No. 15-1391

# In The Supreme Court of the United States

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

*Petitioners,*

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; ERIC GONZALEZ, in his official capacity as Acting District Attorney of Kings County,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## Brief of Action on Smoking and Health, American Thoracic Society, National Association of County and City Health Officials, Public Good Law Center, and Tobacco Control Legal Consortium as *Amici Curiae* in Support of Respondents

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici curiae* are public health and consumer protection organizations committed to the disclosure and dissemination of crucial information about food, medicine, tobacco, and other consumer products, as well as the prevention of deceptive labeling and advertising of those products.[1] Each of these organizations relies on robust mandatory disclosure and truth-in-advertising regimes in order to fulfill its mission. *Amici* consequently recognize the need both for First Amendment protection of commercial speech that conveys vital consumer information and for leeway to regulate commercial speech to ensure that the stream of information flows cleanly and repletely as well as freely.[2]

Pursuant to these principles, *amici* presented arguments adopted by the court in *National Association of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013), a decision relied on by the Second Circuit in this case. They seek by their participation here to assist the Court in resolving the case before it while preserving the vast array of regulatory measures that ensure the health, safety and well-being of the American people.

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[1] This brief was not authored in whole or in part by counsel for a party and no one other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

[2] Statements of interest of the individual *amici curiae* appear in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The case before the Court is an unusual one. The parties agree on a great deal: that the act of pricing is economic conduct that does not implicate the First Amendment; that speech regulations aimed at preventing consumer deception do not generally offend the First Amendment; that any application of the First Amendment in this matter involves scrutiny no more stringent than the standard laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The parties differ principally in their interpretations of New York General Business Law Section 518 as it may be applied. The case is notable for the narrow scope of what the Court is being asked to decide.

The question for the Court's consideration effectively boils down to one of statutory rather than constitutional interpretation: to assess what it means to impose a surcharge under Section 518, and consequently to determine whether the statute is a form of economic regulation, a mandatory disclosure, or a restriction of commercial speech. The language of the statute – "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card" – strongly suggests that there is nothing but conduct at issue here. To "impose a surcharge" is not to speak. Even accounting for the way that the statute has been applied and interpreted over time, the law is still best read as regulating conduct rather than speech. For the reasons set forth in Respondents' brief,

allowing discounts and dual pricing does not transform Section 518 into a regulation of speech. *See* N.Y. Resp. Br. at 22-39.

Should the Court determine, however, that regulation of speech is at issue, the assessment of that regulation under the First Amendment requires no pathbreaking development of constitutional doctrine. To the contrary: the most plausible interpretation of Section 518 may be dealt with straightforwardly under familiar, decades-old precedent.

Under this interpretation, what the statute prohibits is the sort of surprise surcharge familiar to drivers who have been lured into a gas station by a low posted price, only to find out that they will pay significantly more if they use a credit card. In other words, the "surcharge" which may not be imposed is any charge that makes the total cost to a consumer greater than the most prominently displayed or advertised price. Not only is this a "fairly possible" reading of the statute, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997), but it is also the most natural reading. A "surcharge" makes sense only in relation to a "regular price"; the only plausible way to understand "regular price" in this context is as the posted (or advertised) price.

Understood this way, the statute allows the communication that petitioners seek – the ability to make clear to consumers the costs of credit card use – while preventing consumers from being victimized by bait-and-switch tactics. This reading is supported by the

statute's text, its legislative history, and the principle of constitutional avoidance. It even squares with the limited history of New York's enforcement of the statute, adduced by petitioners to demonstrate its alleged unconstitutionality. Even if analyzed as regulating more than just conduct, the statute – properly read as an anti-deception measure – passes constitutional muster, whether interpreted as a mandatory disclosure (requiring the full price to be prominently displayed) or a restriction of inherently misleading speech (prohibiting a business from displaying a price lower than that actually charged).

Some voices in the case – notably, *not* the parties – have suggested that the Court go much further, arguing that the statute imposes a content-based restriction on speech and should therefore be subject to strict scrutiny. But the case's peculiarities – including the absence of interpretation of the statute by state appellate courts and the lack of a genuine Circuit split, *see Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1247 n.9 (11th Cir. 2015) (noting the material differences in the "the relevant statutory text" of the laws of New York and Florida) – make it a singularly unsuitable vehicle for the development of constitutional doctrine.

There are in addition good reasons for the Court to reject such a far-reaching First Amendment holding. Subjecting content-based commercial speech regulations to strict scrutiny would weaken society's ability to regulate deceptive advertising, to mandate public health and safety warnings, and to require that health

claims – on which consumers stake their well-being and sometimes their lives – be founded on sufficient evidence. Erasing the distinction between commercial and core speech would, ironically, also threaten to weaken protections for the sort of political, artistic and religious expression that lies at the heart of what the First Amendment was designed to safeguard.

There is, in sum, no need in this narrow case to break new ground.

## ARGUMENT

### I. THE MOST PLAUSIBLE INTERPRETATION OF SECTION 518 AVOIDS CONSTITUTIONAL DIFFICULTY.

The only question genuinely at issue in this case is the proper interpretation of New York's statute. There are no disagreements between the parties concerning First Amendment doctrine. Petitioners agree that a simple prohibition of dual pricing would regulate only economic conduct and would not implicate the First Amendment at all. Expressions Opening Br. at 35. They also agree that a statute prohibiting merchants from misleading consumers by surprising them with hidden surcharges would pass First Amendment review. *Id.* at 42. New York does not dispute that a statute regulating only how a pricing scheme is described would violate the First Amendment. *See* N.Y. Resp. Br. at 27. The parties differ only as to which, if any, of the foregoing describes Section 518.

Petitioners implausibly interpret Section 518 as regulating nothing besides which of two synonymous descriptions merchants may employ for the difference between cash and credit card prices. Expressions Opening Br. at i, 1-2. This interpretation has no grounding in the language of the statute, which says nothing about how prices may be characterized; is patently unconstitutional; and risks reducing the statute to an absurdity.

New York, by contrast, offers a straightforward reading, according to which the statute does not impinge on petitioners' stated interests and easily passes constitutional muster: the statute prohibits the deceptive tactic of attracting customers through low posted, tagged, or advertised prices and then surprising them with unannounced surcharges when they pay with a credit card.

It is this interpretation, whether understood to implicate only conduct or to involve speech, that best explicates Section 518.

### A. The No-Surprise Interpretation Is The Most Plausible Reading Of The Statute.

Reading Section 518 to prohibit surprise at the register is a natural way to make sense of the law. As the Court of Appeals found, "a surcharge means an additional amount above the seller's regular price." Pet. App. 14a. (In the absence of a statutory definition, the court relied on the "ordinary meaning" of "surcharge." *Id.* at 13a.) The problem then is determining a seller's

"regular price." The generally prevailing price is irrelevant – a retailer does not violate Section 518 by charging more than competitors. Nor can the "regular price" be the price a given retailer charges most frequently. That would reduce the prohibition on credit card surcharges to a nullity, since many retailers – including petitioners – receive payment for *most* of their sales by credit card. According to petitioners' own officers and owners, credit cards are used in about 90% of Five Points Academy's sales, JA 42 (Stephen Milles Decl.); 80% of Patio.com's, JA 55 (David Ross Decl.); and 60-70% of Brite Buy's. JA 46 (Donna Pabst Decl.).

The only plausible way to define the regular price is, following the Court of Appeals, as the posted price, at least with respect to "sellers who post single, readily ascertainable prices." Pet. App. 15a. This understanding finds support in a letter from the bill's Assembly sponsor, explaining that the meaning of "surcharge" should be "identical to the [federal] definition." JA 86. The federal statute explicitly defined "regular price" in part as "the tag or posted price . . . if a single price is tagged or posted." Cash Discount Act, Pub. L. No. 97-25, § 102, 95 Stat. 144, 144 (1981) (quoted in dist. ct. op., Pet. App. 61a). Extending this definition, when more than one price is displayed (or advertised), the regular price is the most prominent one. Section 518 is violated when a credit card customer has to pay more than that price – a reasonable protection against bait-and-switch pricing.

Legislative history corroborates this interpretation. Memoranda summarizing the no-surcharge bill

for the New York legislature justified the proposed legislation by explaining that without it a merchant could "advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment," allowing consumers to be subjected to "dubious marketing practices." JA 81, 83. Similarly, the State Consumer Protection Board supported the bill to "insure that customers can depend on advertised claims and prices." JA 89. Credit card surcharges, the Board explained, can impede this goal by "permitting unannounced price increases at the point of sale." *Id*. The Senate sponsor of the bill also described the legislation as providing "essential protection" to consumers. JA 84.

The doctrine of constitutional avoidance also weighs in favor of this reading. By contrast to the "statute-killing definition of 'surcharge' " advocated by petitioners, *Dana's*, 807 F.3d at 1251 (Carnes, C.J., dissenting), the no-surprise interpretation renders the statute constitutional in all applications. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (the Court is "obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so"). "The question is not whether [a saving interpretation] is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). Here the no-surprise interpretation *is* the most natural interpretation. And, as explained *infra*, § I.D., it easily passes constitutional muster.

It is true that "on its face, [Section 518] . . . says nothing . . . about how prominently prices must be displayed." App. 69a-70a (dist. ct. op.). But petitioners' interpretation (which the district court accepted) fares no better on this score – the statute equally says nothing about how price differences may be *labeled*.[3] The statute must mean *something*, and the no-surprise reading is the least problematic option.

Petitioners' interpretation fares far worse than the no-surprise reading in satisfying New York's standards for statutory construction. *See* N.Y. Stat. Law § 145 (a "construction which would make a statute absurd will be rejected"). Even setting aside constitutional concerns, there is little sense in a statute that does nothing other than decree which of two synonymous representations merchants may employ to describe a difference between cash and credit card prices. By contrast, a statute that protects consumers against bait-and-switch pricing easily satisfies New York's

[3] If petitioners are right that there is no difference between a prohibition on credit card surcharges and a prohibition on cash discounts, the proper conclusion would be not that the statute regulates how dual pricing may be labeled, but rather that it prohibits dual pricing altogether. Interpreting Florida's similar statute prohibiting "a surcharge . . . for electing to use a credit card," Fla. Stat. § 501.0117(1), the Eleventh Circuit observed that "The statute might appear at first blush to ban . . . dual-pricing," rejecting that reading only because Florida's statute "expressly allowed [merchants] to offer a 'discount for the purpose of inducing payment by cash.' " *Dana's*, 807 F.3d at 1243 (quoting Section 501.0117(1)). Section 518, by contrast, does *not* expressly allow discounts.

codified presumption "that a reasonable result was intended by the Legislature." *Id.* § 143.

The fact that New York law includes a general prohibition against deceptive business practices, N.Y. Gen. Bus. Law § 349(a), does not render superfluous a law singling out surprise credit card surcharges. "[T]here is no authority for the proposition that a saving construction of a statute should be rejected simply because it would create an overlap with another statute." *Dana's*, 807 F.3d at 1255 (Carnes, C.J., dissenting). Just as Florida's general anti-deception statute and its credit card surcharge prohibition are "anything but redundant," since "one statute is criminal while the other is civil," *id.* at 1256, so too are New York's relevant statutes complementary. Section 518 is a criminal statute; New York's general deceptive business practices law is a civil statute. G.B.L § 349(b).

Furthermore, there is nothing unusual in a state's having on its books both a law prohibiting deceptive business practices generally and also laws addressing specific kinds of deceptive practices. California law, for example, includes a general prohibition against "any unfair, fraudulent or unlawful business act or practice," Cal. Bus. & Prof. Code § 17200, but also specifically outlaws 24 enumerated practices in consumer transactions, Cal. Civ. Code § 1770(a), including misrepresenting the geographical origin of goods, *id.* § 1770(a)(4), and representing second-hand goods as new. *Id.* § 1770(a)(6). Similarly, federal law generally prohibits "unfair or deceptive acts or practices in or

affecting commerce," 15 U.S.C. § 45(a)(1), but also specifically outlaws certain deceptive practices by, among others, debt collectors, *id.* § 1692; credit reporting agencies, *id.* § 1681; and credit card issuers. *Id.* § 1601. Nor is Section 518 the only more specific prohibition with which New York supplements its general anti-deception statute. *See, e.g.*, N.Y. R. Prof. Conduct 7.1(c), (1) (prohibiting specific communications in attorney advertising); G.B.L. § 396-cc (restricting deceptive senior discount advertising); *id.* § 396-d (restricting misleading advertisements for real property).

Contrary to petitioners' argument that the exemptions to New York's no-surcharge statute undermine the statute's claimed purpose of preventing deception, Expressions Opening Br. at 40-41, the exemptions actually *support* the anti-deception interpretation. They concern mandatory payments, where concern about attracting consumers through misleading pricing is inapplicable. *See* N.Y. Crim. Proc. Law § 420.05 (allowing fees when a credit card is used to pay "a fine . . . upon an individual who stands convicted of any offense"); N.Y. Gen. Mun. Law § 5(c) (allowing service fees for credit card payments to local governments).

### B. New York's Past Enforcement Of The Statute Is Consistent With The No-Surprise Interpretation.

New York's past enforcement actions comport with the no-surprise interpretation of Section 518 (and the First Amendment), as would potential future actions

against petitioners if they engage in the pricing conduct they have proposed.

The clearest violation occurs when a merchant posts one price but then charges more for credit card purchases at the register. By extension, if both cash and credit card prices are posted, the statute is likely violated if the credit card price is significantly less prominent (for example, in significantly smaller font or in an obscure location). Indeed, New York may go further, and require that the credit card price be announced no less prominently than the cash price.

Similarly, New York may assert that Section 518 is violated if the *total* credit card price is not prominently announced. The statute is meant to dispel confusion. So it is not enough to post "$82.50 + 2.5% surcharge if paying by credit card"; the total price of $84.56 needs to be posted. As New York aptly observed below, "It is not hard to imagine consumer confusion resulting from the need to engage in multiple math problems (*e.g.*, comparing a 3% credit-card surcharge in one store with a 2% cash discount in another store) to understand the best price." N.Y. Opening Br. (Ct. App.) at 9.

An instructive parallel is found in the D.C. Circuit's treatment of a rule requiring that advertised airfares "disclose the 'entire price to be paid.'" *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403, 408 (D.C. Cir. 2012) (quoting 14 C.F.R. § 399.84(a)). The court upheld the DOT's interpretation, according to which airlines were free to explain the breakdown

among base fare, taxes and fees – and even to editorialize by characterizing the last as the "Government's Cut" – but were nonetheless subject to the requirement "that the total, final price be the most prominently listed figure, relying on the reasonable theory that this prevents airlines from confusing consumers about the total cost." *Id.* at 411. Similarly, Section 518 does not prohibit sellers from describing (in advertisements or point-of-sale postings) the higher price as a "surcharge" for credit card use – or for that matter a "surcharge to recover costs unfairly imposed by credit card companies" – or adding other commentary. However, New York may require "that the total [credit card] price be the most prominently listed figure." *Id*.

In sum, Section 518 does not prevent merchants from posting or advertising two prices and adding any desired characterization, however pointed, of the credit card price. What the statute does require is that the higher price be clearly announced – that is, it must be prominently displayed and not left as a math problem.

This understanding of Section 518 makes sense of the only enforcement of the statute that has generated written opinions. The dispute in *People v. Fulvio*, 517 N.Y.S. 2d 1008 (Crim. Ct. 1987), concerned a gas station customer who complained, having pumped gas after presenting his credit card, "that the price being registered was five cents per gallon higher than the price on the sign on the top of the pump." *Id.* at 1010. The court's discussion focused on the red herring of whether station personnel, when subsequently explaining the price discrepancy, described the price

difference as a credit card surplus or cash discount. *Id.* at 1010-15. But, from the court's own description of events, the customer's dissatisfaction clearly had to do not with the wording of the explanation, but with the fact that the cashier had explained the dual pricing "*after* he pumped his gas," *id.* at 1010 (emphasis added), since he had "been attracted by the price displayed on signs at the station." *Id.* at 1009. This sort of unfair surprise is precisely what Section 518 was intended to prohibit.[4]

The need to make clear the total price in the initial communication may also explain the state's actions against heating oil companies. Expressions Opening Br. at 17-18, 29. It seems likely that the Attorney General's investigators, rather than regulating how the difference between cash and credit card prices was described, were simply requiring that, when responding to phone inquiries, the higher price be quoted first to avert customer confusion (corresponding to the requirement that the total credit card price, if higher, be the most prominently posted price on-site).[5]

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[4] The owner testified that his signs "clearly stated the 'cash price' and the 'credit price,'" *id.* at 1010, but that was evidently not the customer's perception. Nothing was said about how prominently the credit card price was displayed, and the court made no finding as to whether it was displayed at all, dismissing the issue as irrelevant. *Id.* at 1011-12.

[5] Rather than imposing a "script," Expressions Opening Br. at 18, more likely investigators explained that a seller could legally respond, for example, something like "We charge $3.50 per gallon, but offer a 5¢ per gallon discount for cash payment," but could not respond, "We charge $3.45 per gallon, but add a 5¢ per

### C. The No-Surprise Interpretation Makes Reasonable New York's Intention To Enforce The Statute Against Petitioners.

Under the no-surprise reading of Section 518, the Attorney General is correct that at least some of what petitioners propose to do would violate the statute. Expressions Hair Design wishes to "list with equal prominence both the cash price and the additional credit-card charge – expressed as a percentage – without also displaying the total credit-card price as a dollar figure." JA 104 (Supp. Decl. Linda Fiacco). Five Points Academy similarly does not plan "to display two separate prices for each good and service that we offer, but rather to display – with roughly equal prominence – a single set of prices and the credit card surcharge amount." JA 101-02 (Supp. Decl. Stephen Milles). Under the proposed construction, both businesses would violate the statute by not making explicit the total price to be paid by credit card consumers.

By contrast, Patio.com seeks only "to add a line item to the receipt that illustrates the payment processing costs that Patio.com incurs when customers

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gallon surcharge for credit card payment." Such examples could easily have led some sellers to believe that what mattered was whether the price difference was described as a discount or surcharge, *see, e.g.* JA 107 (Decl. Michael Parisi, ¶ 8), when in fact the issue was whether the higher price was quoted first. The sellers failed to understand that they could still have communicated their view of swipe prices by stating, for example, "We charge $3.50 per gallon, which includes a 5¢ per gallon surcharge to cover the costs imposed on us by credit card companies. You can avoid this surcharge by paying cash."

pay with credit cards." JA 56 (Supp. Decl. David Ross). Adding such a line item would *not* violate the statute. The remaining petitioners state only that they wish to offer dual pricing and to label the price difference a credit card "surcharge," rather than a cash "discount." JA 46-48 (Supp. Decl. Donna Pabst); JA 51-53 (Supp. Decl. Peter Freeman). These statements leave unclear whether they would be violating the statute. It seems likely, however, that at least Brooklyn Farmacy intends not to state total credit card prices in its advertisements, *see* JA 52 (surcharges "would make our advertised prices look higher than they are"), an omission that would constitute a violation.

### D. Under the No-Surprise Interpretation, the Statute Clearly Comports with the First Amendment.

Properly read, Section 518 does not violate the First Amendment. It regulates the commercial conduct of selling at higher prices than posted or advertised. *See* N.Y. Resp. Br. at 22-39. Even if it is taken to regulate speech, the statute easily passes constitutional muster, whether analyzed as imposing a disclosure (prominent display of the total credit card price) or a restriction (prohibiting other prices or descriptions of price to be displayed more prominently).

### 1. Analyzed as a disclosure requirement, Section 518 is constitutional.

If analyzed as a regulation of speech, the statute is best understood as a disclosure requirement – one that easily withstands constitutional scrutiny. Posting the highest total price clearly and prominently gives consumers notice about what they can expect to pay. The district court's contrary conclusion that Section 518 is actually "an *anti*-disclosure statute" because it "bar[s] a seller from disclosing its cash price even marginally more conspicuously than its credit-card price," Pet. App. 75a (emphasis in original), is reminiscent of reasoning persuasively rejected by the D.C. Circuit: "[T]he airlines claim that the rule . . . imposes an affirmative limitation on speech . . . [by] prohibiting them from posting other numbers as prominently or more prominently than the total, final price." *Spirit Airlines*, 687 F.3d at 413-14. But, the court explained, "affirmative limitations on speech" are rules that flatly prohibit certain kinds of speech. *Id.* at 414 (citing, *inter alia*, the prohibition on promotional advertising by electric utilities struck down in *Central Hudson*, 447 U.S. 557 (1980) and the prohibition on disseminating drug price information struck down in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). By contrast, the challenged rule did "not prohibit airlines from saying anything; it just require[d] them to disclose the total, final price and to make it the most prominent figure in their advertisements. . . . [T]his neither prohibit[ed]

nor significantly burden[ed] airlines' ability to provide [other] information." *Id.*

Any requirement that a disclosure be prominent in relation to other text necessarily limits the prominence of other messages the speaker might wish to convey. If that were enough to constitute a limitation on speech, then any number of unproblematic consumer and public health protections would be subject to heightened review under *Central Hudson*. *See, e.g.*, 15 U.S.C. § 1261(p)(2) (safety warnings on hazardous substances must be prominently located, in conspicuous type, and stand out); 21 U.S.C. § 343(q)(1) (regulators may mandate that some required nutritional information "be highlighted on the label . . . by larger type, bold type, or contrasting color"); 21 C.F.R. § 202.1(e)(7)(viii) (prescription drug advertisements must present side effects and contraindications comparably prominently with information about effectiveness). *See also Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524, 567 (6th Cir. 2012) (upholding requirements that health warnings occupy the top 50% of the front and back of cigarette packaging, and 20% of print tobacco advertisements).

Likewise, if requiring that the credit card price posted as a dollar total constitutes a speech restriction, then so does mandating that lenders must state the cost of credit as an annual percentage rate, 15 U.S.C. § 1665a, or that regulators specify the format, content, and units of measurement for nutritional labels on foods. 21 C.F.R. § 101.9. Indeed, California imposes a similar requirement more generally, prohibiting

"[a]dvertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement . . . in a size larger than any other price." Cal. Civ. Code § 1750(a)(20).[6]

Because the requirements that the credit card price be posted as a total dollar amount and be prominently displayed are ordinary disclosures, they are reviewed under the "reasonable relationship" standard of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). And since, like the required disclosures in that case, prominent display of the full credit card price is "reasonably related to the State's interest in preventing deception of consumers," *id.* at 651, Section 518 passes constitutional muster.

### 2. Analyzed as a speech restriction, Section 518 is constitutional.

Section 518 passes constitutional muster even if analyzed (incorrectly) as a restriction on commercial speech.[7] Inherently deceptive communications receive

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[6] And while Section 518 does not, as petitioners claim, prohibit describing price differences as "surcharges," federal law in some circumstances does precisely that. *See, e.g.*, 31 C.F.R. § 50.12 (insurers may not describe cost of mandatory terrorism coverage as a "surcharge").

[7] If Section 518 regulates speech, the regulated speech is entirely commercial, as the parties agree. There is no merit to the Eleventh Circuit's conclusion that a no-surcharge law limits not just commercial speech, but also "elements of core political speech," because it might interfere with the ability of merchants to make clear the cost of credit card use and thereby influence

no constitutional protection. "The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) ("misleading" commercial speech "is not protected by the First Amendment"); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("the State may ban commercial expression that is . . . deceptive without further justification"). Moreover, empirical evidence that consumers were actually misled is not necessary "[w]hen the possibility of deception is . . . self-evident." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (citations and quotation marks omitted); *accord In re R.M.J.*, 455 U.S. 191, 202-03 (1982) ("where . . . particular advertising is inherently likely to deceive . . . advertising may be prohibited entirely").

Advertising or displaying a price without disclosing that most customers will have to pay more than

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debate about what those costs should be and who should bear them. *Dana's*, 807 F.3d at 1247. Potential impact on policy disputes does not lift the affected communications out of the province of commercial speech; to the contrary, such impact was a principal justification for extending constitutional protection to commercial communications in the first place. *See Bates v. State Bar*, 433 U.S. 350, 364 (1977) (commercial speech is protected in part because it "may often carry information of import to significant issues of the day"); *Va. State Bd.*, 425 U.S. at 765 ("the free flow of commercial information is indispensable" to "intelligent and well informed" "allocation of . . . resources" in a free enterprise system, and "also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered").

that price because they use a credit card is as inherently misleading[8] as "hold[ing] out the promise of debt relief without alerting consumers to its potential cost." *Milavetz*, 559 U.S. at 251. As in *Milavetz*, the "likelihood of deception . . . is hardly . . . speculative." *Id.* (citation and quotation marks omitted). As the D.C. Circuit held in *Spirit Airlines*: "Based on common sense and over three decades of experience and complaints, DOT concluded that it was deceitful and misleading when the most prominent price listed by an airline is anything other than the total, final price of air travel." 687 F.3d at 413. Common sense and experience support a similar conclusion here.

Under the "no-surprise" reading of the statute, Section 518 comports easily with the First Amendment, even if analyzed as a restriction on speech rather than conduct.

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[8] Even if the evidence supported petitioners' contention that the legislation was also motivated by the credit card industry's desire to hide the costs of credit, the statute could still be upheld as an anti-deception statute. When a statute has both legitimate and illegitimate purposes, it may be upheld under even heightened First Amendment scrutiny in light of its legitimate purpose. *See Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 446 (2008) (after "reject[ing] as illegitimate three of the [state's] asserted interests" under strict scrutiny, proceeding to consider whether "the remaining interests . . . were . . . compelling"); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (after finding first of two proffered interests sufficient to satisfy intermediate scrutiny, concluding there was no need to consider the second).

## II. THERE IS NO NEED FOR RADICAL CHANGE IN THE REGULATION OF COMMERCIAL SPEECH.

With the proper interpretation of Section 518, the First Amendment challenge to the law is readily disposed of. Not even the full *Central Hudson* analysis need be brought to bear. Nonetheless, some *amici* have called for far-reaching First Amendment holdings, not because such holdings would be useful in resolving this case, but because the *amici* seek to use this case as a vehicle for overturning decades of this Court's precedent and establishing equivalent constitutional protection for commercial speech and core political, artistic or religious speech. The Court may readily decline the invitation to extraordinary activism that these briefs extend.

The briefs urge strict scrutiny, on the ground that Section 518 imposes a content-based limitation on speech, Cato Inst. Br. at 10-13; Albertson's Br. at 11-16, even though this Court has never applied strict scrutiny to regulations of commercial speech. But as even petitioners agree, Expressions Opening Br. at 35-36, there is no call for any such disruption of settled practice in this case. And the radical shift that these briefs call for would create havoc for established regulatory regimes, would drastically undermine the ability of the government to protect and inform its citizens, and would dilute protection for the types of speech that most require the aegis of the First Amendment.

### A. The Doctrine That Content-Based Speech Regulations Are Subject To Strict Scrutiny Has Never Been Applied To Commercial Speech.

This Court "has rejected the argument that strict scrutiny should apply to regulations of commercial speech that are content-specific." *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) ("regulation of commercial speech based on content is less problematic"); *Central Hudson*, 447 U.S. at 564 n.6 (unlike "most other contexts . . . features of commercial speech permit regulation of its content"). Every commercial speech restriction upheld by the Court has been content-based. *See, e.g., Florida Bar v. Went For It*, 515 U.S. 618 (1995) (limitations on lawyer advertising); *Bd. of Trustees of State Univ. v. Fox*, 492 U.S. 469 (1989) (prohibition on product demonstrations in state university dormitories); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (restrictions on attorney solicitation of clients).

Recent decisions have not changed this principle. Although the Court discussed the constitutional infirmities of content-discriminatory regulations in sweeping terms in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-67 (2011), it acknowledged that the speech before it in that case might be commercial and might therefore be subject to only intermediate scrutiny. *Id.* at 571. The Court further signaled that content neutrality was not always required for commercial speech laws. *See* 564 U.S. at 579 ("a State may choose to regulate price

advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there") (citation and quotation marks omitted; ellipsis in original).

The Court again stated the link between content-based laws and strict scrutiny in broad terms in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28, 2231 (2015), but that case did not concern – and never addressed – commercial speech. Given that subjecting content-based commercial speech laws to strict scrutiny would effectively eliminate commercial speech as an analytic category (the distinction between commercial and noncommercial speech is itself content-based), it is implausible that *Reed* extends so far. If this Court had intended to upend decades of commercial speech jurisprudence, it would have said so. "This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

Lower courts have mostly concurred that the holdings of *Reed* do not apply to commercial speech. The Eleventh Circuit squarely rejected the applicability of *Reed*, even as it struck down Florida's no-surcharge statute: "[T]he general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory flexibility in those areas." *Dana's*, 807 F.3d at 1246. *See also Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1201

n.3 (9th Cir. 2016) ("although laws that restrict only commercial speech are content based, *see Reed* . . . , such restrictions need only withstand intermediate scrutiny"); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) ("Although only a small number of courts have addressed First Amendment challenges to commercial-speech regulations since *Reed*, almost all of them have concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech"); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid"); *Timilsina v. W. Valley City*, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) ("Because the parties agree this case concerns commercial speech . . . , the Court need not address how the regulation would fare under . . . *Reed*").

### B. Most Commercial Speech Regulations Are Content-Based.

To apply strict scrutiny to all commercial speech regulations that are in any way content-based would effectively extinguish the distinction between commercial speech and core speech, since most commercial speech regulations are content-based. Indeed, many are not even viewpoint-neutral.

"Commercial speech regulation is by its nature content-based. Such regulations definitionally target commercial speech and normally certain forms of commercial expression." Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 146-47 (2016). Commercial speech restrictions typically target speech of a certain sort that is considered deceptive or otherwise harmful, and thus are content-based. To protect public health, for example, manufacturers may not – absent certain specified conditions – disseminate written information about the benefits of unapproved uses of drugs and medical devices approved for sale. 29 C.F.R. § 99.101. To prevent consumer deception, consumer credit providers, for example, are prohibited from making various misleading representations, including advertising credit terms that they do not usually arrange. 15 U.S.C. § 1662.

Commercial *disclosure* requirements, in particular, are of necessity both content- and speaker-based. "By definition, all mandatory disclosures require some defined class to say something rather than something else." Shanor, *supra* at 178. These requirements either prescribe specific content, *e.g.*, 27 U.S.C. § 215(a) (stating precise wording of warning label required on alcoholic beverage containers), or define a certain content area that must be addressed, *e.g.*, 21 U.S.C. § 343(q)(1)(C) (requiring food labels to state calories per serving), while applying only to certain speakers (sellers of alcohol or food, in the foregoing examples).

Even if only disclosures *triggered* by certain speech content are considered "content-based," it would not

make sense to subject those disclosures in particular to more stringent scrutiny. It defies belief that, for example, requiring warnings of the hazards of smoking on *all* advertisements for *all* products would be less offensive to the First Amendment than the content-based approach of requiring such warnings only in ads for cigarettes and similar products. *See American Meat Inst. v. United States Dept. of Agriculture*, 760 F.3d 18, 33 n.1 (Kavanaugh, J., concurring in judgment) (D.C. Cir. 2014) ("The First Amendment does not tolerate a government effort to compel disclosures unrelated to the product or service – for example, a compelled disclosure on all food packages (not just cigarette packages) that cigarette smoking causes cancer").

In cases involving compelled commercial speech, this Court has applied lenient review in upholding required disclosures of specific content by specific speakers triggered by specific speech content. *See Milavetz*, 559 U.S. at 233 (requiring specific content, including the statement "We are a debt relief agency," triggered by specific speech content – offers of debt relief); *Zauderer*, 471 U.S. at 650 (requiring specific content, including that legal clients might be liable for litigation costs, triggered by specific content – offers of legal representation on contingency).

Indeed, this Court has applied less than strict scrutiny even when reviewing commercial speech regulation that distinguishes on the basis of *viewpoint*. The prohibition reviewed in *Central Hudson* itself was not viewpoint-neutral: it prohibited electric utilities

from promoting electricity use, without any corresponding prohibitions on promotion of electricity conservation. 447 U.S. at 559.

Many unexceptionable commercial disclosure requirements likewise fail the viewpoint neutrality test. Requiring alcoholic beverage labels to state, "Women should not drink alcoholic beverages during pregnancy because of the risk of birth defects," 27 U.S.C. § 215(a), is not viewpoint-neutral, however uncontroversial that viewpoint may be, nor is a requirement that certain hazardous substances carry the instruction "Keep out of the reach of children." 15 U.S.C. § 1261(p)(1)(J)(i). Such laws have never been deemed subject to heightened review.

In sum, because content-based and even viewpoint-based distinctions of necessity pervade regulations touching on commercial speech, applying to commercial speech the rule that laws distinguishing between categories of speech based on content automatically trigger strict scrutiny would effectively end any distinction between standards for reviewing laws regulating commercial speech and standards for reviewing regulations of core political or expressive speech.

### C. Subjecting Commercial Speech Regulations To Strict Scrutiny Would Severely Impair Government's Ability To Protect Public Health And Safety, Prevent Consumer Deception, And Safeguard The Public And Businesses From Other Commercial Harms.

A formalistic application of identical standards for the review of laws regulating commercial speech and core political or expressive speech would have serious practical consequences for efforts to protect public health and welfare. "[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (plur. op.) (citation omitted). Since all commerce is conducted in words, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), enhancing protections for commercial speech threatens government's ability to regulate *any* commercial conduct, no matter how unsafe or detrimental to the public. If the doctrine that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963) is applied to commercial speech, it is unclear what would remain of Congress's power "[t]o regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

A host of important protections would be endangered. Identical treatment of commercial and core speech could imply that straightforward disclosure requirements – whether of important nutritional

information, threats to public health and safety, or financial risks – should be subject to the same standard of review, almost invariably fatal, as compelled speech that deeply violates the conscience. It could likewise mean maximal protection for even deceptive or predatory commercial advertising, as well as for unfounded health and medical claims with potentially grave consequences.

Distinguishing commercial speech is critical even with respect to "truthful, nonmisleading commercial speech," *44 Liquormart*, 517 U.S. at 503. The quest for abstract symmetry does not justify eliminating the pragmatic distinction that applies more lenient scrutiny to vital laws that, for example, enhance privacy. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692e (prohibiting "publication of a list of consumers who allegedly refuse to pay debts"); Fair Credit Reporting Act, 15 U.S.C. §§ 1681b & 1681e (limiting "redisclosure of medical information" and restricting provision of investigative consumer reports containing criminal records, civil judgments or tax records "unless the agency has verified the accuracy of the information"). Even very general protections, such as the Do Not Call registry, 15 U.S.C. § 6151; 16 C.F.R. § 310.4(b)(1)(iii)(B) (restricting commercial autodialed calls), *upheld by Mainstream Marketing Svces., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), or the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (forbidding junk faxes and text messages), *upheld by Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003), could be subject to strict scrutiny as content-based

speech restrictions since they allow content-based exceptions. *See, e.g.*, 47 U.S.C. § 227(b)(1)(A) (exempting calls for emergency purposes from prohibition against automated calls); *id.* § 227(b)(2)(F) (allowing regulators to exempt certain advertisements from tax-exempt professional and trade associations to members from certain rules regulating junk faxes); 47 C.F.R. § 64.1200(a)(3)(v) (exempting certain "health care" messages from prohibition against prerecorded commercial telemarketing calls).[9]

### 1. Content-based regulations of commercial speech are important for protecting consumers and businesses from being misled.

With respect to core speech, even deliberately false statements may be protected, because allowing government to prohibit them would "give government a broad censorial power" and would cast "a chill the First Amendment cannot permit." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012). Until now the same level of protection has not been extended to deceptive speech

[9] The dangers of subjecting all content-based speech regulations to strict scrutiny extend even further, likely impairing the ability to regulate professional speech as well. Until now the First Amendment has not been thought to protect the right of doctors, for example, "to give whatever opinion they choose to their patients, regardless of whether it is misleading or incompetent." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 178 (2015). "Does anyone believe that every Enron accountant is entitled to his or her opinion, regardless of generally accepted accounting practices?" *Id.* at 181.

"used to gain a material advantage." *Id.* But such a distinction could not survive if content-based commercial speech is subjected to the same level of scrutiny as political speech.

Many federal and state statutes and regulations proscribe specific content-based categories of deceptive commercial speech. To cite just a few examples, debt collectors are barred from falsely representing that they are affiliated with government or that they are attorneys, 15 U.S.C. § 1692e(1)-(3); advertisements may not use the word "profit" to describe interest payments, 12 C.F.R. § 230.8(a)(1)-(2); restaurant menus, postings, and advertising may not misrepresent the identity of food products, N.J. Stat. § 56:8-2.9; and sellers of prescription drug discount cards may not advertise false discounts. Tex. Bus. & Com. Code § 17.46(b)(18).

Even general prohibitions of deceptive commercial speech are often content-based in that they exclude certain categories of speech. *See, e.g.*, Tenn. Code § 47-18-111(a)(3) (exempting credit terms of most transactions from requirements of state Consumer Protection Act of 1977, including prohibition on deceptive statements); N.J. Stat. § 56:8-140(e) (exempting public utilities from all provisions of Consumer Fraud Act, including prohibitions of various misrepresentations to consumers); Md. Code Com. Law § 13-104(1) (exempting services of specified professionals from general provisions of title, including prohibitions on various commercial misrepresentations).

### 2. Content-based regulations of speech are critical for protecting public health.

Public health protections would likewise be at risk if content-based restrictions of commercial speech were subject to strict scrutiny. Regulation of health-related advertising claims in advertising extends far beyond prohibition of false claims; positive substantiation is required for what in other contexts would be considered protected expression of opinion. *See, e.g.*, 21 U.S.C. § 343(r)(6)(B) (health claims for dietary supplements are prohibited without substantiation that they are true and not misleading); *see also POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 500 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839 (2016) (upholding under *Central Hudson* review portions of FTC order barring future representations of a product's health benefits unless backed by sufficient competent and reliable evidence, including a randomized controlled trial with statistically significant results); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986) (declining "to hold that firms may not be prevented from advertising their products as efficacious until they are proved otherwise," and upholding F.T.C. order requiring at least two well-controlled, double-blinded clinical studies before manufacturer could make claim about pain relief).[10] The importance of such regulation cannot be

[10] *But see United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (striking down prohibition on advertising unapproved uses of FDA-approved drugs under *Central Hudson* review). The dissent noted that the decision "call[ed] into question the very

overstated. The FDA estimates that over two million serious adverse drug reactions occur annually, with over 100,000 fatalities. FDA, *Preventable Adverse Drug Reactions* (updated 2016).[11] *See also* FDA, *FAERS Reporting by Patient Outcomes by Year*, Fig. 4 (2015)[12] (over 100,000 fatalities in official reporting for last three years that totals were available).

Even prior restraints to protect public health are accepted in the context of commercial speech. *See, e.g.*, Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387k(g)(1) (requiring prior FDA approval before tobacco products may be advertised as "modified risk" (upheld in *Disc. Tobacco*, 674 F.3d at 532-37, after determining that the regulation reached only commercial speech, *id.* at 533); 21 C.F.R. § 202.1(j)(1) (advertisements may not "be disseminated without prior approval" for prescription drugs that may cause serious damage that has not been sufficiently publicized).

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foundations of our century-old system of drug regulation"). *Id.* at 169 (Livingston, J., dissenting).

[11] *At* http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DevelopmentResources/DrugInteractionsLabeling/ucm110632.htm#ADRs:%20Prevalence%20and%20Incidence

[12] *At* http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm070461.htm

### 3. The public relies on content-based mandatory disclosures for protection from serious harm.

If compelled commercial disclosures are subjected to strict scrutiny as "content-based burden[s] on protected expression," *IMS*, 564 U.S. at 565, an enormous swath of protections relied on by the public would be at risk. "Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. . . . To . . . expose these long-established programs to searching scrutiny by unelected courts . . . is neither wise nor constitutionally required." *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001).

Even if the doctrine were thought to extend to only those mandatory disclosures triggered by specific advertising content, a panoply of consumer protections against victimization by misleading or incomplete representations would be at risk. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1663, 1664, 1665a, 1665b (requiring advertisements for credit to include specified disclosures); Securities and Exchange Act of 1933, 15 U.S.C. § 77j, 17 C.F.R. Pt. 230 (investments marketed to the public must disclose specified information in prospectus).

Public health and safety are similarly protected by a host of disclosure requirements triggered by specific advertising content. Such measures are crucial in guarding against the grave consequences of misuse of prescription and even over-the-counter drugs. About

30% of fatalities from adverse drug reactions are attributed to labeling and packaging deficiencies. Inst. of Medicine, *Preventing Medication Errors* 275 (2007).[13] The Federal Trade Commission Act requires advertisements to disclose possible consequences of using the advertised commodity, and mandates that drug advertisements enumerate and quantify ingredients. 15 U.S.C. § 55(a)(1). The Food, Drug, and Cosmetic Act similarly requires disclosures of possible consequences of drug use in advertisements. 21 U.S.C. § 321(n). Prescription drug advertisements must include presentation of hazards "reasonably comparable with the presentation of information relating to effectiveness of the drug." 21 C.F.R. § 202.1(e)(viii).

Other disclosures safeguard against other serious threats to health. At least 20% by area of print smokeless tobacco advertisements must be devoted to specified health warnings. 15 U.S.C. § 1402(b)(2)(B). To reduce the spread of infections, multi-dose diabetes pen devices must bear the warning "For single patient use only." FDA, *Drug Safety Communication: FDA Requires Label Warnings to Prohibit Sharing of Multi-Dose Diabetes Pen Devices Among Patients* (Feb. 25, 2015).[14] Manufacturers must notify motor vehicle owners of safety defects. 49 U.S.C. § 30188(b)(2)(A). Advertisements for distilled liquor must include, among other disclosures, a statement of alcohol content, as a

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[13] *At* https://www.nap.edu/download/11623

[14] *At* http://www.fda.gov/downloads/Drugs/DrugSafety/UCM435289.pdf

percentage by volume. 27 C.F.R. § 5.63(c)(1). As a condition of marketing securities for investment in their operations, mine operators must report information about health and safety violations to the S.E.C. 15 U.S.C. § 78m-2. Providers of long-term care insurance are in many states required to provide certain disclosures as a condition of marketing their products. *E.g.* Okla. Stat. tit. 36 § 2043; Minn. Stat. § 62A.50; Idaho Code Ann. § 41-4605.

Required nutritional disclosures can also have life-or-death consequences. Hypertension sufferers rely on nutritional disclosures concerning sodium content in prepared food, 21 C.F.R. § 101.9(c)(4); diabetics similarly rely on disclosures of sugar content, *id.* § 101.9(c)(6)(ii); obese heart patients rely on disclosures of total calories, *id.* § 101.9(c)(1); people with food allergies rely on required labeling, 21 U.S.C. § 343(w), to inform them of the presence of food ingredients that may be life-threatening to them.

### D. Expanding Protections For Commercial Speech Could Weaken Protection For Core Speech.

No less worryingly, if all content-based speech is treated alike, the need to regulate commerce and protect public health and safety would likely lead in practice, if not in doctrine, to a weakening of standards of review, so as ultimately to *diminish* protections for the sort of political, artistic and religious expression that

lies at the heart of what the First Amendment safeguards. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 at 456; *accord Florida Bar*, 515 U.S. 618, 623 (1995). *See also Mastrovincenzo v. City of New York*, 435 F.3d 78, 92 (2d Cir. 2006) ("To say that the First Amendment protects the sale or dissemination of all objects . . . would entirely drain the First Amendment of meaning"); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 10 (2000) ("Nothing could be more damaging to the First Amendment than to . . . transform it into a mere basis for reviewing economic regulations"). Does the Constitution really require that laws regulating commercial telemarketers (but exempting certain communications) be accorded the identical level of scrutiny as laws prohibiting citizens from criticizing government policies?

To equate mandatory factual commercial disclosures with compelled speech against conscience "trivializes the freedom protected in *Barnette* and *Wooley*." *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 62 (2006) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977)). Factual disclosures do not "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion," *Barnette*, 319 U.S. at 637; "invade the sphere of intellect and spirit," *id.* at 642; or require citizens to disseminate messages

"repugnant to their moral, religious, and political beliefs." *Wooley*, 430 U.S. at 707. If a regulation requiring a manufacturer to disclose the net weight of its saltine crackers is subject to scrutiny identical to that appropriate for a public university's requirement that all instructors sign a loyalty oath, protections of "the sphere of intellect and spirit" are likely to be "devitaliz[ed]" by "a leveling process." *Ohralik*, 436 U.S. at 456.

## CONCLUSION

Under the most plausible reading of Section 518, the statute readily passes muster under the First Amendment. The issues here provide no reason to reconsider commercial speech doctrine, and settled societal expectations militate strongly against doing so. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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# APPENDIX

## Identity and Interest of *Amici Curiae*

### Action on Smoking and Health

Action on Smoking and Health (ASH) is the nation's oldest anti-tobacco organization. ASH is dedicated to ending the global death, disease and damage caused by tobacco consumption and nicotine addiction, through public policy, litigation and public education.

### American Thoracic Society

The American Thoracic Society (ATS) is an international educational and scientific organization founded in 1905 that represents more than 16,000 health care professionals. ATS works to prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. Its membership includes experts on respiratory occupational health. ATS publishes three peer-reviewed scientific journals that disseminate groundbreaking research, including studies on health effects of tobacco use.

### National Association of County and City Health Officials

The National Association of County and City Health Officials (NACCHO) is the voice of the 2,800 local health departments across the country. Local health departments develop policies and create environments that make it easier for people to be healthy and safe,

including informing the public of the hazards of tobacco use, reducing youth access to tobacco, and limiting exposure to secondhand smoke.

**Public Good Law Center**

The Public Good Law Center is a public interest law firm dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for consumer protection, public health, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Public Good has submitted *amicus* briefs in this Court and in Courts of Appeals around the nation in cases involving freedom of speech and the disclosure of information important to consumers, as well as cases involving fair debt collection practices, predatory lending, credit reporting abuses, and other matters of direct and immediate consequence to low-income individuals.

**Tobacco Control Legal Consortium**

The Tobacco Control Legal Consortium is a national network of nonprofit legal centers that provides technical assistance to public officials, health professionals, and advocates concerning legal issues related to tobacco and public health. The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium's briefs – in the United States Supreme Court,

United States Courts of Appeals, and state and federal courts around the nation – have addressed issues related to federal preemption and state and local government authority to regulate the sale of tobacco products, as well as First Amendment issues concerning the regulation of tobacco promotion. The Consortium exists to protect the public from the devastating health consequences of tobacco use. It has a strong interest in maintaining state and local governments' authority to ensure that their communities are informed about those consequences.

The Tobacco Control Legal Consortium's activities are coordinated through the Public Health Law Center, at the Mitchell Hamline School of Law in St. Paul, Minnesota. The Consortium's affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at the University of Maryland Francis King Carey School of Law, Baltimore, Maryland; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey; and the Public Health Advocacy Institute and the Public Health and Tobacco Policy Center, at Northeastern University School of Law, Boston, Massachusetts.