

# After Ruling in *Expressions*, Supreme Court Summarily Vacates Fifth Circuit Decision Upholding Texas Surcharge Prohibition and Denies Review of Eleventh Circuit Decision Striking Down Florida's Surcharge Ban

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Editor's note: The companion article on this subject, published in the 1Q 2017 CRF News, may be accessed [HERE](#).

On March 29, 2017, the United States Supreme Court issued its long-awaited decision in *Expressions Hair Design, et al. v. Schneiderman*, holding that New York's prohibition against surcharging credit card transactions is a regulation of commercial speech and remanding the case to the Second Circuit Court of Appeals for further consideration as such.

On Monday, April 3, 2017, the Supreme Court ruled on petitions for certiorari in the two other surcharge-related cases that were pending before it.

In *Rowell et al. v. Pettijohn*, a group of merchants sought review of a decision by the Fifth Circuit Court of Appeals, which – like the Second Circuit in *Expressions* – held in early 2016 that the Texas surcharge ban is a constitutionally permissible regulation of pricing. On Monday, the Supreme Court granted the merchants' petition, summarily (i.e., immediately and with no further briefing or argument by the parties) vacated the Fifth Circuit's decision, and remanded the case back to the Fifth Circuit for further consideration in light of the Supreme Court's holding in *Expressions*.

In *Bondi v. Dana's Railroad Supply, et al.*, the Florida Attorney General sought review of a decision by the Eleventh Circuit Court of Appeals, which held in late 2015 that Florida's surcharge ban is a facially unconstitutional regulation of merchants' speech. The Supreme Court denied the state's petition for a writ of certiorari, leaving the Eleventh Circuit's ruling intact. As a result, the Florida surcharge ban has effectively been overturned in its entirety.

Denial of certiorari in *Dana's* means the Supreme Court will not have an opportunity to provide further guidance on the application of the commercial speech doctrine to credit card surcharge bans unless and until another case – possibly even *Expressions* or *Rowell*, depending upon the outcome in those cases on remand – comes up from the Courts of Appeals. However, the *Dana's* decision at least suggests that the Supreme Court is receptive to the Eleventh Circuit's reasoning, and is a knockout punch for Florida merchants, whose surcharging fight is now over unless and until the Florida legislature decides to craft a new surcharge ban.



#### About the authors:

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