July 13, 2017

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

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

Dear Ms. Wolfe:

We submit this letter brief to address the three issues identified in this Court's order of May 23, 2017, entered on remand from the Supreme Court.

First, we explain why New York's no-surcharge law, N.Y. Gen. Bus. Law § 518, is a commercial-speech restriction subject to scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). As the Supreme Court held, it is "clear that § 518 proscribes [the plaintiffs'] intended speech," and must "survive[] First Amendment scrutiny." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151–52 (2017). And, as the Eleventh Circuit recognized in holding that Florida's indistinguishable law fails First Amendment scrutiny, laws that proscribe truthful, non-misleading commercial speech must satisfy *Central Hudson*. *See Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1249–51 (11th Cir. 2015), *cert. denied* 137 S. Ct. 1452 (Apr. 3, 2017). The Supreme Court in *Expressions* signaled no disagreement with the Eleventh Circuit's holding, and denied certiorari a few days later. Like Florida in that case, New

York has not come close to showing that its law, as applied to the plaintiffs, meets *Central Hudson*'s demanding standard. Although the state claims that the law serves consumer-protection aims, the state has introduced no evidence in support of that assertion, and the law is both too broad and too narrow to achieve any such aims.

Second, we explain why the law cannot be upheld as a disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). The hallmark of any disclosure requirement is clarity about what speech is being mandated. Whatever else can be said of this law, it certainly does not "specify precisely what disclosures [are] required," as is necessary to be upheld under *Zauderer*. *Id.* at 653 n.15. That is because the law *restricts* speech; it does not *mandate* speech.

Third, we explain why certification to the New York Court of Appeals is inappropriate and foreclosed by the Supreme Court's decision. The Supreme Court adopted this Court's interpretation of the law, held that the law proscribes the plaintiffs' intended speech, and "remand[ed] for [this Court] to analyze § 518 as a speech regulation"—an analysis that does not turn on any unsettled question of state law. *Expressions*, 137 S. Ct. at 1151. The Supreme Court did not embrace Justice Sotomayor's view that certification is warranted. And even she noted the Court's "unexpressed conclusion, with which [she] disagree[d], that no narrowing construction is available that would

avoid constitutional concerns." *Id.* at 1158 n.6. This Court should heed the Supreme Court's mandate and "analyze § 518 as a speech regulation." *Id.* at 1151.

I. As applied to the plaintiffs, New York's no-surcharge law violates the First Amendment because it fails *Central Hudson* scrutiny.

A. *Central Hudson* applies. The state made three arguments to this Court for why, in its view, the no-surcharge law comports with the First Amendment. The first was that "the surcharge prohibition is a direct economic regulation that targets conduct rather than speech." Reply Br. 3 (capitalization removed); *see id.* at 3–17; Appellants' Opening Br. 27–45. The second was that, "even if the First Amendment applied," the "prohibition would satisfy the *O'Brien* test for incidental effects on speech." Reply Br. 18 (capitalization removed); *see id.* at 17–18; Appellants' Opening Br. 46–48. And the third was that the "prohibition would also pass the *Central Hudson* test for commercial speech." Reply Br. 20 (capitalization removed); *see id.* at 20–25; Appellants' Opening Br. 48–54.

The Supreme Court rejected the first two arguments. As to the first: the Court held that it is "clear" that the law "proscribes [the plaintiffs'] intended speech"—that is, their desire to "post[] a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount." *Expressions*, 137 S. Ct. at 1149. As to the second: the Court held that New York's law "is

different" than a law whose "effect on speech would be only incidental to its primary effect on conduct," because it regulates "how sellers may communicate their prices," not "prices themselves." *Id.* at 1151. Only the third issue remains for this Court to decide: As we now explain, because the law proscribes truthful, non-misleading speech, it is subject to—and cannot survive—*Central Hudson* scrutiny. It is thus "unconstitutional as applied to this particular pricing practice." *See id.*

B. The law fails *Central Hudson*. As we explained in our brief to this Court (at 39–50), *Central Hudson* requires the state to show that the law prohibits speech that is either "misleading []or related to unlawful activity," and that the prohibition "directly advance[s]" a "substantial governmental interest" that "could [not] be served as well by a more limited restriction on commercial speech." 447 U.S. at 564, 569. The state's burden is "heavy," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996), requiring actual evidence, not speculation and conjecture, that each factor is satisfied, *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). Needless to say, this is not one of the "rare[]" restrictions that can "survive constitutional review." *44 Liquormart*, 517 U.S. at 504.

To start, the state has not introduced any evidence to support any of its three asserted consumer-protection rationales (preventing profiteering, preventing deception, and stimulating the retail economy). That alone is fatal because, even if the state's purported aims are "substantial in the abstract," *Edenfield*, 507 U.S. at 770, "anecdot[es]

and educated guesses" are not enough, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation Bd. of Accountability*, 512 U.S. 136, 146 (1994) ("If the 'protections afforded commercial speech are to retain their force,' we cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" (citations omitted)).

Evidence aside, the state's problem runs deeper. Ready alternatives exist that would be both *less restrictive* of speech and *more effective* in addressing the state's supposed consumer-protection aims. The state could cap the amount of the price difference (regardless of how it is characterized), require clear disclosure, or enforce existing false-advertising laws. Instead, the state went straight to criminalizing truthful speech.

Profiteering. New York's first rationale (preventing profiteering) cannot justify the law's prohibition on criminal speech. A law that capped the price difference between cash and credit—however expressed—would "far more effectively achieve" any anti-profiteering interest, without restricting protected speech. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring). Indeed, the state already authorizes "reasonable" fees "not to exceed the costs incurred" for state water or sewer bills paid by credit card. *See* N.Y. Pub. Auth. Law § 1045-j(4-a)(b). If profiteering were really the concern, why not follow this model instead of criminalizing speech?

The state's only response has been to claim that a "surcharge cap would trench on just as much, if not more, speech." Resp. Br. 48, *Expressions Hair Design*, 137 S. Ct. 1144 (2017) (No. 15-1391). But as long as the cap regulated the price difference no matter how it was characterized, the law would restrict *no* protected speech. The no-surcharge law, however, allows an unlimited price difference, but regulates only how it is characterized. "Before a government may resort to suppressing speech to address a policy problem, it must show that regulating conduct has not done the trick or that as a matter of common sense it could not do the trick." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 508 (6th Cir. 2008); *see Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("[R]egulating speech must be a last—not first—resort."). The state has not made this showing.

Nor has the state explained why it permits a merchant to charge, for example, $100 for cash and $200 for credit if communicated as a discount. It has cited two recent articles extoling the benefits of credit cards as a policy matter, but nothing that would support its decision to allow merchants to charge an excessive price difference if framed in a certain way. Resp. Br. 48.

The state has also attempted to carry its burden by relying on Australia's experience with price-transparency reforms beginning in 2003. Resp. Br. 45. But that argument cites "outdated sources" that "predate" reforms "limit[ing] surcharges to 'the rea-

sonable cost of acceptance'"—precisely the sort of narrowly tailored alternative that would more effectively address any profiteering concerns. Samuel Merchant, *Merchant Restraints*, 68 Okla. L. Rev. 327, 374–75 (2016); *see* Levitin Br. 17–20, *Expressions Hair Design*, *supra* (No. 15-391). These more recent reforms have reduced the cost of swipe fees in Australia by nearly half—and hence reduced the amount consumers pay to use credit. Levitin Br. 21; Frankel Br. 9 –10, *Expressions Hair Design*, *supra* (No. 15-391).

Preventing deceptive tactics. The state's anti-deception interest similarly fails to overcome the obvious objection: If New York were really concerned about deception, why wouldn't a targeted false-advertising or disclosure regime better serve that interest—and do so without restricting truthful speech?

On this question, too, the state has never had a good answer. It has said that credit-card surcharges (unlike cash discounts) pose a greater "risk that they will mislead customers." Resp. Br. 49. But "[s]tates may not place an absolute prohibition" on information that is merely "potentially misleading . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *see also Alexander v. Cahill*, 598 F.3d 79, 96 (2d Cir. 2010).

The state has also repeatedly tried to convey the impression that its law targets only "bait-and-switch tactics," Resp. Br. 49—"upward adjustment[s] relative to a *previously conveyed* regular price," Resp. Br. 26–27 (emphasis added). But the plaintiffs here

want to clearly and transparently convey truthful pricing information to consumers all at once, by "posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount." *Expressions*, 137 S. Ct. at 1149. And the question for this Court on remand is whether the law is "unconstitutional *as applied to this particular pricing practice*." *Id.* (emphasis added). Because New York's law prohibits this non-deceptive communication, it "sacrifices an intolerable amount of truthful speech about lawful conduct." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999).

So "why not first enforce existing state law"? *BellSouth*, 542 F.3d at 508. The state has suggested that the surcharge prohibition is necessary to add "criminal sanctions" to existing false-advertising laws. Resp. Br. 51–52. As a defense of a statute that reaches truthful speech, that is hardly a point in the state's favor. Criminal statutes demand more scrutiny, not less. And to the extent that the state wants to enforce this law to criminalize only false advertising, its ability to do so is not affected by this as-applied challenge.

Stimulating the retail economy. Finally, the state has claimed that its law "stimulat[es] its retail economy" by reducing the "confusion" that would arise from allowing merchants to frame the price difference as a surcharge. Resp. Br. 52–53. But suppressing speech that highlights the cost of credit because it would "deter credit card

use," *id.,* is just another way to rationalize keeping consumers "uninformed for their own protection," *Rubin*, 514 U.S. at 497 (Stevens, J., concurring). That interest "does not suffice to justify restrictions of protected speech in *any* context," *id.,* and is "*per se* illegitimate," *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring). The First Amendment does not permit the state to criminalize speech to "keep[] the public in ignorance." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

For these reasons, the district court's conclusion that New York's no-surcharge law fails *Central Hudson* was correct and should be affirmed. Nor is the court alone in that judgment. Shortly after the Supreme Court's decision in this case, another district court similarly held that California's no-surcharge law fails *Central Hudson* scrutiny. *See Jang v. Asset Campus Hous., Inc.*, No. 15–cv–01067, 2017 WL 2416376 (C.D. Cal. May 18, 2017). In that case, Judge Kronstadt held that the law does not satisfy the first factor of *Central Hudson* because "the underlying conduct at issue—charging one price for payment by check or electronic funds transfer and another for credit card payment—is not unlawful," and as "long as the price difference is disclosed prior to the making of any rental payments, such a practice is not misleading." *Id.* at *4.

The law fared no better under the other factors. That was true, in particular, with respect to the state's anti-deception argument. The court explained why: "If the

purpose of the statute is to prevent unfair surprise to the consumers at the cash register, California's law is much broader than necessary. A law mandating disclosure of surcharges would be the most direct way to prevent consumer deception. This method would also prevent any encroachment on the freedom of speech." *Id.* at *5 (quoting *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1210 (E.D. Cal. 2015)). The court also found that the law does not "advance[] a substantial governmental interest." *Id.* at *4.

The Eleventh Circuit came to the same conclusion, as did Judge Dennis on the Fifth Circuit and Judge England in the Eastern District of California. *See Dana's R.R. Supply*, 807 F.3d at 1249–51 ("Turning to the commercial-speech analysis, we make short shrift of Florida's no-surcharge law."); *Rowell v. Pettijohn*, 816 F.3d 73, 86 (5th Cir. 2016) (Dennis, J., dissenting), *cert. granted, judgment vacated by* 137 S. Ct. 1431 (Apr. 3, 2017) ("I cannot see how such a restriction [on speech] can avoid First Amendment scrutiny. Nor can I see how such a restriction can survive it."); *Italian Colors*, 99 F. Supp. 3d at 1210 (holding that California's law "cannot pass the intermediate scrutiny required for a content-based, speaker-specific restriction on consumer speech").

On the other side of the ledger, no court has explained how the no-surcharge laws could satisfy scrutiny. No-surcharge laws have been challenged in four states. They have been considered by 22 federal judges, including (most recently) eight Supreme Court Justices and the district judge in *Jang*. Not one of these judges even sug-

gested that these laws can pass muster under *Central Hudson*, with the lone exception of a single conclusory sentence in an unpublished, since-reversed district court opinion. *See Dana's R.R. Supply v. Bondi*, No. 14-cv-134, 2014 WL 11189176, at *2 (N.D. Fla. Sept. 2, 2014) ("And if this were viewed as a restriction on commercial speech, the outcome would be the same; this statute passes muster under the commercial-speech standards imposed in cases like *Central Hudson*[.]"). As the Eleventh Circuit held in reversing that opinion and striking down Florida's virtually identical surcharge ban, the law "crumbles under any level of heightened First Amendment scrutiny." *Dana's R.R. Supply*, 807 F.3d at 1239. So it does here.

II. New York's no-surcharge law cannot be upheld as a disclosure requirement under *Zauderer*.

After the Supreme Court granted certiorari, the state advanced an additional argument that it had not pressed in this Court. Picking up on an theory first proposed by the U.S. Solicitor General as to the lapsed federal law, the state suggested (in two pages) that its "surcharge prohibition"—the same prohibition it argued was a *ban on conduct*—could actually be viewed as a *speech mandate* and hence upheld as "a valid disclosure requirement" under *Zauderer*, "for the reasons set forth by the United States." Resp. Br. 54–55. But the United States took no position on whether New York's surcharge ban really *is* a valid disclosure law. And there is no serious argument that it is.

The Supreme Court's cases recognize the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. Because "disclosure requirements trench much more narrowly on an advertiser's interests," they pass muster if "reasonably related" to a state interest that is either "self-evident" or supported by something in the record (such as a public "survey" determining whether certain communications have "a tendency to mislead"). *Id.* at 651–53. Commercial-speech prohibitions, by contrast, are traditionally subject to *Central Hudson* scrutiny. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

New York's surcharge prohibition is just that—a prohibition. It tells merchants what they *may not* say ("[N]o seller . . . may . . ."), not what they *must* say. *See* Appellants' Opening Br. 35 ("The only thing that plaintiffs cannot say is that their prices include a credit-card surcharge."); *People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (N.Y. Crim. Ct. 1987) ("[W]hat GBL § 518 *prohibits* is a price differential [if] characterized as an additional charge for payment by use of a credit card."); JA 166 ("[The law] prevents [merchants] from saying that there is a 2% or 3% surcharge on heating oil, even if they disclose the surcharge prominently."). And the law restricts speech even if the speech is accurate and prominently disclosed—like the only speech now at issue in this case.

The law's history makes this clear. When the Attorney General's office has told merchants what to say, it has advised them to use the state's preferred "discount" fram-

ing, not to disclose the total credit-card price in dollars and cents. *See* JA 154–55, 162–63, 166, 173. And, from the start, supporters and defenders of the surcharge ban understood that it was the *opposite* of a disclosure rule, while its opponents (the Federal Reserve, the FTC, and consumer groups) advocated *replacing* it with a disclosure rule. Appellees' Br. 10. Indeed, at oral argument, Justice Breyer remarked that the law, by prohibiting surcharges, operates to "hide the cost" of credit. Tr. 46. Justice Ginsburg agreed, asking the state's lawyer: "Can you explain to me how it's a disclosure requirement to suppress the actual cost of the credit card purchase?" Tr. 59.

So it is unsurprising that no court has upheld a no-surcharge law under *Zauderer*, or even found that standard applicable. *See Jang*, 2017 WL 2416376, at *4 ("[California's law] could not fairly be characterized as a permissible disclosure requirement. On its face, it does not require any sort of disclosure."); *Dana's R.R.*, 807 F.3d at 1250–51 (recognizing that Florida's law does not "require merchants to disclose" pricing information, so *Zauderer* is inapplicable). That includes the district court below, which squarely held that "*Zauderer*'s lenient standard of review is inapplicable." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 445–46 (S.D.N.Y. 2013). The state never challenged that holding in its appeal to this Court, and made only a half-hearted gesture in that direction in the Supreme Court.

But even setting all this aside, New York's law cannot be upheld as a disclosure requirement for three independent reasons. *First*, the Supreme Court held that it is "clear that § 518 *proscribes* [the plaintiffs'] intended speech." *Expressions*, 137 S. Ct. at 1152 (emphasis added). That holding recognizes that the law is a prohibition.

Second, the hallmark of disclosure requirements is clarity. They mandate precisely what must be disclosed and how, often down to layout and font size. (Food manufacturers need not guess about what goes on the Nutrition Facts panel; mortgage lenders are not left in the dark about how to disclose interest rates.) As the Supreme Court explained in *Zauderer*, imposing serious penalties based on a disclosure law that fails to "specify precisely what disclosures [are] required" "would raise significant due process concerns." 471 U.S. at 653 n.15. To comply with the Due Process Clause and the First Amendment, a state must "articulate its disclosure rules" to give a "sure guide" to those tasked with following them. *Id.*

New York's law falls laughably short of this requirement. Its substantive provision reads, in its entirety: "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. As Justice Kagan noted at oral argument, "this does not look like a disclosure requirement." Tr. 38. And if a court is "going to say that something is a disclosure requirement and so subject to a lesser form of First Amend-

ment review, shouldn't the State be making clear that that's what this is?" *Id.* at 38–39. Even the state's own lawyer, at oral argument, noted that "this statute is not phrased in any way that touches on what we would ordinarily think of as speech," and specifically *contrasted* the law with the disclosure regime at issue in *Milavetz*. *Id.* at 48. We are aware of no law that, by its terms, contains a single sentence worded as a prohibition that does not mention speech, and yet has been upheld as a disclosure requirement.

Third, even if the law were clear about what speech it was mandating and how it must be disclosed, the state would still have to show that the risk of deception posed by the plaintiffs' speech justifies the mandate. The speech at issue in this case is best illustrated by the two examples given in the Supreme Court's opinion: a sign posted by Expressions Hair Design reading "Haircuts $10 (we add a 3% surcharge if you pay by credit card)[,]" and a line item on a menu at Brooklyn Farmacy listing the price of a sundae as "$10 (with a $0.30 surcharge for credit card users)." *Expressions*, 137 S. Ct. at 1149. For the state to be able to require an additional disclosure of the total credit-card price, the "possibility of deception" would have to be "self-evident," *Milavetz*, 559 U.S. at 251, or else the state would have to point to some hard evidence in the record—not its own say-so. *See Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014).

The risk of deception posed by those two examples—again, the only type of speech at issue in the case—is not self-evident. If anything, as Chief Justice Roberts in-

timated at oral argument, it's the opposite. *See* Tr. 35 ("You're saying that the—the American people are too dumb to understand that if you say $10 plus a 20-cent surcharge, they can't figure out that that's $10.20."); *see also* Tr. 36 ("It's too much to say $10 plus 20—I—I suppose it's a mathematical formula, but it's for second graders."); Tr. 33 ("[T]hat's a very patronizing approach. I mean, you're saying . . . when it says it's $10 cash, it's 20 cents surcharge, that they've got to do the math and say, by the way, that's $10.20?"). Moreover, if the state were really concerned about consumers being able to know the maximum price they'll pay for a product, why does it not require the merchant to disclosure the total price for each item, *including sales tax* (or, for online merchants, shipping and handling)? *See* Tr. 50 (Justice Sotomayor: "[In] every State I have to figure out what that sales tax is and I've got to do the math in my own head."). Because the risk of deception is far from self-evident, the state would have to point to something in the record showing that it was aware of the risk and that the risk is real. Here, the state has offered nothing.

III. Certification to the New York Court of Appeals is foreclosed by the Supreme Court's opinion, and is unwarranted in any event.

Finally, this Court asked whether it "should certify part of this case to the New York Court of Appeals for resolution." ECF No. 237. The Supreme Court's opinion allows for only one answer: no.

Although an amicus proposes certifying the question whether the law allows dual pricing *at all* (no matter how communicated), *see* ECF No. 255, at 6, the Supreme Court has shut the door on that possibility. The Court held that "§ 518 regulates speech" and is subject to "First Amendment scrutiny." *Expressions*, 137 S. Ct. at 1151. It then "remand[ed] for the Court of Appeals to analyze § 518 as a speech regulation"—not to certify the antecedent question *whether* the law is a speech regulation (or any other question) to New York state court. *Id.*

Justice Sotomayor wrote separately to disagree with this directive, and "concur[red] only in the judgment." *Id.* at 1159. She would have "remand[ed] with instructions to certify the case to the New York Court of Appeals." *Id.* But the majority chose a different course. The Court's opinion does not so much as mention the possibility of certification (as it surely could have if it thought that path were appropriate). Thus, although Justice Sotomayor's opinion is styled as a concurrence, on this point it is effectively a dissent—as the opinion itself acknowledges. *See id.* at 1158 n.6 ("The Court's silence on the relevance of the avoidance canon to the Second Circuit's interpretation is consistent with an unexpressed conclusion, *with which I disagree*, that no narrowing construction is available that would avoid constitutional concerns or that a broader constriction raises no constitutional concerns." (emphasis added)).

Certification would be inappropriate even without the Supreme Court's clear directive. In the 33 years since the law's enactment, the state has never taken the position that the law "require[s] a merchant to charge all customers the same price, no matter the form of payment." *Id.* at 1153. And this is for good reason: That interpretation would run counter to the federal statutory history from which the law arose, the legislative history, the enforcement history, and the uniform interpretation of all state no-surcharge laws. *See Expressions*, 137 S. Ct. at 1147 (noting that New York's law "adopted the operative language of the federal ban verbatim"). It would also contravene the settled understanding of both the regulators and the regulated.

Just as bad, construing the law to prohibit dual pricing would directly conflict with a federal statute expressly protecting the right of merchants to provide discounts to cash-paying customers, *see* 15 U.S.C. § 1666f—and so would likely be preempted under the Constitution's Supremacy Clause. The constitutional-avoidance doctrine thus has no application in a case like this one, where avoiding one set of constitutional problems necessarily presents the court with an entirely new set of constitutional problems. *See* Doc. 513311564 in *Rowell v. Pettijohn*, No. 15-50168, filed Dec. 16, 2015 (5th Cir.) (letter brief explaining in detail why state no-surcharge laws do not prohibit dual pricing even if they do not expressly authorize cash discounts).

Nor is certification of any other question warranted. We are not challenging the law's application to a two-sticker regime—in which a merchant labels the total cash and credit-card prices for each item, in dollars and cents—so that question "is no longer at issue." *See Expressions*, 137 S. Ct. at 1152 n.4 ("The Court of Appeals abstained from deciding whether § 518 was constitutional outside of the single-sticker context, but the merchants have disavowed any intent to challenge the law outside of this context."). The answer to that question (whatever it may be) will not affect the law's constitutionality as applied to the plaintiffs; their speech is proscribed regardless. Either way, the answer to the federal constitutional question is the same: The law can't be upheld as a disclosure requirement because it doesn't remotely tell people what to say. And the record provides no evidence to justify its criminal prohibition on the plaintiffs' truthful, non-misleading speech.

Respectfully submitted,

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