Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PDR NETWORK, LLC, ET AL. *v.* CARLTON & HARRIS CHIROPRACTIC, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17–1705. Argued March 25, 2019—Decided June 20, 2019

Petitioners (collectively PDR) produce the Physicians' Desk Reference, which compiles information about the uses and side effects of various prescription drugs. PDR sent health care providers faxes stating that they could reserve a free copy of a new e-book version of the Reference on PDR's website. Respondent Carlton & Harris Chiropractic, a fax recipient, brought a putative class action in Federal District Court, claiming that PDR's fax was an "unsolicited advertisement" prohibited by the Telephone Consumer Protection Act of 1991 (Telephone Act). 47 U. S. C. §227(b)(1)(C). The District Court dismissed the case, concluding that PDR's fax was not an "unsolicited advertisement" under the Telephone Act. The Fourth Circuit vacated the District Court's judgment. Based on the Administrative Orders Review Act (Hobbs Act), which provides that courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission," 28 U. S. C. §2342(1), the Court of Appeals held that the District Court was required to adopt the interpretation of "unsolicited advertisement" set forth in a 2006 FCC Order. Because the Court of Appeals found that the 2006 Order interpreted the term "unsolicited advertisement" to "include any offer of a free good or service," the Court of Appeals concluded that the facts as alleged demonstrated that PDR's fax was an unsolicited advertisement. 883 F. 3d 459, 467.

Held: The extent to which the 2006 FCC Order binds the lower courts may depend on the resolution of two preliminary sets of questions that were not aired before the Court of Appeals. First, is the Order the equivalent of a "legislative rule," which is " 'issued by an agency

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pursuant to statutory authority' " and has the " 'force and effect of law' "? *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303. Or is it the equivalent of an "interpretive rule," which simply " 'advis[es] the public of the agency's construction of the statutes and rules which it administers' " and lacks " 'the force and effect of law' "? *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, ___. If the Order is the equivalent of an "interpretive rule," it may not be binding on a district court, and a district court therefore may not be required to adhere to it. Second, did PDR have a "prior" and "adequate" opportunity to seek judicial review of the Order? 5 U. S. C. §703. If the Hobbs Act's exclusive-review provision, which requires certain challenges to FCC orders to be brought in a court of appeals "within 60 days after" the entry of the order in question, 28 U. S. C. §2344, did not afford PDR a "prior" and "adequate" opportunity for judicial review, it may be that the Administrative Procedure Act permits PDR to challenge the Order's validity in this enforcement proceeding. The judgment of the Court of Appeals is vacated, and the case is remanded for that court to consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case. Pp. 4–6.

883 F. 3d 459, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which THOMAS, ALITO, and GORSUCH, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 17–1705

PDR NETWORK, LLC, ET AL., PETITIONERS *v.* CARLTON & HARRIS CHIROPRACTIC, INC.

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

[June 20, 2019]

JUSTICE BREYER delivered the opinion of the Court.

This case concerns two federal statutes, the Telephone Consumer Protection Act of 1991 (Telephone Act) and the Administrative Orders Review Act (Hobbs Act). The first statute generally makes it unlawful for any person to send an "unsolicited advertisement" by fax. 47 U. S. C. §227(b)(1)(C). The second statute provides that the federal courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain "final orders of the Federal Communication Commission." 28 U. S. C. §2342(1).

In 2006, the FCC issued an Order stating that the term "unsolicited advertisement" in the Telephone Act includes certain faxes that "promote goods or services even at no cost," including "free magazine subscriptions" and "catalogs." 21 FCC Rcd. 3787, 3814. The question here is whether the Hobbs Act's vesting of "exclusive jurisdiction" in the courts of appeals to "enjoin, set aside, suspend," or "determine the validity" of FCC "final orders" means that a district court must adopt, and consequently follow, the FCC's Order interpreting the term "unsolicited advertise-

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ment" as including certain faxes that promote "free" goods.

We have found it difficult to answer this question, for the answer may depend upon the resolution of two preliminary issues. We therefore vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals can consider these preliminary issues.

I

Petitioners (PDR Network, PDR Distribution, and PDR Equity, collectively referred to here as PDR) produce the *Physicians' Desk Reference*, a publication that compiles information about the uses and side effects of various prescription drugs. PDR makes money by charging pharmaceutical companies that wish to include their drugs in the *Reference*, and it distributes the *Reference* to health care providers for free. In 2013, PDR announced that it would publish a new e-book version of the *Reference*. It advertised the e-book to health care providers by sending faxes stating that providers could reserve a free copy on PDR's website.

One of the fax recipients was respondent Carlton & Harris Chiropractic, a health care practice in West Virginia. It brought this putative class action against PDR in Federal District Court, claiming that PDR's fax violated the Telephone Act. Carlton & Harris sought statutory damages on behalf of itself and other members of the class.

According to Carlton & Harris, PDR's fax was an "unsolicited advertisement" prohibited by the Telephone Act. 47 U. S. C. §227(b)(1)(C). The Act 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." §227(a)(5). This provision says nothing about goods offered for free, but it does give the FCC authority to "prescribe regulations to

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implement" the statute. §227(b)(2). And, as we have said, the FCC's 2006 Order provides that fax 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 [Telephone Act's] definition. . . . '[F]ree' publications are often part of an overall marketing campaign to sell property, goods, or services." 21 FCC Rcd., at 3814.

The Order also indicates, however, that faxes "that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited." *Ibid.* The Order then sets forth "factors" the FCC "will consider" when determining whether "an informational communication" that contains advertising material is an "unsolicited advertisement." *Id.*, at 3814, n. 187.

The District Court found in PDR's favor and dismissed the case. It concluded that PDR's fax was not an "unsolicited advertisement" under the Telephone Act. 2016 WL 5799301 (SD W. Va., Sept. 30, 2016). The court did recognize that the FCC's Order might be read to indicate the contrary. *Id.*, at *3. And it also recognized that the Hobbs Act gives appellate courts, not district courts, "exclusive jurisdiction" to "determine the validity of" certain FCC "final orders." 28 U. S. C. §2342(1). Nonetheless, the District Court concluded that neither party had challenged the Order's validity. 2016 WL 5799301, *3. And it held that even if the Order is presumed valid, a district court is not bound to follow the FCC interpretation announced in the Order. *Id.*, at *4. In any event, the District Court also noted that a "careful reading" of the Order showed that PDR's fax was not an "unsolicited advertisement" even under the FCC's interpretation of that term. *Ibid.*

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