17-1705 PDR NETWORK, LLC V. CARLTON & HARRIS CHIROPRACTIC

DECISION BELOW: 883 F. 3d 459

LOWER COURT CASE NUMBER: 16-2185

QUESTION PRESENTED:

This case presents a challenge to the jurisdiction of every court in the nation to interpret and apply the law. A critical question, and circuit split, persists concerning the interplay between the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. § 2342, and this Court's seminal decision in *Chevron USA, Inc. v. Nat. Res. Def Council, Inc*., 467 U.S. 837 (1984). This Court's review is needed to clarify the jurisdiction of all courts to decide the proper level of deference afforded to interpretive agency guidance. If allowed to stand, the Fourth Circuit's jurisdiction-stripping ruling would elevate those agencies identified in the Hobbs Act above even the judiciary; empowering agency orders to trump the courts' fundamental "province and duty" to interpret the law.

In enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress permitted civil liability only for sending "unsolicited advertisements" by fax. 47 U.S.C. § 227(b)(l)(C). In 2006, the Federal Communications Commission ("FCC"), tasked with implementing the TCPA, promulgated a Final Rule with respect to those faxes that "promote goods and services even at no cost."

Under *Chevron*, courts are empowered to independently assess whether a statutory term is "unambiguous," and thus, ripe for judicial interpretation. If a term is deemed ambiguous, courts still retain their discretion to defer to agency guidance. But courts owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, they find themselves unable to discern Congress's meaning.

Applying a traditional *Chevron* analysis, the District Court for the Southern District of West Virginia held the term "advertisement" in the TCPA was unambiguous; thus, it need not automatically defer to the FCC's guidance in deciding whether to grant Defendant/Petitioner's motion to dismiss. The District Court nevertheless "harmonized" the FCC's interpretive guidance with its own reading of the TCPA, and held the single fax at issue could not be read to "promote" anything other than information. In a split decision, the Fourth Circuit vacated and remanded, holding instead that the Hobbs Act "precluded" the District Court from engaging in a *Chevron* analysis, and that the District Court was required to automatically defer to the FCC's guidance on what qualifies as an "advertisement" under the TCPA.

Congress passed the Hobbs Act to provide a mechanism for judicial review of certain agency orders. To ensure the Hobbs Act did not impugn on the "province and duty" of the judiciary, the statute was intended to bar only facial challenges to the "validity" of an agency's order-not judicial review of the applicability of an agency order with respect to a particular set of facts and circumstances. As observed by the Sixth and Ninth Circuits in this precise context, a deepening circuit split exists as to whether courts must automatically defer to, and broadly apply, the FCC's definition of an "advertisement" in the absence of such ambiguity.

Ignoring cannons of statutory interpretation, the Fourth Circuit also held the FCC's guidance created a *per se* rule that faxes that promote goods and services "even at no cost" constitute "advertisements"-despite the lack of any commercial nexus to a firm’s business. This

ruling created a circuit split with the Second, Sixth, Ninth and Eleventh Circuits, all of which require such a nexus, as well as a separate split with the Second Circuit, which held the FCC imposed only a rebuttable presumption that a fax promoting free goods and services qualifies as an “advertisement."

Thus, the questions presented are:

1. Does the Hobbs Act strip courts of jurisdiction to engage in a traditional *Chevron* analysis and require automatic deference to an agency's order even if there has been no challenge to the "validity'' of such order?

2. Must faxes that "promote goods and services even at no cost" have a commercial nexus to a firm’s business to qualify as an "advertisement" under the TCPA, or does a plain reading of the FCC's 2006 order create a *per se* rule that such faxes are automatically "advertisements"?

GRANTED LIMITED TO THE FOLLOWING QUESTION: WHETHER THE HOBBS ACT
CERT. GRANTED 11/13/2018