

No. 23-552

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**In the Supreme Court of the United States**

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AMBASSADOR ANIMAL HOSPITAL, LTD.,  
*Petitioner,*

*v.*

ELANCO ANIMAL HEALTH INCORPORATED and  
ELI LILLY AND COMPANY,  
*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of a fax machine to send an “unsolicited advertisement,” which the Act defines as “material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s” consent. 47 U.S.C. § 227(a)(5), (b)(1)(C). Respondent Elanco Animal Health Inc. (“Elanco”) allegedly sent faxes inviting Petitioner and other veterinarians to continuing-education programs. Although the faxes did not mention, much less invite recipients to purchase, any products or services sold by Elanco, Petitioner filed a putative class-action lawsuit asserting that the faxes were unsolicited advertisements sent in violation of the TCPA. The questions presented are:

1. In determining whether a fax is an “unsolicited advertisement,” must a court inquire whether the fax itself directly or indirectly promotes or sells something, as the Seventh Circuit unanimously held, or may a court rely on the sender’s motivations and subsequent actions, as Petitioner contends?

2. Did the Seventh Circuit err in interpreting the TCPA’s unsolicited-fax prohibition based on the statute’s plain language, rather than by treating as controlling an FCC interpretive rule opining that communications “promot[ing] . . . free consultations or seminars” are presumptively “unsolicited advertisement[s]” because such seminars are often “pretext” for future advertising?

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to this Court's Rule 29.6, Respondents Elanco and Eli Lilly and Company ("Eli Lilly") state that each is a publicly traded corporation with no parent company, and that no publicly held company owns 10% or more of the stock of either Elanco or Eli Lilly.

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## INTRODUCTION

Respondent Elanco allegedly sent Petitioner Ambassador Animal Hospital (“Ambassador”) two faxes that did not mention products sold by Elanco, but instead invited veterinarians to attend presentations that were conducted by veterinarians and approved for continuing-education credit. Rather than attending the presentations, Ambassador filed this putative class-action lawsuit, alleging that the invitations were pretext for marketing Elanco’s veterinary drugs and thus unsolicited advertisements under the TCPA.

The District Court dismissed the suit for failure to state a claim, and the Seventh Circuit unanimously affirmed. In doing so, the Seventh Circuit relied on a straightforward application of the TCPA’s definition of an “unsolicited advertisement,” which focuses on “whether the content of a fax advertises the commercial availability or quality of a thing.” Pet. App. 4a. Elanco’s faxes did not satisfy that test because “nothing in them directly or indirectly alluded to the commercial availability or the quality of Elanco’s products.” Pet. App. 6a. The court acknowledged that “there could be situations in which a similar fax message would qualify as an indirect advertisement,” but held on the facts of this case that the faxes “did not contain the [necessary] promotional quality.” *Id.* 5a–6a. Finally, the court held that there was no need to defer to a 2006 FCC order opining that invitations to free seminars are generally advertisements under the TCPA because that interpretation “conflicts with the statutory text” in several ways. *Id.* 7a.

Nothing in that decision warrants this Court's review. Although there are some differences in how lower courts have characterized the test for determining whether faxes are "unsolicited advertisement[s]" under the TCPA, those differences are not nearly as well-defined or extensive as Ambassador asserts. In particular, the Seventh Circuit did not adopt the rule attributed to it by Ambassador, under which courts may consider only the face of a fax in determining whether the fax is an "unsolicited advertisement." The court focused its analysis on the faxes' content, consistent with the TCPA's language, but also recognized that a fax may satisfy the statutory definition if it "directly or *indirectly* allude[s] to the commercial availability or the quality of" the sender's offerings. Pet. App. 6a (emphasis added). That test recognizes that faxes may indirectly advertise a good or service even if the good or service is not expressly mentioned on the face of the fax, refuting Ambassador's claim of a clearly defined circuit split on that issue.

Moreover, this case is a poor vehicle to address the first question presented because the answer to that question would not affect the outcome. As the District Court held, the complaint fails to state a claim even under the broader theory advocated by Ambassador. Regardless, any differences about the finer points of the TCPA's "unsolicited advertisement" definition are insufficiently important to justify this Court's review, particularly given the increasingly obsolete nature of facsimile machines.

Ambassador falls back on an argument that the Hobbs Act required the courts below to uncritically

accept the FCC’s conclusion that a fax containing an invitation to a free seminar is presumptively an “unsolicited advertisement.” But that second, splitless question does not merit this Court’s review, either. This Court previously took up the question whether the Hobbs Act requires courts to treat the 2006 FCC order as controlling in private TCPA actions. *See PDR Network LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019). The Court remanded that case without resolving the Hobbs Act issue in light of unresolved antecedent questions, and it has since become clear that the FCC’s order is an interpretive rule that could not bind the lower courts regardless of the Hobbs Act’s reach. That is more than a mere vehicle problem: it means the second question raised by Ambassador is not presented at all. For that reason and the others given below, the petition should be denied.

## STATEMENT

1. The TCPA prohibits the “use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). That language dictates that the advertising supporting a TCPA claim must be sent to a fax machine; advertising conveyed through other means—verbally, via e-mail, etc.—does not satisfy the “to a facsimile machine” element. The statute 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).

In 2006, the FCC revised its TCPA regulations, codified in 47 C.F.R. § 64.1200, to implement the Junk Fax Prevention Act of 2005. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005*, 21 F.C.C.R. 3787, 3797–800 (Apr. 6, 2006) (“2006 Order”). In addition to those rule changes, which are not relevant here, the 2006 Order also included a broader discussion of the FCC’s views on various TCPA issues. This part of the Order did not revise the Code of Federal Regulations, but did lay out the FCC’s “interpretation of the facsimile advertising rules.” *Id.* at 3808. In particular, the FCC opined that, in general, faxes offering “free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements” because “in many instances, free seminars serve as a pretext to advertise commercial products or services.” *Id.* at 3814.

2. This case concerns two single-page faxes that Elanco allegedly sent to Ambassador in April 2018. The first, reproduced at Resp. App. 13a, invited veterinarians and veterinary practice owners to an “upcoming program” on “Canine and Feline Disease Prevention Hot Topics,” conducted by a doctor of veterinary medicine. The second, reproduced at Resp. App. 14a, similarly invited veterinarians to a dinner program on “Rethinking Management of Osteoarthritis,” also conducted by a doctor of veterinary medicine. Both faxes noted that the programs had been approved under Illinois law for “CE” (continuing-education) credit. Pet. App. 2a; Resp. App. 13a–14a. Each invitation included

Elanco’s logo, but neither “mentioned . . . products or services” sold by Elanco. Pet. App. 3a.<sup>1</sup>

Ambassador filed this suit alleging that the faxes violated the TCPA. District Court Docket (“DC Dkt.”) 48 ¶¶ 65–71. The complaint claimed that the faxes were “unsolicited advertisements” because Elanco sent them for “marketing purposes” and discussed its products during the continuing-education programs. *Id.* ¶¶ 27, 33, 37. Ambassador did not attend either of the programs or allege specific facts indicating that Elanco promoted its products during the programs, but nevertheless alleged “on information and belief” that the programs included an advertising component. Pet. App. 10a. Ambassador sought statutory damages of \$500 per fax and to represent a nationwide class of fax recipients. DC Dkt. 48, at 18.

3. The District Court dismissed the complaint for failure to state a claim. The court first concluded that the faxes were not “advertisements on their face” because they “d[id] not mention” or otherwise “advertise” “any of [Elanco]’s products or services.” Resp. App. 7a. The court then conducted a second analysis, holding that Ambassador had not plausibly alleged that the faxes were “pretext for some commercial purpose.” *Id.* 5a–11a. The court acknowledged that the continuing-education presentations might have generated “goodwill” for Elanco, but held that any “economic benefit” was so “ancillary, remote, and hypothetical” that it could not “convert a noncommercial, informational

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<sup>1</sup> Elanco was a division of Eli Lilly until it was spun off as a separate entity in September 2018. See Pet. App. 4.

communication into a commercial solicitation.” *Id.* 11a (quotation marks omitted).

Ambassador amended its complaint, which the District Court again dismissed for failure to state a claim. Pet. App. 8a. Although Ambassador added new allegations—e.g., that the continuing-education programs involved topics that overlapped with Elanco’s products—those allegations did not “plausibly suggest a commercial purpose to [Elanco’s] faxes” and could not overcome the fact that the faxes did not mention or advertise Elanco’s products in any way. *Id.* 14a–15a. The court thus dismissed Ambassador’s suit with prejudice.

4. The Seventh Circuit (*Kirsch*, Scudder, Jackson-Akiwumi, JJ.) unanimously affirmed. The court “start[ed] and end[ed] with the plain language of the statute,” explaining that the TCPA adopts an “objective standard” focused on “whether the content of a fax advertises the commercial availability or quality of a thing.” *Id.* 4a–5a, 7a. In contrast to other parts of the TCPA, the fax provisions “d[o] not inquire of the seller’s motivation for sending the fax or the seller’s subsequent actions.” *Id.* 4a. Accordingly, to qualify as an “unsolicited advertisement,” a fax “itself must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property.” *Id.* 4a–5a.

The Seventh Circuit held that the faxes did not satisfy that test. The court acknowledged that the faxes contained Elanco’s name and logo, and it considered Ambassador’s allegations that the topics of the continuing-education programs “related to

products sold by Elanco” and that the invitations “directed RSVPs to individuals in the marketing or sales departments.” *Id.* 5a. Focusing on the content of the faxes—“the ‘material . . . which [was] transmitted’” to Ambassador’s fax machine—the Seventh Circuit concluded, however, that “none of these features transformed Elanco’s invitations to free dinners and continuing education programs into advertisements for a good, service, or property.” *Id.* 4a–5a (quoting 47 U.S.C. § 227(a)(5)). Although the invitations may have “promoted goodwill for Elanco and helped the company manage its brand and image,” they did not promote Elanco’s products, much less “directly or indirectly allud[e] to the commercial availability or the quality of [those] products, as the statutory definition requires.” *Id.* 6a.

The Seventh Circuit also declined to defer to the FCC’s pretext interpretation. The court noted the Fourth’s Circuit’s ruling that the relevant part of the 2006 Order is a non-binding interpretive rule rather than a legislative rule, *id.* 7a (citing *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 263–64 (4th Cir. 2020)), but bypassed that issue because the FCC’s interpretation “conflicts with the statutory text” and thus is “not entitled to deference,” *id.* That is so, the court reasoned, because the FCC’s approach relies on factors not mentioned in the statute, such as the sender’s “subjective motivations” and “subsequent conduct.” *Id.*

Ambassador petitioned for rehearing, arguing among other things that the panel decision conflicted with the Seventh Circuit’s prior decision in *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir.



2013). On August 22, 2023, the court denied rehearing without noted dissent. Pet. App. 18a.

## **REASONS FOR DENYING THE PETITION**

### **I. Ambassador Overstates the Differences in Lower Courts' Application of the TCPA's Fax Provisions, and This Case Is a Poor Vehicle to Address the Issue in Any Event.**

Ambassador first asks this Court to decide whether, in considering if a fax “advertis[es] the commercial availability or quality of any property, goods, or services,” 47 U.S.C. § 227(a)(5), courts may look beyond “the face of” the fax by considering extrinsic evidence such as the “context surrounding the sending of the fax.” Pet. ii, 9. Ambassador asserts that the decision below breaks with every other circuit to have considered the issue, but that is simply not true. Although there are some differences in how courts have framed the “unsolicited advertisement” analysis, those differences are neither as clear nor as extensive as Ambassador contends. The Seventh Circuit focuses on the content of the fax, as the statute prescribes, but also recognizes that faxes can *indirectly* advertise products that are not expressly mentioned on the face of the fax. That test is broadly in line with the approach taken by several of the decisions cited by Ambassador. To the extent Ambassador seeks certiorari regarding other aspects of the “unsolicited fax” test, its arguments fare no better.

In any event, this case is a particularly poor vehicle to address the proper reading of the TCPA

because the outcome would be the same even under Ambassador's preferred approach. Given that limitation, the Seventh Circuit's careful adherence to the statutory text, and the rapidly declining importance of fax machines, the first question presented is not worthy of this Court's review.

**A. Ambassador Exaggerates the Differences  
Between the Lower Courts' Approaches.**

Ambassador makes several missteps in alleging a circuit split regarding the proper application of the TCPA's "unsolicited fax" provisions.

1. Although Ambassador asserts that the decision below conflicts with the Seventh Circuit's prior decision in *Turza*, that assertion does not merit review. This Court "usually allow[s] the courts of appeals to clean up intra-circuit divisions on their own." *Joseph v. United States*, 574 U.S. 1038 (2014) (Kagan, J., respecting denial of certiorari). Regardless, there is no conflict within the Seventh Circuit. The decision below is fully consistent with *Turza*, which held that a fax was an unsolicited advertisement because it mentioned and "alert[ed] potential clients to the availability of [the sender's estate planning and other] services." *Id.* at 687; *see also id.* at 685 (reproduction of fax). That analysis, like the panel's analysis here, focused on whether the fax itself directly or indirectly sold or promoted some good or service. Pet. App. 4a–5a, 7a. Moreover, if the decision below conflicted with *Turza*, the Seventh Circuit could have circulated the opinion to the full court before publication or granted rehearing to address the issue, but the court did not take either of

those steps. *See* 7th Cir. R. 40(e); Pet. App. 18a (denying rehearing petition without noted dissent).

2. With respect to decisions from other circuits, Ambassador argues that the Seventh Circuit created a split by limiting its analysis to only “the face of” the faxes and refusing to consider other factors, such as “the context surrounding the sending of the fax[es].” Pet. ii; *see also* Pet. 9 (characterizing decision below as holding that “no extrinsic allegations could be considered at all”). But that premise is mistaken because the Seventh Circuit did not adopt the “cramped four-corners-of-the-fax-itself test” Ambassador ascribes to it. *Id.* at 11. Instead, the court held that a fax can be an unsolicited advertisement if it “directly *or indirectly* allude[s] to the commercial availability or the quality of [the sender’s] products.” Pet. App. 6a (emphasis added).

The “indirect advertisement” concept recognizes that “there could be situations in which a” fax advertises a good or service even if the good or service is not expressly mentioned on the face of the fax. *Id.* For example, the court explained that a fax might “qualify as an indirect advertisement” if it “said something like . . . ‘RSVP for a free event hosted by Elanco on the best medication available for canine osteoarthritis.’” *Id.* 6a. Whether such a fax would constitute an indirect advertisement necessarily depends on consideration of extrinsic matter, such as whether Elanco sells a canine osteoarthritis medication. The Seventh Circuit’s example would thus have made little sense if the decision below categorically forbade consideration of matter outside

the four corners of the fax itself, as Ambassador erroneously maintains.

The Seventh Circuit has since confirmed that whether a fax is an unsolicited advertisement depends on “a holistic examination of the faxed materials to determine whether they meet [the TCPA’s] requirements,” including whether those materials “indirectly encourag[e]” recipients “to buy” the sender’s services. *Smith v. First Hosp. Laboratories, Inc.*, 77 F.4th 603, 609 (2023). While the Seventh Circuit’s analysis thus focuses on the content of the fax itself, the court has left open the possibility that faxes that do not expressly propose a transaction but nevertheless “advertise in subtle or indirect ways” may thereby qualify as unsolicited advertisements. *See id.*; *see also id.* at 608–10 (faxes that on their face merely offer to buy goods may also indirectly advertise the sender’s services).

The Seventh Circuit’s framework shares many similarities with the approaches taken by other courts of appeals, including in cases cited by Ambassador. For example, the Sixth Circuit has inquired whether a fax “directly or indirectly” “ask[s]” the recipient “to consider purchasing [the sender’s] services.” *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 221 (2015), and the Fourth Circuit has likewise considered whether a fax makes “a business solicitation . . . ‘directly or indirectly,’” *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 473 (2023) (quoting *Sandusky*, 788 F.3d at 224). In conducting this analysis, these courts, like the Seventh Circuit, have focused primarily on the content of “the fax itself.” *Sandusky*, 788 F.3d

at 225; *Carlton & Harris*, 80 F.4th at 476–77 (emphasizing commercial “pitch” in challenged fax).

The lower courts are also broadly in accord on other key aspects of the analysis. The Seventh Circuit held in the decision below that whether a fax is an advertisement is judged using an objective standard, not based on the sender’s purpose. Pet. App. 4a–5a. That holding is consistent with cases cited by Ambassador, which agree that the sender’s motives cannot transform “a purely informational fax” into an unsolicited advertisement. *Carlton & Harris*, 80 F.4th at 476; *see also Sandusky*, 788 F.3d at 225.<sup>2</sup> Similarly, the Seventh Circuit and other courts have reasoned that any “ancillary, remote, [or] hypothetical economic benefit” the sender might gain “later on does not convert a noncommercial, informational” fax “into a commercial solicitation.” *Sandusky*, 788 F.3d at 225; *see also Carlton & Harris*, 80 F.4th at 476; *BPP v. CaremarkPCS Health, LLC*, 53 F.4th 1109, 1113 (8th Cir. 2022); Pet App. 6a.

The upshot is that while there are some differences in the way in which courts have characterized the TCPA analysis, those differences are both narrower

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<sup>2</sup> Cases from other courts, not mentioned by Ambassador, reach the same conclusion. *See, e.g., Robert W. Mauthe M.D. P.C. v. Millennium Health LLC*, 58 F.4th 93, 96 (3d Cir. 2023) (per curiam) (TCPA prescribes an “objective standard” that “does not depend on the subjective viewpoints of either the fax sender or recipient”); *BPP v. CaremarkPCS Health, LLC*, 53 F.4th 1109, 1112–14 (8th Cir. 2022) (concluding that “[t]he fax itself” must be “plainly understood as promoting a commercial good or service,” and rejecting an argument based on the sender’s intent).

and less clear than Ambassador asserts. Indeed, it is far from obvious that the courts' varying formulations yield meaningfully different results in practice. *See, e.g., Sandusky*, 788 F.3d at 221–23 (holding that challenged fax was *not* an unsolicited advertisement because it lacked a “commercial component”).

3. That said, the Second, Sixth, and Seventh Circuits have staked out different positions on a separate issue: whether a fax may constitute an “advertisement” under the TCPA merely because it serves as a pretext for *future* advertising, as the FCC concluded in its 2006 Order. The first question presented in Ambassador’s petition does not mention this pretext theory, *see* Pet. ii, and the argument section corresponding to that question contains only a single, passing reference to the pretext issue, *see id.* at 12. It is thus doubtful that the validity of the pretext theory is fairly included within the scope of the first question presented. *See, e.g., Wood v. Allen*, 558 U.S. 290, 304 (2010) (mere “discuss[ion]” of the “issue in the text of [a] petition for certiorari does not bring [the issue] before us,” even where the issue is “related to the one petitioner presented” (cleaned up)). But even if the pretext issue were properly presented, it would not be worthy of the Court’s review.

The Seventh Circuit rejected the pretext theory in the decision below, concluding that it “conflicts with the statutory text.” Pet. App. 7a. That is so, the court explained, because the pretext theory turns on the sender’s “subsequent conduct”—advertising that comes after the fax transmission is completed and is conveyed through non-fax means, such as product promotions during a free seminar. *Id.* The TCPA, in

contrast, “focuse[s] on the content of the faxed document.” *Id.*

The Second and Sixth Circuits have taken a different tack, holding that the TCPA reaches faxes that are a “pretext for future advertising.” *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 885, 891 (6th Cir. 2020); see also *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017). Those decisions allowed TCPA claims to proceed where the plaintiff alleged that a fax (1) had a “commercial nexus” to the sender’s business and (2) created additional advertising opportunities in the future. *Fulton*, 962 F.3d at 890–91 (citing *Boehringer Ingelheim*, 847 F.3d at 94–95).

*Fulton* applied this theory to a fax requesting that healthcare providers update their contact information in a commercial database. See *id.* at 885. Relying on the FCC’s 2006 Order and reasoning that the pretext theory “require[s] looking to what came after the fax,” the Sixth Circuit held that the plaintiff stated a claim. *Id.* at 889–91. This was so because the fax facilitated operation of the sender’s “commercially available” database, and recipients who provided their contact information would be “subject . . . to future unsolicited advertising,” such as “marketing faxes” from database users. *Id.* at 889–91.

*Boehringer Ingelheim* followed a similar course in evaluating a fax that invited recipients to a “dinner meeting” regarding “two medical conditions.” 847 F.3d at 97. The court adopted the FCC’s pretext theory, concluding in a single sentence that the 2006

Order’s interpretation “comports with the statutory language.” *Id.* at 95. Because the defendant was “in the business of treating diseases” and was developing a drug designed to treat the conditions “to be discussed at the event,” the court found the requisite commercial nexus and adopted an inference that the meeting promoted the new drug. *Id.* at 95–97. The defendant could “rebut” that “inference by showing that it did not . . . advertise its products or services at the seminar, but only after discovery.” *Id.* at 95; *see also id.* at 97 (defendant could rebut presumption “at the summary judgment stage with evidence showing that it did not feature its products or services at the seminar,” such as “testimony” from “dinner meeting participants”).<sup>3</sup>

To the extent Ambassador seeks review on this issue, the split of authority is largely illusory and unlikely to affect the outcome of many cases. *Fulton*, for example, likely would have reached the same result based solely on the content of the fax, which touted a service the sender was paid to offer. *See* 962 F.3d at 885–86. Under the Seventh Circuit’s logic in this case, the *Fulton* fax arguably “indicate[d]” that the sender was “promoting or selling some [commercially available] good, service, or property,”

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<sup>3</sup> Ambassador also claims that the decision below conflicts with the Fourth Circuit’s 2023 decision in *Carlton & Harris*, but that decision discussed the pretext theory only in dicta. *See* 80 F.4th at 478–79 (not “doubt[ing] the legal viability of th[e] pretext theory” but concluding that the plaintiff had not stated a claim under that theory).



Pet. App. 5a, even if the recipients were not the intended purchasers.

That leaves only the Second Circuit’s 2017 decision in *Boehringer Ingelheim*, which appears to have incorrectly assumed that the FCC’s 2006 Order is a binding legislative rule. *See* 847 F.3d at 95 (stating that Order was promulgated as an “[e]xercis[e]” of FCC’s “delegated rulemaking authority”); *id.* (court’s approach “comports with the 2006 Rule”). The Second Circuit did not have the benefit of this Court’s subsequent decision in *PDR Network* or the proceedings on remand in that case, both of which cast serious doubt on that assumption. *See infra* Part II. It is thus far from clear that *Boehringer Ingelheim* would come out the same way today. Even assuming that *Boehringer Ingelheim* remains good law *and* that the petition fairly includes this issue, the split is both narrow and shallow, and therefore unworthy of this Court’s review.

**B. This Case Is a Poor Vehicle to Address the Proper Interpretation of the TCPA’s Fax Provisions.**

Even if the issue raised by Ambassador were certworthy in the abstract, this case is a poor vehicle to take up that issue.

*First*, there is no evidence that the Seventh Circuit believed it was creating (or exacerbating) a circuit split. The court did not express disagreement with any of the decisions cited by Ambassador, and just a few weeks later the Seventh Circuit’s *Smith* decision—authored by Judge Scudder, who also sat on

the panel that decided this case—cited with approval two of those decisions. *See Smith*, 77 F.4th at 607–09 (discussing *Sandusky* and *Turza*). To the extent there is a genuine split of authority on the first question presented, the Court should await a case that acknowledges and substantively addresses the issue.

*Second*, the answer to the first question presented would not affect the outcome of this case. The District Court twice conducted a pretext analysis based on the FCC’s 2006 Order and held both times that Ambassador had not plausibly alleged that the faxes were pretext for Elanco to market its products. *See* Pet. App. 13a–14a; Resp. App. 5a–11a. Those decisions carefully applied the pleading standard, and Ambassador has not offered any persuasive reason why they are incorrect. Thus, even if this Court were to adopt Ambassador’s preferred interpretation of the TCPA, there is no reason to believe that the case would come out differently. That is reason enough to deny review. *See, e.g., Gamache v. California*, 562 U.S. 1083 (2010) (Sotomayor, J., respecting denial of certiorari) (concurring in denial of certiorari where alleged error was not outcome-determinative).

### **C. The Decision Below Is Correct.**

Review is also unwarranted because the Seventh Circuit correctly interpreted the TCPA’s fax provisions.

The Seventh Circuit based its decision on the statute’s plain text. Pet. App. 4a. The TCPA defines an “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” consent. 47 U.S.C. § 227(a)(5). And the statute provides that the advertising content supporting a claim must be sent to a “telephone facsimile machine.” *Id.* § 227(b)(1)(C).

The question under the statute is thus whether the “material . . . which is transmitted” to the recipient’s fax machine “advertis[es] the commercial availability or quality of any property, goods, or services.” *Id.* § 227(a)(5). That language calls for “an objective standard” trained “on the content of the faxed document.” Pet. App. 7a. Critically, the statute does not refer to the sender’s “subjective motivations” or “subsequent conduct.” *Id.*; see also *Robert W. Mauthe M.D. P.C. v. Millennium Health LLC*, 58 F.4th 93, 96 (3d Cir. 2023) (per curiam) (analysis “does not depend on the subjective viewpoints of either the fax sender or recipient”); *id.* at 96 n.2 (collecting authorities in support of that conclusion).

That conclusion finds further support in the contrast between the fax provisions and other parts of the TCPA that expressly turn on the defendant’s purpose. See, e.g., 47 U.S.C. § 227(a)(4) (defining “telephone solicitation” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services”); *id.* § 227(b)(2)(B)(i) (authorizing FCC to exempt “calls that are not made for a commercial purpose”); see also *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same

Act,” the “disparate inclusion or exclusion” is “presumed” to be “intentiona[l]” (citation omitted)).

The statutory text also shows why the TCPA does not reach all faxes sent with a “commercial purpose” or having a “commercial nexus.” In crafting the TCPA, Congress did not simply ban unsolicited faxes or unsolicited faxes sent by businesses, but rather used specific language to target a particular subset of such faxes: i.e., those that “advertis[e] the commercial availability or quality of any property, goods, or services.” 47 U.S.C. § 227(a)(5). Because nearly everything a business does might be said to have a commercial purpose—if only promoting general awareness and goodwill—expansive interpretation of the unsolicited-fax provision would ignore Congress’s handiwork and impose a blanket ban on business faxes whatever their content. *See BPP*, 53 F.4th at 1113.<sup>4</sup>

Nor can the TCPA be read to impose the expansive pretext analysis Ambassador espouses here. In its 2006 Order, the FCC opined without any meaningful analysis of the statutory text that faxes “promot[ing] goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA[]” because “[i]n many instances, ‘free’ seminars serve as a pretext to

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<sup>4</sup> The Seventh Circuit correctly held that the challenged faxes lack the necessary “commercial” character because “[a] bare offer for a free good or service is not an advertisement unless the fax also promotes something that the reader can acquire in exchange for consideration.” Pet. App. 7a.

advertise commercial products and services.” 21 F.C.C.R. at 3814. Based on that assertion and concerns that straightforward application of the statute’s terms “would impede” the TCPA’s remedial “purposes,” the Second Circuit concluded in *Boehringer Ingelheim* that a claim based on an invitation to a free seminar automatically survives dismissal so long as the seminar relates in some way to the defendant’s business. 847 F.3d at 96–97. The court then went on to state that the defendant would be liable if it “feature[d] its products or services at the seminar.” *Id.* at 97. That reasoning strays far from the statutory text in important ways.

Under the pretext theory, one could not determine whether a seminar invitation is an unsolicited fax until the seminar ends, often weeks or months after the fax transmission. Indeed, the pretext theory dictates that *the same fax* would either support or undermine a TCPA claim depending entirely on speech uttered at the seminar—even though that speech is not “sen[t] to a telephone facsimile machine,” as the statute requires. 47 U.S.C. § 227(b)(1)(C) (punctuation omitted). As these points illustrate, the critical flaw in the pretext theory is that it focuses on subsequent, non-fax communications, rather than the content of the fax itself. *See* Pet. App. 6a–7a (elaborating on why the pretext theory “conflicts with the statutory text”); *Mauthe*, 58 F.4th at 97–98, 102–04 (Phipps, J., concurring) (pretext theory “contraven[es]” the “statutory text”); *Robert W. Mauthe, M.D. v. Optum, Inc.*, 925 F.3d 129, 135 (3d Cir. 2019) (declining to endorse the pretext theory).

Finally, the Seventh Circuit’s approach is more flexible than Ambassador lets on. The decision below acknowledges that “indirec[t]” advertising can trigger liability, meaning that a fax need not expressly mention a product or service to be an unsolicited advertisement. Pet. App. 6a. And as noted above, the Seventh Circuit subsequently confirmed in *Smith* that the TCPA calls for “a holistic examination of the faxed materials,” including whether they “directly or indirectly encourage recipients to buy” the sender’s goods or services. 77 F.4th at 606, 609. That methodology puts the Seventh Circuit in good company with *Mauthe*, *BPP*, *Sandusky*, and many other TCPA decisions. See Part I.A, *supra*.

**D. The Precise Contours of the Law  
Regarding Unsolicited Faxes Are of  
Limited and Declining Importance.**

In all events, fine distinctions regarding proper application of the TCPA’s fax provisions do not present an “important matter” worthy of this Court’s review. S. Ct. R. 10(a); Stephen Shapiro et al., *Supreme Court Practice* 4–15 (11th ed. 2019) (contrasting important decisions warranting review from minor or technical questions on which the Court has declined review). When Congress enacted the TCPA (in 2001) and the Junk Fax Prevention Act (in 2005), fax machines were still in widespread use. With the rise of Internet-based communications, however, “the traditional fax machine goes the way of the dinosaur.” *Craftwood II, Inc. v. Generac Power Sys., Inc.*, 2020 WL 13602759, at \*2 (N.D. Ill. June 18, 2020). Thus, while “the fax machine is not yet extinct,” *Bais Yaakov of Spring Valley v. FCC*, 852

F.3d 1078, 1079 (D.C. Cir. 2017) (Kavanaugh, J.), that technology—and any associated concerns with unsolicited commercial faxes—are of slight and declining importance. *See also Craftwood II, Inc. v. Generac Power Sys., Inc.*, 63 F.4th 1121, 1123–24 (7th Cir. 2023) (“annoyances” resulting from unsolicited faxes “have been greatly diminished by changes in technology”).

Real-world evidence bears that point out. Academic research has shown a spike of fax-related litigation in the 2000s that subsided around the turn of the decade. *See* Yuri R. Linetsky, *Protection of “Innocent Lawbreakers”: Striking the Right Balance in the Private Enforcement of the Anti “Junk Fax” Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 80, 91–92 (2011); Spencer Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 Loyola Consumer L. Rev. 344, 381 fig. 3 (2014). Now, the FCC’s public-complaints database shows that *fewer than 1%* of the more than 40,000 complaints received in 2024 concern unsolicited faxes. FCC, *Consumer Complaints Data*, [https://open.data.fcc.gov/Consumer/CGB-Consumer-Complaints-Data/3xyp-aqkj/about\\_data](https://open.data.fcc.gov/Consumer/CGB-Consumer-Complaints-Data/3xyp-aqkj/about_data) (last visited Feb. 29, 2024).

Although the issues presented by this case are of interest to the cottage industry of TCPA class-action lawyers and companies that find themselves dragged into such suits, they are of limited importance to the broader economy or society as a whole.

## **II. This Case Is Also a Poor Vehicle to Consider How the Hobbs Act Applies in Private Enforcement Suits.**

Ambassador tacks on a second question regarding the effect of the Hobbs Act, 28 U.S.C. § 2342, in private litigation. That statute grants the courts of appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . final orders of the [FCC] made reviewable by [47 U.S.C. § 402(a)].” And it provides that “[a]ny party aggrieved” by such an order may challenge it in the courts of appeals “within 60 days after” the order is entered. *Id.* § 2344. Ambassador contends that these provisions mean that, because Elanco did not challenge the 2006 Order when it was issued—more than 14 years before this suit was filed—the courts below were required to treat that Order as controlling. *See* Pet. 16–19. The Court should deny review of that question as well.

### **A. Ambassador Does Not Allege a Split.**

Ambassador does not allege that the decision below created a conflict of authority that would justify this Court’s review. It does not identify any decision from another court of appeals or state court of last resort with which the decision below conflicts regarding the second question presented. *Cf.* S. Ct. R. 10(a). Nor does Ambassador allege that the decision below conflicts with any decision of this Court. *Id.* R. 10(c). Instead, Ambassador asserts that the decision below “conflicts with” and “is directly contrary to” the FCC’s 2006 Order. Pet. 16–17. But that is just another way of saying that the decision



below is incorrect. Such a request for splitless error correction does not merit this Court’s review.

**B. As in *PDR Network*, Unresolved Threshold Issues Would Impede the Court’s Review.**

Although this Court’s *PDR Network* decision left open important questions about the Hobbs Act’s effect in private litigation, this case is a poor vehicle to address those questions.

1. Because the relevant portion of the 2006 Order is an interpretive rule, it does not implicate the second question presented. *PDR Network* involved not only the same FCC order at issue here, but the same *part* of that order (regarding free seminars, etc.). *See* 139 S. Ct. at 2053–54. This Court granted certiorari in *PDR Network* to determine whether the Hobbs Act requires courts to accept the FCC’s interpretation of the TCPA in a private enforcement suit. *See* 139 S. Ct. 478 (2018). But rather than answering that question, the Court remanded for consideration of two antecedent issues: (1) whether the 2006 Order is a “legislative rule” carrying the force and effect of law, or instead a non-binding interpretive rule; and (2) whether the defendant had a “prior and adequate opportunity to seek judicial review” of the Order. 139 S. Ct. at 2053, 2055–56.

On remand, the United States conceded that the “relevant portion of the 2006 [O]rder addressing whether offers of free goods or seminars can be ‘unsolicited advertisements’ is best viewed as an interpretive rule.” Br. for United States as Amicus Curiae, *Carlton & Harris Chiropractic, Inc. v. PDR*

*Network, LLC*, 2019 WL 7049154, at \*17 (4th Cir. 2020) (No. 16-2185). The parties took the same position, and the Fourth Circuit held that this “consensus is correct.” *Carlton & Harris*, 982 F.3d at 263. The Fourth Circuit thus recognized that the Order is not binding on the courts and remanded for further proceedings on that basis. *See id.* at 264.<sup>5</sup>

The Fourth Circuit correctly decided that issue. *See Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (“Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.”). Because the relevant part of the 2006 Order is a non-binding interpretive rule, this case does not implicate the second question presented in Ambassador’s petition. In other words, the interpretive character of the Order’s pretext discussion means that the Order could not have bound the lower courts in this case regardless of how the Hobbs Act is interpreted.

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<sup>5</sup> Ambassador misapprehends the law and the facts in arguing that the 2006 Order is a legislative rule because it was adopted through notice-and-comment procedures. *Cf.* Pet. 18. As the United States conceded in the Fourth Circuit, “[t]he procedures through which the pertinent portion of the order was adopted . . . did not include the full measure of notice and comment provided in connection with other parts of the order.” U.S. Br., *Carlton & Harris*, 2019 WL 7049154, at \*18–19. Regardless, agencies can and often do employ notice-and-comment procedures when adopting non-binding interpretive rules. *See, e.g., Mejia-Ruiz v. INS*, 51 F. 3d 358, 365 (2d Cir. 1995) (agencies may use notice-and-comment procedures to promulgate interpretive rules, and doing so does not “undermine the view that the rule is interpretive”).

2. Even if one does not credit the Fourth Circuit’s analysis (and the United States’ concession), threshold questions about the status of the 2006 Order would make this case a particularly poor vehicle for addressing the second question presented. In order to reach that issue, this Court would need to first wade through multiple antecedent questions, including whether the Order falls within the Hobbs Act’s domain, *see Mauthe*, 58 F.4th at 100 (Phipps, J., concurring) (answering “no” to that question); whether the relevant portion of the Order is legislative or interpretive; whether the Hobbs Act requires courts to follow interpretive rules; and whether Respondents had a prior and adequate opportunity to seek review of the Order. This case thus presents the same obstacles that led the Court to remand in *PDR Network*, along with others.

This case is also a poor vehicle because the Seventh Circuit did not address any of those threshold issues. Instead, the court simply treated the Hobbs Act question as irrelevant because the Order’s pretext discussion is contrary to the text of the TCPA. Pet. App. 6a–7a. Were this Court to take up the Hobbs Act question here, it would do so without the benefit of the reasoned analysis the *PDR Network* remand order concluded was desirable. *See* 139 S. Ct. at 2055–56; *see also Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and in judgment) (issues are better suited for this Court’s review after they have been addressed by “thoughtful colleagues on the district and circuit benches”).

Should this Court decide to revisit the Hobbs Act question it left open in *PDR Network*, it should do so

in a case in which the Hobbs Act clearly applies in the first place—for example where the agency action unquestionably qualifies as a binding legislative rule<sup>6</sup>—and not one that has all of *PDR Network*’s uncertainties and more.

3. This case is also a poor vehicle with respect to the Hobbs Act question because resolution of that question would not affect the outcome. Even if the FCC’s pretext theory were controlling, the result of this case would be the same because—as the District Court twice held—Ambassador did not plausibly allege that Elanco’s faxes were pretext for future advertising. Pet. App. 13a; *supra* pp. 5–6.

**C. The Hobbs Act Does Not Compel  
Acceptance of the FCC’s Atextual Gloss on  
the TCPA.**

Finally, the Court should deny review because Ambassador is incorrect on the merits. Ambassador contends that the Hobbs Act authorizes judicial review of the 2006 Order by petitioning for review in a court of appeals within 60 days after the Order was issued, or after the FCC denies a later request for a declaration that the Order is invalid. Pet. 16. Otherwise, Ambassador contends, courts lack

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<sup>6</sup> Although Ambassador suggests that the decision below created a split with decisions of the Second, Fourth, and Sixth Circuits about whether the 2006 Order’s interpretation is “reasonable” or “persuasive,” Pet. 19, that suggestion simply reprises the first question presented, and does not independently warrant this Court’s review, for the reasons explained in Part I above.

jurisdiction to question the Order’s interpretation. Pet. 16–17.

The Hobbs Act does not compel that constitutionally dubious approach. *See PDR Network*, 139 S. Ct. at 2057 (Thomas, J., joined by Gorsuch, J., concurring in judgment); *id.* at 2062 (Kavanaugh J., joined by Thomas, Alito, and Gorsuch, JJ., concurring in judgment). In light of the text of the statute and the presumption in favor of judicial review of agency action, the Act is best understood as requiring *facial*, *pre-enforcement* challenges to agency orders to be brought promptly in the courts of appeals. *Id.* at 2062–63 (Kavanaugh, J., concurring). It does not follow, however, that a court “determin[es] the validity” of an order when it adopts a different reading of the statute in a later private suit involving application of the statute to a specific party. *See id.* at 2063. Instead, in such a case, the court “simply determines that the defendant is not liable under the correct interpretation of the statute,” without setting aside (or otherwise disturbing) the agency’s order as it relates to other proceedings. *Id.* This Court should deny review because the Hobbs Act thus has no bearing on the resolution of this case.

## CONCLUSION

Insofar as Ambassador alludes to a split about how courts should determine whether a fax constitutes an “unsolicited advertisement” under the TCPA, differences in the lower courts’ approaches are not nearly as extensive or well-defined as Ambassador asserts, and this case is a poor vehicle for addressing the issue in any event. On the splitless second

question presented, there are significant preliminary hurdles that would hinder the Court's ability to reach the issue here. Ambassador's position is incorrect on both questions, and all of the issues in this case concern a pair of invitations sent six years ago by facsimile—a technology that is becoming more obsolete by the day. For those reasons and the others given above, the Court should deny the petition.

Respectfully submitted,

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