

## PAPER OR PLASTIC: SPEECH IN AN UNLIKELY PLACE

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### 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.<sup>1</sup> In response to this practice, ten states and Puerto Rico, have enacted statutes prohibiting merchants from imposing surcharges on credit purchases.<sup>2</sup> Generally, these anti-surcharge statutes exclusively prohibit merchants from charging and advertising a surcharge for credit purchases, but do not prohibit merchants from providing discounts for cash purchases.<sup>3</sup>

Merchants in California, Florida, New York, and Texas have challenged their respective state's anti-surcharge statutes on the grounds that they violate the merchants' First Amendment rights as unconstitutional regulations on protected commercial speech.<sup>4</sup> In determining whether the anti-surcharge regulations abridge commercial speech rights, the threshold issue becomes whether these state statutes regulate economic conduct or commercial speech.<sup>5</sup> The Second, Fifth, and Eleventh Circuit Courts of Appeals are split in determining whether anti-surcharge statutes limit commercial speech<sup>6</sup> and in March 2017, in *Expressions Hair Design v.*

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<sup>1</sup> Merriam Webster defines a surcharge as "an additional tax, cost, or impost." *Surcharge*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

<sup>2</sup> These states are California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas. *Credit or Debit Card Surcharge State Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2016), <http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-statutes.aspx>. See Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV. 327 (2016) (providing a detailed explanation of the intricacies of credit card transactions).

<sup>3</sup> *Credit or Debit Card Surcharge State Statutes*, *supra* note 2.

<sup>4</sup> See *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016); *Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235 (11th Cir. 2015); *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); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015).

<sup>5</sup> *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017) (*Expressions II*).

<sup>6</sup> See *Rowell*, 816 F.3d at 80 ("Texas' law regulates conduct, not speech"); *Expressions*,

*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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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*.<sup>10</sup> 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.*<sup>11</sup> and *Reed v. Town of Gilbert*,<sup>12</sup> 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.<sup>13</sup>

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

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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 . . .”).

<sup>7</sup> *Expressions II*, 137 S. Ct. at 1151.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

<sup>11</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

<sup>12</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

<sup>13</sup> *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).

price and charging a surcharge for credit payment,<sup>14</sup> and (2) dual-pricing—listing one price for cash payment and another for credit payment.<sup>15</sup> Laws targeting each surcharging system implicate speech restrictions in a different manner, but the result is the same—they do not pass constitutional muster. Moreover, this Comment argues that courts must continue to analyze commercial speech restrictions under *Central Hudson*'s intermediate scrutiny standard in order to strike the careful balance between protecting the free flow of truthful commercial information without extending core First Amendment protection so far as to render economic regulation impossible. The extension of strict scrutiny review into the commercial speech realm would increase the likelihood that anti-surcharge statutes would fail constitutional muster; however, it would also likely be detrimental to reasonable economic regulation.

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.<sup>16</sup> Accordingly, the government has greater authority to regulate

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<sup>14</sup> *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 103 (2d Cir. 2017) (*Expressions III*).

<sup>15</sup> *Id.* at 101.

<sup>16</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

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

These regulatory accommodations acknowledge the reality that commercial speech typically arises in areas historically subjected to government regulation.<sup>21</sup> Generally, states are free to establish economic policies promoting public welfare and to create laws enforcing such policies.<sup>22</sup> The power to regulate commercial activity additionally necessitates the ability to regulate commercial speech that is “linked inextricably” to that activity.<sup>23</sup> Outside of these exceptions, the government’s ability to regulate commercial speech is more limited.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> This regulatory capability is further reduced when a state institutes a complete ban on the communication of truthful commercial information.<sup>27</sup> 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.<sup>28</sup> As a result of the public’s substantial interest in the unimpeded flow of truthful commercial information, regulations on non-

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<sup>17</sup> *Id.*

<sup>18</sup> See *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979); see also *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464–65 (1978); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973).

<sup>19</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

<sup>20</sup> *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).

<sup>21</sup> *Ohralik*, 436 U.S. at 456.

<sup>22</sup> *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

<sup>23</sup> *Friedman*, 440 U.S. at 10, n.9.

<sup>24</sup> *Id.*

<sup>25</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

<sup>26</sup> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (citing *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 96 (1977)).

<sup>27</sup> *Id.* at 501.

<sup>28</sup> *Id.*

misleading commercial speech must be a “last-not first-resort.”<sup>29</sup>

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.”<sup>30</sup> 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.<sup>31</sup> 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*,<sup>32</sup> and for more than thirty years, the Court defined commercial speech as that which “propose[d] a commercial transaction.”<sup>33</sup> In *Bigelow v. Virginia*, the Court required that, to qualify as commercial speech, commercial proposals must communicate factual information of public interest.<sup>34</sup> 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.<sup>35</sup> In *Central Hudson*, the Court redefined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”<sup>36</sup> 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.<sup>37</sup>

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

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<sup>29</sup> *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

<sup>30</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12–15, 903 (2d ed. 1988).

<sup>31</sup> *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.”).

<sup>32</sup> 316 U.S. 52 (1942).

<sup>33</sup> *Id.* at 54; *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 384 (1973).

<sup>34</sup> 421 U.S. 809, 821 (1975).

<sup>35</sup> 425 U.S. at 762.

<sup>36</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

<sup>37</sup> *Bolder v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 76 (1983).

commercial speech.<sup>38</sup> The commercial transaction standard was twice affirmed in *Board of Trustees of the State University of New York v. Fox*<sup>39</sup> and *City of Cincinnati v. Discovery Network, Inc.*,<sup>40</sup> where both times the Court noted the “commonsense basis” for distinguishing between “speech proposing a commercial transaction” and other varieties of speech.<sup>41</sup> Though the Court has altered its classification several times, commercial speech is currently identified as that which proposes a commercial transaction.<sup>42</sup>

### 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*.<sup>43</sup> 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.<sup>44</sup> 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;<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup> 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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<sup>38</sup> 471 U.S. 626, 637 (1985).

<sup>39</sup> 492 U.S. 469, 474 (1989).

<sup>40</sup> 507 U.S. 410, 422 (1993).

<sup>41</sup> *Id.* at 422–24.

<sup>42</sup> *Sorrell v. IMS Health Inc.*, 564, 584 U.S. 552 (2011) (Breyer, J., dissenting).

<sup>43</sup> 447 U.S. 557, 563 (1980).

<sup>44</sup> *Id.* at 566.

<sup>45</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–56 (2001). *See also Sorrell*, 564 U.S. at 593 (Breyer, J., dissenting) (applying *Central Hudson*).

<sup>46</sup> *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).

<sup>47</sup> 564 U.S. 552, 557 (2011).

Amendment strict scrutiny and *Central Hudson* intermediate scrutiny.<sup>48</sup> 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.<sup>49</sup> More recently, in *Reed*, the Court addressed a state law restricting the size, duration, and location of temporary outdoor signs.<sup>50</sup> 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.<sup>51</sup> The Court held that the state law was a content-based speech restriction and, therefore, was subject to strict scrutiny.<sup>52</sup>

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,<sup>53</sup> 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.<sup>54</sup> Further, although the *Sorrell* majority applied strict scrutiny,<sup>55</sup> 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.<sup>56</sup> 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.

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<sup>48</sup> *Id.* at 565, 572.

<sup>49</sup> *Id.* at 571.

<sup>50</sup> 135 S. Ct. 2218, 2224 (2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2232.

<sup>53</sup> *Id.* at 2225.

<sup>54</sup> *Id.* at 2226–2231.

<sup>55</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011).

<sup>56</sup> *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.<sup>57</sup> Merchants agreed to incur the fee charged by card issuers each time a consumer paid with a credit card—the swipe fee.<sup>58</sup> In 1974, however, Congress amended the Federal Truth in Lending Act (TILA)<sup>59</sup> and provided merchants the ability to offer cash discounts to circumvent the anti-surcharge provisions in their contracts.<sup>60</sup> 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.<sup>61</sup> Congress then amended TILA again to ratify the Federal Reserve Board’s promulgation and banned credit card surcharges entirely.<sup>62</sup> The amendment highlighted the distinction between protected cash discounts and the newly unlawful surcharges.<sup>63</sup> 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.<sup>64</sup> Discount was defined as a reduction from the *regular price* and something that “shall not mean surcharge.”<sup>65</sup>

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<sup>57</sup> 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.*

<sup>58</sup> *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.

<sup>59</sup> Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified as amended at 15 U.S.C. § 1666f(a) (2012)).

<sup>60</sup> *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.*

<sup>61</sup> See Fair Credit Billing, Description of Transactions, 40 Fed. Reg. 43,200, 43,203 (Sept. 19, 1975) (to be codified at 12 C.F.R. pt. 226).

<sup>62</sup> 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.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



The federal surcharge ban was originally set to expire in 1979; however, Congress extended the ban until 1981.<sup>66</sup> 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."<sup>67</sup> 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.<sup>68</sup>

In 1984, the federal ban on credit card surcharges expired and, as a result, credit card issuers began re-adding anti-surcharge provisions into their merchant contracts and states began implementing statewide anti-surcharge statutes.<sup>69</sup> The contractual anti-surcharge provisions subsequently became the subject of antitrust class action suits against credit card issuers.<sup>70</sup> In 2013, these suits resulted in a nationwide settlement agreement, mandating Visa, MasterCard, and American Express to remove the anti-surcharge provisions from their merchant contracts.<sup>71</sup> With the federal anti-surcharge ban having expired and the contractual anti-surcharge provisions having been removed, state anti-surcharge laws are the only obstacle preventing merchants from imposing a surcharge on credit transactions.<sup>72</sup>

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<sup>66</sup> See Financial Institutions Regulatory & Interest Rate Control Act of 1978, Pub. L. No. 95-630, tit. XV, § 1501, 92 Stat. 3641, 3713 (1978).

<sup>67</sup> Cash Discount Act § 102, Pub.L. No. 97-25, 95 Stat. 144 (1981) (codified in relevant part at 15 U.S.C. § 1602(y)).

<sup>68</sup> *Id.*

<sup>69</sup> *Rowell v. Pettijohn*, 816 F.3d 73, 77 (5th Cir. 2016).

<sup>70</sup> *Id.*

<sup>71</sup> *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.

<sup>72</sup> *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.”<sup>73</sup> 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.”<sup>74</sup> Florida’s ban, much like expired federal anti-surcharge law, creates an exception for cash discounts.<sup>75</sup>

In reaction to the expiration of the federal ban, New York enacted an anti-surcharge law in 1984.<sup>76</sup> 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.”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.”<sup>80</sup> Additionally, the bill summary provides that “merchant[s] would be able to offer a discount for cash if they so desire.”<sup>81</sup>

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.”<sup>82</sup> Similar to New York’s ban, the Texas

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<sup>73</sup> FLA. STAT. ANN. § 501.0117 (LexisNexis 2017).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (allowing the “offering of a discount for the purpose of inducing payment by cash”).

<sup>76</sup> *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).

<sup>77</sup> N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1–502).

<sup>78</sup> *See id.*

<sup>79</sup> *See Expressions*, 808 F.3d at 124–25.

<sup>80</sup> *Id.* (citation omitted).

<sup>81</sup> *Id.* at 125 (alteration in original) (citation omitted).

<sup>82</sup> TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).

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statute does not make an express distinction between cash discounts and credit surcharges.<sup>83</sup> 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.”<sup>84</sup> The statute does not define regular price.<sup>85</sup>

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.”<sup>86</sup> The California statute, unlike New York’s and Texas’, expressly states that a retailer may offer discounts to induce cash payment.<sup>87</sup> 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.<sup>88</sup>

The ten existing anti-surcharge statutes, including the four mentioned above, serve as complete bans on any credit surcharge.<sup>89</sup> Conversely, merchants in states without anti-surcharge regulations may implement a surcharge larger than any swipe fee.<sup>90</sup> Minnesota, however, enacted a unique and more precise surcharge restriction designed to curtail unwarned and unrestrained surcharges.<sup>91</sup> 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.”<sup>92</sup>

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.<sup>93</sup> The majority of state

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<sup>83</sup> *Id.*

<sup>84</sup> *Rowell v. Pettijohn*, 816 F.3d 73, 80–82 (5th Cir. 2016).

<sup>85</sup> *See* § 604A.0021.

<sup>86</sup> CAL. CIV. CODE § 1748.1(a) (Deering 2017).

<sup>87</sup> *Id.*

<sup>88</sup> § 1748.1(e).

<sup>89</sup> *Credit or Debit Card Surcharge State Statutes*, *supra* note 2.

<sup>90</sup> *Id.*

<sup>91</sup> MINN. STAT. § 325G.051 (LEXISNEXIS 2017).

<sup>92</sup> *Id.*

<sup>93</sup> *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 439 (S.D.N.Y. 2013)

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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> *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.<sup>99</sup> 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.<sup>100</sup> Together, merchants maintain that their commercial speech rights are

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("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.").

<sup>94</sup> *Expressions*, 975 F. Supp. 2d at 349; Levitin, *supra* note 93.

<sup>95</sup> Merchant, *supra* note 2, at 354 (citing *United States Census 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/>).

<sup>96</sup> *Id.*

<sup>97</sup> *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).

<sup>98</sup> Brief for Petitioners at 12, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) (No. 15-1391).

<sup>99</sup> *Id.* at 20.

<sup>100</sup> *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.<sup>101</sup>

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.<sup>102</sup> In order to ascertain precisely what the law regulated, the court began by identifying that which it did not regulate.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> Further, the court reasoned that there exists no distinction between a surcharge and a discount because a surcharge is merely a negative discount.<sup>106</sup>

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.<sup>107</sup> 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."<sup>108</sup>

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*?"<sup>109</sup> Secondly, the

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<sup>101</sup> *Id.* at 26.

<sup>102</sup> *Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1238 (11th Cir. 2015).

<sup>103</sup> *Id.* at 1243.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1244.

<sup>106</sup> *Id.* at 1245.

<sup>107</sup> *Id.*

<sup>108</sup> *Dana's R.R. Supply*, 807 F.3d at 1245.

<sup>109</sup> *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.<sup>110</sup> 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.<sup>111</sup> 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 “impos[es] criminal liability for making the ‘wrong choice’ between equally plausible alternative descriptions of an objective reality,” which fails under any form of heightened scrutiny.<sup>112</sup>

This rationale was reiterated in *Italian Colors Restaurant v. Harris*.<sup>113</sup> 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,<sup>114</sup> and because it regulated “speech that conveys price information.”<sup>115</sup> 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.”<sup>116</sup> 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.”<sup>117</sup>

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.<sup>118</sup> 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.<sup>119</sup> Additionally, the court found that mandating the disclosure of surcharges before the register was the “most direct way to prevent consumer

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1246.

<sup>113</sup> *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015).

<sup>114</sup> *Id.* at 1207.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 568 (2011)) (“An individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.”).

<sup>117</sup> *Id.* at 1208.

<sup>118</sup> *Id.* at 1209–10.

<sup>119</sup> *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

deception,”<sup>120</sup> and as a result, the court held that the statute constituted an unconstitutional content-based speech restriction.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> Consumer Action and NACA argue that this lack of consumer knowledge results in American merchants paying the highest swipe fees amongst merchants worldwide.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> 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*,<sup>127</sup> 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.<sup>128</sup> The court concluded that, as applied to single-sticker pricing, the surcharge restriction did not implicate commercial speech because it exclusively regulated economic conduct.<sup>129</sup> The Second Circuit abstained from addressing the dual-pricing argument

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<sup>120</sup> *Id.* at 1210.

<sup>121</sup> *Id.*

<sup>122</sup> Brief for Consumer Action & Nat’l Ass’n of Consumer Advocates as Amici Curiae Supporting Petitioners, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) (No. 15-1391).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Consumers incur approximately \$50 billion in swipe fees per year. *Id.*

<sup>125</sup> Brief for U.S. Pub. Interest Research Grp. Educ. Fund, Inc. as Amici Curiae Supporting Petitioners at 4–5, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) (No. 15-1391).

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *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).

<sup>128</sup> *Id.* at 128–29.

<sup>129</sup> *Id.* at 130.

because the court was uncertain that New York's no-surcharge law, in fact, prohibited dual-pricing schemes.<sup>130</sup>

The court began its analysis by noting that prices, alone, do not qualify as speech,<sup>131</sup> and that price regulations, as well as other forms of direct economic regulation, do not implicate First Amendment protection.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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.”<sup>135</sup> 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.<sup>136</sup> 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,<sup>137</sup> the Second Circuit found that the anti-surcharge statute exclusively regulated economic conduct and the court did not conduct a *Central Hudson* inquiry.<sup>138</sup>

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<sup>130</sup> *Id.* at 140.

<sup>131</sup> *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.”).

<sup>132</sup> *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.

<sup>133</sup> *Expressions*, 808 F.3d at 130–31.

<sup>134</sup> *Id.* at 131.

<sup>135</sup> *Id.*

<sup>136</sup> *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).

<sup>137</sup> *Expressions*, 808 F.3d at 130–31.

<sup>138</sup> *Id.* at 131.



The Fifth Circuit followed the Second Circuit's rationale in *Rowell v. Pettijohn*,<sup>139</sup> 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."<sup>140</sup> Texas' law does not contain express language regarding cash discounts.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup> The Texas statute does not define "regular price" and the Texas legislature did not adopt the federal definition.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> The consumer advocate

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<sup>139</sup> *Rowell v. Pettijohn*, 816 F.3d 73, 80–82 (5th Cir. 2016).

<sup>140</sup> *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).

<sup>141</sup> See § 604A.0021.

<sup>142</sup> *Rowell v. Pettijohn*, 816 F.3d at 81.

<sup>143</sup> Hearings on Tex. H.B. 1558 Before the H. Comm. on Fin. Insts., 69th Leg. R.S. (Apr. 22, 1985).

<sup>144</sup> *Rowell v. Pettijohn*, 816 F.3d at 81.

<sup>145</sup> *Id.*

<sup>146</sup> TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).

<sup>147</sup> *Rowell v. Pettijohn*, 816 F.3d at 82.

<sup>148</sup> Brief of Amici Curiae Pub. Citizen, Inc., et al. in Support of Respondents at 5, 10, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) (No. 15-1391), 2016 WL 7450493.

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."<sup>149</sup> 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*.<sup>150</sup> 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."<sup>151</sup>

### 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.<sup>152</sup> 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."<sup>153</sup> "In regulating the communication of prices

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<sup>149</sup> *Id.* at 28.

<sup>150</sup> *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.

<sup>151</sup> Brief of Amici Curiae, *supra* note 150, at 23–29.

<sup>152</sup> *Expressions II*, 137 S. Ct. 1144 (2017).

<sup>153</sup> *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.<sup>154</sup>

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.<sup>155</sup> As a result, the Court remanded these issues to the Second Circuit for further review.<sup>156</sup> 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.<sup>157</sup> 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.”<sup>158</sup>

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.<sup>159</sup> Though both pricing schemes amount to commercial speech restrictions,<sup>160</sup> each scheme reaches that end in a

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<sup>154</sup> *Id.* At 1151.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *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.”).

<sup>158</sup> *Id.* at 102.

<sup>159</sup> *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).

<sup>160</sup> *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.<sup>161</sup> Generally, however, the laws enable merchants to implement a discount for cash purchases.<sup>162</sup> 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.<sup>163</sup> Accordingly, since the result is the same, the laws mandate how merchants must explain a pricing scheme to customers.<sup>164</sup> 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.<sup>165</sup> 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.”<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> On the other hand, laws that *prevent* an advertiser from providing the public with additional information

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<sup>161</sup> *Expressions III*, 877 F.3d at 103.

<sup>162</sup> *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).

<sup>163</sup> 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.

<sup>164</sup> *Expressions II*, 137 S. Ct. 1144, 1151 (2017).

<sup>165</sup> *Id.*

<sup>166</sup> *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 650.

on a good or service are more akin to a commercial speech regulation.<sup>169</sup> 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.<sup>170</sup>

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.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> The Assistant Attorney General subsequently provided the owner with "a script of what [he] could tell customers when talking to

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 651.

<sup>171</sup> *See id.* at 650–51.

<sup>172</sup> Brief for Petitioners, *supra* note 98, at 8–9.

<sup>173</sup> *Id.* at 7–8.

<sup>174</sup> *Id.* at 17.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 17–18.

<sup>177</sup> *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.<sup>178</sup>

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.<sup>179</sup> 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.”<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup>

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

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<sup>178</sup> Brief for Petitioners, *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 \$.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 \$.05/gallon “surcharge” to use a credit card.’” Brief for Petitioners, *supra* note 98, at 18.

<sup>179</sup> Brief for Plaintiffs-Appellees at 15, *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015) (No. 13-4533, 13-4537).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Mindy Hernandez, *Behavioral Economics 101*, PROSPERITY NOW (Apr. 2011), <https://prosperitynow.org/behavioral-economics-101>.

<sup>183</sup> *Id.*

<sup>184</sup> Daniel Kahneman, Jack L. Knetsch & Ricahrd H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Basis*, 5 J. ECON. PERSP. 193, 203–05 (1991).

card industry.<sup>185</sup> 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.<sup>186</sup> Behavioral economic theory provides that this distinction between a cash discount and a credit surcharge is merely one of framing: communication induced misconception.<sup>187</sup>

Furthermore, behavioral economic theory illuminates the distinction between discounts and surcharges in ways that traditional economic theory cannot.<sup>188</sup> 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.<sup>189</sup> Rational calculation is not always the driver of decision and individuals' decisions are influenced by the manner in which information is presented to them.<sup>190</sup> 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.<sup>191</sup> 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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<sup>185</sup> 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.

<sup>186</sup> *Id.*

<sup>187</sup> Kahneman, Knetsch, & Thaler, *supra* note 184, at 203–05.

<sup>188</sup> Brief of Scholars of Behavioral Econ. as Amicus Curiae in Support of Petitioners at 2, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30 (2016) (No. 15-1391).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 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.”<sup>192</sup> 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.<sup>193</sup> Where regular price is undefined, however, surcharge laws implicate commercial speech and are subject to the *Central Hudson* test.<sup>194</sup>

In *Expressions Hair Design*, the Second Circuit and Supreme Court declined to determine whether New York’s anti-surcharge statute reached dual-pricing schemes,<sup>195</sup> though both the Fifth and Eleventh Circuits concluded that dual-pricing is not prohibited under such laws.<sup>196</sup> 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.<sup>197</sup>

#### 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.<sup>198</sup> The lapsed federal ban defined regular price as the *credit* price and prohibited a merchant from charging an additional amount above the credit price.<sup>199</sup> With this definition, the law’s application is limited to fees charged in addition to the regular price and nothing more.<sup>200</sup> Accordingly, merchants are not prevented from posting a higher credit price and a lower cash price for the same product.<sup>201</sup> Most significantly, the laws do not prohibit a storeowner from characterizing the difference between the two prices as a surcharge.<sup>202</sup> 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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<sup>192</sup> See discussion *infra* Part VI.B.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *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.

<sup>196</sup> *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).

<sup>197</sup> See *Expressions Hair Design*, 808 F.3d at 132.

<sup>198</sup> See discussion *infra* Part VI.B.1.

<sup>199</sup> Cash Discount Act § 102, Pub.L. No. 97-25, 95 Stat. 144 (1981) (codified in relevant part at 15 U.S.C. § 1602(y)).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*



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not charge an additional fee on top of the credit price, the merchant would not violate the law.<sup>203</sup>

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.<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup>

Dual pricing schemes are presumptively permitted by anti-surcharge statutes;<sup>207</sup> however, where the statutes do not define regular price, the laws' application turns entirely on merchant communication.<sup>208</sup> 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.<sup>209</sup> 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

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See discussion *infra* Part VI.B.2.

<sup>206</sup> *Id.*

<sup>207</sup> *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).

<sup>208</sup> 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)

<sup>209</sup> See *Dana's R.R. Supply*, 807 F.3d at 1245.

prosecution.<sup>210</sup> 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.<sup>211</sup> 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—without any 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.<sup>212</sup>

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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<sup>210</sup> See, e.g., N.Y. GEN. BUS. LAW § 518 (Consol. through 2017 released chapters 1-502).

<sup>211</sup> See *id.*

<sup>212</sup> 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.

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In sum, in the dual pricing context, determining whether an anti-surge 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-surge 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.<sup>213</sup> These factors are applied to the laws in the single-sticker context and the dual-pricing context where regular price is undefined.

A. *Anti-Surge 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.<sup>214</sup> 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.<sup>215</sup> 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,<sup>216</sup> 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

<sup>213</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>214</sup> See discussion *supra* Part VI.A.

<sup>215</sup> 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").

<sup>216</sup> *Expressions III*, 877 F.3d 99, 101 (2d Cir. 2017).

not encounter a price change upon arrival at the register.<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup>

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,<sup>220</sup> 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,<sup>221</sup> and the listed surcharge typically reflects the market price of using a credit card.<sup>222</sup> 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.<sup>223</sup> In the restaurant industry, for example, patrons are expected to tip an undetermined amount on top of the listed price of food.<sup>224</sup> 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.<sup>225</sup> Additionally, American consumers are typically presented with an extra percentage based price at the register in the form of

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<sup>217</sup> See discussion *supra* Part VI.B.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Merchant, *supra* note 2, at 356.

<sup>221</sup> Wayne C. Lusvardi & Charles B. Warren, *Unplanned Telecom Corridor Markets: The Marketization of Fiber Optic Easements by Deregulated Network Industries*, 5 PLANNING & MARKETS 1, 9 (2000), <http://www-pam.usc.edu/volume5/v5i1a1s1.html#contents>.

<sup>222</sup> With the exception of Minnesota, no state's anti-surcharge 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.

<sup>223</sup> See Lie Wang, *An Investigation and Analysis of U.S. Restaurant Tipping Practices and the Relationship to Service Quality with Recommendations for Field Application* (2010) (published M.A. dissertation, University of Nevada, Las Vegas).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

sales tax.<sup>226</sup> 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.<sup>227</sup> Moreover, consumers often operate without knowledge of or concern for sales tax;<sup>228</sup> 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.”<sup>229</sup> That is, restrictions on potentially misleading speech cannot be broader than necessary to prevent potential deception.<sup>230</sup> 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.<sup>231</sup> 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.<sup>232</sup> Others suggested that surcharge

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<sup>226</sup> Scott Drenkard & Jard Walczak, *State and Local Sales Tax Rates in 2015*, TAX FOUND. (Apr. 8, 2015), <https://taxfoundation.org/state-and-local-sales-tax-rates-2015/>.

<sup>227</sup> *Id.*

<sup>228</sup> Jacob Goldsin, *Sales Tax Not Included: Designing Commodity Taxes for Inattentive Consumers*, 122 YALE L.J. 258, 264–66 (2012) (discussing the differing effects of tax saliency on consumers’ purchasing habits).

<sup>229</sup> *In re R.M.J.*, 455 U.S. 191, 203 (1982).

<sup>230</sup> *Id.*

<sup>231</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

<sup>232</sup> *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.<sup>233</sup> 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.<sup>234</sup> 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.”<sup>235</sup> 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.<sup>236</sup> 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.”<sup>237</sup> Section 501.0117 of the Florida Statute Annotated was also established in response to consumer protection interests.<sup>238</sup>

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.<sup>239</sup> 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.<sup>240</sup> The states must establish something above “mere speculation or conjecture” to prove that the evils or undesirable practices they regulate are real and that

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*granted*, 137 S. Ct. 30 (2016), and *vacated and remanded*, 137 S. Ct. 1144 (2017).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 123.

<sup>235</sup> *Id.*

<sup>236</sup> *Rowell v. Pettijohn*, 816 F.3d 73, 82 (5th Cir. 2016).

<sup>237</sup> *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1204 (E.D. Cal. 2015).

<sup>238</sup> *Dana’s R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1249 (11th Cir. 2015).

<sup>239</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

<sup>240</sup> *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999).

the regulation will actually assuage those harms to a “material degree.”<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup>

Additionally, an asserted interest in preventing a general harm is insufficient to satisfy the *Central Hudson* test<sup>246</sup> because regulations that suppress or eradicate truthful commercial speech infrequently protect the public.<sup>247</sup> It is not sufficient that states assume a regulation serves a substantial interest because it prevents consumers from responding

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<sup>241</sup> *Id.*

<sup>242</sup> *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”).

<sup>243</sup> *Dana’s R.R. Supply*, 807 F.3d at 1250; TEX. FIN. CODE § 339.001 (LEXISNEXIS 2017); CAL. CIV. CODE § 1748.1(f).

<sup>244</sup> 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).

<sup>245</sup> *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.”).

<sup>246</sup> 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.”).

<sup>247</sup> *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.<sup>248</sup> Moreover, the remedy necessary for misleading speech is “more speech, not enforced silence.”<sup>249</sup>

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.<sup>250</sup> Accordingly, anti-surcharge regulations do not serve a substantial state interest in protecting consumers.

C. *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 *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.<sup>251</sup> 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 *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

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<sup>248</sup> *Id.*

<sup>249</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

<sup>250</sup> *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 122–23 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30, (2016), and *vacated and remanded*, 137 S. Ct. 1144 (2017).

<sup>251</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).



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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> 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

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<sup>252</sup> See, e.g., CAL. CIV. CODE § 1748.1(f) (LEXISNEXIS 2018); TEX. BUS. & COM. CODE ANN. § 604A.0021 (LEXISNEXIS 2017).

<sup>253</sup> *Id.*

<sup>254</sup> MINN. STAT. ANN. § 325G.051 (LEXISNEXIS 2017).

<sup>255</sup> *Id.*

<sup>256</sup> *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 abridgement of sellers' commercial speech rights and *Expressions Hair Design* provides merchants with the vehicle to properly reclaim these rights.