No. 15-1455

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.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Texas's Anti-Surcharge Law restricts merchants from imposing a surcharge upon consumers when they opt to purchase goods or services with a credit card in lieu of cash or similar forms of payment. In contrast, merchants are generally permitted to offer discounts below regular list prices to induce consumers to pay with cash. The Fifth Circuit upheld the Anti-Surcharge Law as a valid exercise of Texas's regulatory authority over economic conduct.

The question presented is whether the Fifth Circuit correctly upheld the law without subjecting it to heightened First Amendment scrutiny.

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STATEMENT

1. a. Since 1985, Texas has restricted merchants from imposing surcharges on consumers who purchase goods or services with a credit card instead of cash. Act of May 27, 1985, 69th Leg., R.S., ch. 443, § 1, 1985 Tex. Gen. Laws 1578, 1578 (current version at Tex. Fin. Code § 339.001(a)). Before that, the federal Truth in Lending Act had similarly prohibited merchants from exacting credit-card surcharges from consumers. Pub. L. No. 94-222, § 3, 90 Stat. 197, 197 (1976) (amending the State Taxation of Depositories Act) ("No seller . . . may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means."). The federal law was renewed twice before it expired in 1984. *See* Financial Institutions Regulatory & Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1501, 92 Stat. 3641, 3713; Cash Discount Act, Pub. L. No. 97-25, § 201, 95 Stat. 144, 144 (1981).

Throughout this period, however, federal law has explicitly protected merchants' ability to offer discounts to cash-paying customers. Fair Credit Billing Act, Pub. L. No. 93-495, tit. III, § 306, 88 Stat. 1500, 1515 (1974); 15 U.S.C. § 1666f(a) (A "card issuer may not . . . prohibit any . . . seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means."). Congress defined the term "discount" as "a reduction made from the regular price," whereas a restricted "surcharge" was defined as "any means of increasing the regular price to a cardholder which is not imposed" on a cash-paying customer. Pub. L. No. 94-222, § 3, 90 Stat. 197, 197; *see also* 15 U.S.C. § 1602(q)-(r). In

turn, Congress defined the term "regular price" as: (1) the posted price, if a seller posts only one price; or (2) the credit-card price, if a seller either does not post any price or posts prices for both credit and cash purchases. Pub. L. No. 97-25, § 102(a), 95 Stat. 144, 144.

The federal statutory definitions of "discount" and "surcharge" reflect the terms' commonly understood meanings. A "discount" is defined as "[a] reduction from the full or standard amount of a price or debt," *The American Heritage Dictionary* 516 (4th ed. 2000), whereas a "surcharge" is defined as "[a]n additional sum added to the usual amount or cost," *id.* at 1740.

b. The Texas Legislature enacted the Anti-Surcharge Law following the expiration of the federal ban on credit-card surcharges. *See* Hearings on Tex. H.B. 1558 Before the House Comm. on Fin. Insts., 69th Leg., R.S. (April 22, 1985) (statement of sponsor Rep. Blanton) ("Rep. Blanton Statement") ("[U]ntil [the] federal government places a permanent ban on [credit-card surcharges], I believe it is in our best interest to protect the consumer.").[1] Today, the Texas Finance Code 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 similar means of payment." Tex. Fin. Code § 339.001(a).

Like its federal predecessor, Texas's Anti-Surcharge Law ensures that consumers are not charged additional fees beyond the regular list price for goods or services based on the consumer's decision to pay with a credit

[1] House Bill 1558 was the companion bill to Senate Bill 1353, which ultimately passed and became law. *Supra* p. 1.

card. *Id.*; *see also* Rep. Blanton Statement (stating that a "credit card surcharge is . . . an added cost over and above [the] regularly marked price on goods and services."). And consistent with federal law, *supra* pp. 1-2, Texas's statute does not restrict merchants from offering discounts below the regular list price to induce consumers to pay with cash. Nine other States and Puerto Rico have similar laws.[2]

2. Petitioners contend that anti-surcharge laws harm the economy by enabling credit-card issuers to "hid[e] the cost of credit from consumers." *See* Pet. 8. But economic literature and real-world experience indicate that these laws can protect against economic and consumer harms that are not posed by cash discounts.

First, credit-card surcharges may enable merchants to collect windfall profits from customers. See Steven Semeraro, *Assessing the Costs & Benefits of Credit Card Rewards: A Response to Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations*, 25 Loy. Consumer L. Rev. 30, 83 (2012). To take one example, in Australia, where credit-card surcharges are legal, the average credit-card surcharge rose to nearly double the amount that merchants paid to credit-card issuers in the form of swipe fees—and they continued to rise even after those swipe fees began to decline. Marc Rysman & Julian Wright, The Economics of Payment

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[2] *See* Cal. Civ. Code § 1748.1(a); Colo. Rev. Stat. § 5-2-212; Conn. Gen. Stat. § 42-133ff; Fla. Stat. § 501.0117; Kan. Stat. Ann. § 16a-2-403; Mass. Gen. Laws ch. 140D, § 28A(a)(1)-(2); Me. Rev. Stat. tit. 9-A, § 8-509; N.Y. Gen. Bus. Law § 518; Okla. Stat. tit. 14A, § 2-211; P.R. Laws Ann. tit. 10, §§ 11, 12.

Cards 12-13 (Nov. 24, 2012) (unpublished manuscript);[3] *see also* Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 584 (2005) (observing that Australian merchants have "impose[d] surcharges on credit transactions that exceed the interchange fee, a strategy that suggests that these surcharges are imposed with a modest eye toward price discrimination").

Second, credit-card surcharges may also harm the economy by reducing sales and causing consumer confusion. As petitioners recognize, consumers tend to respond negatively to surcharges, which are often perceived as a penalty for using credit. Pet. 2-3; *see also The Fair Credit Billing Act Amendments of 1975: Hearings on H.R. 10209 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency & Housing*, 94th Cong. 7 (1975) (statement of Kathleen F. O'Reilly, Legislative Dir., Consumer Fed'n of Am. ("Consumer Federation Statement")). Along these lines, the Senate Report accompanying the 1981 renewal of the federal anti-surcharge law noted that the law ensured that "consumers cannot be lured into an establishment on the basis of the 'low, rock-bottom price' only to find at the cash register that the price will be higher if a credit card is used." S. Rep. No. 97-23, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 74, 77.

Beyond penalizing consumers, surcharges may complicate their ability to compare prices, particularly where both surcharges and discounts are available across outlets for similar goods and services. Consumer Federation

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[3] http://works.bepress.com/marc_rysman/1/

Statement at 8. This particular concern was voiced in support of passing Texas's Anti-Surcharge Law. Rep. Blanton Statement (allowing surcharges "would practically eliminate comparative shopping").

3. a. Petitioners are merchants who operate various types of businesses in Texas. R.151-56.[4] These merchants want to charge additional fees beyond their "regular price[s]" when customers choose to pay for goods or services with a credit card instead of cash or equivalent forms of payment. R.151-55. Although the merchants want to engage in dual pricing—*i.e.*, charging different amounts for cash and credit-card transactions—they do not want to offer discounts below regular list prices to cash-paying customers. *See*, *e.g.*, R.151-52. The merchants claim that surcharges would enable them to "convey[] to their customers . . . that credit cards are a more expensive form of payment." R.156. Petitioners also suggest that they could lower their regular prices if they were able to exact surcharges from credit-card customers. *Id.*

b. Petitioners brought this lawsuit contending that Texas's Anti-Surcharge Law violates the First Amendment by "prohibiting certain disfavored speech"—namely, credit-card surcharges. R.156-57. They additionally claimed that the statute is unconstitutionally vague in violation of the Due Process Clause. R.157. Petitioners sought declaratory and injunctive relief preventing respondent, the Commissioner of the Office of Consumer Credit Commissioner of the State of Texas,

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[4] Citations to "R.*p*" refer to pages of the single-volume Fifth Circuit electronic record on appeal.

from enforcing the statute. R.157. Before discovery commenced, the Commissioner moved to dismiss the lawsuit pursuant to Federal Rule of Procedure 12(b)(6). R.179-203.

The district court granted the Commissioner's motion and dismissed the case with prejudice. Pet. App. 25a-35a. As for the First Amendment claim, the court held that the Anti-Surcharge Law "regulates only prices charged, an economic activity that is within the state's police power, and does not implicate First Amendment speech rights." Pet. App. 31a. Acknowledging that the law ultimately permits merchants to exact a higher price from credit-card users through the use of cash discounts, the court determined that the law permissibly restricts "how a merchant may go about charging that higher price." Pet. App. 31a. Specifically, "[b]y prohibiting merchants from charging an additional fee to customers using credit cards, the law effectively sets the maximum price for credit-card purchases as the posted price." Pet. App. 32a.

Noting that Texas merchants "remain free to discuss and convey . . . lawful information about their prices and pricing activity in general," the district court additionally held that any "speech" restricted by the Anti-Surcharge Law—*i.e.*, "the act of communicating a[n] [illegal] price"—is wholly incidental to the lawfully regulated pricing activity itself. Pet. App. 33a.

The district court then rejected petitioners' vagueness claim, holding that the Anti-Surcharge Law proscribes "a single activity—the act of charging an additional fee for goods and services when a purchaser pays

by credit card" in "simple and straightforward" language. Pet. App. 34a.

c. The Fifth Circuit affirmed. Pet. App. 1a-19a. Adhering to the district court's analysis, the court of appeals held that the Anti-Surcharge Law "does not implicate the First Amendment [because] the law ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards." Pet. App. 11a.

In so holding, the court of appeals rejected petitioners' principal argument that surcharges and discounts function as different "labels" for the same conduct. Pet. App. 8a. As the court explained, the Anti-Surcharge Law "forbids charging credit-card customers an additional amount *above* the regular price that is not also charged to cash customers, but it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers." Pet. App. 12a (internal quotation marks omitted). That "a merchant may have the same ultimate *economic* result if it applies the same amount in the form of a credit-card surcharge that it would otherwise apply as a cash discount" does not transform the Anti-Surcharge Law into a speech restriction. Pet. App. 12a (emphasis added). As the court of appeals observed, "merchants are not prevented from informing customers about the cost of credit, encouraging them to use cash, or expressing views on pricing policy more generally." Pet. App. 15a (internal quotation marks omitted).

Finally, because "[a] plain reading of Texas' law shows it forbids a merchant from imposing an extra charge for a purchase with a credit card," the court of

appeals affirmed the dismissal of petitioners' vagueness claim. Pet. App. 18a.

ARGUMENT

The Fifth Circuit's correct ruling, which implicates only a handful of state anti-surcharge laws, does not warrant this Court's review.

As the Fifth Circuit recognized, Texas merchants are free to inform consumers about costs associated with credit-card transactions. They are free to discuss credit-swipe fees, to talk about alternative forms of payment, and even to directly encourage consumers to pay with cash.

Texas's Anti-Surcharge Law has no bearing on this, or any other speech. The statute merely restricts sellers from charging additional fees when consumers opt to purchase goods or services with a credit card instead of cash. The Fifth Circuit's decision upholding the law is in accord with the rulings of this Court, which confirm that States may regulate pricing practices without triggering heightened First Amendment scrutiny. This remains true even if the regulation has the purpose or effect of promoting credit-card usage. Indeed, virtually every economic regulation is designed to affect market behavior. So long as the law regulates pricing itself—as opposed to speech about pricing—the First Amendment is not implicated.

That Texas does not similarly bar merchants from offering discounts below regular list prices to cash-paying customers does not change the economic character of the Anti-Surcharge Law. As the Fifth Circuit correctly rec-

ognized, surcharges and discounts are not simply different labels for the same conduct. They are opposite pricing practices. The Constitution does not require States to treat these different practices equally.

Petitioners point to a "deepening circuit split," Pet. 7 (internal quotation marks omitted), which consists of a single outlier opinion issued by the Eleventh Circuit that conflicts with opinions from the court of appeals below and the Second Circuit. The holdings of these cases are unlikely to have implications outside the specific context of assessing the constitutionality of state anti-surcharge laws. And the ultimate effect of the existing circuit split is that merchants will continue to encounter differing pricing constraints in different States, notwithstanding petitioners' desire for "national uniformity in the retail economy." Pet. 8. Under these circumstances, the Court should deny the petition and allow the issue presented here to percolate for further review in the lower courts.

I. The Fifth Circuit Correctly Held that Texas's Anti-Surcharge Law Does Not Implicate Speech.

A. States maintain broad authority to regulate economic conduct under their police powers. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). This includes the power to control the "prices to be charged for the products or commodities [a business] sells." *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (upholding order fixing milk prices); *see also Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (upholding rent-control ordinance); *Mobile Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 221-26 (1991) (upholding price ceiling on natural gas); *W. Coast Hotel*

Co. v. Parrish, 300 U.S. 379, 398-99 (1937) (upholding minimum-wage law); *Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) (upholding usury law capping the price of loans).

Beyond setting price ceilings and floors, States may also control prices indirectly by limiting sellers' ability to deviate from reasonable or regularly offered prices. *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931) (upholding ban on "unreasonable" insurance commissions); *see also Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 76-78 (1st Cir. 2013) (upholding ordinance restricting retailers from offering discounts on tobacco products). Texas has exercised its indirect control over pricing repeatedly.[5]

As petitioners observe, Pet. 9, the Speech Clause of the First Amendment undoubtedly protects sellers' ability to advertise truthful information about lawful prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (invalidating statutory ban on advertisements that referenced the retail prices of alcoholic beverages); *see*

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[5] *See*, *e.g.*, Tex. Bus. & Com. Code § 17.46(b)(27) (restricting sale of goods and services at "excessive price[s]" during times of disaster); Tex. Bus. & Com. Code § 27.02(a)(3) (limiting charges that "exceed[] the usual and customary charge" for goods and services related to an insurance claim); Tex. Lab. Code § 101.112(c) (restricting labor unions from charging "excessive initiation fees"); Tex. Occ. Code § 2155.002(c) (restricting hotel operators from charging guests more than the "posted rate" for a room); Tex. Util. Code § 52.155(a) (restricting telecom utilities from charging more than "prevailing rates" for certain access fees).

also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (States may not "completely suppress the dissemination of concededly truthful information about entirely lawful [pricing] activity[.]").

But *Liquormart* makes equally clear that the First Amendment does not restrict States from regulating the underlying pricing practices *themselves*—notwithstanding the fact that such regulations are employed to influence consumer behavior. 517 U.S. at 507 (plurality op.) (The State could maintain "higher prices [to promote temperance] by direct regulation," which "would not involve any restriction on speech."); *id.* at 530 (O'Connor, J., concurring in judgment) (State's "objective of lowering consumption of alcohol . . . could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages . . . without any restriction on speech." (internal quotation marks omitted)).

Concomitantly, there is no constitutional right to advertise an illegal price. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal[.]"); *see also Liquormart*, 517 U.S. at 525 (Thomas, J., concurring in judgment) (Government "may not restrict advertising regarding commercial transactions except to the extent that it outlaws or otherwise directly restricts the same transactions within its own borders.").

B. Applying these principles, the Fifth Circuit correctly held that Texas's Anti-Surcharge Law "does not implicate the First Amendment [because] the law ensures only that merchants do not impose an additional charge above the regular price for customers paying with credit cards." Pet. App. 11a (Anti-Surcharge Law "regulates conduct, not speech.").

As the court of appeals observed, "States' [regulatory] power extends beyond [implementing] price ceilings and floors to having the authority to set 'regular' versus 'excessive' or 'unreasonable' price restrictions." Pet. App. 15a (citing *O'Gorman & Young*, 282 U.S. at 257-58). That is precisely what the Anti-Surcharge Law does by "prohibit[ing] [merchants from imposing] additional costs above the 'normal' price" based upon a customer's chosen form of payment. Pet. App. 14a; *accord* Pet. App. 32a (Anti-Surcharge Law "effectively sets the maximum price for credit-card purchases as the posted price"). The court rejected petitioners' narrow view that the law must "forbid" dual pricing or "regulate the difference between the cash and credit prices" to constitute a true economic regulation. *See* Pet. 9 (internal quotation marks omitted); *cf. Dukes*, 427 U.S. at 303 ("States are accorded wide latitude in the regulation of their local economies . . . and rational distinctions may be made with substantially less than mathematical exactitude.").

The court of appeals then repudiated the notion that the Anti-Surcharge Law warrants First Amendment scrutiny in that the law prevents merchants from characterizing a fee imposed upon credit-card users as a "surcharge." As the court explained, "[p]recisely what the

merchants maintain they are prevented from 'characterizing' is what is prohibited economic conduct under the law: imposing surcharges." Pet. App. 13a. That analysis follows from *Pittsburgh Press* and other precedents established by this Court recognizing that States may regulate economic conduct without triggering heightened First Amendment scrutiny. *See* 413 U.S. at 389 (no First Amendment interest in advertising illegal commercial activity); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.").

As the court of appeals pointed out, the Anti-Surcharge Law has no bearing on actual protected speech. "[M]erchants are not prevented from informing customers about the cost of credit, encouraging them to use cash, or expressing views on pricing policy more generally." Pet. App. 15a (internal quotation marks omitted). "[S]imply imposing credit-card surcharges is prohibited[.]" *Id.*; *accord Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 60 (2006) ("As a general matter, [a statute] regulates conduct, not speech [when] [i]t affects what [persons] must *do* . . . not what they may or may not *say*.").

That Texas permits merchants to offer discounts to cash-paying customers also does not change the First

Amendment analysis.[6] Rejecting petitioners' theory of the case, the court of appeals recognized that surcharges and discounts are not different "labels" for the same conduct. Pet. App. 8a; *see also* Pet App. 12a ("[A] plain reading of the statute indicates that a 'surcharge' is not the same as a 'discount.'"). In fact, surcharges and discounts are precisely opposite pricing practices. *Supra* pp. 1-2. As such, the Anti-Surcharge Law "forbids charging credit-card customers an additional amount *above* the regular price that is not also charged to cash customers, but it permits offering cash customers a discount *below* the regular price that is not also offered to credit-card customers." Pet. App. 12a (internal quotation marks omitted).

Although "a merchant may have the same ultimate *economic* result if it [manipulates its regular prices and] applies the same amount in the form of a credit-card surcharge that it would otherwise apply as a cash discount," that fact alone does not transform the Anti-Surcharge Law into a speech restriction. Pet. App. 12a (emphasis added); *accord Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 77 (upholding ordinance restricting merchants from offering "discounts" on tobacco products even though merchants could offer same lower prices directly). As the district court put it, "[p]ermitting one kind of pricing strategy . . . [while] forbidding another . . . does not change the character of the regulation [because] [i]n

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[6] On the other hand, a state-law ban on discounts might be preempted by the federal statute that ensures that merchants may offer discounts to cash-paying customers. *Supra* pp. 1-2.

both instances, what is permitted or prohibited is a pricing practice." Pet. App. 32a.

In short, the Fifth Circuit's decision upholding the Anti-Surcharge Law comports with this Court's decisions recognizing that pricing regulations need not satisfy heightened First Amendment scrutiny.

II. The Shallow Circuit Split Pertaining to State Anti-Surcharge Laws Does Not Warrant this Court's Review.

A. Three circuit courts have addressed the constitutionality of state anti-surcharge laws to date. Like the Fifth Circuit in this case, the Second Circuit upheld New York's anti-surcharge law without subjecting it to heightened First Amendment scrutiny. *See Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 134-35 (2d Cir. 2015), *petition for cert. filed*, No. 15-1391 (U.S. May 16, 2016) ("Plaintiffs have provided no reason for us to conclude that [the challenged law], which regulates the relationship between a seller's sticker price and its credit-card price, differs in a constitutionally significant way from other laws that regulate prices and therefore do not implicate the First Amendment."). As *Expressions* noted, "[t]he First Amendment poses no obstacle" to pricing restrictions like New York's anti-surcharge law—even if the restriction was designed to "prevent negative consumer reactions" to credit-card usage. *Id.* at 133.

A divided panel of the Eleventh Circuit, however, concluded that Florida's anti-surcharge law "has the sole effect of banning merchants from uttering the word *sur-*

charge" and therefore invalidated the statute as "an unconstitutional abridgment of free speech." *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015), *petition for cert. filed*, No. 15-1482 (U.S. June 6, 2016). According to the *Dana's Railroad* majority, Florida's anti-surcharge law was no different than a hypothetical law restricting restaurateurs from serving "*half-empty* beverages" but allowing "*half-full* beverages" to be poured, making liability turn upon a restaurateur's "choice of words." *Id.* at 1245.

Chief Judge Carnes dissented from that opinion, concluding, like the Second and Fifth Circuits, that Florida's anti-surcharge law does not implicate the First Amendment because it "regulate[s] the actual imposition of a credit-card surcharge [not] what merchants can say about those fees." *Id.* at 1257 (Carnes, C.J., dissenting) (internal quotation marks omitted). As Judge Carnes explained, "the central flaw in the plaintiffs' position . . . [is] their '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.* (quoting *Expressions*, 808 F.3d at 107).

Dana's Railroad was wrongly decided. By treating surcharges and discounts as different "label[s]" for the same conduct, *id.* at 1247, the Eleventh Circuit "overlook[ed] differences in the [restricted and permitted] economic activit[ies]"—namely, that anti-surcharge laws "solely ban[] application of additional fees above the normal price and nothing more," Pet. App. 17a; *accord Expressions*, 808 F.3d at 131 ("Whether a seller is imposing a credit-card surcharge—in other words, whether it is doing what the statute, by its plain terms, prohibits—can

be determined wholly without reference to the words that the seller uses to describe its pricing scheme. If the seller is charging credit-card customers an additional amount above its sticker price that it is not charging to cash customers, then the seller is imposing a forbidden credit-card surcharge.").

Due to the limited scope and effect of these three circuit decisions, *infra* pp. 17-19, and because *Dana's Railroad* stands as the lone decision invalidating a state anti-surcharge law, the Court should allow the question presented here to percolate further in the lower courts.[7] *Dana's Railroad* may remain a tolerable outlier decision that could be rectified by additional legislation or litigation in Florida.

B. The conflict presented by the three circuit decisions concerns only the narrow issue of whether state anti-surcharge laws restrict speech or conduct. Answering that question in the lower courts turned largely upon state-law interpretation, which the circuit courts conducted without the aid of rich enforcement history or state-court decisions construing these statutes. *See* Pet. App. 13a-14a (relying upon plain language and legislative history to interpret Texas's Anti-Surcharge Law); *Dana's R.R.*, 807 F.3d at 1243 (relying upon "plain meaning" to interpret Florida's anti-surcharge law); *cf. Expressions*, 808 F.3d at 135-38 (abstaining to rule on portions of plaintiffs' First Amendment claim due to the uncertain scope of New York's anti-surcharge law).

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[7] As it stands, a fourth appeal raising similar issues is already pending in the Ninth Circuit. *See Italian Colors Rest. v. Harris*, No. 15-15873 (9th Cir. docketed Apr. 30, 2015).

At bottom, all that was decided in each case was whether a particular restriction upon surcharging credit-card usage—*i.e.*, one that does not include an ancillary restriction upon providing discounts to cash-paying customers—constituted an abridgement of speech. Consequently, the holdings in these cases are limited and unlikely to apply outside the context of assessing the constitutionality of other state anti-surcharge laws. Currently, only nine other States maintain such laws. *Supra* note 2. So these cases are unlikely to produce significant changes to First Amendment law.

Petitioners point to a supposed need for "national uniformity in the retail economy" and "uniform pricing schemes" nationwide. Pet. 8. But pricing regulation ordinarily is within the domain of the States. *See Dukes*, 427 U.S. at 303. Accordingly, merchants and consumers are faced with different pricing laws in different jurisdictions as a matter of course. *See*, *e.g.*, Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, Uniform Laws & Regulations in the Areas of Metrology & Engine Fuel Quality: Handbook 103, at 5-9 (2016) (comparing state statutes and regulations related to product weights and measures, including unit-pricing requirements);[8] U.S. Dep't of Labor, Minimum Wage Laws in the States—Jan. 1, 2016 (comparing minimum-wage laws in the

[8] http://www.nist.gov/pml/wmd/pubs/upload/hb130-2016-wfinal3.pdf.

States).[9] There is no greater need for national uniformity in the case of credit-card surcharges than in these other contexts.

C. In addition to the petition for a writ of certiorari filed in this case, similar petitions have been filed in *Expressions* and *Dana's Railroad*. *Supra* pp. 15-16. As discussed above, although these cases present a conflict among the courts of appeals regarding whether state anti-surcharge laws implicate the First Amendment, the conflict is shallow and not sufficiently "important" to warrant the Court's attention at this time. *See* S. Ct. R. 10(a). Nevertheless, if the Court disagrees and intends to grant a petition in any of these cases, respondent respectfully requests that the Court also grant the petition in this case to provide the Commissioner with the opportunity to defend Texas's law.

[9] https://www.dol.gov/whd/minwage/america.htm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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