

Are Prices Free Speech? The Supreme Court is set to weigh in on whether merchant surcharges are protected as free speech

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The Supreme Court recently agreed to review a case from the Second Circuit Court of Appeals holding that New York's anti-surcharge provision was constitutional. Similar cases–with differing outcomes–have been heard in the Fifth and Eleventh Circuits, as well as a District Court in the Ninth Circuit. The issue is this: in each of the states at issue, statutes prohibit "surcharges" but permit discounts to cash purchasers, whether explicitly (California and Florida) or by implication (New York and Texas). For example:

Assume a seller wants to sell a widget for $100, and it costs $3 to process a credit card transaction. To receive $100 per widget, the merchant could set the price of widgets at $103 and then subtract $3 when customers pay with cash, i.e. a cash discount. Due to the anti-surcharge legislation, the merchant could not, however, set the sticker price at $100 and then add $3 when customers pay by credit. Economically, the merchant keeps $100 in either case.

A key focal point of the arguments is whether a "sticker price" is a form of commercial speech that is protected by the First Amendments. Supporters of the law contend that surcharge bans regulate **conduct** by preventing a seller from charging a buyer something higher than the sticker price, while critics argue the law regulates **speech** because a "discount" and a "surcharge" lead to the same economic outcome. Both the Second Circuit and the Fifth Circuit held that the relevant anti-surcharge provisions regulated conduct and not free speech; therefore, the provisions were constitutional. The Eleventh Circuit, however, held that Florida's anti-surcharge law was an unconstitutional infringement of free speech and struck down the provision. For similar reasons, a California District Court enjoined enforcement of that state's anti-surcharge law.

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With this circuit split, it's clear the Supreme Court's ruling will alter the lay of the land in at least two of these states and will impact court interpretation of the law in all states with surcharge laws.

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