17-1705

FILED
JUN 21 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a challenge to the jurisdiction of every court in the nation to interpret and apply the law. A critical question, and circuit split, persists concerning the interplay between the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. § 2342, and this Court's seminal decision in *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This Court's review is needed to clarify the jurisdiction of all courts to decide the proper level of deference afforded to interpretive agency guidance. If allowed to stand, the Fourth Circuit's jurisdiction-stripping ruling would elevate those agencies identified in the Hobbs Act above even the judiciary; empowering agency orders to trump the courts' fundamental "province and duty" to interpret the law.

In enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress permitted civil liability only for sending "unsolicited advertisements" by fax. 47 U.S.C. § 227(b)(1)(C). In 2006, the Federal Communications Commission ("FCC"), tasked with implementing the TCPA, promulgated a Final Rule with respect to those faxes that "promote goods and services even at no cost."

Under *Chevron*, courts are empowered to independently assess whether a statutory term is "unambiguous," and thus, ripe for judicial interpretation. If a term is deemed ambiguous, courts still retain their discretion to defer to agency guidance. But courts owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, they find themselves unable to discern Congress's meaning.

Applying a traditional *Chevron* analysis, the District Court for the Southern District of West Virginia held the term "advertisement" in the TCPA was unambiguous; thus, it need not automatically defer to the FCC's guidance in deciding whether to grant Defendant/Petitioner's motion to dismiss. The District Court nevertheless "harmonized" the FCC's interpretive guidance with its own reading of the TCPA, and held the single fax at issue could not be read to "promote" anything other than information. In a split decision, the Fourth Circuit vacated and remanded, holding instead that the Hobbs Act "precluded" the District Court from engaging in a *Chevron* analysis, and that the District Court was required to automatically defer to the FCC's guidance on what qualifies as an "advertisement" under the TCPA.

Congress passed the Hobbs Act to provide a mechanism for judicial review of certain agency orders. To ensure the Hobbs Act did not impugn on the "province and duty" of the judiciary, the statute was intended to bar only facial challenges to the "validity" of an agency's order—not judicial review of the applicability of an agency order with respect to a particular set of facts and circumstances. As observed by the Sixth and Ninth Circuits in this precise context, a deepening circuit split exists as to whether courts must automatically defer to, and broadly apply, the FCC's definition of an "advertisement" in the absence of such ambiguity.

Ignoring cannons of statutory interpretation, the Fourth Circuit also held the FCC's guidance created a *per se* rule that faxes that promote goods and services "even at no cost" constitute "advertisements"—despite the lack of any

commercial nexus to a firm's business. This ruling created a circuit split with the Second, Sixth, Ninth and Eleventh Circuits, all of which require such a nexus, as well as a separate split with the Second Circuit, which held the FCC imposed only a rebuttable presumption that a fax promoting free goods and services qualifies as an "advertisement."

Thus, the questions presented are:

1. Does the Hobbs Act strip courts of jurisdiction to engage in a traditional *Chevron* analysis and require automatic deference to an agency's order even if there has been no challenge to the "validity" of such order?

2. Must faxes that "promote goods and services even at no cost" have a commercial nexus to a firm's business to qualify as an "advertisement" under the TCPA, or does a plain reading of the FCC's 2006 order create a *per se* rule that such faxes are automatically "advertisements"?

PARTIES TO THE PROCEEDINGS

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC. Each Petitioner belongs to a corporate family of entities dedicated to delivering health knowledge products and services that support drug prescribing decisions and patient adherence to medication regimes to improve health.

Respondent is a chiropractic medical office located in West Virginia that delivers healthcare services.

RULE 29.6 STATEMENT

Petitioners PDR Network, LLC, and PDR Distribution, LLC, are wholly-owned subsidiaries of PDR, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Network, LLC and PDR Distribution, LLC.

Petitioner PDR Equity, LLC is a wholly-owned subsidiary of PSKW Holdings, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Equity, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, App. 1-31a, is reported at 883 F.3d 459. The Order and judgment of the District Court granting PDR's motion to dismiss, *id.* at 32-43a, is unreported, but available at 2016 U.S. Dist. LEXIS 135310.

JURISDICTION

The final Order of the Court of Appeals was entered on February 23, 2018. App. 1a. A timely petition for rehearing *en banc* was denied on March 23, 2018. *Id.* at 45a. The mandate issued on April 2, 2018. *Id.* at 46a. PDR filed this Petition for a Writ of Certiorari on June 21, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the TCPA, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, are reprinted in the Appendix at App. 47-48a. Also reprinted are pertinent provisions of the FCC's May 3, 2006, Final Rule, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967 (May 3,

2006) ("2006 FCC Rule"), *id.* at 49a, and the Administrative Orders Review Act, 28 U.S.C. § 2342(1) ("Hobbs Act"). *Id.* at 50a.

INTRODUCTION

This case presents an opportunity for this high Court to decide the fundamental jurisdiction of all lower courts to independently "say what the law is" when faced with interpretative agency guidance. The Fourth Circuit's holding that the Hobbs Act "precluded" the District Court from conducting a "traditional" *Chevron* analysis curbs the jurisdiction of all courts everywhere to apply the law in private actions. At the same time, the Fourth Circuit's ruling also serves to unjustifiably bolster the power of all orders from agencies identified in the Hobbs Act, 28 U.S.C. § 2342(1)-(7)—effectively allowing such guidance to eclipse even the operative statutes.

As the dissent by Circuit Judge Stephanie D. Thacker makes clear, the Hobbs Act—which provides a mechanism for judicial review of certain administrative orders—is implicated only if there is a challenge to the "validity" of an agency's order. There was no such challenge here. Rather, the District Court "presumed" the FCC's guidance was "valid," and indeed, held the 2006 FCC Rule perfectly harmonized with its interpretation of the TCPA. Because the "validity" of the FCC's guidance was never challenged, the District Court retained its jurisdiction to properly conduct a *Chevron* analysis.

The question of whether the Hobbs Act precludes a *Chevron* analysis has reached a boiling point, as conflicting circuit court decisions pile up across the country. This case presents an ideal vehicle for this

Court to decide this issue, along with equally important issues concerning the scope of the TCPA.

In the decision below, a divided panel of the Fourth Circuit held the District Court lacked the jurisdiction to independently interpret the statutory term "advertisement" and apply it to the single fax in question. That decision contravenes basic judicial providence to say what the law is, directly conflicts with decisions of other circuits, and warrants this Court's review.

The Fourth Circuit's decision also raises two additional questions that merit this Court's review. Indeed, not only did the Fourth Circuit unjustifiably strip the District Court of jurisdiction, it also held that under the 2006 FCC Rule faxes promoting goods or services at no cost: (i) need not have a "commercial aim"; and (ii) are *per se* "advertisements." The Fourth Circuit's rulings rest on the inexplicable and unsupported proposition that a single line of the 2006 FCC Rule could be separated from the remaining text in the same paragraph to create a broad, "prophylactic" rule. This reading ignored the FCC's own comment that an "advertisement" must involve products that are often commercially available for sale. The Fourth Circuit's categorical broadening and draconian interpretation of the 2006 FCC Rule independently warrants this Court's review.

This case underscores the need for this Court to resolve these issues. It involves a nationwide TCPA class action against a company that has been publishing and delivering FDA-mandated drug labeling and prescribing information to healthcare providers for over 70 years. Such publications—including the *Physicians' Desk Reference*©—ensure

providers are aware of critical side effects, potential drug interactions, black box warnings and other key considerations before prescribing medications to their patients. PDR neither manufacturers, sells, nor promotes any of the pharmaceutical drugs listed in the *Physicians' Desk Reference*©.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1991, Congress enacted the TCPA, which prohibits the sending of "unsolicited advertisements" via fax. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395, *codified at* 47 U.S.C. § 227(b). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). The TCPA also created a private right of action for claims "based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection." *Id.* § 227(b)(3). This private cause of action permits the recipient of an unsolicited fax advertisement to seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. *Id.* If a court finds the sender "willfully or knowingly violated" the TCPA, damages may be trebled. *Id.*

In 2005, Congress enacted the JFPA, which, among other things, modified the definition of "unsolicited advertisement" to state that prior express permission may be obtained "in writing or

otherwise." *See* Junk Fax Prevention Act of 2005, Pub. L. No. 10921, § 2(g), 119 Stat 359 (codified at 47 U.S.C. § 227(a)(5)). But it did not otherwise expand on the statutory term "advertisement."

Like the TCPA, the JFPA directs the FCC to "implement" the statute. *Id.* § 2(h). In 2006, the FCC issued a Final Order interpreting the JFPA with respect to "Offers for Free Goods and Services and Informational Messages," which explained:

> [F]acsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, 'free' seminars serve as a pretext to advertise commercial products and services. Similarly, 'free' publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile [sic] recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Therefore, facsimile communications regarding such free goods and services, if not purely 'transactional,' would require the sender to obtain the recipient's permission beforehand, in the absence of an [Established Business Relationship].
>
> By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates,

> or employee benefit information, would not be prohibited by the TCPA rules.

App. 49a.

The Hobbs Act, also known as the Administrative Orders Review Act, provides a mechanism for judicial review of certain administrative orders, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).[1] A party aggrieved by any order of an agency may challenge the order by filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit. *Id.* § 2343. The Hobbs Act specifically vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the orders to which it applies, including FCC interpretations of the TCPA. *Id.* § 2342. "This procedural path created by the command of Congress promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency" charged with overseeing the TCPA. App. 7a (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014)).

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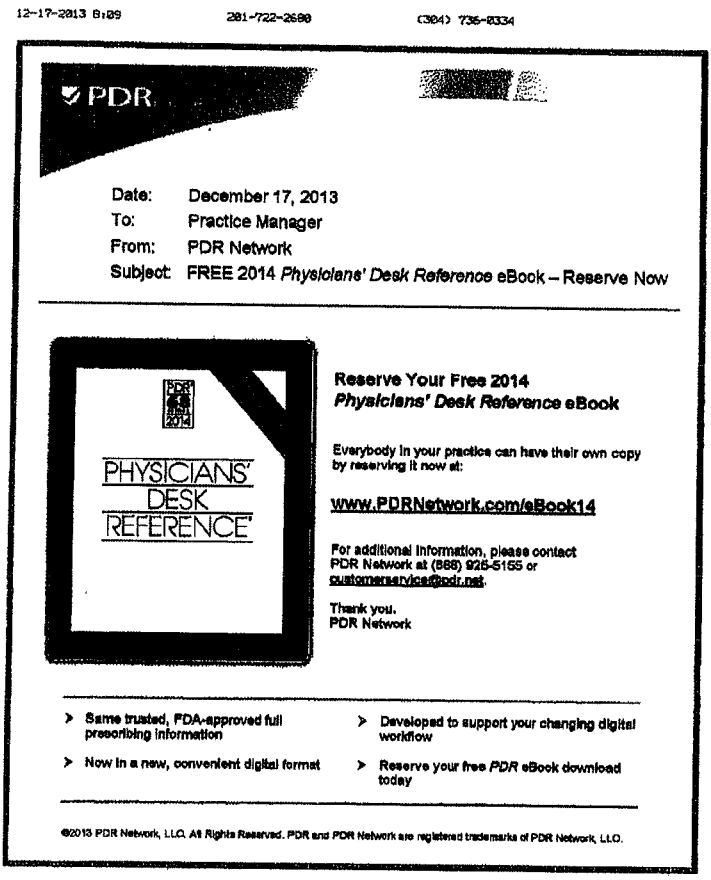
[1] This also includes orders of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission and others. *Id.* § 2342(1)-(7)

B. Carlton & Harris's Lawsuit

The actions giving rise to this case are largely undisputed. Respondent Carlton & Harris maintains a chiropractic office in West Virginia. App. 3a. Petitioner PDR is a company that "delivers health knowledge products and services" to healthcare providers. *Id.* Among other things, PDR publishes the *Physicians' Desk Reference*©, a widely-used compendium of prescribing information for various prescription drugs. *Id.* PDR receives fees from pharmaceutical manufacturers for including their drugs in the *Physicians' Desk Reference*©. *Id.* at 3a. Critically, it is undisputed that the *Physicians' Desk Reference*© is "an informational resource which is free to recipients," and that PDR "does not sell the reference [guide] or sell anything in the reference." *Id.* at 35a. The drugs identified in the reference guide are sold by their respective manufacturers, who are third-parties unaffiliated with PDR. *Id.*

On December 17, 2013, PDR sent Carlton & Harris a single fax (the "Fax"). *Id.* at 3a. A copy of this Fax has been reproduced below:



12-17-2013 8:09 281-722-2698 (304) 736-8334

PDR

Date: December 17, 2013
To: Practice Manager
From: PDR Network
Subject: FREE 2014 *Physicians' Desk Reference* eBook – Reserve Now

PDR 4 2014
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Id. at 51a.

The Fax was addressed to "Practice Manager" and its subject line announced: "FREE 2014 *Physicians' Desk Reference* eBook — Reserve Now." *Id.* at 3a. The Fax invited the recipient to "Reserve [a] Free 2014 *Physicians' Desk Reference* eBook" by visiting PDR's website. *Id.* It included a contact email address and phone number. *Id.* The Fax described various benefits of the e-book, noting that it contained the "[s]ame trusted, FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format" and was "[d]eveloped to

support [the recipient's] changing digital workflow." *Id.* at 3-4a. At the bottom, a disclaimer provided a phone number the recipient could call to "opt-out" of receiving future communications via fax. *Id.* at 4a.

Carlton & Harris sued PDR in the United States District Court for the Southern District of West Virginia, asserting a claim under the TCPA for the single fax in question. *Id.* Carlton & Harris seeks to represent a class of similarly situated recipients of faxes offering free copies of the *Physicians' Desk Reference*© e-book. *Id.*

C. PDR's Motion to Dismiss and District Court Proceedings

PDR moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. *Id.* It argued that the Fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale to the recipient. *Id.* In response, Carlton & Harris pointed to a 2006 FCC Rule interpreting the term "unsolicited advertisement." *Id.* at 5a. Carlton & Harris argued that the Fax it received was an unsolicited advertisement as defined in the 2006 FCC Rule because it promoted a good at no cost. *Id.* Moreover, Carlton & Harris argued that the District Court was obligated to follow the 2006 FCC Rule pursuant to the Hobbs Act. *Id.*

The District Court (Chambers, C.J.) disagreed. *Id.* The District Court held the Hobbs Act did not compel it to defer to "the FCC's interpretation of an unambiguous statute." *Id.* at 5a, 39a. The District Court found the TCPA's own definition of "unsolicited advertisement" "clear and easy to apply," and thus, held it was not required to follow

the 2006 FCC Rule and "decline[d] to defer" to it. *Id.* at 5a, 40a (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).[2] The District Court also opined that even under the 2006 FCC Rule, PDR's fax was still not an advertisement because the rule requires an advertisement have a "commercial aim," and no such aim existed here. *Id.* Accordingly, the District Court held Carlton & Harris had not stated a valid claim under the TCPA and granted PDR's motion to dismiss. *Id.* An appeal to the Fourth Circuit followed.

D. The Fourth Circuit's Split Decision

On February 23, 2018, a divided panel of the Fourth Circuit (Diaz, J.) ruled that because "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," the District Court "erred by engaging in a *Chevron* analysis and 'declin[ing] to defer' to the FCC rule." *Id.* at 11a. The majority held it was of "no moment" whether the District Court "purported" to invalidate the 2006 FCC Rule, or whether PDR had sought to challenge the FCC's ruling. *Id.* at 10a.

The Fourth Circuit majority also held that the 2006 FCC Rule created a "*per se* rule" that a "fax offering a free good or service" constitutes an "advertisement" under the TCPA—regardless of the

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[2] The District Court performed a traditional two-step *Chevron* analysis. At step one, the court determines whether the statute is ambiguous. 467 U.S. at 842-43. If the statute is clear, "that is the end of the matter" and the court does not defer to the agency construction. *Id.* at 842. If the statute is ambiguous, the court moves to step two. *Id.* at 843. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*; App. 40a.

presence of a commercial aim or the purpose and product at issue. *Id.* at 16a, 18a. The majority based its interpretation upon the "first sentence of the relevant portion [of the Rule] . . . [s]etting aside the list of examples [that followed]." *Id.* at 13a.

Notably, the panel's ruling was fractured; it included a poignant dissent from Judge Thacker who opined that: "(1) the [D]istrict [C]ourt did not exceed its jurisdiction under the Hobbs Act; and (2) the 2006 FCC Rule requires a commercial aim, which is not present here[.]" *Id.* at 19a. The dissent concluded the Hobbs Act did not apply because "there [was] no facial challenge to the 2006 FCC Rule," and the District Court had properly "assumed the [Rule] was valid and harmonized the rule with its conclusions about the TCPA." *Id.* at 24a. The dissent also found that by divorcing a single line from the 2006 FCC Rule to create a "prophylactic rule," the majority had failed to appreciate how the remaining language of the FCC Rule "informed" the FCC's guidance. *Id.* at 28-29a. On this point, Judge Thacker concluded that "[r]eading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA." *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

Congress passed the Hobbs Act to prevent disjointed attacks on agency orders via a challenge to the order's "validity." The practical consequence of the Fourth Circuit's decision in this case, however, is to unjustifiably expand the Hobbs Act to strip all courts of jurisdiction to apply federal statutes and interpret agency guidance. In so ruling, the Fourth

Circuit deepened a split of authority among circuit courts as to the reach of the Hobbs Act, as well as the appropriateness of engaging in a *Chevron* analysis to decide issues of statutory interpretation.

Certiorari is warranted to resolve the jurisdictional issues presented, as well as equally-important questions concerning the TCPA's scope raised by the Fourth Circuit's rulings on the law.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTION

As Chief Justice Marshall has stressed, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803); *DaimlerChrsyler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("[n]o principle is more fundamental to the judiciary's proper role in our system of government" than a court's jurisdiction) (citation omitted). Ignoring this bedrock principle, the Fourth Circuit held the Hobbs Act "precluded" the District Court from exercising its well-established jurisdiction under *Chevron* to decide whether the statutory term "advertisement" was unambiguous—instead requiring the lower court to simply defer to, and broadly apply, the FCC's guidance.

As this Court has observed, "[f]ederal courts, though 'courts of limited jurisdiction,' in the main 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376, 132 S. Ct. 740, 747 (2012) (citing *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Cohens* v. *Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 5

L. Ed. 257 (1821)). The District Court was thus acting within its power to conduct a *Chevron* analysis to decide the amount of deference the FCC's guidance deserved. Allowing the Fourth Circuit's jurisdiction-stripping ruling to stand would result in agency guidance subverting courts' "province and duty" to use their judgment to "say what the law is."

A. The Circuits Are Split On Whether A Court Must Automatically Defer To The FCC's Interpretation Of The Term "Advertisement" Under The Hobbs Act.

Since 1984, this Court has held that courts are not required to defer to an agency's interpretation of an unambiguous statute. *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). This principle was reaffirmed earlier this year in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (U.S. 2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.") (citation omitted) (Gorsuch, J.). And it is equally well-settled that "policy considerations cannot create an ambiguity when the words on the page are clear." *Id.* at 707 (citing *SEC* v. *Sloan*, 436 U.S. 103, 116-117 (1978)).

Yet, as the Sixth Circuit has expressly observed, there is a "circuit split" regarding "whether to defer to the [FCC's] explanation of its definition" of the term "advertisement." *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 223 (6th Cir. 2015) (*comparing N.B. Indus. v. Wells Fargo & Co.*, 465 F. App'x 640, 642-43 (9th Cir. 2012) (giving

Chevron deference to FCC's interpretation regarding incidental ads) *with Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687-88 (7th Cir. 2013) (rejecting FCC's interpretation regarding incidental ads)). This known split requires clear guidance from this Court.

1. Likely because the Fourth Circuit found the District Court's interpretation of the TCPA at odds with the FCC's, the majority held the "jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and that by engaging in step one of *Chevron* and not "deferring" to the 2006 FCC Rule, the District Court tacitly "ignored" or "set aside" the FCC's guidance. App. 11a. But as the dissent noted, the Hobbs Act only limits challenges to an order's "validity," and there was no challenge here. *Id.* at 20-21a. Rather, the District Court "assumed" the rule was "valid" and did not conflict with the TCPA. *Id.* at 24a.

The Hobbs Act is not implicated here. The Hobbs Act's jurisdictional restriction is purposefully specific; while it prohibits a challenge to the process or methodology of an order's creation (*i.e.*, a "facial" attack), it does not prohibit a court from accepting an order as "valid" and "interpreting" whether an agency's ruling applies. *Osorio v. State Farm Bank, FSB*, 746 F.3d 1242, 1257 (11th Cir. 2014) ("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."). The majority's assertion that "[w]hen *Chevron* meets Hobbs, consideration of the merits must yield to jurisdictional constraints," App. at 8a, misconstrues Congress's intent. This type of judicial activism has been previously disapproved. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017),

cert. denied, 138 S. Ct. 1043 (2018) (noting, in the context of a TCPA junk fax case, "[i]t is the Judiciary's job to respect the line drawn by Congress, not to redraw it as we might think best.").

As Judge Thacker observed, safeguards exist to alleviate the majority's concern over an "end-run" around the Hobbs Act—with its goal of "judicial efficiency." App. 11a. For example, the Fourth Circuit has held invalidation can occur at step one of *Chevron* if a court finds "the agency's construction is in conflict with the unambiguous statutory language." *Id.* at 20a (citation omitted). That did not happen here. Accordingly, the majority's reference to "[i]nvalidation by any other name," or courts "ignor[ing]" agency orders, is unfounded. *Id.* at 10-11a. When a court holds a statute is "unambiguous" under *Chevron*, and thus, that it need not give "substantial deference" to an agency's order, this is not the same as "invalidating" or "ignoring" the order. *Sandusky*, 788 F.3d at 223 ("[W]here our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation[.] In any event, reliance on the [FCC's] interpretation would only bolster our conclusion."); *IMHOFF Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (defendant questioned the "reasoning of the FCC's letter brief and its application to this case" without "directly challen[ging] the legitimacy of the FCC's definition of sender").[3]

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[3] District courts are in accordance with the Sixth Circuit. *See, e.g., Alpha Tech Pet, Inc. v. Lagasse, LLC*, 2016 U.S. Dist. LEXIS 120452, at *9 n.3 (N.D. Ill. Sep. 7, 2016) ("Contrary to Defendants' argument, this Court is not determining the validity of an FCC ruling by finding that the FCC ruling is not

The majority claimed "[e]very other circuit to consider the issue has reached the same result." App. 9a (citing *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444 (6th Cir. 2013); and *Mais*, 768 F.3d 1110). But as the dissent observed, these cases are "inapposite" or "distinguishable." *Id.* at 23-24a.

Nack and *Leyse* both involved a prohibited "facial challenge to an FCC regulation," which is not present here. *Id.* at 22-23a. In *Leyse*, the Sixth Circuit observed that "[a]s an initial matter, . . . resolving a TCPA claim like Leyse's does not *necessarily* implicate the Hobbs Act." 545 F. App'x at 447 (emphasis in original). Because Leyse argued the conduct at issue did not fit within the exemption for radio calls created by the FCC in 2003, the court would "only reach the question of Hobbs Act and its jurisdictional restrictions if [it] disagree[d] with

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binding, but is merely following the Seventh Circuit's decision that the particular FCC ruling at issue here is not binding with respect to interpreting the statutory and regulatory language relevant to this case."); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2013 U.S. Dist. LEXIS 15952, at *9 (D.N.J. Feb. 6, 2013) ("while the Court does not find that the FCC's interpretations of the TCPA should be afforded substantial deference—because the statute is not facially ambiguous—those interpretations are clearly persuasive"); *P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, at *8 (D. Conn. July 17, 2015) ("Because the statute is not ambiguous and defines the term 'unsolicited advertisement,' the FCC's interpretations are not controlling on this Court under *Chevron*"); *N.B. Indus. v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 126432, at *13-14 (N.D. Cal. Nov. 30, 2010) ("If the [TCPA's] definition of 'unsolicited advertisement' were ambiguous, the court would be inclined to give the [2006 FCC Rule] substantial deference under *Chevron*[.] In any event, the court considers and gives weight to the FCC's examples because they are persuasive and helpful.").

Leyse as to the scope of the FCC's rules." *Id.* at 448-449. Critically, the Sixth Circuit only applied the Hobbs Act because Leyse argued "the rule should be set aside because of procedural deficiencies in its promulgation." *Id.* at 458. The defendant in *CE Design, Ltd. v. Prism Bus. Media, Inc.*, also "asked the district court to ignore the FCC order" at issue, and argued the FCC-created defense "conflicts with the TCPA's plain language." 606 F.3d at 445, 447 (7th Cir. 2010). Lastly, as the dissent noted, *Mais* is "distinguishable" for the same reason. App. 24a.

Here, PDR did not ask the District Court to set aside or ignore the FCC rule; rather, as the dissent observed, "Appellant merely argued for a specific interpretation of the 2006 FCC Rule, and Appellee argued for a different interpretation." *Id.* The majority failed to appreciate this critical distinction.

2. The impact of this circuit split is undeniable. If this case had been filed in the Sixth Circuit, the result would have been markedly different. Under *Sandusky*, the Sixth Circuit would have conducted a *Chevron* analysis; held the statutory term "advertisement" was unambiguous, such that it need not "defer" to the 2006 FCC Rule; concluded an "advertisement" must "have profit as an aim"; and determined the instant Fax lacked such an aim. 788 F.3d at 223-24. This would have ended the case.[4] *Bais Yaakov*, 852 F.3d at 1082 ("The text of the [TCPA] provides a clear answer to the question presented in this case.") (citing *Chevron*, 467 U.S. at 842-43 & n.9); *SAS Inst.*, 138 S. Ct. at 1358 ("[A]fter applying traditional tools of interpretation here, we

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[4] As the dissent opined, dismissal was warranted in this case because Plaintiff was unable to satisfy even this "minimal burden" of alleging a "commercial aim." App. 30a.

are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands."). Nor would the Sixth Circuit have "precluded" the District Court's ability to conduct a *Chevron* analysis under a misguided interpretation of the Hobbs Act's reach. *See also Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, DDS, PA, 781 F.3d 1245, 1256 (11th Cir. 2015) (applying *Chevron* deference to an FCC order interpreting the definition of the "sender" of a fax).

Likewise, if this case had been filed in the Second Circuit, the court would have disregarded the Hobbs Act argument altogether, as seen in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017),[5] and even before that in *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806 n.2 (2d Cir. 2014) ("Since neither party actually challenges the FCC's interpretation of the TCPA, we need not decide the extent to which the [Hobbs Act] limits our jurisdiction to review that interpretation.").

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[5] Notably, the majority was inconsistent regarding which circuit's authority it deemed "persuasive." The majority described *Sandusky* as not "persuasive" because it "made no mention of the Hobbs Act's jurisdictional bar nor explained how the court overcame it." App. 10a. Yet the majority also opined that the Second Circuit's decision in *Boehringer*, 847 F.3d 92—and, specifically, Judge Pierre Leval's concurring opinion—was "persuasive." *Id.* at 15a. But nowhere in *Boehringer* did the panel (or Judge Leval) discuss the "Hobbs Act's jurisdictional bar." In fact, as Judge Thacker pointed out, the plaintiff Physicians Healthsource similarly argued the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule," but the "Second Circuit did not address this argument and instead addressed the merits." *Id.* at 22a.

The result would have been the same in the Third Circuit. *Manuel v. NRA Grp. LLC*, 2018 U.S. App. LEXIS 816, at *4 n.5 (3d Cir. Jan. 12, 2018) ("Because we do not address the validity of the FCC's orders, we need not address Manuel's contention that the Hobbs Act restricts our jurisdiction[.]") (citation omitted); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) ("Because we reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the 'random or sequential number generator' requirement, we need not reach his argument regarding the Hobbs Act[.]").

At core, the majority conflates "deference" to an agency's order with its invalidation. But, as shown, courts can grant an agency's "common-sense interpretation" a level of "persuasive value" without deeming it "invalid." *Osorio*, 746 F.3d at 1256 (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("agency's interpretation may merit some deference whatever its form")). This is what the District Court did when it held that "even if it were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision." App. 40a. The District Court then "presumed" the 2006 FCC Rule was valid.[6] This had

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[6] The Ninth Circuit has repeatedly taken an identical approach to FCC rules and regulations in the context of the TCPA. *See, e.g., Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 792 n.2 (9th Cir. 2018) ("We presume the validity of the relevant FCC rules and regulations.") (citing *US W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid" for purposes of a case not initiated under the Hobbs Act)); *CallerID4u, Inc. v. MCI Communs. Servs.*, 880 F.3d 1048, 1062 (9th Cir. 2018) ("Because this case was not initiated through . . . a petition

the effect of differentiating this case from the majority's "inapposite" or "distinguishable" cases—in that the District Court "harmonized" the agency's order with its interpretation of the TCPA. App. 24a.

Stripped of their jurisdiction, district courts will be expected to simply apply, out of context, *any* agency order identified in the Hobbs Act—regardless of whether the underlying statute is "unambiguous," and thus ripe for independent judicial interpretation. This undercuts the purpose of our judicial system. *Marbury*, 5 U.S. at 178, 1 Cranch 137, 2 L.Ed 60.

If left to stand, the majority's ruling as to the interplay between the Hobbs Act and *Chevron* will create irreconcilable inter-circuit conflicts, further exacerbating the confusion about when, and how, courts must apply *Chevron*. This is exactly the type of issue necessitating this Courts' review. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (resolving a circuit split is a "traditional ground for certiorari"); *Mims*, 565 U.S. at 376, 132 S. Ct. at 747 (granting certiorari "to resolve a split among the Circuits as to whether Congress granted state courts exclusive jurisdiction over private actions brought under the TCPA."); *see also* S. Ct. Rule 10(a).

II. CERTIORARI IS WARRANTED ON THE QUESTION OF THE APPLICATION OF THE FCC'S DEFINITION OF AN "ADVERTISEMENT"

The Fourth Circuit majority's ruling on the merits in this case is a direct outgrowth of its

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[under the Hobbs Act], we must presume the validity of FCC regulations, rules, and orders that are currently in effect.") (citing *Pac. Bell Tel. Co. v. Cal. PUC*, 621 F.3d 836, 843 n.10 (9th Cir. 2010)).

fundamentally flawed conclusion that the Hobbs Act stripped the District Court of jurisdiction to decide the level of deference afforded the 2006 FCC Rule. In so ruling, the Fourth Circuit further misjudged the impact and reach of the 2006 FCC Rule.

A. The Fourth Circuit's Holding That A Fax Promoting A Free Good Or Service Does Not Require A Commercial Aim Conflicts With Decisions Of The Second, Sixth, Ninth and Eleventh Circuits.

The majority held the FCC's order created a rule that "all faxes offering free goods and services" are "advertisements" under the TCPA. App. 16a. Judge Thacker disagreed, expressly holding instead that "the 2006 FCC Rule requires a commercial aim, which is not present here." *Id.* at 19a. Critically, the majority's holding conflicts with authoritative decisions from no less than four other circuits.

The majority heavily relied on Judge Leval's concurrence in *Boehringer* to support its assertion that the 2006 FCC Rule "requir[es] no commercial nexus at all." *Id.* at 14-15a. But the majority opinion of the Second Circuit in *Boehringer refused* to erase this "commercial nexus" requirement from the 2006 FCC Rule, observing: "Of course, as other courts have ruled, not every unsolicited fax promoting a free seminar satisfies the Rule. There must be a commercial nexus to a firm's business, *i.e.*, its property, products, or services[.]" 847 F.3d at 96; *see also id.* at 93 ("[W]e agree that a fax must have a commercial purpose."). *Boehringer* likewise held the 2006 FCC Rule "comports with the statutory language, which defines offending advertisements as those promoting 'the commercial availability or

quality of [the firm's] property goods or services.'" *Id.* at 95 (citing 47 U.S.C. § 227(a)(5)).

The Sixth Circuit similarly emphasized the need for a "commercial nexus" when it held "[t]he term 'advertisement' unambiguously contains commercial components: *To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim.*" *Sandusky*, 788 F.3d at 223-24 (emphasis added). The Ninth Circuit further held that because an item discussed in a fax was not "available to be bought or sold" or "for sale," it was not "commercially available," and thus, not an "advertisement" under the TCPA. *N.B. Indus.*, 465 F. App'x at 642. And lastly, the Eleventh Circuit held "[t]o fall within the [TCPA]," a fax must "draw[] attention to the 'commercial availability or quality' of [defendant's] products to promote their sale." *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366-67 (11th Cir. June 5, 2017). Based squarely on the law as understood by these four circuits, the District Court correctly upheld the "commercial aim" requirement for faxes promoting a "free" offering to be an "advertisement," and in the absence of such a finding, properly granted PDR's motion to dismiss. App. 42 (holding that a "plain reading" of the TCPA and the 2006 FCC Rule demonstrate that "they intend to curtail the transmission of faxes with a commercial aim.").[7]

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[7] *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1163 (N.D. Ill. 2009) ("While Congress's clear intent was to prohibit unsolicited advertising, it is equally clear that Congress intended non-commercial messages to fall outside the ban."); *see also Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 182 (E.D. Pa. 1994) ("Congress clearly did not prohibit fax transmissions of all unsolicited information or

Conversely, the Fourth Circuit sought to erase any "commercial nexus" requirement, and thus, its decision conflicts with these authoritative decisions necessitating review and resolution by this Court.

B. The Fourth Circuit's Holding That Faxes Promoting Free Goods And Services Are *Per Se* "Advertisements" Conflicts With A Decision Of The Second Circuit.

The majority's conclusion that the 2006 FCC Rule created a "*per se* rule" that a fax promoting a free good or service is an "advertisement," App. 16a, separately conflicts with the Second Circuit's *Boehringer* decision—which held the 2006 FCC Rule supported, at best, only a rebuttable "presumption."

In *Boehringer*, the plaintiff argued the FCC's order treated an offer of a free seminar as a *per se* advertisement of "the commercial availability" of a product. 847 F.3d at 95. The Second Circuit rejected this argument. *Id.* Instead, it reasoned the fax would constitute an "advertisement" *only if* the free seminar offer was a pretext or prelude for a commercial promotion or sale offer. *Id.* at 98. The court then held the defendant "'can rebut such an inference [of intent to promote a commercial product] by showing [after discovery] it did not or would not advertise its products or services at the seminar.'" *Id.* at 98-99. By erroneously converting this

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communications, and there is some question whether it could do so constitutionally. . . . No matter how sympathetic plaintiff's case may be, the court may not rewrite the [TCPA] to enjoin or penalize behavior not prohibited by Congress.").

"presumption" into a "*per se* rule," the majority's ruling directly conflicts with *Boehringer*.[8]

On remand, the district court similarly rejected plaintiff's "*per se*" theory of liability. *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 2018 U.S. Dist. LEXIS 64844, at *26 (D. Conn. Apr. 18, 2018). Rather, Boehringer was given the opportunity to—and did—"rebut" the presumption that its fax discussing a free seminar was an advertisement with "evidence it did not feature its products or services at the seminar." *Id.*

The district court in *Boehringer* further held that "Physicians Healthsource's interpretation of an 'advertisement' sweeps far beyond the scope of the TCPA" in that it "would force any faxes with a general business purpose—in the case of a for-profit entity, virtually all of them—into the prohibited category of advertising. Nothing in the TCPA suggests that Congress intended the statute's proscription to be so broad." *Id.* at *24. This too is exactly what the District Court held here. App. 42a.

Here, the Fourth Circuit's majority and dissent agree: the "interpretation of regulations begins with their text." App. 11a, 25a. But diverge over *how* the 2006 FCC Rule should be interpreted. Judge Thacker's dissent elucidates how the majority's

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[8] The remaining "context" of this section of the 2006 FCC Rule further supports the need for a "commercial aim." For example, *Boehringer* observed how "[i]n a different but relevant context, the [2006 FCC Rule] states that 'a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as [its] primary purpose is informational, rather than to promote commercial products.'" 847 F.3d at 96 (citing 2006 FCC Rule at 25973). This is exactly what the District Court held. App. 41a ("The fax here cannot be read to 'promote' anything other than information.").

overly-broad, "prophylactic" construction misconstrues the order's "plain reading":

> A plain reading of the 2006 FCC Rule demonstrates that its objective is to prevent faxes with a commercial aim. Its objective is not to prevent faxes that promote free goods or services per se[.]
>
> In order to reach its conclusion, the majority reads the first sentence of the 2006 FCC Rule—'[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition.'—in isolation. To be sure, if read in a vacuum, the first sentence seems to create a prophylactic rule. However, it is informed by the language that follows.
>
> Specifically, the second sentence of the 2006 FCC Rule redefines the subject faxes as those promoting free offerings with a commercial aim. It states, 'In many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services.' The 2006 FCC Rule then refers to 'such messages'—redefined as those with a commercial aim—and explains, '[I]t is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Reading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA.
>
> This is a 'permissible' construction[.]

Id. at 28-29a (citations omitted) To reach this conclusion, Judge Thacker (and the District Court) considered the text of the TCPA and the 2006 FCC Rule; common definitions of relevant terms[9]; and the context of the full passage. *Id.* at 26a, 40-42a.[10]

Conversely, the majority read the first sentence of the 2006 FCC Rule "in isolation," and failed to appreciate how the "language that followed" "informed" this initial proclamation. *Id.* at 28-29a. In so doing, the Fourth Circuit's judgment ignored fundamental canons of statutory construction, including that: (1) "words of a statute must be read in their context and with a view to their place in the overall statutory scheme"; (2) statutory terms may be read in light of the purpose of the statute; and (3) courts must "give effect . . . to every clause and word of a statute." *Osorio*, 746 F.3d at 1258; *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009). These same canons apply when interpreting regulations. *See, e.g., Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012).

Without considering *any* specific statutory or regulatory term, the majority held the "first sentence" of the 2006 FCC Rule was "clear and unambiguous." App. 13a. Accordingly, the majority intuited the FCC "declined to require" a "fact-based inquiry" regarding whether a fax promoting a free offering was an "advertisement." *Id.* at 17a. But as

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[9] This included: "promote"; "advertise"; and "commercial." App. 26a, 40-41a.

[10] Although Judge Thacker held the definition of an "advertisement" was "ambiguous," App. 26a, and the District Court held it was "unambiguous," *id.* at 39a, the end result is the same. Under either approach, the District Court was free to—and did—consider the FCC's guidance. *Id.* at 40-41a.

Boehringer observed, a "fact-based inquiry" was essential to allow a defendant to rebut any inference that a fax promoting a free offering "relate[d] to the firm's products or services," and thus, had a "commercial purpose." 847 F.3d at 95.

Based on the FCC's stated rationale for its characterization of faxes that "promote" free goods and services, it was clear to the District Court that "the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax." App. 41a. In fact, "[t]o read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly"—as Carlton & Harris proposed—would "obviate[] the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." *Id.* at 42a.

To the extent the majority felt it was improving upon the TCPA by fashioning a "prophylactic" rule, App. 15a, 27a, this was in error. Courts should not impose "substantive changes designed to make the law 'better.' That would give the judiciary entirely too much law-making power." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012); *Bais Yaakov of Spring Valley*, 852 F.3d at 1082. Indeed, this Court was critical of the Director of the U.S. Patent and Trademark Office for similarly trying to rewrite the America Invents Act:

> Moving past the statute's text and context, the Director attempts a policy argument. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't

> our call to make. Policy arguments are properly addressed to Congress, not this Court.

SAS Inst., 138 S. Ct. at 1357. Here, as in *SAS Inst.*, only Congress has the right to amend the TCPA to expand the term "advertisement." In the absence of such a directive, courts retain their jurisdiction—just as they did in *SAS Inst.*—to read the "plain meaning" of the TCPA and to decide the proper level of deference afforded to the 2006 FCC Rule.

Had the majority appreciated: (1) the entire paragraph it cited, rather than just the first sentence; (2) definitional terms; (3) successive paragraphs in the 2006 FCC Rule; and (4) the TCPA's purpose, it would have realized "a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA"—as did Judge Thacker's dissent. App. 29a.

III. THIS COURT'S REVIEW IS NEEDED

This case presents an ideal vehicle to resolve the interplay between the Hobbs Act and *Chevron*, as well as the various splits of authority spawned by the Fourth Circuit's rulings related to the TCPA.

First, this case presents a challenge to the jurisdiction of all courts to interpret the law and decide, for themselves, the appropriate level of deference afforded agency guidance under *Chevron*. It also represents an occasion for this Court to delineate the proper scope of the Hobbs Act when the "validity" of an agency's order is *not* challenged.

The central question in this case is: who decides what the law is? Should agencies be permitted to divine Congress's intent with no check by the courts?

The answer, based on over thirty years of case law following this Court's seminal *Chevron* ruling, is no.

Nor did the District Court ever seek to overstep its bounds with respect to the Hobbs Act's reach. As the District Court observed: "The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA." App. 39a. Instead, the Hobbs Act prohibits facial challenges to the "validity" of an agency's order before a district court. Only in this limited situation would courts "lack the jurisdiction to decide the case," as the District Court itself held. *Id.* (citing *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939 (1984)).

Second, this case highlights the injustice of the Fourth Circuit's ruling. The majority stripped critical meaning from the TCPA—and the 2006 FCC Rule—by removing the universally-recognized limitation that faxes must contain a "commercial nexus" to a firm's business in order to be actionable. At the same time, the majority also impermissibly expanded the scope of TCPA liability nationwide by ruling that all faxes that promote free goods and services are *per se* "advertisements" under the law. The combination of these two rulings will expose innumerably more companies to the "draconian penalties" available under the TCPA—a result the District Court sought to avoid. *Compare Boehringer*, 2018 U.S. Dist. LEXIS 64844, at *23 ("Physicians Healthsource's attenuated notion of 'advertising' would go far beyond the TCPA and effectively ban *all* corporate public service announcements.") (emphasis in original) *with* App. 42a ("Plaintiff's interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA or the FCC interpretation.").

Third, this case implicates unique and significant concerns over public safety and patient wellness. As discussed, the *Physicians' Desk Reference*© is a "compendium of prescribing information for various prescription drugs." App. 3a. The *Physicians' Desk Reference*© is used by healthcare providers around the country to identify and avoid dangerous drug interactions that could harm patients. As such, any lawful effort to make this free drug reference guide more accessible to healthcare providers—for instance, by notifying them of the option to download a free e-book—should be encouraged, not punished.

The instant case also illustrates the clear and present dangers of a *per se* rule for fax "advertisements." As the post-remand district court in *Boehringer* observed, plaintiff's interpretation "would effectively bar companies from faxing 'disease awareness communications,' which . . . the FDA regarded as a way to 'provide important health information to consumers and health care practitioners, and . . . encourage consumers to seek, and health care practitioners to provide, appropriate treatment.'" 2018 U.S. Dist. LEXIS 64844, at *28 n.4. As such, public policy supports healthcare providers—including, but not limited to, Carlton & Harris—being notified that the *Physicians' Desk Reference*© is available in a "convenient digital format." Prohibiting faxes of this benign nature would chill PDR's (and others) ability to keep healthcare providers informed of life-saving drug interaction information needed to protect patient health—as PDR has done for over 70 years.

Relatedly, and as this Court has recognized, pharmaceutical companies are required to widely

disseminate information about the safety risks and side effects of their products to physicians and other prescribers in order to satisfy state "duty to warn" laws. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011) (under Minnesota and Louisiana law, a duty to warn falls on the manufacturer) (citations omitted); *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2474 (2013) (duty to warn under New Hampshire law is part of the "general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses") (citation omitted). The importance of the *Physicians' Desk Reference*© to population health in the U.S.—and its ability to shield pharmaceutical manufacturers from liability where drug labels were properly written and distributed via the *Physicians' Desk Reference*©—has been consistently recognized in dozens of cases across the country.[11] Restricting PDR's ability to widely disseminate notifications regarding its free drug reference guide being available in other forms would mean pharmaceutical companies would be exposed to more suits based on a failure to warn patients of potentially dangerous drug interactions.

Fourth, and finally, this case demonstrates the immense practical consequences of the Fourth

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[11] *See, e.g., Guevara v. Dorsey Labs., Div. of Sandoz, Inc.*, 845 F.2d 364, 366 (1st Cir. 1988) (use of *Physicians' Desk Reference*© along with package insert to provide warning was adequate); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1097-98 (8th Cir. 2013) (discussing effect of the *Physicians' Desk Reference*© on learned intermediary doctrine and failure to warn); *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 2015 U.S. App. LEXIS 21428, at *11 (6th Cir. Dec. 11, 2015) (same); *U.S. v. Azmat*, 2015 U.S. App. LEXIS 19574, at *42, 53-54 (11th Cir. Nov. 10, 2015) (in admitting expert medical testimony, *PDR* described as "standard reference material").

Circuit's rule due to the scale of potential liability. As repeatedly observed by the Seventh Circuit, the TCPA has been abused by opportunistic class action plaintiffs' attorneys seeking to "nail[] the little guy," while taking advantage of the uncapped statutory damages available under the law. *See, e.g., Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915-16 (7th Cir. 2011) (Posner, J.). By removing the protection of a "commercial aim," and instead imposing a *per se* rule that faxes promoting free goods and services "even at no cost" are "advertisements," the TCPA will become an even larger vehicle for abuse by class action attorneys and their professional plaintiffs. This Court has the opportunity to stem the collective flood of frivolous litigation related to fax transmissions that serve a useful and, in this case, even life-saving purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JUNE 21, 2018

No. _____

In The
Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

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

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons,
Plaintiff – Appellant,
v.
PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10,
Defendants – Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert C. Chambers, District Judge. (3:15-cv-14887)

Argued: October 25, 2017
Decided: February 23, 2018

Before DIAZ, THACKER, and HARRIS, Circuit Judges

Vacated and remanded by published opinion. Judge Diaz wrote the majority opinion, in which Judge Harris joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Glenn Lorne Hara, ANDERSON + WANCA, Rolling Meadows, Illinois, for Appellant. Jeffrey N. Rosenthal, BLANK ROME LLP,

Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** Brian J. Wanca, ANDERSON + WANCA, Rolling Meadows, Illinois; D. Christopher Hedges, David H. Carriger, THE CALWELL PRACTICE PLLC, Charleston, West Virginia, for Appellant. Ana Tagvoryan, BLANK ROME LLP, Los Angeles, California; Marc E. Williams, Robert L. Massie, NELSON, MULLINS, RILEY & SCARBOROUGH LLP, Huntington, West Virginia, for Appellees.

DIAZ, Circuit Judge:

Carlton & Harris Chiropractic, Inc. appeals from the district court's dismissal of its claim against PDR Network, LLC, PDR Distribution, LLC, PDR Equity, LLC, and John Does 1-10 (collectively, "PDR Network") for sending an unsolicited advertisement by fax in violation of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227. Carlton & Harris argues that the district court erred in declining to defer to a 2006 Rule promulgated by the Federal Communications Commission (the "FCC") interpreting certain provisions of the TCPA. Specifically, Carlton & Harris contends that the Hobbs Act, 28 U.S.C. § 2342 *et seq.*, required the district court to defer to the FCC's interpretation of the term "unsolicited advertisement." Additionally, to the extent that the district court interpreted the meaning of the 2006 FCC Rule, Carlton & Harris argues that the district court erred by reading the rule to require that a fax have some commercial aim to be considered an advertisement.

Because the Hobbs Act deprives district courts of jurisdiction to consider the validity of orders like the 2006 FCC Rule, and because the district court's

reading of the 2006 FCC Rule is at odds with the plain meaning of its text, we vacate the district court's judgment.

I.

We review a district court's dismissal under Fed. R. Civ. P. 12(b)(6) de novo, "assuming as true the complaint's factual allegations and construing all reasonable inferences in favor of the plaintiff." *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (internal quotation marks omitted).

A.

Carlton & Harris maintains a chiropractic office in West Virginia. PDR Network is a company that "delivers health knowledge products and services" to healthcare providers. J.A. 33. Among other things, PDR Network publishes the *Physicians' Desk Reference*, a widely-used compendium of prescribing information for various prescription drugs. PDR Network is paid by pharmaceutical manufacturers for including their drugs in the *Physicians' Desk Reference*.

On December 17, 2013, PDR Network sent Carlton & Harris a fax. The fax was addressed to "Practice Manager" and its subject line announced: "FREE 2014 *Physicians' Desk Reference* eBook — Reserve Now." J.A. 23. The fax invited the recipient to "Reserve Your Free 2014 *Physicians' Desk Reference* eBook" by visiting PDR Network's website. *Id.* It included a contact email address and phone number. The fax touted various benefits of the e-book, noting that it contained the "[s]ame trusted,

FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format" and that the e-book was "[d]eveloped to support your changing digital workflow." *Id.* At the bottom of the fax, a disclaimer provided a phone number the recipient could call to "opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax." *Id.* Finally, the fax advised that Carlton & Harris had received the offer "because you are a member of the PDR Network." *Id.*

B.

Carlton & Harris sued PDR Network in the Southern District of West Virginia, asserting a claim under the TCPA. The TCPA, as amended by the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, generally prohibits the use of a fax machine to send "unsolicited advertisement[s]." 47 U.S.C. § 227(b)(1)(C). It creates a private cause of action that permits the recipient of an unsolicited fax advertisement to seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. 47 U.S.C. § 227(b)(3). If a court finds that the sender "willfully or knowingly violated" the TCPA, damages may be trebled. *Id.* Carlton & Harris seeks to represent a class of similarly situated recipients of unsolicited faxes offering free copies of the *Physicians' Desk Reference* e-book.

PDR Network moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. It argued that the fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for

sale. In response, Carlton & Harris pointed to a 2006 FCC Rule interpreting the term "unsolicited advertisement." Pursuant to its statutory authority to "prescribe regulations to implement the requirements" of the TCPA, *see* 47 U.S.C. § 227(b)(2), the FCC promulgated a rule providing that "facsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." *See* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) (the "2006 FCC Rule"). Carlton & Harris argued that the fax it received was an unsolicited advertisement as defined in the 2006 FCC Rule because it promoted a good at no cost. Moreover, Carlton & Harris argued that the district court was obligated to follow the 2006 FCC Rule pursuant to the Hobbs Act.

The district court disagreed. The court held that the Hobbs Act did not compel the court to defer to "the FCC's interpretation of an unambiguous statute." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-14887, 2016 WL 5799301, at *4 (S.D. W. Va. Sept. 30, 2016). The district court considered the TCPA's own definition of "unsolicited advertisement" "clear and easy to apply," and thus held that it was not required to follow the 2006 FCC Rule and "decline[d] to defer" to it. *Id.* (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The district court further held that even under the 2006 FCC Rule, PDR Network's fax was still not an advertisement because the rule requires an advertisement to have a "commercial aim," and no such aim existed here. *Id.* Accordingly, the district court concluded that

Carlton & Harris had not stated a valid claim under the TCPA and granted PDR Network's motion to dismiss. *Id.* This appeal followed.

II.

The question presented is whether and when a fax that offers a free good or service constitutes an advertisement under the TCPA. To resolve it, we must answer two more: first, must a district court defer to an FCC interpretation of the TCPA? And if so, what is the meaning of "unsolicited advertisement" under the 2006 FCC Rule? We address these issues in turn.

A.

The TCPA defines "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). In a typical case of statutory interpretation where an agency rule is involved, the familiar *Chevron* framework requires a court to first ask whether the underlying statute is ambiguous ("step one"). *See Chevron*, 467 U.S. at 843; *Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121, 129 (4th Cir. 2015). Where a statute's meaning is clear on its face, the inquiry ends and the unambiguous meaning controls. *Chevron*, 467 U.S. at 842–43.

In this case, the district court applied step one of *Chevron* to the TCPA's definition and found it to be unambiguous. Thus, it declined to defer to the FCC

interpretation. We conclude, however, that the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, precluded the district court from even reaching the step-one question.

The Hobbs Act, also known as the Administrative Orders Review Act, provides a mechanism for judicial review of certain administrative orders, including "all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).[1] A party aggrieved by such an order may challenge it by filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit. 28 U.S.C. § 2343. The Hobbs Act specifically vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the orders to which it applies, including FCC interpretations of the TCPA. *See* 28 U.S.C. § 2342. "This procedural path created by the command of Congress promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency" charged

[1] 47 U.S.C. § 402(a) sets forth the procedure to "enjoin, set aside, annul, or suspend any order of the Commission under" the Communications Act, which includes the Telephone Consumer Protection Act. *See* Pub. L. No. 102-243, 105 Stat 2394. Neither party has disputed that the 2006 FCC Rule is the sort of "final order" contemplated by the Hobbs Act.

with overseeing the TCPA. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (internal quotation marks omitted).

The district court erred when it eschewed the Hobbs Act's command in favor of *Chevron* analysis to decide whether to adopt the 2006 FCC Rule. Federal district courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (internal quotation marks omitted); U.S. Const. art. III, § 1. Where, as here, Congress has specifically stripped jurisdiction from the district courts regarding a certain issue, those courts lack the power and authority to reach it.

This sort of "jurisdiction-channeling" provision, especially in the context of administrative law, is "nothing unique." *Blitz v. Napolitano*, 700 F.3d 733, 742 (4th Cir. 2012) (noting that "agency decisions are commonly subject to such" provisions and that "final agency actions are generally reviewed in the courts of appeals"). When *Chevron* meets Hobbs, consideration of the merits must yield to jurisdictional constraints. "[A]n Article III court's obligation to ensure its jurisdiction to resolve a controversy precedes any analysis of the merits . . . [A]rguing that the district court can put off considering its jurisdiction until after step one of *Chevron* . . . turns that traditional approach on its head." *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 447–48 (7th Cir. 2010). Indeed, a district court simply cannot reach the *Chevron* question without "rubbing up against the Hobbs Act's jurisdictional bar." *Id.* at 449. The district court had no power to decide whether the FCC rule was entitled to deference. By refusing to defer to the FCC

rule and applying *Chevron* analysis instead, the court acted beyond the scope of its congressionally granted authority.

Every other circuit to consider the issue has reached the same result. In *Mais v. Gulf Coast Collection Bureau, Inc.*, the Eleventh Circuit reversed a district court finding that an FCC interpretation of the TCPA's "prior express consent" exception was inconsistent with the statute. 768 F.3d at 1113. The court held that because of the Hobbs Act, the district court "lacked the power to consider in any way the validity of the 2008 FCC Ruling." *Id.* The Eighth Circuit, in *Nack v. Walburg*, refused to consider whether an FCC interpretation of the TCPA "properly could have been promulgated" because the Hobbs Act "precludes us from entertaining challenges to the regulation." 715 F.3d 680, 682 (8th Cir. 2013). And in *Leyse v. Clear Channel Broad., Inc.*, the Sixth Circuit held that the Hobbs Act "deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption [to the TCPA] was invalid or should be set aside because of procedural concerns." 545 F. App'x 444, 459 (6th Cir. 2013) (unpublished) (amending and superseding *Leyse v. Clear Channel Broad. Inc.*, 397 F.3d 360 (6th Cir. 2012)).

PDR Network urges us to instead follow the Sixth Circuit's decision in *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, which also considered the meaning of "advertisement" under the TCPA. 788 F.3d 218 (6th Cir. 2015). But although *Sandusky* declined to defer to the 2006 FCC Rule because it found the statutory definition unambiguous, that decision made no mention of the

Hobbs Act's jurisdictional bar nor explained how the court overcame it. *See id.* at 223. For that reason, we do not find that decision persuasive here.

B.

PDR Network also argues (and our dissenting colleague agrees) that the Hobbs Act should not apply in this case because the district court did not specifically invalidate the 2006 FCC Rule. Instead, PDR Network contends, the court merely chose not to apply it. *See Carlton & Harris*, 2016 WL 5799301, at *3 ("[T]he Court presumes the FCC's order is valid. Nonetheless, the order's validity does not, *ipso facto*, bind the Court to defer to the FCC's interpretation of the TCPA.").

We find this logic unavailing. The Hobbs Act broadly vests federal appellate courts with exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" orders like the 2006 FCC Rule. 28 U.S.C. § 2342(1). District courts, by implication, are without jurisdiction to do any of those things. As other courts have recognized, to decide whether the Hobbs Act applies to restrict jurisdiction in a particular case, we look to the "practical effect" of a claim. *See Mais*, 768 F.3d at 1120. It is of no moment whether PDR Network specifically asked the district court to find the rule invalid, or whether the court purported to do so. *See CE Design*, 606 F.3d at 448 ("[R]equest[ing] that the court 'ignore' the rule is just another way of asking it *not* to enforce the rule."). Like the Seventh Circuit, we see no difference in "this fine distinction." *Id.*

Invalidation by any other name still runs afoul of the Hobbs Act's constraints. To hold that a district

court cannot enjoin or set aside a rule but is nevertheless free to ignore it (or "decline[] to defer" to it, *Carlton & Harris*, 2016 WL 5799301, at *4) would allow a party to perform an end run around the administrative process Congress created and instead tackle administrative orders in a district court. Such an approach is contrary to the text of the Hobbs Act, and would undermine Congress's aim of ensuring uniform application of FCC orders. If PDR Network is bent on challenging the validity or prudence of the FCC rule, it must do so through the specific administrative procedure that the Hobbs Act provides.

For these reasons, we hold that the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA. The district court therefore erred by engaging in *Chevron* analysis and "declin[ing] to defer" to the FCC rule.

C.

Although the Hobbs Act prevents the district court (and this court on appeal) from questioning the validity of the 2006 FCC Rule, the court can, and must, interpret what it says. *See Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448, 452–53 (E.D.N.C. 2016) ("[T]he matters of interpreting and applying the FCC's rulings remain within the province of the court."). We therefore consider whether the district court erred in determining that the 2006 FCC Rule requires a fax to have some commercial aim to be considered an "advertisement" for purposes of TCPA liability.

"[O]ur interpretation of regulations begins with their text." *Gilbert v. Residential Funding LLC*, 678

F.3d 271, 276 (4th Cir. 2012). The 2006 FCC Rule provides, in pertinent part:

> [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 many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR [established business relationship].

The rule also distinguishes messages promoting free goods or services, which are unsolicited advertisements, from communications "that contain only information, such as industry news articles, legislative updates, or employee benefit information," which are not. *Id.*; *see also Sandusky*, 788 F.3d at 223–24.

The district court concluded that even under the 2006 FCC Rule, PDR Network's fax was not an advertisement because the rule includes only faxes with a "commercial aim." *Carlton & Harris*, 2016 WL 5799301, at *5. The district court attempted to "harmonize[] the FCC interpretation with the plain meaning of the TCPA" and concluded that a "blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly obviates the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." *Id.* at *4.

We disagree. There is no need to "harmonize" a rule whose meaning is plain. And the district court's interpretation doesn't follow from the rule's plain text. A close reading of the rule reveals a different result. The first sentence of the relevant portion is clear and unambiguous. Setting aside the list of examples (which, set off by the words "such as," is meant to illustrate rather than exhaust), it reads: "[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." 2006 FCC Rule. The sentences that follow explain the rationale for that straightforward principle. Offers that are purportedly "free" often have commercial strings attached, either as pretext or as part of an overall marketing campaign.[2] For this reason, the FCC chose to interpret the term "advertisement" broadly to include any offer of a free good or service.

[2] Contrary to our colleague's view, we are not here "attempt[ing] to divine the FCC's intent," *post* at 27 n.2, but simply paraphrasing the text of the FCC Rule.

"The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that 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." *Gilbert*, 678 F.3d at 276 (quoting *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003)). From 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. We need not "harmonize" the FCC's rule with the underlying statute, or probe the agency's rationale. Because the plain meaning of the regulation is clear, our interpretive task is complete.

Judge Pierre Leval recently reached a similar conclusion in his concurring opinion in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017). In that case, Boehringer sent an unsolicited fax to physicians inviting them to a free dinner meeting to discuss certain medical disorders. *Id.* at 93. At the time, Boehringer did not sell any drugs that treated those disorders, but was in the process of developing one and had submitted preliminary documents to the FDA for approval. *Id.* at 94.

The district court dismissed the case, holding that the fax was not an advertisement as a matter of law. *See id.* at 93. While the Second Circuit reversed on the basis of the 2006 FCC Rule, it did so recognizing the difficulty of proving a commercial nexus at the pleading stage, and held that the case should advance to discovery to determine whether the meeting in fact had a commercial purpose. *See id.* at 96–97.

But in his concurrence, Judge Leval explained that by reading the 2006 FCC Rule "precisely, sentence by sentence, giving each sentence its natural meaning," a different interpretation emerged requiring no commercial nexus at all. *See id.* at 100–01 (Leval, J., concurring). Specifically, "[b]ecause of the frequency, observed by the [FCC], that messages offering free goods or services in fact mask or precede efforts to sell something, the Commission has adopted a prophylactic presumption that fax messages offering free goods or services *are* advertisements and thus *are* prohibited by § 277." *Id.*

We find Judge Leval's logic persuasive and agree that his is the natural and logical reading of the 2006 FCC Rule.[3] The rule may be overinclusive in that (for example) it may bar an organization from faxing offers for truly free goods and services unconnected to any commercial interest, but prophylactic rules are neither uncommon nor unlawful. *See Friedman v. Heckler*, 765 F.2d 383, 388 (2d Cir. 1985) ("Prophylactic rules . . . cannot, and need not, operate with mathematical precision . . . The mere fact that a regulation operates overbroadly does not render it invalid.").

In any event, given the increasing obsolescence of fax machines, we suspect there will be few occasions where this rule serves to block an entity wishing to offer truly free goods or services from

[3] Our dissenting colleague suggests that we have omitted something from our analysis of *Boehringer*. *See post* at 22 n.1. But we cite the case only to note our agreement with Judge Leval's reading of the FCC Rule.

doing so.[4] And although we do not reach the FCC's intent in enacting the rule, its decision to prohibit all unsolicited offers for free goods or services is (in our view) a reasonable one. A per se rule advances the purpose of the underlying statute by protecting consumers from junk faxes. The rule also helps would-be violators avoid inadvertent liability by eliminating the need for a case-by-case determination of whether a fax is indeed a free offer, or merely a pretext for something more.

The district court expressed concern that this interpretation of the 2006 FCC Rule would undermine the text and purpose of the TCPA, which "seeks to curtail faxes with a commercial nature." *Carlton & Harris*, 2016 WL 5799301, at *4. Relying on the meaning of the words "commercial" and "promote," the court reasoned that the rule cannot mean that all faxes offering free goods and services are advertisements, because that would "read 'commercial' out of the TCPA's definition of 'unsolicited advertisement'—a clear abdication of elementary statutory construction." *Id.* The district court is correct that Congress enacted the TCPA to combat an "explosive growth in unsolicited facsimile advertising, or 'junk fax.'" *See* H.R. Rep. 102–317. But requiring a fax to propose a specific commercial

[4] In his concurrence in *Boehringer*, Judge Leval addressed the concern that his interpretation of the rule would prevent "charitable, nonprofit entities" from sending offers for free goods or services. *See* 847 F.3d at 102–03 (Leval, J., concurring). He noted several reasons why charities or nonprofits might be exempt from liability under the rule. Because there is nothing in the record to suggest PDR Network is such an entity, we need not and do not decide that question here.

transaction on its face takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models.

This case illustrates why the FCC may have decided to implement so broad a rule. At this point in the litigation, Carlton & Harris has not taken any discovery, and few details of PDR Network's business model have emerged. We do know that PDR Network receives money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*. And nothing in the record suggests that PDR Network is a charity that distributes free e-books without hope of financial gain. Although PDR Network does not charge healthcare providers money for its e-book, it's certainly plausible that the amount of money it receives turns on how many copies of the *Physicians' Desk Reference* it distributes. The free distribution of the e-book, then, may not impose a financial cost on healthcare providers, but PDR Network may nevertheless stand to profit when a provider accepts a free copy.

Moreover, giving away products in the hope of future financial gain is a commonplace marketing tactic. PDR Network purports to offer other services to healthcare providers, and it may offer the *Physicians' Desk Reference* for free in the hopes of establishing relationships with healthcare providers that will lead to future sales of other goods or services. All told, we think it entirely plausible that PDR Network distributes the free e-books to further its own economic interests.

Our musings aside, the FCC through its Congressional mandate to administer and implement the TCPA has declined to require such a fact-based inquiry. PDR Network sent Carlton &

Harris a fax that offered a free good, namely, the *Physicians' Desk Reference* e-book.[5] Accordingly, the fax was an advertisement under the plain meaning of the 2006 FCC Rule.

III.

To sum up, this case asks us to determine the meaning of the word "advertisement." In doing so, we do not start with a blank slate. Instead, we must follow the guideposts that Congress has set out. The Hobbs Act tells us where to look for an answer: the 2006 FCC Rule. And that rule, in turn, tells us what "advertisement" means.

The Hobbs Act requires a district court to follow FCC interpretations of the TCPA, and under the 2006 FCC Rule, PDR Network's fax offering a free good was indeed an advertisement. PDR Network may think the FCC Rule unwise or unfair, but the district court was "without jurisdiction to consider [its] wisdom and efficacy." *Mais*, 768 F.3d at 1121.

For these reasons, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED

[5] The primary cases on which PDR Network relies involve informational faxes rather than offers of free goods or services. *See Sandusky*, 788 F.3d at 220 (fax containing formulary information for prescription drugs); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, No. 12-2132, 2013 WL 486207, at *1 (D.N.J. Feb. 6, 2013) (fax containing information about reclassification of prescription drug for insurance purposes). The 2006 FCC Rule expressly states that informational faxes are not unsolicited advertisements.

THACKER, Circuit Judge, dissenting:

Because I believe that (1) the district court did not exceed its jurisdiction under the Hobbs Act and (2) the 2006 FCC Rule requires a commercial aim, which is not present here, I respectfully dissent.

I.

Hobbs Act Jurisdiction

Carlton & Harris ("Appellant") argues that the district court exceeded its jurisdiction under the Hobbs Act. Appellant asserts that the Hobbs Act precludes any *Chevron* analysis and requires district courts to simply defer to -- or adopt – FCC guidance. *See Chevron, U.S., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984). Therefore, Appellant contends, and the majority agrees, that by engaging in a *Chevron* analysis, the district court inappropriately determined the validity of the 2006 FCC Rule. I disagree. In my view, the district court did not actually determine the validity of the 2006 FCC Rule. Therefore, the district court did not exceed its jurisdiction.

A.

Under the Hobbs Act, the federal courts of appeals "ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC]." 28 U.S.C. § 2342. Accordingly, Congress entrusts district courts with the singular task of interpreting and enforcing FCC guidance when required. The

Chevron doctrine, which governs judicial review of an agency's construction of a statute, provides a two step tool guiding when a district court must interpret and enforce administrative authority. At step one of the *Chevron* analysis, the court determines whether the statute is ambiguous. *See* 467 U.S. at 842–43. If the statute is clear, "that is the end of the matter" and the court does not defer to the agency construction. *Id.* at 842. If the statute is ambiguous, the court moves to step two. *See id.* at 843. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The majority concludes that when a court decides that a statute is unambiguous at step one of the *Chevron* analysis and accordingly does not defer to the agency's construction at issue, it necessarily invalidates the agency's construction. Therefore, the majority's reasoning goes, in order to avoid violating the Hobbs Act by deciding the validity of FCC orders, which is the sole purview of the courts of appeal, district courts must simply defer to FCC guidance and cannot engage in any *Chevron* analysis at all. *See ante* at 7 ("We conclude . . . that the Hobbs Act . . . precluded the district court from even reaching the step-one question [of *Chevron*].").

I take issue with the majority's conclusion that the failure of the district court to defer to an agency's construction at step one of the *Chevron* analysis invalidates the agency's construction. Invalidation occurs at step one of *Chevron* only if a court finds that that the agency's construction is in conflict with the unambiguous statutory language. *See, e.g.*, *William v. Gonzales*, 499 F.3d 329, 333–34 (4th Cir. 2007) ("[W]e believe it is evident that [the

regulation] . . . conflicts with the [unambiguous] statute . . . . Therefore, we conclude that this regulation lacks authority and is invalid."); *Foxglenn Inv'rs, Ltd. P'ship v. Cisneros*, 35 F.3d 947, 952 (4th Cir. 1994) (declaring invalid a regulation that rendered a section of an unambiguous statute superfluous); *see also Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (recognizing that the district court invalidated an FCC regulation when it deemed it to be inconsistent with the clear meaning of the TCPA); *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013) (finding that the argument that an FCC regulation was contrary to the unambiguous language of the TCPA was a facial challenge).

Here, there was no such finding. The district court concluded that the TCPA was unambiguous and therefore did not need to defer to the 2006 FCC Rule. But in reaching that conclusion, the district court did not "determine the validity of" the 2006 FCC Rule. 28 U.S.C. § 2342. To the contrary, the court assumed the 2006 FCC Rule was valid and used it to bolster its interpretation of the TCPA. The district court concluded, "A plain reading of the TCPA and the [2006] FCC [Rule] demonstrates that they intend to curtail the transmission of faxes with a commercial aim." J.A. 135. Critically, the district court did not find the language of TCPA and the 2006 FCC Rule to be in conflict, and logically, by virtue of *using and interpreting* the 2006 FCC Rule, the district court could not have invalidated it. Accordingly, it did not exceed the Hobbs Act's jurisdictional bounds.

B.

The majority points to three cases in support of its jurisdictional analysis: (1) *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); (2) *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444 (6th Cir. 2013); and (3) *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014).[1] The majority posits

[1] The majority also uses *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017), to interpret the 2006 FCC Rule and adopts the concurring opinion in that case. *See ante* at 14–16. However, it fails to address a significant omission in *Boehringer*. *See id.*

As a matter of background, the district court in *Boehringer* interpreted the 2006 FCC Rule to require a commercial aim. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms.*, Inc., No. 3:14-cv-405, 2015 WL 144728, at *3 (D. Conn. Jan. 12, 2015). It found that this interpretation conformed with the TCPA's prohibition on the unsolicited sending of "material advertising the commercial availability or quality of any property, goods, or services" and the FCC's exclusion of "messages that do not promote a commercial product or service" from unsolicited advertisements. *Id.* (internal quotation marks omitted). There was no facial challenge to the 2006 FCC Rule, and the district court did not determine that the TCPA and the 2006 FCC Rule were in conflict. The district court further held that Physicians Healthsource failed to plead specific facts to prove a commercial element and therefore dismissed the claim. *See id.* at *5–*6.

On appeal to the Second Circuit, Physicians Healthsource argued in its opening brief that the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule." Appellant's Br. at 22, *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 15-288 (2d Cir. Feb. 2, 2015; filed Mar. 27, 2015), ECF No. 27. The Second Circuit did not address this argument and instead addressed the merits, determining that the 2006 FCC Rule required a commercial aim. *See Boehringer*, 847 F.3d at 95–96. The court ultimately vacated and remanded the case for

that these cases demonstrate that "[e]very other circuit to consider the [jurisdictional] issue has reached the same result." *Ante* at 9. But these cases are inapposite.

In both *Nack* and *Leyse*, the issue presented was a facial challenge to an FCC regulation. In *Nack*, the defendant asserted an affirmative defense that the FCC regulation, as the basis of the plaintiff's action, was contrary to the unambiguous language of the TCPA. *See* 715 F.3d at 685–86. The Eighth Circuit construed this argument as a challenge to the validity of the regulation. *See id.* Accordingly, the district court violated the Hobbs Act by considering it. *See id.* In *Leyse*, the plaintiff argued to the district court that the FCC rule was invalid or should be set aside because of procedural deficiencies in its promulgation. *Leyse*, 545 F. App'x at 458. On appeal, the plaintiff characterized his argument as an as-applied challenge and contended that the lawsuit was not "a proceeding to enjoin, set aside, annul, or suspend an order of the [FCC], and therefore was not barred by the Hobbs Act." *Id.* at 455 (internal quotation marks omitted). The Sixth Circuit determined that the plaintiff's attacks were "exactly the kind of facial attacks on the validity of FCC orders that the Hobbs Act meant to confine." *Id.* at 458. Accordingly, the Sixth Circuit concluded that the Hobbs Act deprived the district court of

discovery upon concluding that Physicians Healthsource successfully stated a claim for relief. *See id.* at 96–97.

I see no difference between the district court's decision in *Boehringer* and the district court's decision here. As in *Boehringer*, the district court here interpreted the 2006 FCC Rule in accordance with the TCPA to require a commercial aim.

jurisdiction over the argument that the FCC regulation was invalid. *See id.* at 459.

In contrast, here there is no facial challenge to the 2006 FCC Rule. Appellant did not argue to the district court that the 2006 FCC Rule is contrary to the plain language of the TCPA. It also did not argue that the 2006 FCC Rule should be set aside due to procedural deficiencies. Appellant merely argued for a specific interpretation of the 2006 FCC Rule, and Appellee argued for a different interpretation.

Mais is also distinguishable. In *Mais,* the district court refused to afford any deference to the FCC rule because the rule conflicted with the clear meaning of the TCPA. *See Mais*, 768 F.3d at 1115. The Eleventh Circuit held that "the district court exceeded its jurisdiction by declaring the . . . FCC [r]uling to be inconsistent with the TCPA." *Id.* at 1119. The Eleventh Circuit determined that "[b]y refusing to enforce the FCC's interpretation" because it was inconsistent with the TCPA, "the district court exceeded its power." *Id.* at 1119. Here, the district court did not find that the TCPA and the 2006 FCC Rule were in conflict. To the contrary, the district court assumed the 2006 FCC Rule was valid and harmonized the rule with its conclusions about the TCPA.

II.

Chevron Analysis

I now turn to whether an "unsolicited advertisement" under the TCPA must have a commercial aim. In doing so, I apply the familiar *Chevron* framework. *See Chevron, U.S., Inc. v. Nat.*

Res. Def. Council, 467 U.S. 837, 842–44 (1984). At step one, I conclude that the TCPA is ambiguous as to whether a fax must have a commercial aim to be an "advertisement." Accordingly, I would defer to the 2006 FCC Rule. At step two, I determine that in order for a fax to be an "advertisement," the 2006 FCC Rule requires that it have a commercial aim. Thus, I would affirm the district court.

A.

At step one of the *Chevron* analysis, we must determine whether the TCPA's definition of "unsolicited advertisement" unambiguously requires faxes to have a commercial aim. Under the TCPA, a person may not "send, to a telephone facsimile machine, an unsolicited advertisement" unless certain notice requirements are met. 47 U.S.C. § 227(b)(1)(C). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." *Id.* § 227(a)(5). Because (1) "advertis[ing]" does not definitely implicate a profit seeking motive; and (2) "commercial" may or may not modify "quality," I conclude that the TCPA is ambiguous on this point.

When interpreting statutory language, we begin by giving the words of the statute their plain meaning. *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012). According to the New Oxford American Dictionary, "advertise" means to "describe or draw attention to . . . in a public medium in order to promote sales or attendance." *Advertise*, New Oxford American Dictionary (3d ed. 2010). But the word is also commonly understood to

not necessarily implicate a profit seeking motive. The New Oxford American Dictionary further defines "advertise" as to "notify (someone) of something" and to "make (a quality or fact) known." *Id.* Additionally, while the New Oxford American Dictionary defines "commercial" as "making or intended to make a profit," the TCPA's definition of "unsolicited advertisement" is unclear as to whether "commercial" modifies "quality." *Commercial*, New Oxford American Dictionary (3d ed. 2010).

The plain language of the statute suggests two competing interpretations: one that requires a commercial aim and one that does not. It follows that a commercial aim *would not be* required if one accepts the common usage of "advertise" and believes "commercial" is divorced from "quality." Under this interpretation, a fax that simply points out the quality of a good would qualify as an unsolicited advertisement. But, it also follows that a commercial objective *would be* required if one accepts the "promote sales or attendance" definition of "advertise" and believes "commercial" modifies "quality." As a result, the TCPA is ambiguous.

B.

I thus move on to step two of the *Chevron* analysis. At step two, I conclude that the 2006 FCC Rule requires a commercial aim and is entitled to substantial deference because it is a "permissible" construction of the TCPA. *Chevron*, 467 U.S. at 843.

The majority determines that a "natural and logical reading" of the 2006 FCC Rule creates a prophylactic rule that all faxes offering free goods and services are "unsolicited advertisements" under

the TCPA. *Ante* at 15. But in my view, the 2006 FCC Rule makes clear that even faxes that purport to have no commercial aim on their face must nonetheless have a commercial aim in order to be an "advertisement" under the TCPA.

The 2006 FCC Rule states:

> 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 many instances "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an [established business relationship].

Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006).

As noted, in interpreting an agency's construction, we begin with the text.[2] *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012). A plain reading of the 2006 FCC Rule demonstrates that its objective is to prevent faxes with a commercial aim. Its objective is not to prevent faxes that promote free goods or services per se. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017). The 2006 FCC Rule explains that the "free" offering is "often part of an overall marketing campaign" and "the products promoted within the ['free'] publication are often commercially available." 71 Fed. Reg. at 25,973. In this way, the 2006 FCC Rule reflects the reality that "[b]usinesses are always eager to promote their wares and usually do not fund [publications, presentations, goods, or services] for no business purpose." *Boehringer*, 847 F.3d at 95.

In order to reach its conclusion, the majority reads the first sentence of the 2006 FCC Rule -- "[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." -- in isolation. 71 Fed. Reg. at 25,973; *see ante* at 13 ("The first sentence of the relevant portion is clear and unambiguous."). To be sure, if read in a vacuum, the first sentence seems

[2] The majority's interpretation of the 2006 FCC Rule goes beyond the plain meaning of the text. The majority attempts to divine the FCC's intent when it states: "Offers that are purportedly 'free' often have commercial strings attached . . . . For this reason, the FCC chose to interpret the term 'advertisement' broadly to include any offer of a free good or service." *Ante* at 13.

to create a prophylactic rule. However, it is informed by the language that follows.

Specifically, the second sentence of the 2006 FCC Rule redefines the subject faxes as those promoting free offerings with a commercial aim. It states, "In many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 71 Fed. Reg. at 25,973. The 2006 FCC Rule then refers to "such messages" -- redefined as those with a commercial aim -- and explains, "[I]t is reasonable to presume that such messages describe the 'quality of any property, goods, or services.'" *Id.* Reading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an "advertisement" under the TCPA.

This is a "permissible" construction. *Chevron*, 467 U.S. at 843. "A construction is permissible if it is reasonable . . . ." *Cetto v. LaSalle Bank Nat'l Ass'n*, 518 F.3d 263, 275 (4th Cir. 2008). This construction is certainly reasonable because it "is a logical interpretation and fits into one of two possible interpretations of the statute based on the plain meaning of the text." *Id.* at 276. Accordingly, this interpretation must be accepted.

III.

Pleading Standard

Having determined that the 2006 FCC Rule requires a commercial aim, I now turn to the relevant pleading standard. Because the TCPA is a remedial statute, it "should be liberally construed

and . . . interpreted . . . in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949); *see Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) ("The TCPA is a remedial statute that was passed to protect consumers . . . ."). "[R]equiring plaintiffs to plead specific facts" showing a commercial aim "would impede the purposes of the TCPA" because plaintiffs will likely face difficulty in discerning whether a fax has a commercial aim. *See Boehringer*, 847 F.3d at 96. Indeed, the 2006 FCC Rule recognizes this fact by highlighting that "in many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 71 Fed. Reg. at 25,973.

Accordingly, the burden at the pleading stage is minimal. "[W]here it is alleged that a firm sent an unsolicited fax promoting a free [publication containing products or services] that relate[] to the firm's [business], there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services." *Boehringer*, 847 F.3d at 95. A plaintiff satisfies its burden at the pleading stage where facts are alleged that the publication's contents relate to the defendant's business. *See id.* at 96 ("There must be a commercial nexus to a firm's business, i.e., its property, products, or services; that, in our view, is satisfied at the pleading stage where facts are alleged that the subject of the free seminar relates to that business."). If the plaintiff meets this minimal burden, the defendant may rebut the inference, but only after discovery.

Here, Appellant has not met even this minimal burden. Appellant merely states in its complaint:

"Each of the [Appellees] benefit or profit from the sale of the . . . [eBook]." J.A. 11 ¶ 12. This statement is contradicted by the fax itself, which demonstrates that the eBook is not offered for sale. *See id.* at 23 ("FREE 2014 *Physicians' Desk Reference* eBook -- Reserve Now"). Appellant does not even hint that the contents of the eBook relate to Appellees' business. Thus, Appellant has failed to state a claim.

IV.

For the foregoing reasons, I would affirm the district court, and I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CIVIL ACTION NO. 3:15-14887

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation, individually and as a representative of a class of similarly-situated persons, Plaintiff,
v.
PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC, and JOHN DOES 1-10, Defendants.

MEMORANDUM OPINION AND ORDER

Pending is a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) and a Motion for Judicial Notice under Federal Rule of Evidence 201, both brought by Defendants PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR"). ECF Nos. 18, 20. Oral argument on the two motions was held on September 29, 2016. For the reasons below, the Court **GRANTS** both motions.

I. Background

This is a putative class action brought pursuant to the Telephone Consumer Protection Act of 1991 as amended by the Junk Fax Prevention Act of 2005 ("TCPA"), 47 U.S.C. § 227, claiming PDR sent unsolicited fax advertising in violation of the TCPA.

According to the Complaint, PDR sent a single fax to Plaintiff's office. The fax, which is attached to the Complaint, offers the recipient a free "Physicians' Desk Reference eBook." The fax describes the reference book as containing the "[s]ame trusted, FDA-approved full prescribing information." The fax also provides a website which the recipient can visit to download the book, a customer service email and phone number, and a prominent picture of an electronic device with the cover of the book displayed. Plaintiff contends that this single fax is an unsolicited advertisement and its transmission is in violation of the TCPA. PDR's motion to dismiss contends that the fax is not an advertisement as a matter of law because it does not offer anything for purchase or sale. The Court agrees.

II. Legal Standard

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court follows a two-step approach: (1) "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and then (2) "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

For the first step, the complaint must provide the plaintiff's "grounds of . . . entitlement to relief" in more factual detail than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "While legal

conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

For the second step, a court must take the remaining factual allegations in the complaint as true, and view them in the light most favorable to the plaintiff. *See Twombly*, 550 U.S. at 555–56. The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 555, 570 (internal quotation marks omitted). Plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

III. Discussion

A. Judicial Notice

PDR asks the Court to take judicial notice of an exhibit attached to the Motion to Dismiss—a printout from PDR Network's website—to help the Court decide the Motion to Dismiss. A court may consider information susceptible to judicial notice on a 12(b)(6) motion to dismiss. When deciding a 12(b)(6) motion to dismiss "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine . . . in particular, . . .

matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)); *see also Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011) (citing *Tellabs*, 551 U.S. at 322). "A court may take judicial notice of information publically announced on a party's web site, so long as the web site's authenticity is not in dispute and it is capable of accurate and ready determination." *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 Fed.Appx. 223, 227 (4th Cir. 2013) (citing Fed. R. Evid. 201(b); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("it is not uncommon for courts to take judicial notice of factual information found on the world wide web.")).

The webpage supplied by PDR is from PDR's "About Us" website. The printout notes that PDR "provides healthcare professionals multichannel access to important drug information: the [Physicians' Desk Reference], the most recognized drug information reference available in the U.S." Def's. Req. for Judicial Notice Ex. 1, ECF No. 18-1. Plaintiff does not disput the authenticity of the printout from PDR's website, and the information contained in the printout is capable of accurate and ready determination. Accordingly, the Court takes judicial notice of the printout from PDR's website.

Moreover, during oral argument, Plaintiff did not dispute Defendants' description of the reference book or of PDR itself as an informational resource which is free to recipients and that PDR the company does not sell the reference or sell anything in the reference.

B. The Motion to Dismiss

PDR argues the Class Action Complaint should be dismissed because the sole fax at issue in this TCPA action is not an advertisement as a matter of law. PDR Network maintains the fax is not an advertisement because it (1) does not offer anything for purchase or sale, and (2) its primary purpose is to inform members, not sell a product or service. Defs' Memo. Supp. Mot. Dismiss 7, ECF No. 19.

In general, the TCPA forbids a person "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 U.S.C. § 277(a)(5). "An advertisement is any material that promotes the sale (typically to the public) of any property, goods, or services available to be bought or sold so some entity can profit." *Sandusky Wellness Ctr., LLC v. Medco Health Sols.*, 788 F.3d 218, 222 (6th Cir. 2015) (citing 47 U.S.C. § 227(a)(5); *Advertisement*, BLACK'S LAW DICTIONARY (10th ed.)); *see also N.B. Indus. v. Wells Fargo Co.*, 465 F.App'x. 640, 642 (9th Cir. 2012) (citing *Commerce* THE AMERICAN HERITAGE DICTIONARY (3d ed. 1994) ("To be commercially available within the meaning of [TCPA], a good or service must be available to be bought or sold (or must be a pretext for advertising a product that is so available."). As such, in order for

an unsolicited fax to become an advertisement the fax must have a commercial aim.

Case law from other federal courts likewise interpret the TCPA to require a commercial element to find that a fax is an advertisement. The Ninth Circuit Court of Appeals found that the subject of an unsolicited fax was not an advertisement because the subject of the fax—an award—"is not commercially available and, therefore, the description of the award, the application to apply for it, and the text encouraging recipients to apply are not unsolicited advertisements within the meaning of the [TCPA]." *N.B. Indus.*, 465 F.App'x. at 642.

Other district courts have held that where the sender of an unsolicited fax had nothing to sell, even if offering a good or service, the fax was not an advertisement. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, No. 3:14-cv-405, 2015 WL 144728, at *5 (D. Conn. Jan. 12, 2015) (finding that a fax sent by a drug manufacturer offering a free seminar that addressed a disorder for which the manufacturer was developing a drug but which was not yet available for sale was not an advertisement); *Phillips Randolph Enters., LLC. v. Adler-Weiner Research Chicago, Inc.*, 526 F.Supp.2d 851, 853 (N.D. Ill. 2007) (finding a fax notifying the recipient of a new research study on health care program was not an advertisement); *Ameriguard Inc. v. Univ of Kan. Medical Ctr.*, No. 06-0369-CV, 2006 WL 1766812, at *1 (W.D. Mo. Jun. 23, 2006) (finding a fax seeking participants in a clinical research trial not an advertisement because there was no "commercial availability" of any goods or services). "Indeed, the potential to gain some benefit from sending information, without the presence of

additional commercial statement in the message, is insufficient to transform an informational message to an advertisement." *Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, No. 12-2132, 2013 WL 486207, at *4 (D.N.J. Feb. 6, 2013).

In light of this raft of authority, the single fax at issue here is not an "advertisement" as defined by the TCPA. The fax certainly offers a good to Plaintiff but neither the fax nor PDR exhibit a commercial aim. The fax offers, for free, a reference book that contains information about prescription drugs. PDR does not sell prescription drugs, nor does it sell the reference book. The essential commercial element of an advertisement is missing from the fax; that is, there is no "hope to make a profit" from the offer and distribution of the reference book. *Sandusky*, 788 F.3d at 222. Moreover, although it is *possible* that PDR accrues some commercial benefit from distribution of the reference book, Plaintiff has not alleged any facts, other than a conclusory recitation of the elements of a TCPA claim, that plausibly indicates that PDR gains financially from the distribution of the reference book beyond speculative or ancillary gains. *See Twombly*, 550 U.S. at 555–56 (finding the complaint must contain "enough facts to state a claim to relief that is plausible on its face."); *Janssen Pharms., Inc.*, 2013 WL 486207, at *4 ("whether the sender will ultimately obtain an ancillary commercial benefit from sending an informational message does not alter [the fact that the fax is not an advertisement]."). In light of the information properly before the Court, the fax sent is not commercial in nature and therefore is not an advertisement.

Plaintiff strenuously urges this Court to adopt the Federal Communications Commission's ("FCC") order interpreting the TCPA's definition of "unsolicited advertisement." *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3814 (2006). Plaintiff argues that the FCC order creates a presumption that any fax that offers free services or goods is an advertisement and PDR's fax offers a free good and should therefore be considered an advertisement. *See id.* Plaintiff further contends that the Hobbs Act requires this Court to adopt the FCC's order. *See* 28 U.S.C. § 2342(1). Regardless of whether Plaintiff's interpretation of the FCC order is correct, Plaintiff is mistaken about the effect of the Hobbs Act.

The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA. The Hobbs Act vests exclusive jurisdiction to "enjoin, set aside, suspend, or to determine the validity of all final orders of the [FCC]" in the Circuit Courts of Appeals. *Id.* Neither party in this case has challenged the validity of the FCC's interpretation of the TCPA. If they had, this Court would lack the jurisdiction to decide the case. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984). Indeed, for the purposes of this case, the Court presumes the FCC's order is valid.

Nonetheless, the order's validity does not, *ipso facto*, bind the Court to defer to the FCC's interpretation of the TCPA. The Court is not obliged to defer to the FCC's interpretation of an unambiguous statute. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837,

843 (1984). The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). This definition is clear and easy to apply. *See Sandusky*, 788 F.3d at 223; *Janssen Pharms., Inc.*, 2013 WL 486207, at *3. Thus, FCC's interpretation of the TCPA is not due "substantial deference," *see Chevron*, 467 U.S. at 843–44, and in light of the clarity of the TCPA and case law applying it, the Court declines to defer to the FCC's interpretation.

Nonetheless, even if the Court were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision. The FCC concludes that "facsimile messages that promote goods or services, even at no cost, . . . are unsolicited advertisements under the TCPA's definition." 21 F.C.C. Rcd. at 3814. According to the FCC's interpretation, the offending message must "promote goods or services." "Promote" is defined as "[t]o publicize or advertise . . . so as to increase sales." *Promote*, OXFORD ENGLISH DICTIONARY (3d ed. 2007). Or "to present (merchandise) for buyer acceptance through advertising, publicity, or discounting." *Promote*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/promote?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. "Promote" has an explicit commercial nature, meaning that faxes that offer free goods or services must aim, through those goods and services, to garner a buyer's acceptance or attempt to increase

sales. The fax here cannot be read to "promote" anything other than information.

Indeed, to define promote to have a commercial nature harmonizes the FCC interpretation with the plain meaning of the TCPA. The TCPA unequivocally defines "unsolicited advertisement" as commercial in nature. 47 U.S.C. § 277(a)(5). The plain meaning of "promote" likewise has a commercial aim. To read the FCC interpretation in any other way would read "commercial" out of the TCPA's definition of "unsolicited advertisement"—a clear abdication of elementary statutory construction. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute.").

The FCC then goes on to explain its rationale for its characterization of faxes that promote free goods and services. It explains "[i]n many instances . . . 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 21 F.C.C. Rcd. at 3814. The FCC's guidance makes it clear that the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax. *See Drug Reform Coordination Net. V. Grey House Pub.*, 106 F. Supp. 3d 9, 13 (D.D.C. 2013) (holding that a fax that was not an unsolicited advertisement on its face was nonetheless an advertisement because three direct

solicitation emails followed). The TCPA, as already explained, seeks to curtail faxes with a commercial nature. To read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly obviates the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA.

A plain reading of the TCPA and the FCC interpretation demonstrates that they intend to curtail the transmission of faxes with a commercial aim. Plaintiff's interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA or the FCC interpretation.

The Court need not reach the disputed and thorny[1] issue of whether the TCPA is a remedial statute and if it should be read broadly or plainly. This Opinion and Order finds that the fax at issue is clearly not an advertisement, rendering the dispute over the remedial nature of the statue moot.

In sum, the TCPA prohibits unsolicited advertisements sent via fax. The TCPA unambiguously requires a fax to be commercial in nature to be considered an advertisement. PDR's fax

[1] *See, e.g., Gager v. Dell Fin. Servs, LLC.*, 727 F.3d 265, 271 (3d Cir. 2013) (finding TCPA remedial); *Hooters of Augusta v. Am. Glob. Ins. Co.*, 272 F.Supp.2d 1365, 1376–77 (S.D. Ga. 2003) (finding TCPA to be punitive); *see also Sandusky*, 788 F.3d at 224 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364–66 (2012)) ("Why interpret a statute's language broadly or narrowly (as opposed to just reasonably or fairly)? And since all statutes remedy what's seen as a problem, which statutes do *not* deserve broad construction?") (emphasis in original).

neither offers anything for sale, nor does PDR plausibly benefit commercially from the free distribution of the Physicians' Desk Reference. Accordingly, PDR's fax is not commercial in nature and therefore not an advertisement as defined by the TCPA.

IV. Conclusion

For the above reasons, the Court **GRANTS** PDR Network's Motion to Dismiss the Class Action Complaint under Federal Rule of Civil Procedure 12(b)(6), and **GRANTS** the Motion for Judicial Notice.

The Court **DIRECTS** the Clerk to send a copy of this Opinion and Order to counsel of record and any unrepresented parties.

ENTER: September 30, 2016

/s/ ROBERT C. CHAMBERS, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CIVIL ACTION NO. 3:15-14887

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation,individually and as a representative of a class of similarly-situated persons, Plaintiff,
v.
PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC, and JOHN DOES 1-10, Defendants.

JUDGMENT ORDER

In accordance with the accompanying order, the Court **GRANTS** Defendants' Motion to Dismiss and **ORDERS** that this case be dismissed and stricken from the docket of this Court.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to all counsel of record, and any unrepresented parties.

ENTER: September 30, 2016

/S/ ROBERT C. CHAMBERS. CHIEF JUDGE

FILED: March 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185
(3:15-cv-14887)

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons Plaintiff – Appellant

v.

PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10 Defendants – Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: April 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185 (3:15-cv-14887)

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons Plaintiff – Appellant
v.
PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10 Defendants - Appellees

M A N D A T E

The judgment of this court, entered February 23, 2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

47 USCS§ 227 (excerpts)

Restrictions on use of telephone equipment:

(a) Definitions. As used in this section—

. . .

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

. . .

(b) Restrictions on use of automated telephone equipment.

. . .

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to

receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions. If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

. . .

75 FR 25967 (excerpts)

. . .

Offers for Free Goods and Services and Informational Messages

The Commission concludes 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 many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules.

. . .

Hobbs Act (excerpts)

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--
(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

. . .

§ 2343. Venue

The venue of a proceeding under this chapter [*28 USCS §§ 2341* et seq.] is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

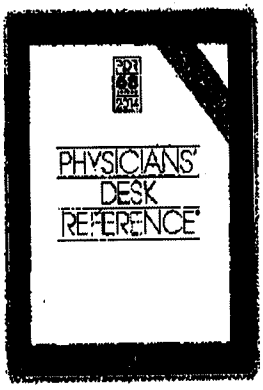
. . .

EXHIBIT A

12-17-2013 8:09 201-722-2688 (201) 755-8334

PDR

Date: December 17, 2013
To: Practice Manager
From: PDR Network
Subject: FREE 2014 *Physicians' Desk Reference* eBook – Reserve Now!



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For additional information, please contact PDR Network at (866) 925-6155 or customerservice@pdr.net.

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PDR Network

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- Now in a new, convenient digital format
- Developed to support your changing digital workflow
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