UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-4533, 13-4537 **Caption [use short title]** Expressions Hair Design v. Schneiderman

Motion for: Leave to file brief as amicl curiae

Set forth below precise, complete statement of relief sought:

Leave for United States Public Interest Research Group Education Fund, Inc., Consumer Action, and National Association of Consumer Advocates to file brief in support of Plaintiffs-Appellees, urging affirmance.

MOVING PARTY: Amici U.S. Public Interest Research Group Education Fund, et al. **OPPOSING PARTY:** Defendants-Appellants

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Sharon K. Robertson **OPPOSING ATTORNEY:** Judith Vale, Assistant Solicitor General

[name of attorney, with firm, address, phone number and e-mail]

Cohen Milstein Sellers & Toll PLLC, 88 Pine Street, 14th Floor, New York, NY 10005, (212) 838-7797; srobertson@cohenmilstein.com

120 Broadway, New York, NY 10271, (212) 416-6274; judith.vale@ag.ny.gov

Court- Judge/ Agency appealed from: On remand from Supreme Court of the United States

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Sharon K. Robertson **Date:** 7/20/2017 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 13-4533 (L)

13-4537

In the United States Court of Appeals for the Second Circuit

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

v.

GERALD MOLLEN, in his official capacity as District Attorney of Broome County,
Defendant,

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, District Attorney CHARLES J. HYNES, in his official capacity as District Attorney of Kings County,
Defendants-Appellants,

On Remand from the Supreme Court of the United States

MOTION OF UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., CONSUMER ACTION AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG"), Consumer Action and National Association of Consumer Advocates ("NACA") hereby move pursuant to Fed. R. App. P. 29 for leave to file a

consented-to brief as *amici curiae* in support of Appellees, seeking affirmance. In support of their motion, U.S. PIRG, Consumer Action and NACA state as follows:

1. U.S. PIRG is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

2. Consumer Action has been educating consumers on credit card related matters, including credit card surcharges, for more than four decades and has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities.

3. NACA is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

4. The statute at issue in this case, N.Y. Gen. Bus. Law § 518, subjects merchants to criminal prosecution for providing truthful information to consumers about credit card fees. The unavoidable consequence of New York's no-surcharge law is that it forces consumers to make decisions about a fundamental economic question (i.e., how should I pay for this good or service?) behind a statutorily-induced veil of ignorance and thereby drives up retail prices for *all* consumers.

5. The views of U.S. PIRG, Consumer Action and NACA are distinct from those of any of the parties and thus may assist the Court in resolving the First Amendment issues before the Court.

6. Before filing this motion, U.S. PIRG, Consumer Action and NACA contacted all of the parties to determine whether they would be willing to consent to the filing of the brief. Counsel for all parties provided their consent.

7. The brief complies with the Court's May 23, 2017 order regarding supplemental briefing. In particular, the brief is being filed by the deadline established for *amici curiae* and is less than one-half the length prescribed for the parties' briefs.

WHEREFORE, U.S. PIRG, Consumer Action and NACA respectfully request that the Court grant their motion for leave to file the attached *amici curiae* brief.

Dated: July 20, 2017

Respectfully submitted,

/s/ Sharon K. Robertson
Sharon K. Robertson
Cohen Milstein Sellers & Toll PLLC
88 Pine Street, 14th Floor
New York, NY 10005
212-838-7797

Counsel for *amici curiae*

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I electronically filed the foregoing Motion of United States Public Interest Research Group Education Fund, Inc., Consumer Action and National Association of Consumer Advocates for Leave to File Brief as *Amici Curiae* in Support of Appellees with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Sharon K. Robertson
Sharon K. Robertson

No. 13-4533 (L)

13-4537

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellees,

v.

GERALD MOLLEN, in his official capacity as District Attorney of Broome County,

Defendant,

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, District Attorney CHARLES J. HYNES, in his official capacity as District Attorney of Kings County,

Defendants-Appellants,

On Remand from the Supreme Court of the United States

BRIEF FOR UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., CONSUMER ACTION AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Sharon K. Robertson
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
srobertson@cohenmilstein.com

Amici Counsel

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, United States Public Interest Research Group Education Fund, Inc., Consumer Action and National Association of Consumer Advocates by and through their undersigned counsel, hereby certify that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

STATEMENT OF CONSENT TO FILE AMICUS

I, Sharon K. Robertson, am admitted to practice in this Court and have obtained consent from all parties to submit this *Amici Curiae* brief in support of Appellees argument to affirm the decision of the United States District Court for the Southern District of New York.

/s/ Sharon K. Robertson
Sharon K. Robertson
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
212-838-7797

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICI

Amici curiae are three leading consumer advocacy groups with broad knowledge about the history of credit cards and are particularly well-qualified to assist the Court in understanding how the public interest, and consumer interests in particular, are undermined by no-surcharge laws, which were originally advanced by the credit card industry and opposed by consumer-advocacy groups.[1]

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG believes that cash customers should not pay more to subsidize credit card reward programs and supports efforts to make the costs of credit transparent to consumers.

Consumer Action has been educating consumers on credit card related matters, including credit card surcharges, for more than four decades. Consumer Action has been a champion of underrepresented consumers since 1971. A

[1] No counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and its counsel, contributed monetarily to the preparation and submission of this brief.

national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities.

National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

BACKGROUND

In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017), the Supreme Court vacated this Court's judgment and remanded with instructions to "analyze [N.Y. Gen. Bus. Law] § 518 as a speech regulation." Thereafter, this Court issued an order directing the parties to simultaneously file supplemental briefs addressing three questions: (1) whether N.Y. Gen. Bus. Law § 518 ("New York's no-surcharge law" or "no-surcharge law") is a valid commercial speech regulation under *Central Hudson Gas & Electric Corp. v. Public Service*

Commission of New York, 447 U.S. 557 (1980); (2) whether New York's no-surcharge law is a valid disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); and (3) whether the Court should certify any part of the case to the New York Court of Appeals.

For reasons explained more fully herein, this Court should find that New York's no-surcharge law fails to satisfy *Central Hudson* and *Zauderer*, and should decline to certify any part of the case to the New York Court of Appeals.

ARGUMENT

I. NEW YORK'S NO-SURCHARGE LAW PRESENTS AN ISSUE OF PROFOUND ECONOMIC SIGNIFICANCE FOR CONSUMERS.

Although this case directly concerns New York's no-surcharge law, which subjects merchants to criminal prosecution for providing truthful information about credit card fees – the economic reality is that ordinary consumers are harmed by the no-surcharge law, too. Put simply, New York's no-surcharge law results in consumers making decisions about a fundamental economic question (i.e., how should I pay for this good or service?) behind a statutorily-induced veil of ignorance. Given the profound economic stakes for ordinary consumers, this Court should uphold the judgment of the District Court finding New York's no-surcharge law unconstitutional and reject the State's request to certify any part of this case to the New York Court of Appeals.

A. New York's No-Surcharge Law Forces Merchants to Recoup Supra-Competitive Credit Card Prices by Raising Sticker Prices for All Consumers, Resulting in Uneconomical Cross-Subsidization

Credit cards (and credit card debt) are growing in America. Over 75 percent of American families own at least one credit card[2] and the average credit-card debt per household is approximately $6,184.[3] In 2016, Americans purchased around $3.3 trillion worth of goods with their credit cards,[4] and total credit card debt reached almost $780 billion.[5]

Unknown to consumers, though, the amount of fees that merchants pay to credit card companies each year for the right to accept credit cards is staggering: almost $70 billion in 2016 alone, a number that accounted for 80 percent of electronic payment fees despite the fact that credit cards only accounted for 56 percent of electronic spending.[6] While economic theory suggests that merchants,

---

[2] *See* Neil J. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. Rev. 327, 333-34 (2014) (discussing growth of consumer debt).

[3] The average credit card debt per *indebted* household is even higher: $16,747 per household, a number that is almost the same as it was before the Great Recession. *See* Erin El Issa, *2016 American Household Credit Card Debt Study*, Nerdwallet (Dec. 14, 2016), *available at* https://www.nerdwallet.com/blog/average-credit-card-debt-household/.

[4] *See* U.S. Merchants Paid $88.39 Billion in Card Fees in 2016, Nilson Rep. (HSN Consultants, Inc., Carpinteria, Cal.), May 2017, *available at* https://www.nilsonreport.com/upload/pdf/U.S._Merchants_Paid_88.39_Billion_in_Card_Fees_in_2016_The_Nilson_Report.pdf.

[5] Nerdwallet, *supra* note 4.

[6] *Id.*

especially large merchants, could negotiate to reduce these fees through price discrimination, no-surcharge laws, like the one at issue here, largely prevent merchants from doing so. Instead, merchant swipe fees grow without regard to competitive pressures.[7]

Merchants have passed along these supra-competitive fees to consumers in the form of universally heightened retail prices largely because no-surcharge laws prevent merchants from truthfully communicating information to consumers about those fees. The absurd consequence of this regime is that the wealthy Platinum Card holder and the poor EBT user pay the same inflated price for their groceries, despite the fact that the credit card company charges the merchant up to an additional 3.5 percentage points to accept its card.[8] While it is difficult to know exactly what degree of the $70 billion in annual swipe fees goes to higher retail prices, there is little doubt that the fees have raised prices.[9]

---

[7] *See, e.g.*, Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1345 (2008) (finding that merchant discount rates "increased 23 percent from 2000 to 2006" and that "[m]erchants' absolute cost of accepting payment cards has increased by 139 percent over the same time period").

[8] *See* Samuel J. Merchant, Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes, 68 Okla. L. Rev. 327, 337-38 (2016) (citing American Express's merchant guidelines).

[9] *See* Alan S. Frankel & Allan A. Shampine, *The Economic Effects of Interchange Fees,* 73 Antitrust L.J. 627, 671-72 (2006) (arguing that card acceptance fees (continued…)

This state of affairs results in high-cost, high-reward credit card users being subsidized by low-cost credit card users and, to a greater extent, debit card and cash-based consumers. One study by the Federal Reserve Bank of Boston found that, "[o]n average, each cash buyer pays $149 to card users and each card buyer receives $1,133 from cash users" in annual cross subsidies.[10] The study also noted the inequality of this subsidization, as only about 40 percent of the lowest-income quintile of Americans owns a credit card, versus 97 percent of households earning over $120,000 per year.[11] Moreover, even if a low-income person owns a credit card, he or she receives far less of this pro-credit card subsidy, as "[b]y far, the bulk of the transfer gap is enjoyed by high-income credit card buyers."[12] For instance, in absolute terms, the estimated transfer is about $1.4 billion to $1.9 billion from poorer, non-rewards card users to wealthier, rewards card users on gasoline and grocery purchases alone.[13]

"significantly and arbitrarily raise[] prices" and distort competition by "steering consumers toward using more costly and less efficient payment methods").

[10] *See* Scott Schuh et al., Federal Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?*, at 3 (2010), *available at* https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

[11] *Id.* at 8; *see also* Levitin, *supra* note 7, at 1356 (further detailing the regressive nature of this cross-subsidy).

[12] Schuh, *supra* note 10, at 21.

[13] *See id.* at 3 (citing Efraim Berkovich, Card Rewards and Cross-Subsidization in the Gasoline and Grocery Markets, Rev. Network Econ. 11.4 (2012)).

If New York's no-surcharge law is deemed unconstitutional, consumers will eventually reap the rewards of lower merchant fees, namely lower retail prices and diminished cross-subsidization. Indeed, experience in the U.S. debit card markets demonstrates that lower merchant fees – the logical result of abolishing no-surcharge laws that restrict speech – lead to lower retail prices.[14] If left standing, however, the no-surcharge law will continue to facilitate supra-competitive merchant fees, as well as the heightened retail prices and unjust cross-subsidization that such restrictions engender.

B. New York's No-Surcharge Law Results in Ordinary Consumers Making Distorted Decisions About Their Choice of Payment Method

In addition to hitting the pocketbooks of consumers each day, the statute at issue in this case causes distortions to commonplace spending decisions. Visit any store in America and you will see merchants using price differences to produce efficiency-enhancing, mutually-beneficial transactions. For instance, when a clothing store receives a special promotion of lower-priced jeans from Levis, they

[14] *See* Merchant, *supra* note 8, at 376 ("A 2013 study by economist Robert Shapiro found that debit-card-interchange-fee regulation under the Durbin Amendment [to the 2010 Dodd-Frank Act] 'saved consumers and merchants an estimated $8.5 billion in 2012,' with $5.87 billion, or around 70%, passed along to consumers in lower prices.") (citing Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees*, Nat'l Retail Fed'n (Oct. 2013), at 2).

might pass along those savings to customers in the form of a "10% Levis sale" (to the chagrin of Wrangler).

Yet, because of New York's no-surcharge law, the routine act of using mutually-beneficial price differences is barred with respect to the most fundamental of consumer decisions: choice of payment. If Discover charges a grocer a swipe fee, for example, one would think it would be reasonable for the grocer to post a sign alerting consumers to the surcharge associated with using the Discover card (e.g., we add a 3% surcharge if you pay by Discover card). Not so. The no-surcharge law blocks merchants from offering this kind of information at the point of sale. Thus, far from constituting a disclosure requirement under *Zauderer*, the no-surcharge law simply *restricts* speech by unnecessarily prohibiting merchants from truthfully conveying pricing differentials.

If consumers were afforded the opportunity to align their credit card use with the merchant's credit card fees, the result would be a freer and more competitive market than the one that exists now. Indeed, when a consumer is making a decision about whether to use cash versus credit, the most useful piece of information for that consumer to have is how much *extra* it is to use credit—whether that information is conveyed in dollar and cents (e.g., $.30 surcharge) or as a percentage (e.g., 3% surcharge). A percentage is particularly useful because it allows a consumer who receives, for example, 1% cash back for credit card

purchases, to determine whether it actually makes sense to use that card, or whether it makes more sense to use another payment method. As such, the best way for a dual-pricing merchant to convey prices is to prominently and truthfully inform consumers that a products costs, for example, "$10 for cash, with a 3% surcharge for credit." Yet, under the status quo, and by design of New York's no-surcharge law, that speech is a crime. Thus, consumers think solely of rewards and benefits when they reach for their high-cost Platinum Card, leaving the true cost of those rewards for the rest of the market to bear while foregoing rewards and benefits at the point of sale that the consumer might find more desirable.

Until the no-surcharge law is struck down, consumers will continue to act behind a statutorily-induced veil of ignorance, which harms their freedom of choice in addition to their pocketbooks.

C. No-Surcharge Laws Fuel Excessive Credit Card Growth that in Turn Result in Uniquely Harmful Social Externalities

It bears emphasizing the social harms caused by excessive credit card growth, which the no-surcharge law at issue here helps fuel. It is clear to most that, for all the benefits of credit cards, an outsized reliance on the product has led to "decreased consumer purchasing power caused by increased debt service; [ ] decreased consumer purchasing power caused by inflation; and [an] increased rate

of consumer bankruptcy filings."[15] Indeed, credit card companies rely on consumers' cognitive biases to market "cheap" cards, only to profit off consumers who fall into deeper debt than they expected.[16] Far from being an academic concern, America's political leaders have expressed consternation about America's credit card use as well.[17] Given this situation, and the fact that credit card debt is nearing levels not seen since the eve of the Great Recession,[18] a no-surcharge law that contributes to the overuse of such a risky product should not be left intact.

II. THE STATE'S JUSTIFICATIONS CANNOT SURVIVE SCRUTINY AND ALTERNATIVE, LESS RESTRICTIVE MEANS ARE READILY AVAILABLE TO PROTECT CONSUMERS FROM POTENTIAL MERCHANT ABUSES WITHOUT HARMING COMMERCE.

In an effort to salvage New York's restrictive statute, the New York Attorney General has offered two purported justifications for the no-surcharge law to this Court: (1) that surcharges make it easier for sellers to engage in "bait and

---

[15] Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 Harv. J. on Legis. 1, 43 (2008); *see also* Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. Rev. 1373, 1377 (2004) (noting that "the long-term costs [of credit card use] outweigh any short-term benefit, because the long-term costs hit the consumer when she is most vulnerable, when financial distress forces her to borrow").

[16] *See generally* Bar-Gill, *supra* note 15.

[17] *See, e.g.*, H.R. Rep. No. 111-88, at 10 (2009), *reprinted in* 2009 U.S.C.C.A.N. 453, 454 ("The accumulation of large amounts of credit card debt can have profound implications on individual consumers and the economy more generally.") (CARD Act legislative history).

[18] *See supra* note 3 and accompanying text.

switch" tactics (Appellant Schneiderman Suppl. Letter Br. at 25-26, filed July 13, 2017, Dkt. No. 259); and (2) that sellers can and often will use surcharges to "levy excessive fees on customers." *Id.* at 26-30. Each of these arguments fails to satisfy the standard set forth in *Central Hudson*, and in any event, the state's objectives can be achieved through alternative, less restrictive interventions.

The first justification, fear of deceptive sales practices, is unavailing. The state has proffered no evidence to demonstrate that this concern is anything more than theoretical and thus fails to satisfy its burden under *Central Hudson*.[19] Even assuming, however, that the state's concern is grounded in reality, the no-surcharge rule is dismally crafted (and hugely overbroad) if its aim is in fact to protect consumers from merchants who could advertise misleading sticker prices and thereby engage in a "bait and switch."[20] Moreover, as a practical matter, a far less

---

[19] This is further supported by the fact that every major consumer advocacy organization, including Consumers Union and Consumer Federation of America, have long opposed state no-surcharge laws. *See* JA 103-104; *see also* Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, available at http://www.nytimes.com/1984/02/29/business/extension-of-credit-surcharge-ban.html?mcubz=2 (quoting Senator William Proxmire, stating in debate on the Senate floor that "[n]ot one single consumer group supports the proposal to continue the ban on surcharges.").

[20] A related defense of the no-surcharge rule argues that two-tiered pricing interferes with consumers' ability to comparison shop. There is no logic to this argument as a justification for disallowing surcharging while permitting discounts as "there is no reason to think that a comparison of maximum prices (allowing discounts, not surcharges) is any better than a comparison of minimum prices (allowing surcharges, not discounts)." Levitin, *supra* note 7, at 1383. Because (continued…)

restrictive and more effective approach to keeping merchants from abusing two-tiered pricing would be to simply institute disclosure rules. Disclosure requirements like those proposed by the Federal Reserve Board would entirely protect consumers from abusive surcharging. *See Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong., 1st Sess. 10 (Feb. 18, 1981) (proposing "a very simple rule": that both surcharges and discounts be allowed and "the availability of the discount or surcharge be disclosed to consumers.").

The second justification, windfall profits, is also without merit and can be addressed through far less restrictive means. As with the deceptive sales practice justification, the state has failed to carry its burden under *Central Hudson* by offering any evidence, empirical or otherwise, to substantiate this concern. Indeed, the very study the state cites to advance its argument concedes as much. *See* Marc Rysman & Julian Wright, *The Economics of Payment Cards*, at 16 (Nov. 29, 2012) (Working Paper, Boston University & National University of Singapore) (acknowledging that "empirical research on surcharging behavior would be very valuable"). Even assuming windfall profits are a legitimate concern, however, the

---

discounts and surcharges are mathematically equivalent, allowing one and not the other relies on an impermissible "underestimation of the public," *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977), especially if merchants are required to disclose their pricing structure.

state's purported objectives can be achieved through less restrictive means that do not offend the First Amendment. For example, price differences (whether framed as a surcharge or a discount) can be capped, ensuring that surcharges for credit card users are within reasonable bounds, as it is in Minnesota. *See* Minn. Stat. Ann. § 325G.051(1)(a) (West 2004) ("the surcharge [may] not exceed five percent of the purchase price"). The state could likewise address this concern by enforcing New York's preexisting false-advertising laws. This would satisfy the state's purported objectives without hampering the free-flow of accurate information between merchants and consumers. However, as currently framed, New York's no-surcharge law does not even remotely resemble a disclosure requirement. To the contrary, it acts as an *anti-disclosure* law by forcing merchants to keep consumers in the dark about the true cost of credit card usage. In any case, the state has far overstated the danger posed by surcharging because the marketplace, through consumer reactions, will naturally discipline merchants who would seek to abuse the right to describe a price difference as a surcharge. As a matter of fairness, sparing consumers who prefer credit cards the burden of weighing their preference against the savings of other payment systems is hardly a substantial state interest, worth imposing those costs on cash consumers, who have no choice but to pay for services from which they derive no benefit.

CONCLUSION

For the foregoing reasons, *amici* United States Public Interest Research Group Education Fund, Inc., Consumer Action and National Association of Consumer Advocates urge this Court to find that New York's no-surcharge law fails to withstand First Amendment scrutiny under either *Central Hudson* or *Zauderer* and reject the State's request to certify any portion of the case to the New York Court of Appeals for resolution.

Dated: July 20, 2017

Respectfully submitted,

/s/ Sharon K. Robertson
Sharon K. Robertson
COHEN MILSTEIN SELLERS
& TOLL PLLC
88 Pine Street
14th Floor
New York, NY 10005
Telephone: (212) 838-7797
srobertson@cohenmilstein.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,228 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Sharon K. Robertson
Sharon K. Robertson

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I electronically filed the foregoing *Amicus* Brief with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Sharon K. Robertson
Sharon K. Robertson

July 20, 2017