I. INTRODUCTION

When a consumer elects to purchase a good or service with a credit card, some merchants impose a surcharge to cover processing fees charged by credit card providers. In response to this practice, ten states and Puerto Rico, have enacted statutes prohibiting merchants from imposing surcharges on credit purchases. Generally, these anti-surcharges statutes exclusively prohibit merchants from charging and advertising a surcharge for credit purchases, but do not prohibit merchants from providing discounts for cash purchases.

Merchants in California, Florida, New York, and Texas have challenged their respective state’s anti-surcharges statutes on the grounds that they violate the merchants’ First Amendment rights as unconstitutional regulations on protected commercial speech. In determining whether the anti-surcharges regulations abridge commercial speech rights, the threshold issue becomes whether these state statutes regulate economic conduct or commercial speech. The Second, Fifth, and Eleventh Circuit Courts of Appeals are split in determining whether anti-surcharges statutes limit commercial speech and in March 2017, in Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017).
Schneiderman, the Supreme Court determined that New York’s anti-surcharge law constituted a speech regulation in regard to at least one particular pricing scheme: single-sticker pricing. The Court subsequently declined to address whether the no-surcharge law regulated speech in other pricing schemes and additionally did not analyze the constitutionality of the state law. As a result, the Court remanded these unaddressed issues to the Second Circuit, which subsequently requested that the New York Court of Appeals provide clarification on the meaning of New York’s anti-surcharge law. The ultimate speech or conduct classification, and the accompanying constitutional evaluation, will likely have a far-reaching, determinative effect on whether state anti-surcharge laws can survive nationwide.

Commercial speech restrictions have traditionally been subject to intermediate scrutiny under Central Hudson Gas and Electric Corp. v. Public Service Commission. There, the Supreme Court established a four-prong test to determine whether a commercial speech restriction went so far as to unjustifiably impede the free flow of truthful commercial information. In the wake of Sorrell v. IMS Health, Inc. and Reed v. Town of Gilbert, however, speculation looms as to whether the Supreme Court has signaled for the end of intermediate scrutiny in its commercial speech doctrine, and instead is prepared to subject all content-based speech restrictions to strict scrutiny.

This Comment analyzes the current circuit split between the Second, Fifth, and Eleventh Circuit Courts of Appeals in light of the Supreme Court’s recent opinion in Expressions Hair Design v. Schneiderman and argues that state anti-surcharge statutes unconstitutionally restrict commercial speech. There exist several different surcharging techniques and this Comment addresses two common forms: (1) single sticker-pricing—listing a single

808 F.3d at 131 (same). But see Dana’s R.R. Supply, 807 F.3d at 1249 (“[T]he no surcharge law regulates speech and not conduct . . . .”).
7 Expressions II, 137 S. Ct. at 1151.
8 Id.
9 Id.
13 Sorrell, 564 U.S. at 588 (Breyer, J., dissenting) (explaining that the majority’s decision “suggest[s] a standard yet stricter than Central Hudson”); Retail Dig. Network, LLC v. Appelsmith, 810 F.3d 638, 648 (9th Cir. 2016) (“Sorrell modified the Central Hudson test for laws burdening commercial speech. Under Sorrell, courts must first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content or speaker based. If so, heightened judicial scrutiny is required.”), reh’g en banc granted sub nom, Retail Dig. Network, LLC v. Gorsuch, 842 F.3d 1092 (9th Cir. 2016).
Part II will introduce the Supreme Court’s commercial speech doctrine and discuss the means by which the Court classifies speech as distinctly “commercial,” as well as the level of constitutional scrutiny to which speech restrictions are subjected. Part III will discuss the reason for state anti-surcharge laws: the expired federal ban. Part IV will introduce Florida’s, New York’s, Texas’s, and California’s anti-surcharge laws—the four most prevalent state laws to the anti-surcharge discussion—and Part V will explore the circuit split arising out the interpretation of these laws. Part VI will explain precisely why both single-sticker and dual-pricing schemes amount to commercial speech restrictions. Lastly, Part VII will demonstrate that anti-surcharges statutes fail intermediate scrutiny under Central Hudson and constitute an abridgement of merchants’ First Amendment speech rights. Part VIII briefly concludes.

II. FIRST AMENDMENT FREE SPEECH PROTECTION AND THE SUPREME COURT’S EVOLVING COMMERCIAL SPEECH DOCTRINE

A. The Commercial Speech Doctrine

The First Amendment affords commercial speech less protection from government regulation than other forms of constitutionally protected expression, and the availability of commercial speech protection turns largely on a balance of the nature of the commercial expression and the nature of the government interest in suppressing or regulating that expression. Accordingly, the government has greater authority to regulate

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15 Id. at 101.
commercial speech where the speech does not “accurately inform the public about lawful activity,”17 where the speech intends to deceive or is likely to deceive or mislead the public, and where the speech is related to illegal activity.18 Additionally, the First Amendment does not prevent regulations directed at commerce or conduct that impose incidental burdens on speech;19 however, speech protection is not wholly precluded simply because an individual’s interest in expression is purely economic.20

These regulatory accommodations acknowledge the reality that commercial speech typically arises in areas historically subjected to government regulation.21 Generally, states are free to establish economic policies promoting public welfare and to create laws enforcing such policies.22 The power to regulate commercial activity additionally necessitates the ability to regulate commercial speech that is “linked inextricably” to that activity.23 Outside of these exceptions, the government’s ability to regulate commercial speech is more limited.24 The Supreme Court’s commercial speech doctrine provides protection for the free flow of economic ideas as a means to aid the public in making decisions in the marketplace.25 States’ regulatory authority, in this regard, is diminished when a commercial speech restriction “strike[s] at the substance of the information communicated rather than the commercial aspect” of the communication.26 This regulatory capability is further reduced when a state institutes a complete ban on the communication of truthful commercial information.27 There, courts are less likely to defer to states’ economic regulatory authority and more likely to provide rigorous First Amendment review of the state action.28 As a result of the public’s substantial interest in the unimpeded flow of truthful commercial information, regulations on non-

17 Id.
20 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–73 (1976) (holding that states may not prohibit the dissemination of truthful information regarding lawful activity because of fear that such information may have a negative effect upon disseminates and its recipients).
21 Ohralik, 436 U.S. at 456.
23 Friedman, 440 U.S. at 10, n.9.
24 Id.
27 Id. at 501.
28 Id.
misleading commercial speech must be a “last-not first-resort.”

B. Commercial Speech Defined

The commercial speech doctrine broadly represents an “accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.” In order to determine the applicability of commercial speech protection to particular expression, commercial speech must first be identified. This classification, however, has proven to be largely imprecise. In fact, neither the Second, Fifth, nor Eleventh Circuits, in their respective analyses of anti-surcharge regulations, explicitly identified the proper analytical framework for classifying commercial speech.

Commercial speech and its relation to First Amendment protection first arose in 1942 in Valentine v. Chrestensen, and for more than thirty years, the Court defined commercial speech as that which “propose[d] a commercial transaction.” In Bigelow v. Virginia, the Court required that, to qualify as commercial speech, commercial proposals must communicate factual information of public interest. The following year, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court provided that speech which does “no more than propose a commercial transaction” may qualify for commercial speech protection. In Central Hudson, the Court redefined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” In order to distinguish commercial speech from simple prices, the Court has looked to whether the speech exists in an advertising format, whether there exists a reference to a specific product, and whether there is an underlying economic motive.

In Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, the Court returned to the “propose a commercial transaction” standard and noted that “advertising pure and simple” sufficiently qualifies as

31 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (“There are undoubted difficulties with an effort to draw a bright line between ‘commercial speech’ on the one hand and ‘protected speech’ on the other hand, and the Court does better to face up to these difficulties than to attempt to hide them under labels.”).
32 316 U.S. 52 (1942).
33 Id. at 54; Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 384 (1973).
34 421 U.S. 809, 821 (1975).
35 425 U.S. at 762.
commercial speech. The commercial transaction standard was twice affirmed in Board of Trustees of the State University of New York v. Fox and City of Cincinnati v. Discovery Network, Inc., where both times the Court noted the “commonsense basis” for distinguishing between “speech proposing a commercial transaction” and other varieties of speech. Though the Court has altered its classification several times, commercial speech is currently identified as that which proposes a commercial transaction.

C. The Commercial Speech Standard of Scrutiny

Determining which speech qualifies as commercial and what degree of protection commercial speech is afforded has proven to be a difficult task. After several years of utilizing different degrees of scrutiny to evaluate the constitutionality of restrictions on commercial speech, the Supreme Court established a four-prong test in Central Hudson. The test asks whether: (1) the challenged law regulates speech that is misleading or related to unlawful activity; (2) the government has a substantial interest at stake in the challenged regulation; (3) the challenged regulation directly advances the government’s interest; and (4) a more limited restriction would be insufficient to achieve the government’s interest. The Central Hudson test, in turn, applies a degree of scrutiny more exacting than rational basis review, but more easily satisfied than strict scrutiny.

Central Hudson currently controls as the constitutional framework through which commercial speech challenges are evaluated; however, the Court’s analysis in recent commercial speech cases has fueled speculation that such challenges may instead be subject to First Amendment strict scrutiny. In Sorrell, the Supreme Court addressed a law that restricted “the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors.” The Sorrell Court determined that the law’s restriction on the free flow of truthful information amounted to a content-based speech restriction and the Court applied both First

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41 Id. at 422–24.
44 Id. at 566.
46 See Micah L. Berman, Manipulative Marketing and the First Amendment, 103 GEO. L.J. 497 (2015) (suggesting that Sorrell indicates that commercial speech regulations are now subject to strict scrutiny); Retail Dig. Network, LLC v. Gorsuch, 842 F.3d 1092 (9th Cir. 2016).
Amendment strict scrutiny and *Central Hudson* intermediate scrutiny.\(^{48}\)

Though the Court did not expressly state which standard of review was mandated, and held that the regulation at issue was unconstitutional under the traditional “commercial speech inquiry or a stricter form of judicial scrutiny,” the application of strict scrutiny, to any degree, is unavoidably significant.\(^{49}\) More recently, in *Reed*, the Court addressed a state law restricting the size, duration, and location of temporary outdoor signs.\(^{50}\)

There, a local church and its pastor sought to advertise Sunday church services and placed numerous signs throughout the town, noting the time and location of church services.\(^{51}\) The Court held that the state law was a content-based speech restriction and, therefore, was subject to strict scrutiny.\(^{52}\)

It is unclear that either *Sorrell* or *Reed* indicates that the Court is pivoting away from the *Central Hudson* intermediate scrutiny standard and toward a strict scrutiny standard for commercial speech challenges. First, it is unlikely that the challenge presented in *Reed*, which involved speech advertising church services for a non-profit organization,\(^{53}\) sufficiently qualified as commercial speech. The *Reed* majority failed to mention *Central Hudson*, to discuss commercial speech, or to suggest that promoting church services amounted to a proposition for a commercial transaction.\(^{54}\)

Further, although the *Sorrell* majority applied strict scrutiny,\(^{55}\) it is significant that the Court utilized strict scrutiny in addition to, rather than in lieu of, *Central Hudson* intermediate scrutiny. Lastly, understanding *Sorrell* to hold that content-based and speaker-based commercial speech regulations must be subjected to strict scrutiny would entail assuming that the majority sought to “threaten[] . . . widely accepted regulatory activity” in nearly all commercial sectors.\(^{56}\) Though possible, it is unlikely that the *Sorrell* majority sought to undo a significant regulatory framework through an implication. Accordingly, *Sorrell* and *Reed* do not suggest that challenges to commercial speech restrictions will no longer be analyzed under the *Central Hudson* framework.

\(^{48}\) *Id.* at 565, 572.

\(^{49}\) *Id.* at 571.

\(^{50}\) 135 S. Ct. 2218, 2224 (2015).

\(^{51}\) *Id.*

\(^{52}\) *Id.* at 2232.

\(^{53}\) *Id.* at 2225.

\(^{54}\) *Id.* at 2226–2231.


\(^{56}\) *Id.* at 590 (Breyer, J., dissenting).
III. THE EXPIRED FEDERAL BAN: THE REASON FOR STATE ANTI-SURCHARGE LAWS

Prior to 1974, credit card issuers—such as American Express, Visa, and MasterCard—contracted with merchants to prohibit them from charging consumers different prices based on payment method.57 Merchants agreed to incur the fee charged by card issuers each time a consumer paid with a credit card—the swipe fee.58 In 1974, however, Congress amended the Federal Truth in Lending Act (TILA)59 and provided merchants the ability to offer cash discounts to circumvent the anti-surcharge provisions in their contracts.60 In 1975, the Federal Reserve Board promulgated a regulation exempting credit surcharges from TILA’s disclosure requirements, thus creating a distinction between cash discounts and credit card surcharges.61 Congress then amended TILA again to ratify the Federal Reserve Board’s promulgation and banned credit card surcharges entirely.62 The amendment highlighted the distinction between protected cash discounts and the newly unlawful surcharges.63 Further, the federal law defined a surcharge as any means of an increase to the regular price to a cardholder, which is not imposed on cash customers.64 Discount was defined as a reduction from the regular price and something that “shall not mean surcharge.”65

57 See Expressions Hair Design v. Schneiderman, 808 F.3d 118, 123 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017). Specifically, these agreements provided that merchants would not charge customers higher prices for credit card payments because the card issuers feared that a higher fee would disincentivize consumers from using credit cards. Id.
58 Rowell v. Pettijohn, 816 F.3d 73, 76 (5th Cir. 2016). Swipe fees generally constitute two to three percent of the transaction cost. Expressions, 808 F.3d at 122.
60 Id. Section 1666(a) provides that issuers of credit cards “may not . . . 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.” Id.
62 See Act of Feb. 27, 1976, Pub. L. No. 94-222, 90 Stat. 197 (1976). The 1976 amendment provided that “[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.” Id.
63 Id.
64 Id.
65 Id.
The federal surcharge ban was originally set to expire in 1979; however, Congress extended the ban until 1981. After extending the ban again from 1981 to 1984, Congress attempted to ameliorate growing criticism of the law’s vague surcharge/discount distinction by clarifying the term “regular price.” Regular price was defined as:

the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of a credit card and the other when payment is made by use of cash, check, or other similar means.

In 1984, the federal ban on credit card surcharges expired and, as a result, credit card issuers began re-adding anti-surchge provisions into their merchant contracts and states began implementing statewide anti-surchge statutes. The contractual anti-surcharge provisions subsequently became the subject of antitrust class action suits against credit card issuers. In 2013, these suits resulted in a nationwide settlement agreement, mandating Visa, MasterCard, and American Express to remove the anti-surchge provisions from their merchant contracts. With the federal anti-surchge ban having expired and the contractual anti-surchge provisions having been removed, state anti-surchge laws are the only obstacle preventing merchants from imposing a surcharge on credit transactions.

68 Id.
69 Rowell v. Pettijohn, 816 F.3d 73, 77 (5th Cir. 2016).
70 Id.
71 Id.; see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207 (E.D.N.Y. 2013). In In re Payment Card Interchange Fee, a class of approximately twelve million merchants filed an antitrust action against Visa U.S.A., Inc. and MasterCard International Incorporated, as well as several other banks, alleging that Visa, MasterCard, and the corresponding banks “conspired to fix interchange fees in violation of section 1 of the Sherman Act. Id. at 213. The District Court for the Eastern District of New York approved a proposed settlement that called for: (1) “a cash recovery slightly in excess of $7 billion” by members of the class; (2) and “certain reforms of the defendants’ rules and practices” to benefit members of the class. Id. Specifically, the settlement provided for “Visa and MasterCard rule modifications to permit merchants to surcharge on Visa- or MasterCard-branded credit card transactions at both the band and products level.” Id. at 217. Rowell, 816 F.3d at 77; In re Payment Card Interchange Fee, 986 F. Supp. 2d at 217.
IV. The State Legislation—Florida’s, New York’s, Texas’s, and California’s Anti-Surcharge Laws

The Florida legislature enacted an anti-surcharge law in 2010, which provides that “[a] seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash.”73 Section 501.0117 defines a surcharge as “[a]ny additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make [the] payment.”74 Florida’s ban, much like expired federal anti-surcharge law, creates an exception for cash discounts.75

In reaction to the expiration of the federal ban, New York enacted an anti-surcharge law in 1984.76 Section 518 of the New York General Business Law provides that “[n]o seller in any sales transaction may impose a surcharge on a [credit card] holder who elects to use a credit card in lieu of payment by cash.”77 Unlike Florida’s ban, the New York statute does not define the term surcharge, does not list exceptions, and does not mention or distinguish cash discounts.78 The bill summary suggests that the law was enacted to protect against the risk of sudden price fluctuations that may arise after observing the customer’s payment choice and to prevent the surprise of a higher price at the register.79 The law addresses the potential risk that “merchants would at the time of the sale, raise or lower the price according to the method of payment, leaving the consumer . . . subject to dubious marketing practices and variable purchase prices.”80 Additionally, the bill summary provides that “merchant[s] would be able to offer a discount for cash if they so desire.”81

Section 604A.0021 of the Texas Business and Commerce Code Annotated, previously section 339.001 of the Texas Finance Code, was enacted in 1985 and provides that “[i]n a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension or credit instead of cash.”82 Similar to New York’s ban, the Texas

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74  Id.
75  Id. (allowing the “offering of a discount for the purpose of inducing payment by cash”).
76  Expressions Hair Design v. Schneiderman, 808 F.3d 118, 123 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017).
77  N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1–502).
78  See id.
79  See Expressions, 808 F.3d at 124–25.
80  Id. (citation omitted).
81  Id. at 125 (alteration in original) (citation omitted).
statute does not make an express distinction between cash discounts and credit surcharges.83 Though the statute does not define the term “surcharge,” the Fifth Circuit interpreted the term to be consistent with the definition in the expired federal law: “an additional amount above the seller’s regular price.”84 The statute does not define regular price.85

Lastly, section 1748.1(a) of the California Civil Code provides that “[n]o retailer . . . may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash.”86 The California statute, unlike New York’s and Texas’, expressly states that a retailer may offer discounts to induce cash payment.87 The statement of intent indicates that the law’s goal is to:

promote the effective operation of the free market and protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges and encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card.88

The ten existing anti-surcharge statutes, including the four mentioned above, serve as complete bans on any credit surcharge.89 Conversely, merchants in states without anti-surcharge regulations may implement a surcharge larger than any swipe fee.90 Minnesota, however, enacted a unique and more precise surcharge restriction designed to curtail unwarned and unrestrained surcharges.91 In Minnesota, a merchant may impose a surcharge for credit purchases, “provided: (1) the seller informs the purchaser of the surcharge both orally at the time of the sale and by a sign conspicuously posted on the seller’s premises, and (2) the surcharge does not exceed five percent of the purchase price.”92

No state has provided justification for the disparate treatment of credit surcharges and cash discounts; however, it is probable that the distinction resulted from credit card industry lobbying efforts.93 The majority of state

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83 Id.
84 Rowell v. Pettijohn, 816 F.3d 73, 80–82 (5th Cir. 2016).
85 See § 604A.0021.
86 CAL. CIV. CODE § 1748.1(a) (Deering 2017).
87 Id.
88 § 1748.1(e).
89 Credit or Debit Card Surcharge State Statutes, supra note 2.
90 Id.
91 MINN. STAT. § 325G.051 (LEXISNEXIS 2017).
92 Id.
anti-surcharge statutes were passed within a five-year window of the lapsed federal ban, and states with prior existing surcharge restrictions implemented exceptions for cash discounts in that same window. Though states with surcharge bans amount to only 20% of those in the United States, together they contain approximately 40% of the United States’ population. It is no coincidence that California, Texas, New York, and Florida—the four most populous states in the country—have been the major focus of these regulations. Accordingly, the purpose of anti-surcharge statutes may be less related to consumer protection than the states originally suggested.

V. THE CIRCUIT SPLIT

The Second, Fifth, and Eleventh Circuit Courts of Appeals were split as to whether no-surcharge restrictions regulated commercial speech or economic conduct, but in March 2017, the Supreme Court provided some clarity, at least in the single-sticker context. The challengers in Expressions Hair Design demonstrate the different potential avenues to achieve the uniform desires of merchant-challengers nationwide: to inform customers about swipe fees and to charge an extra fee for using credit cards. Expressions Hair Design, specifically, sought to advertise the posted price for its service, plus a 3% surcharge for credit payment to offset the cost of swipe fees. Other sellers sought to charge two different prices for cash and credit purchasers, but specifically want to label the difference between cash and credit prices as a surcharge because they believe it is more effective in communicating their message than labeling the difference as a discount. Together, merchants maintain that their commercial speech rights are

("In 1984, however, Congress allowed the no-surcharge provision to lapse. In response, the credit card industry began lobbying for state-level no-surcharge laws, which were eventually enacted in ten states, including New York." (citing N.Y. GEN. BUS. LAW § 518)), judgment entered, No. 13-CV-3775, 2013 WL 7203883 (S.D.N.Y. Nov. 4, 2013), vacated, 803 F.3d 94 (2d Cir. 2015), and vacated, 808 F.3d 118 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017); Adam J. Levitin, Priceless? The Social Costs of Credit Card Merchant Restraints, 45 HARV. J. ON LEGIS. 1, 9 n.35 (2008) (“Based on barebones legislative history for eleven of the twelve states with no-surcharge rules, most state no-surcharge rules appear to be the result of credit card industry lobbying in the 1980s.”). express uni

94 Expressions, 975 F. Supp. 2d at 349; Levitin, supra note 93.
96 Id.
97 Expressions II, 137 S. Ct. 1144, 1151 (2017) (holding that restrictions on single-sticker pricing regulate how merchants communicate their prices and, as a result, implicate commercial speech protection).
99 Id. at 20.
100 Id.
unconstitutionally infringed because no-surcharge laws limit a method of advertising prices to consumers, as there is no real distinction between a discount and a surcharge.101

A. Anti-Surcharge Laws as a Regulation on Commercial Speech

In Dana’s Railroad Supply v. Bondi, the Eleventh Circuit reviewed Florida’s anti-surcharge law and concluded that it regulated commercial speech.102 In order to ascertain precisely what the law regulated, the court began by identifying that which it did not regulate.103 It determined that the law expressly permitted dual pricing, so long as the second form was listed as a cash discount, rather than a credit surcharge.104 Additionally, it held the statute did not constitute a prohibition on bait-and-switch schemes because such a construction would “narrow the no-surcharge law into nothingness” and render it too easily avoidable.105 Further, the court reasoned that there exists no distinction between a surcharge and a discount because a surcharge is merely a negative discount.106

Having determined that surcharges and discounts are indistinguishable, the Eleventh Circuit concluded that a violation of the statute turned exclusively on a merchant’s mode of communication to consumers, rather than a merchant’s conduct.107 Accordingly, the law solely prohibited how a merchant explains his pricing scheme by targeting expression alone, such that it should be renamed a “surcharges-are-fine-just-don’t-call-them-that-law.”108

The court offered two examples to illustrate that the statute regulates speech rather than conduct and that any distinction in the final result is merely one of perception rather than one of substantive difference. First, “[i]f the same copy of Plato’s Republic can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the consumer incur a $2 surcharge or does he receive a $2 discount?”109 Secondly, the

101 Id. at 26.
102 Dana’s R.R. Supply v. Attorney Gen., 807 F.3d 1235, 1238 (11th Cir. 2015).
103 Id at 1243.
104 Id.
105 Id. at 1244.
106 Id. at 1245.
107 Id.
108 Dana’s R.R. Supply, 807 F.3d at 1245.
109 Id. This example illustrates that in a dual-pricing scheme, absent some communication from the seller and absent a “regular price” definition, the customer cannot determine whether he is faced with a discount or a surcharge. If a statute adopted the lapsed federal ban’s “regular price” definition, however, the credit price would serve as the regular price. Assuming the federal definition’s application, the consumer would not be incurring a surcharge so long as the credit price was higher than the cash price. Here, Florida had neither defined regular price nor adopted the federal definition, thus the Eleventh Circuit’s reasoning was sound. Id.
court compared the anti-surcharge law to a hypothetical state law prohibiting restaurants from providing patrons with half-empty drinks, while enabling them to provide half-full drinks. The court reasoned that a half-empty/half-full classification would constitute a content-based speech restriction because it merely regulates how a message could be conveyed, despite permitting an objectively indistinguishable final product. As a result, the Eleventh Circuit concluded that the anti-surcharge regulation amounted to a content-based speech restriction that governed “how to express relative values” and “imposes criminal liability for making the ‘wrong choice’ between equally plausible alternative descriptions of an objective reality,” which fails under any form of heightened scrutiny.

This rationale was reiterated in Italian Colors Restaurant v. Harris. There, the District Court for the Eastern District of California addressed California’s anti-surcharge law and concluded that the law constituted a speech restriction because it mandated the manner in which merchants assigned prices, and because it regulated “speech that conveys price information.” Regulating how prices or a pricing scheme is communicated to consumers, the court reasoned, is distinguishable from an economic regulation that controls “what is charged or paid for something.” Moreover, the law constituted a content-based speech restriction because the content of retailers’ speech was “scrutinized to determine if the price is framed as a permissible discount or an impermissible surcharge.”

The Italian Colors Court then applied intermediate scrutiny under Central Hudson and found both that surcharges did not present a “real” harm and that the restriction was “much broader than necessary” to prevent unfair surprises at the register. The Eastern District concluded that any potential harm posed by credit surcharges was undermined by the fact that the law enabled California’s state agencies to utilize credit-surcharging schemes. Additionally, the court found that mandating the disclosure of surcharges before the register was the “most direct way to prevent consumer

110 Id.
111 Id.
112 Id. at 1246.
113 Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199 (E.D. Cal. 2015).
114 Id. at 1207.
115 Id.
116 Id. (citing Sorrell v. IMS Health, Inc., 564 U.S. 552, 568 (2011)) (“An individual’s right to speak is implicate when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.”).
117 Id. at 1208.
118 Id. at 1209–10.
119 Italian Colors Rest., 99 F. Supp. 3d at 1209.
deception,”120 and as a result, the court held that the statute constituted an
unconstitutional content-based speech restriction.121

Additionally, Consumer Action and the National Association of
Consumer Advocates (NACA) filed amicus briefs in Expressions Hair
Design, asserting that no-surcharge restrictions regulate speech by
controlling how a merchant may articulate a pricing scheme to a
consumer.122 They contended that anti-surcharge laws “hinder consumers’
ability to make meaningful and cost conscious decisions about payment
choice” because merchants are prohibited from educating their consumers
about swipe fees.123 Consumer Action and NACA argue that this lack of
consumer knowledge results in American merchants paying the highest
swipe fees amongst merchants worldwide. 124 Similarly, the United States
Public Interest Research Group Education Fund, Inc. (PIRG) asserted that
this educational divide affords merchants with one option: raising prices
universally.125 In turn, amici contended that these regulations cannot serve
any government interest because the across-the-board price raises most
severely affect poorer consumers—who disproportionately pay with cash
over credit—as they are paying an otherwise higher price than those paying
with credit.126 Following this logic, prices would drop across the board if
credit surcharges were implemented.

B. Anti-Surcharge Laws as a Regulation on Economic Conduct

In Expressions Hair Design v. Schneiderman,127 the Second Circuit
addressed a challenge to New York’s anti-surcharge law and divided the
challenge into two distinct claims: one pertaining to single-sticker pricing
and one pertaining to dual-pricing.128 The court concluded that, as applied
to single-sticker pricing, the surcharge restriction did not implicate
commercial speech because it exclusively regulated economic conduct.129

The Second Circuit abstained from addressing the dual-pricing argument

120 Id. at 1210.
121 Id.
122 Brief for Consumer Action & Nat’l Ass’n of Consumer Advocates as Amici Curiae
15-1391).
123 Id.
124 Id. Consumers incur approximately $50 billion in swipe fees per year. Id.
(No. 15-1391).
126 Id. at 6.
127 Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015), cert. granted,
137 S. Ct. 30, (2016), and vacated and remanded, 137 S. Ct. 1144 (2017).
128 Id. at 128–29.
129 Id. at 130.
because the court was uncertain that New York’s no-surcharge law, in fact, prohibited dual-pricing schemes.130

The court began its analysis by noting that prices, alone, do not qualify as speech,131 and that price regulations, as well as other forms of direct economic regulation, do not implicate First Amendment protection.132 The Second Circuit analogized the Supreme Court’s reasoning in 44 Liquormart, Inc. v. Rhode Island—where the Court emphasized that price regulations do not necessitate First Amendment safeguards—to New York’s anti-surcharge ban.133 The Second Circuit reasoned that if price regulation is free from First Amendment protection, then laws governing the “relationship[] between prices” must be equally insulated from commercial speech protection.134 The Expressions Hair Design Court additionally couched its conclusion that anti-surcharge laws do not concern commercial speech on the notion that a surcharge could be recognized “wholly without reference to the words that the seller uses to describe its pricing scheme.”135 An investigation into the sticker or regular price, the court concluded, provides all necessary information: where a seller charges a sum above the sticker price that is not imposed on cash payments, then that increased price constitutes an illegal surcharge.136 Moreover, since the “words and labels” necessary to determine that a pricing scheme amounts to a surcharge were “merely prices,” which do not receive First Amendment protection,137 the Second Circuit found that the anti-surcharge statute exclusively regulated economic conduct and the court did not conduct a Central Hudson inquiry.138

130 Id. at 140.
131 Id. at 130 (citing Munn v. Illinois, 94 U.S. 113, 125 (1876) (holding that prices do not qualify as speech within the meaning of the First Amendment and price-control laws have never been thought to implicate the First Amendment); Munn, 94 U.S. at 125 (“[I]t has been customary . . . in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and in doing so to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold.”). 132 Id. at 130–31 (citing to 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1977)). In 44 Liquormart, Rhode Island prohibited liquor stores from advertising alcohol and liquor prices outside of the place of sale. 44 Liquormart, Inc., 517 U.S. at 489–90. The Supreme Court concluded that this restriction implicated commercial speech rights because it restricted the free flow of truthful commercial information and found it unconstitutional under Central Hudson because it did not serve the asserted purpose of consumer protection. Id. at 499–504.
133 Expressions, 808 F.3d at 130–31.
134 Id. at 131.
135 Id.
136 Id. at 130–32. “The only ‘words and labels’ on which the operation of the statute thus depends are (1) the seller’s sticker price and (2) the price the seller charges to credit card customers.” Id. at 131. New York’s anti-surcharge law does not define regular price. See N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1-502).
137 Expressions, 808 F.3d at 130–31.
138 Id. at 131.
The Fifth Circuit followed the Second Circuit’s rationale in Rowell v. Pettijohn, and held that Texas’ anti-surcharge statute does not regulate speech, but instead regulates conduct, as a means to ensure that “merchants do not impose an additional charge above the regular price for customers paying with credit cards.” Texas’ law does not contain express language regarding cash discounts. The Fifth Circuit, however, reasoned that this silence permits merchants to implement dual-pricing schemes, so long as merchants do not add a credit surcharge. The legislation’s original sponsor stated that it is in the state’s best interest to “protect the consumer” and prohibit additional costs above some unidentified regular price, although the sponsor did not indicate that from which the consumers required protecting.

The Fifth Circuit determined that the Texas anti-surcharge law exclusively prohibits merchants from charging credit customers an amount in addition to the regular price that is not charged to cash customers, while allowing for a cash discount. Determining that a surcharge differs from a discount, the court found that Texas’ surcharge prohibition unambiguously bars merchants from changing a price above the “regular price,” which amounts to nothing more than a regulation on the relationship between prices. The Texas statute does not define “regular price” and the Texas legislature did not adopt the federal definition. Furthermore, the court found that any speech implicated in the restriction is “merely incidental to the regulated economic conduct” and not significant enough to warrant any First Amendment protection.

Additionally, Public Citizen, Inc., Consumers Union, the National Consumer Law Center, and the Campaign for Tobacco-Free Kids filed amicus briefs before the Supreme Court in Expressions Hair Design, asserting that the anti-surcharge laws regulate conduct because they prohibit the imposition of “an additional charge on cardholders at the register” after a seller provided a standard price for an item. The consumer advocate

139 Rowell v. Pettijohn, 816 F.3d 73, 80–82 (5th Cir. 2016).
140 Id. at 80. Texas’s anti-surcharge statute, like New York’s, does not define regular price. See TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).
141 See § 604A.0021.
142 Rowell v. Pettijohn, 816 F.3d at 81.
144 Rowell v. Pettijohn, 816 F.3d at 81.
145 Id.
147 Rowell v. Pettijohn, 816 F.3d at 82.
groups emphasized that if the Fifth Circuit finds that the anti-surcharge statutes constitute speech regulation, then such a finding would threaten the government’s ability to continue to regulate a broad range of currently regulated areas, such as “food manufactur[ing], debt collect[ing], or drug companies.” Amici contended that such a broad expansion of First Amendment protection threatens to eradicate the government’s current regulatory framework and return the government’s ability to regulate economic activity to the diminished “laissez-faire” capacity established in *Lochner v. New York.* Constitutional, Administrative, Contracts, and Health Law scholars share the fear of a return to *Lochner*-style economic regulation, and argue that expanding First Amendment protection to such conduct would threaten “opt-in/opt-out regulations,” “prohibitions on offering discounts for harmful products,” “food and drug regulations,” and “everything from mandated contract language to employment discrimination to antitrust law.”

C. The Supreme Court’s Partial Determination

In March 2017, in *Expressions Hair Design v. Schneiderman,* the Supreme Court reviewed the Second Circuit’s decision and addressed the narrow issue of whether New York’s prohibition on advertising a surcharge in the single-sticker context constitutes a restriction on commercial speech. Analyzing the practical effect of the law, the Court determined that the regulation “tells merchants nothing about the amount they are allowed to collect,” and instead concerns only “how sellers may communicate their prices.” “In regulating the communication of prices

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149 Id. at 28.
150 Id. at 3, 12; *Lochner v. New York,* 198 U.S. 45 (1905). In *Lochner v. New York,* the Supreme Court held that a state law regulating the number of hours an employee could work violated the Due Process Clause of the Fourteenth Amendment by restricting the freedom of contract. Id. at 64, abrogated by *W. Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). *Locher* came to symbolize a nearly half-century period where the Supreme Court “struck down close to two hundred state and federal laws regulating a wide variety of market relationships.” Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism,* 2 INT’L J. CONST. L. 1, 4 (2004). This period is commonly referred to as the “Lochner Era” and embodied “judicial resistance” to economic legislative regulation. Id. at 5. Amici fear that applying strict scrutiny to commercial speech restrictions will initiate a return to *Lochner* era economic de-regulation and significantly hinder the functionality of the regulatory state. Brief of Amici Curiae Constitutional, Admin., Contracts, & Health Law Scholars in Support of Respondents at 23–29, *Expressions Hair Design v. Schneiderman,* 137 S. Ct. 30 (2016) (No. 15-1391), 2016 WL 7494904.

152 *Expressions II,* 137 S. Ct. 1144 (2017).
153 Id. at 1151 (“A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say ‘$10, with a 3% credit card surcharge’ or ‘$10, plus $0.30 for credit’ because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged.”).
rather than the prices themselves,” the Court concluded, New York’s anti-
surcharge law regulated commercial speech in the single-sticker context.154

The Expressions Hair Design Court left unanswered questions
regarding the law’s effect on dual-pricing schemes and the law’s
constitutionality more generally. Specifically, the Court did not opine as to
whether the no-surcharge regulation is a valid commercial speech regulation
under Central Hudson’s intermediate scrutiny standard or, instead, whether
the law must be analyzed as a mandatory disclosure requirement under
rational basis review.155 As a result, the Court remanded these issues to the
Second Circuit for further review.156 The Second Circuit subsequently
acknowledged that it was not capable of fully addressing these outstanding
questions without first conclusively understanding the breadth and practical
operation of New York’s anti-surcharge law.157 As a result, the Second
Circuit Panel certified to the New York Court of Appeals the question of
whether a merchant complies with New York’s anti-surcharge law “so long
as the merchant posts the total-dollars-and-cents price charged to credit card
users.”158

Accordingly, it is now clear that anti-surcharge laws prohibiting
merchants from advertising and charging a sum in addition to a single listed
price regulate speech. Whether the same laws’ prohibitions on advertising
and charging a surcharge in the dual-pricing context, and whether such laws
are subject to Central Hudson intermediate scrutiny, remains unclear.

VI. ANTI-SURCHARGE REGULATIONS QUALIFY AS COMMERCIAL SPEECH
RESTRICTIONS

The plaintiff-merchants in Expressions Hair Design and the other anti-
surcharge cases sought the same end, albeit by somewhat different means:
the ability to advertise surcharges. Some wished to display a single posted
price and advertise a surcharge to that price—single-sticker pricing—while
others sought to display one price for cash purchases and another for credit
purchases—dual pricing.159 Though both pricing schemes amount to
commercial speech restrictions,160 each scheme reaches that end in a

154 Id. At 1151.
155 Id.
156 Id.
157 Expressions III, 877 F.3d 99, 104 (2d Cir. 2017) (“We see no obvious way to conduct
the functional analysis this view of the Central Hudson/Zauderer distinction requires without
first gaining greater clarity about the correct application of Section 518 under New York
law.”).
158 Id. at 102.
159 Expressions Hair Design v. Schneiderman, 808 F.3d 118, 126–27 (2d Cir. 2015), cert.
granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017).
160 See infra Part V.A. & B.
relatively unique manner. Accordingly, the two pricing schemes are best addressed individually to illustrate how laws targeting each scheme qualify as commercial speech restrictions and, as a result, must be subjected to Central Hudson’s intermediate scrutiny standard.

A. Single-Sticker Pricing Schemes

In the single-sticker context, anti-surcharge laws prohibit merchants from listing a single posted price and from implementing a credit surcharge in addition to that price. Generally, however, the laws enable merchants to implement a discount for cash purchases. Despite the means by which a merchant relates this information to a consumer, the final price for a credit card user will be the same. Accordingly, since the result is the same, the laws mandate how merchants must explain a pricing scheme to customers. Though the Supreme Court made clear in Expressions Hair Design that anti-surcharge regulations serve as a restriction on commercial speech in the single-sticker context, the Court did not comprehensively apply its commercial speech jurisprudence in reaching its conclusion. Accordingly, it is imperative to analyze no-surcharge regulations through this jurisprudential lens to demonstrate that such regulations: (1) do not constitute mandatory disclosure requirements, which are subject to rational basis review; and (2) constitute invalid commercial speech regulations under Central Hudson intermediate scrutiny. This distinction is meaningful because mandatory disclosure requirements do not qualify as burdens on commercial speech and “trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.” As a result, if anti-surcharge statutes are classified as disclosure requirements, then they will not be subject to Central Hudson’s test and will likely survive under rational basis review. Mandatory disclosure requirements necessitate that an advertiser provides the public with more information on a good or service than he otherwise would, absent that requirement. On the other hand, laws that prevent an advertiser from providing the public with additional information

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161 Expressions III, 877 F.3d at 103.
162 See, e.g., TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017); N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1-502).
163 For example, a product listed for $102 with a $2 discount for cash payment yields a final credit price of $102. Likewise, a product listed for $100 with a $2 credit surcharge yields a final credit price of $102. Though the perception surrounding the price change is different, the final product is objectively indistinguishable.
165 Id.
167 Id.
168 Id. at 650.
on a good or service are more akin to a commercial speech regulation. In Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, the Supreme Court explained that commercial speech protections are principally justified by the value that information provides to the consumer, whereas advertisers have, at best, a minimal interest in withholding truthful information from the public.

Anti-surcharge laws are not mandatory disclosure requirements because they do not require that merchants provide information that they otherwise would not present to consumers. For example, merchant-challengers in Expressions Hair Design sought to provide customers with information regarding swipe fees and the cost of using a credit card. They claimed that, as a result of this information, consumers will make a more conscious choice about their payment method because consumers will understand that their conduct may help reduce swipe fees and, in turn, reduce the price of goods. In a less altruistic sense, merchants may simply want to inform consumers that they, rather than the merchants, will incur the cost of doing business with credit cards. In either situation, no-surcharge laws do not mandate that merchants provide information, but rather prevent them from presenting additional information about swipe fees to the public. Therefore, anti-surcharge restrictions are not mandatory disclosure requirements.

While the laws do not constitute a disclosure requirement, they do dictate how a merchant must relate two pricing schemes that arrive at the same result and New York’s enforcement history of section 518 proves as much. In 2008 and 2009, the New York Attorney General “brought a series of sweeps” against approximately fifty merchants because those merchants charged customers a surcharge to pay with a credit card. For example, in 2009, the Attorney General’s office called Parkside Fuel, a small business, under the guise of an interested customer seeking information about Parkside Fuel’s pricing structure. When the Parkside Fuel employee stated that it charges an additional fee for credit payment, an Assistant Attorney General told Parkside Fuel’s owner that this practice constituted an illegal surcharge. The Assistant Attorney General subsequently provided the owner with “a script of what [he] could tell customers when talking to

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169 Id.
170 Id. at 651.
171 See id. at 650–51.
172 Brief for Petitioners, supra note 98, at 8–9.
173 Id. at 7–8.
174 Id. at 17.
175 Id.
176 Id. at 17–18.
177 Id. at 18
them over the phone" in order to comply with section 518, which provided that the owner would not violate the statute so long as he described any price alteration as a cash discount.\footnote{Brief for Petitioners, \textit{supra} note 98, at 18. The AAG told the owner that he “‘could quote the price as $3.50/gallon, for example, and then explain to customers that they would receive a $0.05/gallon “discount” for paying with cash,” but he ‘could not quote the price as $3.45/gallon while explaining that they would have to pay a $0.05/gallon “surcharge” to use a credit card.’” Brief for Petitioners, \textit{supra} note 98, at 18.} Similarly, the New York Attorney General’s office contacted K Skee Oil, another business imposing a credit surcharge, and informed K Skee Oil that its pricing scheme was illegal under section 518.\footnote{Brief for Plaintiffs-Appellees at 15, Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015) (No. 13-4533, 13-4537).} An Assistant Attorney General informed K Skee Oil’s owner that he “‘can charge more for a credit card all [he] want[s], but [he has] to say that [it] is the cash discount rate. [Your employee has] been saying that ‘it is a quarter more a gallon’ and they were not allowed to say that.’”\footnote{Id.} In sum, the New York Attorney General’s office contacted merchants who were perceived to have violated section 518 and informed them that if they did not properly describe their objective pricing practice in a particular manner, that they would be prosecuted.\footnote{Id.}

Moreover, the surcharge/discount distinction regulates speech involved in a commercial transaction because the precise speech expressed can have determinative effects on a consumer’s behavior. Surcharges and discounts have different psychological impacts on consumers and, in turn, behavioral economic theory plays a substantial role in the goal of the legislatures enacting anti-surcharge laws. The theory of loss aversion dictates that individuals generally have a strong tendency to prefer avoiding loss to acquiring gain.\footnote{Mindy Hernandez, \textit{Behavioral Economics 101}, PROSPERITY NOW (Apr. 2011), https://prosperitynow.org/behavioral-economics-101.} For example, individuals often prefer receiving a $5 discount on a product instead of incurring a $5 surcharge, regardless of the fact that the final price is identical.\footnote{Id.} Consumers generally view surcharges as a loss and typically as “more unfair” than eliminating a discount, which is often viewed as the reduction of gain.\footnote{Daniel Kahneman, Jack L. Knetsch & Ricahrd H. Thaler, \textit{Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Basis}, 5 J. ECON. PERSP. 193, 203–05 (1991).}

Originally, credit card companies banned affiliated stores from charging higher prices for credit purchases because they believed that credit surcharges would provide a disincentive to consumers from purchasing products with credit cards, thus affecting the overall profitability of the credit
The agreements required that any difference between cash and credit prices be advertised as a cash discount due to the companies’ belief that consumers would view the cash discount as the opportunity cost of using a credit card, but view the surcharge as an out-of-pocket expense. Behavioral economic theory provides that this distinction between a cash discount and a credit surcharge is merely one of framing: communication induced misconception.

Furthermore, behavioral economic theory illuminates the distinction between discounts and surcharges in ways that traditional economic theory cannot. Traditional economic theory dictates that the “market impact” of a surcharge on a credit transaction and a discount on a cash transaction should be identical, so long as the final price is the same; however, in practice, the two have different market impacts. Rational calculation is not always the driver of decision and individuals’ decisions are influenced by the manner in which information is presented to them. Though behavioral economic theory agrees with traditional economic theory that the final purchase price is the same—regardless of surcharge or discount framing—behavioral economists acknowledge that the framing of a price can produce vastly different results in the mind of the consumer. These differing impacts demonstrate that credit surcharges and cash discounts are two distinguishable communicative events and their regulation necessarily targets speech.

Accordingly, in the single-sticker context, the anti-surcharge regulations serve as a prohibition on commercial speech because the merchants’ desired speech exists in an advertising format; it involves an underlying economic motive; it seeks to inform consumers of the merchants’ pricing strategy; and it mandates what merchants may say about his pricing strategy. Moreover, the anti-surcharge statutes do not constitute mandatory disclosure requirements because they do not demand the disclosure of information that the merchants would otherwise not have provided, and instead serve as a prohibition on providing additional information.

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185 Levitin, supra note 93, at 20. This proposition supports the idea that anti-surcharge statutes, at the federal and state level, were the result of lobbying by the credit card industry. Id. A disincentive for credit card use in its infancy may have altered the long-term profitability of the credit card industry.

186 Id.

187 Kahneman, Knetsch, & Thaler, supra note 184, at 203–05.


189 Id.

190 Id.

191 Kahneman, Knetsch, & Thaler, supra note 184, at 203–05.
B. Dual Pricing Schemes

In the dual-pricing context, the commercial speech determination becomes less clear and turns almost entirely on the definition of the term “regular price.” So long as the term regular price is defined in agreement with the lapsed federal ban, then no-surcharge regulations do not regulate speech and only implicate conduct. Where regular price is undefined, however, surcharge laws implicate commercial speech and are subject to the Central Hudson test.

In Expressions Hair Design, the Second Circuit and Supreme Court declined to determine whether New York’s anti-surcharge statute reached dual-pricing schemes, though both the Fifth and Eleventh Circuits concluded that dual-pricing is not prohibited under such laws. Since dual-pricing is presumptively allowed, any speech challenge must be limited to whether the law burdens how a merchant may characterize the difference between prices.

1. Regular Price Defined

So long as the term regular price is defined similarly to the definition in the lapsed federal ban, anti-surcharge laws do not implicate speech and regulate only conduct. The lapsed federal ban defined regular price as the credit price and prohibited a merchant from charging an additional amount above the credit price. With this definition, the law’s application is limited to fees charged in addition to the regular price and nothing more. Accordingly, merchants are not prevented from posting a higher credit price and a lower cash price for the same product. Most significantly, the laws do not prohibit a storeowner from characterizing the difference between the two prices as a surcharge. That is, a seller may tell consumers that the difference between the two prices is a credit surcharge, but so long as he does

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192 See discussion infra Part VI.B.
193 Id.
194 Id.
195 Expressions Hair Design v. Schneiderman, 808 F.3d 118, 139 (2d Cir. 2015), cert. granted, 137 S. Ct. 30, (2016), and vacated and remanded, 137 S. Ct. 1144 (2017); see Expressions II, 137 S. Ct. at 1151–52.
196 Rowell v. Pettijohn, 816 F.3d 73, 81 (5th Cir. 2016); Dana’s R.R. Supply v. Attorney Gen., 807 F.3d 1235, 1244 (11th Cir. 2015).
197 See Expressions Hair Design, 808 F.3d at 132.
198 See discussion infra Part VI.B.1.
200 Id.
201 Id.
202 Id.
not charge an additional fee on top of the credit price, the merchant would not violate the law.\footnote{203}{Id.}

For example, assume that a merchant implements a dual-pricing scheme and lists the same product at $100 for cash purchasers and $102 for credit purchasers. The regular price, the credit price, is $102. The anti-surcharge law’s application is limited to banning a storeowner from charging a fee in addition to the $102. The storeowner, however, is not prohibited from characterizing the $2 difference as he sees fit because the law’s application is triggered only when the merchant charges a sum above the regular price.\footnote{204}{Id.} As a result, when the term regular price is defined as the credit price, anti-surcharge laws exclusively regulate the difference between a seller’s credit price and the fee imposed in addition to that credit price. A seller may characterize or describe the relationship between the cash price and regular price as a surcharge, but that description would not change the fact that the merchant would not violate the terms of the statute. Accordingly, in this context, no-surcharge laws constitute a price regulation and do not implicate commercial speech.

2. **Regular Price Undefined**

When the term regular price is left undefined, anti-surcharge laws lose their conduct-related target and regulate speech by controlling how a merchant can characterize the difference between two prices.\footnote{205}{See discussion infra Part VI.B.2.} Additionally, the definition-less standard further implicates speech because it requires a merchant to express which of the two prices in a dual-pricing scheme constitutes the regular price.\footnote{206}{Id.}

Dual pricing schemes are presumptively permitted by anti-surcharge statutes;\footnote{207}{Rowell v. Pettijohn, 816 F.3d 73, 81 (5th Cir. 2016); Dana’s R.R. Supply v. Att’y Gen., 807 F.3d 1235, 1244 (11th Cir. 2015).} however, where the statutes do not define regular price, the laws’ application turns entirely on merchant communication.\footnote{208}{See, e.g., Expressions Hair Design v. Schneiderman, 808 F.3d 118, 132 (2d Cir. 2015), cert. granted, 137 S. Ct. 30 (2016), and vacated and remanded, 137 S. Ct. 1144 (2017).} That is, in the definition-less context, the difference between a product’s cash price and credit price cannot be described as a credit surcharge, but if a merchant carefully describes that same price difference as a cash discount, the merchant will evade violation of the statute.\footnote{209}{See Dana’s R.R. Supply, 807 F.3d at 1245.} In the event that a merchant does not communicate this price difference with the specific association permitted by an anti-surcharge law, the merchant will be subjected to
prosecution. Accordingly, anti-surcharge regulations prohibit merchants from freely communicating an objective price difference in the manner of their choosing.

Additionally, enforcing an anti-surcharge statute that does not define regular price necessarily requires speech from the merchant because, absent communication, a customer or prosecutor cannot designate the regular price. Without understanding which of the two prices in a dual-pricing scheme is the regular price, it becomes impossible to determine whether a merchant is implementing a credit surcharge. Further, with the exception of the definition provided in the lapsed federal anti-surcharge regulation, which was not incorporated into the previously addressed state regulations, there exist no guidelines for determining a product’s regular price. For example, upon a trip to a gas station, a customer may observe a sign that relates gas prices—$2.00 cash and $2.10 credit—with no indication of which price is the regular price. In this instance, the customer cannot be certain whether these prices represent a discount for cash payment or a surcharge for credit payment. That is, without an interpretation from the seller, the customer is incapable of conclusively determining which price is the regular price solely based on a facial examination. As a result, the regular price must be defined and expressed by the merchant. Nevertheless, there exists no requirement that a merchant formally submit his pricing scheme for validation or approval with a state agency or a restriction on a merchant regularly altering his definition.

The distinction between statutes where regular price is defined and undefined is clarified with the same example used above. Assume a merchant implements a dual-pricing scheme and charges $100 for cash and $102 for credit. Where the term regular price is undefined, the merchant is prohibited from characterizing the difference as a surcharge; however, where the term regular price is defined the merchant is free to characterize the difference as he sees fit, so long as he does not charge an additional sum above the regular price. Where the statute once governed conduct, it now governs speech.

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210 See, e.g., N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1-502).
211 See id.
212 For example, an employee at the gas station discussed above may serve two customers at the same time: Customer A and Customer B. As each arrives, he or she asks an employee which of the two listed prices is the regular price and whether he or she is incurring a credit surcharge or a cash discount. So long as the statute leaves regular price undefined, and the merchant is charged with communicating his regular price, the employee is seemingly not prohibited from informing Customer A that $2.00 is the regular price and informing Customer B that $2.10 is the regular price. Thus, the enforceability of the statute would turn entirely on the communicative content of the employee, enabling a savvy store owner to inform customers that they are incurring a surcharge and inform law enforcement personnel that they are incurring a discount.
In sum, in the dual pricing context, determining whether an anti-surcharge law amounts to a commercial speech restriction depends on a state legislature’s definition of the term regular price. Where regular price is defined and limited to the definition adopted in the lapsed federal ban, the law governs economic conduct and does not implicate commercial speech protection. Conversely, where regular price is undefined, the law governs commercial speech and requires analysis under the *Central Hudson* test.

VII. **Anti-Surcharge Statutes Fail Intermediate Scrutiny Under Central Hudson**

The last step in determining whether anti-surcharge laws unconstitutionally restrict commercial speech is applying the *Central Hudson* test. This test asks whether: (1) the challenged regulation regulates speech that is misleading or related to unlawful activity; (2) the government has a substantial interest at stake in the challenged regulation; (3) the challenged regulation directly advances the government’s interest; and (4) a more limited restriction would be insufficient to achieve the government’s interest. These factors are applied to the laws in the single-sticker context and the dual-pricing context where regular price is undefined.

A. **Anti-Surcharge Laws Do Not Regulate Misleading Speech or Speech Related to an Unlawful Activity**

Laws prohibiting merchants from listing an additional price above the posted price in the single-sticker context, or explaining the price difference in the dual-pricing context, do not target misleading speech. They do, however, target unlawful activity, inasmuch as the laws cyclically make this speech unlawful.

The Supreme Court has not defined “misleading speech,” but the term is often used in conjunction with false speech. Under either pricing schemes—single-sticker or dual pricing—a surcharge does not provide false information. Additionally, in the dual-pricing context, both prices are listed in the same location, which is presumptively where the buyer physically obtains the good or service. The speech involved in dual-pricing merely characterizes the difference between the two prices and the customer does

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214 See discussion *supra* Part VI.A.
215 See Sorrell v. IMS Health Inc., 564 U.S. 552, 564 (2011); Nike, Inc. v. Kasky, 539 U.S. 654, 666 (2003). See also *Misleading*, BLACK’S LAW DICTIONARY (2nd ed. 2015) (defining “misleading” as “delusive; calculated to lead astray or to lead into error”).
not encounter a price change upon arrival at the register. As it pertains to dual-pricing, the surcharge characterization is not misleading, as the consumer is presented with the full universe of factual information pertaining to his transaction prior to payment. Upon reaching the register, a consumer may encounter a sign or conversation explaining that the difference is a surcharge or a discount, but the consumer is not presented with new information, and therefore, the characterization is not misleading.

In the single-sticker context, the potential for misleading speech is substantially higher. There, a consumer can learn of a fee in addition to the listed price for the first time at the register. The potential is increased further when a merchant advertises the surcharge as a percentage of the purchase price rather than a definitive dollar amount. Inasmuch as the consumer is unaware of the ensuing surcharge, potentially a 2%–5% increase in regard to the total cost, it would present new information regarding the final cost. New information, however, cannot be dispositive of misleading speech. Breaking down the total cost of a product (surcharge included), the listed price typically reflects the market price of that product, and the listed surcharge typically reflects the market price of using a credit card. The proposition of paying an additional market rate fee on top of the listed price for a good or service is not a foreign concept to American consumers. In the restaurant industry, for example, patrons are expected to tip an undetermined amount on top of the listed price of food. The normalization and expectation of this additional fee has become so engrained in American culture that employers account for tips in servers’ income and adjust their wages accordingly. Additionally, American consumers are typically presented with an extra percentage based price at the register in the form of

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217 See discussion supra Part VI.B.
218 Id.
219 Id.
220 Merchant, supra note 2, at 356.
222 With the exception of Minnesota, no state’s anti-surchage law restricts the maximum surcharge that a seller can implement. Credit or Debit Card Surcharge State Statutes, supra note 2. The conclusion a surcharge would reflect the market price of using a credit card is reliant on the assumption that merchants would not seek to un-competitively price their goods or services. To the extent that a merchant’s actions do not align with that assumption, the surcharge may not reflect the market price of using a credit card.
224 Id.
225 Id.
sales tax. In fact, unless an individual lives in one of five states without state sales tax, a “pay-what-you-see” price is the exception rather than the rule. Moreover, consumers often operate without knowledge of or concern for sales tax; however, the government has not mandated that the two prices be combined into one advertised price. Instead, the states’ sales tax framework allows consumers to know precisely the cost of the product and precisely the cost of the tax. In comparison, the single-sticker surcharge is no more misleading than a service tip or a sales tax, and poses a smaller addition to the final price.

Further, states cannot place an “absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.” That is, restrictions on potentially misleading speech cannot be broader than necessary to prevent potential deception. To the extent that single-sticker surcharges present a surprise at the register, the restriction is impermissibly absolute. Though a surprise at the register may be misleading, advertising the surcharge at the door, or throughout the store alongside the listed prices, would certainly alleviate any unintended deception. In either example, the speech would be both informative and accurate.

Accordingly, in the dual pricing context, the anti-surcharge laws are not misleading and, to the limited extent that such laws may be misleading in the single-sticker context, the laws regulate more conduct than is necessary, as they go beyond what is required to prevent potential deception. As a result, the laws fail the first step of Central Hudson.

B. No Sufficiently Substantial State Interest Exists and Is Regulated by Anti-Surcharge Statutes

Second, to satisfy the Central Hudson test, the anti-surcharge statutes must regulate a substantial state interest. In the four cases discussed above, the states asserted several state interests. Some states argued that credit surcharges will have a dampening effect on the economy because they will provide a disincentive for credit use. Others suggested that surcharge

227 Id.
230 Id.
232 Expressions Hair Design v. Schneiderman, 808 F.3d 118, 122–23 (2d Cir. 2015), cert.
prices will be unjustifiably larger than the average swipe fee and, in practice, result in windfall profits to merchants. The history of section 518 of the New York General Business Law provides that the bill was enacted to prevent against the risk of a sudden fluctuation in prices that merchants may charge when learning that a customer plans to pay with a credit card. The legislature determined that if it were to leave this possibility unregulated, then consumers would be “subject to dubious marketing practices and variable purchase prices.” The sponsor of section 339.001 of the Texas Finance Code stated that it was in the State’s best interest “to protect the consumer” until the federal government manages to federally ban credit card surcharges. Similarly, the California legislature stated that its law was created to “promote the effective operation of the free market[,] protect consumers from deceptive price increases[, and to] encourage the availability of discounts.” Section 501.0117 of the Florida Statute Annotated was also established in response to consumer protection interests.

Viewed together, these assertions suggest that these states enacted anti-surcharge laws to ensure that merchants would not exploit, defraud, or mislead consumers. Preventing fraud certainly qualifies as a substantial state interest; however, in practice, fraud and exploitation are not the targets. The states’ restrictions are prohibitions on the dissemination of truthful information as a means to thwart sellers’ abilities to label a price difference or advertise the market cost of using a credit card. Importantly, states do not have an interest in prohibiting truthful communication to keep the public from making what the states perceive as an undesirable judgment based on the information presented. Additionally, any preventative interest regarding misleading pricing schemes, to the extent that any are misleading, must be limited to the single-sticker “surprise at the register” scheme.

To satisfy the burden of showing that anti-surcharge laws address an interest in preventing sellers from misleading, defrauding, or exploiting consumers, states must provide more than conclusory statements. The states must establish something above “mere speculation or conjecture” to prove that the evils or undesirable practices they regulate are real and that

\footnotesize{\begin{itemize}
  \item \textit{Dana’s R.R. Supply v. Attorney Gen.}, 807 F.3d 1235, 1249 (11th Cir. 2015).
  \item \textit{Italian Colors Rest. v. Harris}, 99 F. Supp. 3d 1199, 1204 (E.D. Cal. 2015).
  \item \textit{Rowell v. Pettijohn}, 816 F.3d 73, 82 (5th Cir. 2016).
  \item \textit{Italian Colors Rest. v. Harris}, 99 F. Supp. 3d 1199, 1204 (E.D. Cal. 2015).
  \item \textit{Rowell v. Pettijohn}, 816 F.3d 73, 82 (5th Cir. 2016).
  \item \textit{Id}. at 123.
  \item \textit{Id}.
  \item \textit{Id}. at 123.
  \item \textit{Id}.
\end{itemize}}
the regulation will actually assuage those harms to a “material degree.”241

Here, the states cannot meet this burden. Any asserted interest—preventing fraud, exploitation, or misleading prices—is undermined by the statutes’ enforcement. Each anti-surcharge statute discussed above provides an exception such that the laws do not apply to the states that enforce them.242

Specifically, the anti-surcharge statutes do not restrict the states themselves from implementing surcharges on credit payments for government services, such as public school tuition.243 The states failed to provide any rationale from which one could conclude that consumers are less susceptible to these harms because the state, rather than a merchant, is implementing the surcharge.244 Since these anti-surcharge statutes permit the government to engage in this allegedly harmful and misleading practice, the conclusion that the practice is not dangerous is unavoidable.245

Additionally, an asserted interest in preventing a general harm is insufficient to satisfy the Central Hudson test246 because regulations that suppress or eradicate truthful commercial speech infrequently protect the public.247 It is not sufficient that states assume a regulation serves a substantial interest because it prevents consumers from responding

241 Id.
242 Dana’s R.R. Supply, 807 F.3d at 1250 (“Florida has exempted certain state agencies from its no-surcharge law—allowing them to charge ‘convenience fees’ for the privilege of using a credit card...—without advancing any relevant distinction between private merchants and state agencies that references the asserted interests being served. If customers would be harmed by learning that they faced surcharges but not discounts from private merchants, creating an exception allowing the State to impose convenience fees betrays the frailty of any potential state interest.” (emphasis in original)). See TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017) (providing that the Texas anti-surcharge statute does not apply to state agencies, local governments, county governments, or private or public schools); see also CAL. CIV. CODE § 1748.1(f) (LEXISNEXIS 2018) (providing that California anti-surcharge statutes do not apply to payments made by credit card by an “electrical, gas, or water corporation and approved by the Public Utilities Commission”).
243 Dana’s R.R. Supply, 807 F.3d at 1250; TEX. FIN. CODE § 339.001 (LEXISNEXIS 2017); CAL. CIV. CODE § 1748.1(f).
244 See Dana’s R.R. Supply, 807 F.3d at 1250; CAL. CIV. CODE § 1748.1(f) (LEXISNEXIS 2018); TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).
245 City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994) (“Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government’s rationale for restricting speech in the first place.”).
246 See City of Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 426 (1993) (holding that it is the state’s interest in protecting consumers from “commercial harms” that provides the “the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.”).
247 Id. at 427–28. See also Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 96 (1977) (holding that the reason that bans against truthful commercial speech rarely seek to protect consumers from either deception or overreaching, is because they usually rest solely on the offensive assumption that the public will respond “irrationally” to the truth).
undesirably to the truth.\textsuperscript{248} Moreover, the remedy necessary for misleading speech is “more speech, not enforced silence.”\textsuperscript{249}

Aside from dual-pricing regulations that have adopted the federal definition of regular price, anti-surcharge statutes do not regulate conduct; they regulate the manner in which a merchant communicates prices. A blanket restriction on this communication does not target fraud and it does not target exploitation. Additionally, these restrictions do not target misleading speech because the government engages in analogous speech. More likely, no-surcharge statutes are the result of both lobbying from the credit card industry and a desire to promote consumer spending rather than protecting a substantial interest.\textsuperscript{250} Accordingly, anti-surcharge regulations do not serve a substantial state interest in protecting consumers.

C. \textit{State Anti-Surcharge Regulations Fail to Directly Advance the Asserted State Interests and a More Limited Restriction Would Adequately Prevent Harm}

The final two prongs of the \textit{Central Hudson} test are analyzed in conjunction. In order for the state anti-surcharge regulations to further satisfy heightened scrutiny, they must directly advance the states’ asserted interests and a more limited restriction must be insufficient to achieve those interests.\textsuperscript{251} A blanket ban on communicating a price increase or characterizing a price difference does not advance the states’ asserted interests and a narrower regulation would not inhibit the government’s ability to prevent misleading information.

Assuming \textit{arguendo} that anti-surcharge laws serve a substantial state interest in preventing merchants’ abilities to obtain windfall profits and limiting consumer confusion, these interests are not directly advanced. In the dual-pricing context, the laws’ restrictions on the characterization of a difference between two prices do not prevent consumer confusion. There, consumers are not presented with new information or a price increase at the register. Additionally, the difference between the two prices likely reflects the amount of the would-be surcharge. Since the merchant has already elected to offer different prices for cash and credit, it is improbable that a merchant would charge an additional fee on top of the already increased credit price. Further, anti-surcharge laws do not limit the scope of an available price difference between cash and credit prices, and therefore, do

\begin{itemize}
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} Whitney v. California, 274 U.S. 357, 377 (1927).
\item \textsuperscript{250} Expressions Hair Design v. Schneiderman, 808 F.3d 118, 122–23 (2d Cir. 2015), \textit{cert. granted}, 137 S. Ct. 30, (2016), and \textit{vacated and remanded}, 137 S. Ct. 1144 (2017).
\end{itemize}
not advance the goal of preventing windfall profits via surcharge.

In the single-sticker context, the laws advance the interest of preventing customer confusion and partially advance the goal of preventing windfall profits through surcharges. The laws ensure that a customer will not arrive at the register and learn that the final price has increased because of his or her selected payment method. In this regard, consumer confusion is prevented. Further, no-surcharge laws facially provide that merchants cannot implement any surcharge and, therefore, cannot implement an arbitrary surcharge that is disproportionately larger than the swipe fee and reap the rewards. These laws, however, allow merchants to provide cash discounts and do not regulate how a seller must set the regular price (assuming it is the credit price) in relation to the advertised discount. In practice, this allows merchants to manipulate their pricing scheme and effectively turn a cash discount into a credit surcharge. For example, assume the fair market value of a product is $100 and the applicable swipe fee is 1% of the purchase price. A merchant then lists that product at $102 and offers a 2.04% cash discount. There, the swipe fee is $1.02, the cash customer pays $100 and, the credit customer pays $102. In this example, the swipe fee is offset by the price increase and the merchant obtains $0.98 extra on all credit customers. The seller is still capable of profiting from mere credit use so long as he lists the regular price slightly above market value. As a result, the anti-surcharge laws advance the goal of preventing windfall profits, but can be circumvented with minor alterations to market rate pricing.

Additionally, a more narrow restriction is not insufficient to achieve the states’ goals. Prohibiting windfall profits via credit surcharges is preventable by establishing a maximum surcharge limit. Minnesota’s anti-surcharge restriction, where credit surcharges are allowed, but cannot exceed 5%, serves as a blueprint. Similarly, a state legislature may expressly tie surcharges to swipe fees, such that they may differ by credit card and never exceed the swipe fee. Moreover, consumer deception can be directly addressed with mandatory disclosure requirements. Minnesota’s law is again instructive. There, the seller must orally inform the buyer at the time of the sale and “by [a] sign conspicuously posted on the seller’s premises” of any applicable credit surcharge. There is no need to limit the requirement to one sign or to provide the seller with the discretion to choose the sign’s location. After all, if the sign was located at the register it would

\[252\] See, e.g., CAL. CIV. CODE § 1748.1(f) (LEXISNEXIS 2018); TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).
\[253\] Id.
\[254\] MINN. STAT. ANN. § 325G.051 (LEXISNEXIS 2017).
\[255\] Id.
\[256\] Id.
not provide much, if any, additional notice. States may require sellers to provide a sign detailing the specific surcharge scheme and to place that sign outside and throughout the store. Lastly, states could, and likely already do, ban specific false and deceptive trade practices, such as bait-and-switch tactics. These examples are not an exhaustive list of possible alternatives, but sufficiently illustrate that the anti-surcharge laws’ asserted interests are achievable through more limited restrictions. As a result, the anti-surcharge laws fail the final two prongs in the *Central Hudson* test, in addition to the first two prongs, and therefore fail intermediate scrutiny.

VIII. CONCLUSION

In sum, state anti-surcharge regulations qualify as commercial speech in most pricing schemes. In the single-sticker context, the laws mandate how a merchant may communicate a pricing format to customers. In a dual-pricing scheme, so long as regular price is undefined, sellers are prohibited from characterizing an objective price difference with certain terminology. Where the regular price is defined in accord with the expired federal ban’s definition, anti-surcharge laws operate irrespective of speech and exclusively regulate conduct. Additionally, as applied to the aforementioned speech regulated pricing schemes, the laws fail intermediate scrutiny at each stage of the *Central Hudson* test. Consequently, state anti-surcharge regulations constitute an unconstitutional abridgment of sellers’ commercial speech rights and *Expressions Hair Design* provides merchants with the vehicle to properly reclaim these rights.