No. 23-552

IN THE Supreme Court of the United States

AMBASSADOR ANIMAL HOSPITAL, LTD.,

Petitioner,

v.

ELANCO ANIMAL HEALTH INC., *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT

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The parties' briefing confirms splits in authority among the federal circuits on two issues: (1) whether unsolicited facsimile messages from a manufacturer inviting veterinarians to attend free dinner seminars concerning topics served by the manufacturer's veterinary products can be "unsolicited advertisements" under the Telephone Consumer Protection Act, 47 U.S.C. § 227, even though the invitations do not explicitly offer to sell products to the recipients—and (2) the standard to be applied when considering an Federal Communications Commission regulation directly on point.

Defendant argues the decision in *PDR Network LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051 (2019) ("*PDR Network*"), resolved the latter question. It did not. In fact, *PDR Network* declined to reach the question of whether the Hobbs Act, 28 U.S.C. § 2342(1), requires courts to follow FCC regulations. *PDR Network* vacated and remanded the action for the lower court to answer certain questions about the regulation at issue. 139 S. Ct. at 2053 ("We have found it difficult to answer this question, for the answer may depend upon the resolution of two preliminary issues. We therefore vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals can consider these preliminary issues.").

Does the Hobbs Act require the lower courts to consider and follow *In the Matter of Rules and*

Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, 21 FCC Rcd. 3787, 3814 (FCC April 6, 2006) ("2006 Order")? If not, what deference is owed to the FCC's 2006 Order?

Here, the Seventh Circuit disregarded the FCC's regulation entirely, stating that it "conflicts with the statutory text," and discussing neither the Hobbs Act nor answering the two preliminary questions *PDR Network* said should be answered. *Ambassador Animal Hospital, Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 832 (7th Cir. 2023). That approach conflicts with the other circuit courts.

At the most granular level, the Seventh Circuit's decision conflicts directly with the Second Circuit's decision in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 95 (2d Cir. 2017) ("The [2006 Order] itself comports with the statutory language, which defines offending advertisements as those promoting "the commercial availability or quality of [the firm's] property, goods, or services.")._Both cases involved appeals from dismissal of TCPA suits about unsolicited faxes offering free seminars alleged to be pretextual advertising consistent with the FCC's 2006 Order.

The Second Circuit said discovery was required, but the Seventh Circuit said no information outside the face of the junk fax could be relevant to the "advertisement" issue. *Compare Boehringer*, 847 F.3d

at 95 ("[A]t the pleading stage, where it is alleged that a firm sent an unsolicited fax promoting a free seminar discussing a subject that relates to the firm's products or services, there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services. Businesses are always eager to promote their wares and usually do not fund presentations for no business purpose. The defendant can rebut such an inference by showing that it did not or would not advertise its products or services at the seminar, but only after discovery."); *with Elanco*, 74 F.4th at 833 ("The text of the TCPA creates an objective standard narrowly focused on the content of the faxed document. The FCC's interpretation, however, asks us not only to assume subjective motivations behind faxes that advertise no goods or services, but to assume that subsequent conduct of senders is relevant to the TCPA analysis. … 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.").

Decisions after *PDR Network* have demonstrated confusion about the significance of the FCC's 2006 Order. Here, the Seventh Circuit disregarded the FCC's 2006 Order entirely. In *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 22-15710, No. 22-15732, 2023 WL 7015279, *2 (9th Cir. Oct. 25, 2023), however, the Ninth Circuit found the Hobbs Act applied and an FCC order was binding. In *Bais Yaakov v. ACT, Inc.*, 12 F.4th 81, 86 (1st Cir. 2021), the First Circuit analyzed an FCC regulation

pursuant to *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). In *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020), after remand from this Court, the Fourth Circuit directed the district court to apply *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), to the FCC's 2006 Order. In *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867, 873 n.7 (3d Cir. 2022), the Third Circuit stated that it views *PDR Network* as a "suggestion" to treat FCC rulings as "persuasive authority." The Court's guidance is needed.

Defendant's contention that this case is an inappropriate "vehicle" to resolve the unsettled questions of administrative law is misplaced. This case involves the prototypical "free seminar" fax discussed in the FCC's 2006 Order and in *Boehringer* and, as in *Boehringer*, the action was dismissed prior to discovery, meaning the case presents a pure question of law.

Finally, the Court should not decline to decide the issue because faxing is seen as "obsolete" in many industries. Obviously, Defendant did not perceive the technology as obsolete when it elected to broadcast generic invitations by fax. As the Third Circuit explained: "Although faxes have become almost a relic of the past for most consumers, due to patient privacy laws, healthcare professionals still rely on faxes for certain communications. This, of course, renders them a very captive and easily identifiable audience,

as one of the few subgroups in the population that still commonly employ the use of a fax machine." *Fischbein v. Olson Research Grp., Inc.*, 959 F.3d 559, 564 (3d Cir. 2020).

CONCLUSION

For the foregoing reasons, the petitioner, Ambassador Animal Hospital, Ltd., requests that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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