No. 23-1226

In the Supreme Court of the United States

MCLAUGHLIN CHIROPRACTIC ASSOCIATES, INC., individually and as representative of a class of similarly situated persons,

Petitioner,

v.

MCKESSON CORPORATION and MCKESSON TECHNOLOGIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This case presents the same question that this Court granted certiorari to decide, but did not decide, in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1 (2019): Does the Hobbs Act require a district court to accept the FCC's legal interpretation of the TCPA?

The respondents do not deny that this is an important and recurring question of federal law on which the circuits are divided—just as it was when the Court granted review in *PDR Network*. Nor do they deny that the Ninth Circuit below applied its controlling precedent on this question and held that the district court "correctly found that it was bound by" the FCC's legal interpretation of the TCPA. Pet. App. 7a. And, importantly, the respondents do not contend that either of the "two preliminary issues" that ultimately frustrated resolution of the question presented in *PDR Network*, 588 U.S. at 4, will do the same here.

Nevertheless, the respondents spend 36 pages trying to convince the Court that it should pass up the chance to finally resolve this important question and the split that it has caused. Their arguments pose no barrier to review.

A. The respondents first argue (at 13–16) that there is no "post-*PDR Network* split about interpretive rules," and that deciding the question that this Court intended to decide five years ago would be "premature." But the petition asks the Court to resolve the circuit split on the question presented, which goes well beyond interpretive rules. That split prompted the Court to grant certiorari in *PDR Network*, and it still exists today. Nor does it matter whether the FCC's *Amerifactors* order is properly classified as the equivalent of an interpretive rule (as the respondents argued below). What matters is that, as the district court below recognized, controlling Ninth Circuit precedent treats the *Amerifactors* order as binding under

the Hobbs Act *regardless* of how it's characterized. So the first preliminary issue identified in *PDR Network* stands as no obstacle to reaching the question presented here.

Nor would it be premature for the Court to decide that question now. The issue was ripe in 2018, when the Court granted certiorari in *PDR Network*. And since then, the need for authoritative resolution has only grown. Within months of this Court's decision declining to resolve the split, a full panel of the Eleventh Circuit called on that court "to correct [its] mistake en banc" "in the earliest appropriate case." *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1106 (11th Cir. 2019) (Pryor, J., concurring). But neither that court nor the Ninth Circuit in this case has done so. As a result, the pre-*PDR Network* split is alive and well. It now falls to this Court to bring needed uniformity to the law on this important question.

B. The respondents then turn to the merits (at 16–26). The argue that the answer to the question presented is yes—the Hobbs Act requires a district court in an as-applied enforcement proceeding to accept the FCC's legal interpretation of the TCPA. That is so, they say, because otherwise the court would have to "determine whether the agency's interpretation is 'sound [or] good,'" which the Hobbs Act (in their view) prevents it from doing. BIO 17. This argument was squarely rejected by four Justices in *PDR Network*, and the question to be resolved here will be whether their reading of the Hobbs Act is correct. The petitioner says it is; the respondents say it's not. The point of plenary review will be to determine who's right.

Yet the bulk of the respondents' merits section is not about the text of the Hobbs Act—or even about the Hobbs Act at all. It is instead about whether the FCC was right to interpret the TCPA the way that it did. *See* BIO 21–26. But that issue, which the Ninth Circuit did not reach, will

be an issue for a lower court on remand. It has nothing to do with the question presented and will not "prevent the Court from deciding the question presented." *Contra* BIO 34. The question presented is whether a district court is barred from even *conducting* a statutory analysis, not who will prevail here should the court be permitted to do so.

C. Finally, the respondents make a vehicle argument. *See* BIO 27–35. They claim that there are two distinctions between this case and *PDR Network* that make this case an unsuitable replacement for *PDR Network*. The most "fundamental difference," in their eyes (at 17), is that in *PDR Network*, the party arguing that the Hobbs Act does not require a district court to accept the FCC's legal interpretation of the TCPA was the defendant, whereas here it's the plaintiff. The respondents contend that this Court "should await a case in which a *defendant* questions the statutory interpretation in an FCC order." BIO 3.

But the question presented is about the meaning of a statute. And the Hobbs Act contains no hint that it means something different depending on which party is invoking it. Either the statute requires a district court to adhere to the FCC's interpretation of the TCPA in an enforcement action or it does not. But the answer will not be different depending on who happens to benefit from the FCC order.

Nor did Justice Kavanaugh, in his concurrence in *PDR Network*, suggest any such reading of the statute. To the contrary, his reading applies to plaintiffs and defendants alike. *See* 588 U.S. at 27 ("In an as-applied enforcement action, the district court should interpret the statute as courts traditionally do under the usual principles of statutory interpretation . . . ."). Although his opinion often frames the issue from the vantage point of a TCPA defendant, it does so because that was the posture of that case—not because its textual analysis is reserved *solely*

for the benefit of defendants. *Contra* BIO 18–19; *see also Gorss*, 931 F.3d at 1109 (Pryor, J., concurring) (observing that a "stark implication[] of our misconstruction of the Hobbs Act" is that "a plaintiff with a viable claim under the law Congress enacted may be unable to pursue it simply because an agency has misinterpreted the law in an order to which he was a not a party"). No circuit, including the Ninth Circuit, has drawn any such atextual distinction. Indeed, not even the respondents argue that the statute's text could mean one thing for defendants and another for plaintiffs. They simply disagree with Justice Kavanaugh's textual analysis, thus underscoring the appropriateness of this case as a vehicle.

The respondents also try to make something of the fact that the FCC order in *PDR Network* predated that case by many years, whereas this case was filed six years before the *Amerifactors* order. That distinction, however, has no bearing on the question presented. Unlike in *PDR Network*, the petitioner here never argued that it lacked a prior or adequate opportunity for review under the Hobbs Act, which was the second preliminary issue noted in this Court's opinion. So this difference, if anything, makes this case a *better* vehicle than *PDR Network*, not a worse one.

Nor is there any realistic possibility that FCC action will affect this Court's review. The respondents speculate (at 28) that the FCC could thwart review by acting on a four-year-old application and reversing the *Amerifactors* order. But the respondents give no reason to think that this will actually happen, and the theoretical possibility that an agency could later change its mind is no reason for this Court to stay its hand when the agency action is causing real harm to real people. And here, not only is there no deadline for the FCC to act, 47 U.S.C. 155(c)(4), but the respondents point to no example of the FCC ever

overturning an interpretation that had been reached on delegated authority, much less doing so without first engaging in notice and comment. Far from offering a reason why the FCC will reverse course, the respondents do the opposite: They say that the order represents the FCC's "informed judgment" and is "obvious[ly]" correct. BIO 26, 34. Again, if the respondents are right about what the TCPA means, they should prevail on the merits on remand—but only because a *court* reached that conclusion, not because an *agency* did so.

As for the respondents' argument that the petitioner should be bound by the FCC's order under "normal preclusion principles," BIO 32, that argument is even more off-base. It is wrong, independent of the question presented, and waived to boot. The petitioner was entitled to make its statutory arguments—and to continue seeking as-applied relief—in the same case that it had been litigating for six years before the FCC order. It was not required to halt that litigation and pursue the "convoluted route" of Hobbs Act review. *PDR Network*, 588 U.S. at 25 (Kavanaugh, J., concurring). But that's an argument that can be dealt with by the Ninth Circuit on remand, along with the question of whether the respondents have even preserved the issue. It is not an impediment to this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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