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

PETITIONER'S REPLY BRIEF

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I. THIS CASE PROVIDES A PARTICULARLY GOOD VEHICLE FOR RESOLVING THE SPLIT BETWEEN THE FEDERAL COURTS OF APPEALS.

Respondents agree that the Eleventh Circuit's decision creates a clear split with the Second and Fifth Circuits. Resp. at 6. They also agree that the First Amendment question presented is sufficiently important to warrant this Court's review. *Id.* As Respondents see it, however, the Second Circuit's decision supplies a better vehicle for resolving that First Amendment issue. *Id.* at 6–9. For the reasons set forth below, this Court should grant the petition in this case, which supplies a particularly good vehicle for addressing the conflict among the federal courts of appeals.

Respondents argue that *Expressions Hair Design* v. *Schneiderman*, 808 F.3d 118 (2d Cir. 2015), supplies a superior vehicle because the state law at issue in that case is the subject of a "far more robust enforcement record." Resp. at 1. As the Second Circuit recognized, however, that enforcement record is far more sparse and far less helpful than Respondents suggest. The parties in *Expressions Hair Design* "cited just one reported prosecution" under New York's surcharge ban—a decades-old action that a state trial court dismissed without resolving what type of pricing scheme the merchant had employed. 808 F.3d at 125. Other than that lone prosecution, the *Expressions Hair Design* plaintiffs pointed only to one other "spate of enforcement activity," which culminated in *settlements* between the New York Attorney General and fourteen merchants

who agreed in 2009 to halt a particular verbal pricing practice. *Id.* at 125–26.

As the Second Circuit observed, in the absence of any state appellate decisions interpreting the statute, "[o]ne reported prosecution and one set of threatened prosecutions . . . shed little light, if any," on the "true breadth" of New York's surcharge ban. *Id.* at 140 (holding that the district court committed "clear error" insofar as it relied on that scant enforcement record in construing New York's statute). Far from definitively resolving the meaning of New York's law, the sparse enforcement record on which Respondents rely may not even reflect the New York Attorney General's current litigating position. As the Second Circuit noted, Expressions Hair Design "has employed its dual-price scheme without being prosecuted thus far, and New York has, in this case, effectively disavowed any interpretation of [the statute] under which dual-price sellers will be prosecuted simply because their employees happen to *refer* to their pricing schemes as involving a 'surcharge.'" *Id.* at 141 (emphasis in original).

Respondents advert to a number of other factors that purportedly make this case a less attractive vehicle. In particular, Respondents argue that Petitioner's (and Chief Judge Carnes') reading of Florida's surcharge ban is untenable, contrary to the position that Petitioner previously has taken during this litigation, and in tension with the cease-and-desist letters Respondents received. Resp. at 7–8. As Chief Judge Carnes carefully explained in his dissent, all of these contentions are incorrect. Pet. App. 35a–41a (Carnes, C.J., dissenting).

First, giving effect to the statutory definition does not make Florida's surcharge statute—a *criminal* prohibition—duplicative of Florida's *civil* consumer protection laws. Civil and criminal statutes that impose different kinds of penalties on the same underlying conduct "are anything but redundant." *Id.* at 41a. In any event, "there is no authority for the proposition that" a court should go out of its way to create a constitutional infirmity in a statute that is otherwise valid on its face in order to eliminate a potential redundancy. *Id.* at 40a. Indeed, the panel's "statute-killing" methodology gets the constitutional-avoidance canon exactly backwards. *See id.* at 31a, 34a–36a, 42a.

Second, Petitioner has consistently emphasized the statutory definition's temporal limitation. In both her answer brief and her response to Respondents' supplemental authority letter, Petitioner repeatedly explained that under Florida's statute, prohibited surcharges occur at the time of the transaction. *Id.* at 38a; *see also Dana's R.R. Supply* v. *Bondi*, No. 14-14426, Answer Br. at 5, 12, 14–15, 17, 25, 34 (11th Cir. filed Feb. 26, 2015); Resp. to Supp. Auth. at 1–2 (11th Cir. filed April 10, 2015). At oral argument before the Eleventh Circuit, far from "disavow[ing]" Chief Judge Carnes' reading, Petitioner affirmatively embraced it.[1] Pet.

[1] Respondents assert that Chief Judge Carnes interpreted Florida's surcharge statute as a ban on "false or misleading speech," Resp. at 5, rather than economic conduct, *id.* at 7. That is not the case. As Chief Judge Carnes wrote: "Prescribing when a business can add an additional amount to its price controls the timing of conduct and not the speech describing that conduct. The Supreme Court has long held that the government can regulate economic conduct . . . without violating the First Amendment."

App. 39a (Carnes, C.J., dissenting). All of this prompted Chief Judge Carnes to appropriately ask in his dissent: "[i]f the majority opinion sees all of that as a 'disavowal' of the statutory definition, which turns on what happens at the time of sale, what would an avowal of it look like?" *Id.*

Third, Respondents make too much of the cease-and-desist letters. *Id.* at 36a–37a. As Respondents themselves acknowledge, those letters did not determine—nor did they purport to determine—whether Respondents had violated the law. Resp. at 9. Instead, the letters provided a copy of the statute, noted that the Attorney General's office had received a complaint, and stated only that "*[i]f* you are charging a surcharge to customers who pay for a transaction with a credit card, *as defined in the statute*, please suspend this practice immediately to avoid the possibility of further action by our office." *Dana's R.R. Supply* v. *Bondi*, No. 4:14-cv-134-RH-CAS, Declarations in Support of Plaintiffs' Motion for Summary Judgment, D.E. 18 at 5, D.E. 19 at 4, D.E. 20 at 5, & D.E. 21 at 5 (N.D. Fla. filed June 11, 2014) (emphases added). The Attorney General did not offer any interpretation of the statute in these cease-and-desist letters, much less one that contradicts the position advanced by the State in this litigation.

In short, the factors on which Respondents rely do not make *Expressions Hair Design* a better vehicle. Indeed, to the extent that this Court seeks to avoid

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Pet. App. 42a (Carnes, C.J., dissenting). Thus, Chief Judge Carnes' reading is not "at odds with," Resp. at 7, Petitioner's position that the law regulates conduct rather than speech.

getting enmeshed in ancillary disputes concerning the meaning or scope of any particular state's law, this case would seem to supply a particularly good vehicle for resolving the split between the federal circuits. Several considerations support that conclusion.

First, Florida's ban on credit-card surcharges is embodied in a statutory framework that expressly defines the most pertinent legal terms—including the critical term "surcharge." *See* Fla. Stat. § 501.0117(1); Pet. at 25. Thus, unlike the bans of New York, Texas, and California, Florida law provides a comparatively clear textual basis for assessing the scope of the State's anti-surcharge statute. Pet. at 25–26; *compare, e.g.*, *Expressions Hair Design*, 808 F.3d at 127, 135 (noting that "the [New York] statute does not define the word 'surcharge,'" and declining to reach the merits of certain claims "[b]ecause this portion of Plaintiffs' challenge turns on an unsettled question of state law").

Second, the Eleventh Circuit's facial invalidation of Florida's law simplifies the First Amendment analysis by narrowing the range of state-law issues that this Court would have to decide in order to dispose of this case. In particular, this Court may review the Eleventh Circuit's broad holding—i.e., its conclusion that Florida's statute is unconstitutional in all of its applications—without purporting to delineate the precise contours of state law. Instead, this Court could correct the Eleventh Circuit's error and resolve the current circuit conflict by holding that, regardless of whether Florida's statute may have other applications, that statute may constitutionally be applied in the single-sticker-price context that the Second and Fifth Circuits addressed.

Properly understood, the facial nature of the relief in this case offers at least one more reason to grant the State's petition. As a result of the Eleventh Circuit's decision, Florida may not enforce its surcharge ban in any context. Thus, Florida's courts will have no opportunity to clarify the meaning of the ban. *Compare Expressions Hair Design*, 808 F.3d at 137–42 (abstaining from certain challenges to the New York statute, and thus allowing the parties to seek "a controlling interpretation of the challenged law from the state courts, whose decision could cause the federal constitutional question to disappear altogether"). Unless this Court intervenes, the statute will remain wholly unenforceable, regardless of how Respondents characterize the relief that they sought.

Moreover, a decision to grant certiorari in one of the other pending petitions will not necessarily address the injury Florida has suffered as a result of the panel's broad ruling. Suppose, for example, that this Court were to grant the petition in *Expressions Hair Design* and to reverse the Second Circuit's judgment. A decision holding that the New York statute violates the First Amendment in one of its applications might fairly compel the conclusion that an analogous application of Florida's anti-surcharge statute would similarly be unconstitutional; but such a ruling might well leave the Eleventh Circuit's facial invalidation intact, even if Florida's statute has constitutionally permissible applications.

Finally, Respondents contend that Florida's narrow statutory definition of the term "surcharge" weighs against granting certiorari in this case. Resp. at 7. That

argument turns a virtue into a vice. The statutory definition facilitates the First Amendment analysis by elucidating the meaning and scope of Florida's law. In any event, the facial nature of the Eleventh Circuit's relief eliminates the need for this Court to address ancillary questions of state law. Pet. at 26–27. Notwithstanding Respondents' belated efforts to raise an as-applied challenge, the Eleventh Circuit majority and dissent both agreed that Respondents had mounted a facial attack. Pet. App. 8a (majority op.); *id.* at 37a & n.3 (Carnes, C.J., dissenting).

In sum, this case provides a particularly good vehicle for resolving an important First Amendment question on which the federal courts of appeals are divided. Absent this Court's intervention, law-enforcement authorities in Florida will be entirely prohibited from enforcing the State's anti-surcharge statute; and a decision to grant a petition in a different case will not necessarily alleviate—or ensure the propriety of—the particular injury Florida is suffering as a result of the Eleventh Circuit's categorical ruling.

II. THE ELEVENTH CIRCUIT'S FACIAL INVALIDATION OF FLORIDA'S STATUTE IS INCORRECT, CARRIES SIGNIFICANT DOCTRINAL AND PRACTICAL IMPLICATIONS, AND WARRANTS THIS COURT'S REVIEW.

On the merits, Respondents contend that the Eleventh Circuit's decision is correct, that its sweeping ruling does not jeopardize economic regulations in other contexts, and that Petitioner's interpretation of Florida's surcharge ban would prevent this Court from answering the question presented. Resp. at 9–11. All of these contentions are incorrect.

Respondents observe that Florida's surcharge ban, unlike traditional price-control laws, does not directly regulate the prices that merchants charge for their goods. Resp. at 9–10. This may be true so far as it goes, but it does not follow that the ban regulates speech. As the petition explains, Florida's surcharge ban regulates a *relationship* between prices—the sticker price and the price charged at the register—and nothing more. Pet. at 18–19; *see also Expressions Hair Design*, 808 F.3d at 131 ("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."). Under the ban, merchants remain free to describe their pricing practices in any way they choose, to express their disapproval of credit-card fees, and to otherwise speak freely about their business practices or views on economic policy. The only thing they may not do is to impose a "surcharge," defined 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." Fla. Stat. § 501.0117(1). Florida's surcharge ban prohibits only a particular pricing practice. Liability turns on conduct, not speech.

Addressing Petitioner's concern regarding the practical implications of the panel's broad ruling, Respondents next argue that "none of the state laws that Florida mentions" in its petition "makes liability turn on labeling or has the effect of regulating only semantics." Resp. at 10. Petitioner agrees, but that is also true of the anti-surcharge statute that the panel struck down. *See* Fla. Stat. § 501.0117; Pet. App. 32a (Carnes, C.J., dissenting) ("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."). Nevertheless, the panel majority subjected Florida's surcharge ban to First Amendment scrutiny on the theory that laws differentiating between economically equivalent transactions effectively target speech rather than conduct. Pet. App. 15a–17a. Such an approach casts a cloud of doubt over a broad array of economic regulations that have not heretofore been thought to raise constitutional concerns. *See Expressions Hair Design*, 808 F.3d at 134–35 (finding "no reason" to conclude that a law regulating the relationship between prices "differs in a constitutionally significant way from other laws that regulate prices and therefore do not implicate the First Amendment").

Under the Eleventh Circuit's approach, for example, laws regulating tobacco discounts, banning "free" alcoholic beverages, and prohibiting usury might also implicate the First Amendment. *See* Pet. at 14–16. After all, what is the economic difference between "multipack discounts" such as "buy-two-get-one-free [offers]," and 33.3%-off sales on individual packs? *See, e.g.*, *Nat'l Ass'n of Tobacco Outlets, Inc.* v. *City of Providence*, 731 F.3d 71, 74 (1st Cir. 2013) (internal quotation marks omitted). As for "free" beverage bans, there is no economic difference between selling a non-discounted meal with a "free" $5.00 drink, and a drink-and-meal combo discounted by $5.00. *See, e.g.*, 204 Mass. Code of Regs. §§ 4.03(1)(a), 4.04. Similarly, while usury laws restrict the rates that lenders may charge, lenders often remain free to increase other charges. *See* Todd J. Zywicki, *Consumer Use and Government Regulation of*

Title Pledge Lending, 22 Loy. Consumer L. Rev. 425, 427–33 (2010) (describing how the practice of charging "points" on mortgages originated). Under the Eleventh Circuit's approach, all such laws might draw "distinctions in search of a difference," Pet. App. 3a, and therefore trigger a full-blown First Amendment analysis. Thus, the panel's decision might well have broader implications for the scope of the government's economic regulatory power.

Finally, Respondents reiterate their assertion that Petitioner has vacillated in her interpretation of Florida's surcharge ban, and they also argue that her interpretation is "case-specific and non-responsive to the question presented." Resp. at 10–11. The previous section of this reply addresses the former contention. As to the latter, to the extent Respondents mean to argue that Florida's narrow statutory definition of "surcharge," if given effect, would preclude this Court from resolving the circuit split, they fail to appreciate both the scope of the other circuits' holdings and the scope of the Eleventh Circuit's judgment. Invoking *Pullman* abstention, the Second Circuit confined its analysis to the single-sticker-price context and held that New York's surcharge ban could constitutionally operate in that context. *Expressions Hair Design*, 808 F.3d at 139 ("[W]e cannot presume that Section 518 has any applications outside the single-sticker-price context at all—that is, any applications other than the ones we have already found to be constitutional."). The Fifth Circuit upheld Texas's law on the understanding that it applied only to the single-sticker-price context and not to dual pricing. *See Rowell* v. *Pettijohn*, 816 F.3d 73, 83 (5th Cir. 2016) ("Unlike in *Expressions*, the merchants in this action do not claim Texas' law forbids

a dual-pricing scheme. Therefore, we have no reason, as the second circuit did, to abstain under *Pullman*.").

By facially invalidating Florida's surcharge ban and enjoining the law's application in *any* context—including the single-sticker-price context that the Second and Fifth Circuits addressed—the Eleventh Circuit created a "direct conflict" between the courts of appeals, Pet. App. 44a (Carnes, C.J., dissenting); *see Rowell*, 816 F.3d at 78–79 (discussing the "circuit split"). The "narrowing construction" to which Respondents refer—and which, as Judge Carnes observed, might just as well be called "'the statutory definition interpretation,'" Pet. App. 35a—would not prevent this Court from resolving the question presented. Regardless whether this Court agrees with Petitioner's interpretation of Florida law, the Court may assess "whether Florida's nearly thirty-year-old Surcharge Statute is a facially unconstitutional speech restriction, as the Eleventh Circuit held," Pet. at i. Moreover, giving effect to the statutory definition and confining Florida's surcharge ban to the single-sticker-price context would not make this petition a "case-specific" or "non-responsive" vehicle. Resp. at 11. To the contrary, the Second and Fifth Circuits' rulings were predicated on a substantially similar understanding of the respective state laws at issue in those cases. *See Expressions Hair Design*, 808 F.3d at 139, 141–42; *Rowell*, 816 F.3d at 83. Because it helps to focus the First Amendment inquiry on the very same application at issue in the other pending petitions, the potential "narrowing construction" to which Respondents refer, Resp. at 10–11, enhances rather than diminishes the extent to which Florida's petition presents an appropriate vehicle for resolving the important First

Amendment question on which the federal courts of appeals are divided.

CONCLUSION

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

Respectfully submitted,

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