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SCOTUS will hear case regarding whether lower courts are bound to follow FCC interpretation of key TCPA terms

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On November 13, 2018, the U.S. Supreme Court granted a petition for certiorari in *PDR Network v. Carlton & Harris Chiropractic*, No. 17-1705 (*PDR v. Carlton*), a case under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 et al., which may dramatically affect how lower courts interpret that statute. Specifically, the Court will decide whether lower courts are required to adhere strictly to orders and rulings issued by the Federal Communications Commission ("FCC") that expand the scope of prohibited conduct beyond the plain statutory language. The case highlights the tension between the various courts' inherent power to construe statutory language and the jurisdictional limits imposed on that power by the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. § 2342(a).

Carlton & Harris, a chiropractic firm, sued when it received an unsolicited fax inviting it to download a free copy of the *Physician's Desk Reference*, published by PDR as an e-book, claiming the fax violated the TCPA's ban on unsolicited fax advertisements. PDR's main argument was that its fax was not an "advertisement" because it was offering the e-book for free. While PDR does not charge for the book, drug companies pay PDR to list their drugs in the book along with prescribing information. The TCPA defines "unsolicited advertisement" as "any material advertising the *commercial* availability or quality of any property, goods or services" sent without prior permission. 47 U.S.C. § 227(b) (emphasis supplied). However, the FCC, authorized by statute to "implement" the TCPA, promulgated a final rule, in 2006, stating that faxes that "promote goods or services even at no cost, such as free magazine subscriptions, [or] catalogs … are unsolicited advertisements under the TCPA's definition."

The main issue in *PDR v. Carlton* is whether the district court was bound to follow the FCC's rule that provided a gloss on the statutory definition of "advertisement" as a result of the limits on jurisdiction imposed by the Hobbs Act. That statute provides that any challenge to the "validity" of an FCC order (or an order issue by a handful of other specified agencies) must be filed in a federal court of appeals (not district court) within a specified time from the order's issuance. The district court held that the word "advertisement" as used in the TCPA clearly implied some commercial purpose, and that a fax offering to give away a free book did not constitute an advertisement. The

Fourth Circuit reversed, holding that the FCC's Rule was not properly challenged in the federal court of appeals and that the district court was therefore bound to apply the FCC gloss on the definition of "advertisement" by operation of the Hobbs Act.

In its writ petition, PDR painted the case as presenting a grave threat to the constitutional scheme under which the courts must always have the right to say "what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). Presumably this separation-of-powers theme resonated with the justices and likely influenced their decision to grant review. The justices are also no doubt intrigued by the interplay between the Hobbs Act and the doctrine of "*Chevron* deference" first announced by the Supreme Court in *Chevron USA v. NRDC,* 467 U.S. 837 (1984). Under *Chevron*, the Supreme Court laid down a two-part test that lower courts are supposed to follow in determining how much deference to give an administrative agency's interpretation of its own statute. When a statute is silent or ambiguous on a particular issue, the courts must accord deference to the agency's ruling on the issue, but when the statutory language is clear and unambiguous on its face, the courts are free to apply their own understanding of the statute without the agency's gloss. On the other hand, the jurisdiction of the federal courts is established by Congress, which apparently has chosen, through the Hobbs Act, to limit when and how the validity of certain administrative orders can be challenged.

Ultimately, the arguments in the petition and opposition boil down to whether the lower court's ruling refusing to follow the FCC definition of "advertisement" was a challenge to the "validity" of the FCC rule (in which case it would be outside the district court's jurisdiction under the Hobbs Act) or whether it was merely an "interpretation" of the statute. PDR argued for a narrow understanding of "validity," under which only rulings that challenge the "process or methodology of an order's creation (i.e., a 'facial challenge')" would be subject to the Hobbs Act. As to all other questions of statutory interpretation, PDR argued, the district courts should be free to engage in a *Chevron* analysis, meaning they can disregard agency interpretations or glosses of statutory language if they find Congress' language unambiguous. The Fourth Circuit ruled, to the contrary, that the Hobbs Act effectively strips the lower courts of jurisdiction to issue decisions that conflict with governing administrative rulings.

PDR urged that review was needed to resolve a split in the circuits regarding the deference to be shown to FCC rules interpreting the TCPA. A number of court of appeals cases have previously considered the interaction of the Hobbs Act and the TCPA. *See Mais v. Gulf Coast Collection Bureau,* 768 F.3d 1110, 1119 (11th Cir. 2014) (following an FCC rule that providing a cell number constitutes consent to receive text messages); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2103) (following an FCC rule requiring that opt-out information appear on faxes); *Lyse v. Clear Channel Broad*, 545 F. App'x 444 (6th Cir. 2013) (following an FCC rule exempting certain calls) and *C.D. Design v. Prism Bus. Media,* 606 F.3d 443 (7th Cir 2010) (following an FCC rule exempting faxes sent pursuant to an "established business relationship"). Whether there is an actual circuit split on the specific issue in the *PDR* case is unclear. But what is clear is that the Court is interested in the broader issue of judicial deference to agency interpretations of statutory language.

PDR's writ petition raised a second issue as well: Did the Fourth Circuit err in its interpretation of the FCC regulation itself—i.e., did the regulation as written actually create a black-and-white rule that all non-commercial faxes were "advertisements" even if they offered nothing for "sale"? However, the Court specifically granted certiorari only to consider the first issue detailed above.

Conclusion

The TCPA has been extensively interpreted through FCC rules, which in most cases have expanded the scope of the statute beyond what Congress provided when the law was enacted in 1991. That is not surprising given the major changes in telecommunications technology that have taken place since that time. The Court's decision in the *PDR* case will provide important guidance to the lower courts as to how much weight to give those prior FCC rules as well as new rules that are expected in the near future.

Indeed, there is some irony in the timing of the Supreme Court's decision to grant certiorari. Newly minted conservative Justices Gorsuch and Kavanaugh, both of whom have questioned the wisdom of *Chevron* deference, may be behind the granting of this petition. It would not be surprising for a conservative majority to issue a ruling cutting back on the power and influence of administrative agencies. The irony is that the now Republican-led FCC is seen as poised to issue, in the imminent future, a new ruling interpreting several key provisions of the TCPA that many observers expect to be far more business-friendly than the FCC rulings of years past. If the Supreme Court pulls back on agency deference, the FCC's expected ruling may be anticlimactic. Such a ruling would also all but guarantee further development of the TCPA through litigation.

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