PRESENTATION OF DEPUTY ATTORNEY GENERAL
IAN S.A. CLEMENT
THIRTY-SIXTH LEGISLATURE OF THE VIRGIN ISLANDS
IN RE: BILL NO. 36-0019
COMMITTEE ON ECONOMIC DEVELOPMENT AND AGRICULTURE
April 16, 2025

Good day, Chairman Hubert L. Frederick, Vice-Chair Angel L. Bolques Jr., distinguished members of the Committee on Economic Development and Agriculture, and those of you in the viewing and listening audience. I am Ian Clement, Deputy Attorney General of the Virgin Islands Department of Justice, St. Thomas, St. John, and Water Island District. On behalf of Attorney General Gordon Rhea, I am pleased to provide a few remarks regarding proposed Bill No. 36-0019.

Merchants have historically attempted to pass on to customers who choose to pay with credit cards, rather than cash or checks, the costs imposed by credit card companies on those transactions. Merchants attempt to pass on the additional fees, or "swipe fees," levied by credit card companies to their customers by either imposing credit surcharges or by increasing the price of an item and offering a discount for cash payment. The Truth in Lending Act, or TILA, a federal law that once prohibited credit card surcharges nationwide, has since expired.[1] To fill the gap,

[1] 15 U.S.C.S. § 1601

the state legislatures of California[2], Colorado[3], Connecticut[4], Florida[5], Georgia[6], Kansas[7], Maine[8], Massachusetts[9], Minnesota[10], Nevada[11], New York[12], Puerto Rico[13], Texas[14], Washington[15], and Wyoming[16] enacted either anti-surcharge or cash discount statutes or a combination of both. Oklahoma's anti-surcharge/cash-discount statute, enacted in 1977, predates TILA.[17]

TILA was the primary law that limited a merchant's ability to surcharge customers. Congress enacted TILA to "assure a meaningful disclosure of credit terms so that the consumer will be able to … avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair … credit card practices." The 1974 amendments to TILA expressly prohibited credit card companies from imposing contractual provisions that prevented merchants from offering cash discounts. In 1976, Congress again amended TILA to ban merchants from imposing

---

[2] Cal. Civil Code §1748.
[3] Colo. Rev. Stat. §5-2-212
[4] Conn. Gen. Stat. §42-133ff
[5] Fla. Stat. §501.0117
[6] Ga. Code §13-1-15 (2015)
[7] Kan. Stat. Ann. §16a-2-403
[8] Me. Rev. Stat. Ann. tit. 9-A, §8-509
[9] Mass. Gen. Laws Ann. ch. 140D, §28A
[10] Minn. Stat. §325G.051
[11] Nev. Rev. Stat. §97A.210
[12] N.Y. General Business Law §518
[13] P.R. Code Ann. tit. 10, §§ 11, 12
[14] Tex. Business & Commerce Code Ann. §604A.001 *et seq*. (2015 Chapter 113); Tex. Finance Code Ann. §339.001 (1999)
[15] Wash. Rev. Code §19.52.130
[16] Wyo. Stat. §40-14-209
[17] Okla. Stat. tit. 14A, § 2-211 (1982); Okla. Stat. tit. 14A, §2-417 (1977).

credit surcharges on their customers expressly. Even so, the 1974 amendments remained intact, and merchants could still incentivize customers toward a particular form of payment by offering cash discounts. Additionally, the 1976 amendments clarified the distinction between a surcharge and a discount by providing that the words should be defined by their "ordinary meaning." Congress extended the lifespan of TILA's anti-surcharge provision in both 1978 and 1981.

Although the 1978 amendment only extended the surcharge ban until February 27, 1981, the 1981 amendments solidified a merchant's ability to offer cash discounts. The 1981 amendments also defined "regular price" to further clarify the distinction between discounts and surcharges.

In 2005, merchants filed a class-action suit that they settled with the credit-card companies in 2013. The 2013 settlement allowed merchants to surcharge Visa and MasterCard transactions at the brand and product levels. As a result of the settlement, merchants could fully educate customers about hidden credit card fees. That settlement was overturned by the Second Circuit in 2016. Yet the three years between the settlement and its overturning saw an increase in credit card surcharges.

Soon after the TILA provisions prohibiting credit card surcharges expired, eleven states enacted similar statutes. Some of these statutes forbid merchants from imposing credit surcharges outright but do not mention whether cash discounts are

permissible.[18] Other statutes prohibit credit surcharges while expressly allowing merchants to offer cash discounts.[19] Additionally, some statutes allow for cash discounts but are silent as to whether credit card surcharges are acceptable.[20] On the other hand, at least one statute allows merchants to impose surcharges on customers using credit cards, provided certain conditions are met.[21]

Citizens of Florida, Texas, and New York challenged their respective laws as unconstitutional, resulting in a circuit split between the Second, Fifth, and Ninth Circuit Courts of Appeals. The constitutional challenges were made on First Amendment grounds. The pivotal question was whether the anti-surcharge statutes regulated merchants' speech or conduct. Regulation of merchants' conduct is permitted, but regulation of merchants' speech involves higher levels of scrutiny by

---

[18] See, e.g., Kan. Stat. Ann. § 16a-2-403 (2016) (forbidding merchants from imposing credit surcharges but silent on cash discounts); Me. Stat. tit. 9-A, § 8-509 (2016) (stating discounts not equal to surcharges but silent about their permissibility); N.Y. Gen. Bus. Law § 518 (McKinney 2016) (making act of imposing credit surcharges misdemeanor offense, but no mention of cash discounts).

[19] See *Conn. Gen. Stat. § 42-133ff* (2017) (noting prohibition on surcharge but no bar on discounts); *Mass. Gen. Laws ch. 140D, § 28A* (2016) (forbidding credit surcharges and allowing for cash discounts).

[20] See, e.g., *Md. Code Ann. Com. Law § 12-509* (West 2017) (solidifying merchant's ability to offer cash discounts but silent on credit surcharges); *Nev. Rev. Stat. § 97A.210* (2015) (lacking provision on credit surcharges but allowing for discounts); *Wash. Rev. Code § 19.52.130* (2016) (allowing cash discounts in accordance with TILA but silent on credit surcharges).

[21] See *Minn. Stat. § 325G.051* (2017) (allowing surcharges where merchant informs consumer and surcharge less than 5% of purchase price). Under Minnesota law, a merchant must inform a customer of the surcharge orally and with a clearly visible sign. Nevertheless, a merchant that issues its own credit card may not surcharge a consumer who uses that card when purchasing goods from that particular merchant. Id.

the Court and could be found unconstitutional. If courts determine that anti-surcharge laws are pricing regulations that only regulate commercial conduct, they will be subject to rational basis review and are far more likely to withstand constitutional challenges. If the laws regulate speech, courts must determine whether the restrictions are content-based, requiring strict scrutiny; content-neutral, requiring intermediate scrutiny; or commercial speech, reviewed under the Central Hudson test.

The United States Supreme Court issued that test in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, (1980). Under that test, the Court must ask four questions: First, does the challenged law regulate speech that is "neither misleading nor related to unlawful activity"? Second, does the Government have a "substantial interest" at stake? Third, does the law "directly advance" the Government's interest? Fourth, would "a more limited restriction" be insufficient for that interest to "be served as well"?

The Eleventh Circuit found Florida's law unconstitutionally restricted a merchant's right to free speech. The Court found that the law, which allowed merchants to engage in dual pricing if they offered only cash discounts and did not denote the price difference as a credit card surcharge, was an impermissible restriction on speech, not a regulation of conduct. The former law criminalized

imposing a surcharge on the buyer for electing to use a credit card. The Court found that a surcharge is a discount by another name or a "negative discount." Criminalizing the surcharge but not the discount violated the First Amendment because that amendment prevents staking a citizen's liberty interest on such distinction in search of a difference. The former law directly targeted speech to affect commercial behavior indirectly. It did so by discriminating on the basis of the speech's content, the identity of the speaker, and the message being expressed.

New York's law simply consists of two sentences. It forbids merchants from imposing surcharges on customers who make credit card purchases. The Second Circuit found New York's law constitutional. Similarly, the Fifth Circuit found Texas' anti-surcharge statute constitutional. Like New York, Texas forbade merchants from imposing surcharges on customers who elect to use credit cards, except for government bodies and private schools. Like New York, the Texas statute is silent on the permissibility of cash discounts.

Here, Bill 36-0019 appears constitutional on its face. It does not regulate merchants' use of the terms "surcharge" or "discount." It prohibits credit card surcharges, but it also gives the merchant the option to grant discounts. It directly advances the Government's interest by giving consumers, especially tourists, the ability to pay for items with credit cards rather than carrying large amounts of cash.

It also pushes the Virgin Islands forward merchant technology regarding payment methods. Not only do more and more people use credit cards instead of cash, but now, credit card equivalents are also on our phones. Tourists can tap their phones to pay. St. Thomas hit a highwater mark of a hotel occupancy rate of 76.6 percent in 2024. Those tourists are here overnight and out at night. From a law enforcement perspective, it is a lot safer to carry credit cards, or better yet, a phone, which everyone carries anyway, instead of cash. The Government also has an interest in moving, if ever so slowly, all merchants to accept credit cards. The consumer should not pay a surcharge. Thus, this Bill directly advances the Government's interest. I cannot think of a less restrictive way this Bill could be written. So, on its face, it appears that the Bill regulates merchants' conduct, not speech. But, even if a court were to find that the Bill regulates commercial speech – it does not – it would pass the *Central Hudson* test. Again, in my estimation, the Bill regulates commercial conduct, not speech. Thus, the Bill does not violate the First Amendment and is constitutional.

I thank the Committee for allowing the Department of Justice to testify on Bill No. 36-0019. This concludes my formal remarks. I stand ready to respond to any questions this body may have.