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

REPLY BRIEF FOR PETITIONERS

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REPLY

This case meets all of the Court's criteria for review. The Fourth Circuit's decision entrenches an acknowledged circuit split, defies the plain meaning of federal law, and raises important First Amendment concerns. By reading the Telephone Consumer Protection Act (TCPA) to prohibit sending not only unsolicited advertisements to fax machines, but also any fax on any topic that might open the door to *later* advertising, the court stretches the TCPA beyond recognition.

Respondent's brief in opposition all but concedes that review is appropriate. Respondent does not meaningfully defend the Fourth Circuit's analysis. Nor does Respondent dispute that the decision creates an unmanageable standard and raises serious First Amendment problems. As to the circuit split, Respondent acknowledges that "there are differences in how the circuits have applied th[e]" TCPA, BIO 1, "differences in the way in which courts have characterized the TCPA analysis," *id.* at 9, and "varying formulations" of the relevant statutory standard, *id.* Respondent suggests that "those differences are both narrower and less clear than Pulse8 asserts," *id.*, but Respondent's efforts to gloss over the circuits' differing approaches cannot be squared with what the courts' opinions actually say.

Respondent principally contends that the circuit split may not "yield meaningfully different results in practice." BIO 9. This case proves otherwise. A complaint like this one that alleges receipt of a fax promoting a free educational seminar on a subject matter related to the sender's business would state a

TCPA claim in the Second and Fourth Circuits, *Physicians Healthsource Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2d Cir. 2017); App.4–10, but not in the Third and Seventh Circuits, *Robert W. Mauthe MD PC v. Millennium Health LLC* (*Millennium*), 58 F.4th 93 (3d Cir. 2023) (per curiam); *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829 (7th Cir. 2023). This case is thus an ideal vehicle for addressing the question presented and restoring uniformity in the interpretation of a federal statute. The Court should grant review.

I. The Fourth Circuit's Decision Deepens an Acknowledged Circuit Split.

The Fourth Circuit's decision is in "clear conflict" with decisions from other circuits. App.20 (Agee, J., dissenting). Even Respondent concedes that there are "differences in the way in which courts have characterized the TCPA analysis" and "differences in how the circuits have applied that standard." BIO 1, 9. The reason why courts have characterized the TCPA's standard differently and applied it in different ways is because they are at odds with one another over the statute's proper interpretation and scope.

The circuits are starkly divided on whether a fax itself must qualify as an unsolicited advertisement or whether subsequent advertising can turn a fax into an unsolicited advertisement. The Second, Fourth, and Sixth Circuits have all interpreted the TCPA expansively to adopt the pretext-to-future-advertising theory, holding that the TCPA requires consideration of not only the fax itself but also "what c[o]me[s] after the fax." *Matthew N. Fulton, D.D.S., P.C. v. Enclarity,*

Inc., 962 F.3d 882, 889 (6th Cir. 2020); *Boehringer*, 847 F.3d at 95; App.6, App.11. In contrast, the Seventh Circuit has held that the TCPA "asks whether the content of a fax advertises the commercial availability or quality of a thing." *Ambassador Animal Hosp.*, 74 F.4th at 831. And the Third Circuit has similarly adopted an approach that looks at whether "[t]he fax itself" discusses "anything that can be bought or sold." *Millennium*, 58 F.4th at 96; *see also Robert W. Mauthe, M.D., P.C. v. Nat'l Imaging Assocs., Inc.*, 767 F. App'x 246, 250 (3d Cir. 2019) ("We want to make clear that we do not suggest that we endorse the pretext theory of liability under TCPA.").

Respondent contends that the inter-circuit disagreement is overblown because the Seventh Circuit acknowledged that an advertisement can "directly *or indirectly* allude[] to the commercial availability or the quality of [the sender's] products." BIO 7 (quoting *Ambassador Animal Hosp.*, 74 F.4th at 832). But the Seventh Circuit clarified that "indirect" advertising does not encompass *subsequent* advertising conduct: instead "the fax *itself* must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property." *Ambassador Animal Hosp.*, 74 F.4th at 832 (emphasis added). Applying this interpretation, the Seventh Circuit rejected a TCPA claim based on a fax inviting recipients to attend a continuing education program where the plaintiff alleged that "the free educational dinners were a ploy to advertise [the defendant Elanco's] products and services." *Id.* at 831.

The Seventh Circuit's examples of indirect advertising underscore the court's understanding that the fax itself must do the advertising to fall within the TCPA's reach. "[T]here could be situations in which a similar fax message would qualify as an indirect advertisement—perhaps if Elanco had said something like 'Join us for a free dinner discussion of how Alenza [Elanco's product] can help manage canine inflammation' or 'RSVP for a free event hosted by Elanco on the best medication available for canine osteoarthritis.'" *Id.* at 832. In both scenarios, the hypothetical fax does more than invite the recipient to a free event; it promotes Elanco's commercial product. Without "that promotional aspect," however, a fax inviting recipients to attend an educational program on a "subject matter related to Elanco's business" is not covered by the TCPA. *Id.*

Respondent also tries to downplay the conflict with the Third Circuit because that decision reviewed a grant of summary judgment. BIO 10. But Respondent ignores that the district court "considered only the fax itself" in granting summary judgment and "did not evaluate whether the free seminar was a pretext for advertisement." *Millennium*, 58 F.4th at 95. The Third Circuit affirmed. A fax inviting recipients to attend a free educational seminar on opioid misuse and the role of medication monitoring could not be viewed "as promoting the purchase or sale of goods, services, or property," even though the sender "offered one type of urine testing that could detect opioids." *Id.* at 94–96. As the court explained, "[n]owhere in the fax is a discussion of anything that can be bought or sold—the fax speaks only about a *free* event." *Id.* at 96. The Third Circuit went on to note

that, even if the pretext theory were valid, it would not apply because "the free, educational seminar did not involve any … solicitation." *Id.* at 97. But the court never adopted the pretext theory and instead expressly held that the district court "correctly concluded that the free-seminar fax was not an unsolicited advertisement under the TCPA." *Id.*; *see also id.* at 104 (Phipps, J., concurring) (explaining that the "[Federal Communications Commission's] free-seminar pretext theory" is "in contravention of statutory text" and "has no legal effect").

Despite the clear split, Respondent nonetheless attempts to minimize the courts' "varying formulations" by arguing that they might not "yield meaningfully different results in practice." BIO 9. But the decisions that make up the split refute that claim. The cases involve materially identical faxes, and the courts reached different results. The outcome in *Boehringer* and this case are different from the outcome in *Ambassador Animal Hospital* and *Millennium*, even though all four cases involved faxes inviting recipients to attend free educational seminars or dinner talks on subject matters related to the sender's business. The Third and Seventh Circuits rejected those TCPA claims. *Millennium*, 58 F.4th at 96; *Ambassador Animal Hosp.*, 74 F.4th at 830, 832–33. In contrast, the Second and Fourth Circuits allowed the claims to proceed. *Boehringer*, 847 F.3d at 95–96; App.4–6.

Respondent is unable to muster any explanation for why the outcomes of those cases differed. Nor does Respondent attempt to address the dissent's conclusion that there is a "clear conflict" between the

circuits. App.17–20 & n.2. The reason why the courts of appeals have reached different results in similar cases is straightforward: the circuits are divided on how to interpret the TCPA. Only this Court can resolve that divide.

II. The Fourth Circuit's Decision Is Wrong.

The Fourth Circuit's decision is on the wrong side of the split. Pet. 23–25. In a single sentence, Respondent dutifully professes that the decision below was correct. BIO 2. But Respondent never attempts to explain how the Fourth Circuit's decision can be reconciled with the statutory text.

As Petitioners explained, the TCPA prohibits the sending of "unsolicited advertisements" to fax machines and defines the term "unsolicited advertisement" as "any *material* advertising the commercial availability or quality of any property, goods, or services … transmitted" without consent. 47 U.S.C. § 227(a)(5), (b)(1)(C) (emphasis added). As Respondent concedes, the Fourth Circuit did not rely on the relevant *material* transmitted via fax to find an advertisement; it relied exclusively on the possibility of later advertising. Specifically, the court concluded that Pulse8 might have "pitche[d] its coding software" at the "free webinar" and Pulse8 might have sent "promotional materials about Pulse8's products" to webinar attendees. BIO 2. That approach is irreconcilable with the statutory text, and it drastically and impermissibly "expands the meaning of 'unsolicited advertisement' as defined by the TCPA." App.15 (Agee, J., dissenting).

III. This Case Is an Ideal Vehicle to Address the Important Question Presented.

The question presented is important. The Fourth Circuit's atextual rule is unmanageable and raises serious First Amendment concerns. Pet. 25–32.

Respondent does not offer any guidance on how courts should apply the rule adopted by the Fourth Circuit. Respondent ignores altogether the questions expressly raised by the district court and necessarily raised by the Sixth Circuit's divided application of the pretext rule: How much subsequent advertising is required to trigger TCPA liability? Must future solicitation be the primary purpose of the fax or just one purpose? What happens if the sender changes plans and cancels previously planned advertising at the event? *Compare Matthew N. Fulton, D.D.S., P.C.*, 962 F.3d at 888–91 with *id.* at 892 (Gibbons, J., dissenting) (disagreeing on application of pretext theory); *see also* App.34 n.4. Respondent's inability to answer even basic questions about how the pretext-to-future-advertising theory would apply in practice is further reason to grant review.

Nor does Respondent dispute or grapple with the serious First Amendment concerns implicated by the court's decision. The Fourth Circuit's interpretation of the TCPA risks unconstitutionally imposing liability for speech based on the identity of the speaker, barring noncommercial speech, and prohibiting commercial speech that warrants First Amendment protection. Pet. 29–32. Unable to provide any assurance to the Court, Respondent simply omits any mention of the First Amendment.

Rather than confront those serious concerns, Respondent instead argues in a single paragraph that this case is a poor vehicle because the question presented is not outcome determinative. Specifically, Respondent contends that part of the Fourth Circuit's analysis—the "Second Theory of Liability"—did not rest on the pretext theory. BIO 10–11. But Respondent provides no explanation for that assertion, and it is wrong. As Judge Agee explained in dissent (without objection from the majority), both "the complaint's second and third theories of liability … are premised on the pretext theory." App.18.

Respondent's own description of the "Second Theory of Liability" (at 5) confirms as much. Under that theory, the Fourth Circuit concluded that the fax, which invited recipients to a free webinar, was an unsolicited advertisement based on the complaint's allegations "that the webinar was being used to market Pulse8's product." BIO 5 (quoting App.4–5). That is a "prototypical" example of the "pretext to future advertising" theory: the fax "allegedly invite[s] [recipients] to a free … seminar at which they would be solicited for sales by the … company that sent the fax." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 478 (4th Cir. 2023). Indeed, the Federal Communications Commission (FCC) used exactly this circumstance to exemplify the pretext-to-future-advertising theory. The FCC determined that it was "reasonable to presume" that faxes "that promote goods or services even at no cost … are unsolicited advertisements" because "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products and services." Rules and Regulations Implementing the Telephone

Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006); *compare with* App.7 (concluding that the second theory of liability stated a claim because "it is reasonable to infer that a company that invites you to a free webinar on a subject related to its business intends to promote its products during that event" (cleaned up)). Because the Fourth Circuit relied exclusively on subsequent advertising to conclude that Respondent adequately alleged a TCPA claim, this case is an ideal vehicle to address the question presented.[1]

With nothing else to say, Respondent embarks on a bizarre detour to argue that this petition does not implicate the Hobbs Act question before the Court in *McLaughlin Chiropractic Associates v. McKesson Corp.*, No. 23-1226, 2024 WL 4394119 (U.S. Oct. 4, 2024) (cert. granted). BIO 11–13. In *McLaughlin*, this Court granted certiorari to review the Ninth Circuit's decision that the Hobbs Act requires district courts to apply the FCC's interpretation of the TCPA found in an FCC order. Question Presented, No. 23-1226. The FCC order at issue interpreted a different definition in

[1] In addition to the "second theory of liability," the Fourth Circuit determined that the complaint stated a claim based on the "third theory of liability," which alleged that fax recipients had to consent to receive future promotional material to register for the free webinar. *See* BIO 6 (capitalization omitted); App.11–12. As Respondent concedes (at 10), this holding is also based on the pretext theory: Although the fax itself only invited recipients to a free educational webinar, the fax would be deemed an unsolicited advertisement because of allegations that a recipient who registered for the webinar might later be sent separate materials that contain advertisements for Pulse8's products.

the TCPA (of "telephone facsimile machine") and determined that it does not extend to online fax services (as opposed to traditional fax machines). *In re Amerifactors Fin. Grp., LLC*, 34 FCC Rcd. 11950, 11950–51 (2019). Petitioners agree with Respondent that the *McLaughlin* question has nothing to do with this case. The question presented here is independent from *McLaughlin*, and it separately warrants review.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

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