

V. *Constitutional Win for Retailers' Freedom to Charge Swipe Fees*

A. Introduction

When retailers accept payment by credit card, the credit card company charges the retailer a percentage fee of each transaction.¹ Despite this cost, it is advantageous for retailers to offer payment by credit card.² Payment by credit card is less risky than payment by check, which may not be backed by sufficient funds.³ Moreover, as technology progresses, fewer people carry cash or personal checks.⁴ Ideally, retailers could pass this “swipe fee” on to the customer.⁵ While charging the customer a credit card surcharge outright is illegal in

¹ *E.g.*, *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 122 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144 (“Every time a consumer pays for goods or services with a credit card, the credit card issuer charges the merchant a percentage of the purchase price.”); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1168 (9th Cir. 2018) (“Plaintiffs pay thousands of dollars every year in credit card fees, which are typically 2-3% of the cost of each transaction.”); Helen Christophi, *California Ban on Credit Card Surcharges Is Illegal*, 9th Circuit Says, COURTHOUSE NEWS SERV. (Jan. 3, 2018), <https://www.courthousenews.com/california-ban-on-credit-card-surcharges-is-illegal-9th-circuit-says/> [<https://perma.cc/5TQN-DRRE>] (“[C]redit card companies charge a swipe fee of up to 3 percent . . .”).

² See Edmund W. 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) (“The ability of the establishment to honor the card reassures card holders that . . . they can use their card to pay.”).

³ *The Top 10 Benefits of Accepting Credit Cards*, TSYS (last visited Mar. 18, 2018), www.tsys.com/solutions/products-services/merchant/merchant-support/merchant-basics/top-10-benefits-of-accepting-credit-cards/ [<https://perma.cc/UYE7-GU35>].

⁴ See Ethan Epstein, *Two Faces to a Cashless Future*, ABA BANKING J. (Apr. 13, 2017), <https://bankingjournal.aba.com/2017/04/two-faces-to-a-cashless-future/> [<https://perma.cc/3BJB-PWEY>] (“Only about a quarter of Americans report conducting most of their transactions in cash, down from 36 percent five years ago.”).

⁵ See *Expressions Hair Design*, 808 F.3d at 122 (“Plaintiffs and other businesses that chafe at these fees would like to pass them along to consumers while also making consumers aware of the charge in an effort to convince them to pay cash.”).

several states,⁶ merchants in those states can legally accomplish the same economic outcome by offering a discount for payment in cash.⁷ In other words, laws banning credit card surcharges regulate the characterization of the practice but not the practice itself.⁸ Recently, California's anti-surcharge law was challenged by five retailers as a violation of their First Amendment right to free speech and found unconstitutional by the Ninth Circuit as applied to the plaintiffs.⁹

The focus of this article is on the California law that bans credit card surcharges but allows the economic and substantive equivalent—a discount on cash purchases (the California Law).¹⁰ First, Section B provides the history of anti-surcharge laws in the United States generally, the background of the California Law, and an overview of constitutional challenges to anti-surcharge laws. Then, Section C discusses the recent Ninth Circuit decision on the constitutionality of the California Law as applied to the plaintiffs. Section D explores the implications of the Ninth Circuit decision with respect to the First Amendment, consumer protection, and the future of merchants' pricing practices. Finally, Section E briefly discusses the future of retailers' freedom to charge swipe fees.

⁶ Heather Morton, *Credit or Debit Card Surcharge Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2016), <http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-statutes.aspx> [<https://perma.cc/USR4-J8D5>] (listing the states banning credit card surcharges and the text of each statute).

⁷ See Bob Egelko, *Businesses Can Charge Extra for Credit Card Payments*, *Appeals Court Rules*, S.F. CHRON. (Jan. 3, 2018, 5:33 PM), <https://www.sfchronicle.com/business/article/Businesses-can-charge-extra-for-credit-card-12472045.php> [<https://perma.cc/54BY-Q34W>] (observing Cal. Civ. Code §1748.1 “doesn't prohibit charging less to those who pay by cash or check, as long as the seller calls it a discount rather than a credit card surcharge”).

⁸ For example, the laws permit a retailer to advertise a product for \$102 and offer a \$2 discount for customers paying in cash, but do not permit a retailer to advertise a product for \$100 and charge a \$2 surcharge for customers paying by credit card.

⁹ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018) (finding the California anti-surcharge law unconstitutional as applied to the plaintiffs).

¹⁰ CAL. CIV. CODE § 1748.1(a) (West 2006) (“No retailer . . . may impose a surcharge A retailer may, however, offer discounts for the purpose of inducing payment by cash . . .”).

B. Background

1. History

Retailers' use of credit card surcharges has been the subject of political debate between credit card companies on one side and retailers and consumer protection advocates on the other for several decades.¹¹ In the 1970s, American Express contractually required retailers to charge the same amount for credit card purchases as for purchases by other means.¹² In 1974, the Consumers Union brought suit alleging "an illegal restraint of trade in violation of antitrust laws."¹³ The consumer advocates argued the law was unfair for consumers paying cash, as they paid the same price as those paying by card even though the retailer paid no transaction fees to credit card companies for cash transactions.¹⁴ In settling the case, American Express agreed to allow merchants to offer a cash discount.¹⁵ That same year, Congress amended the Truth in Lending Act to permit cash discounts at check-out.¹⁶ Then, Congress enacted a temporary federal ban on credit card surcharges, which was extended twice before lapsing in 1984.¹⁷

¹¹ See Stephen Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. TIMES (Feb. 27, 1984) www.nytimes.com/1984/02/27/business/credit-card-surcharge-ban-ends.html (discussing both sides of the debate between credit card lobbyists and retailers with respect to the lapse of the federal surcharge ban).

¹² Kitch, *supra* note 2, at 219.

¹³ *Id.* at 220.

¹⁴ *Id.* ("The theory of the lawsuit was that the clause injured consumers who did not use a credit card because merchants were forced to charge consumers who did not use the card the same price even though, as to those consumers, merchants did not face the cost of the transaction fee imposed by the credit card issuer.").

¹⁵ *Id.* ("American Express settled the lawsuit in April by agreeing to abandon the clause and to permit honoring establishments to offer a discount for cash.").

¹⁶ 15 U.S.C. § 1666f(a) (2012) ("[A] card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.").

¹⁷ State Taxation of Depositories Act of 1976, Pub. L. No. 94-222, 90 Stat. 197 (1976); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1170 (9th Cir. 2018) ("The federal surcharge ban expired in 1984.").

Upon the lapse of the federal ban on credit card surcharges, credit card companies lobbied for similar laws at the state level, succeeding in California, Colorado, Connecticut, Kansas, Maine, Massachusetts, New York, Oklahoma, and Texas.¹⁸ At the same time, Visa and MasterCard were contractually banning retailers from imposing credit card surcharges, as American Express had done in the 1970s.¹⁹ The contractual bans of the 1980s followed the same course as the contractual bans of the 1970s, with Visa and MasterCard agreeing to remove the contractual prohibition on credit card surcharges in a class action settlement in 2013.²⁰ However, the settlement was vacated and reversed shortly thereafter because the class representative inadequately represented the interests of absent class members.²¹ Assuming another settlement is eventually reached, retailers still face the obstacle of state laws prohibiting surcharges.²² Consumer advocates and small retailers have been chipping away at that obstacle through First Amendment challenges to the law.²³ The most recent development is

¹⁸ Jon Hood, *Merchants Challenge New York's Credit Card Surcharge Law*, CONSUMERAFFAIRS (June 4, 2013), <https://www.consumeraffairs.com/news/merchants-challenge-new-yorks-credit-card-surcharge-law-060413.html> [<https://perma.cc/LP3K-JFUD>]; Kevin Wack, *Retailers Score Latest Win in Fight to Allow Credit Card Surcharges*, AM. BANKER (Jan. 3, 2018, 7:04 PM), www.americanbanker.com/news/retailers-score-latest-win-in-fight-to-allow-credit-card-surcharges.

¹⁹ See *Rowell v. Pettijohn*, 816 F.3d 73, 77 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (“Upon the lapse of the federal anti-surcharge law in 1984, credit-card companies began reviving anti-surcharge clauses in their contracts with merchants.”); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1205 (E.D. Cal. 2015) (“Until fairly recently, the state ‘no surcharge’ statutes were redundant because credit card companies had contractual provisions that prohibited retailers from imposing surcharges.”).

²⁰ *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 230–34 (E.D.N.Y. 2013) (agreeing in settlement that under the new surcharge system, merchants may impose a surcharge on credit card transactions with clear disclosure to the customer).

²¹ *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* 827 F.3d 223, 231 (2d Cir. 2017).

²² CAL. CIV. CODE § 1748.1(b) (West 2006) (“A cause of action under this section may be brought . . .”).

²³ See, e.g., *Rowell v. Pettijohn*, 137 S. Ct. 1431 (2017), *vacated*, 137 S. Ct. 1431 (challenging the constitutionality of the Texas ban on credit card surcharges); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2016) (challenging the constitutionality of the New York ban on credit card surcharges); *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235 (11th

the Ninth Circuit's holding that the California Law is unconstitutional.²⁴

2. California Law Banning Credit Card Surcharges

The California Law provides:

No retailer in any sales, service, or lease transaction with a consumer 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 means²⁵

The stated legislative intent was to benefit (i) the free market, (ii) consumers, by disallowing “deceptive price increases,” and (iii) retailers, by allowing cash discounts.²⁶ Conspicuously absent were mentions of credit card companies, which lobbied for the law.

Despite the tug-of-war battle between credit card companies, and consumer advocates and retailers over charging swipe fees, the California Law has given rise to only one case before a California court.²⁷ In *Thrifty Oil v. Superior Court*,²⁸ a customer sued a gas station for allegedly violating the California Law. The holding established that dual pricing—the practice of clearly denoting the price for those paying by cash next to the price for those paying by credit card without using the words “surcharge” or “discount”—was neither deceptive nor illegal under the statute.²⁹ The court ruled the advertised

Cir. 2015) (challenging the constitutionality of the Florida ban on credit card surcharges).

²⁴ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

²⁵ CAL. CIV. CODE § 1748.1(a) (West 2006).

²⁶ *Id.* at § 1748.1(e) (“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.”).

²⁷ *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1204 (E.D. Cal. 2015) (“Only one California case has resulted from the enforcement of section 1748.1”).

²⁸ 91 Cal. App. 4th 1070 (2001).

²⁹ *Id.* at 1078.

prices were a permissible discount rather than an impermissible surcharge.³⁰ Although the case did not challenge the California Law directly, it did limit the law's applicability in holding that the statute allows clearly denoted price differentials based on the form of payment.³¹ After *Thrifty Oil*, it appears that only when the price difference is explicitly characterized as a surcharge, or when the price difference is not advertised but charged at check-out, does it violate the California Law.

3. Constitutional Challenges

Prior to the constitutional challenge to the California Law, constitutional challenges were brought against the Florida, New York, and Texas anti-surcharge laws.³² Of the three, only the Florida law was held unconstitutional at the appellate level.³³ The Fifth Circuit and Second Circuit upheld the Texas and New York laws, respectively, on the basis that the laws regulated economic conduct and did not implicate Constitutional free speech protections.³⁴

The first constitutional challenge to a state anti-surcharge law involved a New York law in *Expressions Hair Design v. Schneiderman*.³⁵ Five retailers who wished to impose a swipe fee on credit card transactions claimed the law violated their right to free speech by limiting how they could express their pricing schemes.³⁶ Plaintiffs asserted a theory of behavioral economics dictating that consumers tend to avoid surcharges more than they tend to pursue a discount.³⁷ In

³⁰ *Id.*

³¹ *See id.*

³² *See* *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431; *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235 (11th Cir. 2015); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144.

³³ *Dana's R.R. Supply*, 807 F.3d at 1251 ("Florida's no-surcharge law overreaches to police speech well beyond the State's constitutionally prescribed bailiwick.").

³⁴ *Rowell*, 816 F.3d at 82 ("[S]imply speaking about the prices regulated by Texas' law does not transform it into a content-based speech restriction; the speech is merely incidental to the regulated economic conduct."); *Expressions Hair Design*, 808 F.3d at 135 ("Section 518 regulates conduct, not speech.").

³⁵ 808 F.3d 118 (2d Cir. 2015).

³⁶ *Id.* at 121–22.

³⁷ *Id.* at 122 ("[C]redit card surcharges are more effective than cash discounts at discouraging credit-card use among consumers"); Richard Thaler,

other words, more consumers will respond to the stated surcharge (versus a stated discount) by paying in cash rather than by credit card.³⁸ Ultimately, the Second Circuit found the New York anti-surcharge law regulates pricing, not speech.³⁹

Similarly, the constitutional challenge in the Texas case was brought by five merchants claiming the anti-surcharge law “ban[s] one disfavored way of truthfully describing lawful conduct, [and] is a content-based speech restriction.”⁴⁰ In *Rowell v. Pettijohn*, the Fifth Circuit relied on the Second Circuit’s reasoning in *Expressions Hair Design* to find the Texas law did not implicate free speech.⁴¹ Both the Second and Fifth Circuits emphasized that although merchants could accomplish the economic equivalent of imposing a credit card surcharge by offering a cash discount, the statutes did not require merchants to charge the economic equivalent because the statutes indicated nothing about the *amounts* of the surcharge or the cash discount.⁴² Thus, it is not merely the characterization of the price being regulated. Since both the Second and Fifth Circuits concluded the laws were not speech regulation, neither court had the occasion to review the laws as a speech regulation.⁴³

In the constitutional challenge to the Florida law, decided in between the New York case and the Texas case, plaintiffs were four small businesses who received cease-and-desist letters from the

Toward a Positive Theory of Consumer Choice, 1 J. ECON. BEHAV. & ORG. 39, 45 (1980) (positing the behavioral effect in a cost outlay is greater than the behavioral effect in an opportunity cost).

³⁸ See generally Thaler, *supra* note 37.

³⁹ *Expressions Hair Design*, 808 F.3d at 134–35 (2d Cir. 2015) (“Plaintiffs have provided no reason for us to conclude that Section 518, which regulates the relationship between a seller’s sticker price and its credit-card price, differs in a constitutionally significant way from other laws that regulate prices and therefore do not implicate the First Amendment.”).

⁴⁰ *Rowell v. Pettijohn*, 816 F.3d 73, 77 (5th Cir. 2016).

⁴¹ *Id.* at 78–79.

⁴² *Id.* at 81 (“Texas’ law allows a merchant to discount and dual-price as it wishes; these amounts are not required to be the amount of the ‘swipe fees’ the merchants maintain are at issue.”); *Expressions Hair Design*, 808 F.3d at 131–32.

⁴³ *Expressions Hair Design*, 808 F.3d at 130 (“Because we agree with New York that Section 518 does not regulate speech as applied to single-sticker-price sellers, we do not reach the parties’ arguments under *Central Hudson*); see *Rowell*, 816 F.3d (determining the Texas anti-surcharge law is not a speech regulation and declining to apply the *Central Hudson* test).

Florida Attorney General.⁴⁴ Plaintiffs brought suit claiming violation of their First Amendment right to free speech.⁴⁵ The Eleventh Circuit struck down the Florida law holding that although the law “purports to regulate commercial behavior, [it] has the sole effect of banning merchants from uttering the word *surcharge*, criminalizing speech that is neither false nor misleading.”⁴⁶

The Supreme Court granted certiorari on the New York *Expressions Hair Design* case to resolve the circuit split.⁴⁷ Chief Justice Roberts held the law is a speech regulation because, in contrast to a regulation limiting price, it “tells merchants nothing about the amount they are allowed to collect What the law does regulate is how sellers may communicate their prices.”⁴⁸ The Supreme Court vacated and remanded the case for the Second Circuit to decide whether, as a speech regulation, the law violates the First Amendment.⁴⁹ In conjunction with the Supreme Court decision on the New York anti-surcharge law, the Texas decision was also vacated and remanded for further proceedings.⁵⁰ While there were two concurring opinions, none of the Supreme Court Justices dissented.⁵¹

C. 9th Circuit Decision

Most recently, the Ninth Circuit considered a constitutional challenge to the California Law.⁵² In *Italian Colors Restaurant v. Becerra*, plaintiffs sought to strike down the California Law so they could advertise a single price for their products as well as impose an additional surcharge for consumers paying by credit card.⁵³ Plaintiffs asserted the California Law prevents retailers from communicating the high cost of credit card transactions to customers and artificially raises their prices.⁵⁴ Under the First Amendment, plaintiffs argued the

⁴⁴ *Dana’s R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015).

⁴⁵ *Id.* at 1240.

⁴⁶ *Id.* at 1251.

⁴⁷ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1148–49 (2017).

⁴⁸ *Id.* at 1151.

⁴⁹ *Id.*

⁵⁰ *Rowell v. Pettijohn*, 137 S. Ct. 1431 (2017).

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

⁵² Egelko, *supra* note 7.

⁵³ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1172 (9th Cir. 2018).

⁵⁴ *Id.* at 1169.

California Law regulates plaintiffs' speech rather than conduct because it merely regulates how retailers communicate pricing, not what the pricing is.⁵⁵ Notably, plaintiffs asserted the same behavioral economics theory as the *Expressions Hair Design* plaintiffs, postulating that "imposing a credit card surcharge would be more effective than offering a cash discount in encouraging buyers to use cash."⁵⁶ Although at the appellate level plaintiffs sought a permanent injunction against enforcement of the California Law, the Ninth Circuit could only rule as applied to the five plaintiffs, given that the challenge in the court below was as applied.⁵⁷

Since the Supreme Court held the New York anti-surcharge law was speech regulation, the Ninth Circuit is the first appellate court to inquire whether an anti-surcharge law, as regulation of speech, violates the First Amendment.⁵⁸ The *Central Hudson* test provides a means of determining if regulation of speech violates the First Amendment: if the speech is neither misleading nor related to unlawful activity, then the State must assert a substantial interest to be achieved by the regulation, and the scope of the regulation must fit the asserted interest.⁵⁹ The Ninth Circuit, in affirming the district court's decision, found that imposing a credit card surcharge is neither unlawful nor misleading, the statute does not promote the legislature's stated intent, and the statute's scope is unreasonably broad.⁶⁰ As such, the California Law violates the First Amendment.⁶¹ Following the decision, the plaintiff retailers are free to advertise a single price and impose an additional credit card surcharge for customers paying by credit card.⁶²

The Ninth Circuit provides great significance by clarifying circuit split and applying Supreme Court analysis on the issue. Going

⁵⁵ *Id.* at 1175.

⁵⁶ *Id.* at 1169.

⁵⁷ *Id.* at 1174–75 (noting the District Court erred in declaring the law facially unconstitutional as plaintiffs did not unequivocally bring a facial challenge).

⁵⁸ Wack, *supra* note 18 ("The California decision built on a U.S. Supreme Court ruling from March 2017 involving a similar law in New York.").

⁵⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

⁶⁰ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1177, 1178 (9th Cir. 2018) (finding "plaintiffs' desired pricing schemes are not misleading," enforcing the statute against the plaintiffs "does not directly advance the state's interest in preventing consumer deception," and "[t]here is no reasonable fit between the broad scope" of the law "and the asserted state interest").

⁶¹ *Id.* at 1179.

⁶² *See id.*

forward, as other courts review challenges to anti-surcharge laws, they are bound by the Supreme Court's decision to analyze the law as it relates to speech.⁶³ Applying the *Central Hudson* test to determine if speech regulations violate the First Amendment, the Ninth Circuit decision provides persuasive precedent that the relevant speech is not misleading, anti-surcharge laws do not advance state interests, and anti-surcharge laws do not fit asserted state interests. Other courts will undoubtedly rule on the issue, as the New York and Texas laws have not yet been reconsidered on remand.⁶⁴ This line of cases paves the way for facial challenges in California and states with similar laws.⁶⁵

D. Implications

1. First Amendment

The Supreme Court holding in *Expressions Hair Design* and the Ninth Circuit holding in *Italian Colors* are consistent with the trend starting in the 1920s to read the First Amendment broadly.⁶⁶ However, after *Expressions Hair Design* and *Italian Colors*, the limitations of the right to free speech remain unclear.⁶⁷ Some scholars have compared the Supreme Court decision in *Expressions Hair Design* to *Lochner v. New York*, where the right to contract under the Fourteenth Amendment was expanded to invalidate a regulation limiting the number of hours employees of a bake shop could work in one week.⁶⁸ *Lochner*

⁶³ See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

⁶⁴ Egelko, *supra* note 7 (explaining “the legal landscape changed” when the Supreme Court decided the New York law was a speech regulation and remanded the case, a case which “is still pending”).

⁶⁵ Wack, *supra* note 18 (“The opinion does not fully overturn the state law, but it does provide a clear road map for retailers that want to levy surcharges.”).

⁶⁶ Jesse D.H. Snyder & Andrew F. Gann, Jr., *Did Expressions Hair Design v. Schneiderman Reconstitute the Bygone Lochner Era: How a New Case About Free Speech is Like an Old Case About the Right to Contract*, 69 S.C. L. REV. 221 (2017) (discussing the Supreme Court's “ever-expanding view starting in the 1920s of what constitutes free speech under the First Amendment”).

⁶⁷ See Adam Liptak, *Supreme Court Considers Role of Free Speech in Explaining Credit Card Fees*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/business/supreme-court-credit-card-fees-free-speech.html> (“Justice Breyer . . . said he was alarmed that the Court could use the First Amendment to strike down ordinary economic regulations.”).

⁶⁸ See generally Snyder & Gann, *supra* note 66.

became “a potent weapon against business regulations” for three decades, but is now widely discredited.⁶⁹ Similarly, *Expressions Hair Design* could potentially be used to invalidate any business regulation with only a tenuous connection to free speech.⁷⁰ Just as the expansion of the right to contract in *Lochner* resulted in business deregulation, the expansion of the right to free speech in *Expressions Hair Design* could be used to “hobble all laws and regulations.”⁷¹ The recent *Italian Colors* decision goes one step further than *Expressions Hair Design* in analyzing a statute as speech restriction under the *Central Hudson* test.⁷²

2. Consumer Protection

Greater transparency benefits consumers by enabling consumers to make more informed decisions.⁷³ Following *Italian Colors*, the plaintiff merchants may communicate credit card surcharges directly to consumers by alerting consumers to the additional swipe fee for payment by credit card.⁷⁴ According to the theory of behavioral economics put forth by the plaintiffs in *Expressions Hair Design* and *Italian Colors*, consumers are more likely to make the most rational decision—choosing the cheapest option—by avoiding a surcharge and paying in cash, the result of which is fewer profits from swipe fees for credit card companies. Although this model of behavioral economics was used to successfully argue against anti-surcharge laws, it does not contemplate current market trends.⁷⁵ As cash becomes less ubiquitous,

⁶⁹ *Id.* at 222 (“In 1905, *Lochner v. United States* recognized a potent weapon against business regulation: the right to contract under the Fourteenth Amendment. Not until 1937 did the Court . . . decline to continue recognizing such a right . . .”).

⁷⁰ *Id.* at 246 (arguing the broad interpretation of free speech under the First Amendment in *Expressions* could be the first step towards a doctrine allowing invalidation of a wide array of laws).

⁷¹ *Id.*

⁷² See *supra* notes 60–61 and accompanying text.

⁷³ See Wack, *supra* note 18 (quoting plaintiffs’ counsel, Deepak Gupta, in the *Italian Colors* case, “[i]t means that consumers can’t be kept in the dark about the hidden cost of credit card swipe fees, which funnel vast amounts of money from consumers to large banks and credit card companies”).

⁷⁴ See generally *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

⁷⁵ Epstein, *supra* note 4 (discussing the cashless trend); Andy Newman, *Cash Might Be King, but They Don’t Care*, N.Y. TIMES (Dec. 25, 2017),

some businesses have stopped accepting payment in cash, relying exclusively on credit.⁷⁶ In the coming years, it could become commonplace to pay with cryptocurrency; some major retailers such as Subway and Microsoft already accept payment in Bitcoin.⁷⁷ Mobile payment apps also facilitate payment by credit card.⁷⁸ Paying by credit card may ultimately remain the most rational decision, given the convenience of avoiding a trip to the ATM. Even if fewer consumers switch to cash than estimated by behavioral economics theory, greater transparency nonetheless keeps consumers informed.

In addition to keeping consumers informed, greater transparency could contribute somewhat to alleviating social inequality.⁷⁹ Prior to the Ninth Circuit decision, four out of the five plaintiffs in the case advertised one price for their products.⁸⁰ In order to advertise only one price and comply with the law, the retailers advertised a higher price, which included the swipe fee.⁸¹ This practice is likely not unique to the plaintiffs; government officials have predicted anti-surcharge laws would result in merchants merely hiding the cost of processing credit cards in their prices.⁸² As such, customers paying in cash effectively

<https://www.nytimes.com/2017/12/25/nyregion/no-cash-money-cashless-credit-debit-card.html> (identifying a market trend away from cash).

⁷⁶ Newman, *supra* note 75 (observing a growing number of eateries in New York City do not accept cash).

⁷⁷ Jonas Chokun, *Who Accepts Bitcoins as Payment? List of Companies, Stores, Shops*, 99 BITCOINS (Jan. 14, 2018), <https://99bitcoins.com/who-accepts-bitcoins-payment-companies-stores-take-bitcoins/> [<https://perma.cc/LVA3-QNKV>] (listing merchants accepting Bitcoin).

⁷⁸ Epstein, *supra* note 4 (attributing the trend away from cash in part to mobile payment apps and to the cumbersome nature of carrying cash). For a discussion of the transition from plastic credit cards to mobile electronic payments, see Tom Miller Jr. & Cristian deRitis, *Will There Be a Need for Credit Cards in Five Years?*, WALL ST. J. (Mar. 18, 2018, 10:01 PM), <https://www.wsj.com/articles/will-there-be-a-need-for-credit-cards-in-five-years-1521424860>.

⁷⁹ Brief for Consumer Action, National Association of Consumer Advocates and U.S. Public Interest Research Group as Amici Curiae in Support of Petitioners at 11, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391) [hereinafter Brief for Consumer Action] (arguing anti-surcharge laws in effect allow “credit card companies to tax the poor and give a small share of those proceeds to the rich”).

⁸⁰ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1168 (9th Cir. 2018).

⁸¹ *Id.*

⁸² Melissa Anders, *Merchant Credit Card Surcharges Could be Banned Under Michigan Proposal*, MLIVE (Apr. 10, 2013, last updated at 4:53 PM), www.mlive.com/business/index.ssf/2013/04/merchant_credit_card_surcharge

subsidize the cost of the swipe fees incurred by credit card users.⁸³ In light of consumers' unequal access to credit based on discrepancies in financial means,⁸⁴ low-income consumers are more likely to pay in cash.⁸⁵ Thus, the combination of anti-surcharge laws and retailers' pricing schemes resulting from those laws increases the wealth gap.⁸⁶ As such, the nullification of anti-surcharge laws could serve as a small step toward breaking down barriers keeping low-income households at the bottom of the social chain. However, the trend toward cashless businesses "effectively excludes the unbanked,"⁸⁷ so there is no subsidy from those paying in cash to those paying by card in cashless businesses.

Proponents of anti-surcharge laws argue these laws benefit consumer protection.⁸⁸ Eliminating anti-surcharge laws would allow retailers to advertise a single price and then charge a surprise mark-up at the point of sale representing a surcharge for payment by credit card.⁸⁹ The Ninth Circuit briefly considered and dismissed this argument, asserting the *Italian Colors* plaintiffs showed only a desire "to *communicate*, not conceal, credit card surcharges."⁹⁰ The court ignored the fact that finding the California Law unconstitutional as applied to the plaintiffs nevertheless enables the plaintiffs to legally

_1.html [https://perma.cc/HK3L-RARH] (remarking one local official opposed an anti-surcharge bill in Michigan because businesses would bury the cost in their prices rather than offer a transparent fee).

⁸³ *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1205 (E.D. Cal. 2015).

⁸⁴ See MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 7, 12 (The Belknap Press of Harvard Univ. Press ed., 2017) (noting 60 percent of the black population is unbanked or underbanked versus only 20 percent of whites and arguing American politics and laws use commerce, credit, money, and segregation to sow "the seeds of injustice into the soil of the American economy").

⁸⁵ Epstein, *supra* note 4 ("And since the poor tend to make far more of their payments in cash, they could stand to be the most affected by rapid moves toward a cashless society.").

⁸⁶ See Brief for Consumer Action, *supra* note 79, at 11 ("No-surcharge laws help facilitate this massive transfer of resources from cash users to credit card users, and even among credit card users, from low-income, low-rewards card users to high-income, high-rewards card users.").

⁸⁷ Newman, *supra* note 75.

⁸⁸ *E.g.*, *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

⁸⁹ *Id.* ("The Attorney General focuses on such bait-and-switch surcharges, and their potential to deceive, in arguing that Section 1748.1 targets misleading speech.").

⁹⁰ *Id.* at 1177.

employ the “bait-and-switch” practice, even though they did not express the desire to conceal prices to the court.⁹¹ The Attorney General’s argument could be more persuasive in a facial challenge to the law, where the Court would not be able to rely on specific plaintiffs’ intentions to communicate rather than conceal swipe fees. To mitigate the bait-and-switch effect, California could employ guidelines for retailers imposing surcharges, such as posting a notice at the store entrance and checkout points indicating surcharges will be applied to credit card payments.⁹²

3. Merchants

Greater transparency can also be beneficial for merchants.⁹³ The plaintiffs in *Italian Colors* indicated they advertised a single price, but the price was slightly higher than they would normally charge because it contemplated the credit card surcharge.⁹⁴ Following the Ninth Circuit decision, the five plaintiff retailers can advertise a lower single price.⁹⁵ Although other California retailers cannot technically rely on the as-applied decision, there is nevertheless a low risk of enforcement.⁹⁶ The California Law was not generally enforced even before *Italian Colors*, and the Attorney General asserted the lack of enforcement in defense of the law.⁹⁷

⁹¹ *Id.*

⁹² Melissa Johnson, *Your Complete Guide to Credit Card Surcharges*, MERCHANT MAVERICK BLOG (Feb. 7, 2017), <https://www.merchantmaverick.com/credit-card-surcharges/> [<https://perma.cc/4UAJ-KC9J>].

⁹³ See Jaikaran Singh & Erik Benny, *Ninth Circuit Holds That a Prohibition on Credit Card Surcharges Abridges Merchants’ Freedom of Speech in Violation of First Amendment*, CONSUMER CLASS DEF. COUNS.: ACTS & REGS. (Jan. 23, 2018), www.consumerclassdefensecounsel.com/2018/01/23/ninth-circuit-holds-that-a-prohibition-on-credit-card-surcharges-abridges-merchants-freedom-of-speech-in-violation-of-first-amendment/ [<https://perma.cc/4SME-68KS>].

⁹⁴ *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1169, 1173 (9th Cir. 2018).

⁹⁵ See generally *id.*

⁹⁶ *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1204 (E.D. Cal. 2015) (“Only one California case has resulted from the enforcement of section 1748.1”); but see *Italian Colors*, 878 F.3d at 1174 (“California’s ban on surcharges was likely not enforced in the past because retailers were contractually barred from surcharging, and thus there were few, if any, violations to punish.”).

⁹⁷ *Contra Italian Colors*, 878 F.3d at 1174.

E. Conclusion

While the *Italian Colors* decision signifies a victory for retailers and consumer protection advocates, its impact may be limited. There is speculation that most retailers will not impose credit card surcharges outright because it may adversely affect their businesses.⁹⁸ After the decision, a lawyer who often represents merchants remarked, “[m]ost retailers don’t think this is really a big deal.”⁹⁹ Nevertheless, the plaintiff retailers in *Italian Colors* are now free to characterize credit card surcharges as credit card surcharges rather than cash discounts.¹⁰⁰ The California Law, and equivalent laws in other states, will most likely be struck down in the near future,¹⁰¹ and all retailers will be able to communicate the effect of swipe fees on their prices. In reaching settlements with credit card companies to remove contractual bans and striking down anti-surcharge laws, consumer advocates and retailers will eradicate bans on credit card surcharges. Hopefully, this will help consumers make informed decisions with greater transparency.

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⁹⁸ Wack, *supra* note 18 (“Most retailers are reluctant to impose the fees because they fear losing business to their competitors. The worry is that customers will become annoyed with the additional charges.”).

⁹⁹ *Id.*

¹⁰⁰ See *Italian Colors Rest. v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

¹⁰¹ Wack, *supra* note 18 (quoting the *Italian Colors* plaintiffs’ lawyer, “[w]e’re confident that all these statutes will be wiped out . . . [a]nd that is the clear trend in the courts now”).

¹⁰² Student, Boston University School of Law (J.D. 2019).