

Amicus brief of ICLE & Scholars of Law & Economics, *Expressions Hair Design v. Schneiderman*, SCOTUS

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Summary

Petitioners base their First Amendment argument on two premises: first, that surcharges are “more effective” than discounts at altering consumer behavior; and second, that surcharges and discounts are economically equivalent except for their labels. Under this view, because the only difference between discounts and surcharges is how they are framed, it must be this framing that leads to the difference in consumers’ responses. To explain why Petitioners believe this is true—and, thus, to maintain their claim that New York’s surcharge prohibition is an impermissible restriction on speech—Petitioners and their amici rely on the behavioral economic concepts of “framing” and “loss aversion.” They claim that the State impermissibly wishes to prohibit surcharging because these cognitive biases render surcharge labels more effective than discount labels in altering consumers’ preferred form of payment.

Petitioners’ premises are wrong. There is no sound evidence that the asserted behavioral theories are at work here, or that credit-card surcharging—much less the mere label used to describe the practice—more greatly affects consumers’ chosen method of payment than cash discounting. In fact, some of the studies on which Petitioners and their amici rely suggest the opposite. The Court should not rely, in the absence of sound supporting evidence, on a malleable theory that can be used to support contradictory positions.

Moreover, surcharges and discounts differ in material ways beyond the words used to describe them. Surcharging—but not discounting—enables merchants to engage in certain pricing and sales practices that explain both consumers’ different responses to them, as well as the State’s interest in regulating them differently. And while petitioners lack empirical support for the behavioral claims at the heart of their First Amendment argument, the evidence from countries that permit surcharging reveals that merchants often use surcharges to engage in these types of pricing practices. This Court should thus reject Petitioners’ invitation to base constitutional doctrine on a behavioral hypothesis unsupported by any sound empirical evidence—especially where, as here, that result could potentially expose consumers to the type of conduct that the State’s law seeks to prevent.

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