No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.,*
Petitioners,
v.
ERIC T. SCHNEIDERMAN, *et al.,*
Respondents.

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

BRIEF *AMICUS CURIAE* FOR CardX, LLC IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Miscellaneous

STATEMENT OF INTEREST

CardX, LLC respectfully submits this brief *amicus curiae* in support of Petitioners Expressions Hair Design, *et al.*[1]

CardX is a technology provider of credit card acceptance solutions. CardX developed the first solution that fully complies with the rules introduced by Visa, MasterCard, and Discover in 2013 to permit surcharging.[2] Using this surcharge solution, merchants provide information to customers at the point of sale about the cost of the card presented for payment, pass on the cost of credit card acceptance to cardholders, and incentivize lower-cost payment choices. Industry leaders such as Paychex and Tuition

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[1]All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2]The Visa and MasterCard rule changes were mandated by the antitrust settlement in *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), which required the settling credit card companies to eliminate "no-surcharge" provisions from their contracts with merchants. The antitrust settlement was voided by the Second Circuit on June 30, 2016 on improper certification and inadequate representation grounds (Case No. 12-4671, Doc. 1556-1, 06/30/2016), but the latest update to the credit card companies' contracts has maintained the rules permitting surcharging. *See*, *e.g.,* Visa Core Rules and Visa Product and Service Rules (October 15, 2016), Section 5.6, *Surcharges, Convenience Fees, and Service Fees*, http://vi.sa/2cq3B5l at pp. 318-322.

Management Systems offer the CardX solution to the businesses and institutions they serve.

The basis of the CardX solution is a communication of the true cost of paying by credit card. "No-surcharge" laws, such as the New York statute challenged in this case, undermine the clarity and effectiveness of this solution. For this reason, CardX has a direct and significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

New York law permits charging a different price for credit cards than for cash—so long as merchants contort their explanations of what they are doing in such a way as to defeat the point. "No-surcharge" laws compel merchants to frame dual pricing as a discount for cash, which draws attention away from the fact that credit card acceptance has considerable, and rising, costs.[3]

To "surcharge"—that is, to frame dual pricing as an additional fee for credit cards—is a superior tool both for communicating to customers the costs associated with their payment choices and for motivating them to choose lower-cost forms of payment. By giving a clear

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[3]"Interchange fee rates jumped 23% between 2000 and 2006 [...]." Brief for *Amici Curiae* Consumer Action, *et al*., in support of Pet. for Writ of Certiorari, at 4-5. "[I]nterchange fee costs for Visa's and MasterCard's premium cards have increased about 24 percent since they were introduced in 2005." Brief for *Amici Curiae* Albertsons LLC, *et al*. in support of Pet. for Writ of Certiorari, at 8, citing U.S. Gov't Accountability Off., GAO-10-45, Rising Interchange Fees Have Increased Costs for Merchants, but Options for Reducing Fees Pose Challenges (2009) at 15-16.

and direct incentive to the customer to reduce the cost, surcharging does not merely transfer, but in fact lowers, total transaction costs, promoting market efficiency.

Real-world experience of surcharging attests to its desirability. Surcharging expands consumer choice and, *contra* New York's conjectures, is applied conspicuously and fairly.

ARGUMENT

NO-SURCHARGE LAWS PRECLUDE TRANSPARENT AND DIRECT SOLUTIONS TO THE PROBLEM OF TRANSACTION COSTS

The substantial costs of credit card acceptance cannot be reduced if they cannot be discussed. New York General Business Law § 518 prohibits the most natural and most effective communication of the cost of credit card acceptance: telling customers that paying by credit card is costly, and that, if they elect to use a credit card, they will bear this cost in the form of an additional fee.

To view the benefit of "dual pricing" as simply a means of transferring the merchant's burden (by passing the cost to the customer) draws the problem too narrowly. This case affects not merely the allocation of cost, but the quantity of that cost: the question is not only *who* will pay, but also *how much* will be paid.

Whether the merchant pays or the customer pays, the cost of card acceptance is a social cost, and, no matter

where the incidence lies, it is a *de facto* tax on purchases of goods and services. The tax can be reduced by making the party whose decision determines the cost bear that cost—and *know* that they are bearing that cost.

A. Consumers Are Positioned To Choose Lower-Cost Options And Apply Competitive Pressure To Card Companies.

At the point of sale, only the customer can make the choice that reduces the transaction cost, because the customer chooses what form of payment will be used. Surcharging creates efficiency for the market as a whole, because it steers customers from credit cards to debit cards (which cost significantly less to accept) as well as to cash.[4]

A lower-cost choice, motivated by surcharging, *reduces* total cost—as opposed to merely shifting it. As a real-world illustration, the typical interchange cost of a Visa Infinite credit card, which offers cardholder rewards, is 2.40% plus $0.10 per transaction. By comparison, the interchange cost of a Visa regulated debit card is 0.05% (that is, *five-hundredths of one percent*) plus $0.22 per transaction.[5] On a $1,000

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[4]The card companies' contracts with merchants dictate that no surcharge may be applied to debit cards (that is, surcharges must only be applied to credit cards). From the customer's perspective, therefore, a debit card payment can be made for the same price as a cash payment.

[5]Visa USA Interchange Reimbursement Fees, Section A (*Visa USA Consumer Check Card Exempt and Regulated Interchange* (cont'd)

transaction, the Visa Infinite credit card will have an interchange cost of $24.10 and the Visa regulated debit card will have an interchange cost of $0.72. Steering a customer from using a Visa Infinite credit card to using a Visa regulated debit card would therefore reduce the transaction cost by at least $23.38.

Further, this "comparison shopping" among card types will apply competitive pressure to the prices charged by credit card companies, inducing them to lower their fees. Price transparency of the sort communicated by surcharging is a prerequisite for price competition.

B. Credit Card "Surcharges" Are Superior To Cash "Discounts" For Informing And Motivating Consumer Behavior.

These socially-desirable effects are blunted by the "discount" framing of dual pricing that is compelled by New York law. The well-established phenomenon of loss aversion predicts that a "surcharge" for credit is more salient than an equivalent "discount" offer for cash and debit, and therefore a surcharge serves as a superior tool for incentivizing consumers to choose lower-cost forms of payment. Brief for Petitioners at 6-7.

In addition to the far weaker behavioral effect of a perceived gain (as compared to a perceived loss), framing dual pricing as a discount for cash creates

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(cont'd)
Reimbursement Fees) and Section C (*Visa U.S.A. Consumer Credit Interchange Reimbursement Fees*) (April 16, 2016), http://vi.sa/2eS5RI7 at pp. 5-8.

confusion and talks around the point: credit card acceptance carries costs, and merchant prices must account for those costs. When the cost of credit card acceptance rises, must New York merchants tell their customers that they are raising their prices but offering even steeper cash discounts? If anything is likely to cause "consumer anger," this tortured presentation is it. *See* New York Attorney General's Brief to the Second Circuit at 9, 11 (arguing that awareness of surcharges can cause "consumer anger").

C. Prohibiting Credit Card Surcharges Limits Consumer Choice.

Without the option to transfer the cost of credit card acceptance to cardholders in a clear and direct manner, many merchants will decline to accept credit cards at all. As an example taken from CardX experience, when New York was enjoined from enforcing its no-surcharge law by the district court, a New York-based insurance company that had previously not accepted credit cards adopted the CardX surcharge solution and began offering customers the choice to pay with credit cards for the first time.[6] Numerous customers (collectively making more than $500,000 of payments per month) opted to pay with credit cards, valuing the convenience or rewards associated with their cards more than the fee they were charged.

When the Second Circuit reversed the district court on

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[6]CardX frequently contracts with merchants that, prior to adopting a surcharging solution, had declined to accept credit cards.

appeal, CardX notified the insurance company that the surcharge solution, which characterizes the price differential as an additional fee that reflects the true cost of credit card acceptance, could no longer be used. Now that it was blocked from transferring the cost of credit card acceptance to its customers in a transparent and intelligible way, the insurance company withdrew the option of paying by credit card entirely. The result was that its customers, who formerly could weigh the cost of making a credit card payment against its benefits and choose accordingly, were deprived of their revealed preference.

D. *Contra* New York's Claim, Market Conditions Prevent Exploitative Surcharging Practices.

Proponents of no-surcharge laws may look to respond to these arguments by offering the purported benefits of such bans. New York claims that "sellers can and often will use surcharges to extract windfall profits." Brief for Petitioners at 38. This conjecture found a receptive ear in Judge Livingston, author of the Second Circuit's Amended Opinion in this case:

> According to proponents of prohibitions on credit-card surcharges, experience also suggests that such surcharges will tend to exceed the amount necessary for the seller to recoup its swipe fees, meaning that sellers will effectively be able to extract windfall profits from credit-card users. *** Further, because credit-card surcharges (unlike cash discounts) offer a means of increasing

> customers' bills, dishonest sellers may attempt to profit at their customers' expense by imposing surcharges surreptitiously at the point of sale.

Expressions Hair Design, et al. v. Eric T. Schneiderman, et al., 808 F.3d 118 (2d Cir. 2015) at 6-7.

While state legislatures could craft regulation that would address these concerns without running afoul of the First Amendment (which nullifies this line of argument), such regulation would in fact be redundant with the extant rules imposed on merchants by contracts with the credit card companies. Every merchant that opts to surcharge must comply not only with state law (where applicable), but also with the contractual restraints required by Visa, MasterCard, and Discover as a condition of accepting their cards.

This contractual regime requires conspicuous disclosure of the surcharge and mandates that the surcharge must be no greater than what the merchant pays its provider to accept credit cards.[7] These rules

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[7] *See, e.g.*, Rule 5.6.1.5 *US Credit Card Surcharge Disclosure Requirements - US Region and US Territories*, Visa Core Rules and Visa Product and Service Rules (October 15, 2016):

> A Merchant in the US Region or a US Territory must, at both the point of entry into the Merchant Outlet and the Point-of-Transaction, clearly and prominently disclose any US Credit Card Surcharge that will be assessed.

(cont'd)

directly address Judge Livingston's concerns: merchants cannot profit from the surcharge, and customers are provided ample notice. From its experience as a major provider of a surcharge solution, CardX has observed that the credit card companies vigorously enforce these rules.

CONCLUSION

New York General Business Law § 518 imposes an artificial framing on dual pricing that obscures its objectives and diminishes its benefits. This restriction of speech only serves to give cover to the high costs of credit card acceptance. "No-surcharge" laws advance no cognizable public interest and contradict the well-established principles of the First Amendment: merchants have a right to truthfully explain their practices, and consumers have a "reciprocal right" to hear this information so that they may act on that truth. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

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> The disclosure at the Point-of-Transaction must include all of the following:
>
> - The exact amount or percentage of the US Credit Card Surcharge
>
> * * *
>
> - A statement that the US Credit Card Surcharge amount is not greater than the applicable Merchant Discount Rate for Visa Credit Card Transactions at the Merchant

http://vi.sa/2cq3B5l at p. 321.

The judgment of the Second Circuit Court of Appeals should be reversed.

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