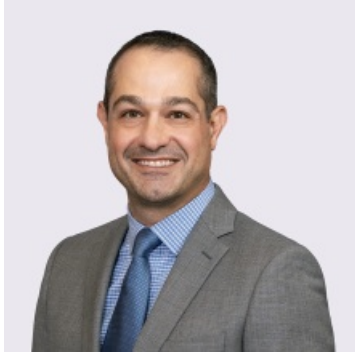


# U.S. Supreme Court Leaves Open Issue of Federal Communication Agency Interpretation of TCPA, For Now

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## Meet the Authors



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Dodging the question of whether the [Hobbs Act](#) requires a federal court to accept the 2006 [Federal Communication Commission](#) (FCC) Order that provides the legal interpretation for the [Telephone Consumer Protection Act](#) (TCPA), which bars any “telephone facsimile machine” from sending an unsolicited advertisement to another fax machine, the U.S. Supreme Court has ruled unanimously that the lower court failed to consider two preliminary issues. [PDR Network, LLC v. Carlton](#), No. 17-1705 (June 20, 2019).

The Hobbs Act, or Administrative Orders Review Act, governs judicial review of agency orders interpreting the TCPA. It provides that “agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement” except “to the extent that [a] prior, adequate, and exclusive opportunity for judicial review is provided by law.”

The Court held that the extent to which a federal district court must defer to the FCC depends on two preliminary issues that the Court of Appeals failed to consider:

1. Whether the Order is equivalent to a “legislative rule” that has the “force and effect of law” or an “interpretative rule” that does not have the “force and effect of law”; and
2. Whether the defendant had the “prior” and “adequate” opportunity to seek judicial review of the Order.

The Court reversed the judgment of the U.S. Court of Appeals for the Fourth Circuit and remanded the case to the lower court to address these issues.

### TCPA

In 1991, Congress passed the TCPA to restrict telephone solicitations and the use of automated telephone equipment. It charged the FCC with interpretation and rulemaking authority over the TCPA.

In 2005, the TCPA was amended to include the [Junk Fax Prevention Act](#) (JFPA) to restrict the use of fax machines to deliver unsolicited advertising.

Shortly after, in 2006, the FCC issued the Order, providing guidance on the 2005 JFPA amendment.

At issue before the Supreme Court was the FCC’s interpretation of the definition of “unsolicited advertisements” in the context of the JFPA, found in the 2006 Order.

### Fourth Circuit Decision

A divided [Fourth Circuit](#) held that the district court erred in refusing to defer to the FCC's interpretation of the definition of "unsolicited advertisement" under the TCPA in the 2006 Order. The district court had ruled that a fax advertisement for free services did not qualify as an "unsolicited advertisement" under the law, despite the Order stating that, "even at no cost," a fax message promoting goods and services qualified as an "unsolicited advertisement."

### Supreme Court Decision

The Supreme Court, in a decision authored by Justice Stephen Breyer, emphasized, "As we have said many times before, we are a court of 'review,' not of 'first view.'" It continued, "Because the Court of Appeals has not yet addressed the preliminary issues we have described, we vacate the judgment of the Court of Appeals and remand this case so that the Court of Appeals may consider these preliminary issues, as well as any other related issues that may arise in the course of resolving this case."

### The Wait Continues

A final decision in this case has been [long-awaited](#), and the wait continues. While the lawsuit centers on a dispute over "junk faxes," its implications extend far beyond.

The case deals with a broad range of issues regarding the scope of deference under the Hobbs Act and its interplay with the [Chevron doctrine](#). The Hobbs Act provides exclusive jurisdiction to the Court of Appeals in challenges to final orders issued by any of the six federal agencies. To complicate matters, the *Chevron* doctrine, an administrative law principle derived from the Supreme Court case, compels federal courts, regardless of level, to follow agency interpretation of a statute it administers unless the court finds Congress' language in the statute "clear and unambiguous."

When a district court is adjudicating a case involving a final order issued by one of the six federal agencies regulated by the Hobbs Act, a dilemma arises. Does the Hobbs Act strip the district court of its ability to apply the *Chevron* deference? In a concurring opinion in *PDR Network*, Justice Brett Kavanaugh stated, "I agree with the Court that we should vacate the judgment of the Fourth Circuit, but I would decide the question that we granted certiorari to decide. I would 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."

Days before releasing its opinion in *PDR Network*, the Supreme Court declined to weigh in on a [similar case](#) regarding the extent to which the TCPA is unclear and thus warrants the application of FCC interpretation. Relatedly, the Senate approved the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), [S. 151](#), which provides the FCC with enhanced TCPA enforcement powers. The TRACED Act has been sent to the House of Representatives for approval.

Please contact a Jackson Lewis attorney with any questions about *PDR Network* or the TCPA.

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