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CONTACT: Deepak Gupta, (202) 888-1741

Consumers and Merchants Score First Amendment Victory in Battle over Swipe Fees; Federal Court of Appeals Strikes Down Florida's Credit-Card Surcharge Law

(WASHINGTON, DC) The U.S. Court of Appeals for the Eleventh Circuit yesterday struck down a Florida state law forbidding merchants from imposing a “surcharge” on any customer who pays with a credit card. The Court held that the law violates the First Amendment and discriminates “on the basis of the speech’s content, the identity of the speaker, and the message being expressed.”

“This is a major victory, not just for merchants but for consumers,” says Deepak Gupta, a Washington lawyer and consumer advocate serving as lead counsel for the plaintiffs.

Whenever consumers use credit cards, merchants pay swipe fees—which are typically passed along to all consumers in the form of higher prices. Merchants are allowed to charge different prices to consumers who pay with credit versus cash. But under laws in effect in Florida and nine other states, the price difference must be described as a “discount” for cash, not a “surcharge” for credit—even though they are mathematically identical. Until yesterday, the decision noted, a Florida merchant was “allowed to offer a discount for cash while a simple slip of the tongue calling the same price difference a surcharge [ran] the risk of being fined and imprisoned.”

The plaintiffs in the lawsuit—four small businesses—claimed that Florida’s law violated their constitutional right to free speech. “The state was seeking to enforce the credit-card industry’s preferred speech code,” Gupta says. “Merchants should be able to use whatever words are most effective to inform their customers about the high cost of using credit cards. Yesterday’s decision makes that clear.”

These kinds of “viewpoint-based restrictions on speech are among governments’ most insidious methods of eliminating unwelcome opinion,” the Eleventh Circuit noted yesterday. The court concluded, “By holding out *discounts* as more equal than *surcharges*, Florida’s no-surcharge law overreaches to police speech well beyond the State’s constitutionally prescribed bailiwick.”

National groups representing the interests of both retailers and consumers filed amicus briefs on behalf of the plaintiffs. “Swipe fees harm consumers and merchants alike,” says Ira Rheingold, Executive Director of the National Association of Consumer Advocates. “They’re like an invisible tax, funneling vast amounts of money from consumers to large banks and credit-card companies.” Americans pay the highest swipe fees in the world—eight times those paid by Europeans. The fees amount to about \$50 billion annually.

Federal judges in New York in California have struck down similar laws on First Amendment grounds; the New York ruling was recently overturned by appellate judges but is subject to rehearing or review by the U.S. Supreme Court.

Nine other states (California, Colorado, Connecticut, Kansas, Maine, Maine, New York, Oklahoma, and Texas) have laws similar to Florida’s. The laws have taken on new life since Visa and Mastercard, under a national class-action settlement, dropped contractual provisions prohibiting merchants from imposing surcharges.

The decision be viewed at the following link:
<http://guptawessler.com/wp-content/uploads/2015/11/Danas-CA11-decision.pdf>

Gupta Wessler PLLC

1735 20th Street, NW, Washington, DC 20009

P 202 888 1741 F 202 888 7792

guptawessler.com