

Supreme Court Punts on Whether Courts are Bound by FCC Orders on the TCPA, But Not Without a Convincing Concurring Opinion

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Earlier this morning, the Supreme Court issued its decision in *PDR Network, LLC, et al. v. Carlton & Harris Chiropractic, Inc.* At issue was whether a TCPA-defendant in a civil case may contest the Federal Communications Commission's interpretation of the TCPA. The Fourth Circuit said no, and the Supreme Court accepted the decision for review. "Ruling narrowly," and instead of expressly deciding the question presented, the Supreme Court vacated the Fourth Circuit's decision and remanded for consideration of two "preliminary issues."

The backdrop of the issue in *PDR Network*—one that has plagued TCPA-defendants in recent years—is the Hobbs Act. That Act provides an administrative procedure for facial, pre-enforcement review of FCC orders. In particular, to challenge an FCC order, a party must file a petition for review in a court of appeals within 60 days of the FCC order. Further clouding the issue is that the Act provides that the court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final FCC orders. Almost every federal court—but not the district court in *PDR Network*—has held that absent a party proceeding under the Hobbs Act's administrative procedures, final FCC orders are binding on district courts. The result is that a defendant in a TCPA action cannot argue to a court that the FCC's interpretation of the statute is wrong, even if the FCC's interpretation is unreasonable when compared with the plain language of the law.

The Supreme Court did not expressly decide the question presented. Instead, because it is a court of "review" and not "first view," it directed the Fourth Circuit to consider two preliminary issues on remand. First, it directed the Fourth Circuit to consider the legal nature of the FCC order at issue, *i.e.*, whether it is a legislative or interpretive rule. If legislative, then it has the "force and effect of law." If interpretive, then the FCC order may not be binding on courts and TCPA defendants, and would instead be construed as advising the public of the FCC's construction.

Second, the Supreme Court directed the Fourth Circuit to consider whether *PDR Network*, the petitioner in the case and the TCPA-defendant below, had a prior and adequate opportunity to seek judicial review of the FCC order at issue. If the answer is no, the Court stated, then "it may be that the [Hobbs Act] permits *PDR* to challenge the validity of the Order in this enforcement proceeding even if the Order is deemed a 'legislative' rule rather than an 'interpretive' rule."

Ultimately, the Supreme Court did not decide the question presented. Perhaps more notable from the decision, though, is Justice Kavanaugh's concurring opinion. Along with Justices Thomas, Alito, and Gorsuch, Justice Kavanaugh wrote that TCPA defendants in civil cases may indeed contest the FCC's interpretation of the TCPA, even if that interpretation is contained in a final FCC order. "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."

Justice Kavanaugh advanced various rationale for this conclusion. Of primary import is that while other similar federal statutes expressly preclude judicial review of agency actions in a subsequent civil case, the Hobbs Act does not. Moreover, while the Hobbs Act provides courts of appeals with "exclusive jurisdiction" to "determine the validity" of final FCC orders, a district court's disagreement with the FCC's statutory interpretation-even if contained in a final order-does not run afoul of this restriction. Rather, a district court only "determines the validity" of an FCC order via a declaratory judgment that the order is valid or invalid, not by merely disagreeing with it. Thus, "if the district court disagrees with the agency's interpretation in an enforcement action, that ruling does not invalidate the order and has no effect on the agency's ability to enforce the order against others."

Justice Kavanaugh noted that his analysis "remains available to the court on remand" as well as to "other courts in the future." On remand, the Fourth Circuit likely must follow the mandate in the Supreme Court's majority opinion, namely, by addressing the preliminary issues identified. Thus, it remains to be seen whether any or all of Justice Kavanaugh's reasoning will find its way into the Fourth Circuit's analysis-and if it all, it would be after the Fourth Circuit addresses the preliminary issues identified by the majority opinion. Regardless, Justice Kavanaugh's concurring opinion is a long-awaited and forceful analysis that will likely be advanced by TCPA defendants in the near future, whether at the Fourth Circuit or elsewhere.

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