Memo to Cannabis Regulators: The *Expressions Hair Design* Decision Does Not Limit Your Broad Authority to Restrict All Forms of Discounting

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I. INTRODUCTION

Cannabis discounts, like the drug itself, act through the brain to trigger physical responses of happiness and relaxation.[1] A 2012 study found that customers who received a $10 voucher experienced a 38% rise in oxytocin levels, their respiration rates dropped 32%, their heart rates decreased by 5% and their sweat levels were 20 times lower than shoppers who did not receive the incentive.[2] Sellers know about these physical effects of price discounting and exploit them to expand their customer bases, increase brand loyalty, and boost profitability and sales.[3] The discount-pleasure-sales chain reaction may be mutually beneficial to sellers and consumers, at least in the short term. This

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1. Danny Wong, *What Science Says About Discounts, Promotions, and Free Offers*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/danny-wong/what-science-says-about-discounts_b_8511224.html (on file with *The University of the Pacific Law Review*).

2. Jack Loechner, *A Rationale for Coupons (If You Need One)*, MEDIA POST: APPY AWARDS (Dec. 12, 2012), https://www.mediapost.com/appyawards/article/189450/a-rationale-for-coupons-if-you-need-one.html (cited in Wong, *supra* n.1.) (on file with *The University of the Pacific Law Review*) (the study was commissioned by Coupons.com).

3. Wong, *supra* note 1 (stating that sellers also employ pricing techniques other than discounting to increase sales); Pius Boachie, *5 Strategies of 'Psychological Pricing,'* ENTREPRENEUR (July 21, 2016), https://www.entrepreneur.com/article/279464 (on file with *The University of the Pacific Law Review*).

Pavlovian dynamic can be disastrous, however, when sellers deploy it to undermine government efforts to adjust price to reduce demand for products, like tobacco, alcohol, gambling, and now cannabis, which are dangerous to minors at low levels and to all consumers in excess.

Of course, sellers rely on psychological studies to craft their branding, media presence, and advertising to attract consumers and stimulate sales.[4] Studies show that "85% of a purchasing decision is emotional and only 15% rational,"[5] that colors trigger emotions, that image placement directs attention and retention of a message, and that humor provokes social media sharing and brand memory.[6] Cannabis sellers in newly legalized markets are following the same trajectory of tobacco and alcohol, employing experts,[7] expanding media platforms,[8] using established[9] and novel techniques,[10] moving from "wellness ads to mainstream, lifestyle-oriented ones,"[11] and focusing on branding[12] to build and cement market share.

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4. Amar Hussain, *Marketing Psychology: 9 Strategies to Influence Consumers*, FEINTERNATIONAL (Feb. 25, 2015), https://feinternational.com/blog/marketing-psychology-9-strategies-influence-consumers/; Eden Ames, *8 Psychological Tips for Your Marketing Strategy*, AMERICAN MARKETING ASSOCIATION, https://www.ama.org/publications/MarketingNews/Pages/8-Psychological-Tips-for-Your-Marketing-Strategy.aspx; Brett Langlois, *6 Psychology Studies With Marketing Implications*, POWERED BY SEARCH, https://www.poweredbysearch.com/blog/psychology-of-marketing/ (on file with *The University of the Pacific Law Review*).

5. Luisa Brenton, *5 Psychological Tactics to Influence Consumers*, JUST CREATIVE (July 27, 2016), justcreative.com/2016/07/27/5-psychological-tactics-to-influence-consumers/ (on file with *The University of the Pacific Law Review*).

6. *Id.*

7. MARIJUANA MARKETING GURUS, *available at* http://marijuanamarketinggurus.com/ (last visited June 27, 2017), (on file with *The University of Pacific Law Review*).

8. Peter Fimrite, *With Marijuana Going Legit, Marketing Blitz Takes a Hit*, SAN FRANCISCO CHRONICLE (Oct. 18, 2016), *available at* http://www.sfchronicle.com/bayarea/article/As-marijuana-goes-legal-marketing-blitz-takes-9979294.php (on file with *The University of the Pacific Law Review*) ("Vashon Velvet, a artisanal grower on Vashon Island in Puget Sound, reaches customers through Facebook, Instagram and Twitter. The slogan on the elegant packaging reads, 'For the pursuit of Happiness.' The plants go by names like Platinum Blueberry, Laughing Buddha and, yes, Acapulco Gold").

9. Nicole van Rensburg, *Marijuana Marketing Strategies that Build Brand Equity*, SMALL BUSINESS TRENDS: MARKETING TIPS (Jan. 3, 2017), https://smallbiztrends.com/2017/01/marijuana-marketing.html (on file with *The University of the Pacific Law Review*).

10. Roger Fillion, *4 Novel Marijuana Marketing Strategies*, MARIJUANA BUSINESS MAGAZINE (July 2016), https://mjbizmagazine.com/4-novel-marijuana-marketing-strategies/ (on file with *The University of the Pacific Law Review*).

11. Vauhini Vara, *The Art of Marketing Marijuana*, THE ATLANTIC (Apr. 2016), https://www.theatlantic.com/magazine/archive/2016/04/the-art-of-marketing-marijuana/471507/ (on file with *The University of the Pacific Law Review*).

12. Rick, *Three Effective Strategies for Cannabis Marketing*, MARIJUANA MARKETING GURUS (Aug. 1, 2015), http://marijuanamarketinggurus.com/three-effective-strategies-cannabis-marketing/ (on file with *The University of the Pacific Law Review*) ("Brand marketing has become the most effective tool in the cannabis industry as an increasing number of companies are targeting to expand their business across cities, states and international boundaries").

Public health agencies cannot restrict psychological appeals embedded in product messaging without running into the restrictions of the Constitution's free speech guarantee,[13] which extends to commercial advertising.[14] The category of commercial speech includes all the many types of ways that sellers may try to communicate with potential buyers, including graphics,[15] images,[16] colors,[17]

13. U.S. CONST. amend. I ("Congress shall make no law abridging the freedom of speech"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the Constitution's free speech guarantee to apply to the states through the Fourteenth Amendment's due process clause).

14. Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). There is some question whether the United States Constitution limits state regulation of cannabis advertising, so long as sale of the product remains illegal federally. First Amendment protection for advertising applies only if it promotes a "lawful" product or service. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). Marijuana is not lawful at the federal level, and some commentators have concluded that this means that the federal Constitution's free speech guarantee does not protect marijuana advertising in states where it is legal. Jacob Sullum, *Are Marijuana Ad Restrictions Constitutional?*, REASON: HIT & RUN BLOG (Mar. 15, 2013), http://reason.com/blog/2013/03/15/are-marijuana-ad-restrictions-constituti ("Since marijuana is still prohibited by federal law, a First Amendment challenge to advertising restrictions like those suggested by the task force would not be viable") (on file with *The University of the Pacific Law Review*); Jacob Sullum, *Legalize It, But Don't Advertise It:* High Times *Fights Colorado's Restrictions on Marijuana-Related Speech*, FORBES (Aug. 28, 2014), http://www.forbes.com/sites/jacobsullum/2014/08/28/legalize-it-but-dont-advertise-it-high-times-fights-colorados-onerous-restrictions-on-marijuana-related-speech/#4be33acb4656 (on file with *The University of the Pacific Law Review*) (quoting UCLA law Professor Eugene Volokh: "I don't see how marijuana sales are lawful, given the federal prohibition, so I think advertising marijuana is not protected under commercial speech doctrine"); Mont. Cannabis Indus. Ass'n v. Montana, 368 P.3d 1131, 1150 (Mont. 2016) (''[A]n activity that is not permitted by federal law—even if permitted by state law—is not a 'lawful activity' within the meaning of *Central Hudson*'s first factor''); Alex Kreit, *What Will Federal Marijuana Reform Look Like?* 65 CASE W. RES. L. REV. 689, 714 (2015) ("Federal prohibition . . . allow[s] for a complete ban on marijuana advertising because there is no First Amendment right to advertise the sale of an illegal good"). This conclusion, however, is not clearly correct. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, Mass., 851 F. Supp. 2d 311, 315 (D. Mass. 2012) (interpreting Supreme Court precedent to mean "that an activity is 'lawful' . . . so long as it is lawful where it will occur") (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). Additionally, states may follow the lead of California and interpret federal commercial speech doctrine into their own constitutional free speech guarantees. Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468, 490 (2000) ("[A]s to the points noted in our discussion of the First Amendment's free speech clause and its right to freedom of speech, article I's free speech clause and *its* right to freedom of speech, *mutatis mutandis*, are at least in accord" (emphasis in original)); id. at 493-94 ("[A]rticle I's right to freedom of speech protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services"); Jacob Sullum, *Would Colorado's Courts Overturn Restrictions on Marijuana Ads?*, REASON: HIT & RUN BLOG (Mar. 18, 2013), https://reason.com/blog/2013/03/18/will-colorados-courts-overturn-restricti (on file with *The University of the Pacific Law Review*) (quoting a Colorado lawyer who specializes in free speech: "The Colorado Supreme Court has repeatedly held that Article II, Section 10, of the state constitution, which prohibits any law 'impairing the freedom of speech' and promises that 'every person shall be free to speak, write or publish whatever he will on any subject,' is more protective than the First Amendment"); Kasky v. Nike, Inc., 27 Cal. 4th 939, 959 (2002) ("This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech" (emphasis in original)). In the face of uncertainty and possible change in federal law, and to avoid expensive litigation, the federal free speech guarantee, as interpreted by the Supreme Court, should be the guidepost for state and local marijuana marketing regulations.

15. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (Confederate flag logo on proposed commemorative license plate); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 566-67 (6th Cir. 2012) (graphics on a cigarette warning label).

lights, sounds,[18] size,[19] physical proximity, other attention-drawing devices such as pop-up web advertisements, dangling in-store displays, or odd juxtaposed images,[20] and likely even undisclosed messaging, such as product placements[21] or hidden messaging.[22] And the Supreme Court has interpreted increasingly rigid limits on advertising regulations into the Constitution's free speech guarantee, leaving public health agencies very few means to counteract the barrage of persuasive messaging aimed at expanding the consumer base and increasing per capita consumption once the underlying sales transaction has been made legal.[23]

The doctrinal reality at the federal level, and the growing frenzy of production and marketing on the ground in newly legalized states, makes it crucial that agencies charged with protecting public health from abuse and overuse of cannabis use the regulatory tools that do not implicate the free speech guarantee. Whether a particular sales practice is "expressive" and protected by the free speech guarantee hinges on whether the seller intends to communicate a message by means of the conduct and whether an audience is likely to understand it as a communication.[24] Many aspects of cannabis sale transactions do not even

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16. Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 647-48 (1985) (illustration of an intrauterine device in attorney advertisement); Saint John's Church in the Wilderness v. Scott, 296 P.3d 273, 283 (Colo. Ct. App.), reh'g denied (Aug. 2, 2012) and cert. denied, 133 S. Ct. 2798 (2013) (images of mutilated fetuses).

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969) (black armband); Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459, 1461-62 (C.D. Cal. 1993) (colors and logos of sports teams adopted by gangs).

18. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (music).

19. *See, e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015) (ordinance regulating size of temporary directional signs); Peterson v. Village of Downers Grove, 150 F. Supp. 3d 910, 919-20 (N.D. Ill. 2015) (ordinance restricting total area of signage).

20. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 725 (2010) ("As we are exposed to more and more, it becomes harder to get our attention, so promoters are forced to further extremes. Advertising clutter drives marketers to put messages on fire hydrants and potholes, on eggs, in urinals, on the bellies of pregnant women, and anywhere else that might surprise us out of our willful disregard.").

21. Rita Marie Cain, *Embedded Advertising on Television: Disclosure, Deception and Free Speech Rights*, 30 J. PUB. POL'Y & MKTG. 226, 230 (2011) ("[T]he law is clearly unsettled regarding undisclosed advertising and whether it is inherently deceptive or entitled to free speech protection under the First Amendment.").

22. Liz Stinson, *12 Hidden Tricks Advertisers Use to Sell You Stuff*, WIRED (June 11, 2014), https://www.wired.com/2014/06/5-hidden-visual-tricks-advertisers-use-to-sell-you/ (on file with *The University of the Pacific Law Review*) (noting, among other examples, that Heineken's "e" is tilted backward to look like a smile).

23. Regulators may seek to counteract the persuasive impact of advertising on consumers who may not legally purchase the product, such as minors. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (recognizing that the state may "protect[] children from tobacco advertisements"). The regulations must, however, survive *Central Hudson* review. *Id*. at 567 (applying the *Central Hudson* test and finding that a "blanket" restriction of in-store advertising below five feet high "does not constitute a reasonable fit with [the goal of avoiding the enticing impact of tobacco advertising on children.]").

24. Spence v. Washington, 418 U.S. 405, 410-11 (1974) (conduct is expressive and protected by the First

arguably send a communication. These include regulations of the quality and potency of the products, the variety of products (liquid, weed, edible), permissible product ingredients, the type and permissible locations and hours of operation of retail vendors, retail licensing, minimum purchasing ages, and maximum quantities of purchase.[25] None of the heightened levels of Free Speech Clause review apply to these types of regulations. They are subject only to minimum due process and equal protection rational basis review.[26]

A particularly potent regulatory tool is product price adjustment. Tobacco[27] and alcohol[28] price adjustments directly affect the level of consumption, which, in turn, averts public health harms.[29] The first recommendation of the authors of a 2014 paper advising on developing public health regulations for marijuana is to keep prices artificially high.[30] The history of tobacco taxes as a public health

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Amendment if "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood [i]s great that the message would be understood by those who viewed it").

25. Institute of Medicine, *Legal Strategies in Childhood Obesity Prevention: Workshop Summary* 33 (2011), THE NATIONAL ACADEMIES PRESS, https://www.nap.edu/read/13123/chapter/6 (last visited June 5, 2017) (on file with *The University of the Pacific Law Review*) ("Regulations on the sale and advertising of foods can be tailored in a variety of ways so as not to constitute unlawful restrictions on free speech.. . . Increasing the price of a product, limiting per capita purchases, banning or limiting harmful products or ingredients, and instituting age limits on the sale of a product have all yielded benefits with other products and could be applied to foods"); *Restricting Tobacco Advertising and Promotions: Dealing with Legal Obstacles*, COUNTER TOBACCO.ORG (Feb. 9, 2016), http://countertobacco.org/restricting-tobacco-advertising-and-promotions-dealing-with-legal-obstacles/ (last visited June 5, 2017) (on file with *The University of the Pacific Law Review*) ("[S]olutions that do not involve restricting commercial speech include: Tobacco retailer licensing programs and tobacco retailer reduction strategies, raising the minimum legal sales age to 21[and] banning tobacco sales in pharmacies").

26. Williams v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

27. Anne-Marie Perucic, Tobacco Control Economics, Tobacco Free Initiative, World Health Organization, *The Demand for Cigarettes and Other Tobacco Products*, Slides from presentation to TobTaxy Capacity Building Workshop, Dublin, Ire. (Feb. 20-22, 2012), *in* http://www.who.int/tobacco/economics/meetings/dublin_demand_for_tob_feb2012.pdf; NATIONAL CANCER INSTITUTE, DIV. OF CANCER CONTROL & POPULATION STUDIES, THE IMPACT OF TAX AND PRICE ON THE DEMAND FOR TOBACCO PRODUCTS, MONOGRAPH 21: THE ECONOMICS OF TOBACCO AND TOBACCO CONTROL, (Jan. 2017) *in* https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21_4.pdf.

28. Frank J. Chaloupka, Michael Grossman & Henry Saffer, *The Effects of Price on Alcohol Consumption and Alcohol-Related Problems*, NATIONAL INSTITUTES OF HEALTH: NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM (Aug. 2002), https://pubs.niaaa.nih.gov/publications/arh26-1/22-34.htm ("The most fundamental law of economics links the price of a product to the demand for that product. Accordingly, increases in the monetary price of alcohol (i.e., through tax increases) would be expected to lower alcohol consumption and its adverse consequences. Studies investigating such a relationship found that alcohol prices were one factor influencing alcohol consumption among youth and young adults. Other studies determined that increases in the total price of alcohol can reduce drinking and driving and its consequences among all age groups; lower the frequency of diseases, injuries, and deaths related to alcohol use and abuse; and reduce alcohol-related violence and other crime.").

29. Rosalie Liccardo Pacula, et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1022 (June 2014), https://www. ncbi.nlm.nih.gov/pmc/articles/PMC4062005/ (on file with *The University of Pacific Law Review*) ("Hundreds of studies on tobacco and alcohol show that raising prices reduces consumption and a long list of related health and social harms.").

30. *Id*.

strategy, however, includes aggressive discounting strategies deployed by sellers to counteract the effect on consumers.[31] Popular discounting schemes include coupons redeemable for cents or dollars off the price, volume discounts (e.g., buy one, get one free), free samples, and free merchandise give-aways with a product purchase (e.g., a free smokeless tobacco product with a cigarette purchase).[32]

A number of years ago, a majority of the Court's Justices made clear that regulations aimed at raising the price of alcohol to decrease demand do not directly restrict speech and are not subject to Free Speech Clause scrutiny.[33] This distinction between constitutionally permissible prohibitions of the conduct of price discounting to reduce demand, and impermissible restrictions of advertising speech to achieve the same end, has held firm despite sellers' efforts to characterize "price" as "speech."[34] Recently, the Court held that a state law that prohibits a retailer from "impos[ing] a surcharge" on credit card transactions regulates speech.[35] This interpretation, if not read carefully and in context, could appear to upend the longstanding distinction between price regulations aimed at conduct and advertising restrictions aimed at speech. Product manufacturers will undoubtedly try to use the precedent aggressively to expand the range of marketing restrictions subject to Free Speech Clause scrutiny.[36] They must not succeed. Public health agencies seeking to reduce demand for cannabis and other health-hazard products must understand the meaning and limits of this recent precedent, so that they can wield the tool of price regulation with confidence and protect the boundary between conduct regulations that are subject to minimum rational basis scrutiny even though they may impact speech incidentally, and regulations that aim at speech directly and are subject to some level of Free

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31. Tobacco Control Legal Consortium, *Death on a Discount: Regulating Tobacco Product Pricing*, PUBLIC HEALTH LAW CENTER (Nov. 2015), http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-death-on-discount-2015.pdf (on file with *The University of Pacific Law Review*) ("The tobacco industry uses a variety of innovative pricing strategies to discourage current tobacco users from quitting, to entice new customers to purchase their products, and to reduce the effectiveness of tobacco tax increases."); Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I., 731 F.3d 71, 75 n.3 (1st Cir. 2013) (collecting testimony and evidence).

32. Tobacco Control Legal Consortium, *supra* note 31.

33. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (Stevens, J., plurality opinion) (regulations that do "not involve any restriction on speech" include maintaining higher prices "by direct regulation or by increased taxation"); *id.* at 530 (O'Connor, J., concurring) (other methods at the state's disposal "without intruding on sellers' ability to provide truthful, nonmisleading information to consumers" are "minimum prices" or "increase[ed] sales taxes").

34. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York, 27 F. Supp. 3d 415, 421 (S.D.N.Y. 2014) (rejecting manufacturers' argument that coupons and discount offers are speech); Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I., 731 F.3d 71, 76 (1st Cir. 2013) (same).

35. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150-51 (2017) (citing N.Y. Gen. Bus. Law § 518).

36. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York, 27 F. Supp. 3d 415, 422 (S.D.N.Y. 2014) (rejecting manufacturers' argument that coupons and discount offers are speech); Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I., 731 F.3d at 76 (1st Cir. 2013) (same).

Speech Clause review.

II. BACKGROUND TO COMMERCIAL SPEECH

The Court first articulated the rationale for protecting commercial speech in the context of reviewing a state restriction on price advertising.[37] In *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, the Court invalidated a state law that prohibited advertising of prescription drug prices.[38] In language repeated through the line of later cases, the Court condemned what it characterized as the "highly paternalistic approach" adopted by the state of keeping truthful price information from consumers based on the assumption that they will not use it well.[39] According to the Court, the Constitution embodies the presumption "that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[40] Although it interpreted the Constitution to protect commercial speech, the Court also noted "commonsense differences" between it and fully protected speech that "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." [41]

In *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*,[42] the Court borrowed from its intermediate-level test for assessing content-neutral time, place or manner regulations to create a similar standard of review for commercial speech restrictions.[43] Under the *Central Hudson* test, courts assess the weight of the government's purpose and the degree of tailoring of the speech-restrictive means apparent in the regulation more deferentially than they do when the government restricts fully protected speech based upon its content. Specifically, the *Central Hudson* test contains four prongs.[44] The first prong is not a part of the end/means balancing, but is rather a prerequisite to First Amendment protection.[45] For commercial speech to receive free speech protection, it must (1)

37. The Court began its movement toward interpreting commercial speech as protected in Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

38. Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

39. *Id.*

40. *Id.*

41. *Id.* at 771 n.24 (Specifically, "the greater objectivity and hardiness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker," "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," and render "inapplicable the prohibition against prior restraints.").

42. 447 U.S. 557 (1980).

43. *Id.*

44. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

45. *Id.* at 566 ("At the outset, we must determine whether the expression is protected by the First

"concern lawful activity and not be misleading."[46] The other inquiries are: (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is "not more extensive than is necessary to serve that interest."[47]

In subsequent cases, the Court has tightened the *Central Hudson* test, and suggested that an unspecified type of "heightened scrutiny" applies to regulations that suppress truthful commercial speech.[48] Whatever the precise level of scrutiny may be, the practical result of this movement in commercial speech jurisprudence is that public health agencies will not prevail if their reason for restricting truthful advertising is their "fear that people w[ill] make bad decisions" after receiving persuasive messaging aimed at inducing them to make a legal purchase of a potentially dangerous product.[49] Although the ends may be legitimate, and even highly important ("improved public health and reduced healthcare costs"), the "indirect" means of "keep[ing] people in the dark for what the government perceives to be their own good" will condemn the regulation as unconstitutional.[50] The "consumer's concern for the free flow of commercial speech" is particularly keen "in the fields of medicine and public health, where information can save lives,"[51] according to the Court.[52]

One additional wrinkle in commercial speech jurisprudence relevant to public health regulators comes from the Court's opinion in *Lorillard Tobacco Co. v. Reilly*.[53] In that case, manufacturers and retailers challenged, among many other things, restrictions on self-service displays, and on free samples and promotional give-aways.[54] The Court did not address the latter challenge because it was not sufficiently briefed and argued.[55] As to the requirement that tobacco products be sold through sales staff, the Court applied its expressive conduct test articulated in *United States v. O'Brien*.[56] The *O'Brien* test applies when conduct restricted by the government for reasons unrelated to communication can be used

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Amendment").

46. *Id.*

47. *Id.*

48. Sorrell v. IMS Health, Inc., 564 U.S. 552, 565 (2011).

49. Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

50. *Sorrell*, 564 U.S. at 577 (quoting 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996) (Stevens, J., plurality opinion)).

51. *Id.* at 566 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)).

52. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996) (rejecting an exception to usual commercial speech restrictions for "vices"—products or activities that pose threats to public health or safety, finding the "vice" label to be indeterminate, and "unaccompanied by a corresponding prohibition against the commercial behavior at issue to provide a principled justification for the regulation of commercial speech about that activity.").

53. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

54. *Id.* at 534–36.

55. *Id.* at 553.

56. United States v. O'Brien, 391 U.S. 367 (1968).

by some people as a means of speech.[57] The state restricted self-service displays for the purpose of preventing access by minors to the product.[58] Tobacco retailers argued that self-service displays sent a message through proximity to adult consumers and by allowing consumers to receive messages from the product itself through touch and smell.[59]

Without deciding, the Court assumed that the tobacco sellers had "a cognizable speech interest in a particular means of displaying their products."[60] Because it applies in instances where the government's purpose is not to suppress messaging, the *O'Brien* test is significantly less rigorous than the modern *Central Hudson* test. The Court found the government's interest in preventing physical access to the product by minors to be substantial, the means of preventing self-service narrowly tailored, and alternate means of display to be available to the tobacco sellers.[61] *Lorillard* is a relevant reminder to public health regulators that even pure, nonspeech intentions may not save their regulations from some level of Free Speech Clause scrutiny. Nevertheless, the limits of *Lorillard* are important for regulators to bear in mind as well. One of these is that the Court assumed a speech interest in a particular type of marketing practice, without deciding that it exists.[62] The other is that the conduct at issue was a method of marketing display, which is a means of interaction between the seller and the customer, not an inherent attribute of the product, or of the sale transaction, which can be spoken about in a marketing communication, but cannot be independent means of speech.[63]

III. PRICE DISCOUNTING IN THE COMMERCIAL SPEECH FRAMEWORK

A. 44 Liquormart

After its decision in *Virginia Pharmacy*, the Court revisited the principles that constrain government restrictions on price advertising in *44 Liquormart, Inc. v. Rhode Island*.[64] Whereas in *Virginia Pharmacy* the Court reviewed the

57. *Id.* at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

58. Lorillard, 533 U.S. at 569-70.

59. *Id.* at 569.

60. *Id.* at 569-70.

61. *Id.*

62. *See generally* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

63. Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 49 (1st Cir. 2005) ("It is the duty of the party seeking to engage in allegedly expressive conduct to demonstrate that the First Amendment applies to that conduct. W & S has offered no plausible argument as to why the provision of advertising services [separate from the advertising itself] is an inherently expressive activity.").

64. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

constitutionality of the price restriction in light of the state's purpose to promote pharmacist "professionalism," in *44 Liquormart* the state's purpose was to promote public health by reducing excessive consumption of a potentially dangerous product.[65] The Court reviewed the constitutionality of the price advertising ban in light of this public health purpose, and so the various opinions written by the Justices to explain their reasoning, read together, provide the best blueprint for regulators seeking to manage demand for newly legalized cannabis products.[66]

The Justices delivered their decision through a number of opinions. Justice Stevens wrote the opinion of the Court rejecting the state's argument that the Twenty-first Amendment provided it the authority to enact the price advertising ban, and announcing the holding.[67] He wrote a plurality opinion joined by Justices Kennedy, Souter and Ginsberg, opining that review of "blanket bans" of truthful commercial speech should be subject to stricter review than set out in the *Central Hudson* test.[68] Nevertheless, the Stevens plurality also applied the *Central Hudson* test and found that the pricing advertising ban failed it. Justice O'Connor wrote a concurring opinion joined by Justices Rehnquist, Souter, and Breyer, applying the *Central Hudson* test only, and reaching the same result at the Stevens plurality.[69] Justice Thomas noted that both the Stevens and O'Connor pluralities appeared to adopt a "stricter, more categorical interpretation of the fourth prong of *Central Hudson*" than in previous opinions, one that could, "as a practical matter, go a long way toward [his position that strict scrutiny should apply to restrictions of truthful commercial speech.]"[70] As set out below, application of *Central Hudson*'s fourth prong is where the Justices in their various opinions have distinguished the unconstitutional means of restricting price advertising from constitutionally permissible restrictions of price discounting. So, points of agreement among the Justices at this part of the analysis provide strong precedent for public health regulators to use the tool of price discounting restrictions freely.

In *44 Liquormart*, alcohol sellers challenged a state law that banned retail price advertising except at the place of sale.[71] The state's goal was to promote public health by reducing alcohol consumption. The state reasoned that higher alcohol prices lead to lower alcohol consumption, and that competitive price

65. *Id.* at 504 (assuming the state's interest in promoting temperance and discussing different meanings).

66. Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I., 731 F.3d 71, 76 (1st Cir. 2013) ("In determining the views of the court as a whole, we may aggregate the views expressed in the various separate opinions.") (citing League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 413–14, 431–35 (2006); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 17 (1983)).

67. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

68. *Id.* at 518 (Justice Thomas agreed with this conclusion but did not join the opinion).

69. *Id.* at 524 (O'Connor, J., concurring in the judgment).

70. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

71. *Id.* at 504.

advertisements lead to lower alcohol prices.[72] The state thus used the means of restricting price advertisements to achieve the intermediate goal of raising prices, which, in turn, would achieve its primary public health purpose, which was to reduce excessive drinking.[73]

The Stevens plurality pieced through this causation chain and accepted it as reasonable.[74] It nevertheless struck down the advertising ban. In the course of doing so, it made clear that the constitutional problem with this type of regulation aimed at raising prices is not the state's objective of reducing demand for a potentially dangerous product.[75] It is within a state's police powers to choose to regulate product sellers to achieve this end. Instead, the constitutional defect is the state's use of the *indirect* means of restricting advertising rather than the *direct* means of prohibiting discounting.[76] Both the Stevens plurality's application of the *Central Hudson* test, and its reasoning confirm that the tool of restricting price discounting in its many, demand-inducing manifestations, is available to public health regulators free of Free Speech Clause constraints.

In applying the *Central Hudson* test, the Stevens plurality found that the state failed to meet its third and fourth prongs.[77] The third prong requires that the state show that its speech-restrictive means directly or significantly advance its interest. The Stevens plurality acknowledged that the price advertising ban "may have some impact" on the consumption of some consumers.[78] Nevertheless, it picked apart the state's evidence, questioning its details and relationship to the goal of "temperance" in numerous particulars to support its conclusion that the state had failed to show a sufficient relationship between the price advertising ban and its goal of reducing alcohol consumption.[79]

Both the Stevens plurality and Justice O'Connor, with the Justices who joined her concurring opinion, explained application of *Central Hudson's* fourth prong. Both found the price advertising ban to fail the requirement that it be "no[] more extensive than necessary" because direct price regulation was a constitutionally permissible tool to achieve the same end.[80] The Stevens plurality specifically noted that the alternatives of "direct regulation" or "increased taxation" do "not involve any restriction on speech."[81] Justice O'Connor agreed

72. *Id.* at 505.

73. *Id.* at 505 (reciting the chain of reasoning).

74. *Id.* (finding that "common sense" supports the assertion that lower competition leads to higher prices, and accepting as "reasonable" the assumption that higher prices reduce demand).

75. *Id.* at 504 (assuming that the state asserted a legitimate interest in promoting temperance, and proceeding to evaluate the fit between the means and end under the other *Central Hudson* test prongs).

76. *Id.* at 507 (finding that the state "failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal).

77. *Id.* at 507–08.

78. *Id.* at 506.

79. *Id.* at 506–07.

80. *Id.* at 508, 534.

81. *Id.* at 507.

that "other methods at [the state's] disposal" such as "establishing minimum prices" or "increasing sales taxes" would "more directly accomplish th[e] stated goal without intruding on [protected speech.]"[82]

Justice Thomas distinguished impermissible price advertising restrictions from permissible regulations of marketing conduct, such as pricing, in even greater detail. He read the Stevens and O'Connor opinions as "commit[ting] the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users."[83] As examples of permissible direct regulations, he listed "directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways)."[84] He noted that "direct regulation is, in one sense, more restrictive of *conduct* generally [than restrictions of advertising]," because consumers will have no access to particular types of products, prices, or places of purchase.[85] In his view, however, and in the views of the Justices expressed in other opinions, more restrictive conduct restrictions are permissible because they are politically visible[86] and within states' police powers[87] whereas the Free Speech Clause prohibits states from using the means of suppressing truthful speech to achieve the permissible end of "dampening demand."[88]

B. Recent Lower Court Decisions

In recent decisions, a panel of the First Circuit Court of Appeals and a district court in the Southern District of New York upheld local tobacco price restrictions against manufacturers' claims that the regulations violated their free speech rights. The First Circuit court addressed a City of Providence ordinance that restricted tobacco and cigarette retailers from reducing prices through coupons or

82. *Id.* at 530 (O'Connor, J., concurring in judgment).

83. *Id.* at 524.

84. *Id.* at (Thomas, J., concurring in part and concurring in judgment).

85. *Id.* (emphasis in original).

86. *Id.* at 509. The Stevens plurality opinion went on to address arguments for deference to the state's choice of means. In refusing to defer to the state's choice to restrict advertising, the plurality repeatedly emphasized the difference between indirect speech restrictions and direct restrictions of conduct, such as pricing, to which the Court defers. First, the state argued that it should be permitted to choose to suppress advertising if the evidence as to the efficacy of this means is mixed. The plurality rejected this argument, noting that the Constitution precludes deference toward the choice of the means of suppressing speech because it shields the state's underlying policy choice to blunt demand for a legal product or activity from "the public scrutiny that more direct, nonspeech regulation would draw."

87. *Id.* at 512 ("commercial speech concerns products and services that the government may freely regulate").

88. *Id.* at 526 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 512 ("attempts to regulate speech are more dangerous than attempts to regulate conduct" and so "speech restrictions cannot be treated as simply another means that the government may choose to achieve its ends") (plurality opinion).

multi-pack discounts "(e.g., 'buy-two-get-one-free' [offers])."[89] The court noted that the city enacted the ordinance for the purpose of reducing youth tobacco use.[90] It cited evidence demonstrating that youth are particularly price-sensitive and tobacco companies exploit this price sensitivity through various types of discounting, which provokes youth initiation and creates addicted consumers.[91] The court acknowledged that "[p]ricing information concerning lawful transactions has been held to be protected speech," but distinguished the Providence restrictions of "pricing practices" from restrictions on the "dissemination of pricing information."[92] Relying on the combined opinions of the Justices in *44 Liquormart*, it concluded that "price regulations designed to discourage consumption do not violate the First Amendment."[93] It also rejected the sellers' claim that prices are expressive conduct, subject to the *O'Brien* test.[94] It distinguished the *Lorillard* Court's comments about self-service cigarette marketing, noting that in that case, the regulated activity pertained to "the display and dissemination of information to consumers."[95]

At issue in the second decision was a New York City ordinance that prohibited various forms of tobacco discounting, including coupons, multi-pack promotions, gifts with sale, and other promotions offering tobacco products below their list price.[96] The practical effect of the ordinance was that the only way for manufacturers or retailers to change the price of tobacco products was to change the listed price. The district court noted legislative findings showing the city's purpose to "reduce tobacco use among adults and to prevent youths from beginning to use tobacco products" and that "numerous studies have demonstrated that high tobacco prices reduce consumption among both youths, who are especially price-sensitive, and adults."[97]

Once again, tobacco sellers argued that the price restrictions should be subject to Free Speech Clause scrutiny. Specifically, they claimed that they "use coupons and discount offers to tell their consumers that they are 'getting a deal' if they purchase the product at a particular price, to encourage them to purchase a particular brand, or to make their purchase at a particular location."[98] The court,

89. Providence, R.I., Code of Ordinances § 14–303 (prohibiting retailers from "accept[ing] or redeem[ing], [or] offer[ing] to accept or redeem . . . any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price," and from "sell[ing] tobacco products to consumers through any multi-pack discounts. . .").

90. Nat'l Ass'n of Tobacco Outlets, Inc., v. Providence, R.I., 731 F.3d 71, 75 (1st Cir. 2013).

91. *Id.* at 75 n.3 (1st Cir. 2013).

92. *Id.* at 77.

93. *Id.*

94. *Id.* at 78.

95. *Id.*

96. N.Y.C. Admin. Code § 17–176.1(b) and § 17–176.1(c), cited in Nat'l Ass'n of Tobacco Outlets, Inc., v. City of New York, 27 F. Supp. 3d 415 (S.D.N.Y. 2014).

97. Nat'l Ass'n of Tobacco Outlets, Inc., 27 F. Supp. 3d at 417-18.

98. *Id.* at 421.

citing from the First Circuit's recent decision, distinguished regulation of commercial *speech* from regulation of pricing *practices*.[99] Like the First Circuit, the court read the combined opinions of the Justices in *44 Liquormart* to "demonstrate that price regulations designed to discourage consumption of a potentially harmful product do not violate the First Amendment so long as they do not preclude the effected retailers' ability to provide truthful, nonmisleading information about the regulated product to consumers."[100] The court emphasized that the New York ordinance "only regulates an economic transaction—the sale of tobacco products below the listed price," not "the dissemination of pricing information."[101] For this reason, the court found the ordinance "does not violate the First Amendment."[102]

In reaching this conclusion, the court reviewed the numerous methods of discounting prohibited by the New York ordinance, and found them all to permissibly regulate conduct and not speech. According to the court, "These regulations are different variations of the same strategy—regulating the sale of cigarettes and tobacco products below the listed price—that simply approach the issue in a different manner."[103] Finally, the court rejected the sellers' contention that the ordinance restricted speech because it precluded "offering to sell cigarettes and tobacco products below the listed price."[104] The court noted that "offers to engage in illegal transactions are categorically excluded from First Amendment protection."[105] "In this case," it said, "the offers that are restricted by the ordinance are offers to engage in an unlawful activity—namely, the sale of cigarettes and tobacco products below the listed price."[106] Consequently, "the ordinance lawfully prohibits retailers from offering what the ordinance explicitly forbids them to do."[107]

IV. *EXPRESSIONS HAIR DESIGN V. SCHNEIDERMAN*

These lower court applications of Supreme Court precedent confirm that regulations aimed at prohibiting any of the many methods of price discounting by sellers impact the conduct of engaging in a sales transaction, not speech. This remains true despite the Court's recent decision in *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144 (2017). In that case, the Court interpreted a

99. *Id.* at 422.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 423.
104. *Id.*
105. *Id.* (quoting United States v. Williams, 553 U.S. 285, 297 (2008)).
106. *Id.*
107. *Id.*

statute that appears on its face to regulate pricing conduct only, to abridge speech.[108] A bizarre and confusing statutory history unique to the statute at issue[109] explains the Court's holding. Nevertheless, product sellers will likely seek to use it to cut away at the legitimate scope of public health regulatory authority. Therefore, it is crucial to parse the Court's brief reasoning with care. A close reading confirms that its holding hinged on statutory interpretation, specifically interpretation of the particular government regulator's intent, and does not in any way undercut or change the core doctrinal distinction between pricing conduct and speech. Regulators must understand the place of this decision in commercial speech jurisprudence to craft regulations, defend against challenges, and hold their ground.

The *Expressions Hair Design* case arose out of a longstanding battle between credit card companies and merchants.[110] Merchants do not like to pay transaction fees to credit card companies, and many would like to pass the extra cost along to consumers who choose to pay with cards. Credit card companies succeeded in getting Congress, for a time,[111] and then state legislatures,[112] to prohibit merchants from imposing "surcharges" on credit card transactions. At the same time, merchants could offer "discounts" to consumers who chose to pay with cash.[113] New York General Business Law section 518 explicitly prohibited "surcharge[s]," and although the provision did not say so explicitly, all parties agreed that the statute did not bar sellers from offering an equivalent "discount" to consumers who use cash.[114] This apparent economic anomaly was the focal point at all levels of review.

The lower courts reached different results as to whether the statute regulated speech or conduct. The district court imported the history of the surcharge/discount oddity at the federal level into its interpretation of the state legislature's intent. As the district court recited the history, after Congress banned credit card companies from prohibiting discounts for paying in cash by

108. N.Y. Gen Bus. Law § 518 ("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.").

109. Expressions Hair Design v. Schneiderman, 975 F. Supp. 2d 430, 435 (S.D.N.Y. 2013) ("Alice in Wonderland has nothing on [the challenged provision.]"), *vacated by* 803 F.3d 94 (2d Cir. 2015).

110. *Id.* at 438 (the challenged provision "is the product of a decades-long battle between credit card companies on the one hand and retailers and consumer advocates on the other").

111. *Id.* (noting that Congress allowed the no-surcharge provision of the Truth in Lending Act to lapse in 1984).

112. *Id.* at 439 n.2 (citing statutes).

113. *Id.* at 438 (explaining that in response to credit card contract provisions prohibiting surcharges, Congress amended the Truth in Lending Act to provide that credit card companies could not prohibit merchants from "offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Fair Credit Billing Act, Pub. L. No. 93–495, tit. III, § 306, 88 Stat. 1500, 1515 (1974) (codified at 15 U.S.C. § 1666f(a)), and later, at the urging of credit card companies, passed another amendment to the Truth in Lending Act, prohibiting merchants from imposing "surcharges." Act of Feb. 27, 1976, Pub. L. No. 94–222, § 3(c), 90 Stat. 197, 197 (codified at 15 U.S.C. § 1666f(a) (1980)).

114. *Id.* at 436 (citing N.Y. Gen. Bus. Law § 518).

means of contracts with retailers, "the battleground moved from whether merchants could charge different prices for cash and credit to how merchants could communicate those different prices to consumers."[115] Enactment of the federal precursor to Section 518 was a victory for the credit card industry.[116] Earlier in its recitation of the facts, the district court had pointed to psychological studies, known to regulators at the federal and state levels, which show that, despite their economic equivalence, consumers perceive surcharges and discounts quite differently.[117] Customers dislike surcharges, but like discounts. According to the district court, the provision "dr[ew] the line between prohibited "surcharges" and permissible "discounts" based on words and labels, rather than economic realities" and so "regulate[d] speech, not conduct."[118] Specifically, the history of the provision showed that credit card companies sought the provision, at the federal and then state levels, to prevent retailers from provoking an adverse consumer reaction to their product by attaching the word "surcharge" or "extra charge" to it,[119] when that is precisely what the retailers wanted to do.[120] The court acknowledged that "[p]ricing is a routine subject of economic regulation," but contrasted "the manner in which price information is conveyed" as "quintessentially expressive, and therefore protected by the First Amendment."[121] In the view of the district court, because the provision permitted retailers to charge more for credit card transactions, it did not prohibit the conduct of charging a surcharge, but rather the use of the word.[122]

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115. *Id.* at 438.

116. *Id.* ("In 1976, at the urging of the credit card industry, Congress passed another amendment to the Truth in Lending Act, providing, as section 518 now provides, that "[n]o seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means." Act of Feb. 27, 1976, Pub. L. No. 94–222, § 3(c), 90 Stat. 197, 197 (codified at 15 U.S.C. § 1666f(a) (1980))").

117. *Id*. at 436 ("A number of studies have indicated, however, that consumers perceive credit-card surcharges negatively as a kind of loss or penalty, while cash discounts are perceived positively as a kind of gain or bonus. *See generally* Daniel Kahneman, Jack L. Knetch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991); Adam Levitan, *The Antitrust Super Bowl: America's Payment Systems, No–Surcharge rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280–81 (2006); *see also* S.Rep. No. 97–23, at 3 ('The [U.S. Senate Banking] Committee recognizes that while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different.'")).

118. *Id.* at 442.

119. *Id*. at 438 (no-charge provision at the federal level was passed "at the urging of the credit card industry"); Expressions Hair Design v. Schneiderman, 808 F.3d 118, 122 (2d Cir. 2015) (""[C]redit-card surcharges are more effective than cash discounts at discouraging credit-card use among consumers, which has naturally led credit-card companies to oppose them. *See* Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39, 45 (1980)"), *vacated and remanded by* 137 S. Ct. 1144 (2017).

120. *Id.* at 437 ("Plaintiffs . . . want to impose credit card surcharges, rather than give cash discounts, and to so inform their customers, precisely because consumers are more likely then to notice the fees, dislike them, and switch to cash in order to avoid them").

121. *Id.* at 445.

122. *Id.* at 447.

The Court of Appeals, by contrast, interpreted the no-surcharge provision to have concrete economic significance that could exist along with permitted discounting. The court acknowledged the psychological literature documenting that consumers react differently to surcharges than to discounts.[123] It also noted other reasons why a legislature might choose to "prohibit credit-card surcharges specifically."[124] With these possibilities in mind, it characterized as "bewildering" the retailers' "persistence in equating the actual imposition of a credit-card surcharge (i.e., a seller's choice to charge an additional amount above the sticker price to its credit-card customers) with the words that speakers of English have chosen to describe that pricing scheme (i.e., the term "credit-card surcharge")."[125] The court of appeals relied on the face of the statute, concluding that "[w]hether a seller is imposing a credit-card surcharge—in other words, whether it is doing what the statute, by its plain terms, prohibits—can be determined wholly without reference to the words that the seller uses to describe its pricing scheme."[126] So, in the view of the court of appeals, the provision simply prohibited a retailer from engaging in the conduct of posting a sticker price and charging more to credit card payers. Under its reading, the provision did not "prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges."[127]

The court of appeals specifically refuted the claim that "credit-card surcharges and cash discounts must just be labels because consumers react differently to them."[128] Instead, it observed, "consumers react negatively to credit-card surcharges not because surcharges "communicate" any particular "message," but because consumers dislike being charged extra."[129] After distinguishing the different sales behaviors—speech or conduct—that may provoke adverse customer reactions, the court of appeals went on to note that the Constitution treats laws aimed at protecting consumers from adverse reactions to the different types of sales behaviors dramatically differently.[130] "Although the

123. *Expressions Hair Design*, 808 F.3d at 122 ("A psychological phenomenon known as 'loss aversion' means that 'changes that make things worse (losses) loom larger than improvements or gains'" of an equivalent amount. Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991)").

124. *Expressions Hair Design*, 808 F.3d at 122-23 (These include "protecting consumers from the inconvenience and annoyance of having extra charges added to their bills," avoiding "adverse economic effects on the broader economy by "dampen[ing] retail sales," preventing retailers from adding more than the credit-card swipe charge as a "surcharge," and creating the opportunity for "dishonest sellers [to] profit at their customers' expense by imposing surcharges surreptitiously at the point of sale").

125. *Id.* at 132.

126. *Id.* at 131.

127. *Id.*

128. *Id.* at 132-33.

129. *Id.*

130. *Id.* at 133.

First Amendment generally prevents the government from justifying a speech restriction by reference to the harmful reactions that the speech in question will cause among the reading or listening public," the court of appeals observed, "there is nothing controversial about the government's banning certain prices because of how consumers will react to them."[131] As it interpreted the purpose and operation of Section 518, it regulated conduct, not speech.[132]

The Supreme Court adopted the district court's reading of the New York statute. The Court narrowed its review to an as-applied challenge, interpreting Section 518 as prohibiting "posting a cash price and an additional credit card surcharge, expressed either as a percentage surcharge or a "dollars-and-cents" additional amount."[133] The Court followed, and agreed with, the first steps in the court of appeals' reasoning. The Court accepted the court of appeals' determination that Section 518 prohibited the pricing practice described in the hypothetical signs.[134] The Court next turned to the question whether Section 518 regulated conduct or speech.[135] The Court agreed with the court of appeals' statement of the principle, drawn from *44 Liquormart*, that "price controls regulate conduct alone."[136] It offered the example of a law requiring all delis to charge $10 for their sandwiches.[137] Such a law, it said, would regulate conduct not speech, and this would be true even though delis would, in turn, communicate the pricing in advertising.[138] Although the price control would indirectly dictate the speech of the delis, the law itself, according to the Court, would regulate conduct, not speech.[139] The Court also agreed with the court of appeals that "[a] law regulating the relationship between two prices regulates speech no more than a law regulating a single price."[140] So, for example, if the New York statute had

131. *Id.*

132. *Id.* at 133.

133. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1149 (2017) ("Under this pricing approach, petitioner Expressions Hair Design might, for example, post a sign outside its salon reading 'Haircuts $10 (we add a 3% surcharge if you pay by credit card).' Or, petitioner Brooklyn Farmacy & Soda Fountain might list one of the sundaes on its menu as costing '$10 (with a $0.30 surcharge for credit card users)'"). Although the Court described its review as of a particular "pricing practice," *id.*, the practice it describes is "posting" and "express[ion.]."

134. *Id.* at 1150.

135. In narrowing the challenge, the Court somewhat confusingly described its review as of a statutory prohibition of a particular "pricing practice" when its ultimate conclusion is that Section 518 regulates speech. The Court makes clear that the Constitution permits regulators to prohibit the conduct of imposing credit card surcharges over a cash price by, for example, setting a uniform price. *Id.* (a law setting a uniform sandwich price regulates conduct). And, its hypothetical applications involve "posting" and "express[ing]" the price. *Id.* So, more accurately, the Court narrowed its review to whether Section 518 prohibited a particular way of expressing a "pricing practice" rather than the "pricing practice" itself.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1150-51.

140. *Id.* at 1150.

said that credit and cash prices must be the same, the law would regulate conduct, not speech. But, the Court continued, the New York statute was "different."[141] Instead of reading the meaning of "surcharge" in light of a hypothetical sticker price, as had the court of appeals, the Court focused on the fact that the statute did not regulate the relationship between the credit card and cash prices. Like the district court, the Court took the view that because the law did not regulate this relationship, it could only regulate how the relationship is expressed.[142] The Court thus remanded the case to the court of appeals to consider whether Section 518 can be upheld as a speech regulation.[143]

V. REGULATORS' UNCHANGED AUTHORITY TO RESTRICT THE PRICING PRACTICE OF DISCOUNTING AFTER *EXPRESSIONS HAIR DESIGN*

The review of the Court's recent *Expressions Hair Design* decision, in light of its peculiar facts and the opinions of the district court and court of appeals, confirms that public health regulators' authority to restrict discounting, in all types of ways, remains intact and unchanged. The Court's willingness to look beyond the face of Section 518 was provoked by the parties' concession that it simultaneously prohibited "surcharges" for credit card transactions while it permitted "discounts" for cash. This concession wiped away the plain meaning of a "surcharge" as a payment above the cash price, and provoked the search for an explanation for the bizarre juxtaposition, which had already included information beyond the statute's words. There is no reason to believe that public health regulators will emulate this odd provision, or that the Court's decision based upon its interpretation of one statute's particular purpose and application impacts their authority to regulate price, directly and exclusively.

Rather than limiting regulators' authority to restrict price to reduce demand for potentially dangerous products, the *Expressions Hair Design* decision, in its few words, affirms it. A "typical price regulation," according to the Court, is well within public health regulators' authority.[144] Regulators may have many different reasons for regulating a product's price, including suppressing demand by eliminating the narcotic effect of discounts on consumers. Setting a uniform price for a product is one of the "typical" price regulation techniques.[145] Maintaining a uniform price requires multiple additional techniques to combat sellers' efforts to subvert it. The Constitution permits regulators to prohibit all forms of product

141. *Id.* at 1151.

142. *Id.* (Section 518 regulated "how sellers may communicate their prices").

143. *Id.* (noting that the parties contested "whether § 518 is a valid commercial speech regulation under *Central Hudson* . . . and whether the law can be upheld as a valid disclosure requirement under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985)").

144. *Id.* at 1150-51.

145. *Id.*

discounting, so long as in doing so they aim at maintaining a price level and not at restricting messaging.[146]

In addition to setting a minimum price, regulators may employ all of the techniques in the New York and Providence ordinances, upheld by the lower courts,[147] and more. These include prohibiting coupon discounts, multi-pack discounts, free samples, and free gifts with purchases. Regulators should take care to restrict the price transaction without reference to messaging.[148] So, for example, regulators may prohibit offering to lower the price of the product by any means, including a coupon, and redemption of a coupon that lowers the price. While it is true that coupons typically contain product advertising in addition to the discount offer, so long as the regulation does not forbid the product advertising, sellers remain free to disseminate it, via hard copy or social media, just without an offer of a price reduction.[149] Similarly, samples and gifts may bear logos and other messaging. Once again, a restriction that aims at price reduction only, prohibiting undercutting price controls by offering free product or any sort of free thing tied to a product purchase without reference to whether it is branded with messaging, regulates pricing conduct and is within public health regulators' authority.[150]

VI. CONCLUSION

Like vivid words, images, and graphics, discounts may trigger psychic reactions in consumers that prompt them to buy. Unlike the crafty advertising techniques, however, public health regulators can restrict the many methods of price discounting freely for the purpose of moderating demand for newly legalized cannabis. The Court's recent decision in *Expressions Hair Design* hinged on its interpretation of a particular legislature's intent, evaluating a specific, and seemingly contradictory, statutory scenario that can be easily avoided by drafters. So long as regulators restrict discounting for the purpose of limiting the effect that the pricing practice has on consumers, the *Expressions Hair Design* decision stands as no limit on their authority. Cannabis sellers will be bold in using the broadest range of media and persuasive techniques to expand

146. *Id.*

147. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York, 27 F. Supp. 3d 415 (S.D.N.Y. 2014); Nat'l Ass'n of Tobacco Outlets, Inc. v. Providence, R.I., 731 F.3d 71, 76 (1st Cir. 2013).

148. *See supra* note 84 (distinguishing laws restricting free samples because of their "communicative" impact from laws restricting free samples for the purpose of maintaining a uniform minimum price).

149. *Cf.* Lorillard (noting that cigarette sellers' speech interest could be fulfilled by allowing displays of empty packages, while keeping the product itself out of the self-service displays).

150. Sellers remain free to distribute branded products for free, so long as the distribution is not tied to a sale. 674 F.3d at 538 (noting that the government had not "articulated an interest in generally regulating the distribution of T-shirts, baseball caps, bobblehead dolls, or any other merchandise that may be available [as a reward for steady customers]").

their customer base. Although regulators must watch with dismay as sellers manipulate consumer reactions by means of advertising, they can be as bold as cannabis vendors in combatting consumer reactions to the pricing practice of discounts.