NO. 15-1482

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

RESPONSE TO PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The question presented in this case is also presented in two earlier-filed petitions currently pending before the Court. *Expressions Hair Design v. Schneiderman*, No. 15-1391 (filed May 12, 2016); *Rowell v. Pettijohn*, No. 15-1455 (filed May 31, 2016). Those petitions, like this one, ask the Court to resolve a direct and acknowledged circuit split over whether state no-surcharge laws violate the First Amendment—a question of enormous practical and doctrinal significance.

The respondents agree that the question presented is certworthy. It is (as Florida says) "too important an issue to tolerate the circuit split," making this Court's review all but "required." Pet. 1, 14. The Court should therefore grant the first-filed petition in *Expressions* and hold this petition pending the outcome there.

Florida does not deny that *Expressions* is the superior vehicle. Nor does it give any credible reason to conclude otherwise. Instead, Florida offers up several reasons why this case is a "suitable vehicle," the first of which is that the case comes from the circuit that struck down (rather than upheld) a no-surcharge law. Pet. 24–27. But this Court can just as easily "put to rest the circuit conflict" by granting the *Expressions* petition. Pet. 24–25. It not only raises the same issue but does so on a far more robust enforcement record—including a criminal prosecution and unrebutted declarations from merchants targeted by the New York Attorney General in recent years—thus eliminating any doubt about how the law really works on the ground. For this reason, and for the other reasons given in the petition in *Expressions* (at 21–22), the Court should grant certiorari in *Expressions* and hold this petition pending the disposition of that case.

STATEMENT

The respondents are four Florida merchants who wish to truthfully convey the cost of credit to customers as a "surcharge" (or "additional" fee) for using credit, not as a "discount" for cash. Each merchant communicated its prices in just this way in early 2013, after the leading credit-card companies dropped their contractual no-surcharge rules. But each received a letter shortly thereafter from the Florida Attorney General's Office threatening prosecution under the state's no-surcharge law, Fla. Stat. § 501.0117. CA11 App. 62–80.

Take, for instance, the experience of the husband-and-wife owners of respondent Dana's Railroad Supply, a model-railroad hobby shop. They wanted to "disclose the true cost of accepting credit cards" to their customers, thus giving them "the chance to make an informed choice." CA11 App. 64. So the owners "posted a sign in the shop stating that [they] would tack on a small fee for transactions paid for with credit cards," and prominently disclosed the amount of the fee. *Id.* But after receiving a cease-and-desist letter from the Florida Attorney General threatening possible criminal prosecution, they were forced to take down the sign. *Id.*

They want to put their sign back up without fearing criminal prosecution. They would like to truthfully tell their customers—"both at the entrance to [the] store and at the register so that there will be no surprise"—that the store "will add a small fee onto the sale if they choose to pay by credit card, and that there will be no fee if they choose to pay with cash or debit." CA11 App. 64–65. The other respondents want to say the same.

The respondents understand that Florida law allows them to charge the same amounts for cash and credit if only they frame the credit price as the "sticker" price

and the cash price as the "discount" price. But they don't want to communicate their prices in that way. Hence they brought this suit, seeking a declaration that Florida's no-surcharge law violates their right to free speech, as well as an injunction barring the law's enforcement against them.

The district court's decision. In a six-page opinion, the district court dismissed the case. App. 46a. It began by observing that "Florida law allows a merchant to exact a higher price from a customer who pays with a credit card than from a customer who pays with cash." App. 46a–47a. The law restricts only the way the price difference is framed, not dual pricing itself—a $5 credit-card "surcharge" is a crime, but a $5 cash "discount" is lawful, even though in both cases the consumer pays the same price. App. 47a. As the district court put it, the difference "is a matter of semantics, not economics." *Id.*

Yet the court applied only rational-basis review. The court took it upon itself to propose three potential justifications for the law—"ensuring that the customer knows the facts," "[p]reventing unpleasant surprises," and "[r]equiring prices to be listed in the same way." App. 49a. Concluding that "[n]one of these assertions is compelling" and that they "might not even be persuasive," the court nevertheless upheld the law. App. 50a.

In the alternative, the court held without elaboration that the law "passes muster under the commercial-speech standards imposed in cases like *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980)." *Id.* The court did not explain how, given its rational-basis analysis, it could possibly conclude that Florida had put forth evidence to show that its law directly advances a legitimate interest and is no more extensive than necessary to address any

such interest—the bare minimum that *Central Hudson* requires.

The court of appeals' decision. The Eleventh Circuit reversed, holding that the law violates the First Amendment. App. 3a. The court agreed with the district court that "a criminal prohibition on credit-card *surcharges* that nevertheless allows for cash *discounts* 'is a matter of semantics, not economics,'" because "surcharges and discounts are nothing more than two sides of the same coin." App. 2a, 29a. But the Eleventh Circuit disagreed as to the consequences of that fact: "Though our Constitution does not dictate an economic orthodoxy," the court explained, "it does care a great about 'semantics.'" App. 29a. The court concluded: "By 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." *Id.*

In reaching that conclusion, the court rejected Florida's argument that the law regulates economic conduct: "After all, what is a surcharge but a negative discount? If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 *surcharge* or does he receive a $2 *discount*? Questions of metaphysics aside, there is no real-world difference between the two formulations," making the law "a restriction on speech, not a regulation of conduct." App. 16a.

Applying *Central Hudson* scrutiny, the court made "short shrift" of the law, finding that it "founders at every step." App. 24a–25a. It is not "a regulation of misleading speech. Calling the additional fee paid by a credit-card user a *surcharge* rather than a *discount* is no more misleading than is calling the temperature *warmer* in

Savannah rather than *colder* in Escanaba." App. 25a–26a. The court also "struggle[d] to identify a plausible governmental interest that would be served by the no-surcharge law"—especially given "the fact that Florida has exempted certain state agencies from [the] law"—and found that, in any event, the law is "too broad and too blunt a means to its ends." App. 26a–27a.

Chief Judge Carnes dissented, expressing his view that the statute should be read to actually *allow* surcharges—and require only that they be disclosed—to save it "from a fatal constitutional flaw" and "a great big First Amendment bullseye." App. 33a, 34a. He did not explain why, if the law were just about false advertising, it would exempt state agencies, *see* Fla. Stat. § 215.322, or why the Attorney General sent letters threatening to prosecute merchants, like Dana's Railroad, that prominently disclosed the surcharge ahead of time. Nor did he explain how his reading of the statute—as prohibiting only false or misleading speech, which other Florida statutes independently prohibit, *see, e.g.*, *id.* §§ 501.201–501.213—is consistent with the Attorney General's litigating position that the law is a "straightforward, unambiguous economic regulation" that "regulates no speech." *See* Appellee Br. in *Dana's Railroad Supply v. Bondi*, No. 14–14426 (11th Cir. filed Feb. 26, 2015), at 2.

By rejecting this reading, Chief Judge Carnes concluded, the majority created a "direct conflict" with the Second Circuit's opinion in *Expressions*. App. 44a.

ARGUMENT

I. This Court should grant the first-filed petition in *Expressions* and hold this petition.

Florida is correct that the Eleventh Circuit's decision "directly conflicts with decisions of the Second and Fifth Circuits," making this Court's review "necessary to resolve a direct, entrenched, and acknowledged circuit split over the constitutionality of credit-card surcharge statutes." Pet. 12–13. Florida is also correct that this is "too important an issue"—to both the national economy and First Amendment jurisprudence—"to tolerate [a] circuit split." Pet. 14. The split "represents not simply a disagreement over surcharge statutes, but a disagreement over where to draw the speech-conduct boundary," Pet. 16, and it directly affects billions of dollars' worth of retail transactions annually, *see* Br. for Albertsons et al. in *Expressions*, at 3–4.

If the Court agrees with the parties that certiorari is warranted, it must decide which petition (or petitions) to grant. Any of the three petitions currently pending before the Court on this issue would be an "appropriate" vehicle to resolve the question. Pet. 2. But because the first-filed petition in *Expressions* presents the same question on a more complete record, there is no reason to grant certiorari in this case instead. Florida does not contend that this case is a better vehicle than *Expressions*, and none of the case-specific "considerations" it identifies (at 24–27) provides a basis for granting this petition over *Expressions*.

The first feature of this case that Florida highlights is that "the Eleventh Circuit is the only federal court of appeals in the country to have struck down a [no-surcharge] law," so "granting certiorari here would allow this Court to immediately and unequivocally put to rest

the circuit conflict." Pet. 24–25. But this is irrelevant to the vehicle question. The Court can just as "unequivocally" resolve the split by deciding *Expressions*.

Next, Florida focuses on the specific language of Florida's statute, emphasizing that cash discounts are "explicitly authorize[d]," and that the definition of surcharge "supplies a readily identifiable textual basis for giving the anti-surcharge statute a narrowing construction," as Chief Judge Carnes did. Pet. 25–26. But there is no doubt that New York has consistently authorized cash discounts ever since enacting its law, as the New York Attorney General concedes in *Expressions*. *See* BIO in *Expressions*, at 1 ("Sellers are permitted, however, to provide discounts to cash users."). And the narrowing construction that Chief Judge Carnes proposed is, if anything, a reason *against* using this case as the vehicle. The availability of a case-specific "narrowing construction" does not somehow make the case a better vehicle for addressing the non-case-specific question presented, on which there is undeniably a split.

At any rate, Chief Judge Carnes' reading of Florida's statute is implausible and at odds with "the Attorney General's own reading of the no-surcharge law." App. 14a. Far from arguing that the law prevents only false or deceptive speech (misleading a consumer into thinking that the total price will be lower than it is), the Attorney General has consistently argued that the law regulates *no* speech. Her office sent cease-and-desist letters to merchants even though they fully disclosed the amount of the surcharge ahead of time. Those letters made clear that, "regardless of the terms of [the nationwide class-action] settlement" then in effect—which *required* any surcharge to be prominently disclosed—Florida's law "does not allow" a seller "to impose a sur-

charge" for using a credit card. CA11 App. 66. And, if Chief Judge Carnes were right that the law prevents only false or deceptive advertising, as other Florida laws independently prohibit, consumer-advocacy groups would not have opposed no-surcharge laws when they were enacted in the 1980s, *see* Pet. for Cert. in *Expressions*, at 8–9, and the state would not have felt the need to exempt itself from the law's prohibition.[1]

Finally, Florida contends that the "plaintiffs' decision to bring a facial challenge" is a reason to grant the petition in this case. Pet. 26–27. But this is not a facial challenge. As we made clear in the district court, "this case is an as-applied challenge"—"just like the as-applied challenge Judge Rakoff sustained in *Expressions*." Dist. Ct. ECF No. 17, at 35–36 n.9. We repeated the point in both briefs on appeal. *See* CA11 Appellants' Br. 2–3 ("[The plaintiffs] seek a declaration that Florida's law violates *their* right to free speech" and "an injunction barring the law's enforcement *against them*.") (emphasis added); CA11 Reply Br. 24 n.3 ("[T]his is an as-applied challenge."). The injunction granted by the district court in *Expressions* applied only to the plaintiffs in that case, and the plaintiffs here seek similar relief. So there is no difference between the cases in this respect. In any event, it is unclear that the facial/as-applied distinction has much significance here; either way, the *Cen-*

[1] Taking a cue from Chief Judge Carnes, Florida now appears to advance the position (at 3) that the law prohibits only "an *unannounced* additional charge," implying that a merchant (like Dana's Railroad) with a sign saying, for example, "We impose a 3% credit-card surcharge" is actually obeying the law. But this newfound position—if that is really what Florida is saying—cannot be reconciled with its position below. Nor can it be reconciled with the cease-and-desist letters. And it is wrong for the reasons just explained.

tral Hudson inquiry evaluates the regulatory scheme as a whole. As the Second Circuit recognized, "the scope of Plaintiffs' First Amendment challenge does not meaningfully affect [the] analysis." *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 130 (2d Cir. 2015); *see also Jacobs v. The Florida Bar*, 50 F.3d 901, 907 (11th Cir. 1995) (Godbold, J, concurring) (questioning "what, if anything, is left of the facial/as-applied distinction in commercial speech cases").

None of this is to say that this case would be a poor vehicle. It would not be. But there is nothing to suggest that it would be a better vehicle than *Expressions*. If anything, the robust record of enforcement in *Expressions* makes that case a superior vehicle. That record includes a criminal prosecution and numerous detailed and uncontested declarations from merchants targeted by the New York Attorney General in recent years for violating the law. Because of that record, the Court would not have to resort to speculation about how the law operates in the real world. In this case, however, the enforcement record is limited to several form letters sent by the Attorney General threatening prosecution but not saying whether the merchant was (in the state's eyes) violating the law. Simply put, *Expressions* is the better vehicle.

II. The Eleventh Circuit's decision is correct.

Because the petition in *Expressions* makes the case why the Eleventh Circuit's answer to the question presented is correct, we need not dwell on the merits here. There will be time enough to brief the merits if the Court grants one of the three petitions currently pending.

That said, a few points deserve a response. *First*, Florida leans heavily (as it did below) on the traditional authority of states to regulate the "charging of prices," thus lumping this law in with a slew of "price-control"

laws. Pet. 17–18. But this law, unlike those laws, does not regulate *any* prices that merchants may charge for their goods or services. To the contrary, as both courts below correctly observed, the law "allows a merchant to exact a higher price" (set at whatever amount the merchant wishes) "from a customer who pays with a credit card than from a customer who pays with cash"—but only if the difference between the two prices is framed as a cash "discount" and not a credit-card "surcharge." App. 46a–47a. Liability turns on speech, not conduct.

Second, and relatedly, none of the state laws that Florida mentions (at 15)—"laws prohibiting tobacco discount coupons and multi-pack discounts," laws banning "'free' alcoholic beverages," and "usury laws"—makes liability turn on labeling or has the effect of regulating only semantics. So the Eleventh Circuit's decision does not in any way "cast a First Amendment cloud over a variety of economic regulation." Pet. 17. States continue to have broad authority to regulate the prices charged to consumers—that is, to "target real-world commercial activity"—and when they do so they "need not fear First Amendment scrutiny." App. 29a. The Eleventh Circuit did not hold otherwise, and we do not contend otherwise. All we contend, and all that the Eleventh Circuit held, is that the choice of how best to frame a dual-pricing system—without changing the amounts charged—is expressive. "Pricing is a routine subject of economic regulation," as Judge Rakoff explained, "but the manner in which price information is conveyed to buyers is quintessentially expressive, and therefore protected by the First Amendment." *Expressions Hair Design v. Schneiderman*, 975 F. Supp. 2d 430, 445 (S.D.N.Y. 2013).

Finally, Florida for the first time advances a narrowing construction, following the lead of Chief Judge

Carnes. But that construction, aside from being case-specific and non-responsive to the question presented, is (as explained above) implausible and cannot be reconciled with the Attorney General's previous interpretation of the statute. If the statute prohibited only undisclosed surcharges, the respondents would not have received cease-and-desist letters from the Attorney General, and hence they would not have brought this case. To be clear: The respondents do not seek to impose undisclosed surcharges (and doing so would be illegal anyway under Florida's consumer-protection laws). Their only goal is to truthfully and prominently *communicate* the cost of credit as a credit-card surcharge, rather than as a cash discount. *See* CA11 App. 62–80.

Any law that makes liability turn on how a person truthfully conveys price information to customers regulates speech and must satisfy scrutiny. The Eleventh Circuit correctly held that the no-surcharge law "crumbles under any level of heightened First Amendment scrutiny," App. 3a. This Court should grant certiorari in *Expressions* and reach the same conclusion.

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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