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The Constitutional Guarantee of Freedom to Surcharge: Brandishing the First Amendment to Strike Down Surcharge Bans

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The Constitutional Guarantee of Freedom to Surcharge: Brandishing the First Amendment to Strike Down Surcharge Bans

MICHAEL R. BIGGOTT*

In what might be described as a modern-day David and Goliath, merchants in the United States find themselves pitted against both credit card companies and state legislatures in a battle over the ability to impose surcharges on purchases made with credit cards. Rather than a sling and a few smooth stones[1] *like the noble David in the biblical account of one of the most famous underdog stories ever told,*[2] *merchants are wielding something far more powerful: The First Amendment to the United States Constitution.*[3]

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1. 1 Samuel 17:40.

2. Keith Bodner, *David and Goliath (1 Sam 17),* BIBLE ODYSSEY, http://www.bibleodyssey.org/en/passages/main-articles/david-and-goliath.aspx [https://perma.cc/2K5K-L5WB].

3.
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend I.

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INTRODUCTION

Among the various issues that dominate headlines in the current socio-political landscape of the United States, those involving free speech generate a massive amount of attention. In 2016, free speech issues began to have obvious prominence in United States media outlets, and discussions on these issues have only seemed to escalate from there.[4] Worth noting, these free speech issues often spark political rather than constitutional controversies,[5] which only adds to the extent to which they facilitate awareness.[6] With speech-related issues generating so much attention, it is not surprising that at least six cases to be decided by the United States Supreme Court during its 2017-2018 term turn on the scope of the First Amendment.[7] Further, because of the political undertones of these hot-button free speech controversies, other First Amendment issues are forced to take a backseat in the purview of the general public. One of these First Amendment issues, which is the focus of this Note, is the freedom of speech problem posed by state statutes banning

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4. Between 2016 and 2017, some of the most noticeable social issues involved freedom of speech, and among these issues were: athletes kneeling during the national anthem; public universities cancelling speaking engagements due to students protesting the speakers' political views; and attacks on freedom of the press by the president of the United States.

5. Priscilla Frank, *The Ugly Business of Defending Free Speech in 2017*, HUFFINGTON POST (Nov. 21, 2017), https://www.huffingtonpost.com/entry/free-speech-center-charlottesville_us_59c8225de4b0cdc773320c85 [https://perma.cc/C5YK-SSBW].

6. Zac Auter, *Number of Americans Closely Following Politics Spikes*, GALLUP (Sept. 22, 2016), https://news.gallup.com/poll/195749/number-americans-closely-following-politics-spikes.aspx [https://perma.cc/W9X7-TZMQ] (noting that the number of Americans who say they follow national politics "very closely increased by 8% from 2015 to 2016").

7. Greg Stohr, *Free Speech is Starting to Dominate the U.S. Supreme Court's Agenda*, BLOOMBERG (Nov. 15, 2017), https://www.bloomberg.com/news/articles/2017-11-14/listen-to-this-free-speech-dominates-at-u-s-supreme-court [https://perma.cc/ASX8-4247].

the ability of merchants to impose surcharges on purchases made with credit cards.[8]

The goal of this Note is to provide a glimpse into the ways in which state-level surcharge bans will be treated in the wake of *Expressions Hair Design v. Schneiderman*, in which the United States Supreme Court concluded that such a ban constituted a speech proscription[9] and was therefore subject to First Amendment scrutiny.[10] Part I of this Note will begin with a discussion of the effects that transactions via credit card have had in the realm of everyday business, and then move into the evolution of surcharges on these transactions. Part II will discuss the relationship between the cases involving state-level surcharge bans and the circuit split that they caused, and then predict the fate of *Expressions Hair Design* as it continues to make its way through the courts. Part III will provide an argument on why merchants should ultimately be free to impose surcharges on certain transactions, and then address the concerns that come with this freedom. Part IV will explain how the Supreme Court failed to provide sufficient closure on the issue of state-level surcharge bans, and then explore the future of surcharge bans in the realm of private contract.

I. THE EFFECTS OF TRANSACTING ON CREDIT AND THE EVOLUTION OF SURCHARGING

A. TRANSACTING ON CREDIT: WHAT'S AT STAKE FOR MERCHANTS, CONSUMERS, AND CREDIT CARD COMPANIES

The ability to impose surcharges on credit card transactions has prompted a long-standing battle between credit card companies and merchants.[11] Without a doubt, the ability to make purchases via credit card has benefited both merchants and consumers alike.[12] For merchants, contracting with a credit card company for the ability to accept payments on credit from the company's cardholders provides them with some certification of financial reliability.[13] This is because card issuers have an incentive to make sure that the merchant is financially reliable enough to honor their cards and not

8. Noah Feldman, *Cash Discounts, Credit Surcharges and Free Speech*, BLOOMBERG (Jan. 10, 2017), https://www.bloomberg.com/opinion/articles/2018-10-08/the-next-financial-crisis-is-staring-us-in-the-face [https://perma.cc/N4JF-W4QB].

9. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017).

10. *Id.* at 1151 (noting that the case is being remanded to the Court of Appeals to analyze the statute in question as a speech regulation).

11. Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 438 (S.D.N.Y. 2013).

12. Edmund J. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. ECON & ORG. 217, 219 (1990).

13. Id.

engage in fraudulent behavior.[14] Additionally, by accepting credit cards, merchants may see increases in their average purchase amounts,[15] improvements in checkout efficiency,[16] and decreases in theft.[17] For consumers, the ability to make purchases with a credit card provides them with an additional payment option.[18] While this option might open the door to merchants making more sales, it is unclear whether such increases are really a direct result of allowing credit card purchases.[19] Although merchants claim that they accept credit cards to increase sales, a study by the Federal Reserve Board found that credit cards did not appear to increase the ability of consumers to make purchases altogether.[20] Ultimately, the notion of credit card acceptance increasing sales boils down to whether this method of purchasing is more convenient for consumers.[21] However, it is unlikely that merchants will start refusing to accept payment in this form because, in the merchants' eyes, refusing to accept credit cards could result in a reduction in sales.[22]

While there are various benefits to merchants for contracting with a credit card company to accept payments on the cards they issue, credit card acceptance is nonetheless an expensive payment system.[23] For one, "credit card transactions cost American merchants six times as much as cash transactions."[24] The reason credit card transactions are so costly for merchants is because when a consumer makes a purchase using a credit card, the card issuer credits the merchant with the purchase amount, minus a "merchant discount fee"[25] (hereinafter "swipe fee"), which is typically two to three percent of the purchase price.[26] Additionally, many credit card issuers offer rewards programs to their cardholders for credit card purchases, and these rewards programs are often funded by the merchants who receive no benefit from

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14. *Id.*
15. Adam J. Levitin, *Priceless – The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1342 (2008).
16. *Id.*
17. As a form of electronic payment systems, transactions conducted through credit cards "facilitate bookkeeping and currency conversion." *Id.*
18. Kitch, *supra* note 12, at 219.
19. *Id.* at 223.
20. *Id.*
21. Id.
22. *Id.*
23. Levitin, *supra* note 15, at 1322-23.
24. *Id.*
25. Merchant discount fees are fees that merchants pay to credit card-issuing institutions for processing transactions between merchants and cardholders. *See* Christine Speedy, *Interchange and Merchant Discount Fees Explained*, 3D MERCHANT BLOG (Mar. 15, 2010), https://3dmerchant.com/blog/managing-payment-processing-costs/interchange-and-merchant-discount-fees [https://perma.cc/M4DG-UFD2].
26. Levitin, *supra* note 15, at 1329-30.

them.[27] To make matters worse for merchants, rewards programs are increasing in popularity.[28] As a result of merchants being assessed swipe fees and having to fund rewards programs, credit card acceptance is an increasing cost of doing business for many merchants.[29]

Through their contracts with merchants, credit card companies reap substantial financial benefits from credit card usage.[30] Just to name a few, these companies receive swipe fees (based on a percentage of the transaction price) from businesses that accept their cards,[31] as well as various fees and interest payments imposed on their cardholders.[32] In order to make up for their losses due to swipe fees, merchants started attempting to steer customers toward lower-cost methods of payment,[33] such as cash, and began to impose surcharges on consumers paying with a card.[34] This, however, did not sit well with the credit card companies, who then began looking into ways to prevent their cardholders from being subjected to surcharges.[35] In particular, credit card companies advocated that any price differential between cash and credit be in the form of a discount for cash rather than a surcharge for credit.[36]

B. THE EVOLUTION OF THE SURCHARGE BAN: PRE-TILA TO TODAY

After merchants started imposing surcharges on consumers to cover the costs associated with accepting credit card payments, credit card issuers began including in their contracts with merchants a clause requiring that card transactions be charged the same price as non-card transactions in order for the merchant to be able to accept that card.[37] These clauses were eventually attacked by a consumer movement on the grounds that they injured

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27. *Id.* at 1354.

28. Bobbie Martin, *What's in the Cards for 2016*, KANTAR (Mar. 8, 2016), https://us.kantar.com/public-affairs/economy/2016/2016-credit-and-debit-card-projections/ [https://perma.cc/MAW7-PVMB] (noting that "75% of all network cardholders us[e] rewards programs.").

29. *Id.* at 1345.

30. Melissa Lambarena, *How Do Credit Card Companies Make Money?*, NERDWALLET (Apr. 6, 2017), https://www.nerdwallet.com/blog/credit-cards/credit-card-companies-money/ [https://perma.cc/2JB5-EFMZ].

31. *Id.*

32. Such fees included, but are not limited to, annual fees, late fees, and cash advance fees. *Id.*

33. Fumiko Hayashi, *Discounts and Surcharges: Implications for Consumer Payment Choice*, FEDERAL RESERVE BANK OF KANSAS CITY, June 2012, at 1.

34. *Id.* at 2.

35. Kitch, *supra* note 12, at 217-18.

36. *Id.* (quoting Richard Thaler, who suggested that credit card companies preferred price differentials in the form of cash discounts because "consumers would view the cash discount as an opportunity cost of using the credit card but the surcharge [would be viewed] as an out-of-pocket cost.").

37. *Id.* at 219-20.

consumers who did not use credit cards.[38] In 1974, American Express was sued by Consumers Union on the grounds that the clauses banning price differentials based on form of payment violated antitrust laws, and the case ultimately settled.[39] While the antitrust settlement appeared to be a signal to the consumer movement that an age of discounts was forthcoming, the settlement ultimately just shifted the issue from the realm of private contract to the realm of Federal law.[40]

In 1976, Congress stepped in and amended the Truth in Lending Act (TILA) to provide 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."[41] In February 1981, this surcharge ban expired, and Congress decided to extend it for an additional three years.[42] When the surcharge ban lapsed in 1984, Congress failed to extend it,[43] which led to a number of states enacting statutes mimicking TILA's surcharge ban.[44] The reason why Congress allowed the ban to lapse is unclear,[45] but the position of the federal government was that credit card companies could contractually restrict merchants from surcharging transactions with their cardholders.[46] Immediately following Congress' failure to extend the surcharge ban, the New York Legislature enacted New York General Business Law § 518 which borrowed the language of TILA's surcharge ban and ultimately led to a Supreme Court decision that expanded the scope of free speech under its First Amendment jurisprudence.[47]

II. THE CREATION OF A SPLIT: *EXPRESSIONS HAIR DESIGN* AND ITS CIRCUIT COMPANIONS

Over the last few years, the future of merchants being able to surcharge has been rather unpredictable. Starting in 2015, the issue of state-level surcharge bans developed into a free speech issue of considerable significance.

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38. *Id.* at 220 (noting that a clause in the contracts between merchants and credit card companies requiring that card transactions be priced the same as non-card transactions would cause non-card-using consumers to pay more, despite the merchants not facing swipe fees for their transactions).

39. *Id.* at 220-21.

40. Kitch, *supra* note 12, at 221.

41. *Id.* at 226 (citing Pub. L. No. 94-222, § 3(c)(1) (1976)).

42. *Id.* at 226-27.

43. Ann Wardrop, *Dealing with Excess: Regulatory Perspectives on Surcharging for Payment*, 36 U. QUEENSL. L.J. 99, 105 (2017).

44. Mark Chenoweth, *Expressions Hair Design: Detangling the Commercial-Free-Speech Knot*, 2017 CATO SUP. CT. REV. 227, 229-30 (2017).

45. Wardrop, *supra* note 43, at 105.

46. *Id*.

47. Chenoweth, *supra* note 44, at 230.

In two states, Texas and New York, surcharge bans were upheld by federal courts; in another two states, California and Florida, similar bans were struck down.[48] With the Second and Fifth Circuits upholding surcharge bans in *Expressions Hair Design v. Schneiderman*[49] and *Rowell v. Pettijohn*,[50] respectively, and the Eleventh Circuit striking down a similar ban in *Dana's Railroad Supply v. Attorney General*,[51] a circuit split in need of resolving was created. Following the decisions rendered in these three circuits, the Supreme Court was asked to review each one.[52] Oddly, these three cases that created the split reached the Court at roughly the same time.[53] However, this was not a simple coincidence, given that each of the businesses challenging the surcharge bans were represented by the same counsel.[54] Because the issues being brought to the Court in these cases were virtually identical, the Court decided to grant certiorari of *Expressions Hair Design*,[55] decline to grant certiorari of the Eleventh Circuit's decision in *Dana's Railroad Supply*,[56] and vacate the Fifth Circuit's holding in *Rowell* and remand the case for further consideration in light of *Expressions Hair Design*.[57] Below is a discussion of the juxtaposition in the handling of surcharge bans by the Fifth and Eleventh Circuits, followed by the progression of *Expressions Hair Design* and a prediction of how the issue will ultimately be decided.

A. SURCHARGE BANS IN THE FIFTH AND ELEVENTH CIRCUITS: *ROWELL V. PETTIJOHN* AND *DANA'S RAILROAD SUPPLY V. ATTORNEY GENERAL*

In *Rowell v. Pettijohn*, a group of Texas merchants challenged Texas' Anti-Surcharge law[58] as an improper speech regulation in violation of the First Amendment.[59] The merchants alleged that the law regulates speech by preventing them from describing a price differential to customers in the way they prefer—namely, that the posted sticker prices are higher for credit card users because they are passing along as a surcharge the transaction fee that

48. Clay Calvert et al., *Speech v. Conduct, Surcharges v. Discounts: Testing the Limits of the First Amendment and Statutory Construction in the Growing Credit Card Quagmire*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 149, 154 (2017).

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

50. Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016).

51. Dana's R.R. Supply v. Gen Att'y, 807 F.3d 1235 (11th Cir. 2015).

52. Chenoweth, *supra* note 44, at 251.

53. *Id.*

54. *Id.* at 251, n.61.

55. Expressions Hair Design v. Schneiderman, 137 S. Ct. 30 (2016).

56. Bondi v. Dana'sR.R. Supply, 137 S. Ct. 1452 (2017).

57. Rowell v. Pettijohn, 137 S. Ct. 1431, 1432 (2017).

58. TEX. BUS. & COM. CODE ANN. § 604A.0021(a) (West 2017) ("In a sale of goods or services, 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.").

59. Rowell v. Pettijohn, 2015 WL 10818660, at *1 (W.D. Tex. Feb. 4, 2015).

the credit card companies impose on them.[60] At trial in the United States District Court for the Western District of Texas, the court concluded that the Anti-Surcharge law regulates economic conduct rather than speech,[61] and upheld the law as being within the scope of the state's police power to regulate business.[62]

On appeal in the United States Court of Appeals for the Fifth Circuit, the merchants argued that the District Court erred in concluding that Texas' Anti-Surcharge law is a permissible economic regulation, claiming instead that the law is a content-based speech restriction because it "ban[s] one disfavored way of truthfully describing lawful conduct."[63] In response, Pettijohn, the Commissioner of the Office of Consumer Credit Commissioner of the State of Texas, argued that the law prohibits nothing more than the ability of merchants to impose surcharges on customers who use credit cards, and that any impact the law has on speech is merely incidental.[64] The Fifth Circuit ultimately affirmed the judgment of the District Court,[65] finding that "[p]ursuant to a plain reading of the [ ] law, it bans surcharges, and is otherwise completely silent regarding other forms of pricing."[66] The merchants appealed the Fifth Circuit's decision to the United States Supreme Court, where the Court vacated the judgment and remanded the issue back to the Fifth Circuit for further consideration in light of its recent holding in *Expressions Hair Design.*[67] Shortly thereafter, the Fifth Circuit remanded the matter to the district court for further proceedings consistent with *Expressions Hair Design.*[68]

In *Dana's Railroad Supply,* a group of Florida merchants challenged a Florida statute[69] on First Amendment grounds, and because the statute's language resembled that of the Texas Anti-Surcharge law in *Rowell*, the merchants argued that the law unlawfully prohibited their desired way of communicating prices.[70] At trial, the United States District Court for the Northern District of Florida applied the rational basis test and held the statute constitutional.[71] In upholding the statute, the court found that the statute was

60. *Id.*
61. *Id.* at 5.
62. *Id.* at 4.
63. Rowell v. Pettijohn, 816 F.3d 73, 77 (5th Cir. 2016).
64. *Id.* at 78.
65. *Id.* at 84.
66. *Id.* at 81.
67. Rowell v. Pettijohn, 137 S. Ct. 1431, 1432 (2017).
68. Rowell v. Pettijohn, 865 F.3d 237, 238 (5th Cir. 2017).
69. FLA. STAT. ANN. § 501.0117(1) (West 1987) ("A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card.").
70. Dana's R.R. Supply v. Bondi, 2014 WL 11189176 (N.D. Fla. Sept. 2, 2014).
71. *Id.* at 4.

reasonably related to the state's legitimate legislative goal in protecting consumers from unpleasant surprises.[72] The court reasoned that preventing unpleasant surprises is a legitimate legislative goal "because it makes for happier customers [which] help[s] drive a stronger economy."[73]

On appeal, the United States Court of Appeals for the Eleventh Circuit took a different approach. First, the Eleventh Circuit rejected the District Court's construction of the Florida statute as a "bait-and-switch offense" because such conduct is already covered by the state's unfair-competition law and there is no "indication that the Florida Legislature intended the no-surcharge law to function solely as a backstop to [this] law."[74] Next, the Eleventh Circuit concluded that the Florida statute regulates speech because it prohibits a specific way of price communication–namely, "[i]n order to violate the statute, a [merchant] must communicate the price difference to a customer and that communication must denote the relevant price difference as a credit-card *surcharge*."[75] After concluding that the law abridges protected speech, the Eleventh Circuit found that it cannot pass intermediate scrutiny and reversed the judgment of the District Court.[76] Following the reversal, Pam Bondi, the Attorney General of Florida, appealed the Eleventh Circuit's decision to the United States Supreme Court, but the Court denied the petition.[77]

Despite the statutory language of the anti-surcharge laws in *Rowell* and *Dana's Railroad Supply* being similar, the Fifth and Eleventh Circuits treated them very differently. Perhaps the distinction had to do with the Florida statute subjecting offenders to criminal sanctions while violation of the Texas statute only subjected persons to civil penalty. Perhaps the distinction had to do with the political ideologies of the circuit judges–an issue which will be touched on later in this Note. However, regardless of the motivations, the difference in treatment of two similarly-worded statutes created a circuit split, which the Court would eventually resolve in *Expressions Hair Design*.

B. THE PROGRESSION OF *EXPRESSIONS HAIR DESIGN* AND A PREDICTION OF ITS FATE

As noted above, New York passed Section 518 in the wake of the expiration of the federal surcharge ban under the 1976 amendment to the Truth

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72. *Id.* (noting that customers may be displeased upon learning that the price they pay is higher than the price they were told due to a merchant imposing a surcharge for their use of a credit card).

73. *Id.*

74. Dana's R.R. Supply v. Gen. Att'y, 807 F.3d 1235, 1244 (11th Cir. 2015).

75. *Id.* at 1245.

76. *Id.* at 1250-51.

77. Bondi v. Dana's R.R. Supply, 137 S. Ct. 1452 (2017).

in Lending Act.[78] The New York statute provides that "[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," and subjects sellers who violate the statute to a fine of no more than $500 or a term of imprisonment of up to one year, or both.[79] The statute was eventually challenged in *Expressions Hair Design v. Schneiderman* as violating the First Amendment because, as applied, it "prohibit[s] retailers from informing their customers that the fees they pay to credit card companies and then pass on to their customers are in the nature of surcharges above the price they would otherwise charge," thereby restricting what merchants may communicate to their customers in terms of additional fees for credit card usage.[80] Among the plaintiffs in *Expressions Hair Design* was a hair salon, Expressions Hair Design, which charged a higher price for credit card payments and posted a sign to inform its customers about this additional charge.[81] Out of fear of prosecution under Section 518, the salon removed its sign but continued to impose an additional charge for credit card purchases.[82]

At trial in the United States District Court for the Southern District of New York, the plaintiffs argued "that framing the incremental cost of credit-card usage as a 'surcharge' is an accurate and effective way to convey to consumers that paying with credit is actually more expensive than paying with cash."[83] The plaintiffs further argued that without surcharges, consumers would not know that the merchant is being charged a fee from the relevant credit card issuer for the transaction.[84] The plaintiffs ultimately wanted to retain the ability to impose surcharges instead of offering discounts for cash purchases "because consumers are more likely then to notice the fees, dislike them, and switch to cash in order to avoid them."[85] The State, on the other hand, argued that the surcharge ban would protect consumers from deception.[86] This is because consumer expectations are based on the posted sticker prices, and when they later come to learn that the price is higher because they chose to pay by credit card, they are unexpectedly harmed.[87] The District Court ultimately agreed with the plaintiffs and enjoined the State from enforcing Section 518.[88] The District Court found that because Section 518

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78. Levitin, *supra* note 15, at 1381, n.216.

79. N.Y. GEN. BUS. LAW § 518 (McKinney 1984).

80. Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 436 (S.D.N.Y. 2013).

81. *Id.* at 439-40.

82. *Id.* at 440.

83. *Id.* at 437.

84. *Id.*

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

86. *Id.*

87. *Id.*

88. *Id.* at 450.

"draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," the statute regulates speech rather than conduct, "and does so by banning disfavored expression."[89]

On appeal, the United States Court of Appeals for the Second Circuit took a different approach. The Second Circuit agreed with New York's position that Section 518 regulates conduct rather than speech, and thus there was no need to analyze the statute under the applicable First Amendment tests.[90] In reaching this conclusion, the Second Circuit looked to the language of Section 518 and asserted that "[b]y its terms, [the statute] does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges."[91] While the plaintiffs argued that Section 518 implicates the First Amendment because it bans a label disfavored by the State,[92] the Second Circuit held that surcharges do not become speech just because the State bans them due to the negative reactions that consumers have towards them.[93] The Second Circuit ultimately decided to vacate the judgement of the District Court and remand the case for the plaintiffs' claims to be dismissed.[94]

The case was then appealed to the United States Supreme Court where, by a unanimous decision,[95] the Court held that Section 518 is a speech regulation and remanded the case to the Second Circuit to analyze the statute as such.[96] In reaching this conclusion, the Court disagreed with the premise of the Court of Appeals that because Section 518 controlled prices, it regulated conduct alone.[97] The Court stated that Section 518 is different because it "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer."[98] Instead, the law regulates the ways in which a

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89. *Id.* at 444.

90. Expressions Hair Design v. Schneiderman, 808 F.3d 118, 130 (2d Cir. 2015).

91. *Id.* at 131.

92. The plaintiffs equated credit card surcharges and cash discounts to "labels" because they elicit different reactions from consumers, and because Section 518 banned the label that consumers react more negatively to while permitting the labeling of a price differential as a "cash discount," the statute regulated speech as opposed to conduct.

93. *Expressions Hair Design*, 808 F.3d at 132.

94. *Id.* at 144.

95. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146 (2017) (the opinion of the Court was delivered by Chief Justice Roberts, in which Justices Kennedy, Thomas, Ginsburg, and Kagan joined, and Justices Breyer and Sotomayor filing opinions concurring in the judgment, with Justice Alito joining Justice Sotomayor's concurrence.)

96. *Id.* at 1151.

97. *Id.* at 1150.

98. *Id.* at 1151.

merchant may communicate prices.[99] The Court demonstrated this point using the following example:

> A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say '$10, with a 3% credit card surcharge' or '$10, plus $0.30 for credit' because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price.[100]

On remand, the Second Circuit was tasked with determining whether Section 518 could survive scrutiny under the Supreme Court's ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[101] and whether it may be upheld as a permissible disclosure requirement under the Court's ruling in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[102] The Supreme Court determined that the *Central Hudson* test was appropriate because the parties disagreed on whether Section 518 was a valid commercial speech regulation.[103] Additionally, the Court determined that *Zauderer* needed to be applied because the parties disputed whether Section 518 could be upheld as a valid disclosure requirement.[104]

The *Central Hudson* test is a four-prong test for analyzing speech regulations.[105] The first prong looks at whether the relevant speech involves a lawful activity and is not misleading.[106] The second prong looks to see whether the asserted governmental interest behind the regulation is substantial.[107] The third prong asks whether the governmental interest is directly advanced by the regulation.[108] The final prong of *Central Hudson* requires that the regulation not restrict any more speech than necessary to further the government's interest.[109] To put it another way, government regulations on non-misleading commercial speech that concerns a lawful activity are subject to

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99. *Id.*
100. *Expressions Hair Design*, 137 S. Ct. at 1151.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Chenoweth*, supra* note 44, at 248.
106. *Id.*
107. *Id.*
108. *Id.*
109. Chenoweth, *supra* note 44, at 248.

intermediate scrutiny.[110] Under *Zauderer*, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[111] Thus, to be upheld as a valid regulation of commercial speech, Section 518 must survive intermediate scrutiny, and its disclosure requirements must be reasonably related to New York's interest in preventing consumers from being misled or deceived.

Rather than attempt to tackle these questions, the Second Circuit certified the following question to be answered by the New York Court of Appeals: "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit card users?"[112] The Second Circuit decided to certify this question because it will enable the New York Court of Appeals to clarify the scope of Section 518, which in turn will determine the proper framework for the Second Circuit's constitutional analysis.[113] Certification in this instance is appropriate given the seriousness of the First Amendment interests at stake and the uncertainty of the legal framework surrounding Section 518.[114] Further, certification is warranted because the issue here involves a question of state law that has yet to be reviewed by the state's highest court.[115] In certifying this question, the Second Circuit has given the New York Court of Appeals a great deal of discretion by adding that "the New York Court of Appeals may reformulate or expand the certified question as it deems appropriate."[116] The New York Court of Appeals accepted the question certified by the Second Circuit,[117] and the Second Circuit will ultimately be able to conduct the First Amendment analysis that it should have conducted in the first place.

When the issue comes back to the Second Circuit for a First Amendment analysis, the Second Circuit should have little difficulty striking down Section 518 as a speech regulation that cannot survive intermediate scrutiny under *Central Hudson.* To be upheld, Section 518 would need to satisfy each of *Central Hudson*'s four prongs. The first prong – whether the speech concerns a lawful activity and is not misleading – will be satisfied because the Supreme Court has already said that the speech involved here is lawful and not misleading.[118] The second prong – whether the state has a substantial

110. Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm'n N.Y., 447 U.S. 557, 573 (Blackmun, J., dissenting).

111. Zauderer v. Office of Disciplinary Counsel of Sup. Ct. Ohio, 471 U.S. 626, 651 (1985).

112. Expressions Hair Design v. Schneiderman, 877 F.3d 99, 100 (2d Cir. 2017).

113. *Id.* at 106-107.

114. *Id.* at 106.

115. *Id.*

116. *Id.* at 107.

117. Expressions Hair Design v. Schneiderman, 30 N.Y.3d 1051, 1052 (N.Y. 2018).

118. Chenoweth, *supra* note 44, at 248.

interest – is where Section 518 will most likely fail. This is because it is difficult to ascertain how the state would have a substantial interest in prohibiting merchants from using the word "surcharge" as opposed to "discount." For guidance in identifying a substantial interest, the Second Circuit could look to Chief Judge Carnes' dissent in *Dana's Railroad Supply*,[119] but this is unconvincing because the two other Eleventh Circuit judges ultimately disagreed with his position.[120] If the Second Circuit is somehow convinced with New York's interest in protecting consumers, Section 518 would then fail *Central Hudson*'s third prong because there are better ways to serve this interest, such as limiting surcharges to the rate that merchants pay the credit card companies.[121] Lastly, if Section 518 manages to survive the first three prongs of *Central Hudson*, the statute would ultimately fail the fourth prong since "there are far too many alternatives to advance the government's interest that do not involve restricting . . . disfavored speech."[122] For instance, the state "easily could have limited its regulation to surcharges that are deceptive or misleading,"[123] thereby advancing its interest without restricting more speech than is necessary.

Aside from a *Central Hudson* analysis, Section 518 ultimately cannot survive an analysis under *Zauderer*. The reason for this is simple: *Zauderer* only applies to government regulations that compel speech in order to combat consumer deception, and Section 518 does not compel speech.[124] Instead, the statute merely prohibits price differentials from being described as "surcharges."[125] However, an argument can be made that Section 518 does compel speech – namely, it requires merchants to characterize price differentials as "discounts," despite the statute not explicitly stating this. Nonetheless, Section 518 would not survive under *Zauderer* as reasonably related to the state's interest in preventing consumer deception because the statute, by preventing merchants from effectively communicating the true costs of credit

119. *See* Dana's R.R. Supply v. AG, 807 F.3d 1235, 1253 (11th Cir. 2015) (Carnes, J., dissenting) (noting the majority's admission that the state's anti-surcharge law would be constitutional if interpreted as "a prohibition on bait-and-switch schemes," and then arguing that the statute should be read this way).

120. *Id.* at 1243-44. The majority rejects the construction of the surcharge ban as a bait-and-switch scheme because such a construction "would narrow the no-surcharge law into nothingness" by allowing merchants to avoid liability by simply announcing the price difference to credit card users prior to the sale, which is not intention of the statute. *Id.*

121. Chenoweth, *supra* note 44, at 248.

122. *Id.* at 248-49.

123. Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 447 (S.D.N.Y. 2013).

124. Chenoweth, *supra* note 44, at 249.

125. *See generally* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) ("[T]he pricing practice [the plaintiffs are interested] in employing is a single-sticker regime, listing one price and a separate surcharge amount . . . [and] §518 bars them from doing so.").

card usage to consumers, actually invites deception. In addition, Section 518 fails to effectively prevent deception because it does not ensure that other charges besides surcharges, such as service fees, will be reflected in the price displayed to consumers.[126]

III. MAKING THE CASE FOR THE FREEDOM TO SURCHARGE: JUSTIFICATIONS, CONCERNS, AND POSSIBLE POLITICAL IMPLICATIONS

This section of the Note delves into some justifications for merchants having the ability to impose surcharges on consumers who use credit cards. First, this section will explore the arguments in favor of surcharges as well as the arguments against anti-surcharge laws. Next, this section will introduce some of the concerns that come with surcharging and then discuss why these concerns are not sufficiently convincing to justify anti-surcharge laws. Finally, this section will briefly address the notion of surcharge bans being politically motivated.

A. IDENTIFYING THE ARGUMENTS IN FAVOR OF SURCHARGING

As noted above, swipe fees have become a costly business expense for merchants, and the primary way in which merchants can relieve themselves of this cost is to impose surcharges on credit card purchases.[127] At first glance, this power seems like it will be used to the detriment of consumers. However, after looking at the issue more closely, this is simply not the case.

One argument in favor of surcharging is that many economists believe that in countries with well-developed credit card industries, the ability of merchants to impose surcharges is generally beneficial.[128] This is because "[m]erchant surcharging enhances efficiency in the retail payments system by improving price signals consumers face when making payments."[129] Additionally, allowing merchants to impose surcharges can provide them greater influence in directing consumers toward using forms of payment that lower the merchants' costs of accepting payment.[130] From this, it can be inferred that merchants will then be better-suited to reduce their sticker prices, thereby benefitting consumers.[131] Furthermore, surcharging may result in

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126. *Expressions Hair Design*, 975 F. Supp. 2d at 446-47.

127. *See supra* Part I.A.

128. Hayashi, *supra* note 33 at 3 (citing Nicholas Economides & David Henriques, *To Surcharge or Not to Surcharge? A Two-Sided Market Perspective of the No-Surcharge Rule* (European Central Bank, Working Paper No. 1388, 2011)).

129. Hayashi, *supra* note 33, at 3.

130. *Id.* at 4.

131. If merchants are able to lower the costs of accepting payments by having the power to influence payment methods through imposing surcharges, they will likely be more inclined to reduce prices.

consumers having the ability to "comparison shop between credit and lower-cost forms of payment, such as debit and cash, effectively bringing down costs to all parties."[132]

In addition, surcharging can be a useful means of facilitating economic growth in the United States. Among a myriad of other factors, increasing the production of goods and services plays an important role in growing the economy.[133] One of the best ways for merchants to be able to increase the production of goods and services is for them to be able to reduce their operating costs. Given that swipe fees have steadily become a substantial operating cost for U.S. merchants,[134] it logically follows that lowering these fees will help businesses thrive. One way to bring about a reduction in swipe fees is to allow surcharging.[135] This is because credit card companies will be encouraged to lower their swipe fees in order to remain competitive.[136] Over time, if merchants are able to surcharge, consumers will begin to switch to paying in cash in order to avoid paying surcharges, and this will force credit card issuers to reduce the swipe fees they impose on merchants.[137] Further, the best way for credit card companies to remain competitive is to increase the number of merchants who accept their cards.[138] However, merchants will be reluctant to do so if the swipe fees are too high,[139] or if they cannot impose surcharges to offset the swipe fees. To summarize, surcharging helps to reduce swipe fees, and lower swipe fees cut down on merchants' operating costs, thereby putting them in a better position to increase the production of their goods and services.

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132. Evan Weese, *Landmark Ruling Pushes U.S. Toward Comprehensive Surcharging,* PAYMENTSJOURNAL (Jan. 11, 2018), http://www.paymentsjournal.com/landmark-ruling-pushes-u-s-toward-comprehensive-surcharging/ [https://perma.cc/655L-HS7K].

133. Leslie Carbone & Jay Richards, *The Economy Hits Home: What Makes the Economy Grow*, THE HERITAGE FOUNDATION (July 1, 2009), https://www.heritage.org/jobs-and-labor/report/the-economy-hits-home-what-makes-the-economy-grow [https://perma.cc/89FR-U76V].

134. Stuart E. Weiner & Julian Wright, *Interchange Fees in Various Countries: Developments and Determinants*, 4 REV. OF NETWORK ECON., no. 4, Dec. 2005, at 299 (noting that swipe fees on credit cards have been rising in the United States and are more than double those in other countries).

135. Italian Colors Rest. v. Harris, 99 F. Supp. 3d 1199, 1205 (E.D. Cal. 2015) ("[I]t has been found that when countries allow surcharges, swipe fees decrease significantly.").

136. *Id.*

137. Adam J. Levitin, *The Antitrust Super Bowl: America's Payment System, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L. J. 265, 313 (2005) (noting that Australian credit card networks were forced to cut their swipe fees by almost half because credit card transactions were becoming too expensive "to compete in a free payment system market.").

138. *See* Weiner & Wright, *supra* note 134, at 311-12.

139. *Id.* at 312 (noting that low merchant demand for the ability to accept credit cards induces decreases in swipe fees).

To further support the ability of merchants to surcharge, it is worth noting that there are some severe consequences that come with laws that prohibit surcharging. For one, surcharge bans might lead merchants down the road of posting higher sticker prices to pass the costs of swipe fees along to all consumers.[140] In effect, this practice will result in the payments of credit card-using consumers being subsidized by non-credit card-using consumers,[141] such as cash-only customers, of which the poor and minorities are heavily overrepresented.[142] To add insult to injury, taxpayers in general will end up subsidizing credit card purchases when consumers who rely on government benefits, like food stamps, have to pay more to compensate merchant losses from the costs of accepting credit cards.[143]

Another troubling facet of surcharge bans is the possibility of political corruption underlying them. Consumers have been shown to be much more displeased with surcharges than with discounts, despite the fact that the two are economically equivalent.[144] Because of this, credit card lobbyists have preferred retailers to describe price differentials as cash discounts, as opposed to credit surcharges (since the notion of a surcharge as a penalty might lead consumers to elect to use other forms of payment).[145] This is troubling because it begs the question: are surcharge bans being passed by state legislatures as a result of pressure from the corporate influences of credit card companies? To put it another way, might state lawmakers be passing laws favorable to credit card companies in exchange for political gain, such as campaign contributions? While surcharge bans appear to be at least partially rooted in consumer protection, one commenter notes, "[t]he strength of lobbying by the card companies [cannot] be overlooked, as they have always been opposed to surcharging."[146] The possibility of such corruption in this regard is too great to be overlooked.

B. ADDRESSING THE CONCERNS OF SURCHARGING

Like most issues related to policy, the ability of merchants to surcharge is not entirely immune from concerns. One concern with surcharging is that merchants might be seeking to profit off credit card transactions by imposing

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140. Adam J. Levitin, *Priceless – The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1, 27 (2008).

141. *Id.* at 28; *See also* Scott Schuh et. al., *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 21 (Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 10-03, 2010) ("[T]he average credit-card-paying household receives a subsidy of $1,133 . . . annually from cash users.").

142. Levitin, *supra* note 140, at 36.

143. *Id.*

144. Levitin, *supra* note 137, at 280.

145. *Id.* at 280-81.

146. Wardrop, *supra* note 43, at 109.

surcharges at a percentage higher than the cost to the merchant in accepting payment by credit card. This is known as "excessive surcharging," and has become problematic in countries such as Australia.[147] Another concern with surcharging is that it might deter consumers from using credit cards. From the standpoint of behavioral economics, "consumers are more sensitive to a loss than to a gain,"[148] thereby resulting in surcharges having a larger impact on payment behavior than discounts,[149] despite them being structured as economical equivalents.

These concerns, though legitimate, are ultimately unconvincing as a basis for government prohibitions on surcharging. In terms of excessive surcharging, this problem can be avoided by legislatures passing laws requiring surcharges to be based on a percentage no higher than the percentage that the merchant must pay to the card issuer in swipe fees. In fact, this approach to combatting excessive surcharges has already been adopted by Australia.[150] In terms of surcharges deterring credit card usage by consumers, "[t]here is little empirical evidence on whether consumers react differently to surcharges and discounts."[151] Further, the studies that have been conducted on consumer payment choice have found that consumers are sensitive to both positive fees (surcharges) and negative fees (discounts).[152] Thus, it is unclear whether consumers truly are deterred from using credit cards because of surcharges, and it would be a stretch to prohibit surcharges based on this uncertainty.

C. A LOOK INTO THE POSSIBLE POLITICAL MOTIVATIONS

As noted earlier, the difference in treatment of virtually identical anti-surcharge laws in the U.S. Courts of Appeals may have been motivated in part by political ideology.[153] While this premise is seemingly plausible, the speech implications behind surcharge bans are generally devoid of partisanship. For evidence of the seemingly non-existent role that partisanship has had in determining the constitutionality of surcharge bans, one could look to the political backgrounds of the judges in the courts that created the circuit split – in particular, the parties of the presidents that nominated these circuit judges. The Second Circuit, which upheld a surcharge ban, consisted of three

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147. *Id.* at 99.

148. Hayashi, *supra* note 33, at 2.

149. *Id.*

150. *See generally* Clancy Yeates, *Small Businesses Face Fines for Excessive Credit and Debit Surcharges from September 1,* THE SYDNEY MORNING HERALD (Aug. 31, 2017) (noting that Australia extended its ban on excessive surcharging to prohibit all businesses from imposing surcharges that are higher than the costs of accepting payment through the cards of any of four card issuers: EFTPOS, Visa, MasterCard, and American Express).

151. Hayashi, *supra* note 33, at 2.

152. *Id.*

153. *See supra* Part II.A.

judges appointed by Republican presidents.[154] In contrast, the Eleventh Circuit, which also consisted of three judges appointed by Republican presidents,[155] struck down a similar statute.[156] In the Fifth Circuit, a surcharge ban was upheld by a divided panel of two Republican-appointed judges over the dissent of a Democratic-appointed judge.[157] In the Ninth Circuit, a panel of three judges, one nominated by a Republican president and the others nominated by a Democratic president,[158] unanimously decided to affirm the district court's ruling striking down a surcharge ban in *Italian Colors Restaurant v. Becerra.*[159] Thus, because there is no clear pattern of circuit judges voting on party lines, the issue of anti-surcharge laws does not appear to be motivated by partisanship.

Although the constitutionality of state-level surcharge bans appears to be free from partisanship, the overarching issue of surcharging is not entirely outside the realm of politics. Recall that credit card companies are strongly opposed to merchants being able to surcharge because doing so has the potential to discourage credit card use by consumers.[160] Credit card companies need consumers to make purchases using their cards because the swipe fees they impose on merchants with these transactions "are a huge source of revenue for [them]."[161] In fact, in 2015, merchants in the United States paid over $40 billion in swipe fees to process credit and debit card transactions.[162] Ultimately, credit card companies make "a large and growing share of their income" off of swipe fees,[163] and any attempts to limit these fees would be contrary to their interests.

With this being said, it is not surprising that credit card companies sometimes seek to help candidates for state offices. For example, in the 2015

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154. Chenoweth, *supra* note 44, at 229.

155. *Id.*

156. *See generally* Dana's R.R. Supply v. Att'y Gen., Fla., 807 F.3d 1235 (11th Circ. 2015) (concluding that Florida's no-surcharge law, which made it unlawful for "[a] seller or lessor in a sales or lease transaction" to "impose a surcharge on the buyer or lessee for electing to use a credit card," was unconstitutional on First Amendment grounds).

157. *Id.*

158. The nomination for the Republican appointee, Judge O'Scannlain, was found on Bloomberg Law by searching the judge's name. The nominations of the two Democratic appointees, Judges Rawlinson and Vance, were found under Lex Machina™ on Lexis Advance.

159. *See* discussion *infra* Part IV.A.

160. *See supra* Part III.A.

161. Leah Zitter, *How Credit Card Companies Make Money*, INVESTOPEDIA (Aug. 9, 2016), https://www.investopedia.com/articles/personal-finance/080916/how-credit-card-companies-make-money.asp [https://perma.cc/3GR7-NR2V].

162. *Retailers and Issuers are Still Battling Over Payment-Card Fees,* THE ECONOMIST (Oct. 15, 2016), https://www.economist.com/finance-and-economics/2016/10/15/retailers-and-issuers-are-still-battling-over-payment-card-fees [https://perma.cc/QG6E-GS29].

163. *Id.*

election year, Capital One Bank donated over $12,000 to the campaign of a State Senate candidate in Virginia.[164] As a more notable example, though on the federal level, a United States senator collected close to $60,000 in campaign contributions from credit card companies and opponents of proposed swipe fee limits after introducing a bill that would delay legislation designed to put a cap on the amount that banks can charge merchants in swipe fees.[165] While merchants may be tempted to look to political officials to help them maintain their right to surcharge, this is likely to be a futile endeavor. Given that credit card companies sometimes help to fund the campaigns of state legislators, their interests likely supersede those of merchants. Further, because contributing to a political campaign is itself a form of protected speech,[166] credit card companies will be able to retain this power. While campaign contributions from credit card companies is a form of protected speech, it nonetheless undermines the integrity of our political processes.

IV. THE (UNCERTAIN) FUTURE OF SURCHARGE BANS: HOW PRIVATE CONTRACTS AND A POTENTIAL CIRCUIT SPLIT ARE COMPLICATING THE ISSUE

From here on out, surcharging is undoubtedly going to influence merchants' thought processes when setting prices to reflect the costs of operating their businesses. This is because credit card usage is on the rise in the United States.[167] In fact, from 2012 to 2015, "[c]redit card payments grew at an annual rate of 8.0 percent by number or 7.4 percent by value."[168] Further, overall Americans are likely to use their credit cards 40 percent of the time to make purchases.[169] As evidenced by recent case law developments, however,

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164. According to FollowTheMoney.org, a nonprofit institute dedicated to providing the public with information about campaign contributions to public officials across the United States, Capital One Bank donated $12,769 to the campaign of Glen Sturtevant Jr., who ran for a seat in Virginia's State Senate. *Glen Sturtevant Jr. 2015 Campaign Donations*, FOLLOWTHEMONEY.ORG, https://www.followthemoney.org/entity-details?eid=31990880&default=candidate [https://perma.cc/MC9B-LZQK].

165. Alexander Bolton, *Swipe-Fee Opponents Shower Sen. Tester with Campaign Contributions,* THE HILL (April 20, 2011), https://thehill.com/business-a-lobbying/156911-swipe-fee-opponents-direct-campaign-money-to-tester [https://perma.cc/F69H-X3T2].

166. *See generally* McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014) (holding that the First Amendment protects the right to participate in the democratic process through political contributions but warning that this right is not absolute).

167. Jason Steele, *Credit Card Use and Availability Statistics,* CREDITCARDS.COM (Aug. 23, 2017), https://www.creditcards.com/credit-card-news/credit-card-use-availability-statistics-1276.php [https://perma.cc/U8FH-UFTL] (noting that the number of credit card payments in 2015 was almost seven billion more than the number of credit card payments in 2012).

168. *Id.*

169. *Id.*

merchants will now have to account for the possibility that their right to surcharge will be substantially impaired.

While there is some certainty that credit cards will continue to be a popular form of payment in the foreseeable future,[170] there is less certainty in the extent to which merchants will be able to impose surcharges on this form of payment. The future of surcharging is uncertain for two reasons. First, the Supreme Court's holding in *Expressions Hair Design* failed to provide sufficient closure on the question of whether states may prohibit surcharges. Second, surcharge bans are still a possibility in the realm of private contracts. This section will begin with a discussion of how the Supreme Court may have opened the door to another circuit split on the issue of state-level surcharge bans. This section will then depart from the First Amendment implications and look into how surcharge bans may still be employed between private parties.

A. AN OPEN DOOR TO ANOTHER SURCHARGE-RELATED CIRCUIT SPLIT

As noted earlier, the Ninth Circuit struck down an anti-surcharge law in the wake of *Expressions Hair Design*.[171] In *Italian Colors Restaurant,* five California businesses and their respective owners filed suit against the California Attorney General, alleging that California's anti-surcharge law[172] constitutes a restriction on commercial speech in violation of the First Amendment.[173] The California anti-surcharge law in question was virtually identical to New York's, except that California's law expressly stated that discounts were permissible, and that it subjected violators to civil rather than criminal liability.[174] As argued by the plaintiffs, California's anti-surcharge law implicates the First Amendment because it "prohibits a certain class of speakers (merchants) from communicating a certain disfavored message (identifying the added cost of credit as a surcharge)."[175] In its counter, the state relied on the legislative history of the law, arguing that it merely prevents a "bait-and-

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170. *See supra* notes 165-66 and accompanying text.

171. *See supra* Part III.C.

172. CAL. CIV. CODE § 1748.1 (West 2006).

173. Italian Colors Restaurant v. Harris, 99 F. Supp. 3d 1199, 1203 (E.D. Cal. 2015).

174. *Compare* CAL. CIV. CODE § 1748.1(a)-(b) (West 2006) (providing that "[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 card" and stating that violators who fail to pay the amount of the surcharge back to the cardholder within 30 days of a written demand "shall be liable to the cardholder for three times the amount at which actual damages are assessed," plus reasonable attorney's fees and costs), *with* N.Y. GEN. BUS. LAW § 518 (McKinney 1984) (providing that "[a]ny 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).

175. *Harris*, 99 F. Supp. 3d at 1207.

switch" situation whereby an additional charge is imposed on credit card users at the point of sale.[176] The state further argued that the law did not prevent the plaintiffs from communicating prices in the way they sought to because they were permitted to tell consumers about merchant fees.[177] The U.S. District Court for the Eastern District of California, however, disagreed, and asserted that even though the plaintiffs could talk to consumers generally about the merchant fees charged by the credit card industry, they were not free to discuss prices in terms of the California no-surcharge law, which is how they sought to explain the additional charge.[178]

After finding that the California law restricted commercial speech, the district court applied the *Central Hudson* test to determine whether the law can survive intermediate scrutiny.[179] In applying *Central Hudson*, the district court was not convinced that the state could satisfy the second prong of the test, which requires the asserted governmental interest justifying the regulation to be substantial.[180] Moreover, the district court found that the fourth prong of the *Central Hudson* test, which requires the regulation to be no more extensive than is necessary to serve the governmental interest, was not satisfied because the anti-surcharge law was broader than necessary to prevent unfair surprise to consumers.[181] For these reasons, the district court struck down California's anti-surcharge law as unconstitutional under the First Amendment.[182]

On appeal, the United States Court of Appeals for the Ninth Circuit agreed that California's anti-surcharge law constituted a commercial speech regulation that must be subject to intermediate scrutiny under the *Central Hudson* test.[183] Like the district court, the Ninth Circuit found that the anti-surcharge law was more extensive than necessary to serve the state's interest in preventing consumer deception.[184] The Ninth Circuit ultimately affirmed the district court's ruling in favor of the plaintiffs, but modified the relief to

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176. *Id.*

177. *Id.*

178. *Id.* at 1207-08.

179. *Id.* at 1209.

180. *Harris*, 99 F. Supp. 3d at 1209 (noting that although "[t]he prevention of consumer deception is certainly a noble goal, . . . [t]he State is also required to point to something more than 'mere speculation or conjecture' to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'").

181. *Id.* at 1210 (noting that the most direct way for the state to prevent consumer deception would be to pass a law requiring merchants to disclose surcharges).

182. *Id.*

183. Italian Colors Restaurant v. Becerra, 878 F.3d 1165, 1176 (9th Cir. 2018).

184. *Id.* at 1178 (noting that the state "has other, more narrowly tailored, means of preventing consumer deception . . . [such as] ban[ning] deceptive or misleading surcharges… [or] requir[ing] retailers to disclose their surcharges both before and at the point of sale.").

apply only to the plaintiffs.[185] The relief was modified because the district court enjoined the law in its entirety, which would only be appropriate had the plaintiffs brought a facial challenge rather than an as applied challenge.[186]

As stated earlier, the Supreme Court remanded *Expressions Hair Design* to the Second Circuit to analyze New York's anti-surcharge law as a commercial speech regulation.[187] In doing so, however, the Court paved the way for a circuit split to form between the Second and Ninth Circuits, which would ultimately result in the Court having to readdress this issue. Recall that the anti-surcharge laws in question in the Second and Ninth Circuits were essentially identical.[188] Given that the Ninth Circuit struck down California's anti-surcharge law on First Amendment grounds after applying the *Central Hudson* test, the Second Circuit might create a circuit split by upholding New York's anti-surcharge law under the same test.[189] Below is an explanation of how the notion of a future circuit split is not all that far-fetched–and may even be inevitable.

When the New York Court of Appeals addresses the question certified by the Second Circuit, the answer it gives the Second Circuit will determine the proper framework for the Second Circuit's constitutional analysis of section 518.[190] Thus, the Second Circuit will ultimately determine whether the statute survives First Amendment scrutiny. Given that, when it was first presented with the issue, the Second Circuit was unwilling to find that section 518 regulated speech at all,[191] the Second Circuit now has another shot at upholding the statute. And, based on the language used by the Second Circuit in its decision to certify the issue, it seems as though the court is preparing to uphold the statute.

First off, the Second Circuit asserted that "the Court of Appeals' answer to the question we certify today will be helpful even if *Central Hudson* is controlling."[192] Based on its use of the phrase "even if," it appears as though the Second Circuit does not want to apply the stringent standard of the *Central Hudson* test to section 518, even though the Supreme Court mandated that this is the appropriate test to apply.[193] Additionally, the Second Circuit noted that the question of whether section 518 preserves alternative channels for merchants to communicate the same message that the statute prohibits

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185. *Id.* at 1179.
186. *Id.* at 1175.
187. *See supra* notes 97-103 and accompanying text.
188. *See supra* note 172.
189. *See* Chenoweth, *supra* note 44, at 250.
190. *Expressions Hair Design*, 877 F. 3d at 107.
191. *See supra* notes 91-94 and accompanying text.
192. *Expressions Hair Design*, 877 F. 3d at 105.
193. *See supra* note 104 and accompanying text.

will be material to its *Central Hudson* analysis.[194] This suggests that the Second Circuit will try to find that section 518 does not completely impair the ability of merchants to communicate their desired message. Further, the Second Circuit stated that "there is a cognizable argument that, even under a *Central Hudson* analysis, a focused rule that effectively mandates only that a merchant disclose certain facts to consumers trenches less heavily on First Amendment interests."[195] Putting these statements together, it is not inconceivable that the Second Circuit is preparing to find that section 518 survives intermediate scrutiny under *Central Hudson.* Had the Supreme Court undertaken the task to analyze section 518 under *Central Hudson* rather than simply finding that the law regulates speech and remanding the issue down, a possible circuit split between the Second and Ninth Circuits would not currently be looming.

B. SURCHARGE REGULATIONS AMONG PRIVATE ACTORS

The Supreme Court's holding in *Expressions Hair Design* undoubtedly let U.S. merchants breathe a sigh of relief, but their solace may be cut short. This is because there is still a chance that credit card companies will be able to contractually restrict the ability of merchants to impose surcharges on their cardholders. Up until 2016, merchants enjoyed being free from contractual surcharge restrictions with the credit card companies. However, the reversal of an antitrust settlement put this question at issue again.

As a result of a nationwide settlement agreement with credit card companies in 2013, contractual provisions prohibiting merchants from imposing surcharges were struck down.[196] Under the terms of this settlement agreement, merchants were free to impose surcharges as long as they "disclose to consumers that the surcharge does not exceed the merchant's cost of acceptance, and disclose the amount of the surcharge both before it is incurred and on a receipt."[197] The settlement agreement was later appealed, and in 2016 the Second Circuit reversed its approval.[198] The Second Circuit reversed the settlement agreement on the grounds of inadequate representation after concluding that, under the terms of the agreement, "class counsel forced [the] merchants to release virtually any claims they would ever have against

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194. *Expressions Hair Design*, 877 F. 3d at 105.

195. *Id.*

196. *See generally* In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 986 F. Supp. 2d 207, 230-34 (E.D.N.Y. 2013) (eliminating the no-surcharge rules imposed by credit card networks because doing so would allow merchants "to steer customers to less costly cards or to other payment mechanisms.").

197. *Id.* at 234.

198. In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 827 F.3d 223, 240 (2nd Cir. 2016).

the defendants."[199] Additionally, the Second Circuit found that merchants who cannot surcharge by reason of state law would be unduly harmed under the terms of the settlement agreement.[200] Interestingly, it seems as though the Second Circuit is primarily responsible for complicating the surcharge issue.[201] Based on a potential forthcoming circuit split and a vacated antitrust settlement that eliminated contractual surcharge bans, the future of surcharging in the United States is largely uncertain.

CONCLUSION

By concluding that state statutes prohibiting merchants from imposing surcharges on credit card-using consumers regulate commercial speech, the United States Supreme Court expanded the scope of its First Amendment jurisprudence. However, this conclusion did not put the issue of surcharging to bed like many, if not all, merchants had hoped. Instead, the issue may need to be revisited by the Court if the Second Circuit's conclusion on the constitutionality of an anti-surcharge law in *Expressions Hair Design* conflicts with the Ninth Circuit's conclusion in *Italian Colors Restaurant.* Further, the future of surcharge bans in the realm of private contracts is largely in question due to the Second Circuit's vacating of an antitrust settlement that prohibited contractual surcharge bans. If nothing else, one thing to be learned from all this is that U.S. merchants have successfully wielded the First Amendment in their attack on state-level surcharge bans, even if their success is short lived.

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199. *Id.* at 238-39.
200. *Id.* at 240.
201. This is because the Second Circuit might create another surcharge-related circuit split if it upholds section 518 in *Expressions Hair Design*, as well as the fact that it vacated an antitrust settlement that prohibited credit card companies from contractually banning surcharging.