IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LYNN ROWELL d/b/a/ BEAUMONT GREENERY; MPC DATA AND COMMUNICATIONS, INC.; MICAH COOKSEY; NXT PROPERTIES, INC.; MARK HARKEN; MONTGOMERY CHANDLER, INC.; PAULA COOK; TOWNSLEY DESIGNS, LLC; and SHONDA TOWNSLEY,	§	
Plaintiffs	§	
v.	§	CIVIL ACTION NO. 1:14-cv-00190-LY
GREG ABBOTT, in his official capacity as Attorney General of the State of Texas; and LESLIE L. PETTIJOHN, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,	§	
Defendants	§	

Plaintiffs' Motion for a Preliminary Injunction

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INTRODUCTION

Each time a merchant swipes a credit card, the merchant incurs a "swipe fee." These fees are typically passed on to all consumers, in the form of higher prices. Merchants who wish to pass on the cost of swipe fees only to customers who pay with credit cards, however, may lawfully do so by charging two different prices depending on how the consumer pays: a higher price for using a credit card and a lower one for using something else (cash, a check, or a debit card).[1]

But a Texas statute, Finance Code § 339.001, seeks to control how a merchant may *communicate* that dual pricing to consumers. As the state's Office of Consumer Credit Commissioner (OCCC) has explained, the statute allows a merchant to "offer a cash customer a discount" but forbids the imposition of a mathematically equivalent "surcharge on a credit card customer." Gupta Decl., Ex. 6. A "surcharge" and a "discount" are just two ways of framing the same price information—like calling a glass half full instead of half empty. Experience, though, shows that consumers react differently to the two labels, perceiving a "surcharge" as a penalty. Precisely because the "surcharge" label is more effective at conveying the cost of credit cards and discouraging their use, the credit-card industry has long insisted that it be suppressed.

Texas's no-surcharge law in effect says to merchants: You may tell your customers that they are paying "$2 less" for not using credit, but you may not tell them that they are paying "$2 more" for using credit—even though they *are* paying more for using credit. Liability thus turns on the language used to describe identical conduct, nothing else. A hypothetical shows how. Suppose a merchant charges two different prices depending on how the customer pays—$100 for cash; $102 for credit. If the merchant says that the price is $102 and there's a $2 "discount" for paying in cash, the merchant has complied with the law. But if the merchant instead says that the

[1] As shorthand, we refer in this brief to cash, checks, and debit cards simply as "cash," unless context dictates otherwise.

price is \$100 and there's a \$2 "surcharge" for using a credit card, the merchant has violated section 339.001. In the two scenarios, the conduct is identical: The merchant charges the customer \$100 for cash or \$102 for credit. The only difference is how the merchant communicates that information to customers—that is, the content of the merchant's speech.

Like New York State's identical no-surcharge law, section 339.001 turns on a "virtually incomprehensible distinction between what a vendor can and cannot tell its customers." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436 (S.D.N.Y. 2013) (attached as Gupta Decl., Ex. 12). For that reason, District Judge Jed S. Rakoff struck down New York's law as an impermissible speech restriction and as unconstitutionally vague. *Id.* Judge Rakoff is not alone in that assessment. The district court presiding over challenges by merchants to Visa and MasterCard's no-surcharge rules expressed its strong agreement with *Expressions*, pronouncing no-surcharge laws "anti-consumer" and "irrational," and finding "good reason to believe" that they will not survive constitutional scrutiny. *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 2013 WL 6510737, *19–*20 (E.D.N.Y. 2013) (Gleeson, J.).

This recognition is not new. The earliest reported prosecution under a no-surcharge law targeted a cashier who made the mistake of truthfully telling a customer that it would cost "five cents 'extra'" to pay with a credit card instead of saying it would cost a "nickel less" to use cash. *People v. Fulvio*, 517 N.Y.S.2d 1008, 1010, 1014 (N.Y. Crim. Ct. 1987). That case yielded the same judicial assessment—that "precisely the same conduct" is considered either illegal or permissible "depending only upon the *label* the individual affixes to his economic behavior." *Id.* at 1011 (emphasis in original). "[I]t is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

Because Texas's no-surcharge law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," it "clearly regulates speech, not conduct, and does so by banning disfavored expression." *Expressions*, 975 F. Supp. 2d at 444. And because the law is far broader than necessary to advance any interest in preventing deception, it cannot satisfy the heightened scrutiny traditionally applied to commercial-speech restrictions, and thus cannot satisfy the First Amendment. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

The no-surcharge law is also unconstitutionally vague. It does not clearly define the line between a permissible "surcharge" and a mathematically equivalent but illegal "discount." Yet that fuzzy semantic line marks the difference between what is unlawful and what is not. The law is so vague that merchants are forced either to operate in constant fear of inadvertently describing a dual-pricing policy in an illegal way or to refrain from dual pricing altogether, even though it is legal, as the plaintiffs here have done. Because the Texas no-surcharge law violates the First Amendment and is unconstitutionally vague—and because irreparable harm is presumed when First Amendment rights are at stake—the defendants should be enjoined from enforcing section 339.001 against the plaintiffs.

BACKGROUND AND STATEMENT OF FACTS

American merchants pay some of the highest swipe fees in the world—around 3% of every credit-card transaction. Gupta Decl., Exs. 1-5. This amounts to well over $50 billion a year in swipe fees. 156 Cong. Rec. S4839 (daily ed. June 10, 2010). The main reason these fees are so high is that they have been kept hidden from consumers—the very people who decide which payment method to use and thus determine whether a fee will be incurred in the first place. As Federal Reserve economists have noted: "What most consumers do not know is that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Schuh, Shy, & Stavins, *Who Gains and Who Loses from Credit Card Payments?*, Federal Reserve Bank of Boston, at 1 (2010). Merchants cannot effectively communicate the cost of credit because the credit-card companies have succeeded in insisting that any price difference be labeled as a "discount" for cash rather than a "surcharge" on credit.

A. The Communicative Difference Between "Surcharges" and "Discounts"

A "surcharge" on credit and a "discount" for cash "are different frames for presenting the same price information—a price difference between two things." Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351–52 (2008). They are identical in every way except one: the *label* that the merchant uses to communicate the difference.

But labels matter. Because of a well-established cognitive phenomenon, many "people have stronger reactions to losses and penalties than to gains" and thus "react very differently to surcharges and discounts," even though they present the same pricing information. Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Many consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers had a negative or strongly negative reaction to credit surcharges, while fewer than half had a negative or strongly negative reaction to cash discounts. *Id.* at 280–81. That difference—the difference in how the same pricing information is understood by consumers—influences their behavior, making "surcharges" more effective at communicating the costs of credit to consumers.

B. The History Of No-Surcharge Rules

The effectiveness of surcharges is why credit-card companies have long opposed them. The history of their efforts, and of the no-surcharge rules they brought about, is explained in greater detail in the accompanying declaration of Deepak Gupta (¶¶ 3–12).

Regulating speech was not the credit-card industry's first strategy in trying to conceal the cost of credit from consumers. In the early days of credit cards, credit-card companies banned any attempt at differential pricing between credit and cash in their contracts with merchants. *See* Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219–20 (1991). That changed in 1974 when two things happened: (1) American Express agreed to drop its contractual ban on differential pricing in response to a federal antitrust lawsuit brought by Consumers Union, *id.* at 225, and (2) Congress then enacted legislation protecting the right of merchants to have dual-pricing systems, amending the Truth in Lending Act to provide that "a card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Pub. L. No. 93, § 495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)).

Only then did the credit-card industry, seizing on Congress's use of the word "discount," shift its focus to the way merchants could *label* and *describe* credit pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing altogether if "surcharges" were outlawed—the credit-card lobby "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986); *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980) ("[T]he credit card lobby turned its attention to form rather than substance," insisting "that any difference between cash and credit card customers take the form of a cash discount rather than a credit card surcharge.").

For a while, this intensive lobbying paid off. In 1976, Congress enacted a temporary ban on credit-card surcharges, but not cash discounts. *See* Pub. L. No. 94–222, 90 Stat. 197; Gupta

Decl., Ex. 7. But by the early 1980s, opposition to the ban intensified as the Reagan Administration, consumer groups, and retailers all urged Congress to let it lapse. A few examples: A member of the Federal Reserve Board, which unanimously opposed the ban, testified about "the obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." Gupta Decl., Ex. 8, at 9. "If you just change the wording a little bit," she explained, "one becomes the other." *Id.* at 22. The Board thus proposed "a very simple rule": that both surcharges and discounts be allowed, and "that the availability of the discount or surcharge be disclosed to consumers." *Id.* at 10. President Reagan's FTC chairman agreed, observing that "a discount and a surcharge are equivalent concepts." *Id.* at 127. So did the major consumer-advocacy groups, including Consumers Union, which explained that the difference between surcharges and discounts "is merely one of semantics, and not of substance." *Id.* at 98. But "the semantic differences are significant," the Consumers Union representative testified, because "the term 'surcharge' makes credit card customers particularly aware that they are paying an extra charge," whereas "the discount system suggests that consumers are getting a bargain, and downplays the truth." *Id.* In 1984, Congress let the ban on surcharges lapse. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.[2]

The credit-card companies then turned to the states, convincing fewer than a dozen (including Texas) to enact no-surcharge laws of their own. To create the illusion of grassroots support for these laws, American Express and Visa created and bankrolled a fake consumer group called "Consumers Against Penalty Surcharges." *See* Gupta Decl., Ex. 9. In Texas, a group

[2] On the other side of the debate, American Express and MasterCard "wholeheartedly" and "strongly" supported the ban, even though they understood that, from a "mathematical viewpoint," "there is really no difference between a discount for cash and a surcharge for credit card use." Gupta Decl., Ex. 8, at 43, 55. And the big banks, like the credit-card giants, supported treating "surcharges" and "discounts" differently because a surcharge "makes a negative statement about the card to the consumer." *Id.* at 32. Surcharges, a banking lobbyist openly explained, "talk against the credit industry." *Id.* at 60.

calling itself "Association to Ban Surcharges on Credit Cards" suddenly emerged and hired a former Speaker of the Texas House of Representatives, Bill Clayton, to lobby in support of the law. Gupta Decl., Ex. 10. Shortly thereafter, in 1985, section 339.001 was enacted.

Around the same time, the major credit-card companies "began including contractual no-surcharge provisions in their agreements with retailers." *Expressions*, 975 F. Supp. 2d at 439. These private no-surcharge rules remained in effect until 2013, when Visa and MasterCard rescinded them in response to major federal antitrust litigation, *Payment Card Interchange*, 2013 WL 6510737, and American Express agreed to do the same, *In re American Express Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221 (E.D.N.Y.), ECF No. 306. As a result, state no-surcharge laws like Texas's—previously largely redundant—have suddenly sprung to life.

C. Texas Ramps Up Enforcement of its No-Surcharge Law

After the major credit-card networks were forced to rescind their illegal surcharge bans, Texas took steps to expand enforcement of its own ban. Before 2013, the Texas Finance Commission had exclusive authority to enforce section 339.001. But that commission is only a governing body that oversees three Texas agencies (including the OCCC); it has no investigative staff or legal department to conduct enforcement proceedings. So, to facilitate active enforcement of the law, the legislature transferred authority to the OCCC, effective September 1, 2013. *See* Tex. Fin. Code § 339.001. With that delegation, the OCCC is now prepared to enforce the law against merchants across the state who express the costs of credit to their customers in the wrong way. And OCCC appears to be doing just that. To take just one instance, it recently sent a letter to a merchant who "tells customers if paying with credit card its [sic] 3% more." Gupta Decl., Ex. 11. The OCCC demanded that the merchant "[c]ease this practice for all future services as it appears to be in conflict with [the no-surcharge law]." *Id.*

D. The Plaintiffs

The merchant plaintiffs in this case seek to use surcharges for the same reason the credit-card industry has long opposed them (first through an outright ban on dual pricing, and then through a speech code): because surcharges most effectively communicate the costs of credit to consumers, and thus most effectively alter behavior. The plaintiffs' declarations bear this out. *See* Gupta Decl., Exs. 1–5. Beaumont Greenery, for instance, sought to put up a sign telling customers that it charges an "extra fee" for credit-card transactions until its owner, Lynn Rowell, learned that this speech would violate Texas law. And while Mr. Rowell now understands that he may lawfully tell customers that he offers a mathematically equivalent cash "discount," he does not want to say that. Gupta Decl., Ex. 1, ¶ 8. What he wants to say is that credit costs *extra*—not that cash costs *less*—and to use that framing to persuade consumers to switch to cheaper payment forms. That speech is exactly what section 339.001 prohibits. *Id.* ¶ 9.

The other plaintiffs are in the same boat. *See* Gupta Decl., Exs. 2–5. They do not want to express the credit-card price as the "regular price" and the cash price as a "discounted price" because they believe that is an ineffective way to communicate their message. Instead, as Montgomery Chandler and Texas Computer explain, they want to label the cash price as the "regular price" and to explain to customers that they must pay an extra fee for using credit cards. That is the open and honest messaging that the plaintiffs wish to convey. But because section 339.001 outlaws that messaging, the plaintiffs have decided to refrain from dual pricing entirely.

Another reason the plaintiffs refrain from dual pricing is that many of them are unable to discern what speech is lawful under section 339.001 and what is banned by it. The law's vagueness leaves these plaintiffs—including Texas Computer, Storage Depot, and Montgomery Chandler—uncertain as to whether they could implement a dual-pricing system in a lawful way. Gupta Decl., Ex. 2, ¶ 7; Ex. 3, ¶ 9; Ex. 4, ¶ 11.

ARGUMENT

I. Texas's No-Surcharge Law Violates the First Amendment.

A. The no-surcharge law is a content-based speech restriction subject to heightened First Amendment scrutiny.

Whenever the government creates restrictions that turn on the content of a speaker's words, the First Amendment "requires heightened scrutiny." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011). This scrutiny applies to any law whose "purpose and practical effect" is "to suppress speech" based on its content, even if the law "on its face appear[s] neutral." *Id.* In other words, "[t]he fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality op.). Content-based speech restrictions are "presumptively invalid," and in many cases "it is all but dispositive to conclude that a law is content-based." *Sorrell*, 131 S. Ct. at 2667 (internal quotation marks omitted).

"Commercial speech is no exception." *Id.* at 2664. The Supreme Court has long held that this speech—including speech conveying "price information" to consumers—is "protected by the First Amendment." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). So if a law's "purpose and practical effect" are to restrict commercial speech based on its content, the law must withstand heightened scrutiny to satisfy the First Amendment. *Sorrell*, 131 S. Ct. at 2663. Here, the "purpose and practical effect" of Texas's no-surcharge law show that it is a content-based (and speaker-based) restriction on speech.

1. Practical effect. As discussed above, section 339.001 does not prevent merchants from charging different prices depending on whether a customer pays with cash or credit, or from setting those prices as high or low as they wish. All the law regulates is how merchants may *communicate* those prices to customers: Characterizing the price difference as a cash "discount" is favored; characterizing it as a credit "surcharge" is banned. The law thus prohibits a certain class of speakers (merchants) from communicating a certain disfavored message (identifying the added cost of credit as a surcharge) and does so to discourage consumers from acting on that message (by deciding not to use a credit card). *Id*. Nothing more is needed to show that the law is "directed at certain content and is aimed at particular speakers." *Id.* at 2665; *see Expressions*, 975 F. Supp. 2d at 444 (holding that New York's no-surcharge law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," and thus "clearly regulates speech" based on content); *Fulvio*, 517 N.Y.S.2d at 1015 ("[I]t is not the *act* which is outlawed [by New York's law], but the word given that act."); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) (regulation that did not prohibit unlicensed people from engaging in interior-design projects, but merely prohibited them from referring to themselves as "interior designers," was an impermissible restriction on commercial speech).

The no-surcharge law also has the practical effect of blocking merchants from communicating the cost of credit to credit-card customers "in the forum most likely to capture [their] attention"—as a line item on the receipt. *BellSouth v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008). Communicating the cost of credit as a line item on the receipts of only those customers who pay in cash (which is what conveying the cost as a "discount" would do) is ineffective because those customers are *already* using cash. Customers who use credit—the target of the merchants' message—are kept "in the dark" because their receipts say nothing about how much of their purchase was the result of their decision to pay with a credit card. *Id.* So it does not matter if merchants "may express [their] views in some other forum or by some other means. Here, the speech is prohibited in the most logical and relevant place for it to occur." *Motor Vehicle Mfrs. Ass'n v. Abrams*, 684 F. Supp. 804, 807 (S.D.N.Y. 1988). The no-surcharge law's prohibition on the use of a particular method of communication—conveying the cost of credit as a surcharge on signs and as a line item on customer receipts—triggers First Amendment scrutiny "even if other, but less satisfactory, methods of communication exist." *Id.*

2. Purpose. Section 339.001 sought to fill the gap left by the short-lived federal ban, just like New York's law and the other state laws enacted around the same time.[3] It was intended, in other words, to forbid merchants from characterizing the cost of credit as a surcharge because that would "talk against the credit industry" and "make[] a negative statement about the card to the consumer." Gupta Decl., Ex. 8, at 60. Indeed, even the most charitable rationale for surcharge bans (as expressed in a memorandum prepared in support of New York's ban) confirms that they are aimed at suppressing unwanted speech: "Surcharges, *even if only psychologically*, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and *encourages desired behavior*." *See* Gupta Decl., Ex. 13, at 10 (emphasis added).

A behavioral effect that "depend[s] on mental intermediation" just "demonstrates the power" of speech. *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The no-surcharge law affects consumer spending "only through the reactions it is assumed people will have to the free flow of [credit-card] price information." *Va. Bd. of Pharmacy*, 425 U.S. at 769. In the context of credit cards, this assumption is well placed: "Because of the framing effect, surcharges are far more effective than discounts at signaling to consumers the relative costs of a payment system." Levitin, *Priceless?*, 55 UCLA L. Rev. at 1352.

States, however, may not pass laws that seek to "diminish the effectiveness" of communication because the state has determined that certain speech is too powerful. *Sorrell*, 131 S. Ct. at 2663. "Those who seek to censor or burden free expression often assert that disfavored

[3] The Senate Committee on Economic Development had initially recommended banning only "unposted" surcharges, but the bill was amended in the House to fully mirror the federal provision that had recently expired. Gupta Decl., Ex. 12.

speech has adverse effects," *id.* at 2670, so courts must "be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality op.). Fear that "the public will respond 'irrationally' to the truth" or "would make bad decisions if given truthful information" is no justification for a speech ban. *Id.* It is for "the speaker and the audience, not the government, [to] assess the value of the information provided." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

Because the "purpose and practical effect" of section 339.001 are to impose restrictions that turn on the content of a speaker's words, the First Amendment "requires heightened scrutiny." *Sorrell*, 131 S. Ct. at 2663–64.

B. The no-surcharge law fails heightened scrutiny.

Commercial speech is traditionally subject to intermediate scrutiny under the *Central Hudson* test, which asks four questions: (1) whether the speech "concern[s] lawful activity and [is] not . . . misleading"; (2) "whether the asserted governmental interest" justifying the regulation "is substantial"; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) whether the regulation is "more extensive than is necessary to serve that interest." 447 U.S. at 566.

Courts "must review the [state's law] with 'special care,' mindful that speech prohibitions of this type rarely survive constitutional review." *44 Liquormart*, 517 U.S. at 504. "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983). This burden is "heavy," requiring actual evidence, not speculation and conjecture, that each *Central Hudson* factor is satisfied. *44 Liquormart*, 517 U.S. at 516; *see Edenfield*, 507 U.S. at 770–71. Because the state has "the burden to prove all elements of the *Central Hudson* test," the Fifth Circuit has held that a preliminary injunction is appropriate when "there is a sufficient likelihood the State will ultimately fail to prove its regulation constitutional." *Byrum*, 566 F.3d at 446. The state cannot carry its burden here.

1. Dual pricing is legal, and calling the price difference a credit-card "surcharge" is not inherently misleading.

The speech restricted by section 339.001 concerns lawful activity and is non-misleading. As Judge Rakoff explained in *Expressions*, "the regulated speech pertains solely to dual pricing, which all parties agree is lawful in itself." 975 F. Supp. 2d at 446. So too here. And there is nothing misleading about the message the plaintiffs want to communicate. Quite the contrary: A sign that prominently tells customers that "all credit card transactions are subject to a 3% surcharge" seeks to *inform* them about the cost of credit, not mislead them. *Id.* ("[The Court finds nothing 'inherently misleading' about a seller describing a price difference as a credit-card 'surcharge.'"). The state cannot possibly satisfy the first prong of *Central Hudson*.

2. The state has no legitimate interest in obscuring the cost of credit from consumers, nor is any legitimate state interest directly advanced by the no-surcharge law.

Nor can the state satisfy the second or third prongs. By preventing merchants from framing the cost of credit as a surcharge, the no-surcharge law does not directly advance any state interest. In fact, it *undermines*, rather than furthers, the interests that the commercial-speech doctrine is designed to protect. The Supreme Court extended First Amendment protection to commercial speech because it recognized a "public interest" in the "free flow of commercial information" to foster "intelligent and well informed" economic decisions by consumers, specifically with respect to "price information." *Va. Bd. of Pharmacy*, 425 U.S. at 765. When a merchant uses a dual-pricing system, a consumer can reduce the final price paid by paying in cash. Yet the no-surcharge law prohibits the merchant from telling consumers that they will incur an added cost for using credit. "It would be perverse to conclude that a statute that keeps consumers in the dark about avoidable additional costs somehow 'directly advances' the goal of consumer deception." *Expressions*, 975 F. Supp. 2d at 446.

The state's self-serving exemptions further defeat any interest that it might claim in preventing deception or otherwise protecting consumers. The law, by its own terms, "does not apply to a state agency, county, local governmental entity, or other governmental entity that accepts a credit card for the payment of fees, taxes, or other charges." Tex. Fin. Code § 339.001(b). What interest does this exemption further, exactly? Why is the *government* permitted to frame the cost of credit as a surcharge when accepting payment for property taxes or motor-vehicle-registration costs, for example, but a private merchant is barred from doing the same? *See* http://bit.ly/UBUOnf (adding "Credit Card Portal Processing Fee" for taxes paid by credit).

These "exemptions and inconsistencies bring into question the purpose of the labeling ban." *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 489 (1995). Texas can "present[] no convincing reason for pegging its speech ban to the identity" of the speaker, allowing certain favored entities to use the "surcharge" label but not others. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999); *see Expressions*, 975 F. Supp. 2d at 447 ("Defendants offer no explanation for why credit-card surcharges are somehow less deceptive when imposed by the Water Board, for example, than when imposed by ordinary commercial retailers like the plaintiffs.").

3. The no-surcharge law is far more extensive than necessary to serve any legitimate state interest.

The state fares no better under the fourth (and final) *Central Hudson* prong—whether the law is broader than necessary to serve the interest identified by the state. For any legitimate purpose the state might identify, there are "numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *see Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 669 (S.D. Ohio 1998) (explaining that "the prohibition against the use of words which could be used to present the information about the surcharge in an accurate and non-misleading manner [is] broader than necessary to prevent the description from being potentially misleading" or to prevent bait-and-switch tactics).

If the state's concern here is that surcharges should be adequately disclosed, then it could enact a law mandating adequate disclosure—just like the one proposed by the Texas Senate Committee on Economic Development in 1985, which the House rejected, or just like Minnesota's law. *See* Gupta Decl., Ex. 12; *Expressions*, 975 F. Supp. 2d at 447 (discussing Minnesota statute). And if the state's concern is "gouging"—imposing surcharges that greatly exceed the swipe fees the merchant incurs—then the state could cap the amount of each surcharge, just as the new credit-card-company rules limit surcharges to the cost of acceptance. *See Payment Card Interchange*, 2013 WL 6510737, at *21. Or the state could address these concerns (disclosure and gouging) simply by enforcing its broad Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Comm. Code § 17.64. *See BellSouth*, 542 F.3d at 508 ("Even granting the Commonwealth's assumption that [consumer deception] was a potential problem, . . . why not first enforce existing state law on the point?").

But what the state cannot do is what it did here: ban an entire category of speech because some of it has the potential to mislead. *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990). "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

II. Texas's No-Surcharge Law Is Impermissibly Vague.

The no-surcharge law is also too vague. We acknowledge that, in the Fifth Circuit, the "void-for-vagueness doctrine has primarily been used to strike down criminal laws" and that "in the civil context . . . the standard for vagueness is more lenient; 'the statute must be so vague and indefinite as really to be no rule at all.'" *Inst. for Creation v. Tex. Higher Educ. Coordinating Bd.*, 2010 WL 2522529, *18 (W.D. Tex. June 18, 2010) (Sparks, J.) (quoting *Groome Res., Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000)).

But no matter how strict the standard, section 339.001—which prevents a merchant from saying that it charges *more* for credit but not that it charges *less* for everything else—is intolerably vague. Who can say, for example, which of the following hypothetical signs would be legal?

1. If you pay by cash/debit, the cost is 2% less than if you pay by credit card.
2. If you pay by credit card, the cost is 2% more than if you pay by cash/debit.
3. Our posted prices reflect a 2% discount for cash/debit. Credit card users do not get the discount.
4. This item costs $100 (cash/debit price) or $102 (credit price).

How is anyone supposed to know which of these signs would violate the statute?

Courts that have considered state no-surcharge laws have uniformly grasped their essential incoherence. *See Payment Card Interchange*, 2013 WL 6510737, at *19 ("No-surcharge laws are not only anti-consumer, they are arguably irrational."); *Expressions,* 975 F. Supp. 2d at 435 ("*Alice in Wonderland* has nothing on [New York's no-surcharge law]."). A California appellate court, in trying to decipher that state's identical no-surcharge law, adopted a construction that would ban only *undisclosed* surcharges. *Thrifty Oil v. Superior Court*, 91 Cal. App. 4th 1070, 1077 (2d Dist. 2001). It reasoned that, even though California's law (like Texas's) says nothing about disclosure, any other reading "would mean that every two-tier pricing system includes an unlawful surcharge on the customer who pays by credit card, a conclusion that would be wholly inconsistent with . . . [allowing] discounts by retailers who wish to offer a lower price for cash purchases." *Id*. The California court explained that its construction was necessary to avoid "mischief or absurdity." *Id.*

By contrast, New York interpreted its law very differently in *Fulvio*, prosecuting a merchant because his cashier told a customer that it would cost "five cents 'extra'" to use credit rather than a "nickel less" to use cash. 517 N.Y.S.2d at 1010, 1014. As that court observed:

> [W]hat [the no-surcharge law] *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what [the no-surcharge law] *prohibits* is a price differential, in that so long as that differential is characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . [The law] creates a distinction without a difference; **it is not the *act* which is outlawed, but the *word* given that act.**

Id. at 1015 (bold added; italics in original). The court found the law's vagueness "intolerable." *Id.*

That two state courts have interpreted two indistinguishable laws in such vastly different ways—as a disclosure requirement, on one reading; as a speech ban covering a merchant's every conversation, on the other—is proof enough that these laws (including section 339.001) are hopelessly vague.

III. The Plaintiffs Are Entitled To a Preliminary Injunction.

Plaintiffs seeking a preliminary injunction must establish four things: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Byrum,* 566 F.3d at 445. In a First Amendment case, the only question is whether the plaintiff is likely to succeed on the merits, since the remaining three factors necessarily follow from it. *Id.; see Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338–39 (5th Cir. 1981).

In any event, the plaintiffs satisfy all four factors. *First*, they are substantially likely to succeed on the merits for the reasons already discussed. *Second*, they have shown irreparable harm because the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). *Third*, the balance of hardships weighs heavily in the plaintiffs' favor: They seek to exercise their First Amendment rights to inform their customers of the high costs of credit, and those rights are being thwarted daily; the state, by contrast, has no discernable interest in insisting that its unconstitutional law be enforced. *Fourth*, the public would benefit from a preliminary injunction. The major credit-card networks were forced to rescind their contractual no-surcharge rules because they are anti-competitive and anti-consumer—a fact highlighted in the amicus curiae briefs submitted by well-known consumer-advocacy groups supporting the plaintiffs in *Expressions*, both in the district court and in the Second Circuit. *See* No. 13-cv-03775, ECF No. 24; No. 13-4553, ECF No. 119; *see also Expressions*, 975 F. Supp. 2d at 437 (noting that surcharge bans result in a "hidden, regressive subsidy for credit card usage" that is paid for by cash users and that averages $1,333 per year for each credit-card user, as calculated by Federal Reserve economists). Because the plaintiffs satisfy each factor, they are entitled to a preliminary injunction.

CONCLUSION

This Court should declare that Tex. Fin. Code § 339.001 violates the plaintiffs' free-speech rights under the First Amendment and is unconstitutionally vague, and should enjoin the defendants from enforcing the statute against them.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed a copy of the foregoing via the Court's CM/ECF system on July 30, 2014, which will automatically serve a copy on counsel for the defendants.

/s/ *Richard L. Coffman*
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