No. 24-327

IN THE

Supreme Court of the United States

PULSE8, LLC, *et al.*,

Petitioners,

v.

FAMILY HEALTH PHYSICAL MEDICINE, LLC,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In deciding whether a one-page fax constitutes "material advertising the commercial availability or quality of any property, goods, or services" under the TCPA, 47 U.S.C. § 227(a)(5), must a court limit its analysis to the four corners of the document, or should the court also consider objective well-pled facts, such as "the nature of the sender's business," and reasonable inferences as to the purpose of the fax.

CORPORATE DISCLOSURE STATEMENT

Respondent Family Health Physical Medicine, LLC, is not a publicly held corporation. Family Health Physical Medicine, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This is a garden-variety TCPA case in which the Fourth Circuit held Family Health adequately stated a claim upon which relief could be granted and allowed the case to proceed beyond the pleadings stage on two of Family Health's four theories of liability. The Fourth Circuit did not hold that the Fax attached to the Complaint is an "advertisement" as a matter of law, nor did it decide any other element of Family Health's claim. There is no reason for this Court to grant review.

First, the question presented as stated by the petition is not actually presented here. The Fourth Circuit did not hold that a fax can be an "advertisement" even if it "do[es] not advertise the commercial availability or quality of any property, goods, or services if plaintiffs allege the possibility of later advertising," as claimed by the petition. (Pet. at i). The Fourth Circuit held, to the contrary, that the test it applied is "does 'the fax itself . . . indicate—*directly or indirectly*—to a reasonable recipient that the sender is promoting or selling some good, service, or property"? App.8. That is the same standard applied by all the circuits, even if there are differences in how the circuits have applied that standard.

Second, the circuit split claimed in the petition is illusory. The Fourth Circuit followed the Seventh Circuit in holding that a fax may plausibly be an "advertisement" under § 227(a)(5) if it "indirectly" advertises the commercial availability or quality property, goods, or services. App.8. Far from creating a circuit split, the Fourth Circuit applied the same rule of law as the Seventh Circuit. *Id.* Petitioner claims the Fourth Circuit

misapplied that standard to the facts of this case, but that is not a basis for certiorari.

Third, the Fourth Circuit's decision was correct. The Complaint alleges the Fax *indirectly* advertises Pulse8's coding software in two ways: (a) by inviting fax recipients to a free webinar where Pulse8 pitches its coding software (Respondent's Second Theory of Liability); and (b) by requiring a fax recipient to consent to receiving promotional materials about Pulse8's products in order to attend the free webinar (the Third Theory of Liability). The "indirect" advertisement reasoning is not unique to the Fourth Circuit, and there is no conflict among the circuits warranting this Court's review.

STATEMENT

A. District Court Proceedings.

On August 17, 2021, Family Health, a chiropractic clinic in Ohio, filed this action against Pulse8 under the TCPA, with the operative Complaint refiled on August 18, 2021. App. 40. Family Health alleged that Pulse8 sent Family Health and a class of others "unsolicited advertisements" via fax in violation of the TCPA, 47 U.S.C. § 227(b)(1)(C), including a fax on or about August 13, 2020, which is attached to the Complaint as Exhibit A (the "Fax"). App. 57. The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services. . . ." 47 U.S.C. § 227(a)(5).

The Fax invites recipients to attend a "Monthly Webinar Series," entitled "Open your Mind to Behavioral

Health Coding." *Id.* The Fax states that attendees of the webinar can "Expand 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." (*Id.*) The Fax provides a link to register for the webinar at "https://pulse8.zoom.us Click Public Event List and search by webinar title." *Id.*

The Complaint alleges that Pulse8's for-profit business includes selling health-care "providers" like Family Health a "suite of uniquely pragmatic solutions" designed to "increase revenues" and "contain costs," including Pulse8's "Coding Technology" for use in obtaining insurance reimbursement. App.44 ¶ 14. The Complaint alleges that the Fax is an "advertisement" because the "Behavioral Health Coding" webinar offered in the Fax "relates to Defendants' for-profit business" of selling Pulse8's Coding Technology to providers like Family Health. App.46 ¶ 18.

In addition, the Complaint alleges that the Fax is an advertisement because registering for the webinar requires attendees to agree to Pulse8's "Terms and Privacy Policy," which states that "We may also use your personal data to deliver information to you that, in some cases, is targeted to your interests, new services *and promotions*." App.46 ¶ 19 (emphasis added). The Complaint alleges Pulse8 sent the Fax and similar faxes to Family Health and "at least forty" other class members. App.49 ¶ 27.

The district court dismissed Family Health's Complaint solely on the basis that it failed to adequately plead the Fax was an "advertisement." App.39. The district

court reasoned that the Fax is not an advertisement because it does not offer to sell anything to the recipient, largely following the district court's decision in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. CV 3:15-14887, 2022 WL 386097, at *1 (S.D.W.Va. Feb. 8, 2022) ("*PDR Network V*").[1] App.38.

B. Fourth Circuit Proceedings.

Family Health timely appealed the district court's dismissal for failure to state a claim. During the pendency of the appeal, the Fourth Circuit issued its decision in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 475 (4th Cir. 2023) ("*PDR Network VI*"), which also involved the proper interpretation of "unsolicited advertisement" in § 227(a)(5). Following the decision in *PDR Network VI*, the Fourth Circuit held oral argument in this case and issued its decision addressing the four theories of liability in Family Health's Complaint, affirming the dismissal as to two theories and reversing as to two theories. App.4–14.

First Theory of Liability. The Fourth Circuit affirmed the dismissal as to Family Health's theory that the Fax is an advertisement because it "makes known" or "calls

1. The decision in *PDR Network V* followed a string of decisions from the Fourth Circuit and this Court. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018) ("*PDR Network II*") (reversing district court's dismissal); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019) ("*PDR Network III*") (vacating and remanding to Fourth Circuit for further proceedings); *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258 (4th Cir. 2020) ("*PDR Network IV*") (remanding to district court).

public attention to" (*i.e.*, "advertises") a "service" (*i.e.*, the free webinar). App.4. The court held this theory was foreclosed by *PDR Network VI*, 80 F.4th at 472–73, which recognized that while the word "advertise" *can* in some contexts mean only "to call attention to something," the context of § 227(a)(5) requires a "commercial component" or a "commercial nexus" between the fax and the sender's business. *Id.*

Second Theory of Liability. The Fourth Circuit held that Family Health adequately stated a claim on its Second Theory of Liability: that the Fax advertises the commercial availability or quality of property, goods, or services "because it promoted a webinar that 'relate[d] to [Pulse8's] for-profit business'—selling software containing medical coding technology." App.4–5. "In other words," the court held, "the complaint alleged that the webinar was being used to market Pulse8's product." *Id.*

The court held "it is reasonable to draw the inference in Family Health's favor—as we must at this stage—that Pulse8 sent the fax 'hop[ing] to persuade" recipients to use Pulse8's products." App.6 (quoting *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017)). The court held that, at the pleading stage, "Family Health is entitled to the plausible inference that Pulse8—a company in the business of providing 'Coding Technology'—was using a free webinar about 'Behavioral Health Coding' to demonstrate just how useful its own coding technology can be." App.9.

In so ruling, the court refused to "blind" itself "to the nature of Pulse8's business," as alleged in the Complaint. App.9. The court emphasized, however, that

"this litigation remains in its early stages," and Family Health's allegations may not ultimately "be borne out by discovery." App.14 (quoting *PDR Network VI*, 80 F.4th at 478; *Robert W. Mauthe, M.D., P.C. v. Millennium Health LLC*, 58 F.4th 93, 94, 96–97 (3d Cir. 2023) (per curiam) (affirming a grant of summary judgment for the defendant where the evidence revealed that a free seminar promoted in a fax did not promote any good, services, or property)).

Third Theory of Liability. The Fourth Circuit concluded the Complaint plausibly alleged that the Fax constitutes "material advertising the commercial availability or quality of any property, goods, or services" under § 227(a)(5) because, in order to accept the free webinar discussed in the Fax, Family Health was required to consent to receive future promotional materials from Pulse8. App.4, 11. The court held that because "[a]cceptance of" the invitation to the free webinar was "leveraged into an opportunity for a sales pitch" in future promotional messages, the Fax had the requisite "commercial nexus" to Pulse8's business to survive a motion to dismiss. *Id.*

Fourth Theory of Liability. Finally, the court rejected Family Health's theory that the Fax was an advertisement because it offered a chance to win an Amazon gift card in exchange for taking a survey. App.12. The court held that there was no allegation that Pulse8 was "in the business of selling Amazon gift cards or buying survey data," and so there was no commercial nexus alleged.

REASONS FOR DENYING THE PETITION

The petition claims there is a circuit split between the Second, Fourth, 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," and the Third and Seventh Circuits, which "rejected the pretext theory as inconsistent with the statute's plain text." (Pet. at 13–14). This split is illusory, and any minor differences between how the circuits apply the statutory definition of "unsolicited advertisement" in § 227(a)(5) are not worthy of this Court's review.

I. No circuit requires the court to put on "evidentiary blinders," and any disagreement among the circuits in applying the statute is minor.

The main flaw in the petition is that the Seventh Circuit's decision in *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829 (7th Cir. 2023), did not adopt the cramped four-corners-of-the-fax-itself test that Pulse8 ascribes to it. (Pet. at 20–21). Instead, the Seventh Circuit 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." *Ambassador Animal Hosp.*, 74 F.4th at 832 (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 Seventh Circuit explained that a fax might "qualify as an indirect advertisement" if it "said something like . . . 'RSVP for a free event hosted

by [the sender] on the best medication available for canine osteoarthritis.'" *Id.* Whether such a fax would constitute an indirect advertisement necessarily depends on consideration of extrinsic matter, such as whether the sender sells a canine osteoarthritis medication. The Seventh Circuit's example would thus have made little sense if the decision categorically forbade consideration of matter outside the four corners of the fax itself, as the petition 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. Labs., 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 under § 227(a)(5). *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. 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). The Fourth Circuit's prior precedents similarly 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) ("*PDR Network II*") (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.3dat 225; *PDR Network II*, 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 *Ambassador Animal Hosp.* that whether a fax is an advertisement under § 227(a)(5) is judged using an objective standard, not based on the sender's purpose. 74 F.4th at 832. That holding is consistent with the Fourth Circuit's decision in this case, which agrees that "the inquiry turns on *objective* facts: the content of the fax and its 'commercial nexus' with the sender's business." App.7; *see also PDR Network VI*, 80 F.4th at 476 (holding sender's motives cannot transform "a purely informational fax" into an unsolicited advertisement); *Sandusky*, 788 F.3d at 225.

Thus, while there are some differences in the way in which courts have characterized the TCPA analysis, those differences are both narrower and less clear than Pulse8 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").[2]

2. For example, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 885-86 (6th Cir. 2020), the court likely would have reached the same result based solely on the content of the fax, which touted a service the sender was paid to

Nor does the decision below conflict with *Robert W. Mauthe MD PC v. Millennium Health LLC*, 58 F.4th 93, 97 (3d Cir. 2023). That case was decided at summary judgment, not on a motion to dismiss, and the evidence gathered in discovery showed that "[n]either the presenter nor the slides discussed" at the free seminar contained "pricing for goods or services offered by Millennium Health," and "[e]ven after the seminar, Millennium Health did not contact seminar registrants or attendees to follow up about the drug-testing services discussed at the seminar." *Id.* at 97. Based on this record, the Third Circuit held there was no genuine issue of material fact that the fax was not an "advertisement" because "nothing about the free seminar would lead a reasonable recipient of Millennium Health's fax to believe that it was an advertisement for goods, services, or property." *Id.* All the Fourth Circuit's decision in this case does is allow Family Health the same opportunity to obtain discovery and try to prove its claims that was afforded to the plaintiff in *Millennium Health*.

II. This case is a poor vehicle to decide the "advertisement" issue because the Complaint states a claim even without the "pretext" theory.

Even if this Court were to grant review on the "pretext" theory (Family Health's Third Theory of Liability), the district court's dismissal would still be properly reversed as to Family Health's Second Theory of Liability, which does not rely on a "pretext" theory. Thus, even if this

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offer. *See* 962 F.3d at 885–86. Under the Seventh Circuit's logic in *Ambassador Animal Hosp.*, the *Fulton* fax arguably "indicate[d]" that the sender was promoting or selling some "commercially available" good, service, or property, even if the recipients were not the intended purchasers. 74 F.4th at 832.

Court were to adopt Pulse8's preferred interpretation of § 227(a)(5), there is no reason to believe that the case would come out differently; the district court's dismissal would still be reversed, and Family Health's claims could proceed beyond the pleading stage. 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).

If the Court were to consider reviewing the viability of the "pretext" theory, it should wait to do so in a case where that is the sole basis on which the complaint survives dismissal.

III. The petition does not implicate the Hobbs Act question currently before the Court in *McLaughlin*.

The petition (at 2) states that it "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 question on which the Court granted certiorari, but did not ultimately answer, in *PDR Network* was "[w]hether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act." *Id.* at 6. Two weeks after Pulse8 filed its petition, the Court granted certiorari to resolve that precise question in *McLaughlin Chiropractic Assocs. v. McKesson Corp.*, No. 23-1226, *cert. granted* 2024 WL 4394119 (U.S. Oct. 4, 2024). The Hobbs-Act issue is squarely presented in *McLaughlin*, but it is not presented in this case.

Here, the Fourth Circuit did not rely on any FCC interpretation in reaching its decision. App.4–12. Nor did the court hold that it was required by the Hobbs Act to follow the FCC's interpretations. *Id.* The Fourth Circuit did not mention any FCC ruling or the Hobbs Act. *Id.*

Moreover, the Fourth Circuit held on remand from *PDR Network* that the FCC ruling that the petition claims the Fourth Circuit followed *sub silentio* in this case—the 2006 ruling regarding faxes offering "free goods or services"—is a non-binding interpretive rule. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 263 (4th Cir. 2020) ("*PDR Network IV*"). The petition fails to explain how the Fourth Circuit could have treated the 2006 ruling as binding, thus implicating the question before the Court in *McLaughlin*, without so much as mentioning the rule or its subsequent holding in *PDR Network IV* that the rule is not binding.

Even if the *McLaughlin* question was implicated here, threshold questions about the status of the 2006 rule would make this case a particularly poor vehicle for addressing the question. In order to reach that issue, this Court would need to first wade through the same antecedent questions that frustrated review in *PDR Network*, including whether the ruling is legislative or interpretive and whether Pulse8 had a prior and adequate opportunity to seek review. This case thus presents the same obstacles that led the Court to remand in *PDR Network*.

This case is also a poor vehicle because the Fourth Circuit did not address those threshold issues in applying its prior precedents interpreting the term "advertisement." 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* 588 U.S. at 7-8; *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").

Finally, even if the Hobbs Act question were arguably present here, there is no good reason the Court should grant review to decide an issue in a case where it is only tangentially presented and where the Court has already granted review to decide the issue in a case where it is directly presented. To the extent Pulse8 seeks review of the same question that is before the Court in *McLaughlin*, the petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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