American University Law Review

Volume 66 | Issue 6 Article 4

2017

Why Anti-Surcharge Laws Do Not Violate a Merchant's Freedom of Speech

Annie P. Anderson
American University Washington College of Law

Why Anti-Surcharge Laws Do Not Violate a Merchant's Freedom of Speech

Abstract

First Amendment litigation is surrounding state anti-surcharge laws, which prevent merchants from imposing surcharges on transactions where customers use credit cards. These laws effectively prevent stores from passing credit card "swipe fees" onto their customers. Merchants argue that because the laws still allow them to provide discounts to customers who use other forms of payment, the laws violate their First Amendment rights by impermissibly restricting the way the stores can communicate. The state governments, in contrast, have defended the laws by asserting that they regulate conduct, not business speech, and therefore do not violate the First Amendment.

The Supreme Court in *Expressions Hair Design v. Schneiderman*answered part of the inquiry when it held that New York's anti-surcharge law violated speech, not conduct. Now, the case will return to the Second Circuit, which will determine whether it survives constitutional scrutiny. This Comment argues that anti-surcharge laws do not violate the First Amendment because they regulate speech that relates to commercial transactions and are thus categorized as commercial speech. Further, this Comment argues that state anti-surcharge laws survive the intermediate scrutiny applied to commercial speech as established by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.

COMMENTS

WHY ANTI-SURCHARGE LAWS DO NOT VIOLATE A MERCHANT'S FREEDOM OF SPEECH

ANNIE P. ANDERSON*

First Amendment litigation is surrounding state anti-surcharge laws, which prevent merchants from imposing surcharges on transactions where customers use credit cards. These laws effectively prevent stores from passing credit card "swipe fees" onto their customers. Merchants argue that because the laws still allow them to provide discounts to customers who use other forms of payment, the laws violate their First Amendment rights by impermissibly restricting the way the stores can communicate. The state governments, in contrast, have defended the laws by asserting that they regulate conduct, not business speech, and therefore do not violate the First Amendment.

The Supreme Court in Expressions Hair Design v. Schneiderman *answered part of the inquiry when it held that New York's anti-surcharge law violated speech, not conduct. Now, the case will return to the Second Circuit, which will determine whether it survives constitutional scrutiny. This Comment argues that anti-surcharge laws do not violate the First Amendment because they regulate speech that relates to commercial transactions and are thus categorized as commercial speech. Further, this Comment argues that state anti-surcharge laws survive the intermediate scrutiny applied to commercial speech as*

* Senior Note & Comment Editor, *American University Law Review*, Volume 67; J.D. Candidate, May 2018, *American University Washington College of Law*; B.A., American Studies, 2012, *Connecticut College*. I would like to thank my family for their unwavering support and encouragement throughout law school. In addition, I am incredibly grateful for the hard work of my colleagues at the *Law Review* as they assisted in editing this piece and for Professor Stephen Wermiel as he advised me during this process.

established by Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.

TABLE OF CONTENTS

INTRODUCTION

Suppose that a shortage of soft beverages has changed the way that Florida's restaurants serve drinks. Rather than pouring them to fill a glass, the average restaurant only pours beverages halfway. A drink filled to the brim is out of the question. Tourist complaints of the meager and overpriced drinks at Floridian establishments cast a negative light on the state's restaurant industry; when restaurant profits plummet, the state fears that tourism profits are next. To save its reputation, Florida decides that it must regulate the restaurant industry more closely. It determines a positive message for restaurants to convey and passes a law that dictates how these establishments may describe soft drinks.

The law is simple: it prevents restaurants from serving "half-empty" beverages but allows them to provide drinks labeled "half-full." There is no additional regulatory scheme in place, and the law does not actually mandate that restaurants provide a greater quantity of the beverages they serve; a violation hinges entirely on a restaurant's choice of words.[1] Restaurant owners recognize the law as a restriction on their constitutional right to free speech,[2] and a group of restaurateurs files suit against the state, fervently litigating the law to the appellate level. Finding that the law directly targets the content that restaurant owners communicate to patrons[3] and that it is not commercial speech that the government may regulate,[4] the appellate court strikes down the restaurant mandate as a violation of the First Amendment.

---

1. This hypothetical is a more elaborate version of the Eleventh Circuit's imagined situation in *Dana's Railroad Supply v. Attorney General of Florida.* 807 F.3d 1235, 1245 (11th Cir. 2015), *rehearing denied en banc,* 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017). There, the court explained that if criminal liability rests on whether a restaurateur uses the term "half-full" or "half-empty," then the regulation impermissibly "discriminates against expression on the basis of content" instead of regulating conduct. *Id.*

2. *See* U.S. CONST. amend. I (declaring that "Congress shall make no law . . . abridging the freedom of speech"); Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (asserting that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

3. *See infra* Section I.A.2 (describing the evolution of the Supreme Court's jurisprudence on commercial speech).

4. *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 5–6 (2014) (explaining that the government may only enforce content-based restrictions on speech when such restrictions are the least obstructive means of furthering a compelling state interest); *see also infra* Section I.A (describing instances in which protected speech may be subjected to government regulation).

While this scenario may seem far-fetched, the Eleventh Circuit in *Dana's Railroad Supply v. Attorney General of Florida*[5] relied on a similar hypothetical to determine whether a Florida law regulating credit card swipe fees (1) implicated and (2) violated storeowners' constitutional rights under the First Amendment.[6] The plaintiffs, a group of Florida merchants, argued that because the law prevented them from imposing surcharges, or fees, on credit card transactions, but allowed them to provide discounts on non-credit card transactions, the law violated their First Amendment rights.[7] They maintained that the Florida law regulated their speech rather than their business conduct.[8]

Though the Eleventh Circuit acknowledged that lawful regulations may sometimes implicate speech without violating the First Amendment, it ultimately found for the plaintiffs.[9] The court held that the statute "directly target[ed] speech [and] indirectly affect[ed] commercial behavior,"[10] reasoning that there was "no legally salient difference between" the anti-surcharge law and the court's glass half-full mandate similar to the one hypothesized above.[11] The court interpreted the anti-surcharge law as a "hybrid" of both commercial speech, which is subject to intermediate scrutiny, and "plain old-fashioned speech suppression," which is subject to strict scrutiny.[12] It concluded that the law would fail either test,[13] so it applied an intermediate scrutiny analysis.[14]

---

5. 807 F.3d 1235 (11th Cir. 2015).

6. *Id.* at 1245–46; *see also* Fla. Stat. § 501.0117(1) (2016) (providing that "[a] seller . . . may not impose a surcharge on the buyer . . . for electing to use a credit card in lieu of payment by cash, check, or similar means"); *supra* note 2 and accompanying text.

7. *Dana's R.R. Supply*, 807 F.3d at 1239–40.

8. *See* § 501.0117(1) ("[Section 501.0117(1)] does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers."); *Dana's R.R. Supply*, 807 F.3d at 1239–40.

9. *Dana's R.R. Supply*, 807 F.3d at 1241–42, 1251 (acknowledging that laws regulating conduct are mere economic regulations that are only subject to rational-basis review).

10. *Id.* at 1239 ("[The law] discriminat[es] on the basis of the speech's content, the identity of the speaker, and the message being expressed. Because the at-best plausible justifications on which the [anti]-surcharge law rest provide no firm anchor, the law crumbles under any level of heightened First Amendment scrutiny.").

11. *Id.* at 1245–46 (ridiculing the possibility that someone could be criminally liable for picking one of two valid ways of describing "an objective reality").

12. *Id.* at 1246–49 (finding that the statute contained both "the flavor of commercial speech" and "plain old-fashioned speech suppression").

13. *Id.* at 1248–49.

14. *Id.*

Diluting the issue through the use of its glass half-full hypothetical allowed the Eleventh Circuit's decision to appear compelling and establish a First Amendment argument in a way that ignored the nuances of Florida's law. The court clung to the rhetorical charm of its own hypothetical, swiftly asserting that the law unconstitutionally restricted speech through a brief and dismissive intermediate scrutiny analysis.[15] The decision's thorough dissent and the lower court's prior dismissal of the First Amendment claim further highlighted the inadequacies of the Eleventh Circuit's holding.[16]

Obscure as the issue may seem, *Dana's Railroad Supply* increased tensions around whether anti-surcharge laws regulated speech and possibly violated First Amendment freedoms or whether they lawfully regulated business conduct. Similar invocations of the First Amendment and anti-surcharge laws are prevalent.[17] The Supreme Court in *Expressions Hair Design v. Schneiderman* (*Expressions II*)[18] recently resolved part of the analysis by classifying New York's anti-surcharge law as a regulation of speech rather than a regulation of

15. *See id.* at 1249–51 (applying the four-pronged *Central Hudson* test and dismissing any possibility that the law could further a substantial government interest).

16. *See id.* at 1252–53 (Carnes, J., dissenting) (criticizing the majority's colloquial interpretation of "surcharge" and deeming the decision "a fatal constitutional flaw"); Dana's R.R. Supply v. Bondi, No. 4:14cv134-RH/CAS, 2014 WL 11189176, at *1–2 (N.D. Fla. Sept. 2, 2014) (asserting that "[r]estrictions on pricing are economic measures subject only to rational-basis scrutiny" and acknowledging that a "whole host of statutes impose similar restrictions on the relationships between businesses and their customers, and many implicate communications").

17. *See* Rowell v. Pettijohn, 816 F.3d 73, 82 (5th Cir. 2016) (holding that Texas's anti-surcharge law is a permissible regulation of economic conduct that incidentally impacts speech), *vacated*, 137 S. Ct. 1431 (2017); Expressions Hair Design v. Schneiderman (*Expressions I*), 808 F.3d 118, 121–22 (2d. Cir. 2015) (upholding a statute that barred merchants from posting one price for a product and charged an additional fee to customers who paid with a credit card, even though the same law allowed merchants to offer discounts to customers paying in cash), *vacated*, 137 S. Ct. 1144 (2017); Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199, 1210 (E.D. Cal. 2015) (striking down a California anti-surcharge law aimed at "prevent[ing an] unfair surprise to consumers at the cash register" because the overly-broad law placed a "content based, speaker-specific restriction on consumer speech"); *see also* Lisa Soronen, *Remember Reed: Might Supreme Court Apply it to Commercial Speech?*, INT'L MUN. LAWS. ASS'N: APP. PRAC. BLOG (Oct. 25, 2016), http://blog.imla.org/2016/10/remember-reed-might-supreme-court-apply-it-to-commercial-speech (noting that until a recent antitrust suit forced credit card companies to change their contract terms, contracts between the companies and vendors prohibited vendors from imposing surcharges on customers for credit card transactions).

18. 137 S. Ct. 1144 (2017).

conduct.[19] The Court found that though the law implicates business conduct, it "is not like a typical price regulation" because it regulates how sellers can communicate their prices.[20] The Court did, however, remand the case to the Second Circuit, leaving the lower court to complete the second half of the analysis: deciding which level of scrutiny should apply and determining whether the law at issue passes constitutional muster.[21] This holding vindicated the Eleventh Circuit's decision, at least in part.[22] It also outdated similar Second and Fifth Circuit precedents, settling what had been a circuit split on the issue of whether anti-surcharge laws regulated speech or conduct.[23] By remanding the New York anti-surcharge case back to the Second Circuit for further proceedings, the Supreme Court left the constitutionality of the state laws open for debate.

This Comment argues that even though anti-surcharge laws regulate speech, not conduct, they fall under the category of commercial speech and are thus subject to intermediate scrutiny rather than strict scrutiny. This Comment further argues that under an intermediate scrutiny analysis, the laws do not violate a merchant's freedom of speech because they easily survive this level of scrutiny. Part I

---

19. *Id.* at 1147, 1150–51.

20. *Id.* at 1150–51.

21. *Id.* at 1146.

22. *Id.* at 1152.

23. *Id.* The Fifth Circuit found that a law banning surcharges for customers paying with credit cards regulated economic conduct and only incidentally affected speech; conversely, the Eleventh Circuit struck down a similar law for affecting speech as well as price. Rowell v. Pettijohn, 816 F.3d 73, 82 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017); Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1245 (11th Cir. 2015), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017). The Second Circuit upheld a law banning surcharges for customers paying with credit after finding that the law regulated only prices and not speech. Amy Howe, *Justices Add Eight New Cases to Docket for Upcoming Term*, SCOTUSBLOG (Sept. 29, 2016, 11:14 AM), http://www.scotusblog.com/2016/09/justices-add-eight-new-cases-to-docket-for-upcoming-term. *But see* Brief in Opposition for Respondent Eric T. Schneiderman at 7, Expressions Hair Design v. Schneiderman, No. 15-1391 (cert. granted Sept. 29, 2016) (arguing that the Second Circuit's decision did not introduce a circuit split because the Eleventh Circuit construed the Florida law "as having a different meaning and applying to different pricing practices than the New York and Texas statutes"). *See generally* Matthew Moloshok, *Free Speech Versus Fair Markets: Will Credit-Card Surcharge Cases Supercharge the First Amendment?*, THE ANTITRUST SOURCE, Feb. 2017, at 1–9, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb17_moloshok_2_16f.authcheckdam.pdf (arguing that "[d]eploying the First Amendment to invalidate conduct-based statutes wields a weapon that could be turned against important consumer protection regulation, and even some antitrust doctrines").

investigates the contours of the First Amendment, focusing on the reality that its protections are not absolute. Additionally, Part I illustrates the federal history of state anti-surcharge laws, examines the three opinions forming the circuit split, and summarizes the Supreme Court's decision in *Expressions II*.

Part II analyzes the First Amendment issue courts face when analyzing anti-surcharge laws and argues that these laws survive intermediate scrutiny because they are reasonably related to important state interests. Part II then illustrates how the Eleventh Circuit's interpretation downplayed the commercial nature of the law and relied too heavily on a contrived hypothetical comparison. Part III re-examines *Expressions II*, arguing that on remand, the Second Circuit should classify New York's anti-surcharge law as commercial speech and uphold it under an intermediate scrutiny analysis. In addition, Part III argues that if the Second Circuit does not categorize the anti-surcharge law as commercial speech, it can either certify the case to the New York Court of Appeals for a more definitive interpretation of the statute or uphold the law as a valid disclosure requirement. Finally, this Comment concludes that when courts overextend First Amendment protections, they trivialize and harm the freedom of speech.

I. BACKGROUND

A. *Tracing the Contours of the First Amendment: Constitutional Limits on the Scope of Free Speech*

The First Amendment reflects some of the most essential concepts of freedom and liberty.[24] However, public reverence for First Amendment protections makes it increasingly difficult for courts to confine its borders; when a freedom is so essential, it is sometimes inconceivable to recognize that it is not absolute. Drawing boundaries around areas of protected speech often leads to quarrels rather than consensus, even though there are necessary limits to the First Amendment's protections, such as restricting obtuse or obscene language.

Among the most common of these quarrels is whether the First Amendment is applicable to the speech in question. Often, lawful

24. *See, e.g.*, United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."); William O. Douglas, Lauterbach Award Address in New York 6 (Dec. 3, 1952) ("Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.").

regulations that incidentally affect speech fall outside the scope of the First Amendment.[25] For example, Congress can prohibit employers from race-based discrimination while hiring.[26] As a result, laws preventing employers from including "White Applicants Only" on their job postings do not fall within the First Amendment's purview.[27] Alternatively, there is speech considered so harmful to society that the First Amendment does not protect it at all,[28] and courts afford that speech a lesser extent of constitutional protection to preserve societal interests.[29] For instance, an advertisement for a gas and electronic company—considered commercial speech, or "speech [that proposes] a commercial transaction"[30]—may be subject to a more extensive set of government regulations and a lower level of judicial scrutiny than other constitutionally protected expressions.[31]

The result is an intricate body of case law that is often as frustrating to societal norms as it is fundamental to civil liberties. Critics gripe that the current jurisprudence remains unable "to formulate clear explanations and coherent rules capable of elucidating and charting the contours of [First Amendment] ground[s]."[32] Likewise, the Court

---

25. Ruane, *supra* note 4, at 9. For example, the Supreme Court upheld a regulation banning camping outside of designated spaces in some national parks in Washington, D.C., even though it incidentally limited the expression of advocates camping in the park to protest issues affecting the homeless. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 290 (1984). The Court found that the Government had a substantial interest in maintaining the parks in the heart of the U.S. capital for a myriad of visitors and that the regulation was narrowly focused on that interest. *Id.* at 296.

26. Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 62 (2006).

27. *Id.*

28. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (a person may not falsely shout "FIRE!" in a movie theater); Ruane, *supra* note 4, at 1, 3 (explaining that obscene materials are not protected by the First Amendment, and that people may not possess child pornography, much less produce or purchase any material depicting sexual conduct by children).

29. *See* Ruane, *supra* note 4, at 1–5.

30. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 559, 561–63, 566 (1980) (articulating a four-part test for determining the constitutionality of a commercial speech restriction).

31. *See* Ruane, *supra* note 4, at 14–17 (demonstrating that enhanced government regulation of commercial speech is important because the government has an interest in protecting consumers by ensuring that advertisements convey accurate information).

32. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000).

continues its long history of interpreting and re-interpreting the First Amendment's scope.[33]

This convoluted landscape contextualizes the Eleventh Circuit's analysis of Florida's anti-surcharge law and highlights how the Eleventh Circuit's simplified glass half-full hypothetical exacerbated the issue.[34] In the Eleventh Circuit hypothetical, the First Amendment is applicable because the imagined regulation is not motivated by a desire to regulate some other conduct; instead, the law regulates speech in an attempt to control the words that restaurants use to describe their beverage offerings,[35] falling within First Amendment territory. The hypothetical thus circumvents the entire question of whether the anti-surcharge law regulates speech or conduct—a critical first step in commercial speech jurisprudence[36]—and blatantly overstates the Florida law's simplicity.[37] After concluding that the First Amendment applied to the challenged measure, the Eleventh Circuit turned to the question of applying the appropriate standard of review. Though the court acknowledged the latitude given to legislatures in

33. Beauharnais v. Illinois, 343 U.S. 250, 286–87 (1952) (Douglas, J., dissenting) ("The Court in this and in other cases places speech under an expanding legislative control . . . . [The majority] puts free speech under the legislative thumb.").

34. Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1245–46 (11th Cir. 2015) (describing Florida's regulation against additional fees for customers paying with credit cards as arbitrarily "govern[ing] how to express relative values"), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017).

35. *Id.* at 1245.

36. *See* Texas v. Johnson, 491 U.S. 397, 404, 406 (1989) (noting that the government has a freer hand in restricting conduct and that not all conduct is speech).

37. *Dana's R.R. Supply*, 807 F.3d at 1245–46 (introducing the hypothetical glass half-full mandate as a content- and viewpoint-based restriction on speech where liability "turns solely on the restaurateurs' choice of words"). Even though the Supreme Court eventually held New York's anti-surcharge law regulated speech and not conduct—implying that Florida's anti-surcharge law is also likely a direct regulation on speech—the debate over whether anti-surcharge laws regulate conduct or speech was legitimate. *See generally Expressions II*, 137 S. Ct. 1144, 1150–51 (2017) (examining whether New York's law regulated speech or conduct, and finding that because it was "not . . . a typical price regulation," it regulated speech). Thus, the Eleventh Circuit overlooked half of the complexity surrounding Florida's law by equating it to a hypothetical that could not possibly involve a question of conduct versus speech. *See Dana's R.R. Supply*, 807 F.3d at 1248 (following its conclusion that the Florida law directly regulated speech with an assertion that the "whole point" of the law was to "impos[e] a direct and substantial burden on disfavored speech—by silencing it"). *But see id.* at 1243 (acknowledging the complexity of determining whether a regulation targets speech or conduct).

regulating commercial activity,[38] it belittled the possibility that a "governmental interest . . . would be served by the no-surcharge law" and found that Florida's anti-surcharge law failed an intermediate scrutiny analysis.[39]

1. The line between speech and conduct

By recognizing the importance of a state's ability to legislate in the interests of its citizens[40] and by identifying the defining features of freedoms the First Amendment does or does not protect,[41] courts acknowledge that a law's ability to impact speech does not necessarily render it unconstitutional.[42] Consistent with the latitude courts afford states in regulating business conduct, courts find restrictions on economic activity that implicate speech as distinct from restrictions on constitutionally protected expressions.[43] For example, the Supreme Court has repeatedly held that a state's lawful ability to regulate business conduct may impose incidental burdens on a merchant's

38. *See id.* at 1242 (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955)) ("By contrast, legislatures are given wide latitude to 'balance the advantages and disadvantages' when choosing whether and how to regulate commercial behavior.").

39. *Id.* at 1248–49 (stating that the Eleventh Circuit "struggle[d] to identify a plausible governmental interest" for the law, ultimately analyzing Florida's law under intermediate scrutiny).

40. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 523–24 (1934) (quoting City of New York v. Miln, 36 U.S. 102, 139 (1837)) (recognizing that "it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem . . . conducive to these ends").

41. *See, e.g.*, Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 61 (2006) (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (discussing the unconstitutionality of a state law requiring schoolchildren to salute the flag and recite the Pledge of Allegiance and a state law requiring New Hampshire drivers to display the state motto on their license plate, and emphasizing that these laws improperly dictate the content of speech).

42. *See, e.g.*, Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 506 (5th Cir. 2001) (explaining that a regulation "prohibit[ing] advertising the sale of motor vehicles by licensed dealers, a commercial activity lawful in Texas," would be a lawful regulation under the First Amendment).

43. *See, e.g.*, *Nebbia*, 291 U.S. at 537 (maintaining that "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells"); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (acknowledging the distinction between regulating speech and conduct); *Ford Motor Co.*, 264 F.3d at 506 (rejecting the notion that the heightened scrutiny of the First Amendment is implicated when a merchant simply "infus[es] [its] prohibited conduct with some element of speech").

speech without violating the First Amendment.[44] A law regulating speech incident to conduct rarely—if ever—poses a constitutional threat.[45] A law must essentially alter the expressive content at issue for incidental speech to fall within constitutionally protected territory.[46]

Since attorneys do not typically litigate the line between speech and conduct in the simplistic terms of the restaurant hypothetical, alternative analyses yield more informative ways of measuring whether speech is regulated independently of, or incident to, conduct.[47] Hence, other case law provides a more instructive framework for understanding the distinction between laws that regulate speech and those that regulate conduct. For example, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,[48] a federal statute requiring law schools to provide military recruiters with the same access to students as other on-campus recruiters did not violate the First Amendment even though it implicated the schools' speech.[49] The Court acknowledged that this statute compelled speech by requiring law schools to advertise military recruiters in the same manner that they advertised all other recruiters.[50] However, the Court asserted that freedom of speech prohibits the government from mandating what

---

44. *See Sorrell*, 564 U.S. at 567 (expounding upon the constitutionality of the Vermont law at issue, which "[did] not simply have an effect on speech, but [was] directed at certain content and [was] aimed at particular speakers"); Roark & Hardee LP v. City of Austin, 522 F.3d 533, 549–50 (5th Cir. 2008) (explaining that a regulation requiring merchants and employees to "'verbally' request smokers to extinguish cigarettes or leave the premises" did not violate the First Amendment because the ban focused on the conduct of the smoker); *Rumsfeld*, 547 U.S. at 61–62 (holding that Congress could deny funding to higher education institutions that did not assist military recruiters without violating the First Amendment because the institutions were not prevented from expressing unfavorable views about the military recruiting programs).

45. *See Rumsfeld*, 547 U.S. at 63, 65–66 (reiterating that "burning the American flag [is] sufficiently expressive to warrant First Amendment protection").

46. *See id.* at 63 (declaring that a compelled speech violation only exists when "the complaining speaker's own message [is] affected" by the regulation).

47. *See e.g.*, United States v. Albertini, 472 U.S. 675, 689 (1985) ("[A]n incidental burden on speech is no greater than is essential, and therefore is permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.").

48. 547 U.S. 47 (2006).

49. *See id.* at 47 (describing university resistance to assist military recruiters on campus because doing so might seemingly endorse the military's policy on homosexual service members).

50. *Id.* at 61–62 (recognizing that if the law schools sent e-mails or posted notices on behalf of other recruiters, they were required to do so for military recruiters in order to comply with the Solomon Amendment—even if the schools did not condone certain military policies).

people must say—not what they must do—and concluded that the law at issue purely did the latter.[51]

The Court further recognized that the law did not dictate the content of the speech involved or restrict the schools from speaking freely about military policies, and it reasoned that "[n]othing about recruiting suggests that law schools agree with . . . recruiters."[52] The Court rebuked the suggestion that requiring a law school to send e-mails for military recruiters in the same fashion that it sent e-mails for other recruiters implicated the First Amendment, remarking that such an imposition would "trivialize[] the freedom protected" in First Amendment jurisprudence.[53]

In *Roark & Hardee LP v. City of Austin*,[54] the Fifth Circuit came to a similar conclusion. A group of bar and restaurant owners filed suit to contest the constitutionality of a "Smoking in Public Places" ordinance adopted in Austin, Texas.[55] The plaintiffs asserted a First Amendment violation, arguing that the ordinance "compel[led] them to speak against their will by" requiring them to verbally request that patrons "stop smoking and leave the premises."[56] Relying in part on the Supreme Court's analysis in *Rumsfeld*, the Fifth Circuit rejected the plaintiffs' First Amendment argument, concluding that it trivialized the freedom of speech.[57]

Courts must closely examine "'from a practical standpoint' the nature of the exact conduct subject to the regulation."[58] Because it is important for states to maintain the authority to regulate in the interests of their citizens, merchants cannot simply "bootstrap themselves into the heightened scrutiny of the First Amendment . . . by infusing . . . prohibited conduct with some element of speech."[59] In an attempt to prevent plaintiffs from overstating their First

51. *Id.* at 59–60.

52. *Id.* at 65 (citing Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion)) ("We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so . . . . Surely students have not lost that ability by the time they get to law school."); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23, 845–46 (1995).

53. *Rumsfeld*, 547 U.S. at 62.

54. 522 F.3d 533 (5th Cir. 2008).

55. *Id.* at 538–39.

56. *Id.* at 549.

57. *Id.*; *Rumsfeld*, 547 U.S. at 62.

58. Rowell v. Pettijohn, No. A-14-CA-190-LY, 2015 WL 10818660, at *2 (W.D. Tex. Feb. 4, 2015) (quoting Voting for Am., Inc. v. Steen, 732 F.3d 382, 389–91 (5th Cir. 2013)), *aff'd*, 816 F.3d 73 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017).

59. Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 506 (5th Cir. 2001).

Amendment protections, courts now expect plaintiffs to provide clear and persuasive displays of how the challenged regulation violates their free speech rights when they invoke First Amendment protections.[60]

2. Commerical speech

Even constitutionally protected speech can fall within the purview of government regulation, depending on the nature of the regulation and the justifications behind it. In remanding *Expressions II* to the Second Circuit,[61] the Supreme Court suggested that the Second Circuit could consider New York's anti-surcharge law as a regulation on commercial speech,[62] which, though protected, is a type of speech that the government can lawfully regulate.[63] By carving out commercial speech as a subset of expression under the First Amendment, the Court acknowledges the increased complexity that arises when business and speech overlap and fuses First Amendment principles with states' valid interest in regulating business.[64]

The Supreme Court defines commercial speech as "expression related solely to the economic interests of the speaker and its audience."[65] This definition serves the speaker's economic interests and furthers society's goal of assisting consumers by fostering the fullest dissemination of information possible.[66] Commercial speech regulations partially stem from the idea that the speech "occurs in an area traditionally subject to government regulation."[67] Though courts now afford commercial speech First Amendment protections subject

60. *Voting for Am. Inc.*, 732 F.3d at 387–88 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984)) (stating that a party claiming a First Amendment violation has the burden to prove that the Amendment is implicated).

61. *Expressions II*, 137 S. Ct. 1144, 1146–47 (2017).

62. *See supra* Section I.A.

63. *See Ruane*, *supra* note 4, at 15 (pointing to the government's ability to regulate commercial speech "more than it may regulate fully protected speech").

64. *See id.* at 14–17 (showing how the *Central Hudson* four-factor test produces varied results in practice).

65. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (citing Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762–63 (1976)); *see also* Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 720 n.2 (1982) (articulating the two elements necessary for the commercial speech doctrine to apply: (1) its content must "promote the purchasing of goods or services" with (2) the purpose of advancing the speaker's financial interests).

66. *Central Hudson*, 447 U.S. at 561–62.

67. *Id.* at 561–63.

to government regulation, courts initially considered commercial speech unworthy of free speech protections altogether.[68]

The Court maintained its hardline stance against First Amendment protection for commercial speech for many years, justifying its denial of affording protections to commercial speech by considering the motivations of advertisers rather than the content of the expressions at stake.[69] It was more than twenty years before the Court adopted any precedent that challenged the ban against protecting commercial speech[70] and another ten years before the Court changed its approach by implementing a balancing test.[71] In the wake of this change, the Court continuously modified the level of protection afforded to commercial speech[72] until it decided *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[73] The analysis the Court used in this case remains the standard today.

a. The Central Hudson *test*

In *Central Hudson*, an electrical utility company challenged the constitutionality of a New York regulation that completely banned promotional advertising.[74] The ban was a direct response to New

68. *Weinberg, supra* note 65, at 722; *see also* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (elucidating that the Constitution imposes no restraints on commercial speech and deferring such matters to state legislative judgment).

69. *Weinberg, supra* note 65, at 722–23.

70. *Id.* at 723 (arguing that the first crack in the wall against protecting commercial speech appeared "almost offhandedly" in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), when the Court disposed of the argument that an advertisement in The New York Times constituted commercial speech instead of focusing on the content of the speech).

71. *See* Bigelow v. Va., 421 U.S. 809, 826 (1975) (instituting a balancing test that considered (1) the state interest served by the dissemination of the speech and (2) the government power advanced by regulation to determine whether commercial speech warranted First Amendment protections).

72. *Compare* Carey v. Population Servs. Int'l, 431 U.S. 678, 700–02 (1977), *and* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (establishing protection for commercial speech by creating a rule that prevented states from completely suppressing truthful and non-misleading advertisements because the advertisements would not have a harmful effect on consumers or advertisers), *with* Friedman v. Rogers, 440 U.S. 1, 12–13 (1979) (upholding a statute that banned the use of trade names because of the significant possibility that advertisers would use them to mislead the public), *and* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978) (declaring the constitutionality of and need for prophylactic regulations that further state interests by protecting the public).

73. 447 U.S. 557 (1980).

74. *Id.* at 559–60 (defining promotional advertising as "advertising intended to stimulate the purchase of utility services" (internal quotation marks omitted)).

York's inability to meet customer fuel demands during the winter of 1973–1974.[75] Three years later, a New York state commission requested comments to determine whether to continue the ban.[76] Though Central Hudson opposed the continuance of the ban on First Amendment grounds, the Commission extended it into the next year.[77] In deciding the case, the Supreme Court emphasized that the regulation restricted only commercial speech and articulated a four-part test to determine whether the regulation was constitutional.[78] The *Central Hudson* test evaluated (1) whether the speech concerns lawful activity and is not misleading,[79] (2) whether the government's asserted interest is substantial,[80] (3) whether the regulation directly advances the government interest, and (4) whether the regulation is more extensive than necessary to serve that interest.[81]

While *Central Hudson* articulated instructive guidelines, lower courts accepted the decision with a dose of skepticism and feared that it afforded too much discretion to courts.[82] Nonetheless, the *Central Hudson* test remains the Court's accepted standard for determining whether commercial speech is constitutionally regulated and serves as an integral component of anti-surcharge litigation.[83]

B. Understanding Anti-Surcharge Laws: The Federal Backdrop, the Circuit Split, and the Supreme Court

While understanding the nature of First Amendment protections and the purpose of allowing restrictions on some speech—namely commercial speech—is critical to understanding the context of anti-

---

75. *Id.* at 559.
76. *Id.*
77. *Id.*
78. *Id.* at 566.
79. This prong of the test aims to determine whether the First Amendment protects the expression in the first place. *Id.* If the expression is not constitutionally protected, it is unnecessary to continue the evaluation because there can be no First Amendment violation in the regulation of an unprotected expression. *Id.*
80. *See id.* At this point, the Court clarified that the first two inquiries must yield positive answers in order to advance to the third prong of the test. *Id.*
81. *Id.*
82. *See Weinberg, supra* note 65, at 728–30.
83. *See* Rowell v. Pettijohn, 816 F.3d 73, 79 (5th Cir. 2016) (noting the Court's traditional use of *Central Hudson*'s four-prong test when analyzing commercial speech cases), *vacated*, 137 S. Ct. 1431 (2017); Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1249 (11th Cir. 2015) (same), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017); *Expressions I*, 808 F.3d 118, 130 (2d. Cir. 2015) (same), *vacated*, 137 S. Ct. 1144 (2017).

surcharge laws, understanding the root of the laws and the layout of their litigation is equally important. Within the split among the three circuit courts that analyzed the constitutionality of the state-level anti-surcharge laws, each opinion first discussed the origins of the law: a lapsed federal scheme developed in the 1970s and 1980s. The courts interpreted the weight and meaning behind this scheme in different ways, but the Supreme Court's decision in *Expressions II* ultimately qualified the litigation in each circuit court.

1. The Truth in Lending Act

State anti-surcharge laws are rooted in a federal statutory scheme that emerged in the 1970s.[84] Regulations that eventually evolved into anti-surcharge laws first took shape with the 1974 amendments to the Truth in Lending Act ("the Act"), which prevented credit card companies from contracting with merchants to prohibit discounts for cash or other non-credit card purchases.[85] Before this amendment, credit card companies often followed such a practice to bar merchants from offering discounts on non-card transactions and imposing surcharges on card transactions.[86]

The 1976 amendments to the Act only banned merchants from imposing surcharges; merchants could still legally provide discounts for non-card purchases.[87] The Act 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";[88] the Act also defined "discount"[89] and "surcharge."[90] In 1981, Congress once again amended the Act—this time to define "regular

84. *See Rowell*, 816 F.3d at 76–77 (recounting the history of the federal anti-surcharge law that drove Texas to enact its own anti-surcharge law); *Expressions I*, 808 F.3d at 123 (outlining the federal anti-surcharge laws that started in 1974 and ended in 1981).

85. 15 U.S.C. § 1666f(a) (2017) (announcing that "the card issuer may not, by contract, or otherwise, prohibit any . . . 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").

86. *Rowell*, 816 F.3d at 76.

87. *Id.*

88. Pub. L. No. 94-222, § 3, 90 Stat. 197 (1976).

89. 15 U.S.C. § 1602(q) ("The term 'discount' as used in section 1666f of this title means a reduction made from the regular price. The term 'discount' as used in section 1666f of this title shall not mean a surcharge.").

90. § 1602(r) ("The term 'surcharge' as used in this section and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.").

price"[91] to "further distinguish between 'surcharge' and 'discount'" and provide clarity as to the kinds of pricing schemes allowed under the law.[92]

Despite twice renewing the surcharge ban, Congress let it expire on February 27, 1984.[93] Eleven states subsequently enacted their own laws prohibiting credit card surcharges—some of which have sparked the anti-surcharge litigation at issue—and the "operative language" of the state statutes effectively mimics the old federal surcharge ban.[94] The three courts forming the circuit split on whether anti-surcharge laws implicated free speech—the Second, Fifth, and Eleventh Circuits—considered this federal history in determining whether the state laws violated merchants' First Amendment protections.[95] The Supreme Court in *Expressions II* also recognized the federal regulatory history when it noted that the New York anti-surcharge law adopted "almost verbatim" the federal language.[96] Despite the connection to the federal scheme, the Court concluded that because New York failed to provide clarifying definitions within its law, the statute's wording remained open to at least three interpretations.[97] Similarly, though the three circuit court decisions—from the Second Circuit in *Expressions Hair Design v. Schneiderman* (*Expressions I*),[98] the Eleventh Circuit in *Dana's Railroad Supply*, and the Fifth Circuit in *Rowell v.*

---

91. § 1602(y) ("[T]he 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 similar means.").

92. Rowell v. Pettijohn, 816 F.3d 73, 76 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017).

93. *Expressions I*, 808 F.3d 118, 124 (2d. Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

94. *Id.*; *see infra* Part III (discussing the litigation surrounding the state laws).

95. *See generally Rowell*, 816 F.3d at 76 (addressing the history of the Truth in Lending Act as a precursor to state-imposed regulation); Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1249 (11th Cir. 2015) (noting the use of *Central Hudson's* four-prong test to adjudicate a commercial speech claim), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017); *Expressions I*, 808 F.3d at 123–24 (highlighting the credit surcharge legislation that led to state level credit regulations).

96. *Expressions II*, 137 S. Ct. 1144, 1154 (2017) (Sotomayor, J., concurring).

97. *See id.* (observing that one could read the statute either "in line with its plain text," "in line with the lapsed federal ban," or "more broadly"); *accord infra* note 178 and accompanying text.

98. 808 F.3d 118 (2d. Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

Pettijohn[99]—all acknowledged the influence of the federal statutory scheme, they promulgated distinct interpretations of anti-surcharge laws.

2. How the Circuit Courts analyzed anti-surcharge laws

a. Expressions Hair Design v. Schneiderman

In *Expressions I*, the Second Circuit held that New York's anti-surcharge law was a regulation of conduct, not speech, and therefore did not violate the First Amendment.[100] The case was based upon the claims of five New York businesses and their owners and managers who brought suit in the U.S. District Court for the Southern District of New York.[101] The plaintiffs claimed that section 518 of the New York General Business Law, which is an anti-surcharge law, violated the Free Speech Clause of the First Amendment and was void for vagueness under the Due Process Clause of the Fourteenth Amendment.[102]

The conflict in *Expressions I* centered around the plaintiffs' desire to impose a "surcharge" on credit card users[103] and the New York law's ban on surcharges for these transactions.[104] The Second Circuit acknowledged the apparent similarities between imposing a surcharge and providing a discount, but it noted that their differences led "to a series of efforts by both credit-card companies and legislators to prohibit credit-card surcharges specifically."[105] The Second Circuit considered consumer reactions to pricing schemes[106] and acknowledged the potential risks and benefits that anti-surcharge laws pose, implying that the laws may provide overarching benefits to consumers.[107]

---

99. 816 F.3d 73 (5th Cir. 2016), *aff'g* No. A-14-CA-190-LY, 2015 WL 10818660, at *1 (W.D. Tex. Feb 4, 2015), *vacated*, 137 S. Ct. 1431 (2017).

100. *See Expressions I*, 808 F.3d at 130.

101. *See id.* at 121, 122 n.1.

102. *Id.* at 122.

103. *Id.*

104. See N.Y. GEN. BUS. LAW § 518 (McKinney 1984), which states:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

105. *Expressions I*, 808 F.3d at 122.

106. *Id.* at 122–23 (describing the psychological phenomenon of "loss aversion"). In this case, loss aversion is the idea that applying surcharges is more effective in discouraging credit-card usage than providing discounts for alternative behavior. *Id.*

107. *Id.* at 123 (suggesting that "surcharges will tend to exceed the amount necessary for the seller to recoup its swipe fees, meaning that sellers will effectively be able to extract . . . profits from credit-card users"). Cash discounts do not pose the

The Second Circuit also described the federal statutory development[108] that informed subsequent state laws[109] and asserted that the New York law was one such law based on the Act.[110] Yet the New York law differed significantly from the previous federal law because it did not include the explicit definitions found in the original federal counterpart.[111] Yet when the New York legislature enacted the law, the legislature deemed it a necessary replacement of the lapsed federal scheme and intended it to prevent consumers from being subject to the whims of unpredictable and "dubious" merchant practices.[112]

The Second Circuit noted that while all plaintiffs desired to impose a higher price on customers paying with credit cards, only Expressions Hair Design had in place a dual-pricing scheme, or a pricing scheme that charges different prices depending on the method of payment.[113] However, Expressions Hair Design expressed a clear fear of being able to effectively communicate its pricing scheme without violating the relevant statute.[114] Further, all plaintiffs expressed a desire to characterize higher amounts for credit card transactions as "surcharges."[115] In its response, the Second Circuit acknowledged that it found that section 518 burdens speech by "draw[ing] the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities."[116]

The Second Circuit's analysis addressed the plaintiffs' wish to implement pricing schemes prohibited by the statute.[117] Yet the court criticized the plaintiffs because all attempts to demonstrate section 518's unconstitutionality referenced "other, hypothetical pricing

---

same risks "because merchants will not set the amount of the discount higher than the marginal cost of credit." However, surcharges might provide an opportunity for dishonest sellers to profit at the consumers' expense by tacking additional charges on at the end of a sale. *Id.*

108. *See supra* Section B.1 for a discussion of the federal statutory history.

109. *Expressions I*, 808 F.3d at 123–24.

110. *Id.* at 124.

111. *See id.* (detailing that the original federal law defined "surcharge," "discount," and "regular price"); *see also supra* Section II.A.

112. *Expressions I*, 808 F.3d at 124–25.

113. *Id.* at 129.

114. *See id.* (noting the plaintiff's hesitation to charge different prices for card-paying customers and cash-paying customers for fear of invoking section 518's statutory provisions).

115. *Id.*

116. *Id.* at 131 (quoting Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 444 (S.D.N.Y. 2013)).

117. *Id.* at 129 (explaining that "section 518 clearly prohibits" the plaintiffs' desired pricing schemes).

schemes that they neither currently employ . . . nor claim they would employ but for [s]ection 518."[118] Further, the court clearly stated that a statute's constitutionality may only be assessed as applied to hypothetical situations when the plaintiffs assert a facial attack on the statute,[119] and it described the two kinds of facial challenges generally available in First Amendment cases.[120]

While the court established that there might be uncertainty as to the scope of the plaintiffs' First Amendment challenge, this understanding did not affect the court's analysis.[121] The Second Circuit held that the statute did not violate the First Amendment because (1) prices do not qualify as "speech" within the meaning of the First Amendment, regardless of the fact that they are necessarily communicated through language; (2) it follows that if prohibiting certain prices does not implicate the First Amendment, then prohibiting certain relationships between prices also does not implicate the First Amendment; and (3) section 518 does not, by its terms, prohibit merchants from referring to credit-cash price differentials as credit-card surcharges or from engaging in advocacy related to such surcharges. The regulation simply prohibits the actual imposition of surcharges.[122] The Second Circuit concluded that all that New York's section 518 regulates is the difference between the number that a merchant puts on a price sticker and the ultimate amount that it charges credit card customers.[123]

b. Dana's Railroad Supply v. Attorney General of Florida

In *Dana's Railroad Supply*, the Eleventh Circuit produced an analysis and conclusion far different from the *Expressions I* opinion when it scrutinized an anti-surcharge law that was substantially similar to the

118. *Id.*

119. *Id.* (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)).

120. *Id.* (quoting Wash. State Grange, 552 U.S. at 449, 449 n.6) (naming the two challenges as "(1) 'that the law is unconstitutional in all of its applications,' or (2) that 'a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep'").

121. *Id.* at 130.

122. The "central flaw in [the plaintiffs'] argument," according to the court, was that they insisted on equating the actual imposition of a surcharge ("to charge an additional amount above the sticker price to . . . credit-card customers") with the words describing that pricing scheme (that "the term 'credit-card surcharge'" is inherently attached to the prohibited behavior described in the statute). *Id.* at 131–32.

123. *Id.* at 132.

New York law in scope and application.[124] The Eleventh Circuit relied upon an imagined scenario to hold not only that an anti-surcharge law merited a First Amendment analysis, but also that it unlawfully restricted speech.[125] In *Dana's Railroad Supply*, four small businesses brought suit in the Middle District of Florida after receiving cease-and-desist letters following each merchant's violation of the state's anti-surcharge law.[126] Each business wished to charge different prices for credit card and non-credit card transactions, and each business wished to express the price difference "as an additional amount for credit-card use rather than a lesser amount for paying in cash."[127]

The district court held that the law was a regulation on economic affairs—not speech—and as such subjected it to rational basis review.[128] Finding that the law passed rational basis review, it declined to apply any level of First Amendment scrutiny and instead upheld the anti-surcharge law.[129] The Eleventh Circuit on appeal, however, disregarded the district court's analysis and employed its hypothetical restaurant scenario to determine that the statute raised First Amendment concerns.[130] As a result, the court turned to the commercial speech analysis and applied *Central Hudson*'s intermediate scrutiny test.[131] It subsequently held that the law failed intermediate scrutiny[132] and therefore directly restricted speech by merely attempting to control conduct in response to the speech.[133]

In a pointed dissent, Chief Judge Edward Earl Carnes focused on the majority's failure to acknowledge and analyze the narrow language of the statute.[134] In doing so, he argued that the majority had "rewritten

---

124. *See* Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235 (11th Cir. 2015) (holding Florida's anti-surcharge statute constitutional), *rev'g* Dana's R.R. Supply v. Bondi, No. 4:14CV134-RH/CAS 2014 WL 11189176, at *1 (N.D. Fla. Sept. 2, 2014).

125. *Id.* at 1246.

126. *Id.* at 1239.

127. *Id.*

128. *Id.* at 1240.

129. *Id.* at 1240–41.

130. *Id.* at 1245 (analogizing the statute at issue with a hypothetical statute that bars restaurants from selling "half-empty beverages" but authorizes restaurants to sell "half-full beverages," and concluding that such a statute would clearly regulate speech rather than economic affairs).

131. *Id.* at 1249; *see also supra* Section I.A.

132. *Dana's R.R. Supply*, 807 F.3d at 1249–51.

133. *Id.* at 1251 (holding the statute unconstitutional because it regulates the language that merchants may use to convey their prices rather than the prices themselves).

134. *Id.* at 1251–52 (Carnes, J., dissenting).

[the statute] with a great big First Amendment bullseye on it."[135] Further, Carnes criticized the opinion for developing "a fatal constitutional flaw," and argued that the plaintiffs actually brought a facial challenge without claiming that the statute is overbroad.[136] A facial challenge not based on overbreadth can only succeed by demonstrating that there is "'no set of circumstances' . . . where the law could be validly applied[,]" and Carnes concluded the plaintiffs failed to do so in that case.[137]

c. Rowell v. Pettijohn

In *Rowell v. Pettijohn*, the Fifth Circuit relied upon *Expressions I* to conclude that Texas's anti-surcharge law did not violate the First Amendment. In that case, a group of Texas merchants claimed that an anti-surcharge law, which penalized characterizing prices as a "surcharge" and simultaneously allowed for discounts on non-credit card transactions, violated free speech rights.[138] Conversely, the Texas Office of Consumer Credit argued that the statute was a lawful economic-pricing regulation that did not implicate the First Amendment.[139]

The Fifth Circuit considered many aspects of the case before coming to its conclusion, including the federal history that led to the Texas law.[140] The court acknowledged that the district court dismissed the challenge at hand for failure to state a claim, denying a preliminary injunction,[141] and it then considered the circuit split resulting from the decisions of the Second and Eleventh Circuits, tracing and comparing the analyses of each case before arriving at the beginning of its own analysis.[142] This trail led the court to conclude that similar to the cases in the Second and Eleventh Circuits, the merchants in this action adequately conveyed that "they were presently chilled from implementing

135. *Id.* at 1252.
136. *Id.* at 1253–54.
137. *Id.* at 1254.
138. *See* Rowell v. Pettijohn, 816 F.3d 73, 75–76 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017).
139. *Id.* at 76.
140. *Id.* (detailing the "substantial federal-law backdrop" stemming from the 1974 amendments to the Truth in Lending Act to the expiration of the relevant provision in 1984).
141. *Id.* at 77 (citing Rowell v. Pettijohn, No. A-14-CA-190-LY, 2015 WL 3637101 (W.D. Tex. 4 Feb. 2015)).
142. *Id.* at 76–80.

their preferred pricing scheme, and . . . had standing based on a credible fear [that Texas's law] would be enforced against them."[143]

The Fifth Circuit addressed the wide latitude afforded to states in regulating their economic activities.[144] It recognized that states are able to adopt any economic policy deemed reasonably necessary to promote the welfare of the state and that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."[145] The court quickly concluded that, in line with state economic policy, the law regulated conduct as opposed to speech, and the First Amendment was therefore not implicated.[146] The court found that the law ensured that merchants did not impose charges above the regular price for customers paying with credit cards.[147]

The Fifth Circuit's conclusion derived from the text of the Texas law—which the court considered analogous to that of the New York law in *Expressions I*[148]—and from the ability of the anti-surcharge law to fit neatly into the place of the lapsed federal scheme.[149] Further, the court supported its conclusion with the legislative history's indication that Congress enacted the law to regulate conduct by prohibiting charges above a "normal" price.[150] Therefore, the merchants' argument that the law regulated speech rather than conduct was "unavailing."[151]

In concluding this, the court relied on the Second Circuit's holding in *Expressions I* and aligned its analysis with that of its sister court. In the Fifth Circuit's view, the Eleventh Circuit's analysis "overlook[ed] differences in the economic activity" that resulted in an incorrect analysis.[152] However, the Supreme Court soon questioned the Fifth and Second Circuits' analyses by holding that New York's anti-surcharge law is a regulation of speech.

---

143. *Id.* at 80 (internal quotation marks omitted) (quoting *Expressions I*, 803 F.3d 118, 127 (2d. Cir. 2015)) (citing Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1241 (11th Cir. 2015), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017)).

144. *Id.* (quoting Howard v. City of Garland, 917 F.2d 898, 901 (5th Cir. 1990)) ("States are accorded wide latitude in the regulation of their local economies under their police powers.").

145. *Id.* (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).

146. *Id.*

147. *Id.*

148. *Id.* at 81.

149. *Id.*

150. *Id.* at 81–82 (citing *Hearings on Tex. H.B. 1558 Before the House Comm. on Fin. Insts.*, 69th Leg. Reg. Sess. (Tex. 1985)).

151. *Id.* at 82.

152. *Id.* at 83.

3. How the Supreme Court analyzed anti-surcharge laws

The Supreme Court took on the anti-surcharge law circuit split when it granted certiorari to *Expressions I.* In a fractured but unanimous opinion, the Supreme Court in *Expressions II* ruled that New York's anti-surcharge law regulates speech.[153] Chief Justice Roberts delivered the majority opinion, detailing the practical implications of the law[154] and asserting that the two issues of the case were whether the law regulated speech and whether it violated the First Amendment.[155] As in the circuit court cases, Roberts began his opinion by providing the history of anti-surcharge laws, tracing their derivation to the Truth in Lending Act's 1976 amendments[156] and making specific note of the definitions provided through the Act.[157] According to Roberts, the definitions provided one major advantage for the law: they demonstrated that "a merchant could violate the surcharge ban only by posting a single price and charging credit card users more than that posted price."[158] Before introducing the petitioners, Roberts noted the expiration of the federal bans, the birth of the state legislation, and the history of the credit card contract prohibitions on swipe fees.[159]

Curiously, Roberts's opinion emphasized the New York merchant petitioners' arguments that they were not responsible for the higher credit card prices and that the credit card companies, not the merchants, were "the bad guys."[160] Roberts also explained the procedural posture of *Expressions II,* indicating that the Second Circuit relied on Supreme Court precedent to determine that price regulations limit conduct, not speech, and that the anti-surcharge law therefore did not violate the First Amendment.[161] He noted that the Second Circuit abstained from the merits of the constitutional

153. *Expressions II,* 137 S. Ct. 1144, 1150–51 (2017).

154. *Id.* at 1146 ("Each time a customer pays for an item with a credit card, the merchant selling that item must pay a transaction fee to the credit card issuer. Some merchants . . . pass on the fees to customers who use [credit cards]. One method of achieving those ends is through differential pricing—charging credit card users more than customers using cash.").

155. *Id.*

156. *Id.* at 1147–48 (discussing the 1976 amendments' bar on credit card surcharges).

157. *Id.* (discussing how discount and surcharge were defined in the 1974 amendments while the 1981 amendments incorporated a definition of regular price to provide increased clarity on the statute's pricing requirements).

158. *Id.* at 1147.

159. *Id.* at 1148.

160. *Id.* at 1149.

161. *Id.* at 1149–50.

question beyond the single-sticker price context[162] because the federal laws only applied to single-sticker price regimes and the merchants did not clearly show that New York's law had a broader reach than the federal law.[163] The merchants maintained they were only bringing an as-applied challenge against New York's law,[164] and Roberts concluded that this challenge limited the Court's own review to whether the statute was unconstitutional as applied to the pricing scheme that the merchants wished to employ.[165]

Roberts and the Court adopted the Second Circuit's definition of surcharge[166] to conclude that the New York law barred the merchants' desired pricing regime.[167] He then asserted that the law "[was] not a typical price regulation" because it does not tell merchants about the amount they may collect; rather, the law attempts to regulate "how sellers may communicate their prices."[168] Roberts agreed with the Second Circuit that the law regulated the relationship between the sticker price and the price charged to credit card users, but he did not conclude that the law was a mere price regulation.[169] As such, he determined that the law regulated speech and remanded the case for the Second Circuit to analyze whether the law is either a valid commercial speech regulation or a valid disclosure requirement.[170]

Justice Stephen Breyer wrote the first concurrence of the opinion, agreeing that the statute regulated speech, but arguing that the correct inquiry is whether the law "affects an interest that the First Amendment protects."[171] Breyer asserted that for the statute to pass constitutional muster, the law need only be reasonably related to the state's interest

---

162. *Id.* at 1149 (describing single sticker pricing as where merchants post one price and would like to charge more to customers who pay by credit card).

163. *Id.* at 1148.

164. *Id.* at 1149 (discussing how the Second Circuit interpreted the merchants' statutory challenge as both a facial attack and an as-applied attack).

165. *Id.* (describing the pricing regime sought by petitioners: "posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount").

166. *Id.* at 1149–50 (indicating that the lower court defined surcharge as "an additional amount above the seller's regular price," and that the Court had to adopt the definition because it was unable to dismiss it as "clearly wrong").

167. *Id.* at 1151.

168. *Id.*

169. *Id.* (holding that because the law regulates the way in which prices are communicated instead of just the prices themselves, it cannot be a mere price regulation).

170. *Id.* at 1151–52. The Court then concluded that the merchants' additional challenge—that the law was vague as applied to them—was dismissed. *Id.*

171. *Id.* at 1152 (Breyer, J., concurring).

in having commercial speakers disclose factual information to consumers.[172] Breyer's premise was that the more important determination of the case is understanding what approach to apply to the law, not merely identifying a regulation as one of speech rather than as one of conduct.[173] He concluded by emphasizing that the statute is unclear and that it is a matter of state law to decipher its meaning; remanding the case was therefore correct.[174]

Justice Sonia Sotomayor, joined by Justice Samuel A. Alito, Jr., provided a more complex concurrence, asserting that the Court should have remanded the case to the Second Circuit with specific instructions to certify the case to the New York Court of Appeals for a complete interpretation of the statute.[175] Sotomayor argued that due to the various interpretations of the New York statute,[176] the petitioners required a clear interpretation to resolve their challenge.[177] Sotomayor further argued that the Second Circuit's interpretation of the statute would be non-binding because state courts, not federal courts, have the final word on the interpretation of state statutes.[178] Sotomayor ultimately concluded that the Court's decision not to certify was an abuse of its discretion.[179] However, Sotomayor noted that the majority did not preclude the Second Circuit from choosing certification on remand and suggested that certification would be the correct path.[180]

Ultimately, the Court only clarified the first portion of the maze: that New York's anti-surcharge law regulates speech, not conduct.[181]

---

172. *Id.*

173. *Id.* (finding that "determining the proper approach is typically more important than trying to distinguish 'speech' from 'conduct'").

174. *Id.* at 1153 (concluding, also, that it would be helpful for the Second Circuit to ask the New York Court of Appeals to clarify the nature of the obligation imposed by the statute).

175. *Id.* (Sotomayor, J., concurring).

176. *Id.* at 1153–54 (arguing that the statute could be interpreted as a prohibition on charging credit card customers more money than other customers; preventing a merchant from displaying only the cash price and then charging a different credit price; or restricting the way that a merchant may characterize a higher credit price, despite being able to charge a higher price).

177. *Id.* at 1155–56.

178. *Id.* at 1156 (discussing the possibility of abstention, but describing it as "a blunt instrument" and arguing in favor of certification).

179. *See id.* at 1158–59 (summarizing that the Second Circuit's failure to provide "persuasive downsides" to certifying the case reflected an abuse of discretion).

180. *See id.* at 1159 (proffering the solution of vacating the Second Circuit's judgment and remanding the case with instructions to certify it in the New York Court of Appeals).

181. *Id.* at 1158–59 (concluding that the Second Circuit offered no decision as to the constitutionality of New York's section 518).

The Second Circuit will act under the Court's direction on remand; however, if it deems the law a regulation on commercial speech, it could either follow the Eleventh Circuit to find that New York's anti-surcharge law does not pass even an intermediate level of First Amendment scrutiny, or recognize the state interests at stake to find that the law survives *Central Hudson.*

II. THE PROBLEM WITH HYPOTHETICALS

Taking into account the variety of ways that courts have interpreted anti-surcharge laws—including the Eleventh Circuit's imagined restaurant scenario—consider a revised version of the introductory hypothetical. Suppose that while drafting the hypothetical restaurant mandate, Florida's legislators realize courts will likely invalidate the glass half-full scheme as a violation of free speech.[182] Rather than move forward with the plan, they re-draft the legislation in a way that is constitutionally permissible but still regulates the restaurant industry to restore Florida's reputation. The goal is to prevent restaurant owners from pouring drinks too conservatively, while allowing them to safeguard resources by incentivizing customers to purchase half-full drinks. Recognizing the wide latitude afforded to states in regulating business conduct and its substantial interest in saving both its restaurant and tourism markets, Florida devises a three-part law to regulate commercial speech, effective immediately.

The revised hypothetical statute provides that (1) no restaurant may impose a surcharge on customers who request that restaurants pour their drinks to the maximum capacity of the glass; (2) restaurants may, however, provide a discount for customers who request restaurants pour their drinks less than halfway to capacity; and (3) a surcharge is defined as any additional amount that increases the charge to a customer who requests a fully poured drink. Violation of the law results in the possibility of fifty days imprisonment or a $500 fine.

While Florida is confident that this new law will help restore the dining industry, restaurant owners are unhappy with the change. They wish to charge higher prices to customers ordering drinks filled to capacity and lower prices to customers ordering drinks filled less than halfway. More specifically, they wish to express the price as an additional charge for a fully poured beverage—not a discount for a partially poured beverage. They file suit against the state, alleging that the law violates the First Amendment by creating an unjustified restriction on speech. These challenges now task Florida courts with assessing the

182. See *supra* note 1 and accompanying text for a discussion of this hypothetical.

new law and deciding whether it is a lawful regulation of commercial speech or an unconstitutional violation of the First Amendment.

However unlikely the hypothetical, this revised version looks much more like the anti-surcharge law litigated in the Eleventh Circuit.[183] It is also clear that there is a higher level of complexity in this hypothetical than in the glass half-full scenario on which the Eleventh Circuit relied.[184] Moreover, this new hypothetical highlights the two most significant shortcomings of the Eleventh Circuit's analysis: (1) that its argument relied too heavily on an over-simplified hypothetical; and (2) that as a result, it mischaracterized the law to conclude that it did not serve a significant government interest and could not survive intermediate scrutiny.[185] Florida's law failed the Eleventh Circuit's intermediate scrutiny analysis because it analyzed the law through this inherently flawed lens.

A. The Eleventh Circuit relied too heavily on its hypothetical, arbitrarily construing a First Amendment violation

To avoid potential confusion, the Eleventh Circuit began its First Amendment analysis by examining what the Florida statute did not do, concluding that it did not ban merchants from engaging in dual-pricing or prohibit merchants from imposing bait-and-switch schemes.[186] The court's next conclusion—that the statute "target[ed] expression alone"—ended its First Amendment analysis quickly and by default.[187] The court decided this through use of the previously described hypothetical that equated surcharges to negative

183. The Florida anti-surcharge statute provides in part: "(1) A seller . . . may not impose a surcharge . . . for electing to use a credit card . . . . A surcharge is any additional amount imposed at the time of a sale . . . by the seller or lessor that increases the charge . . . for the privilege of using a credit card to make payment . . . . This section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers." Fla. Stat. § 501.0117 (2016).

184. *See supra* Section I.B.2.b.

185. *See* Dana's R.R. Supply v. Att'y Gen. of Fla., 807 F.3d 1235, 1249 (11th Cir. 2015), *rehearing denied en banc*, 809 F.3d 1282 (11th Cir. 2016), *cert. denied sub nom.* Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017).

186. *Id.* at 1243–44 (examining alternative statutory aims that could demonstrate both a regulation of conduct and a significant government interest).

187. *Id.* at 1245.

discounts,[188] and the court then subjected the statute to "the robust protections of the First Amendment."[189]

At face value, the Eleventh Circuit's analysis was problematic because of the simplicity of its hypotheticals. The glass half-full mandate diluted the issue to an extent that overlooked the possibility that the statute regulated conduct and contradicted the court's earlier declaration that the First Amendment issue was likely to spark confusion.[190] On a structural level, the analysis was problematic because it diminished the statute's intent from the get-go. It mischaracterized the law as one that discriminated "on the basis of the speech's content, the identity of the speaker, and the message being expressed," which conditioned the law for failure under *Central Hudson*.[191] Further, the Eleventh Circuit cherry picked from the district court's opinion to bolster its own position.[192] It repeatedly quoted the district court's assertion that while there were several possible state interests that would justify the regulation, none were "compelling."[193] However, the Eleventh Circuit blatantly ignored the district court's concession that the law would still survive intermediate scrutiny under *Central Hudson*.[194] This selective extrapolation of favorable facts and legal reasoning further demonstrates how the court's decision was a conclusive product of its own making rather than an informed result of legal analysis. The lack of an even-handed approach suggests that the reasoning leading to its First Amendment violation was flawed.

The Eleventh Circuit's reliance on hypotheticals also made it an easier target for the dissent, which argued that the majority crafted its own "statute-killing" definition of surcharge despite the statute's

---

188. *Id.* (proposing that there was no real-world difference in considering whether a copy of Plato's *Republic*—sold either for $30 cash or $32 credit—means that a customer incurs a $2 surcharge or receives a $2 discount).

189. *Id.* at 1245–46 (using the hypothetical "[t]o more fully understand why the statute restricts speech, rather than regulates conduct").

190. *See id.* at 1243, 1245–46 (asserting at the outset of the opinion that Florida's surcharge law does not ban dual-pricing, and later concluding that the law only prohibits implementing price choices).

191. *Id.* at 1239.

192. *See, e.g., id.* at 1249–50 (asserting that the district court's hypothesis about the state's purported interest was more concrete than that offered by either party).

193. *Id.*

194. Dana's R.R. Supply v. Bondi, No. 4:14CV134-RH/CAS 2014 WL 11189176, at *2 (N.D. Fla. Sept. 2, 2014) ("[I]f this were viewed as a restriction on commercial speech, the outcome would be the same; this statute passes muster under the commercial-speech standards imposed in cases like *Central Hudson*").

narrow definition of the term.[195] Chief Judge Carnes began his dissenting First Amendment analysis by looking to the language of the statute.[196] He emphasized that the Florida statute defined a surcharge as "any additional amount imposed at the time of a sale . . . that increases the charge . . . for the privilege of using a credit card to make a payment,"[197] and he argued that the majority's reasoning only made sense under its own misreading of the statute.[198] Moreover, Carnes highlighted that if the majority were to apply the narrow statutory definition of surcharge imposed by the statute itself, the majority's constitutional analysis would crumble.[199] He noted that the majority's defective statutory interpretation was consistent with its unwavering attachment to the hypothetical restaurant scenario because both hinged on extraneous details construed by the court.[200]

Despite the comfort with which the Eleventh Circuit applied its hypotheticals, the Second Circuit is unlikely to employ such conclusive reasoning when it reviews *Expressions II* on remand. When it initially heard the case, the Second Circuit criticized the plaintiffs because throughout litigation, they relied on hypothetical pricing schemes that they did not employ and did not wish to implement.[201] Similar to the imagined facts of the hypothetical crafted by the Eleventh Circuit, the plaintiffs' proffer of hypotheticals in *Expressions I* stray from the actual facts of the case. In *Expressions I*, the plaintiffs articulated irrelevant hypotheticals by crafting pricing schemes that they did not seek to employ, and the Eleventh Circuit posed a hypothetical that simplified

195. *Id.* at 1251 (Carnes, C.J., dissenting).

196. *Id.* (discussing different interpretations of the term "surcharge"). For a similar statutory analysis, see *Expressions I*, 808 F.3d 118 (2d. Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

197. *Dana's R.R. Supply*, 807 F.3d at 1251 (Carnes, C.J., dissenting) (citing N.Y. Gen. Bus. § 518 (McKinney 1984)).

198. *Id.* at 1252 (Carnes, C.J., dissenting) (quoting Stansell v. Revolutionary Armed Forces of Colom., 704 F.3d 910, 915 (11th Cir. 2013)) (noting that the majority was wrong to reject the statute's narrow definition of surcharge in favor of its own colloquial understanding of the word, and asserting that when a statutory definition exists the court "must follow the well-established and common sense principle that 'statutory definitions control the meaning of a statute's terms'").

199. *Id.* (expressing bewilderment that the majority defined a surcharge as a negative discount and a discount as a negative surcharge in favor of reading the plain language of the statute).

200. *Id.* (describing the bullseye strategy of the majority opinion).

201. See *Expressions I* for a similar statutory analysis. 808 F.3d 118, 129 (2d. Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

the First Amendment issue to an unrecognizable extent.[202] Because the Second Circuit already demonstrated the futility of posing irrelevant scenarios in the absence of an argument that challenges the facial validity of a statute,[203] it should not follow or be persuaded by the Eleventh Circuit's analysis.

III. RE-INTERPRETING *EXPRESSIONS* AS A REGULATION ON SPEECH

When the Supreme Court unanimously remanded *Expressions II* to the Second Circuit, it potentially opened the door to an extended interpretation of First Amendment violations that "could draw into question large swaths of consumer protection regulation."[204] However, under the interpretation that the New York law regulates speech, not conduct, the Supreme Court correctly remanded the case for the Second Circuit to resolve its constitutionality.

While the Court did not definitively instruct the Second Circuit's further analysis, it did provide the Second Circuit with several routes for a remedy.[205] Given the development of the litigation and the history of the New York statute, the Second Circuit should deem the law a regulation on commercial speech. With that understanding, it should apply *Central Hudson* and conclude that the law is able to survive intermediate scrutiny and withstand constitutional muster. On the other hand, if the Second Circuit declines to interpret the statute as a regulation on commercial speech, it should either certify the case to the New York Court of Appeals for a clear interpretation of the statute,[206] or it should interpret the law as a factual disclosure requirement and deem it constitutional.

A. On remand, the Second Circuit should find that New York's law escapes the strict scrutiny of traditional First Amendment analyses and survives the intermediate scrutiny of Central Hudson

During the Second Circuit's hearing of *Expressions I*, New York maintained that even assuming the anti-surcharge law was subject to the First Amendment as a regulation on speech, it escaped strict scrutiny because it was a justifiable regulation under *Central Hudson*'s

202. *See id.*; *Dana's R.R. Supply*, 807 F.3d at 1245–46 (concluding that the "glass-half-full" scenario is exactly synonymous with the anti-surcharge law in regulating the choice between "equally plausible" values).

203. *See Expressions I*, 808 F.3d at 129.

204. *See* Moloshok, *supra* note 23, at 1.

205. *See supra* Section I.B.3 for a discussion of the court's suggestions.

206. *See supra* notes 169–80 and accompanying text.

intermediate scrutiny analysis.[207] The Supreme Court declined to consider this question in the first instance and remanded the case with the expectation that the parties could raise it in the lower court.[208] On remand, the Second Circuit should find that even though New York's law does regulate speech, it regulates *commercial* speech, and an application of the *Central Hudson* test demonstrates that the statute survives intermediate scrutiny.

Under the *Central Hudson* test—which indicates when commercial speech is either protected from unwarranted government regulation under the First Amendment or subject to government regulation for the purpose of guaranteeing a greater public interest[209]—the New York law is properly regulated as commercial speech. When conducting its *Central Hudson* analysis of New York's anti-surcharge law, the Second Circuit will likely consider the case's definition of commercial speech: "[an] expression related solely to the economic interests of the speaker and its audience."[210] Under this definition, New York's law falls within the commercial speech doctrine as an expression about pricing that relates solely to the economic interests of both the merchant ("the speaker") and the consumer ("its audience").[211]

The first prong of the test inquires whether the speech concerns lawful activity and is not misleading, therefore assuring that the speech is the kind protected by the First Amendment.[212] The New York statute easily passes this requirement. The statute describes lawful activity—the exchange of payment between merchant and consumer—and is not misleading as it clearly conveys that the regulation applies in merchant customer exchanges where the merchant may wish to make a purchase with a credit card.[213]

---

207. *Expressions I*, 808 F.3d at 130.

208. *Expressions II*, 137 S. Ct. 1144, 1152 (2017).

209. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (articulating the four-pronged test: (1) determine whether the speech concerns lawful activity and is not misleading; (2) evaluate whether the asserted governmental interest is substantial; (3) assess whether regulation directly advances the government interest; and (4) assert that it is not more extensive than is necessary to serve that interest).

210. *Id.* at 561 (affixing the commercial speech label to an order requiring New York electric utilities to cease all advertising that promotes the use of electricity).

211. *Id.*

212. *See id.* at 563 (asserting that the First Amendment does not protect information intended to deceive its listeners).

213. N.Y. Gen. Bus. Law § 518 (McKinney 1984); *Expressions II*, 137 S. Ct. at 1151 (concluding that the merchants' vagueness challenge against the statute gave the Court "little pause").

The second prong of the test asks whether the asserted government interest is substantial.[214] When it applies this prong to the New York law, it is likely that the Second Circuit will employ a different approach than the Eleventh Circuit, finding that the government interest is substantial. The Supreme Court has repeatedly held that states are best suited to create laws amenable to their citizens, and states are thus given wide latitude to regulate their economies as they see fit.[215] The differences in the states' anti-surcharge laws evidence the states' ability to regulate according to the needs of their people. Though the laws work to accomplish similar ends, they all contain slight variations in reaching those goals.[216] Therefore, the second prong is likely satisfied.

Prong three asks whether the regulation directly advances the governmental interest asserted.[217] Again, this is likely satisfied. New York's asserted government interest is to prevent merchants from passing credit card swipe fees onto their customers, and New York's law does exactly that. Its purpose and effect is to disallow stores from passing swipe fees along to customers.[218] As such, it advances the state interest in preventing consumers from being subject to the fees that accompany a credit card swipe. Further, it perpetuates the broader government interest of giving states the authority to determine and implement the best business regulations for their specific communities.[219] A failure to acknowledge this as an important state interest would undermine New York's ability to govern autonomously and would disrupt longstanding precedent in allowing states to develop their own economically focused legislation.

The fourth prong ensures that the regulation is not more extensive than necessary to serve that government interest.[220] Again, the court would likely find that the New York law satisfies this prong of the test. While the law does regulate speech, it is not so restrictive as to prevent merchants from engaging in dual-pricing systems or to require them to convey specific messages about credit card swipe fees. Additionally, it does not proscribe the exact language that stores must use in

214. *See Cent. Hudson Gas*, 447 U.S. at 566 (laying out the four-part test).
215. *See supra* Section II.A.
216. *See supra* note 187 and accompanying text.
217. *See supra* note 187 and accompanying text.
218. *See Expressions II*, 137 S. Ct. at 1151.
219. *See* Nebbia v. New York, 291 U.S. 502, 523 (1934) (holding that it is both the state's right and burden to have the autonomy to implement the most effective business regulations for its citizens).
220. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

communicating with consumers and does not stop merchants from expressing their preferred payment methods. What New York's law does is eliminate the possibility that merchants may shift swipe fees onto the customer. It restricts merchants from erroneously adding charges to their consumer base and protects customers from being bombarded with unfair or unnecessary fees. As such, the Second Circuit would likely find the law satisfies the final element of the test, concluding that the law survives the intermediate scrutiny of *Central Hudson.* Consequently, the Second Circuit should find that New York's law does not violate the First Amendment.

B. If the Second Circuit does not interpret New York's anti-surcharge law as commercial speech, it should either certify the case to the Court of Appeals or interpret the law as a valid disclosure requirement

The lack of clarity surrounding New York's statute permeated the Court's opinion in *Expressions II.*[221] If the Second Circuit concludes that it cannot classify the law as a regulation of commercial speech, it is likely because of the amount of confusion surrounding the law and its purpose. If this comes to pass, the court should certify the case to the New York Court of Appeals so that the state court may provide a definitive interpretation of the law. The New York Court of Appeals' interpretation would allow the Second Circuit to finally determine whether the law violates the First Amendment.[222]

Alternatively, the Second Circuit might recognize the speech regulated by New York's law as merely "factual and uncontroversial information" about merchant pricing schemes.[223] If the Second Circuit understands the law in this way, it would find *Central Hudson* inappropriate because even intermediate scrutiny might be too severe a test. The Second Circuit would then consider the law a mere disclosure requirement for merchants and would only require that it be reasonably related to New York's interests. It is possible that because the Second Circuit previously interpreted New York's law as a regulation of conduct rather than one of speech, the court is more

---

221. *See Expressions II,* 137 S. Ct. 1144, 1151 (2017) (proposing the various ways in which the law could be applied and may be argued upon remand).

222. *See supra* notes 180–84 and accompanying text (suggesting the Second Circuit will follow the Eleventh Circuit's finding that the surcharge law does not pass even intermediate scrutiny).

223. *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (detailing that speech with a minor impact on First Amendment interests need only be reasonably related to a state's interests to pass constitutional muster).

concerned with applying First Amendment scrutiny to the kinds of interests that the Amendment seeks to protect, and is therefore inclined to treat New York's law as a disclosure requirement. This interpretation would closely align with Justice Breyer's perspective, taking a narrower approach to the First Amendment by concentrating on the interests implicated by the kind of speech at stake.

If the Second Circuit does not automatically interpret the law as a regulation of commercial speech, the ambiguity surrounding the statute and its effects on business and consumer relations should be at the forefront of the court's analysis.

CONCLUSION

First Amendment protections are inextricably tied to notions of liberty and freedom—and rightfully so. The Amendment ensures that citizens are not subject to the whims of an oppressive government; it ensures civil society's ability to think, to change, and to create; it is what assures that expressions are not overly monitored or unnecessarily regulated and delineates what it means to live in a free society. While the Amendment's scope is contentious and always has been, construing attacks on speech where they do not exist trivializes its freedoms. Finding First Amendment violations in anti-surcharge laws thus belittles the expressions that the Amendment protects.

By treating Florida's anti-surcharge law as a First Amendment violation, the Eleventh Circuit misconstrued commercial speech jurisprudence to favor its own loosely related hypothetical. In reviewing *Expressions II* on remand, the Second Circuit should be careful not to do the same. Because New York's law fits the category of commercial speech and because longstanding emphasis on each state's interest in regulating its economic activity demonstrates that the law should survive intermediate scrutiny under *Central Hudson*, the law does not pose a First Amendment violation. Even if the Second Circuit does not interpret the law as a regulation on commercial speech, the uncertainty surrounding the law's meaning and the economic nature of the law preclude it from receiving the severe treatment of the strict scrutiny analysis found in traditional speech regulations.

On remand, the Second Circuit should recognize that regardless of the way it interprets New York's anti-surcharge law, an overextension of the First Amendment only harms free speech. As such, finding an anti-surcharge law to be a First Amendment violation marks an irresponsible extension of constitutional liberties.