

## insights

TYPES NOT MAPPED YET October 23, 2024 | TTR not mapped yet | Brittney K. Mollman, Luke Sosnicki

# Supreme Court Will Again Consider Agency Authority in a TCPA Case

On October 8, 2024, the Supreme Court granted certiorari in [\*McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation and McKesson Technologies, Inc.\*](#), (No. 23-1226) to address whether the [Hobbs Act](#) requires district courts to follow the FCC's interpretation that the Telephone Consumer Protection Act ("TCPA") does not prohibit faxes received via "online fax services."

### Getting to Certiorari in *McLaughlin*

The *McLaughlin* case is a 2013 class action lawsuit filed in federal court in the Northern District of California. The underlying dispute arose when defendant McKesson Corporation allegedly sent unsolicited advertisements to class members, including representative McLaughlin Chiropractic, via facsimile. The advertisements were sent to freestanding fax machines and online fax services.

After the case had been pending for six years, and shortly after the class was certified, the FCC issued an [order](#) construing the TCPA to exclude an "online fax service" from the definition of "telephone facsimile machine." In the FCC's view, an "online fax service that effectively receives faxes sent as email over the Internet" is "not itself equipment which has the capacity to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper" and so "falls outside the scope of the statutory prohibition." The FCC further reasoned that, because an online fax service "cannot itself print a fax," it did not implicate the specific harms Congress addressed in the TCPA, namely "advertiser cost-shifting."

An [application for review](#) of the order was filed before the FCC in early 2020 by other entities. The application is still pending.

The Court, having reviewed the FCC's order, determined it was bound by the FCC's [interpretation of the rule](#), and as a result decertified the *McLaughlin* class on the grounds that the class could not identify which faxes had been sent by online fax service versus by an original fax machine. The Ninth Circuit [affirmed](#).

### Circuit Split on the Binding Nature of FCC Orders

The federal circuits are split as to whether FCC orders bind district courts. The Fourth Circuit in [\*Carlton & Harris Chiropractic Inc. v. PDR Network, LLC\*](#) held that FCC orders interpreting the TCPA fall outside the scope of the Hobbs Act and, accordingly, are not binding on district courts (as opposed to legislative rules, which are binding). The [Second](#), [Third](#), and [Eighth](#) Circuits have taken a similar position.

The [Seventh Circuit](#) has held that its district courts are not bound by FCC rules, regardless of whether the rule is an interpretive or final rule.

Finally, the [Ninth Circuit](#) takes the view that district courts are bound by *both* interpretive and final rules issued by the FCC.

### *Loper Bright* and the Authority of the Administrative State

Last term, the Supreme Court overruled the long-standing [Chevron doctrine](#) - a doctrine under which courts largely had to defer to agencies' interpretations of ambiguous statutes - in a highly publicized case out of the First Circuit, [\*Loper-Bright Enterprises v. Raimondo\*](#).

The opinion's dissent (authored by Justice Kagan and joined by Justice Sotomayor) aptly addressed what have become broad concerns in the wake of *Loper-Bright*, criticizing the majority for judicial overreach and emphasizing the disruption and uncertainty that overturning *Chevron* would cause. In particular, by shifting power away from federal agencies, *Loper-Bright* increases the likelihood of successful challenges to agency actions under the Administrative Procedure Act. Courts are also empowered to independently interpret statutes, without necessarily deferring to agency interpretations, increasing the possibility of divergent statutory interpretations by courts. Finally, agencies may be more cautious in issuing broad rules, in particular those that change interpretations issued by agencies in prior administrations.

### ***McLaughlin's* Potential Effects**

Depending on which way the Court rules in *McLaughlin*, the ruling could lead to even greater litigation under the TCPA to the extent the FCC would no longer be able to rely on its authority under the Hobbs Act to interpret what exactly the TCPA means. The FCC has relied on the [TCPA](#), which restricts the making of telemarketing and the use of automatic telephone dialing systems and artificial or prerecorded voice messages, to regulate new technologies, including evolving technologies that support consumer [lead generation](#) and text message marketing. In the wake of a potential ruling that aligns with the majority opinion in *Loper Bright*, litigants will likely seek out courts to review the enforceability of these and other FCC-created regulations. Such litigation will likely lead to inconsistent interpretations across districts regarding term meanings and applicability, which will mean that businesses need to have heightened awareness of evolving case law.

At the same time, it is important to note that the Ninth Circuit is the only federal circuit that has held district courts are bound by agency interpretive and legislative rules. Likewise, the petitioner in the *McLaughlin* case does not argue that it lacked a prior or adequate opportunity to seek review of the FCC's order under the Hobbs Act. Therefore, even if the Supreme Court rules against deference, the scope of its ruling could serve to limit its ultimate impact.

Oral arguments have yet to be scheduled. Thompson Coburn attorneys will continue to closely monitor these developments.

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