Press Release

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WLF Opposes No-Surcharge Statute on Remand, Protecting Commercial Free Speech

(Expressions Hair Design v. Schneiderman)

"New York has no business preventing merchants from informing their customers that a 'surcharge' will be imposed on all credit purchases. New York and other states violate the First Amendment by depriving consumers of valuable information regarding the costs of products whose purchase they are considering."
—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation addressed the proper scope of commercial-speech rights in an *amicus* brief it filed yesterday in *Expressions Hair Design v. Schneiderman*, a case remanded to the Second Circuit Court of Appeals from the U.S. Supreme Court. WLF's brief supports the Appellees in this case—several New York merchants challenging a state law's constitutionality for restricting how they can express the prices of their products and services.

After four years of federal litigation, the U.S. Supreme Court instructed the Second Circuit to analyze New York General Business Law § 518 as a regulation of speech rather than conduct. Ten states, including New York, have passed laws like § 518 that prohibit merchants from stating that their prices include a "surcharge" for credit customers. The plaintiff, Expressions Hair Design, wants to tell customers that the price of a haircut is "$10, plus a 3% surcharge for credit customers." Section 518 requires Expressions to rephrase this as a discount for using cash.

WLF's brief argues that § 518 violates the First Amendment, as merchants have the right to characterize the fee imposed by credit-card companies as a "surcharge." The state argues that § 518 is a mere mandatory-disclosure statute, meant to prevent consumer deception. But there is nothing deceptive about a pricing regime that affirmatively discloses a surcharge for credit cards.

Next, WLF's brief explains that New York's speech restriction does not pass the *Central Hudson* intermediate scrutiny test under which speech restrictions are typically analyzed (or even the narrower *Zauderer* review). Specifically, New York has not demonstrated that compelling Appellees to speak against their will would serve a substantial government interest.

The brief also points out that upholding § 518 would create an inter-circuit conflict with the Eleventh Circuit, which held—in a case that the U.S. Supreme Court refused to review—that an almost identical Florida no-surcharge statute failed *Central Hudson* and violated the First Amendment. If somehow the Second Circuit were to uphold § 518 under *Central Hudson* and/or *Zauderer*, it would then have to consider whether New York's law could withstand heightened standards of scrutiny articulated in more recent Supreme Court commercial-speech decisions.

Celebrating its 40th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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