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COURT OF APPEALS
STATE OF NEW YORK

EXPRESSIONS HAIR DESIGN,

Respondent,

-against-

SCHNEIDERMAN,

Appellant.

No. 100

20 Eagle Street
Albany, New York
September 12, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 100, Expressions
2 Hair Design v. Schneiderman.

3 Counsel.

4 MS. VALE: Counsel, may it please the court, if I
5 may have two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may.

7 MS. VALE: Thank you. May it please the court,
8 Judith Vale for the Attorney General. The key to complying
9 with General Business Law 518 is posting the credit card
10 price in dollars and cents.

11 JUDGE GARCIA: So counsel - - -

12 JUDGE RIVERA: Counsel - - - go ahead. Go ahead.

13 JUDGE GARCIA: Let me ask you this if you - - -
14 thank you. If you post that price, credit card price,
15 let's say it's 10.40, right? \$10.40 and then you have a
16 little asterisk and on the bottom it says this represents a
17 surcharge on a holder who elects to use a credit card in
18 lieu of payment by cash, check, or similar means. That
19 would comply with the statute?

20 MS. VALE: It would comply with the statute - - -

21 JUDGE GARCIA: You have a plain meaning problem
22 with that?

23 MS. VALE: Well, it would comply with the statute
24 because that credit card price is the key. Although you -
25 - - the key to the statute is not the words you use to



1 describe your prices. It's not whether you label it a
2 surcharge or a discount. It's not whether you - - -

3 JUDGE GARCIA: To me isn't - - - isn't that seem
4 to be the key to this statute because it prohibits a
5 surcharge? So isn't the entire key of the statute you
6 can't impose a surcharge aimed at just that? So I don't
7 understand how you could have a price posted that says it's
8 a credit card price and it represents a surcharge and not
9 violate the plain meaning of the New York statute.

10 MS. VALE: Because the New York statute is not
11 aimed at the word surcharge. What the word surcharge in
12 the statute means in ordinary language is posting a single
13 price and then charging more than that price for credit
14 card use. That's what a surcharge is - - -

15 JUDGE GARCIA: But it seems it would mean that if
16 you amended that statute to put the definitions that the
17 federal statute had in it, but it's not an intuitive
18 interpretation of surcharge which is I think why they had
19 to amend the federal statute to begin with and define
20 regular price. So without the definitions the plain
21 meaning of the statute it seems to be is you can impose
22 what you describe as a surcharge.

23 MS. VALE: Well, I don't agree with that, Your
24 Honor. I - - - certainly the federal definitions make it
25 crystal clear what it means to post a - - - to post a



1 single price and charge more than that, that that's a
2 surcharge.

3 JUDGE GARCIA: How do you get to - - -

4 MS. VALE: But the federal definitions actually
5 only added the regular price later on in time. Surcharge
6 and discount were defined earlier with reference to the
7 regular price, and they incorporated this same ordinary
8 understanding of regular price throughout - - -

9 JUDGE RIVERA: But your - - - your position
10 devolves to the statute covers only conduct not - - - not
11 speech, and the Supreme Court has already said that's
12 incorrect. So you're basically saying when is a surcharge
13 not a surcharge. Well, when we read it not to be a
14 surcharge, right? You're sort of saying there's a
15 surcharge within the meaning of 518 and then it's whatever
16 a retailer wants to call a surcharge they can do so as long
17 as they don't violate the conduct aspect of 518, correct?

18 MS. VALE: Well, the - - - the argument we're
19 making now does not turn on the conduct speech distinction.
20 The U.S. Supreme Court did make clear that the First
21 Amendment is implicated in some respects by this law, but
22 what they said was very specific. It's implicated simply
23 because there is a difference between posting a single
24 price that's the lower price and charging more than that
25 and posting a single price that's the higher price. That's



1 the - - - that's the only words that the Supreme Court said
2 mattered for First Amendment purposes which price is being
3 posted. The Supreme Court did not say - - -

4 JUDGE RIVERA: Then that - - - that means you're
5 reading into 518 a definition that's not there which is the
6 federal definition of what's a regular price. So how - - -
7 how are we to read in definitions that the legislature
8 decided, expressly apparently, to not include?

9 MS. VALE: Well, a couple reasons, Your Honor.
10 There's no clarification as to why the legislature didn't
11 incorporate the definitions. We don't know if that was a
12 conscious decision or not. They did take the operative
13 language - - -

14 JUDGE RIVERA: But aren't our canons of
15 interpretation supposed to tell us if it's not included?
16 And if, as you say, it's an analog of the federal statute
17 and legislature didn't include it there's an intentionality
18 behind that.

19 MS. VALE: I don't think you have to - - - you
20 have to decide that. The definitions existed in the
21 federal law at the time that New York adopted its statute,
22 and the legislature made clear in the legislative history
23 that what it wanted to do was take the federal law and
24 adopt New York policy. That was crystal clear.

25 JUDGE GARCIA: But that's - - - I think the



1 legislative history is very unclear on that point. I think
2 that the legislative history to me says that the New York
3 legislator wanted - - - legislature wanted to step in and
4 fill what they saw as a void or a gap when the federal
5 statute lapsed. And I think that's clear, and the timing
6 of that is clear. But it's not clear that they want - - -
7 and I think it's clear that they didn't - - - adopt the
8 language of the federal statute because they left out, as
9 Judge Rivera was saying, two key definitions. In fact, a
10 definition and a definition tied to that definition are not
11 in the New York statute. So I - - - I'm left wondering
12 then how are we to interpret that since what we have in New
13 York is not the federal statute?

14 MS. VALE: Well, they didn't adopt it expressly,
15 the definitions, that's true. But the legislature - - -
16 legislative history is clear that they want the surcharge
17 to be prohibited to be in keeping with the prior federal
18 ban. That's in the appendix on 110. And they also did say
19 in the legislative history that surcharge should be
20 increased to a regular price identical to the federal
21 definition. That's in the record at 112. So the legis - -
22 -

23 JUDGE WILSON: So how do we - - - how do we get
24 from price to price can't be expressed as a dollar amount
25 plus another dollar amount or a dollar amount plus a



1 percentage? So if I have a deli, all my sandwiches ten
2 dollars and I post if you pay with a credit card there's a
3 one-dollar convenience fee, isn't that - - - that not
4 posting eleven dollars?

5 MS. VALE: Sorry, if I'm - - - if I'm following
6 the - - - the hypothetical you're saying you only have one
7 numeric price posted for everybody but then there's a
8 percentage add-on?

9 JUDGE WILSON: By saying - - - by - - - well,
10 either - - - well, let's take the dollar is easier than the
11 percentage for the moment so let's take the dollar. So
12 I've got a store. All my deli sandwiches are ten dollars.
13 But I also post in big letters before you come into the
14 store on the outside window if you pay by credit card
15 there's an additional dollar charge. Does that violate the
16 statute?

17 MS. VALE: Yes, it does. Because you have not
18 posted the credit card price as eleven dollars, the total
19 price. What you have done is you have posted a single
20 price, the cash price, and then you have posted the extra
21 fee as a math problem - - -

22 JUDGE WILSON: And so how do we - - - how do we
23 know - - - there's nothing in the New York statute that
24 leads you to - - - well, if there is, point me to it - - -
25 that says that price has to be expressed as a single



1 number, not A plus B. Is that right?

2 MS. VALE: Well, the New York statute says that
3 it's unlawful to do a surcharge, and the ordinary meaning
4 of surcharge is posting a single price and then adding a
5 fee on top of that. And the ordinary meaning of discount
6 is posting a single price and going down from that regular
7 price. So that's where - - - and those ordinary meanings -
8 - -

9 JUDGE WILSON: Anything in the federal
10 legislative history that suggests the price can't be
11 expressed as - - - as the sum of two numbers?

12 MS. VALE: Yes, absolutely. Because the federal
13 definitions distinguish between the price posted and the
14 price charged. It is the price posted that matters when
15 there's a single price, and the total price charge only
16 matters in the more rare situations of two prices being
17 posted or no price. And the legislative history, the
18 congressional hearings are very clear that what they were
19 trying to stop was posting a single lower price and then
20 having consumers do the math to get there. The math
21 concern comes not just from the AG's Office. That's from -
22 - -

23 JUDGE WILSON: Is it doing the math that's the
24 concern or being duped into going into a store thinking
25 you're paying a lower price and finding out at the point of



1 the register that you've got to pay a higher one?

2 MS. VALE: That was certainly one of the
3 concerns. True bait and switch are almost essentially
4 fraud. Yes, that was one of the concerns. But that was
5 not the only concern. The Consumer Federation of America,
6 the Federal Reserve, Senator Chafee, it's all over the
7 legislative history in Congress that one of the driving
8 purposes of this law was to make sure that when consumers
9 glanced down at a menu, glanced down at a tag, they're
10 looking quickly, they're trying to compare prices, what
11 they're concerned about is that number on the tag.

12 JUDGE WILSON: And then how do we - - -

13 MS. VALE: That number on the menu.

14 JUDGE WILSON: And how do we know the New York
15 legislators had that same concern or shared that same
16 understanding?

17 MS. VALE: A couple reasons, one, they said
18 expressly that they wanted to adopt the federal policy.
19 That was what they were aiming for. They said they wanted
20 the surcharge to be identical as in the federal policy.
21 And they - - - there is expressions in both the sponsor's
22 memo and the New York Consumer Protection Bureau memo
23 saying that the advertised price, the posted price, is
24 important to consumers.

25 JUDGE GARCIA: But don't you think that - - -



1 MS. VALE: And that that was part of the concern.

2 JUDGE GARCIA: - - - the credit card companies
3 had an interest here, too, right? And certainly, it seems
4 to me, the credit card company interest isn't so aligned
5 with the consumer protection which this statute in a way
6 seems to have morphed into a consumer protection statute.
7 But really, what the credit cards wanted it seems to me,
8 the companies, was merchants not to be able to say I'm
9 penalizing you essentially for using a credit card. I'm
10 charging you more for using a credit card. They're fine
11 with if you want to use cash, we'll give you two percent
12 discount. But don't tell the customers that because you're
13 using a credit card, you're going to pay extra, and that's
14 exactly what's in the New York statute. So why isn't it
15 equally plausible given the absence of clear legislative
16 history that they got that New York statute?

17 MS. VALE: Well, the - - - yes, the credit card
18 companies lobbied, but the sellers lobbied too. I don't
19 think it's their - - -

20 JUDGE GARCIA: Right, so how do we know who won
21 in New York?

22 MS. VALE: Because the only - - - there are only
23 two plausible readings of the text. One is the
24 interpretation that you adopt the federal definitions. The
25 other is the one offered by Justice Sotomayor which is that



1 no surcharge just means don't charge a different amount.
2 That might also be a plausible interpretation - - -

3 JUDGE GARCIA: No, there's a third option that
4 Justice Sotomayor said also which is what Justice Rakoff
5 said in the district court which is surcharge means what
6 surcharge means and you just can't say something is a
7 surcharge. Justice Sotomayor had three options for that
8 statute, and why didn't they adopt - - -

9 MS. VALE: I don't - - -

10 JUDGE GARCIA: - - - the middle one?

11 MS. VALE: I don't think that the third one is a
12 plausible interpretation. It doesn't fit with the ordinary
13 meaning of the word surcharge. It doesn't fit with the
14 federal definitions which New York was trying to adopt.

15 JUDGE RIVERA: Well, if you were to read it that
16 it's third one - - - or maybe there's a fourth and fifth
17 one, but let's just stick with the third one as we're
18 saying. Would - - - would that render it unconstitutional,
19 or should we avoid an unconstitutional reading?

20 MS. VALE: Well, the constitutional avoidance
21 canon doesn't help you get to that third interpretation
22 here because it's not plausible. If you have an ambiguous
23 statute, if that interpretation was plausible maybe
24 constitutional avoidance would come into play, but it
25 doesn't mean that you entirely re-write the statute to



1 prohibit the very thing that was meant to be prohibited. I
2 mean the sellers here have always - - -

3 JUDGE RIVERA: Your position is it's ambiguous?

4 MS. VALE: It's only ambiguous as to whether it
5 means don't charge anybody a different price ever, that's
6 one way to read it.

7 JUDGE RIVERA: Right.

8 MS. VALE: We don't think that that reading fits
9 with the legislative history or with the federal
10 definitions, and we don't think it's the best reading. If
11 you - - -

12 JUDGE RIVERA: To look at the legislative history
13 do we have to conclude it's un - - - it's ambiguous?

14 MS. VALE: You don't have to look at the
15 legislative history to conclude that, but I think the
16 legislative history is one of the - - -

17 JUDGE RIVERA: No, no, no. My question was do we
18 have to say it's ambiguous to then turn to the legislative
19 history?

20 MS. VALE: Normally, yes, you would look to
21 legislative history when it's - - - when the text is
22 ambiguous. But I think here also there is this very
23 powerful - - -

24 JUDGE RIVERA: So isn't the plain language very
25 obvious? It is exactly that first choice, you can't charge



1 two different prices?

2 MS. VALE: I think that - - -

3 JUDGE RIVERA: So I'm not clear how we get to the
4 legislative history.

5 MS. VALE: If that - - - if that - - - we do
6 understand that that is a plausible interpretation, to just
7 charge everybody the same price, no differences.

8 JUDGE RIVERA: Well, it's all - - -

9 MS. VALE: It is - - -

10 JUDGE RIVERA: - - - that the words say unless
11 you go to the legislative history.

12 MS. VALE: If you look at the ordinary meaning of
13 the word surcharge, how people understand it when they - -
14 -

15 JUDGE FAHEY: Yeah, but that's not - - - that's -
16 - -

17 MS. VALE: When they - - -

18 JUDGE FAHEY: Slow down. That's - - - that's not
19 really the way I understand the judge's question. And this
20 is something that I - - - I had trouble with too. It seems
21 to me the language of the statute itself seems to banish
22 differential pricing, charging two different prices for the
23 same object based on the type of - - - of specie you use
24 for the transaction. That's the way I read the statute.
25 Yet, we have a convoluted case law that's developed around



1 this that seems to say that to justify the differential
2 pricing through the use of legislative history. And the
3 way I understand the rules of analysis is you don't get the
4 legislative history if the - - - if the statute is plain on
5 its face. This seems very plainly to have said that
6 there's no differential pricing. It - - - I don't see how
7 we get there. You make some reference to it at the end of
8 your brief, but it - - - has anyone taken that point of
9 view that this statute simply abolished differential
10 pricing, two prices, two different prices for the same
11 object, not what type of specie they use?

12 MS. VALE: That is one way to read the statute.
13 I do think that's a plausible way to read the statute. I
14 think if you thought that was the only way to read the
15 statute then that might be the end of the matter. That has
16 not been the way it's been interpreted by the AG's Office -
17 - -

18 JUDGE FAHEY: What would be the - - -

19 MS. VALE: - - - or by sellers because - - -

20 JUDGE FAHEY: Let me - - - speculate for me - - -

21 MS. VALE: Sorry.

22 JUDGE FAHEY: Speculate for me a second.

23 MS. VALE: Yeah.

24 JUDGE FAHEY: What would be the effect if - - -
25 if we took that position as a court?



1 MS. VALE: I was going to say that has not been
2 the way that the AG's Office or - - - or most sellers have
3 viewed the law because of the legislative history. And I
4 think in practice people do offer discounts. That's pretty
5 clear. I think there would be some - - - I think there
6 would be some disruption to the way that people have
7 understood the statute and have - - - have set their
8 prices. I think it's also important to understand that one
9 of the reasons why there's been no enforcement of the
10 statute for so long is because of the credit card company
11 contracts, and those contracts worked in much the same way
12 as the statutes. They had to allow discounts under federal
13 law.

14 JUDGE RIVERA: I thought your stronger - - -

15 MS. VALE: And they have to - - -

16 JUDGE RIVERA: I thought your stronger argument
17 was it is ambiguous because surcharge is not defined and
18 therefore we have to do what we always do when we don't
19 have a definition. There are perhaps different ways one
20 could read the word, the term, and that's where you get to
21 the dictionaries and the legislative history.

22 MS. VALE: Yes, I do agree that it's ambiguous
23 because you can read it as a straight no differential
24 pricing or you could look at the ordinary meaning of the
25 word surcharge in everyday life, and that means going up or



1 down from a regular price. Because you have those two
2 different ways of looking at the word surcharge you do have
3 an ambiguity. Then you look to the legislative history and
4 the intent, and when you get there it is very, very obvious
5 that what Congress and the legislature wanted to do was to
6 make sure that in the mine-run of cases when someone posts
7 a single price they then do not add an extra fee for credit
8 card use above that price. That's the core of what it
9 means to surcharge. That's what plaintiffs want to do.
10 And that's unlawful - - -

11 JUDGE RIVERA: Well, isn't what - - -

12 MS. VALE: - - - and they've understood that it's
13 unlawful.

14 JUDGE RIVERA: Yes, but isn't what's also going
15 on with your interpret - - - interpretation of 518 is if
16 you have a single price then it's - - - it's got to be the
17 credit card price so that you're not charging more but you
18 can give the discount.

19 MS. VALE: Correct.

20 JUDGE RIVERA: Right?

21 MS. VALE: Yes.

22 JUDGE RIVERA: If you're going to do dual pricing
23 - - - which I believe one of the - - - one of the
24 petitioners wants to do that - - - the - - - one of the
25 appellants- respondents wants to do that, Hair Expressions,



1 I believe, wants the dual pricing - - - that at that point
2 under your analysis they have to do the dollars and cents,
3 but when they do that the regular price is the credit card
4 price. That's why if they call it a surcharge it doesn't
5 matter.

6 MS. VALE: That's right.

7 JUDGE RIVERA: Because the credit card price is
8 now the regular price so they're not adding to that because
9 they've said what it is.

10 MS. VALE: That's right. The two-price
11 situation, it happens. It's more rare, but it does happen.
12 The federal definitions dealt with it explicitly by saying
13 we deem the credit card price to be the regular price.
14 There's no more problem. You can't be adding to the
15 regular price. Another way to look at the New York law is
16 that in a situation where it's hard to tell what your
17 regular price is if you have two prices, five prices, the
18 law doesn't apply anymore because it's not discernable what
19 your regular price is so it's not obvious that you would be
20 charging a surcharge, so New York law doesn't apply. You
21 can get to the same result by that way as well.

22 JUDGE GARCIA: But then what if you called it a
23 surcharge? Then you know you're calling it a surcharge and
24 then you're violating the New York law. Let's say you have
25 five prices and you call one a surcharge, why aren't you



1 violating New York law?

2 MS. VALE: You're not violating the law because
3 the law is not directed at the vocabulary or descriptions
4 that you use when you call something - - -

5 JUDGE GARCIA: The only way your - - -

6 MS. VALE: - - - when you describe your prices.

7 JUDGE GARCIA: - - - interpretation makes sense
8 is to import the federal definition of regular price
9 because again, going back to Judge Rakoff's opinion, you
10 can say surcharge is ambiguous or undefined and you can
11 look to an ordinary definition which is I think what he
12 did. But the regular price definition you want is not
13 intuitive. It's a manufactured definition off of the
14 definition the feds use for surcharge. So I don't know how
15 you read that definition in a plain meaning sense into the
16 New York statute. You can do it for surcharge because it's
17 undefined, and I think that's what Judge Rakoff did again.
18 But then when you go to regular price it doesn't mean that.
19 And, one, we don't use the term regular price in our
20 statute. It's nowhere to be found. So I don't - - -

21 MS. VALE: That's true.

22 JUDGE GARCIA: - - - know how you import a
23 definition of a definition that we don't even have.

24 MS. VALE: Because the ordinary meaning of
25 surcharge itself turns on having a regular price, and I



1 think the federal definition of regular price, at least
2 when it came to the single price schemes, that is based on
3 an ordinary understanding of what it means to have a
4 regular price. In - - -

5 JUDGE GARCIA: "Or the price charged for the
6 property or service when the payment is made is by use of a
7 credit card if either no price is tagged or posted or two
8 prices are tagged or posted" - - - that's not something you
9 would ordinarily read into the term regular price
10 surcharge.

11 MS. VALE: Well, the federal definitions were
12 also - - - at this point in time were trying to address the
13 more unusual situations of when you don't have a
14 discernible regular price in - - - in everyday life, when
15 there's two prices when there's absolutely no prices
16 posted.

17 JUDGE WILSON: Well, if there's no - - -

18 MS. VALE: That's one of the reasons - - -

19 JUDGE WILSON: Hold on. If there's no price
20 posted does the statute apply at all?

21 MS. VALE: We think it shouldn't. Again, we - -
22 - we think the best way to interpret New York's law is to
23 follow the federal law, and the federal law dealt with the
24 also unusual but possible situation that there would be no
25 price posted whatsoever.



1 JUDGE WILSON: So for example, when I go to pay
2 my New York State income taxes online and I'm told if I pay
3 by credit card I have to pay a two percent convenience fee,
4 there's no posted price so it doesn't really fall within
5 the statute - - - putting aside the government is, you know
6 - - -

7 MS. VALE: Yeah, I mean, there are some
8 exceptions for government that I'll put aside. I think the
9 best way to read the statute is that when there is a price
10 posted for sellers and transactions, whether it's on a tag
11 or a menu or a sign, that's when the statute comes into
12 play. If you're in a flea market - - -

13 JUDGE GARCIA: So no price - - -

14 MS. VALE: - - - and you're bargaining and
15 there's no prices whatsoever, that seems to be what the
16 federal law contemplated when it said no price.

17 JUDGE GARCIA: But there's a sign that says we're
18 going to charge you two percent if you - - - surcharge if
19 you use a credit card. No price. That doesn't violate the
20 New York Law?

21 MS. VALE: It wouldn't. I agree that these - - -

22 JUDGE GARCIA: You see that there's a problem,
23 unlike the federal statute where at least you can look at
24 the line and see why you are not violating the law there,
25 whereas a merchant can put up a sign that on its face by



1 the plain language of the New York statute violates a
2 criminal law on the books of New York because you're
3 reading in a definition of a definition, and you can post
4 we are charging you a surcharge and they copy the language
5 of what the New York law tells you you cannot do and that's
6 okay.

7 MS. VALE: Because the law is directed at a very
8 specific thing which is the prices that consumers see when
9 they look down. These hypotheticals, they do stretch the
10 margins of what might - - -

11 JUDGE GARCIA: It's not a hypothetical. Why
12 wouldn't the merchant say post a sign, four percent is
13 added to any credit - - - any credit card purchase as a
14 surcharge?

15 MS. VALE: Well, if you - - -

16 JUDGE GARCIA: Why is that a hypothetical?

17 MS. VALE: Because most sellers, and these
18 sellers in particular, specifically want to have one posted
19 price and then to charge more than that price.

20 JUDGE GARCIA: But I've seen things - - - and it
21 is a government agency - - - where they post, you know, if
22 you use a credit card you're going to get a two percent
23 surcharge.

24 JUDGE STEIN: Well, that - - - doesn't that go to
25 the constitutionality of it and - - - and not what it



1 means? I mean it could be that what we decide that it means
2 here turns out not to be the constitutional statute,
3 couldn't it?

4 MS. VALE: Well, many - - - I mean, yes. Many of
5 these hypotheticals also go to the vagueness challenge that
6 has already been eliminated by the Supreme Court.

7 JUDGE RIVERA: But don't we have to interpret it
8 so that it's - - - that we avoid the unconstitutionality of
9 the statute? I don't know why - - - there's no way around
10 that, isn't there?

11 MS. VALE: Well, I - - - the constitutional canon
12 does come into play if there are multiple interpretations
13 that you think are plausible. But plaintiff's
14 interpretation we think is not plausible, so it doesn't
15 help them. If the only driving concern was avoid any
16 constitutional problem whatsoever then the best
17 interpretation might be no differential pricing whatsoever
18 because that also avoids any First Amendment problem and it
19 at least is connected to the statute. How - - -

20 JUDGE WILSON: I want to go back to the - - -
21 what you just said about the vagueness problem being
22 eliminated by the Supreme Court. My understanding of what
23 the Supreme Court did is it said we the Supreme Court don't
24 interpret state statutes. We do defer to the lower federal
25 courts when they have an interpretation because they're



1 more closely in tune with the local law. And our rule for
 2 deciding whether to accept what they've done, concluded, or
 3 not concluded is whether it's clearly wrong and here we
 4 can't say their interpretation is clearly wrong. Then on
 5 remand, the Second Circuit expressed grave doubts about
 6 what the statute means in general. And the reference in
 7 the Supreme Court's opinion about vagueness depends upon
 8 the acceptance of the definition that is now what we're
 9 arguing about. So I'm not sure the vagueness challenge is
 10 gone at all.

11 MS. VALE: Well, I think it is because the - - -
 12 the vagueness ruling also depended on zeroing in on what -
 13 - - what exactly the plaintiffs want to do and what their
 14 challenge was. And by the time we got to the Supreme Court
 15 they were clear that this is an as-applied challenge, that
 16 they only want to do one thing which is post a single price
 17 and charge more than that without also posting the credit
 18 card price, and at that point the Supreme Court agreed with
 19 the Second Circuit that their - - - that ordinary sellers
 20 of ordinary intelligence are not confused that that's
 21 unlawful. And even if there were some doubt about that - -
 22 -

23 JUDGE WILSON: That depends on - - - that depends
 24 on the determination that is unlawful under the statute.

25 MS. VALE: That's true but plaintiffs - - - the



1 sellers have agreed that that's unlawful under the statute
2 for five years of litigation. That was how they had
3 federal standing to begin with. Every federal court that's
4 looked at this has - - - have thought that that core
5 pricing scheme is unlawful. And the reason for that
6 uniform understanding is because that is the - - - the one
7 obvious pricing scheme that is a surcharge in the way that
8 ordinary people understand it when they open a menu. When
9 they see one price they think that's the regular price, and
10 if you charge more than that it's a surcharge even if that
11 surcharge is disclosed as a math problem.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel.

14 MR. MATZ: May it please the court, Joshua Matz
15 for plaintiffs-respondents.

16 CHIEF JUDGE DIFIORE: Mr. Matz, one could take
17 the view that there is nothing in the legislative history
18 that indicates that the New York Legislature was doing
19 anything but replicating the federal statute. So why would
20 we interpret - - - point me to what directs me to interpret
21 the statute differently.

22 MR. MATZ: We're not asking you to interpret the
23 statute differently. The - - - the legislative history
24 does suggest that what the - - - that what the New York
25 Legislature was aiming to do in 1984 was to as a temporary



1 stopgap manner replicate the existing federal provisions.
2 The difficulty is that - - - as we point out in our brief
3 and we go into some detail about this - - - there was
4 widespread confusion within the federal government about
5 what the federal provisions mean. They had never been
6 enforced against anybody. It was never an enforcement
7 action.

8 JUDGE WILSON: Well, then what does - - - what
9 does it substantively mean then to say that the New York -
10 - - we know that the New York Legislature meant to adopt
11 the federal standard except nobody knew what the federal
12 standard was. I mean what then is the intent of the New
13 York Legislature?

14 MR. MATZ: It does get us somewhere, and where it
15 gets us is to an answer to Judge Garcia's question which is
16 why doesn't the plain language control. The answer to that
17 is that when text is lifted from another source where it is
18 known to have a fairly well-understood meaning, in at least
19 some respects it's common to assume that the legislature
20 intended to take the meaning with it. So I think looking
21 to that legislative history does give us some clarity that
22 they weren't trying to ban dual pricing altogether. What
23 they were instead trying to do was something like the
24 federal scheme which generally speaking imposed some
25 limitations on the circumstances in which there could be a



1 sort of surprise at the cash register when you show up and
2 unexpectedly discover that there's a credit card surcharge.
3 And, you know, we - - - again, we go into this in our
4 briefs. The - - - the state's position here is essentially
5 that the New York Legislature meant to do what the federal
6 government had done, and what the federal government had
7 done was very clear.

8 JUDGE RIVERA: Yeah, but their - - - their
9 position as I understand it - - - she'll correct me if I'm
10 wrong when she gets up for rebuttal - - - is that it's not
11 just that you know that you're going to be charged more
12 which is what happens when you say there's a one percent
13 surcharge. It's that you should know what the actual price
14 is before you get to that cashier. That's one of the
15 things. It may be doing other things, but that's one of
16 the things that the legislature wanted to make sure
17 happened when you went to that business, when you went to
18 pay for something you knew the amount.

19 MR. MATZ: I agree. You know, I have two
20 responses to that. The first is - - - and I just want to
21 put this in some context. No one had ever said that in
22 this litigation or in the context of any other enforcement
23 action either involving this law or the federal law ever
24 until about a year-and-a-half ago. So it's kind of news to
25 everybody, including the merchants of New York state that



1 that was a purpose that this law was trying to solve. The
2 second answer that I have is that it doesn't really achieve
3 that purpose - - -

4 JUDGE WILSON: The senate report - - - the senate
5 report from 1981 sort of suggests that, no?

6 MR. MATZ: The senate report from 1981 says that
7 what they want to make sure happens is that you see the
8 highest price you might have to pay. But as your own
9 question pointed out, there's a bit of a lack of clarity
10 about what it means to see a price. You know, in that same
11 senate report they were explicit in saying that they wanted
12 merchants to have flexibility about quote "the manner and
13 method in which the price will be displayed".

14 JUDGE RIVERA: But - - - but is it not common
15 sense that the average consumer - - - if you use small
16 numbers, sure, we all know what ten dollars plus thirty
17 cents means. But if I'm buying a refrigerator and it's
18 costing close to 1,000 if not over 1,000 dollars I may not
19 know exactly what the surcharge - - - excuse me - - - boils
20 down to. I know it's going to cost more, but I don't know
21 what that exact number is so that I can compare shop or
22 decide no, I'm not going to buy at this store, I'm going to
23 buy at the store across the street that's costing less.

24 MR. MATZ: You don't have to persuade me that
25 math is tricky. I think we can all agree that there are



1 going to be circumstances in which the equations are
2 difficult. There will also be many circumstances like in
3 the case of my client where they're easy where you're just
4 getting a haircut and it's twenty cents additional charge
5 or thirty cents additional charge. I think the point here,
6 though, is when you look at what the senate report talks
7 about that isn't quite what they have in mind. And it
8 doesn't really make sense - - -

9 JUDGE RIVERA: But isn't the - - - isn't the - -
10 -

11 MR. MATZ: - - - to say that there would be
12 flexibility - - -

13 JUDGE RIVERA: - - - common sense understanding
14 of the prices that one number, not a number with additions
15 to it or taking - - - or deduction to it? It's that one
16 number. Right, when you ask someone what's the price you
17 don't expect, well, it's ten dollars plus a three percent
18 surcharge which might be thirty cents.

19 MR. MATZ: So this - - - this is a point both
20 about the meaning of the statute and it - - - this also
21 bears on the avoidance analysis to - - - because the state
22 would then have to justify its position under the First
23 Amendment, under Central Hudson in our view or Zauderer in
24 their view. They say that the justification is that it
25 prevents people from having to do math. I - - - you know,



1 I think part of the problem here is it doesn't. First of
2 all, they say it's still fine to have discounts. There are
3 sales fees which no one has to disclose in which people
4 have to walk around calculating, there are shipping fees,
5 handling fees, processing fees, service fees, this - - -

6 JUDGE STEIN: Yeah, but they - - - they apply
7 equally to everybody for one thing, and for another thing
8 just because the government decides it wants to tackle one
9 problem doesn't mean it has to tackle every problem, does
10 it?

11 MR. MATZ: I - - - I completely agree with you,
12 but I think - - - I'm - - - I was born and raised in New
13 York state, and I could not for the life of me tell you
14 what percentage the sales tax is when I walk into a store.
15 Whereas if I walk into a store - - -

16 JUDGE STEIN: But it doesn't matter because it's
17 - - -

18 MR. MATZ: - - - and it says on the front door
19 that - - -

20 JUDGE STEIN: - - - the same for every - - - it's
21 the same sales tax for everybody.

22 MR. MATZ: It's the same sales tax for everybody
23 and presumably the reason that we're partially comfortable
24 with that - - - I assume the reason you're highlighting
25 that fact is because people know that that sales tax will



1 be levied. But our position is that this law should be
2 read as requiring that consumers know if there's a credit
3 card surcharge in the store in which that might happen.
4 Now I don't know how many stores Your Honors have been in
5 where you saw two prices posted on the wall for every
6 single product and differential pricing.

7 JUDGE RIVERA: So why does it - - - why - - - if
8 we were to agree with the AG that - - - again, I think this
9 is what they're arguing; she'll come back and correct me
10 when she gets up if I'm wrong - - - that you could say it's
11 a surcharge, you've got to put the dollar and cents and you
12 can say it's a surcharge. You could even put the
13 percentage of the surcharge. Why is that a problem for the
14 - - - your clients?

15 MR. MATZ: It's a problem for us because - - -

16 JUDGE RIVERA: You get to do both.

17 MR. MATZ: It's a problem for us because of
18 behavioral psychology, because of how the human mind works.
19 We talk about this in the brief but with reference to
20 academic - - -

21 JUDGE RIVERA: But you get - - - you get to say
22 it's a surcharge. You don't have to say there's a
23 discount.

24 MR. MATZ: It doesn't - - -

25 JUDGE RIVERA: Which is - - - which is where the



1 science goes.

2 MR. MATZ: Your Honor, respectfully, it - - - it
3 doesn't matter. Our clients talk about this in our
4 affidavit where they emphasize in - - - in each of their
5 affidavits that they tried alternate ways of communicating
6 the added cost of credit. There's a well-established
7 literature showing - - -

8 JUDGE RIVERA: You mean you're - - - you're
9 saying that if you wrote on the sign there's a three
10 percent surcharge and then you put what that amount
11 calculates to that somehow a consumer would view that
12 differently if you - - - versus if you didn't put the
13 amount but you said three percent surcharge?

14 MR. MATZ: Yes, there is a literature
15 demonstrating - - - and - - - and you may just not feel
16 this but, you know what, the literature does suggest - - -

17 JUDGE STEIN: But if we accept - - - if we accept
18 your - - - what you're proposing here isn't that the very -
19 - - I mean what is a surcharge if it is not what you are
20 suggesting?

21 MR. MATZ: So I - - - you know, you look at the
22 text of this statute, and it's kind of hard to take the
23 text too literally given that we know that the legislature
24 in New York was trying to borrow a sort of general federal
25 scheme. And so you look at that scheme, what was the



1 problem it was trying to solve with respect to surcharges?
2 And we know the answer to us. They tell us in the 1981
3 senate report where they say they don't want people showing
4 up at cash registers being surprised that because they're
5 choosing to pay with a credit card all of a sudden the
6 product costs more.

7 JUDGE WILSON: Well, that's the federal purpose,
8 but to Judge Garcia's earlier point, the state may have
9 just been filling a gap pending Congress taking action.
10 And is it not conceivable that the gap is filled by the
11 question Judge Fahey asked which is for the - - - that
12 limited period of time - - - which turned out to be not
13 that limited but who knew that - - - it was going to be a
14 prohibition on dual pricing?

15 MR. MATZ: So two responses to that. So the
16 first is there's no indication anywhere that I'm aware of
17 in the legislative history or subsequent that anyone that
18 was involved in writing this law thought or contemplated
19 that it would - - - it would have that effect. And if they
20 were planning to do that one might think someone might have
21 said something at some point or that someone might have
22 expressed some surprise when it was never subsequently
23 enforced that way.

24 The - - - the other point to make here, though,
25 is that, you know, they use the word surcharge I think in



1 the same way that the federal government had tried to use
2 it. There's plenty of evidence that they were aiming to
3 capture the same basic idea, and that basic idea was more
4 in the nature of a - - - of ambush at the register,
5 surcharges levied on unsuspecting people who were paying
6 with credit card. You know, part of the evidence that
7 supports this is that at least until about a year-and-a-
8 half ago my - - - my friends here in her office understood
9 it that way. You know, the Attorney General's Office and
10 the district attorneys of this state in enforcing this
11 criminal law - - - and I just want to emphasize that
12 because this is a law that criminalizes speech, that does
13 truthfully convey the price of a good or service. Their
14 interpretation of the law up until very recently, they
15 didn't at all adopt this dollars-and-cents position that
16 they're advocating. In fact, at various points in the
17 litigation they agreed with the view that we are taking
18 that this - - - that this court should adopt to interpret
19 the law. And at other points they said that it prohibited
20 even mentioning the word surcharges and went after people
21 who they believed had done so.

22 JUDGE GARCIA: But, counsel, aren't you in a way
23 also asking us - - - as I understand your argument or what
24 you would like here is for us to read the statute to ban
25 undisclosed surcharges, right, akin to the Minnesota



1 statute, I think, or - - - but I have the same issue
2 because the statute here says what it says and the
3 legislature enacted it. And you'd like us to amend it by
4 adding the word undisclosed and the - - - your counterpart,
5 your opponent here, would like us to amend it by adopting
6 the federal definitions. And I don't see our job as really
7 being a legislature in that way. So the words are the
8 words, and how do we get to where you would like us to get
9 again without adding to it and - - - and there is this
10 canon where we avoid a construction that would be
11 unconstitutional. But it doesn't allow us to rewrite the
12 law.

13 MR. MATZ: Of course, so I - - -

14 JUDGE GARCIA: I don't see going this way or this
15 way without us engaging in rewriting this statute.

16 MR. MATZ: Of course, and so my ultimate response
17 that I'm going to get to in a second, I do want to
18 emphasize because I'd feel remiss if I didn't, that if this
19 court were to hold that having dual pricing is a crime in
20 the state of New York it would turn tens or hundreds of
21 thousands of New York merchants currently engaged in
22 commerce into misdemeanants. And I just want to emphasize
23 that because the rule of lenity - - -

24 JUDGE GARCIA: But you have that option - - - but
25 you also have the option of importing a definition - - - a



1 plain meaning definition of surcharge which is again what I
2 think the district court did below. But putting that
3 aside, what the effect would be or that it - - - we could
4 read it as prohibiting dual pricing or read a surcharge
5 definition, could you also just answer my question about
6 amending?

7 MR. MATZ: Yes, with - - - with apologies. The
8 answer to your question is the - - - is the answer I tried
9 to get out earlier, and maybe I wasn't as articulate as I
10 ought to have been which is this law came from somewhere,
11 and when statutory text is taken from somewhere it's
12 ordinarily understood to import the meaning it had in the
13 place from whence it came. And it's true that they didn't
14 - - -

15 JUDGE GARCIA: Even when it leaves out the
16 definitions that give it that meaning?

17 MR. MATZ: Yes. Well, those definitions, as my
18 friend pointed out, were added as - - - as attempted but
19 failed clarifications to the statute in the late '70s and
20 in the early '80s. But even in - - - even before those
21 definitions were added to the statute, to the federal
22 statute, nobody understood it as a prohibition on dual
23 pricing. They simply understood it as a still more
24 confusing attempt at regulating the manner in which people
25 talk about surcharges. And so even - - - even if one goes



1 back in time and let's assume that it was deliberate that
2 they left out those definitional provisions and they were
3 doing this time warp thing like we want to be in 1976
4 federal world not in 1981 federal world, it still would not
5 be the case that the interpretation Your Honor has proposed
6 would be the natural reading.

7 Instead, what would follow is that - - - is the
8 point that we make in our brief that's sort of at the core
9 of our argument that they were trying to incorporate a
10 federal scheme that was ambiguous and even more ambiguous
11 in 1976 on the point at the very heart of this case which
12 is whether a merchant violates the law if they post a price
13 and very - - - if they say we're going to sell you a
14 sandwich - - -

15 JUDGE STEIN: Why - - - why shouldn't - - -

16 MR. MATZ: - - - for ten bucks and it's twenty
17 cents extra that that is in fact the price for purposes of
18 figuring out whether a surcharge - - -

19 JUDGE STEIN: Why shouldn't we follow what the
20 United States Supreme Court has now said that federal
21 statute meant?

22 MR. MATZ: Because of federalism, Your Honor.
23 The New York State Legislature in 1984 couldn't possibly
24 have prophesied what years later the court would say when -
25 - - and we point this out in our brief and I want to



1 emphasize there's no response in their reply brief - - -
2 there's literally no evidence that anyone on earth
3 understood this law to mean what the Solicitor General told
4 the court it - - - the Supreme Court that it meant in 2016
5 when they filed their brief. No enforcement actions, no
6 guidance.

7 All we see is a record of congressional testimony
8 and op-eds rife with leading figures in the field pointing
9 out just how ambiguous and confusing this law was. So much
10 so that many merchants stopped dual pricing because they
11 honestly weren't even sure how to comply with it. And it
12 seems peculiar for the government to now - - - for the
13 state to now say that this federal background law was so
14 incredibly clear on this dollars and cents interpretation
15 that it just so happens no one ever uttered out loud that
16 you should feel free to go ahead and criminalize our
17 clients' speech even though that speech is truthful, non-
18 deceptive, and very unambiguously seeks to inform consumers
19 about the added cost of credit.

20 JUDGE RIVERA: So just to be clear, because your
21 red light is off, what exactly is the speech, what's the
22 communication that your clients wish to make if - - - if
23 they were not fearful that they would act in a way that's
24 criminal under Section 518? What is it they want to do?

25 MR. MATZ: So they all sell different things. We



1 would like to sell you goods and services. We're going to
 2 post on each of the goods and services or at the front
 3 door, you know, a haircut is ten bucks, and if you pay with
 4 a credit card you're paying twenty cents or two percent in
 5 addition to that for that particular good or service. That
 6 - - - that is what they would like to say. It's truthful.
 7 It's clear. And while I agree that it may involve some
 8 math - - -

9 JUDGE RIVERA: I thought that Expressions wanted
 10 to do two prices - - - no? Am I wrong about that?

11 MR. MATZ: Well, it - - - it sort of - - - this
 12 is part of the ambiguity. It depends on how you define
 13 price, and this was a point that Judge Wilson made earlier
 14 in the argument.

15 JUDGE RIVERA: No, no, what's the ambiguity? I'm
 16 asking what your client wants to do.

17 MR. MATZ: My client wants to say that we'll cut
 18 your hair for ten bucks and if you pay with a credit card
 19 it's going to be 10.30.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.
 21 Counsel.

22 MS. VALE: Thank you, Your Honor. I'd like to
 23 address just three points, first, the idea that there's - -
 24 - that the federal law was unclear. The federal
 25 definitions are very clear. If you follow them along there



1 is no other way to read them than if you post a single
2 price, like sellers want to do, that is your regular price.
3 That is the definition. And then if you charge more than
4 that that is the definition of a surcharge. And it is
5 throughout the legislative history, not just the senate
6 report, that what they were concerned - - - what Congress
7 was concerned about was, yes, bait and switch but also that
8 math, that confusion. That's in the hearings. You can see
9 it in Senator Chafee's discussions.

10 JUDGE GARCIA: Do you disagree with the statement
11 in the district court opinion that says, "In 1976, at the
12 urging of the credit card industry, Congress passed" - - -
13 essentially this law?

14 MS. VALE: I do disagree with that. I do.

15 JUDGE GARCIA: It wasn't at the urging of the
16 credit card - - - it was always designed as a consumer
17 protection statute? That's what this was always about?

18 MS. VALE: Is it true that the credit card
19 companies lobbied for this? Yes, absolutely. Did - - -

20 JUDGE GARCIA: And they wanted to protect
21 consumers - - -

22 MS. VALE: - - - the sellers - - -

23 JUDGE GARCIA: - - - or they wanted to protect
24 themselves from being subject to this merchant saying
25 you're going to be penalized for using a credit card by



1 adding a surcharge?

2 MS. VALE: I'm sure the credit card companies had
3 their own financial interest at heart just as the sellers
4 did when they lobbied Congress.

5 JUDGE GARCIA: So why - - -

6 MS. VALE: But it is clear - - -

7 JUDGE GARCIA: - - - are we going to choose
8 between who won? Is this a consumer protection statute or
9 is this a credit card company protection statute?

10 MS. VALE: It is a consumer protection statute.
11 If you - - - there were multiple congressional hearings on
12 this. This was a mass - - -

13 JUDGE STEIN: Can it - - - can it be both?

14 MS. VALE: It - - - yes, it could be both. But
15 if you look at the multiple congressional hearings that
16 went on, it is it clear that Congress was legitimately
17 concerned about - - -

18 JUDGE GARCIA: But the definitions seem to me - -
19 -

20 MS. VALE: - - - consumer protection.

21 JUDGE GARCIA: The definitions to the federal
22 statute seem to me to push it over into the consumer
23 protection landscape, and we didn't adopt them. So why
24 can't I look at that legislative history and not think,
25 oops, the New York Legislature forgot the definitions in a



1 two-line statute, or I could think the credit card
2 companies rolled the clock back to what they originally
3 wanted? And why should this court make that call?

4 MS. VALE: Because the fed - - - the New York
5 legislative history is clear that what they wanted - - -
6 what the legislature wanted to do was pick up right where
7 the federal law was in 1984 at that time. And that - - -
8 at that time it included all of the definitions. I think
9 that is a perfectly fair reading of the New York
10 legislative history.

11 JUDGE GARCIA: And why did they leave the
12 definitions out?

13 MS. VALE: I do not know the answer to that.
14 They may have thought that they were unnecessary because
15 they thought they were using the ordinary meaning of
16 surcharge.

17 JUDGE GARCIA: Or the credit companies may have
18 convinced - - -

19 MS. VALE: Well - - -

20 JUDGE GARCIA: - - - them not to put them in.

21 MS. VALE: But also, the federal definitions
22 didn't have the regular price definition for quite a few
23 years, and everybody still - - - but everyone still
24 understood it to operate this way.

25 JUDGE GARCIA: There's no - - - if your opponent



1 is right. There's no enforcement actions. There's no
2 guidance issued on that federal statute, so how do we know
3 how the government interpreted that statute?

4 MS. VALE: Because you can look at the
5 legislative history. The senate report is clear. The
6 congressional testimony is clear. The Federal Reserve
7 adopted regulations that used the exact same definition of
8 regular price before Congress did. And although there
9 wasn't that much enforcement of this, part of that is
10 because the credit card companies had their own private
11 contracts that were already banning surcharges anyway. And
12 - - -

13 JUDGE GARCIA: As a consumer protection angle or
14 did they not want you telling your customers that we're
15 charging you extra for using a credit card?

16 MS. VALE: I can't speak to the credit card
17 companies' motivations, but I think it's clear that what
18 Congress and the New York Legislature did was rational.
19 And I'd like to point out, too, that - - -

20 JUDGE RIVERA: Well, their motivation is
21 different from the consumer side in many ways, right?

22 MS. VALE: Absolutely.

23 JUDGE RIVERA: Isn't their motivation I don't
24 want my retailer discouraging the use of my product that I
25 make money off of, i.e. a credit card?



1 MS. VALE: Yes, and there is a lot more going on
2 in the credit card versus seller fight that has nothing to
3 do with the surcharges. But I also want to emphasize that
4 there is - - - there may be policy disagreement about what
5 the best thing is to do, no doubt. But that was the policy
6 disagreement that was in front of Congress and that was in
7 front of the New York Legislature. And making the policy
8 choice that seeing that price is important, is a rational
9 one, and it is one that this court should uphold. And it -
10 - - this statute is not the only one that does something
11 like that. This is very similar to what happened in the
12 Spirit Airlines case where the - - - where DOT decided that
13 seeing the actual number as opposed to math was important
14 to consumers when they're trying to compare prices.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MS. VALE: Thank you.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Expressions Hair Design v. Schneiderman, No. 100 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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