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Oyez! Oyez! Oyez! The U.S. Solicitor General Set to Argue in Closely-Watched PDR Network Petition

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Chiropractic clinic, Carlton & Harris, has a friend in the U.S. Solicitor General. The Supreme Court has granted the Solicitor's General request to appear as a friend of the court on behalf of the clinic during oral argument on March 25 in the highly-anticipated TCPA case, *PDR Network LLC et al. v. Carlton & Harris Chiropractic Inc*., case number 17-1705, in the U.S. Supreme Court. The Solicitor General will argue that the buck stops with the FCC under the Hobbs Act and that courts must accept the agency's interpretations of the TCPA. The Supreme Court's ruling on this issue will have major implications for TCPAworld as we await the FCC's Omnibus II ruling following the public notice proceeding on the TCPA initiated following *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) last year—that ruling, it now seems, will either be entirely binding or entirely useless following *PDR Network*.

By way of background, the original case, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC,* arose under the Junk Fax Prevention Act of the TCPA. The Fourth Circuit held that the district court erred in its lower opinion by refusing to defer to the FCC's statutory interpretation of an "unsolicited advertisement" under the TCPA. In particular, the district court ruled that a fax advertisement for free services could not qualify as an "unsolicited advertisement" as a matter of law—despite a 2006 FCC Rule providing that fax messages promoting goods and services "even at no cost" may nonetheless qualify as "unsolicited advertisements." *See* Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967, 25973 (May 3, 2006).

The appeal to the Fourth Circuit in *PDR Network* focused on whether the district court applied the correct analysis in deciding not to defer to the FCC's statutory interpretation. As a general rule, a district court considering an agency rule will apply *Chevron* deference by first determining whether the statutory language is clear, and then either applying the clear language of the statute, or, if unclear, deferring to the agency interpretation. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984). The district court in *PDR Network* applied the *Chevron* framework in ruling that the TCPA statutory language defining "unsolicited advertisement" was unambiguous, and thus, the court need not defer to the FCC's interpretation.

However, under the Hobbs Act, 28 U.S.C.S. § 2342(1), only federal appellate courts have jurisdiction to determine the validity of final FCC orders, including TCPA rules, challenged by aggrieved parties. In other words, the Act strips the jurisdiction of lower district courts to consider the validity of FCC administrative rulings. The appellant in PDR Network, therefore, contended that the district court did not have the authority to set aside the FCC's statutory interpretation under the 2006 FCC Rule, regardless of the *Chevron* doctrine. The Fourth Circuit agreed and held that "[t]he district court erred when it eschewed the Hobbs Act's command in favor of a *Chevron* analysis to decide whether to adopt" the FCC's statutory interpretation. 883 F.3d at 464.

The Supreme Court thereafter granted defendant PDR Network's petition for review on November 13, 2018, and will now decide: "Whether the Hobbs Act required the district court . . . to accept the FCC's legal interpretation of the [TCPA]." Stated another way, does the Hobbs Act require district courts to apply automatic deference to the FCC's orders without a typical *Chevron* analysis or can district courts apply *Chevron* deference to interpret TCPA provisions they find unambiguous without deferring to the FCC's interpretations? On the one hand—if the Court rules that the Hobbs Act requires automatic deference—courts will be bound by FCC interpretations without further analysis. In that case, disputed issues under the TCPA will be brought at the appellate level under the

Hobbs Act as challenges to the agency's interpretation, as with the petitions that led to *ACA International*. On the other hand—if the Court rules that the Hobbs Act does not require such strict adherence—courts will be able to apply *Chevron* deference to determine whether to defer to the FCC's interpretations.

Though the facts of *PDR Network* center on the definition of the term "unsolicited advertisement" under the 2006 FCC Rule, the high court's eventual decision may not be just about fax liability. The Court is set to address wide-ranging issues concerning the interplay between the FCC's interpretive authority under the Hobbs Act and the Supreme Court's *Chevron* deference doctrine, which means the outcome of the Court's holding may have far-reaching implications for pending and future litigation under the TCPA. Specifically, the Court's decision may determine whether the FCC's independent interpretation of the TCPA controls on an issue before a district court or whether district courts can independently devise their own interpretations under the *Chevron* doctrine. As we await the much-anticipated response and potential rule-making from the FCC based on its recent Public Notices concerning critical issues relevant for TCPA liability, the Supreme Court's decision in *PDR Network* may prove to be a watershed decision in TCPA jurisprudence.