No. 18-1258

IN THE

Supreme Court of the United States

ENCLARITY, INC., LEXISNEXIS RISK SOLUTIONS, INC., LEXISNEXIS RISK SOLUTIONS GA, INC., LEXISNEXIS RISK SOLUTIONS FL, INC.,

Petitioners,

v.

MATTHEW N. FULTON, D.D.S., P.C.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant the petition where the petition presupposes the Court will hold in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705, that federal courts are not bound by FCC interpretations of the TCPA and by so holding will fundamentally alter the basis upon which the circuit court decisions that Petitioner claims are in conflict were decided, thereby abrogating any basis for this Court's review?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that Respondent Matthew N. Fulton, D.D.S., P.C. is a professional corporation wholly owned by Matthew N. Fulton, has no parent corporation, and no publicly held company owns 10% or more of its stock.

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RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Matthew N. Fulton, D.D.S., P.C. ("Respondent" or "Fulton") respectfully submits this response in opposition to the petition for a writ of certiorari filed by petitioners Enclarity, Inc., LexisNexis Risk Solutions, Inc., LexisNexis Risk Solutions GA, Inc., and LexisNexis Risk Solutions FL, Inc. (collectively referred to as "Enclarity"). Fulton respectfully requests that this Court deny Enclarity's petition for a writ of certiorari.

STATUTES AND REGULATIONS INVOLVED

I. The Telephone Consumer Protection Act, 28 U.S.C. § 227 ("TCPA").

> Restrictions on use of telephone equipment
> (a) Definitions
> As used in this section--
> ***
> (5) The term "unsolicited advertisement" means 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.

II. The Codified FCC Regulation Implementing the TCPA, 47 C.F.R. § 64.1200 (f) (15).

> The term unsolicited advertisement means 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.

III. The FCC Order Construing the TCPA Term "Advertisement" to Include Faxes Sent as a Pretext to Future Marketing or Advertising. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Protection Act of 2005*, 71 Fed. Reg. 25967, 25973 (May 3, 2006) (the "2006 Rules").

[F]acsimile messages that promote goods or services even at no costs, 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 facsimile 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].

STATEMENT OF THE CASE

Enclarity sent an unsolicited fax to Fulton requesting that Fulton confirm or update its information in Enclarity's database of medical providers. The fax read, in pertinent part:

> Re: Fax Number Verification for Delivery of Patient PHI (Internal ID: 34290748)
>
> The purpose of this Fax Verification Request is to help preserve the privacy and security of your patients' Protected Health Information ("PHI"), as defined by the Health Insurance Portability and Accountability Act ("HIPAA"). LexisNexis is seeking your cooperation to verify or update your information. We validate and update the fax in our system so our clients can use them for clinical summaries, prescription renewals, and other sensitive communications. Verifying the practice address, phone number and your secure fax number(s) for this location will minimize the potential privacy risks that could arise from information sent to an unsecured location. As part of our effort to assure that the [sic] transmission of PHI, it is vital to verify the information for Dr. Matthew Norman Fulton, DDS is accurate. This information will be verified once each year.

App. 3a. The fax provided space for Fulton to validate or update its contact information, sign the validation/update, and add comments. App. 4a. The fax concluded by providing a phone number and URL link to the Frequently Asked Questions (FAQs) page of Enclarity's website. *Id.*

According to that FAQs page, the "system" referenced in the fax is Enclarity's Master Provider Referential Database ("database"), and providers' contact information will be licensed to Enclarity's "customer base" of "health insurance plans, preferred provider organizations, pharmacy network companies, pharmacy benefit managers, property and casualty insurance carriers, retail pharmacies, government entities, as well as life sciences companies (pharmaceutical and medical device manufacturers)." *Id.* The FAQs tout that Enclarity has "compiled the largest, most accurate database of medical provider business and professional demographic data in the United States." *Id.*

The FAQs also disclose specific uses that would be made of the providers' verified contact information:

> Our customers use provider information in a variety of ways, including communicating patient prescription data, validating provider identity for claims payments, reimbursing providers for medical bills, updating provider directories, renewing prescriptions, researching health care practitioners *to invite*

> *them to become part of a provider network*, sending important notifications, such as product recalls, *and other uses*.

Id. (emphasis added). The FAQs represent that validating contact information will "help drive more business to you." *Id.*

Fulton sued Enclarity under the TCPA, App. 5a, alleging the fax was an advertisement for two distinct reasons: (1) because Enclarity sent it to enable or facilitate future marketing directed to Fulton by Enclarity or its clients, *id.*; and (2) because Enclarity sent the fax to maintain or improve the quality of its database, in order to generate indirect financial gain through future, for-profit licensing of the database to Enclarity's clients, *Id.* Fulton attached the above-quoted FAQs from Enclarity's website as exhibits to its Complaint. *Id.* Enclarity did not dispute the facts contained in its FAQs.

The district court granted Enclarity's Fed. R. Civ. P. 12 (b) (6) motion to dismiss Fulton's TCPA claim. *Id.*; *see also Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. 16-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017). The district court construed the Sixth Circuit's earlier decision in *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015), as precluding consideration of anything other than the "four corners" of the fax in determining whether it was an advertisement, and on this basis refused to consider the exhibits attached to

Fulton's Complaint. App. 5a-6a. The district court further construed *Sandusky* as requiring that a fax propose a commercial transaction between sender and recipient to be an advertisement. *Id.* Based on this interpretation of *Sandusky*, the district court held as a matter of law that Enclarity's fax was not an advertisement, *id.*, and dismissed Fulton's TCPA claim with prejudice. *Id.*

On appeal, the Sixth Circuit reversed. App., 2a-16a; *see also* 907 F.3d 948 (6th Cir. 2018). The court began by clarifying its earlier *Sandusky* decision, explaining that the district court's interpretation was incorrect. In particular, the Sixth Circuit clarified (1) that a fax need not propose a commercial transaction with the recipient to be an advertisement, and (2) that consideration of whether a fax is an advertisement is not necessarily limited to the four corners of the fax, but sometimes must take into account other evidence, especially where it is alleged the fax was sent as a pretext to enable or facilitate future marketing directed to the recipient. App., 10a ("*Sandusky* … does not entail the two requirements imposed by the district court: that the fax must propose a direct commercial transaction between the sender and the recipient and that courts are constrained to examining only the face of the face. … *Sandusky* recognizes that the fax 'need not be an explicit offer' and that the 'best ads' are sometimes not 'so overt[.]'").

Bringing these clarifications to bear on Fulton's allegations of advertisement by pretext, the court

held the district court erred in refusing to consider exhibits from Enclarity's website attached to the Complaint. App. 8a. The court further held those exhibits plausibly supported Fulton's pretext allegation that Enclarity sent the fax to enable or facilitate future marketing to Fulton by Enclarity or its clients.

> According to Fulton's complaint, providing verified contact information paves the way for Defendants' customers to "send additional marketing faxes to recipients." [] This allegation finds support in the FAQs, which confirm that Defendants' customers use the system to "invite [providers] to become part of a provider network" and "send[] important notifications," among "other uses." [] The potential for future advertising is also implied by Defendants' assertion that verifying contact information will "drive more business to" providers. Defendants have not contested this allegation.

App., 13a-14a. The court noted that the FCC's 2006 Rules expressly recognizes the viability of a pretext theory of TCPA liability. *Ibid.* at 12a-13a (citing 2006 Rules). The court concluded that these plausible allegations sufficed to state a claim of TCPA advertising by pretext upon which relief may be granted under Fed. R. Civ. P. 12 (b) (6). *Ibid.* at 15a. ("[W]e find that Fulton has adequately alleged that the fax Fulton received was an unsolicited

advertisement because it served as a commercial pretext for future advertising opportunities. Fulton has therefore stated a plausible TCPA claim under the fax-as-pretext theory.").

Having concluded the dismissal must be reversed and remanded on Fulton's theory of advertisement by pretext, the court declined to address and resolve Fulton's alternative, indirect-financial-gain theory of TCPA fax advertisement liability. *Ibid.* ("Because this conclusion is sufficient to warrant reversing and remanding the case, we need not reach Fulton's alternative theory that the fax was an advertisement because Defendants sent it with a profit motive").

As Enclarity's petition notes, Judge Gibbons dissented from the majority's reversal and remand. Pet., p. 8; App., pp. 16a-17a. To the extent Enclarity suggests that Judge Gibbons disagreed with the majority's clarification of *Sandusky*, however, that is not true. To the contrary, Judge Gibbons began her dissent stating, "I agree with the majority's analysis of *Sandusky's* import and its assessment of the district court's errors." App., p. 16a. Notwithstanding this agreement on governing legal principles, Judge Gibbons—implicitly invoking the requirements of Fed. R. Civ. P. 8 (a) through citation to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 557 (2007)—expressed the view that Fulton's allegations of advertisement by pretext were too "conclusory" to plausibly state a viable TCPA claim of advertisement by pretext. App., p. 17a.

Enclarity's petition raises no issue relating to Fed. R. Civ. P. 8 (a), and therefore, Judge Gibbons' dissent is irrelevant to its petition.

Enclarity's petition for rehearing *en banc* was denied. App., pp. 32a-33a. Enclarity's petition for writ of certiorari followed.

ARGUMENT

I. Fulton does not oppose Enclarity's request that the Court hold its petition pending issuance of a decision in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* (No. 17-1705).

In its petition, Enclarity notes this Court has granted review in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* (No. 17-1705), limited to the issue of whether FCC pronouncements interpreting the TCPA are binding on federal courts under the Hobbs Act. 28 U.S.C. § 2342 *et seq.* Enclarity argues that if the Court holds in *PDR* that FCC pronouncements are not binding on federal courts, the result would be relevant to the proper disposition of Enclarity's petition. On this basis, Enclarity asks the Court to hold its petition pending a decision in *PDR*.

Fulton agrees that the Court's resolution of the issue in *PDR* is relevant to the proper disposition of Enclarity's petition. Therefore, Fulton does not oppose Enclarity's request that the Court hold its petition pending a decision in *PDR*.

II. If the Court holds in PDR that FCC pronouncements interpreting the TCPA are binding upon federal courts, Fulton contends that the Court should deny Enclarity's petition.

Enclarity's petition seems to presuppose that the Court's forthcoming decision in *PDR* will hold that FCC pronouncements interpreting the TCPA are not binding upon federal courts. Enclarity does not seem to acknowledge the possibility that the *PDR* decision may hold just the opposite, *i.e.*, that FCC pronouncements regarding the TCPA are binding upon federal courts.

Nevertheless, if *PDR* holds that FCC pronouncements are binding, the Court should deny Enclarity's petition because it is undisputed that the Sixth Circuit's pretext holding follows the FCC's 2006 pretext pronouncement. App., pp. 12a-13a (citing FCC's 2006 Rules recognizing viability of pretext theory of junk-fax advertisement liability). Enclarity does not even suggest otherwise.

III. If the Court holds in *PDR* that FCC pronouncements interpreting the TCPA are not binding upon federal courts, Fulton does not oppose Enclarity's request for remand to the Sixth Circuit for further proceedings consistent with PDR.

Presupposing the decision in *PDR* will hold FCC pronouncements interpreting the TCPA are not binding on federal courts, Enclarity first argues the

Court should remand the case to the Sixth Circuit for further proceedings consistent with the *PDR* decision.

Assuming Enclarity's expectation regarding *PDR* proves correct, Fulton does not oppose the remand requested by Enclarity because, one way or another, the Sixth Circuit ultimately would need to consider the advertisement by pretext issue through the corrected lens of deference to the FCC's pronouncement on that issue dictated by the *PDR* decision.[1] In all likelihood, the Sixth Circuit also would need to address and resolve Fulton's alternative theory of indirect-financial-gain TCPA liability, which it declined to consider in its original decision. *See also Robert W. Mauthe, M.D., P.C. v. Optum Inc.*, -- F.3d --, No. 18-2894, 2019 WL 2262706 (3d Cir. May 28, 2019) (adopting a narrow version of indirect financial gain liability).

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[1] Holding Enclarity's petition pending a decision in *PDR* is not the only option. The Court could deny Enclarity's petition now, and if *PDR* is ultimately decided as Enclarity hopes—*i.e.*, holding FCC interpretations of the TCPA are not binding on federal courts—*PDR* would be intervening, controlling authority requiring reconsideration in the district court and then in the Sixth Circuit.

IV. If the Court holds in *PDR* that FCC pronouncements interpreting the TCPA are not binding upon federal courts, Fulton opposes Enclarity's alternative request that the Court grant plenary review of the "advertisement-by-pretext" issue raised in its petition, because even assuming there is currently a conflict among the circuits on that issue, the *PDR* decision that Enclarity anticipates would moot that conflict. There is no such conflict, however.

A. If *PDR* holds that FCC pronouncements are not binding on federal courts, the supposed conflict among the circuits on which Enclarity relies for certiorari review will be moot.

Fulton does not agree that the particular conflict among the circuits urged by Enclarity exists. Nevertheless, assuming it does, the specific decisions on which Enclarity relies to demonstrate that supposed conflict followed the FCC's 2006 Rules recognizing the viability of a claim of advertisement by pretext. As such, if the Court's *PDR* decision holds that FCC interpretations of the TCPA are not binding on federal courts, the precedential value of those circuit decisions will be compromised—at least until those same circuits again decide the pretext issue through the proper lens of deference to the FCC

dictated by the *PDR* decision—and the current conflict relied on by Enclarity will be moot.

As indicated, the Sixth Circuit in the case *sub judice* specifically cited to and quoted from the FCC's 2006 Order in holding Fulton's Complaint plausibly pleaded that Enclarity's fax was an advertisement under a pretext theory. App., pp. 12a-13a. Although the court did not cite to the Hobbs Act or expressly state that the FCC's pronouncement regarding pretextual fax advertising was binding upon it, there was no need to do so because existing Sixth Circuit precedent already made that clear. *See*, *e.g.*, *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. Appx. 444, 459 (6th Cir. 2013) (holding under Hobbs Act, 28 U.S.C. § 2342 *et seq.*, FCC rules and regulations implementing the TCPA are binding upon district and circuit courts, except in direct appeals of agency action to circuit courts under 28 U.S.C. § 2343). If *PDR* ultimately holds that such FCC pronouncements are not binding, the Sixth Circuit will be tasked with deciding the advertising-by-pretext issue through the lens of a different level of deference to the FCC's interpretation.

Enclarity also points to the Second Circuit's decision in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2d Cir. 2017), as another example of a supposedly erroneous circuit decision improperly expanding the TCPA beyond its proper limits. Pet., pp. 13-14. Like the Sixth Circuit in the case below, however, the

Second Circuit's recognition of advertising by pretext as a viable theory of TCPA liability derived from the court's strict adherence to the FCC's 2006 Rules on that issue. *Boehringer*, 847 F.3d at 95-97 (quoting 2006 Rules' text regarding TCPA junk-fax pretext liability, and extensively analyzing case-specific advertisement issue under 2006 Rules); *see also ibid.* at 97-103 (Leval, J., concurring) (questioning whether majority had correctly interpreted 2006 Rules relating to junk-fax pretext liability). If *PDR* holds that strict deference is not required because such FCC pronouncements are not binding, the Second Circuit will need to reconsider the viability of the advertisement-by-pretext theory through a different level of deference to the FCC's pronouncement.

In *Carlton & Harris Chiro., Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018), *cert. granted*, No. 17-1705, 2018 WL 3127423 (U.S. Nov. 13, 2018), the Fourth Circuit offered observations consistent with a generally expansive view of the meaning of the term "advertisement":

> [R]equiring a fax to propose a specific commercial transaction on its face takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models.
>
> *** We do know that PDR Network receives money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*. And nothing in the record suggests

> that PDR Network is a charity that distributes free e-books without hope of financial gain. Although PDR Network does not charge healthcare providers money for its e-book, it's certainly plausible that the amount of money it receives turns on how many copies of the *Physicians' Desk Reference* it distributes. The free distribution of the e-book, then, may not impose a financial cost on healthcare providers, but PDR Network may nevertheless stand to profit when a provider accepts a free copy.
>
> Moreover, giving away products in the hope of future financial gain is a commonplace marketing tactic. PDR Network purports to offer other services to healthcare providers, and it may offer the *Physicians' Desk Reference* for free in the hopes of establishing relationships with healthcare providers that will lead to future sales of other goods or services. All told, we think it entirely plausible that PDR Network distributes the free e-books to further its own economic interests.

883 F.3d at 468. Nevertheless, the *PDR* court did not decide the case based on that expansive view. Rather, the court described its own expressions in that regard as "musings," *ibid.*, that were unnecessary to the disposition of the case because the court held the FCC's 2006 Rules were binding. *Ibid.* at 469.

If *PDR* holds FCC pronouncements interpreting the TCPA are not binding upon federal courts, the

very decisions on which Enclarity relies to demonstrate a circuit conflict warranting resolution by this Court cease to be firmly precedential, and the supposed conflict disappears. In that event, there would be no basis for review in this Court. More to the point, under no circumstances will this Court's plenary review of Enclarity's petition be warranted.

B. There is no true conflict among the circuits on the pretext issue.

Setting aside the foregoing, Enclarity's entire petition is premised on the misguided notion that a true conflict exists among the circuits on the viability of TCPA claims involving faxes that do not propose a commercial transaction with the recipient. There is no such conflict.

In *Boehringer, supra*, the Second Circuit held that a fax inviting recipients (medical doctors) to a free dinner seminar could be a pretextual advertisement if the defendant intended to promote its pharmaceutical products to the recipients at the dinner in order to induce them to prescribe those products to their patients. 847 F.3d at 97 ("The fax invitation was sent to a doctor, whom Boehringer would presumably hope to persuade to prescribe its drugs to patients"); *see also ibid.* at 99 (Leval, J., concurring) ("[T]he objective of the event [promoted in the fax] is to get doctors to eventually prescribe the company's drugs to their patients"). *Boehringer* does

not require that the fax propose a commercial transaction with the recipient to be an advertisement.

In *Sandusky, supra*, and in the case *sub judice*, the Sixth Circuit held that a fax need not, on its face, propose a commercial transaction with the recipient to be an advertisement. *Sandusky*, 788 F.3d at 225 ("To be sure, a fax need not be an explicit sale offer to be an ad"); App., p. 10a. In both cases, the court went further, acknowledging that advertising is often not so obvious. *Sandusky*, 788 F.3d at 225 ("It's possible for an ad to promote a product or service that's for sale without being so overt, as in the free-seminar example, *see* [2006 Rules], 71 Fed. Reg. at 25973[.] The best ads sometimes do just that. But the fax itself must at least be an indirect commercial solicitation, or pretext for a commercial solicitation. If it's not, it's not an ad."); App., p. 10a.

Enclarity asserts that in the case *sub judice*, the court endorsed the broader proposition that a fax may be an advertisement if there is any "commercial nexus" between the content of the fax and the sender's business, Pet., pp. 7-8, but the court held no such thing. The court was very clear that its decision was based on Fulton's allegations that the fax was sent as a pretext to future marketing to Fulton by Enclarity and its clients, and these allegations were plausibly supported by both the content of the fax and the content of Enclarity's website FAQs webpage. App., p. 2a ("[W]e find that Fulton has plausibly alleged that the fax was an unsolicited advertisement insofar as it

alleged that the fax served as a pretext to send Fulton additional marketing materials"). In suggesting otherwise, Enclarity is reading something into the court's decision that simply is not there.

In *PDR, supra*, the Fourth Circuit expressed general disapproval of the notion that to be an advertisement, a fax must on its face propose a commercial transaction with the defendant, pointing out that such a rule fails to take account of many modern business models, and the marketing methods used to serve those models. 883 F.3d at 468.

More recently, in *Robert W. Mauthe, M.D., P.C. v. Optum, Inc., et al.*, No. 18-2894, 2019 WL 2262706 (3d Cir. May 28, 2019), the Third Circuit joined the Second, Fourth and Sixth Circuits in holding that a fax need not, on its face, solicit a commercial transaction with the recipient to be an advertisement. *Ibid.* at *2-3. The court described this viable theory of liability as "third-party based liability." *Ibid.* at *2. Although Fulton does not agree with the specific holding or result in *Optum*, and although the *Optum* decision itself may provide the proper case for this Court to expound upon the appropriate breadth to be given the term "advertisement" under the TCPA, *Optum* nevertheless serves as yet another example of the uniformity of circuit court decisions in recognizing that a fax need not seek, on its face or otherwise, a

commercial transaction with the recipient in order to be an advertisement.[2]

In the end, the only circuit decision on which Enclarity relies to show a supposed conflict with one or more of the foregoing decisions is *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362 (11th Cir. 2017). Enclarity portrays the decision in *Florence* as holding that a purely "informational" fax that does not, on its face, propose a commercial transaction with the recipient is not an advertisement for TCPA purposes. Pet., p. 12. But that was not the court's holding.

In *Florence*, the plaintiff (a medical provider) received a fax from the defendant (a manufacturer of orthopedic products) asking the plaintiff to complete a prescription for a patient to receive one of the defendant's products that the patient himself already had ordered and purchased. *Ibid.*, at 1364. The purpose of the prescription was merely to enable the patient to obtain insurance reimbursement for the product. *Ibid.* The court held that a fax sent to a doctor for the purpose of facilitating a transaction already consummated by the doctor's patient was not an

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[2] Enclarity suggests that the increasing volume of TCPA litigation reflects an abuse that requires correction through a rule that facilitates early dismissal on the pleadings. Pet., p. 3. But Congress intended for civil actions under the TCPA to serve a private-enforcement role, and the more likely explanation for the persistence of TCPA litigation is the recalcitrance of creative marketers to accede to the TCPA's junk-fax provisions.

advertisement. *Ibid.* at 1367. Notably, this result was entirely consistent with that portion of the FCC's 2006 Rules holding "transactional faxes" are not TCPA advertisements. 2006 Rules, 71 Fed. Reg. at 25972. Further, in rejecting the plaintiff's argument that the fax was an advertisement, the *Florence* court expressly noted that the fax did not seek to sell the product to the plaintiff, *or to induce the plaintiff to prescribe the product for another patient*. *Ibid.* at 1367. This language is entirely consistent with the holding in *Boehringer*. *Florence* simply does not stand for the broad proposition that Enclarity urges, and there is no conflict between *Florence* on the one hand, and *Boehringer*, *Sandusky*, *PDR*, *Optum*, and the case *sub judice* on the other hand.[3]

CONCLUSION

Fulton does not oppose Enclarity's request that the Court hold its petition pending issuance of a decision in *PDR*. If *PDR* holds FCC pronouncements are binding on federal courts, the Court should deny Enclarity's petition. Alternatively, if *PDR* holds FCC pronouncements are not binding on federal courts, the

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[3] Fulton does not mean to suggest the circuits are fully aligned in defining the standard for determining whether a fax is an advertisement under the TCPA, or that review by this Court to resolve such differences is not warranted. Fulton is merely pointing out that the specific conflict identified by Enclarity does not exist and Enclarity's petition raises no issue warranting this Court's review.

Court should remand this case to the Sixth Circuit for further proceedings consistent with *PDR*.

Respectfully submitted,

/s/ Phillip A. Bock

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