In what is shaping up to be an increasingly active term for judicial scrutiny of agency deference, the U.S. Supreme Court granted certiorari in *McLaughlin Chiropractic Assoc. v. McKesson Corp.*, No. 23-1226 (U.S. Oct. 4, 2024)—a case which appears primed to address how much deference federal courts must give to agency interpretations of the law. At issue in *McLaughlin* is whether the federal Hobbs Act, 28 U.S.C. § 2342(1), requires that courts treat orders by the Federal Communications Commission (FCC) interpreting the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(C), as "invariably binding[.]"

The TCPA, as amended by the Junk Fax Prevention Act, prohibits the sending of unsolicited advertisements to a "telephone facsimile machine" unless certain conditions are met.[1] "Telephone facsimile machine" is defined to include any "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or

both) from an electronic signal received over a regular telephone line onto paper." *Id.* § 227(a)(3). In 2019, the FCC issued a declaratory ruling that online fax services—or cloud-based services that allow users to access "faxes" by logging into a server over the Internet or by receiving a pdf attachment of a fax as an email—fall outside the scope of the TCPA's statutory prohibition. *In the Matter of Amerifactors Fin. Grp., LLC*, 34 F.C.C. Rcd. 11950 (2019).

In urging the Supreme Court to reconsider whether the FCC's interpretation of the TCPA is entitled to judicial deference, the Petitioner (McLaughlin Chiropractic Associates) is also seeking to revive a proposed class action against McKesson Corporation over purportedly unsolicited "junk faxes" that it claims lacked the necessary opt-out provisions. Previously, the Ninth Circuit Court of Appeals affirmed a decision by Judge Gilliam of the Northern District of California decertifying Petitioner's putative class due to the inability to distinguish between class members who had received fax transmissions through an online fax service and those that had received a fax transmission through a traditional fax machine.

The Supreme Court's decision to grant certiorari here is notable for at least two reasons. First, in light of its decision in *Loper-Bright Enterprises v. Raimondo*, it seems plausible that the Court may further limit the judicial deference afforded to federal agency interpretations of statutes. Additionally, this is also the second time that the Supreme Court has reviewed a TCPA case in the last decade. In 2021, the Court took up *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), in which it greatly reduced the scope of what constitutes an "autodialer" subject to the TCPA.

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[1] For example, where there is an established business relationship with the recipient; the recipient must have voluntarily provided the fax number; and the sender must have included a compliant opt-out notice. *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 290 (7th Cir. 2018).

Authors

James G. Snell

Partner
JSnell@perkinscoie.com 650.838.4367

Tim Carter

Associate
TCarter@perkinscoie.com 650.838.4786

Jelani Shelton

Not Yet Admitted
JShelton@perkinscoie.com

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