No. 15-50168

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LYNN ROWELL, doing business as Beaumont Greenery; MICAH P. COOKSEY; MPC DATA AND COMMUNICATIONS, INCORPORATED; MARK HARKEN; NXT PROPERTIES, INCORPORATED; PAULA COOK; MONTGOMERY CHANDLER, INCORPORATED; SHONDA TOWNSLEY; TOWNSLEY DESIGNS, L.L.C.,

Plaintiffs-Appellants,

v.

LESLIE L. PETTIJOHN, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Texas No. 1:14-cv-00190-LY (Hon. Lee Yeakel)

AMICUS CURIAE BRIEF FOR THE INSTITUTE FOR JUSTICE SUPPORTING PLAINTIFFS-APPELLANTS FOR REVERSAL

Paul M. Sherman
Samuel B. Gedge
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203-1854
Tel.: 703.682.9320
Fax: 703.682.9321
E-mail: psherman@ij.org

Dated: June 16, 2015

Counsel for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The plaintiffs-appellants have set forth the interested parties in this case at pages i–ii of their opening brief. In accordance with Fifth Circuit Rule 29.2—which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief"—undersigned counsel of record certifies that, in addition to those persons listed in the plaintiffs-appellants' statement, the following persons have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) The Institute for Justice, *amicus curiae* in this case; and
2) Attorneys for *amicus curiae*: Paul M. Sherman and Samuel B. Gedge (Institute for Justice).

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation and does not have any parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Dated: June 16, 2015

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute for Justice challenges laws across the nation that regulate a wide array of commercial and occupational speech. In much of this litigation, *amicus* has been confronted with the central question presented in this case: whether a restriction on communicating certain information should be characterized as a restriction on "speech" (and therefore subject to robust judicial scrutiny) or whether it should instead be characterized as a restriction on "conduct" (and therefore subject only to rational-basis review).

The district court got this vitally important constitutional question wrong. In doing so, the court broke with binding Supreme Court precedent. *Amicus* is deeply concerned that this ruling, if allowed to stand, will imperil the First Amendment rights of businesses and consumers throughout this Circuit.

---

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that counsel for the appellants and counsel for the appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The central question in this appeal is whether Texas's anti-surcharge law is a regulation of "speech" that must satisfy First Amendment scrutiny, or whether it is instead a regulation of "conduct," to be evaluated under the more lenient rational-basis standard. Under the U.S. Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this is not a close call: Texas's law operates as a restriction on speech that must be evaluated under the First Amendment.

Under Texas's law, businesses are free to charge a higher price for credit-card users, but they cannot *say* they are charging a higher price, because that would be deemed an illegal surcharge. Instead, to operate lawfully, businesses must express the price disparity as a "discount" for non-credit-card users. In other words, the anti-surcharge law is triggered by how a seller communicates its prices to customers—and by nothing else. Under *Humanitarian Law Project*, that fact is dispositive.

The district court nevertheless concluded that Texas's law "does not implicate First Amendment speech rights" in any way. ROA.440. But it reached this conclusion only by ignoring *Humanitarian Law Project*, which is not cited anywhere in the district court's opinion, despite its being the Supreme Court's most recent and most authoritative discussion of the speech/conduct distinction.

Under a proper application of *Humanitarian Law Project*, not only should the State's motion to dismiss have been denied, but Appellants' motion for preliminary injunction should also have been granted, because the government cannot come close to satisfying the rigors of First Amendment scrutiny.

ARGUMENT

The Texas anti-surcharge provision limits buyer-seller communications. For this reason, it must satisfy First Amendment scrutiny (here, the *Central Hudson* test used for restrictions on commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)). Yet the court below recast the law as regulating only "economic conduct," allowing it to dispose of Appellants' entire claim with one sentence of rational-basis boilerplate. ROA.440. As explained in Section A, that conclusion cannot be reconciled with the Supreme Court's recent ruling in *Humanitarian Law Project*, 561 U.S. 1. As explained in Section B, applying the appropriate standard of review, Texas's motion to dismiss should have been denied and Appellants' motion for preliminary injunction should have been granted, because Texas made no effort whatsoever to satisfy the rigorous demands of First Amendment scrutiny.

A. Under *Holder v. Humanitarian Law Project*, the anti-surcharge law regulates speech because it is triggered by speech.

Texas's anti-surcharge law prohibits a seller of goods or services from "impos[ing] a surcharge on a buyer who uses a credit card . . . instead of cash, a

check, or a similar means of payment." Tex. Fin. Code § 339.001(a). As all parties agree, this provision does not stop businesses from charging more for credit-card transactions than they do for non-credit-card transactions. ROA.439 n.3. It simply hinders businesses' ability to convey that fact to consumers. Thus, as Appellants explain, a business can legally sell a product to cash purchasers for $100 and to credit-card purchasers for $102. Yet the business violates Texas law if it describes that $2 difference as a credit-card "surcharge" rather than as a cash "discount." *See* Appellants' Br. 2. Indeed, Texas freely admits that "the restriction necessarily limits how merchants communicate with customers." ROA.193 (Defs.' Mot. Dismiss 11).

The district court nonetheless held that the anti-surcharge provision "does not implicate First Amendment speech rights" at all. ROA.440. By styling Appellants' communication of their pricing decisions as "economic conduct," the court substituted rational-basis review for First Amendment scrutiny. ROA.440.

This was error. As other courts have concluded in materially identical cases, "the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 445 (S.D.N.Y. 2013) (Rakoff, J.), *argued*, No. 13-4533 (2d Cir. Mar. 2, 2015); *see also Italian Colors Rest. v. Harris*, --- F. Supp. 3d ----, No. 2:14-cv-00604-MCE-DAD, 2015 WL 1405507, at

*6 (E.D. Cal. Mar. 26, 2015), *appeal docketed*, No. 15-15873 (9th Cir. Apr. 30, 2015); Appellants' Br. 21–22 (discussing other authority). More fundamentally, the district court's conclusion that Texas's law regulates conduct, rather than speech, cannot be squared with binding Supreme Court precedent.

The controlling decision is *Holder v. Humanitarian Law Project*—the Court's most recent and authoritative pronouncement on the line between speech and conduct. 561 U.S. 1. In that case, the Supreme Court considered the constitutionality of a federal law that criminalizes giving "material support" to designated foreign terrorists in the form of, among other aid, "training" and "expert advice or assistance." 18 U.S.C. § 2339B(g)(4); *see also* 561 U.S. at 8–9. The plaintiffs—U.S. citizens and domestic organizations—wished to provide training to a covered terrorist group "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." 561 U.S. at 14–15. Put more simply, they wanted to give prohibited "material support" by communicating advice. *See id.*

The government defended the challenged law by arguing that it governed only conduct, and not speech. *Id.* at 26. But the Supreme Court emphatically and unanimously rejected that argument. *See id.* at 28 (majority opinion); *id.* at 42

(Breyer, J., dissenting).[2] In doing so, the Court articulated a clear test for distinguishing speech from conduct, holding that the First Amendment is implicated whenever a law's applicability turns on the content of a speaker's message. *Id.* at 27–28 (majority opinion).

Applying that test to the material-support prohibition, the Court concluded that the law "regulates speech on the basis of its content," because whether the plaintiffs could lawfully communicate with designated terrorist organizations "depends on what they say." *Id.* at 27. If their speech imparted a "specific skill" or conveyed advice derived from "specialized knowledge"—training on international law, for example—then it would be barred. By contrast, if their speech conveyed general or unspecialized knowledge, it would be lawful. *Id.* So framed, the material-support law targeted parties' speech and called for heightened First Amendment scrutiny. *Id.*[3]

---

[2] Although Justice Breyer and two other Justices dissented from the majority's holding on the merits in *Holder v. Humanitarian Law Project*, the dissenting Justices agreed with the majority that the challenged law was a restriction on speech, not conduct. 561 U.S. 1, 42 (2010) (Breyer, J., dissenting).

[3] Unlike Texas, the government in *Humanitarian Law Project* did not advocate against all First Amendment scrutiny. *See id.* at 26–27 (majority opinion). Instead, the government argued for intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Thus, Texas's position in this case is even more extreme than the argument that the Supreme Court unanimously rejected in *Humanitarian Law Project*.

This reasoning applies with full force here. Appellants are lawfully permitted to charge customers a higher price if they use credit cards than if they use any other form of payment. ROA.439 n.3. What Texas's anti-surcharge law restricts is how sellers convey that price gap to consumers. In other words, whether businesses can alert customers to the different prices "depends on what they say." *Humanitarian Law Project*, 561 U.S. at 27. If they phrase the price difference as a discount for non-credit-card transactions, that is legal. But if they phrase the difference as an added cost for credit-card users, they are subject to enforcement at the hands of the Consumer Credit Commissioner. Tex. Fin. Code § 339.001(c). Because the only difference between a lawful "discount" and an illegal "surcharge" boils down to whether a speaker uses the government's preferred phrasing, "the conduct triggering coverage under the statute consists of communicating a message." *Humanitarian Law Project*, 561 U.S. at 28. Accordingly, the anti-surcharge provision must be reviewed as a content-based restriction on speech.

Indeed, Texas's restriction is even more clearly speech-oriented than the law at issue in *Humanitarian Law Project.* The federal material-support law barred many types of aid to terrorist groups, including obvious non-speech conduct such as furnishing "safehouses" and "lethal substances." 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). For this reason, it could be argued that the law "*generally* function[ed] as a regulation of conduct." 561 U.S. at 27–28. But the same cannot

be said for the anti-surcharge provision. Unlike the material-support law, Texas's law operates as a limit on speech alone; it is triggered exclusively by speech and therefore must be subject to the First Amendment.

Because the district court totally ignored *Humanitarian Law Project*, its opinion provides no response to this argument. Instead, the district court relied on broad generalizations from a handful of First Amendment cases that simply cannot carry the weight that the court placed on them. The most notable of these is *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), on which the district court relied for the proposition that "a State does not lose its power to regulate commercial activity . . . whenever speech is a component of that activity." ROA.442 (quoting *Ohralik*, 436 U.S. at 456). But while that is certainly true as a general proposition, the district court lifted this statement entirely out of context and, in doing so, ignored the actual holding of *Ohralik*, in which the Supreme Court held that the speech under review in that case—a lawyer's in-person solicitations—"[came] within the ambit of the [First] Amendment's protection." 436 U.S. at 455. And as the Court made clear, while a communication's commercial nature may inform "the level of appropriate judicial scrutiny," it certainly "does not remove the speech from the protection of the First Amendment" altogether. *Id.* at 457.

In short, the speech/conduct question in this case begins and ends with *Holder v. Humanitarian Law Project*. That case establishes that Texas's anti-surcharge law must be reviewed as a content-based restriction on commercial speech for the commonsense reason that it is triggered exclusively by commercial speech of a particular content. The district court's contrary ruling was error.

B. Texas has not even attempted to carry its First Amendment burden at the motion-to-dismiss or the preliminary-injunction stage.

Because Texas's surcharge law is a content-based restriction on speech, the district court should have denied Texas's motion to dismiss. Far from failing to state a claim upon which relief may be granted, Appellants have stated the same claim upon which relief *has been granted* in two substantively identical First Amendment cases. *See Italian Colors Rest.*, 2015 WL 1405507, at *9, 10 (granting summary judgment to plaintiffs in challenge to California's anti-surcharge law, declaring law unconstitutional, and enjoining its enforcement); *Expressions Hair Design*, 975 F. Supp. 2d at 444–47, 450 (preliminarily enjoining enforcement of New York's anti-surcharge law, followed by declaratory and permanent-injunctive relief). Accordingly, for the reasons explained in more detail in Appellants' opening brief, Appellants' Br. 32–53, the district court's decision granting Texas's motion to dismiss was error.

The district court also erred by failing to grant Appellants' motion for preliminary injunction, because it is clear that Texas did not come close to meeting its burden of opposing that motion under the appropriate level of First Amendment scrutiny. It is well established that "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). In this case, that means Texas bore the burden of demonstrating that it had a likelihood of success under the Supreme Court's *Central Hudson* standard for restrictions on commercial speech. *See Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (reversing denial of preliminary injunction and holding that "the State had the burden to prove all elements of the *Central Hudson* test").

Under the *Central Hudson* test, the government bears the burden of showing (1) that its interest in regulating the speech is substantial; (2) that its regulation directly advances that interest; and (3) that the regulation is no more excessive than necessary to serve that interest. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. Additionally, Supreme Court precedent makes clear that Texas could not carry this burden "by mere speculation or conjecture," but was instead required to demonstrate with actual evidence "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

Texas has necessarily failed to carry its burden because it made no effort whatsoever to "show[] its ability to justify the statute['s] constitutionality." *Byrum*, 566 F.3d at 446. The State barely hinted at what evidence might exist to sustain the anti-surcharge law under *Central Hudson* scrutiny, much less provide any evidence to the court below. In the face of this total evidentiary default, had the district court not erroneously granted Texas's motion to dismiss, the court would have had little choice but to grant Appellants' motion for preliminary injunction. Because the district court did not do so, its ruling should be reversed and this Court should remand this case with instructions to grant Appellants' motion for preliminary injunction.[4]

[4] Even under rational-basis review, which Texas advocated in the district court, the anti-surcharge law would be highly suspect. The district court identified only one conceivable justification: ensuring that "[i]n no event . . . will the price for an item be more than the posted price." ROA.441. Yet whatever the standard of scrutiny, the law does nothing to further that objective. As the state Attorney General's Office advised, Texas retailers are always free to add to their posted prices "an itemized and disclosed 'service fee'"—so long as that fee does not single out credit-card companies. Tex. Att'y Gen. Op. No. GA-0951, 2012 WL 2371475 (June 18, 2012).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ Paul M. Sherman

Paul M. Sherman
Samuel B. Gedge
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel.: 703.682.9320
Fax: 703.682.9321
E-mail: psherman@ij.org

Dated: June 16, 2015

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 2,548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font for the primary text and 14-point Times New Roman font for the footnotes.

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that this *Amicus Curiae* Brief of the Institute for Justice Supporting Plaintiffs-Appellants for Reversal has been filed with the Clerk of the Court and sent via the Court's ECF system to the following counsel of record:

Deepak Gupta
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009

Richard L. Coffman
THE COFFMAN LAW FIRM
First City Building
505 Orleans Street, Suite 505
Beaumont, TX 77701

Counsel for Plaintiffs-Appellants Lynn Rowell, et al.

Evan S. Greene
OFFICE OF THE SOLICITOR GENERAL FOR THE STATE OF TEXAS
209 W. 14th Street, 7th Floor
Austin, TX 78701

Maria A. Calaf
OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF TEXAS
Financial Litigation, Tax & Charitable Trusts Division
P.O. Box 12548
Austin, TX 78711-2348

H. Melissa Mather
OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF TEXAS
P.O. Box 12548
Capital Station
Austin, TX 78711-2548

Counsel for Defendant-Appellee Leslie L. Pettijohn

/s/ Paul M. Sherman
Paul M. Sherman
Counsel of Record for *Amicus Curiae*