State of New York
Court of Appeals

To be argued Wednesday, September 12, 2018

No. 100 Expressions Hair Design v Schneiderman

Expressions Hair Design and four other retailers brought this federal lawsuit against the New York Attorney General and three district attorneys to challenge the constitutionality of General Business Law § 518, which provides, "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." Violators may be charged with a misdemeanor. The plaintiffs argued the statute violated their First Amendment rights because it prohibits them from advertising or marking their products with a single sticker price for cash transactions and noting next to the cash price that credit card users would be charged an additional amount. They said this improperly regulated how they can communicate their prices to customers.

U.S. District Court ruled in favor of the merchants, holding that the statute burdens commercial speech, but the U.S. Court of Appeals for the Second Circuit reversed. It said section 518 prohibits the "single-sticker-price scheme," and held that as applied to that scheme the statute is a price regulation that prohibits retailers from charging credit card users more than the sticker price. As a price regulation, it said the statute regulates conduct, not speech.

The U.S. Supreme Court vacated the judgment, saying section 518 "is not like a typical price regulation.... The law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer.... What the law does regulate is how sellers may communicate their prices.... Accordingly, while we agree with the [Second Circuit] that § 518 regulates a relationship between a sticker price and the price charged to credit card users, we cannot accept its conclusion that § 518 is nothing more than a mine-run price regulation. In regulating the communication of prices rather than prices themselves, § 518 regulates speech." It remanded the case for the Second Circuit to consider whether the statute could be upheld as "a valid commercial speech regulation" under Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of N.Y. (447 US 557) or as "a valid disclosure requirement" under Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio (471 US 626).

Before addressing the First Amendment issues, the Second Circuit is asking this Court to clarify "how section 518's restrictions operate in practice," which will determine whether the intermediate scrutiny required by Central Hudson or the "less-exacting standard" of Zauderer applies. The statute "has never been understood to bar differential pricing schemes in their entirety," it said, and the State has not argued that it "bars sellers from offering discounts on their advertised prices to consumers willing to pay in cash." Section 518 "could potentially be understood, from a First Amendment perspective, to do nothing but compel the truthful disclosure of an item's credit-card price" and might "permit merchants to post the cash price alongside the credit card price." If so, it said, the statute might be a disclosure rule subject to Zauderer. In a certified question, the Second Circuit asks, "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit card users?"

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State of New York
Court of Appeals

To be argued Wednesday, September 12, 2018

No. 101 International Union of Painters & Allied Trades v New York State Department of Labor

The plaintiffs -- District Council No. 4 (DC4) of the International Union of Painters & Allied Trades, its Glazier Apprenticeship Program, and several contractors, among others -- brought this action for a declaration that Labor Law § 220(3-e) permits contractors to pay apprentices employed on public works projects at the apprentice wage rate even if the kind of work they are performing is not in the same trade or occupation as their apprenticeship. The statute provides, "Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor." The Department of Labor (DOL) has interpreted the statute as allowing contractors to pay apprentice-level wages only to apprentices who perform work that DOL has classified as being within their own trade. In this case, DOL said workers registered in the DC4 Glazier Apprenticeship Program were performing work it had classified as within the ironworkers' trade and, therefore, contractors were required to pay them at the much higher journeyman rate.

Supreme Court ruled in favor of DOL and dismissed the suit, saying "it was appropriate for the [DOL] to classify the work done to determine the appropriate wage to be paid." DOL's "determination that the work in question is that of the ironworkers and not the glaziers is not unreasonable or arbitrary or capricious."

The Appellate Division, Fourth Department reversed on a 4-1 vote, saying "we agree with plaintiffs that Labor Law § 220(3-e) permits an apprentice to work as such if he or she is registered in any bona fide apprentice program. Defendants would have us limit the application of Labor Law § 220(3-e) to apprentices who are performing work within the trade that is the subject of the apprenticeship program in which the apprentice is registered. The statute, however, contains no such limitation, and nothing in the remaining sentences of section 220(3-e) provides any basis to interpret that section any differently.... We thus conclude that Labor Law § 220(3-e), by its terms, permits glazier apprentices who are registered, individually, under a bona fide glazier apprenticeship program to work and be paid as apprentices even if the work they are performing is not work in the same trade or occupation as their apprenticeship program."

The dissenter said, "The DOL reasonably concluded that ... an employee may be paid at the lower rate for apprentices only for work within the trade classification of his or her apprenticeship program. Any employee who is working outside the trade classification of his or her apprenticeship program is not working 'as such,' i.e., as an apprentice, under the statute.... The DOL's interpretation ensures that workers receive appropriate wages based upon the work they perform, and that they receive appropriate training in their trade classification when they are in fact working as apprentices.... The language of the statute is ambiguous and lends itself to either of the competing interpretations offered by the parties. Because the agency responsible for implementing section 220(3-e) gave the statute a rational interpretation that is not inconsistent with its plain language, that interpretation must be upheld...."

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State of New York
Court of Appeals

To be argued Wednesday, September 12, 2018

No. 27 People v Raymond Crespo (reargument)

Raymond Crespo was arrested in January 2013 after he allegedly stabbed a man during a street fight in East Harlem in January 2013. Prior to the start of jury selection for his trial, Crespo's attorney moved to withdraw, telling Supreme Court that Crespo would no longer speak with him. The court denied the motion. During jury selection, Crespo told the court that he did not want his appointed lawyer to represent him and that he wanted to defend himself. The court denied his request, saying it was "too late to make that request." A short time later, Crespo again told the court that he wanted to represent himself, and the court again denied the request as untimely. Crespo was convicted of first-degree assault and weapon possession, and was sentenced to 20 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial, ruling the trial court violated Crespo's right to self-representation. "Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted" because they were made before the prosecution's opening statement, it said, citing People v McIntyre (36 NY2d 10 [1974]. "We reject the People's argument that the request to proceed pro se must be made before jury selection...."

The prosecution says McIntyre held only that requests to proceed pro se "are timely if they are made 'before the trial commences.'" The trial in McIntyre was held under the former Code of Criminal Procedure, which provided that a trial commenced with the prosecution's opening statement. The prosecution argues that the adoption of the Criminal Procedure Law to replace the Criminal Code in 1971 changed the meaning of the term "trial" to include jury selection, and thus a request to proceed pro se must be made prior to jury selection in order to be timely.

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