No. 15-1391

IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, et al.,
Respondents.

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

BRIEF OF LABOR, ENVIRONMENTAL, AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici curiae[1] Labor, Environmental, and Civil Rights Organizations share an interest in defending the states' and political branches' historical power to regulate to protect the public and our environment. A ruling for Petitioners would threaten that traditional regulatory prerogative and upset the balance of power between legislatures and the courts.

Amicus the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is a union of 1.6 million members in the United States and Puerto Rico, both in the public and private sectors, who share a commitment to service. AFSCME advocates for prosperity and opportunity for all working families. AFSCME's interest in this case is to defend the government's ability to regulate the economy so that AFSCME's members and other working Americans are protected from exploitation and deceptive business practices.

Amicus the American Federation of Teachers ("AFT"), an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.6 million members in K-12 and higher education, public employment, and health care. The AFT has more than 3,500 locals nationwide. The AFT's interest in this case arises from its long-term commitment to defending the balance under the First Amendment between protected speech and associational rights on the one hand and the traditional right of government to issue economic and social regulation and legislation that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

addresses conduct on the other.

Amicus the National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people through legislation, policy, and litigation, and represents LGBT people in First Amendment and other cases in courts throughout the country.

Amicus the National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in their families, including in the workplace. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving discrimination in employment before the United States Supreme Court, federal courts of appeals, and state courts.

Amicus Natural Resources Defense Council, Inc. ("NRDC") is a non-profit membership corporation founded in 1970 with hundreds of thousands of members nationwide. NRDC engages in scientific analysis, public education, advocacy, and litigation to protect human health and the environment. NRDC's

members rely on disclosure requirements and laws against false and misleading commercial speech to protect themselves and their families from environmental toxins and other harms.

Amicus the Service Employees International Union ("SEIU") is a labor union representing more than 2 million men and women in healthcare, property services, and public service employment in the United States, Canada, and Puerto Rico. SEIU is dedicated to improving the lives of workers and their families and creating a more just and humane society. SEIU's interest in this case is to defend the ability of elected officials to enact policies that protect working people and other consumers from exploitation or deception.

Amicus the Sierra Club is a national nonprofit organization with 67 chapters and over 665,000 members dedicated to educating and enlisting humanity to protect and restore the quality of the natural and human environment. The Sierra Club's concerns include protecting the public from products that pose risks to safety, health, and welfare. The Sierra Club's particular interest in this case is to preserve the ability of government entities to protect the public through regulation of commercial transactions, by adopting laws that support the public's right to know and that require disclosure of risks to consumers.

Amicus the United Steelworkers International Union ("USW") is an international trade union representing over 600,000 working women and men in the United States and Canada in a diverse range of manufacturing, mining, and service industries. USW participated in the Congressional hearings in support of a credit card surcharge ban that preceded the

passage of Pub. L. No. 94-222, 90 Stat. 197 (1976), the federal statute providing the model for the New York law, N.Y. Gen. Bus. L. § 518, at issue before the Court, and USW's positions at those hearings are referenced on pages 6 and 8 of Respondent's Brief. USW's interest in this case is to defend the ability of America's elected representatives to enact legislation that protects its members and other working people from deceptive business practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and their *amici* disagree with the policy justifications for New York General Business Law § 518. But rather than leave economic policy decisions to the state legislature, where the interests of merchants, credit card companies, and consumers are appropriately weighed, Petitioners and their *amici* seek to constitutionalize their disagreement with this unremarkable consumer protection statute. In so doing, they invite a decision undermining distinctions—between conduct and speech and between commercial and non-commercial speech—that have guided First Amendment law for decades.

This Court has long distinguished for First Amendment purposes between laws aimed at conduct and laws aimed at speech. This conduct-speech distinction marks an important boundary between the functions of the judicial branch and those of the political branches and state governments, ensuring that courts are not enmeshed in policy disputes masquerading as constitutional questions.

Section 518, like its federal predecessor, aims at conduct rather than speech. The statute bars merchants from "impos[ing] a surcharge" on credit-card customers at the point of sale. Merchants remain free to offer discounts from their posted price to customers who pay with cash, to induce cash payment by posting a low price for cash buyers and a higher price for credit-card payers, and to speak about the evils of "swipe fees." Merchants are prohibited from engaging in only one course of conduct: charging consumers who pay with credit-cards a higher price than what was posted.

Because section 518, properly interpreted, regulates conduct rather than speech, a decision invalidating the statute risks undermining the longstanding conduct-speech distinction, with grave consequences. Such a ruling will leave courts with no doctrinally sound way to distinguish section 518 from laws that have been upheld for decades as aimed at conduct, *e.g.*, laws regulating deceptive marketing, securities disclosures, product safety warnings, workplace and housing discrimination, and even the communicative professions. Courts will be called on to adjudicate the kind of policy disputes they have avoided since the New Deal.

Petitioners' and their *amici*'s arguments demonstrate the dangers presented by a ruling in their favor. Their briefs encourage the Court to invalidate section 518 in part because of what are, in their view, the statute's undesirable social and economic consequences. *See, e.g.*, Cato Inst. Br. at 3-9; Consumer Action Br. at 9-16; Ahold U.S.A., Inc. Br. at 23-31. But accepting that invitation risks a return to the *Lochner* era, when courts displaced legislatures as the arbiters of social and economic policy—a role this Court has rejected since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Furthermore, even if this Court were to treat section 518 as a speech regulation (which it should not), it should reaffirm rather than depart from the longstanding principle of deference to commercial speech regulation. Petitioners' *amici* urge a radical change in doctrine that would subject all content-based regulation of commercial speech to strict scrutiny. But accepting that view would hamstring the political branches and states, because nearly all commercial regulation draws distinctions on the basis

of the topic addressed. Indeed, Petitioners themselves (unlike certain of their *amici*) seek application only of the ordinary commercial-speech test, making this case a particularly inappropriate vehicle for casting that test aside.

New York General Business Law § 518 is a conduct regulation that under settled precedent should be subject to nothing more than rational-basis review. A decision invalidating it as a speech restriction (especially via some departure from ordinary commercial-speech principles) risks a return to an era when courts, rather than legislatures, passed on the wisdom of general economic legislation.

ARGUMENT

I. A DECISION INVALIDATING SECTION 518 WOULD UNDERMINE SETTLED DOCTRINE AND SUBJECT ORDINARY SOCIAL AND ECONOMIC REGULATION TO CONSTITUTIONAL CHALLENGE.

A. The conduct-speech distinction is settled law and serves important purposes.

This Court has long held that laws aimed at conduct do not implicate the First Amendment even if the regulated conduct is achieved through or evidenced by language. As explained in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), "it has never been deemed an abridgement 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, either spoken, written, or printed." *Id.* at 502 (citing *Fox v. Washington*, 236 U.S. 273, 277 (1915) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

When a law regulates conduct achieved through language, "the unprotected features of the words [used to achieve the conduct] are, despite their verbal character, essentially a 'nonspeech' element of communication." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). "That is why[, for example,] a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"); *R.A.V.*, 505 U.S. at 385).

Put another way, even a law that may conceivably limit what a person says is properly viewed as outside the First Amendment's purview when the law's purpose is to regulate conduct and not to suppress or favor ideas. *See Sorrell*, 564 U.S. at 567. Indeed, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *id.*, even if the speech incidentally burdened is core political expression. *See id.* ("'an ordinance against outdoor fires' might forbid 'burning a flag'" without implicating the First Amendment, even though flag-burning is a form of protected expression (quoting *R.A.V.*, 505 U.S. at 385)). "Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring).

Because the government may regulate conduct generally without implicating the First Amendment, it is also specifically true that "the State does not lose its power to regulate commercial activity deemed

harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Thus, even though a transaction cannot be accomplished without communication (a seller communicates an offer of a particular good or service for a particular price; a buyer communicates a counteroffer or acceptance), it has always been held within the states' power to regulate transactions without offending the First Amendment. *See id.*

For that reason, it is also beyond debate that a law regulating prices is a form of direct economic regulation that does not implicate the First Amendment. Eight justices emphasized this point in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), agreeing that "direct regulation" requiring "higher prices" for certain alcoholic beverages "would not involve any restriction on speech." *Id.* at 507 (plurality op.); *see also id.* at 525 (Thomas, J., concurring in part and concurring in judgment) (regulation "directly banning a product, ... controlling its price, or otherwise restricting its sale in specific ways" "involv[es] no restriction on speech"); *id.* at 530 (O'Connor, J., concurring in judgment) (regulation "establishing minimum prices" does not require First Amendment analysis).

This is so even though the "power to ban the sale of [a particular product] entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product." *Id.* at 513 (plurality op.); *see also Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). States may directly regulate how sellers determine their prices for goods or services even though they may not ban all truthful advertisements of the sellers' lawfully

determined prices. *See Va. State Bd. of Pharm.*, 425 U.S. at 773. Critically, this means the First Amendment does not prevent the direct regulation of product-pricing practices, even though such regulation will necessarily affect what sellers may say in their advertisements (in that sellers may advertise only lawful prices). *See id.*

The Court's distinction between laws aimed at conduct and laws aimed at speech is grounded in the recognition that "an expansive interpretation of the constitutional guaranties of speech and press" otherwise would be unworkable and would significantly reconfigure the relationship between the legislative and judicial branches. *Giboney*, 336 U.S. at 502. The absence of a conduct-speech distinction would lead to an unduly broad reading of the First Amendment which would, for example, "make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Id.*

Indeed, because "[v]irtually everything humans do requires the use of language," "virtually all government regulations will, in one way or another, 'burden' speech, if by speech we mean the use of human language." Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 179 (2015) (citation omitted). Human communication – literal "speech" – is "literally everywhere." *Id.* "The conduct of buying a car, for instance, involves conversations with the dealer, the offer of a price, and the signing of a contract that is written in words." Amanda Shanor, *The New* Lochner, 2016:1 Wisc. L. Rev. 133, 177.

But laws regulating contracts have not traditionally posed First Amendment problems, and for good reason. If they did, even something as ordinary as a state statute of frauds would require searching constitutional scrutiny. *Cf.* Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 914 (2015) (although "every rent control law limits the words we may express in a contract," rent control laws are not currently held to implicate the First Amendment). Given the ubiquity of human communication, interpreting the First Amendment to encompass every law that burdens speech *qua* speech would subject practically the entire policymaking work of the states and the political branches to constitutional review.

Such a rule would also contravene the Court's historical recognition that the state's power to regulate economic activity is broad. Over eighty years ago, this Court remarked that "there can be no doubt that upon proper occasion and by appropriate measures the 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). In fact, the propriety of general economic regulation has been recognized far longer than that: "[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeeper, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U.S. 113, 125 (1877).

B. Invalidating section 518 would undermine the conduct-speech distinction.

Section 518 regulates merchants' conduct in a manner that, under this Court's longstanding precedent, does not implicate the First Amendment. The law bars sellers from imposing a "surcharge" on customers who pay with credit cards. Although the statute does not define "surcharge," that word's ordinary meaning is "[a]n additional sum added to the *usual* cost or amount paid." American Heritage Dictionary 1752 (5th ed. 2016) (emphasis added); *see also* Webster's Third New International Dictionary 2299 (2002) (defining "surcharge" as "a charge in excess of the usual or normal amount: an additional tax, cost, or impost.").

Thus, section 518 is correctly interpreted to apply only to "single-sticker-price schemes," Pet. Br. at 25—where a seller posts a single "sticker" price for a product but then demands a higher-than-posted price from credit-card customers at the point of sale. As Congress explained in connection with section 518's federal Truth in Lending Act ("TILA") predecessor, a law against "surcharge[s]" is by any ordinary understanding a prohibition against "increasing the regular price" of a good or service above "the tag or posted price ... *if a single price is tagged or posted.*" 15 U.S.C. § 1602(q), (x) (1982) (emphasis added); *see also id.* § 1666f(a)(2); Resp. Br. at 22 ("By its plain terms, [section 518] prohibits sellers from collecting additional money, in excess of the usual or regular price, from consumers who pay with a credit card."); U.S. Br. at 15 (Section 518 "prohibits a merchant who posts a single price for an item from charging more than the posted price to a customer who elects to pay by credit card rather than cash."); Ahold Br. at 24

(describing section 518 as "prohibit[ing] merchants from surcharging credit transactions at the point of sale.").

Properly interpreted then, section 518 regulates "conduct, not speech," because "[i]t affects what [persons] must *do* ... not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Sellers may still engage in truthful advertising about their lawfully determined prices, *cf. Va. State Bd. of Pharm.*, 425 U.S. at 773, and remain free to say anything they like about credit-card "swipe fees." Sellers also remain free to use and advertise differential pricing schemes for credit-card and cash customers. *See* Resp. Br. at 30-31. All a seller may *not* do is engage in the conduct of charging credit-card customers a higher-than-posted price at the point of sale. And although that forbidden action is "carried out by means of language," *Giboney*, 336 U.S. at 502, its prohibition no more implicates the First Amendment than forbidding fraud or "agreements in restraint of trade." *Id.*

Petitioners and their *amici* make two arguments for treating section 518 as a speech regulation, neither of which has merit.

First, seeking to avoid the straightforward conclusion that section 518 regulates conduct rather than speech, Petitioners insist that the statute is aimed at speech because it also bars the use of "dual prices," *i.e.*, posting one price for cash buyers and a different, higher price for credit-card buyers. But the plain terms of section 518 do not prohibit "dual pricing." *See* Resp. Br. at 30-31. As previously discussed, the ordinary meaning of "surcharge" is an extra sum added to the "usual" price. *See supra* p. 11. Where a merchant displays two prices for the same product, the merchant is not adding a sum to the

"usual" price by charging a customer one of those two prices—both prices could be characterized as a "usual" price. Respondent thus correctly construes section 518, like TILA before it, to apply only when a seller posts a single regular price for a particular product. Resp. Br. at 28; *see also* 15 U.S.C. § 1602 (q), (x) (1982).[2]

Second, Petitioners and their *amici* urge the Court to hold that section 518 implicates the First Amendment because it affects how sellers "communicate the added cost" to their customers. Pet. Br. at 5; *see also, e.g.*, Ahold U.S.A., Inc. Br. at 19. But while communicating the fact of the extra fee may be a "component" of imposing it, *Ohralik*, 436 U.S. at 456, that fact does not prevent the State from restricting the particular pricing *practice* of imposing a surcharge. *See id.*; *see also Sorrell*, 564 U.S. at 567; *Giboney*, 336 U.S. at 502. "[D]espite their verbal character," the words used to accomplish a forbidden point-of-sale surcharge are "essentially a 'nonspeech' element of communication" that have no constitutional salience. *R.A.V.*, 505 U.S. at 386.

For similar reasons, the United States is wrong in arguing that section 518 regulates speech because it affects how merchants "communicate" their pricing schemes—that is, because it affects what price a merchant may display on a price tag. *See* U.S. Br. at 19. No one disputes that the state may lawfully regulate the prices themselves and the relationship between prices. *See, e.g., 44 Liquormart*, 517 U.S. at

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[2] Even if Respondent's reading of section 518 were not the only plausible one, this Court should reject Petitioners' invitation to construe the statute in a manner that could create a constitutional question. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

507 (plurality op.); *id.* at 525 (Thomas, J., concurring in part and concurring in judgment); *id.* at 530 (O'Connor, J., concurring in judgment). And because the state may dictate what price can be charged, the state necessarily may regulate the price a merchant may write on a price tag. In other words, just as the state could prohibit a merchant from writing $10 on a price tag for a product that the state mandates be sold at minimum for $20, the state may also prohibit merchants who intend to charge credit card customers $103 from posting $100 as the sole price and then charging an extra $3 at the point of sale. *See* U.S. Br. at 19. Section 518 forbids conduct (charging an extra $3 at the point of sale when the price posted was only $100) the same way that a minimum price regulation forbids conduct (charging $10 when the legal minimum is $20). That both laws affect what dollars-and-cents price may legally be written on the price tag is thus wholly outside the First Amendment's concern. *Cf. Va. State Bd. of Pharm.*, 425 U.S. at 773.

Unless premised on a misreading of the statute as applicable to dual pricing, then, a ruling for Petitioners would mean striking down a restriction on conduct – the act of charging a customer more than the posted, regular price at the point of sale – simply because that conduct is carried out in part through speech. While a merchant might believe that imposing a surcharge at the point of sale would be a more "effective" means of "drawing attention to the cost of credit," Pet. Br. at 30, the First Amendment does not bar the State from making the policy judgment that such *conduct* is "harmful to the public." *Ohralik*, 436 U.S. at 456. A bank robber fancying himself a real-life Robin Hood might believe that robbing financial institutions is the most effective

way to draw attention to wealth inequality, but that does not mean laws proscribing robbery implicate the First Amendment—even though they may thwart Robin's preferred way of getting his message across. *Cf. R.A.V.*, 505 U.S. at 385 ("expressive activity can be banned because of the action it entails, [though] not because of the ideas it expresses").

In sum, precedent requires holding that section 518 (properly interpreted as applying only to single-sticker-price schemes) regulates conduct rather than speech and is therefore subject only to rational-basis review.[3]

C. A ruling that section 518 regulates speech would enmesh courts in policy disputes best left to the legislative branch.

For nearly eighty years, this Court has declined to rely on constitutional doctrines to scrutinize the political branches' justification for ordinary economic regulation. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of*

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[3] While the above precedents make clear that freedom of speech is not implicated by a state's regulation of the price of a product or service, *amici* acknowledge that regulation of other sums may in some circumstances implicate the First Amendment. Certain restrictions on payments to expressive organizations could, for example, implicate the freedom of association. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658 (2000) ("[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment." (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)). Freedom of association is of course not at issue in this case.

Oklahoma Inc., 348 U.S. 483, 488 (1955).

Instead, this Court has recognized that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Nebbia*, 291 U.S. at 537. "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment." *W. Coast Hotel*, 300 U.S. at 399.

The rule of judicial restraint in the realm of ordinary economic regulation is animated by the recognition that, "[e]ven where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government." *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring). Accordingly, it is now black-letter law that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

These same principles also animate the conduct-speech distinction. If it were true that the First Amendment required searching judicial review of every law that burdens communicative acts, then the First Amendment would inevitably become the same scourge of regulation that the Fourteenth once was. Rather than a nebulous "freedom of contract," an unduly expansive concept of free speech would authorize courts to strike down all manner of legislation. The Court would "return[] to the bygone

era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

Petitioners may disclaim any desire to undermine the conduct-speech distinction, but there is no principled way to distinguish section 518 from many other statutes with a similarly attenuated relationship to speech. New York's surcharge ban is not meaningfully different, for example, from a law banning agreements in restraint of trade. *Cf., e.g.*, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade ... is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...."). The acts prohibited by both kinds of laws are accomplished through communication between actors, *i.e.*, the co-conspirators in the case of agreements in restraint of trade and the seller and buyer in the case of surcharges. The purpose of both laws is to forbid the activity that the legislature has deemed harmful, either restraining trade or imposing a surcharge. And both kinds of laws affect only such communications as would actually accomplish the forbidden conduct—*i.e.*, the "nonspeech" words employed in committing the act of conspiring or of surcharging. *R.A.V.*, 505 U.S. at 386.

"Certainly the constitutionality of the antitrust laws is not open to debate," *California Motor*

Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972), but if the Court rules for Petitioners, it will invite debate on precisely that question.

Indeed, Petitioners' and their *amici*'s arguments show how dangerous a path the Court walks. Some *amici* rail that New York's anti-surcharge ban should be invalidated because it leads to "retailers charging a higher baseline price for both cash and credit users," such that cash customers subsidize credit-card users who may be wealthier overall. Cato Inst. Br. at 9. Similarly, Petitioners complain that because of their *own* decision to pass "swipe fees" along by raising prices across the board, cash purchasers are in effect "subsidiz[ing] the cost of credit cards." Pet. Br. at 7-8. Other *amici* object that "customers who choose to pay with credit cards" are not "required to bear the marginal cost of their expensive payment method." Ahold U.S.A., Inc. Br. at 24. Still others opine that surcharge bans "decrease consumer welfare." Consumer Action Br. at 11. And Petitioners explain that they want to be able to impose surcharges because "surcharges are far more effective than discounts" at discouraging credit card use. Pet. Br. at 31.

But it should be irrelevant that the law may be undesirable from Petitioners' preferred policy perspective. The economic soundness or "social undesirability" of the challenged law is of no moment to this Court. *Am. Sash & Door Co.*, 335 U.S. at 553 (Frankfurter, J., concurring); *see also W. Coast Hotel*, 300 U.S. at 399. Courts do not "sit as ... superlegislature[s]" to weigh "the wisdom or policy of legislation." *N. Dakota State Bd. Of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731

(1963)); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting)). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson*, 348 U.S. at 488.

Again and again in the years since *West Coast Hotel* this Court has "emphatically refuse[d] to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *N. Dakota State Bd. of Pharm.*, 414 U.S. at 165 (quoting *Ferguson*, 372 U.S. at 731). Yet Petitioners and their *amici* would have this Court do precisely that, only using the First Amendment instead of the Fourteenth. The Court would thus "reawaken[] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue." *Sorrell*, 564 U.S. at 603 (Breyer, J., dissenting).

D. A ruling for Petitioners would invite constitutional challenges to a wide swath of ordinary economic and social legislation.

If this Court were to undermine the conduct-speech distinction by determining that section 518 regulates speech even if it applies only to single-sticker-price schemes, many laws not previously thought to raise constitutional questions would be subject to First Amendment challenge.

Laws forbidding workplace harassment or housing discrimination, for example, would arguably present

constitutional questions because the proscribed discrimination is usually effectuated through speech. *Cf. FAIR*, 547 U.S. at 62 (relying on the current conduct-speech distinction for the proposition that "Congress ... can prohibit employers from discriminating in hiring on the basis of race ... [even if] this will require an employer to take down a sign reading 'White Applicants Only' ...." (citing *R.A.V.*, 505 U.S. at 389)). In fact, at least one lower court has already suggested that the First Amendment might bar a Title VII sexual harassment claim where the plaintiff's proof included derogatory comments circulated widely by a male coworker, who also reminisced about the "good ol' days" before women joined the workforce, compared female coworkers to dogs, and opined that they were less qualified than men to do the job. *See DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594-96 (5th Cir. 1995).

Other ordinary social and economic legislation would be similarly threatened by a ruling for Petitioners. If section 518 were held to burden speech, "[n]umerous examples ... of [other] communications that are [currently thought to be] regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" could also be called into question. *Ohralik*, 436 U.S. at 456 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

Applying First Amendment scrutiny to any regulation that burdens an instance of the spoken or written word would also have profoundly antiregulatory effect in the "information age," when the marketplace is increasingly saturated with information products. Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 U. Tex. L. Rev. 1427, 1446 (2016).

Lower courts have already fallen into the trap of concluding the First Amendment applies to speech *qua* speech, notwithstanding this Court's longstanding conduct-speech distinction. In *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), for example, the Ninth Circuit determined that a county's addendum to its lease with a commercial fairground operator that prohibited any person from "selling" or "from offering for sale ... firearms or ammunition to any other person at a gun show at the fairgrounds" implicated the First Amendment. *Id.* at 710. Although the court recognized that "the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment," the court concluded that the act of "offering for sale" was "commercial speech" because such action constituted a proposal of a commercial transaction. *Id.* (citing *Va. State Bd. of Pharm.*, 425 U.S. at 762) (emphasis added).

"But of course any sale or contract involves the communicative elements of offer and acceptance." Shanor, *supra*, at 182. And because "offer and acceptance are communications incidental to the regulable transaction called a contract," it has long been the rule that regulating such literal communications no more implicates the First Amendment than would regulating the terms or

performance of the contract itself. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). If the county could lawfully prohibit the act of completing a transaction ("selling"), then surely the county could also prohibit the act of initiating that same transaction ("offering for sale"). *Nordyke*, 110 F.3d 708-09. Cases like *Nordyke* will surely abound if the Court were to undermine the conduct-speech distinction by ruling in Petitioners' favor.

Nor is the challenge in *Nordyke* an outlier. Litigants recently brought a First Amendment challenge to a statute that "regulate[d] individuals and entities that hold themselves out to the public as willing to purchase precious metals," on the theory that "holding oneself out" constituted protected commercial speech. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691, 692 (6th Cir. 2014), *cert. denied sub nom. Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015). Others challenged on First Amendment grounds a law that distinguished between "large" and "small" businesses in determining how much time a business would have to come into compliance with minimum wage increases, on the theory that the law burdened the contractual franchise agreements that pushed some businesses into the "large" category. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408-09 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1838 (2016).

These examples demonstrate

> the increasing and broadening use by corporations of challenges under the First Amendment to laws and regulations generally, and especially and increasingly laws that do not constrain expressive businesses (such as media companies), but any communicative or expressive activity of any

> business, no matter how incidental to the purpose and goals of the business, and no matter how little any ordinary individual (even a shareholder or employee of the business) might care about the expression in question.

John C. Coates IV, *Corporate Speech and The First Amendment: History, Data, and Implications*, 30 Const. Comment. 233, (2015).

Still other regulations of the marketplace would also be called into question by a ruling for Petitioners. First Amendment challenges could be brought to laws regulating or imposing substantive licensure requirements on the practice of professions in which communication plays an important role. For example, "[m]ost, if not all, medical and mental health treatments require speech." *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014), *and cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014). And most, if not all, of an attorney's work takes the form of speech. *See id.* at 1228.

Most courts have to date relied on the conduct-speech distinction to uphold regulation of communicative professions, on the theory that, "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession." *Lowe*, 472 U.S. at 232 (White, J., concurring). Under the current conduct-speech distinction, holding a lawyer liable for malpractice does not implicate the First Amendment even though the attorney's incompetence is demonstrated in written or oral work product. *Cf. Pickup*, 740 F.3d at 1228. And doctors may be "held liable for giving negligent medical advice to their

patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." *Id.*

For similar reasons, most courts currently hold that "[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Lowe*, 472 U.S. at 232 (White, J., concurring). Where the government adopts such licensing requirements, it is regulating the conduct of the profession, even if the profession itself is conducted through speech. *See id.*; *cf. also Pickup*, 740 F.3d at 1229. If the rule were otherwise, then the states' universal requirement that aspiring lawyers pass the bar exam would be subject to First Amendment scrutiny, since practicing law is paradigmatically communicative. But a decision that undermines the conduct-speech distinction—as a decision for Petitioners inevitably threatens—puts these holdings at risk. *Cf. Pickup*, 740 F.3d at 1229; *compare also Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (invalidating ordinance requiring licensure of tour guides on First Amendment grounds) *with Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (reaching opposite conclusion), *cert. denied*, 135 S. Ct. 1403, (2015).

If Petitioners succeed in undermining the conduct-speech distinction in this case, other litigants will surely bring First Amendment challenges to regulations with which they disagree, on the theory that the regulations affect some form of literal speech. And district and appellate courts will struggle to find a meaningful way to determine which laws are

exempt from constitutional scrutiny and which must be subject to some form of searching judicial review, with the likely result that many laws currently held to regulate conduct will instead be struck down as impermissible regulations of speech. A ruling for Petitioners would thus "involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and wellbeing of their citizens." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting).

II. EVEN IF SECTION 518 IS INTERPRETED AS A REGULATION OF SPEECH, IT SHOULD BE SUBJECT TO DEFERENTIAL SCRUTINY.

A. For good reason, this Court has long held that commercial speech merits lesser protection than political speech.

Since the time the First Amendment's protections were first held to extend to commercial speech, this Court has recognized that "a different degree of protection is necessary" for that category of expression. *Va. State Bd. of Pharm.*, 425 U.S. at 770, 771 n.24; *see also Central Hudson*, 447 U.S. at 562. "Commercial speech ... is linked inextricably with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (internal quotation marks omitted). In other words, "commercial speech doctrine ... represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." *44 Liquormart*, 517 U.S. at

499 (plurality op.) (internal quotation marks omitted; emphasis in original).

For these reasons, the Court "developed a framework for analyzing regulations of commercial speech that is 'substantially similar' to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Central Hudson*, 447 U.S. at 562). Under this standard, restrictions upon truthful and nonmisleading commercial speech are subject to a form of intermediate scrutiny. *Edenfield*, 507 U.S. at 767. ("[L]aws restricting commercial speech ... need only be tailored in a reasonable manner to serve a substantial state interest ...."). The Court "ha[s] not insisted that there be no conceivable alternative" to a challenged restriction of commercial speech, only that the regulation "not burden substantially more speech than is necessary to further the government's legitimate interests." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) (internal quotations omitted).

Commercial speech is also "subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Id.* at 477 (quoting *Ohralik*, 436 U.S. at 456). That the nature of commercial speech renders it more readily susceptible of verification, and more durable, permits the state to compel certain speech (such as warnings or disclaimers) and obviates the need for certain constitutional rules (such as overbreadth and prior restraint doctrines). *See Va. State Bd. of Pharm.*, 425 U.S. at 772 n.24; *Ohralik*, 436 U.S. at 463 n.20; *Central Hudson*, 447 U.S. at 564 n.6.

Certain laws intended to prevent confusing or deceptive commercial speech are subject to an even

more deferential reasonableness analysis. Among the "well settled" First Amendment principles are that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *see also Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it."); *R.A.V.*, 505 U.S. at 388 ("risk of fraud" is among "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection"). "The First Amendment ... does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Va. State Bd. of Pharm.*, 425 U.S. at 771-72.

As recently as 2010, this Court reaffirmed that required disclosures are subject to "the less exacting scrutiny described in *Zauderer*." *Milavetz, Gallop & Milavetz, PA v. United States*, 559 U.S. 229, 249 (2010). That standard demands only that the mandated disclosures be "reasonably related" to the government's interests in preventing consumer confusion or deception. *Id.* at 250 (quoting *Zauderer*, 471 U.S. at 651).

Thus, it does not offend the First Amendment to "'require that a commercial message appear in such a form ... as [is] necessary to prevent its being deceptive.'" *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 775-81) (alterations in original). Laws that require disclosures in order to prevent consumer confusion or deception "'trench much more narrowly'" on core First Amendment interests, and so are subject to relatively

deferential review. U.S. Br. at 22 (quoting *Zauderer*, 471 U.S. at 651).

A single-sticker-price surcharge ban operates to vindicate the government's interest in preventing consumer confusion and deception by requiring merchants to disclose the total dollar-and-cents price that credit card customers will pay, at a time before they are actually purchasing the product. *See* Resp. Br. at 54-55. It requires that customers receive more, not less, information. If treated as regulating speech, section 518 should thus be upheld as long as the mandated disclosure is "*reasonably related* to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651 (emphasis added). Because the danger that credit card customers will believe they will have to pay only the posted sticker price is "self-evident," there is no need for the State to submit further evidence that the prohibited surcharge practice is misleading in order to demonstrate the law's constitutionality. *Milavetz*, 559 U.S. at 251.

B. Overturning this Court's well-established commercial speech doctrine, as Petitioners' *amici* urge, would be a dangerous and unwarranted departure from longstanding precedent.

Petitioners confine their arguments to the application of existing legal standards, and urge the application of *Central Hudson*'s intermediate scrutiny standard. Pet. Br. at 27-28, 36. But their *amici* go much further, urging this Court to subject commercial speech regulations to strict scrutiny if they draw distinctions based on content. *See, e.g.*, Ahold U.S.A., Inc. Br. at 4, 11-12, 15-16; Cato Institute Br. at 10-13. Such a ruling would discard decades of settled

precedent and render it nearly impossible for the government to protect consumer interests.

Petitioners' *amici* claim to find support for this direction in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), but the speech at issue in *Reed* was not commercial. *See id.* at 2231. *Reed* did not address commercial speech or cite the main commercial speech cases at all, and the Court therefore had no need to address Justice Breyer's admonition that subjecting content-based regulations of commercial speech to strict scrutiny would "write a recipe for judicial management of ordinary government regulatory activity." *Id.* at 2234 (Breyer, J., concurring in judgment).

That admonition highlights the fundamental problem that would result from strict scrutiny of all content-based regulation of commercial speech. As Justice Breyer noted, "[r]egulatory programs almost always require content discrimination." *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in judgment). Of course that *must* be true, because of the very definition of content-based restrictions: "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed* or the idea or message expressed." *Reed*, 135 U.S. at 2227 (emphasis added). Laws requiring specified warnings on cigarettes, prohibiting the marketing of certain food products as organic or low-salt, mandating disclosures of conflicts of interest in fiduciary relationships, compelling disclosures of certain provisions in mortgage contracts, and forbidding off-label marketing of pharmaceutical drugs are all triggered by the topic addressed, and would therefore all be subject to strict scrutiny under Petitioners' *amici*'s proposed new rule.

That warning should be heeded here. If content-based burdens upon commercial speech were subject to strict scrutiny, the government would lose its ability to protect consumers against confusion or deception. Laws requiring warnings or disclosure of facts necessary to avoid confusion or danger about drugs, food, or other subjects, or prohibiting misleading forms or means of advertising about certain topics, would be invalidated unless courts agreed with the legislative or regulatory determination of the importance of the problem addressed and that the methods chosen were the least restrictive.

Strict scrutiny applies to noncommercial content-based distinctions because of the danger that such content-based distinctions could disguise laws that in reality disfavor certain viewpoints, and thereby "interfere with democratic self-government and the search for truth." *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring); *see also id.* at 2229 (noting danger that "future government officials may" use content-based laws "to suppress disfavored speech"). Here, where the speech at issue is indisputably commercial, and the law addresses pricing schemes without interfering with consumers' ability to receive accurate information or with a merchant's speech on issues such as the evils of credit card companies, there is no similar justification for strict scrutiny. *Cf. Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24.

Nor does *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), support applying strict scrutiny to all commercial speech. *Sorrell* employed "heightened scrutiny" to evaluate a law prohibiting certain speakers from making specified uses of information, but did not make clear whether that standard was a

version of *Central Hudson*'s intermediate review, strict scrutiny, or something in between. *See id.* at 565. In fact, *Sorrell* concluded that the result would be the same even if the *Central Hudson* standard applied, rendering it unnecessary to decide whether stricter scrutiny was appropriate. *Id.* at 571-72.

Even more relevant here, *Sorrell* addressed a law that prohibited a subgroup of disfavored speakers from utilizing lawfully available information, for the purpose of suppressing viewpoints to which the State was hostile. *See id.* at 563-64 ("The law on its face burdens disfavored speech by disfavored speakers."); *id.* at 567 (law was "aimed at particular speakers" and imposed burdens based on "the identity of the speaker"). The law itself made that purpose explicit. *Id.* at 565 ("Given the legislature's expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.").

Whether treated as a mandatory disclosure law or (more appropriately) as a prohibition on certain pricing schemes, section 518 is not analogous to the law at issue in *Sorrell*. Section 518, unlike that law, is not designed to suppress a disfavored message that conflicts with the state's goals. Section 518 does not restrict speech about "swipe fees" or a merchant's pricing practices, and in fact enhances, rather than suppresses, consumer access to information. It does so by requiring disclosure of the full dollar-and-cents price that credit-card customers will pay, which both enables consumers to easily compare prices across merchants and also helps avoid the kinds of consumer deception or confusion that might flow from consumers being charged more than the posted price

at the point of sale. Thus, unlike *Sorrell*, this case involves a statute with a legislative purpose of enhancing, rather than preventing, access to valuable information. A purpose of preventing such access was critical in *Sorrell* and may warrant heightened scrutiny in other cases. *Cf. Sorrell*, 564 U.S. at 566 (consumers' interest in information is strong; in medicine and public health fields, "information can save lives"); *Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

That the merchants in this case also wish to convey a message through the action of imposing a surcharge does not change the constitutional analysis. The law does not restrict merchants from speaking out against or educating their customers about the cost of credit cards. And this Court long ago rejected the notion that commercial speech "link[ed] ... to a current public debate" would thereby be entitled to greater protections. *Central Hudson*, 447 U.S. at 563 n.5; *see also Fox*, 492 U.S. at 475. Because the protection for commercial speech rests upon listeners' interest in the free flow of information, not the autonomy interest of speakers, *Va. State Bd. of Pharm.*, 425 U.S. at 764, a commercial actor's desire to utilize certain mechanisms to amplify its speech does not require constitutional invalidation.

As previously discussed, *see supra* section I.B, Petitioners' and their *amici*'s focus on the policies implicated by section 518 make clear why heightened scrutiny of commercial speech would return courts to the *Lochner* era. One set of *amici*, for example, argue that the State is wrong to conclude that consumers will be deceived by the imposition of credit card surcharges at the point of purchase, that it has other

mechanisms to prevent this kind of deception, and that allowing surcharges would actually benefit consumers and the market economy. Consumer Action Br. at 12-16, 18-19; *see also* Cato Inst. Br. at 3-10 (calling section 518 a form of "cronyism" and complaining about its policy results); Ahold U.S.A., Inc. Br. at 6-7, 23-31 (complaining of "massive negative impact on the national economy" and "massive market inefficiency"). Similarly, Petitioners protest that section 518 is unsound because "surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Pet. Br. at 31.

This sort of second-guessing of legislative and regulatory determinations is not the proper role for the courts. Rather, this Court has "provide[d] the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.'" *Fox*, 492 U.S. at 481 (quoting *Ohralik*, 436 U.S. at 455-56). Petitioners' and their *amici*'s suggestion that this Court should evaluate whether the New York legislature was *correct* in its policy judgment about credit-card surcharges threatens to unravel the longstanding judicial consensus that the role of courts "is only to determine the *reasonableness* of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 286-87 (1932) (Brandeis, J., dissenting) (emphasis added).

The *Central Hudson* majority presumably rejected Chief Justice Rehnquist's dissenting admonition that granting First Amendment protection to commercial speech would bring back "the bygone era of *Lochner*" because of their conviction that applying *intermediate*

scrutiny would not reinstate "the common practice ... to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." 447 U.S. at 589 (Rehnquist, J., dissenting). But that would be the necessary implication of Petitioners' *amici*'s call to require strict scrutiny of all content-based regulations of commercial speech. The Court should reject Petitioners' *amici*'s invitation to undermine the courts' legitimacy by turning back the clock to the age of that anticanon.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be affirmed.

Respectfully submitted,

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