

TCPA §227(c)(5)

Text Messages & the National Do-Not-Call Rules

Post-Loper Bright District Court Analysis | Circuit Split, Statutory Interpretation, Appellate Proceedings & Compliance Guidance for Marketers

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Sources: TCPA Blog · National Law Review · JD Supra · Kennedys Law · Greenspoon Marder · FaegreDrinker · Troutman Amin · ZwillGen · Justia

Executive Summary

The Telephone Consumer Protection Act's Do-Not-Call private right of action — 47 U.S.C. §227(c)(5) — has become the center of a deepening judicial crisis. Since the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which eliminated Chevron deference, and *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. 146 (2025), which held that district courts are not bound by FCC interpretations of the TCPA in civil enforcement proceedings, federal courts have fractured sharply on a single threshold question: does the term 'telephone call' in §227(c)(5) — enacted in 1991 before SMS existed — encompass modern text messages?

<h2 style="margin: 0;">15+</h2> <p style="font-size: small; margin: 0;">District court decisions post-Loper Bright</p>	<h2 style="margin: 0;">~2:1</h2> <p style="font-size: small; margin: 0;">Defendant-favorable vs. plaintiff-favorable</p>	<h2 style="margin: 0;">2</h2> <p style="font-size: small; margin: 0;">Active circuit appeals (7th & 11th Circuits)</p>	<h2 style="margin: 0;">1</h2> <p style="font-size: small; margin: 0;">Circuit with binding 'texts = calls' ruling (9th Cir.)</p>
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The split tilts decisively toward defendants: courts in the Sixth, Seventh, and Eleventh Circuits have predominantly dismissed §227(c)(5) DNC text claims on plain-text grounds, while courts in the Ninth and Fifth Circuits and isolated Seventh Circuit judges continue to allow such claims. Two appeals — *Jones v. Blackstone Med. Servs.* (7th Cir. No. 25-2398) and *Radvansky v. Kendo Holdings* (11th Cir. No. 26-10837) — are pending and will likely produce the first binding circuit-level guidance. The Ninth Circuit has separately held (in an early 2026 ruling involving the National Republican Committee) that texts are 'calls' under §227(b), though that holding does not directly resolve the §227(c)(5) issue. Supreme Court intervention appears increasingly likely once the circuit split crystallizes.

Key Takeaways for Marketers

- Text-only DNC §227(c)(5) claims are now routinely dismissed in the 6th, 7th, and 11th Circuits — but live in the 9th Circuit and parts of the 5th Circuit.
- The FCC's 2024 codification (47 C.F.R. §64.1200(e)) that DNC rules apply to texts carries no binding weight in civil cases post-McLaughlin — courts assess it only under Skidmore persuasiveness.
- The 'voice texts' / audio message carve-out flagged in *James v. Smarter Contact* (M.D. Fla. 2026) may create new liability vectors; audio-embedded texts remain analytically distinct.
- §227(b) ATDS claims and state-law analogues remain fully viable nationwide — DNC dismissals do not eliminate TCPA exposure for text campaigns.
- Until circuit courts resolve the split, the safest compliance posture treats all marketing texts as regulated under both §227(b) and §227(c) and maintains rigorous National DNC scrubbing.
- Forum selection is now a critical factor in TCPA litigation strategy for both plaintiffs and defendants.

I. Statutory and Regulatory Framework

The TCPA's Do-Not-Call Private Right of Action

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. §227), was enacted to protect residential telephone subscribers from unwanted telemarketing. Section 227(c)(5) — the DNC private right of action — states:¹

"A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring ... an action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater..."

The statute's threshold trigger word — 'telephone call' — is undefined in the TCPA. When Congress enacted the statute in 1991, the first SMS message had not yet been sent (it was transmitted in December 1992). Congress has since amended the TCPA multiple times, and in doing so explicitly added 'text message' and 'text messaging service' in §§227(e)(1) and 227(e)(8) via the Consolidated Appropriations Act, 2018. Section 227(c)(5) was left unamended — a textual asymmetry that anchors the 'texts are not calls' line of authority.

FCC Interpretive History

Year	FCC Action	Relevance to §227(c)(5)
2003	In re Rules & Reguls. Implementing TCPA of 1991, 18 F.C.C. Rcd. 14014 — first stated that TCPA restrictions on calls to wireless numbers using an ATDS under §227(b) 'encompasses both voice calls and text calls.'	Issued under §227(b), not §227(c). Courts now find this does not govern DNC private right of action. ²
2003–2016	Series of FCC orders consistently treating texts as functionally equivalent to calls for TCPA purposes; courts largely deferred under Chevron.	Pre-Loper Bright deference drove plaintiff-favorable outcomes in DNC text cases. Now given only Skidmore weight.
2023 (Dec.)	Second Report & Order (89 FR 5098, Jan. 26, 2024): FCC expressly codified that 'the National Do-Not-Call (DNC) Registry's protections extend to text messages,' amending 47 C.F.R. §64.1200(e). ³	Codification post-dates most alleged violations; courts applying plain-text analysis find even this rule cannot expand §227(c)(5)'s private right of action.
2024 (Jun.)	Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) — SCOTUS overrules Chevron, eliminating mandatory deference to agency statutory interpretations.	Courts must now independently determine statutory meaning; FCC guidance has no binding force.
2025 (Jun.)	McLaughlin Chiropractic Associates, Inc. v. McKesson Corp., 606 U.S. 146 (2025) — SCOTUS (6-3) holds district courts in TCPA civil enforcement are not bound by FCC orders; must independently determine statute's meaning. ⁴	Decisive trigger for the current split. District courts began immediately rejecting FCC guidance that texts = calls under §227(c)(5).
2024–2026	FCC 'one-to-one consent' rule struck by 11th Circuit as exceeding statutory authority; various FCC rules facing renewed challenge.	Reinforces post-Loper Bright judicial skepticism of FCC authority to expand TCPA liability beyond statutory text.

1. 47 U.S.C. §227(c)(5). See <https://www.law.cornell.edu/uscode/text/47/227>.

2. Troutman Pepper: Post-McLaughlin TCPA Chaos (July 2025).

3. 89 FR 5098-01 (Jan. 26, 2024). Duane Morris Advisory.

4. McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 606 U.S. 146, 155-56 (2025). Fenwick analysis.

II. The Interpretive Divide: Key Statutory Arguments

Courts on both sides of the split claim fidelity to plain-text statutory interpretation. The dispute distills to five core analytical battlegrounds:

Argument	Texts NOT Calls (Defendant/Majority View)	Texts = Calls (Plaintiff/Minority View)
1. 1991 Ordinary Meaning	'Telephone call' in 1991 meant voice communication via telephone. Webster's (1990): 'telephone' = 'instrument reproducing sounds at a distance.' Texts did not exist. Courts apply originalism.	'Call' in 1991 meant communication by phone; texts are 'sent and received by phone' and thus fall within the ordinary concept of phoning someone.
2. Intra-statutory Textual Contrast	Congress explicitly used 'text message' and 'text messaging service' in §§227(e)(1)&(8) (added 2018) and distinguished 'a call made' from 'a call made or text message sent' in TRACED Act reporting provisions. Omission from §227(c)(5) is intentional.	Congress's use of 'telephone solicitation' in §227(a)(4) — defined to include 'call or message' — signals a broad reading. FCC's 2024 amendment to 47 C.F.R. §64.1200(e) expressly extending DNC to texts is entitled to Skidmore weight.
3. Role of FCC Guidance (Post-McLaughlin)	Post-Loper Bright/McLaughlin, FCC orders cannot expand §227(c)(5)'s private right of action. 'Doubling the scope of the provision is not filling up the details' (S.D. Fla., McGonigle). Even Skidmore respect is unavailable where text is unambiguous.	Skidmore respect remains available post-McLaughlin. FCC's consistent 20-year interpretation, thoroughly reasoned, and supported by consumer protection goals, is highly persuasive even without Chevron. Statutory stare decisis also supports texts-in reading.
4. Encapsulation / Technological Modernization	Mere encapsulation of older technology in a new device does not expand the statute. Cell phones can make voice calls (true telephone calls) but also send texts; the latter function is categorically different. (N.D. Ohio, Stockdale)	Technology-neutral interpretation: the TCPA protects 'telephone subscribers' and 'residential' users from 'solicitations'; excluding texts would arbitrarily narrow protection as communications shifted from voice to text.
5. Private Right of Action Narrowly Construed	Private rights of action are strictly construed. FCC cannot expand them through regulation; only Congress can. If Congress wanted texts included, it would have said so, especially after the post-2003 widespread adoption of SMS.	§227(c)(1) mandates FCC to 'protect residential subscribers' from telephone solicitations; §227(c)(5) is the enforcement mechanism. Reading them in harmony supports including all 'telephone solicitations,' which FCC has determined includes texts.

Critical nuance flagged in *James v. Smarter Contact* (M.D. Fla., Mar. 31, 2026): Judge Mizelle expressly noted that audio messages or 'voice texts' — communications that involve reproduction of sound, even if delivered digitally — present a distinct question from traditional SMS, and may qualify as 'telephone calls' even under the strict 1991 ordinary-meaning framework. Marketers using RCS messages with audio components, voice drop tools, or AI-generated voice texts should not assume this line of authority protects them.

- 5. [James v. Smarter Contact](#) (M.D. Fla. Mar. 31, 2026).
- 6. [Kennedys Law: Post-Chevron Chaos](#) (Mar. 23, 2026).

III. Case-by-Case Analysis: Complete Decision Table

All known federal district court decisions since Loper Bright (June 2024) addressing whether §227(c)(5) 'telephone call' encompasses text messages. Listed chronologically.⁷

Case	Date	Court / Circuit	Holding	Key Reasoning	Outcome
Jones v. Blackstone Med. Servs., LLC 1:24-CV-01074 (C.D. Ill.) 792 F. Supp. 3d 894	Jul. 21, 2025	C.D. Illinois (7th Cir.)	TEXTS NOT CALLS (MTD Granted)	Plain 1991 meaning: 'telephone call' ≠ text; text messaging not available in 1991; FCC 2003 Order under §227(b) does not govern §227(c). Congress used distinct terms. On appeal to 7th Cir. (No. 25-2398).	DEF WINS
Wilson v. Skopos Fin., LLC 6:25-CV-00376-MC (D. Or.) 2025 WL 2029274	Jul. 21, 2025	D. Oregon (9th Cir.)	TEXTS = CALLS (MTD Denied)	FCC guidance and TCPA purpose support inclusion. Excluding texts undermines consumer privacy. FCC's expansion 'congruent with Congress's overarching goals.' Skidmore weight to FCC orders.	PLF WINS
Watkins v. EyeBuyDirect, Inc. 2025 U.S. Dist. LEXIS 167479 (W.D. Tex.)	Aug. 28, 2025	W.D. Texas (5th Cir.)	TEXTS = CALLS (MTD Denied)	Followed pre-McLaughlin precedent treating texts as calls; emphasized consumer protection purpose; declined to depart from established FCC interpretation absent clearer statutory direction.	PLF WINS
Davis v. CVS Pharmacy, Inc. 3:25-cv-231, 797 F. Supp. 3d 1270 (N.D. Fla.)	Aug. 26, 2025	N.D. Florida (11th Cir.)	TEXTS NOT CALLS (MTD Granted)	'No ordinary person would think of a text message as a telephone call.' Ordinary public meaning as of 1991. Congress's post-2018 use of 'text message' in §227(e) confirms omission from §227(c)(5) was intentional.	DEF WINS
Bosley v. A Bradley Hosp., LLC 2025 WL 2686984 (S.D. Fla.)	Sept. 19, 2025	S.D. Florida (11th Cir.)	TEXTS = CALLS (MTD Denied)	Declined to depart from pre-McLaughlin caselaw; cited pre-McLaughlin FCC deference precedent. Did not engage in fresh textual analysis. Minority view within 11th Circuit district courts.	PLF WINS
Sayed v. Naturopathica Holistic Health 1:25-cv-214, 2025 WL 2997759 (M.D. Fla.)	Oct. 24, 2025	M.D. Florida (11th Cir.)	TEXTS NOT CALLS (MTD Granted)	'Statutory text here is clear.' Omission of 'text message' from §227(c)(5) is intentional. Followed N.D. Fla. Davis reasoning. Appeal later voluntarily dismissed.	DEF WINS
Wilson v. MEDVIDI Inc. 5:25-cv-1441, 2025 WL 2856295 (N.D. Cal.)	Oct. 7, 2025	N.D. California (9th Cir.)	TEXTS = CALLS (Leave to Amend on other grounds)	Nothing in text, structure, or purpose of TCPA supports rigid distinction between written and oral phone communications. Consumer privacy purpose broadly construed.	PLF WINS
Richards v. Fashion Nova, LLC 1:25-CV-01145-TWP-MKK (S.D. Ind.) 2025 WL 3167069	Oct. 27, 2025	S.D. Indiana (7th Cir.)	STAYED pending 7th Cir. Jones appeal	Court stayed case pending Jones (7th Cir. No. 25-2398). Independently agreed 'telephone call' means voice communication; texts not covered under 1991 plain meaning.	DEF WINS
Mujahid v. Newity, LLC 2025 WL 3140725 (N.D. Ill.)	Nov. 10, 2025	N.D. Illinois (7th Cir.)	TEXTS = CALLS (MTD Denied)	Holistic reading; cited Supreme Court's assumption in Campbell-Ewald (2016) that texts are 'calls' under §227(b); FCC guidance; TCPA purpose. Contrary to Jones (C.D. Ill.).	PLF WINS

Case	Date	Court / Circuit	Holding	Key Reasoning	Outcome
Wilson v. Better Mortg. Corp. 1:25-cv-9173, 2025 WL 3493815 (S.D.N.Y.)	Dec. 5, 2025	S.D. New York (2nd Cir.)	TEXTS = CALLS (MTD Denied)	'Telephone call' in 1991 = communication made by phone; texts sent/received by phone fall within the concept. Gave Skidmore weight to FCC guidance. First significant 2nd Circuit district decision.	PLF WINS
McGonigle v. Pure Green Franchise Corp. 2026 WL 111338 (S.D. Fla.)	Jan. 15, 2026	S.D. Florida (11th Cir.)	DISCOVERY STAYED (Skeptical of texts = calls)	Stayed discovery; 'doubling scope of private right of action is not filling up details.' Raised nondelegation concerns about FCC authority. Acknowledged growing split.	DEF WINS
Radvansky v. Kendo Holdings, Inc. 3:23-cv-00214-LLM (N.D. Ga.)	Feb. 12, 2026	N.D. Georgia (11th Cir.)	TEXTS NOT CALLS (MTD Granted)	Congress amended TCPA in 2019 to add 'text message' in neighboring provision and chose to leave §27(c)(5) unamended. Post-Loper Bright/McLaughlin fresh analysis. Now on appeal to 11th Cir. (No. 26-10837).	DEF WINS
Lopresti v. Nouveau Essentials Mktg. LLC 2026 U.S. Dist. LEXIS 39599 (M.D. Fla.)	Feb. 26, 2026	M.D. Florida (11th Cir.)	TEXTS NOT CALLS (Judgment on Pleadings; also dismissed §227(b) claim)	Followed N.D. Fla. and prior M.D. Fla. precedent. Notably also dismissed §227(b) ATDS-based claim for same texting conduct — unusually broad ruling.	DEF WINS
Radvansky v. 1-800-Flowers.com, Inc. 2026 WL 456919 (N.D. Ga.)	Feb. 17, 2026	N.D. Georgia (11th Cir.)	TEXTS NOT CALLS (MTD Granted)	§227(c)(5) authorizes private suits only for 'telephone calls.' 'Residential telephone subscriber' can include cellphone users, but the cause of action is limited to voice calls. 4th consecutive 11th Circuit district court ruling against text DNC claims.	DEF WINS
Stockdale v. Skymount Prop. Grp., LLC No. 1:25 CV 1282, 2026 WL 591842 (N.D. Ohio)	Mar. 3, 2026	N.D. Ohio (6th Cir.)	TEXTS NOT CALLS (MTD Granted)	1990 Webster's: 'telephone' = 'instrument reproducing sounds at a distance.' Texts do not reproduce sounds. Rejected argument that cell phone encapsulates telephone functionality. Criticized pro-plaintiff decisions for using post-1991 dictionaries. Acknowledged conflict with FCC but left to Congress to fix.	DEF WINS
Rabbit v. Rohrman Midwest Motors 2026 WL 851279 (N.D. Ill.)	Mar. 27, 2026	N.D. Illinois (7th Cir.)	TEXTS = CALLS (MTD Denied)	FCC interpreted 'telephone solicitations' to include SMS — defendant did not challenge this. Cell phones = residential numbers. Accorded Skidmore respect to FCC. Criticized for circularity and residual deference by commentators.	PLF WINS
Richards v. Fashion Nova, LLC 1:25-cv-01145 (S.D. Ind.) [Second Ruling]	Late Mar. 2026	S.D. Indiana (7th Cir.)	TEXTS NOT CALLS (MTD Granted)	After prior stay, court resolved motion on merits. 1991 plain meaning; 'telephone call' means voice communication. §227(a)(4)'s 'call or message' distinguishes the two; omission from §227(c)(5) intentional. Post-Loper Bright restraint.	DEF WINS

Case	Date	Court / Circuit	Holding	Key Reasoning	Outcome
James v. Smarter Contact, Inc. No. 8:25-cv-1657-KKM-SPF (M.D. Fla.)	Mar. 31, 2026	M.D. Florida (11th Cir.)	TEXTS NOT CALLS (MTD Granted w/ prejudice)	Analytically rigorous ruling by Judge Mizelle. 'Call' is a noun in §227(c)(5), not a verb. Even verb definition requires reproduction of sound — texts don't. Congress understood distinction and legislated accordingly. Carve-out for 'voice texts' / audio messages noted. FCC's assumption not binding.	DEF WINS

7. Sources: [TCPA Blog \(Stockdale\)](#); [National Law Review SMS Heatmap \(Apr. 2026\)](#); [JD Supra \(Mar. 2026\)](#); [Kennedys Law \(Mar. 2026\)](#).

Legend: Defendant-favorable (pink rows) = TEXTS NOT CALLS; Plaintiff-favorable (blue rows) = TEXTS = CALLS.

IV. Litigation Timeline

Date	Event	Significance
Nov. 2021	Facebook, Inc. v. Duguid, 592 U.S. 395 — SCOTUS narrows ATDS definition under §227(b).	Plaintiffs pivoted heavily to §227(c)(5) DNC text claims as primary TCPA theory.
Jun. 2024	Loper Bright Enterprises v. Raimondo, 603 U.S. 369 — Chevron deference eliminated.	Opens door for courts to independently interpret TCPA, including 'telephone call.'
Dec. 2023 (eff. Jan. 2024)	FCC Second Report & Order (89 FR 5098): codifies DNC applies to texts; one-to-one consent rule.	FCC's last major attempt to lock in 'texts = calls'; courts now refuse to be bound.
Jun. 2025	McLaughlin Chiropractic Associates v. McKesson Corp., 606 U.S. 146 — SCOTUS (6-3): district courts not bound by FCC TCPA interpretations.	Immediate decisive shift. Within days, courts begin rejecting FCC guidance on DNC text coverage.
Jul. 21, 2025	Jones v. Blackstone (C.D. Ill.) and Wilson v. Skopos (D. Or.) — issued same day, opposite holdings.	The split begins dramatically on Day 1. Jones appealed to 7th Circuit (No. 25-2398).
Jul.–Nov. 2025	Davis (N.D. Fla.), Bosley (S.D. Fla.), Sayed (M.D. Fla.), MEDVIDI (N.D. Cal.), Mujahid (N.D. Ill.), Better Mortgage (S.D.N.Y.).	Split deepens across circuits. 11th Circuit district courts predominantly against DNC text claims. Ninth Circuit district courts mixed.
Oct. 2025 (9th Cir.)	9th Circuit ruling (National Republican Committee case): text messages are 'calls' under §227(b).	Does not directly resolve §227(c)(5) question but signals 9th Circuit leans toward broad 'calls' reading.
Nov. 2025	11th Circuit: Plaintiffs voluntarily dismiss Sayed and Davis appeals.	Gap in 11th Circuit appellate proceedings; Radvansky (N.D. Ga.) fills it with new appeal (No. 26-10837).
Jan.–Mar. 2026	McGonigle (S.D. Fla. stay), Radvansky/Kendo (N.D. Ga.), 1-800-Flowers (N.D. Ga.), Lopresti (M.D. Fla.), Stockdale (N.D. Ohio).	Defendants win in every 11th Circuit court plus 6th Circuit. Growing body of analytically rigorous dismissals.
Mar. 27, 2026	Rabbit v. Rohrman (N.D. Ill.) — texts = calls. Same day: Richards v. Fashion Nova (S.D. Ind.) — texts not calls.	Intra-7th Circuit split sharpens. 7th Circuit Jones appeal becomes more urgent.
Mar. 31, 2026	James v. Smarter Contact (M.D. Fla.) — comprehensive textualist ruling. 'Voice texts' carve-out noted.	Most analytically thorough defendant-favorable ruling to date. New 'audio text' liability vector identified.
2026 (Pending)	7th Circuit: Jones v. Blackstone (No. 25-2398). 11th Circuit: Radvansky v. Kendo (No. 26-10837). Briefing schedules set.	First binding circuit guidance. If circuits split, SCOTUS certiorari highly likely. Congress may act pre-emptively to amend §227(c)(5).

8. [National Law Review: New Era TCPA Litigation \(Jul. 2025\)](#).

9. [TCPA Blog: Ohio Decision \(Mar. 20, 2026\)](#).

V. The Circuit Split: Geographic and Doctrinal Map

The table below maps the current alignment of federal circuits and representative district courts on the §227(c)(5) text message question, as of April 2026.¹⁰

Circuit	District Court Trend	Key Cases	Appellate Status	Net Posture
2nd Circuit	Plaintiff-favorable (limited decisions)	Wilson v. Better Mortg. Corp. (S.D.N.Y. Dec. 2025)	No circuit authority. No pending appeals known.	TEXTS = CALLS (tentative)
5th Circuit	Mixed — narrowing toward defendant with consent doctrine	Watkins v. EyeBuyDirect (W.D. Tex. Aug. 2025) [PLF]; Bradford v. Sovereign Pest Control (5th Cir. Feb. 2026) [consent limits]	No binding 5th Cir. ruling on texts = calls specifically.	MIXED (leaning DEF)
6th Circuit	Defendant-favorable (emerging)	Stockdale v. Skymount (N.D. Ohio Mar. 2026) — most rigorous dict. analysis	No binding 6th Cir. ruling. No appeals pending.	TEXTS NOT CALLS (district level)
7th Circuit	SPLIT — C.D. Ill. vs N.D. Ill. directly opposing	Jones v. Blackstone (C.D. Ill.) [DEF]; Mujahid v. Newity (N.D. Ill.) [PLF]; Rabbit v. Rohrman (N.D. Ill.) [PLF]; Richards v. Fashion Nova (S.D. Ind.) [DEF]	ACTIVE APPEAL: Jones v. Blackstone, 7th Cir. No. 25-2398. Briefing set. Multiple cases stayed pending outcome.	SPLIT (appeal pending)
9th Circuit	Plaintiff-favorable at district level; circuit signal via §227(b) ruling	Wilson v. Skopos (D. Or.) [PLF]; Wilson v. MEDVIDI (N.D. Cal.) [PLF]; 9th Cir. NRC decision (texts are 'calls' under §227(b))	9th Cir. §227(b) 'calls' ruling favorable to plaintiffs but does not directly bind §227(c)(5). No §227(c)(5) circuit ruling.	TEXTS = CALLS (likely)
11th Circuit	STRONGLY defendant-favorable — unanimous district court alignment (6+ decisions)	Davis (N.D. Fla.); Sayed (M.D. Fla.); Radvansky/Kendo (N.D. Ga.); 1-800-Flowers (N.D. Ga.); Lopresti (M.D. Fla.); James v. Smarter Contact (M.D. Fla.); McGonigle stay (S.D. Fla.).	ACTIVE APPEAL: Radvansky v. Kendo Holdings, 11th Cir. No. 26-10837. Note: Bosley (S.D. Fla.) is sole pro-plaintiff outlier.	TEXTS NOT CALLS (strong consensus)

Supreme Court Implications

The current circuit landscape creates conditions ripe for Supreme Court review:

- No binding circuit authority yet: Neither the 7th nor the 11th Circuit has ruled. Once Jones (7th) and Radvansky (11th) are decided, if they conflict — or if either conflicts with the 9th Circuit's pro-plaintiff stance on §227(b) 'calls' — a certiorari petition becomes highly compelling.
- The issue is outcome-determinative and recurring: The question whether \$500-per-text DNC liability exists for hundreds of millions of annual marketing texts is of massive economic significance. The per-text damages structure makes class certification transformative.
- Pure question of statutory interpretation: The Court has shown appetite post-Loper Bright for mooring statutory language to original public meaning. This is an ideal vehicle.

- Legislative action is the alternative path: Congress could resolve the issue by amending §227(c)(5) to explicitly include 'text messages,' mirroring FCC guidance. Industry lobbying pressure cuts both directions — tech/marketing sectors favor the narrow reading; consumer advocates support the broad reading.
- FCC rulemaking limitations: Even the FCC's 2024 DNC-codification rule (47 C.F.R. §64.1200(e)) cannot expand the private right of action in §227(c)(5) — that is a congressional prerogative. No regulatory fix is available without legislation or a definitive Supreme Court ruling.

10. [FaegreDrinker: Courts in 11th Cir. \(Mar. 2026\)](#).

11. [National Law Review: 7th Circuit to Decide SMS Split \(Nov. 2025\)](#).

VI. Plaintiff vs. Defendant Outcomes Analysis

Win Rate Summary (Post-McLaughlin, July 2025 – April 2026)

Outcome Category	Count	Courts / Jurisdictions
DEF WINS — Texts NOT Calls (MTD Granted / Dismissed)	~11	C.D. Ill., N.D. Fla., M.D. Fla. (x3), S.D. Fla. (stayed), N.D. Ga. (x2), N.D. Ohio, S.D. Ind. (x2)
PLF WINS — Texts = Calls (MTD Denied / Allowed to Proceed)	~6	D. Or., W.D. Tex., S.D. Fla. (Bosley), N.D. Cal., N.D. Ill. (x2), S.D.N.Y.
MIXED / STAYED	~2	S.D. Fla. (McGonigle — discovery stayed; skeptical); N.D. Cal. MEDVIDI (leave to amend on other grounds)

Strategic Implications by Party

FOR DEFENDANTS (Marketers / Telemarketers)	FOR PLAINTIFFS (DNC Registry Registrants)
<ul style="list-style-type: none"> • File early MTDs in 6th, 7th (some), and 11th Circuits on statutory grounds. • Move for discovery stays pending Jones (7th Cir.) and Radvansky (11th Cir.). • Lead defense with 'texts not calls' threshold arg before reaching merits. • Distinguish §227(b) (ATDS/prerecorded) from §227(c)(5) — don't let them conflate. • Raise nondelegation argument against FCC authority to expand private rights. • Preserve Skidmore counter: if FCC analysis is flawed, attack its reasoning quality. 	<ul style="list-style-type: none"> • Forum-shop aggressively: 9th Circuit (D. Or., N.D. Cal.) and S.D.N.Y. most favorable. • Avoid 11th Circuit venues; if sued there, argue Bosley (S.D. Fla.) as outlier authority. • Layer §227(b) ATDS/prerecorded claims alongside §227(c)(5) — ATDS claims still viable. • Emphasize FCC's 2024 codification under Skidmore (persuasive, not binding). • Invoke statutory stare decisis — decades of consistent judicial interpretation. • Advance state-law claims (state TCPA analogs, unfair/deceptive acts) in parallel.

VII. Compliance Recommendations for Marketers

The legal uncertainty is irreducible until circuit courts rule. In the interim, the following compliance framework applies regardless of a marketer's litigation posture. The recommendations address both the immediate risk environment and the longer-term regulatory landscape.

CRITICAL

1. Maintain Full National DNC Scrubbing — Do Not Relax

- Continue scrubbing all marketing text campaigns against the National DNC Registry every 31 days or less, regardless of whether you believe §227(c)(5) applies to texts.
- The FCC's 47 C.F.R. §64.1200(e) still makes DNC regulations applicable to marketers sending texts (even if courts disregard FCC interpretations for private plaintiffs). FTC enforcement and state AG enforcement are unaffected by the judicial split.
- Courts in the 9th Circuit and S.D.N.Y. still hold §227(c)(5) applies to texts. Until circuit courts rule, nationwide DNC exposure persists in plaintiff-favorable forums.
- Establish internal DNC lists and honor opt-out requests for texts within 30 days, documenting every request and action.

HIGH

2. Treat All Marketing Texts as If §227(b) and §227(c) Both Apply

- The 'texts not calls' defense applies only to §227(c)(5) DNC claims. It provides no protection against §227(b) ATDS/prerecorded claims, which are fully live for texts sent via automated platforms.
- Obtain prior express written consent (PEWC) for all marketing texts using ATDS-capable platforms — regardless of DNC scrubbing status. Consent is a complete defense to §227(c)(5) claims as well.
- Document consent with granularity: timestamp, source page/URL, opt-in mechanism, exact disclosure language. Class certification typically requires systematic consent documentation to defeat.
- After Duguid (2021), ensure 'ATDS' analysis is current — focus on whether platform uses random/sequential number generation, not merely automation.

HIGH

3. Flag 'Audio Text' / Voice Message Communications

- *James v. Smarter Contact* (M.D. Fla. Mar. 2026) expressly carved out 'voice texts' and audio messages from the 'texts not calls' defense, noting they may qualify as 'telephone calls' under §227(c)(5).
- Audit your platform for: (a) RCS messages with embedded audio, (b) AI-generated voice drops, (c) ringless voicemail platforms, (d) multimedia messages with audio content. All present heightened DNC liability.
- Apply the same DNC scrubbing and PEWC standards to audio-embedded messages as to voice calls.

MEDIUM

4. Implement Jurisdiction-Aware Risk Stratification

- Classify your addressable consumer universe by mobile carrier area code / billing address, identifying 9th Circuit (California, Oregon, Washington, Nevada, Arizona, Idaho, Montana, Alaska, Hawaii) and 2nd Circuit (New York) recipients as highest DNC text risk.
- Eleventh Circuit recipients (Alabama, Florida, Georgia) present lowest current §227(c)(5) DNC text litigation risk under district court precedent — but this may shift after Radvansky (11th Cir. No. 26-10837).
- Track the Jones (7th Cir.) ruling as a bellwether. Seventh Circuit covers Illinois, Indiana, Wisconsin — major consumer marketing states. An adverse 7th Circuit ruling will materially shift risk.
- Assign legal review resources to campaigns targeting 9th Circuit states proportional to higher litigation probability.

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5. Monitor and Preserve Records for Pending Appellate Rulings

- Preserve all consent records, campaign records, and internal DNC lists for at least 4 years to address claims arising from current campaigns after circuit courts rule.
- Monitor: (a) Jones v. Blackstone (7th Cir. No. 25-2398) — expected decision 2026–2027; (b) Radvansky v. Kendo (11th Cir. No. 26-10837); (c) any FCC rulemaking or congressional action amending §227(c)(5).
- Subscribe to updates from TCPA Blog, National Law Review's TCPA section, and CTIA for regulatory alerts.
- Upon circuit decisions, immediately reassess compliance program and DNC scrubbing protocols with TCPA counsel.

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6. Structuring Consent Programs for Maximum Protection

- Use compliant double opt-in for marketing texts: consumer initiates contact → confirmation text → affirmative reply to confirm. This creates a clear consent record that travels across jurisdictions.
- Post-Loper Bright, the 'prior express written consent' standard may itself be independently interpreted by courts without FCC deference. Use written consent (checked opt-in box, signed agreement, or equivalent) rather than oral or behavioral consent as a conservative baseline.
- Maintain clear and conspicuous opt-out mechanisms in every text: STOP, UNSUBSCRIBE, QUIT, CANCEL, END, REVOKE. Honor opt-out requests campaign-wide under the FCC's revocation rule (effective April 2026 in full).
- Limit consent scope to specific topics / products — do not use omnibus consent clauses that purport to cover all future contacts from all affiliated entities.

LITIGATION
SPECIFIC

7. Assess Forum Strategy in Pending TCPA Litigation

- If you are currently a defendant in a TCPA DNC text case: (a) assess whether removal is possible to federal court; (b) identify the filing district and circuit alignment; (c) file a threshold MTD on 'texts not calls' grounds in 6th, 7th (C.D./S.D. Ind.), and all 11th Circuit courts; (d) seek a discovery stay pending Jones or Radvansky in 7th Circuit cases.
- If settling: discounting for the possibility of dispositive threshold rulings is appropriate in 11th Circuit cases; full merits valuation applies in 9th Circuit cases.
- Consider nationwide class exposure carefully: a 9th Circuit action on behalf of a nationwide class of DNC registrants remains viable under current law.

12. [ZwillGen: TCPA Plaintiffs Pressure-Testing FCC Rules \(Mar. 27, 2026\)](#).

13. [BMD: Consent Remains King as Courts Divide \(Mar. 31, 2026\)](#).

VIII. Forward Outlook & Monitoring Priorities

Trigger Event	Expected Timing	Likely Impact
7th Circuit rules in Jones v. Blackstone (No. 25-2398)	2026–2027	Binding on all 7th Circuit districts (C.D./N.D. Ill., S.D./N.D. Ind., E./W.D. Wis.). If 'texts not calls': massive shift in Midwest TCPA litigation. If 'texts = calls': deepens circuit split with 11th Cir.
11th Circuit rules in Radvansky v. Kendo (No. 26-10837)	2026–2027	Binding on all 11th Circuit districts. If 'texts not calls' (strongly expected): effectively eliminates private DNC text claims in AL, FL, GA, largest consumer market in the Southeast. Circuit split with 9th Cir. cemented.
9th Circuit rules on §227(c)(5) specifically (no pending cert. case identified)	Uncertain	9th Circuit §227(b) ruling implies pro-plaintiff stance but is not precedent on §227(c)(5). A direct §227(c)(5) ruling would create or resolve the circuit split needed for SCOTUS cert.
SCOTUS grants certiorari on §227(c)(5) text message question	2027–2028 (if circuits split)	Final resolution. Based on current Court's textualist orientation and post-Loper Bright jurisprudence, 'texts not calls' under 1991 plain meaning is the likely outcome — though purposivist Justices may influence the vote count.
Congress amends §227(c)(5) to include 'text message'	Uncertain; possible 2026–2027	Would resolve the split legislatively. Consumer groups favor this; marketing/tech industry opposes. A bipartisan TRACED Act-style bill is not implausible if SCOTUS rules against text coverage and public reaction is strong.
FCC revises or expands DNC rulemaking to codify §227(c)(5) text coverage	Low probability in current admin.	FCC cannot expand the private right of action — only Congress can. Any FCC rule codifying text coverage carries no binding weight in private litigation under McLaughlin. Current FCC leadership is deregulatory.

Monitoring Checklist

- [TCPAWorld / TCPA Blog](#) (Troutman Amin) — daily case alerts; maintains SMS heatmap
- [National Law Review TCPA section](#) — circuit-by-circuit coverage
- PACER alerts on Jones (7th Cir. No. 25-2398) and Radvansky (11th Cir. No. 26-10837)
- CTIA and ANA bulletins for industry regulatory developments
- [FCC ECFS docket](#) for any TCPA NPRM activity
- Congressional TCPA reform bills — monitor Senate Commerce and House Energy & Commerce Committees
- State TCPA analog legislation (Illinois, Florida, Texas, California have active state-level developments)

Disclaimer: This report is prepared for informational and research purposes only and does not constitute legal advice. The law in this area is rapidly evolving. Readers should consult qualified TCPA counsel before making compliance or litigation decisions. Case outcomes and appellate proceedings described are current as of April 9, 2026.

14. [Greenspoon Marder: Rabbitt vs. Richards comparison \(Mar. 31, 2026\)](#).
15. [JD Supra: Courts Split on TCPA \(Nov. 2025\)](#).