Can Credit Card and Debit Card Swipe-Fee Subcharges be Passed on to Consumers in Kansas?

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Introduction

Each time a credit or debit card is used to pay for goods or services in Kansas, the merchant accepting the card must pay an interchange fee to the credit-card issuer, usually about three percent of the transaction. These fees are commonly known as "swipe fees" and total approximately $80 billion per year nationwide.[1] But the purchaser of those goods or services likely does not know about those swipe fees thanks to K.S.A. 16a-2-403. Enacted in 1986, it states:

> No seller or lessor in any sales or lease transaction or any credit or debit card issuer may impose a surcharge on a card holder who elects to use a credit or debit card in lieu of payment by cash, check or similar means.[2]

The statute defines "surcharge" as "any additional amount imposed at the time of the sales or lease transaction by the merchant, seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or debit card."[3] This has been understood to mean a merchant cannot tack on the extra three percent (or whatever the fee is) to the purchase price and pass on that charge to the purchaser.

If you concluded that the purpose of this statute was simply to prohibit charging different prices for the same item based on the method of payment, you would be wrong. Kansas' Attorney General has construed K.S.A. 16a-2-403 to let merchants offer "discounts" for payment with cash or check. The effect of a

discount is the same as that of a surcharge: the purchaser is paying more because a credit or debit card is used to make the purchase. But because the price difference occurs in the context of a "discount" instead of a "surcharge," it is allowed. Thus, what K.S.A. 16a-2-403 is meant to ban is somewhat unclear; regardless, in the words of former Attorney General Eric Holder, the statute and the uncertainty around it put "merchants and consumers in a no-win situation: accept our card, pay our fees and don't even think about trying to get a discount."[4]

Despite the prohibitions of K.S.A. 16a-2-403, there are merchants in Kansas who pass on swipe fees to consumers without even attempting to couch the price difference as a "discount." The authors were recently working up a class action to recover swipe fees for consumers who had been charged millions of dollars of swipe fees in violation of the language of K.S.A. 16a-2-403. But after researching the matter fully, it appears Kansas consumers may not have these protections for much longer. After a wave of federal constitutional litigation, cresting in the U.S. Supreme Court's recent decision in *Expressions Hair Design v. Schneiderman*,[5] the statute may violate the First Amendment rights of merchants and be unconstitutional.

This article discusses whether, based on recent constitutional litigation, Kansas purchasers can rely on K.S.A. 16a-2-403 to protect themselves from direct swipe-fee surcharges.

Background

If the reasoning behind swipe-fee statutes was to prohibit differential pricing in a way that tends to punish purchasers, then trying to understand the reasoning of the lawmakers who passed both the surcharge prohibitions and the discount exceptions is a bit like trying to follow the reasoning from *Monty Python and the Holy Grail*, when villagers dressed a woman up as a witch (carrot nose and all) and presented her to the village elder, Bedevere. After protesting she was not a witch, the following (lightly edited) discussion occurred:

> **Bedevere:** There are ways of telling whether she is a witch.
>
> **Villager:** What are they?
>
> **Bedevere:** Tell me. What do you do with witches?
>
> **Crowd:** Burn! Burn them up! Burn!
>
> **Bedevere:** And what do you burn apart from witches?
>
> **Villager:** Wood!
>
> **Bedevere:** So, how do we tell whether she is made of wood?
>
> **Villager:** Build a bridge out of her.
>
> **Bedevere**: Ah, but can you not also make bridges out of stone?
>
> **Villager:** Oh, yeah.
>
> **Bedevere:** Does wood sink in water?
>
> **Villager:** No, it floats! It floats!
>
> **Bedevere:** What also floats in water?
>
> **Villager:** Bread! Apples! Uh, very small rocks!
>
> **Arthur:** A duck!
>
> **Bedevere:** Exactly. So, logically...
>
> **Villager:** If she weighs the same as a duck, she's made of wood.
>
> **Bedevere:** And therefore?
>
> **Villager:** A witch!

In 1976, in amendments to the Truth in Lending Act, Congress barred merchants from imposing surcharges on consumers who paid with credit cards. Congress defined a surcharge as "any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means," and a discount as "a reduction made from the regular price."[6] In 1981, Congress further defined "regular price" to mean the single price when a merchant "tagged or posted" a single price, but to mean the credit-card price when a merchant did not tag or post a price, or tagged or posted two prices, one for cash and one for credit. As a result, the federal surcharge ban only prevented merchants from "posting a single price and charging credit card users more than that posted price."[7] It did not prevent merchants from (1) posting a single price and offering cash-paying customers a discount, or (2) posting separate prices for cash and credit.

When the federal ban expired in 1984, the Kansas legislature added K.S.A. 16a-2-403 to Kansas's version of the Uniform Consumer Credit Code.[8] It states that it applies to all "sales or lease transaction[s]" in the state, but its placement in the UCCC raises some questions about its reach because the UCCC applies only to "consumer credit transactions."[9] The Uniform Law Commission, which drafted the UCCC, has noted that "[o]ther transactions are inferentially excluded by the definitions of the three key [consumer-credit] transactions

covered by the Act, 'consumer credit sale' . . . , 'consumer lease' . . . , and 'consumer loan.'"[10] Therefore, placing K.S.A. 16a-2-403 in the Kansas UCCC would seem to limit its scope to transactions subject to the UCCC. This is consistent with the fact that K.S.A. 16a-2-403 is listed under Part 4 of the UCCC, which generally only applies to "consumer loans, including loans made by supervised lenders."[11]

But concluding that K.S.A. 16a-2-403 applies only to UCCC transactions would probably be incorrect. First, there are numerous exemptions elsewhere in the Kansas statutes allowing swipe-fee surcharges for transactions that are clearly not subject to the UCCC, such as allowing counties to pass on swipe-fees for paying taxes or renewing vehicle registrations.[12] In addition, the Kansas Attorney General has indicated that the statute extends beyond the UCCC.[13] Thus, in all likelihood Kansas's anti-surcharge law applies to all sales or lease transactions in the state.

If K.S.A. 16a-2-403 applies to all sales or lease transactions in the state, it does not prevent merchants from indirectly passing on swipe-fee surcharges, so long as the merchant couches the price difference as a "discount." But such "discounts" have not become prevalent. Anyone buying groceries or shopping anywhere in Kansas is unlikely to see a merchant offering two prices, one the regular price, and the other less for paying with cash or check. But having the "discount" option has not prevented some merchants from having one price with a surcharge equal to the merchant's swipe fee in seeming violation of K.S.A. 16a-2-403. This raises the question: what, if anything, can purchasers in Kansas do if the merchant attempts to pass on the swipe-fee surcharge? Apart from taking one's business elsewhere, the answer unfortunately may be: nothing.

First Amendment Challenge

Although swipe-fee statutes seemingly regulate conduct (prohibiting a merchant from charging more for using a credit or debit card), courts have construed these statutes as prohibiting merchants from *communicating* their prices.[14] According to the Supreme Court of the United States, the prohibitions in K.S.A. 16a-2-403 may violate the First Amendment rights of merchants.

In *Expressions Hair Design v. Schneiderman*,[15] five retailers brought suit against the Attorney General of the State of New York and various New York District Attorneys, challenging the constitutionality of a New York ban on surcharges because the retailers wanted "to impose surcharges on credit-card transactions and to so inform their customers."[16] The New York statute states, "[n]o 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."[17] Like K.S.A. 16a-2-403, the New York law appears to ban surcharges. The only possible distinction between the two is that Kansas's law defines "surcharge," where the New York does not. But this distinction may be without a difference. In *Schneiderman*, the courts applied a definition of surcharge as "a charge in excess of the usual or normal amount."[18] That definition is much like Kansas,' which defines "surcharge" as "any additional amount imposed at the time of the sales or lease transaction by the merchant, seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit or debit card."[19]

The Court held in *Schneiderman* that New York's ban on surcharges regulated speech because:

> [t]he law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer. Sellers are free to charge $10 for cash and $9.70, $10, $10.30, or any other amount for credit. What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases. He is not free to say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit" because both of those displays identify a single sticker price—$10—that is less than the amount credit card users will be charged. Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price . . . In regulating the communication of prices rather than prices themselves, [the law] regulates speech.[20]

The Court's statement, "Sellers are free to charge $10 for cash and . . . $10.30 . . . for credit" seems to ignore the plain language of the statute, which states "[n]o 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." The New York statute does not allow a base price of $10 but $10.30 if using a credit or debit card. But the fact remains that merchants can, by using the cash-or-check "discount," cause a product or service to end up costing $10 for cash and $10.30 if using a credit or debit card. Because it is an issue of semantics, it is an issue of speech.

Having decided that the New York law regulates speech, the Supreme Court remanded the case for analysis as to what level of scrutiny should apply to a statute that limits speech: intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*,[21] or lower scrutiny under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[22] Under *Central Hudson's* intermediate scrutiny, the law must directly advance and be narrowly tailored to a substantial state interest if "the challenged regulation restricts the 'informational function' provided by truthful commercial speech," whereas a "more permissive standard of review" applies under *Zauderer* if "a challenged regulation simply requires a commercial speaker to disclose 'purely factual and uncontroversial information.'"[23]

On remand, the U.S. Court of Appeals for the Second Circuit asked New York's highest court the following question: "Does a merchant comply with New York's [anti-surcharge statute] so long as the merchant posts the total-dollars-and-cents price charged to credit card users?"[24] The New York Court of Appeals answered "yes," concluding that New York law requires merchants to post "the total dollars-and-cents price for credit card purchases" but does not prevent merchants from calling this price a "surcharge."[25] Put another way, in New York, merchants may post two prices—a cash price and a credit-card price—for each good but may not post a single cash price and impose an extra fee for credit-card users.

To reach this result, the Court of Appeals reasoned that when the New York legislature passed the statute, it meant to replace the federal surcharge ban that lapsed in 1984, and the federal ban only banned price increases from the so-called "regular price," which federal law defined as:

> [T]he tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of . . . a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of . . . a credit card and the other when payment is made by use of cash, check, or similar means.[26]

Under this definition, a credit-card price posted alongside a cash price was a "regular price," not a surcharge, so the federal law allowed merchants to post two prices, a cash and a credit-card price, for each good, and to describe these prices however they liked. Hence, even though New York never actually enacted the federal definition of "regular price," the Court of Appeals reasoned that the legislature meant to import the definition into New York's anti-surcharge regime.

In a dissent, Justice Garcia took aim at the majority's reading -- "that a merchant *may* impose a surcharge where the total credit-card price is displayed" -- by arguing that "[t]hat interpretation is contradicted by the statute's text, construing [the statute] to tolerate conduct that it explicitly prohibits. . . . The New York Legislature could have, quite easily, enacted a total dollars-and-cents disclosure requirement. It did not."[27]

K.S.A. 16a-2-403, like other anti-surcharge statutes, does not look much like a disclosure regime. The statute does not make merchants disclose credit-card "surcharges." To the contrary, it appears to ban the communication of anything resembling a "surcharge."[28] It should come as no surprise then, that several federal cases suggest that *Central Hudson* applies to statutes like K.S.A. 16a-2-403. In *Rowell v. Paxton*, a U.S. District Court for the Western District of Texas applied *Central Hudson* to a Texas statute similar to K.S.A. 16a-2-403, although unlike Kansas' statute, the Texas statute did not expressly define a "surcharge."[29] Similarly, in *Dana's R.R. Supply v. AG*, the Fifth Circuit applied *Central Hudson* to a Florida ban nearly identical to Kansas'.[30]

Applying *Schneiderman* to K.S.A. 16a-2-403

K.S.A. 16a-2-403 raises the same First Amendment concerns as those at issue in *Schneiderman*. K.S.A. 16a-2-403, like the New York ban, appears to regulate prices. Indeed, the U.S. Court of Appeals for the Second Circuit concluded, before the Supreme Court issued its opinion in *Schneiderman*, that the New York ban "does not prohibit sellers from referring to credit-cash price differentials as credit-card surcharges, or from engaging in advocacy related to credit-card surcharges; it simply prohibits imposing credit-card surcharges."[31] But under the Supreme Court's reasoning in *Schneiderman*, K.S.A. 16a-2-403 likely regulates speech, not conduct.

As outlined above, the Kansas Attorney General opined in 1986 "that a discount for cash payment is not a surcharge as that term is used" in the Kansas provision.[32] Accordingly, K.S.A. 16a-2-403 does not regulate prices; Kansas merchants may charge different prices to consumers who use cash versus those who use credit cards. They may, for example, charge $1.03 for a candy bar but offer a $0.03 "discount" for customers who pay with cash or check. What Kansas merchants may not do is describe their prices as, for example, a "regular price" and a "credit-card surcharge." K.S.A. 16a-2-403, like the New York law, regulates commercial speech.

But just because a law infringes upon the First Amendment does not mean the law is unenforceable. It may depend on the level of scrutiny given to the law in question, and thus may depend on whether K.S.A. 16a-2-403 is analyzed under the stricter *Central Hudson* standard, or under the more lenient *Zauderer* standard. The Court of Appeals for the Second Circuit has not answered this question, and the Supreme Court may ultimately decide.

Only time will tell whether Kansas' appellate courts will read K.S.A. 16a-2-403 like the majority or Justice Garcia's dissent in *Schneiderman*. But Kansas courts, like Justice Garcia's dissent, often value statutory text over legislative history, noting that "[w]hen a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it," and that "[o]nly if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent."[33] The statutory text of K.S.A. 16a-2-403 does not include the federal definition of "regular price," so Kansas courts may mirror Justice Garcia's dissent in seeing K.S.A. 16a-2-403 as a straight-up regulation of commercial speech, not a disclosure regime.

Regardless, if K.S.A. 16a-2-403 is subject to the stricter scrutiny of *Central Hudson*, the provision faces an uphill battle in any legal challenge. *Central Hudson* generally applies to regulations of commercial speech,[34] or speech that "does no more than propose a commercial transaction," like advertising.[35] The courts protect commercial speech under the First Amendment because it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[36]

Under the *Central Hudson* test, the first question is whether the commercial speech is illegal or misleading; if it is, the government may freely regulate it.[37] But if it is not, the courts require three elements to be met: (1) "the government must assert a substantial interest to be achieved by the regulation;" (2) "the regulation must directly advance that governmental interest, meaning that it must do more than provide 'only ineffective or remote support for the government's purpose'" and (3) "although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary."[38]

On the first element, the government may assert its interest via "anecdotes, history, consensus, or simple common sense," but a court cannot itself "supplant the interests put forward by the state with [its] own ideas of what goals the challenged laws might serve."[39] And the Tenth Circuit in particular likes to see an "empirical explanation and justification" for the state's asserted interest.[40]

The second element requires a "reasonable fit between the government's objectives and the means it chooses to accomplish those ends."[41] The state cannot show this fit with "mere speculation or conjecture," and to meet its burden, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[42] On the third element, courts look for "evidence that the state 'carefully calculated the costs and benefits associated with the burden on speech imposed' by the regulations."[43]

Lower federal courts that have applied the above test to anti-surcharge laws have uniformly struck them down.[44] One problem with surcharge bans is that they do not regulate misleading speech. As the Eleventh Circuit recently explained, "[c]alling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading than is calling the temperature *warmer* in Savannah rather than *colder* in Escanaba."[45]

Another problem is the lack of a link between any substantial state interest and surcharge bans. For instance, the Ninth Circuit recently rejected California's proffered goal for its anti-surcharge law -- to "promote the effective operation of the free market and protect consumers from deceptive price increases" -- because such a law "prevents retailers . . . 'from communicating with [their customers] in an effective and informative manner' about the cost of credit card usage and why credit card customers are charged more than cash users."[46]

The court also pointed out that the California law's many exemptions "would undermine any ameliorative effect."[47] And like California, Kansas has carved out many exceptions from its surcharge ban -- for counties,[48] cities,[49] state agencies,[50] and school boards[51] -- prompting the question: If K.S.A. 16a-2-403 prevents consumer deception, why allow government entities, and only those entities, to deceive consumers? In short, if *Central Hudson* applies to K.S.A. 16a-2-403, the law likely violates the First Amendment.

By contrast, if *Zauderer's* rules about mandatory disclosures apply, the law might be upheld. Again, *Zauderer* might apply if Kansas courts, following the New York Court of Appeals in *Schneiderman*, read K.S.A. 16a-2-403 to ban posting a cash price and charging an extra credit-card fee but to allow talk of "surcharges" so long as merchants post two prices for each good, one for cash and one for credit.

In the context of disclosure requirements, the U.S. Supreme Court has reasoned that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[52] Put another way, "*Zauderer* . . . eases the burden of meeting the *Central Hudson* test" for disclosure requirements by presuming "that the government's interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored."[53]

If *Zauderer* applies to K.S.A. 16a-2-403, courts might uphold the law as requiring "disclosure only of factual and uncontroversial information."[54] The rationale for forcing merchants to disclose two prices, one for cash and one for credit, is straightforward: consumers might struggle to calculate credit-card fees if tacked on as a percentage of the cash price. In effect, by requiring merchants to post two prices, K.S.A. 16a-2-403, if construed as a disclosure regime, would simply make merchants do the math for consumers.

Conclusion

Recent federal litigation around anti-surcharge laws makes Kansas's law, K.S.A. 16a-2-403, look increasingly open to legal challenge. Depending on how Kansas courts read the statute, it may be unconstitutional under the First Amendment's *Central Hudson* test for commercial speech and thus unenforceable. Thus, given some enterprising lawyers, merchants and bit of luck, Kansas consumers may soon learn the true cost of using their credit or debit card instead of cash or check.

1 *Policy Issues: Swipe Fees*, National Retail Federation (June 14, 2019, 2:39 PM), https://nrf.com/on-the-hill/policy-issues/swipe-fees.

2 K.S.A. 16a-2-403.

3 *Id.*

4 Andrew Martin, Visa and MasterCard Settle Antitrust Suit, N.Y. TIMES, Oct. 5, 2010, at B1.

5 137 S. Ct. 1144 (2017).

6 *Id.* at 1147 (citations omitted).

7 *Id.*

8 *See* H.B. 3018, 1986 Leg., Reg. Sess. (Kan. 1986).

9 *See* K.S.A. 16a-1-301.

10 Uniform Consumer Credit Code § 1.202 cmt. (1974).

11 K.S.A. 16a-2-102.

12 *See, e.g.*, K.S.A. 19-122 (counties); K.S.A. 12-16,125 (cities); K.S.A. 75-30,100 (state agencies); K.S.A. 72-1176 (boards of education).

13 *See* Kan. Att'y Gen. Op. No. 86-115 (1986).

14 Of course, analyzing these statutes through the lens of freedom of speech ignores the possibility of merchants charging swipe fees at checkout without notifying the customer of the swipe-fee surcharge. For example, sticker prices at stores do not tell the consumer what the sales tax will be on the transaction, it just states the sales price. Customers understand there will be an additional charge for sales tax, but the only place the customer sees that amount is on the purchase receipt. The analysis in the challenge to the New York statute fails to address how these statutes could be enforced when the merchant is not trying to display the price differential.

15 137 S. Ct. 1144 (2017).

16 *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 436 (S.D.N.Y. 2013).

17 N.Y. Gen. Bus. Law § 518.

18 *Schneiderman*, 137 S. Ct. at 1150.

19 K.S.A. 16a-2-403.

20 *Schneiderman*, 137 S. Ct. at 1151.

21 447 U.S. 557 (1980).

22 471 U.S. 626 (1985).

23 *Schneiderman*, 137 S. Ct. at 1152 (Breyer, J., concurring).

24 *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 100 (2d Cir. 2017).

25 *Expressions Hair Design v. Schneiderman*, 117 N.E.3d 730, 736-37 (N.Y. 2018).

26 *Id.* at 734 (citation omitted).

27 *Id.* at 745-46 (Garcia, J., dissenting) (emphasis in original).

28 *See* K.S.A. 16a-2-403.

29 *See Rowell v. Paxton*, 336 F. Supp. 3d 724, 730-31 (W.D. Tex. 2018).

30 *See Dana's R.R. Supply v. AG*, 807 F.3d 1235, 1249 (11th Cir. 2015); *see also* Fla. Stat. Ann. § 501.0117 ("A seller or lessor in a sales or lease transaction may not impose a surcharge on the buyer or lessee for electing to use a credit card in lieu of payment by cash, check, or similar means, if the seller or lessor accepts payment by credit card. A surcharge is any additional amount imposed at the time of a sale or lease transaction by the seller or lessor that increases the charge to the buyer or lessee for the privilege of using a credit card to make payment.").

31 *Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 107 (2d Cir. 2015).

32 Kan. Att'y Gen. Op. No. 86-115 (1986).

33 *State v. Urban*, 291 Kan. 214, 214, 239 P.3d 837 (2010); *see also Patterson v. Cowley Cty.*, 307 Kan. 616, 622, 413 P.3d 432 (2018) ("When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. A court determines legislative intent by first applying the meaning of the statute's text to the specific situation in controversy.").

34 *Cent. Hudson*, 447 U.S. at 564-66; *see also Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1236 (10th Cir. 2004) ("In reviewing commercial speech regulations, we apply the *Central Hudson* test."); *Sorenson Communs. v. FCC*, 567 F.3d 1215, 1226 (10th Cir. 2009).

35 *United States v. Wenger*, 427 F.3d 840, 846 (10th Cir. 2005) (citation omitted).

36 *Cent. Hudson*, 447 U.S. at 561-62.

37 *See U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1233 (10th Cir. 1999).

38 *Mainstream Mktg. Servs.*, 358 F.3d at 1237 (citation omitted).

39 *Id.*

40 *U.S. W.*, 182 F.3d at 1235.

41 *Mainstream Mktg. Servs.*, 358 F.3d at 1237 (citation omitted).

42 *Utah Licensed Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1071 (10th Cir. 2001) (citations omitted).

43 *Id.* at 1075 (citation omitted); *see also U.S. W.*, 182 F.3d at 1238.

44 *See Rowell*, 336 F. Supp. 3d at 730-31; *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1179 (9th Cir. 2018); *Dana's R.R. Supply*, 807 F.3d at 1249-50.

45 *Dana's R.R. Supply*, 807 F.3d at 1249 (emphasis in original).

46 *Italian Colors Rest.*, 878 F.3d at 1177.

47 *Id.*

48 K.S.A. 19-122.

49 K.S.A. 12-16,125.

50 K.S.A. 75-30,100.

51 K.S.A. 72-1176.

52 *Zauderer*, 471 U.S. at 651.

53 *Wenger*, 427 F.3d at 849.

54 *Id.*