No. 15-50168

In the United States Court of Appeals for the Fifth Circuit

LYNN ROWELL, doing business as Beaumont Greenery; MICAH P. COOKSEY; MPC DATA AND COMMUNICATIONS, INCORPORATED; MARK HARKEN; NXT PROPERTIES, INCORPORATED; PAULA COOK; MONTGOMERY CHANDLER, INCORPORATED; SHONDA TOWNSLEY; TOWNSLEY DESIGNS, L.L.C.,
Plaintiffs-Appellants,

v.

LESLIE L. PETTIJOHN,
in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas (The Honorable Lee Yeakel)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

I. Texas's no-surcharge law violates the First Amendment.

A. The law regulates speech, not conduct.

The Commissioner stakes her defense of Texas's no-surcharge law entirely on her argument that the law "regulates quintessential economic conduct—pricing—in simple, unambiguous terms." Texas Br. 17. But as we explained at length in our opening brief, the law does not regulate *any* prices that merchants may charge for *any* goods—whether paid for in cash or with a credit card—and the Commissioner does not contend otherwise. Quite the contrary, the Commissioner concedes that "dual pricing is lawful" in Texas, such that merchants may charge higher prices if the consumer pays with a credit card instead of cash. *Id.* at 34. And she does not deny that merchants may set the credit-card price for any item at any amount, and so too for the cash price. So what, exactly, does the law regulate if not how those prices are conveyed to consumers? And how, exactly, is that not speech?

Any doubt that the law regulates speech is dispelled by the example raised in our opening brief (at 34–35 and 55). Suppose you are a merchant who has decided to sell an item for $100 if the consumer pays in cash and $102 if the consumer pays with a credit card. How do you comply with the law? The Commissioner's answer is that you must "set" the credit-card price as the "posted" price, which she claims "is a core economic decision." *Id.* at 29. But the prices have *already* been set (at

$100 for cash and $102 for credit); the law regulates only how those prices are conveyed to consumers. So the Commissioner's response is really this: You are permitted to tell consumers that the product costs $102 and there's a $2 "discount" for paying in cash, but you are not permitted to say that the product costs $100 and there's a $2 "surcharge" for paying with credit—even though consumers are in fact being charged $2 more for paying with credit rather than cash. That is, in practical effect, a speech code.

The Commissioner never confronts this practical effect. Nor does she confront the enforcement history of indistinguishable laws in states like New York, where merchants have long been targeted for using the wrong language. *See* Opening Br. 35–37. And she never once acknowledges that the purpose of these laws was to achieve the very result they have brought about: to regulate "semantics" because credit-card surcharges "talk against the credit industry" and "make[] a negative statement about the card to the consumer." *Id.* at 11–13; *see also id.* at 39.

Rather than focus on the law's purpose or practical effect, the Commissioner seizes on speech that she insists the law doesn't regulate. She repeatedly emphasizes (beginning on page 1 of her brief) that merchants "are free to discuss credit-swipe fees, to converse about alternative forms of payment, and even to directly encourage consumers to pay with cash." Maybe so. But "the test for constitutional validity of restraints of speech, even commercial speech, is not whether the would-be

speaker may express his views in some other forum or by some other means." *Motor Vehicle Mfrs. Ass'n of the U.S. v. Abrams*, 684 F. Supp. 804, 807 (S.D.N.Y. 1988). As Judge Sutton has explained, it does not "make a difference that other channels of communication remain open." *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 510 (6th Cir. 2008). All that matters is that the law restricts speech on the basis of its content by demanding one way of communicating truthful, non-misleading "price information" over another. *Va. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). Nothing more is needed to trigger First Amendment scrutiny. *Id.*; *see BellSouth*, 542 F.3d at 510 (striking down state law prohibiting a surcharge on phone bills reflecting the cost of a tax, even though companies could lawfully pass on that cost to consumers); *Abrams*, 684 F. Supp. at 807 (striking down state law prohibiting a surcharge for lemon-law compliance costs, even though companies could lawfully pass on those costs to consumers).

Because the no-surcharge law cannot survive scrutiny, the Commissioner spends her brief resisting it. She contends that the law "effectively sets the maximum price for credit-card purchases as the posted price," and thus need only pass rational-basis review. Texas Br. 29. Of course, Texas's law does not simply require that the price difference between cash and credit be "posted," so as to prevent consumers from being "lured into" purchases by deceptive advertising, as the Commissioner suggests. *Id.* at 9–10. The plaintiffs here all wish to convey the

credit-card price just as prominently and truthfully as the cash price—as a separate charge displayed on signs—and the recent antitrust settlement requires as much. But more importantly, even assuming that the law were truly aimed at disclosure, that doesn't make it a regulation of economic conduct. Far from it: Any law that bases liability exclusively on what is "posted"—that is, what is *communicated*—is a law that regulates speech, not conduct.

By stark contrast, the laws on which the Commissioner relies (at 18–19) plainly regulate conduct because they "control the prices to be charged for . . . products or commodities." *Id.* at 18 (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). Some set "price ceilings and floors"; others ban "unreasonable" and "excessive" prices. *See* Texas Br. 18–19. None, however, does what the no-surcharge law does: allow merchants to charge any price for any product, but only if the prices are labeled in a particular way. *See* Opening Br. 41–45.

Only two laws cited by the Commissioner merit further discussion. The first is the Providence law prohibiting retailers from "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). That law (discussed at page 44 of our opening brief) effectively *bans* differential pricing by requiring retailers to charge all consumers the same price for every pack of cigarettes, regardless of whether the consumer uses a coupon or buys multiple packs. That is nothing

like the no-surcharge law, which *allows* differential pricing based on how the consumer pays but regulates only how the price difference is communicated.[1]

The second law is Texas OCC Code § 2155.002(c), which restricts hotels from charging guests more than the "posted rate" for a room. *See* Texas Br. 19. That law is different from the others in that it actually regulates speech. Under the law, a hotel that charges $100 per room may not tell its guests that it charges $50 per room, nor may it post a $50 base rate and wait until checkout to mention the remainder. But the reason Texas can constitutionally restrict this speech is that the First Amendment does not protect false or deceptive advertising. *See Central Hudson*, 447 U.S. at 563. It protects truthful, non-misleading commercial speech. *Id.* Because Texas's no-surcharge law restricts truthful speech, it must satisfy scrutiny.

B. Under this Court's decision in *Byrum v. Landreth*, the State's inability to defend its law requires remand for entry of a preliminary injunction.

The Commissioner makes no effort to show that the law can withstand *Central Hudson* scrutiny if subjected to it. She hints at various possible consumer-protection rationales—preventing potential "windfall profits," preventing potential "consumer confusion" and harm to the economy because of how surcharges are

[1] If Texas's law banned dual pricing outright, rather that just how it is conveyed to consumers, the law would regulate conduct because it would require that the prices charged to credit-card payers and cash payers be the same. Any accompanying speech restriction would be incidental to that regulation of conduct and constitutional under the first prong of *Central Hudson*. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980).

"perceived," and preventing potential bait-and-switch tactics. *See* Texas Br. 7–10. Yet she does not actually attempt to test these purported justifications under *Central Hudson*. She offers no reason, for example, why the State exempts itself from the law's reach. Nor does she make any attempt to explain why a narrow disclosure requirement, akin to the one passed in Minnesota, *see* Minn. Stat. § 325G.051, or the one the Texas House of Representatives rejected, would not accomplish all of the State's potential aims without restricting as much speech. And she does not articulate any purpose served by prohibiting the plaintiffs from truthfully and prominently informing their customers that there is a "surcharge" for credit rather than a "discount" for cash.

Instead, the Commissioner once again seeks to avoid scrutiny, this time by arguing that the question is not before the Court. She asks the Court to "remand the case for fact development" should it conclude that the law regulates speech, not enter a preliminary injunction as the plaintiffs have requested. Texas Br. 37. She also claims that the plaintiffs have "waived any challenge" to the district court's dismissal of their preliminary-injunction motion. *Id.* at 38 n.10.

For starters, we have not waived any challenge to the court's dismissal of our preliminary-injunction motion. Our opening brief expressly requested that this Court enter "an injunction barring the law's enforcement" against the plaintiffs "because the State has not shown its ability to justify" the law under *Central Hudson*.

Opening Br. 2, 47; *see also id.* at 30 (providing the standard of review for challenging preliminary-injunction denial); *id.* at 51 (explaining that this Court will "remand for entry of a preliminary injunction" when "the State has not demonstrated a reasonable 'fit' between its regulation and the constitutional speech at issue"); *id.* at 58 (requesting that the district court's judgment "be reversed in its entirety and remanded for entry of a preliminary injunction").

In light of the Commissioner's failure to justify the law, this Court's precedent requires that it remand the case for entry of a preliminary injunction. In *Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009), Judge Yeakel denied a preliminary injunction in a commercial-speech challenge to a Texas law that prohibited unlicensed interior designers from using certain labels to describe their trade, without regulating anything else. This Court "reverse[d] and remand[ed] for entry of a preliminary injunction." *Id.* at 449. After explaining that the district court's analysis was "confused," and that "[t]he confusion [was] even more pronounced because the State had the burden to prove all elements of the *Central Hudson* test," the Court had "little difficulty in concluding that [the plaintiffs] are likely to succeed on their claim because the State has not shown its ability to justify the statutes' constitutionality." *Id.* at 446.

The same is true here. The Commissioner had an opportunity to defend the law below, and she defaulted. *See* Texas Br. 38. After the plaintiffs filed their pre-

liminary-injunction motion, she steadfastly refused to offer any justification for the law under *Central Hudson*, and "essentially placed all [her] eggs in the basket of [her] contention that the Court should analyze" the law as a regulation of conduct. *Schwartz v. Welch*, 890 F. Supp. 565, 571 (D. Miss. 1995). Because she's wrong about that—and because she has the burden of satisfying *Central Hudson*—the Court should remand for entry of a preliminary injunction.

II. Texas's no-surcharge law is unconstitutionally vague.

When it comes to vagueness, the Commissioner essentially punts. She refuses to answer any of the questions we posed on page 55 of our opening brief, dismissing them as "hypothetical." Texas Br. 41. It is not hypothetical, however, to ask what a merchant can tell its customers about its prices. If a merchant employs dual pricing—as Texas law permits, and as the plaintiffs here would all like to do—can the merchant say that the credit-card price is "more" than the cash price? Can the merchant put up signs informing customers of the extra cost of credit by describing it as a "surcharge" or "additional charge" intended to cover the cost of swipe fees? As Judge England remarked in striking down California's indistinguishable law, these "represent legitimate concerns that retailers must face when determining whether to impose a legal dual-pricing system." *Italian Colors Rest. v. Harris*, — F. Supp. 3d —, 2015 WL 1405507, *8 (E.D. Cal. 2015). The Commissioner gives no reason to think otherwise.

Rather than clarify the law's meaning, the Commissioner underscores its vagueness. She contends that the law is clear because it "proscribes a single activity—the act of charging an additional fee for goods and services when a purchaser pays by credit card." Texas Br. 40. Again, the law *doesn't* proscribe that conduct. It permits merchants to charge an additional fee for credit-card purchases—but only if the amount is labeled a cash "discount" rather than a credit "surcharge."

The Commissioner tries to clear up the confusion by quoting the dictionary. "A restricted 'surcharge,'" she says, "is commonly understood as '[a]n additional sum added to the usual amount or cost,' the precise opposite of a permissible 'discount,' which is defined as '[a] reduction from the full or standard amount of a price or debt.'" That hardly helps. To see why, put yourself back in the merchant's shoes. You decide to charge $100 for a product if the consumer pays in cash and $102 if the consumer pays with credit. Do the definitions solve the problem? Which price is the "usual" or "standard" amount? Is it the one that you *say* is the "standard" amount, such that liability hinges on speech? Or is it something else? If so, what? The Commissioner's inability to answer these questions says all there is to say about whether this law comports with the Constitution. The law not only offends the First Amendment; it is hopelessly vague to boot.

CONCLUSION

The district court's judgment should be reversed and remanded for entry of a preliminary injunction against enforcement of Texas Finance Code § 339.001.

Respectfully submitted,

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August 11, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2015, I electronically filed the foregoing Reply Brief for Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 2,337 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

August 11, 2015 Deepak Gupta