No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telephone Consumer Protection Act regulates the sending of "unsolicited advertisement[s]" to fax machines. 47 U.S.C. § 227(b)(1)(C). The statute defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." *Id.* § 227(a)(5). The question presented is:

Whether faxes that only request information and propose no commercial transaction with recipients are "advertisements" under the TCPA.

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1 and 29.6, petitioners state the following:

The parties to the proceeding are listed in the caption.

Petitioners, Enclarity, Inc., LexisNexis Risk Solutions Inc., LexisNexis Risk Solutions GA Inc., LexisNexis Risk Solutions FL Inc., are not publicly traded companies. The following entities are direct or indirect parent companies of all four petitioners: LexisNexis Risk Holdings Inc., RELX Inc., RELX US Holdings Inc., RELX Overseas BV, RELX Holdings BV, RELX (Holdings) Ltd., and RELX Group plc. The following entity is a direct or indirect parent company of LexisNexis Risk Solutions Inc., LexisNexis Risk Solutions GA Inc., and LexisNexis Risk Solutions FL Inc.: LexisNexis Risk Assets Inc. The following entity is a direct or indirect parent company of LexisNexis Risk Solutions FL Inc.: LexisNexis Risk Data Management Inc.

RELX Group plc is a publicly traded company and is a parent company of Enclarity, Inc., LexisNexis Risk Solutions Inc., LexisNexis Risk Solutions GA Inc., LexisNexis Risk Solutions FL Inc.

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PETITION FOR A WRIT OF CERTIORARI

Enclarity, Inc., LexisNexis Risk Solutions Inc., LexisNexis Risk Solutions GA Inc., LexisNexis Risk Solutions FL Inc. (collectively, "Enclarity") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 907 F.3d 948. The opinion of the district court (App., *infra*, 18a-31a) is unreported but appears at 2017 U.S. Dist. LEXIS 28439.

JURISDICTION

The court of appeals entered judgment on November 2, 2018. App., *infra*, 1a, 18a-19a. Enclarity's timely petition for rehearing en banc was denied on December 27, 2018. App., *infra*, 36a-37a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Telephone Consumer Protection Act ("TCPA") are reproduced in the appendix to this brief. App., *infra*, 36a-66a.

INTRODUCTION

This petition involves both an order of the Federal Communications Commission central to a case already pending before the Court and a recurring Telephone Consumer Protection Act issue that has divided lower

courts. The Court should therefore hold the petition pending its decision in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* (No. 17-1705). It should then either (1) grant the petition, vacate the judgment below, and remand for further consideration in light of *PDR Network*, or (2) grant the petition for plenary review.

PDR Network involves the question whether district courts must follow a 2006 FCC Order interpreting the TCPA's term "advertisement" in private-party litigation, or instead only owe it some level of deference. Order Granting Certiorari, No. 17-1705, 2018 U.S. Lexis 6754, at *1 (U.S. Nov. 13, 2018). In this private-party TCPA case, the district court and Sixth Circuit relied on the very same FCC Order in deciding whether the fax at issue was a TCPA "advertisement." This Court should hold Enclarity's petition and postpone consideration of the question presented until *PDR Network* is decided.

If the Court does not remand after *PDR Network*, it should grant this petition because the question presented independently warrants this Court's review. Federal circuit courts, and at least one state court of last resort, are divided on whether faxes merely requesting or providing information are "advertisements" under the TCPA. In the decision below, the Sixth Circuit deepened that conflict by siding with those courts holding that any fax counts as an "advertisement" at the pleading stage so long as the plaintiff alleges some connection between the fax and the sender's business.

Other courts have correctly held that this open-ended standard is inconsistent with the text and purpose of the TCPA. They hold instead that an informational fax that does not propose a commercial transaction with the recipient is not an "advertisement." The fax here, which merely asked recipients to update contact information, is not an advertisement under that proper standard.

Given the growing volume of TCPA litigation, district courts need tools to weed out meritless cases on the pleadings. Dismissal on the threshold question of whether the challenged fax counts as an "advertisement" should be among those screening options. Under the Sixth Circuit's approach, however, plaintiffs will be able to avoid dismissal merely by alleging some attenuated connection to the sender's business. They will then force costly discovery and possibly coerce settlements in even meritless cases, given the looming presence of the TCPA's crushing statutory damages. This Court can prevent that outcome—and ensure faithful application of the statute's plain terms—by granting this petition and reversing.

STATEMENT

A. The Telephone Consumer Protection Act

The TCPA imposes conditions on the "send[ing]" of "unsolicited advertisements" "to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" as "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 provides a private cause of action for plaintiffs who can show that they received an "unsolicited advertisement" via fax in violation of the statute. *Id.* § 227(b)(3). Successful plaintiffs can recover statutory damages of $500 per fax, with treble damages up to $1,500 per fax for willful violations. *Ibid.* As courts have observed, these penalties can impose potentially ruinous liability on TCPA defendants, particularly in the class action context. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1080 (D.C. Cir. 2017) (recognizing that TCPA damages "can add up quickly"); *see Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018) ("The consequences for a firm that violates the TCPA can be dire.").

B. The 2006 FCC Order Interpreting The Telephone Consumer Protection Act

The Federal Communications Commission is responsible for issuing regulations to implement the TCPA. 47 U.S.C. § 227(b)(2). In 2006, the FCC released an order interpreting the TCPA's term "advertisement" in the context of "Offers for Free Goods and Services and Informational Messages." *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).

The FCC posited that the TCPA may cover faxes promoting "free goods and services" if they "serve as a pretext to advertise." *Id.* at 25,973. The FCC emphasized, however, that "informational" faxes are not TCPA "advertisements." *Ibid.* It defined informational faxes as those providing information or those in which "an advertisement is incidental to an informational communication." *Ibid.* The FCC further explained that the determination of whether a fax is "informational" turns on its content, *i.e.*, "the text of the communication" and "the amount of space devoted to advertising versus the amount of space used for information or 'transactional' messages." *Ibid.*

C. Fulton Sues Based On Enclarity's Information Verification Request

This case involves a fax that Enclarity sent to respondent Matthew N. Fulton, D.D.S., P.C., which asked Fulton to "verify or update" its contact information. App., *infra*, 20a (image of fax).

Enclarity maintains a database of medical provider information. To ensure the accuracy of the information in that database, Enclarity asks medical providers to verify or update their contact information via fax. *Ibid.* In requesting that information, Enclarity's faxes offer no product or service to anyone. App., *infra*, 25a-30a. They contain no pricing, ordering, or sales information, and they do not ask recipients, directly or indirectly, to engage in any commercial activity. *Ibid.* Enclarity does not even market its

database to the medical providers that receive its information requests. App., *infra*, 26a, 29a-30a.

Rather, as the fax sent to Fulton explained, the purpose of Enclarity's request was "to help preserve the privacy and security of [Fulton's] patients' Protected Health Information" because accurate provider information "will minimize the potential privacy risks that could arise from information sent to an unsecured location." App., *infra*, 20a. The fax explained that Enclarity would use the requested information to "validate and update the fax in [its] system so [its] clients can use them for clinical summaries, prescription renewals, and other sensitive communications." *Ibid*.

Yet based on that fax, Fulton filed a putative TCPA class action, alleging that Enclarity's fax was an "unsolicited advertisement." App., *infra*, 22a. Fulton sought to represent a class of persons who had received a fax from Enclarity "requesting that they 'verify' or 'update' their contact information," and it demanded statutory treble damages of $1,500 for every fax Enclarity sent. App., *infra*, 5a-6a.

D. The District Court Dismisses Fulton's Suit

The district court dismissed Fulton's complaint. After reviewing the statutory text and the 2006 FCC Order, the court held that Enclarity's fax was not an advertisement because, "on its face," the "Fax does not offer—or even mention—any product, good, or service to Plaintiff, nor does it [] offer or solicit any product, good, or service for sale." App., *infra*, 25a (citing 2006

FCC Order). The court rejected Fulton's contention that the fax was a "pretext" to advertise, even if Enclarity sent it "'with the goal of ultimately making profit.'" App., *infra*, 24a. As the court explained, "[e]ven if Defendants were to profit from verifying Plaintiff's contact information and selling it to third parties, there is no allegation or argument that Defendants are advertising—or will advertise—any goods or services to Plaintiff." App., *infra*, 26a.

The district court also rejected Fulton's reliance on allegations about Enclarity's website (whose address appeared on the fax). App., *infra*, 20a, 27a-29a. The court explained that "nothing" on the "website advertises for sale any good, products, or services of Defendants." App., *infra*, 28a (parentheses omitted). But even if it did, the court held the mere possibility of future economic benefits does not transform a fax into an ad. App., *infra*, 26a-27a. Rather, as the court explained, the "four corners" of the fax determine whether it is an advertisement, not ancillary material never sent to any fax machine. *Ibid.*

E. A Divided Sixth Circuit Reverses

A divided panel of the Sixth Circuit reversed. App., *infra*, 1a-17a. Also relying on the 2006 FCC Order, the majority held that Fulton had asserted a plausible TCPA claim "insofar as it alleged that the fax served as a pretext to send Fulton additional marketing materials." App., *infra*, 2a-3a, 12a-13a (citing 2006 FCC Order). To allege a "fax-as-pretext" theory, according to the panel majority, TCPA plaintiffs need

only posit a "commercial nexus" between the fax and the sender's business. App., *infra*, 14a-15a (quoting *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 95-96 (2d Cir. 2017)). The court thus concluded that Fulton had alleged a sufficient "nexus" here by asserting that Enclarity's "fax solicits information to verify its system of provider information, which Defendants make commercially available to other health care organizations, who may subject Fulton to future unsolicited advertising." App., *infra*, 15a.

Judge Gibbons dissented: "I disagree with [the majority's] legal conclusion that the fax at issue was an unsolicited advertisement under [the] TCPA." App., *infra*, 16a. She explained that Enclarity's "fax was not an advertisement under the TCPA because its primary purpose was to improve the service and not to solicit business or sales from, or through, Fulton." App., *infra*, 17a.

Judge Gibbons reasoned that Fulton could not plausibly allege that Enclarity's fax was an advertisement by asserting that if Fulton "updated its contact information as requested by the fax, it would then have agreed to Enclarity's privacy policy, which in turn would have allowed Enclarity to send promotional material for other products and services." *Ibid.* In Judge Gibbons' view, that "conclusory" and "highly speculative" theory of pretext was too attenuated to allege a TCPA claim. *Ibid.*

The Sixth Circuit subsequently denied Enclarity's petition for rehearing en banc over Judge Gibbons' dissent. App., *infra*, 32a-33a ("Judge Gibbons would grant rehearing for the reasons stated in her dissent."). The court then granted a stay of its mandate to allow Enclarity "time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case." App., *infra*, 34a-35a.

REASONS FOR GRANTING THE PETITION

The Court should hold this petition for *PDR Network*, which involves the same FCC order at issue here. After decision in *PDR Network*, the Court should either (1) grant this petition, vacate in light of *PDR Network*, and remand, or (2) grant plenary review to resolve the conflict in the lower courts on the meaning of "advertisement" under the TCPA.

I. THE COURT SHOULD HOLD THE PETITION FOR *PDR NETWORK* AND THEN CONSIDER REMANDING

The Court should hold this petition pending the outcome in *PDR Network*, which involves the same FCC order upon which the district court and Sixth Circuit relied here. After decision in *PDR Network*, it may be appropriate to grant this petition, vacate the judgment below, and remand for further proceedings in light of the decision.

Like this case, *PDR Network* involves a healthcare provider's claim for damages under the TCPA based on a fax that the provider contends was an "unsolicited

advertisement." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018), *cert. granted*, 2018 U.S. Lexis 6754 (U.S. Nov. 13, 2018). The Fourth Circuit held that the fax was a pretext to advertise based on its understanding of the 2006 FCC Order, which the court deemed binding under the Hobbs Act, 28 U.S.C. § 2342(1). *Id.* at 464-68.

This case involves the same FCC order. As explained above, the district court here expressly relied on the FCC's 2006 Order in dismissing Fulton's TCPA claim. App., *infra*, 22a-23a (citing 71 Fed. Reg. 25,973). The Sixth Circuit panel majority also purported to rely on the 2006 FCC Order in holding that Fulton had plausibly alleged a "fax-as-pretext" theory under the TCPA. App., *infra*, 12a-13a (citing 71 Fed. Reg. 25,973).

In *PDR Network*, the Court will decide whether courts adjudicating private-party litigation are bound by the 2006 FCC Order's articulation of what types of faxes count as TCPA "advertisements" or whether courts should instead simply afford the FCC's Order some degree of deference. 2018 U.S. Lexis 6754, at *1.[1] Although the Court chose not to grant certiorari on the

[1] The Court's answer to this question takes on additional importance in light of ongoing FCC proceedings on the meaning of "advertisement" under the TCPA. Brief for Respondent at 31-32, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. Feb. 7, 2019). Enclarity has filed comments in one of those proceedings. Comments of Enclarity, Inc., *In the Matter of Best Doctor's, Inc.'s Petition for Declaratory Ruling*, CG Docket No. 02-278 (FCC Jan. 25, 2019), https://ecfsapi.fcc.gov/file/1012557406850/Enclarity%20FCC%20Comments%202019-01-25.pdf.

question whether the fax at issue in *PDR Network* was an advertisement, *see* Petition for Writ of Certiorari at i-iii, 2-4, No. 17-1705 (U.S. June 21, 2018), the Court may address the meaning of the 2006 FCC Order as part of its analysis of that Order's role in private-party TCPA litigation.

The Court's analysis of the role of the 2006 FCC Order in private-party litigation (and possibly on that Order's meaning) may be relevant to the proper disposition of this case. The Court should thus withhold consideration of Enclarity's petition until it decides *PDR Network* and then, if appropriate, grant the petition, vacate the Sixth Circuit's judgment, and remand for further consideration in light of *PDR Network*.

II. IF THE COURT DOES NOT REMAND, IT SHOULD GRANT PLENARY REVIEW

If the Court does not remand in light of *PDR Network*, it should grant the petition and set the case for plenary review. The petition provides an excellent vehicle for deciding an important question of federal law that has divided federal and state appellate courts—namely, whether the TCPA's prohibition on "unsolicited advertisements" applies to informational faxes.

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

Appellate courts disagree on when a fax constitutes an "advertisement" under the TCPA. Several courts have held that faxes merely requesting or

providing information are not advertisements and that the pertinent inquiry is limited to the four corners of the fax. Other courts have concluded that even informational faxes may constitute advertisements if a plaintiff alleges that the information provided or requested relates to the sender's business. The Court should resolve that conflict and reject the latter position as inconsistent with the text and purpose of the TCPA.

1. A number of courts hold that faxes are not TCPA advertisements if they merely provide information to, or request information from, recipients and propose no commercial transaction with the recipient.

This approach is exemplified by the Eleventh Circuit's decision in *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362 (2017). In *Florence*, a medical supplier (Arriva) sent faxes to a clinic (Florence) about products that Florence's patients purchased from Arriva. *Id.* at 1364-65. The Eleventh Circuit held that the faxes were not advertisements because they did not, on their face, "induce the clinic to purchase Arriva products" or "induce the physicians to prescribe those products to patients." *Id.* at 1366-67.

Focusing solely on the faxes' content, the court explained that the faxes merely sought "information from physicians" and asked "only that the doctor of the patient fill out an order form to facilitate a purchase made by that patient." *Ibid.* Although the faxes thus described Arriva's commercially available products (and were obviously connected to Arriva's business), the Eleventh Circuit held that the faxes were not

advertisements because they did not propose a direct or indirect commercial transaction with recipients. *Ibid.*

New York's highest court follows the same rule on informational faxes. *Stern v. Bluestone*, 911 N.E.2d 844 (N.Y. 2009). *Stern* involved "Attorney Malpractice Reports" that a lawyer specializing in malpractice litigation (Bluestone) faxed to another attorney (Stern). *Id.* at 845. The faxes listed "Bluestone's contact information and Web site addresses," and they each included "a short essay about various topics related to attorney malpractice." *Ibid.* Focusing solely on the "body of each fax," the New York Court of Appeals held that the reports were "informational messages" not prohibited by the TCPA. *Id.* at 845-46. The faxes simply "furnished information about attorney malpractice lawsuits" and "did not promote commercial products." *Ibid.*

The court acknowledged "that Bluestone may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals." *Id.* at 846. Even so, that meant "at most" that Bluestone's faxes constituted "'an incidental advertisement' of his services, which 'does not convert the entire communication into an advertisement.'" *Ibid.* (quoting 2006 FCC Order) (brackets omitted).

2. Other courts—including the Sixth Circuit here—have adopted a conflicting, more expansive, view of what constitutes a TCPA "advertisement."

In the Second Circuit, for example, courts must "presume" at the pleading stage that faxes are TCPA advertisements so long as plaintiffs assert that the faxes have a "commercial nexus" to the defendant's "business." *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 95-96 (2017) (quotations omitted). In *Boehringer*, a pharmaceutical company (Boehringer) sent a fax inviting a healthcare provider (Physicians Healthsource) to a free dinner presentation on certain medical disorders. *Id.* at 93-94. The Second Circuit held that Physicians Healthsource had adequately alleged that the fax was a "pretext" to advertise. *Ibid.*

The Second Circuit noted the 2006 FCC Order's determination that "informational" faxes are not advertisements, but it suggested that applying such a rule at the pleadings stage "would impede the purposes of the TCPA." *Id.* at 96. The court stated that for a fax to be an advertisement "[t]here must be a commercial nexus to a firm's business, i.e., its property, products, or services." *Ibid.* But it made clear that such a nexus can be inferred "at the pleading stage where facts are alleged that the subject of the free seminar relates to that business." *Ibid.* And defendants "can rebut such an inference * * * only after discovery." *Id.* at 95. The Second Circuit held that the inquiry into whether a fax is a TCPA "advertisement" requires "evidence beyond the four corners of the fax," such as "testimony," "presentation slides," or "internal emails." *Id.* at 95-97.

In its decision here, the Sixth Circuit further entrenched this conflict by expressly adopting the

Second Circuit's loose "commercial nexus" standard for TCPA claims. App., *infra*, 14a-15a. Relying extensively on *Boehringer*, the court held that TCPA plaintiffs can survive a motion to dismiss simply by alleging that there is a "nexus" between the fax and "the defendant's 'business, i.e., its property, products, or services.'" *Ibid.* (quoting 847 F.3d at 96). The court explained that, in *Boehringer*, "the Second Circuit found sufficient the allegation that the defendant sent a fax on a subject that 'related to its products or services.'" *Ibid.* (quoting 847 F.3d at 95 (brackets omitted)). The panel majority then held that plaintiff had adequately alleged "that the same nexus exists here: The fax solicits information to verify its system of provider information, which Defendants make commercially available to other health care organizations, who may subject Fulton to future unsolicited advertising." App., *infra*, 15a.

The court also followed the Second Circuit in holding that the TCPA analysis is not limited "to the four corners of the fax" and that it thus did not matter that "[n]othing mentioned in the fax is available to be bought or sold." App., *infra*, 6a-7a (quotations omitted). According to the panel majority, a court *must* "look[] to what came after the fax," and it cannot "possibly" "confine[] its evaluation to the fax itself." App., *infra*, 10a (quotations omitted). The majority thus concluded that Fulton had alleged a plausible TCPA claim because Fulton's posited "commercial nexus" between Enclarity's fax and its business indicated that the fax

"served as a commercial pretext for future advertising opportunities." App., *infra*, 15a.

3. These decisions cannot be reconciled. Under the rule followed by the Eleventh Circuit and the New York Court of Appeals, a fax that merely requests or provides information is not an advertisement, even if it describes commercially available goods and services that no doubt relate to the sender's business. *Florence*, 858 F.3d at 1366-67; *Stern*, 911 N.E.2d at 845-46. The Second and Sixth Circuits' standard yields precisely the opposite conclusion. For those courts, a fax requesting only information from the recipient *would* be an advertisement at the pleadings stage if the fax so much as mentions anything "related to" the sender's business. App., *infra*, 14a-15a; *Boehringer*, 847 F.3d at 95-97.

Had the Second and Sixth Circuits' standard been applied in *Florence* or *Stern* those cases would have been decided differently. In *Florence*, the commercially available medical products described in Arriva's faxes clearly related to Arriva's business as a seller of medical supplies. *See* 858 F.3d at 1366-67. So, too, in *Stern*, where the court acknowledged that Bluestone's "Attorney Malpractice Reports" related to and incidentally advertised his services as an attorney specializing in legal malpractice litigation. *See* 911 N.E.2d at 845-46. Yet the Eleventh Circuit and New York Court of Appeals adhered to the plain language of the statute and held that the faxes in those cases were not "advertisements" under the TCPA because they proposed no commercial transaction with recipients.

B. The Rule Adopted By The Sixth Circuit Is Wrong

The Sixth Circuit's decision is wrong. As noted, that court's commercial nexus standard presumes at the pleading stage that even informational faxes are pretextual advertisements if their content is allegedly "*related* to" the sender's business. App., *infra*, 15a (emphasis added) (quotations, brackets omitted). That atextual standard stretches the TCPA's language beyond its reasonable limits.

As noted previously, the TCPA defines "advertisement" as "material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. §§ 227(a)(5), (b)(1)(C). To "advertise" a good or service, one must "draw attention to [it] in a public medium in order to promote sales." Oxford Dictionary of English 24 (3d ed. 2010). Similarly, a communication is "commercial" when made to obtain a "profit" from the recipient. Webster's Third New Int'l Dictionary 456 (1986). And to "send" an advertisement, one must "dispatch" it, or cause it "to be conveyed." American Heritage Dictionary 1642 (3d ed. 1992).

Under the plain terms of the TCPA, then, a fax cannot qualify as an advertisement unless, on its face, it proposes or initiates a commercial transaction with the recipient. *Florence*, 858 F.3d at 1366-67. Otherwise, the fax is not promoting a good or service for purposes of sale and thus lacks the required commercial content of an advertisement. *See* Black's Law

Dictionary 65, 325 (10th ed. 2014) (defining "advertisement" as "[a] commercial solicitation," and defining "commercial" as "involving the buying and selling of goods").

It is not enough that the fax is somehow related to the sender's business. Such a connection does not establish that the content of the fax promotes a commercially available good in order to procure sales from the recipients. *Stern*, 911 N.E.2d at 845-46. The TCPA thus cannot be read to prohibit communications that merely request information from recipients without more. *See* 2006 FCC Order, 71 Fed. Reg. 25,967, 25,973.

Nor can anything outside the four corners of the fax change that analysis. A necessary implication of the Sixth Circuit's commercial nexus standard is the erroneous notion that courts cannot, and indeed *must* not, "confine [their] consideration of TCPA claims to the face of the challenged fax." App., *infra*, 10a; *see Boehringer*, 847 F.3d at 95-97 (requiring courts to consider "evidence beyond the four corners of the fax"). But requiring such a free-ranging inquiry into materials that were not sent via fax squarely contravenes the TCPA's text.

By its terms, the TCPA applies only to "advertisements" that a business may "send" "to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). Yet extraneous information absent from the face of the fax is, by definition, *not* sent to a fax machine. Even if such information on its own would constitute an advertisement in the colloquial sense, it has no relevance to the

TCPA analysis unless it is in fact "sen[t] to a telephone facsimile machine." *Ibid.* The express language of the statute thus precludes plaintiffs from manufacturing TCPA liability based on evidence outside the fax itself.

For these reasons, the panel majority's decision here is legally erroneous. Enclarity's fax simply asked recipients like Fulton to "verify or update" their contact information—nothing more. App., *infra*, 20a. The fax explained that its purpose was "to help preserve the privacy and security of [recipients'] patients' Protected Health Information," and that Enclarity would use the requested information only "to validate and update" the data in its system so that other healthcare organizations could use the contact information "for clinical summaries, prescription renewals, and other sensitive communications." *Ibid.*

Because that was the only information Enclarity "sen[t]" to Fulton's "telephone facsimile machine," that is the only information that has any bearing on the TCPA analysis. 47 U.S.C. § 227(b)(1)(C). Even though Enclarity's fax included a website address at the bottom of the page, nothing on that website was sent or otherwise transmitted to any fax machine. The existence of the website thus cannot support an allegation of TCPA liability. *See ibid.* Judge Gibbons was correct in concluding that Enclarity's fax did not violate the TCPA as a matter of law because it did not "solicit business or sales from, or through, Fulton." App., *infra*, 16a-17a.

C. The Meaning Of "Advertisement" Under The TCPA Is An Important, Recurring Issue That Warrants This Court's Review

The question presented is important and likely to recur as part of the ever-increasing volume of TCPA litigation.

1. The "TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014." *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Comm'r Pai, dissenting), *vacated in part*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); *see* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* 3 (Aug. 2017) (noting more than 1,000 TCPA class actions filed in a recent 17-month period). This deluge of TCPA litigation persists even though the injuries targeted by the statute (*i.e.*, the cost of fax paper and ink) have largely vanished from modern life. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) ("Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today.").

This boom in TCPA suits is even more troubling given the statute's "potential of ruinous financial liability." *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1048 (S.D. Cal. 2015). In permitting treble damages of up to $1,500 per fax, the TCPA gives courts "discretion to increase damages that, at $500 per [violation], are

already greater than actual damages in most cases." *Parchman v. SLM Corp.*, 896 F.3d 728, 740 (6th Cir. 2018). Such "stiff" penalties "can add up quickly given the nature of mass business faxing," *Bais Yaakov*, 852 F.3d at 1080, particularly when a TCPA defendant "is facing not just a single aggrieved person, but a class," *Brodsky*, 910 F.3d at 291.

The prospect of obtaining such a windfall under the TCPA has led many companies to make "filing class action junk-fax suits" part of their "business model." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723-24 (7th Cir. 2011) (noting one "small civil engineering firm" that had "filed at least 150 class action suits under the [TCPA]"). It is doubtful that "Congress intended the TCPA, which it crafted as a consumer-protection law," to have "blossomed into a national cash cow for plaintiff's attorneys." *Bridgeview*, 816 F.3d at 941. Yet that is precisely what has happened in the absence of clear guidance on the meaning of the statute's critical terms. *First Mercury Ins. Co. v. Nationwide Sec. Servs.*, 54 N.E.3d 323, 336 (Ill. Ct. App. 2016) (recognizing that "the proliferation of TCPA class actions" has nothing to do with "compensating members of the class" and "everything to do with compensating the lawyers of the class"); *see* Adonis Hoffman, Commentary, *Sorry, Wrong Number, Now Pay Up*, WALL ST. J. (June 15, 2015) ("In the past two years, TCPA lawsuits have extracted large settlements from companies.* * * Plaintiffs' lawyers received an average of $2.4 million.").

2. Decisions like the one here that unmoor the TCPA from its text and purpose will only make this problem worse. The Sixth Circuit held that plaintiffs need only posit some "commercial nexus" between a fax and the sender's business to allege that the fax was a "pretext" to advertise. App., *infra*, 14a-15a. Under that rule, TCPA plaintiffs can survive a motion to dismiss and impose costly discovery on defendants simply by alleging "that the defendant sent a fax on a subject that *related to* its products or services." App., *infra*, 15a (quotations, brackets omitted) (emphasis added).

The Second and Sixth Circuits are candid about this consequence of their rule. In *Boehringer*, the Second Circuit acknowledged that the "commercial nexus" standard requires courts to "presume" at the pleading stage that a defendant's faxes are advertisements if they mention anything allegedly "relating to its business"—a presumption defendants "can rebut * * * *only after discovery*." 847 F.3d at 95-97 (emphasis added). And in its decision here, the Sixth Circuit likewise conceded that its pretext rule "would *require* looking to what came after the fax"—namely, "record evidence" beyond "the face of the fax." App., *infra*, 10a (emphasis added).

This rule will disable courts from deciding whether a fax is an "advertisement" at the pleading stage. It thus deprives district courts of a critical tool for screening out baseless TCPA cases early on. That will further increase the cost and complexity of TCPA litigation and the likelihood of coerced settlements in even meritless cases.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* (No. 17-1705), and then either be disposed of as appropriate in light of that decision, or, in the alternative, be granted for plenary review.

Respectfully submitted,

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