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Why Does the TCPA Equal Chaos? The US Supreme Court Opens FCC Orders to New Challenges

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On June 20, the U.S. Supreme Court issued its opinion in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. —- — S.Ct. —- 2025 WL 1716136 (2025), addressing whether, under the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. §2342, district courts are bound by the Federal Communication Commission's (FCC) interpretation of the Telephone Consumer Protection Act (TCPA). The Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits had held that because the Hobbs Act vests exclusive jurisdiction to determine the validity of FCC orders in the circuit (appellate) courts, district courts were bound by the FCC's orders interpreting the TCPA.

In a 6-3 vote, the Supreme Court rejected these decisions, holding that district courts are not bound by the FCC's interpretation of the TCPA. District courts are empowered to independently interpret the TCPA under ordinary principles of statutory interpretation, affording appropriate respect to the agency's interpretation. This decision has important implications for businesses engaged in any outbound telephone communications where the TCPA applies.

Case Background:

Over 10 years ago, McKesson Corporation sent unsolicited fax advertisements through a subsidiary to medical practices, including McLaughlin Chiropractic Associates. McLaughlin filed a class action complaint in 2013, seeking damages and an injunction from McKesson, alleging TCPA violations for failing to include the required opt-out notices. McLaughlin sought to represent a class of fax recipients who received the advertisements either on traditional fax machines or through online fax services.

While McLaughlin's lawsuit was pending, the FCC issued a declaratory ruling interpreting "telephone facsimile machine" in the TCPA to exclude online fax services. Following Ninth Circuit cases holding that FCC final orders are reviewable exclusively in the courts of appeals under the Hobbs Act, the district court held that the FCC's order was binding and granted summary judgment to McKesson on claims involving online fax services. The court then decertified the class, leaving McLaughlin with claims for only 12 faxes received on a traditional machine and damages of $6,000. The Ninth Circuit affirmed.

Question Presented:

Does the Hobbs Act require a federal district court to accept the FCC's legal interpretation of the TCPA?

The Supreme Court's Decision:

In a 6-3 decision, authored by Justice Kavanaugh (which was to be expected), but joined by Roberts, Thomas, Alito, Gorsuch, and Barrett, the Supreme Court reversed, holding that the Hobbs Act does not bind district courts in civil enforcement proceedings to the FCC's interpretation of the TCPA. The Court distinguished statutes that expressly preclude, or expressly authorize, judicial review in subsequent enforcement proceedings from statutes that do neither, finding that the Hobbs Act did neither. The Court found that the proper default rule where judicial review is neither expressly precluded nor authorized is that "a district court must independently determine for itself whether the agency's interpretation of a statute is correct." The district court must "determine the meaning of the law under ordinary principles of statutory interpretation, affording appropriate respect to the agency's interpretation." The Court found that the Administrative Procedure Act, 5 U. S. C. §703, which provides: "except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement," controls the outcome. It cautioned that when "Congress wants to bar a district court in an enforcement proceeding from reviewing an agency's interpretation of a statute, Congress can and must say so."

The *McLaughlin* decision was foretold by another recent Supreme Court decision. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Court overruled a longstanding judicial policy of deference to administrative interpretations of statutes, rejecting the idea that the agencies' specialized expertise warrants deference to their interpretation. In that case as well, the Court relied upon 5 U. S. C. §703 as the basis to refuse deference.

Implications for Clients:

This ruling is crucial for companies involved in outbound telephone calls, including telemarketing and automated communications. After *McLaughlin* and *Loper Bright*, district courts are now free to apply traditional statutory interpretation principles to re-examine prior FCC orders that have driven litigation against sellers and telemarketers. While nearly any FCC order is subject to challenge, a few issues stick out:

Whether DNC Rules Cover Cell Phones: In a 2003 order, the FCC found that the definition of "residential subscribers" includes cell phone subscribers. *See e.g.Buxton v. Full Sail, LLC*, No: 6:24-cv-747-JSS-DCI, 2024 WL 5057222 (M.D. Fla. Dec. 10, 2024) (citing In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 14014 (July 3, 2003)). The Supreme Court's ruling will encourage defendants to revisit that ruling.

Whether Robocall and DNC Rules Cover Text Messages: The 2003 order also expanded the definition of "telephone call" to include text messages. *Melito v. Experian Marketing Solutions, Inc.*?, ?923 F.3d 85? (2d Cir. 2019). Earlier Supreme Court decisions questioned the FCC's interpretation of "telephone call." In a footnote in *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021), the Court explained that it was assuming, "without … resolving [the] issue," that the TCPA "extends to sending text messages." Following *McLaughlin*, a district court applying ordinary principles of statutory interpretation could hold that the TCPA does not apply to texting. The first text message was on December 3, 1992, after the TCPA was enacted. A court applying the plain, ordinary meaning of "telephone call or message" as it was understood in 1991 when the TCPA was enacted and text messaging did not exist could find that Congress could not have intended the TCPA to cover text messages.

Who "Makes" or "Initiates" a Call: In several orders, the FCC has addressed who is liable for making or initiating a telephone call. In 1992, the FCC concluded that liability exists if a defendant demonstrates "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions." *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, ¶ 54 (1992). In 2015, the FCC found that "one can violate the TCPA either by taking the steps necessary to physically place a telephone call, or by being so involved in the placing of a specific telephone call as to be deemed to have initiated it." *See* Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7890 (2015). The Supreme Court's ruling will encourage defendants to litigate issues surrounding who "makes" or "initiates" a telephone call.

Use of Artificial Intelligence: In a 2024 order, the FCC declared that the TCPA's restrictions on the use of an "artificial or prerecorded voice," encompass the use of artificial intelligence technologies that generate human voices. The FCC thus held that calls using artificial intelligence in that way "require the prior express consent of the called party to initiate such calls absent an emergency purpose or exemption." Declaratory Ruling, *In re Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts*, FCC 24-17 (Feb. 8, 2024). Because the use of generated voices of real humans raises questions of whether those voices are "artificial" for purposes of the statute, the Supreme Court's ruling foreshadows challenges to the FCC's ruling.

Prior Express (Written) Consent: Perhaps nowhere will the impact of the Supreme Court's *McLaughlin* decision be felt more than in the area of the definition of prior express consent and permission. The statutory text requires that a caller obtain "prior express consent" or "prior express invitation or permission" from a consumer. The FCC has repeatedly re-defined the meaning of that term to limit the ability of consumers to consent or give permission for marketing calls, and each of those limits can now be challenged in a district court.

First, in 2012, the FCC interpreted "prior express consent" for telemarketing calls to mean consent that is in writing, signed by the consumer. *In re Rules and Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1831 (2012); 47 C.F.R. § 64.1200(a)(2), (3).

The FCC went further in 2023, issuing a new order prohibiting consumers from providing consent to more than one entity at a time. Second Report and Order, *In re Targeting and Eliminating Unlawful Text Messages*, 38 FCC Rcd. 12247, 12258–69 (2023).

This "one-to-one consent rule" was immediately challenged. In *Insurance Marketing Coalition Ltd. v. FCC*, 127 F.4th 303 (11th 2025), the court vacated the rule holding that the FCC exceeded its statutory authority. The court held that the plain and ordinary meaning of "express consent" only required that consent be "clearly and unmistakably stated." The FCC's interpretation of "express consent" as requiring one-to-one consent amounted to a requirement of "prior express consent" *plus*: "At bottom, the FCC has 'decreed a duty [on lead generators] that the statute does not require and that the statute does not empower the FCC to impose.'" *Id.*, at 317 (citation omitted). The Supreme Court's new ruling allowing facial challenge to the FCC's interpretations and regulation presents the opportunity to challenge the FCC's other orders requiring prior express consent plus.

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The FCC has interpreted, and in many cases expanded, the text of the TCPA in regulations dozens of times in the 33 years since its enactment. These interpretations have limited the ability of consumers to give consent and provide permission to companies to make calls offering products and services consumers want and need, and have restricted companies' ability to rely on consumers' consent. Although the examples listed above stand out, every interpretation of the FCC is now subject to challenge in the wake of *McLaughlin* and *Loper Bright.*

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