No. 23-1226

IN THE

Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC.,

Petitioner,

v.

MCKESSON CORPORATION, MCKESSON TECHNOLOGIES, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 2019, a Federal Communications Commission (FCC) bureau issued a declaratory order clarifying that online fax services, whose users essentially receive faxes as email attachments, are not "telephone facsimile machine[s]" under the Telephone Consumer Protection Act (TCPA). It based its conclusion on, among other things, online fax services' inability to "transcribe text * * * onto paper," a statutory requirement for a "telephone facsimile machine." 47 U.S.C. § 227(a)(3).

In this private-party TCPA action, the court of appeals held in an unpublished memorandum decision that the district court correctly followed the FCC bureau's determination on the scope of "telephone facsimile machine." That determination, the court of appeals explained, would ultimately be reviewable only under the Hobbs Act, 28 U.S.C. § 2342(1).

The question presented is:

Whether the court of appeals correctly held that a TCPA plaintiff may not collaterally attack an FCC bureau's declaratory order limiting the scope of defendant's liability when that order will ultimately be subject to review under the Hobbs Act; and, regardless, whether the TCPA's plain text, structure, and purpose show that online fax services are not "telephone facsimile machines" and thus not covered by the statute.

CORPORATE DISCLOSURE STATEMENT

McKesson Corporation is a publicly traded company. McKesson Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. McKesson Technologies, Inc., which became McKesson Technologies LLC in 2017, was a wholly owned subsidiary of McKesson Corporation. In 2018, McKesson Technologies LLC was acquired by Change Healthcare. As part of the sale agreement, McKesson Corporation retained responsibility for McKesson Technologies LLC's obligations related to this suit. McKesson Corporation currently has no ownership or direct or indirect voting interest in either Change Healthcare or McKesson Technologies LLC.

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INTRODUCTION

According to petitioner, "[t]his case presents an ideal vehicle to resolve the question presented, but left undecided," in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019). Pet. 2. In reality, the question presented here is different from that in *PDR Network*, and the petition presents a flawed vehicle for review.

In *PDR Network*, a *defendant* who had been sued under the Telephone Consumer Protection Act contended that its conduct was not covered by the statute. Years before, the Federal Communications Commission had issued an order suggesting otherwise. The question before this Court was whether the exclusive direct review scheme for FCC orders established by the Hobbs Act barred the defendant from defending itself by questioning the FCC order's understanding of the statute. *PDR Network*, 588 U.S. at 3-4.

The Court "found it difficult to answer this question, for the answer may depend upon the resolution of two preliminary issues." *Id.* at 4. In a concurrence for four Justices, Justice Kavanaugh would have applied the "traditional[]" rule that a defendant in an "enforcement proceeding" can "raise an as-applied challenge to an agency's interpretation of a statute." *Id.* at 15. He suggested that prohibiting such a defense would "raise[] significant questions under the Due Process Clause." *Id.* at 19.

This case presents numerous differences and vehicle problems that make it a poor candidate for revisiting the question that was presented in *PDR Network*. *First*, the parties' positions here are reversed. Petitioner is the

plaintiff, seeking to impose millions of dollars of liability on a defendant based on an interpretation of the TCPA that an FCC declaratory order has rejected. No traditional rule supports a plaintiff's ability to expand a defendant's liability in this way. The due process concerns underlying Justice Kavanaugh's *PDR Network* concurrence are absent.

Second, the timing and nature of the FCC order at issue also distinguishes this case from *PDR Network*. There, the relevant FCC order had been issued by the full FCC years before the case, when the defendant had no reason to challenge it through a Hobbs Act petition for review. Here, the FCC order was issued during this litigation by an FCC bureau on delegated authority, and the FCC is now considering an application for review of the bureau order. If certiorari were granted, the FCC could act on that application for review at any time (and judicial review under the Hobbs Act could follow). Such actions could fundamentally alter the contours of this case, ultimately causing it to be dismissed as improvidently granted.

Even if FCC action did not interfere with this Court's review, petitioner's strategic decisions respecting the ongoing proceedings would. Petitioner could have participated in that proceeding (and still could today). Petitioner could then pursue judicial review via the Hobbs Act. It has strategically opted not to do so. That choice to forgo plainly available administrative remedies presents an independent barrier to collateral attack of the FCC order. *See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970).

Third, the Ninth Circuit here did not address, or even mention, *PDR Network* or the supposed post-*PDR Network* split petitioner tries to invoke. There is no such split. Petitioner cites only the non-precedential order in this case for its argument that, since *PDR Network*, the Ninth Circuit has continued to apply Hobbs Act preclusion for "interpretative" rules while other courts of appeals do not. But the Ninth Circuit here deemed the relevant FCC order an *adjudication*, not an interpretative rule. That is a different category of decision under the Administrative Procedures Act (APA). Once petitioner's miscategorization is corrected, its purported split melts away. Petitioner does not invoke any post-*PDR Network* conflict on the Hobbs Act's application to agency adjudications. And the unpublished decision below could not be part of such a split regardless.

Finally, the Ninth Circuit's decision here is correct for a reason it did not reach—the TCPA's plain text supports the exact same conclusion as the FCC order. So whether or not that order is binding, it is correct. The TCPA's text, structure, and purpose unanimously support the conclusion that it does not apply to faxes sent to online fax services. That readily available alternative ground for affirmance could prevent the Court from deciding the Hobbs Act question. At the very least, it means the Court's review of that question is unlikely to affect the ultimate outcome of this case.

If the Court wants to revisit the question that was presented in *PDR Network*, it should await a case in which a *defendant* questions the statutory interpretation in an FCC order; where that order was issued by the full Commission and is no longer subject to Hobbs Act review;

and where the Court's review would actually make a difference.

Certiorari should be denied.

STATEMENT

A. Statutory And Regulatory Background

1. The Telephone Consumer Protection Act

Subject to certain exceptions, the TCPA prohibits the "use [of] any [1] telephone facsimile machine, [2] computer, or [3] other device to send, to a [1] telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C); *see id.* § 227(b)(1)(C)(i)-(iii) (exceptions).

A "telephone facsimile machine" is defined as "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper." *Id.* § 227(a)(3); *see* 47 C.F.R. § 64.1200(f)(14) (same).

The TCPA creates a private right of action for a violation of Section 227(b) or its implementing regulations. *Id.* § 227(b)(3)(A). Plaintiffs may seek actual damages or $500 in statutory damages "for each such violation." *Id.* § 227(b)(3)(B).

2. FCC authority and judicial review

Congress authorized the FCC to "prescribe regulations to implement the requirements" of the TCPA. *Id.* § 227(b)(2). Like other agencies, the FCC also has adjudicatory authority to "issue a declaratory order" to "terminate a controversy or remove uncertainty" in the laws it administers. 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2(a).

This case involves a declaratory order issued by an FCC component on delegated authority. Congress expressly authorized the FCC to delegate "any of its functions" (subject to certain exceptions not relevant here) to its staff. 47 U.S.C. § 155(c)(1). Any person aggrieved by an action taken on delegated authority may file an application for review by the FCC. *Id.* § 155(c)(4). But unless and until reversed by the FCC, any "action made or taken pursuant to any such delegation * * * shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission." *Id.* § 155(c)(3); *see* 47 C.F.R. § 1.102(b)(1); 47 C.F.R. § 1.102(b)(3) (absent a stay from the FCC, filing an application for review does not limit the effectiveness of an action taken on delegated authority).

A decision by the full FCC is a "condition precedent to judicial review" of any action taken by an FCC component on delegated authority. 47 U.S.C. § 155(c)(7). Any such judicial review takes place under the Hobbs Act, which gives federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). With limited

exceptions not relevant here, section 402(a) governs "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." 47 U.S.C. § 402(a).

3. FCC orders

a. Amerifactors

In 2017, a party filed a petition asking the FCC to adjudicate whether "online fax services" are "telephone facsimile machines" within the meaning of the TCPA. Pet. App. 47a ("*Amerifactors*"). "An online fax service is 'a cloud-based service consisting of a fax server or similar device that is used to send or receive documents, images and/or electronic files in digital format over telecommunications facilities' that allows users to 'access "faxes" the same way that they do email.'" *Ibid.* (footnote omitted).

Acting on delegated authority, the FCC's Consumer and Governmental Affairs Bureau decided the petition after notice and comment. Pet. App. 49a, 56a (citing 47 C.F.R. §§ 0.141, 0.361). It issued a declaratory order stating that an online fax service "is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition." Pet. App. 48a. That conclusion followed from the statute's text, its underlying purposes, and the large amount of information in the record "on the nature and operations of current online fax services." Pet. App. 50a.

The Bureau's analysis began with the statute's text: "the TCPA's language demonstrates that Congress did not intend the statute's prohibition to apply to faxes sent to equipment other than a telephone facsimile machine." Pet. App. 51a. While "Congress made clear that the pro-

scription applies when such a fax is sent *from* other devices"—such as "a 'computer,' or any 'other device'"—"the language of the statute proscribes sending a fax only *to* a 'telephone facsimile machine.'" Pet. App. 51a-52a (quoting 47 U.S.C. § 227(b)(1)(C)) (emphases added).

The Bureau then explained that online fax services do not fall within the statutory definition of a "telephone facsimile machine." Pet. App. 52a. A "fax received by an online fax service as an electronic message is effectively an email." *Ibid.* And because "an online fax service cannot itself print a fax," "an online fax service is plainly not 'equipment which has the capacity * * * to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.'" Pet. App. 52a-53a (quoting 47 U.S.C. § 227(a)(3)). That straightforward understanding of the plain statutory language was consistent with the FCC's longstanding view "that the TCPA's prohibition [on faxing unsolicited advertisements] does not extend to facsimile messages 'sent as email over the Internet.'" Pet. App. 48a (citing *Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶200 (2003)).

The Bureau's plain reading of the text was reinforced by the TCPA's purposes. It noted that "faxes sent to online fax services do not cause the specific harms to consumers Congress sought to address in the TCPA": shifting printing costs from advertisers to fax recipients and making fax machines unavailable for "legitimate business messages while processing and printing the junk fax." Pet. App. 53a (quoting H.R. Rep. No. 102-317, at 10 (1991)). Online fax services do not use paper or ink and can handle multiple incoming transmissions simultaneously. Pet. App. 53a-54a.

The *Amerifactors* order was "effective upon release." Pet. App. 56a. An application was filed in 2020 seeking review of the order by the full FCC, but the applicant did not seek a stay, and none was issued. *Amerifactors Fin. Grp., LLC Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Career Counseling Services, Inc. Application for Review (Jan. 8, 2020). That application for review remains pending.

b. **Ryerson**

In 2020, the FCC's Consumer & Governmental Affairs Bureau issued another declaratory order finding that an online fax service falls outside the TCPA's definition of a "telephone facsimile machine." *Joseph T. Ryerson Petition for Declaratory Ruling*, 35 FCC Rcd. 9474, 9475 ¶ 4 (2020). It found that the technology at issue there was "sufficiently similar to that described in *Amerifactors*" that *Amerifactors* "governed." *Ibid.*

Petitioner's counsel here (Anderson + Wanca) had filed comments in the *Ryerson* proceedings on counsel's own behalf, stating that it is "an Illinois law firm that represents clients across the country in private litigation enforcing the [TCPA]" and that the ruling on the *Ryerson* petition "could have implications beyond Ryerson's case." Anderson + Wanca's Comments on Ryerson's Petition for Declaratory Ruling, CG Docket Nos. 05-338, 02-278, at 1 (Dec. 9, 2015).[1] Petitioner's counsel argued that "faxes received as e-faxes" are covered by the TCPA. *Id.* at 3-5.

[1.] Available at https://www.fcc.gov/ecfs/document/60001325164/1.

After the Bureau issued the *Ryerson* order, Anderson + Wanca filed an application for review with the FCC. Application for Review, CG Docket Nos. 05-338, 02-278 (Oct. 5, 2020).[2] It argued that "[a]s with the Amerifactors Bureau Order, which is currently the subject of a separate Application for Review, the Commission should reverse the Ryerson Bureau Order" on the grounds that "its reasoning regarding 'online fax services' is in conflict with the statute, regulations, case precedent, and established Commission policy." *Id.* at 1-2; *see id.* at 10-15 (arguing that *Amerifactors* was wrongly decided). Counsel's application for review remains pending.

B. Factual And Procedural Background

1. In 2009 and 2010, Physician Practice Solutions, a business unit of respondent McKesson Technologies, Inc., sent twelve faxes to petitioner's stand-alone fax machine. 1-ER-5.[3] The faxes offered petitioner upgrades, add-ons, and companion products to software it had purchased from Physician Practice Solutions. 1-ER-5.

Petitioner and another chiropractic practice that had received such faxes (collectively, "plaintiffs") filed this suit as a putative class action, alleging that respondents faxed them "unsolicited advertisements" in violation of the TCPA. 3-ER-462-478. Plaintiffs sought to certify a class of all persons who received such faxes from respondents from September 2009 to May 2010. 3-ER-399.

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2. Available at https://www.fcc.gov/ecfs/document/10051296223794/1.

3. Citations to __-ER-__ are to the Excerpts of Record in the court of appeals.

2. The district court initially denied certification. 3-ER-399-408. It concluded that plaintiffs failed to establish predominance because the court "would need to make detailed factual inquiries regarding whether each fax recipient granted prior express permission." 3-ER-406-407.

The Ninth Circuit granted permission to appeal (3-ER-398), and partially reversed. *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 926 (9th Cir. 2018), cert. denied, 139 S. Ct. 2743 (2019). It determined that the district court should have considered subclasses based on the several methods by which respondents obtained consent to send faxes. *Id.* at 931-33.

3. On remand, the district court granted plaintiffs' renewed motion for class certification of one subclass. 1-ER-44-77. But following the FCC's 2019 decision in *Amerifactors*, respondents moved to decertify, arguing that individual, fact-intensive inquiries would be needed to separate class members who received faxes on a stand-alone telephone facsimile machine from those who received them via online fax services. 2-ER-197-222; 2-ER-127-151.

The district court concluded that decertification was premature but split the class into a "Stand-Alone Fax Machine Class" and an "Online Fax Services Class." Pet. App. 24a-42a. It determined that it was bound by the FCC's interpretation of the TCPA in *Amerifactors*. Pet. App. 36a (citing *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399 (9th Cir. 1996)). And it permitted plaintiffs to attempt a subpoena process "for identifying those who received faxes via an online fax service" and those who did not. Pet. App. 39a-42a.

The district court then sua sponte entered summary judgment against the Online Fax Services Class. Pet. App. 21a-23a. "[B]ased on the analysis in" its previous ruling, the court concluded that "the Online Fax Services Class has no cause of action as a matter of law under *Amerifactors*." Pet. App. 22a.

After plaintiffs served 246 subpoenas on class members' telephone carriers, the resulting evidence confirmed that they could not determine whether customers received faxes on stand-alone fax machines or through online fax services. 2-ER-111-113.

The district court decertified the class. Pet. App. 12a-20a. It explained that, because "[t]here can be no TCPA liability at all if the fax was received via an online fax service," the method of receipt was a dispositive threshold issue for each class member. Pet. App. 18a. It concluded that the lack of class-wide evidence meant that "the individualized question of whether each class member received the faxes at issue on a stand-alone fax machine predominates over common questions" and prevents certification. *Ibid.*

Decertification left only the individual claims of petitioner and its co-plaintiff. 1-ER-3. In the interest of efficiency, respondents stipulated that they sent the thirteen faxes at issue, that plaintiffs received the faxes on stand-alone "telephone facsimile machine[s]," and that the faxes were "advertisements" under the TCPA. 2-ER-80.

The district court found respondents liable but concluded that plaintiffs were not entitled to treble damages because they failed to prove respondents had "willfully

or knowingly" violated the TCPA. 1-ER-12. The court awarded base statutory damages of $500 to the co-plaintiff for the one fax it received and $6,000 to petitioner for its twelve faxes. 1-ER-2.

4. The court of appeals affirmed in an unpublished memorandum. Pet. App. 3a-11a. It found the district court did not abuse its discretion in decertifying the class. Pet. App. 7a. It concluded that the district court correctly followed *Amerifactors*' conclusion "that the TCPA does not apply to faxes received through an online fax service." *Ibid.* It rejected petitioner's argument that *Amerifactors* could be disregarded because, as an order issued on delegated authority, it was "neither an order of the Commission, nor final." *Ibid.* It observed that the Bureau acted on delegated authority and that by statute its decision "'ha[d] the same force and effect' as orders of the full Commission." Pet. App. 7a-8a (quoting 47 U.S.C. § 155(c)(3)).

The court of appeals further held that the *Amerifactors* order applied retroactively to the faxes at issue here. Pet. App. 9a. In so concluding, it cited authorities characterizing "declaratory rulings as adjudications" and explaining that "when an agency's adjudicatory decisions apply preexisting rules to new factual circumstances, its determinations apply retroactively." *Ibid.* (citations omitted).

Having so held, the court did not reach respondents' alternative argument that, regardless of the FCC's order, the plain text of the TCPA shows that online fax services

are not covered by the statute. Resp. CA Response/Reply Br. at 17-28.[4]

5. The court of appeals denied petitioner's petition for rehearing en banc without recorded dissent. Pet. App. 1a-2a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN AUTHORITY WARRANTING THIS COURT'S INTERVENTION

A. Because The Decision Below Treated *Amerifactors* As An Adjudication, It Does Not Implicate Any Purported Post-*PDR Network* Split About Interpretive Rules

Petitioner contends that there is a post-*PDR Network* circuit split "on whether the Hobbs Act extends even to FCC interpretive rules." Pet. 14. There is no such split, and, even if there were, it would not be presented here.

As petitioner notes, before *PDR Network*, the Ninth Circuit held that the Hobbs Act applies to interpretive as well as legislative rules. *U.S. W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000); *see* Pet. 15. But petitioner cites no post-*PDR Network* decision from the Ninth Circuit or any other court of appeals so holding.

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[4] The court of appeals affirmed the district court's denial of treble damages on plaintiffs' individual claims and grant of summary judgment to plaintiffs on respondents' consent defenses. Pet. App. 9a-11a. Neither petitioner nor respondents seek review of those issues.

There is no such holding here. The Ninth Circuit did not characterize *Amerifactors* as an interpretive rule—or any rule at all. Instead, the court treated the *Amerifactors* order as an *adjudication*. Pet. App. 9a. It noted that the FCC Bureau had acted pursuant to 47 C.F.R. § 1.2(a). Pet. App. 9a. That provision authorizes the Bureau to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2(a). The court further observed that the APA characterizes declaratory rulings as adjudications. Pet. App. 9a (citing 5 U.S.C. § 554(e)); *see Central Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (FCC declaratory order proceedings are adjudications). And it was the order's classification as an adjudication that supported the court of appeals' holding that the order "applie[d] retroactively to the faxes at issue here." Pet. App. 9a (citing *Reyes v. Garland*, 11 F.4th 985, 991 (9th Cir. 2021)).

Adjudications and rules (whether legislative or interpretive) are fundamentally different categories under the APA. *See Corner Post, Inc. v. Board of Governors*, 144 S. Ct. 2440, 2454 n.4 (2024); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-225 (1988) (Scalia, J., concurring); *compare* 5 U.S.C. § 553 (rulemaking) *with id.* § 554 (adjudications, including declaratory orders). For that reason, an "adjudicative decision * * * does not fit within the legislative/interpretive framework for rulemaking." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007) (emphasis omitted); *see Bowen*, 488 U.S. at 222 (Scalia, J., concurring) (contrasting an "interpretive rule" with a "declaratory order" through which an agency can decide a legal question "retroactively through adjudication"); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (agencies can "announc[e] new principles in an adjudicative proceeding").

"Agencies often have a choice of proceeding by adjudication rather than rulemaking." *Central Texas Tel. Co-op.*, 402 F.3d at 210. Here, as the Ninth Circuit held (Pet. App. 9a), the FCC proceeded through adjudication.

Petitioner cites no post-*PDR Network* court of appeals decision accepting a collateral attack on an FCC adjudicative ruling, much less a split on that question. Nor could the court of appeals' decision here be part of any such split, given that it is non-precedential (and does not even cite *PDR Network*).

B. Regardless, Revisiting The Hobbs Act Question Would Be Premature

Although *PDR Network* did not resolve the question presented there, the Court—in both the majority opinion and Justice Kavanaugh's concurrence—provided guidance for lower courts about what factors may be relevant and how to approach the Hobbs Act question. Given the recency of that decision and the relatively small number of cases that present the question, the courts of appeals have just begun to react to and apply that guidance. Certiorari would be premature without first giving the courts of appeals an opportunity to fully consider *PDR Network*.

The cases petitioner cites for its supposed post-*PDR Network* split illustrate this prematurity. Three of those cases make passing references to *PDR Network* only in a footnote. *Panzarella v. Navient Sol., Inc.*, 37 F.4th 867, 873 n.7 (3d Cir. 2022); *Gorss Motels, Inc. v. Lands' End, Inc.*, 997 F.3d 470, 477 n.4 (2d Cir. 2021); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 960 n.8 (8th Cir. 2019). It is unsurprising that these courts did not meaningfully engage with the Hobbs Act question or the guidance in

PDR Network because the issue would not have been outcome-determinative in any of those cases. All three courts agreed with the FCC's interpretation, so it did not matter whether they were bound by it. *See, e.g., Golan*, 930 F.3d at 960 n.8 ("Our decision is not implicated by the recent Supreme Court opinion in *PDR Network*."). In fact, far from adopting the rule petitioner claims, the Second Circuit expressly stated that the status of FCC orders remained "an open question" and that it "need not decide that question here." *Gorss Motels*, 997 F.3d at 477 n.4.

If the Court wants to revisit *PDR Network*, it should at least wait for the courts of appeals to digest and act on its prior guidance, so it can reconsider the question with the benefit of those reasoned decisions.

II. THE COURT OF APPEALS' DECISION WAS CORRECT

The court of appeals correctly held that a plaintiff in a TCPA case cannot impose liability on a defendant based on a reading of the statute the FCC has rejected in still-pending proceedings. And, regardless, the FCC's interpretation of the statute is correct, providing a straightforward alternative ground for affirmance.

A. The Court Of Appeals Correctly Held Petitioner Could Not Collaterally Attack The FCC Bureau's Order

1. The court of appeals correctly held that the district court "was bound by the Federal Communication Commission's *Amerifactors* declaratory ruling, which determined that the TCPA does not apply to faxes received through

an online fax service." Pet. App. 7a. The Hobbs Act gives courts of appeals "*exclusive* jurisdiction" to "determine the validity of" certain final orders of the FCC. 28 U.S.C. § 2342 (emphasis added); *see* 47 U.S.C. § 402(a). To "determine the validity" of an agency order is to "settle a question or controversy about" whether it is "sound [or] good." *Webster's New International Dictionary of the English Language* 711 (2d ed. 1958) (determine); *id.* at 2813 (valid). That broad definition includes collateral attacks to the order that require a court to determine whether the agency's interpretation is "sound [or] good." *Ibid.* And when, as here, an FCC component issues an order on delegated authority, the full FCC's resolution of an application for review of the order is a "condition precedent to judicial review." 47 U.S.C. § 155(c)(7).

Congress thus laid down one exclusive path for courts to determine whether *Amerifactors* correctly interpreted the TCPA. The first stop would be a decision by the full FCC on the pending application for review. The second would be review by a court of appeals on a petition for review under the Hobbs Act. A plaintiff whose claims depend on a determination that the FCC's interpretation of the statute is wrong may not circumvent that exclusive path by inviting a district court to make its own determination.

2. In support of petitioner's position on the merits, it repeatedly invokes *PDR Network* and Justice Kavanaugh's opinion concurring in the judgment. *E.g.*, Pet. 1, 2, 20. But it fails to acknowledge that case's fundamental difference. There, a TCPA *defendant* argued that, notwithstanding the Hobbs Act, it had a right to defend itself from liability under an erroneous interpretation of a statute.

PDR Network, 588 U.S. at 6. Here, by contrast, the agency entrusted by Congress to interpret and enforce the TCPA has said that the defendant's interpretation is correct. It is the TCPA *plaintiff* that seeks to circumvent Hobbs Act review of that determination to expand the defendants' liability.

The first line of Justice Kavanaugh's separate opinion identified the issue he was addressing: "May *defendants in civil enforcement actions* under the Telephone Consumer Protection Act contest the Federal Communications Commission's interpretation of the Act?" *Id.* at 10-11 (emphasis added). And his opinion repeatedly emphasized the defendant-centered question before the Court. *See, e.g.*, *id.* at 12 ("I would conclude that the Hobbs Act does not bar a *defendant in an enforcement action* from arguing that the agency's interpretation of the statute is wrong."); *id.* at 12 ("The general rule of administrative law is that in an enforcement action, a *defendant* may argue that an agency's interpretation of a statute is wrong, at least unless Congress has expressly precluded the defendant from advancing such an argument."); *id.* at 14 ("The question for us is whether the Hobbs Act bars *defendants in those enforcement actions* from arguing that the agency incorrectly interpreted the statute. The answer is that the Act does not bar *defendants* from raising such an argument."); *id.* at 15 ("In those enforcement actions, the *defendant* may argue that the agency's interpretation is wrong."); *id.* at 16 (invoking "the tradition of allowing *defendants* in enforcement actions to argue that the agency's interpretation is wrong"); *id.* at 17 (noting the government's acknowledgement that the APA "establishes a general rule that, when a *defendant's liability* depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement

suit") (citation omitted); *id.* at 17 ("In enforcement proceedings, this Court has routinely considered *defendants'* arguments that the Administration's interpretation of a statute is incorrect."); *id.* at 23 ("To deprive *a defendant such as PDR* the opportunity to contest the agency's interpretation, Congress must expressly preclude review."); *id.* at 26 (expressing concern about "blindsid[ing] *defendants* who would not necessarily have anticipated that they should have filed a facial, pre-enforcement challenge") (emphases added in all).

That posture matters because Justice Kavanaugh's position in *PDR Network* was a particular application of the rule that "[r]egulated parties may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings *against them*." *Corner Post*, 144 S. Ct. at 2458 (quotation marks and citation omitted; emphasis added). That background principle formed the basis of the "default rule" that he applied to statutes he categorized as "silent about review in subsequent enforcement actions": "In those enforcement actions, the defendant may argue that the agency's interpretation is wrong." *PDR Network*, 588 U.S. at 15. But neither he nor the *PDR Network* majority cited any such principle under which a *plaintiff* in such an enforcement action may do the same.

Justice Kavanaugh's emphasis on defendants' rights also implicated a "constitutional issue": "Barring defendants in as-applied enforcement actions from raising arguments about the reach and authority of agency rules enforced against them raises significant questions under the Due Process Clause." *Id.* at 19. He explained that this constitutional concern counseled in favor of "the default rule" allowing defendants to make such arguments. *Ibid.*

In contrast, allowing plaintiffs to challenge an agency's interpretation that limits liability for defendants would disrupt the statutory scheme. Congress provided for both FCC and private enforcement of the TCPA. *See Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 374 n.4 (2012) (noting that FCC may initiate civil actions and impose forfeitures for violations of the statute and its regulations). In such FCC enforcement actions, the agency would not be permitted to impose liability based on an interpretation of the statute the agency had expressly rejected. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-254 (2012) (penalizing regulated entity for non-compliance with new, more expansive interpretation of prohibited conduct violates due process). It makes sense that an enforcement action brought by a private individual would be subject to the same limitation.[5]

B. The TCPA Does Not Prohibit Fax Advertisements Sent To Online Fax Services

Whether or not *Amerifactors* is binding, it is correct. As the Fourth Circuit recently held, the TCPA's plain

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[5] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), casts no doubt on the Ninth Circuit's holding. *Loper Bright* involved the standard that courts apply when reviewing an agency's interpretation of a statute—not which court is the proper one to conduct such review. *Loper Bright* held that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 2273. Should the full FCC decide the *Amerifactors* application for review and should a party challenge that decision in a court of appeals under the Hobbs Act, *Loper Bright* will control that court's review. This case involves the different question of whether a TCPA plaintiff can circumvent the Hobbs Act by effectively seeking such review in a district court.

language shows that Congress did not extend the statutory prohibition to advertisements sent to online fax services. *See Career Counseling, Inc. v. AmeriFactors Financial Grp., LLC*, 91 F.4th 202, 208-211 (4th Cir. 2024), pet. for cert. filed, No. 24-86 (July 19, 2024).

This presents an independent and straightforward alternative ground for affirmance that would obviate the need for the Court to even consider the Hobbs Act question. *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (respondent may defend court of appeals' judgment "on any ground that the law and the record permit and that will not expand the relief granted below"); *see* Resp. CA Response/Reply Br. at 17-28 (making statutory argument).

1. The TCPA's plain text unambiguously excludes online fax services

Courts interpreting a statute "begin[] with the statutory text, and end[] there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "When a statute includes an explicit definition," courts "must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987).

The TCPA prohibits the use of "any [1] telephone facsimile machine, [2] computer, or [3] other device to send, to a [1] telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The term "telephone facsimile machine" means "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe

text or images (or both) from an electronic signal received over a regular telephone line onto paper." *Id.* § 227(a)(3).

That definition is unambiguous and clearly resolves this case. Multiple features of the statutory text establish that "telephone facsimile machine" excludes online fax services.

First, the statute draws a clear distinction between a "computer" or "other device" on the one hand and a "telephone facsimile machine" on the other. 47 U.S.C. § 227(b)(1)(C); *see Career Counseling*, 91 F.4th at 210. As the FCC explained, "the language of the statute proscribes sending a fax only to a 'telephone facsimile machine,'" even though a prohibited communication "can originate on any of three types of equipment: a 'telephone facsimile machine,' a 'computer,' or any 'other device.'" Pet. App. 51a-52a. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (internal quotation marks and brackets omitted). And "[t]hat maxim is especially apt" where "the distinction appears in a single paragraph." *Medina Tovar v. Zuchowski*, 982 F.3d 631, 635 (9th Cir. 2020).

Here, in a single breath, Congress referred to the use of a "computer," "telephone facsimile machine," or "other device" to "send" certain faxes but used only the term "telephone facsimile machine" for receipt of such faxes. If Congress had intended to extend the prohibition to faxes received via an online fax service, it would have specified that prohibited communications included those sent to "a computer" or "other device." Reading

"telephone facsimile machine" in section 227(b)(1)(C) to include online fax services would erroneously render the terms "computer" or "other device" superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts should "give effect, if possible, to every clause and word of a statute").

Second, an online fax service is not a "telephone facsimile machine" because it is not "equipment," a threshold requirement of the statutory definition. 47 U.S.C. § 227(a)(3). The statute does not define "equipment." But it repeatedly uses that word to specifically mean "telephone equipment" (*e.g.*, 47 U.S.C. § 227(b) ("Restrictions on use of automated telephone equipment"))—which an online fax service plainly is not. Equipment's plain meaning is a physical object. *See Merriam-Webster's Collegiate Dictionary: Eleventh Edition* 423 (2003) (defining equipment as "the set of articles or *physical* resources serving to equip a person or thing") (emphasis added). By contrast, online fax services are digital, not physical. As the FCC explained, "online fax services hold inbound faxes in digital form on a cloud-based server, where the user accesses the document via the online portal or via an email attachment." Pet. App. 54a.

Third, an online fax service is not a "telephone facsimile machine" because it does not "transcribe text or images * * * onto paper." 47 U.S.C. § 227(a)(3); *see Career Counseling*, 91 F.4th at 210. "[A]n online fax service cannot itself print a fax—the user of an online fax service must connect his or her own equipment in order to do so." Pet. App. 52a.

Finally, the TCPA's definition of "telephone facsimile machine" excludes an online fax service because such services do not "transmit [a] signal over a regular telephone

line." 47 U.S.C. § 227(a)(3) (emphasis added); *see Career Counseling*, 91 F.4th at 210. The TCPA does not define "regular telephone line." But regular means "normal" or "typical." *Merriam-Webster's Collegiate Dictionary: Eleventh Edition* 1049 (2003). In contrast, online fax services use the Internet, as their name suggests; thus, "a fax received by an online fax service as an electronic message is effectively an email." Pet. App. 52a.

In short, the TCPA's plain text is unambiguous: online fax services are not "telephone facsimile machines" under the statute. That alone suffices to justify affirmance of the judgment for respondents.

2. The TCPA's purpose is not served by extending its reach to online fax services

If the Court were to look beyond the text, the TCPA's purpose confirms what the plain text provides: Congress did not intend "telephone facsimile machine" to include online fax services. *See Career Counseling*, 91 F.4th at 210-211.

Congress was principally concerned about advertisers imposing printing costs on fax recipients and tying up their traditional phone lines. As the House Committee on Energy and Commerce explained, because "[f]acsimile machines are designed to accept, process, and print all messages which arrive over their dedicated lines," a "fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient's machine." H.R. Rep. No. 102-317, at 10 (1991). "This type of telemarketing is problematic" because "it shifts some of the

costs of advertising from the sender to the recipient" by requiring the recipient to bear the cost of the paper and ink required to print the fax, and it "occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." *Ibid.*; *see id.* at 25. The Committee Report noted that these problems made fax advertisements very different than regular mail marketing, where "the recipient pays nothing to receive the letter," and its receipt does not disrupt the delivery of other mail. *Id.* at 25.

As the FCC recognized in *Amerifactors*, neither of these two rationales for regulating fax advertisements applies to faxes received via online fax services. Pet. App. 53a-54a. Because online fax services operate essentially like email inboxes, "[f]axes sent to online fax services use paper and ink only when the recipient *chooses* to print it using their own separately provided equipment." Pet. App. 54a (emphasis in original). And "[t]hese services can handle multiple simultaneous incoming transmissions and thus receipt of any one fax does not render the service unavailable for others." *Ibid.*

3. The FCC's view is entitled to respect

Although this Court exercises "independent judgment" in construing statutes, it accords "due respect to Executive Branch interpretations." *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). Specifically, "the 'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon * * * specialized experience,' 'constitute a body of experience and informed judgment to which courts and litigants [can] properly resort for guidance,' even on legal questions."

Id. at 2259 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944) (one set of brackets omitted; ellipses in original).

The FCC's *Amerifactors* decision is entitled to such respect. It relied on extensive public comments and "a great deal of information on the nature and operations of current online fax services." Pet. App. 50a. The operation of communications devices and services are "factual" matters at the core of the FCC's "expertise," making its views here "especially informative." *Loper Bright*, 144 S. Ct. at 2267 (citation omitted). And the FCC drew on its previous decisions issued over the course of more than fifteen years and explained its consistency with them. Pet. App. 47a (noting that the FCC's view since 2003 has been that the TCPA "does not extend to facsimile messages 'sent as email over the Internet'") (quoting *Rules and Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶ 200 (2003)); *see* Pet. App. 48a-49a, 55a-56a (explaining consistency with earlier orders).

The FCC's interpretation thus reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Loper Bright*, 144 S. Ct. at 2262 (quoting *Skidmore*, 323 U.S. at 140).

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In sum, text, purpose, and agency interpretation all lead to the same conclusion: class decertification and summary judgment for respondents can be affirmed without addressing the Hobbs Act question.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Petitioner pitches this case as the "ideal vehicle to resolve the question presented, but left undecided, in *PDR Network*." Pet. 2. But this case is different from *PDR Network* for multiple reasons, and each one poses a significant vehicle problem. If the Court wants to revisit the question presented in *PDR Network*, it should wait for another case to do so.

A. The Due Process Concerns Present In *PDR Network* Are Absent Here

As noted above, there is a fundamental difference between *PDR Network* and this case. *See supra* pp. 17-20. In *PDR Network*, the plaintiff invoked a favorable FCC order and argued the defendant could not challenge it. This case presents the opposite situation. It is the defendants who invoke a favorable FCC order and argue it is binding.

That difference means that the reasoning and concerns that animated Justice Kavanaugh's concurrence in *PDR Network* are inapplicable here. *PDR Network* implicated the traditional principle that a defendant can typically defend itself in an enforcement action by contending that a regulation is invalid. To hold otherwise, Justice Kavanaugh wrote, would raise serious due process concerns. *See supra* pp. 19-20. Petitioner points to no comparable traditional principle that allows plaintiffs to attack an agency determination to *expand* the scope of defendants' liability. Limiting plaintiffs' ability to do so implicates none of the due process concerns Justice Kavanaugh expressed.

To answer the question that was presented in *PDR Network*, the Court should await a case where the plaintiff invokes the Hobbs Act to prevent a defendant from challenging an FCC order that the defendant contends expands its liability beyond what the statute allows.

B. The FCC Proceeding At Issue Is Ongoing

The FCC order here was issued by the FCC's Consumer & Governmental Affairs Bureau on delegated authority. Pet. App. 57a. An application for review of that order remains pending with the full FCC. Pet. App. 8a n.1. When the FCC decides that application for review, its decision will then be reviewable under the Hobbs Act in a court of appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

The ongoing FCC proceedings make this case different from *PDR Network*, where the relevant FCC order (by the full Commission) had issued many years before the relevant private-party litigation. 588 U.S. at 3. The provisional nature of the FCC order here poses several problems for review.

1. A decision by the FCC while this case is pending could prevent the Court from reaching the question presented

Because FCC proceedings are ongoing, the Commission could decide the pending application for review before this Court issued its decision on the merits. And whichever side lost before the full Commission could then seek Hobbs Act review of that decision in a court of appeals.

The outcome of those further administrative (and possibly judicial) proceedings could fundamentally change the nature of this case and hinder this Court's ability to answer the question presented. For example, it is not clear what would happen if the full Commission were to grant the application for review and reverse the Bureau's *Amerifactors* order. Under those circumstances, the FCC order on which respondents and the court of appeals relied would no longer be in force, but a new order favoring petitioner would be.

Or if a court of appeals sets aside the full FCC's order during the pendency of this case in this Court, there would then be *no* FCC order at issue. And a different question—decided by the Ninth Circuit in an appeal earlier in this case—could be presented: is the decision of a Hobbs Act court setting aside an FCC order binding on another court deciding a dispute between private parties? *See True Health Chiropractic*, 896 F.3d at 930 (answering yes); *accord Gorss Motels, Inc. v. FCC*, 20 F.4th 87, 96 (2d Cir. 2021); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467-468 (6th Cir. 2017).

These and other scenarios made possible by *Amerifactors*' pendency greatly increase the risk of a dismissal of the petition as improvidently granted, a finding of mootness, or a remand to the Ninth Circuit based solely on *Amerifactors*-related developments. Any of those outcomes would prevent the Court from reaching the question presented. This risk can be eliminated if the Court waits to revisit the *PDR Network* question in a case in which the FCC order was issued by the full Commission and is no longer subject to judicial review.

2. Strategic decisions by petitioner and its counsel in the FCC proceedings could preclude challenging the FCC's order, independent of the Hobbs Act

Petitioner made a strategic choice not to participate in the administrative proceeding whose (interim) outcome it now complains about. But its *attorneys* in their own names are participating in a related FCC proceeding presenting the same question. *See supra* pp. 8-9 (discussing *Ryerson*). Both those circumstances distinguish this case from *PDR Network* and render it an unappealing vehicle for consideration of the question presented.

In *PDR Network*, the relevant FCC decision came seven years before the fax advertisements at issue. 588 U.S. at 3. This Court noted that the APA "provides that 'agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement' except 'to the extent that [a] *prior, adequate, and exclusive opportunity for judicial review is provided by law*.'" *Id.* at 7 (quoting 5 U.S.C. § 703) (emphasis by Court). The Court thus flagged the question whether the Hobbs Act had afforded the defendant in *PDR Network* an "adequate" opportunity for review, given that the deadline for seeking it had passed years before the private-party litigation even started. *Id.* at 8.

Here, by contrast, the relevant FCC proceeding has been ongoing in parallel with this case. The *Amerifactors* petition for declaratory ruling was filed and circulated for comment in 2017—while this litigation was already pending. Pet. App. 47a; Consumer & Governmental Affairs Bureau Seeks Comment on Amerifactors Financial Group, LLC Petition for Expedited Declaratory Ruling Under the

Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278 & 05-338.[6] The Bureau issued its decision on December 9, 2019, and an application for review was filed on January 8, 2020. Pet. App. 46a; *see supra* p. 8.

Petitioner easily could have participated in the FCC proceedings—and could have asked for a stay of the district court litigation while it did so. *See, e.g.*, *Advanced Rehab & Med., P.C. v. Amedisys Holding, LLC*, No. 1:17-CV-1149, 2022 WL 1555240, at *2 (W.D. Tenn. May 17, 2022) (staying class action "pending resolution of the application for review of the *Amerifactors* determination"). Its strategic decision not to do so should bar it from seeking a different answer here—regardless of whether FCC determinations are more broadly binding in private-party litigation. *See Port of Boston Marine Terminal Ass'n*, 400 U.S. at 72. When a party's "interests [are] clearly at stake" in an administrative proceeding and it "had every opportunity to participate" in them and then "seek timely review in the Court of Appeals" but "chose not to do so," "it cannot force collateral redetermination of the same issue in a different and inappropriate forum." *Ibid.* That rule—which Justice Kavanaugh's *PDR Network* concurrence did not mention, much less suggest was incorrect—should prevent petitioner from challenging *Amerifactors*'s conclusion independent of the Hobbs Act, thus again leaving the broader *PDR Network* question unresolved.

At the same time, the participation by petitioner's *counsel* as a party in the ongoing *Ryerson* proceedings at the FCC raises a different problem. In *PDR Network*, Justice Kavanaugh noted that a party that "challenges

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6. Available at https://www.fcc.gov/ecfs/document/071870836381/1.

an agency action in a facial, pre-enforcement suit" may be prohibited "by ordinary preclusion principles" from "relitigating" the same question in an enforcement action. 588 U.S. at 16 n.2. To be sure, petitioner here has not participated in *Ryerson*. But its counsel has—not on behalf of some other client, but in counsel's own name. And it did so for a stated representational reason: counsel advised the FCC that it "represents clients across the country in private litigation" in TCPA cases and that the FCC's decision could impact them. Anderson + Wanca Comments, *supra*, at 1. And all of counsel's *Ryerson* filings occurred concurrently with the district court litigation here; indeed, counsel filed its *Ryerson* application for review arguing that *Amerifactors* was wrongly decided while respondents' motion to decertify the class based on *Amerifactors* was pending. *See supra* pp. 8-9.

A prior decision can be the basis for issue preclusion even as to non-parties in a variety of circumstances, including when there is a "pre-existing substantive legal relationship between the person to be bound and a party to the judgment" and where the nonparty was "adequately represented by someone with the same interests who was a party." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (quotation marks and brackets omitted). Here, counsel and petitioner had a preexisting legal relationship and counsel adequately represented petitioner's interests as to the online-fax-service issue when it participated in *Ryerson*. It is thus possible that normal preclusion principles would bind petitioner to the result in *Ryerson*. *See PDR Network*, 588 U.S. at 16 n.2 (Kavanaugh, J., concurring); *cf. Ferris v. Cuevas*, 118 F.3d 122, 127, 130 (2d Cir. 1997) (applying New York law and finding res judicata bar because, among other reasons, attorneys in second case had appeared in first case in their own names).

At the very least, both of these issues would likely complicate the Court's review of the Hobbs Act question.[7]

C. There Is A Mismatch Between The Question Presented And The Decision Below

Petitioner's principal argument in the district court and court of appeals was that *Amerifactors* was not binding under the Hobbs Act *because* it was a bureau-level decision. Pet. CA Principal & Resp. Br. 30-33. It limited the broader argument it now makes to a footnote in its merits brief and to its rehearing petition. Pet. CA Principal & Resp. Br. 32 n.4; Pet. CA Reh'g Pet. This would impede the Court's review of the question now presented in two ways.

First, as a result of how petitioner briefed the case below, the Ninth Circuit's unpublished memorandum did not engage on the broader question or even cite *PDR Network*. Instead, it addressed only the argument it understood petitioner to be making—that the Bureau's order was not a "final order" for purposes of the Hobbs Act. Pet. App. 8a. Yet petitioner does not seek review of that question, so there is a mismatch between the decision below and the question petitioner wants this Court to decide. This denies the Court the benefit of a reasoned decision to review that addresses the question in light of *PDR Network*. The Court generally does not grant certiorari in that situation. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

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[7] Respondents had no reason to raise these complications below because petitioner did not make the argument it is pressing here, and no decision has yet triggered preclusion. *See infra* Part III.C.

Second, petitioner nowhere disclaims the argument it made to the court of appeals. If petitioner's merits brief were to revive that argument involving the bureau-level nature of the FCC order, the case could end up focused on that idiosyncrasy. Again, this possibility for distraction makes this a poor vehicle for review.

D. An Alternative Ground For Affirmance Based On The Plain Statutory Text Makes This A Poor Vehicle

An obvious alternative ground for affirmance—the FCC's interpretation of the statute is plainly correct as a de novo matter—could prevent the Court from deciding the question presented.

As discussed above, respondents have argued all along that the statute plainly does not cover online fax services, and they would make that argument again as an alternative ground for affirmance if certiorari were granted. *See supra* pp. 20-26. That straightforward question of statutory construction is not itself worthy of this Court's review.[8] Yet it would provide an obvious basis for affirmance—whether for the entire Court or just some Justices—thus potentially preventing the Court from deciding the question presented in *PDR Network* yet again.

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[8] Petitioner argued below that the Sixth Circuit in *Lyngaas v. Ag*, 992 F.3d 412 (2021), supports its statutory argument that the TCPA applies to online fax services. But as the Fourth Circuit has explained, that is incorrect. *Lyngaas* "defines an 'efax' as something different from an online fax service and specifies that an efax 'is sent over a telephone line' rather than 'as an email over the Internet.'" *Career Counseling*, 91 F.4th at 210 n.5 (quoting *Lyngaas*, 992 F.3d at 427).

The Fourth Circuit's recent decision in *Career Counseling* previews how the statutory question could here supplant the one involving the Hobbs Act. The district court there found *Amerifactors* binding under the Hobbs Act. *See Career Counseling, Inc. v. Amerifactors Financial Group, LLC*, No. 3:16-cv-03013, 2021 WL 3022677, at *8-*10 (D.S.C. July 16, 2021). On appeal, the plaintiff "argue[d] that the district court committed legal error in according Hobbs Act deference to the *Ameri[f]actors* FCC Ruling that an online fax service does not qualify as a 'telephone facsimile machine' under the TCPA." *Career Counseling*, 91 F.4th at 208.

But the Fourth Circuit concluded that it "need not assess or determine whether the district court erred in according Hobbs Act deference to the *Ameri[f]actors* FCC ruling." *Id.* at 209. That was so because it was "satisfied to rule—de novo—that pursuant to its plain statutory language, the TCPA prohibits the sending of unsolicited advertisements to what the district court labelled as 'stand-alone fax machines,' but not to what the court accepted to be 'online fax services.'" *Ibid.* That same path of least resistance is present here.

And were this Court to disregard the statutory question and reverse the Ninth Circuit on the Hobbs Act, that court on remand would then likely come to the same conclusion based on the plain statutory text. If the Court wants to address the Hobbs Act question, it should await a case where it might matter to the ultimate outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submittted,

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