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First Brief Filed in the Supreme Court's TCPA Appeal: Our In-Depth Analysis

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Recall that a couple months ago, the Supreme Court granted the Petition for Certiorari in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc*., a TCPA junk fax class action proceeding, setting the stage for what could be the beginning of the end of judicial deference to federal executive branch agency interpretation of federal regulations. The process of potentially overhauling the deference courts give federal regulatory agencies has been on a slow boil since even before the passing of the late Justice Antonin Scalia, but began picking up steam with the appointment of Justice Neil Gorsuch in April 2017, followed by the confirmation of Justice Brett Kavanaugh in October 2018, and reached a fever pitch with the Supreme Court's 11th hour decision to add a case revisiting *Auer* deference to its docket in December.

With the Hobbs Act at the center of everyone's attention in *PDR Network*, it is safe to say that the issue of agency deference is no longer on the back burner. Rather, the examination of the Hobbs Act in *PDR Network* could well be the first domino to fall in a process that fundamentally reshapes decades-old precedent that governs the balance of power between federal courts and federal regulatory agencies, including the FCC. If the views expressed by Gorsuch and Kavanaugh prevail, we can expect to see that balance tip in favor of giving courts greater leeway to scrutinize agency interpretations of both statutory language and the rules they adopt pursuant to the authority delegated by Congress.

On Tuesday, January 8, 2019, PDR Network, LLC, et al. ("PDR") filed its brief on the merits in the highly anticipated Supreme Court case. The question presented in the case before the SCOTUS is whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the TCPA.

Background

Before we delve deep into the substance of PDR's brief, let's recap how PDR got here. This case arises from a TCPA junk fax class action in which Plaintiff/Respondent Carlton & Harris Chiropractic, Inc. ("C&HC") sued PDR for sending a single fax offering a free eBook version of *Physicians' Desk Reference*. C&HC claimed the fax violated the TCPA because it was an "unsolicited advertisement" sent without its consent.

The District Court for the Southern District of West Virginia dismissed the case after concluding that the fax was not an "unsolicited advertisement" because the fax did not have a "commercial aim." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. CV 3:15-14887, 2016 WL 5799301, at *3 (S.D.W. Va. Sept. 30, 2016). Specifically, because PDR does not sell the eBook or any of the prescription drugs contained in the eBook, the fax was missing an essential commercial element of an advertisement.

Plaintiff urged the court to apply its view of a 2006 FCC ruling in which the Commission concluded 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." But the court found that it was not bound by these few words to simply ignore the fact that PDR's fax had no commercial purpose. The court engaged in a three-part analysis:

1. First, the court concluded that it was not required to defer to the FCC's 2006 ruling under the Hobbs Act because the Act only requires direct challenges to agency action to be brought in federal appellate courts. Here, in a case between private litigants, there was no direct challenge to the validity of the FCC's interpretation, and the court "presumes the FCC's order is valid."
2. Second, even if the Plaintiff was interpreting the FCC's 2006 ruling correctly, *Chevron* deference would not require the court to defer to the agency because the statutory definition of "unsolicited advertisement" was not ambiguous; rather it was "clear and easy to apply." *Id*. at *4. Therefore, the court was not required to defer to a contrary agency interpretation.
3. Finally, the court concluded that the FCC's 2006 ruling, when viewed as a whole, was better understood as retaining the requirement that the sender of the fax have the intention to engage in a commercial transaction with the recipient that was being furthered by first providing a free good or service. The court distinguished that from PDR's situation, because PDR was giving away a free copy of the book without any intention of luring the recipient into a subsequent commercial transaction.

These issues propelled the case up to the Fourth Circuit, which reversed the District Court. In a divided opinion, the Fourth Circuit held that the District Court was required to follow the FCC's 2006 ruling under the Hobbs Act because the Act "stripped" the court of jurisdiction to consider the validity of the ruling. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 464 (4th Cir. 2018). The Fourth Circuit found that the district court refused to follow the FCC's ruling and that this refusal was the equivalent of considering the validity of the ruling, which it did not have the jurisdiction to do under the Hobbs Act.

PDR then petitioned the Supreme Court, which granted review of the question of whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the TCPA.

PDR'S Supreme Court Brief on the Merits

We'll discuss the key arguments from PDR's brief below, but if you want to take a deeper dive into things, here is PDR's brief in its entirety.

PDR's primary argument is that the Hobbs Act does not preclude a federal district court from deciding legal questions in TPCA suites between private parties and that the Fourth Circuit erred in concluding that it stripped the district court of jurisdiction. PDR argues that the Fourth Circuit's interpretation of the Hobbs Act focused "almost exclusively on a single phrase"—the language in 28

U.S.C. § 2342 giving the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency orders. The Fourth Circuit "read this language as 'specifically stripp[ing] jurisdiction from the district courts' to review 'FCC interpretations of the TCPA.'"

PDR contends that the Hobbs Act is far narrower than the Fourth Circuit's interpretation. PDR argues that the Hobbs Act "speaks *only* to jurisdiction over a specific type of proceeding: one for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government." Thus, only the courts of appeals have jurisdiction to award such relief in these specific types of proceedings and that is all that the Hobbs Act precludes district courts from doing.

PDR focuses on the fact that the Hobbs Act's statutory command of vesting exclusive jurisdiction to review FCC decision in the federal appellate courts is limited to "actions against the United States." Thus, according to PDR, "the Hobbs Act has no bearing on the power of the district court to decide" a private TCPA class action suit for monetary damages.

PDR also seeks to persuade the Supreme Court that the Hobbs Act should not apply to it because it was impractical for PDR to have challenged the FCC's 2006 decision in the 60-days permitted to file an appeal of the FCC's decision. Specifically, it asserts that PDR was not a party to the FCC's rulemaking processes, and therefore had no right to appeal the FCC's decision in 2006. PDR also argues that it had no reason to challenge the FCC's 2006 Order because the need for review only arose when the Plaintiff advanced an expansive reading of the FCC's 2006 order in the litigation, which was filed years later. PDR argues that it would be a serious violation of due process to require parties to identify and appeal all potentially adverse constructions of an agency interpretation that may hypothetically arise years later in litigation, and preemptively file appeals on those issues.

PDR argues that the "'strong presumption that Congress intends judicial review of administrative action' counsels against construing the Act to preclude a defendant from obtaining review of the FCC's interpretation of the TCPA in an enforcement action." (*citing Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 670 (1986). "Without that ability," PDR contends, "many defendants will have no opportunity for judicial review of the orders being enforced against them because, in most cases, the 60-day window for direct review under the Hobbs Act will have long since closed."

This is important. If the Supreme Court rejects this argument, it would essentially require all businesses that make telemarketing calls or sends automated text messages to engage fully in the administrative law process, and file preemptive appeals, in order to be able to challenge any regulations or orders issued by the FCC regarding the TCPA.

Our Commentary

One issue not covered by PDR in their opening brief, but which we think is important to understand as context for this case, is a bit of a history lesson. The Hobbs Act, currently codified at 28 U.S.C. § 2342, was originally adopted in 1946, just twelve years after Congress adopted the Communications Act of 1934, the federal law that sought to ensure that the telephone was a universally-available utility in the United States. In 1946, there was essentially a monopoly on interstate telecommunications services, and AT&T was the monopolist. AT&T and similarly-situated, highly-regulated telecommunications providers had lawyers and regulatory consultants that constantly monitored all developments at the FCC and could be expected to challenge agency over-reach. Those heavily-regulated carriers were also generally able to recover the expenses associated with having these lawyers and lobbyists on hand through their federally-regulated rate base. Thus, the Hobbs Act

made sense when applied to the FCC of 1946.

The TCPA, adopted in 1991, dramatically expanded the role of the FCC. It inserted the FCC into regulating the telecommunications practices of companies, big and small, across the country, not simply heavily-regulated carriers like AT&T. A narrow interpretation of the Hobbs Act that requires companies to challenge all FCC TCPA rules and orders within 60-days simply does not make sense in this context. It is not possible for companies to identify and predict every issue that may arise from an FCC order interpreting the TCPA. For this reason, we hope that PDR's arguments persuade the Supreme Court that the Fourth Circuit's interpretation of the Hobbs Act requires reversal.

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