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.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The decision below should be vacated and the case remanded in light of *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. June 19, 2019). The same preliminary issues that warranted remand there do so here as well. If the Court does not remand, it should grant the petition for plenary review. The Sixth Circuit's decision entrenches a clear split of authority on whether informational faxes qualify as "advertisements" at the pleading stage under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

ARGUMENT

I. THE COURT SHOULD GRANT, VACATE, AND REMAND IN LIGHT OF *PDR NETWORK*

The Court should grant the petition, vacate the Sixth Circuit's decision, and remand for reconsideration in light of *PDR Network*.

The parties agree on the close connection between *PDR Network* and this case. Enclarity asked the Court to hold its petition for *PDR Network*, "which involves the same FCC order upon which the district court and Sixth Circuit relied here." Pet. 9. The petition explained that "[t]he Court's analysis of the role of the 2006 FCC Order in private-party litigation" in *PDR Network* could prove "relevant to the proper disposition of this case" and make it appropriate to grant,

vacate, and remand. Pet. 11; *see In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967 (May 3, 2006) (2006 FCC Order).

In response, Fulton "agree[d] that the Court's resolution of the issue in *PDR* is relevant to the proper disposition of Enclarity's petition." Opp. 10. Fulton thus "d[id] not oppose Enclarity's request that the Court hold its petition pending a decision in *PDR*." *Ibid.*

Now that the Court has decided *PDR Network*, a grant, vacate, and remand here is appropriate. In *PDR Network*, the Fourth Circuit had held that certain faxes were a "pretext" to advertise based on its reading of the 2006 FCC Order, which the court deemed binding in private-party litigation under the Hobbs Act. *PDR Network*, Slip op. 2-4. The Hobbs Act gives courts of appeals "exclusive jurisdiction" to "determine the validity of" FCC orders. 28 U.S.C. § 2342(1). This Court granted certiorari in *PDR Network* "to decide whether the Hobbs Act's commitment of 'exclusive jurisdiction' to the courts of appeals requires a district court in a private enforcement suit like this one to follow the FCC's 2006 Order interpreting" the TCPA. *PDR Network*, Slip op. 4.

The Court in *PDR Network* did not ultimately decide that question, however, because "the answer may depend upon the resolution of two preliminary issues" that "were not aired" before the court of appeals. *Id.* at 2, 5.

First, it was unclear whether the 2006 FCC Order was a "legislative rule" having "the force and effect of law," or "an interpretive rule, which simply advises the public of the agency's construction." *Id.* at 5 (quotations, brackets omitted). The Court explained that, if the "relevant portion" of the 2006 FCC Order was merely an "interpretive rule" it may not be binding in private-party litigation. *Ibid.*

Second, it was unclear whether the petitioner in *PDR Network* had a "prior" and "adequate" opportunity to seek judicial review of the 2006 FCC Order. *Ibid.* Agency action is presumptively reviewable in civil cases unless "'[a] *prior, adequate, and exclusive opportunity for judicial review is provided by law*.'" *Id.* at 5-6 (quoting 5 U.S.C. § 703 (emphasis added by Court)). So if the Hobbs Act did not afford the TCPA defendant in *PDR Network* a "prior," "adequate" chance to challenge the 2006 FCC Order, it may be able "to challenge the validity of the Order in this enforcement proceeding even if the Order is deemed a 'legislative' rule rather than an 'interpretive' rule." *Id.* at 6.

In sum, the Court in *PDR Network* explained that "[b]ecause the [Fourth Circuit] ha[d] not yet addressed the preliminary issues [this Court had] described," it was appropriate to "vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals may consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case." *Ibid.*

The same disposition is appropriate here. Like *PDR Network*, this private-party TCPA suit turns on the meaning of "advertisement," and it involves the same portion of the same 2006 FCC Order addressing informational faxes. Pet. App. 2a-5a. And like *PDR Network*, the court of appeals here has not addressed whether the 2006 FCC Order is a legislative or interpretive rule; whether Enclarity had a prior, adequate opportunity to challenge that Order; or whether the answers to those questions impact the Order's force. *See* Pet. App. 1a-31a. A remand would give the court of appeals the opportunity to address those questions in the first instance.

Fulton's certiorari response (filed before release of *PDR Network*) recognized that if *PDR Network* were to hold that "FCC pronouncements interpreting the TCPA are not binding on federal courts," then a remand would be warranted here. Opp. 11-12. Although, as noted, the Court did not reach that ultimate determination, it identified predicate questions possibly necessary to doing so. It thus remains true that "the Sixth Circuit ultimately would need to consider the advertisement by pretext issue through the corrected lens of deference," if any, "to the FCC's pronouncement on that issue dictated by the *PDR* decision" (Opp. 12) and by the Sixth Circuit's answers to the preliminary questions identified by that decision.[1]

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[1] According to Fulton, "[a]lthough the [Sixth Circuit here] did not cite to the Hobbs Act or expressly state that the FCC's pronouncements regarding pretextual fax advertising was binding upon it, there was no need to do so because existing Sixth Circuit

II. ALTERNATIVELY, THE COURT SHOULD GRANT PLENARY REVIEW

If the Court does not vacate and remand, it should grant the petition to resolve an important, recurring issue that has divided federal and state courts: whether faxes that merely provide information to, or request information from, recipients without proposing a commercial transaction, are "advertisements" under the TCPA.

A. Courts Are Divided On Whether An Informational Fax Is An "Advertisement" Under The TCPA

In the decision below, the Sixth Circuit favorably cited the Second Circuit's "commercial nexus" standard, under which TCPA plaintiffs can survive a motion to dismiss so long as they allege that a fax was "*related to*" the sender's business. Pet. App. 14a-15a (citing *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2d Cir. 2017)). According to the Second Circuit, that is enough to plead that a fax is an advertisement or pretext to advertise under the TCPA, and defendants "can rebut such an inference * * * only after discovery." *Boehringer*, 847 F.3d at 95-97. Other courts reject that lax standard. Pet. 11-16.

For example, the New York Court of Appeals held in *Stern v. Bluestone* that "Attorney Malpractice Reports" faxed by a lawyer specializing in such litigation were not TCPA ads because the "body of each fax"

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precedent already made that clear." Opp. 14 (citing *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013)).

simply "furnished information" and "at most" offered "'an incidental advertisement.'" 911 N.E.2d 844, 845-46 (2009) (quoting 2006 FCC Order). Because those faxes undoubtedly related to the sender's business as a lawyer specializing in malpractice litigation, *Stern* is directly at odds with *Boehringer*'s commercial nexus standard. Pet. 11-16. Fulton says nothing about *Stern* and offers no way to square that case with *Boehringer* or the decision below.

The Sixth Circuit's ruling also conflicts with *Florence Endocrine Clinic v. Arriva Medical*, where the Eleventh Circuit held that faxes about medical supplies sent by a medical supplier to a clinic were not advertisements. 858 F.3d 1362, 1364-67 (2017). The faxes on their face sought only information and did not "induce the clinic to purchase Arriva products" or "induce the physicians to prescribe those products to patients." *Ibid.* Fulton suggests that this inducement "language" somehow renders *Florence* "consistent" with the Sixth Circuit's decision below and the Second Circuit's decision in *Boehringer*. Opp. 21. But there is no allegation here that Enclarity's faxes sought to "induce" recipients to buy anything, much less to encourage others to do so. And the dispositive commercial nexus in *Boehringer* also existed in *Florence*, where the medical products listed in Arriva's faxes clearly related to its business as a medical supplier, *see* 858 F.3d at 1366-67. Yet unlike in *Boehringer*, that nexus did not save the TCPA claim in *Florence* from dismissal. *Ibid.* Fulton says nothing about that irreconcilable inconsistency.

This conflict has only deepened since the petition was filed, with the Third Circuit's decision in *Robert W. Mauthe, M.D. v. Optum Inc.*, 925 F.3d 129 (2019), which rejected Fulton's broad interpretation of "advertisement" under the TCPA. The defendants in *Optum* maintained a proprietary database of healthcare information. 925 F.3d at 131-33. To ensure the accuracy of that database, they sent faxes to healthcare providers so the providers could "update and verify" their contact information for defendants' "Optum Provider Database product." *Ibid.* One recipient of those faxes (Mauthe) alleged that they were TCPA advertisements, but the district court rejected that claim at summary judgment. *Ibid.*

The Third Circuit affirmed. The court held that the faxes were not TCPA ads—even if defendants sent them "to obtain information enhancing the quality of their services, and thus reasonably calculated their faxes to increase their profits"—because "the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of a fax or a third party." *Id.* at 134-35. The Third Circuit likewise rejected Mauthe's "pretext" theory, holding that, even were such a theory viable, it failed in that case because defendants did not plan to send Mauthe any future ads. *Id.* at 135. The court noted that, although defendants planned to send Mauthe a future fax to verify or update contact information, any such "fax will no more be an advertisement than the fax here if it is of similar content." *Ibid.*

Optum cannot be reconciled with Second or Sixth Circuit precedent. The faxes there unquestionably related to the senders' proprietary database, and yet the Third Circuit held they were not TCPA ads, even under a pretext theory. *Id.* at 133-35. As the court explained, "a fax does not become an advertisement merely because the sender intended it to enhance the quality of its products or services and thus its profits. After all, a commercial entity takes almost all of its actions with a profit motivation." *Ibid.* *Optum* thus held that information-request faxes sent to healthcare providers who do not patronize the senders' database are not TCPA ads unless they promoted the database, were calculated to increase the sender's profits, *and* encouraged recipients to influence the purchasing decisions of others. *Ibid.*

Had that standard applied here, Fulton's TCPA claim would have failed as a matter of law. Enclarity's fax requested only information, and there is no suggestion that it sought to influence anyone's purchasing decisions. Contrary to Fulton's assertions (Opp. 19-20), *Optum* squarely contradicts the Sixth Circuit's decision here.

Equally meritless is Fulton's contention that no "true conflict" exists here because (according to Fulton) federal courts agree "that a fax need not, on its face, propose a commercial transaction with the recipient to be an advertisement." Opp. 17-18. Even if courts accept that idea in theory, the fact remains that *Stern*, *Florence*, and *Optum* would have come out differently under the commercial nexus standard. The faxes in all

those cases obviously related to the sender's business, and yet those courts held they were not TCPA advertisements as a matter of law. *See Optum*, 925 F.3d at 132-35 (fax describing sender's proprietary database); *Florence*, 858 F.3d at 1366-67 (fax describing sender's products); *Stern*, 911 N.E.2d at 845-46 (fax discussing sender's legal specialty).

B. The Sixth Circuit's Decision Is Wrong, And The Important, Recurring Question Presented Warrants Review

Aside from conflicting with the precedents of other courts, the Sixth Circuit's decision contravenes the TCPA's text by erroneously construing "advertisement" to include even faxes that propose no commercial transaction. Pet. 17-19.

Fulton does not contest Enclarity's reading of the TCPA, nor does it defend the Sixth Circuit's atextual standard. *See* Opp. 18-19. For good reason: a fax containing no suggestion of a commercial transaction cannot violate the TCPA because an "advertisement" is by definition "[a] commercial solicitation," Black's Law Dictionary 65 (10th ed. 2014), that "draw[s] attention to [goods or services] in a public medium in order to promote sales." Oxford Dictionary of English 24 (3d ed. 2010). Given that Enclarity's fax did not "solicit business or sales from, or through, Fulton," the fax cannot be an advertisement and the decision below should be reversed. Pet. App. 16a-17a (Gibbons, J., dissenting).

The Sixth Circuit's erroneous decision is all the more worthy of review given the ever-increasing

volume of TCPA litigation. As the petition explained, the TCPA's fax provisions address a now-outdated problem (*i.e.*, the cost of fax paper and ink), and yet fax-related TCPA litigation has skyrocketed, especially in the class-action context where the threat of ruinous liability is particularly acute. Pet. 20-22. The decision below will only exacerbate that problem by making it easier for TCPA plaintiffs to survive meritorious Rule 12(b)(6) motions and to impose costly discovery on businesses and individuals requesting information via fax. *Ibid.*

Fulton does not deny that the question presented is important and recurring, or that the Sixth Circuit's decision will spur more TCPA lawsuits. Fulton instead maintains that "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." Opp. 20 n.2.

But private enforcement of the TCPA is delimited by the statute's text, which Fulton does not and cannot reconcile with the Sixth Circuit's expansive standard. *See supra*. Also, courts are not simply dealing with a "*persistence* of TCPA litigation"—they are inundated with an ever-increasing number of TCPA cases (Pet. 20-22), which cannot be explained by supposedly recalcitrant marketers. *Contra* Opp. 20 n.2 (emphasis added). Because the Sixth Circuit's erroneous decision will facilitate the continued growth of needless, costly

TCPA litigation, this case presents an important, recurring question that warrants review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded in light of *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. June 19, 2019). In the alternative, the petition should be granted for plenary review.

Respectfully submitted,

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