13-4533(L)

13-4537 (CON)

United States Court of Appeals for the Second Circuit

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, DAVID ROSS,
Plaintiffs-Appellees,

v.

GERALD MOLLEN, in his official capacity as District Attorney of Broome County,
Defendant,

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York; CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County; CHARLES J. HYNES, in his official capacity as District Attorney of Kings County,
Defendants-Appellants.

On Remand from the Supreme Court of the United States

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and does not issue stock, and no publicly held company enjoys a 10% or greater ownership interest.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) [1] is a public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared frequently in this and other courts to address the proper scope of commercial-speech rights. *See, e.g.*, *Grocery Mfrs. Ass'n v. Sorrell*, No. 15-1504, *appeal withdrawn pursuant to FRAP 42(b)* (2d Cir., Aug. 5, 2016); *Caronia v. United States*, 703 F.3d 149 (2d Cir. 2012); *IMS Health, Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2111).

The statute at issue in this case, N.Y. Gen. Bus. Law § 518, threatens criminal penalties against merchants who express their pricing in a non-misleading but disfavored manner. In WLF's view, such restrictions severely impinge on merchants' First Amendment speech rights—for no apparent purpose other than to placate the concerns of credit-card companies that the prohibited speech might

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[1] Pursuant to Local Rule 29.1, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

deter use of credit cards. WLF believes that those restrictions deprive consumers of valuable information regarding the costs of products whose purchase they are considering.

STATEMENT OF THE CASE

In the U.S. Supreme Court, Appellants (New York Attorney General Eric Schneiderman and several district attorneys, being sued in their official capacities) contended that § 518 regulates conduct, not speech, and thus that its application to Appellees (collectively, "Expressions Hair") does not implicate the First Amendment. The Supreme Court rejected that contention (which also formed the basis of this Court's initial decision), stating, "In regulating the communication of prices rather than prices themselves, § 518 regulates speech." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017).[2]

The Supreme Court vacated this Court's judgment and remanded with directions "to analyze § 518 as a speech regulation." *Ibid.* It stated that among the issues that this Court "may need to consider" is the extent to which § 518 permits a

[2] The Supreme Court accepted this Court's construction of § 518, which prohibits sellers from imposing a "surcharge" on purchasers who pay by means of a credit card. As so construed, the statute prohibits merchants "who post a single sticker price" from "charg[ing] credit-card customers an additional amount above the sticker price that is not also charged to cash customers." *Id.* at 1149 (quoting *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 128 (2d Cir. 2016)).

"two-sticker pricing scheme[ ]" that lists separate cash and credit prices. *Id.* at 1151 n.3.

This Court thereafter issued an order directing the filing of supplemental briefs addressing, among other issues, whether § 518 can withstand First Amendment scrutiny under either the "*Central Hudson* test" or the "*Zauderer* test," and whether the Court should certify any portion of the case to the New York Court of Appeals for resolution.

SUMMARY OF ARGUMENT

This case has been pending in federal court for more than four years. Until the case is concluded, merchants throughout the State will remain in the dark regarding whether they face criminal prosecution for providing their customers with truthful information about credit-card fees. WLF opposes certification of any issues to the New York Court of Appeals, a process that would compound the delays that Expressions Hair has already endured.

Certification is particularly inappropriate when, as here, senior New York State law enforcement officials are parties to the lawsuit. State courts may, of course, ultimately disagree with the construction of § 518 espoused by those officials. But there is no pressing need to seek definite guidance from the New York Court of Appeals when the construction being urged by those officials is

almost surely the same construction they would espouse were they to bring criminal charges for alleged violations of the statute.

Appellants have repeatedly asserted that a pricing scheme that Expressions Hair wishes to employ violates § 518. But for the statute, Expressions Hair would post signs listing a cash price and an additional surcharge for customers paying by credit card, expressed either as a percentage surcharge or a dollars-and-cents additional amount—such as "Haircuts $10.00 (with a $.30 surcharge for credit card users)." Appellants assert that § 518 prohibits such signs, although their rationale for the assertion has varied considerably throughout this litigation.

Section 518 violates Expressions Hair's First Amendment rights, whether judged under the four-part analysis laid out in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) or under the First Amendment standard set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Under either of those standards, New York bears the burden of identifying a "substantial" government interest that the speech restriction is designed to promote. Appellants have failed to identify any such interest.

In particular, Appellants cannot reasonably contend that the restriction is designed to prevent "bait and switch" marketing, under which a consumer is lured into making a purchase based on a low advertised price only to be hit with a higher

price when it comes time to pay. A sign stating that the price of a widget is "$10.00 plus a $.30 fee for credit card users" provides consumers with all the information they need to calculate the charge they will incur—depending on their method of payment. Indeed, in striking down on First Amendment grounds a similar no-surcharge statute adopted by Florida, the Eleventh Circuit rejected out of hand Florida's claim that the statute could serve the State's interest in preventing consumer deception, even though the price information at issue (unlike here) did not specify the precise amount of the surcharge to be imposed on credit customers. *Dana's R.R. Supply v. Attorney General*, 807 F.3d 1235, 1249-50 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 1452 (2017). Moreover, New York is in no position to argue that § 518 is intended to require disclosure of information for the purpose of preventing consumer deception, given that—until they lost in the Supreme Court—Appellants argued that the statute did not regulate speech at all.

Finally, the Eleventh Circuit's decision counsels strongly in favor of affirming the district court. *Dana's R.R. Supply* cannot plausibly be distinguished; in striking down the Florida no-surcharge law, it held that merchants possess a First Amendment right to use the precise surcharge language that § 518 prohibits Expressions from using. This Court cannot uphold § 518 without creating an inter-circuit conflict on an important First Amendment issue, something the Court has

repeatedly expressed a desire to avoid.

ARGUMENT

I. THE COURT SHOULD NOT CERTIFY ANY PART OF THE CASE TO THE NEW YORK COURT OF APPEALS FOR RESOLUTION

The Court should not certify any portion of this case to the New York Court of Appeals, a process that was not endorsed by the Supreme Court and that would significantly delay resolution of a four-year-old lawsuit yet would leave unresolved the important First Amendment issues raised by Expressions Hair.

There is no consensus regarding the precise meaning of § 518, as Appellants' shifting interpretations of the statute demonstrate. But certification of state-law questions to a State's highest court "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Certification is inappropriate when, as here, the plaintiffs have already faced a "lengthy delay in adjudication of [their] claims" and further delay would be inappropriate. *Tunick v. Safir*, 94 N.Y.2d 709, 711 (2000). *Accord, Gutierrez v. Smith*, 702 F.3d 103, 117 (2d Cir. 2012) (certification is inappropriate, "even when a state law question seems unclear, ... when time is of the essence."). This case raises important First Amendment issues, and the Supreme Court has held unequivocally that First Amendment plaintiffs "have a special interest in obtaining a prompt adjudication

of their rights, despite potential ambiguities of state law." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011). In its initial decision, this Court adopted a plausible construction of § 518 with respect to the price scheme that Expressions seeks to employ, a construction with which the New York Attorney General agreed. 808 F.3d at 131-32. The Court should adhere to that construction rather than further delay the case by soliciting the views of New York's courts.

Importantly, Appellees are *not* mounting a facial challenge to § 518; they challenge the statute only as they reasonably fear it will be applied to them. Indeed, any construction of § 518 espoused by state officials in future criminal cases will almost surely match the construction they offer here. If Appellees prevail on their First Amendment claims, they will obtain an injunction against the speech restrictions that, the Attorney General asserts, § 518 imposes on them. It is possible, of course, that the New York courts might later construe § 518 more narrowly than the Attorney General and determine that the statute does not restrict the speech that Appellees wish to express. If so, then any injunction will have made no practical difference and will have caused little or no harm. Under that scenario, Appellees' speech rights would be upheld, both because they are protected by the First Amendment and because they are not addressed by § 518. And by promptly addressing Appellees' as-applied challenge to § 518 as construed

by the Attorney General, this Court will not be interfering with other possible applications of the statute.[3]

Moreover, any New York Court of Appeals opinion construing § 518 will very likely leave Appellees' claims unresolved. Whether § 518 as so construed violates the First Amendment as applied to Appellees would still likely require the Court to address complex constitutional issues. Under those circumstances, certification to the New York Court of Appeals is unwarranted.

II. SECTION 518 VIOLATES EXPRESSIONS HAIR'S FIRST AMENDMENT RIGHTS, WHETHER EXAMINED UNDER *CENTRAL HUDSON* OR *ZAUDERER*

In district court proceedings, Appellants failed to carry their burden of identifying a "substantial" government interest that their restrictions on speech rights are designed to promote. Under those circumstances, § 518's speech regulations violate Expressions Hair's right to commercial free speech, regardless whether they are examined under the four-part analysis laid out in *Central Hudson* or under the First Amendment standard set forth in *Zauderer*.

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[3] One *amicus curiae* urges certification to the New York Court of Appeals based on the possibility that § 518 is solely a price-control measure; that it requires merchants to charge credit customers no more than cash customers. Brief of *Amicus* Public Good Law Center at 3-6. That construction is not plausible. The parties agree that § 518 was modeled on federal statutes that lapsed in 1984. Those statutes, while regulating credit "surcharges," consistently permitted (and still permit) merchants to offer discounts to cash customers. *See* 15 U.S.C. § 1666f(b).

A. Appellants Err in Asserting that Section 518's Speech Restrictions Should Be Reviewed under a Relaxed, "Reasonable Relationship" Standard

Appellants assert that § 518's speech restrictions do not *prevent* Expressions Hair from saying anything. Rather, they contend, the statute merely *compels* Expressions Hair to disclose information necessary to ensure that credit customers are given fair warning of the price they will be charged. They argue that such compelled commercial speech is subject to review under the First Amendment standard set forth in *Zauderer*, which they assert requires no more than a showing of a reasonable relationship between the compelled speech and a substantial government interest.

Appellants' argument is based on a misunderstanding of Supreme Court case law. Government regulation of commercial speech is generally subject to review under the intermediate standard articulated in *Central Hudson*.[4] As the D.C. Circuit has explained, *Zauderer* is best understood as a special application of *Central Hudson* to a particular type of case: cases in which the government has a

[4] Under *Central Hudson*, the government may regulate commercial speech that (1) is neither inherently misleading nor related to an unlawful activity only upon a showing that: (2) the government has a substantial interest that it seeks to achieve; (3) the regulation directly advances the asserted interest; and (4) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

substantial interest in regulating the commercial speech but in which, instead of banning the commercial speech altogether, it seeks to advance its substantial interest by requiring the commercial speaker to append certain messages to the speech. *Am. Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18, 26 (D.C. Cir. 2014) (*en banc*). Under those circumstances, the D.C. Circuit explained, *Zauderer* directs that the fourth prong of the *Central Hudson* test (narrow tailoring) is met so long as "the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *Ibid* (quoting *Zauderer*, 471 U.S. at 651).

As construed by Appellants, § 518 prohibits merchants from expressing a price as "$10.00 (with a $.30 surcharge for credit card users)" or "$10.00 (with a 3% surcharge for credit card users)." Appellants contend that such pricing is prohibited unless the "regular price" listed by a merchant (a term not defined by the statute) is the credit price. Thus, Appellants assert, the *Zauderer* standard of review (not *Central Hudson*) applies here because § 518 merely compels merchants to inject the dollars-and-cents credit price into whatever pricing language they choose to employ.

Even if § 518 could properly be characterized as a "mere" disclosure requirement, however, that characterization would not lessen Appellants' burden

(under both *Central Hudson* and *Zauderer*) of demonstrating that New York has a "substantial interest" that it promotes through its speech regulation.[5] The burden of proof on government speech regulators is not light. That burden entails pointing to harms that are "potentially real, not hypothetical" and that its speech regulation is designed to alleviate. *Ibanez v. Fla. Dep't of Bus. and Professional Regulation*, 512 U.S. 136, 146 (1994).

In every instance in which this Court has applied *Zauderer* to compelled commercial speech, it has upheld the challenged statute only after determining that the government could demonstrate a substantial interest in its regulation. *N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) (law requiring restaurants to disclose calorie-content information upheld where government demonstrated a substantial interest in disclosing information as a means of reducing obesity); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-15 (2d Cir. 2001) (Vermont demonstrated substantial interest in disclosures designed to prevent mercury pollution). But where the government has been unable to identify a substantial interest, the Court has not hesitated to strike down

[5] Indeed, *Zauderer* noted that government orders directing one to speak against one's will are often subject to more exacting First Amendment review than speech restrictions. 471 U.S. at 650 ("involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

compelled government speech on First Amendment grounds. *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996) (Vermont failed to demonstrate substantial interest in disclosure that milk came from cows treated with growth hormone). In *Ibanez*, the Supreme Court relied on *Zauderer* to invalidate Florida's efforts to require an attorney to attach a disclaimer to an advertisement listing her professional status; it determined that the compelled speech served no substantial government interest because Florida could point to no evidence of consumer deception that was "potentially real, not purely hypothetical." 512 U.S. at 146.

B. Appellants Have Failed to Demonstrate a Substantial Interest in Compelling Expressions to Disclose Additional Price Information

Appellants' current characterization of § 518 as a statute that does no more than compel disclosure of certain pricing information is highly problematic, given Appellants' position in the Supreme Court that the statute did not implicate the First Amendment because it did not regulate speech at all, only conduct. Their current position that § 518 does not restrict use of the word "surcharge" is similarly problematic, given their previous position in this Court that § 518 includes a "surcharge prohibition [that] directly *prohibits* the economic activity of imposing a surcharge" and "prohibits a form of dual pricing in which credit-card users are

charged more than the regular or usual price." Appellants 2014 Opening Br. 49-50 (emphasis in original).

But even if one accepts that § 518 is an information-disclosure statute,[6] it cannot survive First Amendment scrutiny under *Central Hudson* and *Zauderer* because Appellants have failed to demonstrate that compelling Expressions Hair to speak against its will would serve a substantial government interest. Appellants rely principally on their assertion that applying § 518 to Expressions Hair serves New York's interest in preventing "bait and switch" marketing, under which consumers are lured into making purchases based on a low advertised price only to be hit with a higher price when it comes time to pay. That interest in eliminating hypothetical consumer deception does not withstand First Amendment analysis because Appellants have failed to demonstrate how any consumer could possibly be deceived under the facts of this case.

Expressions Hair's proposed signage provides consumers with timely knowledge of the precise charges they will incur under both payment scenarios: cash or credit. The credit-card companies who pushed for adoption of § 518 have an economic interest in requiring merchants to give special emphasis to the credit

[6] As pointed out by several justices during Supreme Court oral arguments, that characterization of § 518 is inconsistent with the actual wording of the statute. Section 518 contains no language directing merchants to disclose anything.

price; their hope is that when a merchant does so, consumers will view the credit price as the "regular" price and thus will be more willing to incur the higher costs that use of a credit card entails. But a sign stating, "Haircuts $10.00 (with a $.30 surcharge for credit card users)" fully discloses both the cash and credit prices to all consumers; common sense dictates that no credit customers will be surprised when they incur a $.30 surcharge. Appellants have presented *no* evidence that actual consumers would be deceived; "purely hypothetical" deception claims are insufficient to meet the substantial-government-interest requirement imposed by *Central Hudson* and *Zauderer* on would-be commercial-speech regulators. *Ibanez*, 512 U.S. at 146.[7]

III. REJECTING EXPRESSIONS HAIR'S FIRST AMENDMENT CLAIMS WOULD CREATE A DIRECT CONFLICT WITH THE ELEVENTH CIRCUIT

This Court has expressed the desire, where possible, to avoid creating inter-circuit conflicts. *See, e.g., Lozado v. United States*, 107 F.3d 1011, 1016 (2d Cir. 1997). Any decision holding that § 518 can withstand First Amendment scrutiny would directly conflict with the Eleventh Circuit's *Dana's R.R. Supply* decision.

[7] Appellants suggest that requiring display of the dollars-and-cents credit price might facilitate comparison shopping among consumers. That suggestion makes little sense when one considers the numerous other charges (*e.g.*, shipping costs, sales taxes) that are not disclosed in advance in dollars-and-cents terms. The comparison-shopping hurdles imposed on credit customers who must add $.30 to $10.00 to compute their final price pale in comparison.

That consideration provides an additional reason to affirm the decision below.

Dana's R.R. Supply cannot plausibly be distinguished. Florida's no-surcharge statute, Fla. Stat. § 501.0117, is substantially identical to § 518. The Eleventh Circuit held that the Florida statute was facially unconstitutional, meaning that it violated the First Amendment in substantially all of its applications. *Dana's R.R. Supply*, 807 F.3d at 1249-51. The court explicitly rejected Florida's claim that the statute could be justified as an effort to prevent bait-and-switch schemes. *Id.* at 1244. The court granted First Amendment relief to plaintiffs who sought to post signs that provided timely notice that an additional fee would be imposed on credit customers. *Id.* at 1239-40.[8] Any judgment of this Court denying relief to Expressions Hair could not be reconciled with *Dana's R.R. Supply*. Accordingly, upholding the district court's judgment would further this Court's interests in avoiding inter-circuit conflicts.

CONCLUSION

The Court should affirm the judgment of the district court.

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[8] Because the Eleventh Circuit held the no-surcharge statute unconstitutional even when scrutinized under standards applicable to commercial-speech regulations, it concluded that it need not subject the statute to heightened First Amendment scrutiny as a content-based speech restriction. *Id.* at 1246 (citing *Sorrell*, 564 U.S. at 571). If this Court concludes that § 518 passes muster under *Central Hudson* and *Zauderer*, it must then consider whether *Sorrell* requires application of a heightened standard of scrutiny.

Respectfully submitted,

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Dated: July 13, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced Times New Roman type. The brief is 15 pages long, which is one-half the page limit imposed on the parties by the Court's May 23, 2017 order.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of July, 2017, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp