No. _____

In The
Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a challenge to the jurisdiction of every court in the nation to interpret and apply the law. A critical question, and circuit split, persists concerning the interplay between the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. § 2342, and this Court's seminal decision in *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This Court's review is needed to clarify the jurisdiction of all courts to decide the proper level of deference afforded to interpretive agency guidance. If allowed to stand, the Fourth Circuit's jurisdiction-stripping ruling would elevate those agencies identified in the Hobbs Act above even the judiciary; empowering agency orders to trump the courts' fundamental "province and duty" to interpret the law.

In enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress permitted civil liability only for sending "unsolicited advertisements" by fax. 47 U.S.C. § 227(b)(1)(C). In 2006, the Federal Communications Commission ("FCC"), tasked with implementing the TCPA, promulgated a Final Rule with respect to those faxes that "promote goods and services even at no cost."

Under *Chevron*, courts are empowered to independently assess whether a statutory term is "unambiguous," and thus, ripe for judicial interpretation. If a term is deemed ambiguous, courts still retain their discretion to defer to agency guidance. But courts owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, they find themselves unable to discern Congress's meaning.

Applying a traditional *Chevron* analysis, the District Court for the Southern District of West Virginia held the term "advertisement" in the TCPA was unambiguous; thus, it need not automatically defer to the FCC's guidance in deciding whether to grant Defendant/Petitioner's motion to dismiss. The District Court nevertheless "harmonized" the FCC's interpretive guidance with its own reading of the TCPA, and held the single fax at issue could not be read to "promote" anything other than information. In a split decision, the Fourth Circuit vacated and remanded, holding instead that the Hobbs Act "precluded" the District Court from engaging in a *Chevron* analysis, and that the District Court was required to automatically defer to the FCC's guidance on what qualifies as an "advertisement" under the TCPA.

Congress passed the Hobbs Act to provide a mechanism for judicial review of certain agency orders. To ensure the Hobbs Act did not impugn on the "province and duty" of the judiciary, the statute was intended to bar only facial challenges to the "validity" of an agency's order—not judicial review of the applicability of an agency order with respect to a particular set of facts and circumstances. As observed by the Sixth and Ninth Circuits in this precise context, a deepening circuit split exists as to whether courts must automatically defer to, and broadly apply, the FCC's definition of an "advertisement" in the absence of such ambiguity.

Ignoring cannons of statutory interpretation, the Fourth Circuit also held the FCC's guidance created a *per se* rule that faxes that promote goods and services "even at no cost" constitute "advertisements"—despite the lack of any

commercial nexus to a firm's business. This ruling created a circuit split with the Second, Sixth, Ninth and Eleventh Circuits, all of which require such a nexus, as well as a separate split with the Second Circuit, which held the FCC imposed only a rebuttable presumption that a fax promoting free goods and services qualifies as an "advertisement."

Thus, the questions presented are:

1. Does the Hobbs Act strip courts of jurisdiction to engage in a traditional *Chevron* analysis and require automatic deference to an agency's order even if there has been no challenge to the "validity" of such order?

2. Must faxes that "promote goods and services even at no cost" have a commercial nexus to a firm's business to qualify as an "advertisement" under the TCPA, or does a plain reading of the FCC's 2006 order create a *per se* rule that such faxes are automatically "advertisements"?

PARTIES TO THE PROCEEDINGS

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC. Each Petitioner belongs to a corporate family of entities dedicated to delivering health knowledge products and services that support drug prescribing decisions and patient adherence to medication regimes to improve health.

Respondent is a chiropractic medical office located in West Virginia that delivers healthcare services.

RULE 29.6 STATEMENT

Petitioners PDR Network, LLC, and PDR Distribution, LLC, are wholly-owned subsidiaries of PDR, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Network, LLC and PDR Distribution, LLC.

Petitioner PDR Equity, LLC is a wholly-owned subsidiary of PSKW Holdings, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Equity, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, App. 1-31a, is reported at 883 F.3d 459. The Order and judgment of the District Court granting PDR's motion to dismiss, *id.* at 32-43a, is unreported, but available at 2016 U.S. Dist. LEXIS 135310.

JURISDICTION

The final Order of the Court of Appeals was entered on February 23, 2018. App. 1a. A timely petition for rehearing *en banc* was denied on March 23, 2018. *Id.* at 45a. The mandate issued on April 2, 2018. *Id.* at 46a. PDR filed this Petition for a Writ of Certiorari on June 21, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the TCPA, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, are reprinted in the Appendix at App. 47-48a. Also reprinted are pertinent provisions of the FCC's May 3, 2006, Final Rule, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967 (May 3,

2006) ("2006 FCC Rule"), *id.* at 49a, and the Administrative Orders Review Act, 28 U.S.C. § 2342(1) ("Hobbs Act"). *Id.* at 50a.

INTRODUCTION

This case presents an opportunity for this high Court to decide the fundamental jurisdiction of all lower courts to independently "say what the law is" when faced with interpretative agency guidance. The Fourth Circuit's holding that the Hobbs Act "precluded" the District Court from conducting a "traditional" *Chevron* analysis curbs the jurisdiction of all courts everywhere to apply the law in private actions. At the same time, the Fourth Circuit's ruling also serves to unjustifiably bolster the power of all orders from agencies identified in the Hobbs Act, 28 U.S.C. § 2342(1)-(7)—effectively allowing such guidance to eclipse even the operative statutes.

As the dissent by Circuit Judge Stephanie D. Thacker makes clear, the Hobbs Act—which provides a mechanism for judicial review of certain administrative orders—is implicated only if there is a challenge to the "validity" of an agency's order. There was no such challenge here. Rather, the District Court "presumed" the FCC's guidance was "valid," and indeed, held the 2006 FCC Rule perfectly harmonized with its interpretation of the TCPA. Because the "validity" of the FCC's guidance was never challenged, the District Court retained its jurisdiction to properly conduct a *Chevron* analysis.

The question of whether the Hobbs Act precludes a *Chevron* analysis has reached a boiling point, as conflicting circuit court decisions pile up across the country. This case presents an ideal vehicle for this

Court to decide this issue, along with equally important issues concerning the scope of the TCPA.

In the decision below, a divided panel of the Fourth Circuit held the District Court lacked the jurisdiction to independently interpret the statutory term "advertisement" and apply it to the single fax in question. That decision contravenes basic judicial providence to say what the law is, directly conflicts with decisions of other circuits, and warrants this Court's review.

The Fourth Circuit's decision also raises two additional questions that merit this Court's review. Indeed, not only did the Fourth Circuit unjustifiably strip the District Court of jurisdiction, it also held that under the 2006 FCC Rule faxes promoting goods or services at no cost: (i) need not have a "commercial aim"; and (ii) are *per se* "advertisements." The Fourth Circuit's rulings rest on the inexplicable and unsupported proposition that a single line of the 2006 FCC Rule could be separated from the remaining text in the same paragraph to create a broad, "prophylactic" rule. This reading ignored the FCC's own comment that an "advertisement" must involve products that are often commercially available for sale. The Fourth Circuit's categorical broadening and draconian interpretation of the 2006 FCC Rule independently warrants this Court's review.

This case underscores the need for this Court to resolve these issues. It involves a nationwide TCPA class action against a company that has been publishing and delivering FDA-mandated drug labeling and prescribing information to healthcare providers for over 70 years. Such publications—including the *Physicians' Desk Reference*©—ensure

providers are aware of critical side effects, potential drug interactions, black box warnings and other key considerations before prescribing medications to their patients. PDR neither manufacturers, sells, nor promotes any of the pharmaceutical drugs listed in the *Physicians' Desk Reference*©.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1991, Congress enacted the TCPA, which prohibits the sending of "unsolicited advertisements" via fax. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395, *codified at* 47 U.S.C. § 227(b). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). The TCPA also created a private right of action for claims "based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection." *Id.* § 227(b)(3). This private cause of action permits the recipient of an unsolicited fax advertisement to seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. *Id.* If a court finds the sender "willfully or knowingly violated" the TCPA, damages may be trebled. *Id.*

In 2005, Congress enacted the JFPA, which, among other things, modified the definition of "unsolicited advertisement" to state that prior express permission may be obtained "in writing or

otherwise." *See* Junk Fax Prevention Act of 2005, Pub. L. No. 10921, § 2(g), 119 Stat 359 (codified at 47 U.S.C. § 227(a)(5)). But it did not otherwise expand on the statutory term "advertisement."

Like the TCPA, the JFPA directs the FCC to "implement" the statute. *Id.* § 2(h). In 2006, the FCC issued a Final Order interpreting the JFPA with respect to "Offers for Free Goods and Services and Informational Messages," which explained:

> [F]acsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, 'free' seminars serve as a pretext to advertise commercial products and services. Similarly, 'free' publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile [sic] recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Therefore, facsimile communications regarding such free goods and services, if not purely 'transactional,' would require the sender to obtain the recipient's permission beforehand, in the absence of an [Established Business Relationship].
>
> By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates,

> or employee benefit information, would not be prohibited by the TCPA rules.

App. 49a.

The Hobbs Act, also known as the Administrative Orders Review Act, provides a mechanism for judicial review of certain administrative orders, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).[1] A party aggrieved by any order of an agency may challenge the order by filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit. *Id.* § 2343. The Hobbs Act specifically vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the orders to which it applies, including FCC interpretations of the TCPA. *Id.* § 2342. "This procedural path created by the command of Congress promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency" charged with overseeing the TCPA. App. 7a (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014)).

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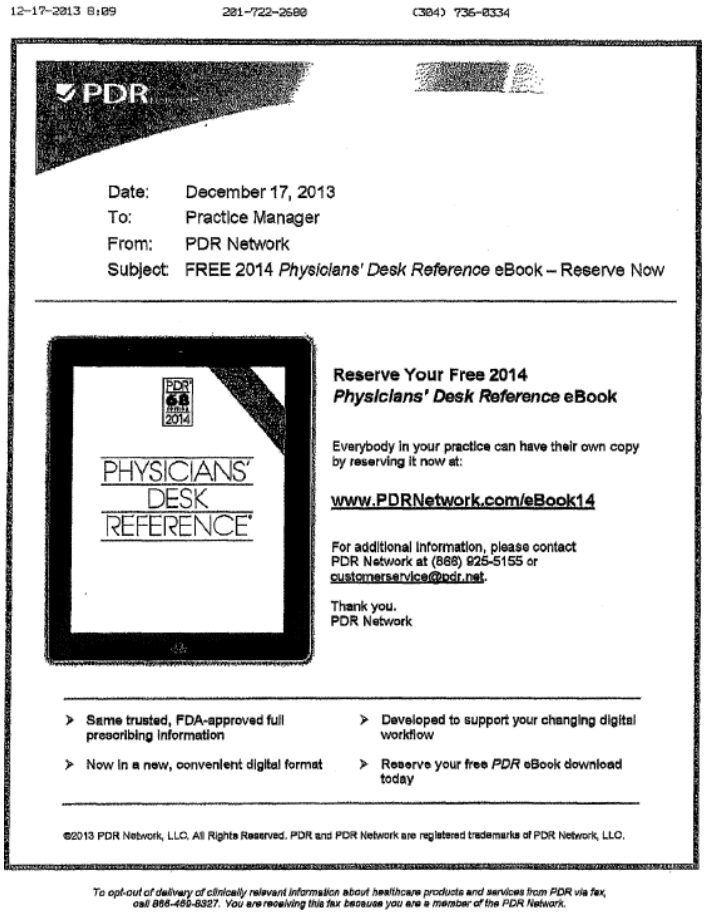
[1] This also includes orders of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission and others. *Id.* § 2342(1)-(7)

B. Carlton & Harris's Lawsuit

The actions giving rise to this case are largely undisputed. Respondent Carlton & Harris maintains a chiropractic office in West Virginia. App. 3a. Petitioner PDR is a company that "delivers health knowledge products and services" to healthcare providers. *Id.* Among other things, PDR publishes the *Physicians' Desk Reference*©, a widely-used compendium of prescribing information for various prescription drugs. *Id.* PDR receives fees from pharmaceutical manufacturers for including their drugs in the *Physicians' Desk Reference*©. *Id.* at 3a. Critically, it is undisputed that the *Physicians' Desk Reference*© is "an informational resource which is free to recipients," and that PDR "does not sell the reference [guide] or sell anything in the reference." *Id.* at 35a. The drugs identified in the reference guide are sold by their respective manufacturers, who are third-parties unaffiliated with PDR. *Id.*

On December 17, 2013, PDR sent Carlton & Harris a single fax (the "Fax"). *Id.* at 3a. A copy of this Fax has been reproduced below:



12-17-2013 8:09 221-722-2680 (304) 736-8334

PDR

Date: December 17, 2013
To: Practice Manager
From: PDR Network
Subject: FREE 2014 *Physicians' Desk Reference* eBook – Reserve Now

PDR 68 edition 2014
PHYSICIANS' DESK REFERENCE

Reserve Your Free 2014 *Physicians' Desk Reference* eBook

Everybody in your practice can have their own copy by reserving it now at:

www.PDRNetwork.com/eBook14

For additional information, please contact PDR Network at (866) 925-5155 or customerservice@pdr.net.

Thank you.
PDR Network

- Same trusted, FDA-approved full prescribing information
- Now in a new, convenient digital format
- Developed to support your changing digital workflow
- Reserve your free *PDR* eBook download today

Id. at 51a.

The Fax was addressed to "Practice Manager" and its subject line announced: "FREE 2014 *Physicians' Desk Reference* eBook — Reserve Now." *Id.* at 3a. The Fax invited the recipient to "Reserve [a] Free 2014 *Physicians' Desk Reference* eBook" by visiting PDR's website. *Id.* It included a contact email address and phone number. *Id.* The Fax described various benefits of the e-book, noting that it contained the "[s]ame trusted, FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format" and was "[d]eveloped to

support [the recipient's] changing digital workflow." *Id.* at 3-4a. At the bottom, a disclaimer provided a phone number the recipient could call to "opt-out" of receiving future communications via fax. *Id.* at 4a.

Carlton & Harris sued PDR in the United States District Court for the Southern District of West Virginia, asserting a claim under the TCPA for the single fax in question. *Id.* Carlton & Harris seeks to represent a class of similarly situated recipients of faxes offering free copies of the *Physicians' Desk Reference*© e-book. *Id.*

C. PDR's Motion to Dismiss and District Court Proceedings

PDR moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. *Id.* It argued that the Fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale to the recipient. *Id.* In response, Carlton & Harris pointed to a 2006 FCC Rule interpreting the term "unsolicited advertisement." *Id.* at 5a. Carlton & Harris argued that the Fax it received was an unsolicited advertisement as defined in the 2006 FCC Rule because it promoted a good at no cost. *Id.* Moreover, Carlton & Harris argued that the District Court was obligated to follow the 2006 FCC Rule pursuant to the Hobbs Act. *Id.*

The District Court (Chambers, C.J.) disagreed. *Id.* The District Court held the Hobbs Act did not compel it to defer to "the FCC's interpretation of an unambiguous statute." *Id.* at 5a, 39a. The District Court found the TCPA's own definition of "unsolicited advertisement" "clear and easy to apply," and thus, held it was not required to follow

the 2006 FCC Rule and "decline[d] to defer" to it. *Id.* at 5a, 40a (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).[2] The District Court also opined that even under the 2006 FCC Rule, PDR's fax was still not an advertisement because the rule requires an advertisement have a "commercial aim," and no such aim existed here. *Id.* Accordingly, the District Court held Carlton & Harris had not stated a valid claim under the TCPA and granted PDR's motion to dismiss. *Id.* An appeal to the Fourth Circuit followed.

D. The Fourth Circuit's Split Decision

On February 23, 2018, a divided panel of the Fourth Circuit (Diaz, J.) ruled that because "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," the District Court "erred by engaging in a *Chevron* analysis and 'declin[ing] to defer' to the FCC rule." *Id.* at 11a. The majority held it was of "no moment" whether the District Court "purported" to invalidate the 2006 FCC Rule, or whether PDR had sought to challenge the FCC's ruling. *Id.* at 10a.

The Fourth Circuit majority also held that the 2006 FCC Rule created a "*per se* rule" that a "fax offering a free good or service" constitutes an "advertisement" under the TCPA—regardless of the

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[2] The District Court performed a traditional two-step *Chevron* analysis. At step one, the court determines whether the statute is ambiguous. 467 U.S. at 842-43. If the statute is clear, "that is the end of the matter" and the court does not defer to the agency construction. *Id.* at 842. If the statute is ambiguous, the court moves to step two. *Id.* at 843. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*; App. 40a.

presence of a commercial aim or the purpose and product at issue. *Id.* at 16a, 18a. The majority based its interpretation upon the "first sentence of the relevant portion [of the Rule] . . . [s]etting aside the list of examples [that followed]." *Id.* at 13a.

Notably, the panel's ruling was fractured; it included a poignant dissent from Judge Thacker who opined that: "(1) the [D]istrict [C]ourt did not exceed its jurisdiction under the Hobbs Act; and (2) the 2006 FCC Rule requires a commercial aim, which is not present here[.]" *Id.* at 19a. The dissent concluded the Hobbs Act did not apply because "there [was] no facial challenge to the 2006 FCC Rule," and the District Court had properly "assumed the [Rule] was valid and harmonized the rule with its conclusions about the TCPA." *Id.* at 24a. The dissent also found that by divorcing a single line from the 2006 FCC Rule to create a "prophylactic rule," the majority had failed to appreciate how the remaining language of the FCC Rule "informed" the FCC's guidance. *Id.* at 28-29a. On this point, Judge Thacker concluded that "[r]eading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA." *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

Congress passed the Hobbs Act to prevent disjointed attacks on agency orders via a challenge to the order's "validity." The practical consequence of the Fourth Circuit's decision in this case, however, is to unjustifiably expand the Hobbs Act to strip all courts of jurisdiction to apply federal statutes and interpret agency guidance. In so ruling, the Fourth

Circuit deepened a split of authority among circuit courts as to the reach of the Hobbs Act, as well as the appropriateness of engaging in a *Chevron* analysis to decide issues of statutory interpretation.

Certiorari is warranted to resolve the jurisdictional issues presented, as well as equally-important questions concerning the TCPA's scope raised by the Fourth Circuit's rulings on the law.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTION

As Chief Justice Marshall has stressed, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803); *DaimlerChrsyler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("[n]o principle is more fundamental to the judiciary's proper role in our system of government" than a court's jurisdiction) (citation omitted). Ignoring this bedrock principle, the Fourth Circuit held the Hobbs Act "precluded" the District Court from exercising its well-established jurisdiction under *Chevron* to decide whether the statutory term "advertisement" was unambiguous—instead requiring the lower court to simply defer to, and broadly apply, the FCC's guidance.

As this Court has observed, "[f]ederal courts, though 'courts of limited jurisdiction,' in the main 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376, 132 S. Ct. 740, 747 (2012) (citing *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Cohens* v. *Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 5

L. Ed. 257 (1821)). The District Court was thus acting within its power to conduct a *Chevron* analysis to decide the amount of deference the FCC's guidance deserved. Allowing the Fourth Circuit's jurisdiction-stripping ruling to stand would result in agency guidance subverting courts' "province and duty" to use their judgment to "say what the law is."

A. The Circuits Are Split On Whether A Court Must Automatically Defer To The FCC's Interpretation Of The Term "Advertisement" Under The Hobbs Act.

Since 1984, this Court has held that courts are not required to defer to an agency's interpretation of an unambiguous statute. *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). This principle was reaffirmed earlier this year in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (U.S. 2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.") (citation omitted) (Gorsuch, J.). And it is equally well-settled that "policy considerations cannot create an ambiguity when the words on the page are clear." *Id.* at 707 (citing *SEC* v. *Sloan*, 436 U.S. 103, 116-117 (1978)).

Yet, as the Sixth Circuit has expressly observed, there is a "circuit split" regarding "whether to defer to the [FCC's] explanation of its definition" of the term "advertisement." *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 223 (6th Cir. 2015) (*comparing N.B. Indus. v. Wells Fargo & Co.*, 465 F. App'x 640, 642-43 (9th Cir. 2012) (giving

Chevron deference to FCC's interpretation regarding incidental ads) *with Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687-88 (7th Cir. 2013) (rejecting FCC's interpretation regarding incidental ads)). This known split requires clear guidance from this Court.

1. Likely because the Fourth Circuit found the District Court's interpretation of the TCPA at odds with the FCC's, the majority held the "jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and that by engaging in step one of *Chevron* and not "deferring" to the 2006 FCC Rule, the District Court tacitly "ignored" or "set aside" the FCC's guidance. App. 11a. But as the dissent noted, the Hobbs Act only limits challenges to an order's "validity," and there was no challenge here. *Id.* at 20-21a. Rather, the District Court "assumed" the rule was "valid" and did not conflict with the TCPA. *Id.* at 24a.

The Hobbs Act is not implicated here. The Hobbs Act's jurisdictional restriction is purposefully specific; while it prohibits a challenge to the process or methodology of an order's creation (*i.e.*, a "facial" attack), it does not prohibit a court from accepting an order as "valid" and "interpreting" whether an agency's ruling applies. *Osorio v. State Farm Bank, FSB*, 746 F.3d 1242, 1257 (11th Cir. 2014) ("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."). The majority's assertion that "[w]hen *Chevron* meets Hobbs, consideration of the merits must yield to jurisdictional constraints," App. at 8a, misconstrues Congress's intent. This type of judicial activism has been previously disapproved. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017),

cert. denied, 138 S. Ct. 1043 (2018) (noting, in the context of a TCPA junk fax case, "[i]t is the Judiciary's job to respect the line drawn by Congress, not to redraw it as we might think best.").

As Judge Thacker observed, safeguards exist to alleviate the majority's concern over an "end-run" around the Hobbs Act—with its goal of "judicial efficiency." App. 11a. For example, the Fourth Circuit has held invalidation can occur at step one of *Chevron* if a court finds "the agency's construction is in conflict with the unambiguous statutory language." *Id.* at 20a (citation omitted). That did not happen here. Accordingly, the majority's reference to "[i]nvalidation by any other name," or courts "ignor[ing]" agency orders, is unfounded. *Id.* at 10-11a. When a court holds a statute is "unambiguous" under *Chevron*, and thus, that it need not give "substantial deference" to an agency's order, this is not the same as "invalidating" or "ignoring" the order. *Sandusky*, 788 F.3d at 223 ("[W]here our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation[.] In any event, reliance on the [FCC's] interpretation would only bolster our conclusion."); *IMHOFF Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (defendant questioned the "reasoning of the FCC's letter brief and its application to this case" without "directly challen[ging] the legitimacy of the FCC's definition of sender").[3]

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[3] District courts are in accordance with the Sixth Circuit. *See, e.g., Alpha Tech Pet, Inc. v. Lagasse, LLC*, 2016 U.S. Dist. LEXIS 120452, at *9 n.3 (N.D. Ill. Sep. 7, 2016) ("Contrary to Defendants' argument, this Court is not determining the validity of an FCC ruling by finding that the FCC ruling is not

The majority claimed "[e]very other circuit to consider the issue has reached the same result." App. 9a (citing *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444 (6th Cir. 2013); and *Mais*, 768 F.3d 1110). But as the dissent observed, these cases are "inapposite" or "distinguishable." *Id.* at 23-24a.

Nack and *Leyse* both involved a prohibited "facial challenge to an FCC regulation," which is not present here. *Id.* at 22-23a. In *Leyse*, the Sixth Circuit observed that "[a]s an initial matter, . . . resolving a TCPA claim like Leyse's does not *necessarily* implicate the Hobbs Act." 545 F. App'x at 447 (emphasis in original). Because Leyse argued the conduct at issue did not fit within the exemption for radio calls created by the FCC in 2003, the court would "only reach the question of Hobbs Act and its jurisdictional restrictions if [it] disagree[d] with

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binding, but is merely following the Seventh Circuit's decision that the particular FCC ruling at issue here is not binding with respect to interpreting the statutory and regulatory language relevant to this case."); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2013 U.S. Dist. LEXIS 15952, at *9 (D.N.J. Feb. 6, 2013) ("while the Court does not find that the FCC's interpretations of the TCPA should be afforded substantial deference—because the statute is not facially ambiguous—those interpretations are clearly persuasive"); *P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, at *8 (D. Conn. July 17, 2015) ("Because the statute is not ambiguous and defines the term 'unsolicited advertisement,' the FCC's interpretations are not controlling on this Court under *Chevron*"); *N.B. Indus. v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 126432, at *13-14 (N.D. Cal. Nov. 30, 2010) ("If the [TCPA's] definition of 'unsolicited advertisement' were ambiguous, the court would be inclined to give the [2006 FCC Rule] substantial deference under *Chevron*[.] In any event, the court considers and gives weight to the FCC's examples because they are persuasive and helpful.").

Leyse as to the scope of the FCC's rules." *Id.* at 448-449. Critically, the Sixth Circuit only applied the Hobbs Act because Leyse argued "the rule should be set aside because of procedural deficiencies in its promulgation." *Id.* at 458. The defendant in *CE Design, Ltd. v. Prism Bus. Media, Inc.*, also "asked the district court to ignore the FCC order" at issue, and argued the FCC-created defense "conflicts with the TCPA's plain language." 606 F.3d at 445, 447 (7th Cir. 2010). Lastly, as the dissent noted, *Mais* is "distinguishable" for the same reason. App. 24a.

Here, PDR did not ask the District Court to set aside or ignore the FCC rule; rather, as the dissent observed, "Appellant merely argued for a specific interpretation of the 2006 FCC Rule, and Appellee argued for a different interpretation." *Id.* The majority failed to appreciate this critical distinction.

2. The impact of this circuit split is undeniable. If this case had been filed in the Sixth Circuit, the result would have been markedly different. Under *Sandusky*, the Sixth Circuit would have conducted a *Chevron* analysis; held the statutory term "advertisement" was unambiguous, such that it need not "defer" to the 2006 FCC Rule; concluded an "advertisement" must "have profit as an aim"; and determined the instant Fax lacked such an aim. 788 F.3d at 223-24. This would have ended the case.[4] *Bais Yaakov*, 852 F.3d at 1082 ("The text of the [TCPA] provides a clear answer to the question presented in this case.") (citing *Chevron*, 467 U.S. at 842-43 & n.9); *SAS Inst.*, 138 S. Ct. at 1358 ("[A]fter applying traditional tools of interpretation here, we

[4] As the dissent opined, dismissal was warranted in this case because Plaintiff was unable to satisfy even this "minimal burden" of alleging a "commercial aim." App. 30a.

are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands."). Nor would the Sixth Circuit have "precluded" the District Court's ability to conduct a *Chevron* analysis under a misguided interpretation of the Hobbs Act's reach. *See also Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, DDS, PA, 781 F.3d 1245, 1256 (11th Cir. 2015) (applying *Chevron* deference to an FCC order interpreting the definition of the "sender" of a fax).

Likewise, if this case had been filed in the Second Circuit, the court would have disregarded the Hobbs Act argument altogether, as seen in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017),[5] and even before that in *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806 n.2 (2d Cir. 2014) ("Since neither party actually challenges the FCC's interpretation of the TCPA, we need not decide the extent to which the [Hobbs Act] limits our jurisdiction to review that interpretation.").

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[5] Notably, the majority was inconsistent regarding which circuit's authority it deemed "persuasive." The majority described *Sandusky* as not "persuasive" because it "made no mention of the Hobbs Act's jurisdictional bar nor explained how the court overcame it." App. 10a. Yet the majority also opined that the Second Circuit's decision in *Boehringer*, 847 F.3d 92—and, specifically, Judge Pierre Leval's concurring opinion—was "persuasive." *Id.* at 15a. But nowhere in *Boehringer* did the panel (or Judge Leval) discuss the "Hobbs Act's jurisdictional bar." In fact, as Judge Thacker pointed out, the plaintiff Physicians Healthsource similarly argued the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule," but the "Second Circuit did not address this argument and instead addressed the merits." *Id.* at 22a.

The result would have been the same in the Third Circuit. *Manuel v. NRA Grp. LLC*, 2018 U.S. App. LEXIS 816, at *4 n.5 (3d Cir. Jan. 12, 2018) ("Because we do not address the validity of the FCC's orders, we need not address Manuel's contention that the Hobbs Act restricts our jurisdiction[.]") (citation omitted); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) ("Because we reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the 'random or sequential number generator' requirement, we need not reach his argument regarding the Hobbs Act[.]").

At core, the majority conflates "deference" to an agency's order with its invalidation. But, as shown, courts can grant an agency's "common-sense interpretation" a level of "persuasive value" without deeming it "invalid." *Osorio*, 746 F.3d at 1256 (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("agency's interpretation may merit some deference whatever its form")). This is what the District Court did when it held that "even if it were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision." App. 40a. The District Court then "presumed" the 2006 FCC Rule was valid.[6] This had

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[6] The Ninth Circuit has repeatedly taken an identical approach to FCC rules and regulations in the context of the TCPA. *See, e.g., Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 792 n.2 (9th Cir. 2018) ("We presume the validity of the relevant FCC rules and regulations.") (citing *US W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid" for purposes of a case not initiated under the Hobbs Act)); *CallerID4u, Inc. v. MCI Communs. Servs.*, 880 F.3d 1048, 1062 (9th Cir. 2018) ("Because this case was not initiated through . . . a petition

the effect of differentiating this case from the majority's "inapposite" or "distinguishable" cases—in that the District Court "harmonized" the agency's order with its interpretation of the TCPA. App. 24a.

Stripped of their jurisdiction, district courts will be expected to simply apply, out of context, *any* agency order identified in the Hobbs Act—regardless of whether the underlying statute is "unambiguous," and thus ripe for independent judicial interpretation. This undercuts the purpose of our judicial system. *Marbury*, 5 U.S. at 178, 1 Cranch 137, 2 L.Ed 60.

If left to stand, the majority's ruling as to the interplay between the Hobbs Act and *Chevron* will create irreconcilable inter-circuit conflicts, further exacerbating the confusion about when, and how, courts must apply *Chevron*. This is exactly the type of issue necessitating this Courts' review. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (resolving a circuit split is a "traditional ground for certiorari"); *Mims,* 565 U.S. at 376, 132 S. Ct. at 747 (granting certiorari "to resolve a split among the Circuits as to whether Congress granted state courts exclusive jurisdiction over private actions brought under the TCPA."); *see also* S. Ct. Rule 10(a).

II. CERTIORARI IS WARRANTED ON THE QUESTION OF THE APPLICATION OF THE FCC'S DEFINITION OF AN "ADVERTISEMENT"

The Fourth Circuit majority's ruling on the merits in this case is a direct outgrowth of its

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[under the Hobbs Act], we must presume the validity of FCC regulations, rules, and orders that are currently in effect.") (citing *Pac. Bell Tel. Co. v. Cal. PUC*, 621 F.3d 836, 843 n.10 (9th Cir. 2010)).

fundamentally flawed conclusion that the Hobbs Act stripped the District Court of jurisdiction to decide the level of deference afforded the 2006 FCC Rule. In so ruling, the Fourth Circuit further misjudged the impact and reach of the 2006 FCC Rule.

A. The Fourth Circuit's Holding That A Fax Promoting A Free Good Or Service Does Not Require A Commercial Aim Conflicts With Decisions Of The Second, Sixth, Ninth and Eleventh Circuits.

The majority held the FCC's order created a rule that "all faxes offering free goods and services" are "advertisements" under the TCPA. App. 16a. Judge Thacker disagreed, expressly holding instead that "the 2006 FCC Rule requires a commercial aim, which is not present here." *Id.* at 19a. Critically, the majority's holding conflicts with authoritative decisions from no less than four other circuits.

The majority heavily relied on Judge Leval's concurrence in *Boehringer* to support its assertion that the 2006 FCC Rule "requir[es] no commercial nexus at all." *Id.* at 14-15a. But the majority opinion of the Second Circuit in *Boehringer refused* to erase this "commercial nexus" requirement from the 2006 FCC Rule, observing: "Of course, as other courts have ruled, not every unsolicited fax promoting a free seminar satisfies the Rule. There must be a commercial nexus to a firm's business, *i.e.*, its property, products, or services[.]" 847 F.3d at 96; *see also id.* at 93 ("[W]e agree that a fax must have a commercial purpose."). *Boehringer* likewise held the 2006 FCC Rule "comports with the statutory language, which defines offending advertisements as those promoting 'the commercial availability or

quality of [the firm's] property goods or services.'" *Id.* at 95 (citing 47 U.S.C. § 227(a)(5)).

The Sixth Circuit similarly emphasized the need for a "commercial nexus" when it held "[t]he term 'advertisement' unambiguously contains commercial components: *To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim*." *Sandusky*, 788 F.3d at 223-24 (emphasis added). The Ninth Circuit further held that because an item discussed in a fax was not "available to be bought or sold" or "for sale," it was not "commercially available," and thus, not an "advertisement" under the TCPA. *N.B. Indus.*, 465 F. App'x at 642. And lastly, the Eleventh Circuit held "[t]o fall within the [TCPA]," a fax must "draw[] attention to the 'commercial availability or quality' of [defendant's] products to promote their sale." *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366-67 (11th Cir. June 5, 2017). Based squarely on the law as understood by these four circuits, the District Court correctly upheld the "commercial aim" requirement for faxes promoting a "free" offering to be an "advertisement," and in the absence of such a finding, properly granted PDR's motion to dismiss. App. 42 (holding that a "plain reading" of the TCPA and the 2006 FCC Rule demonstrate that "they intend to curtail the transmission of faxes with a commercial aim.").[7]

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[7] *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1163 (N.D. Ill. 2009) ("While Congress's clear intent was to prohibit unsolicited advertising, it is equally clear that Congress intended non-commercial messages to fall outside the ban."); *see also Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 182 (E.D. Pa. 1994) ("Congress clearly did not prohibit fax transmissions of all unsolicited information or

Conversely, the Fourth Circuit sought to erase any "commercial nexus" requirement, and thus, its decision conflicts with these authoritative decisions necessitating review and resolution by this Court.

B. The Fourth Circuit's Holding That Faxes Promoting Free Goods And Services Are *Per Se* "Advertisements" Conflicts With A Decision Of The Second Circuit.

The majority's conclusion that the 2006 FCC Rule created a "*per se* rule" that a fax promoting a free good or service is an "advertisement," App. 16a, separately conflicts with the Second Circuit's *Boehringer* decision—which held the 2006 FCC Rule supported, at best, only a rebuttable "presumption."

In *Boehringer*, the plaintiff argued the FCC's order treated an offer of a free seminar as a *per se* advertisement of "the commercial availability" of a product. 847 F.3d at 95. The Second Circuit rejected this argument. *Id.* Instead, it reasoned the fax would constitute an "advertisement" *only if* the free seminar offer was a pretext or prelude for a commercial promotion or sale offer. *Id.* at 98. The court then held the defendant "'can rebut such an inference [of intent to promote a commercial product] by showing [after discovery] it did not or would not advertise its products or services at the seminar.'" *Id.* at 98-99. By erroneously converting this

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communications, and there is some question whether it could do so constitutionally. . . . No matter how sympathetic plaintiff's case may be, the court may not rewrite the [TCPA] to enjoin or penalize behavior not prohibited by Congress.").

"presumption" into a "*per se* rule," the majority's ruling directly conflicts with *Boehringer*.[8]

On remand, the district court similarly rejected plaintiff's "*per se*" theory of liability. *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 2018 U.S. Dist. LEXIS 64844, at *26 (D. Conn. Apr. 18, 2018). Rather, Boehringer was given the opportunity to—and did—"rebut" the presumption that its fax discussing a free seminar was an advertisement with "evidence it did not feature its products or services at the seminar." *Id.*

The district court in *Boehringer* further held that "Physicians Healthsource's interpretation of an 'advertisement' sweeps far beyond the scope of the TCPA" in that it "would force any faxes with a general business purpose—in the case of a for-profit entity, virtually all of them—into the prohibited category of advertising. Nothing in the TCPA suggests that Congress intended the statute's proscription to be so broad." *Id.* at *24. This too is exactly what the District Court held here. App. 42a.

Here, the Fourth Circuit's majority and dissent agree: the "interpretation of regulations begins with their text." App. 11a, 25a. But diverge over *how* the 2006 FCC Rule should be interpreted. Judge Thacker's dissent elucidates how the majority's

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[8] The remaining "context" of this section of the 2006 FCC Rule further supports the need for a "commercial aim." For example, *Boehringer* observed how "[i]n a different but relevant context, the [2006 FCC Rule] states that 'a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as [its] primary purpose is informational, rather than to promote commercial products.'" 847 F.3d at 96 (citing 2006 FCC Rule at 25973). This is exactly what the District Court held. App. 41a ("The fax here cannot be read to 'promote' anything other than information.").

overly-broad, "prophylactic" construction misconstrues the order's "plain reading":

> A plain reading of the 2006 FCC Rule demonstrates that its objective is to prevent faxes with a commercial aim. Its objective is not to prevent faxes that promote free goods or services per se[.]
>
> In order to reach its conclusion, the majority reads the first sentence of the 2006 FCC Rule—'[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition.'—in isolation. To be sure, if read in a vacuum, the first sentence seems to create a prophylactic rule. However, it is informed by the language that follows.
>
> Specifically, the second sentence of the 2006 FCC Rule redefines the subject faxes as those promoting free offerings with a commercial aim. It states, 'In many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services.' The 2006 FCC Rule then refers to 'such messages'—redefined as those with a commercial aim—and explains, '[I]t is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Reading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA.
>
> This is a 'permissible' construction[.]

Id. at 28-29a (citations omitted) To reach this conclusion, Judge Thacker (and the District Court) considered the text of the TCPA and the 2006 FCC Rule; common definitions of relevant terms[9]; and the context of the full passage. *Id.* at 26a, 40-42a.[10]

Conversely, the majority read the first sentence of the 2006 FCC Rule "in isolation," and failed to appreciate how the "language that followed" "informed" this initial proclamation. *Id.* at 28-29a. In so doing, the Fourth Circuit's judgment ignored fundamental canons of statutory construction, including that: (1) "words of a statute must be read in their context and with a view to their place in the overall statutory scheme"; (2) statutory terms may be read in light of the purpose of the statute; and (3) courts must "give effect . . . to every clause and word of a statute." *Osorio*, 746 F.3d at 1258; *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009). These same canons apply when interpreting regulations. *See, e.g., Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012).

Without considering *any* specific statutory or regulatory term, the majority held the "first sentence" of the 2006 FCC Rule was "clear and unambiguous." App. 13a. Accordingly, the majority intuited the FCC "declined to require" a "fact-based inquiry" regarding whether a fax promoting a free offering was an "advertisement." *Id.* at 17a. But as

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[9] This included: "promote"; "advertise"; and "commercial." App. 26a, 40-41a.

[10] Although Judge Thacker held the definition of an "advertisement" was "ambiguous," App. 26a, and the District Court held it was "unambiguous," *id.* at 39a, the end result is the same. Under either approach, the District Court was free to—and did—consider the FCC's guidance. *Id.* at 40-41a.

Boehringer observed, a "fact-based inquiry" was essential to allow a defendant to rebut any inference that a fax promoting a free offering "relate[d] to the firm's products or services," and thus, had a "commercial purpose." 847 F.3d at 95.

Based on the FCC's stated rationale for its characterization of faxes that "promote" free goods and services, it was clear to the District Court that "the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax." App. 41a. In fact, "[t]o read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly"—as Carlton & Harris proposed—would "obviate[] the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." *Id.* at 42a.

To the extent the majority felt it was improving upon the TCPA by fashioning a "prophylactic" rule, App. 15a, 27a, this was in error. Courts should not impose "substantive changes designed to make the law 'better.' That would give the judiciary entirely too much law-making power." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012); *Bais Yaakov of Spring Valley*, 852 F.3d at 1082. Indeed, this Court was critical of the Director of the U.S. Patent and Trademark Office for similarly trying to rewrite the America Invents Act:

> Moving past the statute's text and context, the Director attempts a policy argument. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't

> our call to make. Policy arguments are properly addressed to Congress, not this Court.

SAS Inst., 138 S. Ct. at 1357. Here, as in *SAS Inst.*, only Congress has the right to amend the TCPA to expand the term "advertisement." In the absence of such a directive, courts retain their jurisdiction—just as they did in *SAS Inst.*—to read the "plain meaning" of the TCPA and to decide the proper level of deference afforded to the 2006 FCC Rule.

Had the majority appreciated: (1) the entire paragraph it cited, rather than just the first sentence; (2) definitional terms; (3) successive paragraphs in the 2006 FCC Rule; and (4) the TCPA's purpose, it would have realized "a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA"—as did Judge Thacker's dissent. App. 29a.

III. THIS COURT'S REVIEW IS NEEDED

This case presents an ideal vehicle to resolve the interplay between the Hobbs Act and *Chevron*, as well as the various splits of authority spawned by the Fourth Circuit's rulings related to the TCPA.

First, this case presents a challenge to the jurisdiction of all courts to interpret the law and decide, for themselves, the appropriate level of deference afforded agency guidance under *Chevron*. It also represents an occasion for this Court to delineate the proper scope of the Hobbs Act when the "validity" of an agency's order is *not* challenged.

The central question in this case is: who decides what the law is? Should agencies be permitted to divine Congress's intent with no check by the courts?

The answer, based on over thirty years of case law following this Court's seminal *Chevron* ruling, is no.

Nor did the District Court ever seek to overstep its bounds with respect to the Hobbs Act's reach. As the District Court observed: "The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA." App. 39a. Instead, the Hobbs Act prohibits facial challenges to the "validity" of an agency's order before a district court. Only in this limited situation would courts "lack the jurisdiction to decide the case," as the District Court itself held. *Id.* (citing *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939 (1984)).

Second, this case highlights the injustice of the Fourth Circuit's ruling. The majority stripped critical meaning from the TCPA—and the 2006 FCC Rule—by removing the universally-recognized limitation that faxes must contain a "commercial nexus" to a firm's business in order to be actionable. At the same time, the majority also impermissibly expanded the scope of TCPA liability nationwide by ruling that all faxes that promote free goods and services are *per se* "advertisements" under the law. The combination of these two rulings will expose innumerably more companies to the "draconian penalties" available under the TCPA—a result the District Court sought to avoid. *Compare Boehringer*, 2018 U.S. Dist. LEXIS 64844, at *23 ("Physicians Healthsource's attenuated notion of 'advertising' would go far beyond the TCPA and effectively ban *all* corporate public service announcements.") (emphasis in original) *with* App. 42a ("Plaintiff's interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA or the FCC interpretation.").

Third, this case implicates unique and significant concerns over public safety and patient wellness. As discussed, the *Physicians' Desk Reference*© is a "compendium of prescribing information for various prescription drugs." App. 3a. The *Physicians' Desk Reference*© is used by healthcare providers around the country to identify and avoid dangerous drug interactions that could harm patients. As such, any lawful effort to make this free drug reference guide more accessible to healthcare providers—for instance, by notifying them of the option to download a free e-book—should be encouraged, not punished.

The instant case also illustrates the clear and present dangers of a *per se* rule for fax "advertisements." As the post-remand district court in *Boehringer* observed, plaintiff's interpretation "would effectively bar companies from faxing 'disease awareness communications,' which . . . the FDA regarded as a way to 'provide important health information to consumers and health care practitioners, and . . . encourage consumers to seek, and health care practitioners to provide, appropriate treatment.'" 2018 U.S. Dist. LEXIS 64844, at *28 n.4. As such, public policy supports healthcare providers—including, but not limited to, Carlton & Harris—being notified that the *Physicians' Desk Reference*© is available in a "convenient digital format." Prohibiting faxes of this benign nature would chill PDR's (and others) ability to keep healthcare providers informed of life-saving drug interaction information needed to protect patient health—as PDR has done for over 70 years.

Relatedly, and as this Court has recognized, pharmaceutical companies are required to widely

disseminate information about the safety risks and side effects of their products to physicians and other prescribers in order to satisfy state "duty to warn" laws. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011) (under Minnesota and Louisiana law, a duty to warn falls on the manufacturer) (citations omitted); *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2474 (2013) (duty to warn under New Hampshire law is part of the "general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses") (citation omitted). The importance of the *Physicians' Desk Reference*© to population health in the U.S.—and its ability to shield pharmaceutical manufacturers from liability where drug labels were properly written and distributed via the *Physicians' Desk Reference*©—has been consistently recognized in dozens of cases across the country.[11] Restricting PDR's ability to widely disseminate notifications regarding its free drug reference guide being available in other forms would mean pharmaceutical companies would be exposed to more suits based on a failure to warn patients of potentially dangerous drug interactions.

Fourth, and finally, this case demonstrates the immense practical consequences of the Fourth

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[11] *See, e.g., Guevara v. Dorsey Labs., Div. of Sandoz, Inc.*, 845 F.2d 364, 366 (1st Cir. 1988) (use of *Physicians' Desk Reference*© along with package insert to provide warning was adequate); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1097-98 (8th Cir. 2013) (discussing effect of the *Physicians' Desk Reference*© on learned intermediary doctrine and failure to warn); *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 2015 U.S. App. LEXIS 21428, at *11 (6th Cir. Dec. 11, 2015) (same); *U.S. v. Azmat*, 2015 U.S. App. LEXIS 19574, at *42, 53-54 (11th Cir. Nov. 10, 2015) (in admitting expert medical testimony, *PDR* described as "standard reference material").

Circuit's rule due to the scale of potential liability. As repeatedly observed by the Seventh Circuit, the TCPA has been abused by opportunistic class action plaintiffs' attorneys seeking to "nail[] the little guy," while taking advantage of the uncapped statutory damages available under the law. *See, e.g., Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915-16 (7th Cir. 2011) (Posner, J.). By removing the protection of a "commercial aim," and instead imposing a *per se* rule that faxes promoting free goods and services "even at no cost" are "advertisements," the TCPA will become an even larger vehicle for abuse by class action attorneys and their professional plaintiffs. This Court has the opportunity to stem the collective flood of frivolous litigation related to fax transmissions that serve a useful and, in this case, even life-saving purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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