IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LYNN ROWELL d/b/a/ BEAUMONT GREENERY;	§	
MPC DATA AND COMMUNICATIONS, INC.;	§	
MICAH COOKSEY;	§	
NXT PROPERTIES, INC.;	§	
MARK HARKEN;	§	
MONTGOMERY CHANDLER, INC.;	§	
PAULA COOK;	§	
TOWNSLEY DESIGNS, LLC; and	§	
SHONDA TOWNSLEY,	§	
	§	
Plaintiffs	§	
v.	§	CIVIL ACTION NO. 1:14-cv-00190-LY
	§	
GREG ABBOTT, in his official capacity as Attorney General of the State of Texas; and	§	
LESLIE L. PETTIJOHN, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,	§	
	§	
Defendants	§	

Plaintiffs' Opposition to Defendants' Motion to Dismiss

Maybe the Attorney General has decided that if he does not mention Judge Rakoff's decision striking down New York's indistinguishable statute in *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013)—let alone grapple with its reasoning—that this Court will simply forget that it exists. Perhaps he drew the same conclusion about the U.S. Supreme Court's decisions in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011), which holds that the First Amendment "requires heightened scrutiny" of laws whose purpose or practical effect is to restrict speech based on content, and *Central Hudson Gas & Electric Corp. v.*

Public Service Commission of New York, 447 U.S. 557 (1980), which sets forth the minimum standard under which the state must actually justify and defend its statute.

Whatever his strategic calculations, the Attorney General does not deny that Texas'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* Tex. Fin. Code § 339.001. Nor does he deny that the law permits the merchant to tell customers that the product costs $102 and that there's a $2 "discount" for paying in cash. But if the merchant instead wants to tell customers that the same product costs $100 and that there's a $2 "surcharge" for using credit, the Attorney General concedes, the merchant has violated the law. This "virtually incomprehensible distinction between what a vendor can and cannot tell its customers offends the First Amendment"—just as New York's identical law did before it was struck down. *Expressions*, 975 F. Supp. 2d at 436.

Rather than face *Expressions*, *Sorrell*, or *Central Hudson*, the Attorney General now contends that the no-surcharge law is a "typical" and "straightforward economic regulation" that "regulates conduct, not speech," and thus does "not implicate the First Amendment." AG Mot. 2, 6–7, 9. That ignores the distinction that gave birth to the commercial-speech doctrine in the first place. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976). "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 (emphasis added). Once that bedrock distinction is understood, the Attorney General's attempt to evade scrutiny reduces to the circular contention that "nothing in the First Amendment will protect that speech, because it is not lawful." AG Mot. 11. Suffice it to say, that is no ground to dismiss this case on the pleadings. The Attorney General has two choices: Put forward a justification for the statute and defend it, or allow it to fall.

ARGUMENT

I. Texas's no-surcharge law regulates speech, not conduct.

As we explained in our preliminary-injunction motion (at 9–12), Texas's no-surcharge law is a content-based speech restriction that is subject to "heightened scrutiny" under the First Amendment. *Sorrell*, 131 S. Ct. at 2664. The law's "purpose and practical effect" are to regulate how merchants *communicate* prices to consumers—not to regulate the prices themselves. *Id.* at 2663. That means, at a minimum, that the law must satisfy intermediate scrutiny under *Central Hudson*. It cannot do so. By keeping consumers in the dark about the true cost of credit (and by exempting the government from its prohibition), the law does not directly advance any state interest in preventing consumer deception—which could be addressed with a simple disclosure requirement in any event. (Indeed, Texas does not even identify any interest ostensibly served by its statute beyond a vague reference to consumer protection. AG Mot. 3.)

Unable to defend the law, the Attorney General tries to escape First Amendment scrutiny altogether. He argues that he doesn't have to justify the law because it regulates "economic conduct—the act of charging more for the use of a credit card"—not speech. AG Mot. 1. But the law does not prohibit that conduct. To the contrary, like New York's law, section 339.001 *permits* merchants to charge more for credit so long as they frame the price difference as a cash "discount" rather than a credit "surcharge"—that is, so long as they use the right words. For that reason, Judge Rakoff concluded that the no-surcharge law "draws the line between prohibited 'surcharges' and permissible 'discounts' based on words and labels, rather than economic realities," and so it "clearly regulates speech, not conduct." *Expressions*, 975 F. Supp. 2d at 444.

The Attorney General has no response to this, and does not bother to give one. So are we supposed to assume that Texas's law—which was passed around the same time, in response to the same concerted credit-card industry lobbying, to enact the same industry speech code

through similar statutory language—is somehow different from New York's? If so, what makes it different? What "conduct" does it regulate that New York's law doesn't? Or was Judge Rakoff just wrong? And, if so, in what way? The Attorney General offers no answers to any of these questions. Nor does he provide an account of the law's "purpose and practical effect," as required by *Sorrell*—another case he doesn't grapple with.

Instead, the Attorney General seeks refuge in a basic proposition: that states have "broad authority to regulate economic conduct"—"'including the prices to be charged for [particular] products'"—"without implicating the First Amendment." AG Mot. 6 (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). We do not contend otherwise. But again, the reason direct regulations of economic conduct do not implicate the First Amendment is that they actually regulate conduct—they "fix a maximum of charge to be made," for example, or otherwise regulate what is charged or paid for something. *Munn v. Illinois*, 94 U.S. 113, 125 (1876). Texas's law doesn't.

To see the difference, consider each of the authorities that the Attorney General cites (at 7–9) to support his argument. They involve laws that:

- set "maximum of charges for the storage of grain," *id.* at 123;
- "fix minimum and maximum . . . retail prices to be charged" for milk, *Nebbia*, 291 U.S. at 515;
- set a "maximum price for old gas," *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 221 (1991);
- ban insurance commissions "in excess of a reasonable amount," *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 255 (1931);
- "authorize[] the fixing of minimum wages," *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386 (1937);
- prohibit unapproved "rent increases," *Yee v. City of Escondido*, 503 U.S. 519, 524 (1992);
- set "utility rates" and permit utility companies to request authorization to "adjust [the] rates," Tex. Util. Code § 39.202, 58.057;
- cap the interest rate, Tex. Fin. Code § 302.001–.002; and

- forbid landlords to impose "a late fee for failing to pay rent" unless certain conditions are met, Tex. Prop. Code § 92.019.

Although the Attorney General asserts that the no-surcharge law "lies in the heartland of these price regulations," AG Mot. 9, each one of these laws—unlike Texas's no-surcharge law—directly regulates the total amount charged or paid for something. Indeed, the Attorney General even cites a Texas law that prohibits certain unreasonable dual-pricing practices by gas-station franchisors, and explicitly does so without regard to how the price difference is characterized—whether as a "fee, charge, or discount." Tex. Bus. & Com. Code § 104.002. That is the opposite of section 339.011.

If the no-surcharge law actually regulated prices—that is, if it capped the difference between the cash and credit prices, say, or banned dual pricing outright—then it would be a price-control law of the kind the Attorney General cites. And it surely would not trigger First Amendment scrutiny. But that's not this law. In Texas, merchants are free to set the credit-card price as they please; the law regulates only how they may communicate their prices to customers. That feature makes the no-surcharge law fundamentally different from every law the Attorney General cites, including Texas's price-gouging law (which prohibits charging "an exorbitant or excessive price" during an emergency, Tex. Bus. & Com. Code § 17.46(b)(27)) and 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)). Unlike the price-gouging law, the no-surcharge law allows merchants to set the difference between the cash and credit prices at any level they wish. And unlike the tobacco-discount law, the no-surcharge law allows differential pricing (and regulates only how it is labeled). The Attorney General never confronts these critical distinctions.

Finally, the Attorney General relies on *Ford Motor Co. v. Texas Department of Transportation*, which considered the constitutionality of a Texas law "prohibit[ing] manufacturers from retailing motor vehicles to consumers." 264 F.3d 493, 506 (5th Cir. 2011). "An accompanying result of this prohibition," the court noted, "is that Ford is not allowed to advertise the sale of motor vehicles to consumers." *Id.* Because that law regulates speech based on its content, the Fifth Circuit applied *Central Hudson* and held that the law survives scrutiny because the speech it prohibits "does not concern a lawful activity"—not because it doesn't prohibit speech. *Id.* at 507. Here, however, dual pricing *is* a lawful activity. And if the Attorney General wants to defend the law under *Central Hudson*, he is welcome to try.

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

The Attorney General also argues that section 339.001 is not unconstitutionally vague. "No fair reading" of the statue, he asserts, "would determine that there is no core of defined prohibited activity." AG Mot. 18. And that activity, in his view, is "the act of charging more for credit." *Id.* Of course, the law *doesn't* prohibit that activity. As discussed above, it prohibits only how the activity is characterized. But even setting that aside, the Attorney General admits that the law doesn't prohibit charging less for cash—a $2 cash "discount" is okay, a mathematically equivalent $2 credit-card "surcharge" is verboten. So what's the difference? Yet again, the Attorney General does not say.

Nor does the Attorney General grapple with any of the cases that have addressed the meaning of state no-surcharge laws and universally grasped their incoherence. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 2013 WL 6510737, *19–*20 (E.D.N.Y. 2013) ("No-surcharge laws are not only anti-consumer, they are arguably irrational."); *Expressions*, 975 F. Supp. 2d at 435 ("*Alice in Wonderland* has nothing on [New York's no-surcharge law]."); *People v. Fulvio*, 517 N.Y.S.2d 1008, 1012 (N.Y. Crim. Ct. 1987) (holding

that the no-surcharge law, by prohibiting credit surcharges but permitting cash discounts, is "so vague, uncertain and arbitrary of enforcement as to be fatally defective"). It is possible, of course, that all of these judges simply adopted an "[un]fair reading" of no-surcharge laws. AG Mot. 18. But the Attorney General doesn't say why that is. The more likely explanation—by far—is that these laws (section 339.001 included) are hopelessly, unconstitutionally vague.

CONCLUSION

The state's motion to dismiss should be denied.

Date: August 27, 2014

Respectfully submitted,

/s/ Richard L. Coffman
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CERTIFICATE OF SERVICE

I certify that on August 27, 2014 I filed a copy of the foregoing opposition to the defendants' motion to dismiss via the Court's CM/ECF system, which will automatically serve a copy on counsel for the defendants.

/s / Richard L. Coffman
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