

# THE NATIONAL LAW REVIEW

---

## Breaking: Supreme Court Vacates and Remands TCPA Case to Fourth Circuit for Further Analysis

---

Thursday, June 20, 2019

It is a busy TCPA news day! The United States Supreme Court has released its decision in *PDR Networks, LLC v. Carlton & Harris Chiropractic, Inc.*, a TCPA junk fax class action. The decision is available for download [here](#).

### Background

The case arises from a TCPA junk fax class action in which Carlton & Harris Chiropractic, Inc. (“Carlton”) sued PDR Networks, LLC (“PDR”) for sending a single fax offering a free eBook version of Physician’s Desk Reference. Carlton claimed the fax violated the TCPA because it was an “unsolicited advertisement” sent without its consent. PDR claimed that it did not violate the TCPA because the book was offered for free with no intention of selling a good or service in the future.

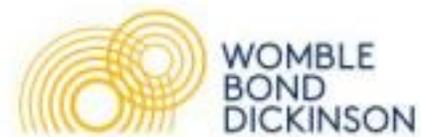
The District Court for the Southern District of West Virginia dismissed the case after concluding that the fax was not an “unsolicited advertisement” because the fax did not have a “commercial aim.” Specifically, because PDR does not sell the eBook or any of the prescription drugs contained in the eBook, the fax was missing an essential commercial element of an advertisement. The district court also found that it was not bound by a few words in a 2006 FCC order concluding that faxes for free goods could still constitute an advertisement. The district court determined that the FCC’s decision was intended to apply when a sender used a free product offering as a way to open the door to a commercial relationship and, moreover that the district court was not required to ignore the fact that PDR’s fax had no commercial purpose. On appeal, the Fourth Circuit reversed, concluding the Administrative Order Review Act, otherwise known as the Hobbs Act, required the trial court to defer to the FCC’s order because the Hobbs Act requires all challenges to FCC decisions be brought exclusively in the federal courts of appeals.

### Supreme Court Decision

In its decision, the Supreme Court determined that it was unable to decide whether or not the Hobbs Act required the district court to defer to the FCC’s interpretation of the TCPA because two “preliminary” questions were left unanswered.

The first question is whether the FCC’s order was a “legislative rule” that has the “force and effect of law” or whether it was simply an “interpretative rule” that “advises the public of the agency’s construction of the statute and rules which it administers” and lacks the “force and effect of law.” According to the Supreme Court, if the FCC’s interpretation is an “interpretative rule,” “it may not be binding on a district court, and a district court therefore may not be required to adhere to it.” Here, the Supreme Court stressed the use of the word “may” because it declined to definitively resolve the issue.

The second question is whether PDR had a “prior” and “adequate” opportunity to challenge the FCC’s interpretation when it was adopted in 2006. According to the Supreme Court, if PDR did not have a prior and



Article By

[G. David Carter](#)

[Womble Bond Dickinson \(US\) LLP  
TCPA Defense Force](#)

[Communications, Media & Internet  
Litigation / Trial Practice](#)

[All Federal](#)

[4th Circuit \(incl. bankruptcy\)](#)

adequate opportunity to challenge the rule, then that may mean be allowed to challenge the validity of the FCC's order in the course of defending the TCPA class action. Again, the Supreme Court stressed that it was using the word "may" because it refused to decide the issue now. Instead, the Supreme Court remanded the case to the Fourth Circuit to address these two "preliminary issues."

The Court's decision to punt on the key legal questions was authored by Justice Breyer and, not surprisingly, joined by Justices Ginsburg, Sotomayor, and Kagan. Also joining the liberal justices was Chief Justice John Roberts, who may have provided the tie breaking vote, departing from his more conservative counterparts who clearly wanted the court to reach a more decisive outcome.

Justice Kavanaugh authored a separate opinion concurring in the judgment. He was joined by Justice Thomas, Justice Alito, and Justice Gorsuch. Justice Kavanaugh's opinion makes clear his displeasure with the majority's decision to "remand[] the case for analysis of two 'preliminary issues,'" that could "eliminate the need for an answer in the case to the broader question we granted certiorari to decide." Justice Kavanaugh writes that the court should "decide the question we granted certiorari to decide" and should conclude that "the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong." According to Justice Kavanaugh, the "District Court is not bound by the FCC's interpretation of the TCPA. Rather, the District Court should interpret the TCPA under usual principles of statutory interpretation, affording respect to the agency's interpretation." Justice Kavanaugh then sets forth a detailed legal analysis to support his conclusions, expressly suggesting that the analysis is "available to the court on remand" and to "other courts in the future."

Justice Thomas, joined by Justice Gorsuch, also issued a separate opinion concurring in the judgment. Justice Thomas asserts that the Hobbs Act actually has little to do with PDR's litigation because it applies only in an effort to "enjoin, set aside, suspend" or "determine the validity of" an FCC order. Here, according to Justice Thomas, the federal district court was simply "applying the governing statute to the case or controversy within its jurisdiction" and not enjoining or determining the validity of the FCC's order. Justice Thomas took issue with the Fourth Circuit's decision, saying it "rested on the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the extent of the governing statute," and contends that "this case proves the error of that assumption and emphasizes the need to reconsider it."

## Looking Ahead

Based on the Supreme Court's decision today, while the extent to which the Hobbs Act prevents private litigants from challenging the FCC's interpretation of the TCPA remains in flux, it is clear that is likely to much narrower than many TCPA litigators may have previously believed. While few cases have attempted to challenge the application of the Hobbs Act in TCPA litigation based either on the distinction between legislative and interpretative rules or because the particular defendant did not have a prior adequate opportunity to challenge the FCC's order, we can expect to see more parties arguing that the FCC's interpretation of the TCPA are not absolutely binding on district courts. Moreover, we are very likely to see litigants and ultimately courts adopting the analysis provided by Judge Kavanaugh, which would provide courts with greater leeway to disagree with the FCC interpretations of the TCPA.

Copyright © 2019 Womble Bond Dickinson (US) LLP All Rights Reserved.

**Source URL:** <https://www.natlawreview.com/article/breaking-supreme-court-vacates-and-remands-tcpa-case-to-fourth-circuit-further>