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PLAYING WORD GAMES WITH NEW YORK'S NO SURCHARGE LAW

*Katie Coggins**

I. INTRODUCTION

A handful of states, including New York, have laws that prohibit retailers from imposing an additional fee or surcharge on purchases made by credit.¹ The purpose of these “no surcharge” laws is to protect consumers from unpredictable price increases at the register, and ultimately, to protect retailers from decreased sales.² No surcharge laws encourage merchants to have a uniform price for all forms of payment, which then allow customers to depend on that uniform sticker price for their purchases.³ Also, customers are not

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¹ David L. Hudson Jr., *Cash or Credit?*, 102 A.B.A.J. 17 (2016). States that have a “no surcharge” law similar to New York include California, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, Oklahoma and Texas. See CAL. CIV. CODE § 1748.1 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.); COLO. REV. STAT. ANN. § 5-2-212 (West, Westlaw through laws effective Apr. 18, 2017 of the First Reg. Sess. of the 71st Gen. Assemb. (2017)); CONN. GEN. STAT. ANN. § 42-133ff (West, Westlaw through enactments of Public Acts enrolled and approved by the Governor on or before May 16, 2017 and effective on or before May 16, 2017); FLA. STAT. ANN. § 501.0117 (West, Westlaw through chapters from the 2017 First Reg. Sess. of the 25th Leg. in effect through May 9, 2017); KAN. STAT. ANN. § 16a-2-403 (West, Westlaw through laws enacted during the 2017 Reg. Sess. of the Kansas Leg. effective on or before Apr. 27, 2017.); ME. REV. STAT. ANN. tit. 9-A, § 8-509 (West, Westlaw through emergency legis. through Ch. 47 of the 2017 First Reg. Sess. of the 128th Leg.); MASS. GEN. LAWS ANN. ch. 140D, § 28A (West, Westlaw through Ch. 9 of the 2017 1st Ann. Sess.); N.Y. GEN. BUS. LAW § 518 (McKinney 2012); 14A OKLA. STAT. ANN. § 2-211 (West, Westlaw through emergency effective provisions through Ch. 302 of the First Reg. Sess. of the 56th Leg. (2017)); TEX. FIN. CODE ANN. § 339.001 (West, Westlaw through Ch. 8 of the 2017 Reg. Sess. of the 85th Leg.).

² *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 125 (2d Cir. 2015).

³ Adam J. Levitin, *Payment Wars: The Merchant-Bank Struggle for Control of Payment Systems*, 12 STAN. J.L. BUS. & FIN. 425, 427-28 (2007).

subject to an additional fee, which they may perceive as a negative financial penalty.⁴ As a result, consumer credit card use is unrestrained and may result in higher profits for retailers.⁵

Even though these laws appear to be beneficial on their face, they also have disadvantages to both merchants and consumers.⁶ For example, cash customers often pay the same price as credit customers because merchants are encouraged to have a uniform sticker price.⁷ The issue, however, is that credit transactions cost merchants about six times more than cash transactions because credit card companies charge the merchant a fee for every single credit purchase made.⁸ As a result, customers end up paying for credit card fees in the sticker price because retailers increase the uniform sticker price to account for credit card fees.⁹

Furthermore, the motives behind no surcharge laws have been called into question.¹⁰ States have adopted no surcharge laws largely due to heavy lobbying done by credit card companies in the 1980s.¹¹ Lobbying was directed at states with the largest populations, and hence, states with the most amount of credit card transactions.¹² California, Florida, New York and Texas, the four largest states in terms of population, all have a no surcharge statute.¹³

In addition to the motives behind no surcharge laws, the interpretation of these laws has also been questioned.¹⁴ Recently, the constitutionality of New York's no surcharge law, General Business Law ("GBL") § 518, was brought before the United States Supreme Court in *Expressions Hair Design v. Schneiderman*.¹⁵ In 1984, New

⁴ *Expressions Hair Design*, 808 F.3d at 122-23.

⁵ Levitin, *supra* note 3, at 434, 444.

⁶ Adam J. Levitin, *Priceless? The Societal Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 1 (2008).

⁷ *Id.* at 27-28.

⁸ Samuel J. Merchant, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV. 327, 327-29 (2016).

⁹ *Id.*

¹⁰ *Id.* at 353-54.

¹¹ *Id.* at 353.

¹² *Id.* at 354.

¹³ Merchant, *supra* note 8, at 354.

¹⁴ See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017); *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235 (11th Cir. 2015); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015); *Rowell v. Pettijohn*, 816 F.3d 73 (W.D. Tex. 2016); *People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. 1987).

¹⁵ *Expressions Hair Design*, 137 S. Ct. 1144.

York passed GBL § 518 to prohibit sellers in any sales transaction to “impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.”¹⁶ While GBL § 518 does not define “surcharge,”¹⁷ the Second Circuit, in *Expressions*, asserted that the “ordinary meaning” of surcharge is “a charge in excess of the usual or normal amount: an additional tax, cost, or impost.”¹⁸ The definition of surcharge is an issue in this case because, while the law clearly bans an additional charge on purchases made by credit, the statute has been interpreted to allow for a *discount* on purchases made by cash.¹⁹ Like the term surcharge, the New York statute does not define discount; thus, the Second Circuit relied on the Truth in Lending Act’s definition of discount as “a reduction made from the regular price.”²⁰ The problem is that GBL § 518 also lacks a definition for regular price.²¹ Without a clear method to determine what the regular price is, merchants can manipulate prices so that credit customers pay more and cash customers pay less through either a cash discount or a credit surcharge.²² Therefore, retailers are uncertain whether their pricing schemes constitute discounts or surcharges because both create the same results—cash customers pay less and credit customers pay more.²³

In *Expressions*, the Second Circuit suggested that the difference between a surcharge and a discount is a common-sense distinction.²⁴ However, the plaintiffs did not see the distinction.²⁵ They argued that credit surcharges and cash discounts could be construed as the same thing, just worded differently.²⁶ The plaintiffs argued that, because GBL § 518 restricts speech, rather than conduct, GBL § 518 violates the First Amendment.²⁷

¹⁶ N.Y. GEN. BUS. LAW § 518 (McKinney 2016).

¹⁷ *Expressions Hair Design*, 808 F.3d at 124.

¹⁸ *Id.* at 127.

¹⁹ *Id.* at 125.

²⁰ *Id.* at 128, citing 15 U.S.C. § 1602 (2017).

²¹ *Id.* at 124.

²² *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 435-36 (S.D.N.Y. 2013).

²³ *Id.*

²⁴ *Expressions Hair Design*, 808 F.3d at 127, 139, 142.

²⁵ *Expressions Hair Design*, 975 F. Supp. 2d at 435-36.

²⁶ Brief for Petitioners at 2, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391).

²⁷ *Expressions Hair Design*, 975 F. Supp. 2d at 444.

Lower federal courts are split as to whether no surcharge laws violate the First Amendment²⁸ and the answer depends on whether no surcharge laws regulate speech or conduct.²⁹ Courts that uphold no surcharge laws have held that the laws regulate *conduct* because they prevent retailers from performing the act of charging extra fees on credit purchases.³⁰ Courts that strike down no surcharge laws have held that the laws regulate *speech* because the illegality of the conduct is determined by whether the conduct involves the use of the term cash discount or the term credit surcharge, regardless of the actual conduct.³¹

It seems as if the split has been resolved because, in March 2017, the U.S. Supreme Court concluded that GBL § 518 is a speech regulation.³² However, the Court remanded the case back to the Second Circuit to decide whether GBL § 518 survives First Amendment scrutiny.³³ The constitutionality of GBL § 518 depends on the level of scrutiny the Second Circuit will use, and this depends on what type of speech the Second Circuit determines to be at issue.³⁴ Some lower courts have found that no surcharge laws are restrictions of, specifically, commercial speech and have applied intermediate scrutiny to decide their constitutionality.³⁵

This Note argues that GBL § 518 violates the First Amendment as it unconstitutionally restricts commercial speech. It also explains why commercial speech is at issue and how courts determine whether a law unconstitutionally restricts commercial speech. This Note will be divided into eight sections. Section II of the article sets a brief history of no surcharge laws. Section III sets out how courts have ruled on the constitutionality of GBL § 518. Section IV describes the relevant First Amendment principles that apply to the commercial speech doctrine. Section V explains what commercial speech is.

²⁸ David L. Hudson Jr., *Cash or Credit?*, 102 A.B.A.J. 17, 17-18 (2016).

²⁹ Hudson, *supra* note 28, at 17.

³⁰ Hudson, *supra* note 28, at 17-18.

³¹ Hudson, *supra* note 28, at 17-18.

³² *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1147, 1151 (2017).

³³ *Id.* at 1147. At the request of the Second Circuit, the parties have filed Supplemental Appellate Briefs detailing why or why not the Second Circuit should certify the interpretation of GBL § 518 to the Court of Appeals. As of October 2017, the Second Circuit has not decided this issue.

³⁴ *Expressions Hair Design*, 137 S. Ct. at 1152-53 (Breyer, concurring in the judgment).

³⁵ *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1239, 1246 (11th Cir. 2015); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 12010 (E.D. Cal. 2015).

Section VI sets out how courts determine whether a regulation impermissibly restricts commercial speech and how other courts have decided the constitutionality of no surcharge laws. Section VII provides enforcement background of GBL § 518, and lastly, section VIII argues how the Second Circuit should decide *Expressions*.

II. BRIEF HISTORY OF CREDIT CARD SURCHARGE LAWS

When credit card use began in the 1950s, the credit card industry was mostly unregulated.³⁶ However, in 1968, Congress passed the Truth in Lending Act to prevent unfair credit practices.³⁷ In the 1970s, the Truth in Lending Act was amended to allow discounts on purchases made by cash and to prohibit surcharges on purchases made by credit.³⁸ After the Truth in Lending Act's ban on surcharges lapsed, Congress passed the Cash Discount Act in 1981, which reinstated the credit surcharge ban for another three years.³⁹

The Cash Discount Act ("Act") received sharp criticism from its inception.⁴⁰ Specifically, the Board of Governors of the Federal Reserve ("Board") expressed uncertainty about the Act in a 1981 Senate Report,⁴¹ stating that surcharges were economically similar to cash discounts and allowing surcharges might be beneficial to consumers.⁴² The Board also noted that the Act had discouraged retailers from offering cash discounts because retailers do not want to risk noncompliance with the law.⁴³ Adding to the futility of the law, the Board compared the Act's discount/surcharge distinction to a half-full/half-empty distinction.⁴⁴

³⁶ Adam J. Levitin, *The Antitrust Superbowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. 265, 276 (2006).

³⁷ *Truth in Lending Act*, US LEGAL <https://truthinlendingact.uslegal.com/> (last visited May 21, 2017).

³⁸ Levitin, *supra* note 36, at 277-78.

³⁹ Levitin, *supra* note 36, at 278.

⁴⁰ See S. REP. NO. 97-23, at 8-9 (1981) (statement of Senator Bill Proxmire); *Statement by Nancy H. Teethers, Member, Bd. of Governors of the Fed. Reserve Sys., Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous., and Urban Affairs, U.S. Senate, Feb. 18, 1981*, 67 FED. RES. BULL. 235 (1981) [hereinafter *Statement*].

⁴¹ *Statement*, *supra* note 40.

⁴² *Id.* at 235.

⁴³ *Id.* at 236.

⁴⁴ *Id.* The Board pointed out an "obvious difficulty in drawing a clear economic distinction between a permitted discount and a prohibited surcharge." *Id.* According to the Board, "[d]iscounts and surcharges may not be as identical in practice as, say, a half-empty glass of

Furthermore, in another 1981 Senate report, one senator stated that merchants often account for credit card fees by increasing the regular price because they have no way of knowing which customers will pay cash or credit.⁴⁵ The senator argued that cash-paying customers should not have to pay this subsidy charge, and merchants should have the choice of whether to impose a surcharge or not.⁴⁶

Eventually, Congress allowed the Act to lapse.⁴⁷ However, in response to lobbying by the credit card industry, many states passed their no surcharge laws similar to the expired Act.⁴⁸ Specifically, New York enacted GBL § 518 in 1984 as its own no surcharge law with language that was almost identical to the expired Act.⁴⁹

Recently, no surcharge laws adopted after the expiration of the Cash Discount Act have been challenged as unconstitutional restrictions of free speech.⁵⁰ Particularly, the constitutionality of New York's GBL § 518 has been challenged in *Expressions*.⁵¹

III. EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN

In *Expressions*, the Second Circuit did not find GBL § 518 to be a restriction of commercial speech.⁵² Instead, the Second Circuit found GBL § 518 to be a permissible economic regulation without any speech implications.⁵³ Nevertheless, the U.S. Supreme Court has

water is to a half-full one. Nevertheless, it is difficult to quarrel with the fact that the distinction is, at best, uncertain." *Id.*

⁴⁵ S. REP. NO. 97-23, at 9.

⁴⁶ *Id.*

⁴⁷ See *Expressions Hair Design*, 808 F.3d at 123-25.

⁴⁸ Levitin, *supra* note 36, at 285-86.

⁴⁹ *Expressions Hair Design*, 808 F.3d at 124. Compare the no surcharge provision of the Cash Discount Act with GBL § 518. "No 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." Truth in Lending Act, Pub. L. No. 94-222, § 3(c)(1), 90 Stat 197 (1976), amended by Cash Discount Act, Pub. L. No. 97-25, 95 Stat 144 (1981). "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." N.Y. GEN. BUS. LAW § 518 (McKinney 2016).

⁵⁰ See *Dana's R.R. Supply v. Attorney Gen.*, Florida, 807 F.3d 1235 (11th Cir. 2015); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015); *Rowell v. Pettijohn*, 816 F.3d 73 (W.D. Tex. 2016).

⁵¹ *Expressions Hair Design*, 137 S. Ct. 1144.

⁵² *Expressions Hair Design*, 808 F.3d at 141-42.

⁵³ *Id.* at 130.

remanded the case to the Second Circuit because it did find GBL § 518 to be a speech regulation.⁵⁴

A. Facts and Procedural History

Five New York businesses (“plaintiffs”) brought an action against the Attorney General of New York, the District Attorney of New York County, and the District Attorney of Kings County (“State”), alleging that GBL § 518 violated their right to freedom of speech under the First Amendment.⁵⁵ The plaintiffs asserted that they want to charge credit card customers more than cash paying customers to make up for credit card fees imposed on them, but feared that to do so would violate GBL § 518.⁵⁶

Specifically, the plaintiffs wanted to decrease credit card use by imposing credit surcharges.⁵⁷ They argued that a credit surcharge is a more effective way of communicating the cost of credit purchases to customers, rather than hiding the fee in the sticker price because, when customers are faced with a surcharge, they are more likely to become aware of credit card fees.⁵⁸ The plaintiffs asserted that credit card swipe fees, which can be 2-3% of the purchase price per transaction, are a fast-growing burden to their businesses.⁵⁹ They hoped that, if customers become aware of these fees, they would switch to cash.⁶⁰

On the other hand, the State argued that the credit surcharge ban protects costumers by encouraging a uniform sticker price, which prevents unfair and surprise price increases at the register.⁶¹

⁵⁴ *Expressions Hair Design*, 137 S. Ct. at 1151.

⁵⁵ *Expressions Hair Design*, 808 F.3d at 121-22.

Plaintiffs are Expressions Hair Design, a unisex hair salon in Vestal, New York, and its co-owner, Linda Fiacco; The Brooklyn Farmacy & Soda Fountain, Inc., an ice-cream parlor in Brooklyn, and its co-founder, Peter Freeman; Bunda Starr Corp., which owns a Manhattan liquor store, and its president, Donna Pabst; Five Points Academy, a Manhattan martial arts studio, and its vice president, Steve Milles; and Patio.Com LLC, an outdoor furniture and billiards company with stores throughout New York, and its founder and president, David Ross.

Id. at 121 n.1.

⁵⁶ *Id.* at 126.

⁵⁷ *Expressions Hair Design*, 975 F. Supp. 2d at 437.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Expressions Hair Design*, 975 F. Supp. 2d at 437.

Furthermore, it asserted that GBL § 518 does not prevent retailers from imposing two different prices for credit and cash purchases; it only prohibits an extra fee added onto the credit price.⁶² Therefore, it argued, GBL § 518 allows retailers to impose a cash discount, which may similarly encourage customers to stop using credit.⁶³ The State argued that the purpose of GBL § 518 is to require retailers to disclose higher credit prices to customers, not to limit how retailers word their pricing schemes.⁶⁴

The United States District Court for the Southern District of New York found the State's arguments to be "absurd."⁶⁵ The District Court exemplified the absurdity by stating that a merchant who displays a \$100 price for cash and a \$103 price for credit, including the 3% surcharge, could still legitimately fear prosecution under the statute.⁶⁶ Accordingly, The District Court found that GBL § 518 restricted the plaintiffs' expression of commercial speech.⁶⁷ It held that GBL § 518 violated freedom of speech under the First Amendment because it regulated pricing system *labels* rather than regulating the actual pricing system itself.⁶⁸ On appeal, the United States Court of Appeals for the Second Circuit held that the district court had erred.⁶⁹ The Second Circuit held that New York's no surcharge law does not violate the First Amendment.⁷⁰

1. Second Circuit Decision

The Second Circuit reasoned that GBL § 518 regulated conduct, not speech, by prohibiting retailers from charging credit customers above the regular price paid by cash customers.⁷¹ In other words, the court held that price regulations did not implicate speech.⁷²

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 444.

⁶⁵ *Id.* at 443.

⁶⁶ *Expressions Hair Design*, 975 F. Supp. 2d at 443.

⁶⁷ *Id.* at 444-47.

⁶⁸ *Id.* at 444.

⁶⁹ *Expressions Hair Design*, 808 F.3d at 127.

⁷⁰ *Id.* at 141-42.

⁷¹ *Id.* at 135.

⁷² *Id.*

The court then discussed several reasons why cash discounts are preferable to credit surcharges.⁷³

First, the court reasoned that a consumer's reaction to the term "cash discount" is different than a consumer's reaction to the term "credit surcharge"⁷⁴ because the term cash discount is suggestive of saving money while the term credit surcharge is suggestive of losing money.⁷⁵ Second, the court noted that credit surcharges are more likely to cause an increase in overall prices while cash discounts are more likely to cause a decrease in overall prices because surcharges tend to exceed the amount necessary for retailers to recover swipe fees.⁷⁶

The court then reasoned that GBL § 518 prohibited retailers from charging credit card customers a price higher than the regular price that cash customers pay⁷⁷ while allowing cash customers to pay a price lower than the regular price that credit customers pay.⁷⁸ As such, the statute regulated the relationship between cash price and credit price, *not* the labels of the different pricing systems.⁷⁹ Because the court held that GBL § 518 regulated conduct, not speech, it did not apply a First Amendment analysis.⁸⁰ Although the government is prohibited from regulating speech on the sole basis that listeners may have a negative reaction to it,⁸¹ the court noted that this rule did not apply to prices—the government may enact price control laws to control consumer demand.⁸² As such, the court held that GBL § 518 was not a violation of free speech under the First Amendment⁸³ because its purpose was to increase consumer demand for credit spending by regulating prices, not by regulating labels.⁸⁴

⁷³ *Id.* at 122-23.

⁷⁴ *Expressions Hair Design*, 808 F.3d at 122.

⁷⁵ *Id.*

⁷⁶ *Id.* at 123.

⁷⁷ *Expressions Hair Design*, 808 F.3d at 128.

⁷⁸ *Id.* at 128.

⁷⁹ *Id.* at 131.

⁸⁰ *Id.* at 130; *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

⁸¹ *Expressions Hair Design*, 808 F.3d at 133.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 133-35.

2. *U.S. Supreme Court Decision*

The U.S. Supreme Court disagreed with the Second Circuit concluding, “[Section] 518 is not like a typical price regulation.”⁸⁵ The Court determined that GBL § 518 regulates the way prices are communicated, rather than the prices themselves; hence, it is a speech regulation.⁸⁶ However, the Court did not specify what type of speech is at issue or what level of scrutiny should be used to decide the constitutionality of GBL § 518.⁸⁷ Instead, it remanded the case back to the Second Circuit to decide those issues.⁸⁸

The State argued that the New York Court of Appeals should certify the scope of GBL § 518 because the constitutionality of GBL § 518 depends on the statutory interpretation of a state law.⁸⁹ On the other hand, the plaintiffs argued that certification to the Court of Appeals is improper because the Supreme Court already determined that GBL § 518 is a speech regulation, which is not an unsettled question of state law.⁹⁰ Nonetheless, in December, 2017, the Second Circuit did certify the scope of GBL § 518 to the New York Court of Appeals.⁹¹ It held that the level of scrutiny applied to its First Amendment analysis of GBL § 518 will depend on how GBL § 518 actually operates in practice.⁹² Based on the Court of Appeals’ analysis as to how GBL § 518 actually operates, the Second Circuit will review GBL § 518 as either a disclosure regulation (a less exacting standard) or as a commercial speech regulation (using intermediate scrutiny).⁹³

The State argues that GBL § 518 should be reviewed as a disclosure regulation because § GBL 518 requires merchants to disclose the total price of a product, including the surcharge amount in

⁸⁵ *Expressions Hair Design*, 137 S. Ct. at 1150.

⁸⁶ *Id.* at 1151.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Brief for Appellants at 10, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (Nos. 13-4533, 13-4537) [hereinafter Brief for Appellants].

⁹⁰ Brief for Plaintiffs-Appellees at 2-3, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (Nos. 13-4533, 13-4537) [hereinafter Brief for Plaintiffs-Appellees].

⁹¹ *Expressions Hair Design v. Schneiderman*, 877 F.3d 99 (2d Cir. 2017).

⁹² *Id.* at 102-03.

⁹³ *Id.*

the sticker price.⁹⁴ However, the plaintiffs argue that GBL § 518 is not a disclosure regulation because disclosure regulations compel merchants to provide more information.⁹⁵ The plaintiffs contend that GBL § 518 actually restricts the information that merchants could provide customers, and thus, should be reviewed under a commercial speech regulation standard.⁹⁶ Furthermore, the plaintiffs point out that the U.S. Supreme Court already held in *Expressions* that GBL § 518 “proscribes” speech, and therefore, is speech regulation, not a disclosure requirement.⁹⁷

A hallmark of the First Amendment is that Americans should have full access to information that is needed to make informed choices because their intelligent participation and input is needed in a democratic society.⁹⁸ If the Second Circuit follows this principle, it should find that the commercial speech doctrine applies because GBL § 518 forces merchants to hide information from the public, not disclose it.⁹⁹ When credit surcharge information is suppressed, consumers are less likely to make informed economic choices.¹⁰⁰

IV. FIRST AMENDMENT FREEDOM OF SPEECH

The First Amendment to the U.S. Constitution reads: “Congress shall make no law . . . abridging the freedom of speech”¹⁰¹ The freedom of speech has been described as “fundamental to our notions of ordered liberty,”¹⁰² as it enables the free flow of information, which a democratic society needs to make intelligent choices.¹⁰³ It protects a person’s right to choose to speak or not to speak, and the right to choose what to say and not to say.¹⁰⁴

First Amendment protection is not limited to speech, however; the First Amendment protects the communication of ideas through

⁹⁴ Brief for Appellants, *supra* note 89, at 16-17.

⁹⁵ Brief for Plaintiffs-Appellees, *supra* note 91, at 14.

⁹⁶ *Id.* at 2.

⁹⁷ *Id.* at 14, citing *Expressions Hair Design*, 137 S. Ct. at 1152.

⁹⁸ *Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co.*, 518 F.2d 130, 135 (3d Cir. 1975).

⁹⁹ See Brief for Plaintiffs-Appellees, *supra* note 91, at 2, 13.

¹⁰⁰ Levitin, *supra* note 36, at 287-88.

¹⁰¹ U.S. CONST. amend. I.

¹⁰² *Asociacion de Trabajadores*, 518 F.2d at 135.

¹⁰³ *Id.*

¹⁰⁴ *Suarez v. Trigg Labs., Inc.*, 3 Cal. App. 5th 118, 123 (2016).

expressive conduct.¹⁰⁵ In *Spence v. Washington*,¹⁰⁶ the U.S. Supreme Court held that expressive conduct is conduct that has a specific message and is likely to be perceived by others as an expression of that message.¹⁰⁷ In *Spence*, the Court ruled that a man's act of displaying an upside down American flag with peace symbols taped to it was expressive conduct protected by the First Amendment.¹⁰⁸ The Court stated this action was "expression of an idea through activity"¹⁰⁹ because the man desired to convey a specific message (which was to show that America stood for peace) and the message was likely to be understood.¹¹⁰ Therefore, the Court held the man's action constituted expressive conduct, which was communication that afforded First Amendment protection.¹¹¹

The right to choose what to say and how to communicate it, however, is not completely unrestricted.¹¹² Fighting words, obscenity and libel are examples of speech that may be restricted by the government.¹¹³ These types of speech are given less First Amendment protection because they have been deemed as "low-value speech."¹¹⁴ Fighting words, obscenity and libel are deemed "low-value" speech because they are considered to be disruptive of social order and morality.¹¹⁵

Although the order and morality of society plays a part in determining the First Amendment value of speech, the constitutionality of speech regulation largely depends on whether the

¹⁰⁵ See *Spence v. Washington*, 418 U.S. 405 (1974).

¹⁰⁶ *Spence*, 418 U.S. 405.

¹⁰⁷ *Id.* at 410-11.

¹⁰⁸ *Id.* at 415.

¹⁰⁹ *Id.* at 411.

¹¹⁰ *Id.* at 410-11.

¹¹¹ *Spence*, 418 U.S. at 409-11.

¹¹² Joseph T. Hanlon, *First Amendment Commercial Speech-Notwithstanding A State's Twenty-First Amendment Power to Ban the Use of Alcohol Entirely, A State May Not Completely Prohibit Truthful, Non-Misleading Advertising of Liquor Prices-44 Liquor Mart Inc. v. Rhode Island*, 166 S. Ct. 1495 (1996), 7 SETON HALL CONST. L.J. 1009, 1009, n.3 (1997).

¹¹³ Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for The Supreme Court to Abandon its Inside-Out Approach to Freedom Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV 883, 887 (1996).

¹¹⁴ Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMUL. REV. 297, 299 (1995).

¹¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

regulation is content-based or content-neutral.¹¹⁶ To determine whether speech regulation is content-based, courts look to the legislative purpose behind the regulation.¹¹⁷ If the purpose behind the regulation is to suppress the content of a certain message, the regulation will be deemed content-based.¹¹⁸ If the purpose behind the regulation is unrelated to the content of a certain message, the regulation will be deemed content-neutral.¹¹⁹

A. Content-Based Speech Regulation

Whether a speech regulation is deemed content-based or content-neutral determines the level of scrutiny applied to a constitutional challenge to the regulation.¹²⁰ Content-based regulations are usually subject to strict scrutiny because they are likely to improperly favor certain types of speech over others and may interrupt the free flow of information, which can mislead the public.¹²¹

In *Boos v. Barry*,¹²² The U.S. Supreme Court struck down a content-based speech regulation that prohibited the display of signs criticizing foreign governments within 500 feet of a foreign embassy as a violation of the First Amendment.¹²³ The Court concluded that the statute was content-based because the statute prohibited unfavorable speech about foreign governments while allowing favorable speech about foreign governments.¹²⁴ The government's justification for the regulation was to "protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments."¹²⁵ Even though the Court held that the government had a compelling interest in maintaining civil relations with foreign officials,¹²⁶ the statute was not narrowly tailored to achieve that interest because less restrictive alternatives were

¹¹⁶ R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitation of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006).

¹¹⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Wright, *supra* note 116, at 334.

¹²¹ *Id.* at 335.

¹²² *Boos v. Barry*, 485 U.S. 312 (1988).

¹²³ *Id.* at 334.

¹²⁴ *Id.* at 318-19.

¹²⁵ *Id.* at 321.

¹²⁶ *Id.* at 323-24.

available.¹²⁷ The Court concluded that a less restrictive alternative was to allow “peaceful picketing” that did not “intimidate, coerce, threaten, or harass,” rather than banning all speech critical of foreign governments.¹²⁸ Therefore, the Court held that the statute violated the First Amendment as an impermissible content-based speech regulation.¹²⁹

B. Content- Neutral Speech Regulation

On the other hand, content-neutral regulations are subject to less judicial scrutiny.¹³⁰ For example, speech may be regulated as to its time, place, and manner, provided that the content of a particular message is not the reason for the regulation.¹³¹ Regulations of the time, place, and manner of speech must be “narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”¹³²

In *Ward v. Rock Against Racism*,¹³³ the U.S. Supreme Court upheld a content-neutral speech regulation that required performers at the Central Park band shell to use certain sound-amplification equipment and a specific sound technician provided by the city.¹³⁴ The respondent argued that the regulation violated its First Amendment rights because the regulation constituted state control over artistic expression.¹³⁵ However, the Court held that the city had a significant governmental interest in ensuring sufficient sound amplification at park events and in limiting the sound emanating outside the park.¹³⁶ The Court recognized that “those interests would have been less well served in the absence of the sound-amplification guideline.”¹³⁷ Therefore, the regulation of the time, place and manner of the musical content was deemed content-neutral because the purpose of the

¹²⁷ *Boos*, 485 U.S. at 329.

¹²⁸ *Id.* at 326.

¹²⁹ *Id.* at 324, 329.

¹³⁰ Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348 (2006).

¹³¹ *Ward*, 491 U.S. at 791.

¹³² *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹³³ *Ward*, 491 U.S. 781.

¹³⁴ *Id.* at 784.

¹³⁵ *Id.* at 792.

¹³⁶ *Id.* at 796-97.

¹³⁷ *Id.* at 802.

regulation was not to suppress any certain message.¹³⁸ Furthermore, it did not violate First Amendment principles because the regulations were narrowly tailored to serve the city's significant governmental interests.¹³⁹

The content-based/content-neutral distinction is important in the discussion of no surcharge laws because courts that strike down no surcharge laws deem them to be impermissible content-based regulations of commercial speech.¹⁴⁰ Hence, the Second Circuit's decision will turn on whether it finds GBL § 518 to be a content-based regulation of commercial speech.¹⁴¹

V. COMMERCIAL SPEECH

The courts have not developed a specific test to determine whether speech is commercial; as a result, whether speech is commercial in nature is often unclear.¹⁴² The U.S. Supreme Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”¹⁴³ In addition, the Court has described commercial speech as speech that serves the interests of the speaker, assists consumers, and facilitates the flow of information.¹⁴⁴

Traditionally, commercial speech has been given a lesser amount of protection than other forms of constitutionally protected speech.¹⁴⁵ Commercial speech is considered less deserving of protection because the state has the power to regulate commercial activity, which also includes speech concerning that activity.¹⁴⁶ On the other hand, noncommercial speech, such as political speech, has been afforded greater First Amendment protection because:

¹³⁸ *Ward*, 491 U.S. at 792, 800-01.

¹³⁹ *Id.* at 803.

¹⁴⁰ See *Expressions Hair Design*, 975 F. Supp. 2d at 445-46, 450; *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1247 (11th Cir. 2015); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1208-09 (E.D. Cal. 2015).

¹⁴¹ See *Expressions Hair Design*, 975 F. Supp. at 445-46, 450; *Dana's R.R. Supply*, 807 F.3d at 1247; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

¹⁴² Scott Wellikoff, *Mixed Speech: Inequities That Result from an Ambiguous Doctrine*, 19 St. John's J. Legal Comment 159, 177 (2004).

¹⁴³ *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

¹⁴⁴ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 561-62.

¹⁴⁵ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

¹⁴⁶ Wellikoff, *supra* note 142, at 184-85.

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁴⁷

In contrast, commercial speech has not traditionally been thought of as integral to the exchange of ideas needed in a democratic society.¹⁴⁸ However, it has been afforded some protection because the commercial nature of speech does not render it completely “valueless in the marketplace of ideas.”¹⁴⁹ The public relies on the free flow of commercial information to make intelligent economic choices¹⁵⁰ and to suppress this information from the public “defeats the purpose of the First Amendment.”¹⁵¹

Before the 1970s, it was unclear whether commercial speech should be afforded protection under the First Amendment at all.¹⁵² It was not until 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁵³ that the U.S. Supreme Court held that speech could not be restricted simply because its content is commercial in nature.¹⁵⁴ In *Virginia State Board of Pharmacy*, the Court struck down a state law that prohibited pharmacists from advertising prescription drug prices¹⁵⁵ because it held that a purely commercial advertisement might still be of general public interest that deserves First Amendment protection.¹⁵⁶

The Court noted that prescription drug consumers had an interest in the availability of prescription drug prices because the elderly, sick, and disabled had limited means to shop for the cheapest

¹⁴⁷ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 595-96 (1980), citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

¹⁴⁸ Wellikoff, *supra* note 142, at 168.

¹⁴⁹ *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

¹⁵⁰ Wellikoff, *supra* note 142, at 169.

¹⁵¹ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 567.

¹⁵² *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

¹⁵³ *Virginia State Bd. of Pharmacy*, 425 U.S. 748.

¹⁵⁴ *Id.* at 761-62.

¹⁵⁵ *Id.* at 750, 773.

¹⁵⁶ *Id.* at 764.

drugs, and the availability of drug pricing information could be life changing.¹⁵⁷ As such, the Court reasoned that the public has an interest in receiving information to make informed and intelligent economic choices, which, in turn, facilitates the free flow of information that is necessary for the decision-making process of democracy.¹⁵⁸ Additionally, it stated that the effect of the ban on prescription drug pricing advertising was to keep consumers in the dark regarding their choices.¹⁵⁹ Hence, the Court concluded that the state had the power to regulate the pharmaceutical industry, but not at the expense of keeping the public in ignorance.¹⁶⁰ Commercial speech, such as the speech at issue in this case, was finally deemed protected by the First Amendment.¹⁶¹

Nevertheless, commercial speech is afforded less protection than other forms of speech as regulations of commercial speech are only subject to intermediate judicial scrutiny.¹⁶² Courts use the intermediate scrutiny test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹⁶³ to determine whether a regulation of commercial speech violates the First Amendment.¹⁶⁴

In *Central Hudson*, the Public Service Commission of New York (“Commission”) ordered all electric utility companies in the state to stop running advertisements that encouraged the use of electricity because the State’s electric utility companies did not have enough fuel to meet customer demand for the winter of 1973-74.¹⁶⁵ In 1977, the Commission decided to extend the ban to help decrease energy consumption even after the fuel shortage was over,¹⁶⁶ but allowed “informational” advertising to help control customer demand for electricity.¹⁶⁷ *Central Hudson Gas & Electric Corp.* sued the Commission, arguing that the Commission’s order violated the First

¹⁵⁷ *Id.* at 763-64.

¹⁵⁸ *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

¹⁵⁹ *Id.* at 769.

¹⁶⁰ *Id.* at 770.

¹⁶¹ *Id.* at 770.

¹⁶² *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

¹⁶³ *Id.* at 557, 566.

¹⁶⁴ Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1626-29 (1997).

¹⁶⁵ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 559.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 560.

and Fourteenth Amendments as a restriction on commercial speech.¹⁶⁸ The trial court, the intermediate appellate court, and the New York Court of Appeals upheld the Commission's order.¹⁶⁹ However, the U.S. Supreme Court granted certiorari and reversed, holding that the Commission's order unconstitutionally restricted commercial speech.¹⁷⁰

The Court articulated a four-part test to determine whether a governmental regulation unconstitutionally restricts commercial speech in violation of the First Amendment.¹⁷¹ First, the commercial speech in question cannot be misleading and must concern lawful activity.¹⁷² Second, the law in question must have a substantial governmental interest, and the commercial speech cannot be banned due to an unsupported belief of harm.¹⁷³ Third, the law must be narrowly tailored and directly advance the asserted governmental interest.¹⁷⁴ Fourth, the law cannot be more extensive than necessary to serve the governmental interest.¹⁷⁵

Applying this four-part test, the Court held the ban against electricity advertisements violated the First Amendment.¹⁷⁶ First, the Court reasoned that the commercial speech in question was neither misleading nor concerning unlawful activity.¹⁷⁷ Second, the Court stated that the State's asserted interest in energy conservation and fair rates were substantial governmental interests because the United States was dependent on energy resources from other countries, where the United States government had no control over the quantity and price; hence, energy conservation and fair rates were needed to ensure an

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 560-61.

¹⁷⁰ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 561.

¹⁷¹ *Id.* at 566.

¹⁷² *Id.*

¹⁷³ *Linmark Assocs v. Twp. of Willingboro*, 431 U.S. 85, 92 n.6 (1977). Overall, the government bears the burden in proving a substantial interest and will only meet that burden if the harm that the government seeks to prevent is real and not mere speculation, and the restriction on commercial speech will alleviate that harm. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 183; *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1963).

¹⁷⁴ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566; *Greater New Orleans Broad. Ass'n v. U.S.*, 527 U.S. 173, 188 (1999). Although the government is not required to use the "least restrictive means conceivable," a law that only weakly supports the governmental interest will not be upheld. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 564; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188.

¹⁷⁵ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

¹⁷⁶ *Id.* at 561.

¹⁷⁷ *Id.* at 566-67.

adequate supply of energy resources for itself and its citizens.¹⁷⁸ Third, the Court found that the advertising ban supported the State's interest in conserving energy because it helped to decrease the energy demand.¹⁷⁹ Ultimately, however, and for the fourth part of the test, the Court reasoned that the advertising ban was more extensive than necessary to support the governmental interest in conserving energy¹⁸⁰ because the ban prevented the appellants from advertising energy efficient products and restricted speech that did not harm the State's interest in energy conservation.¹⁸¹ Therefore, the Court held that, due to the State's failure to prove the fourth element, the advertising ban violated the First Amendment.¹⁸²

The U.S. Supreme Court continues to use the four-part test developed in *Central Hudson* to determine whether a government regulation restricts commercial speech in violation of the First Amendment.¹⁸³ However, to determine whether commercial speech is at issue is not always an easy task.¹⁸⁴ As stated above, the courts have not developed a specific test to identify commercial speech.¹⁸⁵ Consequently, courts have differing opinions as to whether no surcharge laws involve commercial speech.¹⁸⁶

VI. NO SURCHARGE LAWS AS RESTRICTION ON SPEECH OR CONDUCT?

In the Fifth Circuit decision, *Rowell v. Pettijohn*,¹⁸⁷ the Court of Appeals held that Texas's no surcharge law solely regulates economic conduct, not speech.¹⁸⁸ However, a California District Court

¹⁷⁸ *Id.* at 568.

¹⁷⁹ *Id.* at 569.

¹⁸⁰ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 569-70.

¹⁸¹ *Id.*

¹⁸² *Id.* at 571.

¹⁸³ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72 (2011); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184; 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-08 (1996).

¹⁸⁴ Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154-55 (2012).

¹⁸⁵ Wellikoff, *supra* note 142.

¹⁸⁶ See *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235 (11th Cir. 2015); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015); *Rowell v. Pettijohn*, 816 F.3d 73 (W.D. Tex. 2016); *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015).

¹⁸⁷ *Rowell*, 816 F.3d 73.

¹⁸⁸ *Id.* at 76.

in *Italian Colors Restaurant v. Harris*,¹⁸⁹ and the Eleventh Circuit in *Dana's R.R. Supply v. Attorney General, Florida*,¹⁹⁰ both held that the no surcharge laws at issue were regulations of commercial speech.¹⁹¹ Oddly, the no surcharge laws at issue in all three cases were almost identical, yet, two courts found speech to be at issue and one did not.¹⁹² This section explains why or why not these courts found the no surcharge laws to involve commercial speech.¹⁹³ Additionally, this section explains why courts that found commercial speech to be at issue also found that the no surcharge laws failed the *Central Hudson* test in violation of the First Amendment.¹⁹⁴

A. No Surcharge Law as Purely Economic Regulation

In *Rowell*, the U.S. Court of Appeals for the Fifth Circuit held that the Texas no surcharge law is a permissible economic regulation and does not violate the First Amendment as the law does not implicate speech.¹⁹⁵ The Texas no surcharge law reads, “[A] seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.”¹⁹⁶

The plaintiffs, a group of Texas merchants, sued the Texas Commissioner of the Office of Consumer Credit, arguing that the Texas no surcharge law violated their First Amendment rights as a content-based restriction of commercial speech.¹⁹⁷ The plaintiffs wanted to charge two different prices for cash and credit purchases, but asserted that the law prevented them from effectively communicating their pricing systems.¹⁹⁸ The court disagreed,

¹⁸⁹ *Italian Colors Rest.*, 99 F. Supp. 3d 1199.

¹⁹⁰ *Dana's R.R. Supply*, 807 F.3d 1235.

¹⁹¹ *Id.* at 1247-49; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

¹⁹² CAL. CIV. CODE § 1748.1 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.); FLA. STAT. § 501.0117 (West, Westlaw through the 2016 Second Regular Session of the Twenty-Fourth Legislature); TEX. FIN. CODE ANN. § 339.001 (West, Westlaw through Ch. 8 of the 2017 Reg. Sess. of the 85th Leg.).

¹⁹³ See *Dana's R.R. Supply*, 807 F.3d 1235; *Expressions Hair Design*, 808 F.3d 118; *Rowell*, 816 F.3d 73; *Expressions Hair Design*, 975 F. Supp. 2d 430; *Italian Colors Rest.*, 99 F. Supp. 3d 1199.

¹⁹⁴ See *Dana's R.R. Supply*, 807 F.3d at 1247; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

¹⁹⁵ *Rowell*, 816 F.3d at 76.

¹⁹⁶ TEX. FIN. CODE ANN. § 339.001 (West, Westlaw through Ch. 8 of the 2017 Reg. Sess. of the 85th Leg.).

¹⁹⁷ *Rowell*, 816 F.3d at 77.

¹⁹⁸ *Id.* at 77-78.

reasoning that it could not “bootstrap” the economic conduct prohibited by the no surcharge law with an element of speech.¹⁹⁹ The Court held that based on a plain reading of the statute, the statute simply bans surcharges on credit purchases as a form of price control.²⁰⁰

Moreover, the court noted that price-control laws have never been determined to implicate speech, as the state has the power to set price restrictions.²⁰¹ As such, it held that the no surcharge law is only an incidental burden on speech,²⁰² and compared this law to a regulation that required restaurant owners to ask customers to extinguish their cigarettes.²⁰³ Therefore, the court held that the Texas no surcharge law is simply a regulation of economic conduct and does not violate the First Amendment.²⁰⁴

As discussed above, the Second Circuit in *Expressions Hair Design* used reasoning similar to the Fifth Circuit in this case, also finding that New York's no surcharge law is purely an economic regulation.²⁰⁵ However, in the following cases, courts have found no surcharge laws to be more than just economic regulations.²⁰⁶

B. No Surcharge Law as Commercial Speech Restriction

1. *Dana's R.R. Supply v. Attorney General, Florida*

In *Dana's R.R. Supply*, the U.S. Court of Appeals for the Eleventh Circuit struck down Florida's no surcharge law.²⁰⁷ Four retailers received cease and desist letters from the State after telling

¹⁹⁹ *Id.* at 80.

²⁰⁰ *Id.* at 82.

²⁰¹ *Id.* at 82.

²⁰² *Rowell*, 816 F.3d at 83.

²⁰³ *Id.* at 82-83. In *Roark & Hardee LP v. City of Austin*, the Court of Appeals for the Fifth Circuit held that a law which required bar owners to verbally request that patrons put out their cigarettes did not violate the bar owners' First Amendment rights because the law regulated conduct, not speech. 522 F.3d 533, 549-50 (5th Cir. 2008). The Fifth Circuit held that the law's burden on speech was only incidental to the law's regulation of conduct as the verbal requirement was a necessary step in prohibiting smoking in public places. *Id.*

²⁰⁴ *Rowell*, 816 F.3d at 83.

²⁰⁵ *Expressions Hair Design*, 808 F.3d at 141-42.

²⁰⁶ *Dana's R.R. Supply*, 807 F.3d at 1247; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

²⁰⁷ *Dana's R.R. Supply*, 807 F.3d at 1239.

their customers that they must pay a fee for using a credit card.²⁰⁸ These retailers preferred to use the term surcharge rather than cash discount because they felt that the term surcharge was more accurate and transparent.²⁰⁹ If the retailers had used the term cash discount, they would not have received the cease and desist letters under Florida's no surcharge law.²¹⁰ The retailers brought suit, alleging that Florida's law violated the First Amendment as a restriction of free speech.²¹¹ The court struck down Florida's no surcharge law as a violation of free speech under the First Amendment.²¹²

The court examined whether Florida's no surcharge law restricted speech or conduct.²¹³ The relevant parts of Florida's no surcharge law read:

A seller . . . in a sales . . . transaction may not impose a surcharge on the buyer . . . electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller . . . accepts payment by credit card. A surcharge is any additional amount imposed at the time of a sale . . . that increases the charge to the buyer . . . for the privilege of using a credit card to make payment²¹⁴

The court reasoned that the only way to violate Florida's law was to describe the price distinction as a credit surcharge instead of cash discount, thereby targeting the *expression* of the price distinction alone.²¹⁵ Specifically, it explained that "surcharges and discounts are nothing more than two sides of the same coin; a surcharge is simply a 'negative' discount, and a discount is a 'negative' surcharge."²¹⁶ As such, the court comically concluded that the law should have been called the "surcharges-are-fine-just-don't-call-them-that law."²¹⁷ Therefore, it held that Florida's no surcharge law was a restriction on

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1240.

²¹⁰ *Id.* at 1239-40.

²¹¹ *Id.*

²¹² *Dana's R.R. Supply*, 807 F.3d. at 1251.

²¹³ *Id.* at 1241.

²¹⁴ FLA. STAT. § 501.0117 (West, Westlaw through the 2016 Second Regular Session of the Twenty-Fourth Legislature).

²¹⁵ *Dana's R.R. Supply*, 807 F.3d at 1245.

²¹⁶ *Id.* at 1239.

²¹⁷ *Id.*

wording, not conduct, and was protected under the First Amendment.²¹⁸

The court did not specifically decide whether the speech at issue was speech in general or commercial speech.²¹⁹ Instead, it vaguely stated, “Florida’s no-surcharge law directly targets speech to indirectly affect commercial behavior . . . by discriminating on the basis of the speech’s content, the identity of the speaker, and the message being expressed.”²²⁰ While the court’s statement suggests a content-based restriction on speech warranting strict scrutiny review, the court instead decided to apply intermediate scrutiny under the *Central Hudson* test because the law had the “flavor of commercial speech” in that it appeared to regulate business pricing systems.²²¹

Under the *Central Hudson* test,²²² the court first reasoned that the law did not target false or misleading speech because a pricing system description as either a surcharge or a discount is not false or misleading.²²³ The court compared this distinction to describing the weather as either warmer or colder, which is, in effect, a statement of fact and neither false nor misleading.²²⁴ Second, the court failed to find a substantial governmental interest in Florida’s no surcharge law.²²⁵ While the state argued that it had an interest in consumer fraud protection, protection from unfair surprises at the register, and price uniformity among merchants,²²⁶ the court held that these interests were neither substantial nor persuasive because the state failed to explain why “convenience fees” on certain credit transactions were allowed and not credit surcharges.²²⁷ Third, the court held that Florida’s no surcharge law was not narrowly tailored and did not directly advance the asserted governmental interests of consumer fraud protection, protection from unfair surprises at the register, and price uniformity among merchants because such interests would be better served by the regulation of specific behavior.²²⁸ Fourth, the court reasoned that the

²¹⁸ *Id.* at 1246.

²¹⁹ *Id.*

²²⁰ *Dana’s R.R. Supply*, 807 F.3d at 1239.

²²¹ *Id.* at 1247.

²²² *Id.* at 1249; *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

²²³ *Dana’s R.R. Supply*, 807 F.3d at 1249.

²²⁴ *Id.*

²²⁵ *Id.* at 1249.

²²⁶ *Id.* at 1249-50.

²²⁷ *Id.* at 1250.

²²⁸ *Dana’s R.R. Supply*, 807 F.3d at 1250.

state could have used a plethora of less restrictive alternatives to the no surcharge law, such as completely banning dual pricing systems, capping the difference in price that can be charged to credit and cash customers, banning specific deceptive trade practices, or requiring retailers to disclose their pricing policies.²²⁹ Consequently, the law was deemed more extensive than necessary because the state did not use any of these less restrictive alternatives.²³⁰

Therefore, the court held that Florida's no surcharge law failed intermediate scrutiny under the *Central Hudson* test and was an unconstitutional restriction of commercial speech under the First Amendment.²³¹ The California District Court in *Italian Colors* had a similar holding.²³²

2. *Italian Colors Restaurant v. Harris*

In *Italian Colors*, the California District Court struck down California's no surcharge law.²³³ The plaintiffs, five California businesses, sued the California Attorney General, alleging that California's no surcharge law violated their First Amendment rights as an impermissible restriction on commercial speech.²³⁴ In their complaint, they asserted that they preferred to label the higher price for credit card payments as a surcharge because they wanted to discourage customers from using credit cards by using a word with a negative connotation.²³⁵ As such, they argued that California's no surcharge law did not regulate pricing systems, but instead regulated how retailers could *describe* their pricing systems.²³⁶ Conversely, the Attorney General argued that the no surcharge law only prohibited retailers from adding on an additional fee to the regular sticker price for purchases made by credit.²³⁷ He also pointed out that the purpose of the statute was to prevent "bait and switch" tactics in which customers would unknowingly be sprung with an extra fee at the

²²⁹ *Id.*

²³⁰ *Id.* at 1250-51.

²³¹ *Id.* at 1251.

²³² *See Italian Colors Rest.*, 99 F. Supp. 3d at 1203.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1204.

²³⁶ *Id.*

²³⁷ *See Italian Colors Rest.*, 99 F. Supp. 3d at 1207.

register.²³⁸ Furthermore, the Attorney General insisted that the statute did not implicate speech and should only be subject to rational basis review, as it was an economic regulation.²³⁹

The relevant parts of California's no surcharge law read as follows:

(a) No retailer . . . may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means. A retailer may, however, offer discounts for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card²⁴⁰

The District Court ultimately agreed with the plaintiffs and held that the no surcharge law was an unconstitutional restriction on free speech because it did not dictate how retailers should assign prices,²⁴¹ but instead dictated how prices were communicated to customers.²⁴² Specifically, it held that “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.”²⁴³ Although the retailers were free to speak about credit card fees with their customers, they were still limited in the way that they could express that information.²⁴⁴

In addition, the court pointed out that the law made an exception for surcharges imposed by gas, electric and water utilities.²⁴⁵ Hence, the law singled out a specific class of speakers, and did so without any identified reason, which is impermissible under the First Amendment.²⁴⁶ Also, the court concluded that the law was a content-based regulation because its purpose was to suppress the message that credit transactions cost more than cash payment transactions.²⁴⁷ As the statute was deemed to be a “content-based, speaker-specific”

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ CAL. CIV. CODE § 1748.1 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.).

²⁴¹ *Italian Colors Rest.*, 99 F. Supp. 3d at 1207.

²⁴² *Id.*

²⁴³ *Id.* at 1208 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

²⁴⁴ *Id.* at 1207-08.

²⁴⁵ See *Italian Colors Rest.*, 99 F. Supp. 3d at 1207-08.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

regulation of commercial speech, the court applied the *Central Hudson* test.²⁴⁸

First, the court held that although surprise credit purchase fees at the register may be misleading, the state cannot ban information simply because it has the *potential* to be misleading and when it can be presented straightforwardly.²⁴⁹ It noted that an alternative non-deceptive way to inform customers about credit purchase surcharges could be to display surcharge information throughout the store and explain that the surcharge is due to merchant swipe fees.²⁵⁰ This, the court reasoned, would lead to the distribution of accurate information.²⁵¹

Second, the court addressed the state's asserted interest in the regulation.²⁵² The intent of the legislature was set out in the statute as follows:

It is the intent of the Legislature to promote the effective operation of the free market and protect consumers from deceptive price increases for goods and services by prohibiting credit card surcharges and encouraging the availability of discounts by those retailers who wish to offer a lower price for goods and services purchased by some form of payment other than credit card.²⁵³

The court noted that, while the prevention of consumer deception is significant, the harm associated with that interest must not be speculative.²⁵⁴ It reasoned that the state's asserted interest could not be substantial because the statute created an exception for government utilities.²⁵⁵ Thus, the actual harm at issue was called into question.²⁵⁶

The court then appeared to skip over the third part of the *Central Hudson* test and jumped to the last prong instead.²⁵⁷ It argued that the statute was broader than necessary because a more direct way

²⁴⁸ *Id.* at 1209.

²⁴⁹ *Id.*; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

²⁵⁰ *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ CAL. CIV. CODE § 1748.1 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.).

²⁵⁴ *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1209-10.

to prevent consumer deception would be to require the disclosure of surcharges.²⁵⁸ As an example, the court pointed to a Minnesota statute that allows surcharges on the condition that retailers inform “the purchaser of the surcharge both orally at the time of sale and by a sign conspicuously posted on the seller’s premises.”²⁵⁹ Hence, the court found that California’s no surcharge statute was broader than necessary and an unconstitutional restriction of commercial speech because it did not pass the *Central Hudson* test.²⁶⁰

The California District Court in *Italian Colors* and the Eleventh Circuit in *Dana’s R.R. Supply* both came to the right conclusion that the no surcharge laws at issue are impermissible restrictions of commercial speech.²⁶¹ Both laws involve a commercial transaction and are content-based speech regulations.²⁶² The Second Circuit should similarly find GBL § 518 to be a content-based regulation of commercial speech.²⁶³ The enforcement history of GBL § 518 supports the conclusion that it is a content-based regulation of commercial speech.²⁶⁴

VII. ENFORCEMENT OF GBL § 518

In *People v. Fulvio*,²⁶⁵ a complaint was filed against a gas station owner for violating GBL § 518.²⁶⁶ A gas station customer paying with a credit card was told to pay five cents per gallon higher than the cash price for gas.²⁶⁷ The customer stated that only the cash price was advertised on the gas station’s sign, although this fact was disputed.²⁶⁸ After the customer complained, the defendant gas station owner, Fulvio, allowed him to pay the cash price.²⁶⁹ The customer then filed a complaint against Fulvio, arguing that his pricing policy

²⁵⁸ *Id.* at 1210.

²⁵⁹ *Italian Colors Rest.*, 99 F. Supp. 3d at 1210; MINN. STAT. ANN. § 325G.051(1)(a) (West, Westlaw through laws of the 2017 Reg. Sess. through May 13, 2017).

²⁶⁰ *Italian Colors Rest.*, 99 F. Supp. 3d at 1210.

²⁶¹ *Dana’s R.R. Supply*, 807 F.3d at 1247; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

²⁶² *Id.*

²⁶³ *See Cent. Hudson Gas & Electric Corp.*, 447 U.S. 557.

²⁶⁴ *See People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. 1987).

²⁶⁵ *Fulvio*, 517 N.Y.S.2d 1008.

²⁶⁶ *Id.* at 1009.

²⁶⁷ *Id.* at 1010.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

was in violation of GBL § 518 as an impermissible credit surcharge.²⁷⁰ In opposition, Fulvio argued that the pricing policy was a cash discount program and his signs clearly listed two different prices for cash and credit.²⁷¹ Fulvio was ultimately convicted of an attempt to violate GBL § 518.²⁷²

Fulvio moved to dismiss on the grounds that GBL §518 violated his substantive due process rights as the law is impermissibly vague, arbitrary and capricious.²⁷³ The court held that GBL § 518 did violate the defendant's substantive due process rights, and granted the defendant's motion to dismiss.²⁷⁴

The court held that GBL § 518 was unconstitutional as applied on due process grounds.²⁷⁵ It reasoned that a conviction under this statute depended solely on whether the word surcharge or cash discount was used, not on the defendant's actual conduct.²⁷⁶ It declared that, under GBL § 518, the terms credit surcharge and cash discount could be used interchangeably to describe the same conduct.²⁷⁷ The court added that even if a cash discount was intended, it was easy to phrase incorrectly as a credit surcharge.²⁷⁸ For example, an unsophisticated employee may have unintentionally violated the statute by simply explaining to a customer that the credit price was higher than the cash price, even if the employee meant to say the opposite.²⁷⁹ Therefore, the court held that GBL § 518 was unconstitutional as applied to the facts of this case because Fulvio's conviction was based on the use of a certain word, not because of a specific act.²⁸⁰

Although GBL § 518 was not challenged on First Amendment grounds in this case, the enforcement of GBL § 518 was clearly based on the content of the defendant's speech.²⁸¹ The defendant's conviction was based on the use of the unfavorable term, credit

²⁷⁰ *Fulvio*, 517 N.Y.S.2d at 1010-11.

²⁷¹ *Id.* at 1010.

²⁷² *Id.* at 1009.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Fulvio*, 517 N.Y.S.2d at 1009.

²⁷⁶ *Id.* at 1011.

²⁷⁷ *Id.* at 1013-15.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1013-14.

²⁸⁰ *Fulvio*, 517 N.Y.S.2d at 1015.

²⁸¹ *See Fulvio*, 517 N.Y.S.2d at 1015.

surcharge, rather than the favorable term, cash discount.²⁸² Based on this prior enforcement history²⁸³ and the fact that U.S. Supreme Court has already decided that GBL § 518 does implicate speech,²⁸⁴ the Second Circuit should find GBL § 518 to be an unconstitutional restriction of speech.

VIII. SECOND CIRCUIT SHOULD HOLD NEW YORK'S NO SURCHARGE LAW UNCONSTITUTIONAL

Although the U.S. Supreme Court has decided that GBL § 518 does implicate speech, two other issues are left unresolved.²⁸⁵ The first is whether GBL § 518 regulates commercial speech, and the second is whether GBL § 518 violates the First Amendment.²⁸⁶ The Second Circuit should rule in favor of the plaintiffs, as GBL § 518 is clearly a content-based regulation of commercial speech and does not pass the *Central Hudson* commercial speech test.²⁸⁷

Justice Roberts correctly stated that GBL § 518 implicates speech.²⁸⁸ Currently, GBL § 518 does not require retailers who wish to charge different prices for cash and credit to disclose the cash price, regular price, and credit price.²⁸⁹ Without a requirement for retailers to post all three prices, customers have no way of knowing what the regular price is and whether the cash price is actually a discount.²⁹⁰

The Second Circuit defined a surcharge as “a charge in excess of the usual or normal amount: an additional tax, cost, or impost.”²⁹¹ The State exemplified a surcharge as an extra fee added onto a credit purchase, after the customer already received the bill stating the regular price.²⁹² This scenario used by the State constitutes an unanticipated charge.²⁹³ The definition of surcharge used by the Second Circuit does not mention an unanticipated charge, only a

²⁸² *Id.* at 1011-15.

²⁸³ *Id.* at 1008.

²⁸⁴ *Expressions Hair Design*, 137 S. Ct. at 1147.

²⁸⁵ *Id.* at 1151.

²⁸⁶ *Id.* 137 S. Ct. at 1151.

²⁸⁷ *See Cent. Hudson Gas & Electric Corp.*, 447 U.S. 557.

²⁸⁸ *Expressions Hair Design*, 137 S. Ct. at 1147.

²⁸⁹ N.Y. GEN. BUS. LAW § 518 (McKinney 2016).

²⁹⁰ *Expressions Hair Design*, 975 F. Supp. 2d at 435-36.

²⁹¹ *Expressions Hair Design*, 808 F.3d at 127.

²⁹² Brief for Respondents at 1, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391) [hereinafter Brief for Respondents].

²⁹³ *Id.* at 7, 49.

charge in addition to the regular price.²⁹⁴ Therefore, it would seem as if GBL § 518 prohibits higher prices for credit purchases across the board.²⁹⁵ However, GBL § 518 allows lower prices for cash purchases, which is mathematically the same as allowing higher credit prices.²⁹⁶

Consequently, retailers can frame a pricing scheme as a cash discount, when it is actually a credit surcharge because customers have no way of knowing what the regular price is.²⁹⁷ Therefore, whether retailers comply with GBL § 518 is completely dependent upon how their pricing schemes are worded, rather than their economic conduct.²⁹⁸ Hence, the U.S. Supreme Court was correct in holding that GBL § 518 involves the regulation of speech.²⁹⁹

The issue then is whether GBL § 518 is a content-based speech regulation.³⁰⁰ GBL § 518 is a content-based speech regulation if the purpose of the law is to promote certain favorable speech over certain unfavorable speech and less restrictive alternatives are available.³⁰¹ The State stated that the purpose of the statute is to protect consumers from practices that would place them at a disadvantage and to reduce confusion.³⁰² In other words, the purpose of GBL § 518 is to promote the use of cash discounts and restrict the use of credit surcharges to support the economy.³⁰³ Hence, as stated above, because cash discounts and credit surcharges are merely different wordings for the same conduct, GBL § 518 favors speech that allows cash discounts, over speech that allows credit surcharges.

Additionally, less restrictive means are available to protect consumers and reduce confusion.³⁰⁴ As stated by the Eastern District of California, another less restrictive alternative is for retailers to display surcharge information throughout their stores and to explain to customers that surcharges are due to merchant swipe fees.³⁰⁵ This alternative would protect customers from unfair practices and reduce

²⁹⁴ See *Expressions Hair Design*, 808 F.3d at 127.

²⁹⁵ See Brief for Respondents, *supra* note 292, at 1.

²⁹⁶ See *Expressions Hair Design*, 808 F.3d at 128.

²⁹⁷ *Expressions Hair Design*, 975 F. Supp. 2d at 435-36.

²⁹⁸ *Fulvio*, 517 N.Y.S.2d at 1015.

²⁹⁹ *Expressions Hair Design*, 137 S. Ct. at 1147.

³⁰⁰ *Dana's R.R. Supply*, 807 F.3d at 123; *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

³⁰¹ See *Boos*, 485 U.S. at 321, 329.

³⁰² Brief for Respondents, *supra* note 292, at 13.

³⁰³ *Id.*

³⁰⁴ See *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

³⁰⁵ *Id.*

confusion without favoring one type of speech over another.³⁰⁶ Therefore, the Second Circuit should find that GBL § 518 is a content-based speech regulation because it favors one type of speech over another when less restrictive means are available.

On the other hand, as Justice Breyer pointed out in his concurring opinion in *Expressions*, “virtually all government regulation affects speech.”³⁰⁷ Furthermore, he stated that “[h]uman relations take place through speech.”³⁰⁸ Hence, he asserted that the focus should be on whether a regulation affects interests protected by First Amendment, not on whether a regulation affects conduct or speech.³⁰⁹ Following Justice Breyer’s reasoning, courts that dismissed the speech implications of no surcharge laws applied the wrong analysis.³¹⁰ The analysis should have been based on whether no surcharge laws are consistent with the First Amendment principle of the free flow of information in a democratic society.³¹¹

In view of Justice Breyer’s reasoning, GBL § 518 does affect the free flow of information.³¹² The ban on surcharges hinders how retailers communicate the price of credit transactions to their customers and keeps customers in the dark as to the true cost of their payment methods.³¹³ Using the phrase cash discount, rather than credit surcharge, does not put consumers on alert as to the high swipe fees imposed by credit companies on retailers for every credit transaction.³¹⁴ Therefore, First Amendment analysis is warranted because GBL § 518 contradicts the First Amendment principle of the free flow of information needed to make informed choices.³¹⁵

The next issue is what level of scrutiny the court should apply, which depends on what type of speech is at issue.³¹⁶ The New York Court of Appeals was correct in deciding that GBL § 518 involves

³⁰⁶ *Id.*

³⁰⁷ *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *See id.* at 1152-53.

³¹¹ *Id.*

³¹² David L. Hudson Jr., *Folding Cards, Merchants Call Loss of ‘Swipe Fees’ a 1st Amendment Violation*, 99-OCT A.B.A. J. 18, 19 (2013).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *See Asocion de Trabajadores Agricolas de Puerto Rico*, 518 F.2d at 135.

³¹⁶ *Expressions Hair Design*, 137 S.Ct. at 1152 (Breyer, J., concurring in the judgment).

commercial speech.³¹⁷ As stated by the U.S. Supreme Court in *Cent. Hudson Gas & Electric Corp.*, commercial speech is “expression related solely to the economic interests of the speaker and its audience.”³¹⁸ The communication of whether a pricing scheme is a credit surcharge or a cash discount is expression of an economic interest by retailers to their customers. Therefore, the Second Circuit should apply the *Central Hudson* test because GBL § 518 is a content-based restriction on commercial speech.³¹⁹

Furthermore, the Second Circuit should find that GBL § 518 fails the *Central Hudson* test.³²⁰ Under the first prong, allowing surcharges is neither misleading nor concerning unlawful activity.³²¹ Although surcharges are technically banned, the state still allows retailers to post prices for credit purchases that are higher than the regular price as long as the retailer calls it a cash discount and not a surcharge.³²² Therefore, the activity of a surcharge is lawful, but not the label of surcharge for that activity.³²³ In addition, imposing surcharges is not misleading because it would open communication between customers and retailers regarding credit card fees.³²⁴ Without surcharges, customers are unaware of the fees that they and retailers pay for using credit cards.³²⁵ When credit purchases and cash purchases are one single price, the true cost of credit card use is hidden.³²⁶ Surcharges allow customers to have full knowledge of the cost of credit card use and promote transparency in pricing policies, and therefore, are not misleading.³²⁷

General Business Law § 518 fails the second prong of the *Central Hudson* test because, even though the State argued that the law prevents false advertising and bait-and-switch tactics,³²⁸ which can be deemed a substantial governmental interest, the harm caused by

³¹⁷ *Id.* at 1152-53.

³¹⁸ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 561.

³¹⁹ *See id.* at 566, 445-46; *Dana’s R.R. Supply*, 807 F.3d at 1247; *Italian Colors Rest.*, 99 F. Supp. 3d at 1208-09.

³²⁰ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

³²¹ *Id.*

³²² *Expressions Hair Design*, 808 F.3d at 128.

³²³ *Fulvio*, 517 N.Y.S.2d at 1011, 1013-15.

³²⁴ *Hudson*, *supra* note 312, at 18.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Merchant*, *supra* note 8, at 367-69.

³²⁸ Brief for Respondents, *supra* note 292, at 7-8.

surcharges is merely speculative.³²⁹ As discussed above, serious doubt was expressed in the Senate Committee Report for the Cash Discount Act as to the benefits of the no surcharge law.³³⁰ The Committee asserted that the effect of the law was actually a credit subsidy that increased prices for cash and credit customers alike.³³¹ In addition, because the difference between a discount and a surcharge is so blurry, retailers simply charge one single price to account for the swipe fees so as to comply with the statute.³³² As a result, this especially hurts lower income consumers because they are forced to pay a higher price that accounts for swipe fees and end up subsidizing higher income consumers' frequent-flier miles.³³³

On the other hand, if surcharge disclosure becomes a normal practice, it will no longer be a surprise at the register; eliminating the harm that GBL § 518 was enacted to combat.³³⁴ Additionally, open disclosure of surcharge fees may ultimately improve the economy.³³⁵ Credit use may decrease, reducing the burden of credit card swipe fees for retailers, which should reduce overall prices for consumers and increase consumer spending.³³⁶

Lastly, New York already has a false advertising statute that protects consumers from false advertising and bait-and-switch tactics.³³⁷ Therefore, the state's asserted harm cannot be concrete because the state already has a remedy in place for that harm.³³⁸ As such, the Second Circuit should find that GBL § 518 fails the second prong of the *Central Hudson* test, as the harm it seeks to remedy is merely speculative.³³⁹

General Business Law § 518 fails the third prong of the *Central Hudson* test because it is not narrowly tailored and does not directly advance the asserted governmental interest.³⁴⁰ The State, on the one

³²⁹ *Statement, supra* note 40, at 235-36.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Merchant, supra* note 8, at 369-70.

³³⁴ *Id.* at 373.

³³⁵ *Hudson, supra* note 312, at 19; *Merchant, supra* note 8, at 370.

³³⁶ *Merchant, supra* note 8, at 367-69.

³³⁷ N.Y. GEN. BUS. LAW § 350 (McKinney 2012); Brief for Petitioners at 1-2, Expressions Hair Design v. Schneiderman, 137 S.Ct. 1144 (2017) (No. 15-1391) [hereinafter Brief for Petitioners].

³³⁸ *See* N.Y. GEN. BUS. LAW § 350.

³³⁹ *See Edenfield*, 507 U.S. at 770-71 (1963).

³⁴⁰ *See* Brief for Petitioners, *supra* note 337, at 43.

hand, argued in its brief that the law “implements a narrow regulation that directly advances the State’s substantial interests in protecting consumers from unfair profiteering, preventing deceptive and abusive sales tactics, and reducing consumer confusion that harms the economy.”³⁴¹ The plaintiffs, on the other hand, asserted that the law is not narrowly tailored and stated that a more narrow approach would be a regulation of excessive surcharges, not a complete ban on surcharges.³⁴²

Even if the no surcharge law was narrowly tailored, it does not directly advance the state’s interests.³⁴³ Hiding the actual cost of credit card use in a single pricing scheme or masking credit card fees as a cash discount is, in itself, deceptive.³⁴⁴ Also, although implementing a single price may reduce confusion, it most likely does not benefit the economy.³⁴⁵ When consumers are encouraged to use credit cards without restraint, consumer debt and bankruptcies increase.³⁴⁶ Therefore, GBL § 518 does not directly advance the state’s interest in consumer protection.³⁴⁷

Finally, GBL § 518 fails the fourth prong of the *Central Hudson* test because it is broader than necessary.³⁴⁸ Even though the State argued that New York’s no surcharge law prevents false advertising and bait-and-switch tactics, the statute is unnecessary because New York already has a false advertising statute that protects consumers from those practices.³⁴⁹ Furthermore, as stated by the plaintiffs, the state cannot “ban an entire category of speech because some of it has the potential to mislead.”³⁵⁰ Credit surcharges can be implemented in a way that promotes consumer protection and transparency.³⁵¹ The purpose of GBL § 518, to protect consumers from surprises at the register and unfair pricing strategies, can be accomplished by implementing credit surcharge pricing policy disclosure and a credit surcharge cap, as suggested by the Eleventh

³⁴¹ Brief for Respondents, *supra* note 292, at 21.

³⁴² Brief for Petitioners, *supra* note 337, at 43.

³⁴³ *See Statement*, *supra* note 40, at 235-36.

³⁴⁴ *Id.*

³⁴⁵ Merchant, *supra* note 8, at 327-28.

³⁴⁶ *Id.* at 367-69.

³⁴⁷ *See id.*

³⁴⁸ *See Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

³⁴⁹ *See N.Y. GEN. BUS. LAW* § 350 (McKinney 2012).

³⁵⁰ Brief for Petitioners, *supra* note 337, at 43.

³⁵¹ *See Italian Colors Rest.*, 99 F. Supp. 3d at 1209; Merchant, *supra* note 8, at 376-77.

Circuit and the Eastern District of California.³⁵² Therefore, the Second Circuit should find that a complete ban on credit surcharges is more extensive than necessary.

VIII. CONCLUSION

The Second Circuit should find that GBL § 518 fails to satisfy intermediate scrutiny under the *Central Hudson* test and should be struck down as an impermissible restriction of commercial speech under the First Amendment.³⁵³ As stated by the U.S. Supreme Court, “[i]f the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.”³⁵⁴

For the reasons stated above, the clear and present danger element is missing in allowing retailers to impose credit surcharges.³⁵⁵ Commercial expression is important to the exchange of ideas in our society and this principle should weigh heavily on the Second Circuit’s decision.³⁵⁶ The veil needs to be lifted because consumers should know exactly for what they are paying.³⁵⁷

³⁵² *Dana’s R.R. Supply*, 807 F.3d at 1250; *Italian Colors Rest.*, 99 F. Supp. 3d at 1209.

³⁵³ *See Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

³⁵⁴ *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 575.

³⁵⁵ *See Dana’s R.R. Supply*, 807 F.3d at 1250; *Italian Colors Rest.*, 99 F. Supp.3d at 1209; *Hudson*, *supra* note 312 at 18; *Merchant*, *supra* note 8, at 367-70; *Statement*, *supra* note 40, at 235-36; Brief for Petitioners, at 43.

³⁵⁶ *Asociacion de Trabajadores*, 518 F.2d at 135.

³⁵⁷ *See Merchant*, *supra* note 8, at 327-28, 367-69, 376-77; *Statement*, *supra* note 40, at 235-36.