LEADING CASES

CONSTITUTIONAL LAW

First Amendment — Freedom of Speech — Commercial Speech — Expressions Hair Design v. Schneiderman

When a ban on commercial advertising faces a First Amendment challenge, courts typically address the merits of the constitutional claim by applying the four-part test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[1] However, since its inception, *Central Hudson*'s test has been criticized for being both over- and under-inclusive,[2] as well as overexpansive.[3] Justice Blackmun, in his concurrence, took an alternative route and maintained that courts should not apply *Central Hudson* when a statute seeks to withhold commercial information for the purpose of manipulating consumer behavior.[4] Last Term, in *Expressions Hair Design v. Schneiderman*,[5] the Court held that New York's statutory prohibition on credit card surcharges regulated the communication of prices and thus regulated speech.[6] The Court, however, declined to assess the merits of the constitutional claims, instead invoking the "court of review, not of first view" maxim to remand the issue to the Second Circuit.[7] The Court not only erred in refusing to address the parties' constitutional arguments, but given that the statute withheld commercial information for the purpose of manipulating consumer behavior, also missed an opportunity to answer definitively whether such a statute is per se illegitimate or whether it should undergo intermediate scrutiny under *Central Hudson*.

Credit card issuers and retailers have been enmeshed in a decades-long war.[8] At first, issuers contractually banned retailers from charging different prices for cash and credit card transactions.[9] Congress re-

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[1] 447 U.S. 557, 566 (1980); *see, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–56, 566 (2001) (invalidating ban on advertising tobacco products); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (invalidating ban on advertising liquor prices); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (invalidating ban on advertising alcohol content); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 344 (1986) (upholding ban on advertising casinos to Puerto Rican residents); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68, 75 (1983) (invalidating ban on unsolicited advertising of the benefits of condoms).

[2] *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring in the judgment).

[3] *Id.* at 583, 591–92 (Rehnquist, J., dissenting).

[4] *Id.* at 573 (Blackmun, J., concurring in the judgment).

[5] 137 S. Ct. 1144 (2017).

[6] *Id.* at 1147, 1151.

[7] *Id.* at 1151.

[8] *See generally* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321 (2008).

[9] *See* Edmund W. Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. ECON. & ORG. 217, 219–20 (1990).

sponded with a series of amendments to the Truth in Lending Act[10] ("TILA"): first to prohibit contractual bans on discounts for cash,[11] and then again to enact its own ban on surcharges for credit card use.[12] The federal ban lapsed in 1984,[13] but credit card lobbyists quickly convinced ten states and Puerto Rico to enact similar statutes.[14] For years, these statutory bans had little importance because contractual bans on surcharges were already in place across the industry.[15] Then in 2012, Visa and MasterCard — the two largest credit card issuers — agreed to lift their contractual surcharge bans as part of an antitrust settlement.[16] Though the Second Circuit rejected the settlement agreement,[17] the litigation has drawn attention to those eleven nonfederal surcharge bans.[18]

New York General Business Law Section 518[19] is one such statute. It copies verbatim TILA's operative language: "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."[20] Merchants who violate Section 518 are subject to criminal sanctions and civil enforcement actions.[21] But unlike the lapsed federal surcharge ban, Section 518 does not define "surcharge," "discount," or "regular price."[22] These omissions posed a problem for merchants seeking to understand Section 518's scope. Because TILA explicitly differentiated between a "surcharge"[23]

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10 Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2012)).

11 *See* Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, sec. 306, § 167, 88 Stat. 1500, 1515 (1974) (codified as amended at 15 U.S.C. § 1666f(a) (1976)).

12 *See* An Act to Extend the State Taxation of Depositories Act, Pub. L. No. 94-222, sec. 3(c), § 167(a), 90 Stat. 197, 197 (1976) (codified at 15 U.S.C. § 1666f(a)(2) (1976)).

13 *See* 15 U.S.C. § 1666f note (2012).

14 *See* Petition for a Writ of Certiorari at 9–10, 10 n.1, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 3383878.

15 *See* Noah Feldman, *Cash Discounts, Credit Surcharges and Free Speech*, BLOOMBERG VIEW (Jan. 10, 2017, 2:10 PM), https://www.bloomberg.com/view/articles/2017-01-10/cash-discounts-credit-surcharges-and-free-speech [https://perma.cc/UQE7-M7KQ].

16 *See* Class Action Settlement ¶ 42, *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (No. 05-MD-1720), 2012 WL 3932046.

17 *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 240 (2d Cir. 2016).

18 *See, e.g.*, Alan S. Kaplinsky, *Analyzing 2nd Circ. NY Credit Card Surcharge Ban Case*, LAW360 (Nov. 4, 2015, 11:19 AM), https://www.law360.com/articles/722507/analyzing-2nd-circ-ny-credit-card-surcharge-ban-case [https://perma.cc/PVY7-W756].

19 N.Y. GEN. BUS. LAW § 518 (McKinney 2012).

20 *Id.*; *see also* 15 U.S.C. § 1666f(a)(2) (1976).

21 Violating the provision constitutes a misdemeanor offense punishable by a fine up to $500, imprisonment up to one year, or both. N.Y. GEN. BUS. LAW § 518. In addition, the New York State Attorney General may bring civil enforcement actions to enjoin "continuous" violations, *id.* § 513, and to seek restitution, damages, and cancellation of business licenses against repeat or persistent offenders, N.Y. EXEC. LAW § 63(12) (McKinney 2010).

22 *Compare* N.Y. GEN. BUS. LAW § 518, *with* 15 U.S.C. § 1602(q)–(r), (x) (2012).

23 15 U.S.C. § 1602(r) (defining "surcharge" as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means").

added to and a "discount"[24] subtracted from a posted "regular price,"[25] two pricing schemes existed under the federal ban: single-sticker pricing (that is, allowing merchants to post one price for a product and offer price reductions for cash payments while forbidding them from charging an additional fee for credit card payments) and dual-sticker pricing (that is, allowing merchants to post one price for cash payments and another price for credit card payments that could be higher than the cash price).[26] The lack of clear definitions in the New York statute, however, left New York merchants uncertain of which scheme they were allowed to follow under Section 518. What *was* clear was that neither scheme allowed a merchant to describe a price difference as a "surcharge."

In 2013, five New York City retailers filed suit in the United States District Court for the Southern District of New York against the New York State Attorney General.[27] The merchants — wanting to impose additional fees on credit card payments and describe the fee as a surcharge[28] — challenged Section 518 as violative of the First Amendment's Free Speech Clause, void for vagueness under the Fourteenth Amendment's Due Process Clause, and preempted by the Sherman Antitrust Act.[29] Plaintiffs moved to preliminarily enjoin Section 518's enforcement based on their First and Fourteenth Amendment claims, and defendants cross-motioned to dismiss the complaint.[30]

The district court granted plaintiffs' motion for a preliminary injunction.[31] Judge Rakoff first determined the case was "clearly ripe"[32] and that all of the merchants had standing because they "legitimately

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[24] *Id.* § 1602(q) (defining "discount" as "a reduction made from the regular price" and clarifying that a discount "shall not mean a surcharge").

[25] *Id.* § 1602(y) (defining "regular price" as "the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of [a credit card] if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of [a credit card] and the other when payment is made by use of cash, check, or similar means").

[26] *See* S. REP. NO. 97-23, at 4 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 74, 77 (showing that federal definitions were designed to permit "two-tier pricing systems"). With single-sticker pricing, a merchant could list an item at $10 and offer a $1 discount for cash payments but could not add a $1 fee for credit card payments. With dual-sticker pricing, a merchant could list an item both at $11 for credit card payments and $10 for cash payments.

[27] Complaint, Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430 (S.D.N.Y. 2013) (No. 13 CIV 3775), 2013 WL 12130635.

[28] Plaintiffs contended that describing an imposed fee as a "surcharge" more transparently informs customers that higher prices are due to credit card transaction fees. *See Expressions Hair Design*, 975 F. Supp. 2d at 439. Under their view, the alternative of posting a higher price and advertising any reduction as a cash discount is disingenuous because it makes the price seem higher without reason. *See id.*

[29] Complaint, *supra* note 27, ¶¶ 49–52.

[30] *Expressions Hair Design*, 975 F. Supp. 2d at 440.

[31] *Id.* at 450.

[32] *Id.* at 441 (determining that the merchants would "continue to suffer" a "cognizable injury . . . if review were withheld").

fear[ed]" that New York may enforce Section 518 "beyond the bounds of its federal precursor."[33] Turning to the First Amendment challenge, Judge Rakoff found that Section 518 "clearly regulat[ed] speech, not conduct," because Section 518 created a semantic distinction between "permissible 'discounts'" and "prohibited 'surcharges'" that had nothing to do with economic realities.[34] Nor was Section 518 a permissible disclosure requirement deserving of rational basis review — to the contrary, Section 518 prohibited speech outright, thus subjecting it to "heightened judicial scrutiny."[35] Applying *Central Hudson*'s test for commercial speech regulations,[36] Judge Rakoff found that Section 518 restricted the lawful, nonmisleading dual-pricing scheme,[37] did not advance New York's interest in protecting consumers from deception,[38] and was overbroad.[39] Section 518 thus violated the First Amendment.[40]

The United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case with instructions to dismiss the plaintiffs' claims.[41] Writing for a unanimous panel, Judge Livingston[42] held that the district court erred in invalidating Section 518 under the First Amendment and the Due Process Clause.[43] Because Section 518 did not define surcharge, Judge Livingston adopted the word's ordinary meaning[44] and determined that Section 518 as applied to the single-sticker pricing scheme merely regulated conduct.[45] By its own terms, Section 518 did not prohibit sellers from *referring* to price differentials as surcharges; it prohibited sellers from *imposing* surcharges, thus regu-

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[33] *Id.* at 444.

[34] *Id.*

[35] *Id.* at 445 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011)).

[36] Under *Central Hudson*, "commercial speech . . . [is] subject to intermediate scrutiny, which directs courts to consider (1) whether the regulated speech 'concern[s] lawful activity and [is] not . . . misleading,' (2) 'whether the asserted governmental interest' justifying the regulation is 'substantial,' (3) 'whether the regulation directly advances the governmental interest asserted,' and (4) whether the regulation 'is not more extensive than is necessary to serve [that] interest.'" *Id.* (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

[37] *Id.* at 446.

[38] *Id.*

[39] *Id.* at 447.

[40] *Id.* Judge Rakoff also concluded that Section 518 was impermissibly vague under the strictest vagueness standard, *id.* at 448, for hinging on the "virtually incomprehensible distinction between what a vendor can and cannot tell its customers," *id.* at 436. Judge Rakoff briefly addressed plaintiffs' antitrust challenge, finding that Section 518 could plausibly violate the Sherman Act under rule of reason analysis. *Id.* at 448–49. After stipulating to a final judgment in plaintiffs' favor, the state appealed. Expressions Hair Design v. Schneiderman, 808 F.3d 118, 127 (2d Cir. 2015).

[41] *Expressions Hair Design*, 808 F.3d at 127.

[42] Judge Livingston was joined by Judges Wesley and Carney.

[43] *Id.*

[44] *Id.* ("A 'surcharge' ordinarily means 'a charge in excess of the usual or normal amount: an additional tax, cost, or impost.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2299 (2002))).

[45] *Id.* at 135.

lating a pricing practice.[46] Furthermore, even though "prices [are] necessarily communicated through language," the panel relied on the premise that prices are not speech for First Amendment purposes.[47] If ordinary price regulations do not implicate the First Amendment, it follows that statutes like Section 518 that regulate the relationship between prices do not implicate the First Amendment either.[48]

The panel declined to settle the overbreadth challenge (that is, whether Section 518 was unconstitutional as applied to other pricing schemes), invoking *Pullman*[49] abstention because the issue turned on unsettled questions of state law.[50] The panel could have certified to the New York Court of Appeals the question of whether Section 518 applied to sellers using dual-sticker pricing, yet the panel declined to do so, noting that the "present state of the record" was insufficiently developed.[51]

The Supreme Court vacated the Second Circuit's decision and remanded the case for further proceedings upon finding that Section 518 regulates speech.[52] Writing for the Court, Chief Justice Roberts[53] first noted that the merchants' challenge was limited to Section 518 as applied to their preferred pricing scheme (that is, "posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a 'dollars-and-cents' additional amount").[54] The Court agreed with the Second Circuit that Section 518 prohibited this pricing scheme;[55] however, the Court disagreed with the Second Circuit's conclusion that Section 518 regulated only conduct.[56] The Court determined that Section 518 was not "like a typical price regulation"[57] that incidentally burdened speech because Section 518 "tells merchants nothing about the amount they are allowed to collect."[58] Instead, Section 518 regulates the "communication of prices" and therefore regulates speech.[59] Because the Court is "a court of review, not of first view,"[60] it declined to decide whether Section 518 is a commercial speech regulation subject to *Central Hudson* or a disclosure requirement subject to

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[46] *Id.* at 131.
[47] *Id.* at 130–31.
[48] *Id.* at 131.
[49] R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941).
[50] *Expressions Hair Design*, 808 F.3d at 138–39.
[51] *Id.* at 141. The panel also held that Section 518 was not unconstitutionally vague because it could be construed to eliminate the vagueness problem. *Id.* at 144.
[52] *Expressions Hair Design*, 137 S. Ct. at 1147.
[53] The Chief Justice was joined by Justices Kennedy, Thomas, Ginsburg, and Kagan.
[54] *Id.* at 1149.
[55] *Id.* at 1150.
[56] *Id.* at 1150–51.
[57] *Id.* at 1150.
[58] *Id.* at 1151.
[59] *Id.*
[60] *Id.* (quoting Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120, 2131 (2014)).

Zauderer v. Office of Disciplinary Counsel,[61] leaving the Second Circuit to determine Section 518's constitutionality.[62]

Justice Breyer, concurring in the judgment, wrote separately to underscore that "virtually all government regulation affects speech."[63] As such, it is more important for courts to determine whether and how a statute or rule affects a protected First Amendment interest, rather than attempt to distinguish between conduct and speech.[64] To emphasize the inquiry's significance, Justice Breyer summarized how different kinds of speech regulation — political speech regulations, commercial speech regulations, and disclosure requirements — demand different standards of review.[65]

Justice Sotomayor concurred in the judgment but wrote separately to criticize the Court for not ordering the Second Circuit to certify an interpretative question to the New York Court of Appeals.[66] Justice Sotomayor noted that multiple possible interpretations of Section 518 exist.[67] Given that the decision turned on knowing exactly what Section 518 prohibited — as authoritatively construed by New York's highest court — Justice Sotomayor concluded that the Second Circuit abused its discretion in declining to certify the question, and the Court continued the error by not ordering the Second Circuit to do so.[68]

Expressions Hair Design assumes an unusual position in commercial speech jurisprudence, in that the Court rarely grants certiorari merely to determine whether the statute at issue regulates conduct or speech. From *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[69] where the Court first recognized that commercial speech is protectable,[70] to *Sorrell v. IMS Health Inc.*,[71] where the Court applied an even more exacting level of scrutiny to a commercial regulation it

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[61] 471 U.S. 626, 651 (1985) (holding that regulators may require commercial actors to disclose information as long as such a requirement is "reasonably related to the State's interest in preventing deception of consumers").

[62] *Expressions Hair Design*, 137 S. Ct. at 1151. The Court also concluded that because Section 518 prohibited the merchants' favored pricing scheme, Section 518 was not vague as applied to them. *Id.* at 1152.

[63] *Id.* at 1152 (Breyer, J., concurring in the judgment).

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1153 (Sotomayor, J., concurring in the judgment) ("This quarter-loaf outcome is worse than none."). Justice Sotomayor was joined by Justice Alito.

[67] *Id.* at 1153–55.

[68] *Id.* at 1156–59. Justice Sotomayor preferred certification over *Pullman* abstention. Both mechanisms allow federal courts to defer to state judges in cases where a constitutional challenge turns on the proper interpretation of state law. However, certification is a more "precise tool" whereas abstention is a "blunt instrument," *id.* at 1156, that requires "a full round of litigation in . . . state court," *id.* (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1996)).

[69] 425 U.S. 748 (1976).

[70] *Id.* at 770–71.

[71] 564 U.S. 552 (2011).

deemed to be content- and speaker-based,[72] the Court has typically addressed the merits of the constitutional challenge at bar. To be sure, in *Expressions Hair Design*, the Court helpfully reaffirmed in dicta that price controls regulate conduct while, at best, incidentally burdening speech.[73] In addition, the Court's holding addressed the circuit-splitting issue of whether surcharge bans like Section 518 implicate the First Amendment.[74] However, any gains were tempered by the dissatisfying and odd fact that the Court used the "first view" maxim to end its analysis at the threshold conduct/speech inquiry. In doing so, the Court not only erred but also missed an opportunity to definitively answer the question of whether a state can ever restrict speech in order to manipulate consumer behavior.

To some extent, the "first view" maxim seems like an opportunistic tool to avoid fully addressing the merits of the question presented. After all, the Court does not always let this maxim stop it from addressing issues or arguments that were not presented by the parties or were not litigated in the lower courts. For example, as Professor Michael Coenen explained, the Court in *Burwell v. Hobby Lobby Stores, Inc.*[75] was faced with the issue of "whether the government had 'substantially burdened' the religious beliefs of the plaintiffs by requiring them to offer employer-provided health insurance plans that covered various methods of contraception."[76] Several amici for the government advanced a game-changing argument that the "$2,000 per-employee penalty is actually less than the average cost of providing health insurance."[77] The government itself did not raise this argument, and though the government's silence should have militated against the Court addressing the issue,[78] the Court still went to pains to explain why the argument was unavailing.[79] That same Term in *Daimler AG v. Bauman*,[80] the Court departed from established personal jurisdiction doctrine based on an argument

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[72] *Id.* at 564–65.

[73] *Expressions Hair Design*, 137 S. Ct. at 1150.

[74] *Compare* Dana's R.R. Supply v. Att'y Gen., 807 F.3d 1235, 1251 (11th Cir. 2015) (holding that Florida's surcharge ban violates the First Amendment), *with* Rowell v. Pettijohn, 816 F.3d 73, 80 (5th Cir. 2016) (holding that Texas's surcharge ban does not implicate the First Amendment), *vacated*, 137 S. Ct. 1431 (2017) (mem.). *See also* Andy Jang v. Asset Campus Hous., Inc., No. LA CV15-01067, 2017 WL 2416376, at *5 (C.D. Cal. May 18, 2017) (invalidating California's surcharge ban in light of *Expressions Hair Design*).

[75] 134 S. Ct. 2751 (2014).

[76] Michael Coenen, *Hello, and a Question About Hobby Lobby*, PRAWFSBLAWG (Feb. 2, 2015, 9:43 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/02/hello-and-a-question-about-hobby-lobby.html [https://perma.cc/R67H-ANWA]; *see also Hobby Lobby*, 134 S. Ct. at 2759.

[77] *Hobby Lobby*, 134 S. Ct. at 2776.

[78] *Id.* ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, and there are strong reasons to adhere to that practice in these cases." (citations omitted)); *see also* Coenen, *supra* note 76.

[79] *See Hobby Lobby*, 134 S. Ct. at 2776–77.

[80] 134 S. Ct. 746 (2014).

that was advanced "for the first time in a footnote of Daimler's merits brief before [the] Court."[81] Yet, in *Expressions Hair Design*, the Court refused to address the properly presented constitutional issue and thus ignored several arguments both parties raised in their briefs — arguments that were advanced at the district, circuit, and Supreme Court levels.

Generally, the Court articulates reasons for "not decid[ing] in the first instance issues not decided below."[82] When the Court invokes the "first view" maxim, it typically justifies its refusal to assess an issue on the grounds that (1) the Court granted certiorari on only a particular issue, (2) the claims were not sufficiently developed below,[83] or (3) neither the district court nor the appellate court focused on the issue.[84] The first two reasons are premised on notions of fairness and procedural legitimacy — both parties should be afforded the opportunity to develop their arguments on a particular issue,[85] and the Court should not go beyond the record or the questions presented for which it granted certiorari.[86] The third reason is likely premised on the belief that the district and appellate courts, being more familiar with the facts and laws at issue, should be accorded due deference.[87]

However, because *Expressions Hair Design*'s procedural history did not raise those concerns, the Court should have determined Section 518's constitutionality. The first two traditional justifications are easily dispelled. The Court granted certiorari to determine "whether the statute *violates the First Amendment*," not merely whether Section 518 regulates speech or conduct.[88] The merchants and the State of New York had argued and briefed the constitutional question since the district court proceedings and similarly advanced their constitutional arguments

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[81] *See id.* at 766 (Sotomayor, J., concurring in the judgment); *see also* Richard M. Re, *A Court of Review, or First View?*, PRAWFSBLAWG (Feb. 4, 2015, 4:46 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/02/a-court-of-review-or-first-view.html [https://perma.cc/F43U-F65K]. *But see Daimler*, 134 S. Ct. at 760 n.16 (majority opinion) (pointing out that the argument was raised below by amici).

[82] Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999).

[83] *See* Roberts *ex rel.* Johnson v. Galen of Va., Inc., 525 U.S. 249, 253–54 (1999) (per curiam).

[84] *See* United States v. Bestfoods, 524 U.S. 51, 72 (1998); *see also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 175 (2004).

[85] *Daimler*, 134 S. Ct. at 766 (Sotomayor, J., concurring in the judgment).

[86] *See id.*

[87] *See Bestfoods*, 524 U.S. at 73. *But see* Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 707 (2012) ("When issues are avoided, they are generally avoided for reasons unrelated to any quasi legitimacy concerns."). It is also possible, though hard to prove, that the Court has decided not to address constitutional issues as part of interchambers bargaining. *See id.* at 705.

[88] *Expressions Hair Design*, 137 S. Ct. at 1146–47 (emphasis added); *see also* Petition for a Writ of Certiorari, *supra* note 14, at i (emphasis added), *granted*, 137 S. Ct. 30 (mem.).

in their briefs to the Supreme Court.[89] The Court's third justification has some weight only because the Second Circuit indeed refused to assess whether Section 518 would survive *Central Hudson*'s intermediate scrutiny.[90] However, as Justice Thomas once suggested, this justification should be overridden if the first two justifications are satisfied.[91]

Had the Court addressed the constitutional issue, it would have had a tee-ball opportunity to decide definitively whether a state can ever abridge speech to induce its favored economic behavior. In other words, should *Central Hudson* apply to regulation of speech aimed at manipulating economic behavior, or should such attempts be per se unconstitutional? This debate took root when the *Central Hudson* Court suggested that such a regulation is permissible if it satisfies a substantial state interest.[92] But as Justice Blackmun contended then[93] and as Justice Thomas later avowed, any governmental attempt to keep consumers "ignorant in order to manipulate their choices in the marketplace" should be deemed "per se illegitimate."[94] For such regulations, courts should not even apply *Central Hudson*.[95]

Well-established principles regarding which arguments are available upon certiorari suggest that the Court could have addressed the merits of the "per se illegitimate" argument in *Expressions Hair Design*. Though the Court may decline to address an issue that was not raised below, the Court may address any argument made in support of a properly presented federal claim.[96] In other words, petitioners are not limited to the arguments made below.[97] And though the merchants did not advance the "per se illegitimate" argument at the circuit level,[98] they noted it, albeit briefly, in their merits brief.[99]

Given that the Court was barred by neither procedure nor precedent, the Court should have addressed the "per se illegitimate" argument, for

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[89] *See* Complaint, *supra* note 27, ¶¶ 49–51; Corrected Brief for Plaintiffs-Appellees at 26–50, Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2d Cir. 2015) (No. 13-4533(L)), 2014 WL 2994763; Brief for Petitioners at 27–44, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 6833414; Brief for Respondent Eric T. Schneiderman at i, 39–55, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), 2016 WL 7321781.

[90] *Expressions Hair Design*, 808 F.3d at 135.

[91] *See* Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring).

[92] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment).

[93] *See id.* at 578.

[94] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in the judgment) (emphasis omitted); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 497 (1995) (Stevens, J., concurring in the judgment).

[95] *See 44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in the judgment).

[96] *See* Yee v. City of Escondido, 503 U.S. 519, 534 (1992).

[97] 5 AM. JUR. 2D *Appellate Review* § 620 (2017).

[98] *See* Corrected Brief for Plaintiffs-Appellees, *supra* note 89.

[99] *See* Brief for Petitioners, *supra* note 89, at 32 n.7.

allowing the lower courts to apply *Central Hudson* to a statute like Section 518 offends modern First Amendment principles. The Court has recognized that the First Amendment must protect "the free dissemination of information about commercial choices in a market economy."[100] As such, an antipaternalism principle exists that prevents the government from regulating speech for the people's own good.[101] This principle disfavors legislation that restricts speech because the government fears how the people will react to it.[102] A transparency principle also exists that recognizes the "dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly."[103] This principle favors disclosure and direct regulation over clandestine attempts to influence behavior by controlling the flow of information.[104]

As deceptive legislation, Section 518 violates both of these principles. First, it abridges the merchant's ability to describe any additional fee as a surcharge because credit card lobbyists, working through the state legislature, feared that the volume of credit card use would decline if surcharges were permitted.[105] Second, instead of directly regulating credit card and cash use, the state legislature sought to abridge speech by shrouding Section 518 in language that seemed, on its face, to regulate conduct. The Court's careful scrutiny of Section 518's effects exemplifies the need for courts to "examine[] more searchingly the State's professed goal[s]."[106] But the Court should have gone further and held that legislative deception should not be afforded even a modicum of protection against the First Amendment. Deceptive regulations should instead be deemed per se illegitimate.

Though the *Expressions Hair Design* Court sharpened its doctrine to better detect when legislatures try to shrewdly regulate speech, the Court missed an opportunity to determine whether Section 518 is per se illegitimate. If ever again faced with a similar case, the Court should address the constitutional argument instead of hiding behind the "first view" maxim.

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100 *44 Liquormart*, 517 U.S. at 520 (Thomas, J., concurring in the judgment).

101 *See id. See generally* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004).

102 *See* Carpenter, *supra* note 101, at 595.

103 *See 44 Liquormart*, 517 U.S. at 520 (Thomas, J., concurring in the judgment).

104 *See, e.g.*, *id.* at 507 (plurality opinion) (recognizing increased taxation and direct price control regulation as nonspeech alternatives to banning liquor price advertising).

105 True, the merchants could post signs explaining that increased prices are due to credit card swipe fees. But First Amendment protection does not end with the existence of alternative methods of communication. To the contrary, it remains pivotal that the government is illegitimately abridging speech at all.

106 *44 Liquormart*, 517 U.S. at 531 (O'Connor, J., concurring in the judgment).