

Expressions Hair Design: Detangling the Commercial-Free-Speech Knot

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As dads of daughters with long hair soon learn, one can spend quite a while detangling a particularly nasty rat's nest. Patience is the primary key to success. Working slowly to avoid further damage, combing through the problem area in sections, and using a large-tooth comb (never a broad brush) are other important steps to follow. The U.S. Supreme Court took a similarly painstaking approach to detangling the commercial-free-speech issues in the three credit-card-surcharge cases it reviewed during October Term 2016. It thereby straightened out the mess that the U.S. Court of Appeals for the Second Circuit had made of *Expressions Hair Design v. Schneiderman*, further clarified the law with its actions on other cases from the Fifth and Eleventh Circuits, and repaired an important area of First Amendment doctrine.¹

Each of the three cases—*Expressions Hair, Rowell v. Pettijohn*, and *Dana's Railroad Supply v. Bondi*—posed the same basic question: Does it violate the First Amendment to force merchants who want to charge more for credit-card purchases to style their differential prices as a discount for cash rather than a surcharge for credit? Nearly everyone agrees in these cases that it would be fine to post one price as the regular price, charge that price for credit transactions, and give a discount to cash customers. Nearly everyone also agrees that it would be perfectly lawful to post two separate prices for each product: the cash price and the credit price. The problem arises when a merchant wishes to characterize the price difference as a “surcharge” for credit. Whether such a merchant wishes to explain why it charges

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¹ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

more to its customers using credit cards, to deter credit purchases, or simply to be free from government dictates, the dilemma remains the same: Is this dispute about speech or merely conduct, and, if the former, does the First Amendment protect the merchant's speech?

Lest one think these are easy questions, a cursory review of the paths these three cases followed to the Supreme Court will dispel that notion—as well as any idea that this controversy is a proxy for some partisan fight. *Expressions Hair* saw the New York statute struck down at the district court level by a Democrat-appointed judge;² a three-judge panel of Republican appointees at the Second Circuit then reversed to uphold the statute.³ In *Rowell v. Pettijohn*, a Republican-appointed district court judge upheld the Texas statute,⁴ and a divided Fifth Circuit upheld that ruling with two Republican appointees in the majority over the dissent of a Democratic appointee.⁵ Finally, in *Dana's Railroad Supply v. Bondi*,⁶ a Democrat-appointed district judge upheld the Florida statute only to see a divided three-judge panel of Republican appointees at the Eleventh Circuit reverse and strike down the state law.⁷ Such a tortuous path to the Supreme Court, escorted by a wide array of judges on all sides, does not bespeak a simple issue.⁸

Some quick-take commentators contended that *Expressions Hair* did not accomplish much because it ultimately left First Amendment

² *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 444, 447 (S.D.N.Y. 2013) (Rakoff, J.).

³ *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015) (amending and superseding 803 F.3d 94 (2d Cir. 2015)).

⁴ *Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 U.S. Dist. LEXIS 40739 (W.D. Tex. Feb. 4, 2015).

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

⁶ *Dana's R.R. Supply v. Bondi*, No. 14-cv-134 2014 WL 11189176 (N.D. Fla. Sept. 2, 2014); *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235 (11th Cir. 2015).

⁷ For good measure, the federal district court in the Ninth Circuit case *Italian Colors Restaurant v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015), appeal docketed, No. 15-15873 (9th Cir. Apr. 30, 2015), featured a Republican-appointed district judge who struck down California's law. Thus, across four district courts, one Republican appointee struck down a state statute (CA) and another upheld one (TX). Likewise, one Democrat appointee struck down a state statute (NY) and another upheld one (FL).

⁸ Together with a fourth case from California that awaits decision by the Ninth Circuit, these cases represented state laws from the four largest U.S. states by population, totaling nearly one-third of the national population across them—an oft-overlooked indicator of the significance of cases like these.

analysis up to the Second Circuit on remand. Closer inspection reveals that the Court's cautious treatment of the three related credit-card-surcharge cases achieved quite a lot. Even within just the *Expressions Hair* opinion itself, the Court did some deft work. This essay proceeds by explaining what the Court held in that case and why that holding is both new and significant. Then it describes what the Fifth Circuit said in *Rowell*, what the Eleventh Circuit said in *Dana's Railroad Supply*, and what the high court did with them. Finally, the essay steps back to view this triptych of cases as a whole. By identifying the similarities and differences among these cases—and their outcomes—it teases out the greater significance of the Supreme Court's nuanced treatment of this subject and predicts what the Second Circuit will decide on remand in *Expressions Hair Design*.

I. State Anti-Surcharge Laws and Their Federal Roots

Some important (and relatively uncontested) federal statutory background explains why three credit-card-surcharge cases reached the Supreme Court at the same time. Congress enacted amendments to the Truth in Lending Act (TILA) in 1974 that prohibited credit-card companies from forbidding discounts for cash in their contracts with merchants.⁹ Two years later, Congress amended TILA to forbid surcharges by merchants for use of credit cards. It also added definitions of “discount” and “surcharge.” Then, in 1981, Congress passed the Cash Discount Act (CDA), which defined “regular price” as either the single price marked or as the credit price (if separate cash and credit prices were posted).¹⁰ Because TILA defined a surcharge as “increasing the regular price,” and the regular price was defined as the credit-card price, the CDA essentially made it so that the only way to violate the law was to mark a single price and then charge credit-card customers more than that marked price. The surcharge ban lapsed in 1984 and Congress has never revived it, but it lived on as the model for a dozen state-level copycat statutes.¹¹ That very

⁹ Fair Credit Billing Act, Pub. L. No. 93-495, Tit. III, § 306, 88 Stat. 1515.

¹⁰ Cash Discount Act, Pub. L. No. 97-25, Tit. I, § 102(a), 95 Stat. 144.

¹¹ Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Mass. Gen. Laws ch. 140D, § 28A(a) (1)-(2); Me. Rev. Stat. tit. 9-A, § 8-509; Miss. Code Ann. § 31-7-9(d); N. Y. Gen. Bus. Law § 518; Okla. Stat. tit. 14A, § 2-211; Tex. Fin. Code § 339.001(a); Utah Code Ann. § 13-38a-302 (2013), repealed by § 63I-1-213 (2014).

same year New York passed its version of the surcharge ban, borrowing the federal statute's prohibitory language, but leaving out the definition of "surcharge."

Predictably, credit-card companies resumed including anti-surcharge provisions in their contracts with businesses once the federal prohibition was no longer in effect. Because those agreements specifically prohibited businesses from describing any price difference as a surcharge for using credit, the state laws did not come into play at first. That is, state attorneys general had no need to enforce the statutes because the credit-card companies had contractual remedies available to enforce the prohibitions themselves. As part of an anti-trust class-action lawsuit settlement reached in 2013, however, the major credit-card companies agreed to strike no-surcharge provisions from their contracts with merchants. This move awakened the long-dormant state laws at exactly the same time, so state attorneys general began to enforce them—presumably with some encouragement from the credit-card companies. Hence, once the credit-card companies dropped their contract clauses prohibiting surcharges, three cases reached the U.S. Supreme Court in quick succession.

In New York, *Expressions Hair Design*, *Brooklyn Farmacy* [sic] & *Soda Fountain*, and three other businesses (and their owners/managers) sued the New York attorney general and three district attorneys to enjoin enforcement of New York General Business Law § 518 as the only remaining barrier to discussing their prices freely with customers. These plaintiffs brought an "as applied" challenge to a single-sticker pricing regime in which a merchant quotes one price for a good or service and wishes to advertise a higher price for payment with a credit card. Specifically, they claimed that § 518 violates the First Amendment by controlling how they characterize the price differences they charge. In addition, they challenged the law as unconstitutionally vague because it assigns liability based on the hazy distinction between discounts and surcharges. They contended that the New York law did not make it sufficiently clear exactly what merchants could and could not say in relating their prices.

II. Order of the Coif: The Supreme Court's *Expressions Hair Design* Decision

Chief Justice John Roberts coiffed a careful, albeit brief, opinion for the Court that Justices Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Elena Kagan joined in its entirety, while Justices Stephen Breyer, Sonia Sotomayor, and Samuel Alito concurred in the judgment. The heart of the decision first noted the limited nature of the petitioners' case. Although the court of appeals had treated their challenge to § 518 as a facial one, Roberts observed that petitioners had clarified at oral argument that they were bringing only an as-applied challenge to the single-sticker pricing format. The only challenged application of the law, the Court noted, is where a merchant "post[s] a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount."¹²

Having thus narrowed the scope of the debate, the chief justice asked whether § 518 prohibits the petitioners' preferred pricing practice, as the court of appeals held, and he concluded that it does. The court of appeals had looked to the dictionary definition of "surcharge" because the New York statute (unlike its federal predecessor) fails to define the term. Because the appeals court's interpretation was not "clearly wrong," the Court followed customary practice and deferred to its interpretation of state law, finding that, "[w]here a seller posts a single sticker price, it is reasonable to treat that sticker price as the 'usual or normal amount' and conclude . . . that a merchant imposes a surcharge when he charges a credit card user more than that sticker price."¹³

Given that New York law so construed prohibits petitioners' desired pricing regime, the Court next considered whether it "unconstitutionally regulates speech."¹⁴ The Second Circuit had

¹² *Expressions Hair*, 137 S. Ct. at 1149.

¹³ *Id.* at 1150.

¹⁴ Although the merchants also made a void-for-vagueness argument, the Court made short work of it. Even if the scope of the statute remains unsettled, the Court reasoned, the merchants' challenge sought only to vindicate one clearly forbidden pricing practice. Since "the law is not vague as applied to them," the merchants could not prevail. *Expressions Hair*, 137 S. Ct. at 1151–52 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim."). By insisting at oral argument that they

concluded that § 518 does not implicate the First Amendment because the law regulates conduct rather than speech. It read the law to govern the mere relationship of the seller's sticker price to the price charged to credit-card customers, "requiring that these two amounts be equal."¹⁵ Just as a law governing a single price does not regulate speech, it reasoned, so too a law governing how two prices relate to each other does not: "[P]rices (though necessarily communicated through language) are not 'speech' . . . when considered in relation to one another. Because all that Section 518 prohibits is a specific relationship between two prices, it does not regulate speech."¹⁶

But the Supreme Court recognized that "§ 518 is not like a typical price regulation."¹⁷ Whereas typical price regulations dictate how much a store can collect for a good or service, New York's statute "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer."¹⁸ Instead, it "regulate[s] . . . how sellers may communicate their prices."¹⁹ "A merchant . . . may not convey that price any way he pleases" but rather "must display [the higher price charged to credit-card customers] as his sticker price."²⁰ While reiterating *Sorrell's* admonition that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech[,]'" the Court did not consider the law's curbs on merchants' speech as a mere incidental burden accompanying primarily a conduct restriction.²¹ To the contrary,

were bringing an as-applied challenge rather than a facial challenge, the plaintiffs essentially abandoned their void-for-vagueness claim. On the other hand, the plaintiffs might not have been able to win a facial challenge outright given both the confusion about what the statute required, which perplexed a large fraction of the Court, and the lack of a textual hook for the petitioners' surcharge/discount argument in the New York statute as compared to the laws from Florida and Texas. There has to be only one constitutional interpretation of the statute in order to survive a facial challenge, and there appears to be one available here, albeit it was not the interpretation that was enforced against these petitioners.

¹⁵ *Id.* at 1150 (citing 808 F.3d at 131).

¹⁶ *Expressions Hair*, 808 F.3d at 131.

¹⁷ *Expressions Hair*, 137 S. Ct. at 1150.

¹⁸ *Id.* at 1151.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

the Court held, “[i]n regulating the communication of prices rather than prices themselves, § 518 regulates speech.”²²

Because the Second Circuit’s resolution of the case sidestepped the First Amendment question, the Court next faced whether to analyze the constitutionality of New York’s statute in the first instance. It declined. Even though the federal district court had reviewed the law under the First Amendment before striking it down, the court of appeals did not. So the Supreme Court begged off, as a court of review. In remanding the case with instructions to evaluate the statute as a speech regulation, the Court pointed out that the parties’ briefs contested both the validity of § 518 under the *Central Hudson* test and whether it might be construed as a permissible mandatory disclosure statute under *Zauderer v. Office of Disciplinary Counsel*.²³

Such a half-a-loaf holding did not come as much of a surprise. In fact, speculation ensued after oral argument that the Court might “DIG” the case entirely—that is, dismiss it as improvidently granted. The theory ran that several justices did not appear to be clear on the meaning of the statute and how it was being enforced in New York State. But instead of DIG-ing the case, the Court definitively held that the statute regulates speech rather than conduct, thereby requiring First Amendment analysis in this context.

Another reason this result did not surprise is that the Court did almost precisely what the solicitor general’s brief recommended that the Court do. “The Court would provide an appropriate level of guidance on the question presented in this case by clarifying that Section 518 regulates speech. . . . The Court could then remand for the court of appeals . . . to determine the grounds on which respondents are defending Section 518 and to evaluate the statute’s constitutionality in light of those defenses.”²⁴

²² *Expressions Hair*, 137 S. Ct. at 1151.

²³ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

²⁴ See Brief for the United States as Amicus Curiae Supporting Neither Party at 34–35, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391); see also *id.* at 19 (“Because Section 518 addresses the *communication* of an otherwise-permissible pricing scheme, rather than the pricing scheme *itself*, it is properly considered a regulation of speech.”) (emphasis in original).

III. Running with Scissors: Bad Ideas in the Concurrences in Judgment

Justice Breyer's solo opinion concurring in the judgment reads more like a dissent. Given that he recently has been the Court's most ardent antagonist of commercial-free-speech rights, that position holds true to form.²⁵ Breyer's opinion interweaves three strands that bear analyzing more closely: *Lochner*,²⁶ former Yale Law School Dean Robert Post, and *Carolene Products*.²⁷

Breyer's first concern surfaced at oral argument, where he put his objection starkly:

[W]e are diving headlong into an area called price regulation. It . . . goes on all over the place in regulatory agencies. And so the word that I fear begins with an L and ends with an R; it's called *Loc[h]ner*. . . . Using the First Amendment as a tool to get at price regulation . . . [i]f you want to know what's worrying me, that's it.²⁸

Breyer's invocation of the *Lochner* watchword signals his concern that respecting commercial-free-speech rights might somehow lead to judges' negating or supplanting legislative decisions regarding ordinary economic regulation—as he believes they did in the *Lochner* era—only now in the service of free speech rather than economic liberty or freedom of contract. As he put it later in the oral argument:

[T]he Court should stay out of this under normal First Amendment standards. Because if we don't, we are going to discover all kinds of price regulation all over the place that suffers to greater or lesser degrees from this kind of problem, and you'll have judges all over the country substituting for regulators and others in trying to regulate.²⁹

²⁵ See, *Sorrell v. IMS Health Inc.*, 564 U.S., 580–81 (Breyer, J., dissenting); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring in the judgment only).

²⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁷ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

²⁸ Transcript of Oral Arg. at 22, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391).

²⁹ *Id.* at 47.

Breyer conceded at oral argument that he “may be the only one that . . . ha[s] this *Loch[er]*ner problem,”³⁰ but the discussion below will show that at least some lower courts share similar concerns.

To those who follow commercial-free-speech debates closely, Breyer’s reference early in his opinion to Robert Post’s scholarship provides the second clue to where he’s coming from. An ongoing push by academics in the law schools, law journals, and the broader public square has sought to delegitimize commercial-free-speech rights. The origins and causes of that phenomenon fall outside the scope of the present article, but suffice it to say that Post has been perhaps the foremost protagonist in this drive to undermine First Amendment protection for commercial expression.³¹ But the fact that no one else joined Breyer’s opinion may well indicate that the Court will not bend to the winds of academe on this point.

Breyer assiduously prefers not to inquire whether a given regulation targets speech or conduct at all. He would just evaluate regulations by what kind of First Amendment interest they implicate, giving the greatest scrutiny where political discourse is involved, lesser scrutiny to commercial speech, and still lesser scrutiny where a mandatory disclosure simply seeks to prevent consumer deception. He is at pains to ensure that the First Amendment not interfere with applying a “permissive standard of review to ‘regulatory legislation affecting ordinary commercial transactions.’”³² He appears far less concerned about taking sides in the speech/conduct dichotomy than in embracing the *Carolene Products* side of the *Lochner/Carolene Products* dichotomy.

While still styling his opinion a concurrence in the judgment, Breyer agrees that § 518 governs speech only “because virtually all government regulation affects speech.”³³ In other words, his agreement is in name only. He also endorses the majority’s decision to

³⁰ *Id.* at 46.

³¹ See, e.g., Gilad Edelman, The Supreme Court’s First Amendment Problem, *Yale Alumni Magazine*, Vol. LXXX, No. 1, at 34 (Sept./Oct. 2016) (discussing Post’s views at length); see also Martin H. Redish, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy* at 29–74 (2013) (critiquing Post’s participatory democracy conception of the First Amendment).

³² *Expressions Hair*, 137 S. Ct. at 1152 (Breyer, J., concurring) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)).

³³ *Id.* at 1152.

remand the case to the Second Circuit but joins Justices Sotomayor and Alito's later (strong) suggestion that the appeals court certify a question to the New York Court of Appeals seeking clarification as to the statute's meaning. Ultimately, Breyer concludes that "it is not clear just what New York's law does" and so he offers conditional applications of the First Amendment depending on how the law gets interpreted.³⁴ Yet all those that he limns would apply standards deferential enough for the statute to survive review.

Justice Sotomayor's opinion concurring in the judgment, which slightly exceeds Chief Justice Roberts's opinion for the Court in length, takes issue both with the Second Circuit's failure to certify the statutory interpretation question to the New York Court of Appeals (the state's highest court) and her own Court majority's unwillingness to do the same—as well as its failure to resolve more than a portion of the case. Joined by Justice Alito, she advocates certification as the appropriate course of action, even on remand, seeing that as the only way to "permit the full resolution of petitioner's claims."³⁵

Like Justice Breyer, Sotomayor suggests that "a federal court's resolution of the constitutional question may turn out to be unnecessary."³⁶ That is, if the New York Court of Appeals were to interpret the statute as simply requiring that cash and credit customers be charged the same price, then it would be an economic regulation subject only to rational-basis review. And so Sotomayor would have asked New York's highest court "What pricing schemes or pricing displays does § 518 prohibit?"³⁷ Even if certification did not avoid unnecessarily tackling the First Amendment question, she says, it "might have limited the scope of the constitutional challenge in the case."³⁸

The fundamental problem with the Sotomayor/Alito approach is that the *Expressions Hair* petitioners brought an as-applied objection, so they already limited the scope of their constitutional challenge. Asking the state's highest court to identify all the schemes that the statute would prohibit is thus too broad a question, because it

³⁴ *Id.* at 1153.

³⁵ *Id.* at 1153 (Sotomayor, J., concurring).

³⁶ *Id.* at 1156.

³⁷ *Id.* at 1158.

³⁸ *Id.*

would be seeking an advisory opinion under these circumstances. The only statutory question properly before the Court—and the only one it might have been appropriate to certify—is whether the statute forbids the particular pricing scheme petitioners challenge. And the majority has now resolved that question in the affirmative, which is how it dispensed with the void-for-vagueness argument.

Inviting the Second Circuit on remand to come up with a different answer to this question (or advising it to certify that question to the New York Court of Appeals), as Sotomayor does, risks taking a knotty problem and making it worse. In theory, those courts might construe the statute “only as a price regulation” in such a way as to avoid the constitutional question, but there is likely an insurmountable obstacle to doing so.³⁹ Because longstanding practice and the aforementioned federal Cash Discount Act—which formed the background for New York’s law—allow merchants to give a discount to cash customers, interpreting the New York (or Florida or Texas) statute to mean that merchants must charge identical prices to cash and credit customers is highly problematic.

Adopting such an interpretation would moot the Supreme Court’s decision that New York General Business Law § 518 regulates speech and would postpone answering a First Amendment question simultaneously presented in two other certiorari petitions. The appeals court surely must recognize that undercutting the Supreme Court in that fashion would discredit the lower court as well. Hence, Justice Sotomayor’s preferred approach might have made sense as an original matter, but it no longer does. Had the Second Circuit gone that route, or had the Supreme Court majority vacated the Second Circuit’s opinion and instructed it to seek certification on remand (without deciding the speech/conduct question), that might have led to a satisfactory resolution of the case. But doing so at this juncture would only make a mess of things. Besides, even if the majority had gone this route, Sotomayor’s solution would not have resolved the Fifth and Eleventh Circuit cases with the clarity that the majority’s actions provided.

³⁹ *Id.*

IV. A Little Dab'll Do Ya: Why *Expressions Hair's* Minimalist Holding Matters

Some commentators have slighted the Court's ruling in *Expressions Hair*, arguing that Chief Justice Roberts artificially manufactured unanimity by avoiding the central question in the case. That interpretation misreads what happened here. If the Court had wanted to sidestep, it could have followed Justice Sotomayor's suggested path. By instead eschewing the certification option and addressing whether state laws like New York's regulate speech, the chief justice's majority opinion broke new constitutional ground. Whether § 518 regulates speech or merely conduct was the central question this case presented, and the Court answered it directly. By deciding that "regulating the communication of prices . . . regulates speech," the Court did not answer whether this statute survives scrutiny under the First Amendment (or even what standard of review applies).⁴⁰ But that limited holding did accomplish several things.

First, the holding rescues commercial free speech from a tautology. Some lower courts, including the federal district court for the Western District of Texas in the *Rowell* case, have tried to sidestep any impact that credit-card surcharge laws have on the First Amendment by arguing that speech quoting an illegal price is unprotected. From the very beginning of commercial-free-speech doctrine, the Supreme Court has emphasized that speech concerning unlawful activity does not come within the ambit of First Amendment protection.⁴¹ Indeed, the first prong of the *Central Hudson* test asks whether speech concerns lawful activity and is not misleading. Fail to satisfy that prong and the rest of the test does not matter.

If Congress or state legislatures could simply forbid speech about certain topics or, in this case, prevent describing a transaction in a particular way and then negate any First Amendment challenge to that ban on the rationale that the speech concerned illegal conduct, there would be very few speech restrictions that the First Amendment would preclude. "Congress shall make no law . . . abridging the freedom of speech" would mean little in the commercial-speech context. Fortunately, consistent with the strict scrutiny it applies to

⁴⁰ *Id.* at 1146.

⁴¹ See *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973).

content-based speech restrictions after *Town of Gilbert*, the Court's holding in *Expressions Hair* thwarts that source of mischief.⁴²

Second, the Court's holding directly refutes the notion, propounded by the Second Circuit, that this statute governs conduct rather than speech. By establishing that regulating the communication of prices *does* regulate speech, the Court laid down an important marker. Contrary to Justice Breyer's view, it held that there *is* a line of demarcation between mere conduct and speech for the First Amendment to patrol. Although this decision does not specify where or how to locate that line, it countermands those lower courts that have behaved as though such laws simply do not regulate speech. In so doing, it throws a lifeline to citizens everywhere who confront statutes seeking to constrain them from uttering truthful and nonmisleading speech in the marketplace.

Just as important, the holding deprives lower courts of a shortcut to evade First Amendment scrutiny and compels them to analyze these laws under usual First Amendment tests, rather than the mere rational-basis review accorded to economic regulations. Likewise, legislators writing laws in this area now know that they cannot mischaracterize the regulation of speech as the regulation of conduct and thereby escape the Court's newly heightened scrutiny for commercial speech. In this way, *Expressions Hair* acts as a kind of backstop to *IMS Health* and *Town of Gilbert*.

Holding that this law governs speech (and not conduct) does not open the door to *Lochner*. Justice Breyer's concurrence in judgment does not repeat the concern that he voiced at oral argument, so perhaps he came to the same conclusion himself. At any rate, a sure sign that this decision does not list in *Lochner's* direction is that Justices Ginsburg and Kagan joined it. To be sure, some academics from the "nudge" school of regulation urged the Court not to reject New York's statute.⁴³ But this holding does not foreclose all nudge-style

⁴² As noted above, the federal district court in Texas employed this circularity in *Rowell*. Another federal court in Texas likewise discounted First Amendment objections to the Department of Labor's Fiduciary Rule. See *Chamber of Commerce of the United States of America v. Hugler*, 3:16-cv-1476, 2017 U.S. Dist. LEXIS 17619 (N.D. Tex. Feb. 8, 2017).

⁴³ See Brief for Constitutional, Administrative, Contracts, and Health Law Scholars as Amici Curiae in Support of Respondents, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391).

regulation any more than it embraces *Lochner*. Rather, consistent with existing compelled-speech First Amendment jurisprudence, this ruling merely requires regulation that implicates the First Amendment to satisfy a level of scrutiny greater than rational-basis review. Or, if the government wishes to tip the regulatory scales in favor of one choice over another, it must do so through use of its own speech rather than commandeering or forbidding the speech of other actors in the marketplace in a content-discriminatory manner. Such a restriction on regulators promotes freedom and fidelity to longstanding First Amendment principles.

The final point to make about the Court's minimalist holding is that it may have helped assemble a somewhat unusual coalition. Chief Justice Roberts managed to sway Justices Ginsburg and Kagan to sign on to his opinion, both of whom joined Justice Breyer's dissent in *IMS Health* and merely concurred in the judgment (along with Breyer) in *Town of Gilbert*. At the same time, the chief justice lost Justices Sotomayor and Alito, both of whom had joined the majorities in *IMS Health* and *Town of Gilbert*. Because they did not write separately, any speculation as to why Ginsburg and Kagan joined the Court's opinion is uncertain at best. But the Court's choice to remand the question of how to apply the First Amendment to these facts may have papered over any differences these two justices have had with the Court's recent commercial-free-speech jurisprudence.

Moreover, judging by what these justices said at oral argument, they seem genuinely to perceive the statute to regulate the expression of prices rather than prices themselves. Justice Ginsburg observed, "It doesn't set any price at all. It lets the merchant set the price. And the question is how that price is described . . . New York is not regulating . . . the price of the goods."⁴⁴ Likewise, Justice Kagan observed, "So it does affect the way a seller communicates which price he's going to say is the regular price, is the list price. So why isn't that a speech regulation?"⁴⁵ In short, to them, because the statute dictates how a merchant can express prices, it regulates speech and thus is subject to First Amendment scrutiny. So they were on board with remanding the statute for such analysis. That these two justices in particular do not appear to be alarmed by the distinct

⁴⁴ Transcript of Oral Arg., *supra* note 28, at 49.

⁴⁵ *Id.* at 51.

possibility that appropriate First Amendment scrutiny will torpedo a regulation is a positive development for defenders of commercial speech.

V. Lather, Rinse, Repeat: Does the GVR in *Rowell* Have Separate Significance?

Having partially resolved the questions presented in *Expressions Hair* on March 29, five days later the Court granted, vacated, and remanded (“GVR’d”) the certiorari petition filed in the Fifth Circuit’s *Rowell v. Pettijohn* case. Like the Second Circuit, the Fifth Circuit panel had upheld the state statute it reviewed. Also like the Second Circuit, the Fifth Circuit had held that Texas’s statute regulated conduct, not speech (or speech only incidental to an economic-conduct regulation)—allowing it to sidestep any elaborate First Amendment analysis. A third similarity is that both the New York and Texas statutes fail to define “discount” and “surcharge.” In fact, the Fifth Circuit’s reasoning tracked the Second Circuit’s logic so closely (and quoted its language so extensively) that the Supreme Court had little choice but to remand *Rowell* in light of its *Expressions Hair* decision.

Nonetheless, a few key differences in the cases are worth noting. First, the Texas statute, unlike the New York one, is civil only. While that difference does not alter the First Amendment analysis much, it does affect the void-for-vagueness analysis, because the standard for deeming a statute overly vague that can only be enforced civilly is very high. Had the Supreme Court fully addressed *Rowell* on the merits, it would almost certainly have upheld the void-for-vagueness portion of the Fifth Circuit’s judgment.

Rowell and *Expressions Hair* also differ in that the Fifth Circuit’s decision appeared to turn in part on its determination that a surcharge and a discount are not the same thing. The appeals court seems to indicate that by banning surcharges and allowing discounts, the Texas law regulates only conduct. That is, because it rejects the Eleventh Circuit’s view that a discount and a surcharge are two ways of referring to the same price difference, the Fifth Circuit treats those terms as regulating conduct rather than speech. Like the Second Circuit, the Fifth does not buy into the plaintiffs’ complaints that their manner of talking about the price differences is restricted, but the court’s reasoning turns in part on asserting a meaningful functional difference between a surcharge and a discount.

The third—and most significant—difference between *Rowell* and *Expressions Hair* is that the Second Circuit refrained from adjudging the constitutionality of a dual-pricing regime while in the Fifth Circuit “the parties concede dual pricing is allowed; the merchants simply object to their inability to characterize price differentials as a ‘surcharge,’ juxtaposed with a ‘discount.’”⁴⁶ As the dissent observes, “The majority does not . . . explain how a law that affects merchants’ ability to characterize legal price differentials as ‘surcharges’ rather than as ‘discounts’ is not a content-based restriction on speech subject to First Amendment scrutiny.”⁴⁷

Finally, as alluded to above, the Fifth Circuit upheld the trial court’s granting of a motion to dismiss in this case. Unlike the Second Circuit, which reversed a trial court’s striking down of New York’s statute on substantive review, the Fifth Circuit may need to remand the case back to the trial court for a first shot at subjecting the Texas statute to First Amendment analysis.

In any event, by GVR-ing this case, the Supreme Court reversed both circuits that upheld state no-surcharge statutes. But there is a catch. Both the Second and Fifth Circuits also sidestepped the First Amendment question to a large extent. The Court let stand, without comment, the one court of appeals opinion that grappled with the First Amendment implications of these laws and struck down the state statute in question. While it is tempting to conclude that the Court reversed these two circuits because it believes both state statutes are unconstitutional, that reading goes too far. The most that can be deduced for certain is that lower courts must treat these kinds of regulations as speech regulations and must subject them to at least the intermediate scrutiny that traditional First Amendment analysis requires.

VI. If You Don’t Look Good, We Don’t Look Good: Why the Court Denied Cert in *Dana’s Railroad Supply*

On the same day it GVR’d *Rowell*, the Supreme Court denied certiorari in *Dana’s Railroad Supply v. Bondi*, having held onto the case for several months. This order of events further confirms the inter-related nature of these decisions from the Court’s perspective. Court

⁴⁶ *Rowell*, 816 F.3d at 83.

⁴⁷ *Id.* at 85 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)).

watchers normally caution not to read anything into a denial of certiorari. There can be vehicle problems or other cert-worthiness reasons why a case is denied that have nothing to do with the merits. Here, however, where three separate state statutes bearing a close resemblance to each other came before the justices at the same time, the Court's decision to let stand the Eleventh Circuit's ruling while almost simultaneously reversing and remanding two other circuit court judgments is probably significant.

The Eleventh Circuit is the only court of appeals to strike down a state credit-card surcharge statute to date, and it did so explicitly on First Amendment grounds. As related above, the Second and Fifth Circuits upheld the state statutes at issue without engaging the First Amendment issue at the heart of those cases. If the Court had thought that the Eleventh Circuit utterly bollixed up its handling of the First Amendment issue, it seems likely the Court would have said something more about the First Amendment to keep other courts of appeals from modeling their future work after the Eleventh Circuit.

Hence, a recap of what the Eleventh Circuit held might help forecast what the Second Circuit and other lower courts may do in forthcoming credit-card surcharge cases. The district court in *Dana's Railroad Supply* treated Florida's statute as a pricing restriction subject to rational-basis review and upheld it on those grounds. On review, the panel majority recognized that whether the statute was found to regulate conduct or speech would seal its fate, as laws that restrict speech are disfavored and presumptively unconstitutional.⁴⁸ The court determined that the statute does not ban dual-pricing regimes and does not appear to be designed to prevent bait-and-switch pricing tactics. Instead of banning particular pricing practices, which the court averred would be subject to rational-basis review, the statute splits hairs by restricting how stores may express the price difference between cash and credit purchases. Merchants can call the price difference a discount for cash but may not call it a surcharge for credit, even though the two things are identical under the circumstances. Thus, the Eleventh Circuit concluded that Florida's "no-surcharge law" . . . is something of a misnomer. The statute targets expression

⁴⁸ See *Dana's R.R. Supply*, 807 F.3d at 1241–42 (citing *United States v. Alvarez*, 132 S. Ct. 2537, 2543–44 (2012)).

alone. More accurately, it should be a ‘surcharges-are-fine-just-don’t-call-them-that law.’”⁴⁹

The Eleventh Circuit considered applying strict scrutiny to Florida’s statute, as it saw the surcharge/discount issue as potentially treading on political issues, and it flirted with using the heightened standard of review called for in *IMS Health* and *Town of Gilbert* to evaluate content- or speaker-based discriminatory regulations. In the end, however, because it held that the statute could not survive intermediate scrutiny under *Central Hudson*, it did not evaluate the statute under more stringent standards.⁵⁰ In applying *Central Hudson*, the panel held that Florida’s statute failed every prong of the test. Because it struck down the statute on First Amendment grounds, the panel did not reach the void-for-vagueness question except to hold that there was jurisdiction to address that question and that it was properly presented to the court.

If other circuits are going to follow the Eleventh Circuit’s lead here, they should avoid replicating a couple of mistakes the majority made in *Dana’s Railroad Supply*. First, the court treated the petitioners’ challenge as a facial challenge to the statute when it was actually an as-applied challenge. Petitioners said theirs was an as-applied challenge in their briefs, and the litigation was prompted in part by cease-and-desist letters sent to the plaintiffs by the Florida attorney general. As the dissent pointed out, the prosecutor’s interpretation of the statute would only be relevant to an as-applied challenge.

The second mistake the *Dana’s Railroad Supply* majority made was to imply that a mandatory-disclosure regime would pass muster under *Zauderer* in the absence of consumer deception. Quite appropriately, the panel majority considered the applicability of *Zauderer* in the context of applying the *Central Hudson* test. The Second Circuit’s questions for briefing on remand in *Expressions Hair Design* ask separately whether New York’s statute would survive scrutiny under *Central Hudson* and whether § 518 could be deemed a valid disclosure requirement under *Zauderer*. Thus the Eleventh Circuit’s recognition that *Zauderer* is really just a special case of applying the fourth prong of *Central Hudson* is a welcome development. Still, in saying in *dicta* that Florida “could require merchants to disclose to

⁴⁹ *Id.* at 1245.

⁵⁰ *Id.*

their customers the workings of their pricing policy,” the majority overlooks the fact that charging customers a credit-card surcharge is not misleading in the first place.⁵¹ Hence, even if Florida wanted to force a disclosure, it would first have to show that any such disclosure was “reasonably related to the State’s interest in preventing deception of consumers.”⁵²

In any event, the Supreme Court’s *Expressions Hair* decision resolved the circuit split on whether credit-card surcharge statutes regulate speech or conduct. Since only the Eleventh Circuit held that such statutes govern speech and evaluated it accordingly, there is not (yet) a circuit split on the question of how to apply the First Amendment to these statutes. The other circuits decided that it did not apply. The Supreme Court’s minimalist holding resolved the split, and its remand of *Expressions Hair* and *Rowell* will permit the “how to evaluate no-surcharge statutes under the First Amendment” question to percolate further before the Court addresses it—if it ever does.

To be sure, a circuit split might still exist after the Second and Fifth Circuits complete their respective homework assignments from the high court. If so, it seems probable that the Court would revisit the First Amendment question that it forbore addressing in *Expressions Hair*. Of course, even if all of the other circuits now follow the Eleventh Circuit’s lead, the Supreme Court might still take a cert petition from one of them. For example, the Court may have thought that the Eleventh Circuit was not on the right track but let the decision stand because that circuit had properly decided that the First Amendment applied and made a stab at scrutinizing the statute under the correct tests. The better guess is that the Second and Fifth Circuits should follow what the Eleventh did, rather than count too heavily on the high court’s taking issue later with the First Amendment analysis of a case in which it denied cert.

VII. A Second Chance to Make a First (Amendment) Impression: Predicting the Second Circuit on Remand

On May 23, the Second Circuit issued an order recalling the mandate and reinstating the appeal in *Expressions Hair Design*. It further ordered both sides to submit letter-briefs addressing (1) whether § 518

⁵¹ *Id.* at 1250 (citing *Zauderer*, 471 U.S. at 650–51).

⁵² *Id.*

as applied to plaintiffs' pricing regime survives *Central Hudson* scrutiny; (2) whether § 518 is a valid disclosure requirement under *Zauderer*; and (3) what, if any, question the Second Circuit should certify to the New York Court of Appeals. The first two parts of this order track language at the end of Chief Justice Roberts's opinion ordering remand, while the third part asks whether to follow the certification suggestion made by the justices who concurred in judgment.

As of this writing, the Second Circuit has not decided whether to send part of the case to the New York Court of Appeals for resolution or whether it will hold oral argument, and its decision is still pending. Thus, it remains an opportune time to predict what the court might do on remand in this case. The short answer is that the court will evaluate, per the Supreme Court's instructions, whether § 518 can withstand First Amendment scrutiny. Multiple courts have evaluated these statutes accordingly, including the federal district court in this same case, so the panel has a road map (or several) to follow.

A. *The Certification Question*

Perhaps the first decision that the Second Circuit has to make is whether or not to certify a question to the New York Court of Appeals. None of the other courts examining these statutes certified a question, and the Second Circuit most likely will not do so either. Only the three justices who refused to join the Court's opinion recommended this course of action, and it would be a step at odds with the majority's holding in the case. Chief Justice Roberts's opinion already held that the statute regulates speech. If the Second Circuit certifies a question to the New York Court of Appeals, that court might interpret the statute *not* to regulate speech.⁵³ Then the Second Circuit would be a bit stuck. For the same reason that the Second Circuit itself won't follow the Breyer/Sotomayor suggestion and interpret the statute so as not to implicate the First Amendment, it will almost assuredly decide against certifying a question (and thereby running the risk of undercutting the U.S. Supreme Court's ruling).

⁵³ The Second Circuit might be able to fashion a question to certify to the New York Court of Appeals that would avoid this risk. But any question that forecloses that possibility would not be likely to give the Second Circuit any more information about the statute than it already has based on the Supreme Court's decision.

Besides, the Court already tried the *Pullman* abstention route the first time around to avoid deciding the state law question on how best to interpret § 518.⁵⁴ From the U.S. Supreme Court's perspective, the main thing that the Second Circuit got wrong the first time around was that it failed to recognize the statute as implicating the First Amendment. The appeals court won't make that same mistake again; the panel will take its cue from the majority opinion rather than the Breyer/Sotomayor/Alito concurrences in judgment and address the merits of the commercial-free-speech question directly.⁵⁵ It also will not want to further delay the case.

Another reason why the court of appeals will not certify a question is that the case remains an as-applied challenge where the specific set of facts—as the Supreme Court's ruling on the vagueness challenge underscored—is no longer in dispute. If this case were a facial challenge to the statute, seeking more information about how the statute applies might well be in order. But state supreme courts tend to balk at certifications anyway, especially to the extent that they see them as seeking advisory opinions. Here, the certification would almost explicitly be an advisory opinion, because further information on the metes and bounds of the statute are not necessary to resolve the as-applied challenge. Moreover, the New York Court of Appeals would probably prefer to opine in a case where it could also address the First Amendment question, not just to say how the statute applies and then return the case to the Second Circuit for the First Amendment analysis.

B. Central Hudson Analysis

Once the panel turns to analyzing the statute under First Amendment tests, there is every reason to think that the statute will fail

⁵⁴ See *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

⁵⁵ Certifying a question would also be in tension with having ruled against the plaintiffs on the void-for-vagueness argument. Justice Sotomayor's concurrence in judgment indicates oddly that this statute is not so vague as to create a due process problem but that it is ambiguous (that is, vague) enough to require certification. See *Expressions Hair*, 137 S. Ct. at 1155, note 3 (“The multiple available interpretations of § 518 do not render § 518 so vague as to violate the Due Process Clause. But they do render § 518 ambiguous enough to warrant asking the New York Court of Appeals to resolve the statute's meaning.”). But if the Court cannot parse the statute without another court's help, how is an ordinary merchant subject to the statute's criminal penalties supposed to figure it out?

review. Although commercial speech has been the redheaded stepchild of free-speech jurisprudence in most other lower courts, the Second Circuit has been a bright spot in recognizing commercial-speech rights.⁵⁶ As the court's briefing order portends, it will first consider how § 518 squares under the four-prong *Central Hudson* test, except that it will ignore the first prong because the Supreme Court has already decided that this speech concerns lawful activity and is not misleading.⁵⁷

The second prong of *Central Hudson* asks whether the government's asserted interest in the regulation is substantial. As applied to a single-sticker pricing regime, it is hard to see what substantial interest the government would have in insisting that merchants describe a price difference as a "discount" rather than a "surcharge." The panel offered some interests the first time around, implying they would survive rational-basis review (for example, to promote credit cards), but none would count as a substantial interest. The dissent in the Eleventh Circuit thought that preventing bait-and-switch tactics was a substantial interest, which it might be, but the majority there showed that the statute was not applied just to that narrow situation. The enforcement history in New York shows a broader pattern of enforcement as well, so the Second Circuit will not see a substantial government interest in play.

Central Hudson's third prong asks if the regulation directly advances the government's asserted interest. Here, whatever that interest might be, it would be better served by regulating prices rather than communication about prices. For example, to prevent profiteering, the state could cap the surcharge at the rate the merchant pays the credit-card company. Or the state could force merchants to disclose exactly how they calculate their prices. Therefore, the Second Circuit will find that § 518 fails this prong too.

Finally, *Central Hudson* requires that the regulation be no more extensive than necessary to serve the government's interest—in other words, that it be narrowly tailored. New York's

⁵⁶ See, e.g., *United States v. Caronia*, 703 F.3d 149 (2d Cir. (2012)) (reversing the conviction of pharmaceutical sales rep for off-label speech).

⁵⁷ Just as the Eleventh Circuit considered analyzing Florida's statute under the heightened standards of review suggested by *IMS Health* and *Town of Gilbert*, so too the Second Circuit would have to consider whether § 518 can survive more stringent review if it were to hold that § 518 satisfies *Central Hudson*.

§ 518 cannot possibly satisfy this prong because there are far too many alternatives to advance the government's interest that do not involve restricting—indeed criminalizing—disfavored speech.

C. *Zauderer Analysis*

Having decided that the statute fails *Central Hudson* review, the Second Circuit might see if it can save the statute by construing it as a disclosure regime subject to *Zauderer*. As an initial matter, despite the passing reference to *Zauderer* in Roberts's opinion, it does not apply in this context. That test comes into play where the government has compelled speech, such as a disclaimer, that is designed to prevent consumer deception. New York's law does not compel any speech whatsoever. As applied, as Justice Ginsburg recognized at oral argument, a statute that "suppress[es] the actual cost of the credit card purchase" is not a disclosure regime.⁵⁸ Nor does it combat deception; if anything, it facilitates deception. Moreover, a disclosure statute would be clear about what a merchant must say to comply. This law includes no such affirmative guidance.

Finally, in legal terms *Zauderer* is not an altogether separate, stand-alone test that commercial-speech restrictions can satisfy in lieu of *Central Hudson*. Rather, *Zauderer* simply means that when governments try to narrowly tailor regulations to meet the fourth prong of the *Central Hudson* test, compelled disclaimers will pass muster where speech bans will not in order to prevent consumer deception. If the Second Circuit finds that § 518 fails any of the other prongs of *Central Hudson*, then *Zauderer* will not apply.

If, however, the Second Circuit misconstrues *Zauderer*, it might simply ask whether the New York statute means to track the former federal statute. If so, according to the solicitor general's brief, the former federal statute would have survived *Zauderer* scrutiny. One might then think that § 518 should satisfy *Zauderer* too. This theory founders on two points. First, the *Expressions Hair* plaintiffs have brought an as-applied challenge, and the enforcement history in New York is not consistent with construing the statute as identical to its federal precursor. Under the federal statute, the only way to violate it (because of the unique definition given to "surcharge" under that statute) was to list one price, call it the regular price, and

⁵⁸ Transcript of Oral Arg., *supra* note 28, at 59.

then charge credit-card customers more than that price. As long as a merchant listed both prices, he was free to call the higher price for credit-card customers a “surcharge.” The same is not true under New York law.

Second, *Zauderer* applies a “purely factual and uncontroversial information” requirement to a particular disclosure.⁵⁹ Although one might construe New York’s statute as allowing two different prices to be listed by those merchants who wish to charge separate prices to cash and credit customers, nothing in the statute *compels* that. So *Zauderer* would not seem to apply. Moreover, there is nothing deceptive about Expressions Hair Design’s or the other plaintiffs’ desires to list a single price along with a set percentage surcharge. Without the need to combat deception, again, *Zauderer* should not apply. Finally, even if *Zauderer* does apply, it is quite a stretch to contend that it’s “uncontroversial” to disguise the cost of paying with credit.

The straightforward nature of the Second Circuit’s order suggests that it does not plan to do anything very creative on remand. If that proves true, then the panel ought to eschew certifying a question to the New York Court of Appeals, strike down § 518 as unconstitutional under *Central Hudson*, and not apply *Zauderer* at all. If the panel does apply *Zauderer* (and/or *Central Hudson*) to uphold a dual-price regime under the statute somehow, then it will create a new circuit split between the Second Circuit and Eleventh Circuit on whether a no-surcharge statute survives *Central Hudson* review. The Second Circuit will then need to consider whether the statute must withstand heightened scrutiny under *IMS Health* and *Town of Gilbert*. If it rules that the no-surcharge statute does not withstand heightened scrutiny, then how it got there may not matter so much. But if the Second Circuit ultimately upholds the statute by adopting a First Amendment theory at odds with the Eleventh Circuit, this case may wind up back at the U.S. Supreme Court. If the circuit split was worth resolving once, the Court could well conclude it is worth resolving once and for all.

⁵⁹ *Zauderer*, 471 U.S. at 651.

VIII. Finishing Touches

When the three credit-card-surcharge cases arrived together on the Supreme Court's doorstep last year, they were a hot mess. Of course, circuit splits reach the Court with regularity, but it seldom happens that the cases causing the split reach the Court almost simultaneously.⁶⁰ The timing here was no mere coincidence.⁶¹ Wisely the Court did not try to resolve all of the questions in the cases at once. Working patiently, the Court noted the limited question presented to it, undid the severe tangles left by the Second Circuit's bad *Hair* day, and sent that case back for a makeover. The Court then GVR'd the *Rowell* case and denied certiorari in *Dana's Railroad Supply*, letting stand the Eleventh Circuit's decision striking down Florida's no-surcharge statute on First Amendment grounds.

Avoiding a broad brush that might implicate *Lochner*, the Court issued a narrow but significant decision that no-surcharge statutes regulate speech, not merely conduct. Deeming such statutes economic-conduct regulations would have shredded the Court's commercial-speech jurisprudence. By not taking that shortcut, the *Expressions Hair* decision buttressed the Court's recent commercial-speech precedents. In holding that regulating the communication of prices regulates speech, the Court ensured that legislators at all levels will not find it easy to restrict merchants' speech in the future.

It will take another round of briefing in at least three different circuits—the Second, the Fifth, and the Ninth (in *Italian Colors*)—before the final fate of these various state statutes is known. Thus, although *Expressions Hair* did not deliver the sweeping victory that petitioners sought, the Supreme Court freed the Second Circuit's commercial-speech knot and straightened out an important area of commercial-free-speech doctrine.

⁶⁰ A cert petition was filed in *Expressions Hair Design* on May 12, 2016. A petition in *Rowell* was lodged on May 31, 2016, and the Florida attorney general filed one in *Dana's R.R. Supply* on June 6, 2016.

⁶¹ Deepak Gupta serves as counsel to the targeted businesses in all four of the no-surcharge appellate cases discussed herein, which explains many of the similarities in the cases.