No. ___

In the Supreme Court of the United States

LYNN ROWELL, doing business as Beaumont Greenery; MICAH P. COOKSEY; MPC DATA AND COMMUNICATIONS, INC.; MARK HARKEN; NXT PROPERTIES, INC.; PAULA COOK; MONTGOMERY CHANDLER, INC.; SHONDA TOWNSLEY; TOWNSLEY DESIGNS, L.L.C.,
Petitioners,

v.

LESLIE L. PETTIJOHN, in her official capacity as Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 31, 2016

QUESTION PRESENTED

Ten states have enacted laws that allow merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge."

The question presented is:

Do these state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or do they regulate only economic conduct (as the Second and Fifth Circuits have held)?

CORPORATE DISCLOSURE STATEMENT

No publicly held corporation owns 10% or more of any petitioner's stock. Nor is any petitioner a subsidiary of any parent company.

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INTRODUCTION

This case is substantially identical to *Expressions Hair Design v. Schneiderman*, No. 15-1391, which is currently awaiting this Court's review. Like *Expressions*, this case raises an important constitutional question that has sharply divided the lower courts: Do state no-surcharge laws—which allow merchants to offer "discounts" to those who pay in cash but prohibit them from imposing equivalent "surcharges" on those who pay by credit card—violate the First Amendment?

The Fifth Circuit, in the opinion below, held that Texas's no-surcharge law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment." App. 11a. In so holding, the panel majority recognized that its decision deepened the existing "circuit split" between the Second and Eleventh Circuits over this question. App. 7a; *compare Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 130–31 (2d Cir. 2015) *with Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1245–46 (11th Cir. 2016).

The decision below cannot be reconciled with this Court's precedent. A law that makes liability turn on how a merchant conveys truthful "price information" to consumers regulates speech. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). That is what Texas's law does: "All that it regulates is what merchants can tell customers about their prices." App. 23a (Dennis, J., dissenting). And it "cannot survive First Amendment scrutiny." *Id.* at 24a.

To restore much-needed certainty to the national retail economy and resolve the growing split in the circuits, petitioners respectfully request that this Court grant the petition in *Expressions* and hold this petition pending the disposition of that case. Alternatively, the Court should grant this petition for plenary review.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 816 F.3d 73 and reproduced at 1a. The district court's decision is unreported and reproduced at 25a.

JURISDICTION

The court of appeals entered judgment on March 2, 2016. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Texas's no-surcharge law provides: "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." Tex. Fin. Code § 339.001(a).

STATEMENT

1. A "credit-card "surcharge" and a cash "discount" are just "different frames for presenting the same price information—a price difference between two things." Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351 (2008). But labels matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss." Hanson & Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). For this reason, "[c]onsumers react very differ-

ently to surcharges and discounts," and react far more strongly to surcharges. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2005). Surcharges thus more effectively inform consumers of the cost of credit cards and thereby foster meaningful competition.

Aware that the manner by which information is presented to consumers can have a huge impact on their behavior, the credit-card lobby has long "insist[ed] that any price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986). Over the years, the industry has succeeded, through contractual provisions as well as state and federal legislation, in silencing merchants' attempts to call consumers' attention to the true costs of credit.[1]

2. Following the expiration of a federal ban on credit-card surcharges in 1984, the credit-card industry convinced ten states (including Texas) to enact no-surcharge laws of their own. Texas's law took effect later that year. The law prohibits a seller from "impos[ing] 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." Tex. Fin. Code § 339.001(a).

But "[t]he law does *not* ban, nor does it mention, discounts." App. 4a. And the state has consistently interpreted the no-surcharge law to permit dual pricing so long as the merchant expresses the price difference as a

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[1] The decision below describes the "substantial federal-law backdrop to" Texas's no-surcharge law, App. 2a–4a, and the *Expressions* petition (at 6–10) sets forth that background in greater detail.

"discount" rather than a "surcharge." *See* Tex. OCCC, *Credit Card Surcharge Advisory Bulletin* (2015), *available at* http://bit.ly/1IT0tNU (describing "cash discount[s]" as one of several "alternative" ways of labeling prices "that are not prohibited credit card surcharges"). The Texas Office of Consumer Credit Commissioner (OCCC), which enforces the law, has explained that it "prohibits surcharges for paying by credit card, but it does not prohibit discounts for paying by cash, check, debit card, or other methods." *Id.* According to the OCCC, "if X is the posted price, a merchant may charge a cash customer X-1, but may not charge a credit customer X+1, without imposing the same charge on a cash customer." CA5 ROA 259.

Thus, under Texas's law (and the law of nine other states), a merchant who charges two different prices for a widget depending on how the customer pays (for example, $100 for cash and $102 for credit) may say that the widget costs $102 and that there is a $2 discount for paying in cash. But if the merchant instead says that the widget costs $100 and there is a $2 surcharge for using credit to account for the swipe fee, the merchant has run afoul of the law.

In 2013, shortly after the major credit-card networks were forced to rescind their contractual no-surcharge rules in a national antitrust class-action settlement, *see In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013), Texas sought to expand enforcement of it own ban. That year, the legislature transferred authority to enforce the law from the Finance Commission—which had no investigative or enforcement staff—to the OCCC. *See* Tex. Fin. Code § 339.001. And, since then, the OCCC has stepped up enforcement actions against Texas merchants who express the costs of credit to their customers in the wrong way. To take one example, it

recently sent a letter to a merchant who "tells customers if paying with credit card" they must pay "3% more"—as opposed to 3% *less* if paying with cash. CA5 ROA 294. The OCCC demanded that the merchant "[c]ease this practice for all future services as it appears to be in conflict with [the no-surcharge law]." *Id.*

3. In March 2014, after the district court in *Expressions* struck down New York's no-surcharge law as unconstitutional, *see Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430 (S.D.N.Y. 2013), and not long after Visa and MasterCard dropped their contractual no-surcharge rules as part of the antitrust settlement, five Texas merchants and their principals brought this case. Although their circumstances differ slightly, they all want the same thing: to truthfully tell their customers that there is an "additional fee" or "surcharge" for using credit.

The district court granted the state's motion to dismiss. Acknowledging that "nothing in the Anti-Surcharge law prohibits dual pricing," the court nevertheless concluded that Texas's law "regulates only prices charged"—an "economic activity." App. 31a. Thus, in the district court's view, the law "does not implicate First Amendment speech rights." *Id.* Having determined that the law is an "economic regulation," the court upheld the law on rational-basis review, although it did not identify any basis for the law's distinction between cash discounts and credit surcharges. App. 32a–33a. It then reasoned that the law is not impermissibly vague, instead finding it "simple and straightforward." App. 34a.

A divided panel of the Fifth Circuit affirmed. Drawing on the Second Circuit's "persuasive" reasoning in *Expressions*, the majority held that the law "regulates conduct, not speech, and, therefore, does not implicate the First Amendment." App. 11a. The majority acknowl-

edged that "the merchants simply object to their inability to characterize price differentials as a 'surcharge,' juxtaposed with a 'discount.'" App. 16a. And it also recognized that Texas's law allows a merchant to "dual-price as it wishes," so a merchant may achieve the "same ultimate economic result" whether expressed as a cash discount or credit-card surcharge. App. 12a. Finally, and "[l]argely for the reasons discussed," the majority also found that Texas's law is "not unconstitutionally vague." App. 18a.

Dissenting, Judge Dennis set forth his view that the law implicates the First Amendment: "If [a merchant] violates the Anti-Surcharge Law it is because of the content of his speech, not because of the nature of his conduct." App. 21a. The law "does not regulate the difference between [the cash and credit] prices," App. 23a; it only regulates how a merchant may "characteriz[e] a perfectly legal price differential in a chosen way," App. 21a. Because the law "makes the legality of a price differential turn on the language used to describe it," he would have held that the law restricts "protected commercial speech" and "cannot survive First Amendment scrutiny." App. 24a. Instead of restricting price gouging and limiting customer confusion, as the state asserted, Judge Dennis found that the law only "prohibited merchants from *justifying* their maximum prices to their customers by preventing them from characterizing the differential between cash and credit prices as a surcharge." App. 24a.

REASONS FOR GRANTING THE PETITION

I. The circuits are deeply and openly split over the question presented.

In the decision below, the Fifth Circuit majority held that Texas's no-surcharge law "concerns pricing regulation" and thus "does not implicate the First Amend-

ment." App. 14a–15a. In doing so, it acknowledged that it was taking one side of the deepening "circuit split" over this question. App. 7a. The Second Circuit, like the Fifth Circuit, held that New York's no-surcharge law "regulates conduct, not speech." *Expressions*, 808 F.3d at 135. By contrast, the Eleventh Circuit declared Florida's virtually identical law "an unconstitutional abridgment of free speech," *Dana's R.R. Supply*, 807 F.3d at 1251, thus setting up a "direct conflict with [its] sister circuit on this issue," *id.* at 1257 (Carnes, J., dissenting).[2]

These openly "conflicting cases" concern a fundamental constitutional question: they "illustrate the importance of the threshold determination of whether a regulation governs speech or conduct." Note, *Free Speech After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1988–89 (2016) (noting "the conflict between the Second and Eleventh Circuits").

Absent this Court's intervention, the split will only deepen further. Three circuits and four district courts have already issued opinions thoroughly grappling with the First Amendment issues presented here. And two of those opinions, including the decision below, produced reasoned and thoughtful dissents. Thus, there is no reason for the Court to await further percolation in the lower courts. The question presented is ripe for this Court's review.

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[2] A California district court struck down that state's indistinguishable no-surcharge law for violating the First Amendment and being unconstitutionally vague; that decision is currently on appeal to the Ninth Circuit. *See Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1207 (E.D. Cal. 2015), *appeal pending* No. 15-15873 (9th Cir.).

II. The question presented is important.

A growing circuit split on a fundamental constitutional question is undesirable under any circumstances, but, as explained in greater detail in the *Expressions* petition (at 19–21), it is intolerable here given the need for national uniformity in the retail economy. As things currently stand, state no-surcharge laws in Florida and California have been struck down and may not be enforced, while state laws in New York in Texas have been upheld. Meanwhile, similar laws in other states are in a state of constitutional limbo.

Thus, because of the conflict, New York and Texas merchants—unlike those in Florida and California, and the 40 states without a no-surcharge law—cannot reap the benefit of the historic national antitrust settlement protecting merchants' rights to truthfully inform customers about the cost of credit. And given the size and importance of the economies of New York and Texas, and the need for uniform pricing schemes, the reality is that national retailers are unlikely to use the surcharge label *at all*, even where it is permissible, as long as the split endures.

Even setting aside the need for uniformity, the question presented has enormous stakes for our economy. Because credit-card companies have been so successful in hiding the cost of credit from consumers, U.S. merchants pay some of the highest swipe fees in the world—around 3% of every credit-card purchase, or over $50 billion a year in fees. *See* 156 Cong. Rec. S4839 (June 10, 2010). And allowing merchants to truthfully inform consumers of the cost of credit will also reduce the substantial "regressive transfer of income from low-income to high-income consumers." Schuh et al., Federal Reserve

Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 2 (2010).

III. The decision below is wrong.

Like the Second Circuit's decision in *Expressions*, the decision below cannot be squared with this Court's commercial-speech precedents.

The First Amendment "requires heightened scrutiny" whenever the government creates restrictions that turn on the content of a speaker's words, and "[c]ommercial speech is no exception." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565–66 (2011). This scrutiny applies to any law whose "purpose and practical effect" are "to suppress speech" based on content, even if the law "on its face appear[s] neutral." *Id.* And the Court has long held that speech conveying "price information" to consumers is "protected by the First Amendment." *Va. State Bd. of Pharmacy*, 425 U.S. at 770. If a law makes liability "depend[] on what [people] say," in other words, it "regulates speech on the basis of its content." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

The Fifth Circuit majority, however, concluded that Texas's law "regulates conduct, not speech"—that it "ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards." App. 11a. But the law does not regulate *any* conduct: It does not "forbid merchants from charging cash customers a different price than that charged to credit-card customers," App. 12a, nor does it regulate the difference between the cash and credit prices. *See id.* ("Texas' law allows a merchant to discount and dual-price as it wishes."). To the contrary, the law "targets expression alone." *Dana's R.R. Supply*, 807 F.3d at 1245.

And regulating speech was the law's purpose. It was enacted to fill the gap left by the federal ban's expiration—a ban resulting from years of lobbying by credit-card companies who understood that the surcharge label "talk[s] against the credit industry." *Cash Discount Act, 1981: Hearings on S. 414 Before the Senate Banking Comm.*, 97th Cong. 32, 60 (1981). Like Congress, Texas presumably knew that credit surcharges and cash discounts, although "mathematically the same," are "very different" in terms of their "practical effect and impact . . . on consumers." S. Rep. No. 97-23, at 3 (1981).

Because Texas's law regulates speech, it must satisfy First Amendment scrutiny. This Court has traditionally subjected commercial-speech restrictions to intermediate scrutiny under the four-part *Central Hudson* test. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). And this Court should easily conclude that the law flunks every part of this test—and, indeed, that it "crumbles under *any level* of heightened First Amendment scrutiny," *Dana's R.R. Supply*, 807 F.3d at 1239 (emphasis added).

In fact, Texas has all but conceded that its law fails First Amendment scrutiny, having "presented no evidence regarding the State's interests and the reasonableness of the statute." CA5 Tex. Br. 38. And for good reason. The state's grasps at possible consumer-protection rationales—preventing potential "windfall profits," preventing potential "consumer confusion," and preventing potential bait-and-switch tactics, *see id.* at 7–10—cannot survive even a cursory *Central Hudson* analysis. The state is unable to explain, for instance, why it exempts *itself* from the law's reach, Tex. Fin. Code § 339.001(b)(1), nor can it explain why a narrow disclosure requirement, like those passed in Georgia and Min-

nesota, *see* Ga. Code § 13-1-15; Minn. Stat. § 325G.051, would not accomplish all of the state's potential aims without restricting as much speech.

What's more, the law's First Amendment deficiencies are exacerbated by its vagueness. If a merchant employs dual pricing—as Texas law permits, and as the plaintiffs here would all like to do—can the merchant say that the credit-card price is "more" than the cash price? Can the merchant put up signs informing customers of the extra cost of credit by describing it as a "surcharge" or "additional charge" intended to cover the cost of swipe fees? The state does not say. And the fact that liability under Texas's law turns on such a vague semantic line only underscores the First Amendment concerns that warrant this Court's review.

CONCLUSION

The Court should grant the petition in *Expressions Hair Design v. Schneiderman*, No. 15-1391, and hold this petition pending the disposition of that case. Alternatively, the Court should grant plenary review in this case.

Respectfully submitted,

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