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Supreme Court of the United States

PHOTOS ETC. CORP., TRADITIONS, LTD., CAPITAL AUDIO ELECTRONICS, INC., CHS INC., CRYSTAL ROCK LLC, DISCOUNT OPTICS, INC., LEON'S TRANSMISSION SERV., INC., PARKWAY CORP., AND PAYLESS SHOESOURCE, INC.,

Petitioners,

v.

HOME DEPOT, U.S.A., INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

K. CRAIG WILDFANG
THOMAS J. UNDLIN
RYAN W. MARTH
ROBINS KAPLAN LLP*
800 LaSalle Avenue
Minneapolis, MN 55402

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC†
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

November 23, 2016

PATRICK J. COUGHLIN
JOSEPH DAVID DALEY
ALEXANDRA SENYA BERNAY
ROBBINS GELLER
RUDMAN &
DOWD LLP*
655 West Broadway
Suite 1900
San Diego, CA 92101

JOSEPH GOLDBERG
FREEDMAN BOYD
HOLLANDER
GOLDBERG
URIAS & WARD, P.A. *
20 First Plaza
Suite 700
Albuquerque, NM 87102

H. LADDIE MONTAGUE
MERRILL G. DAVIDOFF
MICHAEL J. KANE
BERGER &
MONTAGUE, P.C. *
1622 Locust Street
Philadelphia, PA 19103

* *Counsel for All Petitioners*
† *Counsel for Parkway Corp.*

QUESTION PRESENTED

After nearly a decade of hard-fought litigation, the parties to this case reached a landmark settlement of class-action antitrust claims involving "interchange fees" for credit-card transactions. The settlement involved an extraordinary $7.25 billion damages fund as well as sweeping injunctive relief that would eliminate several anticompetitive network rules imposed by the credit-card companies.

The district court approved this settlement as both procedurally and substantively fair, but the Second Circuit reversed. Ignoring the district court's extensive factual findings that class counsel adequately represented the *entire* class, the Second Circuit held that the class representatives and class counsel could not simultaneously represent both a Rule 23(b)(3) class seeking money damages and a Rule 23(b)(2) class seeking injunctive relief. The court reached that holding even though the vast majority of plaintiffs sought *both* types of relief and even though there were numerous structural guarantees of fairness, including the participation of two independent mediators and even the district court in settlement negotiations.

The question presented is:

Whether the "adequacy" requirement in Rule 23(a)(4) necessitates subclasses and separate counsel for plaintiffs seeking money damages under Rule 23(b)(3) and those also seeking injunctive relief under Rule 23(b)(2).

PARTIES TO THE PROCEEDING

Petitioners are Photos Etc. Corp., Traditions, Ltd., Capital Audio Electronics, Inc., CHS Inc., Crystal Rock LLC, Discount Optics, Inc., Leon's Transmission Serv., Inc., Parkway Corp., and Payless ShoeSource, Inc. Petitioners were plaintiffs in the district court and plaintiffs-appellees in the Second Circuit.

The full list of Respondents is reproduced in Appendix C to this Brief.

CORPORATE DISCLOSURE STATEMENT

Photos, Etc. Corp., is a privately-owned California corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Traditions, Ltd., is a privately-owned Minnesota corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Capital Audio Electronics, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

CHS Inc., is a Minnesota-based cooperative corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Crystal Rock LLC, is wholly owned by publicly held corporation Crystal Rock Holdings, Inc.

Discount Optics, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Leon's Transmission Service, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Parkway Corp., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Payless ShoeSource, Inc.'s parent corporation is Payless Finance, Inc. No publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

This is one of the most consequential antitrust cases ever litigated. The underlying claims (brought by merchants that accept credit cards) involved a sweeping challenge to numerous anticompetitive practices of Visa, MasterCard, and the banks that controlled and once owned the credit-card networks. Through those anticompetitive practices—such as a network rule prohibiting merchants from "surcharging" credit-card transactions—the defendants were able to artificially inflate the "interchange fees" they charge on hundreds of billions of dollars of credit-card transactions each year.

This litigation has spurred sweeping structural changes to the credit-card industry that will have profound benefits for merchants and consumers alike. The plaintiffs and class counsel in this case helped facilitate a number of major reforms outside the courtroom, including the spinoff of Visa and MasterCard from the banks; legislative limits on fees for debit-card transactions; and a major consent decree between Visa and MasterCard and the Department of Justice (in which DOJ worked closely with class counsel and, in a reversal of the normal pattern, piggybacked on class counsel's work product and discovery materials).

Plaintiffs' achievements within the four corners of this litigation were no less extraordinary. After eight years of hard-fought adversarial litigation, plaintiffs secured a historic settlement that includes both forward-looking and backward-looking relief for merchants harmed by the defendants'

anticompetitive practices. The settlement includes a $7.25 billion damages fund (the largest-ever cash relief in an antitrust class-action settlement) to compensate merchants who were charged excessive interchange fees before 2012. And the settlement includes sweeping injunctive relief that provides enduring reform by altering the networks' rules in ways that place downward pressure on interchange fees going forward, reforms that even DOJ did not obtain. In particular, the settlement requires the credit-card networks to eliminate their "no-surcharging" rules, which had long been used to insulate interchange fees from competitive pressure. As a result of this historic reform, merchants will be empowered to educate consumers about the true cost of credit-card usage, even if Visa and MasterCard try to alter their fee structure, and will finally be able to steer consumers toward lower-cost forms of payment such as cash, debit cards, or credit cards with lower fees.

The district court—which had overseen this litigation for nearly a decade—approved the settlement in full, finding it to be both procedurally and substantively fair in light of the valuable relief obtained for the class, the risk and uncertainty of future litigation, and limits of what could be achieved in any one lawsuit. The court also made specific factual findings that class counsel fully and fairly represented the *entire* class. But the Second Circuit reversed. The court held that the district court should not have certified a class because class counsel could not "adequately" represent both merchants seeking money damages and those seeking injunctive relief. Even though the vast

majority of class members sought *both* types of relief, just as they would in individual lawsuits—and even though there were numerous structural guarantees of fairness, including two independent mediators and the district court's active involvement in the settlement—the panel found that there were "unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement." Pet.App.17.

The importance of this case alone warrants certiorari, as this settlement has profound implications for the millions of merchants across the country that stood to obtain substantial monetary benefits from this litigation. The decade of hard-fought litigation in this case culminated in a landmark settlement that includes an unprecedented $7.25 billion in cash compensation as well as far-reaching structural reforms of the credit-card industry. By scuttling that carefully negotiated settlement, the Second Circuit deprived the plaintiffs of the extraordinary relief obtained by class counsel and left the parties facing the risk, uncertainty, and expense of years of additional litigation in an ever-changing legal environment. While objectors proceeded with the blithe assurance that destroying this hard-fought settlement would eventually result in an even-more-favorable revised settlement, intervening developments underscore the fairness of the settlement and the risk to merchants of losing the benefit of this groundbreaking settlement. If there is ever a case involving "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), this is it.

The far-reaching implications of the Second Circuit's decision for class-action litigation further underscore the need for this Court's review. The panel's decision badly misconstrues this Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Those cases found that the same counsel could not represent already-injured plaintiffs and plaintiffs who might become injured in the future in a case where the cash-only settlement included limits on the defendant's overall liability. But whatever the need for separate counsel to represent *mutually exclusive* subclasses in a zero-sum situation with a capped classwide recovery, it is nonsensical to impose a rigid rule of separate representation when there is substantial *overlap* between the two purportedly antagonistic classes. The rule adopted by the Second Circuit threatens the commonsense practice of having a class seeking both damages and injunctive relief represented by class counsel, just as they would in individual litigation. The Second Circuit's novel rule has nothing to recommend it, and will significantly increase the complexity and cost of class-action litigation. This Court's review is plainly warranted.

OPINIONS BELOW

The Second Circuit's opinion is reported at 827 F.3d 223 and is reproduced at Pet.App.1. The district court's opinion is reported at 986 F. Supp. 2d 207 and is reproduced at Pet.App.36.

JURISDICTION

The Second Circuit issued its opinion on June 30, 2016. Justice Ginsburg granted two extensions of the

deadline for filing this petition, to and including November 23, 2016. *See* No. 16A280. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 23 of the Federal Rules of Civil Procedure is reproduced at Pet.App.110.

STATEMENT OF THE CASE

A. The Payment Card Industry

Visa and MasterCard were created as bank-owned joint ventures a half-century ago, and were subsequently owned and controlled by the largest banks in the United States. The banks were members of Visa and MasterCard, owned stock in them, placed representatives on their boards of directors, and issued Visa and MasterCard cards. Through those influential positions, the member banks used Visa and MasterCard to establish and enforce network rules that produced ever-increasing "interchange fees"—the fees that a merchant must pay to a card-issuing bank in order to accept Visa or MasterCard-branded cards. *See* C.A.App.868-70.[1]

Visa and MasterCard have grown exponentially over the last four decades. By 2007, transaction volume on bank-issued credit cards topped two trillion dollars, and Visa and MasterCard transactions accounted for nearly 75% of that volume. C.A.App.873, 884-85. As their market power grew, the interchange fees they levied on merchants rose as well. Interchange fees have now

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[1] C.A.App. refers to the Joint Appendix in the Second Circuit. C.A.SPA refers to the Special Appendix in the Second Circuit.

become one of the largest operating costs for many merchants, and by the mid-2000s, card-issuing banks were reaping more than $30 billion annually in such fees. C.A.App.1305-06.

The card networks and the banks that controlled them also adopted various "anti-steering restraints" as network rules that every card-accepting merchant was required to follow. The foremost example was the "anti-surcharging rule," which prohibited merchants from adding a surcharge to the sales price at the point of sale to alert customers to the costs of payment options and recoup the costs associated with credit card usage. C.A.App.924. That rule prevented merchants—who were unable as a practical matter to stop accepting Visa and MasterCard—from using surcharges to steer customers towards less-expensive payment methods such as cash, debit cards, or lower-cost credit cards. Customers, in turn, were left in the dark about the true costs of credit card usage that they were indirectly bearing as higher prices. C.A.App.879-81.

Similarly, Visa's and MasterCard's anti-minimum purchase rules prevented merchants from requiring a minimum purchase amount before they would accept Visa and MasterCard cards. And their anti-discounting rules (or "anti-discrimination" rules) prohibited merchants from offering discounts and other benefits for purchases made with non-Visa and non-MasterCard products. *See* C.A.App.861.

B. Eight Years of Hard-Fought Litigation

In June 2005, merchants filed the first class-action complaint alleging that Visa and MasterCard and their member banks conspired, *inter alia*, to

impose and fix the price of interchange fees in violation of the Sherman Act. That case and related class actions were consolidated along with 19 individual cases before Judge John Gleeson in the Eastern District of New York.

From inception, plaintiffs sought both injunctive and monetary relief and requested certification under both Rule 23(b)(2) and Rule 23(b)(3). C.A.App.830-31, 871. Plaintiffs sought both "monetary damages to compensate them for the overcharges caused by th[e] illegal conspiracy" and "equitable relief to protect themselves against continuing and future harm." C.A.App.825. Both types of relief were premised on identical facts and evidence about the defendants' uniform course of anticompetitive conduct. And both were equally "important" in ensuring an effective remedy. C.A.App.928. Several objectors were plaintiffs for the proposed 23(b)(2) and 23(b)(3) classes (before later changing their minds).

The settlement that ultimately emerged was the result of eight years of hard-fought litigation that consumed enormous resources and was closely monitored by the district court. The parties went toe-to-toe over discovery, which consumed more than five years and entailed "more than 400 depositions, the production and review of more than 80 million pages of documents, the exchange of 17 expert reports, and a full 32 days of expert deposition testimony." Pet.App.41-42. The parties engaged in multiple rounds of briefing regarding class certification (in which no "adequacy" objection on these grounds was raised), motions to dismiss, and motions for summary judgment.

C. Industry Reforms During, and Due to, This Litigation

Plaintiffs' litigation efforts brought public (and Justice Department) attention to the networks' anticompetitive practices and spurred major industry reforms. Indeed, several critical changes sought by plaintiffs were achieved outside the courtroom, often as a direct result of this litigation. While those reforms marked a great accomplishment for merchants, they also injected delay and uncertainty into the litigation process. Moreover, as the defendants abandoned past anticompetitive practices, they strengthened the case for retrospective damages and narrowed the scope for further prospective relief.

Corporate Restructurings. Shortly after the first class action was filed, and to avoid the "ruinous" antitrust liability that this litigation threatened, the networks abandoned their longstanding joint venture structures. C.A.App.857. MasterCard and Visa—joint ventures of banks for over four decades—were restructured in 2006 and 2008, respectively. Both became publicly owned and operated, with the banks divesting and relinquishing their board memberships and control over network rules. This separation of the networks and banks, whereby the banks no longer controlled the networks' business decisions, marked a tectonic industry shift as a direct result of this litigation.

Durbin Amendment. Beginning in 2009, class counsel became significantly involved in legislative reforms of the networks' practices. Working with leading merchant groups, class counsel focused on

limiting fees on debit card transactions to provide a lower-cost alternative to which merchants could eventually steer customers. Those efforts culminated in the Durbin Amendment to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

The Durbin Amendment curtailed the networks' anti-discounting rules, restricting their ability to "inhibit the ability of any person to provide a discount or in-kind incentive" to steer consumers at the point of sale toward less-expensive forms of payment. 15 U.S.C. §1693o-2(b)(2)(A). And, critically, the Durbin Amendment authorized the Federal Reserve Board to cap interchange fees on Visa and MasterCard debit card transactions to ensure that they are "reasonable and proportional to the cost incurred by the issuer." *Id.* §1693o-2(a)(3)(A). By limiting debit interchange fees, Congress rendered debit cards a substantially lower-priced form of payment other than cash to which merchants could steer consumers.

Justice Department Consent Judgment. As early as 2006, DOJ and several state attorneys general contacted class counsel. In 2008, at the urging of class counsel, DOJ opened an antitrust investigation into Visa's and MasterCard's anti-steering restraints. After DOJ issued a Civil Investigative Demand on plaintiffs seeking "all products of discovery relating to the Anti-Steering Rules," class counsel granted extraordinary access to their document and deposition databases, work product, and advice over the next three years. C.A.App.1337-41. That

assistance directly resulted in DOJ filing its own action against Visa and MasterCard.

As the district court later observed, "the plaintiffs did not piggyback on previous government action—indeed, the government piggybacked on their efforts." C.A.SPA59. In 2011, DOJ entered a Consent Judgment against Visa and MasterCard that secured critical modifications to the anti-discounting rules, enabling merchants to offer discounts at *both* the brand level (*i.e.*, discounts on cards other than Visa credit cards) and product level (*i.e.*, discounts on cards other than higher-cost Visa Signature cards). But the DOJ Consent Judgment did not include any alteration of the networks' no-surcharge rules.

D. Mediation and Settlement

1. In the wake of these significant industry reforms, the completion of discovery, and briefing and argument on class certification, dismissal, and summary judgment, the parties agreed at an advanced stage of the litigation to settle their claims. The settlement was the culmination of a painstakingly thorough and inclusive four-year mediation process spearheaded by two of the most experienced and respected mediators in the country, Retired Chief Magistrate Judge Edward Infante and Professor Eric Green.

Between April 2008 and December 2011, the parties met with one or both of the mediators approximately 45 times. C.A.App.1358-60. The district court also held several multi-day settlement conferences. Proposed class representatives—including several objectors—were heard at length by the mediators and the court. C.A.App.1134, 1142-43.

The mediators presented a settlement proposal in December 2011. After weeks of discussions, the parties—including several objectors—accepted that proposal. Class counsel concluded that accepting the mediators' proposal was "far preferable to the only alternative, which was many more years of litigation while merchants continued to be hamstrung by the no surcharge rules of Visa and MasterCard and remaining anti-steering rules." C.A.App.1362-63. In class counsel's view, settlement was particularly attractive "when compared ... to what was reasonably likely to be obtained by injunction in a trial before Judge Gleeson." *Id.* at 1362. Class counsel recognized that even after years of further litigation, victory was by no means assured; plaintiffs faced a number of potential risks in their efforts to establish liability and damages and maintain a class action; and the out-of-court successes would narrow the scope for injunctive relief even in the event of a complete litigation victory.

By February 2012, the parties—again, including several objectors—accepted the mediators' proposal for a final settlement. C.A.App.1134, 1143-44. After months of careful debate over nearly every term, the parties—still including several plaintiffs who later became objectors—reached a final settlement in July 2012, C.A.App.1043-44, which was executed in October 2012.

2. The settlement secures substantial—indeed, unprecedented—relief for plaintiffs. It achieves the largest-ever cash relief in an antitrust case—two funds totaling an estimated $7.25 billion (before opt-out reductions)—to compensate "all persons,

businesses, and other entities that have accepted" Visa or MasterCard cards in the United States from 2004 through 2012. C.A.SPA118. It also achieves an unprecedented bundle of network rule reforms "as of" November 27, 2012 or after for all merchants that "accept" Visa and MasterCard cards in the United States. *Id.*

Chief among the rule reforms is the lifting of the prohibitions on surcharging, C.A.SPA141-49, which had been the most potent anti-steering restraint. *See* C.A.App.842-43. In class counsel's view, "[w]inning the surcharging tool is the most consequential and empowering development yet in the long battle U.S. merchants have waged to counter the anticompetitive practices and legacies in the credit-card industry." C.A.App.1366. For the first time, the networks cannot prevent merchants from imposing surcharges on Visa and MasterCard transactions at the brand or product level to "steer" customers towards lower-cost payment methods. Because the amount of any surcharge is disclosed before it is incurred (and on the receipt after purchase), customers are also educated about the costs of credit card acceptance and may in turn opt for cheaper payment methods such as cash, debit cards, or lower-cost credit cards. The anti-surcharging reform thus works in tandem with the Durbin Amendment's lowering of debit card fees to ensure that consumers have an educated chance to opt for lower-cost alternatives. And the anti-surcharging relief is a uniquely enduring reform—while relief focused on interchange fees could be frustrated by the imposition of new fees, no matter what precise form future fees take the anti-surcharging rules allow for disclosure and empower

consumers to choose alternatives. Moreover, the *threat* of surcharging helps incentivize networks to lower their fees to stay competitive. *See* Pet.App.76-79.

Additional rule reforms further enhance the surcharging tool. The settlement requires networks to negotiate in good faith for better rates with bona fide merchant buying groups; permits merchants to use different acceptance strategies at different outlets; and locks in the discounting, minimum price, and other reforms of the Durbin Amendment and DOJ Consent Judgment until July 2021. C.A.SPA140-50, 153-64.

Both mediators attested that the settlement negotiations were "fair, adversarial, and always conducted at arms-length." C.A.App.1135-36, 1144. Both lauded counsel for "zealously represent[ing] the interests of their clients," and giving their "best professional effort." *Id.* And both declared that the settlement terms were fair, reasonable, and adequate, "taking into account the risks, strengths and weaknesses of [the parties'] respective positions on the substantive issues of the case and the risks and costs of continued litigation." *Id.*

E. The District Court's Review and Approval of the Settlement

The district court approved the settlement after an exhaustive review of both the settlement process and the substantive terms. After granting preliminary approval and provisionally certifying the (b)(2) and (b)(3) classes, the court invited objectors to file written submissions and "appear at the final approval hearing." C.A.App.1106. The court also

appointed Dr. Alan Sykes of NYU to offer independent analysis of the economic issues raised by the settlement.

The district court granted final approval of the settlement in a 55-page decision issued on December 13, 2013. The court first deemed the settlement procedurally fair, concluding that the "record ...demonstrates beyond any reasonable doubt that the negotiations were adversarial and conducted at arm's length by extremely capable counsel." Pet.App.57.

The district court then found the settlement substantively reasonable. The court noted that the advanced stage of litigation gave all involved "a more than adequate basis for assessing the claims" after "more than eight years" of "full-throttle" litigation. Pet.App.42-43, 62. Moreover, "[n]umerous motions remain[ed] pending," the class certification motion would inevitably entail "interlocutory review by the Second Circuit," "a trial would take several months," and the "losing parties would likely appeal any adverse jury verdicts." Pet.App.58. And, even after many more years of litigation, the class would still face "the prospect of uncertain relief." Pet.App.74. By contrast, the settlement affords a certain recovery, enabling class members to "take advantage of rules changes *now*" and receive "significant monetary compensation in the *near future*." Pet.App.58-59 (emphasis added).

The district court thoroughly considered and rejected the objectors' concerns. The court lamented that "[t]he behavior of a small number of objectors has threatened to undermine the efforts of the

others" with "needless hyperbole," "vitriol," and the improper use of "websites that disseminated false and misleading information." Pet.App.47, 59.[2]

The objectors appeared to "assum[e] that a complete victory on the merits is a foregone conclusion." Pet.App.63. In fact, a "wide range of outstanding issues" created substantial risks and uncertainties if litigation were to proceed. Pet.App.63-64. For instance, objectors assumed the illegality of Visa's and MasterCard's rules that required acceptance of all cards bearing each network's mark, even though there was case law suggesting that those rules would be found "*procompetitive* under the Rule of Reason." Pet.App.69-70. And plaintiffs faced "complexities ... in proving damages to the jury" and risks associated with class certification. Pet.App.71-72.

Objectors also "underestimated the significance of the Rule 23(b)(2) relief." Pet.App.61. The district court found that lifting the networks' prohibitions on surcharging was "an indisputably procompetitive development that has the potential to alter the very core of the problem this lawsuit was brought to challenge." Pet.App.76-78. Merchants can now provide customers with clear signals of "what it costs the merchant to accept a particular card," giving them valuable leverage to encourage the use of cheaper payment methods and brands. Pet.App.77-78. Customers, meanwhile, will have a choice between surcharged payment methods and lower-cost

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[2] 90% of the objections were generated on "boilerplate forms" downloaded from those misleading websites. Pet.App.59.

payment methods. Networks will face incentives to "lower their interchange fees to avoid being disfavored." Pet.App.77-78. As the court explained, "[e]ven if the objectors are right in contending that additional dominoes must fall before the alleged anticompetitive behavior of Visa and MasterCard is eradicated"—through challenges to state laws or third-party conduct—"those dominoes will have to fall in other forums." Pet.App.52.[3]

Finally, the district court rejected the objectors' challenges to class certification. The court found that "the Class Plaintiffs adequately represent both the (b)(2) and the (b)(3) settlement classes." Pet.App.96. As the court explained, because the class plaintiffs were existing merchants seeking both injunctive and monetary relief, "the interests of the Class Plaintiffs and the rest of the (b)(2) class *are not antagonistic*." *Id.* (emphasis added). And the class plaintiffs *actually* discharged their obligations to fully and fairly represent all members of the class: "the Class Plaintiffs have been involved in this action from the outset and have fulfilled all of the obligations associated with being class representatives." Pet.App.96-97.

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[3] For example, objectors disputed the value of the (b)(2) relief on the ground that American Express could continue to prohibit surcharging. But American Express' conduct is subject to ongoing litigation, and the district court correctly concluded that the objectors "have no solution" to the American Express problem "because there could not be one *in this case*." Pet.App.84 (emphasis added).

F. The Second Circuit's Decision

The Second Circuit vacated the district court's certification of the settlement classes and wiped out the settlement. The panel concluded that the "unitary representation of these plaintiffs" by class counsel was "inadequate" under Rule 23(a)(4) as a matter of law because "[c]lass representatives had interests antagonistic to those of some of the class members they were representing." Pet.App.16. Citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the panel held that class counsel could not "adequately" represent both merchants "pursuing solely monetary relief" and those "seeking only injunctive relief." Pet.App.16. According to the court, "[t]he former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future." *Id.*

The Second Circuit reasoned that those purportedly "divergent" interests "require separate counsel" to represent the monetary-relief class and the injunctive-relief class. *Id.* The panel expressly refused to "impugn the motives or acts of class counsel," but concluded that "class counsel was charged with an inequitable task." Pet.App.18. And the court found the "trouble with unitary representation" "exacerbated because the members of the worse-off (b)(2) class could not opt out." *Id.*

Finally, the panel asserted that its adequacy holding was "confirmed" by "the substance of the deal that was struck." Pet.App.22-23. For example, according to the court, "[m]erchants in the (b)(2) class

that ... operate in states that prohibit surcharging *gain no appreciable benefit* from the settlement." Pet.App.26 (emphasis added). Ten states have adopted statutes that prohibit merchants from surcharging credit-card transactions, and the panel concluded that those state laws render the injunctive relief "virtually worthless to vast numbers of class members." Pet.App.27. Judge Leval filed a concurring opinion concluding that the settlement also violated "the due process rights of those compelled to surrender [potential future] claims for money damages." Pet.App.32.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's decision rests on a demonstrably flawed interpretation of Rule 23(a)(4)'s adequacy requirement. Based on its deep familiarity with the litigation and parties—and the payment-card industry—the district court concluded that the class representatives and class counsel "adequately represent[ed] both the (b)(2) and the (b)(3) settlement classes." Pet.App.96. The class representatives were injured by the defendants' anticompetitive practices in the same manner as the rest of the class, and they sought *both* monetary and injunctive relief to remedy those injuries, just as they would in individual actions. They were thus ideally situated to represent other plaintiffs who sought both types of relief, and were more-than-adequate representatives of idiosyncratic class members who were either phasing out or beginning their businesses, as they had ample incentives to obtain both forms of relief. Two independent mediators, the district judge, and the magistrate judge also participated in the settlement

negotiations and confirmed that class counsel fairly and adequately represented the entire class.

The Second Circuit panel nonetheless concluded that there was a conflict in having one set of lawyers seeking both monetary and injunctive relief, and thus separate counsel and class representatives were needed for the (b)(3) and the (b)(2) classes. In reaching that holding, the panel badly misconstrued this Court's decisions in *Amchem* and *Ortiz*. Those cases involved two categories of plaintiffs with *mutually exclusive* interests: those already injured by asbestos and those who might develop asbestos-related injuries in the future. Every dollar given to one group was a dollar that would not be available for the other. Here, in contrast, there was significant *overlap* between the (b)(2) class and the (b)(3) class and there was no "zero-sum" conflict. The class representatives would benefit from both types of relief and had every incentive to both maximize their monetary recovery *and* ensure that they were not subject to anticompetitive network rules going forward. While it, of course, might be possible for class counsel to agree to a settlement that obtains inadequate relief of one form or the other (or both), courts must police that concern in judging the overall fairness of the settlement under Rule 23(e), not under Rule 23(a)(4).

By treating the mere possibility that the settlement could favor monetary relief at the expense of injunctive relief as an *adequacy* problem, the Second Circuit committed a category mistake with enormous negative consequences. Like individual litigants, class-action plaintiffs routinely seek

monetary and injunctive relief in the same suit. Yet the panel's opinion endangers that common practice, and suggests that separate counsel will be needed each time a class simultaneously seeks (b)(2) relief and (b)(3) relief. Allowing that holding to stand would significantly increase the number of mandatory subclasses (and the need for additional counsel), thereby increasing the cost and complexity of class-action litigation. Worse still, by treating the simultaneous pursuit of monetary and injunctive relief as an adequacy problem that requires separate counsel, rather than a 23(e) fairness issue, the decision below will exaggerate tensions within the class and make class litigation more difficult to settle, to the detriment of plaintiffs and defendants alike, as well as to the courts and the justice system.

II. Wholly apart from the serious flaws in the panel's interpretation of Rule 23(a)(4), certiorari would be warranted based on the importance of this case alone. This case involves a landmark settlement that resolved eight years of hard-fought litigation and achieved a $7.25 billion recovery for the class as well as unprecedented reforms of the credit-card industry. As the district court explained, the settlement is "an indisputably procompetitive development that has the potential to alter the very core of the problem this lawsuit was brought to challenge." Pet.App.76. The settlement provides substantial relief to the plaintiff class of merchants under circumstances where obtaining comparable relief in a revised settlement is far from a foregone conclusion. This Court should grant certiorari and consider these issues on the merits before allowing

this historically consequential settlement to be vacated.

III. Although the best course is to grant certiorari outright, this Court should at a minimum hold this petition pending its resolution of *Expressions Hair Design v. Schneiderman*, No. 15-1391 (*cert. granted* Sept. 29, 2016). In *Expressions*, this Court will address the constitutionality of state-law bans on surcharging credit-card transactions. These are the same statutes the Second Circuit cited in deeming the injunctive relief in this case "virtually worthless" for merchants in states with surcharging prohibitions. Pet.App.27. Indeed, the parties to this case cited the lower court decisions in *Expressions* in both their briefs and in supplemental authority letters. If this Court finds the state anti-surcharge laws to be unconstitutional in *Expressions*, the decision below in this case would plainly need to be vacated and remanded for further consideration.

I. The Court Should Grant Certiorari To Address The Second Circuit's Deeply Flawed Interpretation Of Rule 23's Adequacy Requirement.

A. The Second Circuit Badly Misconstrued This Court's Decisions in *Amchem* and *Ortiz*.

1. As a prerequisite to class certification, Rule 23(a)(4) requires that "representative parties will fairly and adequately protect the interests of the class." The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625; *see also E. Tex. Motor Freight Sys., Inc. v.*

Rodriguez, 431 U.S. 395, 403 (1977) (class representatives "must be part of the class and 'possess the same interest and suffer the same injury'" as other class members).

The "adequacy" requirement was plainly satisfied here. The class representatives were merchants who—like countless other class members—sought *both* money damages for past harms *and* injunctive relief to protect against future harms. Because they incurred both backward-looking and forward-looking injuries, the class representatives had a vested interest in maximizing both backward-looking monetary relief and forward-looking injunctive relief. They were thus perfectly capable of representing the interests of the minority who sought only monetary relief, only injunctive relief, or—like the majority of the class—both types of relief.

Based on its deep familiarity with the litigation and parties, the district court made an express factual finding that the class representatives and class counsel "adequately represent[ed] both the (b)(2) and the (b)(3) settlement classes." Pet.App.96. There was no need to speculate about the adequacy (or quality) of the representation that class members received. Over an eight-year period, "experienced and able" class counsel "litigated the case with skill and tenacity," expending 500,000 hours of work on the case. Pet.App.56; C.A.SPA61. They reviewed more than 80 million pages of documents in discovery and deposed more than 400 witnesses. Pet.App.42. And the intensive negotiations that led to the

settlement were "fair[]," "adversarial," and "conducted at arm's length." Pet.App.57.

There were also additional "structural assurance[s] of fair and adequate representation for the diverse groups and individuals affected" by the settlement. *Amchem*, 521 U.S. at 627. In particular, the settlement negotiations were overseen by two distinguished mediators who were jointly selected by the parties. C.A.JA1358-60. Judges Gleeson and Orenstein also participated in the process toward the end of the negotiations.

In short, the lead plaintiffs were ideal representatives in both theory and in practice. The class representatives had every incentive to fight for the maximum possible recovery for both the (b)(3) damages class and the (b)(2) injunctive relief class. Those incentives resulted in a settlement that provided enormous monetary relief and injunctive relief that Judge Gleeson believed "may very likely exceed the value of the monetary relief in the long run." SPA67. Thus, as the judge intimately familiar with whole course of this litigation from inception to settlement concluded, there was no adequacy problem here.

2. Despite this exhaustive record of class counsel's zealous representation of *both* classes—and the district court's express factual findings of adequate representation—the Second Circuit panel concluded that separate counsel and class representatives were needed for the (b)(2) and the (b)(3) classes. In finding as a matter of law that class counsel could not adequately represent both classes, the panel relied heavily on this Court's decisions in

Amchem and *Ortiz*. Pet.App.11-22. But the court read far too much into those decisions and ignored critical distinctions between those cases and this one.

Both *Amchem* and *Ortiz* involved two categories of plaintiffs with *mutually exclusive* interests: those already injured by asbestos and those who might develop asbestos-related injuries in the future. *See Amchem*, 521 U.S. at 595 (plaintiffs who were "currently injured" by asbestos versus "exposure-only plaintiffs"); *Ortiz*, 527 U.S. at 853, 857 ("presently injured" versus "future claimants"). By definition, any one plaintiff could not simultaneously fall within both categories. And simultaneous representation of both kinds of plaintiffs was especially problematic in light of the zero-sum nature of the settlement: "the terms of the settlement reflect essential allocation decisions designed to *confine compensation* and to *limit defendants' liability*." *Amchem*, 521 U.S. at 627 (emphasis added). In other words, the subclasses of present and future claimants were mutually exclusive, and every dollar given to one group was a dollar that would not be available for the other. Indeed, even in *individual* cases it would be difficult for one lawyer to represent both currently injured plaintiffs and potentially injured plaintiffs if both plaintiffs sought to recover from the same limited source of funds. There was thus an obvious risk in *Amchem* and *Ortiz* that class counsel would be unable to simultaneously represent the interests of both "currently injured" and "exposure-only" plaintiffs.

This case could not be more different. Unlike the mutually exclusive classes of plaintiffs in *Amchem*

and *Ortiz*, here there exists substantial *overlap* between the (b)(2) class and the (b)(3) class, with most class members and all class representatives seeking both injunctive and monetary relief. Just as a lawyer could readily represent a plaintiff seeking both injunctive and monetary relief in an individual case, there was no obstacle to having class counsel and class representatives pursuing (b)(2) and (b)(3) relief simultaneously. The (b)(2) class was overwhelmingly comprised of present merchants, who—wholly apart from any interest in monetary recovery—had a powerful interest in ensuring fair network rules going forward. The fact that some newer merchants might have a *relatively* stronger interest in injunctive relief vis-à-vis monetary relief does not remotely rise to the level of the zero-sum structural conflict of interest in *Amchem* and *Ortiz*. As the Second Circuit itself recognized in an earlier decision, "[a]ll class settlements ... strike compromises," and if "compromises automatically created subclasses that required separate representation, the class action procedure would become even more cumbersome." *Charron v. Wiener*, 731 F.3d 241, 253-54 (2d Cir. 2013).

The Second Circuit's analysis is also on a collision course with both common sense and Article III when it comes to so-called "future merchants." The Second Circuit suggested that "future merchants"—*i.e.*, merchants that were not yet in existence at the time of the settlement—would need separate representation in any settlement negotiations. *See, e.g.*, Pet.App.26-31 (discussing purportedly unique interests of merchants that would come into existence after July 20, 2021). But

"future merchants" by definition do not yet exist, and finding a concrete future merchant to represent in ongoing settlement negotiations is an impossibility. Counsel cannot "represent" in an adversarial proceeding a client that has not yet come into existence.

Moreover, the Second Circuit's misguided focus on "future merchants" underscores that its rule does not protect against existing conflicts, but rather manufactures conflicts that do not otherwise exist. Requiring separate representation for "future merchants" demands not only the conjuring up of a group that does not exist with claims that do not exist, but also the accentuation of the tensions between those nonexistent merchants and the balance of extant merchants by the appointment of a lawyer with no mission but the exaggeration of tension. Nothing could be more antithetical to the commonsense settlement of disputes. *See, e.g.*, *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"). The Second Circuit's rule creates a conflict where none exists and ensures that class actions that could be settled as individual actions become impossible to settle as class actions.

The panel's conclusion that the class representatives and their counsel were "inadequate" also rests upon the highly dubious assumption that "future merchants" would have valid and valuable claims in the future despite the substantial prospective reforms obtained in and precipitated by this litigation. For example, the panel suggested

that such "future merchants" may have lost their ability to challenge the "Honor All Cards" or "default interchange" rules. Pet.App.27-30. But the district court found, based in part on the opinion of the court's appointed economic expert, that the "Honor-All-Cards" and "default interchange" rules "undeniably have significant procompetitive effects." Pet.App.50. Despite three intensive investigations over the last twenty years that resulted in two full bench trials and a consent judgment entered into by Visa and MasterCard, the Department of Justice has never *challenged* either of the network rules that the Objector-Appellants now claim have such great value to hypothetical future merchants. And, of course, future merchants would have to contend that these rules were anti-competitive even after the anti-surcharging relief and other reforms took effect. Class counsel's decision to obtain substantial monetary and injunctive relief and not forego immediate relief to pursue exceptionally difficult challenges to other policies is properly evaluated under Rule 23(e) (and was eminently reasonable as Judge Gleeson found), but it is not remotely the basis for a Rule 23(a)(4) adequacy problem.

Indeed, implicit in the panel's reasoning is the notion that potential future claims by merchants who did not exist at the time of the Settlement (based on conduct that had not yet occurred, and might never occur) constitute a property interest sufficient to require the full protections of the Due Process Clause. Pet.App.26-31. The panel cited no case endorsing that novel and counterintuitive legal theory. By elevating the speculative future claims of so-called "future merchants" to a protectable property

interest under the Due Process Clause, the panel has effectively *denied* the Due Process rights of the currently existing merchants to settle their litigation for a record-setting cash settlement and sweeping injunctive relief.

B. The Decision Below Is in Significant Tension With the Decisions of Other Circuits.

In addition to misinterpreting this Court's precedents in *Amchem* and *Ortiz*, and imposing the impossible burden of finding class representatives for nonexistent "future merchants," the Second Circuit's decision is also in significant tension with the decisions of other courts of appeals that have faced similar issues.

For example, *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012), involved a class-wide settlement of claims alleging that certain Volkswagen models were prone to leaking. A group of objectors argued that the settlement "presents a classic *Amchem* conflict between 'past' claimants (those who have already suffered damage) and 'future' claimants (those who have not yet suffered damage)." *Id.* at 185. Those objectors argued that "because the representative plaintiffs can seek damages for their past leakage, which makes up the vast majority of their damages, they will likely value future protections less than class members with no leakage-related damages." *Id.* at 186.

The Third Circuit squarely rejected that argument, finding no "fundamental intra-class conflict sufficient to undermine Rule 23(a)(4)" even though the named plaintiffs may have "value[d]

protections for future claimants less than other members of the class." *Id.* The fact that "each class member ... derives different amounts of utility from any class-wide settlement" hardly shows that a fundamental conflict exists. *Id.* And the court's holding was buttressed by evidence of the settlement negotiations, which showed that the class representatives "seriously pursue[d] protections for future claimants." *Id.*

That holding cannot be squared with the Second Circuit's approach in the decision below. Whereas the Second Circuit effectively adopted a bright-line, categorical requirement of separate representation for past claimants (the (b)(3) class) and future claimants (the (b)(2) class), the Third Circuit imposed no such requirement. Indeed, the Third Circuit emphasized that "[a] class member who has already suffered leakage, and is thus a 'past' claimant, can continue to suffer leakage into the future to the same extent as a future claimant .... As such, *past claimants also have an incentive to protect the ability of class members to make claims for future damage.*" *Id.* at 185-86 (emphasis added). Just so here. Given that the class representatives were existing merchants, they had a powerful interest in not only maximizing their monetary recovery but also ensuring that the credit card companies were not imposing anticompetitive network rules going forward. Moreover, while the Second Circuit strained to find a conflict of interest based on the plight of hypothetical "future merchants," the Third Circuit refused to find a fundamental conflict of interest based on "speculation about whether the structural incentives ... sufficiently motivated the

representative plaintiffs to represent the rest of the class." *Id.* at 186.

Similarly, in *Uhl v. Thoroughbred Technology*, 309 F.3d 978, 985-86 (7th Cir. 2002), the Seventh Circuit held that a named plaintiff with a "real stake in all aspects of the case" and an "equal incentive to represent both sides" was an adequate class representative even though some class members would have their property encumbered by the challenged cable line and others would not (and even though some class members would receive "direct cash payments" and others would not). Here, too, there is no question that the class representatives—existing merchants—had a "real stake" in both the (b)(2) relief and the (b)(3) relief, and had every incentive to "represent both sides" in seeking to maximize both types of relief.

C. The Decision Below Will Have Profound Negative Implications for Class-Action Litigation.

In addition to scuttling the landmark settlement in this case, the Second Circuit's deeply flawed interpretation of the adequacy requirement will also create novel and unwarranted obstacles to class-action litigation more generally. In particular, the panel's decision calls into question the common (and, until this case, unobjectionable) practice of seeking both damages and injunctive relief in the same class action. "'[W]here injunctive relief and damages are both important components of the relief requested, court[s] have regularly certified an injunctive class under Rule 23(b)(2) and a damages class under Rule

23(b)(3) in the same action.'" *In re NASDAQ Antitrust Litig.*, 169 F.R.D. 493, 515 (S.D.N.Y. 1996).[4]

Whenever a class seeks injunctive relief and money damages in the same case, the injunctive relief will be of disproportionate importance to class members that continue to interact with the defendants and the monetary relief will be of disproportionate benefit to class members that have limited prospective interaction with the defendant. For example, in a class action involving a high school's allegedly discriminatory treatment of its students, the freshmen will have more interest in injunctive relief than the seniors, and the seniors will have a comparatively greater interest in monetary relief. Remarkably, the Second Circuit's reasoning suggests that the same lawyers and class representatives would be *incapable* of adequately representing both the freshmen and the seniors because there would be "unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement." Pet.App.17. If the decision below is allowed to stand, the result will be a proliferation of mandatory sub-classes—and, in turn, the need to hire additional counsel—thereby making class-action suits more expensive and complex to litigate and more difficult to settle. Worse yet, the appointment of those

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[4] *See also Gooch v. Life Investors Ins.*, 672 F.3d 402, 428-29 (6th Cir. 2012) (appropriate to certify distinct (b)(2) and (b)(3) classes where (b)(2) relief "is a separate and distinct type of relief"); *Huyer v. Wells Fargo*, 295 F.R.D. 332, 345 (S.D. Iowa 2013); *Bristol v. Louisiana-Pacific*, 916 F. Supp. 2d 357, 370 (W.D.N.Y. 2013); *Easterling v. Dep't of Corr.*, 278 F.R.D. 41 (D. Conn. 2011).

subclasses will be guaranteed to exacerbate tensions between students with a shared interest in both remedying past violations and preventing future transgressions.

The Second Circuit asserted in passing that nothing in its decision "is to say that (b)(3) and (b)(2) classes cannot be combined in a single case, or that (b)(3) and (b)(2) classes necessarily and always require separate representation." Pet.App.20. But that disclaimer is fundamentally incompatible with the court's *reasoning*. Indeed, if there were ever a case where (b)(2) and (b)(3) classes should have been able to be "combined in a single case," this was it. The class representatives were neither former retailers nor brand-new businesses, but existing merchants that expected to be in business for years; they thus had a powerful interest in ensuring both fair compensation for past wrongs and fair network rules going forward. It strains credulity to suggest that these companies could not fairly represent the much-smaller number of merchants that sought only one type of relief. The existence of a few merchants with either overwhelmingly retrospective or overwhelmingly prospective claims does not render merchants with *both* types of claims somehow inadequate representatives. Mandatory subclasses accentuate tensions and destroy the practical ability of a class-action settlement to provide meaningful relief to all merchants. Here—as two independent mediators and two federal judges emphasized—the record demonstrates beyond any doubt that all members of the class *in fact* received substantial relief and zealous representation from class counsel.

Moreover, given that the panel must have concluded that the speculative "future merchant" claims are protected by the Due Process Clause, *see supra* pp.25-27, the same so-called "conflicts" the panel identified here will be inherent in *every* case in which plaintiffs seek certification of both a (b)(2) and a (b)(3) class. Class-action cases will become impossible to litigate and settle if the Due Process Clause requires class counsel to consider and protect the interests of persons who do not currently exist in pursuing claims that do not currently exist and may never be viable.

Indeed, if the panel were correct that speculative future claims by future persons are *always* to be given full Due Process protections under Rule 23(b)(2), then cases involving *only* injunctive relief for a (b)(2) class would become problematic. Under the panel's holding, counsel must protect the Due Process rights of potential future claimants, even though it is impossible to identify who those future claimants are and what claims they might bring in the future. The result of such a requirement would be to eliminate any prospective preclusive effects of the injunctive relief, which is completely inconsistent with the nature of injunctive relief and with Rule 23 itself. *See* Adv. Comm. Notes to 2003 Amendments to Rule 23(e). If the panel's view is correct, then Rule 23(b)(2) in its entirety would be either useless, unconstitutional, or both.

Finally, in addition to misinterpreting the adequacy requirement of Rule 23(a)(4), the panel's holding also violates the Rules Enabling Act. The Act provides that the Federal Rules of Civil

Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). But the panel's opinion does just that. *Individual* litigants routinely seek both monetary and injunctive relief arising out of a common nucleus of operative fact while represented by a single lawyer. Yet the panel's reasoning would make this a near-impossibility in the class-action context, thereby "abridg[ing]" the rights of the substantial number of litigants who choose to proceed through the class-action device.

II. The Decision Below Addresses Questions Of National Importance That Warrant This Court's Review.

Even apart from the significant legal errors in the decision below, the importance of this case alone warrants this Court's intervention. *See* Sup. Ct. R. 10(c). This case involves a landmark settlement that resolved eight years of hard-fought litigation and achieved unprecedented reforms of the credit-card industry. Against "the prospect of uncertain relief" years down the line, the settlement secures "significant monetary compensation in the near future" in the form of an estimated $7.25 billion damages fund. Pet.App.59, 74. That historic sum represents the largest-ever cash relief in an antitrust class-action settlement, and the third-largest class-action settlement in history. Yet the Second Circuit's decision deprives the settling class members of their ability to finally receive compensation for the many years in which they paid artificially inflated interchange fees to the defendant banks and credit card networks.

In addition to this historic damages fund, the settlement *also* secures groundbreaking injunctive reforms of several long-entrenched merchant restraints that had allowed the networks and banks to charge excessive interchange fees—reforms that the district court found "may *very likely exceed* the value of the monetary relief in the long run." C.A.SPA67 (emphasis added). The "heart" of the injunctive relief was the lifting of the networks' bans on surcharging. Pet.App.49. From the inception of this litigation, the anti-surcharging rules were viewed as a "linchpin to the problem, as far as the merchants [were] concerned." Pet.App.41.

As a result of this settlement, "[f]or the first time" since the networks were created a half-century ago, merchants could impose a surcharge on Visa and MasterCard credit-card transactions at the point of sale to recover the full costs of acceptance of such transactions and steer customers to less costly payment methods and brands. Pet.App.49. This marks a sea-change in the payment industry. In the district court's words, surcharges can finally "make transparent and avoidable what has been opaque and inevitable." Pet.App.77. Levying a surcharge on credit card payments enables merchants to steer customers towards using lower-cost and non-surcharged payment methods or brands. C.A.App.1177-78, 1185-86. This remedy, unlike relief targeting a specific policy (like honor-all-cards) or a specific fee (such as default interchange) is enduring. No matter what new fees defendants impose, the anti-surcharging reform empowers merchants to inform consumers and steer them to lower-cost alternatives. The district court specifically noted

expert estimates that, in all, surcharging may save merchants between "$26.4 and $62.8 billion in acceptance costs over the next decade." Pet.App.74.

In sum, the hard-won settlement in this case is "an indisputably procompetitive development that has the potential to alter the very core of the problem this lawsuit was brought to challenge." Pet.App.76. Yet the Second Circuit's decisions will relegate the parties to many more years of costly litigation while facing "the prospect of uncertain relief." *Id.* at 74. This settlement is simply too important to be scuttled without this Court's review.

III. In The Alternative, The Court Should Hold This Petition Pending Its Resolution Of *Expressions Hair Design v. Schneiderman.*

For all the reasons noted above, the best course is to grant certiorari outright. At a minimum, however, the Court should hold this petition pending its disposition of *Expressions Hair Design v. Schneiderman*, No. 15-1391 (*cert. granted* Sept. 29, 2016).

Expressions will address whether state "no-surcharge" laws violate the First Amendment by unconstitutionally restricting speech conveying accurate pricing information to consumers. *See* Pet. for Cert. at i, No. 15-1391 (May 12, 2016). Ten states have adopted statutes that allow merchants to offer "discounts" to consumers who pay with cash but make it a crime to impose identical "surcharges" on consumers who pay with credit cards. Consider two merchants: Merchant A sells a product for $100 and offers a $2 "discount" to cash-paying customers, while Merchant B sells the product for $98 and imposes a

$2 "surcharge" on customers who pay with credit cards. Customers of either merchant would pay $100 if using a credit card or $98 if paying cash. Yet ten states would deem Merchant B to have committed a crime, based solely on the *words the merchant uses* to characterize its pricing practices. In *Expressions*, this Court will decide whether these speech-restricting state laws can be squared with the First Amendment.

This Court's decision in *Expressions* will have direct and significant implications for this case. The Second Circuit's holding regarding the purported inadequacy of representation was bolstered by what the court deemed the substantive unfairness of the settlement. Pet.App.22-31. In particular, the panel found that merchants that "operate in states that prohibit surcharging *gain no appreciable benefit from the settlement*," and that the (b)(2) injunctive relief was "virtually worthless to vast numbers of class members" that are located in such states. Pet.App.26-27 (emphasis added).

Those holdings are untenable in their own right, and disregard the district court's extensive factfinding on these issues. In particular, the district court found that surcharging allowed interchange fees to be transparent to consumers, which in turn created pressure on the defendants to lower those fees; that because interchange fees are set on a *nationwide* basis, the downward pressure in the 40 states that allowed surcharging would likely carry over to the ten states that have "no-surcharge" statutes; and that allowing surcharging was more effective than other types of relief that would abolish

the interchange fee but could easily be replaced with a new fee. *See* Pet.App.76-79. The Second Circuit mentioned none of this in finding the surcharging relief to be "virtually worthless."

The Second Circuit's holding on this issue will be even more untenable if this Court agrees with the petitioners in *Expressions*. If state anti-surcharging laws are unconstitutional, then merchants in all fifty states will be able to take full advantage of the injunctive relief obtained through this settlement. Indeed, there is no question that *Expressions* is directly relevant to this case, as the parties have addressed that case at length in numerous filings. Petitioners favorably cited Judge Rakoff's initial decision (which invalidated New York's no-surcharge law) in their brief to the Second Circuit. *See* C.A.Br. for Plaintiffs-Appellees at 65-66. Then, after the Second Circuit reversed Judge Rakoff's decision, Respondents filed a 28(j) letter citing that decision as "pertinent" authority. Dkt.No.1472. The parties subsequently filed additional 28(j) letters regarding other challenges to anti-surcharging laws in the Fifth and Eleventh Circuits. Dkt. No. 1516, 1523, 1546.

In short, Petitioners, Respondents, and the Second Circuit panel have all recognized that state anti-surcharge statutes are highly pertinent to this case. If the Court does not grant certiorari outright, it should hold this petition pending its resolution of *Expressions* and should vacate the decision below if it finds state anti-surcharge laws to be unconstitutional.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC†
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

K. CRAIG WILDFANG
THOMAS J. UNDLIN
RYAN W. MARTH
ROBINS KAPLAN LLP*
800 LaSalle Avenue
Minneapolis, MN 55402

PATRICK J. COUGHLIN
JOSEPH DAVID DALEY
ALEXANDRA SENYA BERNAY
ROBBINS GELLER
RUDMAN &
DOWD LLP*
655 West Broadway
Suite 1900
San Diego, CA 92101

H. LADDIE MONTAGUE
MERRILL G. DAVIDOFF
MICHAEL J. KANE
BERGER &
MONTAGUE, P.C. *
1622 Locust Street
Philadelphia, PA 19103

JOSEPH GOLDBERG
FREEDMAN BOYD
HOLLANDER
GOLDBERG
URIAS & WARD, P.A. *
20 First Plaza
Suite 700
Albuquerque, NM 87102

* *Counsel for All Petitioners*
† *Counsel for Parkway Corp.*

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