NO. _____

In the
Supreme Court of the United States

PULSE8, LLC, a Maryland limited liability company; PULSE8, INC., a Maryland corporation,

Petitioners,

v.

FAMILY HEALTH PHYSICAL MEDICINE, LLC,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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September 19, 2024

QUESTION PRESENTED

The Telephone Consumer Protection Act ("TCPA") generally prohibits sending an "unsolicited advertisement" to a fax machine. An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person" without prior permission. 47 U.S.C. § 227(a)(5).

Respondent alleges that Petitioners violated the TCPA by sending a fax inviting recipients to attend a free continuing education webinar. Had Respondent sued Petitioners in the Third or Seventh Circuit, the claim would have been dismissed. Both circuits apply an objective standard to determine whether the fax itself advertises the commercial availability or quality of a good or service. *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 832-33 (7th Cir. 2023); *Robert W. Mauthe MD PC v. Millennium Health LLC* (*Millennium*), 58 F.4th 93, 96 (3d Cir. 2023) (per curiam). In a divided opinion, the Fourth Circuit took a conflicting approach: a fax that provides information about a free event—and does not advertise the commercial availability or quality of any property, goods, or services—is deemed an "unsolicited advertisement" within the meaning of the TCPA if there is a possibility of later advertising at the event.

The question presented is:

Does the TCPA prohibit sending faxes that do not advertise the commercial availability or quality of any property, goods, or services if plaintiffs allege the possibility of later advertising?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Pulse8, LLC and Pulse8, Inc. were Defendants-Appellees below.

Respondent Family Health Physical Medicine, LLC was Plaintiff-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Pulse8 LLC is a Maryland Limited Liability Company whose sole member is Veradigm LLC. Veradigm LLC is an indirect, wholly owned subsidiary of Veradigm Inc., which is a publicly traded corporation. Stonehill Capital Management LLC owns 10% or more of the stock of Veradigm Inc. No other company owns 10% or more of Veradigm Inc.'s stock.

Pulse8, Inc. is named by Respondent in the complaint. Pulse8 Inc. no longer exists, however, as it converted to Pulse8, LLC in August 2020.

RELATED PROCEEDINGS

United States District Court (D. Md.):

Family Health Physical Medicine, LLC v. Pulse8, LLC, No. SAG-21-2095, 2022 WL 1096362 (Apr. 1, 2022)

Family Health Physical Medicine, LLC v. Pulse8, LLC, No. SAG-21-2095, 2022 WL 596475 (Feb. 28, 2022)

United States Court of Appeals (4th Cir.):

Family Health Physical Medicine, LLC v. Pulse8, LLC, No. 22-1393, 105 F.4th 567 (June 21, 2024)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully ask this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion is published at 105 F.4th 567 (4th Cir. 2024) and is reproduced in the appendix at App.1-24. The district court's opinion granting Petitioners' motion to dismiss with prejudice is available at 2022 WL 1096362 (D. Md. Apr. 1, 2022) and reproduced at App.25. The district court's opinion granting Petitioners' motion to dismiss without prejudice is available at 2022 WL 596475 (D. Md. Feb. 28, 2022) and reproduced at App.26-39.

JURISDICTION

The Fourth Circuit issued its opinion on June 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 227(b) provides:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States …
>
> to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement … .

42 U.S.C. § 227(a)(5) provides:

> The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

INTRODUCTION

This petition asks the Court to finish the work it started in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.,* 588 U.S. 1 (2019), to resolve whether an agency interpretation can expand Congress's carefully crafted limits on speech sent to fax machines. The TCPA makes it unlawful to send "any material advertising the commercial availability or quality of any property, goods, or services" to a fax machine without permission. 47 U.S.C. § 227(a)(5), (b). In 2006, the Federal Communications Commission ("FCC") issued a rule asserting that the statute banned "facsimile messages that promote goods or services even at no cost" because those free goods or events could "serve as a pretext to advertise commercial products and services" later. Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). Certain appellate courts initially adopted the FCC's pretext theory, with the Fourth Circuit treating the FCC's rule as binding. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC* (*PDR Network I*), 883 F.3d 459, 469 (4th Cir. 2018). This Court vacated the Fourth Circuit's opinion and instructed it to consider whether the

FCC's interpretation qualified as a legislative or interpretive rule. *PDR Network*, 588 U.S. at 7-8. On remand, the Fourth Circuit acknowledged that the FCC's rule was interpretive and not binding.

Despite that decision, a divided Fourth Circuit panel has now resurrected the FCC's overbroad "pretext-to-future-advertising" theory, concluding that the TCPA prohibits faxes that promote free educational seminars alleged to be related to a sender's business because a sender might advertise at the seminar. Over a dissent from Judge Agee, the court declined to follow the ordinary reading of the TCPA and instead deepened a split with decisions of the Third and Seventh Circuits.

This Court should review the Fourth Circuit's decision for three reasons.

First, the Fourth Circuit's interpretation sets up a "clear conflict" with other circuits. App.20 (Agee, J., dissenting). In the Second, Fourth, and Sixth Circuits, courts deploy the FCC's "pretext theory," looking to a sender's subsequent advertising conduct (or potential advertising conduct) to determine whether a fax is an advertisement. The Third Circuit has declined to adopt such an overbroad theory, instructing courts instead to consider the content of the fax itself. And the Seventh Circuit has unanimously rejected the pretext theory, holding that it clashes with the TCPA's plain text. Moreover, the legal split is crisply presented in this case: In the Second and Fourth Circuits, a recipient of a faxed invitation to participate in a free educational seminar alleged to be related to the sender's business can sue under the TCPA. In the

Third and Seventh Circuits, a party receiving an identical fax has no claim.

Second, the Fourth Circuit's holding is wrong. The TCPA's text asks whether "material" "transmitted" to a fax machine "advertis[es] the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5), (b)(1)(C). The text neither requires nor permits an inquiry into "the seller's motivation for sending the fax or the seller's subsequent actions." *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 831 (7th Cir. 2023).

And *third*, the question presented in this case is important. Congress legislates carefully when it restricts speech. "Congress's choice" of creating a "clear, bright-line standard" in the statute respects "First Amendment principles." App.34 n.4. The Fourth Circuit's decision embracing the FCC's pretext theory runs roughshod over those principles. The decision dramatically expands the TCPA's prohibition beyond what the text will bear, and it creates unnecessary tension—if not outright conflict—with the First Amendment.

The district court correctly determined that a fax inviting recipients to participate in a free continuing education webinar was not "material advertising the commercial availability or quality of any property, goods, or services," and the Fourth Circuit lost its way in reversing. This Court should grant review to correct that error of law and resolve the circuit split.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1991 Congress enacted the TCPA, which makes it unlawful to send an "unsolicited advertisement" to a "telephone facsimile machine." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395 (codified at 47 U.S.C. § 227(b)). The TCPA 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." 47 U.S.C. § 227(a)(5); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, § 2(g), 119 Stat. 359, 362 (codified at 47 U.S.C. § 227(a)(5)) (amending definition to permit unsolicited advertisements when permission is obtained "in writing or otherwise").

The TCPA contains a private right of action for claims "based on a violation of this subsection." 47 U.S.C. § 227(b)(3). Under this private cause of action, a recipient of an unsolicited advertisement may seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. *Id*. Damages may be trebled if a court finds that the sender "willfully or knowingly violated" the TCPA. *Id*.

In 2006, the FCC interpreted the statute to address "Offers for Free Goods and Services and Informational Messages." Rules and Regulations Implementing the TCPA, 71 Fed. Reg. at 25973. According to the FCC:

> [F]acsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, 'free' seminars serve as a pretext to advertise commercial products and services. Similarly, 'free' publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile [sic] recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the 'quality of any property, goods, or services.'

Id.

In 2018, this Court granted certiorari to determine whether the FCC's interpretation was binding on district courts under the Hobbs Act. In that case, the district court had dismissed a TCPA claim concerning a fax that promoted a free e-book, concluding that that the fax was not an unsolicited advertisement. *PDR Network*, 588 U.S. at 5. The Fourth Circuit had reversed, holding that the Hobbs Act required district courts to apply the FCC's interpretation of the TCPA and that under that interpretation, any offer of a free good or service constituted an unsolicited advertisement. *Id.* at 6.

This Court vacated the Fourth Circuit's judgment. The Court held that resolution of the Hobbs Act question depended on the answers to preliminary

questions, including whether the 2006 FCC Order was a legislative rule or an interpretive rule "which simply 'advises the public of the agency's construction of the statute[]' … and lacks 'the force and effect of law.'" *Id.* at 7 (quoting *Perez v. Mortg. Bankers Ass'n*, 572 U.S. 92, 97 (2015)). Justice Thomas wrote a concurrence, in which Justice Gorsuch joined, explaining that a scheme that "'precluded [a] district court from even reaching' the text of the TCPA and instead required courts to treat 'FCC interpretations of the TCPA' as authoritative … would trench upon Article III's vesting of the 'judicial Power' in the courts." *Id.* at 9 (quoting *PDR Network I*, 883 F.3d at 464). Justice Kavanaugh also wrote a concurrence, joined by Justices Thomas, Alito, and Gorsuch, concluding that regardless of how the Fourth Circuit answered the preliminary questions, nothing bars a plaintiff "from arguing that the FCC's legal interpretation of the TCPA is incorrect." *Id.* at 27.

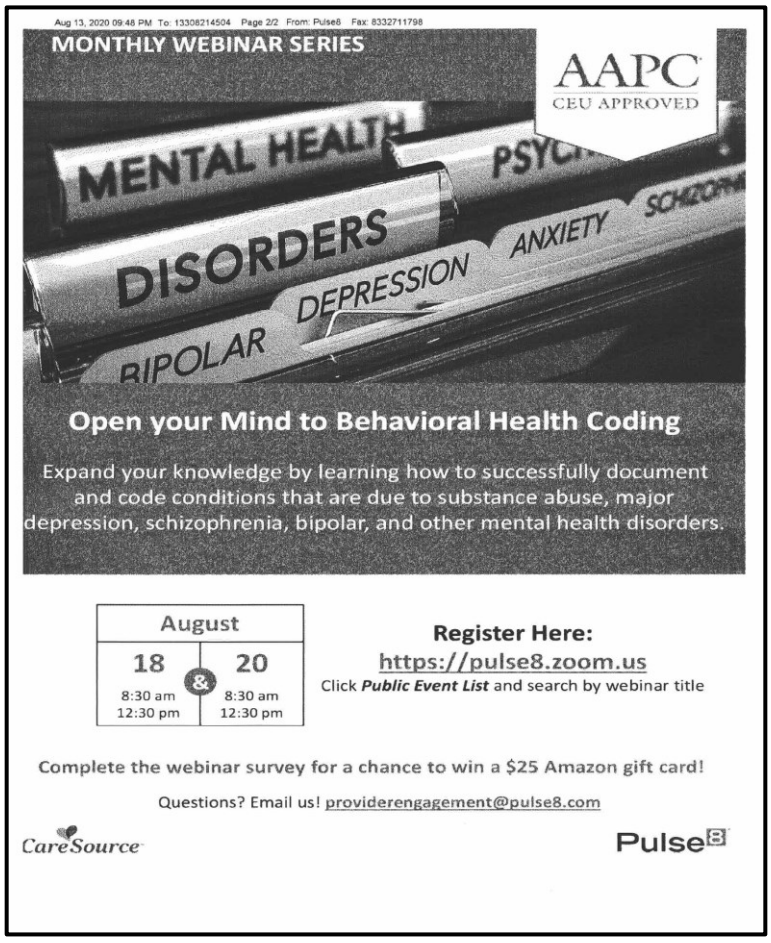
On remand, the Government filed an amicus brief in the Fourth Circuit, acknowledging that the FCC's rule was interpretive and could not "give rise to new requirements" not present in the text of the statute. Brief for the United States as Amicus Curiae in Support of Appellant at 16-17, *PDR Network I*, No. 16-2185, Dkt. 63-1. The Fourth Circuit held as much and concluded that the FCC's rule did not bind the district court. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC* (*PDR Network II*), 982 F.3d 258, 263 (4th Cir. 2020).

B. Factual Background

Because this case is at the motion-to-dismiss stage, the facts alleged in the complaint are taken as

true. Respondent Family Health is a healthcare provider based in Ohio. App.43 ¶ 12. Petitioner Pulse8 is an analytics and technology company that offers a "[v]isualization [and] [r]eporting platform" for "risk-bearing entities." App.44 ¶ 14.

On August 13, 2020, Petitioners sent Respondent a single fax. App.41 ¶ 3. A copy of the fax is reproduced below:



App.57 (Ex. A).

The fax invited the recipient to attend a free webinar entitled "Open Your Mind to Behavioral Health Coding." App.57. It provided a link to a Zoom website where participants could register for the webinar. The fax invited recipients to "[e]xpand your knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders." App.57.

In large letters in the upper right-hand corner, the fax describes the webinar as "AAPC | CEU Approved." App.57. According to its website, AAPC is "the world's largest training and credentialing organization for the business of healthcare, with members worldwide working in, among other things, medical coding, billing, [and] auditing." AAPC, *Over 250,000 Members and Growing* (2024), https://www.aapc.com/. CEU stands for "continuing education units," which are continuing education courses that allow health care professionals to fulfill their "obligat[ion] to stay current in their profession." AAPC, *Continuing Education Units (CEUs)* (2024), https://www.aapc.com/medical-coding-education/.

C. Proceedings in the District Court

Respondent sued Petitioners in the United States District Court for the District of Maryland, asserting a claim under the TPCA. *See* App.53-55 ¶¶ 32-37. Respondent seeks to represent a class of similarly situated recipients of faxes from Petitioners offering free continuing education courses. App.49-53 ¶¶ 26-31.

Petitioners moved to dismiss under Rule 12(b)(6) for failure to state a claim. It argued that a fax offering a free webinar could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale to the recipient.

In its response, Respondent argued that the fax it received was an unsolicited advertisement based on two theories. *First*, Respondent contended that the fax qualified as an unsolicited advertisement under the FCC's 2006 rule because it offered a free good or service. Dkt. 22 at 8-10. *Second*, Respondent asserted that the fax qualified as an unsolicited advertisement because recipients who signed up for the webinar might face advertisements later. Dkt. 22 at 4-8, 11-12. Specifically, Respondent claimed that the court should infer that recipients who attended the webinar would learn about Petitioners' products at the webinar. Dkt. 22 at 4-8. And Respondent asserted that, because registration for the webinar required attendees to agree to boilerplate terms and privacy conditions, this might mean that Petitioners might decide to use the attendees' contact information to deliver advertisements down the line. Dkt. 22 at 11-12.

The district court (Gallagher, J.) dismissed the claim. The court first determined that no deference should be afforded to the 2006 FCC order, and that the court "must then consider the Fax in light of the TCPA's plain text." App.35. Turning to the text, the court found that the fax was not "material advertising the commercial availability or quality of any property, goods, or services." App.35-36. The court explained that "commercial" means "of, relating to, or involving the buying and selling of goods." App.35 (cleaned up).

This fax did not relate to or involve the buying and selling of any property, goods, or services—it simply offered a free webinar. App.36. The district court rejected Respondent's speculation about future commercial efforts, explaining that the relevant inquiry considers what is "within the fax at issue." App.38 (quoting *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 2022 WL 386097, at *7 (S.D.W.V. Feb. 8, 2022)).

The court recognized that the statutory text would thus not reach circumstances where the sender's underlying "commercial purpose does not appear on the face of the fax." App.34 n.4. The court reasoned that "Congress's choice of narrow language in the TCPA … may have intentionally sacrificed broader protection from uninvited faxes in favor of a clear, bright-line standard mindful of First Amendment principles." App.34 n.4. The court dismissed the claim, allowing Respondent to seek leave to amend. App.39. After Respondent chose not to amend, the court entered a final judgment and order dismissing the complaint with prejudice. App.25. An appeal to the Fourth Circuit followed.

D. The Fourth Circuit's Split Decision

On June 21, 2024, a divided panel of the Fourth Circuit ruled that the TCPA prohibits faxes that promote a free event where that event could be leveraged into an opportunity for a sales pitch. The majority held that "a fax need not 'propose a specific commercial transaction on its face' to be covered by the TCPA." App.5 (quoting *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC* (*PDR Network III*), 80 F.4th 466, 476 (4th Cir. 2023)). Instead, it is enough for

there to be "'a commercial nexus' between the fax and 'the sender's business.'" App.5 (quoting *PDR Network III*, 80 F.4th at 474). Aligning itself with the Second Circuit's decision in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017)—which predated this Court's decision in *PDR Network*—the court held that a fax that invites participants to a free event that relates to the sender's business is an "unsolicited advertisement" under the TCPA. App.5-7.

Judge Agee dissented, explaining that the majority had "effectively adopt[ed] a 'pretext' theory of liability." App.15. Looking to the TCPA's text, which defines an "unsolicited advertisement" as any *material* advertising the commercial availability or quality of any property, goods, or services—the dissent concluded that the law "creates an objective standard narrowly focused on the content of the faxed document." App.15 (quoting *Ambassador Animal Hosp.*, 74 F.4th at 832-33). The dissent pointed out that the majority's broad approach looking to subsequent conduct cannot be reconciled with the statute's "reference to only the material transmitted." App.18.

The dissent also emphasized the "clear conflict" between the circuits. App.20. In *Ambassador Animal Hospital*, "the Seventh Circuit applied the correct statutory standard: 'the fax itself must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property.'" App.20 (quoting 74 F.4th at 832). The Seventh Circuit's analysis aligns with the Third Circuit, which has likewise adopted an "objective

standard" that focuses on "whether the 'fax would be plainly understood as promoting a commercial good or service.'" App.16 (emphasis omitted) (quoting *Robert W. Mauthe MD PC v. Millennium Health LLC* (*Millennium*), 58 F.4th 93, 96 (3d Cir. 2023) (per curiam) & *BPP v. CaremarkPCS Health, L.L.C.*, 53 F.4th 1109, 1113 (8th Cir. 2022)).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision entrenches a circuit split on a pure question of law. The decision below is on the wrong side of that split and raises important First Amendment concerns. Moreover, it is hard to envision a better vehicle for addressing the question presented. There are no factual disputes because this case was decided on a motion to dismiss, and the fax at issue here—inviting individuals to participate in a free continuing education course—is materially indistinguishable from faxes that the Third and Seventh Circuits have held are not unsolicited advertisements. The petition should be granted.

I. The Fourth Circuit's Decision Deepens a Circuit Split on the Statutory Definition of an "Unsolicited Advertisement."

The circuits are split on whether the TCPA's prohibition on unsolicited advertisements covers only faxes that *themselves* advertise goods or services in commerce or whether the prohibition also covers faxes that promote free goods or services that could possibly give rise to later advertising. In a divided opinion, the Fourth Circuit has aligned itself with the Second and Sixth Circuits, which have adopted the FCC's view that faxes promoting a free good or service qualify as

unsolicited advertisements if they are connected to later advertising. In contrast, the Seventh Circuit has expressly (and unanimously) rejected the pretext theory as inconsistent with the statute's plain text. And the Third Circuit has likewise declined to adopt the pretext theory and held instead that the TCPA creates an objective standard.

1. Cases decided before this Court's opinion in *PDR Network* generally adopted the FCC's pretext-to-future advertising theory. But even after this Court's instruction in *PDR Network*, the Fourth and Sixth Circuits have continued to endorse the FCC's pretext theory by relying on earlier precedent citing the FCC's rule.

The Second Circuit. The Second Circuit's decision in *Physicians Healthsource Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017), is the "prototypical case law example" of the "pretext to future advertising" theory. *PDR Network III*, 80 F.4th at 478 (cleaned up) (citing *Boehringer*). In that case, the Second Circuit held that a plaintiff stated a claim for a TCPA violation based on a fax from Boehringer inviting participants to "join us for a dinner meeting entitled, It's Time to Talk: Recognizing Female Sexual Dysfunction and Diagnosing Hypoactive Sexual Desire Disorder." 847 F.3d at 93. Because the plaintiff alleged that the meeting related to Boehringer's business, the Second Circuit held that this was enough to establish "that the fax has a commercial pretext—i.e., that the defendant advertised, or planned to advertise, its products or services at the seminar." *Id.* at 95 (quoting *Physicians*

Healthsource Inc. v. Boehringer Ingelheim Pharms., Inc., 2015 W 144728, at *3 (D. Conn. Jan. 12, 2015)).

The Second Circuit started its analysis by quoting the FCC's 2006 order, which states that "facsimile messages that promote goods or services even at no cost … are unsolicited advertisements under the TCPA's definition" as "[i]n many instances, free seminars serve as a pretext to advertise commercial products and services." *Id.* (quoting 71 Fed. Reg. at 25,973). Relying on the order, the Second Circuit applied a rebuttable presumption—where a defendant sends a fax inviting recipients to participate in a free event, a court will presume that the defendant planned to advertise there and thus find the fax to be an unsolicited advertisement. *Id.* After discovery, the defendant would then have the opportunity to "rebut such inference by showing that it did not or would not advertise its products or services at the seminar." *Id.* Confirming that this pretext theory arose from the FCC's order, the Second Circuit explained that its "interpretation comports with the 2006 Rule." *Id.*

The Sixth Circuit. The Sixth Circuit has also adopted the pretext theory. The court initially alluded to the theory in passing in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015). In rejecting a TCPA claim, the Sixth Circuit cited the FCC's rule to note in dicta that "a fax need not be an explicit sale offer to be an ad" if it is a "pretext for a commercial solicitation." *Id.* at 225. Later, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 907 F.3d 948, 953 (6th Cir. 2018), the Sixth Circuit latched onto this remark to hold that the TCPA analysis requires consideration not only of the fax but

also "what c[o]me[s] after the fax." Citing *Boehringer*, the court concluded that an alleged fax soliciting information fit within the confines of the pretext-to-future advertising theory: "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." 907 F.3d at 955. Judge Gibbons dissented. *Id.* Although she agreed with the majority's adoption of the pretext theory, she disagreed with its application. *Id.* According to Judge Gibbons, a court must ascertain a fax's "primary purpose" to determine whether it is a pretext to advertising. *Id.* at 956. "[H]ighly speculative" allegations about possible future advertising would not satisfy that test. *Id.* at 955.

This Court issued a grant, vacate, and remand order directing the Sixth Circuit to reconsider its decision in light of its *PDR Network* decision. *Enclarity, Inc. v. Fulton*, 140 S. Ct. 104 (2019) (mem.). The Sixth Circuit determined "*PDR Network* does not impact the resolution of this case." *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 885 (6th Cir. 2020). Although the earlier decision "did mention the 2006 order"—indeed, quoted it at length—the Sixth Circuit concluded that the decision did not "require that the district court strictly adhere to the 2006 Order" but rather "relied primarily on our precedent." *Id.* at 888.

The Fourth Circuit. Following a circuitous path, **t**he Fourth Circuit has now aligned itself with the Second and Sixth Circuits. In 2018, the court reversed the dismissal of a TCPA claim involving a fax offering

a free e-book. *PDR Network I*, 883 F.3d at 464-67. The court held that the Hobbs Act compelled district courts to defer to the FCC's order and that, under the order, "any offer of a free good or service" qualifies as an "unsolicited advertisement." *Id.*

After this Court vacated that decision, *see PDR Network*, 588 U.S. 1 (2019), the Fourth Circuit concluded that the 2006 FCC order is interpretive and district courts are not bound to follow it. *See PDR Network II*, 982 F.3d at 263. Noting that all "sides, as well as the United States (as amicus curiae), agree[d] that the relevant portions of the 2006 FCC Rule are interpretive, rather than legislative," the Fourth Circuit remanded to the district court for further proceedings. *Id.*

After the district court dismissed again on remand, the Fourth Circuit reversed. In this final iteration of the *PDR Network* litigation, the Fourth Circuit interpreted the term "unsolicited advertisement" to require a "commercial nexus" and found that nexus requirement satisfied. *PDR Network III*, 80 F.4th at 476 (quotation marks omitted). There, the plaintiff alleged that the defendant advertised a free e-book via fax and made money from a third party every time a recipient downloaded the e-book. *Id.* Because there was "an offer … of a product, and it [was] coupled with a direct mechanism by which the sender will profit if the offer is accepted," the court determined that the fax was a commercial advertisement. *Id.* at 477. Judge Thacker concurred but noted her "view that this lawsuit pushes the outer limits of" the TCPA's "liberal construction." *Id.* at 479.

The Fourth Circuit explained that the facts of the case did not implicate the pretext theory, but it outlined how such a theory would apply. *Id.* at 478. The court first explained that the "'pretext'" theory has its roots in "the FCC and TCPA case law." *Id.* The court then identified two different types of "pretext" cases. The "basic form" involves "a fax advertisement that calls itself something else—say, a survey—but in fact promotes a product or service for sale." *Id.* The other form—"a pretext to *future* advertising … is somewhat more sophisticated" and involves "[a] fax that offers a good or service that is free but will be used, once accepted, to promote goods or services at a cost." *Id.* (quotation marks omitted). The "prototypical case law example" of the pretext to future advertising theory "is the fax at issue in *Boehringer*, which allegedly invited doctors to a free dinner seminar at which they would be solicited for sales by the drug company that sent the fax." *Id.*

One year later, in this litigation, a divided panel adopted the pretext-to-future-advertising theory discussed in *Boehringer*. Here, Respondent alleged that Petitioners sent a fax promoting a free educational webinar that related to its business. App.2. According to the majority, this allegation was tantamount to alleging "that the webinar was being used to market Pulse8's product." App.5. Passing over the TCPA's text, the majority looked to its reasoning in *PDR Network*. Noting that the *PDR Network III* panel had described *Boehringer* as the "prototypical case law example" (of the "'pretext' to future advertising" theory, 80 F.4th at 478), the court determined that "[i]f *Boehringer* provides the prototypical example, this case falls comfortably

within its rule." App.6. Because Family Health alleged (1) that the free webinar was about "a 'subject related to' Pulse8's 'business'" and (2) that Pulse8 would hold contact information used to sign up for the course in accordance with its standard privacy policy allowing future communications, the Fourth Circuit held that these potential links to "future promotional messages" gave the fax the requisite "'commercial nexus.'" App.6, 11 (quoting 847 F.3d at 93 & 80 F.4th at 478).

In dissent, Judge Agee focused on the TCPA's text. He agreed with the Seventh Circuit that the plain language of "the TCPA creates an objective standard narrowly focused on the content of the faxed document: to be an unsolicited advertisement under the TCPA, *the fax itself* must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property." App.15-16 (quoting *Ambassador Animal Hosp.*, 74 F.4th at 832-33). The majority's "'consideration of facts extrinsic to the fax,'" Judge Agee explained, "thus cannot be squared with the TCPA's express text." App.16 (quoting *Millennium*, 58 F.4th at 103 (Phipps, J., concurring)). The TCPA defines an unsolicited advertisement "in reference to only *the material transmitted*." App.18 (quoting *Millennium*, 58 F.4th at 104 (Phipps, J., concurring)). Judge Agee observed that the majority's opinion set up a "clear conflict" with the Seventh Circuit. App.20.

2. Circuits that have looked afresh at the TCPA's text, rather than turn to pre-*PDR Network* precedent, have refused to adopt the pretext theory.

The Seventh Circuit. In *Ambassador Animal Hospital*, the Seventh Circuit unanimously rejected

the pretext theory as inconsistent with the TCPA's text. 74 F.4th at 832-33. There, the plaintiff alleged it had received two unsolicited faxes inviting recipients to two free "dinner programs—one titled 'Canine and Feline Disease Prevention Hot Topics' and the other 'Rethinking Management of Osteoarthritis'" that "had been approved for continuing education credits." *Id.* at 830. Although the faxes mentioned no products or services for sale, the plaintiff claimed that "the free educational dinners were a ploy to advertise [the defendant's] products and services" because "the seminars … overlapped with products it sold" and the defendant "assigned sales managers to receive RSVPs." *Id.* at 831.

The Seventh Circuit's analysis "start[ed] and end[ed] with the plain language of the statute." *Id.* at 831. "Section 227 asks whether the content of a fax advertises the commercial availability or quality of a thing." *Id.* "It does not inquire of the seller's motivation for sending the fax or the seller's subsequent actions." *Id.* Instead, to fall within the TCPA's ambit, "the material … which is transmitted—the faxed document—must perform the advertising." *Id.* at 832 (quotation marks omitted). Just because a free seminar "relate[s] to products sold by [the sender]" does not "transform[] … invitations to free dinners and continuing education programs into advertisements for a good, service, or property." *Id.* According to the Seventh Circuit, "[t]he TCPA does not go so far as to prohibit sending faxes on company letterhead to promote free education on topics that relate to the sender's business—it prohibits advertising products or services." *Id.*

In reaching these conclusions, the Seventh Circuit rejected "the pretext portion of the [FCC's] 2006 Order." *Id.* As the court explained, the FCC's pretext interpretation requires courts "to assume that subsequent conduct of senders is relevant to the TCPA analysis." *Id.* at 833. That approach "conflicts with the statutory text" and "is not entitled to deference." *Id.* at 832. "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." *Id.* at 833.

The Third Circuit. The Third Circuit likewise rejected a TCPA claim based on a fax that invited recipients to a free continuing education seminar. In *Millennium*, the Third Circuit held that no reasonable recipient could view a free-seminar fax and conclude that it "promote[s] the purchase or sale of goods, services, or property." 58 F.4th at 96. In that case, the defendant faxed its customers a single-page flyer promoting a free educational seminar that "would highlight national trends in opioid misuse and abuse … and discuss the role of medication monitoring as a valuable tool that provide objective, actionable information during the care of injured workers." *Id.* at 94-95 (quotation marks omitted). The seminar was related to the sender's business, as the business "offered one type of urine testing that could detect opioids," but "the fax did not mention that specific service or its availability from Millenium Health." *Id.* at 95. Considering "only the fax itself," the district court granted summary judgment, explaining "that the fax did not constitute an unsolicited advertisement because it promoted a free seminar rather than any commercially available product." *Id.* at 95 (cleaned

up). The Third Circuit affirmed. "[U]nder an objective standard, no reasonable recipient" of the "unsolicited free-seminar fax could view it as promoting the purchase or sale of goods, services, or property." *Id.* at 96.

Concurring with the majority's interpretation and application of the TCPA's text, Judge Phipps wrote separately "to explain why … the pretext theory should be rejected" outright. *Id.* at 97. Judge Phipps explained that the pretext theory stems directly from the FCC, not the statute's text. *Id.* at 99. While "the TCPA confines the meaning of the term 'unsolicited advertisement' to the *material transmitted*," the "FCC's pretext theory … involves consideration of facts extrinsic to the fax itself." *Id.* at 103. The FCC's focus on "prevalent marketing practices to enlarge the statutory definition" is inconsistent not only with the statute's plain text, Judge Phipps explained, but also with this Court's analysis in *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021), in which the Court "focused on the text of the TCPA, and rejected the argument that the term's meaning should account for broad concerns about 'intrusive telemarketing practices.'" *Millennium*, 58 F.4th at 103-04 (quoting 592 U.S. at 408). Because the FCC's pretext interpretation "cannot be reconciled with the TCPA," the "free-seminar pretext theory has no legal effect." *Id.* at 104.

Judge Phipps' concurrence echoed concerns raised in an earlier Third Circuit decision. In *Robert W. Mauthe, M.D., P.C. v. National Imaging Associates, Inc.*, the Third Circuit "ma[d]e clear that we do not suggest that we endorse the pretext theory of liability under TCPA," noting that "in almost all cases, a

recipient of a fax could argue under the pretext theory that a fax from a commercial entity is an advertisement." 767 F. App'x 246, 250 (3d Cir. 2019). "The pretext theory, unless closely cabined," would thus "extend TCPA's prohibition too far." *Id.*

* * *

Five circuits have now weighed in on the split. The Second, Fourth, and Sixth Circuits have adopted the FCC's pretext-to-future-advertising theory to allow claims to move forward, even if the faxes plaintiffs received did not contain a commercial advertisement. The Third and Seventh Circuits have declined to adopt this pretext theory and instead focused on the content of challenged faxes themselves. The courts thus squarely disagree with each other, and only this Court can resolve that disagreement.

II. The Fourth Circuit's Decision Is Wrong.

The Fourth Circuit's decision conflicts with the text of the TCPA. The TCPA makes it unlawful "to send, to a telephone facsimile machine," "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5), (b)(1)(C). The statute thus "asks whether the content of a fax advertises the commercial availability or quality of a thing." *Ambassador Animal Hosp.*, 74 F.4th at 831. The Fourth Circuit's approach, which "expand[s] the meaning of the term 'unsolicited' advertisement so that it depends on facts beyond those contained in the fax," "cannot be reconciled with the TCPA, which defines the term in reference to only the material transmitted." *Millennium*, 58 F.4th at 104 (Phipps, J., concurring). By looking to possible later

advertisements, the Fourth Circuit's opinion "impermissibly expands the meaning of 'unsolicited advertisement' as defined by the TCPA." App.15 (Agee, J., dissenting).

The Fourth Circuit reached the wrong result because it employed the wrong analysis. This Court has instructed that, "in any statutory construction case," a court should "start, of course, with the statutory text." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). That prescribed methodology holds true for the TCPA. When interpreting a statutory definition, courts should "begin with the text." *Duguid*, 592 U.S. at 402. The Fourth Circuit, however, skipped over any meaningful analysis of the TCPA's "unsolicited advertisement" definition in favor of parsing dicta from its past precedent. *See* App.5-6.

That approach is especially problematic because the earlier Fourth Circuit decision on which the court relied declined to "resolve th[e] grammatical puzzle" posed by the TCPA's definition of an "unsolicited advertisement." *PDR Network III*, 80 F.4th at 473 n.3. This Court has recently reiterated that "[w]hen Congress takes the trouble to define the terms it uses, a court must respect its definition as 'virtually conclusive.'" *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 59 (2024) (quoting *Sturgeon v. Frost*, 587 U.S. 28, 56 (2019)). A court cannot ignore language in a statutory definition because it is difficult to interpret. *See Astoria Fed. Sav. & Loan Ass'n v. Solimo*, 501 U.S. 104, 112 (1991) ("we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof").

What's more, all the pretext-to-future-advertising caselaw can ultimately be traced back to one source: the FCC's 2006 interpretive rule. An agency's interpretation of a statute, however, cannot expand a statutory prohibition beyond its terms. *Perez*, 575 U.S. at 103 ("[i]nterpretive rules do not have the force and effect of law"). The "foundational" principle of judicial independence is that "it is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "When the meaning of a statute [is] at issue, the judicial role [is] to 'interpret the act of Congress'"—not apply the interpretation of an agency—"'in order to ascertain the rights of parties.'" *Id.* (quoting *Decatur v. Paulding*, 29 U.S. 497, 515 (1840)). The Fourth Circuit's reasoning conflicts with this fundamental principle: its analysis gives short shrift to the statutory text Congress wrote and instead applies the FCC's pretext theory that has been laundered through past precedent. This Court should grant certiorari and reverse.

III. This Case Is an Ideal Vehicle to Address an Important Issue that Raises Serious First Amendment Concerns.

Addressing the question presented is important. To start, the divide among circuits on how to interpret federal law creates an untenable situation in which the same provision creates different rights and obligations for people depending on whether they live in Illinois or Virginia. Only this Court can clean up this circuit split, and this case is an ideal vehicle for this Court to do just that. Moreover, the pretext theory

adopted by one side of the split will generate serious practical problems for TCPA litigation, counseling in favor of addressing the issue now. And finally, the opinion below sets the TCPA on a collision course with the First Amendment.

1. This petition allows the Court to cleanly address a clear circuit split. Because this case arises from the grant of a motion to dismiss, there are no factual disputes. Resolution of the issue in Petitioners' favor would be outcome-determinative. *See, e.g.*, *Gamache v. California*, 131 S. Ct. 591, 593 (2010) (Sotomayor, J., respecting denial of certiorari) (looking to whether an alleged error was outcome-determinative). And the Third, Fourth, and Seventh Circuits reached conflicting results based on are virtually indistinguishable facts. The Third and Seventh Circuits both held that the TCPA allows companies to send faxes inviting recipients to attend continuing education seminars. *Ambassador Animal Hosp.*, 74 F.4th at 831; *Millennium*, 58 F.4th at 96. In the Fourth Circuit, in contrast, sending such faxes exposes a company to potentially devastating TCPA liability. App.4-6.

Confirming the need for review, parties on *both* sides of the issue recognize that a split exists and that it warrants the Court's attention. In *Ambassador Animal Hospital*, the plaintiffs petitioned for a writ of certiorari on this question. *See* Cert. Petition, *Ambassador Animal Hospital, Ltd. v. Elanco Animal Health Inc.*, No. 23-552 (U.S. Nov. 20, 2023). The Court requested a response. *See* Order, *Ambassador Animal Hosp.*, No. 23-552 (U.S. Jan. 3, 2024). In its brief in opposition, the respondents did not contest the

existence of a split but argued that it was not clear that the split between the Seventh Circuit, Third Circuit, and Second Circuit would last. BIO, *Ambassador Animal Hosp.*, No. 23-552 (U.S. Mar. 1, 2024). The respondents pointed out that the "Second Circuit's 2017 decision in *Boehringer Ingelheim* … appears to have incorrectly assumed that the FCC's 2006 Order is a binding legislative rule," and that "this Court's subsequent decision in *PDR Network* … cast serious doubt on that assumption." *Id.* at 16. Because it was unclear whether the Second Circuit would reconsider *Boehringer* in light of this Court's precedent, granting certiorari then may have been premature. Now, it is not.

The Fourth Circuit's decision below adopts the FCC's pretext theory notwithstanding this Court's decision in *PDR Network,* confirming the split will persist *even if* the Second Circuit were to reconsider *Boehringer*. And the Fourth Circuit's decision following *Boehringer* also makes it far less likely that the Second Circuit will reconsider its precedent. The split is entrenched. And, absent this Court's intervention, it will persist.

2. By scrapping the bright-line rule embodied in the TCPA's text, the Fourth Circuit will create headaches for courts resolving these claims moving forward. The district court here highlighted that very problem: If liability exists "under some circumstances even where the commercial purpose does not appear on the face of the fax," then a court will be tasked with a "seemingly arbitrary exercise in 'line drawing'" to ascertain when liability exists and when it does not. App.34 n.4. For example, if the legality of a fax turns

on later conduct, how much advertising needs to occur at the free event to invoke the pretext theory? "[M]ust the company try to sell its products at the webinar in order to connect the fax to marketing purposes?" App.34 n.4. If a recipient sues before a free event occurs and the sender cancels the event, would there be no violation of the TCPA because no later advertising happened? "What if [a company] simply collects the contact information from webinar attendees for potential marketing months or years later?" App.34 n.4. Or what if a fax invites participants to attend a free webinar held at multiple times and advertisement occurs only at one of the webinar events? Would the same fax be deemed an unsolicited advertisement for some recipients and not for others?

These questions have already arisen, and there are no easy answers. Judges purporting to apply the same pretext-to-future-advertising theory have split over what it takes to meet this amorphous standard. In *Fulton*, for example, the majority allowed a TCPA claim to proceed where a fax invited recipients to submit information, and that information would be held in accordance with the sender's privacy policy. 962 F.3d at 886. It was enough, according to the majority, that the plaintiff "alleged that the fax was a pretext to obtain both participation in Defendants' proprietary database and consent … to send additional marketing faxes to recipients." *Id.* (quotation marks omitted). Judge Gibbons dissented. In her view, it is not enough to allege the mere possibility of later advertising. *Id.* at 892 (Gibbons, J., dissenting). To be a "pretext," in Judge Gibbons' view,

the "primary purpose" of the fax must be to later "solicit business or sales from" the recipients. *Id.*

The lack of clarity stems directly from appellate courts adopting a pretext theory that does not align with the TCPA's text. To avoid the morass of difficult legal questions that will inevitably arise when applying the pretext theory, this Court should clarify that the theory has no place in these sorts of claims.

3. The amorphous pretext theory also threatens to chill—or outright prohibit—protected speech. As the district court explained below, "Congress's choice of narrow language in the TCPA, restricting its prohibition to 'any material advertising the commercial availability or quality of any property, goods, or services,' may have intentionally sacrificed broader protection from uninvited faxes in favor of a clear, bright-line rule mindful of First Amendment principles." App.34 n.4. This Court's "commercial speech doctrine rests heavily on 'the common-sense distinction between speech proposing a commercial transaction … and other varieties of speech.'" *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 637 (1985) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). The TCPA's text is written against that backdrop to stay within the confines of this Court's commercial-speech doctrine. So whatever concerns may exist "about intrusive telemarketing practices," *Duguid*, 592 U.S. at 408, they cannot allow a court to expand the TCPA's text at the expense of the First Amendment.

The Fourth Circuit's decision here raises at least three different First Amendment concerns.

First, under the court's interpretation, liability for speech depends on the identity of the speaker. The court held that the plaintiff stated a claim because it alleged that the fax promoted a webinar that related to Petitioners' "for-profit business." App.4 (quotation marks omitted). The implication is that an identical fax inviting recipients to participate in an identical continuing education webinar would *not* expose a sender to liability if the sender were a nonprofit educational facility. Judge Agee's dissent highlighted this concern: "As other jurists have explained, the pretext theory impermissibly expands the meaning of 'unsolicited advertisement' as defined by the TCPA, providing a cause of action to nearly every recipient of a fax from a for-profit entity …." App.15. This Court has cautioned against treating speech differently "on the basis of the speaker's corporate identity." *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). The Fourth Circuit's decision, however, does just that.

Second, the court's interpretation is so broad that it could ban noncommercial speech. As Judge Agee highlighted in his dissent, under the majority's opinion, the TCPA's prohibition would apply "regardless of the content of the fax itself." App.15. There can be no dispute that, at times, speech relating to a for-profit business may also implicate core expression protected by the First Amendment. If a social-media platform, for example, were to send a fax promoting a "free speech online protest," this would presumably run afoul of the TCPA under the Fourth Circuit's analysis, as First Amendment protection for a social media company (or individuals who use its platform) is certainly relevant to its business. *Cf. Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2393

(2024); *Murthy v. Missouri*, 144 S. Ct. 1972, 1998 (2024) (Alito, J., dissenting). Yet it is difficult to imagine how an invitation to a political protest could possibly fall within the confines of commercial speech, even if the company planned to hoist a company banner at the event. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) ("Laws that burden political speech are … subject to strict scrutiny …." (quoting *Citizens United*, 558 U.S. at 340)).

And *third*, the Fourth Circuit's view that the TCPA facially prohibits companies from sending *any* unsolicited fax relating to its business will, in at least some circumstances, not pass First Amendment muster even under the commercial-speech doctrine. As this Court has repeatedly explained, "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,'" especially in fields such as "medicine and public health." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

In *Bolger v. Youngs Drug Products Corp.*, for example, this Court stressed the importance of "convey[ing] truthful information relevant to important social issues," even if that information is found in a commercial mailing. 463 U.S. 60, 69 (1983). In that decision, the Court held that a law prohibiting the mailing of unsolicited advertisements for contraceptives violated the First Amendment. *Id.* at 75. The Government's interests simply could not justify the "sweeping prohibition" on advertisements that barred not only "flyers promoting a large variety

of products" but also "informational pamphlets discussing the desirability and availability of prophylactics in general." *Id.* at 62, 75. Instead of heeding the TCPA's text to keep its prohibition focused on pure advertisements, the Fourth Circuit's interpretation has converted the TCPA into a similarly sweeping prohibition that will prevent valuable informational communications.

This Court has long held that "[f]ederal statutes are to be … construed as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). The Fourth Circuit instead departed from the TCPA's plain text in a way that creates serious constitutional doubt. With no real response to these First Amendment concerns, the Fourth Circuit brushed them aside as a "late-breaking suggestion." App.10. But these First Amendment concerns were squarely raised by the district court, App.34 n.4; by Petitioners in its initial appellate brief under a separate subsection entitled "Penalizing Noncommercial Speech Raises First Amendment Concerns," C.O.A. Dkt. 17 at 20-22; and in the supplemental brief requested by the Fourth Circuit, C.O.A. Dkt. 42 at 4-5. The question presented clearly implicates important constitutional concerns. This Court should grant review.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

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