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July 13, 2017

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Expressions Hair Design v. Schneiderman*, Nos. 13-4533 (L); 13-4537

Dear Ms. Wolfe:

Appellant Eric T. Schneiderman, Attorney General of the State of New York, submits this letter brief in accordance with the Court's Amended Order, dated May 23, 2017, directing the parties to address three issues: (1) whether the Court should certify questions to the New York Court of Appeals, and, if so, what questions should be certified; (2) whether New York's credit-card surcharge statute, General Business Law (GBL) § 518, as applied to plaintiffs' practice of posting a single dollars-and-cents sticker price, is valid under First Amendment principles governing commercial disclosures, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); and (3) whether GBL § 518 validly limits commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), as applied to plaintiffs' pricing scheme.

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Because GBL § 518's constitutionality turns on threshold questions of statutory interpretation, this Court should certify two questions of state law to the New York Court of Appeals and defer consideration of plaintiffs' First Amendment claims. Specifically, this Court should certify: (1) whether a seller complies with GBL § 518 so long as it lists the total dollars-and-cents price charged to credit-card users when it posts prices, as was the case under a prior federal statute; and (2) whether GBL § 518 imposes no other restrictions on a seller's communications, including speech describing a particular pricing structure. Certification is warranted here because, among other reasons, the New York Court of Appeals has never interpreted GBL § 518, and the answers to these unaddressed state-law questions directly affect the relevant First Amendment analysis.

If this Court declines to certify, it should uphold GBL § 518 as a constitutional regulation of commercial speech under either *Zauderer's* principles for disclosure regulations or *Central Hudson*'s standards for affirmative limitations on commercial speech. *Zauderer* provides the appropriate standard because, as the Attorney General has consistently maintained, New York's credit-card surcharge law parallels a lapsed federal statute in effectively requiring sellers to post the *total* price they charge to credit-card users in dollars-and-cents form (e.g., "$12.50 with a credit card," or "$12.50" as the baseline price for all customers), rather than either withholding that total price until the point of sale, or listing it solely as an addition to a lower dollars-

and-cents price charged to other customers (e.g., "$10 + 25% with a credit card"). So long as a seller posts the total dollars-and-cents price that credit-card users will pay, the statute imposes no other restrictions on the seller's speech. Such a scheme easily satisfies *Zauderer*'s reasonableness standard for regulations that require sellers to do no more than provide additional, accurate information to prevent consumers from misapprehending the terms of a commercial transaction. And even if this Court were to construe GBL § 518 as an affirmative limitation on commercial speech, the statute would nonetheless satisfy *Central Hudson* because the statute implements a narrow regulation that directly advances the State's substantial interests in preventing deceptive and abusive sales tactics and protecting consumers from unfair profiteering.

Statement of the Case[1]

A. Statutory Background

1. The lapsed federal surcharge-disclosure regime

New York's surcharge prohibition was modeled on a lapsed federal statute and was intended to serve the same policy purposes as that federal law. The operative provision of this prior federal statute stated that "[n]o seller in any sales transaction

[1] The full background is set forth in the Attorney General's opening brief. Corrected Br. for Appellant Schneiderman ("Br.") at 4-23. This summary provides background relevant to the issues raised in the Court's May 2017 Order.

may impose a surcharge on a cardholder who" uses a credit card rather than cash or another form of payment.[2] Pub. L. No. 94-222, § 3(c)(1), 90 Stat. 197, 197 (1976). Congress further defined the term "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed" on a cash-paying customer, and defined the term "discount" as "a reduction made from the regular price." *Id.* § 3(a), 90 Stat. 197. Congress later further defined the term "regular price" as (1) the posted price, if only a single price is posted; or (2) the credit-card price, if a seller posts that price along with other prices or posts no prices at all. Cash Discount Act, § 102(a), Pub. L. No. 97-25, 95 Stat. 144, 144 (1981).

As the United States observed as amicus curiae in the Supreme Court (Br. for the United States ("U.S. Br.") at 7-9, 23-25, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017)), the practical effect of the federal statute was to require sellers to disclose their total credit-card prices to customers in dollars-and-cents form. Sellers could comply with this requirement by posting a single price for all users, including credit-card users, thus ensuring that no surcharge would be imposed in excess of this "regular price." *See* S. Rep. No. 97-23 ("1981 Report"), at 3-4 (1981). A seller could also charge credit-card users and cash users different amounts so long as it listed the total credit-card price in dollars-and-cents form

[2] For simplicity, we will use the term "cash" to refer to payment through means other than a credit card, including cash, checks, or debit cards.

alongside the cash price—a practice known as "dual pricing." Thus, a seller "could violate the [federal] surcharge ban only by posting a single price and charging credit card users more than that posted price." *Expressions*, 137 S. Ct. at 1147.

The legislative history of the prior federal statute made clear that Congress intended sellers to comply with the law by disclosing the total dollars-and-cents prices they were charging to credit-card users. As a Senate Report explained, Congress aimed to ensure that customers would see "at least the highest possible price they will have to pay" for using a credit card when they see a posted price. 1981 Report at 4. Without such a rule, witnesses warned that sellers could engage in bait-and-switch tactics that lure consumers into a store "on the basis of the 'low, rock-bottom price'" and then collect surprise credit-card fees at the register. *Id.*; *see Fair Credit Billing Act Amendments: Hr'g Before the H. Subcomm. on Consumer Affairs*, 94th Cong. 8 (1975) ("*FCBA House Hr'g*") (Consumer Federation of America). Witnesses further cautioned that merely disclosing a credit-card fee as an additional percentage or dollar amount—such as $126.50 plus a 3% credit-card surcharge—would not be enough to avoid customer deception or confusion because forcing consumers to perform such mathematical computations would be "burdensome and confusing." *FCBA Two-Tier Pricing: Hr'g Before the S. Subcomm. on Consumer Affairs*, 94th Cong. 8 (1975) ("*FCBA Senate Hearing*") (Federal Reserve Board member).

The legislative history further explains that Congress intended to combat another consumer harm, namely, sellers' use of credit-card fees to extract windfall profits from customers. Congress was concerned that sellers would not limit surcharges to the minimum amount necessary to recoup the fees that sellers pay to credit-card issuers. *FCBA House Hr'g* at 6-8, 17, 89-90. Rather, sellers would use credit-card surcharges to "maximize profits" by collecting fees far exceeding any cost of credit. And sellers would not lower the prices they charged non-credit-card customers if permitted to surcharge—a failure that would result in sellers collecting windfall profits from credit-card users while other consumers received "no benefit." *Id.* at 1; 127 Cong. Rec. 4225 (Sen. Garn) ("If the Senator believes that the general price level will go down . . . and that the surcharge will not be just an additional cost to the consumer, then I suggest that he believes in the tooth fairy.").

2. New York's surcharge statute

In 1984, when the federal surcharge law expired, the New York Legislature enacted its own statute to preserve the federal law's consumer protections. New York's law adopts the operative provision of the prior federal law. *See* GBL § 518. New York did not expressly incorporate the federal definitions into state law. The legislative history does not specifically show the reason for that drafting decision, but the history is clear that the Legislature intended to model New York's law after the federal statute. (Joint Appendix (J.A.) 110-112.) The legislative history further

explains that New York aimed to continue the same consumer-protection purposes as the prior federal law—including ensuring that credit-card customers would be notified in advance of the total dollars-and-cents price they would actually pay, and reducing sellers' incentives to reap windfall profits. (J.A. 110-112, 114.)

B. Plaintiffs' Lawsuit

1. Plaintiffs' claims

Plaintiffs state that they want to impose a surcharge on credit-card users by posting a single dollars-and-cents price that applies to cash users, while tacking on an "additional credit-card surcharge, expressed either as a percentage surcharge or a dollars-and-cents additional amount." *Expressions*, 137 S. Ct. at 1149. Plaintiffs say that they do not wish to display "the total credit-card price as a dollar figure." (J.A. 151.) And plaintiffs further seek to "characterize the price difference [between cash and credit-card users] as a surcharge" rather than a "discount," Transcript of Oral Argument (Tr.) at 1, *Expressions*, 137 S. Ct. 1144. (*See* J.A. 59, 88, 98.) Plaintiffs assert that New York's surcharge law violates the First Amendment because it regulates the specific words that they can use to describe their prices, "no matter how [they] display [their] prices," *Expressions*, 137 S. Ct. at 1154 (Sotomayor, J., concurring in the judgment). (*See* J.A. 57 (plaintiffs' complaint alleging that GBL § 518 bars sellers from "calling the [price] difference a 'surcharge'").)

2. Prior proceedings

The United States District Court for the Southern District of New York (Rakoff, J.) held that GBL § 518 violated the First Amendment. On appeal, this Court vacated the judgment and remanded for dismissal of the complaint. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *vacated and remanded by* 137 S. Ct. 1144.

The Court first analyzed the constitutionality of GBL § 518 as applied to plaintiffs' desired "single sticker" pricing scheme—i.e., posting a single dollars-and-cents price and collecting an additional amount from credit-card users. The Court held that New York's prohibition of this pricing scheme regulated conduct and thus did not implicate the First Amendment. *Id.* at 130-34.

The Court then considered whether GBL § 518 also applied to other pricing schemes that sellers such as plaintiffs might adopt to comply with the statute—such as posting both a cash price and a credit-card price in dollars and cents, or posting a single numeric credit-card price and describing the difference between that price and a lower price paid by cash users as "a 'surcharge' or an 'extra' charge." *Id.* at 135-36. This Court found it unlikely that GBL § 518 prohibited such practices, in light of the fact that the lapsed federal statute plainly did not, but it abstained from issuing a definitive ruling on these questions in light of the absence of controlling New York authority. *Id.* at 137-40.

3. The United States Supreme Court's decision

The Supreme Court vacated this Court's decision and remanded for further proceedings. The Court limited its review to plaintiffs' proposed practice of posting a single dollars-and-cents price and an "additional credit-card surcharge" amount—without also posting the total dollars-and-cents price paid by credit-card users. *Expressions*, 137 S. Ct. at 1149. The Court concluded that New York's prohibition of this pricing practice implicated speech because New York law does not restrict "the amount [that sellers] are allowed to collect from a cash or credit card payer," but only "how sellers may communicate their prices." *Id.* at 1151. That is, a seller that "wants to charge $10 for cash and $10.30 for credit" and "wishes to post a single sticker price . . . must display $10.30 as his sticker price," instead of $10. *Id.*

The Court declined to analyze whether New York's surcharge statute comports with the First Amendment, instead remanding for this Court to determine the law's constitutionality. The Court noted that determining the law's validity might require further interpretation of New York's surcharge statute, *see id.* at 1151 n.3, but did not address whether state-law questions should be certified.

Three justices concurred only in the judgment. Justices Sotomayor and Alito would have remanded the case to this Court with "directions to certify the case to the New York Court of Appeals for a definitive interpretation of the statute." *Id.* at 1153. As they explained, New York's surcharge law could be interpreted in at least

three ways: (a) it could prohibit any price differential between cash and credit-card users; (b) it could parallel "the lapsed federal ban to permit" differential pricing so long as the seller displayed the total credit-card price in dollars-and-cents form; or (c) it could prohibit a seller from describing a price differential "as a 'surcharge,' no matter how he displays his prices." *Id*. at 1154. Justices Sotomayor and Alito would have asked the New York Court of Appeals to issue a definitive interpretation of GBL § 518 because its interpretation could narrow or obviate any First Amendment inquiry. *Id.* at 1158.

Justice Breyer agreed in a separate opinion that "it is not clear just what New York's law does," that a clarifying construction would control any First Amendment analysis, and that certification "may well be helpful." *Id.* at 1152-53.

Argument

I. This Court Should Certify to the New York Court of Appeals Questions about the Scope of New York's Surcharge Law.

The Court should certify at least two questions of state law to the New York Court of Appeals concerning the proper interpretation of GBL § 518: first, whether a seller complies with the surcharge law so long as it lists the total dollars-and-cents price charged to credit-card users; and second, whether the surcharge law does not otherwise impose restrictions on a seller's communications, including its communications of other prices or its characterization of any price differentials.

Under the federal statute on which New York's law was based, the answer to both questions was "yes," as the federal government has made clear. (*See* U.S. Br. at 23-26.) The Attorney General has consistently maintained that both the text and history of New York's statute support interpreting it to operate in the same manner as the prior federal regime. *See* Br. at 48-54; Mem. of Law in Supp. of Attorney General's Mot. to Dismiss ("Mot. Dismiss Br.") at 21-22, 38-39 (ECF No. 27). As the Attorney General has explained, New York's prohibition against "surcharges" should be interpreted as prohibiting a seller from imposing any "charge in excess" of a single posted dollars-and-cents price—i.e., the seller's regular or baseline price. *Expressions*, 808 F.3d at 127-128. Under this reading, the statute does not apply to a seller that either posts a regular price that is the price that credit-card users pay, or that posts a total dollars-and-cents credit-card price along with a (lower) price for cash users. In the latter scenario, the seller has not imposed an unlawful "surcharge" because it is not adding an unlawful fee on top of a discernible regular price—a result that parallels the effect of the prior federal law.

Notwithstanding the Attorney General's consistent interpretation, significant dispute has arisen over the scope of GBL § 518. Three justices of the Supreme Court expressed deep uncertainty about the precise scope of the statute's prohibition, and strongly recommended that the New York Court of Appeals resolve this uncertainty. See *supra* at 9-10. This Court found the statute to be clear about the pricing practice

that it prohibited (i.e., adding an additional fee for credit-card use on top of a single posted regular price), but found the law's application unclear as to other pricing practices that sellers might adopt to comply with the statute—such as dual-pricing schemes. *See* 808 F.3d at 135-36, 139-42. Finally, plaintiffs have consistently argued that New York's law should be read more broadly than the federal statute to prohibit sellers from describing their prices in certain ways, such as characterizing a price differential as a "surcharge" on credit-card users. See *supra* at 7. New York's highest court should resolve this lingering interpretive uncertainty over GBL § 518.

Three criteria inform whether to certify a state-law issue to New York's highest court: (1) whether that court has previously "addressed the issue," (2) the importance of the state-law question and whether its resolution depends on "public policy choices," and (3) whether the question "is determinative" of the appeal. *Berman v. City of New York*, 770 F.3d 1002, 1005 (2d Cir. 2014) (quotation marks omitted). All three factors support certification here.

First, the New York Court of Appeals and the intermediate appellate courts have never interpreted GBL § 518—an absence of appellate authority that counsels strongly in favor of certification. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153 (2d Cir. 2001). Plaintiffs have relied on a single reported prosecution to support their interpretation, *People v. Fulvio*, 136 Misc. 2d 334 (Crim. Ct. Bronx County 1987) (*Fulvio II*), but, as Justice Sotomayor noted in her concurrence, that decision "does

not clear up the ambiguity" created by the absence of any other state-court precedent. *Expressions*, 137 S. Ct. at 1154 n.2; *see also Expressions*, 808 F.3d at 125 (finding *Fulvio II*'s holding unclear because it failed to address a critical factual ambiguity). Indeed, this single trial-court decision does not bind any other court in New York. *See Expressions*, 137 S. Ct. at 1154 n.2. And the Attorney General's interpretation of the statute likewise does not bind the state courts or other state enforcement authorities. Without more authoritative state-court guidance, this Court "cannot predict how the State's highest court would" rule on the statute's proper scope. *Berman*, 770 F.3d at 1007.

Second, the proper interpretation of GBL § 518 implicates important "value judgments and policy choices" that affect consumers and businesses throughout the State. *Schoenefeld v. State*, 748 F.3d 464, 470 (2d Cir. 2014). The Legislature enacted the surcharge rule to strike a "careful balance" between consumer-protection concerns and the countervailing interest of businesses "to prosper with a minimum of direct government regulation." (J.A. 111.) The state courts should have the opportunity to consider that balancing of public and private interests in construing the statute. *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013).

Third, the scope of GBL § 518 is dispositive of this case because it will determine the appropriate First Amendment analysis. For example, the parties agree that the statute would not violate the First Amendment if it were interpreted to

prohibit sellers from imposing *any* price differential on cash and credit-card users—including a cash discount. *See* Corrected Br. for Plaintiffs-Appellees ("Pls. Br.") at 35-36; *see also Expressions*, 137 S. Ct. at 1158 (Sotomayor, J., concurring). While the Attorney General has not previously endorsed this interpretation, four justices on the Supreme Court recognized that it was supported by the statute's "plain text,"[3] and the Court of Appeals could adopt this reading.

If the Court of Appeals were to conclude instead that GBL § 518 permitted some forms of differential pricing, its resolution of the state-law questions identified above would still narrow or at least "materially change the nature of" this Court's First Amendment inquiry—specifically, by affecting the First Amendment standards and levels of scrutiny that would apply here. *Osterweil*, 706 F.3d at 143. The Attorney General has argued that the relevant First Amendment standard is *Zauderer*'s rational-basis standard for disclosure regulations, or at most *Central Hudson*'s framework for commercial-speech regulations, based upon his interpretation of GBL § 518 as paralleling the prior federal regime. See *supra* at 11. *See Expressions*, 137 S. Ct. at 1151 n.3; *id.* at 1158 (Breyer, J., concurring). By

[3] *See Expressions*, 137 S. Ct. at 1153-54 (Sotomayor, J., concurring, joined by Alito, J.); *id.* at 1153 (Breyer, J., concurring) ("On its face, the law seems simply to tell merchants that they cannot charge higher prices to credit-card users."); Tr. 24 (Kagan, J.) ("The law as written actually can be read . . . as just requiring a single price.").

contrast, plaintiffs have argued for "heightened" scrutiny (Pls. Br. at 24) based on their interpretation of GBL § 518 as "prohibit[ing] a merchant from characterizing the difference between the cash and credit card prices as a 'surcharge,' no matter how he displays his prices," *id.* at 1154 (Sotomayor, J., concurring). An authoritative interpretation of the statute would thus "at least substantially modify[] the federal constitutional question" presented. *Scopetta*, 344 F.3d at 168.

Certification would also serve critical federalism interests in this case. As this Court has explained, certification allows the state courts to determine in the first instance whether to apply the canon of constitutional avoidance to prevent a state law from being invalidated on federal constitutional grounds. *See Tunick v. Safir*, 209 F.3d 67, 75 (2d Cir. 2000). Under these circumstances, the Court should not "hold a duly enacted state law unconstitutional based entirely on speculation that the New York courts might give it an expansive and arguably problematic reading." *Expressions*, 808 F.3d at 139. Rather, the New York Court of Appeals "should be afforded the opportunity to adopt the narrower, less problematic interpretation," *id.* at 138, "using the interpretive tools, presumptions, and standards" that it deems proper, *Serio*, 261 F.3d at 152.[4]

[4] This Court previously declined to certify because it deemed the factual record to be insufficiently developed regarding plaintiffs' intended pricing practices. *See Expressions*, 808 F.3d at 140-41. This concern is no longer present because plaintiffs clarified at the Supreme Court that their constitutional challenge is limited

II. If the Court Declines to Certify, It Should Uphold the Surcharge Statute.

If the Court declines to certify any questions to New York's highest court and addresses the merits of plaintiffs' challenge, it should conclude that GBL § 518 is a valid commercial-speech regulation under either *Zauderer*'s principles for disclosure requirements or *Central Hudson*'s standards for affirmative limitations on commercial speech. *Zauderer*'s "rational basis test," *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2000), applies to commercial-speech regulations that sellers can comply with by disclosing "accurate, factual, commercial information," *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001). By contrast, *Central Hudson*'s somewhat stricter test applies to commercial-speech regulations that affirmatively prohibit sellers from conveying information to consumers—for example, a prohibition against "separately stating" a state-imposed tax "on the bill." *Bellsouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 500 (6th Cir. 2008). Such an affirmative restriction on commercial speech is constitutional if it directly advances a substantial state interest that could not "be served as well" by a more limited speech regulation. *Central Hudson*, 447 U.S. at 564.

Zauderer supplies the appropriate framework here because, as under the

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to a scheme in which they post a single dollars-and-cents price and tack on an additional credit-card surcharge in the form of a percentage or dollar amount, without posting the total credit-card price. *See Expressions*, 137 S. Ct. at 1149.

lapsed federal statute, a seller can fully comply with GBL § 518 by posting the total dollars-and-cents price that it charges to credit-card users. The statute does not otherwise restrict how sellers characterize their prices or how they describe the differential between credit-card prices and prices for other methods of payment. A seller thus violates GBL § 518 only by posting a single price in dollars-and-cents form and charging credit-card customers an "additional . . . surcharge, expressed either as a percentage surcharge or a dollars-and-cents additional amount," *Expressions*, 137 S. Ct. at 1149. That seller can come into compliance with the law simply by posting an additional piece of information—the total dollars-and-cents price charged to credit-card users—which it may disclose either by setting its single-sticker price as the credit-card price, or by posting the full credit-card price alongside a (lower) cash price.

Zauderer's principles for evaluating disclosure regulations thus apply to New York's law because a seller can always come into compliance with GBL § 518 simply by providing more information to customers. So construed, New York's statute satisfies the *Zauderer* test because requiring sellers to provide the total dollars-and-cents price charged to credit-card users is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. And even if construed not as a disclosure requirement but as an affirmative restriction on commercial speech, GBL § 518 would satisfy *Central Hudson* because

it directly advances a substantial state interest that could not "be served as well" by a more limited speech regulation. 447 U.S. at 564.

A. The Surcharge Statute Is Valid Under *Zauderer*'s Framework for Commercial Disclosure Requirements.

As under the lapsed federal statute, a seller complies with New York's surcharge law so long as it conveys to customers the total credit-card price in dollars-and-cents form, rather than withholding that information or conveying the credit-card price instead through a more complicated mathematical operation. The total price that a seller will charge a customer who uses a credit card is "purely factual and uncontroversial information about the terms under which" the seller is offering to engage in its own commercial transaction. *Zauderer*, 471 U.S. at 651. Indeed, it is information that a seller will inevitably convey to a credit-card customer even under plaintiffs' proposed pricing scheme at the close of any sale, when all price adjustments are factored into the final price. New York's surcharge law, like the federal statute, thus effectively requires only that a seller communicate this price information earlier in the commercial transaction—when it posts prices—rather than withholding the dollars-and-cents credit-card price until the end of the sale.

So long as a seller makes the required disclosure of credit-card prices, GBL § 518 imposes no restrictions on the seller's communication. Contrary to plaintiffs' contentions, neither the text of the statute nor its practical effect restricts a seller

from providing consumers with additional information about its prices—including characterizing its prices as imposing a "surcharge" for credit-card use or spelling out that the listed dollars-and-cents price charged to credit-card users includes a percentage or dollar amount added to the price charged to cash users. The statute thus contrasts sharply with laws that affirmatively *prohibit* a seller from conveying information to consumers. See *supra* at 16-17. Unlike those statutes, GBL § 518 does not forbid any particular price information from being communicated; it simply requires that one particular form of price information—the total dollars-and-cents credit-card price—always be conveyed.

To be sure, GBL § 518 does prohibit sellers from conveying their prices in a way that omits a total dollars-and-cents price for credit-card users. But *any* disclosure requirement necessarily prohibits speech that excludes the mandatory disclosure: for example, the disciplinary rule at issue in *Zauderer* effectively forbade attorneys from advertising their services without disclosing the risk that clients might be exposed to significant litigation costs. *See* 471 U.S. at 650-51. The relevant distinction between disclosure requirements evaluated under *Zauderer* and affirmative limitations on speech evaluated under *Central Hudson* is thus not whether any particular form of communication is prohibited, but instead whether a seller can comply with the regulation at issue by providing more information, or is instead forced to restrict its speech. For true limitations on commercial speech, a

seller's only option will be to refrain from communicating certain information. By contrast, for commercial regulations that are appropriately subject to *Zauderer*, a seller will have the option of complying by providing more information to customers. *See Zauderer*, 471 U.S. at 650. It is thus appropriate to apply here *Zauderer*'s test for reviewing laws involving commercial-speech disclosures.

GBL § 518 satisfies *Zauderer* because requiring sellers to provide the total credit-card price when prices are posted is "reasonably related to the State's interest in preventing" consumers from being misled about the price they will pay when they use a credit card. *Id.* at 651. Commercial experience and common sense support the Legislature's "intuitive conclusion that customers are likely to be deceived by price quotes" that provide only a single dollars-and-cents figure that is lower than the price they will actually be charged if they use a credit card. *Spirit Airlines Inv. v. U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012). Ensuring that consumers are "exposed to the highest price" they might have to pay when they see prices, 1981 Report at 4, is a reasonable way to combat such "consumer confusion about the total price" they might incur, *Spirit Airlines*, 687 F.3d at 414-15. The D.C. Circuit recently reached a similar conclusion, upholding under *Zauderer* a Department of Transportation regulation that requires airlines to list most prominently the "total, final price of air travel" in their airfare advertisements, rather than lower prices that excluded certain costs such as taxes. *Id.* at 413; *see also Poughkeepsie Supermarket*

Cop. v. County of Dutchess, 140 F. Supp. 3d 309, 311, 316 (S.D.N.Y. 2015) (requirement that stores list numeric price on individual items, rather than only on shelves, reasonably protected "consumers' interest in obtaining accurate, accessible price information"), *aff'd*, 648 F. Appx. 156 (2d Cir. 2016).

Although the *Zauderer* framework "does not demand evidence or empirical data to demonstrate the rationality of mandated disclosures," *Connecticut Bar Assoc.*, 620 F.3d at 97-98, ample evidence supports the reasonableness of the Legislature's determination that a posted price is misleading when it lacks the total credit-card price. Federal legislators and consumer advocates explained the genuine concern that customers can be lured into an establishment on the basis of a low single-sticker price, "only to find at the cash register that the price will be higher if a credit card is used." 1981 Report at 4; *see FCBA House Hr'g* at 8. Indeed, consumers in New York and other jurisdictions have been the victims of such bait-and-switch tactics, particularly from gas stations that lure drivers with a single listed price and then charge more at the pump for credit-card users. (J.A. 197, 200). *See* CHOICE, Credit Card Surcharging in Australia, 4, 8, 11, 14 (2010).

The Legislature also reasonably adopted the prior federal surcharge law's requirement that sellers post their credit-card prices in dollars-and-cents format when making the necessary disclosure. The federal definitions required that the credit-card price be "tagged or posted" as a "price," i.e., the total numeric dollar

amount that the seller would collect from a consumer who used a credit card. Cash Discount Act, § 102(a), *supra*, 95 Stat. at 144. This disclosure format rationally combats consumer misperception about credit-card prices because consumers are more likely to understand the credit-card price if they see the price expressed as a total dollars-and-cents figure, i.e., $92.69, rather than a mathematical formula, i.e., $89.99 plus a 3% credit-card surcharge. *See* Tr. 20 (Kagan, J.) (posting $32.46 plus a 2% credit-card fee "require[s] people to do some work" to understand the credit-card price). And the difficulty of engaging in such mathematical calculations only increases when customers compare multiple prices at different times. *See FCBA House Hr'g* at 8; *see also Poughkeepsie*, 140 F. Supp. 3d at 311 (numeric price-disclosure "facilitated informed shopping"). In light of the prior "congressional record demonstrating" the consumer confusion that occurs when pricing systems lack actual credit-card prices, the Legislature's determination that consumers would be misled by such systems was "hardly speculative." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (quotation marks omitted).

The requirement that a seller provide the full credit-card price rather than a cash price with a mathematical add-on is not "overly burdensome" on sellers. *See id.* at 249. The required disclosure is not lengthy or complicated—the seller must post a dollars-and-cents figure that reflects its own numeric credit-card price. And sellers retain considerable flexibility to choose "the manner and method by which

they will" post their prices, including listing a single dollars-and-cents price charged to credit-card users while offering a cash discount, or posting both the credit-card price and a lower cash price in dollars-and-cents form. 1981 Report at 4. Sellers further remain free to provide further information or descriptions about their prices, in addition to the credit-card price. *See Spirit Airlines*, 687 F.3d at 409.

The Legislature also reasonably allowed sellers to offer a cash discount, without requiring that sellers post the full numeric cash price when they post prices. Sellers have little incentive to mislead consumers about the possibility of obtaining a cash discount because broadcasting discounts helps to "bring consumers into the store." *Cash Discount Act: Hr'g Before the S. Subcommittee on Consumer Affairs* ("*CDA Senate Hr'g*"), 97th Cong. 27 (1981). And unlike consumers who see only the lower cash price and then are unfairly surprised by a higher credit-card price, customers who see only the higher credit-card price will, "at worst," learn that they must pay less than they expected if they use cash. *FCBA Senate Hearing* at 86.

The statute's reasonableness is also not undercut by the fact that it does not necessarily require disclosure of the final price that a customer will pay inclusive of other fees, such as sales tax or shipping charges. A disclosure requirement is not subject to attack for being "'underinclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate." *Zauderer*, 471 U.S. at 652 n.14. States

are entitled to make legislative judgments about which fees are likely to mislead consumers absent particular price disclosures. *See National Elec.*, 272 F.3d at 116.

B. Even If the Surcharge Statute Operates as an Affirmative Restriction on Commercial Speech, It Satisfies the *Central Hudson* Test.

The district court reasoned that New York's surcharge statute operates as an affirmative limitation on commercial speech, rather than a disclosure requirement, because it prohibits sellers from conveying only a (lower) single-sticker price for cash users, and then adding an additional fee for credit-card users. (J.A. 42.) But this ostensible "restriction" is simply another way of describing GBL § 518's disclosure requirement—the problem with posting only a lower single-sticker price for cash users is that the seller has not conveyed the dollars-and-cents price for credit-card users. This characterization of GBL § 518's practical effect thus would not prevent the application of *Zauderer*. *See Milavitz*, 559 U.S. at 251 (applying *Zauderer* despite plaintiffs' preference to refer to themselves as a law firm without the required disclosure to which they objected). But even if GBL § 518 were deemed to be a commercial-speech restriction, it would satisfy *Central Hudson* because it directly advances a substantial state interest that could not "be served as well" by a more limited speech regulation. 447 U.S. at 564.

1. New York's Interest in Reducing Deceptive and Unfair Sales Tactics.

New York has a substantial interest in preventing sellers from engaging in "misleading, deceptive, or aggressive sales practices" that harm consumers and the State's economy. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality op.). The surcharge prohibition directly furthers this interest.

As explained, when sellers are not required to post the full credit-card price, there is a risk that they will mislead consumers by posting a low cash price and then collecting surprise credit-card fees at the register. And even when sellers post credit-card surcharges as percentage or dollar figures added to a cash price, such disclosures "may not be sufficient . . . to prevent something akin to the troublesome 'bait and switch' technique." *FCBA Senate Hr'g* at 85-86. As economists, consumer advocates, and federal legislators have explained, the unique prominence that consumers give to a seller's listed dollars-and-cents price leads them to anchor their expectations on that price. *See CDA Senate Hr'g* at 18; National Economic Council, *The Competition Initiative and Hidden Fees*, at 8 (Dec. 2016) *(*"*Hidden Fees*") ("[M]any consumers do not focus on the full price, but rather buy on the basis of the lower price."). Merchants can take advantage of the powerful role that a single listed price plays in a retail transaction by listing a lower dollars-and-cents price without displaying the higher credit-card price—a tactic that lures customers even when a seller displays the surcharge as a mathematical computation. Ian Lee et al., *Credit*

Where It's Due 21 (Oct. 2013) at 22. Indeed, similar tactics that obscure a dollars-and-cents price inclusive of other types of extra fees have raised significant consumer-deception concerns—such as ticket sellers that post a numeric concert ticket price and then tack on a percentage convenience fee. *Hidden Fees* at 9-14.

Prohibiting sellers from posting only a single-sticker price and then collecting credit-card fees directly advances New York's goal of preventing such misleading practices. (J.A. 110.) Ensuring that consumers are exposed to the higher credit-card price in an easily understood and familiar format reduces consumer deception and confusion about a seller's credit-card price, *see Hidden Fees* at 16, and prevents consumers from being deterred from using credit cards, *see* Br. of Amici Curiae Credit Union National Association, et al. at 17-22, *Expressions*, 137 S. Ct. 1144. And encouraging consumers to compare prices furthers New York's interest in protecting its retail economy. (*See* J.A. 114.)

2. New York's Interest in Reducing Profiteering.

The surcharge statute also directly furthers New York's substantial interest in preventing sellers from levying excessive fees on customers. *See Griffith v. Connecticut*, 218 U.S. 563, 569 (1910). The law does so by eliminating a specific pricing practice that results in sellers gouging credit-card users, without providing any corresponding price reduction to other consumers.

Actual experience in jurisdictions that allow credit-card surcharges confirms that excessive credit-card fees are a genuine concern. For example, when Australia allowed surcharging, the average credit-card fee skyrocketed, despite predictions that competition would prevent that result. *See* Marc Rysman & Julian Wright, The Economics of Payment Cards 13 (Nov. 2012). And sellers in jurisdictions that allow surcharging have likewise reaped excessive fees from credit-card users—including surcharges that exceed the fees that sellers pay to credit-card issuers—particularly in markets where consumers are less able to use cash. *See* CHOICE, Credit Card Surcharging in Australia 4, 8, 14 (2010).

When surcharges are allowed, excessive fees to credit-card users are not offset by any corresponding price reduction for other customers. (*See* J.A. 112.) Plaintiffs assume otherwise, suggesting that, without the prohibition, sellers would reduce their single-sticker prices and levy excess fees only on credit-card users. (J.A. 42-43, 47.) But this supposition is not supported by real-world experience or economic studies. *See* Allen Rosenfeld, Point-of-Purchase Bank Card Surcharges 7-8 (2010); Lee, et al., *supra*, at 22. Instead, economists have found that sellers maintain their prior listed prices and simply impose new fees on credit-card users when such surcharges are allowed—and they do so even when their past regular prices ostensibly already included their credit-card costs. *See* Todd J. Zywicki, *The*

Economics of Payment Card Interchange Fees and the Limits of Regulation, at 45-47 (Geo. Mason Univ. L. & Econ. Research Paper Series No. 10-26) (June 2010).

New York's surcharge statute directly advances New York's interest in preventing these consumer harms and "is drawn to achieve that interest," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). The statute protects credit-card users from price gouging by aligning the regular price—here, plaintiffs' single-sticker prices—with the price charged to credit-card customers. Tying a seller's credit-card price to the single-sticker price reduces the seller's incentive to gouge credit-card users because of the central role that regular prices play in retail transactions. For example, sellers may be less willing to raise the single-sticker price than to impose a surcharge on subgroups of customers, since the single-sticker price typically applies more broadly, and thus has greater effects when changed. Moreover, sellers may face constraints in setting their single-sticker prices that they would not face with surcharges. Regular prices may be dictated by suppliers, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), or by franchisors, *National Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232 (S.D. Fla. 2010). And regular prices are subject to consumer expectations. For example, if consumers have come to expect that a hot dog costs $1, then a seller may be forced to set his posted single-sticker price at $1 or risk losing business to competitors. Because regular prices thus face constraints

that more narrowly applicable credit-card surcharges do not, tying credit-card prices to regular prices meaningfully inhibits excessive increases to credit-card prices.

These competitive restraints dispose of plaintiffs' argument that the surcharge law fails to prevent profiteering because it does not dictate the prices that sellers may charge, meaning that sellers could theoretically impose the same (high) prices on credit-card users by inflating the single posted price in lieu of imposing a surcharge. *See* Pls. Br. at 46-47. Contrary to plaintiffs' assumption, the single listed price is not an arbitrary figure that sellers can easily alter to charge a particular price to credit-card users. Rather, single-sticker prices have real-world importance that prevent sellers from simply substituting increases to their regular prices for credit-card surcharges. *See Lee* et al., *supra*, at 21; *Rosenfeld*, *supra*, at 3-4.

The surcharge statute also restrains profiteering without burdening "substantially more speech than" necessary. *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989). As explained, the statute affects the barest commercial speech—the numeric prices posted as regular prices or credit-card prices—without preventing any other speech by sellers.

Plaintiffs argue otherwise, asserting that New York could have achieved its anti-profiteering aim through a "narrower" regulation that places a cap on the allowable surcharge amount. Pls. Br. at 49. But this assertion wrongly assumes that New York has an interest only in *limiting* the magnitude of the inflationary harm

caused by credit-card surcharges, rather than *preventing* that harm altogether. In any event, a surcharge cap would trench on just as much, if not more, speech than GBL § 518. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Under plaintiffs' First Amendment theory, a three-percent cap on credit-card surcharges would prevent a seller that offers a lawful five-percent cash discount from "labeling" his discount as a five-percent credit-card "surcharge." And a statute that addressed profiteering concerns by limiting the "difference charged between the credit amount and the cash amount" (Pls. Br. at 49) fares no better because, under plaintiffs' theory, it would prevent sellers from using surcharges or discounts in excess of that permissible difference to express their views. Plaintiffs' proposed surcharge rules would thus limit sellers' commercial speech in the same way as GBL § 518.

Accordingly, whether New York's statute is construed as a disclosure requirement or an affirmative limitation on commercial speech, it validly advances the State's consumer-protection interests without imposing undue burdens on sellers.

Respectfully submitted,

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