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,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

RICHARD L. COFFMAN
The Coffman Law Firm
First City Building
505 Orleans Street, Suite 505
Beaumont, TX 77701
(409) 833-7700

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

This petition—along with the petitions in *Expressions Hair Design v. Schneiderman* (No. 15-1391) and *Bondi v. Dana's Railroad Supply* (No. 15-1482)—asks this Court to resolve a sharp and acknowledged circuit split over whether state no-surcharge laws violate the First Amendment. In opposing certiorari, Texas concedes the existence of this split and attempts to diminish it as "shallow." But Texas cannot deny the split's enormous practical importance to billions of dollars' worth of transactions in the national retail economy annually. And despite its claim (at 18) that the issues presented are "unlikely to apply outside the context of assessing the constitutionality of other state anti-surcharge laws," Texas acknowledges (at 17) that these petitions concern the proper boundary between "speech [and] conduct"—a fundamental question about the reach of the First Amendment itself. Finally, Texas does not dispute that *Expressions* is the best vehicle to resolve that question. *See* Pet. in *Expressions*, at 21–22. Accordingly, this Court should grant the *Expressions* petition and hold this petition pending the disposition of that case.

1. There is no doubt that there is a split. Texas concedes as much (at 15–17). And the circuits agree: The Fifth Circuit recognized that its decision below further entrenched the "circuit split" resulting from the Second and Eleventh Circuits' decisions, App. 7a, and Chief Judge Carnes said the same in his *Dana's Railroad* dissent, *see Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1257 (11th Cir. 2016) (Carnes, C.J., dissenting) (observing that the majority opinion set up a "direct conflict with [its] sister circuit on this issue"). Indeed, in defending the constitutionality of its invalidated no-surcharge law, Texas's sister state Florida expressly urged this Court "to resolve a square conflict between the circuits"—a conflict that was "deepened when the

Fifth Circuit . . . upheld Texas's anti-surcharge law." Pet. in *Dana's R.R. Supply*, at 2.

Unable to deny the split, Texas tries to downplay it, calling it "shallow" and dismissing the Eleventh Circuit's decision as a "tolerable outlier." BIO 15, 17. But the divide is far deeper than Texas lets on, with two of the three circuit-court decisions producing strong dissents. And, far from the Eleventh Circuit being an outlier, two district courts shared its view, as did the dissent below—a dissent that Texas conspicuously fails to mention. Indeed, Judge Dennis agreed with the Eleventh Circuit that because no-surcharge laws make "the legality of a price differential turn on the language used to describe it," they regulate "protected commercial speech," and thus "cannot survive First Amendment scrutiny." App. 24a (Dennis, J., dissenting).

As Florida explained in its *Dana's Railroad* petition (at 13), these decisions have only "entrench[ed] the conflict[,] leaving certiorari as the only viable method to resolve it." And there is no reason for this Court to delay its intervention: Seven courts have already weighed in, resulting in nine opinions (fracturing five to four) that together provide a thorough and thoughtful exploration of the key issues. Although the Ninth Circuit will eventually add its voice to the debate, that decision, as Florida observed in its petition (at 13), will only "widen" the conflict. Only this Court can resolve it.

2. The practical importance of this case to the national economy also goes unchallenged. Texas does not dispute, for instance, that "the question presented has enormous stakes for our economy," given that American merchants pay over $50 billion a year in credit-card swipe fees. Pet. 8. As national merchants explained in their amicus brief in *Expressions*, "[n]o-surcharge laws directly impact the movement of huge sums of money in

the American economy every day," creating "a massive market inefficiency by incentivizing far more credit-card transactions than would occur in a free market with accurate information available to consumers about the true cost of credit." Br. for Albertsons et al. in *Expressions*, at 4.

Nor does Texas contest that no-surcharge laws result in massive regressive transfers of income from low-income to high-income consumers by subsidizing credit use. *See* Pet. 8–9; Albertsons Br. in *Expressions*, at 10–13 (noting that the laws "ultimately suppress[] the purchasing power of America's poorest consumers"); Br. for Consumer Action et al. in *Expressions*, at 11 ("No-surcharge laws help facilitate this massive transfer of resources from cash users to credit card users, and even among credit card users, from low-income, low-rewards card users to high-income, high-rewards card users."). Even standing alone, these significant, national effects demonstrate the importance of this Court's review.

Texas nevertheless attempts to downplay the case's importance in other respects, arguing that it concerns only a "narrow" legal issue and that there is no need for "national uniformity" in the credit-card-surcharge context. BIO 17–19. Both arguments lack merit.

First, Texas claims (at 18) that "the holdings in these cases are limited and unlikely to apply outside the context of assessing the constitutionality of other state anti-surcharge laws." But resolving the constitutionality of these laws requires the Court to address fundamental (and novel) issues concerning whether and the extent to which the First Amendment limits state-imposed restrictions on the manner by which merchants can frame and convey price information.

The Fifth Circuit below, for instance, held that Texas's law "regulates conduct, not speech," because "a

'surcharge' is not the same as a 'discount'"—even though they "may have the same ultimate economic result." App. 12a. The Eleventh Circuit, by contrast, held that, "[b]y holding out discounts as more equal than surcharges, Florida's no-surcharge law overreaches to police speech well beyond the State's constitutionally prescribed bailiwick." *Dana's R.R. Supply*, 807 F.3d at 1251. These diametrically opposite conclusions do not reflect a disagreement over "state-law interpretation[s]," as Texas contends (at 17), but over something much more profound: "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 (2016). As Florida put it in its petition (at 16), "the speech-conduct boundary marks the First Amendment's outer contours," and the split "represents not simply a disagreement over surcharge statutes, but a disagreement over where to draw the speech-conduct boundary."

Texas's effort to minimize the need for national uniformity likewise falls flat. It initially points to the fact that only ten states have no-surcharge laws. BIO 18. But these states make up "40% of the country's population," Albertsons Br. in *Expressions*, at 4, and include the four largest state economies in the United States (California, Texas, New York, and Florida).[1]

Texas also suggests (at 18–19) that, because "merchants and consumers are faced with different pricing laws in different jurisdictions as a matter of course," "[t]here is no greater need for national uniformity in the case of credit-card surcharges than in these other contexts." In one sense, Texas is right: "pricing regulation

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[1] *See Gross domestic product (GDP) by state (millions of current dollars)*, Bureau of Econ. Analysis, Dep't of Commerce (last updated June 14, 2016), http://bit.ly/2a7ZsqG.

ordinarily is within the domain of the States." BIO 18. But the antecedent question whether the First Amendment applies to state restrictions on the *communication* of price information demands a national answer. If the split remains unresolved, as we have explained, national merchants will not avail themselves of dual pricing even in those states where it is permitted, to the detriment of the national economy and consumer welfare. *See* Pet. 8; Albertsons Br. in *Expressions*, at 13–15. Moreover, Texas's argument that there is a lack of national uniformity in "other contexts"—like the minimum wage—simply begs the question; this Court specifically held, for example, that states may constitutionally enact their own minimum wage laws. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937). Here, by contrast, the lower courts have divided over whether the Constitution limits states' abilities to enact no-surcharge laws.

In fact, the national significance of the question presented was recently highlighted in the Second Circuit's decision disapproving the proposed antitrust settlement—the largest of its kind in history—between merchants and Visa/MasterCard. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, __ F.3d __, 2016 WL 3563719 (2d Cir. June 30, 2016). The Second Circuit specifically observed that "[t]he incremental value and utility" of the injunctive relief obtained for the "forward-looking" subclass of merchants—"the ability to surcharge Visa- and MasterCard-branded credit cards"—was "limited . . . because many states, including New York, California, and Texas, prohibit surcharging as a matter of state law." *Id.* at *2–*3 (citing *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 127 (2d Cir. 2015); *Rowell v. Pettijohn*, 816 F.3d 73, 80 (5th Cir. 2016) (App. 10a); *Dana's R.R. Supply*, 807 F.3d at 1249). This settlement will likely be renegotiated and resolved; but to the extent it is now in limbo, the

prospect that this extraordinary settlement could rise or fall at least in part on the constitutionality of the state no-surcharge laws further demonstrates the importance of resolving that question. This Court should step in.

3. Given the importance of the issue, and the clear split, it is no surprise that Texas primarily chooses to respond to our arguments on the merits. *See* BIO 9–15. If the Court grants review—whether here or in *Expressions* or *Dana's Railroad*—it will have time enough to fully ventilate the relevant First Amendment questions.

That said, Texas's arguments largely miss the point. We agree that "States maintain broad authority to regulate economic conduct" and "may also control prices indirectly by limiting sellers' ability to deviate from reasonable or regularly offered prices." BIO 9–10. And we agree that there is no "constitutional right to advertise an illegal price." BIO 11.

But Texas does not deny that its no-surcharge law does *not* in any way control the amounts a merchant may charge for either cash or credit transactions; it controls only how a merchant may communicate the price difference to consumers. Although Texas claims (at 14) that "surcharges and discounts are precisely opposite pricing practices," in this context "there is no real-world difference between the two formulations." *Dana's R.R. Supply*, 807 F.3d at 1245. The law thus "targets expression alone." *Id.* And once the Court finds that the law regulates protected speech, it "should easily conclude that the law flunks" any level of First Amendment scrutiny. *See* Pet. 10–11.

4. Finally, Texas does not deny that *Expressions* is the first-filed and superior vehicle to review the question presented. Unlike the sparse record here, the record in *Expressions* presents a thorough account of the enforcement history of New York's no-surcharge law,

including unrebutted declarations from merchants who were targeted by the state attorney general for prosecution. *See* Pet. in *Expressions*, at 21–22. That fully developed record provides the Court with a more accurate understanding of how the law works on the ground. Additionally, New York's law, unlike Texas's, is a *criminal* prohibition—meaning that it "poses greater First Amendment concerns," given that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997).

Indeed, all that Texas asks (at 19) is that, "if the Court . . . intends to grant a petition in any of these cases, . . . the Court also grant the petition in this case to provide the Commissioner with the opportunity to defend Texas's law." But when considering petitions raising the same question presented, the Court's usual practice is to grant one petition for argument and hold the remaining petitions "for summary disposition in light of the decision ultimately rendered in the first case." Gressman et al., Supreme Court Practice 763 (9th ed. 2007). It grants cases to be heard in tandem only when there is good reason to do so—usually because a companion case presents an important wrinkle or variation on the question presented. Texas does not even attempt to make such a showing here. Thus, for all the reasons provided in the *Expressions* petition, the Court should grant review in that case.

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 here.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
NEIL K. SAWHNEY
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

RICHARD L. COFFMAN
The Coffman Law Firm
First City Building
505 Orleans Street, Suite 505
Beaumont, TX 77701
(409) 833-7700

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