No. 15-1391

IN THE
Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,
v.

ERIC SCHNEIDERMAN,
ATTORNEY GENERAL OF NEW YORK, *et al.*,
Respondents.

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

BRIEF OF THE CREDIT UNION NATIONAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

STATUTES

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

The Credit Union National Association (CUNA) is the largest organization representing America's credit unions. CUNA advocates for credit unions before Congress, federal agencies, and the courts. It also provides credit unions with training, compliance, and operational resources. CUNA likewise provides support on state issues and sponsors educational and networking opportunities for credit union volunteers and staff.

Credit unions are not-for-profit financial cooperatives with the statutory mission of meeting the credit and savings needs of consumers, often in low-income, rural, or underserved populations. See Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913 (1998).

> Credit unions, unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means.

Id. § 2(4), 112 Stat. at 914. Credit unions return their earnings to the consumers they serve in the form of

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus curiae* contacted counsel for all parties, who communicated their written consent to the filing of this brief.

better interest rates, lower minimum deposits, and lower fees.

Although there are approximately 104 million credit union memberships nationwide, credit unions are generally small and often struggle to compete with larger players in a fiercely competitive consumer financial services market. The median size for a U.S. credit union is roughly $28 million in assets. By comparison, JPMorgan Chase had approximately $2.4 trillion in assets as of 2016. JPMorgan Chase & Co., *About Us*, https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm (last visited Dec. 14, 2016).

To meet consumer expectations, credit unions offer many of the same financial products as commercial banks, including credit cards. Cost-effective card programs help credit unions fulfill a core part of their statutory mission to serve the credit needs of their members, including those of "modest means." See Credit Union Membership Access Act, § 2(4), 112 Stat. at 914.

CUNA and its members have an interest in this case because its outcome could negatively affect the use of credit cards and, as a consequence, CUNA's members. Petitioners seek to discourage credit card usage by imposing surcharges. These surcharges would make credit card purchases more expensive and compel many customers to use other forms of payment. With a diminished customer base and reduced cash flow, credit unions would suffer, and so would the members who depend upon them.

Among these members are many low-income individuals and their families. For a variety of reasons, as discussed below, they would be particularly hard-hit by a ruling that lessened the availability and utility of credit cards. Not only would these members have diminished access to credit, but they could lose the benefits of other programs that credit unions offer, including free checking, the costs of which are offset by credit unions' revenues, including credit card revenues.

At bottom, New York State made a sensible economic choice by enacting legislation that protects consumers, credit unions, and other participants in the credit card market. The anti-surcharge law is quintessential economic legislation, which is consistent with federal legislation that was enacted decades ago. Petitioners' constitutional challenge lacks merit.

SUMMARY OF ARGUMENT

The challenged New York law is a classic price control, just like the many others that affect Americans each and every day. This Court has left no doubt that States have the power to set price controls for the goods and services sold within their borders. Price controls, including surcharges, regulate economic conduct, not speech, and States have inherent authority to regulate that conduct for the benefit of their citizens.

Petitioners emphasize the New York law's incidental effects on speech. But the fact that a law regulating economic conduct incidentally affects speech does not trigger any heightened requirements under the First Amendment. A contrary rule would subject countless economic regulations, including every price-control statute, to First Amendment scrutiny.

Laws like New York's are vital to preserving consumer credit card use—a payment method that confers important benefits on both consumers *and* merchants. Credit cards play an especially helpful role for many low-income families, for whom credit cards are the best available source of funds for emergencies and cashflow management. Credit card revenues, like other financial institution revenues, also allow them to afford additional vital services, such as free checking and savings accounts. The New York law prohibits merchants from imposing surcharges on this economically efficient form of payment and from gouging consumers at the cash register. The New York law is especially critical for credit unions, who have a statutory mission to serve consumers of modest means and who often can provide credit cards only if an adequate number of cardholders is maintained.

Striking down the New York statute would allow merchants to increase their profits under the guise of recovering interchange fees through a surcharge. Several features of surcharges facilitate this tactic, and empirical evidence from Australia's recent experience shows that surcharges effect a regressive wealth transfer from consumers—including low-income individuals—to merchants.

BACKGROUND

A brief discussion of how credit cards are processed and their benefits will help put the New York law into perspective.

1. When a consumer pays for merchandise with a credit card, typically five parties are involved in that transaction: (1) the consumer; (2) the merchant; (3) the merchant's financial institution, which processes credit card transactions (called the "acquirer"); (4) the consumer's financial institution (called the "issuer"); and (5) the network itself (e.g., Visa or MasterCard). Credit unions and other financial institutions that participate in the consumer financial services mar-

ketplace serve as issuers and acquirers. See U.S. Gov't Accountability Off., *Credit Cards: Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges* 6–7 (2009), http://1.usa.gov/1wQTiKS.

A typical credit card transaction works as follows: When a credit union member applies for a credit card, the credit union assesses the applicant's ability to repay credit card debt based on the member's income and assets, existing debt obligations, and payment history. If the credit union concludes that the member is creditworthy, it issues a credit card. When the member later uses the card to make a purchase, a signal is sent to the merchant's acquirer. The acquirer in turn notifies the credit union via the network that the member wants to make a credit card purchase. The credit union then approves the transaction—assuming the purchase does not exceed the member's line of credit and is not indicated as fraudulent—and communicates its authorization through the network to the acquirer, which prompts the merchant to consummate the sale. All of this happens in the span of seconds. *Id.* at 6–9.

Once the purchase is complete, the merchant sends a payment request to the acquirer, which again signals the credit union through the network. The credit union responds by sending the requested funds through the network's settlement arrangement to the acquirer, which forwards the funds to the merchant less a discount fee. The discount fee typically includes a "switching" fee paid to the card network for processing the transaction, a payment to the acquirer, and an interchange fee to the credit union. The credit union's default interchange fee is generally established by the network. The total discount fee typically ranges from 1% to 3% of the purchase price. *Id.*

Although the credit union pays the merchant almost immediately, the consumer generally does not pay the credit union until a due date in the future. In the meantime, until the due date, the credit union effectively provides the consumer with an interest-free loan. The credit union also bears all of the risk of non-payment. *Id.* at 4; Todd J. Zywicki, *The Economics of Payment Card Interchange Fees and the Limits of Regulation* 8 (June 2, 2010), http://www.laweconcenter.org/images/articles/zywicki_interchange.pdf.

2. "Since its inception in the 1950s, the credit-card industry has generated untold efficiencies to travel, retail sales, and the purchase of goods and services by millions of United States consumers." *United States* v. *Am. Express Co.*, 838 F.3d 179, 184 (2d Cir. 2016) (reversing *United States* v. *Am. Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015)). For consumers, credit cards provide readily accessible credit that can be tapped in the event of a financial emergency. A recent survey revealed that 46 percent of Americans indicated that a $400 emergency expense would be a challenge to handle and that they either could not pay the expense or would have to borrow or sell something to do so. Bd. of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2015* 1 (May 2016), http://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf. Furthermore, because bills and purchases often do not coincide with payroll cycles, credit cards also provide consumers with the important ability to prudently pay for certain purchases over time and when needed. That can be especially important for big-ticket purchases, such as appliances and furniture. See Zywicki, *supra*, at 7. And, because most issuers do not charge interest as long as the cardholder pays the card's balance before the next

billing cycle, the short-term loans that make this prudent cash flow management possible are free to consumers.

Credit cards confer a number of other consumer benefits in addition to the core benefit of providing accessible credit. Responsible use of credit cards is one of the key ways consumers build—or rebuild—their credit histories. See, *e.g.*, Experian, *How to Build Credit*, http://www.experian.com/blogs/ask-experian/credit-education/life-events/building-credit/ (last viewed Dec. 14, 2016). Using a credit card avoids the inconvenience of trips to the ATM or bank, as well as ATM fees, which reached $1 billion last year at the three largest banks alone. See Heather Long, *ATM and overdraft fees top $6 billion at the big 3 banks* (Jan. 14, 2016), http://money.cnn.com/2016/01/14/investing/atm-overdraft-fees/. Because credit cards track where they are used, they provide an easy way for cardholders to keep records. Credit cards facilitate purchasing online, which would be extremely difficult with cash or checks. Zywicki, *supra*, at 18. And credit cards come with robust antifraud protections. See, *e.g.*, 15 U.S.C. § 1643(a)(1)(B) (limiting cardholder liability for unauthorized credit card use to $50).

Credit cards also give merchants important benefits. Unlike checks, credit cards protect merchants against a risk of insufficient funds and default, and generally against the risk of fraud as well. Indeed, the avoidance of this risk alone—which cost Visa and MasterCard $65 billion in 2009—more than compensates for the interchange fees merchants pay. Zywicki, *supra*, at 8, 14. Merchants likewise are spared the logistical difficulties and safety risk of transacting in, storing, and protecting large quantities of cash on a daily basis. See, *e.g.*, 127 Cong. Rec. 4204, 4219 (1981).

In addition, because credit cards can serve as a buffer against unexpected expenses, they free up funds that consumers would otherwise have to hold against a rainy day, allowing them to spend more on merchandise. Credit cards also streamline the sales transaction process itself, shortening customer wait times (thus promoting consumer goodwill) and allowing merchants to make sales online or via automated systems when no attendant is available. See, *e.g.*, *Am. Express*, 838 F.3d at 185 ("Retail sellers get the benefits … of increased trade because of consumer convenience…."). And, of course, many merchants—especially small businesses and startups—themselves rely on credit cards to provide the liquidity that makes doing business possible. Zywicki, *supra*, at 15 ("The availability of personal credit and business credit cards is thus likely an important source of economic stimulus, enabling businesses to start or grow even in a credit-constrained economy.").

ARGUMENT

I. THE NEW YORK LAW DOES NOT IMPLICATE THE FIRST AMENDMENT.

A. The New York Law Regulates Conduct, Not Speech.

This Court has left no doubt that a State "may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934). That authority is part of each State's broader power to "adopt whatever economic policy may reasonably be deemed to promote the public welfare"—a decision the courts may not question. *Id.*

In particular, a "[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Id.* at 539. Relying on this principle, federal, state, and local governments have enacted statutes setting various price ceilings and floors, and these statutes play important roles in the lives of many Americans. See, *e.g.*, 29 U.S.C. § 206 (federal minimum wage); N.Y. Gen. Oblig. Law § 5-501 (anti-usury interest rate cap); S.F. Admin. Ordinance § 37.3 (rent control); Tex. Bus. & Com. Code Ann. § 17.46(b)(27) (anti-price gouging statute). This Court routinely upholds such pricing laws and has done so for decades. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519 (1992) (upholding rent control statute); *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (upholding ceiling on insurance agent compensation).

The challenged New York law is a classic price control, far outside the scope of the First Amendment. Just like many other price control statutes that Americans rely on every day, the New York statute sets a price cap. The law provides that merchants may not "impose a surcharge on a holder who elects to use a credit card." N.Y. Gen. Bus. Law § 518. In other words, merchants may not charge more than the regular price—typically the price on the price tag, advertisement, or grocery store shelf—when a customer chooses to pay with a credit card.

That is no different than capping the rent that a landlord may charge for an apartment, the interest rate that a bank may charge for a loan, or the markup that a merchant may charge during an emergency. Like these other ubiquitous price control statutes, the New York law regulates what people may or may not *do*. It thus falls well within the States' long-recognized power to "regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Nebbia*, 291 U.S. at 537.

Petitioners' case hinges on the assertion that the New York law regulates what merchants may *say*. But that is simply false: The statute is silent on what merchants may say about credit cards, surcharges, or any other topic. Under New York's law, a merchant is free to explain—via a store-front banner, a message on all receipts, a bull horn, or any other medium of its choosing—its view on interchange fees or their effect on prices. The merchant is also allowed to say—after providing a discount for cash purchases—that credit card purchases are relatively more expensive. The law prohibits only one thing: charging a customer more than the regular price for using a credit card. That is conduct, not speech.

Petitioners argue that customers' adverse reactions to surcharges somehow make imposing a surcharge speech. See Petr. Br. 26. But economic conduct does not become speech simply because someone reacts to it. For instance, a gas tax does not violate the First Amendment even though higher gas prices would likely deter some customers and possibly drive up sales of Teslas. Indeed, the Supreme Court has blessed, as an example of a law that does not regulate speech, a price floor for alcoholic beverages enacted to promote temperance by prompting consumers to buy fewer drinks. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507 (1996) (plurality op.). A contrary ruling here would not only be unprecedented, but would also subject a massive array of economic regulation to First Amendment scrutiny—resuscitating *Lochner* and dressing it up in First Amendment garb. See *Lochner* v. *New York*, 198 U.S. 45 (1905).

B. The Incidental Effect on Pricing Communications Is Constitutionally Irrelevant.

The most that Petitioners can say is that the New York law implicates speech because merchants cannot impose a surcharge and, as a result, cannot tell consumers that credit card purchases will give rise to a surcharge. *E.g.*, Petr. Br. 1. But "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 62 (2006) (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Such incidental effects on speech do not trigger First Amendment scrutiny.

Indeed, most business regulations—including every price ceiling or floor—bring about incidental effects on speech. For instance, the federal minimum wage law, 29 U.S.C. § 206, has the incidental effect of preventing employers from telling employees that they will make less than the minimum wage. That fact, however, does not subject the law to First Amendment scrutiny.

The same is true for rent control regulations, antiusury statutes, and all manner of other price regulations. A landlord cannot tell his tenant that the rent exceeds the regulated amount, and a banker cannot tell his customer that the interest exceeds the cap. But neither businessman can file a viable First Amendment claim.

Petitioners cannot point to any case subjecting such regulations to First Amendment analysis—let alone invalidating them under the First Amendment. Indeed, taken to its logical conclusion, Petitioners' position would require First Amendment analysis of not only those laws, but also laws banning employment discrimination on the basis of race because such laws "require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62. Yet this Court has explicitly rejected this notion. *Id.*

The Court's opinion in *FAIR* is particularly instructive. There, a federal statute required law schools to permit the military to recruit on-campus on the same terms as other employers. The schools argued that the statute violated the First Amendment by forcing them to provide recruiting assistance to the military in the form of speech (e.g., posting notices about recruiting on bulletin boards) if the schools provided similar assistance to other employers. *Id.* at 61–62. This Court rejected the schools' argument, explaining that "[t]he compelled speech to which the law schools point" is "plainly incidental" to the federal statute's "regulation of conduct," *i.e.*, permitting the military to recruit on campus. *Id.* at 62. So too here. Any effect of the New York law on merchant speech is "plainly incidental" to the law's regulation of conduct: forbidding merchants to impose a surcharge on credit card use.

Petitioners are not aided by this Court's cases establishing that the First Amendment protects the right of merchants to advertise lawful prices. See Petr. Br. 27 (citing, *e.g.*, *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Those cases dealt with prohibitions on speech itself, not a prohibition on conduct with incidental effects on speech. See *44 Liquormart*, 517 U.S. 484 (invalidating prohibition on advertising prices for alcoholic beverages); *Bates* v. *State Bar*, 433 U.S. 350, 355 (1977) (invalidating restriction on advertisements of attorneys' billing rates); *Va. State Bd.*, 425 U.S. 748 (invalidating prohibition on advertising drug prices by pharmacists). And nothing in those cases suggests a departure from this Court's longstanding rule that a law regulating economic conduct does not violate the First Amendment by virtue of incidental effects on speech.

Indeed, Petitioners do not claim that New York's law prevents them from telling customers how much they will pay for merchandise, like the laws in the advertising cases Petitioners cite. See Petr. Br. 6; *compare 44 Liquormart*, 517 U.S. at 489–90; *Bates*, 433 U.S. at 354–55; *Va. State Bd.*, 425 U.S. at 749–50. Nor do Petitioners argue that they cannot speak to consumers about the effects of interchange fees; as explained *supra*, at 10, the New York law does not restrict such speech in any way. Petitioners' claim is instead that they cannot *impose a surcharge as a way of communicating* their views on interchange fees. Petr. Br. 1, 5–6. But imposing a surcharge, standing alone, would communicate nothing to customers; to make their point, merchants must include commentary explaining that the surcharge is due to interchange fees that, in their view, are too high. In other words, as in *FAIR*: "The expressive component of [the merchants'] actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection ...." *FAIR*, 547 U.S. at 66.

C. Surcharges and Discounts Are Not Two Sides of the Same Coin.

Petitioners' argument depends on their repeated insistence that "[a] 'surcharge' and a 'discount' are just two ways of framing the same price information—like calling a glass half full instead of half empty." Petr. Br. 1. But this argument misses the mark.

First, surcharges pose unique dangers that discounts do not present. For example, surcharges create a heightened risk of price gouging and cash-register surprises. That is because merchants can use surcharges to "add[] additional fees that appear only at the register, where it may be more difficult for consumers to opt out or make another payment selection …, and where doing so makes price comparisons between merchants more difficult." Marc Rysman & Julian Wright, *The Economics of Payment Cards* 12 (2012); 127 Cong. Rec. 4219 (recognizing this difficulty en route to repassing federal surcharge ban); see also *infra*, at 24. This danger does not exist with regard to a merchant who raises the regular price to take interchange fees into account and offers discounts for choosing particular payment methods, both because customers will know the maximum they will pay (the regular price) at the outset and because merchants will have an incentive not to over-inflate the discount.

Surcharges also offer a tempting opportunity for fraud and misrepresentations by merchants. Consumers may have difficulty monitoring which of the wide array of interchange fees applies to a particular transaction. See, *e.g.*, MasterCard, *U.S. Region Interchange Programs and Rates*, *available for download at* https://www.mastercard.us/en-us/about-mastercard/what-we-do/interchange.html (last viewed Dec. 14, 2016) (detailing various fees that may apply). Merchants may thus be able to represent that a profit-seeking surcharge is needed to cover interchange fees with little prospect of detection.

Furthermore, surcharges threaten to slow retail sales nationwide, with adverse ripple effects across the economy. Surcharges may unpleasantly surprise customers with a higher-than-expected bill at the register. Pet. App. 8a. This experience can cause consumer frustration and dampen overall retail sales. *Id.*

Second, Petitioners are simply wrong that offering a discount and imposing a surcharge constitute "identical conduct." Petr. Br. 1–2. The two concepts are *opposites*. A surcharge is "a charge in excess of the usual or normal amount: an additional tax, charge, or cost," *Webster's Third New International Dictionary* 2299 (2002), whereas a discount is "an abatement or reduction made from the gross amount or value," *id.* at 646. A law that allows discounts but does not allow surcharges simply treats different economic concepts differently; it does not choose between two alternative ways to describe "identical conduct." Petr. Br. 2.

To illustrate this concept, imagine a Wisconsin sports bar that lists beer at $5 per glass. The bar also offers a $1 discount to Packers fans and imposes a $1 surcharge on Vikings fans. It is perfectly clear that the discount and surcharge are not "two ways of framing the same price information," Petr. Br. 2, but instead are two completely distinct economic arrangements. If Wisconsin passed a law forbidding surcharges against Vikings fans but allowing discounts for Packers fans, no one would argue that the State was telling the bar which of two expressions it could use to describe a single economic reality. Rather, the State would be forbidding one economic arrangement while permitting a completely different one. Likewise, a surcharge for credit card use and a discount for cash use are simply different things, and New York did not violate the First Amendment by allowing one and forbidding the other.

That is especially clear here, where multiple other forms of payment in addition to cash and credit cards exist, including debit cards, checks, and electronic payment systems such as PayPal. It is also true even in a case—unlike this one—in which the surcharged and discounted classes constitute together the entire population. For instance, imagine a gas station that offered a 5% discount to customers at least seven feet tall and charged everyone else the advertised price. No one would describe that arrangement as a surcharge on customers who are shorter than seven feet. Rather, the station's regular price is for customers who are shorter than seven feet, and it simply offers a reduction in price for very tall customers. Likewise, in this case, even if customers could pay only with cash or credit card, the surcharge on credit cards that the New York law prescribes would not be the same as a discount for cash use.[2]

[2] Even if discounts and surcharges were economically identical here, New York's differential treatment of them would not violate the First Amendment, both because the New York law does not regulate speech, *see supra*, at 8–13, and because discounts and surcharges pose distinct risks that warrant treating them differently, *see supra*, at 14–15.

II. AS A REGULATION OF ECONOMIC CONDUCT, THE NEW YORK LAW SERVES IMPORTANT ECONOMIC POLICIES.

A. The Law Fosters Credit Card Use, Which Benefits Consumers and Merchants.

The New York law and others like it play the vital role of protecting credit card purchases from discriminatory burdens and price gouging. The statute prohibits merchants from singling out payment with a credit card for particularly unfavorable treatment, which would make credit cards less attractive to consumers. The New York law thus helps preserve the benefits that credit cards offer, including, as discussed earlier: providing a critical source of emergency liquidity and a means of prudent cash flow management (at no cost to consumers, as long as the monthly balance is paid in full); helping consumers build positive credit histories and keep accurate records; avoiding the inconvenience and expense of trips to banks and ATMs; and affording robust antifraud protections. See *supra*, at 6–7.

These benefits would be diminished insofar as surcharges discourage credit card use. Not only would credit cards be less desirable to consumers, but the surcharge would impact the availability of credit cards in the first place. Issuing credit cards is expensive, involving "substantial fixed costs that are feasible only when defrayed over large account and transaction volumes." Adam J. Levitin, *Interchange Regulation: Implications for Credit Unions* 39 (2010), https://filene.org/assets/pdf-reports/224_Levitin_final_WEB.pdf. When account and transaction volumes decline, so does the availability of credit cards.

The fixed costs of credit card issuance can prove especially difficult for credit unions, which are often very small: The median size for a U.S. credit union is roughly $28 million in assets. For many credit unions, the ability to benefit their members by issuing credit cards depends on persuading a large percentage of members to use their cards and use them often, thus driving up the account and transaction volumes that defray the costs of card issuance.

Allowing merchants to impose credit card surcharges would seriously undermine credit unions' ability to issue cards. As members switch to other payment methods the merchants favor, credit unions that have already issued credit cards may find the fixed costs of maintaining their credit card programs insupportable. See Zywicki, *supra*, at iii ("community banks and credit unions—which rely especially heavily on interchange revenue—are likely to be harmed by interchange fee regulation and may be forced to shrink or cease their card operations"). And credit unions that have not yet issued credit cards will hesitate to do so, reducing access to credit cards. That result is inconsistent with Congress's mandate to credit unions to serve the credit and savings needs of "consumers … of modest means."

Discouraging credit card use would also adversely affect many merchants. See *supra*, at 7–8. If, as a consequence of surcharges, credit card use diminished, many merchants would have to deal in larger stockpiles of cash, with the attendant expense and safety risk. And they would be exposed to greater risk of insufficient funds and fraud arising from checks. Customer wait times would increase, and fewer customers would purchase merchandise via the Internet or automated systems. The funds available for purchases would also decrease, as some consumers increase bank account reserves to serve as a safety net for unexpected needs. Merchants across the country would experience these detriments, not just those who decide to impose surcharges. That is because the decision by some merchants to impose surcharges could prompt a number of consumers to stop applying for or using credit cards at all, out of fear of paying more for the same product.

A reduction in credit card use could also increase costs for merchants. After accounting for reduced labor and cash-processing expenses, increased sales, and other efficiencies, credit cards may be cheaper than other payment alternatives. See, *e.g.*, Allen Rosenfeld, *Point-of-Purchase Bank Card Surcharges: The Economic Impact on Consumers*, New Am. Found. 3 (May 2010), https://na-production.s3.amazonaws.com/documents/ point-of-purchase-bank-card-surcharges. "[T]he variable fees of card use are less than the variable costs of handling cash," and "empirical evidence shows [that] electronic payments are more cost-efficient than paper payments." *Id.* at 4. Thus, for many merchants in competitive markets, "the credit card price should be less than, not higher than, the cash price," even with acceptance fees. *Id.* at 3. "This would contradict the assumption that bank card use leads to higher retail prices, thereby undermining the claims of retailers advocating for the right to add surcharge fees to posted retail prices." *Id.* at 4. And the cost advantages of credit cards are only highlighted when costs of other payment systems "that are borne by consumers and society generally" are taken into account. Zywicki, *supra*, at 2.

In sum, "credit transactions fall within the domain of win-win transactions." Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 567 (2005). They provide benefits to both consumers and merchants, and "the only quarrel is over the size of the gain for each party." *Id.*

B. The Law Aids Low-Income Consumers.

Petitioners and their *amici* seek to portray the New York law as favoring the wealthy at the expense of the underprivileged. See, *e.g.*, Petr. Br. 8; Levitin Br. 22–25. But the New York law and others like it *help* low-income consumers. Specifically, these laws make critical financial tools available to low-income individuals and allow them to rely on advertised prices.

1. The Law Makes Important Financial Tools Available to the Underprivileged.

Reducing the costs of credit-card purchases is especially important for the economically disadvantaged, for whom credit cards often play a vital role. For instance, credit cards offer the most affordable method of cashflow management for many people who lack bank account reserves. Without a credit card, these individuals would be forced to turn to expensive alternatives, such as payday lenders, when bills are due before the next payday. See Consumer Fin. Prot. Bureau, *What is a payday loan?*, http://www.consumerfinance.gov/askcfpb/1567/what-payday-loan.html (last visited Dec. 14, 2016) ("A typical two-week payday loan with a $15 per $100 fee equates to an annual percentage rate (APR) of almost 400%. By comparison, APRs on credit cards can range from about 12 percent to 30 percent.").

Likewise, for people with low income, a credit card is often the only accessible source of funds in the event of a financial emergency, such as an unexpected hospital bill. See *supra*, at 6 (46 percent of Americans would not be able to cover a $400 emergency expense or would have to borrow or sell something to do so). A credit card also removes the inconvenience of frequent trips to a bank or ATM, which can be more burdensome to low-income Americans. See*, e.g.*, Gillian B. White, *Stranded: How America's Failing Public Transportation Increases Inequality*, The Atlantic (May 16, 2015), http://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-trans-portation-increas es-inequality/39 3419/. And responsible use of a credit card can be a critical first step in rebuilding bad credit history.

Credit cards have important advantages over other payment methods. To rely on cash as a primary form of payment, a person must either keep a large sum on hand—risking serious hardship if the cash is lost or stolen—or rack up ATM fees by making many small withdrawals throughout the month. These fees—which are often the same regardless of the amount of cash withdrawn—impact low-income customers more than high-income customers. See, *e.g.*, ValuePenguin, *Bank ATM Fees: How Much Do Banks Charge and How Can I Avoid Them?*, https://www.valuepenguin.com/banking/bank-atm-fees (listing ATM fees charged by various banks).[3]

Credit cards help cardholders escape this dilemma. And credit cards likewise have important advantages over debit cards—for instance, allowing individuals to rent a car or check into a hotel, a task that often cannot be accomplished with a debit card due to the large transaction holds placed on the account, which may exceed available funds. Credit cards also serve the

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[3] That is especially true for independently-operated ATMs, which make up about half the market and charge higher fees. *See* U.S. Gov't Accountability Off., *Automated Teller Machines* (2013), http://www.gao.gov/assets/660/653725.pdf.

underprivileged in another important way: Like other financial institution revenues, credit card revenues can help offset the cost to credit unions of providing free services, such as checking and savings accounts, that the credit unions may otherwise find uneconomical to offer.

Contrary to Petitioners' claims that the New York law is regressive, the law actually *prohibits* regressive behavior by merchants. Low-income persons are likely to spend a far greater percentage of their income than high earners on expenses, such as food, clothing, and gasoline, that are sold at retail outlets. See Bureau of Labor Statistics, *Table 1101: Quintiles of income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Survey, 2015* (2016), http://www.bls.gov/cex/2015/combined/quintile.pdf (lowest income quintile spent 55% of income on food, clothing, gasoline, drugs, and tobacco products, compared to 12% for highest quintile). A percentage surcharge by retail outlets would thus apply to a much higher percentage of the income of low earners than of high earners.

Petitioners' proposed rule would also lead to regressive results even outside the credit card context. On Petitioners' view, the First Amendment bars States and the federal government from prohibiting surcharges on *any* payment method, so long as discounting for any other method is allowed. Merchants would thus be permitted to impose surcharges for paying with debit cards and checks in addition to credit cards, pressuring disadvantaged individuals into a cash-only economy with its attendant inconveniences and fees. See *supra*, at 21. The First Amendment certainly does not tie States' hands in responding to these tactics.

2. The Law Allows Consumers to Rely on Advertised Prices.

As the State Consumer Protection Board recognized when the New York law was enacted, "permitting credit-card surcharges would undermine efforts to insure that customers can depend on advertised claims and prices." Pet. App. 8a (internal quotation marks omitted). That concern is especially important for many low-income persons. Living on a tight budget often means carefully comparing retailer advertising for the best deals on necessities such as food and clothing. Allowing surcharges simply for using a credit card would make this process much more difficult.

Surcharges would make price advertisements confusing at best and meaningless at worst. Unlike a sales tax—which applies uniformly to all merchants in a jurisdiction—a surcharge could be charged by only some merchants, and the amount of the surcharge could vary from merchant to merchant and from purchase to purchase. Merchants could even change their surcharge policy from one day to the next or impose surcharges for some credit cards but not others. See Frankel Br. 11. Price comparison is exceedingly difficult when non-advertised surcharges are involved. Discounts do not pose this problem, because they simply make goods *less* expensive than the consumer previously believed, and the merchant has every incentive to make the discount well-known.

C. International Evidence Supports the Economic Rationale Behind the New York Law.

Petitioners insist that surcharges are needed so merchants can recoup interchange fees. But the truth is that surcharges are more likely to provide cover for merchants to exact excess profits from consumers.

As explained above, several features of surcharges make them an ideal vehicle for covert price increases. See *supra*, at 14. They allow merchants to claim that a price increase is the fault of another company—namely, the credit card issuer—and hence shift any loss in consumer goodwill resulting from the price increase to the issuer. They also enable merchants to surprise customers with a price at the register after the customer has already committed to making the purchase or lacks time to seek the same item elsewhere for a lower price. Rysman & Wright, *supra*, at 15. And surcharges, as noted *supra*, at 23, make comparing prices difficult, allowing more expensive merchants to attract consumers who would ordinarily have shopped from a less pricy competitor. Rysman & Wright, *supra*, at 15.

Empirical evidence demonstrates that merchants use the ability to impose surcharges as cover for exacting additional profits. In 2003, the Reserve Bank of Australia issued regulations authorizing surcharges for paying with a credit card. Merchants responded by imposing surcharges that were, on average, twice the interchange fee the merchants themselves had to pay the issuers. *Id.* Furthermore, "this average surcharge … increased [over time] even while [interchange] fees … decreased." *Id.* Surcharges were often evident in industries in which consumers have limited alternative payment options. New S. Wales Office of Fair Trading, *Choice Report: Credit Card Surcharging in Australia* 14 (2010), http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Credit_card_surcharges_part1.pdf.

Faced with this evidence, Australian regulators implemented new reforms in 2012 to tie surcharges to the interchange fee. Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Re-*

forms and Regulation Impact Statement 1 (June 2012); see also Reserve Bank of Australia, *Standard No. 3 of 2016: Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions* § 4.1 (2016) (the "Permitted Surcharge for a Merchant and a Scheme … is an amount not exceeding the Cost of Acceptance for that Merchant and that Scheme"). Even after the 2012 reforms, however, companies continued to hide profit-seeking price hikes in their surcharges. For instance, airlines in Australia "continue[d] to hit Australians with millions more in surcharges than it costs to process" their credit card transactions—including a surcharge of "523% more than the average merchant service fee" for some flights. Consumers Fed'n of Australia, *Airlines still demand mark ups of over 500% on credit card surcharges* (Jan. 9, 2014), http://consumersfederation.org.au/airlines-still-demand-markups-of-over-500-on-credit-card-surcharges/. Petitioners have advanced no reason to believe the American experience of surcharges will be any different.

CONCLUSION

For the foregoing reasons, and those stated by Respondents, the Court should affirm the judgment of the court of appeals.

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