No. _____

In the Supreme Court of the United States

PAMELA JO BONDI, ATTORNEY GENERAL OF FLORIDA,
Petitioner,

v.

DANA'S RAILROAD SUPPLY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By statute, Florida, nine other States, and Puerto Rico prohibit merchants from imposing surcharges for the use of a credit card, but they generally allow the offering of discounts to induce other payment methods. These surcharge statutes are modeled after an expired federal law, which prohibited credit-card surcharges and allowed cash discounts.

The question presented is whether Florida's nearly thirty-year-old Surcharge Statute is a facially unconstitutional speech restriction, as the Eleventh Circuit held, or whether such a law regulates only conduct and does not even implicate the First Amendment, as the Second and Fifth Circuits have held, *see Expressions Hair Design* v. *Schneiderman*, 808 F.3d 118 (2d Cir. 2015); *Rowell* v. *Pettijohn*, 816 F.3d 73 (5th Cir. 2016).

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1) Pamela Jo Bondi, the Attorney General of Florida, petitioner on review, was the defendant–appellee below.

2) Dana's Railroad Supply, Dana Jackson, TM Jewelry LLC, Lee Harper, Tallahassee Discount Furniture, Duana Palmer, Cook's Sportland, and Eric Cook, respondents on review, were the plaintiffs–appellants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pamela Jo Bondi, the Attorney General of Florida, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 807 F.3d 1235 and reproduced at Pet. App. 1a–45a. The unreported decision of the district court is available at 2014 WL 11189176 and reproduced at Pet. App. 46a–51a.

JURISDICTION

The Eleventh Circuit entered judgment on November 4, 2015, and denied Petitioner's timely filed petition for rehearing en banc on January 13, 2016, *see* Pet. App. 1a, 52a–53a. On April 7, 2016, Justice Thomas extended the time for Petitioner to file a petition for a writ of certiorari to and including June 6, 2016. *See* Extension Appl., No. 15A1021 (granted on April 7, 2016). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution, along with Section 501.0117, Florida Statutes, are set forth in the appendix to this Petition. Pet. App. 54a–55a.

INTRODUCTION

This case involves a constitutional challenge to Florida's Surcharge Statute, which prohibits merchants from imposing a surcharge at the time of sale when a consumer elects to pay with a credit card. Fla. Stat. § 501.0117(1). The Eleventh Circuit held the Statute facially invalid under the First Amendment as an abridgment of free speech. In doing so, the Eleventh Circuit split directly with the Second Circuit, which had recently upheld New York's similar anti-surcharge law against a First Amendment challenge. The split soon deepened when the Fifth Circuit acknowledged the conflict and upheld Texas's anti-surcharge law, agreeing with the Second Circuit that such laws do not implicate the First Amendment because they regulate economic conduct—not speech.

The Attorney General's petition for a writ of certiorari should be granted. The Eleventh Circuit is the only federal court of appeals in the country to have struck down a law of this kind; this Court's review is required to resolve a square conflict between the circuits; that circuit split implicates an important question of First Amendment law; and this case provides an appropriate vehicle for resolving the circuit split.

STATEMENT OF THE CASE

A. Florida's Surcharge Statute

Florida's Surcharge Statute governs how merchants may charge for their products at the time of sale. Specifically, the Statute provides that "[a] seller

. . . may not impose a surcharge on the buyer . . . for electing to use a credit card in lieu of payment by cash, check, or similar means . . . ." Fla. Stat. § 501.0117(1) (the "Surcharge Statute"). The Statute narrowly defines a surcharge as "any additional amount imposed at the time of a sale . . . that increases the charge to the buyer . . . for the privilege of using a credit card to make payment." *Id.* The Statute, however, expressly allows merchants to offer discounts if a buyer elects to pay "by cash, check, or other means not involving the use of a credit card, if the discount is offered to all prospective customers." *Id.* Violating the Surcharge Statute is a second-degree misdemeanor. *Id.* § 501.0117(2).

The Surcharge Statute prohibits a particular pricing practice: "ambush[ing] the credit-card-using customer with a higher price at the register." Pet. App. 32a (Carnes, C.J., dissenting). Under the law, a retailer may, for example, use a sticker price of $1.00 for a loaf of bread and charge cash customers 95 cents at the register. Merchants also may employ a dual-pricing regime, by which they display two sticker prices—a 95-cent "cash" price and a $1.00 "credit" price. What merchants may *not* do, however, is use a single 95-cent label on the shelf and charge credit-card users a dollar at the register without pre-sale notice of the increase. Critically, it does not matter under the Surcharge Statute what merchants *call* their pricing practices. Unless their pricing regime entails an unannounced additional charge imposed on credit-card customers at the time of sale, merchants will not violate the statute, even if they describe their pricing regime as a "surcharge."

The Surcharge Statute is neither new nor unique to Florida. The Florida Legislature enacted the Surcharge Statute in 1987 following the expiration of a federal law that accomplished similar aims. In 1976, Congress enacted a law restricting merchants' ability to pass on the cost of accepting credit cards by charging credit users surcharges. It provided: "No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card . . . ." Act to Extend the State Taxation of Depositories Act, Pub. L. No. 94-222, § 3(c)(1), 90 Stat. 197, 197 (1976) (amending 15 U.S.C. § 1666f). Like Florida's Surcharge Statute, the federal law allowed retailers to offer cash payers a discount. *See id.* § 3(a), (c)(1).

Also like Florida's Surcharge Statute, the federal law defined "surcharge" in relation to the normal price that merchants charge, although it did so without imposing a temporal limitation on the prohibited conduct. Specifically, it defined "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." *Id.* § 3(a). Inversely, it defined "discount" as "a reduction made from the regular price." *Id.* In 1981, Congress amended the federal surcharge law to clarify the distinction between surcharges and discounts, defining the term "regular price" to mean "the tag or posted price . . . if a single price is tagged or posted, or the price charged . . . when payment is made by use of . . . a credit card if either" (1) no price is displayed, or (2) the merchant employs a dual-pricing regime, posting one price for credit and another for other payment methods. Cash Discount Act, Pub. L. No. 97-25, § 102(a), 95 Stat. 144, 144 (1981).

After the federal law's 1984 sunset, Florida, nine other States, and Puerto Rico filled the void with their own surcharge prohibitions.[1] Four of those prohibitions—from States in four different circuits—currently face First Amendment challenges.

B. Proceedings Below

1. Proceedings before the district court

This case began with consumer complaints that Respondent businesses were imposing illegal surcharges. As a result, the Attorney General sent letters to Respondents notifying them of the Surcharge Statute and requesting they immediately suspend any illegal surcharging. Respondents sued the Attorney General in the United States District Court for the Northern District of Florida, alleging that the Surcharge Statute violates the First Amendment and is void for vagueness. As part of a coordinated effort, on the same day the Florida suit was filed, different groups of plaintiffs in Texas and California filed similar complaints challenging those States' surcharge laws. *See* Compl., *Rowell* v. *Pettijohn*, No. 14-cv-00190 (W.D. Tex. Mar. 5, 2014), DE 1; Compl., *Italian Colors Rest.* v. *Harris*, No. 14-cv-00604 (E.D. Cal. Mar. 5,

[1] Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Kan. Stat. Ann. § 16a-2-403; Me. Rev. Stat. Ann. tit. 9-A, § 8-509; Mass. Gen. Laws ch. 140D, § 28A; N.Y. Gen. Bus. Law § 518; Okla. Stat. tit. 14a, §§ 2-211, 2-417; P.R. Laws Ann. tit. 10, §§ 11, 12; Tex. Fin. Code Ann. § 339.001. In addition, Utah enacted its own anti-surcharge law in 2013 but then allowed it to expire. *See* Utah Code Ann. § 13-38a-302 (2013), *repealed by* § 63I-1-213 (2014); *see also* 2013 Utah Laws ch. 421 (S.B. 67), Part 3, § 8.

2014), DE 1. This trio of challenges arose nine months after a group of New York plaintiffs filed a similar complaint. *See* Compl., *Expressions Hair Design* v. *Schneiderman*, No. 13-cv-03775, (S.D.N.Y. June 4, 2013), DE 1.

The Attorney General moved to dismiss, arguing that the Complaint failed to state either a First Amendment or void-for-vagueness claim and noting that Respondents could challenge the Statute only on rational-basis grounds, which they failed to do. Respondents moved for summary judgment and simultaneously filed an opposition to the motion to dismiss.

The district court denied Respondents' motion and dismissed the case with prejudice. The court concluded that the Surcharge Statute is "within the Florida Legislature's broad discretion in regulating economic affairs," and held that the Legislature had a rational basis to enact it. Pet. App. 47a, 48a. The court rejected "the plaintiffs' effort to make this a First Amendment case," noting that a "whole host of statutes impose similar restrictions on the relationships between businesses and their customers, and many implicate communications." *Id.* at 50a (discussing the Truth-in-Lending Act and Fair Debt Collection Practices Act). The court concluded that the Statute, as a "[r]estriction[] on pricing," is an "economic measure[] subject only to rational-basis scrutiny." *Id.* In the alternative, the court held that the Statute would be a valid restriction on commercial speech. *Id.* The court also rejected Respondents' vagueness arguments. *Id.* at 50a–51a.

2. Proceedings before the court of appeals

Respondents appealed to the Eleventh Circuit. Over a dissent by Chief Judge Carnes, the panel majority reversed the district court's judgment. The majority began its analysis of the First Amendment claim by noting that the outcome "hinge[d] on a single determination: whether the law regulates *speech*—triggering First Amendment scrutiny—or whether it regulates *conduct*—subject only to rational-basis review as a mine-run economic regulation." Pet. App. 8a (emphases in original).[2]

The majority concluded the Statute is a speech regulation. It reasoned that the law is not a restriction on "dual-pricing" because it allows for discounts. *Id.* at 11a–12a. And because a "surcharge" is nothing "but a negative discount," the majority concluded, "[t]he statute targets expression alone"—what merchants choose to call their pricing practices—and could more accurately be described as "a 'surcharges-are-fine-just-don't-call-them-that law.'" *Id.* at 15a. According to the majority, to violate the Surcharge Statute, a merchant "must communicate the price difference to a customer and that communication must denote the relevant price difference as a credit-card *surcharge*." *Id.* (emphasis in original). The majority saw the statute as akin to

[2] Before reaching the merits of the First Amendment claim, the majority addressed whether Respondents had standing to bring their claims. Pet. App. 6a–8a. Although the opinion referred to "the Attorney General's argument" on this point, *id.* at 6a, the Attorney General has not challenged Respondents' standing to raise a First Amendment claim.

a ban on "half-empty beverages" accompanied by an allowance for "half-full" ones. *Id.* at 17a (emphases omitted). In other words, because credit-card surcharges and cash discounts are economically equivalent, the majority reasoned that the Statute regulates only the words that merchants use to describe their pricing regimes.

The majority analyzed the Statute under intermediate scrutiny—though it left open the question of whether the law might be subject to strict scrutiny, *id.* at 19a—and "conclud[ed] that § 501.0117 is an unconstitutional abridgment of free speech," *id.* at 29a–30a. The majority did not reach the merits of Respondents' void-for-vagueness claim. *Id.* at 8a.

In dissent, Chief Judge Carnes explained that the Surcharge Statute prohibits only a particular pricing practice, not speech. "It does not matter whether the store characterizes the difference in price as a credit card surcharge, a cash discount, or both. The merchant can speak in any way he chooses so long as he does not ambush the credit-card-using customer with a higher price at the register." *Id.* at 32a (Carnes, C.J., dissenting). And as a regulation of economic conduct, he reasoned, the Statute plainly poses no First Amendment problem. *See id.* at 42a–44a (citing *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 504–09, (1996)). Chief Judge Carnes also pointed out that the majority had created an immediate circuit split because the Second Circuit recently upheld a similar but broader New York law "banning *all* credit card surcharges." Pet. App. 43a–44a (emphasis in original) (citing *Expressions Hair Design* v. *Schneiderman*, 803 F.3d 94 (2d Cir. 2015), *amended and superseded by* 808

F.3d 118 (2d Cir. 2015)). The majority's holding, he concluded, "places our circuit in direct conflict with our sister circuit on this issue." Pet. App. 44a.

Specifically, the dissent noted that the statutory definition—by "specif[ying] that a surcharge is 'any additional amount *imposed at the time of a sale* or lease transaction'"—is narrower than the ordinary meaning of surcharge, *id.* at 31a (quoting Fla. Stat. § 501.0117(1)) (emphasis in original), upon which the Second Circuit relied in upholding New York's broader credit-card surcharge ban, *id.* at 43a–44a & n.5. Accepting the Statute's narrow definition made resolving Respondents' claims "relatively easy." *Id.* at 42a. "Prescribing when a business can add an additional amount to its price controls the timing of conduct and not the speech describing that conduct." *Id.* Therefore, the Statute does not implicate the First Amendment. *Id.* at 44a. The narrow definition also resolves any vagueness concerns, a point the majority did not address. *Id.*

REASONS THE PETITION SHOULD BE GRANTED

I. THIS CASE PRESENTS AN EXCEPTIONALLY IMPORTANT ISSUE OVER WHICH THE FEDERAL COURTS OF APPEALS STAND IN ACKNOWLEDGED CONFLICT.

A. There Is a Direct, Entrenched, and Acknowledged Conflict.

The Eleventh Circuit's decision presents a clear split with both the Second and Fifth Circuits. As the dissent noted, a little over a month before the Eleventh Circuit struck down Florida's Surcharge Statute, the

Second Circuit upheld New York's surcharge law in the face of similar First Amendment and vagueness challenges. *Expressions Hair Design*, 808 F.3d at 121. And following on the heels of the Eleventh Circuit's decision, the Fifth Circuit expressly acknowledged the conflict and sided with the Second Circuit, upholding Texas' surcharge law against a similar attack. *Rowell* v. *Pettijohn*, 816 F.3d 73, 78, 80 (5th Cir. 2016). Moreover, this split is now squarely before this Court for its consideration and resolution, as the plaintiffs in *Expressions Hair Design* and *Rowell* have filed petitions for writs of certiorari. *See* Pet. for Writ of Cert., *Expressions Hair Design* v. *Schneiderman*, No. 15-1391 (May 12, 2016); Pet. for Writ of Cert., *Rowell* v. *Pettijohn*, No. __-____ (May 31, 2016).

In *Expressions Hair Design*, a unanimous panel of the Second Circuit upheld against free-speech and vagueness challenges a New York statute banning credit-card surcharges.[3] Like Florida's Surcharge Statute, the New York law at issue in *Expressions Hair Design* bans credit-card surcharges but allows discounts to induce other payment methods. 808 F.3d at 128, 131. The plaintiffs argued that by drawing a distinction between economically equivalent pricing practices, the statute targets expression. *Id.* at 131. The Second Circuit rejected their argument. Looking to this Court's decision in *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), in which eight Justices opined that direct price controls do not implicate the First Amendment, the court started with the premise

[3] *See* 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.").

that "prices, although necessarily communicated through language, do not rank as 'speech' within the meaning of the First Amendment." *Expressions Hair Design*, 808 F.3d at 130. This was enough to decide the First Amendment claim. "If prohibiting certain prices does not implicate the First Amendment, it follows that prohibiting certain relationships between prices also does not implicate the First Amendment." *Id.* at 131.

Confining its analysis to the single-sticker-price context, the Second Circuit reasoned that New York's surcharge statute prohibits a pricing scheme, not speech, because it "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." *Id.* at 131. Citing this Court's decision in *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (*FAIR*), the Second Circuit noted that such statutes regulate conduct, not speech, because they affect what merchants may do, not what they may say. *Expressions Hair Design*, 808 F.3d at 131. The court then refuted the "central flaw" in the plaintiffs' argument, a flaw that the Eleventh Circuit would later embrace: a "bewildering persistence in equating the actual imposition of a credit-card surcharge . . . with the words that speakers of English have chosen to describe that pricing scheme." *Id.* at 131–32. The court abstained from addressing the balance of the plaintiffs' challenges because it was unclear whether New York's law applies outside of the single-sticker-price context. *Id.* at 135–42, 144.

A divided panel of the Fifth Circuit adopted the same reasoning in *Rowell*, upholding Texas' surcharge

law against First Amendment and vagueness claims.[4] 816 F.3d 73. Like the Florida and New York statutes, Texas's anti-surcharge law allows cash discounts, and the plaintiffs seized on the surcharge–discount distinction to argue that the Texas law regulates speech. *Id.* at 76–77. The Fifth Circuit disagreed. The court began by "consider[ing] the circuit split resulting from our sister circuits' recently ruling on state anti-surcharge bans." *Id.* at 78. After examining the split, it embraced the Second Circuit's reasoning as "persuasive." *Id.* at 80 (citing *Expressions Hair Design*, 808 F.3d at 127–35). The court held that "Texas' law regulates conduct, not speech, and, therefore, does not implicate the First Amendment. Instead, the law ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards." *Id.* at 80. The court specifically relied upon this Court's distinction between speech and conduct regulations in *FAIR*, *id.* at 82, and it rejected the Eleventh Circuit's conflation of surcharges and discounts because it "overlooks differences in the economic activity, and that the anti-surcharge law solely bans application of additional fees above the normal price and nothing more." *Id.* at 83.

The decision below, therefore, directly conflicts with decisions of the Second and Fifth Circuits. While examining a narrower statute that Respondents and the New York plaintiffs repeatedly called "indistinguishable" from New York's, *see* Corrected Appellants'

[4] *See* Tex. Fin. Code § 339.001(a) ("In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.").

Br. at 3, 4, 15, *Dana's R.R. Supply*, No. 14-14426 (11th Cir. Feb. 10, 2015); Pet. for Writ of Cert. at 16, *Expressions Hair Design*, No. 15-1391 (May 12, 2016), the Eleventh Circuit adopted reasoning that the Second Circuit considered "bewildering" and "flaw[ed]," *Expressions Hair Design*, 808 F.3d at 131–32, and the Fifth Circuit rejected as "unavailing," *Rowell*, 816 F.3d at 82. Notably, both the Eleventh Circuit and Second Circuit have denied *en banc* review, entrenching the conflict and leaving certiorari as the only viable method to resolve it. *See* Pet. App. 52a–53a; *see also Expressions Hair Design*, No. 13-4533, DE 217 (2d Cir. Jan. 13, 2016). Moreover, the conflict likely will widen in the near future, as the Ninth Circuit is poised to decide a First Amendment and vagueness challenge to California's similar surcharge statute.[5] *See Italian Colors Rest.* v. *Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015), *appeal docketed* No. 15-15873 (9th Cir. Apr. 30, 2015)). Accordingly, this Court's review is necessary to resolve a direct, entrenched, and acknowledged circuit split over the constitutionality of credit-card surcharge statutes.

B. The Issue Is Important.

As parties on both sides of the issue agree, *see* Pet. for Writ of Cert. at 19–21, *Expressions Hair Design*, No. 15-1391 (May 12, 2016); Pet. for Writ of Cert. at 8, *Rowell*, No. __-____ (May 31, 2016), the validity of state

[5] *See* Cal. Civ. Code § 1748.1(a) ("No retailer in any sales, service, or lease transaction with a consumer may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.").

surcharge laws under the First Amendment is too important an issue to tolerate the circuit split. Ten States and Puerto Rico currently have statutes that prohibit credit-card surcharges, *see* sources cited *supra* note 1, and legislators across the country continue to introduce bills that would do the same in their own States. *See Credit or Debit Card Interest, Surcharges and Fees 2013 Legislation*, Nat'l Conf. of State Legislatures (July 15, 2013), http://www.ncsl.org/research/financial-services-and-commerce/credit-or-debit-card-surcharges-2013-legis.aspx (compiling a summary of 44 surcharge bills introduced in multiple state legislatures during the 2013 legislative session). Outside of the Second and Fifth Circuits, the Eleventh Circuit's ruling casts doubt on these laws and legislative efforts. As things now stand, States' power to prohibit surcharges depends on the circuit in which they are located.

While this state of affairs alone merits this Court's intervention, the Eleventh Circuit's ruling may have implications far beyond surcharge laws. As district courts have begun to realize, under the Eleventh Circuit's approach—which focuses on economically equivalent transactions rather than the different pricing practices that produce them—other common methods of regulating economic conduct may be subject to First Amendment scrutiny. *See Funtana Village, Inc.* v. *City of Panama City Beach*, No. 5:15-CV-282-MW-GRJ, 2016 WL 375102, at *3 (N.D. Fla. Jan. 28, 2016) (assuming that ordinances related to the sale of alcohol are speech restrictions, and noting that in light of the Eleventh Circuit's decision in this case, "the First

Amendment looms over everything like some anti-regulatory Death Star (in Republic clothing), threatening to strike at any moment").

From laws prohibiting tobacco discount coupons and multi-pack discounts,[6] to bans on "free" alcoholic beverages,[7] to usury laws,[8] under the Eleventh Circuit's expansive approach, there are many pricing regulations that the First Amendment might touch. After all, there is no difference in the economic result between a $60.00 cigarette carton discounted by a $5.00 *coupon* and one that is discounted by a $5.00-off *sale*, or a $20.00 meal discounted by $5.00 with the option to buy a $5.00 beer and a "free" beer with the purchase of a non-discounted meal. Under the Eleventh Circuit's reasoning, laws touching on such pricing

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[6] *See, e.g.*, *Nat'l Ass'n of Tobacco Outlets* v. *City of Providence*, 731 F.3d 71, 77 (1st Cir. 2013) (upholding such an ordinance, concluding that it regulated pricing practices rather than speech); *see also Nat'l Ass'n of Tobacco Outlets* v. *City of New York*, 27 F. Supp. 3d 415, 422 (S.D.N.Y. 2014) (upholding ordinance prohibiting sale of tobacco below advertised price, concluding that it regulated an economic transaction rather than speech); City of Chicago, Bus. Affairs & Consumer Prot., *Tobacco Regulations*, http://www.cityofchicago.org/city/en/depts/bacp/supp_info/tobaccoregulations.html (last visited May 27, 2016) ("Beginning October 10, 2016, all coupons and other discounts on tobacco products are banned.").

[7] *See, e.g.*, 204 Mass. Code of Regs. §§ 4.03(1)(a), 4.04.

[8] Usury laws long have restricted the rates lenders may charge, though in some cases lenders might simply increase other charges. Indeed, this is how the practice of charging "points" on mortgages originated. *See* Todd J. Zywicki, *Consumer Use and Government Regulation of Title Pledge Lending*, 22 Loy. Consumer L. Rev. 425, 427–33 (2010).

matters might be considered "[coupons or freebies]-are-fine-just-don't-call-them-that law[s]," Pet. App. 15a, and thus subjected to First Amendment scrutiny.

From a doctrinal perspective, the Eleventh Circuit's approach has ramifications even outside the context of economic regulation. Like the government–private speech boundary, which this Court addressed last term, *see Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015), the speech–conduct boundary marks the First Amendment's outer contours. It is a threshold inquiry, the resolution of which determines in a given case whether the First Amendment applies at all. *See United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (noting that conduct does not "bring into play the First Amendment" unless it has a sufficient "communicative element"). The split between the Eleventh Circuit and the Second and Fifth Circuits represents not simply a disagreement over surcharge statutes, but a disagreement over where to draw the speech–conduct boundary. *Accord* Pet. for Writ of Cert. at 19, *Expressions Hair Design*, No. 15-1391 (May 12, 2016); Pet. for Writ of Cert. at 9, *Rowell*, No. __-____(May 31, 2016). This disagreement could manifest in other contexts, producing disparate outcomes whenever there is a dispute over whether a regulation targets non-expressive conduct or speech.

Given the number of jurisdictions with surcharge laws, the gate-keeping function of the speech–conduct boundary, and the scope of economic regulatory power at stake, this Court should not tolerate the direct circuit split occasioned by the Eleventh Circuit. This Court should grant certiorari not only to resolve the important and immediate issue of the validity of

surcharge laws under the First Amendment, but also to encourage uniform application of its speech–conduct distinction by the courts of appeals and to reaffirm the States' power to regulate pricing practices.

II. THE ELEVENTH CIRCUIT'S DECISION CONTRAVENES WELL-SETTLED FIRST AMENDMENT JURISPRUDENCE AND BEDROCK PRINCIPLES OF STATUTORY INTERPRETATION.

A. Regulations of Economic Conduct Do Not Implicate the First Amendment.

This Court's intervention is necessary to correct the Eleventh Circuit's contravention of a well-established axiom of First Amendment law: regulations of economic conduct do not implicate the First Amendment. The Surcharge Statute, by prohibiting a particular pricing practice, is just such a regulation. If allowed to remain, the Eleventh Circuit's holding to the contrary will obscure the bright line that this Court has drawn between speech and economic conduct and, as explained *supra* at 14–16, will cast a First Amendment cloud over a variety of economic regulations.

This Court long has recognized that "States are accorded wide latitude in the regulation of their local economies under their police powers . . . ." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). The States' broad power to regulate the economy encompasses the authority to control the prices that merchants charge for their products. *See, e.g.*, *Nebbia* v. *New York*, 291 U.S. 502, 539 (1934) (upholding state price control for milk); *Pub. Serv. Comm'n of Mont.* v. *Great N. Utils. Co.*, 289 U.S. 130, 134–36 (1933) (upholding state price

control for natural gas). Indeed, this price-control power has a pedigree that predates the Republic. *See Munn* v. *Illinois*, 94 U.S. (4 Otto) 113, 125 (1876).

Consistent with this lengthy history, this Court made clear in *44 Liquormart* that price controls do not implicate the First Amendment. *See* 517 U.S. at 507 (plurality op.) (recognizing that "direct regulation" of prices does not "involve any speech restrictions"); *id.* at 524–25 (Thomas, J., concurring in part and concurring in the judgment) (agreeing that price controls do not restrict speech); *id.* at 530 (O'Connor, J., concurring in the judgment) (same). This is because the charging of prices constitutes economic conduct that States freely may regulate, rather than speech entitled to First Amendment protection. *See Nat'l Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 77 (1st Cir. 2013) (noting that in *44 Liquormart*, eight Justices "made clear that price regulations and other forms of direct economic regulation do not implicate First Amendment concerns").

The Eleventh Circuit's majority opinion did not even cite *44 Liquormart*, and its invalidation of the Surcharge Statute cannot be reconciled with this Court's blessing of direct pricing regulations in that case. As the First, Second, and Fifth Circuits have concluded in reliance on *44 Liquormart*, if the charging of prices constitutes economic conduct rather than speech, then *manners* of charging them certainly do as well. *See Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 77 (holding that a ban on certain tobacco discount promotions, as a pricing-practice regulation, does not violate the First Amendment); *Expressions Hair Design*, 808 F.3d at 131; *Rowell*, 816 F.3d at 82. And that is exactly

what Florida's Surcharge Statute regulates—merchants' pricing practices. Under the statute, merchants "may not impose a surcharge . . . for electing to use a credit card." Fla. Stat. § 501.0117(1). The statute defines a surcharge as "any additional amount imposed at the time of a sale . . . that increases the charge to the buyer . . . for the privilege of using a credit card to make payment." *Id.* By its plain terms, the statute regulates only a particular pricing practice, not speech.

The fundamental premise undergirding the Eleventh Circuit's First Amendment holding—that the statute targets the speech merchants use to describe their pricing practices because credit-card surcharges are economically equivalent to cash discounts, *see* Pet. App. 15a–16a—is "simply wrong." *Expressions Hair Design*, 808 F.3d at 132. Consumers "react more negatively to credit-card surcharges than they react to cash discounts . . . . not because surcharges 'communicate' any particular 'message,' but because consumers dislike being charged extra." *Id.* at 132–33. Moreover, under the statute, merchants remain free to employ other pricing schemes, even if they reach the same ultimate economic result as a surcharge, and they may describe their transactions in any way they choose. *Id.* at 132. What matters under the statute is not what merchants call their prices, but how they impose them. Merchants with dual pricing, cash discounts, or presale notices to credit-card customers might characterize their price structures as "surcharges." But unless their pricing scheme entails an additional charge for credit-card use imposed at the time of sale, they will not run afoul of the statute. Fla. Stat. § 501.0117(1). In short, merchants do not convert their pricing practices into surcharges merely by calling them "surcharges."

See Expressions Hair Design, 808 F.3d at 132; *Rowell*, 816 F.3d at 82.

This Court has maintained a bright line between conduct and speech regulations. Where a statute, like Florida's Surcharge Statute, "affects what [regulated parties] must *do* . . . not what they may or may not *say*," the statute entirely avoids First Amendment scrutiny because it "regulates conduct, not speech." *FAIR*, 547 U.S. at 60 (emphases in original). Furthermore, a regulated party cannot "transform conduct into 'speech' simply by talking about it." *Id.* at 66; *accord Rowell*, 816 F.3d at 80. Even where a commercial-conduct regulation imposes "incidental burdens on speech," *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011), or "speech is a component of" the regulated commercial activity, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the First Amendment is not implicated.

The Eleventh Circuit's holding contravenes *44 Liquormart*'s teaching that the charging of prices constitutes conduct, obscures *FAIR*'s clear line between conduct and speech, and as explained *supra* at 14–16, casts a First Amendment shadow over a wide swath of economic regulations. This Court should grant review to correct the confusion that will result if the Eleventh Circuit's holding is left intact.

B. When Interpreting State Statutes, Federal Courts Must Avoid Constitutional Defects, Not Create Them.

What makes this case especially appropriate for this Court's intervention is not only that the Eleventh

Circuit has muddied this Court's demarcation between speech and conduct, but that it contradicted well-established principles of statutory interpretation in order to do so. As Chief Judge Carnes noted in his dissenting opinion, Florida's Surcharge Statute expressly defines "surcharge" to encompass not speech, but conduct—"ambush[ing] the credit-card-using customer with a higher price at the register." Pet. App. 32a (Carnes, C.J., dissenting). By gratuitously expanding the statute to encompass merchants' speech about their pricing practices, the Eleventh Circuit cast aside "the statute-saving definition of [surcharge] that the legislature itself crafted" in favor of its own contorted, "statute-killing definition." *Id.* at 31a. This interpretive methodology contradicts this Court's consistent instructions regarding the interpretation of state statutes, and it provides additional warrant for a writ of certiorari.

Where the state courts have not yet construed a state statute and the statute is "susceptible of a construction" that avoids any constitutional problem, the federal courts have a "*duty* to adopt it." *S. Utah Mines & Smelters* v. *Beaver Cty.*, 262 U.S. 325, 331 (1923) (emphasis added). In the absence of clear indicia to the contrary, federal courts must "presume[]" that state courts would construe state statutes "in such a way as to avoid the constitutional question presented." *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964). The duty to adopt "fairly possible" saving interpretations applies even when they are not "the most natural interpretation." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2594 (2012) (op. of Roberts, C.J.) (internal quotation marks omitted). "The elementary rule is that *every* reasonable construction must be resorted to in order to

save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895) (emphasis added). [9]

Here, the Eleventh Circuit turned these bedrock canons of construction on their head by rejecting "not only a 'fairly possible' [saving] interpretation," but "also the most natural one"—the statutory definition itself. Pet. App. 42a (Carnes, C.J., dissenting). The statutory definition of "surcharge" plainly embraces a particular pricing practice, not speech, *see supra* at 2–3, 8–9, but the Eleventh Circuit disregarded the definition as an "alternative construction" and a "strained reading" of the statute. Pet. App. 13a–14a.

"It is passing strange for a court to dismiss a legislature's definition of its own words as a strained reading of the legislature's own words." *Id.* at 33a–34a (Carnes, C.J., dissenting); *see Burgess* v. *United States*, 553 U.S. 124, 129–30 (2008) (statutory definition generally controls over alternative meanings). The Eleventh Circuit's contrived, "statute-killing definition of 'surcharge,'" Pet. App. 31a (Carnes, C.J., dissenting), is all the more puzzling when compared to the refusal

[9] A federal court of appeals' failure to apply the constitutional-avoidance canon, leading it to facially invalidate a state statute, merits this Court's review. As this Court has held, although it ordinarily defers to "the views of a federal court as to the law of a State within its jurisdiction," such deference is inappropriate where, as here, the lower court fails to "draw upon a deep well of state-specific expertise," the statutory language "appears in many state and federal statutes," and reliance upon the lower court's interpretation would require this Court "to decide conclusively a federal constitutional question." *Town of Castle Rock, Colo.* v. *Gonzales*, 545 U.S. 748, 757–58 (2005) (internal quotation marks omitted).

of the Second and Fifth Circuits to adopt such a reading even when examining surcharge statutes that contain no express definition of "surcharge." The Second and Fifth Circuits recognize that, absent a statutory definition, the statutory term "surcharge" should be given "its ordinary meaning" as "a charge in excess of the usual or normal amount: an additional tax, cost, or impost," *Expressions Hair Design*, 808 F.3d at 127; *see also Rowell*, 816 F.3d at 80–81. And so defined, a ban on surcharges—but not discounts—embraces only economic conduct. *See Expressions Hair Design*, 808 F.3d at 127–35; *Rowell*, 816 F.3d at 80–82.

Florida's statutory definition of "surcharge" narrows the ordinary meaning by adding a temporal limitation: "'any additional amount *imposed at the time of a sale*.'" Pet. App. 31a (Carnes, C.J., dissenting) (quoting Fla. Stat. § 501.0117(1)) (emphasis in original). Yet the Eleventh Circuit still chose to interpret Florida's statute as a speech regulation. This approach does not avoid constitutional infirmity where fairly possible; it creates constitutional infirmity where none exists.

The Eleventh Circuit's rejection of the statutory definition inverts this Court's consistent teachings regarding the care with which federal courts must examine state statutes. Chief Judge Carnes put the point best: "we have a Greek tragedy consisting of a state statute being struck down by a federal court for no good reason." Pet. App. at 45a (Carnes, C.J., dissenting). This Court should grant review not only to correct the Eleventh Circuit's deeply erroneous First Amendment holding, but also to make clear that it does not condone the Eleventh Circuit's "statute-killing," *id.* at

31a, constitutional-confrontation approach to facially invalidating state statutes.

III. This Case Is a Suitable Vehicle for Addressing the First Amendment Issue Dividing the Federal Courts of Appeals.

Of the six circuits in which credit-card surcharge statutes exist—the First, Second, Fifth, Ninth, Tenth, and Eleventh Circuits, *see* sources cited *supra* note 1—three already have rendered decisions on their validity under the First Amendment. The Second and Fifth Circuits held that surcharge statutes permissibly regulate economic conduct, and they did so for essentially the same reasons, relying on *44 Liquormart* and *FAIR*. *See Expressions Hair Design*, 808 F.3d at 130–35; *Rowell*, 816 F.3d at 80–82. The Eleventh Circuit, on the other hand, held that Florida's similar statute impermissibly regulates speech. Pet. App. 15a–30a. The Ninth Circuit is also poised to opine on the issue. *See Italian Colors Restaurant*, 99 F. Supp. 3d 1199, *appeal docketed* No. 15-15873 (9th Cir. Apr. 30, 2015)). And while it has yet to confront a credit-card surcharge statute, three years ago, the First Circuit upheld a ban on certain tobacco discount promotions against a similar challenge, relying on *44 Liquormart* to hold that the ban did not implicate the First Amendment. *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 77.

Several considerations make this case an attractive vehicle for resolving the rift between the circuits. First, the Eleventh Circuit is the only federal court of appeals in the country to have struck down a law of this kind. Thus, granting certiorari here would allow this Court to immediately and unequivocally put

to rest the circuit conflict created by the panel's sweeping and unprecedented holding.

Second, certain aspects of Florida's anti-surcharge statute help to create a congenial context in which to assess the First Amendment question at issue here. Unlike the statutes of New York and Texas, for example, Florida's law explicitly authorizes discounts for payment by means other than by credit card. *Compare* Fla. Stat. § 501.0117(1) *with* N.Y. Gen. Bus. Law § 518; *and* Tex. Fin. Code Ann. § 339.001. And unlike the New York and Texas laws, Florida's statute expressly and fully defines the term "surcharge." *Compare* Fla. Stat. § 501.0117(1) *with* Cal. Civ. Code § 1748.1(d) (without fully defining "surcharge," specifying that "[c]harges for third-party credit card guarantee services . . . shall be deemed surcharges" even if separately charged or paid directly to the third party); N.Y. Gen. Bus. Law § 518 (omitting any definition of "surcharge"); *and* Tex. Fin. Code Ann. § 339.001 (same).

Thus, this Court would not have to rely on (or, for that matter, divine) the "ordinary meaning" of "surcharge," and likewise would not be required to rely on apparent agreements between the parties as to the reach and meaning of the relevant state law. *Compare Expressions Hair Design*, 808 F.3d at 127 ("Because the statute does not define the word 'surcharge,' we give it its ordinary meaning."); *id.* at 128 (defining the term "surcharge" as used in the New York law on the assumption that "a seller to which the statute applies will have a 'usual or normal price,' that serves a baseline for determining whether credit-card customers are charged an 'additional' amount," and relying on the parties' asserted "agree[ment] that this baseline is not

the ultimate price that the seller charges to cash customers"). Relatedly, Florida's statutory definition supplies a readily identifiable textual basis for giving the anti-surcharge statute a narrowing construction, in the event that any such limitation is required to avoid serious constitutional concerns. *See* Pet. App. 31a (Carnes, J., dissenting) ("By disregarding the statute's limiting definition of 'surcharge,' the majority opinion creates constitutional infirmity where none would otherwise exist.").

Third, plaintiffs' decision to bring a facial challenge—but not an overbreadth challenge—makes this case a particularly good vehicle for resolving the split between the circuits, because it minimizes the extent to which the relevant First Amendment analysis turns on ancillary and disputed issues of state law. "Where plaintiffs bring a free-speech facial challenge that is not based on overbreadth, the only way they can succeed is by demonstrating that 'no set of circumstances exist' where the law could be validly applied." Pet. App. 37a (Carnes, C.J., dissenting) (quoting *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)). Regardless of whether Florida's anti-surcharge statute also applies in any other circumstances, the law assuredly applies when a seller processing a transaction at a cash register imposes a higher price on a credit-card-using-customer than the single sticker price previously posted, where such an "additional amount" is imposed "for the privilege of using a credit card to make payment." *See* Fla. Stat. § 501.0117(1); *see also* Pet. App. 31a–32a (Carnes, J., dissenting). If, as the Second and Fifth Circuits have held, such an application does not run afoul of the First Amendment, this Court would not need to decide whether Florida's law also applies to any

other circumstances. *Compare Expressions Hair Design*, 808 F.3d at 135–42 (explaining that "the balance of Plaintiffs' First Amendment challenge" "turns on an unsettled question of state law," noting that it was unclear whether the plaintiffs had properly raised an overbreadth challenge, declining to certify state-law issues to the New York Court of Appeals because such questions "would likely prove difficult in light of the present state of the record," and invoking the *Pullman* abstention doctrine as justification for "not reach[ing] the merits" as to the part of plaintiffs' First Amendment claim "premised on the assumption that Section 518 applies to sellers who do not post single sticker prices").

Finally, and to the extent that the law in this area is in need of clarification, it would seem particularly appropriate for this Court to carefully scrutinize a federal circuit court's decision to facially invalidate a duly-enacted state statute. Such a broad and potentially consequential ruling implicates unusually delicate and important concerns. At a minimum, this Court should have a full opportunity to assess—and, if appropriate, reverse or narrow—such a decision before it becomes the law of the land.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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