide swipe fees wore thin, and Congress let the 1976 amendment lapse.

Not to be deterred, the credit-card industry turned to the states, which promised new majorities to capture—and were successful in doing so in 10 states, including New York. Indeed, N.Y. Gen. Bus. Law § 518 was modeled after the 1976 amendment to the TLA. See *Expressions Hair Design v. Schneiderman*, 975 F. Supp.2d 430, 439 (S.D.N.Y. 2013) ("New York's no-surcharge provision, section 518, 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 New York trial court dealing 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 be-

[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.

havior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Id.* at 1011. 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. In the May 30, 1984 letter of the Assembly sponsor of the bill (Mr. Goldstein) to the Governor, recommending approval of that legislation, Mr. Goldstein notes that the concepts in the bill were identical to those contained in the Federal Truth in Lending Act (15 USC § 1601 et seq.).

Id. at 1012.

New York's legislature thus instituted the same unconstitutional labeling requirements that the card companies lobbied for at the federal level. This Court should grant the petition and recognize the improper motivations for restricting commercial speech.

II. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE CONSTITUTIONAL PROTECTION FOR THE FREEDOM OF SPEECH—COMMERCIAL OR OTHERWISE

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

This case presents the opportunity to confirm that the First Amendment provides the same protection to commercial speech as any other speech that has been

abridged based solely on its content. The Court has repeatedly held that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584–85 (2010) (internal citations omitted). This concept is especially important in light of the fact that state legislatures are regulating the speech of their citizens to further the economic goals of particular interests at the expense of individual rights. This case affords the Court a chance to stop this disturbing practice.

As many members of this Court have observed, the distinction between speech that is commercial in nature and speech that is not, has not been grounded in any clear rationale. *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 concurring 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.). This is not surprising because the decision to place truthful, non-misleading 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.

The fact that there has been no clear rationale for why commercial and non-commercial speech are treated differently has, inevitably, lead to an unstable and unworkable doctrine. *See generally,* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 Harv. L. Rev. 1892 (2007). The Court itself has acknowledged on several occasions that the definition of "commercial speech" is itself confusing and vague. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 184 (1999); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court 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). Indeed, 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 actions abridging speech based on its content—regardless whether dollar signs are involved—will be given the highest degree of judicial scrutiny.

B. This Case Underscores the Need for Coherence and Clarification, Particularly Given Conflicting Precedent

N.Y. Gen. Bus. Law § 518 is facially a content restriction on how merchants can present their prices, and not a mere restriction on their conduct. The district court below—and other courts that have dealt with nearly identical statutes—came to the same conclusion. In striking down the law, the district 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 pointed to the "Alice in Wonderland" distinction without a difference:

> [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 speech restriction, that court opined that the law smelled of "plain old-fashioned speech suppression." *Dana's Railroad Supply v. Attorney General, 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 vivid language is hard to ignore.

In sum, lower courts could not be clearer or more direct about their disagreement regarding the nature of the regulation here and the kind of judicial scrutiny to apply. The issues are squarely presented and cry out for this Court's attention.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

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June 15, 2016