

MEMORANDUM

January 12, 2018

To Our Clients and Friends

Re: Ninth Circuit Affirms California Anti-Surcharge Law is Unconstitutional

The U.S. Court of Appeals for the Ninth Circuit has affirmed a lower court decision that a California statute that prohibits retailers from imposing a surcharge on credit card transactions violates the First Amendment. The retailers wanted to post a single price for their products and charge customers an extra fee for credit card use. The district court had ruled that the California anti-surcharge statute was an unconstitutional restriction of speech.

The Court of Appeals agreed that the retailers had standing to pursue the matter “notwithstanding the meagre enforcement history” of the law because there was a credible threat of enforcement should retailers communicate prices in the way they desired. The Court also noted that the California law permitted retailers to “offer discounts for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card, provided that the discount is offered to all prospective buyers.”

The Court of Appeals stated that the California statute is a content based restriction on commercial speech and applied a standard of “intermediate scrutiny.” It concluded that the California prohibition restricted the retailers’ non-misleading commercial speech and did not directly advance the state’s interest in preventing consumer deception, nor was it narrowly drawn to achieve that interest. Accordingly, the Court held that the California statute violated the First Amendment. It also stated that because the retailers challenged the law on an “as applied” basis rather than as a “facial” challenge, the Court’s decision invalidated the application of the law only to them rather than voiding the law generally.

The case is *Italian Colors Restaurant v. Bacerra* (No. 15-15873). A copy of the court’s opinion is available on our website at <http://www.schwartzandballen.com/news.html>.

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox, Heidi Wicker or Magda Gathani at (202) 776-0700.