December 16, 2015

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, LA 70130

Re: *Rowell v. Pettijohn*, No. 15-50168—Letter brief per order of December 1, 2015

Dear Mr. Cayce:

As we explained in our briefs, Texas's no-surcharge law, Tex. Fin. Code § 339.001, permits merchants to charge different prices to cash and credit-card customers, but only if the merchant labels the price difference a cash discount. If the merchant labels the *same* price difference as a credit-card surcharge, by contrast, the merchant has violated the law. Such a statute, the Eleventh Circuit recently held, "targets expression alone," because "there is no real-world difference between the two formulations." *Dana's R.R. Supply v. Attorney General, State of Florida*, No. 14-14426, — F.3d —, 2015 WL 6725138, at *5–*6 (11th Cir. Nov. 4, 2015).

At oral argument, the panel suggested that an "anti-discount" interpretation—under which the statute would be construed more broadly, to prohibit dual pricing altogether—could avoid the First Amendment problems that plainly flow from the statute's direct regulation of merchants' communication of truthful price information.

But this proposed broadening interpretation would run counter to the statute's text, the federal statutory history from which the law arose, the legislative history, and the uniform interpretation of all state no-surcharge laws. And it would conflict with the settled understanding of the Texas agencies charged with administering the law, as well as that of the regulated merchant community. Worse, it would do so in a way that *expanded* the law's scope—to actually regulate economic conduct.

All that is reason enough to reject the anti-discount interpretation. But the proposed interpretation cannot stand for still another reason: Construing the law to prohibit dual pricing would directly conflict with a federal statute expressly protecting the right of merchants to provide discounts to cash-paying customers, *see* 15 U.S.C. § 1666f—and so would likely be preempted under the U.S. Constitution's Supremacy Clause. The constitutional-avoidance doctrine thus has no application in a case like

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this one, where avoiding one set of constitutional problems necessarily presents the court with an entirely new set of constitutional problems.

Rather than invoke constitutional avoidance to expand the scope of the law against the state's will, in a way that would likely render it preempted and hence unconstitutional, this Court should instead adopt the longstanding, universal interpretation of the law and decide the First Amendment and vagueness questions.

I. The anti-discount interpretation is wrong.

Although Texas's no-surcharge law is vague in many respects, it is at least clear about one thing: All indicators of its meaning—text and context, statutory history and legislative history, the understanding of both the regulators and the regulated—leave no doubt that the law permits merchants to engage in dual pricing if they express the price difference as a cash discount, rather than a credit-card surcharge.

A. As used in Texas's no-surcharge law, the term "surcharge" has a particular, settled meaning that does not include a cash "discount."

Texas's no-surcharge law prohibits "impos[ing] a surcharge on a buyer who uses a credit card . . . instead of cash." Tex. Fin. Code § 339.001(a). But the law does not define the word "surcharge." Like many terms, "surcharge" can mean different things depending on its context. And here, the "context indicates that a technical meaning applies." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at 73.

Texas's law was enacted against the backdrop of a federal statutory regime that authorized merchants to use dual pricing as long as they described the difference as a "discount" and not a "surcharge." 15 U.S.C. § 1666f. In the federal law, Congress defined "discount" as "a reduction made from the regular price," and expressly provided that "[t]he term 'discount' . . . *shall not mean a surcharge*." *Id.* § 1602(q) (emphasis added); *see also id.* § 1666f(b); 12 C.F.R. 226.4(c)(8). A brief review of the statutory context makes clear that Texas's statute incorporates the meaning of "surcharge" from the federal law, at least to the extent that the word "shall not mean" a discount. In doing so, the statute preserves the right of merchants to use dual pricing if they express the difference using the right words: as a cash "discount."

1. As we explained in our opening brief (at 10–13), Congress initially enacted legislation in 1974 "protecting the right of merchants to have dual-pricing systems" by ensuring that they could offer discounts to cash-paying customers. *See* Pub. L. No. 93, § 495, 88 Stat. 1500 (1974) (codified at 15 U.S.C. § 1666f(a)). Two years later, at the behest of the credit-card industry, Congress enacted a temporary ban on "surcharges," despite the authorization for discounts. Pub. L. No. 94-222, 90 Stat. 197. Numerous stakeholders, from federal regulators to consumer advocates, complained to Congress that the surcharge ban was anti-consumer because it hid the true cost of credit by regulating "significant" "semantic differences" in how the cost could be communicated to consumers. ROA.285. Congress thus allowed the surcharge ban to expire in 1984.

The credit-card lobby quickly succeeded in convincing ten states, including Texas, to fill the gap created by the federal ban's lapse with no-surcharge laws of their own.[1] These laws were enacted to resurrect the prior federal statutory framework, which banned the use of the surcharge label while protecting merchants' ability to communicate the price difference as a cash "discount."

2. This statutory background makes clear that Texas's legislature, although it did not define the term "surcharge," had in mind the specific meaning that the term had acquired in this context. Even if a statute does not define a word or phrase, that word or phrase may have an accepted meaning in the area of law addressed by the statute, or it may have been borrowed from another statute under which it had an accepted meaning. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) ("Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning."). And "when a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning." Scalia & Garner, *Reading Law*, at 323.

That is true here. It is eminently reasonable to conclude that the meaning of the term "surcharge" in Texas's law borrows the meaning from the federal law it replaced, at least to the extent that it excludes cash discounts. *See* 15 U.S.C. § 1602(q). Not only does the law occupy the "same field" as the federal law, Scalia & Garner, *Reading Law*,

[1] *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; Me. Rev. Stat. 9-A, § 8-303; Mass. Gen. Laws ch. 140D, § 28A(a)(1)-(2); N.Y. Gen. Bus. Laws § 518; Okla. Stat. 14a, § 2-211(A); Tex. Fin. Code § 339.001.

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at 323; it is also the direct successor to that law. To interpret the key term to mean something vastly different (and far broader) in Texas's law than it meant in the federal law would defy a basic tenet of statutory interpretation: that "adoption of the wording of a statute from another legislative jurisdiction, carries with it the previous judicial interpretations of the wording." *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (explaining that courts "must read the words in their context and with a view to their place in the overall statutory scheme"). Thus, as the state agency with exclusive authority to enforce the statute has explained: "Read together, § 339.001, Tex. Fin. Code, and 15 U.S.C. § 1666f stand for the proposition that a merchant may offer a cash customer a discount, but may not impose a surcharge on a credit card customer." ROA 259.

Every other state that has enacted a no-surcharge law has interpreted its statute in the same way. Some states, to be sure, explicitly clarified that cash discounts are permitted, presumably to explain that the federal law authorizing merchants to do the same remained undisturbed in that jurisdiction. But even those states that lack such explicit provisions have uniformly interpreted their no-surcharge laws to permit cash "discounts." *See* Kan. Att'y Gen. Op. No. 86-115 (concluding that "a discount for cash payment is not a surcharge as that term is used" in Kansas' no-surcharge law); *People v. Fulvio*, 517 N.Y.S.2d 1008, 1015 (Crim. Ct. 1987) (holding that New York's no-surcharge law "permits [] a price differential . . . so long as that differential is characterized as a discount for payment by cash"). As described in Part I.B., Texas has long interpreted its law in the same way.

As Justice Frankfurter once wrote, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Scalia & Garner, *Reading Law*, at 73. So it is here. The proposed anti-discount interpretation is premised on an impermissibly broad definition of "surcharge" that divorces text from context. That interpretation is wrong as a matter of basic statutory construction, and should be dismissed out of hand.

Black's Law Dictionary does not compel a contrary conclusion. Nor does it give this Court any license to override the other indicia of statutory meaning. To the contrary, *Black's* only confirms that the meaning of "surcharge" is contextual: It defines the word to mean very different things depending on the particular context in which it is used. *Black's Law Dictionary* 1670 (10th ed. 2014). One such definition is "[a]n additional tax, charge, or cost." *Id.* But even that definition is ambiguous as to whether it includes *any* additional cost, no matter how labeled (the economic meaning), or only those

additional costs that are labeled as such (the semantic meaning). "Thus the dictionary does not resolve [this question], wholly apart from heeding the admonition, so frequently expressed by Judge Learned Hand, that judges in construing legislation ought not to imprison themselves in the fortress of the dictionary." *United States v. Mersky*, 361 U.S. 431, 445–46 (1960) (Frankfurter, J., dissenting).

B. The Texas no-surcharge law has always been understood to permit dual pricing, both before and after its enactment.

The settled understanding of the law by state legislators, regulators, and businesses confirms that it permits dual pricing if expressed as a cash "discount."

1. Begin with the legislative history. The Texas legislature enacted the law specifically to "ensure that credit card users are not charged additional fees," while "not restrict[ing] merchants from offering discounts to cash-paying customers." Texas Br. 6–7 (citing Hearings on Tex. H.B. 1558 Before the House Comm. on Fin. Insts., 69th Leg., R.S. (Apr. 22, 1985)). And, when testifying in support of the law, the law's sponsor left no doubt that the law preserved the right of merchants to characterize the cost of credit as a "discount," saying that "'[t]he cash discount system is working fine.'" *Id.* (quoting statement of Rep. Blanton).

After enacting the law, the Texas legislature again confirmed that the law should be read consistently with the federal statute permitting cash discounts. In 2005, for instance, the legislature amended the no-surcharge law to authorize the Texas Finance Commission to adopt rules relating to the law.[2] *See Regulation of Financial Businesses and Practices; Providing Civil Penalties*, 2005 Tex. Sess. Law Serv. Ch. 1018 (H.B. 955) (Vernon's) (codified at Tex. Fin. Code § 339.001(d)). As part of this amendment, the legislature mandated that "[r]ules adopted pursuant to this section *shall be consistent with federal laws and regulations* governing credit card transactions described by this section." Tex. Fin. Code § 339.001(d) (emphasis added).

2. In keeping with the legislature's intent, the Texas agencies tasked with administering the statute have consistently interpreted it to permit dual pricing. The Office of the Consumer Credit Commissioner (OCCC)—which has sole authority to

[2] The Texas legislature initially gave the Texas Finance Commission the authority to enforce section 339.001, but has since transferred that authority to the OCCC (which the Finance Commission oversees). *See* Tex. Fin. Code § 14.101.

enforce the statute—has concluded that the law, like its federal predecessor, permits dual pricing if the merchant expresses the price difference as a cash "discount" rather than a credit-card "surcharge."

For example, in a formal advisory bulletin from earlier this year, the OCCC described "cash discount[s]" as one of several "alternative" methods of labeling pricing "that are not prohibited credit card surcharges." OCCC Advisory Bulletin B15-2, *Credit Card Surcharge Advisory Bulletin: Alternatives to Credit Card Surcharges* (revised June 25, 2015), *available at* http://bit.ly/1IT0tNU. "Section 339.001," the agency explained, "prohibits surcharges for paying by credit card, but it does not prohibit discounts for paying by cash, check, debit card, or other methods." *Id.* "A surcharge is an increase from the regular price of a good or service, but a discount is a decrease from the regular price." *Id.* Likewise, in a formal 2011 opinion letter to the Attorney General, the OCCC advised that, under the no-surcharge law, "a merchant may offer a cash customer a discount, but may not impose a surcharge on a credit card customer." ROA 259.

The Texas Attorney General has similarly ratified this interpretation of the law in public-education materials, which advise consumers that "[b]usinesses that add a surcharge to those who pay by credit card might be violating provisions of the Texas Finance Code." Tex. Att'y Gen., *Frequently Asked Questions About Credit Cards* (Nov. 6, 2006), http://bit.ly/1IT0vp5. "However," the document continues, "businesses in Texas can *discount* the regular retail price of an item for consumers who pay cash instead of using a credit card." *Id.* (emphasis added).

3. Given the state's consistent position, it should come as no surprise that the regulated community in Texas has long understood the no-surcharge law to permit cash discounts. To take one example: the owner of Spec's, a Texas chain of wine and liquor stores, famously "offers a 5 percent discount to customers who use cash" and "mark[s] every item in the store with two prices" for the customers' benefit. Lieber, *The Damage of Cash Rewards*, N.Y. Times, Jan. 8, 2010, http://nyti.ms/225k57Z. Yet, if the proposed broadening interpretation were adopted, Spec's—and likely hundreds, if not thousands, of other merchants across Texas—will have been flagrantly violating the law for years and would have to stop engaging in dual pricing.

C. Under Texas law, this Court must give deference to the state agencies' interpretation of the no-surcharge law.

That Texas's no-surcharge statute permits dual pricing is clear from the statute's language, context, and the settled understanding of the law by all interested parties. But even if the meaning were ambiguous, Texas law would require this Court to defer to the OCCC's reasonable interpretation of the statute.

The Texas Supreme Court "ha[s] long held that an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language." *R.R. Comm'n of Tex. v. Tex. Citizens*, 336 S.W.3d 619, 624 (Tex. 2011); *see also Tex. Dep't of Ins. v. Am. Nat. Ins.*, 410 S.W.3d 843, 853 (Tex. 2012). This analysis is "similar" to the federal *Chevron* and *Skidmore* doctrines. *See Tex. Citizens*, 336 S.W.3d at 625.

Specifically, even if a statute were "subject to multiple interpretations" (as is not the case here), a court "must uphold the enforcing agency's construction if it is reasonable and in harmony with the statute," because "governmental agencies have a 'unique understanding' of the statutes they administer." *Id.* at 629 (quoting *Wyeth v. Levine*, 555 U.S. 555, 577 (2009)). All the more so when the administrative agency seeking deference "has long been the agency charged with regulating matters related" to the statute at issue; indeed, the Texas Supreme Court has held, "an agency's long-standing construction of a statute . . . is particularly worthy of our deference." *Id.* at 630, 632; *see also Burroughs v. Lyles*, 181 S.W.2d 570, 573 (Tex. 1944) (holding that a "long-continued administrative construction is entitled to great weight").

This Court should defer to the state agencies' interpretation of the no-surcharge law. Not only is their interpretation "reasonable" and "long-standing"—so reasonable, in fact, that no one (to our knowledge) has *ever* taken a contrary view—but it is also directly borrowed from the federal law that Texas sought to replace. To reject the state agencies' "long-continued administrative construction" of the no-surcharge law, *Burroughs*, 181 S.W.2d at 573, this Court would have to conclude that the law *unambiguously* prohibits dual pricing. And it would have to do so in the face of the federal statutory history and the state's consistent understanding of the law—not to mention the uniform interpretation among states with no-surcharge laws that expressly protect the right of merchants to characterize dual pricing as a cash discount. The Court would have to conclude, in other words, that the cash-discount provisions of the federal and state no-surcharge laws "conflict with the statutory text" of the surcharge

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provision *in those very same laws*. *Tex. Citizens*, 336 S.W.3d at 624. That hurdle cannot possibly be overcome in this case.

II. Interpreting the no-surcharge law to prohibit dual pricing would be unconstitutional because federal law likely preempts that interpretation.

The anti-discount or broadening interpretation is wrong not only as a matter of statutory construction. That interpretation, as the Commissioner recognized in her brief, also directly conflicts with the federal statute authorizing merchants to provide discounts to cash-paying customers, and thus is likely preempted. *See* 15 U.S.C. § 1666f; Texas Br. 27 n.9 (noting that "[a] ban on dual pricing might . . . conflict with federal law that ensures that merchants may offer discounts to cash-paying customers"). As a result, although the Court suggested in its pre-argument letter that constitutional-avoidance doctrine might compel adoption of the broadening construction, that doctrine should not be invoked when avoiding *one* constitutional problem pushes the statute into the jaws of *another* constitutional problem. Rather, the Court should adopt the universally accepted meaning of the statute: that it permits merchants to engage in dual pricing, but only if expressed as a cash discount.

A. The preemptive effect of 15 U.S.C. § 1666f(a).

As already explained, federal law protects the right of merchants to offer two prices—a higher price for credit cards and a lower price for cash-paying customers. Specifically, it provides that, "[w]ith respect to [a] credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." 15 U.S.C. § 1666f(a).[3] The statute further provides that state laws on "credit billing practices" are not disturbed "except to the extent that those laws are *inconsistent with any provision of this part*." *Id.* § 1666j(a). If Texas's no-surcharge statute is such an "inconsistent law," it is preempted.

"The question of whether federal statutes or regulations preempt state law under the Supremacy Clause of the Constitution is essentially a question of

[3] As mentioned above, the statute defines "discount" as "a reduction made from the regular price" and states that the term does "not mean a surcharge." *Id.* § 1602(q).

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congressional intent." *Perry v. Mercedes Benz of N. Am.*, 957 F.2d 1257, 1261 (5th Cir. 1992) (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)). "[E]ven when Congress declares its preemptive intent in *express* language, deciding exactly what it meant to preempt often resembles an exercise in *implied* preemption analysis." *Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (emphasis added). In fact, "analysis of whether state requirements are 'inconsistent' with the federal [law]"—as required under § 1666j—"is substantially identical to the analysis of implied conflict preemption." *Id.* at 1073.

To that end, this Court holds that "[a] state law is conflict-preempted when it operates as an obstacle to the accomplishment of a federal objective, or when federal law authorizes expressly an activity prohibited by state law." *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 237 (5th Cir. 2012) (citation omitted). And this Court "do[es] not begin with an assumption against conflict preemption, for '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Perry*, 957 F.2d at 1261–62 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

Adopting the anti-discount interpretation of Texas' no-surcharge law would "operate[] as an obstacle to the accomplishment of a federal objective," *Teltech*, 702 F.3d at 237, because it would interfere with (and in fact nullify) a federal policy endorsing the right of merchants to use dual-pricing schemes. Indeed, section 1666f(a) "authorizes expressly an activity," *id.*—allowing merchants to induce cardholders to pay with cash by offering a discount—that the anti-discount interpretation would prohibit. The history of the Cash Discount Act (the law that became section 1666f) demonstrates that Congress intervened after significant consumer outcry to preclude credit-card companies from forcing no-dual-pricing rules on unwilling merchants. *See* Levitin, 55 UCLA L. Rev. 1321, 1379–80 (2008). The anti-discount interpretation would reinstate those anticompetitive rules on all merchants in Texas, obliterating the Cash Discount Act's objectives. On that interpretation, the no-surcharge law would "yield" under the Supreme Clause because it would "interfere[] with" and be "contrary to federal law." *Perry*, 957 F.2d at 1261–62.

B. The constitutional-avoidance doctrine is unsuitable here.

The doctrine of constitutional avoidance counsels that, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question

of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But, as Justice Thomas has explained, "the constitutional avoidance doctrine counsels [courts] to adopt constructions of statutes to avoid decision of constitutional questions, not to deliberately create constitutional questions." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 280, 124 S. Ct. 619, 738 n.12 (2003) *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (Thomas, J., concurring in part). That is, "the constitutional-avoidance doctrine . . . allows courts only to choose between a decision with a constitutional ruling and one without a constitutional ruling, not between *two constitutional questions* of varying degrees of difficulty." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554 (6th Cir. 2011), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Sutton, J., concurring) (emphasis added).

As noted, adopting the broadening construction may avoid a First Amendment problem, but it cannot avoid a constitutional problem. The constitutional-avoidance doctrine is thus inapplicable here, where the Court cannot "choose between a decision with a constitutional ruling and one without a constitutional ruling." *Id.* "[I]n seeking to avoid the clear constitutional problems stemming from the application of the statute according to its plain meaning," this Court should not "create[] new and potentially equally troubling constitutional questions which would not otherwise be raised," particularly when the alternative is a broadening construction that would fundamentally conflict with its text, history, and context. *Cmty.-Serv. Broad. of Mid-Am., Inc. v. F.C.C.*, 593 F.2d 1102, 1105 n.4 (D.C. Cir. 1978).

Avoidance doctrine is a not a device to avoid taking sides in a circuit split. This Court should join the Eleventh Circuit and hold that this law, by treating "*discounts* as more equal than *surcharges*," "overreaches to police speech well beyond the State's constitutionally prescribed bailiwick." *Dana's R.R. Supply*, 2015 WL 6725138, *11.

Respectfully submitted,

/s/ Deepak Gupta
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Jonathan E. Taylor
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cc: Evan S. Greene, Assistant Solicitor General