OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2019-12

The Honorable Michael Brooks
Oklahoma Senator, District 44
2300 N. Lincoln Blvd., Room 513
Oklahoma City, OK 73105

December 17, 2019

Dear Senator Brooks,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **Federal courts have invalidated several state statutes that prohibit merchants from imposing surcharges on purchases made with credit cards but allow merchants to offer discounts for making the same purchase with cash or check, finding that the statutes regulate what label merchants can use for differentiated pricing and are impermissible commercial speech regulations that violate the First Amendment to the U.S. Constitution. In light of those cases, does 14A O.S.Supp.2019, § 2-211, which allows discounts on purchases made with cash or checks but bans surcharges on purchases made with credit cards or debit cards, also violate the First Amendment?**

I.
BACKGROUND

A. The history of Oklahoma's prohibition on sellers imposing surcharges on credit card transactions.

In Title 14A of the Oklahoma Statutes, the State adopted its version of the Uniform Consumer Credit Code ("UCCC"). 14A O.S.Supp.2019, § 1-101. Two provisions of Title 14A are relevant to your request, and they are nearly identical. ***First***, Section 2-211 provides, in relevant part, as follows:

> With respect to all sales transactions, a discount which a seller offers, allows or otherwise makes available for the purpose of inducing payment by cash, check or similar means rather than by use of an open-end credit card account shall not constitute a credit service charge as determined under Section 2-109 of this title if the discount is offered to all prospective buyers clearly and conspicuously in accordance with regulations of the Administrator of Consumer Affairs. ***No seller in any sales transaction may impose a surcharge on a cardholder who elects an***

> ***open-end credit card or debit card account instead of paying by cash, check or similar means***. There is no limit on the discount which may be offered by the seller.

Id. § 2-211(A). ***Second***, Section 2-417 uses almost identical language: "No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card or debit card in lieu of payment by cash, check or similar means." *Id.* § 2-417(A).

Oklahoma adopted these statutes to maintain an exemption from the federal Consumer Credit Protection Act, commonly known as the Truth in Lending Act ("TILA"). *See* 14A O.S.2011 Ann. § 2-211, Okla. cmt.[1] Congress enacted TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601. One major requirement of TILA is the disclosure of any charge imposed on a person in a consumer credit transaction incident to the extension of credit, referred to in TILA as a "finance charge." *See id.* § 1605(a).

TILA directs the relevant federal agency[2] to exempt certain transactions from TILA at a state's request if the applicable state law is substantially similar and the state has adequate provision for enforcement. 15 U.S.C. § 1633. In 1970, Oklahoma was granted an exemption from many TILA provisions. *See Dalton v. City of Tulsa*, 1977 OK 25, ¶¶ 7 n.2, 14, 560 P.2d 955, 956-57. In 1982, the federal government renewed the exemption under the revised TILA. *See Consumer Leasing, Truth in Lending; Order Granting Exemptions to the States of Massachusetts, Oklahoma, and Wyoming*, 47 Fed. Reg. 42171 (1982). It reserved the right to revoke the exemption if Oklahoma failed to maintain the requirements for an exemption. *Id.* at 42172.

In 1976, Congress amended TILA to address fees imposed on merchants in sales by credit card. *See* Pub. L. 94-222, § 3(c)(1), 90 Stat. 19 (1976). Similar to the UCCC provisions described above, TILA provided that a discount of 5% or less for purchases by cash, check, or similar means that satisfied certain notice requirements did not constitute a "finance charge" that had to be disclosed under TILA. *Id.* It also provided that "[n]o seller in any sales transaction may impose a surcharge on a card holder who elects to use a credit card in lieu of payment by cash, check or similar means." *Id.*[3] Congress eliminated the 5% cap on discounts in federal law in 1981. Pub. L. 97-25, 95 Stat. 144 (1981). TILA's ban on surcharges expired in 1984. *Id.*

In 1977, Oklahoma passed Sections 2-211 and 2-417 of Title 14A, which essentially copied the TILA provisions regarding discounts and surcharges. *See* 14A O.S.Supp.1977, §§ 2-211, 2-417. After TILA was amended in 1981, Oklahoma similarly amended Section 2-211, eliminating the

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[1] *See also Maltos v. Bison Fed. Credit Union*, 1994 OK CIV APP 83, ¶ 9 n.4, 879 P.2d 1254, 1257 n.4 ("Rather than merely adapting federal legislation to local purposes, the Oklahoma version of the UCCC was enacted to provide this state an exemption for covered transactions from the application of [TILA].").

[2] The relevant agency changed from the Board of Governors of the Federal Reserve System to the Consumer Financial Protection Bureau in 2010. *See* Pub. L. 111-203, Title X, § 1100A(2), 124 Stat. 2107 (2010).

[3] Some legislative reports indicate that Congress wanted to ensure consumers were not lured in by an advertisement of a low price only to be surprised by a higher price at the register, while Congress had no concern about surprise lower prices. *See* S. Rep. 97-23, 4, 1981 U.S.C.C.A.N. 74, 77.

5% cap on discounts and incorporating the prohibition on surcharges from Section 2-417 into Section 2-211. 14A O.S.Supp.1982, § 2-211. Oklahoma later amended its statutes to also ban surcharges on debit cards. 2010 Okla. Sess. Laws ch. 69, §§ 1, 2.

B. Constitutional challenges to similar laws enacted in other states.

After the federal surcharge ban expired in 1984, several states enacted laws banning surcharges on credit card purchases. *See* Cal. Civ. Code § 1748.1; Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. § 16a-2-403; Me. Rev. Stat. tit. 9-A, § 8-303(2) (replaced by Me. Rev. Stat. tit. 9-A, § 8-509 in 2011); N.Y. Gen. Bus. Law § 518; Tex. Bus. & Com. Code § 604A.0021; *see also* Mass. Gen. Laws ch. 140D, § 28A (adopted 1981). Some of these state laws only discuss surcharges rather than discussing both surcharges and discounts. *See, e.g.,* N.Y. Gen. Bus. Law § 518. TILA alters these laws because it still contains both a provision stating that a discount is not a finance charge and a provision preempting any contrary state laws. *See* 15 U.S.C. §§ 1666f(b), 1666j(c). Thus, between the text of the state laws and the continuing TILA provisions on discounts, these state laws are substantively similar to each other.

Recently, several of these laws have been challenged as unconstitutional limitations on commercial speech. Before turning to the cases themselves, we briefly outline what "commercial speech" is in constitutional terms, and what limitations are permissible on this type of speech.

1. Legal standards for determining whether a statute is an unconstitutional commercial speech regulation.

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment applies to the states through the due process clause of the Fourteenth Amendment. *Stromberg v. People of State of Cal.*, 283 U.S. 359, 368 (1931). By its plain text, the First Amendment only applies to laws that regulate speech, not laws that regulate conduct. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017).

The First Amendment accords lesser protection to commercial speech than it does to other speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980). Commercial speech is speech that proposes a commercial transaction, such as a sale. *See id.* Because such transactions are traditionally subject to government regulations, the protection available for commercial speech depends on the nature of the expression and on the nature of the governmental interests served by regulating that expression. *See id.* at 562-63.

In addition, speech regulations face different levels of scrutiny based on whether they ***restrict*** speech or ***compel*** disclosures. *See Expressions Hair Design*, 137 S. Ct. at 1151. Under *Central Hudson*, restrictions on commercial speech must survive a four-part test that imposes a type of intermediate scrutiny. *See Cent. Hudson*, 447 U.S. at 566; *id.* at 574 (Blackmun, J., concurring) (describing the test as intermediate scrutiny). ***First***, a court assesses whether the commercial speech is not misleading and not related to unlawful activity. *See id.* at 566. If the speech passes that test, then it receives some First Amendment protection. *See id.* The next three parts of the test determine whether the governmental interests are sufficient to justify regulation notwithstanding

the First Amendment. *See id.* ***Second***, a court must decide "whether the asserted governmental interest is substantial." *Id.* ***Third***, it must be "determine[d] whether the regulation directly advances the governmental interest asserted." *Id.* ***Fourth***, the court analyzes whether the regulation "is not more extensive than is necessary to serve that interest." *Id.* A regulation will be upheld only if it satisfies each step; essentially it must directly advance a substantial governmental interest in a manner that is no more extensive than necessary to serve that interest.

Regulations that do not restrict speech, but rather only compel certain disclosures, are subject to less scrutiny. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985). Although *Zauderer* involved several commercial speech regulations on the practice of law, the Supreme Court treated one provision differently. *See id.* at 650. The relevant provision of Ohio law required lawyer advertisements for contingency work to include "information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful." *Id.* The Supreme Court described this provision as subject to the same commercial speech test as other regulations, but it then also concluded that the First Amendment interest in not providing factual information is minimal. *See id.* at 650-51. Then, it stated that disclosure requirements only need to be "reasonably related to the State's interest" to be upheld. *See id.* at 651. Essentially, "*Zauderer* presumes that the government's interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored." *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005). Thus, a state law that only requires disclosures in commercial transactions, as opposed to prohibiting certain commercial speech, is more likely to be constitutional.

2. Commercial speech challenges to credit card surcharge bans in other states.

At least four state statutes with language similar to Section 2-211 of Title 14A have been challenged as unconstitutional restrictions on commercial speech. The challenge to New York's statute led to a decision from the U.S. Supreme Court generally affecting the analysis of these type of statutes. Three other challenges have at least partially invalidated statutes in Florida, California, and Texas.

a. New York's Statute.

New York's statute 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." N.Y. Gen. Bus. Law § 518. It was challenged in 2013 as an unconstitutional restriction of commercial speech and reached the U.S. Supreme Court in 2017. Following the analysis from lower courts, the Supreme Court presumed that the term "surcharge" under New York law refers to an increase above a single posted price. *Expressions Hair Design*, 137 S. Ct. at 1151. It then observed that the statute prohibits New York merchants who want to charge different prices for cash purchases and credit card purchases from choosing how to communicate that price difference. *Id.* If the merchant wants to list a single price, the merchant must use the higher price as the posted price. *See id.* For example, if a merchant sells sandwiches for $10 to cash purchasers and $10.30 to credit card purchasers, the New York law did not prohibit the price difference, but prohibited the merchant from listing the price as "'$10, with a 3% credit card surcharge' or '$10, plus $0.30 for credit'"

and required the merchant to list the price as "$10.30." *Id.* The Court held that this was a regulation of speech, not conduct, because it regulated "the communication of prices." *Id.*

The Court declined to address whether the law was a commercial speech regulation subject to intermediate scrutiny under *Central Hudson* or a disclosure requirement subject to minimal scrutiny under *Zauderer*, leaving that decision for the lower courts. *Id.*

b. Florida's Statute.

The Florida statute provided: "A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card." Fla. Stat. § 501.0117. It also defined "surcharge" to mean "any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment." *Id.* Four businesses brought a facial challenge, meaning they argued the statute violated the First Amendment when applied to any possible pricing practice. *See Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015).

The Eleventh Circuit Court of Appeals agreed, finding Florida's statute completely invalid under the four-part *Central Hudson* test described above. *See Dana's R.R. Supply*, 807 F.3d at 1249-51. The Court applied *Central Hudson* because it concluded that Florida law banned certain commercial speech, controlling how merchants label a permissible price difference. *See id.* at 1245. First, the court held that the regulated commercial speech was not misleading or related to unlawful activity and thus received First Amendment protection. *See id.* at 1249. Second, the court observed that the statute's exceptions for state entities undermined any assertion of a state interest. *See id.* at 1250. Under the third and fourth parts of *Central Hudson*, the court found that the statute did not directly advance a state interest, nor was it narrowly tailored to any such interest. *Id.* Florida claimed the statute narrowly served to prevent bait-and-switch tactics, provide advance notice of the pricing difference to customers, and level the playing field among merchants, but the court found these assertions unconvincing. Such interests would be better served, the court stated, by "direct and focused regulation of actual pricing behavior" than by regulating speech. *See id.* The Florida Attorney General petitioned the U.S. Supreme Court for certiorari, and the Supreme Court denied certiorari after issuing its decision in *Expressions Hair Design*. *See Bondi v. Dana's R.R. Supply*, 137 S. Ct. 1452 (2017).

c. California's Statute.

The California statute provides that "No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." Cal. Civ. Code § 1748.1(a). It was challenged in 2014 by a group of businesses that wanted to post a single sticker price for their products and charge an extra fee above those posted prices for purchases made by credit card. *See Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018). The plaintiffs did not challenge the validity of the entire law, instead arguing only that it would be invalid if construed to prohibit their particular pricing practices. *Id.* at 1175.

In 2018, the case reached the Ninth Circuit Court of Appeals, which, like the Eleventh Circuit, applied the *Central Hudson* test. *Becerra*, 878 F.3d at 1176. The court concluded that the statute prohibited merchants from communicating prices in certain ways, like the New York law did in *Expressions Hair Design*, and was therefore subject to intermediate scrutiny under *Central Hudson*. *See id.* It then largely agreed with the Eleventh Circuit's analysis in *Dana's R.R. Supply*. *See id.* at 1176-79. Under the first part of *Central Hudson*, it concluded the regulated speech was not misleading or related to unlawful conduct and thus was protected by the First Amendment. *See id.* at 1176-77. Under the second and third parts, the court acknowledged that the state named possible substantial interests but found that no state interest was advanced by the law. *See id.* at 1777. In particular, it noted that the law undermined state interests by preventing merchants from communicating truthful information about why credit card customers are charged more than cash users. *See id.* It also alternatively held that even if the law prevented consumer deception or other harm to the free market, the exceptions in California's law undermined any assertion that it advanced the state's interests. *See id.* at 1777-78. Finally, under the fourth part of *Central Hudson*, the court held that the law did not reasonably fit the state's interests because other options were better tailored, such as requiring disclosure of a surcharge before and at the point of sale, banning deceptive or misleading pricing practices, or enforcing existing laws on unfair practices and misleading advertising. *See id.* at 1178. Accordingly, the court held the statute would violate the First Amendment if it were applied to prohibit the plaintiffs from posting a single sticker price and charging an extra fee above that posted price. *Id.* at 1179.

d. Texas's Statute.

Texas's surcharge ban was also invalidated as applied to a particular pricing practice. *See Rowell v. Paxton*, 336 F. Supp. 3d 724 (W.D. Tex. 2018). The Texas statute provides: "In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment." Tex. Bus. & Com. Code § 604A.0021. The plaintiffs wanted to post a single sticker price and charge an extra percentage above that price for customers who used a credit card. *See Rowell*, 336 F. Supp. 3d at 728.

Originally challenged in 2014, the statute was found to regulate conduct, not speech, by both the district court and the Fifth Circuit. *See id.* at 727. After *Expressions Hair Design*, however, the Supreme Court granted a petition for certiorari from the Fifth Circuit and vacated and remanded the decision. *See id.* The Fifth Circuit then remanded the case to the district court. *See id.*

On remand, the district court applied *Central Hudson* and largely followed the reasoning of the Eleventh Circuit. *See id.* at 730-32. It appears no party raised the question of whether *Zauderer* or *Central Hudson* applied, as the state only argued that (1) the law regulated misleading speech and, alternatively, (2) that the law would survive intermediate scrutiny under *Central Hudson*. *See id.* at 730-31. The court first held the surcharges were not misleading because they were equal to the swipe fees for a credit card transaction. *See id* at 730. Under the second *Central Hudson* factor, the court found that there was no evidence in the record that the surcharge harmed consumers. *See id.* at 731. Under the third and fourth factors, the court explicitly adopted the Eleventh Circuit's analysis of the Florida statute. *See id.* at 731-32. Thus, the court held the statute would violate the First Amendment if construed to prohibit the plaintiffs from posting a single sticker price and charging an extra percentage above the posted price for credit card customers. *See id.* at 732.

II.
DISCUSSION

In light of the similarities between the language of Title 14A, Section 2-211 and the statutes invalidated—in whole or in part—in the cases described above, you have asked whether Section 2-211 is unconstitutional. No court has yet held that a state surcharge ban is constitutional. Thus, an important issue regarding Section 2-211 is whether it regulates commercial speech and, if so, what test applies.

A few canons of statutory interpretation guide our understanding of Oklahoma's statutes. "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and no further construction is required or permitted." *Sullins v. Am. Med. Response of Oklahoma, Inc.*, 2001 OK 20, ¶ 17, 23 P.3d 259, 263. "When the meaning of a statutory provision is unclear or its application is uncertain, the language is to be given a reasonable and sensible construction." *Id.* "If there are two possible interpretations—one of which would hold the legislation unconstitutional, the construction must be applied which renders them constitutional." *Calvey v. Daxon*, 2000 OK 17, ¶ 24, 997 P.2d 164, 172.

A. Possible interpretations of Oklahoma's surcharge ban statutes.

Like some of the invalidated statutes, the relevant terms in Section 2-211 are not defined in statute and have not been defined by Oklahoma courts. In the cases reviewed above, some courts applied the plain meaning of surcharge, while others incorporated the definitions from TILA.[4]

The Ninth Circuit found the plain meaning of surcharge to be "an extra fee in addition to the price the retailer would otherwise charge a customer." *Becerra*, 878 F.3d at 1172 (citing *Random House College Dictionary* 1321 (rev'd ed. 1980)); *see also Surcharge,* MERRIAM-WEBSTER, www.merriam-webster.com. The court concluded that the difference between a surcharge and a discount is one in name only because the cash price is the price that the merchant "would otherwise charge." *See id.*

The fact that this interpretation conflates a surcharge and a discount into two labels for the same price difference does not undermine its possible application to Oklahoma law. In general, we "consider[] relevant provisions together in order to give full force and effect to each." *Matter of C.M.*, 2018 OK 93, ¶ 22, 432 P.3d 763, 768. Thus, ordinary principles of statutory interpretation would tell us to interpret "surcharge" and "discount" in a way that gives separate meaning to both. Nevertheless, the Supreme Court in *Expressions Hair Design* similarly conflated the two terms. *See* 137 S. Ct. at 1147, 1151. Facing a statute that had no definition of a "regular price" from which a merchant could add a surcharge or subtract a discount, the Supreme Court concluded that New York's law said nothing about the permissible prices for a cash or credit card payer. *See id.* at 1151. Similarly, Oklahoma law contains no defined price terms that would allow a court to interpret the terms surcharge and discount aside from their relationship to one another. *See* 14A O.S.Supp.2019, § 2-211. Thus, like the Supreme Court, we could permissibly follow an interpretation that does not give separate effect to surcharge and discount in the absence of legislative guidance on what counts as a regular price.

[4] Florida had a statutory definition of a surcharge, and the Texas case did not discuss defining the term.

New York did not follow the plain meaning approach, instead applying the TILA definitions. Under TILA, a surcharge is "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means," and a discount is "a reduction made from the regular price." 15 U.S.C. § 1602(q), (r). "This [regular price] becomes an elusive figure as long as merchants are free to adjust their prices to market conditions." RALPH J. ROHNER AND FREDERICK H. MILLER, THE LAW OF TRUTH IN LENDING: AN UPDATE OF TRUTH IN LENDING § 10.10[2] (2018) (hereinafter "ROHNER AND MILLER"). In the 1981 amendments, Congress added a definition for the term "regular price":

> the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means.

Pub. L. 97-25, Title I, § 101, 95 Stat. 144 (1981). Under this definition, neither Congress nor the regulating agencies have "attempted to limit a merchant's freedom to set his or her basic market prices." ROHNER AND MILLER § 10.10[2]. Instead, this definition compels a merchant with separate prices for cash and credit card customers to include the higher price in any posted prices. For example, the merchant with sandwiches for sale at $10 for cash and $10.30 for credit card has the option of posting just the $10.30 price, posting both prices, or posting no price at all. The only way the merchant could violate the statute is by posting a price sticker that does not include the dollars and cents version of the credit card price.

While the plain meaning definition has led to a statute being found unconstitutional in part, no court has decided whether the TILA definitions render a statute constitutional. In the New York case, the Second Circuit certified a question to the New York Court of Appeals, asking whether a merchant who posts the total price charged to credit card users complies with New York's statute. *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 107 (2d Cir. 2017). The New York Court of Appeals answered in the affirmative, construing the statute using the TILA definitions. 117 N.E.3d 730 (2018). After that, no further litigation occurred regarding the New York statute.

B. Applying the possible interpretations to Oklahoma law.

Typically, Oklahoma law would favor the plain meaning. "Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears." 25 O.S.2011, § 1. Nevertheless, Section 2-211 was enacted to comply with TILA, which suggests it was intended to mirror TILA (or at least have a common understanding of the relevant terms). Furthermore, courts have found other surcharge bans to be unconstitutional when using the plain meaning, and, as noted previously, if multiple interpretations apply and some render the law unconstitutional, "the construction must be applied which renders [the law] constitutional." *Calvey*, 2000 OK 17, ¶ 24, 997 P.2d at 172. Thus, we must examine (1) whether the plain meaning would likewise render Section 2-211 unconstitutional and (2) if the TILA definitions would render the law constitutional. Assessing the constitutionality of Section 2-211 under either definition requires three steps. First, we must determine whether the statutes under a particular interpretation regulates conduct or

commercial speech. *See Expressions Hair Design*, 137 S. Ct. at 1150. Second, if they regulate commercial speech, then we must determine whether the *Central Hudson* test or *Zauderer* test applies. *See id.* at 1151. If a law bans particular speech, then it must survive the *Central Hudson* test. *See id.* If a law only compels disclosure, then it only needs to survive the *Zauderer* test. *See id.* Third, we must apply the relevant test to assess the statute under the proffered interpretation.

1. Plain meaning definition.

At first glance, the plain meaning used in the Ninth Circuit appears to be consistent with Oklahoma's statute. Oklahoma law describes a prohibited surcharge as one that occurs because a buyer uses a credit card ***instead of*** cash, check, or similar means. *See* 14A O.S.Supp.2019, § 2-211. Similarly, the Ninth Circuit decision defined a surcharge in terms of what the merchant would otherwise charge. *See Becerra*, 878 F.3d at 1172. Such a definition would lead to the conclusion that the phrase "instead of cash, check, or similar means" in Section 2-211 is a reference to what the merchant "would otherwise charge."

Under this interpretation of the term "surcharge," Section 2-211 would be held to regulate commercial speech. It "tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer," *Becerra*, 878 F.3d at 1175 (quoting *Expressions Hair Design*, 137 S. Ct. at 1151), and instead regulates how merchants communicate a price difference. *See id.* The merchant selling sandwiches for $10 by cash or $10.30 by credit card must describe them as $10.30 sandwiches with a cash discount in order to comply with the law.

Next, we conclude, as did the federal court decisions on this plain meaning reviewed above, that this interpretation of Section 2-211 would likely be tested under *Central Hudson*, not *Zauderer*. Specifically, a merchant who discloses both the cash price and the credit card price violates the law if the credit card price is presented as being higher than the cash price. The law is not a simple disclosure requirement, but rather prohibits certain commercial speech.

We also agree with the federal courts that this interpretation would fail the *Central Hudson* test. Under the first part of *Central Hudson*, the communication regarding prices is protected by the First Amendment because the price difference is not misleading or related to unlawful activity. Second, Oklahoma has a substantial interest in protecting consumers by (i) prohibiting the bait and switch tactic of imposing a higher price at the register, and (ii) requiring advance notice of the price. The State may also have a substantial interest in advancing merchants' acceptance of credit cards to help consumers have access to credit. Problems arise under the third and fourth parts of *Central Hudson*, regarding whether Section 2-211 directly advances these interests and is narrowly tailored to those interests. If the same price differential is permitted so long as the merchant uses the correct label of "discount," then consumers are not protected against any of the alleged harms. A merchant who posts signs telling customers about the higher credit card price in advance, preventing any bait-and-switch, would violate the law as much as one who imposes a surreptitious surcharge at the register. That same merchant is also discouraging the use of credit cards by not treating them on par with cash even if the merchant complies with the law. As the Eleventh Circuit stated, a state law would be tailored to the state's interests here if it regulated the differential pricing itself or the pricing tactics rather than just the labels for the prices. *See Dana's R.R. Supply*, 807

F.3d at 1250. Thus, under *Central Hudson*'s intermediate scrutiny, a law banning certain labels for price differences would not be narrowly tailored to advance Oklahoma's interests.

2. TILA definitions.

As defined by the former TILA provisions, a "surcharge" is an increase over the regular price, which in turn is the highest posted price if any price is posted. These definitions require that the credit card price must be the highest posted price. Returning to the sandwich merchant, he or she can charge $10 to cash customers and $10.30 to credit card customers only if the pricing is described as mandated by Section 2-211. If the merchant posts the credit price or both prices, the merchant complies with the law, but if the merchant posts "'$10, with a 3% credit card surcharge' or '$10, plus $0.30 for credit,'" *Expressions Hair Design*, 137 S. Ct. at 1151, the merchant would violate the law. Accordingly, using this definition Section 2-211 still regulates commercial speech.

Using the TILA definition, Section 2-211 would also likely be analyzed using the *Central Hudson* framework, not *Zauderer*. A merchant would violate the law if the merchant posted a sign saying $10 for cash users and $.30 extra for credit card users even though that sign communicates the same information as the required sign. This interpretation of the law bans certain ways of describing a credit card price even for the merchant who discloses it.

The TILA definitions would not save Section 2-211 under the *Central Hudson* test. The analysis of the first two factors is largely the same, and the problems again occur under the third and fourth factors. Under the third factor, this interpretation better advances Oklahoma's interests because it bans ***actually hiding*** the higher price rather than simply banning ***describing*** the prices as higher, focusing on advance notice to consumers. The problem is that statutory exceptions for certain entities undermine any argument that Section 2-211 is narrowly tailored to advance the stated interests. *See* 14A O.S.Supp.2019, §§ 2-211(E) (listing exceptions); *see also Dana's R.R. Supply*, 807 F.3d at 1241 (reaching the same conclusion about surcharge exceptions); *Becerra*, 878 F.3d at 1176 (same).[5] If the ban on surcharges is truly a ban on undisclosed higher prices rather than a ban on higher prices, then the exceptions for entities like municipalities and certain public trusts are inconsistent with that purpose. Oklahoma's statute is not narrowly tailored to prevent a bait and switch or to provide advance notice to consumers if it explicitly allows certain entities to evade its protections. Thus, even if the TILA definitions apply, the Section 2-211 would likely be found to violate the First Amendment under *Central Hudson*.

In light of the above analysis, we conclude that Oklahoma's ban on surcharges for purchases using credit cards or debit cards would not survive scrutiny. The plain meaning of a surcharge would render the statute an impermissible commercial speech regulation, and the TILA definitions would not save the statute because of the exceptions to compliance in Oklahoma law. Nevertheless, we cannot say definitively that no possible application of the statute is consistent with the First Amendment. The plain meaning interpretation only addressed one pricing scheme: a single sticker pricing scheme with some form of increase for credit card purchases. Many pricing schemes are possible, and we have not considered—nor would it be feasible for us to consider—how ***all*** possible pricing schemes would fare under the First Amendment.

[5] New York's statute, using TILA definitions, had no such exceptions. *See* N.Y. Gen. Bus. Law § 518.

It is, therefore, the official Opinion of the Attorney General that:

1. **Oklahoma's ban on surcharges for purchases using credit cards or debit cards, found in 14A O.S.Supp.2019, § 2-211, does not facially violate the First Amendment to the U.S. Constitution.**

2. **Oklahoma's ban on surcharges for purchases using credit cards or debit cards, found in 14A O.S.Supp.2019, § 2-211, would violate the First Amendment to the U.S. Constitution in the pricing schemes discussed in *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018) and *Rowell v. Paxton*, 336 F. Supp. 3d 724 (W.D. Tex. 2018) if interpreted consistent with the plain meaning of surcharge.[6]**

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[6] An attorney general opinion that concludes an "act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state." *State ex rel. York v. Turpen,* 1984 OK 26, 681 P.2d 763, 767.