No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR"), who were appellees below and defendants in the district court.

Respondent is Carlton & Harris Chiropractic, Inc. ("Carlton & Harris"), the appellant below and the plaintiff in the district court. Carlton & Harris has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENT

Respondent, Carlton & Harris, respectfully requests that this Court dismiss this appeal as improvidently granted or, in the alternative, affirm the judgment of the United States Court of Appeals for the Fourth Circuit on the merits.

STATEMENT

On November 10, 2015, Carlton & Harris, a chiropractic clinic in West Virginia, filed this lawsuit alleging that PDR sent it and a class of others "unsolicited advertisements" in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C), and the implementing regulations issued by the Federal Communications Commission ("FCC"), 47 C.F.R. § 64.1200(a)(4), including a fax on December 17, 2013 (the "Fax").

The Fax is addressed to "Practice Manager" from "PDR Network" and offers a "FREE 2014 Physicians Desk Reference eBook." (Pet. App. 51a). Fine print at the bottom of the Fax states: "To opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax, call 866-469-8327. You are receiving this fax because you are a member of the PDR Network." (*Id.*) Carlton & Harris's Complaint seeks the relief authorized by the TCPA's private right of action, 47 U.S.C. § 227(b)(3), consisting of statutory damages of $500 to $1,500 per violation and injunctive relief. (Pet. App. 47a–48a).

On February 5, 2016, PDR moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). PDR did not dispute that Carlton & Harris adequately alleged the Fax was "unsolicited"—meaning it was sent without Carlton & Harris's "prior express invitation or permission," 47 U.S.C. § 227(a)(5)—but it argued that the Fax is not an "advertisement" as a matter of law because it "does not offer anything for purchase or sale," instead offering a "free" copy of the 2014 eBook. (Pet. App. 33a).

On March 4, 2016, Carlton & Harris filed its opposition to the motion to dismiss, arguing that the FCC issued a final order in 2006 interpreting the term "unsolicited advertisement" in 47 U.S.C. § 227(a)(5), and ruling that "facsimile 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." (Pet. App. 49a; *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3814 ¶ 52 (Apr. 6, 2006) ("2006 Order")). Carlton & Harris explained that the FCC found that faxes offering free goods or services are "[i]n many instances" and "often" a mere "pretext" to further advertising or part of an "overall marketing campaign," and so it is "presume[d] that such messages describe the 'quality of any property, goods, or services,'" under 47 U.S.C. § 227(a)(5). (*Id.*)

Carlton & Harris argued that (1) the FCC's ruling is binding in district courts under the Hobbs Act, 28

U.S.C. § 2342(1), which provides that "exclusive jurisdiction" to "determine the validity of" a final order of the FCC lies in the court of appeals; and (2) that the plain language of the 2006 Order states that a fax offering free goods or services, like the Fax offering a free PDR e-book, is an "advertisement," and thus subject to the TCPA and the FCC regulations. (Pet. App. 39a–40a). Carlton & Harris argued that, to the extent PDR was arguing the district court should not accept the FCC's interpretation on the basis that it is inconsistent with the statute, the rule could not be challenged outside of a Hobbs Act petition. (ECF No. 28, Pl.'s Resp. Mot. Dismiss at 3).

On March 18, 2016, PDR filed its reply in support of its motion to dismiss, arguing that the Hobbs Act was irrelevant because it was "not asking [the] Court to ignore the 2006 Order, . . . or suggesting that it should decline to 'adopt' FCC regulations on the basis they are 'unreasonable.'" (ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 3). To the contrary, PDR insisted that it was "ask[ing] the Court to apply the [FCC] ruling," but to "interpret" it to mean that a fax offering free goods or services must be a "pretext" in fact to be an advertisement, rather than creating a *per se* rule, as Carlton & Harris argued. (*Id.* at 2).

On September 30, 2016, the district court granted PDR's motion to dismiss. First, the district court held that because the statutory definition of "advertisement" is "clear," it need not "defer to" the "FCC's interpretation of the TCPA" under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984). (Pet. App. 40a). The district court reasoned that the statutory definition unambiguously requires a fax to have a "commercial aim" to be an advertisement, and so it would "decline[] to defer to the FCC's interpretation." (Pet. App. 42a).

Second, the district court held that, "even if the Court were to defer to the FCC's interpretation," the 2006 Order states that a fax must "promote" free goods or services to be an advertisement, and *promote* has "an explicit commercial nature," which it concluded was lacking in the Fax offering the free PDR e-book, making it not an "advertisement" under the district court's interpretation of the 2006 Order. (Pet. App. 40a–41a).

Carlton & Harris timely appealed to the Fourth Circuit, and the Fourth Circuit vacated the district court's dismissal. (Pet. App. 18a). The Fourth Circuit's decision is reported at *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018).

First, the Fourth Circuit held that "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and the district court had "no power to decide whether the FCC rule was entitled to deference." (Pet. App. 8a, 11a). The Fourth Circuit noted that the type of "jurisdiction-channeling" provision contained in the Hobbs Act is "nothing unique," and joined the Sixth, Seventh, Eighth, and Eleventh Circuits in holding that "[b]y refusing to defer to the FCC rule and applying

Chevron analysis instead, the [district] court acted beyond the scope of its congressionally granted authority." (*Id.* 8a–9a).

Second, having held that the 2006 Order was binding, the Fourth Circuit considered its meaning, holding that the FCC's ruling that faxes offering "free goods or services" are advertisements is "clear and unambiguous," and "if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." (*Id.* 14a). The Fourth Circuit held that "[f]rom a natural reading of the text of the regulation, we get this simple rule: faxes that offer free goods and services are advertisements under the TCPA." (*Id.*) The Fourth Circuit held "[w]e need not 'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale," and that "[b]ecause the plain meaning of the regulation is clear, our interpretive task is complete." (*Id.*)

The Fourth Circuit held that "although we do not reach the FCC's intent in enacting the rule," it was "reasonable" for the agency to classify all faxes offering free goods or services as "advertisements." (*Id.* 16a). The Fourth Circuit held the district court's focus on the word "commercial" in the statutory definition "takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models." (*Id.* at 17a). The Fourth Circuit reasoned that "[t]his case illustrates why the FCC may have decided to implement so broad

a rule," where Carlton & Harris's Complaint was dismissed without any discovery, where "few details of PDR Network's business model have emerged," and where "nothing in the record suggests that PDR Network is a charity" with some non-commercial motive for sending the Fax. (*Id.* 17a).

The Fourth Circuit vacated the judgment and "remand[ed] for further proceedings consistent with this opinion." (*Id.* 18a). PDR filed a petition for rehearing en banc, which was denied. (*Id.* 45a).

PDR petitioned this Court to review two questions: (1) whether the Hobbs Act requires a district court to defer to an FCC order interpreting the TCPA "even if there has been no challenge to the 'validity' of such order"; and (2) whether the Fourth Circuit properly interpreted the 2006 Order as "creat[ing] a *per se* rule" that faxes offering free goods or services "are automatically 'advertisements.'" (Pet. at iii).

On November 13, 2018, the Court entered an order stating, "[t]he petition for a writ of certiorari is granted limited to the following question: Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act."

SUMMARY OF ARGUMENT

PDR's primary argument in seeking certiorari was that there is a "circuit split" regarding the question presented. (Pet. at i–ii, 13–20). PDR's brief on the merits abandons that argument, neither mentioning

this supposed split, nor disputing the Fourth Circuit's holding that "[e]very other circuit to consider" the question presented has answered it in the affirmative. (Pet. App. 9a). To the extent this Court granted certiorari to decide a split of authority over whether a district court is required to accept the FCC's interpretation of the TCPA, this appeal should be dismissed as improvidently granted. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001).

If the Court reaches the question presented, the answer is, yes, the district court was required to accept the FCC's legal interpretation of the TCPA. But this is a strange case in which to decide that question, given that PDR never argued that the district court should *not* accept the FCC's interpretation. Rather, PDR asked the district court to "accept[]" and "apply" the FCC's order, but "interpret[]" it in PDR's favor. (Pet. at 14, 21; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 2). As PDR noted in its petition, Carlton & Harris "argued for a specific interpretation of the 2006 FCC Rule," and PDR "argued for another interpretation." (Pet. at 17). The Fourth Circuit adopted Carlton & Harris's interpretation, and this Court denied certiorari on that issue.

Because PDR never before argued that the district court should not "accept" the FCC's interpretation, it makes sense that *none* of the arguments in PDR's brief were raised below. For example, PDR's brief argues for the first time that fax advertisers cannot be expected to challenge "unlawful TCPA regulations" by

petitioning the FCC to change its rules *before* undertaking their fax campaigns (PDR Br. at 28), and that the Hobbs Act does not provide an adequate means for a party to "challenge the validity of" the FCC's interpretations *after* the faxes have been sent (*id.* at 36). These arguments were never raised below because PDR never argued that the 2006 Order was "unlawful" and expressly stated that it did not "challenge the validity of" that order. Because PDR's new arguments were "never presented to any lower court," they are "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

If the Court considers PDR's new arguments, it should reject them. Defendants in TCPA actions have successfully sought relief using the Hobbs Act procedures. *See, e.g.*, *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018). The FCC is currently considering a petition from another TCPA defendant (Inovalon, Inc.) asking it to rule that the 2006 Order does not create a *per se* rule that faxes offering free goods or services are "advertisements." (*See* Section I.E, below). PDR did not comment on that petition, which would have given it "party aggrieved" standing allowing it to appeal from an adverse "final order" under the Hobbs Act, even without the burden of filing its own petition. *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Contrary to PDR's position, "[a] legal remedy is not inadequate" under the Administrative Procedure Act simply "because it is procedurally inconvenient" or because PDR would prefer to litigate an

issue in another forum. *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998).

In sum, the Court should dismiss this appeal as improvidently granted, or affirm the Fourth Circuit's judgment.

ARGUMENT

I. The Hobbs Act required the district court to accept the FCC's legal interpretation of the TCPA.

A. To the extent the Court granted certiorari to resolve PDR's claimed "circuit split" regarding the question presented, PDR has abandoned that argument and the appeal should be dismissed as improvidently granted.

PDR's petition argued there is a "circuit split" regarding whether the Hobbs Act requires a district court to accept the FCC's interpretations of the TCPA, claiming the Fourth Circuit's answer in the affirmative conflicts with *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015), *N.B. Indus. v. Wells Fargo & Co.*, 465 Fed. App'x 640 (9th Cir. 2012), and *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013). (Pet. at 13–20). Carlton & Harris explained why there is no such split (Br. Opp. at 7–15), and PDR has abandoned the argument.

PDR's merits brief does not mention the circuit split it claimed existed in its petition, and it does not cite two of the cases that formed the supposed split described in its petition: the Ninth Circuit's decision in *N.B. Industries* and the Seventh Circuit's decision

in *Holtzman*. (PDR Br. at 1–50). PDR cites the Sixth Circuit's decision in *Sandusky Wellness* only to argue that the Fourth Circuit in this case *misinterpreted* paragraph 52 of the 2006 Order as creating a *per se* rule that a fax offering free goods or services is an advertisement, not to argue that there is a split in authority over whether a district court is required to accept the FCC's interpretations. (*Id.* at 26; *id.* at 47, n.8). But that question—the meaning of paragraph 52 of the 2006 Order, the second question presented in PDR's petition—is the issue on which this Court *denied* certiorari.

Thus, to the extent the Court granted certiorari to resolve the circuit split described in PDR's petition regarding whether a district court is required to accept the FCC's interpretations of the TCPA, the appeal should be dismissed as improvidently granted. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001) (dismissing as improvidently granted, where "[i]t appeared at the certiorari stage that petitioner" was challenging one set of regulations, but petitioner's merits brief challenged a different set of regulations); *see also United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 855 (1996) (refusing to address argument abandoned by petitioner).

B. The plain language of the Hobbs Act bars a district court from determining the validity of a "final order" of the FCC, such as the 2006 Order.

The Administrative Orders Review Act, commonly known as the Hobbs Act, provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). With the addition of the Fourth Circuit's decision in this case, five circuits have unanimously held that, under the Hobbs Act, a district court has no power to question the validity of a final order of the FCC interpreting the TCPA, and must apply those interpretations in private TCPA litigation. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013) ("*Leyse II*"), *cert. denied*, 135 S. Ct. 57;[1] *C.E. Design,*

[1] The *Leyse II* decision superseded the Sixth Circuit's prior ruling in the case, which mistakenly ruled that the Hobbs Act did not bar the challenge to the regulation. *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 376 (6th Cir. 2012) ("*Leyse I*"). As discussed in greater detail in Section I.E, below, the Sixth Circuit reconsidered its prior opinion only after attorneys at the FCC fortuitously happened to learn of the *Leyse I* decision and petitioned the Sixth Circuit to grant rehearing.

Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

"The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommc'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (discussing the same Communications Act scheme). The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals as provided by statute." *FCC v. ITT World Commcn's, Inc.*, 466 U.S. 463, 468 (1984).

In 2006, the FCC issued an order that, among other TCPA-related rulings, interpreted the term "unsolicited advertisement" in 47 U.S.C. § 227(a)(5) to mean that "facsimile 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 re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3814 ¶ 52

(Apr. 6, 2006) ("2006 Order").[2] The FCC reasoned that, in its experience interpreting and enforcing the TCPA, such faxes are "[i]n many instances" and "often" a "pretext" to further advertising or part of an "overall marketing campaign," and so it is "presume[d] that such messages describe the '*quality* of any property, goods, or services,'" under 47 U.S.C. § 227(a)(5). (*Id.* (emphasis added)).

The Fourth Circuit held in this case that paragraph 52 of the 2006 Order means that the Fax PDR sent to Carlton & Harris offering a "free" copy of its 2014 e-Book is an "advertisement."[3] (Pet. App. 13a). As such, the Fax is subject to the statutory and regulatory rules governing fax advertisements.[4]

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[2] The FCC applies the same rule to prerecorded voice telephone calls. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 20 FCC Rcd. 3788, 3804 ¶ 39 (Feb. 18, 2005) (prerecorded "messages that promote goods or services at no cost are nevertheless unsolicited advertisements because they describe the 'quality of any property, goods or services'").

[3] The Second Circuit takes a different view, holding that paragraph 52 of the 2006 Order merely creates a "presumption" that a fax offering free goods or services is an advertisement. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 93 (2d Cir. 2017). This Court denied certiorari on this difference of opinion, which was the second question presented in PDR's petition for certiorari. (Pet. at 1).

[4] Notably, that PDR's fax is an "advertisement," even an "unsolicited advertisement," does not necessarily mean it was unlawful. Congress amended the statute in 2005 to allow the sending of fax advertisements, even in the absence of prior express invitation or permission, provided that (1) there is an "established

PDR's brief does not dispute that the 2006 Order is a "final order" of the FCC within the meaning of 28 U.S.C. § 2342(1). (PDR Br. at 1–50). Neither PDR's petition for certiorari, nor its reply in support disputed that the 2006 Order is a "final order." (Pet. at 1–32; Reply at 1–12).[5]

PDR conceded below that the 2006 Order is a "final order," arguing that Carlton & Harris was "conflat[ing] a challenge to the 2006 Order's *validity* (which is prohibited by the Hobbs Act) with a challenge to the 2006 Order's *applicability* to the facts of this case (which remains the 'province of the courts')."[6] (PDR Appellee's Br. at 21). In reaching its decision, the Fourth Circuit relied on the fact that "[n]either party has disputed that the 2006 FCC Rule

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business relationship" between sender and recipient; (2) the sender obtained the recipient's fax number in a permissible way, including "voluntary communication" of the number by the recipient; and (3) the fax includes a compliant "opt-out notice." *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, § 2, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)(i)–(iii)). The 2006 Order is not a "blanket ban" on faxes offering free goods or services, contrary to PDR's characterization. (PDR Br. at 11).

[5] If anything, PDR's reply concedes this point, arguing that the 2006 Order is subject to the "Hobbs Act" time limits for judicial review. (PDR Reply at 11). If the 2006 Order was not a "final order" under 28 U.S.C. § 2342(1), it would not be subject to those limits.

[6] At the district court hearing on PDR's motion to dismiss, PDR's counsel stated with respect to the issue of "whether [the 2006 Order is] dispositive," that "we don't really have a dispute on that." (ECF No. 39, Hr'g Tr., Sept. 29, 2016, at 7).

is the sort of 'final order' contemplated by the Hobbs Act." (Pet App. 7a, n.1).[7]

If there were any doubt on the question, PDR's petition for rehearing en banc did not dispute the panel's holding that the "final order" issue was uncontested, arguing that "the Hobbs Act—which provides a mechanism for judicial review of certain administrative orders—is *only* implicated if there is a challenge to the 'validity' of an agency order," and "[t]here was no such challenge here." (PDR Pet. Rehearing at 2).

Thus, at every stage in this case, PDR's position has been that the Hobbs Act does not apply here, not because the free-goods-or-services ruling in paragraph 52 of the 2006 Order is not a "final order" subject to the Hobbs Act's jurisdictional limitations, but because PDR "did not ask the District Court to set aside/ignore the FCC rule," and merely "argued for a specific interpretation" of the rule.[8] (*Id.* at 6).

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[7] One of PDR's amici, Professor Bamzai, agrees that the 2006 Order is a "final order" of the FCC under the Hobbs Act (*see* Bamzai Amicus Br. at 23), although he contends that a district court does not "determine the validity of" such an order by refusing to apply it on the basis that it conflicts with the statute, which is incorrect, as discussed in Section I.C.

[8] Again, this question—the *meaning* of paragraph 52 of the 2006 Order—is the question on which this Court denied certiorari.

C. When a district court declines to "accept" a final order of the FCC interpreting the TCPA on the basis that it conflicts with the statute, the court "determine[s] the validity of" the order in violation of the Hobbs Act.

Because the 2006 Order is a "final order" of the FCC, the only question under the Hobbs Act is whether a district court "determine[s] the validity of" such an order by refusing to "accept" it on the basis that it is inconsistent with the statute. PDR asserts that the Fourth Circuit's answer to that question in the affirmative reflects a "radical reading" of the Hobbs Act. (PDR Br. at 3). But far from being "radical," the Fourth Circuit's decision follows an unbroken line of circuit court decisions refusing to allow a party to make an end-run around the Hobbs Act in private TCPA litigation. *See Mais*, 768 F.3d at 1119; *Nack*, 715 F.3d at 686; *Leyse II*, 545 Fed. App'x at 459; *C.E. Design*, 606 F.3d at 445–50.[9]

In each of these cases, the party seeking to avoid the FCC rule at issue—sometimes the plaintiff, sometimes the defendant—argued that it was not asking the district court to "determine the validity of" the rule, but merely to "decline" to apply it, or to "harmo-

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[9] PDR conceded below that "a challenge to the 2006 Order's *validity*" is "prohibited by the Hobbs Act" (PDR Appellee's Br. at 21), and did not dispute that "[the 2006 Order is] dispositive," instead merely arguing for a different interpretation than Carlton & Harris. (ECF No. 39, Hr'g Tr., Sept. 29, 2016, at 7).

nize" it with the statute, or to "interpret" it in a manner more consistent with the statute. And in each case, the court of appeals held these were euphemisms for "determin[ing] the validity of" the rule.

In *C.E. Design*, the defendant argued its faxes were not "unsolicited" under the FCC's 1992 Order interpreting the TCPA to mean that faxes "from persons or entities who have an established business relationship ["EBR"] with the recipient can be deemed to be invited or permitted by the recipient." 606 F.3d at 445 (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8779 n.87 (Oct. 16, 1992) ("1992 Order")).[10] The plaintiff, represented by the same firm representing Carlton & Harris in this case, Anderson + Wanca, argued that the statute itself "unambiguously" states that a fax is "unsolicited" if the sender fails to obtain "prior *express* invitation or permission," and that merely having an EBR with a recipient does not constitute "express" permission to send fax advertisements to that recipient. *Id.* at 447. The plaintiff argued that, because the statute was unambiguous at "step one" of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), "there was no need for the district court to even consider" the 1992 Order. *Id.*

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[10] The faxes in *C.E. Design* were sent before Congress codified the EBR exemption (adding an opt-out-notice requirement) in the Junk Fax Prevention Act of 2005. *See C.E. Design*, 606 F.3d at 445.

The district court disagreed and granted the defendant summary judgment on the basis that there was an EBR between the parties. *Id.*

The Seventh Circuit affirmed, holding that a district court cannot simply "ignore" the FCC's interpretation on the basis that the statute is unambiguous at *Chevron* "step one." *Id.* at 447. The Seventh Circuit held the "purpose of even just the first step of the *Chevron* analysis is to determine the validity of the agency's interpretation," but "deeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders." *Id.* at 447–48. The Seventh Circuit held that for the district court to "ignore—or in other words, invalidate" the FCC's EBR rule would violate the Hobbs Act. *Id.* at 448.

In *Mais*, the district court granted summary judgment for the plaintiff in a TCPA case, rejecting the defendant's request to apply the ruling in the 1992 Order that the mere "provision of a cell phone number" constitutes "prior express consent" to receive autodialed voice telephone calls at that number, reasoning that the rule was "inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013). The district court held "Congress could have written the statute that way, but it didn't," and so "the FCC's contrary construction is not entitled to deference" under *Chevron*. *Id.* The *Mais* district court insisted it was

not "determin[ing] the validity of" the FCC's rule and was merely finding that the statute was unambiguous at *Chevron* "step one" and declining to "defer" to the rule. *Id.* at 1239.

The Eleventh Circuit reversed, holding that "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power" in violation of the Hobbs Act. *Mais*, 768 F.3d at 1119. The Eleventh Circuit held it made "no difference" that the validity of the FCC's interpretation arose "in a dispute between private parties," rather than a proceeding with the primary purpose of attacking the ruling. *Id.* It held the plaintiff was "free to ask the Commission to reconsider its interpretation of 'prior express consent' and to challenge the FCC's response in the court of appeals," but the district court was bound to enforce the ruling, even if it considered it unworthy of *Chevron* deference. *Id.* at 1119–20; *see also Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (district courts "may not determine the validity of FCC orders, *including by refusing to enforce an FCC interpretation*") (citing *Mais*, 768 F.3d at1114) (emphasis added).

In *Nack*, the district court entered summary judgment for the TCPA defendant, "interpreting" an FCC rule requiring "opt-out notice" on fax advertisements sent with "prior express invitation or permission," 47 C.F.R. § 64.1200(a)(4)(iv), as not applying to faxes sent with express permission, reasoning that "as a whole," the TCPA applies "only to unsolicited faxes," i.e., faxes sent without prior express permission. *Nack*

v. Walburg, 2011 WL 310249, at *4–5 (E.D. Mo. Jan. 28, 2011). The district court insisted it was not "enjoining, setting aside, annulling, or suspending" the FCC rule in violation of the Hobbs Act, but "interpreting" it in a manner "consistent with the TCPA, and with Congress' and the FCC's stated intent to prevent 'unsolicited' facsimile advertisements." *Id.* at *5–6.

On appeal, the FCC filed an amicus brief arguing that the defendant's "interpretive" challenge to the rule was barred by the Hobbs Act and that, to obtain judicial review of the rule, the defendant must petition the FCC and then (if the petition was denied) seek review in the court of appeals. *Nack*, 715 F.3d at 686 n.2. The Eighth Circuit agreed with the FCC and reversed, holding the district court lacked jurisdiction to "interpret" the regulation away as contrary to the statute and that the defendant must first "challenge the validity" of the regulation before the FCC to obtain judicial review. *Id.* The *Nack* defendant petitioned this Court for review, which was denied. *See* 134 S. Ct. 1539.[11]

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[11] As discussed in Section I.E, below, the defendant in *Nack* also filed a petition with the FCC challenging the validity of the regulation, which led to an appealable "final order" from the FCC in 2014, which the *Nack* defendant then successfully challenged in the D.C. Circuit in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043. After this Court denied certiorari in *Bais Yaakov*, the plaintiff in *Nack* voluntarily dismissed the case. *Nack v. Walburg*, No. 10-cv-478 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 71 (Apr. 11, 2018).

In *Leyse*, the district court dismissed a TCPA plaintiff's claim arising out of a telephone call from a local radio station, holding the FCC issued an order in 2003 exempting such calls from the TCPA's definition of "advertisement," and that the plaintiff's challenge to the validity of that exemption was barred by the Hobbs Act. 545 Fed. App'x at 459. The Sixth Circuit's initial opinion affirmed, but in doing so, it examined the validity of the FCC's 2003 order, holding "the FCC decision lies comfortably within the statutory scheme," and that this determination was not barred by the Hobbs Act because the action was not a "proceeding to enjoin, set aside, annul, or suspend" the order, since the "central object" of the litigation was not "to either enforce or undercut an FCC order." *Leyse I*, 697 F.3d at 373.

The FCC, which had of course not been a party to the case, subsequently learned of the decision in *Leyse I* and moved to intervene and petition for rehearing, which the Sixth Circuit granted. In *Leyse II*, the Sixth Circuit superseded its prior opinion to once again affirm the district court's dismissal on the basis that the call was exempted under the FCC rules, but to hold that "the Hobbs Act deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption was invalid or should be set aside," holding, "the Hobbs Act's jurisdictional limitations are equally applicable" regardless of whether a party challenges the agency order directly or "indirectly" in a private TCPA action.

Leyse II, 545 Fed. App'x at 459 (quoting *C.E. Design*, 606 F.3d at 448).

In sum, when a district court "declines to apply" a final order of the FCC interpreting the TCPA on the basis that it is inconsistent with the statute, it "determine[s] the validity" of the order. A district court lacks subject-matter jurisdiction to make that determination under the plain language of the Hobbs Act, and the Court should affirm.

D. The Hobbs Act's jurisdictional limitations are not limited to actions against the government.

PDR argues the Hobbs Act applies only to bar "suits against the United States brought to obtain injunctive or declaratory relief from agency action." (Pet. Br. at 2). PDR argues that "[n]o other type of proceeding is mentioned in the Hobbs Act." (*Id.*) PDR did not raise this argument in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12), in the Fourth Circuit (PDR Appellees' Br. at 1–40), or in its petition for certiorari or reply in support. (Pet. at 1–33; Reply at 1–12). Because this argument "was never presented to any lower court" it is "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). As "a court of final review and not first view," this Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (citations omitted).

PDR is also mistaken that the Hobbs Act applies to only a certain "type of proceeding." The Hobbs Act

does not refer to any type of "proceeding." It refers to a type *of court* (i.e., the court of appeals), and the type *of actions* that court has jurisdiction to undertake (i.e., the "exclusive jurisdiction" to "determine the validity of" final FCC orders). Rather, as the Fourth Circuit held in this case (Pet. App. 10a), and as every circuit court to address this question has held, it makes "no difference" whether a challenge to an FCC order arises in a private TCPA action or in an action with the express purpose of attacking the rule. *C.E. Design*, 606 F.3d at 448; *Mais*, 768 F.3d at 1119; *Nack*, 715 F.3d at 686; *Leyse*, 545 Fed. App'x at 456; *see also Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) (holding "[n]o collateral attacks on the FCC Order are permitted" in private litigation, since "[t]he case before us is not a Hobbs Act petition for review.").

PDR cites 28 U.S.C. §§ 2342 and 2349 for the proposition that the Hobbs Act channels "certain kinds of 'proceedings' and 'judgment[s]' to the courts of appeals." (PDR Br. at 14). Although the word "judgment" is from § 2349, PDR's quotation of the word "*proceedings*" is mysterious. That word does not appear in § 2342, nor in § 2349. The Hobbs Act simply does not say what PDR wants it to say; it is not limited to certain types of "proceedings."

PDR is correct that Section 402(a) of the Communications Act states that a "proceeding to enjoin set aside, annul, or suspend any order of the Commission" shall be brought according to the Hobbs Act pro-

cedures, 47 U.S.C. § 402(a), but that is entirely consistent with the reading of the Hobbs Act that only the court of appeals has jurisdiction to determine the validity of a "final order" of the FCC. There are many statutes that refer to the Hobbs Act in this manner. *See, e.g.*, 8 U.S.C. § 252(a)(1) (stating "final order[s] of removal" of the Board of Immigration Appeals are subject to review under the Hobbs Act), *cited in Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015).

Contrary to PDR's argument, this Court has applied the Hobbs Act in a private lawsuit that was not a "suit against the United States." In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 322 (1981), this Court held the Hobbs Act precluded a private lawsuit against a railroad for damages arising from the abandonment of a branch line. The railroad had obtained an order from the Interstate Commerce Commission ("ICC")—today, the Surface Transportation Board, *see* 28 U.S.C. § 2342(5)—granting it permission to abandon the line. *Id.* A brick manufacturer who used the line to ship its goods filed suit in Iowa state court under Iowa statutes and common law, seeking damages. *Id.* The plaintiff did not seek to enjoin, set aside, or determine the validity of the ICC's abandonment order, or even "mention[] the word 'abandonment,'" which this Court held was mere "artful pleading" attempting to avoid the Hobbs Act. *Id.* at 324.

The Court held the shipper "made no attempt to comply with the provisions of the Interstate Com-

merce Act regarding judicial review of the Commission's decision." *Id.* at 316, 322 (citing 28 U.S.C. § 2342(5)). The Court held "[t]he structure of the Act thus makes plain that Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission." *Id.* at 322. The Court held that its decision "does not leave a shipper in respondent's position without a remedy," and "an aggrieved shipper is still free to pursue the avenues for relief set forth in the statute." *Id.* at 331.

In sum, the plain language of the Hobbs Act does not support a reading that it applies solely to actions against the government, and the Court should reject that argument.

E. PDR cannot complain that the Hobbs Act procedures are inadequate, where it has refused to avail itself of those procedures.

PDR argues that the Administrative Procedure Act ("APA"), 5 U.S.C. § 703(a), independently "compels reversal of the decision below" because the Hobbs Act does not provide PDR a "prior, adequate, and exclusive opportunity for judicial review" of the 2006 Order. (PDR Br. at 24). PDR has never before mentioned the APA in this litigation: not in this Court (Pet. at 1–33; Reply at 1–12); not in the Fourth Circuit (PDR Appellees' Br. at 1–40); and not in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12). Understandably, neither court below discussed the APA, and because this argument "was never presented to

any lower court" it is "forfeited." *OBB Personenverkehr AG*, 136 S. Ct. at 397.

PDR's arguments regarding the adequacy of the Hobbs Act procedures are also not ripe. PDR has never petitioned the FCC to challenge the free-goods-or-services rule, and it cannot complain that a remedy is inadequate while refusing to avail itself of that remedy. If the "practical problems" PDR complains of are serious enough to warrant this Court's review, then it should reserve that question "for a case in which it is not hypothetical," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *i.e.*, a case in which the petitioner has availed itself of those allegedly inadequate review mechanisms.

PDR is also mistaken that the Hobbs Act does not afford an adequate means to challenge FCC rules. A business like PDR considering a mass-faxing campaign in the United States always has the option of consulting with experienced TCPA counsel before sending its faxes. Contrary to PDR's assertion, any competent TCPA lawyer would have advised PDR that sending faxes offering free copies of its e-Book would, at the very least, be risky, given the FCC's ruling that faxes offering "free publications" are "advertisements," and that it should petition the FCC to either change the rules or, if counsel determined the 2006 Order was ambiguous, clarify whether the contemplated fax campaign would be permitted. *See Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir.1958), *cert. denied*, 361 U.S. 813 (1959). A statutory remedy provided by Congress is not inadequate

where it is the party's "own inaction which foreclosed review." *Sable Commc'ns of Cal., Inc. v. FCC*, 827 F.2d 640 (9th Cir. 1987); *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003); *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998) ("A legal remedy is not inadequate for purposes of the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of an opportunity to pursue that remedy.").

Even after a defendant has been sued, the Hobbs Act affords an adequate means to challenge the FCC's interpretations. As the U.S. Chamber of Commerce recognizes in its amicus brief, "[l]itigants have options, even after the Hobbs Act period, in which to bring substantive challenges to agency rules." (Brief of U.S. Chamber of Commerce at 5). The Chamber explains that a party may at any time "fil[e] a petition for amendment or rescission of the agency's regulations, and challeng[e] the denial of that petition" in the court of appeals. (*Id.*, n.3 (quoting *Edison Elec. Inst. v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992)).[12]

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[12] The Chamber of Commerce asks this Court to rule that the Hobbs Act allows TCPA defendants to challenge the validity of FCC rules in the district court, but bars TCPA plaintiffs from doing the same. The Hobbs Act's language that the court of appeals has "exclusive jurisdiction" to "determine the validity of" an FCC order cannot mean completely contradictory things depending on whether it is a defendant seeking to challenge an FCC order or a plaintiff seeking to challenge an FCC order.

PDR complains that petitioning the agency and then taking a Hobbs Act appeal is "cumbersome at best and almost always illusory" and that the 2006 Order was "effectively unreviewable" by the time this case was filed in 2015. (PDR Br. at 17).[13] But PDR glosses over *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018), a recent case in which TCPA defendants used the Hobbs Act to obtain relief from a different part of the 2006 Order by petitioning the FCC and then challenging the denial of their petitions in the court of appeals, which they did long after the 60-day period for direct review of the 2006 Order expired.

The *Bais Yaakov* litigation was related to the Eighth Circuit's decision in *Nack*, 715 F.3d at 686. Following the Eighth Circuit's 2013 decision that the Hobbs Act required the district court to apply the FCC's 2006 regulation requiring opt-out notice on fax advertisements sent with the recipient's prior express permission, 47 C.F.R. § 64.1200(a)(4)(iv), the *Nack* defendant obtained a stay of the district court litigation, *see Nack v. Walburg*, No. 10-cv-478, 2013 WL

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[13] PDR argues that "for orders promulgating rules of general applicability, a party may not be 'aggrieved' in any legal or practical sense until it faces a judicial enforcement action," and "[i]n that circumstance, section 703 preserves the right to judicial review," citing this Court's decisions in *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), and *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984). (PDR Br. at 29–30). But PDR *has* a right to judicial review. It simply must obtain that review by following the Hobbs Act, and not in a district court.

4860104, at *1 (E.D. Mo. Sept. 12, 2013), and, along with over a dozen other TCPA defendants, petitioned the FCC challenging the validity of the rule. After a notice-and-comment period, the FCC issued a final order on October 30, 2014, granting in part and denying in part the petitions, ruling in relevant part that the FCC had statutory authority to issue the opt-out regulation in the 2006 Order. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 29 FCC Rcd. 13998 (Oct. 30, 2014) ("2014 Order").

Multiple "aggrieved parties," both TCPA defendants and TCPA plaintiffs (several of whom were represented by undersigned counsel, Anderson + Wanca), filed Hobbs Act petitions for review from the 2014 Order, which were consolidated in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir.). In that consolidated appeal, the D.C. Circuit reviewed the 2014 Order and vacated it on the basis that the FCC lacked statutory authority to issue the regulation requiring opt out notice on faxes sent with express permission in the 2006 Order. *Bais Yaakov*, 852 F.3d at 1082.

After this Court denied certiorari in *Bais Yaakov*, *see* 138 S. Ct. 1043, the plaintiff in *Nack*, who had conceded that the defendant obtained his prior express permission to send fax advertisements and was suing solely on the opt-out-notice violation, voluntarily dismissed the case in the district court.[14] *See Nack*

[14] Other private TCPA actions against petitioners in *Bais Yaakov* that were voluntarily dismissed include *St. Louis Heart Ctr.*

v. Walburg, No. 10-cv-478 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 71 (Apr. 11, 2018).[15] As the *Bais Yaakov* litigation makes clear, the petitioners in those cases obtained the relief they sought: they were no longer subject to the regulation requiring opt-

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v. Gilead Palo Alto, Inc., No. 13-cv-958 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 65 (July 17, 2018). In several other TCPA actions against *Bais Yaakov* petitioners, the plaintiff disputes that the defendant actually obtained prior express permission and is continuing to sue for the sending of *unsolicited* advertisements lacking an opt-out notice complying with the statute, 47 U.S.C. § 227(b)(1)(C). *See Physicians Healthsource, Inc. v. Masimo Corp.*, 14-cv-00001 (C.D. Cal.); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 12-cv-01208 (D. Conn.); *Med. West Ballas Pharm., Ltd. v. Anda Inc.*, No. 08SL-CC00257 (Cir. Ct. St. Louis Cty., Mo.).

[15] Another recent Hobbs Act appeal came before the D.C. Circuit from the FCC's 2015 Order, *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015), which decided multiple issues regarding the rules governing voice telephone calls and text messages, including interpreting the statutory term "automatic telephone dialing system" ("ATDS"). *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Numerous petitioners in that appeal were defendants in private TCPA litigation. The D.C. Circuit vacated in part and affirmed in part, *id.*, and the matter is pending before the FCC on remand. As PDR would have it, however the FCC rules on remand, courts hearing future TCPA actions will be free to apply their own interpretations of the statute, without being required to accept the FCC's interpretation. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018) (holding "equipment that ma[kes] automatic calls from lists of recipients" is "covered by the TCPA" definition of ATDS).

out notice on faxes sent with prior express permission, which was issued years earlier in the 2006 Order.[16]

Although PDR chose not to petition the FCC, there are three relevant petitions currently pending before the FCC filed by defendants in private TCPA actions seeking declaratory rulings regarding the meaning of the term "advertisement" in the fax context. *See Best Doctors, Inc. Petition for Declaratory Ruling*, CG Docket Nos. 02-278 (filed Dec. 14, 2018) (seeking declaratory ruling that fax asking physician to confirm contact information for inclusion in a "Best Doctors in America" publication was not an advertisement);[17]

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[16] The more difficult question is whether TCPA defendants who were *not* parties to the *Bais Yaakov* appeal remain subject to the regulation, or whether the regulation was "invalidated" universally, such that it cannot be enforced against any defendant. Three circuit courts of appeal have ruled on this question, each holding that the 2006 opt-out regulation could not be enforced against the defendant, even though the defendant was not a party to *Bais Yaakov*. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1284 (2018); *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 930 (9th Cir. 2018), *petition for cert. filed*, No. 18-987 (Jan. 25, 2019); *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 289–91 (7th Cir. 2018), *petition for rehearing en banc filed*, Nos. 17-3067 & 17-3506 (Jan. 4, 2019). This Court denied certiorari on that question in *Sandusky Wellness v. ASD*, 138 S. Ct. 1284, and the question is not presented in this case because no Hobbs Act appeal has been filed (let alone decided) challenging the free-good-or-services rule.

[17] *Available at* https://ecfsapi.fcc.gov/file/1214143237261/Best%20Doctors%20-%20Petition%20for%20Declaratory%20Ruling%20sent%2012-14-18.pdf.

Petition of Inovalon Inc. for Expedited Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act & Junk Fax Prevention Act, CG Docket No. 02-278 (Feb. 19, 2018) ("Inovalon Petition") (seeking declaratory ruling that fax offering "no cost" medical-records services was not an advertisement);[18] *Petition of M3 USA Corporation for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Mar. 20, 2017) (seeking declaratory ruling that fax asking recipients to participate in a survey were not advertisements).[19]

One of those petitions, the Inovalon Petition, seeks a declaratory ruling that faxes offering "no cost" medical recordkeeping services are not "advertisements." (Inovalon Petition at 1). The Inovalon Petition argues that the language in paragraph 52 of the 2006 Order means that a fax offering free goods or services is an advertisement *only if* it is in fact a "mere pretext" to advertisement, and is not a *per se* rule that a fax offering free goods or services is an advertisement. (*Id.* at 7).

The Inovalon Petition was filed February 20, 2018, and three days later (the same day the Fourth Circuit issued its opinion in this case), the FCC issued a Pub-

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[18] *Available at* https://ecfsapi.fcc.gov/file/1021917486065/2018.2.19%20FCC%20Petition.pdf.

[19] *Available at* https://ecfsapi.fcc.gov/file/10321896504076/M3%20Petition%20for%20Declaratory%20Ruling.pdf.

lic Notice seeking comments on the petition. *Consumer & Governmental Affairs Bureau Seeks Comment on Inovalon, Inc. Petition for Declaratory Ruling Under the Tel. Consumer Prot. Act & Junk Fax Prevention Act*, CG Docket No. 02-278, 2018 WL 1100910 (CGAB Feb. 23, 2018). The Public Notice advised any "interested parties" to file comments on the Inovalon Petition by March 26, 2018, and reply comments by April 10, 2018. (*Id.*)

On March 26, 2018, interested parties filed comments on the Inovalon Petition. For example, M3 Corporation, a defendant in a TCPA action, filed comments in support of the Inovalon Petition.[20] In addition, Eric B. Fromer Chiropractic, Inc. ("Fromer"), the plaintiff in the private TCPA action against Inovalon, filed comments in opposition.[21] Fromer is represented by undersigned counsel, Anderson + Wanca. Fromer's comments argue that the requested declaratory ruling is contrary to the free-goods-or-services rule in the 2006 Order, and that this "prophylactic" rule is "reasonable and appropriate to prevent fax advertisers from evading the TCPA." (Fromer Comments at 1, 4).

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[20] *Comments of M3 USA Corp.*, CG Docket No. 02-278 (Mar. 26, 2018), *available at* https://ecfsapi.fcc.gov/file/10326116073256/Inovalon%20--%20FCC%20Comments%20M3%2003262018.pdf.

[21] *Available at* https://ecfsapi.fcc.gov/file/10326103825518/File%20Final.pdf.

On September 5, 2018, Inovalon notified the FCC that the district court hearing the private TCPA action against it had stayed the case pending the FCC's ruling on the Inovalon Petition.[22] On November 28, 2018, Inovalon notified the FCC that this Court had granted certiorari in this case "limited solely to the question of whether the Fourth Circuit correctly concluded that deference to the FCC interpretation is automatic."[23]

PDR did not file comments in response to the FCC's Public Notice seeking input on the Inovalon Petition, nor participate in any way before the FCC. If PDR had filed comments on the Inovalon Petition, that would have given PDR standing to file a Hobbs Act appeal from any adverse "final order" of the FCC because "commenting on a petition in agency proceedings" will "confer 'party aggrieved' status on a litigant whose position the agency rejected." *ACA Int'l*, 885 F.3d at 711.

The closest PDR's brief comes to explaining why PDR refused to follow the path laid out by Congress

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[22] *See Ex Parte Notice of Stay Pending FCC Decision*, CG Docket No. 02-278 (Sept. 5, 2018), *available at* https://ecfsapi.fcc.gov/file/10905126100197/2018.9.5%20FCC%20Ex%20Parte%20re%20Motion%20to%20Stay.PDF

[23] *Ex Parte Notice: Scope of Granted Certiorari in JFPA case*, CG Docket No. 02-278 (Nov. 28, 2018), *available at* https://ecfsapi.fcc.gov/file/1128157123148/Inovalon%20Ex%20Parte%20re_%20PDR%20Networks%20Certiorari.PDF.

in the Hobbs Act is PDR's speculation that *if* it had gone to the FCC, the district court in this case might decline to stay the case, or the FCC proceedings could "drag on for years."[24] (PDR Br. at 37). The Court should not answer these hypothetical questions. PDR has never sought a stay from the district court, has never indicated any interest in petitioning the FCC, and has not even filed comments on other relevant petitions pending before the FCC. These questions are "appropriately reserved for a case in which [they are] not hypothetical." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

PDR's arguments are also mistaken. District courts routinely grant stays of TCPA litigation while the defendant petitions the FCC, as in *Nack* and the litigation against Inovalon. *See also, e.g.*, *Comprehensive Health Care Sys. Of the Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv-80967, 2017 WL 4868185, at *1-*3 (S.D. Fla. Oct. 6, 2017); *Degnen v. Dental Fix RX, LLC*, No. 4:15-cv-1372, 2016 WL 4158888, at *3 (E.D. Mo. Aug. 5, 2016). PDR cites a handful of district court decisions denying stays (PDR Br. at 37–38), but they involved situations where "discovery in this case will be required regardless of the outcome" because issues raised in the Hobbs Act proceeding would not be dispositive. *Edwards v. Oportun, Inc.*, 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016); *Lathrop v. Uber*

[24] Of course, the real reason PDR never petitioned the FCC is because it never challenged the validity of the FCC's rule, and argued the district court should "accept[] the rule as 'valid,'" and "interpret[]" it in PDR's favor. (Pet. at 14).

Techs., Inc., 2016 WL 97511, at *5 (N.D. Cal. Jan. 8, 2016); *see also Hofer v. Synchrony Bank*, 2015 WL2374696, at *2–3 (E.D. Mo. May 18, 2015) (denying stay where the plaintiff's "claim would not be affected by an FCC decision").

PDR is correct that there is no statute *requiring* a district court to stay a private TCPA action when the defendant files an FCC petition. But that is up to Congress, which knows well how to impose a mandatory stay. *See, e.g.*, 11 U.S.C. § 362(a) (automatic stay of nearly all civil litigation against debtor after filing of bankruptcy petition); 15 U.S.C. § 78u-4(b)(3)(B) (staying "all discovery and other proceedings" pending motion to dismiss in private securities litigation). And Congress has expressly contemplated imposing deadlines for the FCC to issue public notices on petitions, and requiring the FCC to issue "guidelines (relative to the date of filing) for the disposition of petitions" for declaratory rulings, although it has not done so. *See* Federal Communication Commission Process Reform Act of 2017, H.R. 290, 115th Cong. § 2(a) (2017).

PDR argues that any relief a TCPA defendant could hope to obtain from petitioning the FCC and appealing a denial would do the defendant no good because it would be prospective and "not retroactive" under *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). (PDR Br. at 37). Again, PDR is mistaken. *See Manhattan Gen. Equip. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134–35 (1935) (holding that application of an amended regulation, which was

issued after the original regulation was declared invalid as *ultra vires*, to pending cases was not "retroactive" because "[a] regulation which does not [carry into effect the will of Congress] but operates to create a rule out of harmony with the statute, is a mere nullity . . . Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule."); *Dixon v. United States*, 381 U.S. 68, 75 (1965) (a decision reversing a prior incorrect administrative interpretation of a statute and applying that interpretation to pending cases "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand").

The D.C. Circuit has a line of cases dealing with this precise issue, beginning with *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (holding radio station could appeal FCC's denial of petition to eliminate a rule issued more than 60 days prior on the basis that the rule exceeded the FCC's statutory authority). This line of cases is best summarized in *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 197 (D.C. Cir. 1987) (Edwards, J.).

In *NLRB Union*, the Union petitioned the Federal Labor Relations Authority (the "FLRA") seeking a ruling that regulations the FLRA had issued years earlier were inconsistent with the authorizing statute. *Id.* at 193. The FLRA denied the petition, finding that the regulations were valid, and the Union appealed pursuant to 5 U.S.C. § 7123(a), which, like the Hobbs

Act, provides that a "person aggrieved" by a "final order" of the FLRA may "during the 60-day period beginning on the date on which the order was issued" seek "judicial review" in "the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." *Id.*

The FLRA argued that the appeal was untimely because the 60-day period had expired "almost seven years" before the appeal was filed. *Id.* at 195. The D.C. Circuit rejected that argument, holding "[a]n agency's regulations may be attacked in two ways once the statutory limitations period has expired." *Id.* First, the court held, the rule may be attacked "directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them" in a Hobbs Act petition "properly brought before this court for review of further [agency] action applying it." *Id.* at 195–96.

"The second method of obtaining judicial review of agency regulations once the limitations period has run," the D.C. Circuit explained, "is to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision." *Id.* There are "three types of challenges" in such an appeal: (a) an objection to a "*procedural* infirmity," in which case the appeal is time-barred; (b) a claim that the rule suffers a "*substantive* deficiency *other than the agency's lack of statutory authority* to issue the regulation," in which case review is limited to the "*narrow*

issues as defined by the denial of the petition for rule-making" and "does not extend to a challenge of the agency's original action in promulgating the disputed rule"; and (c) a petition claiming "that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives," which is "reviewable outside of a statutory limitations period." *Id.* at 196–97 (emphasis in original).[25] Since the Union's petition fell "under the third category of indirect challenges," the D.C. Circuit held, the appeal was timely and "warrants judicial consideration." *Id.* at 197.

Strangely, PDR's brief cites *Functional Music*, seemingly to suggest that it allows a challenge to the FCC's rules on the basis that they were issued without statutory authority after the 60-day period *only* in an appeal from "subsequent actions by an agency to enforce it." (PDR Br. at 27). To be clear: *Functional*

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[25] In contrast to challenges to the agency's statutory authority to issue a rule, "challenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the 60-day period provided by statute." *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (emphasis in original) (applying *NLRB Union* and refusing to consider procedural challenge to FCC order outside 60-day period for Hobbs Act appeal); *see also Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602–03 (D.C. Cir. 1981) (noting that a party who had the opportunity to seek direct review of a regulation cannot use a petition to repeal as a "back door procedural challenge[]" to challenge the procedures used to promulgate the original rule).

Music "involved an appeal from [the FCC's] refusal to reconsider its denial of a petition for rescission of the disputed regulations," not an appeal from an FCC enforcement action. *NLRB Union*, 834 F.2d at 197.

Finally, PDR cites what it claims are "comparable statutory schemes," but they do not support PDR's arguments about the Hobbs Act. PDR cites 29 U.S.C. § 655(f), which provides that a person "adversely affected" by standards issued by the Secretary of Labor "may at any time prior to the sixtieth day after such standard is promulgated" challenge the validity of the standard in the court of appeals. (PDR Br. at 31). PDR argues that the Fourth Circuit's logic "would preclude review" of these standards "in enforcement actions" brought by the government, such as *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 7–9 (1980), and *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1346, 1354 (N.D. Ill. 1997). (*Id.* at 32). And PDR notes that the Exchange Act provides in 15 U.S.C. § 78y(a) & (b) that "[a] person aggrieved by a final order of" the SEC "may obtain review of the order" in the court of appeals within 60 days, which, under the Fourth Circuit's ruling, PDR argues would have "preclude[d]" the courts from considering whether particular SEC rules were valid in *United States v. O'Hagan*, 521 U.S. 642, 666–76 (1997), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212–14 (1976), and *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 795–96 (S.D.N.Y. 2018).

PDR is mistaken. First, it does not appear any party argued 29 U.S.C. § 655(f) or 15 U.S.C. § 78y barred review of the rules at issue in any of these

cases. Second, unlike the Hobbs Act, these statutes do not state that the court of appeals has "exclusive jurisdiction" to determine the validity of the agency's rules; they merely state that a person "may" challenge them in this manner. As this Court has specifically held with respect to 15 U.S.C. § 78y, this language "does not expressly limit the jurisdiction that other statutes confer on district courts," and "[n]or does it do so implicitly." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010).[26]

In contrast, the "statutory scheme" of the Hobbs Act displays a "fairly discernible" intent to limit jurisdiction, and the claims at issue "are of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). And, "[g]enerally, when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,'" those procedures "'are to be exclusive.'" *Id.* (quoting *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

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[26] It is true that courts have held a defendant subject to a final order in an administrative SEC enforcement action must "proceed exclusively through" 15 U.S.C. § 78y(a)(1). *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015). But that is no different than saying PDR would be required to challenge a "final order" issued against PDR in an FCC administrative enforcement action through the Hobbs Act, which PDR admits is the case.

There is an exception where (1) "a finding of preclusion could foreclose all meaningful judicial review"; (2) the suit is "wholly collateral to a statute's review provisions"; and (3) the claims are "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212–13). The Court does not consider it a "meaningful" avenue of relief for the party to be required to "bet the farm . . . by taking the violative action" before "testing the validity of the law." *Id.* (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). But here, PDR was not required to send its fax advertisements before challenging the validity of the FCC's free-goods-or-services ruling. It could have easily filed a petition before it took the "violative action." *Id.*

PDR's assertion that the Hobbs Act does not provide an adequate means to challenge an FCC order on the basis that it was issued without statutory authority is simply incorrect.

F. PDR's new constitutional arguments fail.

PDR argues it would violate due process to require it to pursue relief under the Hobbs Act because "everyone should have his own day in court," quoting *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015). (PDR Br. at 41). The Fourth Circuit "did not address" this argument because PDR "did not raise the due process points in his briefs before that court," and this Court should "decline to consider these contentions in the first instance." *O'Hagan*, 521 U.S. at 677.

PDR is also mistaken that it is "effectively estopped" by the Hobbs Act "from raising any argument bearing on the consistency between the 2006 Order and the TCPA itself . . . ." (PDR Br. at 41). Notably, PDR has never argued that there is an "inconsistency between" the 2006 Order and the statute. If PDR had chosen to make such an argument, it would have had to do so in a court with jurisdiction to make that determination (*i.e.*, the court of appeals in a circuit in which venue is proper, 28 U.S.C. § 2342(1)). Congress is vested with virtually unfettered discretion to define the jurisdiction of federal courts, and that is all the Hobbs Act does. U.S. Const. Art. III § 1; *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (the "power to ordain and establish inferior courts" includes the power to "invest[]" or "withhold[]" jurisdiction). This includes the power to limit jurisdiction to a particular court and then only after a party has exhausted administrative remedies. *Id.*

Similarly, PDR argues the Hobbs Act violates the separation of powers, citing cases such as *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). These cases are irrelevant because the Hobbs Act does not prevent "the judiciary" from saying "what the law is" (PDR Br. at 42); it merely channels jurisdiction to declare certain agency orders unlawful to the court of appeals.

PDR's constitutional arguments are based on hyperbole about the effect of the Hobbs Act, and the Court should reject them.

II. PDR forfeited its new argument regarding "legislative rules" and "interpretive rules," and the argument fails on the merits.

PDR argues the Fourth Circuit "overlooked" a distinction between "interpretive rules" and "legislative rules." (PDR Br. at 18). The Fourth Circuit did not "overlook" any such distinction because PDR never raised it. There is no mention of "legislative" or "interpretive" rules in PDR's briefs in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12), or the court of appeals (*see* PDR Appellees' Br. at 1–40), or in PDR's petition for certiorari or reply (Pet. at 1–33; Reply at 1–12). The argument is "forfeited." *OBB Personenverkehr AG*, 136 S. Ct. at 397.

PDR's new argument also fails on the merits. First, PDR argues that "the Hobbs Act does not apply at all to interpretive rules," citing *Columbia Broad. Sys. Inc. v. United States*, 316 U.S. 407, 418 (1942), for the proposition that an "interpretive rule" does not "set[] a standard of conduct for all to whom its terms apply." (PDR Br. at 46). The *CBS* case does not draw any distinction between "interpretive" and "legislative" rules; it merely held that a broadcaster could appeal rules stating that the FCC would revoke its license if it entered into certain types of contracts prior to the revocation of the license. *CBS*, 316 U.S. at 419.

In addition, PDR provides no reason why an agency's "interpretation" of a statute cannot "set a standard of conduct" for regulated parties.[27] That is precisely what happened in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), where the court held the appeal was "governed by the Hobbs Act" in reviewing the FCC's interpretations of the statutory terms "called party" and "automatic telephone dialing system."

As the Sixth Circuit held in the TCPA context in *Leyse II*, the "fundamental flaw" in PDR's argument is that, even if an FCC ruling is "interpretive," it still "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 545 F. App'x at 453 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)). And, as in *Leyse*, Congress clearly delegated "general" authority to the FCC to "prescribe regulations to implement the requirements of this subsection." *Id.* (quoting 47 U.S.C. § 227(b)(2)); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370 (2012).[28]

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[27] PDR concedes elsewhere that the 2006 Order "promulgat[es] rules of general applicability . . . ." (PDR Br. at 29).

[28] Although not relevant to the question presented, the supposed "skyrocketing" number of TCPA cases that PDR complains of (PDR Br. at 4), considers only the number of *federal* TCPA actions, and can be explained largely by this Court's 2012 holding

Second, PDR argues that "a court is not required to give effect to an interpretative regulation," citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). (PDR Br. at 47). The regulation at issue in *Batterton* was not issued by an agency subject to the Hobbs Act (nor was it "interpretive"), and the Court stated, in dicta, that a court is not *required* to give effect to an interpretative regulation because "[v]arying degrees of deference" are accorded to interpretations, "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Batterton*, 432 U.S. at 425, n.9. That speaks to the *standard* to be applied in reviewing the validity of an interpretation, whereas this case concerns which *court* has jurisdiction to conduct that review.

Third, PDR argues the free-goods-or-services rule does not "purport[] to create new, binding obligations for private parties or to alter anything in a prior regulation," pointing out that the FCC "did not codify its views in its TCPA regulations" at 47 C.F.R. § 64.1200. Most of the FCC's interpretations of the TCPA are not codified in the C.F.R., including the interpretation this Court applied in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016), that "under federal common-law principles of agency, there is vicarious liability for TCPA violations." (citing *In re Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574 (May

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in *Mims* that federal courts have original jurisdiction over TCPA claims. Prior to that ruling, the majority of circuits held that TCPA actions could not be filed in or removed to federal court. *See Mims*, 565 U.S. at 376.

9, 2013)). This FCC interpretation was neither "new," nor "codified" in the C.F.R., and there is no such requirement that a "final order" of the FCC be new or codified in order to be subject to the Hobbs Act.

In sum, the Court should decline to decide PDR's argument based on "legislative rules" and "interpretive rules," or reject the argument on the merits.

CONCLUSION

For the foregoing reasons, the Court should either dismiss this case as improvidently granted or affirm the Fourth Circuit's decision.

Respectfully submitted,

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