IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DANA'S RAILROAD SUPPLY, DANA JACKSON, TM JEWELRY LLC, TIFFANY BALLARD, TALLAHASSEE DISCOUNT FURNITURE, DUANA PALMER, COOK'S SPORTLAND, and ERIC COOK,
Plaintiffs,

v.

PAMELA JO BONDI, in her official capacity as Attorney General of the State of Florida,
Defendants.

No. 4:14-cv-134-RH/CAS

Plaintiffs' Reply in Support of their Motion for Summary Judgment

The Attorney General does not deny that Florida's no-surcharge law permits a merchant to charge two different prices for a product depending on how the customer pays: one price for using cash (say, $100) and another for using credit (say, $102). *See* Fla. Stat. § 501.0117(1). Nor does the Attorney General deny that the law permits the merchant to tell customers that the product costs $102 and there's a $2 "discount" for paying in cash. But what happens if the merchant instead wants to tell customers—through its labeling and signs—that the product costs $100 and there's a $2 "surcharge" for using credit, much like the plaintiffs in this case told their customers before the Attorney General forced them to stop? Although the Attorney General asserts in a footnote (at 6 n.5) that the statute "provides [a] ready answer[]" to this question, she doesn't say what that answer is. So we will: The merchant would violate the statute and could go to jail, all for communicating prices to customers in the wrong way. That "virtually incomprehensible distinction between what a vendor can and cannot tell its

customers offends the First Amendment"—just as New York's indistinguishable law did before Judge Rakoff declared it unconstitutional. *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436 (S.D.N.Y. 2013).

1. Rather than face Judge Rakoff's logic head on, the Attorney General tries to run away from New York's statute (the only other criminal no-surcharge law in the nation), claiming that even if a New York "merchant could break the law based only on how it described its pricing," "*Florida's* statute does not 'turn on semantics'; it turns on conduct"—"the *conduct* of imposing a surcharge." AG Opp. 1. "The statutory language," the Attorney General declares, "resolves that issue." *Id.* at 2.

But if the statutory language resolves anything, it is that Florida's law is *more clearly* about speech than New York's. Whereas New York's law says nothing about cash discounts, Florida's law expressly allows them. Here is the text of New York's law:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. N.Y. Gen. Bus. Law § 518.

And here is Florida's:

> A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card. A surcharge is any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment. . . . **This section does not apply to the offering of a discount for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card**, if the discount is offered to all prospective customers. Fla. Stat. § 501.0117(1) (emphasis added).

It says something about the faith the Attorney General has in her constitutional arguments that she begins her brief by attempting to distinguish between these two laws—both passed around the same time, in response to the same concerted industry

lobbying, to enact the same industry speech code through similar statutory language—instead of grappling with Judge Rakoff's reasoning in *Expressions*.[1]

That's because the Attorney General has no answer to *Expressions*. She repeatedly claims that Florida's law does not extend to cover the words merchants use in conversations with their customers but covers only how prices are "posted" or labeled. AG Opp. 3; *see, e.g.*, *id.* at 5 ("[M]erely *calling* a price a surcharge, or informing customers that they are incurring an 'extra cost' or paying more for credit, does not *impose* a surcharge within the meaning of the Statute."). But even assuming that were true (and how is a merchant to know?), the problem for the Attorney General is that the First Amendment protects more than just conversations. The way in which a merchant chooses to communicate price information to consumers—on labels, signs, advertisements, and the like—*is itself speech*. And it's not just any speech, but speech at the heart of the commercial-speech doctrine. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that speech conveying "price information" to consumers is "protected by the First Amendment"). As Judge Rakoff put it: "Pricing is a routine subject of economic regulation, but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Expressions*, 975 F. Supp. 2d at 445. The Attorney General has no response to this fundamental point.

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[1] The fact that Florida claims to interpret its no-surcharge law more narrowly than New York does—to cover labeling, signs, and advertising, but not conversations—also underscores its vagueness. The statutory text does not explain this difference, and merchants should not be expected to read the Attorney General's brief in this case to learn what the law means. It is enough that merchants (and the plaintiffs in this case) steer clear of telling customers that credit costs "extra" or "more," or that there's a "surcharge" for credit, and are thus "chilled from engaging in constitutionally protected activity." *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011).

Nor does she have a response to the Supreme Court's holding in *Sorrell v. IMS Health*—that any law that has the "practical effect" of banning a disfavored way of truthfully describing lawful conduct is a content-based speech restriction that is subject to "heightened scrutiny" and "presumptively invalid." 131 S. Ct. 2653, 2663-64, 2667 (2011). The Attorney General suggests (at 3) that the no-surcharge law's practical effect is only to ensure that merchants "honor the posted price," but the law obviously sweeps far broader than disclosure. Indeed, the recent national antitrust settlements with the major credit-companies require prominent disclosure of any credit-card surcharge; yet the Attorney General sent letters to the plaintiffs (attached to each of the plaintiffs' declarations) informing them that, "regardless of the terms of that settlement," Florida's no-surcharge law still applies.

Instead of grappling with *Expressions* or confronting the practical effect of its own law, the Attorney General relies primarily on two cases about entirely different laws. The first upheld the constitutionality of Providence's tobacco-discount law, which prohibits "reducing prices on tobacco products by means of coupons and certain multi-pack discounts." *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013). The Attorney General claims that this case conflicts with our position here because a tobacco "retailer who wanted to communicate the message that it was giving customers a bargain could lawfully sell three packs of cigarettes for $2.00 each, but could not sell two for $3.00 and say that the third would be free." AG Opp. 7. But selling cigarette packs for $2.00 each plainly is not the same conduct as selling them for $3.00 each and offering a buy-two-get-one-free discount. One provides a monetary incentive to buy more than one pack; the other does not. The no-surcharge law, by contrast, regulates no conduct but only the way in which lawful conduct is truthfully *communicated* to consumers.

The Attorney General's other case involves New York City's tobacco-discount law. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, --- F. Supp. 2d ---, 2014 WL 2766593 (S.D.N.Y. June 18, 2014). The Attorney General argues that, because the plaintiffs there unsuccessfully tried to draw an analogy to *Expressions* in their briefing, the court's decision upholding the law somehow rejects the reasoning of *Expressions* itself. But that decision doesn't even cite or discuss *Expressions*; it simply adopts the First Circuit's reasoning in the Providence case. It is revealing, to say the least, that the Attorney General feels the need to resort to such a convoluted argument rather than directly addressing the purpose and practical effect of its own no-surcharge law.

2. When it comes time to try to justify the no-surcharge law under *Central Hudson*, the state's arguments evaporate on inspection. In our summary-judgment motion, we criticized the Attorney General's "vague and unsubstantiated appeal to 'consumer protection'" and her failure to explain "how the no-surcharge law might actually further any legitimate consumer protection interest." Pl's S.J. Mtn. 29-30. The state made "so little effort" that it was "difficult to know how to respond." Pl's S.J. Mtn. 30.

Now that the state has filed an opposition brief, its inability to substantiate a defense of its statute has only become more apparent. This time, Attorney General makes even fuzzier references to "consumer harms," without specifying what those harms are, providing evidence that they exist, or demonstrating how the no-surcharge law has anything to do with them. Opp. 13-14. The state's halfhearted effort isn't remotely enough to satisfy its burden to demonstrate with actual evidence—not just speculation or conjecture—that each *Central Hudson* factor is satisfied. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

Indeed, the *only* evidence the state can muster is a one-page conclusory declaration from an employee of the Attorney General's Office. *See* Oswald Decl. That declaration states, without elaboration, that a handful of people have complained about violations of the statute. But the fact that some people "have been upset," to use the state's words (at 13), doesn't show real consumer harm. If anything, it shows the power of labels to produce different psychological reactions. As we previously explained, a credit-card "surcharge" and a cash "discount" are simply "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 U.C.L.A. L. Rev. 1321, 1330, 1351 (2008). The use of these two different labels to describe identical conduct has been empirically demonstrated to produce different consumer reactions—negative reactions to "surcharges" and positive reactions to "discounts," even when they are mathematically and economically identical. *See* Pl's S.J. Mtn. 6-8. It is precisely those reactions that the plaintiffs hope to provoke by using the "surcharge" label, and to thereby make the cost of credit more transparent.

The whole point of the commercial-speech doctrine is that the state may not use its coercive power to control "the reactions it is assumed people will have to the free flow of price information." *Va. Bd. of Pharmacy*, 425 U.S. at 769. The Attorney General never confronts this stubborn fact. Some ways of framing pricing information may make people "upset," but that is no justification for a state policy mandating one word over another. *Cf. Cohen v. California*, 403 U.S. 15 (1971). If it were, there wouldn't be much left of the First Amendment.

Even apart from her failure to offer any evidence, the Attorney General's efforts fail as a matter of logic. She asserts that "[a] mere disclosure regime would fail to achieve

the state's consumer protection interest … because a consumer who learns about the surcharge while at the register … will still be subject to the risk of unfair surprise, overcharging, and confusion." Opp. 14. But that hypothetical risk of "unfair surprise, overcharging, and confusion"—a risk, in other words, of *insufficient disclosure*—is precisely the sort of harm that a "mere disclosure regime" would address. If the problem is that consumers might not learn of the price difference between using cash and credit until they reach the register and attempt to pay, why not require prominent disclosure at the same time that any other price information is disclosed? That is just what Minnesota's disclosure statute requires—that the seller "inform[] the purchaser" of that price difference "both orally at the time of sale and by a sign conspicuously posted on the seller's premises." Minn. Stat. § 325G.051(1)(a). Florida never explains why such a regime would be unable to satisfy its supposed consumer-protection aims.

Similarly, as noted above, the recent national settlement agreements with the credit-card companies require merchants to "provide clear disclosure to the merchant's customers at the point of store entry"; additional "clear disclosure … at the point of interaction or sale with the customer" of (a) the amount of the surcharge, (b) a statement that the surcharge is being imposed by the merchant, and (c) a statement that the surcharge is not greater than the applicable swipe fees; and "clear disclosure of the dollar amount of the surcharge on the transaction receipt provided by the merchant to the customer." Settlement Agreement, ¶ 42(c), https://www.paymentcardsettlement.com. Yet, as the letters attached to the plaintiffs' declarations make clear, Attorney General Bondi sent case-and-desist letters to Florida merchants, including all of the plaintiffs, *after* the settlement's disclosure provisions had been announced. Indeed, the Attorney General's office went further, informing merchants that "[r]egardless of the terms of that

settlement," the no-surcharge law broadly prohibits use of the surcharge label. That fact alone demonstrates that the state's real concern cannot be preventing "unfair surprise, overcharging, and confusion."

3. Rather than try to meet its own constitutional burden to justify the challenged statute with actual evidence, the Attorney General takes aim at the *plaintiffs'* evidence. But the Attorney General's evidentiary attack on the plaintiffs' declarations misunderstands the purpose for which those declarations are introduced and, as a result, misunderstands their relevance. *First*, the Attorney General (at 18) characterizes the plaintiffs' declarations as offering inadmissible statements concerning "whether a consumer is confused," "what a customer's preference is," or "what the law provides." But the statements in question are relevant only because they detail the speech in which the plaintiffs seek to engage and their reasons for wanting to engage in that speech—not because the plaintiffs are somehow holding themselves out as experts on law or consumer psychology. They are not.

Second, the Attorney General (at 18) characterizes as "pure hearsay" the declaration of a New York merchant, Michael Parisi, against whom the New York Attorney General enforced that state's no-surcharge law. But the plaintiffs here have not introduced Mr. Parisi's declaration for the truth of the matters asserted there. As the Attorney General himself acknowledges, it is perfectly appropriate for this Court to take judicial notice of a document filed in another court. That is especially so where the document sheds light on the other court's decision in a way that is relevant to the legal issue before the Court. Judge Rakoff cited the Parisi declaration as illustrative of a "representative case" under the New York no-surcharge statute. *Expressions*, 975 F. Supp. 2d at 444 n.7. It stands to reason that this Court may be interested in learning more

about that "representative case"—not as an evidentiary matter but rather because it presents a useful hypothetical against which to test the constitutionality of Florida's indistinguishable statute.

The Attorney General's decision to attack the Parisi declaration on evidentiary grounds is telling because the Attorney General has no other response to it. The state never explains why we should regard Florida's statute as any different, or provide any assurance for Florida merchants that the state's law will not be interpreted similarly. That is an indication not only of the statute's infirmity under the First Amendment but also of its vagueness.

CONCLUSION

This Court should issue an order granting the plaintiffs' motion for summary judgment, declaring Florida's no-surcharge statute unconstitutional, and permanently enjoining the Attorney General (or any other person acting in the name of the State of Florida) from enforcing the no-surcharge statute.

Respectfully submitted,

/s / Deepak Gupta
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CERTIFICATE OF SERVICE

I certify that I filed a copy of the foregoing reply via the Court's CM/ECF system on July 18, 2014, which will automatically serve a copy on counsel for the defendants.

/s / Deepak Gupta
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