



Robocall Regulation and Judicial Review

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Robocalls—calls placed using an automatic telephone dialing system or an artificial or prerecorded voice—continue to be one of the most common consumer complaints received by the Federal Communications Commission (FCC). Generally, it is illegal under the [Telephone Consumer Protection Act](#) (TCPA) to place robocalls to consumers without their consent. However, enforcement efforts have been complicated by technology that allows callers to falsify, or “spoof,” their caller ID information and adopt an area code or telephone number similar to that of the recipient. One method of combating robocalls with spoofed numbers involves deploying technology to verify the authenticity of caller ID information and to block calls made from numbers with unverified caller ID information.

On June 7, 2019, the FCC published a [declaratory ruling on the use of call-blocking technologies](#), including those that rely on caller ID authentication. The ruling set forth the FCC’s position that telecommunications providers may provide call-blocking to consumers as a default option without violating the providers’ statutory duty under section 201(b) of the Communications Act to complete calls on a “just and reasonable” basis. The ruling is subject to judicial review in the U.S. Courts of Appeals up to sixty days after its publication; however, the Supreme Court’s recent decision in *PDR Network, LLC v. Carlton Harris Chiropractic, Inc.* leaves open the possibility that the ruling may be challenged in district courts after that time frame and may put the FCC on a shakier footing with respect to regulating robocalls in the future.

Section 201(b) of the Communications Act

Title II of the Communications Act of 1934 regulates telecommunications service providers who offer their services to the public (referred to in the Act as “common carriers”). [Section 201\(b\)](#) of the Communications Act requires that all common carriers ensure that “[a]ll charges, practices, classifications, and regulations for and in connection with [their services] shall be just and reasonable” [Section 207](#) permits an individual to sue a common carrier who violates any of the Act’s provisions, including [Section 201\(b\)](#).

The June 7 Ruling

Because call-blocking technologies deployed by common carriers deny service to the party initiating the blocked call, the FCC has clarified on several occasions how [Section 201\(b\)](#)’s “just and reasonable” requirements apply to call-blocking services. Several FCC orders [referred to in the FCC’s June 7 Ruling](#)

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have set forth the FCC's policy that "opt-in" call-blocking services do not violate Section 201(b). The [June 7 Ruling](#) built on these previous orders by clarifying the FCC's position that common carriers may also offer "opt-out" call-blocking services without violating Section 201(b). The FCC [reasoned](#) that many consumers are frustrated by robocalls, but very few consumers go through the process of opting in to call-blocking services. The FCC [noted](#) that consumers' rights to block calls by choice is not legally controversial, and nothing in the Communications Act or FCC rules and regulations suggests that consumers may only opt in to exercise such a choice. The FCC saw opt-out call-blocking programs as a means to increase participation in call-blocking programs while still respecting consumer choice.

The PDR Network Decision

On June 20, 2019, the Supreme Court of the United States issued an opinion in [PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.](#) At issue before the Court was whether a federal district court was required to accept as law an FCC order that defined a term from the TCPA.

A series of statutes known collectively as the Hobbs Act vests in the U.S. Courts of Appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . final orders of the Federal Communications Commission," provided such challenges are made within [sixty days](#) of the FCC issuing the final order. The Court was asked to decide whether the Hobbs Act's grant of "exclusive jurisdiction" to federal appellate courts obligates district courts to follow legal interpretations contained in FCC orders. This question turned on whether the Hobbs Act is a "jurisdiction-stripping" statute, which takes away the district courts' jurisdiction to adjudicate challenges to FCC orders, or merely provides a means for pre-enforcement review of such orders. Reading the Hobbs Act as jurisdiction-stripping would prevent parties from challenging the FCC's legal interpretations outside the 60-day period afforded by the Hobbs Act, at which point district courts would have to follow the FCC's interpretations.

A [brief](#) of one of the parties before the Supreme Court sets out Supreme Court precedent, as well as multiple decisions from the Courts of Appeals, reading the Hobbs Act as a jurisdiction-stripping statute. Among the counterarguments raised in the [opposing brief](#) is that stripping district courts of jurisdiction could prevent an entity from having an opportunity to challenge the order, as the [Administrative Procedure Act](#) (APA) arguably requires, when the entity does not understand how the order affects them until after the review period has concluded.

Rather than answer the question, the Court remanded the case, holding that the lower courts had not properly considered: (1) whether the FCC order at issue was a "legislative rule" with the force of law or an "interpretive rule" that merely states the agency's construction of the law, and (2) whether the "exclusive jurisdiction" provision afforded a "prior" and "adequate" opportunity for judicial review of the order.

Although a majority of the Court declined to reach the merits of the case, at least four Justices appear willing to hold that district courts are not bound by an FCC order's legal interpretations. In a [concurring opinion](#) joined by Justices Thomas, Alito, and Gorsuch, Justice Kavanaugh concluded that district courts should not give the FCC's legal interpretations the force of law and should instead apply usual principles of statutory construction. Justice Kavanaugh reasoned that an individual may typically challenge agency actions under the APA specifically as those actions affect the individual (sometimes known as an "as-applied" challenge). Because the APA expressly allows for as-applied review, Justice Kavanaugh determined that as-applied review should only be considered barred if Congress has explicitly done so, as it has in the [Comprehensive Environmental Response, Compensation, and Liability Act](#), the [Clean Air Act](#), and the [Clean Water Act](#).

Why This Matters for Robocalls

After the *PDR Network* decision, district courts may be willing to consider legal challenges to the FCC's June 7th Ruling. Prior to the *PDR Network* decision, few district or appellate courts had questioned the notion that district courts are bound by the FCC's orders under the Hobbs Act. While the central question of *PDR Network* remains unresolved, the decision has exposed an avenue for challenging FCC orders in federal courts long after the sixty days allowed by the Hobbs Act have passed. Justice Kavanaugh's concurrence does not bind lower courts, but they are free to treat the concurrence as persuasive authority; thus, lower courts may reverse course on how they treat FCC orders.

The shift contemplated by Justice Kavanaugh's concurrence would not, however, strip all authority from the FCC to make legal determinations. More likely is that any such determinations would receive deference according to the framework set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* Under the *Chevron doctrine*, a court examining an FCC order interpreting statutory language would ask (1) whether congressional intent is clear from the language at issue, and (2) if congressional intent is not clear, whether the agency's interpretation of the language is reasonable. For straightforward or uncontroversial definitions set forth by the FCC, applying this framework may result in the FCC's definition being upheld. But where the FCC redefines a term in a way dramatically different from the plain language of the statute, courts may be more willing to strike the new definition down, as the [Court of Appeals for the DC Circuit](#) did recently when asked to review an FCC order defining an "automatic telephone dialing system."

In the case of the June 7 Ruling, a caller blocked by a common carrier could bring suit against that carrier under Section 207(b) of the Communications Act, challenging the FCC's conclusion that opt-in blocking services are "just and reasonable." While a phrase like "just and reasonable" is ambiguous enough that courts [typically defer](#) to agency constructions of the term, more concrete terms may be subject to greater scrutiny. The TCPA contains a number of terms that the FCC has clarified through administrative action, including "[prior express consent](#)," "[elderly homes](#)," and even what constitutes a "[telephone call](#)." Because the TCPA permits individuals to bring suit against callers who violate it, such callers could now defend themselves by challenging the validity of FCC orders defining terms in the TCPA.

The questions raised in *PDR Network* may reach the Supreme Court again, at which point the Court would have another opportunity to decide whether the FCC's legal interpretations bind district courts. Four Justices have indicated that FCC orders are not binding. Regardless of the answer, Congress has the authority to amend the Communications Act or TCPA with "clear statements" of congressional intent.

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