



## U.S. SUPREME COURT HOLDS NY ANTI-SURCHARGE LAW REGULATES SPEECH AND REMANDS FOR DETERMINATION OF CONSTITUTIONALITY

The United States Supreme Court concluded that the New York law prohibiting merchants from imposing a surcharge on purchases paid for with a credit card regulates speech. *Expression Hair Design v. Schneiderman*, \_\_ S.Ct \_\_ (March 29, 2017). The Court noted that the merchants brought the case as an “as applied” challenge. The merchants argued that the law violated the First Amendment by regulating how they communicated their prices, and that it was unconstitutionally vague because liability under the law turned on the blurry difference between surcharges and discounts.

According to the Court, the merchants identified only one pricing scheme that they seek to employ: posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a “dollars-and-cents” additional amount. Thus, the Court limited its review to the question whether the New York Law is unconstitutional as applied to this particular pricing practice.

The Court concluded that the New York law prohibits this pricing regime that the merchants sought to use. The Court determined that the New York Law regulates the “communication of prices” rather than prices themselves. Therefore, the Court held that the New York law regulates speech. The Court rejected the vagueness challenge.

The Court remanded the case to determine whether the New York Law is a valid commercial speech regulation or an unconstitutional regulation of speech under the First Amendment.

We will continue to follow the case on remand. Please contact us if you have any questions. □

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