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FIRST AMENDMENT COMMERCIAL SPEECH—SWIPE FEES MUTE TEXAS MERCHANTS

*Shelby T. Perry**

IN *Rowell v. Pettijohn*, the Fifth Circuit deepened the circuit split on whether states' anti-surcharge laws regulate economic conduct or implicate the First Amendment's free speech protections.¹ The court held that Texas's anti-surcharge law, which forbids merchants from imposing surcharges for items purchased with credit cards, but allows the imposition of discounts for cash purchases,² regulates economic conduct rather than speech, and therefore does not raise a First Amendment issue.³ In deciding the case, the court applied faulty reasoning in insisting that there is a meaningful distinction between a surcharge and a discount. This crucial misstep in its analysis led the court to hold that Texas's anti-surcharge law does not implicate the First Amendment and, therefore, that merchants cannot choose how to label the prices of their goods and services.⁴

The Texas law was originally “enacted to address how the ‘swipe fee’ of two to three percent of the purchase price, which credit-card issuers charge merchants for each transaction paid with a credit card, is passed on from the merchant to the consumer.”⁵ Prior to the enactment of the Texas law, Congress had passed the Truth in Lending Act, which prohibited merchants from imposing surcharges.⁶ After receiving extensive criticism, the federal ban was allowed to expire in 1984.⁷ As a result, major credit card companies began including prohibitions on surcharges in their contracts with merchants.⁸ Simultaneously, several states, including Texas in 1985, enacted their own legislation in order to continue regulating the swipe fees.⁹ Twenty years later, a slew of antitrust actions against credit

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1. See 816 F.3d 73, 80 (5th Cir. 2016).

2. See TEX. FIN. CODE ANN. § 339.001 (West 2015).

3. See *Rowell*, 816 F.3d at 80.

4. See *id.*

5. *Id.* at 76.

6. *Id.*

7. *Id.*

8. See *id.* at 77.

9. See *Rowell*, 816 F.3d at 77.

card companies that prohibited the surcharges arose, which caused them to eventually lift the ban, and left only state laws to prohibit surcharges.¹⁰

The plaintiffs in *Rowell* are a group of Texas merchants who challenged the law on the grounds that it violates the First Amendment's free speech protections.¹¹ They sued Leslie L. Pettijohn in her official capacity as Commissioner of Texas's Office of Consumer Credit in the U.S. District Court for the Western Division of Texas, Austin Division.¹² The merchants argued that the law implicated the First Amendment because it "deprive[d] them of the right to tell a customer that goods or services will cost more if paid for with a credit card rather than cash."¹³ Instead, they had to tell consumers that the posted price would be less if they used cash, with no mention of the posted price actually being a surcharge.¹⁴ They asserted that because the law dictated how they describe the pricing scheme to customers, it violated the First Amendment.¹⁵

The district court disagreed that the law implicates the First Amendment's free speech protections and granted Pettijohn's 12(b)(6) motion to dismiss.¹⁶ The court held that the "law regulates only prices charged—an economic activity that is within the state's police power—and does not implicate First Amendment speech rights."¹⁷ The court explained that, ultimately, the law merely sets the maximum price that can be posted because in only prohibiting a surcharge on the sticker price, the law allows merchants to offer a discount on the sticker price for cash purchases.¹⁸ By setting a ceiling on the charged price in relation to the sticker price, the law regulates conduct rather than speech.¹⁹

On appeal, the Fifth Circuit affirmed the district court's holding for two primary reasons.²⁰ First, in looking at the plain language of the statute, the court found that the law prohibits certain economic conduct—imposing surcharges on credit card purchases—but is silent as to offering discounts for cash purchases, thus indicating that surcharges and discounts are two different types of economic conduct and not merely differences in characterization.²¹ Second, the court analyzed whether prices themselves are "speech" within the First Amendment, holding that they are not by relying heavily on the Second Circuit's analysis of the same issue in *Expressions Hair Design v. Schneiderman*.²² Therefore, the court held, "[i]f prohibiting certain prices does not implicate the First Amendment, it fol-

10. *Id.*

11. *Id.* at 75–76.

12. *Rowell v. Pettijohn*, No. A-14-CA-190-LY, 2015 WL 10818660, at *1 (W.D. Tex. Feb. 4, 2015), *aff'd*, 816 F.3d 73 (5th Cir. 2016).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at *3.

18. *Id.*

19. *Id.*

20. *See Rowell v. Pettijohn*, 816 F.3d 73, 80 (5th Cir. 2016).

21. *Id.* at 81.

22. *See id.* at 82.

laws that prohibiting certain relationships between prices also does not implicate it.”²³

In analyzing the issue, the court placed a great deal of emphasis on two other cases dealing with state anti-surge laws and the First Amendment: (1) the Second Circuit’s decision in *Expressions*, which upheld New York’s anti-surge law, and (2) the Eleventh Circuit’s decision in *Dana’s R.R. Supply v. Florida*, which struck down Florida’s anti-surge law.²⁴ In analyzing the plain text of Texas’s anti-surge law, the Fifth Circuit followed the Second Circuit’s reasoning in *Expressions*. Like the New York law, Texas’s law only forbids surcharges and does not prevent merchants from offering discounts to cash-paying customers.²⁵ The court explained, “While a merchant may have the same ultimate economic result if it applies the same amount in the form of a credit-card surcharge that it would otherwise apply as a cash discount, the law does not require that.”²⁶ Instead, the law allows merchants to impose a dual-pricing scheme, therefore regulating conduct rather than characterization.²⁷ Lastly, the court looked to the legislative history, which suggested that the law’s intent was to ban surcharges and thereby protect consumers, thus indicating that the law prohibits the conduct of imposing surcharges, rather than regulating the way in which prices are characterized and communicated.²⁸

In holding that prices themselves are not speech within the First Amendment, the court first made the argument that because “price-control laws . . . have never been thought to implicate the First Amendment,” they simply do not.²⁹ The court then quickly concluded that if price-control laws do not implicate the First Amendment’s free speech protections, then “prohibiting certain relationships between prices” does not either.³⁰ The court next pointed out that under the law, merchants are not prohibited from talking about and explaining price differences with customers, but this “does not transform [the law] into a content-based speech restriction” because speaking about the differential is “merely incidental” to the prohibition.³¹

In addressing the circuit split, the court distinguished the Eleventh Circuit’s holding in *Dana’s R.R. Supply* by first drawing a distinction between the Florida law’s express exclusion of “discounts” from the

23. *Id.* at 82 (quoting *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015)) (alteration in original) (internal quotation marks omitted).

24. *See id.* at 78; *Expressions*, 808 F.3d at 122; *Dana’s R.R. Supply v. Florida*, 807 F.3d 1235, 1239 (11th Cir. 2015).

25. *Rowell*, 816 F.3d at 80–81; *see* TEX. FIN. CODE ANN. § 339.001 (West 2015); N.Y. GEN. BUS. LAW § 518 (McKinney 2015).

26. *Rowell*, 816 F.3d at 81.

27. *See id.*

28. *See id.* at 81–82; *Hearing on Tex. H.B. 1558 Before the H. Comm. On Fin. Insts.*, 69th Leg. R.S. (1985).

29. *See id.* at 82 (quoting *Expressions*, 808 F.3d at 130).

30. *Id.* (quoting *Expressions*, 808 F.3d at 130).

31. *Id.*

prohibition and the Texas law's silence on discounts.³² The court then disagreed with the Eleventh Circuit's holding that there is "no real-world difference" between a surcharge and a discount.³³ Instead, the court reasoned that lumping the two together fails to consider the differences in the economic conduct that is regulated because in only banning surcharges above the sticker price, "the end result of a discount does not always equal a surcharge."³⁴

Circuit Judge James L. Dennis firmly dissented from the majority in *Rowell*. He pointed out that although the statute silently permitted dual-pricing schemes, merchants' speech is ultimately regulated by the statute if they choose this type of pricing scheme because the statute dictates how they may describe the prices to customers.³⁵ While they may describe the difference as a discount, they may not describe it as a surcharge.³⁶ In characterizing the price difference as a surcharge, the merchant would not be "assessing 'additional' fees above a 'regular' price; he [would] only [be] characterizing a perfectly legal price differential in a chosen way."³⁷ Ultimately, the merchant would be violating Texas's law "because of the content of his speech, not because of the nature of his conduct."³⁸

The dissent also interpreted the way in which the Second Circuit, in *Expressions*, described the difference in regulating actual prices versus regulating how merchants describe those prices to customers.³⁹ The court in *Expressions*, like the majority in *Rowell*, held that the law only regulates credit-cash price differentials and the sticker price.⁴⁰ The dissent emphasized the Second Circuit's explanation that when merchants impose a surcharge on credit card purchases, there is no way they could characterize the price differential in order to make it legal. But, if they were to offer a discount instead, they could characterize the prices however they want without violating the law.⁴¹ The dissent argues that this differentiates the New York law in *Expressions* from the Texas law because the New York law only regulates purely economic conduct by not restricting how merchants describe their prices. On the contrary, the Texas law, as applied to dual pricing schemes, *does* restrict how merchants may describe their prices, rather than regulating what the price

32. See *Rowell*, 816 F.3d at 83; compare FLA. STAT. § 501.0117 (West 2016), with TEX. FIN. CODE ANN. § 339.001(a) (West 2015).

33. *Rowell*, 816 F.3d at 83; see *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1245 (11th Cir. 2015).

34. *Rowell*, 816 F.3d at 83.

35. See *id.* at 85 (Dennis, J., dissenting).

36. See *id.* (Dennis, J., dissenting); FIN. § 339.001.

37. *Rowell*, 816 F.3d at 85 (Dennis, J., dissenting).

38. *Id.* (Dennis, J., dissenting).

39. See *id.* at 85–86 (Dennis, J., dissenting); see also *id.* at 81 (majority opinion).

40. See *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 132 (2d Cir. 2015); *Rowell*, 816 F.3d at 82.

41. See *Rowell*, 816 F.3d at 85–86 (Dennis, J., dissenting); *Expressions*, 808 F.3d at 132.

itself can be.⁴²

The majority in *Rowell* erred in finding that there is a meaningful difference between a surcharge and a discount. In *Dana's R.R. Supply*, the Eleventh Circuit demonstrated the real-world similarity between the two by explaining that “[i]f the same copy of Plato’s *Republic* can be had for \$30 in cash or \$32 by credit card, absent any communication from the seller,” it is unclear whether the customer would incur a \$2 surcharge or receive a \$2 discount.⁴³ Conversely, the Fifth Circuit held that lumping surcharges and discounts together fails to consider differences in the economic conduct that is regulated because “the end result of a discount does not always equal a surcharge.”⁴⁴ However, the results *are* the same. The end result of offering a discount for cash purchases is that credit card users pay more for the same item than cash users—the same result as if a surcharge were imposed. There is no real-world difference between a surcharge and a discount because, as the Eleventh Circuit pointed out, the price differential still exists.⁴⁵

However, this does not necessarily implicate the First Amendment’s free speech protections. To implicate the First Amendment, the statute must regulate speech directly, rather than incidentally.⁴⁶ While the majority’s proposition that state regulation of prices does not typically implicate the First Amendment is well-grounded,⁴⁷ its mistake was finding that merchant speech explaining the pricing rationale to customers was only incidentally regulated by the statute. The majority defends its holding that the law does not implicate the First Amendment by reasoning that “simply speaking about the prices . . . is merely incidental to the regulated economic conduct” and merchants can still “infor[m] customers about the cost of credit” and “encourage[e] them to use cash, or expres[s] views on pricing policy more generally.”⁴⁸

While it is true that simply speaking about the prices is incidental to the regulation, this is not the speech at issue. The speech at issue is the *way* in which the prices are characterized—not the prices themselves nor the merchants’ general views on pricing policy.⁴⁹ Further, as the majority indicated, the law’s legislative history shows that it was enacted in order to ban the imposition of surcharges, but, as the Eleventh Circuit noted, “[a] law enacted for the sole purpose of forbidding a price difference to be labeled a *surcharge*, while allowing the same to be called a *discount*, does

42. See *Rowell*, 816 F.3d at 86 (Dennis, J., dissenting); N.Y. GEN. BUS. LAW § 518 (McKinney 2015); TEX. FIN. CODE ANN. § 339.001 (West 2015).

43. *Dana’s R.R. Supply v. Florida*, 807 F.3d 1235, 1245 (11th Cir. 2015).

44. *Rowell*, 816 F.3d at 83.

45. See *Dana’s R.R. Supply*, 807 F.3d at 1245.

46. See *Rowell*, 816 F.3d at 80 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011)).

47. See *id.* at 82.

48. *Id.* (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)) (internal quotation marks omitted).

49. See *id.* at 77–78.

not impose an ‘incidental burden’ on speech.”⁵⁰ By mischaracterizing the speech at issue, the majority avoided deciding whether the law is a content-based speech restriction.

As the dissent makes clear, the fact that dual-pricing schemes are permitted under the statute transforms the law into a content-based speech restriction. In fact, the majority inadvertently admitted that, when applied to the dual-pricing context, it does prohibit certain speech.⁵¹ While a merchant may post two different prices for the same goods or services (one for credit users and one for cash users), the law prohibits merchants from describing their prices in a certain way, thereby regulating speech rather than economic conduct.⁵² This is because “[a] merchant [implementing a dual-pricing scheme] who describes the difference between [its] prices as a surcharge is not assessing ‘additional’ fees above a ‘regular’ price; he is only characterizing a perfectly legal price differential in a chosen way.”⁵³ Essentially, being in compliance with Texas’s law ultimately turns on the language that the merchant chooses in describing its price differentials. As the Eleventh Circuit put it, the effect that anti-surcharge statutes have on dual-pricing schemes makes calling these statutes “no-surcharge law[s]” inaccurate because, in effect, they are more of “surcharges-are-fine-just-don’t-call-them-that-law[s].”⁵⁴

While the *Rowell* decision has been petitioned for certiorari, it may not be granted because the United States Supreme Court has already granted review of the Eleventh Circuit’s decision in *Expressions*.⁵⁵ Since the *Rowell* majority relied on *Expressions* in crucial steps of its analysis, and the two states’ laws are incredibly similar, the Supreme Court’s review of *Expressions* may shed some light on whether the Fifth Circuit properly decided *Rowell*. However, there are still serious policy implications arising from the *Rowell* decision. By upholding Texas’s anti-surcharge law, the court has incidentally perpetuated the national problem of rising consumer debt. When faced with the possibility of a surcharge for using credit, consumers are more likely to pay with the more affordable alternative of cash, which ultimately results in less consumer debt and a stronger economy.⁵⁶ Additionally, keeping the anti-surcharge law in place reduces the likelihood that banks will compete with one another to have the lowest possible interchange fee.⁵⁷ By prohibiting surcharges,

50. *Dana’s R.R. Supply*, 807 F.3d at 1247–48; see also *Sorrell*, 564 U.S. at 566–67.

51. See *Rowell*, 816 F.3d at 85 (Dennis, J., dissenting).

52. *Id.* (Dennis, J., dissenting); see TEX. FIN. CODE ANN. § 339.001 (West 2015); see also *Dana’s R.R. Supply*, 807 F.3d at 1245 (explaining that, in the context of dual-pricing, compliance with Florida’s anti-surcharge statute requires that “a [merchant] must communicate the price difference to a customer and that communication must denote the relevant price difference as a credit-card surcharge”) (emphasis in original).

53. *Rowell*, 816 F.3d at 85 (Dennis, J., dissenting).

54. *Dana’s R.R. Supply*, 807 F.3d at 1245.

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

56. See Samuel J. Merchant, Comment, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV. 327, 368–69 (2016).

57. *Id.* at 370.

merchant-discount “fees are concealed from consumers and therefore insulated from the competition in a free market.”⁵⁸ If the United States Supreme Court does not reverse *Expressions*, increasing consumer debt will not be ameliorated and interchange fees will remain high.

In conclusion, the Fifth Circuit’s reasoning in *Rowell* is unconvincing. It not only failed to recognize that the distinction between a surcharge and a discount is a distinction without a difference, but it also erred in focusing on reassuring merchants that they could still discuss with customers why the prices vary. Ultimately, the fact that the statute does not prohibit a dual-pricing scheme is what renders Texas’s anti-surcharge law a regulation of speech rather than conduct.

58. *Id.*